Finley v. United States: Pendent Party Jurisdiction Under the Federal Tort Claims Act

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FINLEY v. UNITED STATES: PENDENT PARTY JURISDICTION UNDER THE FEDERAL TORT CLAIMS ACT

All issues of federal subject matter jurisdiction command two levels of analysis: constitutional and statutory.1 Article III of the United States Constitution extends the judicial power of the United States to “cases” and “controversies.”2 Furthermore, the Constitution requires that the judicial power of all federal courts inferior to the United States Supreme Court be established by Congress.3 Therefore, in order for a matter to be heard in federal court, it must amount to a “case” or “controversy” under article III of the Constitution4 and comply with jurisdictional statutes set by Congress.

2. Article III provides:
   Section 1. 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 ordain and establish. . . .
   Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this 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.
U.S. CONST. art. III, §§ 1-2; see infra text accompanying notes 32-35.
4. This Note shall refer to a legal action conforming to constitutional constraints as a “constitutional case” or simply as a “case.” Generally, the concept of case involves the doctrine of justiciability. In order for a civil action to be justiciable in the federal courts as a
Under the judge-made doctrine of pendent jurisdiction, a plaintiff suing in federal court may join a nonfederal action provided the two actions amount to a single constitutional case and the anchor claim is within the statutory jurisdiction of the court.

The United States Supreme Court first alluded to the doctrine of pendent jurisdiction in the early 1820's, indicating that the Constitution empowers the federal courts to resolve nonfederal matters which are naturally incident to the legitimate exercise of federal judicial power. Over one hundred years later, the Supreme Court gave the doctrine of pendent jurisdiction constitutional force. Specifically, the Court stated that as long as two claims "derive from a common nucleus of operative fact" they comprise "one constitutional 'case.' " Thus, once a "case," the actions are justiciable in the federal courts. Since this landmark decision, the Supreme Court has greatly narrowed the doctrine of pendent jurisdiction. Most importantly, the Court circumscribed the application of the doctrine in situations in which the plaintiff seeks to join pendent parties. The Court held that "the addition of a completely new party would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress."

In Finley v. United States, the United States Supreme Court confronted the "subtle and complex" issue of whether a plaintiff suing the United States Government under the Federal Tort Claims Act (FTCA) may join additional state parties according to the theory of pendent party jurisdiction. A similar issue arose in a prior Supreme Court decision, which held that acts

5. Pendent jurisdiction is so called because a litigant, usually the plaintiff, appends an action lacking federal statutory jurisdiction to one which possesses sufficient federal jurisdiction. See generally J. Friedenthal, M. Kane, & A. Miller, Civil Procedure § 2.12, at 65-66 (1985) [hereinafter Friedenthal].
6. The term "nonfederal" is used to denote a lack of federal statutory jurisdiction.
10. Id.
12. Id. at 725.
13. Aldinger v. Howard, 427 U.S. 1 (1976). Note that the Court spoke of pendent parties and not pendent claims. See infra notes 40-69 and accompanying text; see also infra notes 79-86.
of Congress which confer special grants of jurisdiction may be found to exclude certain defendants. Thus, Supreme Court precedent established that such virtues as judicial economy and fairness will have to yield to statutory jurisdictional requirements. In Finley, the Supreme Court continued its trend of narrowing the pendent party doctrine.

The Finley case arose as a result of a plane crash at a San Diego airfield. The plaintiff, Barbara Finley, a California resident, brought suit in California state court against the city of San Diego for negligently maintaining the airfield's runway lights, and against the San Diego Gas & Electric Company for negligent placement of the power lines with which the aircraft collided. The plaintiff also brought suit in United States District Court against the United States for negligence on the part of the Federal Aviation Administration (FAA) in the maintenance of the airfield.

Approximately one year after filing her complaints, Finley moved to amend her complaint against the United States in order to join the state defendants. Thus, the issue arose as to whether Finley could, under the law, join additional parties over whom there was no independent source of federal subject matter jurisdiction. Despite consistent Ninth Circuit disapproval of pendent party jurisdiction, the district judge allowed the state parties to be joined in Finley's federal action for reasons of judicial economy and efficiency. The United States Court of Appeals for the Ninth Circuit subsequently reversed the district court's decision.

The United States Supreme Court granted certiorari to hear the case, and affirmed the Ninth Circuit's holding. The Supreme Court stated that because the FTCA does not extend federal jurisdiction to any party other

18. See Aldinger, 427 U.S. at 16-17 (holding that if it can be found that Congress has excluded a party from liability under a particular jurisdictional statute, that party is not subject to the court's jurisdiction under that statute); see also infra notes 79-86 and accompanying text.


20. Id.

21. Id.

22. Id.

23. Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978); Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975), aff'd, 427 U.S. 1 (1976); Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), aff'd in part and rev'd in part sub nom. Moor v. County of Alameda, 411 U.S. 693 (1973); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Williams v. United States, 405 F.2d 951 (9th Cir. 1969); see infra notes 157-64 and accompanying text.


25. Id. at A-2; see also Finley, 109 S.Ct. at 2005.


27. Finley, 109 S. Ct. at 2010.
than the United States, nonfederal parties may not be appended as defendants in tort actions against the United States.\textsuperscript{28} The dissent, however, argued that, based on Supreme Court precedent, Finley should be able to join nonfederal parties because the federal and state claims arose out of a common nucleus of operative fact and, thus, amounted to a constitutional case.\textsuperscript{29} Further, the dissent reasoned that, because the FTCA requires that tort actions against the United States be brought in federal court, fairness and judicial economy mandate that the plaintiff not be forced to sue other parties in state court.\textsuperscript{30}

This Note discusses the unstable doctrine of pendent party jurisdiction, its roots and its uncertain future. First, the Note discusses the forms of supplemental jurisdiction and the federal courts' application of such jurisdiction. Next, it analyzes the jurisdictional requirement of the FTCA and compares the FTCA to other sources of federal jurisdiction. This Note then examines the Supreme Court's majority and dissenting opinions in \textit{Finley v. United States}. This Note explains Finley's effect on the law of pendent party jurisdiction as well as its impact on the construction of the FTCA's jurisdictional grant. This Note concludes that while Finley may appear narrow in its reasoning, it is consistent with the Court's prior decisions. Moreover, although \textit{Finley v. United States} is a blow to the pendent party doctrine's already "wobbly"\textsuperscript{31} foundation, future interpretations of the doctrine should limit Finley to FTCA litigation.

\section*{I. THE CONSTITUTIONAL FOUNDATION OF FEDERAL JURISDICTION}

Article III of the United States Constitution permits the federal courts to hear "cases" and "controversies."\textsuperscript{32} Whether something is a "case" is a basic constitutional question that must be answered in the affirmative before any suit may proceed in federal court. By "case" or "controversy," article III requires that the case be justiciable.\textsuperscript{33} That is, there must be a genuine

\begin{itemize}
\item 28. \textit{Id.} at 2008.
\item 30. \textit{Finley}, 109 S. Ct. at 2015 n.15 (Stevens, J. dissenting).
\item 31. Moore \textit{v.} Marketplace Restaurant, Inc., 754 F.2d 1336, 1359 (7th Cir. 1985) (Posner, J., separate opinion).
\item 32. U.S. CONST. art. III, § 2; \textit{see supra} note 2.
\item 33. One of the requirements of justiciability is that the litigant have standing. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." \textit{Warth v. Seldin}, 422 U.S. 490, 498 (1975).
\end{itemize}
issue regarding some right created by the Constitution or laws of the United States that will be affected if the Constitution or law is interpreted in a particular manner. Once deemed a "case," there also must be valid subject matter jurisdiction.

Supplemental jurisdiction, which augments otherwise jurisdictionally insufficient actions, is jurisdiction derived from the Constitution and principles of judicial economy. That is, actions which amount to a case under the Constitution but lack any statutory jurisdictional basis must rely on supplemental jurisdiction to supply the second jurisdictional prong required by article III.

There are two forms of supplemental jurisdiction: ancillary and pendent jurisdiction. Ancillary jurisdiction is essentially a defendant's device which allows the defendant to join related state claims or parties over which the federal courts have no statutory jurisdiction to a federal action. Plaintiffs primarily utilize pendent jurisdiction in a similar manner, to join nonfederal parties or claims to a federal action. Within each form of supplemental jurisdiction there are two levels on which jurisdiction is supplied: claims and parties.

plaintiff's complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982)). Additionally, justiciability requires that the claim be ripe for adjudication and not moot. See, e.g., United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1946) (stating that hypothetical cases are unripe for adjudication); see also, e.g., Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (stating that a moot case is not justiciable); Murphy v. Hunt, 455 U.S. 478, 482 (1982) (stating the exception that cases which are "capable of repetition, yet evading review" will overcome mootness (citations omitted)).


35. See Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868) (stating that a federal court's jurisdiction must be both constitutionally and statutorily granted).

36. For an argument that supplemental jurisdiction is rooted in federal jurisdictional statutes, see Freer, supra note 2.

37. U.S. CONST. art. III, § 1; see supra note 2.


39. See Friedenthal, supra note 5, § 2.12, at 66; see, e.g., United States ex rel. Small Business Admin. v. Pena, 731 F.2d 8 (D.C. Cir. 1984) (in a suit brought by SBA, the defendant was permitted to implead a third party defendant under the doctrine of ancillary jurisdiction).
A. Pendent Claim Jurisdiction

Pendent claims meet the article III requirement that there be statutory jurisdiction over the entire case because they "derive from a common nucleus of operative fact" with substantial federal claims. This requirement is driven primarily by a desire to promote public policy and judicial economy. Streamlining civil actions produces efficiency and prevents inconvenient and costly duplicative litigation.

