

DRIVING MISJOINDER: THE IMPROPER PARTY PROBLEM IN REMOVAL JURISDICTION

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ABSTRACT

This Article explores, and ultimately embraces, a new exception to the complete diversity rule in removal cases: the doctrine of procedural misjoinder. We argue that the doctrine offers federal courts a vital tool with which to police joinder gamesmanship. Absent this power, plaintiffs may preclude defendant access to federal courts by the relatively simple expedient of joining in state court largely unrelated claims against or on behalf of nondiverse parties. The resulting lawsuit thus fails the complete diversity test, rendering such cases removal-proof. Like fraudulent joinder, the long-standing practice of ignoring nondiverse parties against whom no valid claim may be asserted, the doctrine of procedural misjoinder would permit federal courts to disregard any diversity-destroying parties who have been added improperly to the state lawsuit. Because access to the federal courts is at stake, we believe federal courts should adopt this new doctrine, applying federal joinder standards to test the legitimacy of plaintiffs' party alignments before denying removal jurisdiction.

INTRODUCTION

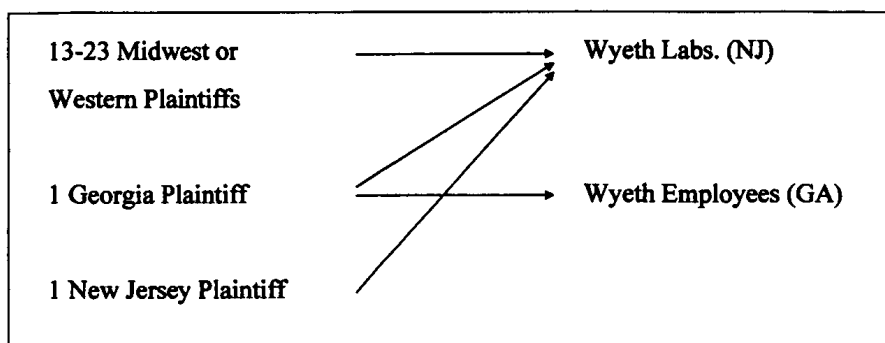
Some very oddly structured lawsuits have been appearing in state courts lately. Plaintiffs who have never met—indeed, who often live half-way across the country from one another—are teaming up to sue in state court. And in many of these cases, the joint suits include defendants against whom most of the plaintiffs assert no claim.

A recent case involving Fen-Phen presents a particularly striking example. Six lawsuits were filed in Georgia state court against New Jersey-based Wyeth Laboratories,¹ and some of Wyeth's Georgia-based employees.² These suits included between fifteen and twenty-five joined plaintiffs aligned in an eerily similar pattern. Each case included a single Georgia plaintiff, a single New Jersey plaintiff, and a contingent of between thirteen and twenty-three other plaintiffs from states scattered across the country.³ The plaintiffs from distant states like Idaho and Wyoming had neither met their co-plaintiffs from Georgia and New Jersey, nor had any grievance against Wyeth's Georgia-based employees. So each of these lawsuits looked something like this:

1. Wyeth manufactures Pondimin and Redux. *See In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 671 (E.D. Pa. 2003).

2. *Id.* For the sake of clarity in our example, we have omitted references to plaintiffs' claims against a Georgia company that made phentermine, an ingredient in Fen-Phen. *See id.*

3. The additional plaintiffs came from Arizona, California, Idaho, Illinois, Minnesota, Montana, North Dakota, Utah, Wisconsin, and Wyoming. *See id.*

