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Ninth Circuit Review—Pendent Party Jurisdiction—Forcing the Subtle and Complex Issue

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PENDENT PARTY JURISDICTION—FORCING THE "SUBTLE AND COMPLEX ISSUE"

I. INTRODUCTION

Whether the doctrine of pendent jurisdiction[1] may be invoked to join "pendent parties"[2] has been the subject of a great deal of conflict and confusion in recent years. The Ninth Circuit has consistently taken the minority view that there must be an independent basis of federal jurisdiction for each party before the court. Other circuits disagree, and Supreme Court decisions have done more to confuse the issue than to resolve it.

In *Ayala v. United States*,[3] the Ninth Circuit has attacked the very foundation of pendent party jurisdiction, holding that such jurisdiction is beyond the scope of power granted to the federal courts under article III of the Constitution.[4] In reviewing this decision, the Supreme Court may be forced to confront the basic nature of pendent jurisdiction in a way it has not done since the landmark opinion of *United Mine Workers v. Gibbs*.[5]

II. THE DEVELOPMENT OF PENDENT JURISDICTION

Since federal courts are courts of limited jurisdiction, their adjudication of particular claims must, theoretically, be predicated upon a grant of judicial power governing those claims. The doctrine of pendent jurisdiction, however, allows federal courts certain limited authority to adjudicate nonfederal claims. This concept may be traced to the 1824 case

1. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 921-26 (2d ed. 1973); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 19 (3d ed. 1976) [hereinafter cited as WRIGHT, FEDERAL COURTS]; 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3567 (1973); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of the Two Doctrines*, 22 U.C.L.A. L. REV. 1263 (1975).

2. *See generally* WRIGHT, FEDERAL COURTS, *supra* note 1, at § 19; Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1 (1972) [hereinafter cited as Fortune]; Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968); Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194 (1976).

3. 550 F.2d 1196 (9th Cir.), *cert. granted*, 98 S. Ct. 50 (1977).

4. *Id.* at 1199-1200. U.S. CONST. art. III, § 2 provides in pertinent part: "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" . . . .

5. 383 U.S. 715 (1966).

of *Osborn v. Bank of United States*.[6] In *Osborn*, Chief Justice Marshall held that the Constitution's grant of power to the federal judiciary included the power to decide subsidiary questions of state law, where necessary to resolve a federal claim before the circuit courts.[7]

In 1909 the Supreme Court extended this proposition in *Siler v. Louisville & Nashville Railroad*[8] to permit resolution of a state claim which rendered review of a constitutional issue unnecessary.[9] The Court reasoned in *Siler* that, as a general proposition, jurisdiction to decide a federal claim necessarily empowers the federal court to decide all other questions in the case.[10]

Twenty-four years later, in *Hurn v. Oursler*,[11] the Court formulated a "cause of action" test to assess federal jurisdiction over questions of state law: federal courts could exercise pendent jurisdiction where the federal and state claims involved could be said to constitute "two distinct grounds in support of a single cause of action."[12] By failing to adequately define the scope of a "cause of action,"[13] however, the *Hurn* standard generated considerable confusion and resulted in the adoption of several conflicting standards among the lower federal courts.[14]

In 1966 the Supreme Court attempted to resolve this confusion. In *United Mine Workers v. Gibbs*,[15] the Court replaced the "unnecessarily grudging"[16] single cause of action test with a doctrine recognizing broad federal power over pendent state claims:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a [federal] claim . . . and the relationship between that claim

6. 22 U.S. (9 Wheat.) 738 (1824).

7. *Id.* at 822-23.

8. 213 U.S. 175 (1909).

9. *Id.* at 191-93. In *Siler* a state provision which regulated rules affecting railroad rates was attacked as both unauthorized under state law and as unconstitutional. *Id.* at 190-91.

10. *Id.* at 191.

11. 289 U.S. 238 (1933). *Hurn* involved joinder of a state claim of unfair competition with a federal claim of copyright infringement.

12. *Id.* at 246.

13. "A 'cause of action' may mean one thing for one purpose and something different for another." *Id.* at 247 (quoting United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933)).

14. *Compare* Musher Foundation v. Alba Trading Co., 127 F.2d 9, 11 (2d Cir. 1942) (Clark, J., dissenting) ("[R]equiring [complete] identity of facts, practically excludes the possibility of a single cause [of action].") *with* United Lens Corp. v. Doray Lamp Co., 93 F.2d 969, 974 (7th Cir. 1937) (accepting jurisdiction, though noting, "Keeping in mind that 'a cause of action does not consist of facts but the violation of a right which the facts show,' we find plaintiff skating on ice that is rather thin.").