The two essential elements in a court's determination to extend pendent jurisdiction are a sufficient factual overlap between the state and federal actions and the existence of a substantial federal question. The factual similarity between the state and federal actions allows a federal court to treat them as a single constitutional case. Absent such an overlap, any additional nonfederal claims must be brought in state court. The second element a federal court must consider is statutory in nature.

In United Mine Workers v. Gibbs, the United States Supreme Court established the test for the joinder of state claims in federal actions. Gibbs arose out of a labor dispute between the United Mine Workers of America (UMW) and the Southern Labor Union. In 1960, the Tennessee Consolidated Coal Company closed one of its mines in southern Tennessee, thereby laying off one hundred miners belonging to the UMW's local union. The respondent, Paul Gibbs, was hired by the Grundy Company, a subsidiary of Consolidated, as a superintendent at a new mine on Consolidated's property. Angry about not being hired to work in the new mine, the local union forcibly stopped the mine from opening, threatened Gibbs, and beat a rival labor organizer. As a result of this conflict, the mine did not open, and Gibbs lost his employment position with Grundy.

40. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The issue in Gibbs was whether two actions make up a "case." There was no issue of statutory construction.

Gibbs, 383 U.S. at 726.

42. See id. (explaining that the justification for pendent jurisdiction rests in principles "of judicial economy, convenience and fairness to litigants"). Moreover, it is a well known principle that procedures that increase judicial economy and decrease waste are favored over those that merely administer justice without regard to economy. See Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399, 435 (1973) (mentioning, for example, collateral estoppel as a procedural device designed to reduce the expense of litigation).


44. Id. at 717-722; see also Gibbs v. United Mine Workers, 343 F.2d 609, 610-614 (6th Cir. 1965); Gibbs v. United Mine Workers, 220 F. Supp. 871 (E.D. Tenn. 1963).


46. Id.

47. Id.

48. Id. at 720.
In August 1961, Gibbs brought suit against the UMW in the United States District Court for the Eastern District of Tennessee. Gibbs based jurisdiction on the Labor Management Relations (Taft-Hartley) Act, alleging that the union's actions resulted in a secondary boycott prohibited by the Act. Gibbs also brought state claims against the UMW for unlawful conspiracy and boycott aimed at tortiously interfering with his employment. The jury found in favor of the plaintiff Gibbs and awarded him a total of $174,500. However, the district court only granted damages after Gibbs accepted an $85,000 remittitur of the jury's award. Additionally, the district court found that it had jurisdiction to hear the common law claims under the doctrine of pendent jurisdiction.

Both the UMW and Gibbs appealed the district court decision to the United States Court of Appeals for the Sixth Circuit. The court of appeals affirmed the lower court's substantive rulings and agreed that the jury could consider the same facts in its determinations of the plaintiff's federal and state common law claims.

On the petition by UMW, the Supreme Court granted certiorari and reversed the court of appeals on the substantive law, but agreed with the lower courts on the issue of federal jurisdiction. The Supreme Court, however, abandoned its prior test and substituted a new two tier test for pendent jurisdiction.

52. Id. at 880.
53. Id. at 879 (citing Hurn v. Oursler, 289 U.S. 238, 245-46 (1933) (holding that state law claims may be heard in federal court provided they call for a "separate and distinct" ground for relief while making up a single cause of action with a substantial federal claim)).
55. Id. at 618.
56. Id. at 614-15.
57. 382 U.S. 809 (1965).
59. The Court explained that there was a special proof requirement imposed by section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1982). Gibbs, 383 U.S. at 735. The Court concluded that "the crucial fact of [the UMW's] participation in or ratification of the violence that occurred was not proved to the degree of certainty required by § 6 [of the Norris-LaGuardia Act]." Id. at 742.
60. Gibbs, 383 U.S. at 728-29 (stating that the district court did not abuse its discretion in hearing the state claim).
61. See Hurn v. Oursler, 289 U.S. 238 (1933); see also supra note 53. Hurn was decided before the promulgation of the Federal Rules of Civil Procedure in 1938. Thus, in light of this change, the Court reasoned that a new rule of pendent jurisdiction was needed to reflect the meaning of the Federal Rules' use of "civil action" and to help dispel problems associated with the vague term "cause of action." Gibbs, 383 U.S. at 722-24 (citing Fed. R. Civ. P. 2); see infra note 147.
dent jurisdiction. Specifically, the Supreme Court held that in order for a nonfederal claim to be appended to a federal claim, the federal claim must be “substantial” and both “claims must derive from a common nucleus of operative fact.” The Court further explained that whether pendent jurisdiction will exist lies entirely in the discretion of the trial court. The Court found that the justification for pendent jurisdiction “lies in considerations of judicial economy, convenience and fairness to litigants.”

B. Pendent Party Jurisdiction

On the “party” level, pendent jurisdiction arises when the plaintiff seeks to join additional, nonfederal, parties to an action against the original defendant in federal court. Unlike appending claims, plaintiffs face difficulty when attempting to utilize pendent jurisdiction to join nonfederal parties. Generally, opposition to the joinder of pendent parties is supported by the lack of the necessary statutory jurisdiction required of all parties in the federal courts. The mere fact that there is a substantial factual overlap between actions against party A and party B may not be enough for a federal court to waive the requirement that there be statutory jurisdiction. For example, when a plaintiff seeks to add a party over whom there is no federal question, diversity, or special jurisdiction, the case against the additional party is not justiciable unless the court will permit the party to be joined according to the doctrine of pendent party jurisdiction. However, the party in question may be excluded from the jurisdictional grant under the particular statute. Thus, the fact that actions against multiple parties are part of one constitutional case may be immaterial in light of a statute excluding the additional parties. This jurisdictional tenet derives from the fact that the supplemental jurisdiction is only as inclusive as the original, or “anchor,” jurisdiction. That is, if a jurisdictional statute requires all parties to have a sufficient amount in controversy, the statute necessarily restricts the joinder of pendent parties to those that meet the requirement.

64. Id. at 726.
65. Id.
66. See Friedenthal, supra note 5, § 2.12, at 66.
68. See infra note 83 and accompanying text.
69. See Zahn v. Int’l Paper Co., 414 U.S. 291 (1973); see also infra notes 92-99 and accompanying text.

The restriction on joining pendent parties, however, is relaxed for defendants who must countersue the plaintiff or implead nonfederal third parties. Under the Federal Rules of Civil Procedure, a “pleader,” who has a compulsory counterclaim against an opposing party, must
C. The Statutory Basis Limiting Pendent Party Jurisdiction

Federal subject matter jurisdiction is required for the federal courts to hear a case.\textsuperscript{70} Sections 1331 and 1332 of the Federal Judicial Code\textsuperscript{71} state that the federal courts have jurisdiction over two types of civil actions: (1) those which present federal questions; and (2) those in which the litigants are diverse citizens having an amount in controversy exceeding \$50,000.\textsuperscript{72} In addition, the code provides special jurisdictional statutes that explicitly grant federal jurisdiction in such areas as antitrust suits,\textsuperscript{73} civil rights cases,\textsuperscript{74} and claims against the United States.\textsuperscript{75} Thus, all federal subject matter jurisdiction fits into three statutory categories: Federal question, diversity, and special.

state the claim in the appropriate pleading or waive the claim. Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1 (1974). Federal jurisdiction for nonfederal compulsory counterclaims automatically exists because such claims are, by definition, ancillary to the main claim. \textit{Id.}; \textit{see also} Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798, 810-11 (2d Cir. 1979).

Rule 13 of the Federal Rules of Civil Procedure defines "compulsory counterclaim" as a claim "aris[ing] out of the same transaction or occurrence that is the subject matter of the opposing party's claim." \textit{FED. R. Civ. P. 13(a)}. Because ancillarity, for jurisdictional purposes, is similarly defined, federal jurisdiction will lie for compulsory counterclaims. \textit{See} Moore v. New York Cotton Exch., 270 U.S. 593 (1926); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (1961). Ancillary jurisdiction, however, will not lie for permissive counterclaims because such claims do not arise out of the same transaction or occurrence as the main claim. \textit{Revere Copper & Brass Inc. v. Aetna Casualty & Surety Co.}, 426 F.2d 709, 714 (5th Cir. 1970).

Parties impleaded pursuant to Rule 14 of the Federal Rules of Civil Procedure obtain ancillary jurisdiction in a similar manner as nonfederal compulsory counterclaims. F&D, Inc. v. O'Hara & Kendall Aviation, Inc., 547 F. Supp. 44, 45 (S.D. Tex. 1982) ("[A] defendant's nonfederal claim against a nondiverse third party defendant is within the ancillary jurisdiction of a federal court."); \textit{see Revere Copper & Brass}, 426 F.2d at 715. Generally, only defendants implead third parties. \textit{FED. R. Civ. P. 14(a)}. Rule 14(b), however, permits plaintiffs to implead third parties after they have been countersued, thus putting plaintiffs in the position of a defendant. \textit{Id. 14(b); see FRIEDENTHAL, supra note 5, § 6.9, at 360-65. But cf. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (ancillary party jurisdiction was denied over a nondiverse impleaded party in a diversity suit after the main defendant was dismissed); see infra notes 100-17 and accompanying text.}

70. \textit{See supra} note 35 and accompanying text.