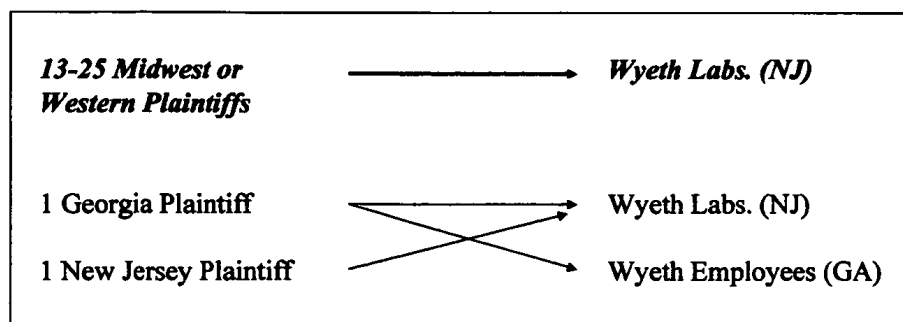


So what were they all doing together in Fulton County, Georgia state court? How can we explain this phenomenon of strangers joining together across state lines, suing defendants connected only to a handful of them? From a distance, such cases appear to be random acts of misjoinder—that is, the grouping of claims by or against unrelated parties. But we suspect that in each of these cases, the same thing was driving the plaintiffs to commit misjoinder: the desire to prevent removal jurisdiction.

It is no secret that plaintiffs often deliberately structure their state court lawsuits to prevent removal by defendants to federal court. Plaintiffs have long known that they could prevent removal in a putative diversity suit by either adding a co-plaintiff from the same state as the defendant or adding a co-defendant from the same state as the plaintiff.⁴ The trick, of course, was finding a “spoiler”; in many cases, the transaction or occurrence being litigated simply did not involve a nondiverse plaintiff or defendant to add. Today, however, some plaintiffs appear to be pushing the limits of (or ignoring altogether) the “transactional” structure of modern litigation in order to add a diversity-destroying party in state court. The result is that, while there is a core group of completely diverse parties litigating a particular transaction or occurrence, removal is blocked by the presence of unrelated nondiverse parties.

Consider again the *Wyeth* case. The bulk of the plaintiffs (all but two) assert claims against completely diverse defendants:

4. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).



For these plaintiffs, the only thing keeping their cases in state court is that they have joined forces with two “spoiler” plaintiffs to sue a common enemy.

Defendants have begun fighting back. In particular, they have urged the federal courts to adopt a doctrine we call “procedural misjoinder,”⁵ under which federal courts disregard any misjoined parties when assessing the citizenship of the parties for purposes of exercising removal jurisdiction.⁶ The doctrine is not unprecedented. Under the well-established fraudulent joinder doctrine, federal courts already do something very similar: when a claim against a nondiverse “spoiler” defendant is wholly without legal merit, the court disregards that party for purposes of determining whether there is complete diversity of citizenship.⁷

So far, the doctrine of procedural misjoinder has achieved somewhat mixed success. On one hand, federal courts increasingly have demonstrated a willingness to take on this challenge, untangling the claims, carving out the improperly joined parties under Federal Rule of Civil Procedure 21, and then assessing diversity for each of the newly separated litigation units. But on the other hand, the doctrine of procedural misjoinder has been disappointing. Some courts, following an approach suggested by *Federal Practice and Procedure*,⁸ have refused to adopt the doctrine, instead holding that defendants must return to state court and seek severance there. Still other courts have adopted the doctrine but have held that any misjoinder must be assessed under state joinder standards because the case was initially filed in

5. While some courts have referred to this as “fraudulent misjoinder,” we prefer the term “procedural misjoinder” because we do not believe that the application of the doctrine should rely on an inquiry into a plaintiff’s motive (fraudulent or otherwise). See *infra* Part IV.C.

6. 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723, at 656 (3d ed. 1998) (identifying procedural misjoinder as a “new concept that appears to be part of the doctrine of fraudulent joinder has begun to emerge in the case law”).

7. See *infra* notes 46-65 and accompanying text; see also 14 WRIGHT ET AL., *supra* note 6, § 3641, at 169 (discussing fraudulent joinder of a nondiverse defendant “who could not conceivably be liable” as a procedural device used to defeat complete diversity (citing *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907))); *Wecker*, 204 U.S. at 186 (“Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.”).

8. See 14B WRIGHT ET AL., *supra* note 6.

state court. In many such cases, courts have found joinder proper under the more liberal and forgiving joinder rules employed by the state in question. Finally, some courts have adopted the doctrine but have limited it to situations of “egregious” misjoinder.