15. 383 U.S. 715 (1966). In *Gibbs* plaintiff sought to join claims of unlawful union practices under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1970), with state claims for tortious interference with contract. 383 U.S. at 720.

16. 383 U.S. at 725.

> and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." . . . The state and federal claims must derive from a common nucleus of operative fact. But if, 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* to hear the whole.[17]

The Court noted, however, that pendent jurisdiction was "a doctrine of discretion, not of plaintiff's right"[18] and premised its application upon "considerations of judicial economy, convenience and fairness to litigants."[19]

III. THE EXTENSION TO PENDENT PARTY JURISDICTION

Gibbs involved the joinder of claims between parties already properly before the federal court.[20] The pendent party variant of pendent jurisdiction arises when one or more parties to the pendent state claim are not involved in the federal claim. In such a case there is no independent basis of federal jurisdiction over the pendent parties. They are only in federal court by virtue of their participation in events which generate a federal claim between other parties.[21] Pendent party claims may arise in conjunction with either diversity or federal question claims under any of several federal jurisdiction-conferring statutes,[22] and may entail the joinder of either an additional plaintiff or an additional defendant.

Although a few anomalous pre-*Gibbs* decisions permitted pendent party claims,[23] it appears that joinder of a plaintiff's nonfederal claim against the defendant, or joinder of a pendent claim against an additional defendant, was outside the parameters of the *Hurn* test.[24] *Gibbs*, how-

17. *Id.* (footnotes omitted) (emphasis in original).

18. *Id.* at 726 (footnote omitted).

19. *Id.* Dismissal is available at any point in the action and should be utilized when (1) the federal claims are dismissed prior to trial, (2) the court ascertains that state issues predominate, or (3) the conflicting state and federal remedies are likely to confuse a jury. *Id.* at 726-27.

20. *Id.* at 720.

21. *See* authorities cited note 2 *supra*.

22. *See, e.g.*, cases cited note 27 *infra*.

23. *See* Borror v. Sharon Steel Co., 327 F.2d 165, 172 (3d Cir. 1964); Morris v. Gimbel Bros., 246 F. Supp. 984, 986 (E.D. Pa. 1965). Note that these decisions were based upon the exigencies of Pennsylvania law, which compelled joinder of claims in certain situations.

24. A pendent party claim would have constituted a separate cause of action under the *Hurn* test. *See, e.g.*, Desert Beach Corp. v. United States, 128 F. Supp. 581, 585-86 (S.D. Cal. 1955).

ever, permitted the conclusion that federal judicial power exists whenever pendent claims arise from common "operative facts," and, while the facts in *Gibbs* did not involve the joinder of a pendent party, nothing in the Court's reasoning suggests that pendent party claims require a more restrictive analysis than other pendent claims. The opinion, in fact, noted that under the Federal Rules of Civil Procedure, "joinder of claims, *parties* and remedies is strongly encouraged."[25]

Several courts and commentators have interpreted these factors in the *Gibbs* opinion to constitute a *sub silentio* endorsement of pendent party theory.[26] To date, eight circuits have applied the *Gibbs* rationale to the joinder of pendent parties.[27] Only the Seventh Circuit, relying on pre-*Gibbs* precedent, has joined the Ninth Circuit in consistently denying

25. 383 U.S. at 724 (emphasis added).

26. *See* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 (2d Cir. 1971); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 816 (8th Cir. 1969); Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968); Fortune, *supra* note 2, at 12.

27. First Circuit: Bowers v. Moreno, 520 F.2d 843, 846-48 (1st Cir. 1975) (breach of fiduciary duty on contract pendent to federal claim).

Second Circuit: Galella v. Onassis, 487 F.2d 986, 996 (2d Cir. 1973) (pendent party jurisdiction not automatically lost when federal question anchor claim dismissed); Almenares v. Wyman, 453 F.2d 1075, 1084 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972) (federal statutory claim lacking amount in controversy pendent to constitutional claim); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 (2d Cir. 1971) (federal admiralty claim and pendent state tort claim); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 629 (2d Cir. 1971) (state unfair competition claim pendent to copyright claim).