71. The Judicial Code comprises title 28 of the United States Code which concerns the organization, jurisdiction, venue, and procedures of the federal court system.

72. In 1988, Congress increased the minimum amount in controversy requirement of the diversity statute from \$10,000 to \$50,000. Diversity of Citizenship, Pub. L. No. 100-702, 102 Stat. 4646 (codified as amended at 28 U.S.C. § 1332(a) (1988)).


In addition, grants of special federal question jurisdiction fall into two subcategories: Exclusive and concurrent jurisdiction. Tort claims against the United States must be brought in United States District Court while contract claims against the United States exceeding $10,000 must be brought in United States Claims Court. In each of the above instances, jurisdiction is exclusive. For contract suits less than $10,000, jurisdiction is concurrent. Namely, such suits may be brought either in the United States Claims Court or the United States District Court.

Additionally, in diversity actions jurisdiction is concurrent because diversity actions are actually state claims that are litigated in federal court by virtue of the amount in controversy and the diversity of the parties' citizenship. Therefore, both state and federal courts have jurisdiction over such claims.

1. Federal Question Jurisdiction

In *Aldinger v. Howard*, the Supreme Court narrowed the *Gibbs* doctrine by holding that pendent parties must not only present a constitutional case but also survive statutory scrutiny in order to lie within the pendent jurisdiction of the federal courts. In *Aldinger*, the plaintiff, Monica Aldinger, charged the county of Spokane, Washington and the county treasurer with violating her civil rights and with other state law claims. Aldinger brought the action in the United States District Court for the Eastern District of Washington, asserting jurisdiction under the federal civil rights statute.

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76. For example, the FTCA grants exclusive jurisdiction to the district courts. 28 U.S.C. § 1346(b); see infra note 252 and accompanying text. For a discussion of exclusive and concurrent jurisdiction, see 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3527, at 245 (2d ed. 1987) [hereinafter WRIGHT].


The FTCA, however, provides that only the district courts may be the forum for FTCA actions against the government.


80. Id. at 16-19.

81. Id. at 2-5.

82. Id. at 3-4. The statute provides that:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

... To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Con-
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The Supreme Court found that, even though the federal civil rights suit and the state law claims against the county and its treasurer arose from a common nucleus of operative fact, thereby comprising a case under article III, the district court lacked the judicial power to hear the state law suit against the county because Congress excluded counties from liability under the Civil Rights Act. Thus, the Court determined that the federal jurisdiction granted under the Civil Rights Act could not supply pendent jurisdiction in the absence of statutory jurisdiction because the Civil Rights Act, by implication, did not extend its jurisdiction to counties. The Court stated that when Congress has circumscribed federal jurisdiction within a particular statute, the plaintiff is limited to the exact language of the statute and to any valid congressional requirements present in the legislative history. Therefore, the Court determined that the "[r]esolution of a claim of pendent-party jurisdiction . . . calls for careful attention to the relevant statutory language." In dissent, Justice Brennan argued strongly in favor of extending the Gibbs standards to pendent parties. Relying on the language of Gibbs, Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

83. Aldinger, 427 U.S. at 16-17. The Civil Rights Act provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


Although Aldinger tried, she could not sue Spokane County because the county was not deemed to be a "person" under the statute and, therefore, was not liable under the Civil Rights Act. Aldinger, 427 U.S. at 16. In Aldinger, the Supreme Court relied on Monroe v. Pape, 365 U.S. 167 (1961), rev'd, 436 U.S. 658 (1978), to make its finding that, under 42 U.S.C. § 1983, the county was not a "person." Aldinger, 427 U.S. at 16. The Court has since overruled Monroe's interpretation of section 1983 in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). This reversal, however, does not affect Aldinger's underlying principle that there must be both constitutional and statutory power for the federal courts to have jurisdiction over a case or controversy and that Congress can exclude particular parties from a statute's jurisdiction. In Monell, the Court merely recanted its former reading of "person" under the Civil Rights Act. Monell, 436 U.S. at 664-65.

84. See Aldinger, 427 U.S. at 16.

85. Aldinger, 427 U.S. at 18. Writing for the majority in Aldinger, Justice Rehnquist held that, "[b]efore it can be concluded that [pendent party] jurisdiction exists, 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.

86. Id. at 17.

87. Id. at 34-36 (Brennan, J., dissenting).
tice Brennan warned against stressing the claim or party aspect of the state action, but instead urged the Court to focus on whether the state and federal actions would ordinarily be expected to be tried together. 88 Justice Brennan's dissent noted that the constitutional issue of pendent jurisdiction concerns only the subject matter, not the "in personam" jurisdiction of the federal courts. 89

In both the Court's majority opinion in Gibbs and the dissent in Aldinger, Justice Brennan argued in favor of giving the constitutional, rather than the statutory, aspect of jurisdiction more weight. 90 Justice Brennan maintained that when there is a clear factual overlap and no plain statutory barrier to prevent additional actions from being heard in federal court, courts should be free to join the actions in one proceeding. 91 When jurisdiction is based upon diversity, the Supreme Court has further limited pendent party jurisdiction.

2. Diversity Jurisdiction

In Zahn v. International Paper Co., 92 four owners of Vermont lakefront property brought a class action on behalf of themselves and two hundred other lakefront property owners against International Paper Company, a New York corporation, for polluting the waters of the lake with discharges from the paper plant. 93 The property owners asserted jurisdiction under 28 U.S.C. § 1332(a)(1), 94 the diversity statute. However, only the four main plaintiffs could show damages in excess of the statutory minimum of

88. "[I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." Id. at 19 (majority opinion) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966)) (emphasis in original).
89. Id. at 20.
90. Id. at 20-21; Gibbs, 383 U.S. at 725.
94. Section 1332 contains strict in personam restrictions. It provides that:
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of or value of $50,000, exclusive of interest and costs, and is between—
(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, . . . as plaintiff and citizens of a State or of different States.
$10,000. Thus, under the rule that all parties to a class action based upon diversity of citizenship have a claim satisfying the statutory amount in controversy requirement, the suit was not permitted to proceed as a class action. In Zahn, all the plaintiffs’ claims amounted to a constitutional case, but the Court refused to allow any one plaintiff to “ride in on another’s coattails” because of the statutory jurisdictional defect.

In Owen Equipment & Erection Co. v. Kroger, a citizen of Iowa sued the Omaha Public Power District (OPPD), a Nebraska corporation, alleging that OPPD caused the wrongful death of her husband. The plaintiff, Kroger, asserted jurisdiction under the federal diversity statute. The defendant, OPPD, then impleaded Owen Equipment according to the doctrine of ancillary jurisdiction. The court thereafter granted Kroger leave to amend her complaint. In her amended complaint, Kroger named Owen, an Iowa corporation, which she incorrectly alleged was a Nebraska corporation.

When the trial court granted summary judgment in favor of OPPD, Kroger’s only remaining action was against Owen, a nondiverse party. The district court, in a memorandum opinion, found that it had jurisdiction over the nondiverse party despite the absence of any independent jurisdictional basis. The district court reasoned that United Mine Workers v. Gibbs granted the federal courts discretion in cases to exercise judicial power over pendent parties.

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95. Zahn, 414 U.S. at 292; see supra note 72.


97. The Federal Rules of Civil Procedure require that the “class [be] so numerous that joinder of all members is impracticable...” FED. R. CIV. P. 23(a).


99. Zahn, 414 U.S. at 301.

100. 437 U.S. 365 (1978).

101. Id. at 367-68.


103. Kroger, 437 U.S. at 374-75; see supra text accompanying notes 38-39 (ancillary jurisdiction); see also supra note 69 (impleader).


105. Id.

106. Id.

107. See id.


109. See Kroger, 558 F.2d at 419.
cuit affirmed the trial court, stating that the "district court's retention of jurisdiction in the case at bar is clearly outlined in Gibbs." The court of appeals found that, because the claims against OPPD and Owen arose from a common nucleus of operative facts, an unfair result would follow if the court denied jurisdiction. Thus, the court held that it was proper for the district court to exercise its discretion to permit Kroger to pursue her case against a nondiverse party in federal court. The Supreme Court granted certiorari and reversed the court of appeals' decision. The Supreme Court held that in order for the plaintiff to remain in federal court, she would have to be diverse with Owen or sue pursuant to a federal law. Because Kroger could not meet either requirement, the Court dismissed the case against Owen for lack of subject matter jurisdiction.

In dissent, Justice White disagreed with the majority's approach. Justice White stressed that Kroger was a plaintiff who asserted a claim against a third-party defendant and, most importantly, did not seek to add a new party. Moreover, because Kroger did not initiate the proceedings against Owen, she should not be penalized. Thus, the dissent agreed with the court of appeals that, in Kroger's case, virtues of fairness and judicial economy should receive greater consideration than they would if she had initiated proceedings against the nonfederal party.

3. Special Federal Jurisdiction

In suits brought pursuant to federal statutes which grant jurisdiction independent of the federal question or diversity statutes, the same general principles of statutory construction apply. The requirements remain that statutory jurisdiction be present and that any and all prescribed limitations on such jurisdiction be enforced.