This Article seeks to bring some clarity to this muddled state of affairs, offering a proposed methodology for applying the new doctrine. Parts I and II examine the origins of the misjoinder problem, briefly recounting the historical background of the removal doctrine and the complete diversity rule, as well as permissive joinder law and misjoinder generally. Part III explores the emerging case law on procedural misjoinder. Part IV critiques the existing approaches. Finally, Part V discusses the impact that a properly developed doctrine of procedural misjoinder might have on the federal removal docket, highlighting areas where procedural misjoinder can be a valuable tool for federal courts, but also emphasizing some critical limits to the doctrine we advocate.

Ultimately, we conclude that federal courts should adopt the doctrine of procedural misjoinder and apply federal joinder standards to determine whether parties have been improperly joined. We regard misjoinder as a real threat to diversity removal, and we view the doctrine of procedural misjoinder as a vital judicial tool to police joinder gamesmanship. We believe that it is the obligation of federal courts to exercise such authority rather than washing their hands of the problem by relegating the task to state courts. A doctrine based on Federal Rule of Civil Procedure 20 would provide a uniform, nationwide method for ensuring that the addition of transactionally unrelated parties does not thwart diversity removal.

I. REMOVAL JURISDICTION AND THE COMPLETE DIVERSITY REQUIREMENT

We have had removal jurisdiction for as long as we have had federal courts.⁹ And it seems that we have been struggling to get it right ever since. In particular, Congress and the courts have wrestled mightily with the question of when to allow removal in multi-party diversity suits. This Part analyzes the relationship between complete diversity and removal jurisdiction. We begin with the current statute and the apparent requirement that only completely diverse defendants may remove. We then explore the various ways that the courts and Congress have, over the years, permitted removal in cases of incomplete diversity, including two judge-made exceptions that survive today.

9. The First Congress provided for removal in its first jurisdictional statute. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (codified as amended in scattered sections of 28 U.S.C.). The original removal bill allowed out-of-state defendants to remove cases brought by home-state plaintiffs when the amount in controversy exceeded \$500. *Id.*; *see generally* 14B WRIGHT ET AL., *supra* note 6, § 3721, at 288-89 (discussing removal mechanism in the Judiciary Act of 1789).

A. Complete Diversity and the Current Removal Statute

The current removal statute nowhere uses the phrase “complete diversity.”¹⁰ Rather, the complete diversity requirement for removal exists by incorporation. Under the general removal statute, a state court action may be removed only if it was one “of which the district courts of the United States have original jurisdiction.”¹¹ Translated, this means that the defendant may remove a case to federal court only if the plaintiff could have filed the suit in federal court in the first place.¹²

Original diversity jurisdiction, of course, requires complete diversity of citizenship, meaning that no plaintiff can be a citizen of the same state as any defendant.¹³ Thus, by incorporation, the removal statute generally requires complete diversity of citizenship in order for a suit to be removed on the basis of diversity.¹⁴

B. Statutory Exceptions to the Complete Diversity Rule in Removal— Then and Now

The complete diversity rule has become an entrenched feature of original diversity jurisdiction under 28 U.S.C. § 1332.¹⁵ As a result, one might take it as gospel that complete diversity must exist in order for a case to be removed on the basis of “diversity.” As Professor Hartnett observed, Congress has defined removal jurisdiction by reference to original jurisdiction for so long (over one hundred years) that “courts and commentators tend to have a reflexive inclination toward insisting on parallelism in direct-filed

10. See 28 U.S.C. § 1441(a) (2000). We can quickly dispense with any idea that the complete diversity requirement for removal comes from the Constitution since “[u]nlike original jurisdiction based on diversity of citizenship, removal jurisdiction is nowhere mentioned in the text of the Constitution.” C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 663 (2004). Rather, removal jurisdiction flows from Congress’s general power over the federal courts and from the Necessary and Proper Clause. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816).