Third Circuit: Curtis v. Everette, 489 F.2d 516, 520 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (prisoner's state law claim against fellow prisoners pendent to federal claim against prison officials); Nelson v. Keefer, 451 F.2d 289, 291 n.4 (3d Cir. 1971) (dicta) (pendent party-plaintiffs' claims which lacked requisite amount in controversy could be joined to federal diversity anchor claim); Jacobson v. Atlantic City Hosp., 392 F.2d 149, 154 (3d Cir. 1968) (diversity claim lacking requisite amount in controversy pendent to diversity anchor claim).

Fourth Circuit: Stone v. Stone, 405 F.2d 94, 97 (4th Cir. 1968) (diversity claim for less than requisite amount joined with diversity anchor claim against another defendant).

Fifth Circuit: Florida E.C. Ry. v. United States, 519 F.2d 1184, 1195 (5th Cir. 1975) (state claim pendent to Federal Tort Claims suit).

Sixth Circuit: Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir. 1970) (diversity claim lacking requisite amount in controversy pendent to diversity anchor claim); F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917, 919-20 (6th Cir. 1970) (diversity claim lacking requisite amount in controversy pendent to diversity anchor claim).

Eighth Circuit: Schulman v. Huck Finn, Inc., 472 F.2d 864, 866 (8th Cir. 1973) (nonfederal unfair competition claim pendent to federal infringement claim); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 816 (8th Cir. 1969) (diversity claim lacking requisite amount in controversy pendent to diversity anchor claim).

Tenth Circuit: Niebuhr v. State Farm Mut. Auto. Ins. Co., 486 F.2d 618, 621 (10th Cir. 1973) (diversity claim lacking requisite amount in controversy pendent to diversity anchor claim).

jurisdiction over pendent party claims in the context of both federal question and diversity claims.[28]

IV. PENDENT PARTY THEORY: THE NINTH CIRCUIT VERSUS THE SUPREME COURT

Hymer v. Chai,[29] expressly reaffirmed in *Ayala*,[30] marks the starting point of the Ninth Circuit's campaign to limit *Gibbs* to the pendent claim situation.[31] In *Hymer*, the Ninth Circuit acknowledged the policies of fairness and efficiency which animated *Gibbs*,[32] but rejected a pendent party claim on the authority of *Kataoka v. May Department Stores Company*,[33] a Ninth Circuit decision which predated *Gibbs* and was decided under the more restrictive *Hurn* "cause of action" test.[34] This reliance on *Kataoka* has been criticized by commentators[35] and, indeed, the blanket rejection of pendent party theory posited by *Hymer* has met with resistance[36] and even rejection[37] by district courts within the Ninth Circuit itself. The Ninth Circuit's invocation of *Hymer* as mandating a bar to pendent party jurisdiction in all circumstances may also be criticized on the ground that *Hymer* presented one of the least compelling cases for the exercise of pendent party jurisdiction.[38]

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28. *See* Hampton v. City of Chicago, 484 F.2d 602, 611 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974) (citing Wojtas v. Village of Niles, 334 F.2d 797, 799 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965)).

29. 407 F.2d 136 (9th Cir. 1969).

30. 550 F.2d at 1200.

31. "Joinder of claims, not joinder of parties, is the object of the [*Gibbs*] doctrine." 407 F.2d at 137.

32. The Ninth Circuit stated:

> Pendent jurisdiction was devised to avoid the waste and inefficiency resulting from fragmenting a single action and dividing the pieces into separate proceedings before the state and federal courts and to encourage a party who had a claim presenting a substantial federal question, mixed with a nonfederal claim, to take his bundle of claims to the federal court.

Id. (footnote omitted).

33. 115 F. 2d 521 (9th Cir. 1940).

34. *See* text accompanying note 12 *supra*.

35. *See, e.g.*, Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153, 164 (1973).

36. *See, e.g.*, Kaufman v. Union Pac. R.R., 351 F. Supp. 392, 393 (C.D. Cal. 1972) ("I believe also, that there is much merit in the reasoning in the opinion in Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970), which invoked pendent jurisdiction under comparable circumstances. However, I am obliged to conclude that the controlling decision in the Circuit is *Hymer v. Chai.*").

37. Princess Cruises Corp. v. Bayly, Martin & Fay, Inc., 373 F. Supp. 762, 765 (N.D. Cal. 1974).

38. *See* Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194, 230-31 (1976).