In United States v. Sherwood, in order to obtain complete relief, a judgment creditor, Sherwood, sued the United States and a judgment debtor

110. See id. at 428.
111. Id. at 424.
112. Id. at 427.
115. Id. at 373-77.
116. Id. at 377 (White, J., dissenting); see supra note 92.
117. Id. at 381; see FED. R. CIV. P. 14(a) (explaining that "third party defendants" are those impleaded by a named defendant).
118. Kroger, 437 U.S. at 381.
119. See id. at 382.
121. 312 U.S. 584 (1941).
under the Tucker Act\textsuperscript{122} in United States District Court for damages resulting from a breach of contract. The New York Supreme Court, acting pursuant to section 795 of the New York Civil Practice Act, authorized the suit.\textsuperscript{123} The United States Supreme Court reversed the state court ruling on the grounds that the district court lacked jurisdiction as to the private party, the judgment debtor.\textsuperscript{124} In \textit{Sherwood}, the Court decided that when a waiver of sovereign immunity provides for federal jurisdiction in suits brought against the government, any interpretation of the statute expanding that jurisdiction violates the doctrine that waivers of sovereign immunity be strictly construed.\textsuperscript{125}

\section*{II. Jurisdiction Under the Federal Tort Claims Act}

The United States Supreme Court has interpreted pendent party jurisdiction in three jurisdictional contexts.\textsuperscript{126} For purposes of interpreting pendent party jurisdiction under the FTCA, however, diversity jurisdiction is the most useful guidepost.

The FTCA and the Tucker Act are both statutes, waiving sovereign immunity, which permit plaintiffs to bring what would otherwise be a state variety tort or contract action against the Federal Government. Thus, like the diversity statute, these acts involve nonfederal suits in a federal court. The main differences between these waivers of sovereign immunity and the diversity statute are merely procedural. That is, although the FTCA and the Tucker Act provide for an exclusive federal forum, there is no substantive difference in the type of tort or contract claims brought under these statutes and the diversity statute. There are also other special jurisdictional grants, however, which provide for federal jurisdiction such as in civil rights and antitrust suits.\textsuperscript{127} In these other special jurisdictional cases, substantial federal law is involved because the right of legal action derives from the United States Constitution and federal laws. In contrast, aside from the fact that the Tucker Act and the FTCA involve waivers of sovereign immunity, such cases raise no substantial \textit{federal} issues.

\textsuperscript{122} 28 U.S.C. § 1346(a)(2) (1982); see \textit{supra} note 77 (discussing the Tucker Act).
\textsuperscript{123} \textit{Sherwood}, 312 U.S. at 585-86 (Section 795(g) of the New York Civil Practice Act makes a judgment debtor a necessary party).
\textsuperscript{124} \textit{Id.} at 588.
\textsuperscript{125} \textit{Id.} at 590-91.
\textsuperscript{126} The three types of pendent party jurisdiction are federal question, diversity, and special federal.
\textsuperscript{127} See \textit{supra} notes 73-74 and accompanying text.
A. Substantiality and Sovereign Immunity

1. Substantiality

In FTCA cases, federal jurisdiction does not exist because there is a substantial, nonfrivolous claim arising under the Constitution or laws of the United States. Rather, federal jurisdiction is predicated on the fact that the sovereign, in its waiver of immunity from suit, chose the federal court system as the exclusive forum for tort actions against it: not because there is some substantial federal interest at stake. Thus, the notion of "substantiality" has two meanings.

First, traditional substantiality relates to the well-pleaded complaint rule in that an utterly frivolous claim is not sufficiently substantial for disposition in the federal courts. The purpose of this rule is to prevent litigants from overburdening the federal court system with frivolous legal actions.

In the second instance, substantiality relates to whether a claim, which is nonfrivolous, is substantially federal in character. Claims which arise under the Constitution and laws of the United States are, by definition, substantially federal. Claims based on state or common law, however, are not substantially federal because they involve no federal issue. For example, when federal jurisdiction is based on diversity of citizenship, there is no substantial federal issue at stake because the plaintiff's cause of action stems from a principle of state or common law. Federal diversity jurisdiction is merely a way of hearing in federal court cases in which the parties are of diverse citizenship and have an amount in controversy in excess of $50,000.

It is imperative that, when pendent jurisdiction is exercised in diversity situations, the amount in controversy and diversity of citizenship between the parties be sufficient. In matters where the legal issues are nonfederal, pendent jurisdiction is at its weakest because the slightest statutory defect may render aspects of the case unfit for federal adjudication. In federal question cases, however, no in personam requirements exist. Therefore, the constitutional issues of pendent jurisdiction predominate.

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129. FRIEDENTHAL, supra note 5, § 2.4, at 24.
130. See U.S. CONST. art. III, § 2; supra note 2.
131. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (stating that in diversity actions substantive state law applies).
132. 28 U.S.C. § 1332(a) (1988); see supra note 94.
133. Note that when Congress supplies special jurisdiction over what is otherwise a federal question, as in civil rights cases, any implied or express in personam requirements in the juris-
The FTCA is similar to the diversity statute because it allows litigants to bring what would otherwise be state and common law tort claims in federal court. The substance of FTCA actions does not arise under the Constitution or laws of the United States: It derives from common law tort principles. The Federal Government, however, has prescribed procedures by which such suits may be brought against it. The statutes relating to the FTCA set out procedural limits and provide for a federal forum. Thus, while an FTCA action may be substantial because of its nonfrivolous nature, an FTCA action is not substantially federal in character because no substantive federal issue or law must be interpreted or given effect.134 Claims relating to specific aspects of the FTCA, however, such as whether a particular person is an "employee of the government"135 or whether a particular claim has been fully exhausted in the relevant administrative agency,136 are substantially federal in character. Such claims arise under the laws of the United States. Therefore, jurisdiction in such cases could be predicated on the federal question statute.137

The FTCA does not involve any federal question by itself nor does the statute contain any in personam requirements. Nevertheless, FTCA cases are like diversity cases because the plaintiff presents no substantial question of federal law. Moreover, they are akin to federal question cases since the right of legal action arises under a law of the United States. Therefore, the FTCA is a hybrid jurisdictional statute which requires its own rule of pendant jurisdiction.

2. Sovereign Immunity

The United States is immune from suit unless it consents to be sued.138 The FTCA is a waiver of sovereign immunity.139 As such, the statute must
be construed narrowly. The FTCA provides that the United States Government will be liable for the negligence of its employees acting within the scope of their employment. From the plain language of the statute, it is clear that the government has statutorily consented to suit as if it were a private employer.

B. The FTCA's Jurisdictional Scope

Despite the Supreme Court's limitation of pendent party jurisdiction in Aldinger v. Howard, the Aldinger Court remarked in dictum that when jurisdiction is exclusive, as it is under the FTCA, "the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together." Although this statement unquestionably supports the joinder of private pendent parties under the FTCA, the Court in Aldinger was reluctant to "lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction." The Court's remark, therefore, never became law.


140. Sherwood, 312 U.S. at 590 (holding that waivers of sovereign immunity must be strictly construed). But see 3A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice, ¶ 20.07(3), at 20-58 (2d ed. 1987) (arguing that Sherwood's rule of strict construction is unsound and outdated because liberal construction best serves the purpose of the statute). Other commentators have rejected Sherwood's hardline position against the joinder of any private parties, even those who fall under other federal jurisdictional statutes, in suits against the government. See Wright, supra note 77, § 1658, at 415 (citing Baumgold Bros., Inc. v. Allan M. Fox Co., 336 F. Supp. 175, 178 (N.D. Ohio 1972) (rejecting the Sherwood anti-joinder principle where the plaintiff asserted a Tucker Act claim for lost diamonds insured by the Postal Service and a claim against a diverse defendant who had received the package)).

141. 28 U.S.C. § 1346(b); see supra note 139.

142. 28 U.S.C. § 1346(b); see Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955) (holding that the purpose of the FTCA is to compensate victims of negligence of governmental activities in circumstances like those in which a private person would be liable); see also 28 U.S.C. § 2674 (1982).

143. 427 U.S. 1 (1976).

144. Id. at 18 (emphasis in original).

145. Id.
To assess the FTCA’s jurisdictional scope, a court must first look to the statute’s language. The FTCA uses the term “civil actions” in its generic sense. “Civil action” has a broad meaning which includes the concept of “case” and the outdated concept of “cause of action.” The term “against the United States,” on the other hand, suggests that the statute only applies to actions against the United States and no one else. The apparent discrepancy between the statute’s rather broad and very specific language is a matter for judicial interpretation. Thus, it is not entirely unclear whether the FTCA makes special in personam requirements.

A second method of determining whether the statute encompasses pendent parties is to examine its legislative history. The FTCA’s legislative history indicates that the legislature’s original intent may have been to exclude all private parties from FTCA actions, including those who satisfy some other federal jurisdictional requirements. The Supreme Court, however, has rejected this line of thinking.

Third, common legal practices may help to define the statute’s meaning. At common law, a plaintiff may join joint tortfeasors, holding them jointly and severally liable for a single wrong. The Federal Rules of Civil Procedure encourage the joinder of all parties defendant if the right to relief arises out of the same transaction or occurrence. When the FTCA was enacted,

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146. “[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . .” 28 U.S.C. § 1346(b) (1982) (emphasis added).

147. “There shall be one form of action to be known as ‘civil action.’ ” FED. R. CIV. P. 2.