11. § 1441(a).

12. *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 163 (1997). It is the removing defendant’s burden to show that the federal court would have had subject matter jurisdiction if the plaintiff had filed in federal court instead of state court. See *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002).

13. While the diversity jurisdiction statute (§ 1332) does not mention complete diversity, the Supreme Court interpreted the earliest congressional grant of diversity jurisdiction as including a complete diversity requirement. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

14. Until recently, it was unclear whether the supplemental jurisdiction statute created an end-run around the complete diversity requirement in cases involving joined plaintiffs. This past summer, however, the Supreme Court made clear that, while the supplemental jurisdiction statute eliminated the requirement that all plaintiffs meet the amount in controversy requirement, it did not overrule the requirement of complete diversity. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2617-18 (2005). In the words of the Court, the presence of a single nondiverse plaintiff “contaminates” the suit as a whole, destroying the diversity jurisdiction to which the supplemental plaintiff seeks to attach himself. *Id.* at 2621.

15. See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) (rejecting the argument that the citizenship of a partnership should be considered only with regard to its general partner by stating that the complete diversity rule is so entrenched that any deviation from it must come from Congress).

and removed cases.”¹⁶ But it is quite clear that Congress need not limit removal jurisdiction to cases of complete diversity.

To begin, the requirement of complete diversity comes from Congress, not Article III.¹⁷ Congress may authorize “minimal diversity” suits in federal court and did so last year with class actions.¹⁸ Moreover, nothing prevents Congress from granting federal courts more of the Article III diversity power by way of removal than by original filing.¹⁹ If it wanted to, for example, Congress could allow defendants to remove regardless of the amount in controversy, even while retaining an amount in controversy requirement for plaintiffs. More to our point, Congress could allow defendants to remove up to the Article III limit of minimal diversity while still preserving the complete diversity requirement as to original filings by plaintiffs. Indeed, as we set forth below, Congress did just that for over one hundred years.

Ironically, removal jurisdiction began much like it is now. From its founding through the Civil War, diversity-based removal was allowed only when all of the plaintiffs were in-state and all of the defendants were out-of-state.²⁰ It did not matter that some of the parties were diverse: “If the whole suit could not be removed, no part of it could be taken from the State court.”²¹ In 1866, however, Congress fundamentally altered diversity-based removal with the Separable Controversy Act of 1866.²²

After the Civil War, Congress was concerned that plaintiffs were thwarting the expanded jurisdiction of the federal courts by joining unnecessary parties in order to render diversity incomplete.²³ To counteract that problem, the act allowed a diverse defendant to remove his part of the case to federal court—despite the presence of joined, nondiverse co-defendants—if the case against him was “separable” from the case against

16. Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 *FORDHAM L. REV.* 1099, 1125 (1995).

17. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

18. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. (to be codified in scattered sections of 28 U.S.C.).

19. The asymmetry currently runs in favor of original filings. For example, plaintiffs may sue in diversity in the federal courts of their home states, but “home-state” defendants may not remove on the basis of diversity. See 28 U.S.C. § 1441(b) (2000). Although this disparity has been oft-criticized, it still remains. See AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, PROPOSED SECTION 1302(a), at 124-26 (1969) (no person may invoke diversity originally or by removal in a federal court in his home state); see also Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 *VA. L. REV.* 1769, 1821-22 (1992).

20. See *Barney v. Latham*, 103 U.S. 205, 209 (1880), *superseded by statute*, Judiciary Code of 1948, ch. 646, § 1441(c), 62 Stat. 869, 937-38 (codified as amended at 28 U.S.C. § 1441(c)), *as recognized in* *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 11 (1951). The opinion in *Barney* gives a splendid overview of the history of removal from the First Congress through 1880. See *id.* 7-11. For more history, see Hartnett, *supra* note 16, at 1108-14.

21. *Barney*, 103 U.S. at 209.