In *Moor v. Madigan*,[39] the Ninth Circuit again faced the issue of pendent party jurisdiction. There, the petitioner sought to join state law claims against a county with a related claim against local government officials under 42 U.S.C. section 1983.[40] The Ninth Circuit cited *Hymer* for the proposition that the court lacked power to join a party against whom no federal claim was asserted.[41] Nevertheless, the court proceeded to discuss the discretionary concerns outlined by *Gibbs* and noted that the facts in *Moor* did not warrant the exercise of jurisdiction with respect to "considerations of judicial economy, convenience and fairness to the litigants."[42] Thus, the court seemed to base its decision on a conclusion that pendent jurisdiction was inappropriate in terms of judicial discretion as well as federal power.[43]

On certiorari, the Supreme Court, reviewing *sub nom. Moor v. County of Alameda*,[44] upheld the Ninth Circuit's decision as a valid exercise of the court's discretion to refuse pendent jurisdiction.[45] This holding necessarily entailed an application of the *Gibbs* rationale to pendent party jurisdiction,[46] which one commentator has referred to as a "flirtation with the joinder of pendent parties."[47] Indeed, Justice Marshall's opinion went a step further than *Gibbs* by expressly citing the Federal Rules of Civil Procedure governing third-party claims[48] and compulsory counterclaims[49] as examples of situations in which parties may be brought into federal court without an independent basis of federal jurisdiction over them.[50] *Moor* also impliedly disapproved *Hymer*, noting that: "*Hymer* stands virtually alone against [the] post-*Gibbs* trend . . . and significantly *Hymer* was largely based on . . . a decision which predated

39. 458 F.2d 1217 (9th Cir. 1972), *aff'd sub nom.* Moor v. County of Alameda, 411 U.S. 693 (1973).

40. 42 U.S.C. § 1983 (1970). Jurisdiction was asserted under 28 U.S.C. § 1343 (1970).

41. 458 F.2d at 1221.

42. *Id.*

43. *Id.* "Thus, the district court also felt that as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims." *Id.* (footnote omitted).

44. 411 U.S. 693 (1973).

45. *Id.* at 716-17.

46. *See id.* at 712-16.

47. Sullivan, *Pendent Jurisdiction: The Impact of Hagans and Moor*, 7 IND. L. REV. 925, 944 (1974).

48. 411 U.S. at 714-15 (citing FED. R. CIV. P. 13(a) and 13(h)).

49. 411 U.S. at 714-15 (citing FED. R. CIV. P. 14(a)).

50. Among the cases cited by the Court on this point were: Moore v. New York Cotton Exch., 270 U.S. 593, 608-09 (1926); Albright v. Gates, 362 F.2d 928, 929 (9th Cir. 1966); Pennsylvania R.R. v. Eric Ave. Warehouse Co., 302 F.2d 843, 844 (3d Cir. 1962); Union Paving Co. v. Downer Corp., 276 F.2d 468, 471 (9th Cir. 1960); Dery v. Wyer, 265 F.2d 804, 807-08 (2d Cir. 1959).

Gibbs and the expansion of the concept of pendent jurisdiction beyond the narrow limits set by *Hurn v. Oursler* . . . ."[51]

The Supreme Court opinion did note differences between the pendent claim situation contemplated by *Gibbs* and the pendent party variant.[52] The Court, however, declined to state in what manner these distinctions affected application of the *Gibbs* rationale. It merely concluded: "Whether there exists judicial *power* to hear the state law claims against [the pendent party] is, in short, a subtle and complex question with far-reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case. . . ."[53]

Thus *Moor*, though apparently questioning the application of the *Gibbs* standard to pendent parties, avoided a ruling on the existence of federal power under article III to allow pendent party claims.[54] The result appears somewhat anomalous, inasmuch as the lengthy discussion of *discretionary* dismissal implies the existence of power to accept jurisdiction. This ambiguous approach left much room for continuing disagreement among the circuit courts.