149. See Finley v. United States, 109 S. Ct. 2003, 2008 (1989); see also infra notes 197-202 and accompanying text.

150. The issue is whether the FTCA is party-specific. The diversity statute specifies that only parties of diverse citizenship meeting the amount in controversy requirement may sue under the statute. See 28 U.S.C. § 1332 (1982), supra note 94. The general federal question statute, however, is not party-specific. This statute makes no reference to parties: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (1982).

151. In an early version of the FTCA, the House of Representatives stated that, “[t]he bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill.” H.R. REP. No. 1287, 79th Cong., 1st Sess., 5 (1945) (citing United States v. Sherwood, 312 U.S. 584 (1941)).

152. United States v. Yellow Cab Co., 340 U.S. 543, 551-52 n.8 (1951) (wherein the Supreme Court allowed Yellow Cab, which was being sued for injuries sustained in a collision with a postal truck, to implead the United States for contribution under the FTCA).


154. The rule provides that:
it expressly recognized the applicability of the Federal Rules of Civil Procedure to tort claims against the government.\textsuperscript{155} Although this provision of the FTCA is no longer in force, Congress has established that the Federal Rules of Civil Procedure apply in all federal civil actions.\textsuperscript{156} Therefore, if the United States is an alleged joint tortfeasor, it could, under the Federal Rules, be joined as a codefendant. The various circuit courts of appeal, however, have not universally accepted this result.

The United States Court of Appeals for the Ninth Circuit has consistently held that the United States is the only proper party in a civil action pursuant to FTCA jurisdiction.\textsuperscript{157} In \textit{Ayala v. United States},\textsuperscript{158} over one hundred actions were filed against the United States for damages arising from the explosion of a bomb-laden boxcar under a Navy haulage contract.\textsuperscript{159} The plaintiffs sought to sue the government and the boxcar manufacturer.\textsuperscript{160} The district court denied the joinder of the manufacturer, a private party, on grounds that the Ninth Circuit did not recognize pendent party jurisdiction.\textsuperscript{161} The court of appeals affirmed the dismissal of the manufacturer, holding that pendent party jurisdiction is not a viable form of federal jurisdiction.\textsuperscript{162} The court based its decision on Ninth Circuit precedent\textsuperscript{163} disallowing pendent parties. Although the Ninth Circuit's view is that pendent party jurisdiction is not permissible, the Ninth Circuit cases agree that provided an independent ground of federal jurisdiction over a third party defendant exists, that party may be joined.\textsuperscript{164} The theory is that, because there

\textsuperscript{155} See United States v. Yellow Cab, 340 U.S. at 553 n.9 (1951).
\textsuperscript{157} See infra note 163.
\textsuperscript{158} 550 F.2d 1196 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978).
\textsuperscript{159} Id. at 1197.
\textsuperscript{160} Id.
\textsuperscript{161} See id. (mentioning that the circuit has rejected pendent party jurisdiction altogether).
\textsuperscript{162} Id. at 1200.
\textsuperscript{163} Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975), aff'd, 427 U.S. 1 (1976); Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), aff'd in part and rev'd in part sub nom., Moor v. County of Alameda, 411 U.S. 693 (1973); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Williams v. United States, 405 F.2d 951 (9th Cir. 1969).
\textsuperscript{164} Williams v. United States, 405 F.2d at 954 (9th Cir. 1969). See generally \textsc{Jayson}, \textit{Handling Federal Tort Claims} § 177 (1989). The Ninth Circuit, in Benbow v. Wolf, 217 F.2d 203, 205 n.3 (9th Cir. 1954), stated that United States v. Yellow Cab Co., 340 U.S. 543 (1951), reversed the opinion expressed in Uarte v. United States, 7 F.R.D. 705, 707 (S.D. Cal.)
exists independent federal jurisdiction, such as diversity or federal question jurisdiction, over the additional party, the plaintiff could have brought the action against the additional party despite any limitations of the anchor jurisdiction. Thus, the plaintiff merely consolidates the actions as opposed to joining a new party over whom there is no federal jurisdiction.

Contrary to the Ninth Circuit view, the United States Court of Appeals for the Tenth Circuit, in *Stewart v. United States*, found that, because the FTCA bestows jurisdiction exclusively on the district courts, the plaintiff has no choice but to initiate the entire case in federal court. In *Stewart*, an employee of a company hired by the government to manage a nuclear weapons facility brought suit in tort against the United States, his employer Rockwell International, and a coemployee for injuries incurred in an accident at the facility's parking lot. The court addressed the issue of whether there was proper subject matter jurisdiction as to the nondiverse coemployee. The court held that, under *Gibbs*, pendent jurisdiction existed. Moreover, the court also found no "congressional disapproval of the exercise of . . . pendent party jurisdiction in the FTCA."*\(^{169}\)

The United States Court of Appeals for the Eleventh Circuit echoed the *Stewart* court's position in *Lykins v. Pointer, Inc.**\(^{170}\) In *Lykins*, the court held that there is "no express or implied negation of the federal courts' power to hear pendent party claims when [the FTCA] is invoked to confer jurisdiction on the district court."*\(^{171}\) Thus, both the Tenth and Eleventh Circuits allow the use of pendent party jurisdiction to join additional parties in FTCA litigation.

Without any clear legislative intent to include or exclude pendent parties, federal courts had to rely on the FTCA's language in determining which parties may sue and be sued under the statute. Because the federal judiciary was unable to reach a consensus on the breadth of the statute, the Supreme Court resolved the issue in *Finley v. United States*.\(^{172}\)


\(^{166}\) *Id.* at 758.

\(^{167}\) *Id.* at 757.

\(^{168}\) *Id.* at 757-58.

\(^{169}\) *Id.* at 758; *see* *Finley v. United States*, 109 S. Ct. 2003, 2010-11 (1989) (Blackmun, J., dissenting).

\(^{170}\) 725 F.2d 645 (11th Cir. 1984).

\(^{171}\) *Id.* at 647. For a discussion of jurisdictional exclusion *see* notes 79-86 and accompanying text.

III. FINLEY v. UNITED STATES

On November 11, 1983, Barbara Finley, a resident of California, lost her husband and two children when their twin engine plane struck city power lines and crashed at a San Diego airfield. 173 Finley brought a tort action in California state court against the San Diego Gas & Electric Company for negligently positioning and illuminating the power lines at the airport. She also sued the city of San Diego, claiming that negligent maintenance left the airport’s runway lights inoperative. 174 Subsequently, Finley brought a similar action against the United States, alleging that the FAA had negligently maintained the runway lights and negligently carried out its duties as air traffic controller. 175 Pursuant to the jurisdictional grant under the FTCA, 176 Finley brought her action against the FAA in United States District Court for the Southern District of California. 177

Approximately one year later, Finley moved to amend her federal complaint to join the San Diego Gas & Electric Company and the city of San Diego. 178 Hence, the issue arose as to whether a plaintiff suing the United States under the FTCA could join additional defendants over whom there is no independent basis of federal subject matter jurisdiction. Contrary to the controlling Ninth Circuit holdings on this issue, 179 the district court found that the plaintiff could join the nonfederal parties under the theory of pendent party jurisdiction. 180 Relying on a footnote in a Ninth Circuit decision 181 for legal support, the district court reasoned that “judicial economy and efficiency” warranted trying all the actions together. 182 The United States Court of Appeals for the Ninth Circuit summarily reversed the district court’s decision. 183 The court of appeals found that the district court improperly permitted the joinder of nonfederal parties in light of Ayala’s plain prohibition against the joinder of nonfederal parties in FTCA ac-

173. Id. at 2005.
174. Id.
175. Id.
176. 28 U.S.C. § 1346(b); see supra note 139.
178. Id.
179. See supra notes 158-64 and accompanying text.
181. Mattschei v. United States, 600 F.2d 205, 207 n.2 (9th Cir. 1979) (Judge Kennedy questioned the dismissal of a pendent action in an FTCA case); see Petition for Certiorari, supra note 24, Appendix A at A-8.
183. Id. at A-2; see also Finley, 109 S. Ct. at 2005.
The plaintiff petitioned to the United States Supreme Court and the Court granted certiorari.\textsuperscript{185} The Supreme Court affirmed the Ninth Circuit’s decision, choosing to construe the FTCA’s jurisdictional grant narrowly.\textsuperscript{186} The majority\textsuperscript{187} found that the FTCA’s jurisdictional grant did not reach the nonfederal defendants.\textsuperscript{188} Specifically, the Court determined that, under the jurisdictional grant of the FTCA, a plaintiff may bring an action only against the United States.\textsuperscript{189} Thus, the Court resolved the split among the federal circuit courts of appeal\textsuperscript{190} as to whether the FTCA permits the joinder of nonfederal defendants.

Justice Blackmun, in his dissent, found that the Court’s decision was misguided because there was no clear congressional intent to ban nonfederal parties under the FTCA.\textsuperscript{191} In a separate dissent, Justice Stevens disagreed with the majority, asserting that the FTCA extends jurisdiction to “civil actions” against the United States.\textsuperscript{192} Justice Stevens urged that in light of the term’s use in the Federal Rules of Civil Procedure, the statute requires courts to read the term “civil action” broadly.\textsuperscript{193} Furthermore, the dissenters contended that, because plaintiffs who sue pursuant to the FTCA are in the awkward posture of being required to bring their suit in federal court, they should be able to litigate their entire case there.\textsuperscript{194} A plaintiff such as Finley, who is not diverse with the state parties and does not sue them pursuant to any federal law, is automatically precluded from getting complete relief in one judicial proceeding.