22. Ch. 288, 14 Stat. 306.

23. According to one commentator, Congress was attempting to protect “carpet-baggers” from having to defend themselves in southern state courts. See Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 *ILL. L. REV.* 566, 576 (1941).

the other defendants.²⁴ But the Separable Controversy Act of 1866 proved troublesome and costly in that it split cases between state and federal courts.²⁵

To cure that predicament, Congress altered diversity-based removal yet again, this time providing that the presence of a “separable controversy” allowed the nondiverse defendant to remove the *entire* suit.²⁶ But many problems remained. Courts continued to struggle to draw principled lines between separable and non-separable claims.²⁷ And some lower courts simply resisted the idea that the presence of a “separable” controversy could support removal of the entire suit. These courts developed the so-called “separate” controversy doctrine, under which courts would split the case and remand the “separate” part back to state court.²⁸

Despite its many flaws, the “separable controversy” removal model remained in place until 1948, when Congress enacted the Judicial Code of 1948.²⁹ Among its changes, Congress abolished “separable controversy” removal and replaced it with a provision allowing removal of the entire suit if it included a removable “separate and independent claim or cause of action.”³⁰ Congress still felt a need to protect non-resident defendants from the expanding joinder practices in state court.³¹ But it would do so under a new model, one that looked to whether the plaintiff had joined multiple claims rather than whether the plaintiff sought joint or several liability.³² If the suit contained a separate claim that itself was removable, then the whole suit

24. See *Barney*, 103 U.S. at 210.

25. As the Supreme Court remarked, “Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the [Act of 1866] permitting the separation of controversies arising in a suit, removing some to the Federal court, and leaving others in the State court for determination.” *Id.* at 213.

26. Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470, 470. See *Barney*, 103 U.S. at 213 (“Rather than split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal court.”).

27. See William Cohen, *Problems in the Removal of a “Separate and Independent Claim or Cause of Action,”* 46 MINN. L. REV. 1, 5 (1962).

28. See James Wm. Moore & William VanDercreek, *Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489, 490-92 (1961).

29. Ch. 646, 62 Stat. 869 (codified as amended in scattered sections of 28 U.S.C.); see also Hartnett, *supra* note 16, at 1129-31. For a general discussion of Title 28 and the Judicial Code, see ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 75-77 (1987).

30. Judiciary Code of 1948, ch. 646, § 1441(c), 62 Stat. 869, 937-38 (codified as amended at 28 U.S.C. § 1441(c) (2000)).

31. David P. Currie, *The Federal Courts and the American Law Institute* (pt.1), 36 U. CHI. L. REV. 1, 22 (1968) (citing JAMES MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 239 (1949)); see also Charles Rothfeld, *Rationalizing Removal*, 1990 BYU L. REV. 221, 234 (1990) (“The original purpose of the predecessor to section 1441(c) is clear and (perhaps) salutary: it was designed to prevent plaintiffs from destroying diversity jurisdiction, and thus defendants’ removal rights, by joining nondiverse parties to otherwise removable claims.”).

32. Professor Moore explained, “While the Revisers, seeking simplification, were willing to eliminate the separable controversy as a basis for removal, they were not willing that there be no replacement.” Moore & VanDercreek, *supra* note 28, at 498.

could be removed, leaving it to the district court's discretion whether to remand the tagalong part of the suit.³³

As drafted, "separate claim" removal under § 1441(c) might still have left defendants with ample opportunity to remove incomplete diversity cases.³⁴ But three years later, in *American Fire & Casualty Co. v. Finn*,³⁵ the Supreme Court held that a "separate and independent claim" does not exist under § 1441(c) if "there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions."³⁶ On a practical level,³⁷ this meant that "separate and independent claim" removal had been gutted; few cases—and, in particular, few diversity cases—would satisfy the exacting standards set out by *Finn*.³⁸ Ironically (at least for our purposes), one of the few remaining applications of § 1441(c) in the putative diversity docket was the joinder of multiple plaintiffs against a common enemy.³⁹

After *Finn*, diversity-based removal under § 1441(c) became something of a nagging headache for courts and litigants. Despite being "virtually never available in the diversity setting," diversity defendants continued to invoke it regularly.⁴⁰ As a result, it was widely viewed as "a breeding ground for wasteful procedural litigation."⁴¹ Many prominent commentators, Professor Currie among them, called for Congress to eliminate it altogether.⁴² Congress did just that in 1990, amending § 1441(c) to limit separate and independent claim removal to federal question cases.⁴³

33. *Id.* at 514-15 (discussing partial remand mechanism).