The Ninth Circuit, dismissing *Moor*'s unfavorable dicta concerning *Hymer*,[55] reaffirmed its position against pendent parties in *Aldinger v. Howard*,[56] a case which served as the vehicle for the Supreme Court's most recent opinion in the area. The situation in *Aldinger* somewhat resembled that in *Moor*: a civil rights claim against county officials[57] was joined with a state law claim against the county.[58] There was no diversity as to the county, and the county was not a "person" amenable to suit under 42 U.S.C. section 1983,[59] the source of the federal claim.[60]

The Ninth Circuit opinion acknowledged that the court was "not unaware of the widespread rejection of *Hymer* by other courts. In fact, support for this court's position seems to have eroded since [its] holding in *Moor v. Madigan*."[61] Nevertheless, the Ninth Circuit rejected juris-

51. 411 U.S. at 713-14 (footnote omitted).
52. *Id.* at 712-13.
53. *Id.* at 715 (emphasis added).
54. *Id.*
55. *Id.* at 713-14, *discussed in* Aldinger v. Howard, 513 F.2d 1257, 1260-61 (9th Cir. 1975), *aff'd*, 427 U.S. 1 (1976).
56. 513 F.2d 1257 (9th Cir. 1975), *aff'd*, 427 U.S. 1 (1976).
57. The claim was made under 42 U.S.C. §§ 1983, 1988 (1970). Jurisdiction was invoked under 28 U.S.C. § 1343(3) (1970).
58. *See* WASH. REV. CODE § 4.08.120 (1974).
59. The statute provides in pertinent part: "Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen . . . 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 . . . ." 42 U.S.C. § 1983 (1970).
60. 513 F.2d at 1259. Plaintiff also relied upon 42 U.S.C. § 1988 (1970). *Id.*
61. 513 F.2d at 1261 (footnote omitted).

diction over the pendent party claim, citing the district court's view that, under Ninth Circuit precedent, the court had "no *power* to hear claims against 'pendent parties.' "[62] The court further stated that it was "not bound by any of the . . . dicta in Moor v. County of Alameda to reconsider [its] decisions in Hymer v. Chai and Moor v. Madigan."[63]

In the course of its decision, the court also engaged in a statutory analysis of the Civil Rights Act of 1871, concluding that "this legislation and Congress' failure to repeal it reflect a congressional disinclination to see local governmental units subjected to actions in federal courts . . . ."[64]

On review, the Supreme Court affirmed the Ninth Circuit on the basis of this statutory interpretation.[65] Justice Rehnquist, writing for the majority,[66] approached the issue of federal power only in terms of the jurisdiction conferred by Congress.[67] In *Aldinger*, as in *Moor*, the Court side-stepped the more fundamental question of article III jurisdiction, reasoning that "it would be . . . unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction."[68] The opinion also noted 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."[69]

The majority thereupon held that since Congress had deliberately excluded counties from liability under section 1983 of the Civil Rights Act of 1871, it could not have intended that counties be "brought back" into the suit as pendent parties under the general jurisdictional statutes.[70]

As the dissent observed, this test may well prove difficult and overly restrictive in application, "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."[71]

62. *Id.* at 1260 (emphasis added).
63. *Id.* at 1260-61.
64. *Id.* at 1261.
65. Aldinger v. Howard, 427 U.S. 1, 19 (1976).
66. Justices Brennan, Marshall and Blackmun dissented. *Id.* at 19. Interestingly, as a circuit court judge, Justice Blackmun had authored an opinion critical of *Hymer*. *See* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 817 (8th Cir. 1969).
67. 427 U.S. at 16-17. The extent to which article III jurisdiction is transmitted to the federal courts has long been said to be within Congress' discretion. *Id.* at 17.
68. *Id.* at 18.
69. *Id.*
70. *Id.* at 17.
71. *Id.* at 23. *See generally* Comment, *The Impact of Aldinger v. Howard on Pendent*

Although *Aldinger* added a restrictive component to pendent party analysis, the Supreme Court opinion contained the following dictum:

> Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in federal court may all of the claims be tried together.[72]

V. *AYALA*: CHALLENGING THE AMBIT OF ARTICLE III

The compelling case posed by the Supreme Court in *Aldinger*[73] was precisely the case presented to the Ninth Circuit in *Ayala v. United States*.[74] Multiple plaintiffs asserted consolidated claims against the United States and Pullman, Incorporated in connection with the explosion of several Pullman-manufactured boxcars which had been transporting government bombs pursuant to a contract with the Department of the Navy.[75] While all of the plaintiffs were able to assert federal claims against the United States under the Federal Tort Claims Act[76] and 28 U.S.C. section 1346(b),[77] several of those who sought to join Pullman as an additional defendant were unable to meet either the diversity requirement[78] or the amount in controversy requirement for federal subject matter jurisdiction.[79] These plaintiffs attempted joinder under two theories of pendent party jurisdiction. Principally, they sought to append Pullman as an additional defendant to their Federal Tort Claims actions against the United States.[80] In the alternative, they attempted to join themselves, as pendent party-plaintiffs, to those federal court claims