\textsuperscript{184} Petition for Certiorari, supra note 24, at A-1 to A-2.
\textsuperscript{185} Finley v. United States, 109 S. Ct. 52 (1988).
\textsuperscript{186} Finley, 109 S. Ct. at 2007, 2010.
\textsuperscript{187} Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O’Connor, and Kennedy.
\textsuperscript{188} Finley, 109 S. Ct. at 2008, 2010.
\textsuperscript{189} Id. at 2008.
\textsuperscript{191} Finley, 109 S. Ct. at 2011 (Blackmun, J., dissenting)
\textsuperscript{192} Id. at 2021 (Stevens, J., dissenting). Justice Stevens was joined by Justices Brennan and Marshall. Id.
\textsuperscript{193} Id. at 2019 n.25.
\textsuperscript{194} All four dissenting Justices agreed that exclusivity of jurisdiction was a compelling reason to allow the joinder of nonfederal parties. Id. at 2011, 2021.
The dissenters relied on dictum in Aldinger, which hinted that the FTCA's jurisdictional exclusivity supports the joinder of nonfederal parties who meet the Gibbs test. The dissent's reliance on Aldinger was ironic because the majority in Finley relied on the same case to deny Finley's motion for joining state and federal parties.

A. The Court's Interpretation of the FTCA's Jurisdictional Grant

In Finley, the Supreme Court held that the FTCA's jurisdictional grant does not allow a plaintiff to join a nonfederal party in a suit against the United States even though the state action and the federal action arise out of a common nucleus of operative fact. The Court wrote that "[i]nstinct as the statutory provision 'between ... citizens of different States' has been held to mean citizens of different States and no one else, ... so also here we conclude that 'against the United States' means against the United States and no one else." To emphasize this, the majority reiterated, "the statute here defines jurisdiction in a manner that does not reach defendants other than the United States." To support its point, the Court relied on United States v. Sherwood, which interpreted the same statutory language in the Tucker Act, a federal statute with similarly limited jurisdictional parameters. Sherwood held that private parties were not within the reach of the Tucker Act's jurisdictional grant.

The Court's declaration that "'against the United States' means against the United States and no one else" did not mean that private parties may not be joined as defendants when the government is sued pursuant to the FTCA. Throughout the Finley opinion, the Court rejected the notion that parties that fall under independent sources of federal jurisdiction should

195. Aldinger v. Howard, 427 U.S. 1, 18 (1976); see supra text accompanying note 144.
197. Id. at 2009 (footnote omitted).
198. 312 U.S. 584 (1941) (holding that in suits brought pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2), no private parties may be joined with the United States); see supra notes 121-25 and accompanying text.
199. 28 U.S.C. § 1346(a)(2) provides: "The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of ... any ... civil action or claim against the United States not exceeding $10,000 . . . ." (emphasis added).
200. The Court held that: "The court's jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States, and if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court." Sherwood, 312 U.S. at 588 (citations omitted).
Pendent Party Jurisdiction

be excluded from joinder with the government in FTCA actions. Accord-
ingly, the Court agreed with the Ninth Circuit's view and held that the
FTCA cannot supply jurisdiction over defendants other than the United
States.

The Court reasoned that the pendent jurisdiction supplied by the underly-
ing anchor claim was necessarily the same jurisdiction that would supple-
ment any nonfederal actions. The additional parties could not be
appended to the anchor FTCA jurisdiction because the statute necessitated
that the only party defendant be the United States Government. More-
over, there is no generic form of federal jurisdiction to which parties may be
appended. The Court emphasized that pendent jurisdiction is only as in-
clusive as the jurisdiction granted by the underlying jurisdictional statute, in
this case, the FTCA. Thus, since the FTCA did not provide for any party
defendant other than the United States, pendent parties did not fall under its
jurisdiction.

Just as in Owen Equipment & Erection Co. v. Kroger, the jurisdiction
invoked to support the main case is the very jurisdiction that extends to a
pendent party or claim. In Owen, ancillary jurisdiction supported the
presence of Owen Equipment & Erection Co. This jurisdiction necessarily
disappeared when the ancillarity disappeared. The ancillary jurisdiction ex-
ested between the defendant Owen and the impleaded defendant, OPPD.
Thus, that ancillarity ceased once OPPD was dismissed from the suit. The
vital jurisdictional link of diversity between Kroger and Owen no longer ex-
ested. From an understanding of this principle, the Court in Finley ruled
that, in FTCA cases, pendent jurisdiction could not supplement any lacking
federal jurisdiction.

202. Finley, 109 S. Ct. at 2008; see id. at 2006-10. If the Court is trying to use Sherwood to
justify its holding that "'against the United States' means against the United States and no one
else," then it cannot consistently rely on Sherwood and say that private parties are permissible
in section 1346 litigation insofar as they possess independent jurisdiction. See id.
203. For a discussion of the Ninth Circuit's view see supra notes 158-64 and accompanying
text.
204. See Finley, 109 S. Ct. at 2007-09.
205. Id. at 2008-10.
206. See supra text accompanying notes 70-76.
207. See Finley, 109 S. Ct. at 2009.
209. See supra notes 100-15 and accompanying text.
210. See Finley, 109 S. Ct. at 2007-08.
B. Justice Blackmun's Dissent: The "Sensible Result"

Justice Blackmun, dissenting from the majority’s opinion, questioned the Court's reading of *Aldinger v. Howard.* 211 Specifically, Justice Blackmun criticized the Court’s attempt to find congressional intent to exclude pendent parties by relying on the absence of any mention of pendent parties within the statute. The Justice argued that since pendent parties, by definition, are not mentioned in jurisdictional statutes, they could never be expressly or impliedly excluded212 in a jurisdictional statute.213

Finding no congressional intent in the FTCA exempting private parties,214 Justice Blackmun argued that since the FTCA confers exclusive jurisdiction on the federal courts,215 the “sensible result is to permit the exercise of pendent-party jurisdiction.”216

C. Justice Stevens’ Dissent: The “Federal Question”

Justice Stevens argued that the majority’s opinion in *Finley* was contrary to the well-reasoned opinions of many federal judges.217 Furthermore, Justice Stevens asserted that the majority mistakenly applied the standards of the diversity statute to interpret the FTCA, and failed to acknowledge the true meaning of the term “civil action.”218 Additionally, Justice Stevens argued that even if the Court were not to find that Finley’s actions amounted

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212. *Finley,* 109 S. Ct. at 2011 (Blackmun, J., dissenting). If parties cannot be expressly excluded, they cannot, logically, be impliedly excluded.

213. In *Aldinger,* Justice Brennan wrote:

The test the Court announces is “whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner’s principal claim . . . rests, Congress has addressed itself to the party as to whom jurisdiction pendent to the principal claim is sought.” At one level of analysis, this test is of course meaningless, being capable of application to all cases, because all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly “addressed itself” by not expressly conferring subject-matter jurisdiction on the federal courts. *Aldinger v. Howard,* 427 U.S. 1, 22-23 (1976) (Brennan, J., dissenting) (citation omitted).

214. *Finley,* 109 S. Ct. at 2010-11 (Blackmun, J., dissenting); see supra note 169 and accompanying text. But see supra note 151 and accompanying text (legislative history suggesting that private parties are not to be joined in FTCA actions).

215. Justice Blackmun relied on Justice Rehnquist’s dictum in *Aldinger,* 427 U.S. at 18; see supra text accompanying note 144.


217. Justice Stevens relied on the reasoning of Justice Cardozo and Judge Friendly to support his contention that pendent parties should be allowed in the *Finley* case. See *Finley,* 109 S. Ct. at 2015-23 (Stevens, J., dissenting); see infra notes 224-25 (Friendly, J.), and note 277 (Cardozo, J.) and accompanying text.

to a constitutional case, two alternative rationales supported the joinder of state parties in Finley's federal suit.\(^{219}\)

First, Justice Stevens noted that article III of the United States Constitution provides that the federal courts shall have jurisdiction over "[c]ontroversies to which the United States shall be a party."\(^{220}\) Second, Justice Stevens pointed out that the FTCA expressly grants jurisdiction for tort claims against the United States.\(^{221}\)

According to Justice Stevens, a third alternative source of jurisdiction for the Finley claim existed. Namely, Justice Stevens stated that an application of the "arising under" provision of the Constitution, which makes no in personam requirements, would avoid extending the FTCA's subject matter jurisdiction.\(^{222}\) Justice Stevens' alternative argument, however, is weakened by the fact that the "law" under which the case arises, the FTCA itself, contains a superseding grant of special federal jurisdiction. Even if Finley had argued that her case arose under the laws of the United States, the FTCA does not constitute a substantial federal claim and is thus inadequate for meeting the "arising under" requirements.\(^{223}\)

Relying on two prior Second Circuit decisions,\(^{224}\) Justice Stevens found exclusivity of jurisdiction to be a compelling reason to allow pendent parties. Justice Stevens also highlighted the judiciary's discretion in matters of supplemental jurisdiction.\(^{225}\) To support his argument that there is constitutional power to hear the case, Justice Stevens cited a First Circuit decision\(^{226}\) that supported the notion that cases brought pursuant to the FTCA are, in the words of the Constitution, "[c]ontroversies to which the United States [is] a [p]arty." This First Circuit decision, however, contradicts Justice Ste-
vens' assertion that FTCA actions are "[c]ase[s] . . . arising under . . . the laws of the United States." Justice Stevens advanced the theory that the FTCA is, by virtue of being a federal law, a federal question and deserves the appropriate jurisdictional treatment. Some federal courts and commentators argue, however, that FTCA actions do not present a substantial question of federal law.