34. Indeed, for the first three years, many diverse defendants successfully invoked § 1441(c) on the basis that the claim against them was "separate" from the claim against their nondiverse co-defendant. *See, e.g.,* *Buckholt v. Dow Chem. Co.*, 81 F. Supp. 463, 465 (S.D. Tex. 1948).

35. 341 U.S. 6 (1951), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5089, 5114 (codified at 28 U.S.C. § 1441(c) (2000)).

36. *Id.* at 14.

37. On an academic level, *Finn* might be viewed as Charles E. Clark's final victory in his battle with Oliver McCaskill to define the scope of a claim or cause of action based on events rather than rights. *See* Douglas D. McFarland, *The Unconstitutional Stub of Section 1441(c)*, 54 OHIO ST. L.J. 1059, 1069-70 (1993). *But see* Hartnett, *supra* note 16, at 1138 (declaring Pomeroy the real winner).

38. *See* Cohen, *supra* note 27, at 13 (explaining that *Finn* barred removal in the large number of cases where a single plaintiff sued several defendants but, having but a single injury, could obtain only a single recovery). An article critical of *Finn* characterizes the court as having "swallowed the Yale Law School party line as to 'cause of action' and the Harvard Law School party line as to the viciousness of diversity of citizenship jurisdiction." Arthur J. Keefe et al., *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569, 605 (1952).

39. *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107App.106[2], at -111, (3d ed. 1997); Cohen, *supra* note 27, at 15 n.58; Moore & VanDercreek, *supra* note 28, at 494-95.

40. Rothfeld, *supra* note 31, at 239.

41. John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 748 (1991).

42. *See* Currie, *supra* note 31, at 25 (finding no reason "for perpetuating this confusing, complicated, and unequal provision, which with every amendment has increasingly done more harm than good").

43. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5089, 5114 (codified at 28 U.S.C. § 1441(c) (2000)). For an overview of all of the changes made by this legislation, including the introduction of the landmark (and now, perhaps, infamous) supplemental jurisdiction statute, *see* David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61 (1991).

Today, the text of the removal statute contains but a single exception to the complete diversity rule: “For purposes of removal under this chapter . . . , the citizenship of defendants sued under fictitious names shall be disregarded.”⁴⁴ In other words, a case is removable under diversity despite the presence of a same-state defendant if the plaintiff sues the defendant as a “Doe” defendant or other fictitious name. Nothing else in the current removal statutes, however, explicitly permits a court to disregard the citizenship of a state court party when assessing whether the suit qualifies for original diversity jurisdiction.⁴⁵ Thus, diversity-based removal has more or less returned to where it started in 1789: a diverse defendant joined with a diversity spoiler has no statutory vehicle to seek removal on the basis that he has a “diversity suit” unfairly (and perhaps intentionally) trapped inside a larger non-removable action.

C. Judge-Made Exceptions to the Complete Diversity Rule

While Congress historically has taken the lead in creating exceptions to the complete diversity rule in removal cases, it has not been alone. The Supreme Court has crafted two doctrines under which removal can be accomplished despite incomplete diversity of citizenship.

1. Fraudulent Joinder

Perhaps the most important judge-made exception to the complete diversity requirement for diversity-based removal is the doctrine of fraudulent joinder. Under the fraudulent joinder doctrine, federal courts may disregard a nondiverse party in determining complete diversity of citizenship where it can be established that the plaintiff does not have a valid cause of action

44. § 1441(a).