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Party Jurisdiction, 125 U. PA. L. REV. 1357 (1977); Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976):

> [E]ven where an examination of the legislative history reveals some discussion of the jurisdictional issue, total reliance by the courts on their discernment of the actual intent of Congress will not produce a sensible allocation of jurisdiction for federal causes of action. . . . Moreover, even if purported expressions of majority opinion could be identified, their reliability would be questionable . . . .

Id. at 328.

72. 427 U.S. at 18 (footnote omitted).

73. *See* text accompanying note 72 *supra*.

74. 550 F.2d 1196 (9th Cir.), *cert. granted*, 98 S. Ct. 50 (1977).

75. *Id.* at 1197.

76. 28 U.S.C. §§ 2671-2680 (1970 & Supp. V 1975).

77. 28 U.S.C. § 1346(b) (1970). The statute provides in pertinent part: "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . ."

78. *See* 28 U.S.C. § 1332(a) (1970).

79. *Id.*

80. 550 F.2d at 1198.

initiated against Pullman by parties who had fulfilled the diversity requirements.[81] The district court ordered dismissal of plaintiffs' claims against Pullman and they appealed to the Ninth Circuit.[82]

In affirming the lower court's dismissal, the Ninth Circuit dealt rather brusquely with the Supreme Court's suggestion in *Aldinger* that pendent party claims brought in conjunction with claims under the Federal Tort Claims Act present an attractive setting for pendent party jurisdiction:[83]

> We concluded in *Aldinger* that this court was not bound by Supreme Court dictum in *Moor* . . . . Similarly, we conclude here that we are not bound by new dictum in *Aldinger* which, in any event, merely suggests that "[o]ther statutory grants and other alignments of parties and claims *might* call for a different result.[84]

Indeed, the *Ayala* court appears to have treated the entire *Aldinger* opinion as a nullity, noting that "[t]he Supreme Court's affirmance in *Aldinger*, grounded as it was on a congressional disinclination to allowing pendent party jurisdiction, may . . . be read merely as another avoidance of the ultimate question of constitutional power left unanswered by the Court in *Moor*."[85]

The plaintiff-appellants in *Ayala* urged the Ninth Circuit to re-examine its holding in *Williams v. United States*,[86] an earlier case which rejected a pendent party claim brought in conjunction with a Federal Tort Claims Act anchor claim.[87] The court, however, refused to apply the approach suggested by *Aldinger*, observing that "putting to one side the potential statutory analysis underlying our decision in *Williams*, it is clear that *Hymer's* rejection of pendent party theory was not based on a ferreted congressional disinclination, but rather rested on a more fundamental constitutional consideration."[88]

While *Aldinger* posited the statutory test as preceding an inquiry into article III's applicability to pendent party claims,[89] and thereby avoided examination of article III, *Ayala* reversed the sequence, holding that the constitutional power hurdle precluded analysis of the jurisdiction-conferring statute.[90] This process appears to have been designed to foreclose any opportunity for the Supreme Court to affirm *Ayala* on alternate

81. *Id.*
82. *Id.* at 1197.
83. *See* 427 U.S. at 18.
84. 550 F.2d at 1200.
85. *Id.* (footnote omitted).
86. 405 F.2d 951 (9th Cir. 1969).
87. 550 F.2d at 1199.
88. *Id.* at 1199-1200.
89. *See* 427 U.S. at 15-17.
90. *See* 550 F.2d at 1199-1200.

grounds as it had done in *Moor* and *Aldinger*. The district court judge in *Ayala* expressly ruled that, should the court of appeals determine pendent party jurisdiction to be proper, he would exercise discretion in favor of pendent party joinder.[91] The Ninth Circuit opinion concluded with challenging language directed to the Supreme Court: "[U]ntil the Supreme Court directly confronts the 'subtle and complex question' . . . posed by pendent party jurisdiction . . . we re-affirm *Williams* and *Hymer*."[92]

It is interesting to note two other points raised by *Ayala*. The Ninth Circuit, citing *Hymer*, reaffirmed its minority view that pendent party-plaintiff claims coupled with diversity anchor claims present "inviting circumstances for the theory's application."[93] The Ninth Circuit view on this point appears to have been strengthened somewhat by the Supreme Court's silence on the subject in *Aldinger*.[94]