Although a dispute exists as to whether article III's use of "to which the United States [is] a [p]arty" refers to the United States as a party plaintiff or defendant, Justice Stevens argued that because the sovereign waived its immunity in the FTCA, civil actions brought pursuant to that statute are within the jurisdictional scope of article III. To support this assertion, Justice Stevens cited a prior Supreme Court decision dismissing precedent holding that the Founding Fathers deliberately omitted the word "all" when they wrote "[c]ontroversies to which the United States shall be a [p]arty." Justice Stevens argued that "controversies" means all controversies. Thus, when the government consents to be a "party" in a suit, the Constitution provides that "party" means both plaintiff and defendant. Justice Stevens' argument seems to rely on a principle that the Constitution alone provides jurisdiction in civil actions against the government. This argument, however, is contrary to the principle that jurisdiction must be both constitutionally and statutorily ordained.

227. Id. (footnote omitted); see also WRIGHT, supra note 77, § 3563, at 56 n.17 (1984) (remarking that "[t]here is debate about whether suits under the Federal Tort Claims Act . . . are federal question cases.").

228. See Mickelic v. United States Postal Service, 367 F. Supp. 1036, 1039-40 (W.D. Pa. 1973) (holding that the FTCA does not present a substantial federal question); see also infra notes 241-47 and accompanying text. But see Ayala v. United States, 550 F.2d 1196, 1201 n.8 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978) (rejecting the idea that "substantiality" under Gibbs means that the anchor claim must turn on a significant matter of federal law and holding that "substantial" merely means nonfrivolous). See Matasar, supra note 38, at 1420-21 (asserting that "insubstantiality is virtually identical to a 'failure to state a claim.'"). No matter how "substantial" or nonfrivolous a litigant's claim may be, however, it may still fail to present a substantial federal question. See supra notes 128-37 and accompanying text.

229. U.S. CONST. art. III, § 2; see infra text accompanying notes 255-57.


233. Justice Stevens' reliance on Glidden seems to be weakened, however, by the fact that Glidden recognized Williams' exception in situations where the sovereign has waived immunity from suit. Glidden, 370 U.S. at 563-64.

234. See Finley, 109 S. Ct. at 2012-13. Justice Stevens relied on this argument to support the notion that the Constitution bestows an independent source of jurisdiction on FTCA cases. No one suggests, however, that FTCA actions belong anywhere but in federal court. The issue is whether pendent parties should follow.

235. See supra note 219.

236. See supra note 35.
IV. FINLEY AND PENDENT PARTY JURISDICTION

A. Applicability of the Federal Question and Diversity Cases

The Court's holding in Finley that "against the United States" be construed literally is uncharacteristic of the current attitude in FTCA jurisprudence. Only the Ninth Circuit has consistently denied pendent party jurisdiction under the FTCA.\(^{237}\) Other circuits\(^{238}\) have read Aldinger less narrowly and, therefore, have been more permissive of the joinder of pendent parties. Justice Stevens, dissenting in Finley,\(^{239}\) contended that the majority erred by reading the FTCA as if it were the diversity statute. Specifically, Justice Stevens alleged that the Court erred by relying on diversity cases\(^{240}\) to interpret a federal question statute because diversity cases do not present any "special federal interest."\(^{241}\)

In United Mine Workers v. Gibbs,\(^{242}\) the Court held that in order for a state claim to be pendent to a federal question claim, "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court."\(^{243}\) However, whether an FTCA claim is one which invokes substantial federal law is debatable.\(^{244}\) Although the FTCA confers federal jurisdiction, the jurisdiction is specially granted.\(^{245}\) Because the FTCA is merely a statutory waiver of sovereign immunity, granting jurisdiction in tort suits against the government, it is not the substance of the tort claim which triggers federal jurisdiction, rather it is the fact that the United States Government has waived its immunity from suit and has specially provided for a federal forum.\(^ {246}\) Because diversity cases are no different from insubstantial


\(^{238}\) See, e.g., Lykins v. Pointer, 725 F.2d 645 (11th Cir. 1984). See generally Petitioner's Brief, supra note 237 at 12-26. See also supra notes 165-71 and accompanying text.

\(^{239}\) See supra notes 128-37, 228 and accompanying text.

\(^{240}\) The majority relied on Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) and Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); see supra notes 92-117 and accompanying text.

\(^{241}\) See supra note 128-37, 228 and accompanying text.

\(^{242}\) See supra notes 70-77 and accompanying text.

\(^{243}\) For example, Finley sued under the common law theory of negligence. See Finley v. United States, 109 S. Ct. 2003, 2005 (1989). Additionally, the lack of a substantial federal question is supported by the fact that the government has consented to suit as though it were a private person. Common law tort suits against private persons involve no federal question. See supra notes 128-37 and accompanying text.
federal question cases in that both involve state law in a federal forum,\textsuperscript{247} the
diversity cases may be dispositive of FTCA jurisdiction cases like \textit{Finley}. Thus, Justice Stevens' argument that the diversity cases are faulty indicators
of how pendent parties should be treated under the FTCA seems incor-
rect.\textsuperscript{248} Justice Stevens is correct, however, in noting that the diversity case
law on pendent parties is not entirely analogous in the FTCA context. Un-
like the diversity statute, the FTCA statute does not make express in
personam or amount in controversy requirements.\textsuperscript{249} Instead, the FTCA raises
the issue of how pendent parties should be treated in an exclusive forum and
when the anchor jurisdiction is a waiver of sovereign immunity. Therefore,
neither the federal question nor diversity cases are dispositive of whether
pendent parties are permissible under the FTCA.

\textbf{B. Jurisdictional Exclusivity}

The dissenting justices found that the FTCA's exclusivity provision was a
compelling reason to allow the joinder of state parties. Exclusivity of juris-
diction is not a persuasive reason to permit pendent parties under the FTCA,
however, because exclusivity only goes to the forum itself, not to the parties.
The dispute in \textit{Finley} is over pendent parties. Thus, if the Supreme Court
had found that Finley could have joined state parties in her federal action,
the Court would not have allowed the joinder on the basis of exclusivity.
Instead, the Court would have found that, under \textit{Aldinger}, the FTCA does
not expressly or impliedly exempt private parties.

The \textit{Finley} Court did nothing more than apply the \textit{Aldinger} standard.\textsuperscript{250}
In \textit{Finley}, the Court looked at the FTCA's jurisdictional statute and deter-
mined that parties other than the United States were not covered. There-
fore, pendent jurisdiction was not a means of joining private parties in a tort
action against the United States. For additional parties to be joined, they
must fall under an independent jurisdictional statute.\textsuperscript{251}

Some might argue, however, that because the Court does not allow pen-
dent parties in FTCA actions where there is exclusive federal jurisdiction,
there is no reason to expect the Court to allow pendent parties in the less

\begin{itemize}
\item \textsuperscript{247} Justice Stevens, relying on the fact that diversity cases are not based on a federal
question, ignored the fact that the FTCA is not a substantial federal question. Instead, the
Justice should have distinguished the diversity cases on the basis of their in personam focus.
\item \textsuperscript{248} See \textit{Finley}, 109 S. Ct. at 2018-22 (Stevens, J., dissenting).
\item \textsuperscript{249} See supra notes 94 (diversity) and 139 (FTCA); see also \textit{Finley}, 109 S. Ct. at 2019
(Stevens, J., dissenting) (remarking that the Court mistakenly "treats the absence of an affirm-
ative grant of jurisdiction" as though it implicitly excluded pendent parties).
\item \textsuperscript{250} See supra note 85 and accompanying text.
\item \textsuperscript{251} See \textit{Finley}, 109 S. Ct. 2003; \textit{Ayala v. United States}, 550 F.2d 1196 (9th Cir. 1977),
\end{itemize}
compelling diversity or federal question actions where federal jurisdiction is not exclusive. Therefore, federal courts ought not to focus on the exclusivity of the forum, but on the substantiality of the claim.\textsuperscript{252}

Jurisdictional exclusivity does not persuade the Finley Court to permit pendent parties in FTCA litigation. Moreover, Finley would have lost her case even if the Court accepted the Aldinger dictum favoring the joinder of state parties because Finley focuses on the language "against the United States," interpreting it to mean against the United States and no one else.\textsuperscript{253} Exclusivity is not the issue.

C. Determining Which Language Controls

The Finley Court held that since the FTCA's jurisdictional grant only covers suits against the United States and can only extend its own variety of jurisdiction to pendent parties, private parties are excluded from the FTCA's grant.\textsuperscript{254} Contrary to Justice Stevens' reasoning, the Court did not find that the constitutional provision extending federal jurisdiction to "[c]ontroversies to which the United States shall be a [p]arty" grants federal jurisdiction over all civil actions brought pursuant to the FTCA.\textsuperscript{255} In Gibbs, however, the Court stated that "cases" and "controversies" may encompass state actions.\textsuperscript{256} Thus, under this broad reading it appears that a "[c]ontroversy to which the United States [is] a Party" may include state actions.\textsuperscript{257} Because of these diverging views, it is not clear which term is controlling: "controversy" or "to which the United States shall be a [p]arty."