45. One court has suggested that § 1441(b) speaks to the complete diversity requirement in that it allows removal “only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.” *Jones v. Nastech Pharm.*, 319 F. Supp. 2d 720, 726 (S.D. Miss. 2004) (quoting § 1441(b)). According to this court, the reference to parties being “properly joined” signals Congress’s intention that federal courts disregard improperly joined parties for removal purposes. *Id.* at 726 (“[J]oinder in that action could only be proper in accordance with the state rule of procedure on joinder, not the federal rule of joinder.”). We read § 1441(b) not as *expanding* diversity removal but as further *limiting* it: even in suits where § 1441(a) is met because complete diversity exists, the case is not removable if the diverse defendant is a citizen of that state. To illustrate the different orbits of these provisions, imagine a suit filed by a Texas plaintiff against a New York defendant in California state court. If the plaintiff had joined a Texas co-defendant, removal would have been barred by § 1441(a) for lack of complete diversity, but would not have triggered § 1441(b). In contrast, if the plaintiff had joined a California co-defendant, the suit would still have satisfied complete diversity and been removable under § 1441(a), but would have triggered the § 1441(b) bar because of the presence of a home-state defendant.

against that party.⁴⁶ The court then decides whether to keep the case or remand for lack of diversity based on the remaining parties.⁴⁷

While the fraudulent joinder doctrine is judge-made, it does have statutory roots. Shortly after Congress authorized removal of separable controversies,⁴⁸ the Supreme Court ruled that claims asserted jointly against multiple tortfeasors or obligors were not separable for removal purposes.⁴⁹ This was true even if the plaintiff could have sued the defendants severally.⁵⁰ As a result, a plaintiff who included a nondiverse defendant and pursued his case as one for joint liability was assured of keeping his state court forum.⁵¹

Soon after, defense lawyers started complaining that plaintiffs were pleading “sham” joint liability claims involving nondiverse defendants for the express purpose of precluding separable controversy removal.⁵² The defendants urged the courts to disregard the “sham” joint liability defendants, just as the courts would disregard a “formal” or “nominal” party.⁵³ But the comparison was not quite apt; the “sham” defendants were not nominal parties because the plaintiffs were in fact asserting claims of personal liability against them. Thus, the litigants and courts coined a new term—“fraudulent joinder”—to describe the alleged, unfounded assertion of joint liability.⁵⁴

46. 16 MOORE ET AL., *supra* note 39, § 107.14[2][c]. For a recent discussion of the fraudulent joinder doctrine, see E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 198 (2005).

47. See 16 MOORE ET AL., *supra* note 39, § 107.14[2][c].

48. See *supra* notes 22-33 and accompanying text.

49. See *Pirie v. Tvedt*, 115 U.S. 41, 43 (1885) (no separable controversy when plaintiff sues joint tortfeasors); *Louisville & Nashville R.R. Co. v. Ide*, 114 U.S. 52, 55 (1885) (no separable controversy when plaintiff sues joint obligors).

50. See *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 96-97 (1898).

51. One treatise authored by a federal judge includes a section frankly titled, “How Plaintiff May Prevent Removal by Joining as a Defendant a Resident of the State.” JOHN C. ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS § 385, at 334 (2d ed. 1922).

52. See *Plymouth Gold Mining Co. v. Amador & Sacramento Canal Co.*, 118 U.S. 264, 270 (1886).

53. See *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421, 450 (1823) (“This court will not suffer its jurisdiction to be ousted, by the mere joinder or non-joinder of formal parties”); see also *Walden v. Skinner*, 101 U.S. 577, 589 (1879) (“[T]he rule is settled that the mere fact that one or more [nominal] parties reside in the same State with one of the actual parties to the controversy will not defeat the jurisdiction of the court.”); *Wood v. Davis*, 59 U.S. 467, 469 (1855) (“It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction”).