The court also noted that while its position against pendent parties remains that of a small minority, "the erosion of support for [its] position . . . has, however, recently been offset by the decision in *Fawvor v. Texaco, Inc.*"[95] In addition to the fact that this Fifth Circuit case is subject to a great deal of criticism,[96] it is not nearly as apposite to the *Ayala* facts as was the case of *Florida East Coast Railway v. United States*.[97] In *Florida East Coast Railway*, the Fifth Circuit concluded that the exercise of pendent party jurisdiction was proper in connection with a claim under the Federal Tort Claims Act.[98]

Ayala is the latest, and seemingly the most well-tailored attempt to force the Supreme Court to consider the constitutionality of pendent party jurisdiction. It bases its rejection on the single ground that such jurisdiction is beyond the scope of federal power under article III, even when

91. *Id.* at 1200 n.6.

92. *Id.* at 1200 (citation and footnote omitted).

93. *Id.* at 1198 n.4 (citing Aldinger v. Howard, 513 F.2d at 1257).

94. This is noteworthy in light of the fact that the Court adopted the Ninth Circuit's rationale with respect to congressional disinclination. Compare the Ninth Circuit's opinion in *Aldinger*, 513 F.2d at 1261, with that of the Supreme Court in the same case, 427 U.S. at 17.

95. 550 F.2d at 1200-01 (citing Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977)) (citations omitted).

96. *Fawvor*, in fact, involved a plaintiff's attempt to assert a claim against a non-diverse third party defendant who was already before the court. Since *Aldinger* distinguished pendent party jurisdiction as involving the joinder of a new party, 427 U.S. at 14, it is difficult to support the Fifth Circuit's contention that *Fawvor* is expressly based on the rationale of *Aldinger*. *See* Fawvor v. Texaco, Inc., 546 F.2d at 641.

97. 519 F.2d 1184 (5th Cir. 1975).

98. *Id.* at 1194. Note, however, that *Florida E.C. Ry.*, like *Fawvor*, involved a claim against a third party defendant, rather than joinder of a new party.

discretion weighs in favor of joinder. And it presents the article III issue in the context of a federal question anchor claim over which federal courts possess exclusive jurisdiction,[99] a situation which, notwithstanding the Ninth Circuit's view to the contrary, seems to pose the most persuasive context for the exercise of pendent party jurisdiction.[100] Having granted certiorari,[101] the Supreme Court may finally be forced to reexamine the rationale for pendent jurisdiction in the context of pendent parties.

VI. CONCLUSION

As noted above, the Supreme Court's last and most comprehensive consideration of pendent jurisdiction under article III was in *United Mine Workers v. Gibbs*.[102] As *Gibbs* implicitly recognized, the Constitution grants federal courts jurisdiction over *cases*, not over claims or parties.[103] *Gibbs* defined the scope of a constitutional "case" as encompassing a federal claim sufficient to grant subject matter jurisdiction, together with other claims deriving from a "common nucleus of operative fact" such that plaintiff(s) would normally be expected to try them all in the same judicial proceeding.[104] This definition, by itself, places no limitation on the nature of the parties who may be joined, given a factual nexus between federal and nonfederal claims.

Still, as both the Ninth Circuit and the Supreme Court have repeatedly pointed out, pendent parties present a special problem. It is not readily apparent, for example, why an unwilling defendant should be forced into a federal court on a state cause of action merely because he was involved in an occurrence which also featured the United States or an out-of-state defendant. However, given a constitutional grant of jurisdiction over *cases*, these considerations would seem more appropriate to the exercise of judicial discretion or the analysis of legislative intent underlying a particular jurisdictional statute than as limits upon fundamental federal power. A Supreme Court opinion in *Ayala* which recognizes this power and defines the prerogatives for its use would be of inestimable help in clearing the air surrounding pendent parties.

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99. *See* Shannon v. United States, 417 F.2d 256, 263 (5th Cir. 1969) (Serviceman's Group Life Insurance Act).

100. *See* note 93 *supra* and accompanying text; Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194, 203-04 (1976).

101. 98 S. Ct. 50 (1977).

102. 383 U.S. 715 (1966). *See* text accompanying notes 15-19 *supra*.

103. 383 U.S. at 725.

104. *Id.*