Justice Stevens asserted that Finley should be able to join her state parties in her federal action because of the substantial factual overlap in the cases. Applying the Gibbs standard, Justice Stevens found that Finley's state and federal actions amounted to one constitutional case. Justice Stevens relied on the judicial reasoning of a Second Circuit decision\textsuperscript{258} that determined that since the merger of the rules of procedure for admiralty and other civil actions in 1966, "the constitutional rationale which underlies the doctrine of ancillary jurisdiction . . . may be applied to support the conclusion that a federal court has the power to hear a related state claim."\textsuperscript{259} Furthermore,

\textsuperscript{252} See supra notes 128-37, 228 and accompanying text.
\textsuperscript{253} Finley, 109 S. Ct. at 2008; see supra text accompanying notes 196-201.
\textsuperscript{254} Finley, 109 S. Ct. at 2008.
\textsuperscript{255} The majority in Finley did not address this precise point. Instead, the majority focused on the statutory inadequacies facing pendent parties. Id. at 2005-10.
\textsuperscript{256} United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); see U.S. CONST. art. I, § 2, supra note 2, on "civil action" and "cases" and "controversies."
\textsuperscript{257} See supra notes 226-36 and accompanying text.
\textsuperscript{258} Leather's Best, Inc. v. Mormaclynx, 451 F.2d 800, 810 (2d Cir. 1971) (Friendly, J.).
\textsuperscript{259} Id. at 810-11.
because the Federal Rules of Civil Procedure apply to all federal civil actions, the use of the term “civil action” as used in the FTCA and in the rules should be read identically. Justice Stevens endorsed the notion that the term “civil action” is coextensive with constitutional “case.”

In *Finley*, the majority refused to interpret the FTCA to give “civil action” more weight than “against the United States.” If *Finley* is any indication of how the Court understands article III, the Court again may find that when Congress has extended jurisdiction to cases in which the United States is a defendant, the jurisdiction does not extend to pendent parties. A review of other statutes may be helpful in clarifying the intent of the FTCA.

I. Actions Commenced by the United States

Under section 1345 of the Judicial Code, Congress has granted federal jurisdiction over all cases brought by the United States Government. Pendent jurisdiction is a plaintiff’s device. Therefore, analyzing whether federal jurisdiction extends to pendent party defendants when the United States initiates a civil action pursuant to section 1345 is of little help because this section automatically creates federal jurisdiction over all of the government’s defendants.

Whether section 1345 extends jurisdiction to third parties impleaded by a section 1345 defendant, however, is unclear. *Finley* suggests that section 1345 would not reach so far as to allow nonfederal parties, because the statute only applies to civil actions “commenced by the United States.” Read narrowly, this language does not reach any defendants not expressly named in the government’s complaint. Nevertheless, the fact that Congress has provided for a federal forum whenever the United States is sued or brings a civil action is indirect support for the argument that any case involving the United States belongs in federal court. One federal district court has held that “[n]othing in the plain language of this statute suggests an intent by

263. “Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.” 28 U.S.C. § 1345 (1982).
264. See *supra* note 39 and accompanying text.
265. See *Wright*, *supra* note 77, § 3651 at 151 (“No subject matter jurisdiction difficulties are presented when the United States is the plaintiff in an action in the federal courts.”) (footnote omitted).
266. Moreover, the Constitution extends federal jurisdiction when the United States is a party. U.S. CONST. art. III, § 2; see *supra* note 2; see also *supra* notes 229-36 and accompanying text.
Congress to prevent the exercise of jurisdiction over parties appending their claims to actions brought by an agency of the United States.” Moreover, since the government can implead third parties when it is a defendant, the defendants of the government should be able to do the same.

2. Removal Jurisdiction

The question of pendent parties also arises under the removal statute, section 1441 of the U.S. Code. Federal removal jurisdiction arises when a federal defendant removes the case against him from a state to a federal forum. Once the federal defendant removes pursuant to section 1441, the district judge must decide whether to remand any remaining state actions. The issue of pendent parties is present in a situation where a plaintiff, suing both state and federal parties, brings the entire case in state court to get complete relief by avoiding the dismissal of a pendent party on the federal level. If the defendant removes and the state actions are remanded, the result will be duplicative litigation. The existence of the judge’s power to remand state actions confirms the fact that nonfederal actions are only heard at the judge’s discretion and according to applicable standards.

270. The statute provides that:
Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.
271. See Finley v. United States, 109 S. Ct. 2003 (1989) (pendent party jurisdiction not permitted under the FTCA); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (ancillary party jurisdiction denied between nondiverse parties in a diversity suit); Aldinger v. Howard, 427 U.S. 1 (1976) (pendent party jurisdiction denied in a civil rights action against a party not deemed to be a “person” under the statute which only provides for actions against persons); Zahn v. Int’l Paper Co., 414 U.S. 291 (1973) (pendent party jurisdiction found not to exist between diversity class action plaintiffs who lacked a claim for less than the requisite $10,000); United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (pendent jurisdiction will exist, at the court’s discretion, when the anchor claim is based on a substantial federal issue and the state and federal actions derive from a common nucleus of operative fact); see also Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1 (1st Cir.) (federal court lacked pendent party jurisdiction because the removal statute does not provide a basis for jurisdiction which would otherwise be lacking), cert. denied, 464 U.S. 936 (1983). But see Aragona v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1377 (5th Cir. 1980) (finding ‘that [28 U.S.C.] § 1441(d), when invoked by a ‘foreign state’ defendant, should operate to remove the entire
Under the standards articulated in *Aldinger*, federal courts are required to look at the applicable jurisdictional statute when determining whether to admit pendent parties.\(^{272}\) Additionally, the removal statute neither expressly nor impliedly precludes a federal court from hearing state actions.\(^{273}\) Even though federal courts have varying attitudes toward pendent jurisdiction, they all must follow the *Aldinger* rule. Thus, the *Finley* Court applied *Aldinger*’s axiom.\(^{274}\)

D. Reading the FTCA as a Whole

A principal defect in the majority’s reasoning in *Finley* is the unwillingness to read the FTCA as a whole. The FTCA states that the government should be held liable as if it were a “private person.”\(^{275}\) The United States has waived its sovereign immunity to the extent that its liability equals that of any private person under similar circumstances. Therefore, “against the United States” should be understood as *against the United States as if it were a private person.*\(^{276}\) Because private persons can be joined as joint tortfeasors, so should the United States be joined when it reduces itself to the level of a private person. As Justice Cardozo said, “No sensible reason can be imagined why the state, having consented to be sued, should thus paralyze the remedy.”\(^{277}\)

Although *Finley* is an application of the *Aldinger* rule, the *Finley* Court chose not to read “civil action” broadly. Instead, it held that “against the United States” was the operative language barring pendent parties. The next jurisdictional cases before the Supreme Court should require a construction of “civil action.” One commentator suggests that civil action is as inclusive as “case”\(^{278}\) in *United Mine Workers v. Gibbs*.\(^{279}\) The Court may accept this

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Action pending in state court against all defendants, private and domestic, as well as the foreign sovereign,” cert. denied, 474 U.S. 995 (1985).

272. *Aldinger v. Howard*, 427 U.S. at 16-17; see supra notes 84-86 and accompanying text.

273. See 28 U.S.C. § 1441(c) (“the district court may determine all issues therein”). Section 1441(d) provides for removal jurisdiction in a civil action brought against a foreign state. One court interpreted the term “civil action” to encompass all the parties, state and federal. *Aragon*, 621 F.2d 1371, 1377 n.7 (1980).


275. See supra notes 139-42 and accompanying text.

276. The statute could also be amended to exclude pendent parties. Congress could provide that “against the United States” entails the notion that any jurisdictionally insufficient private party is not appendable to a claim under the FTCA. Note that the Court remarked that Congress may, at any time, reverse the Court’s ruling and provide for the joinder of pendent parties such as *Finley*. See *Finley*, 109 S. Ct. at 2010.


278. See Freer, supra note 2, at 58.

interpretation. The Court also may rule, however, that the terms “case” and “civil action” are to be qualified by the contextual language of the Constitution or the particular statute. Thus, although “case” and “civil action” are broadly defined in some instances, the terms can take on a narrower meaning in accordance with the particular jurisdictional language. Therefore, as Finley teaches, the federal courts can construe “civil action” in special jurisdictional statutes such as the FTCA in a manner inconsistent with the broad concept of constitutional case.

V. CONCLUSION

Although Finley v. United States further limits the doctrine of pendent party jurisdiction, the decision has not eliminated the doctrine under the federal question statute. Furthermore, Finley has not destroyed the doctrine under the various non-FTCA special jurisdictional statutes. Finley merely applies the rule that courts look to both the constitutional and statutory validity of a nonfederal party before extending jurisdiction over that party. Thus, Finley is not determinative of whether pendent party jurisdiction is dead or alive. Finley, as an application of Aldinger, only speaks to jurisdiction under the FTCA. Nevertheless, there is a discernible trend away from the joinder of pendent parties. Finley is part of that trend. As the split among the justices and the circuit courts indicates, the exclusion of pendent parties is not a widely favored practice. Therefore, in the instances where the more liberal circuits can distinguish Finley on its facts, pendent party jurisdiction may still be a viable jurisdictional avenue.

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