54. Courts deciding the early fraudulent-joinder cases had good reason to delve deeply into whether the nondiverse defendant could be jointly liable under the applicable state law. Common law joinder was far more restrictive (at least in actions at law) than the comparatively free-wheeling, transaction-based joinder we have now under the Federal Rules of Civil Procedure. If a plaintiff wanted to sue two defendants together, he had to allege joint liability (or at least joint and several liability). See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 257 (1928); JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING 188, 199 (1899); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 398-99 (3d ed. 1923). “Misjoinder” generally meant that the plaintiff had joined defendants who were only separately liable. OLIVER L. BARBOUR, A SUMMARY OF THE LAW OF PARTIES 305 (1864); see also CLARK, *supra*, at 262 (discussing consequences of misjoining severally liable parties); SHIPMAN, *supra*, at 394 (same). So, if a nondiverse defendant could only be separately liable, his joinder really was improper, and it could therefore be assumed to be a device to deprive the defendant of his right to exercise separable controversy removal. See, e.g., *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152-53 (1914).

During a span of fifteen years, the Supreme Court referred to the “fraudulent joinder” of a joint tortfeasor no fewer than five times, though each time deciding the case on a different basis.⁵⁵ Finally, in 1907, the Supreme Court explicitly adopted and applied the fraudulent joinder doctrine in *Wecker v. National Enameling & Stamping Co.*,⁵⁶ finding that the defendant had conclusively shown in its removal petition and supporting materials that the nondiverse defendant simply had not done anything that could give rise to joint liability.⁵⁷ As the Court explained:

While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.⁵⁸

Over the next decade or so, the Supreme Court addressed fraudulent joinder many times, clarifying its meaning and making concrete two fundamental principles. First, the Court made clear that there was no fraudulent joinder if the applicable state law recognized a possibility of holding the “spoiler” jointly liable.⁵⁹ Second, the Court held that the plaintiff’s motive in pursuing joint liability was immaterial.⁶⁰ So long as the plaintiff was pursuing a plausible theory of joint liability, his reasons for doing so simply did not matter.⁶¹

55. See *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 215 (1906); *Kan. City Suburban Belt Ry. Co. v. Herman*, 187 U.S. 63, 66-71 (1902); *Whitcomb v. Smithson*, 175 U.S. 635, 638 (1900); *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 102-03 (1898); *Louisville & Nashville R.R. Co. v. Wangelin*, 132 U.S. 599, 602-03 (1890).

56. 204 U.S. 176 (1907).

57. *Id.* at 185.

58. *Id.* at 185-86. Concluding that “the real purpose in joining Wettengel was to prevent the exercise of the right of removal by the non-resident defendant,” the Supreme Court affirmed the lower court’s decision disregarding his presence and refusing remand. *Id.* at 186.

59. See *McAllister v. Chesapeake & Ohio Ry. Co.*, 243 U.S. 302, 310-11 (1917); *Chi., Rock Island, & Pac. Ry. Co. v. Whiteaker*, 239 U.S. 421, 424-25 (1915); *Chi., Rock Island, & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 193 (1913); *Chi., Burlington, & Quincy Ry. Co. v. Willard*, 220 U.S. 413, 424-25 (1911). In an earlier case giving a glimpse into practice under *Swift v. Tyson*, the Supreme Court had squarely held that state law—not federal common law—determined whether joint liability was possible. See *Thompson*, 200 U.S. at 219. This was an important ruling because federal common law rejected joint liability in many situations where state law recognized it. See *id.* (“The fact that the state court may take a different view from the courts of the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal.”). Nonetheless, the Court was clear that state law determined whether a case filed under state law presented a separable controversy. *Id.*

60. See *Ill. Cent. R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909) (“In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive . . .”).

61. As a result, the Court rejected fraudulent joinder arguments in several cases involving spoilers who were legally viable targets but whose real value, being men of small means, lay in their sharing the same citizenship as the plaintiff. See, e.g., *Chi., Rock Island & Pac. Ry. Co. v. Dowell*, 229 U.S. 102,

While the Supreme Court has not applied the fraudulent joinder doctrine in the modern joinder era,⁶² there is no doubting the doctrine's continued vitality.⁶³ Of course, with the end of separable controversy removal in 1948, the focus is no longer on joint liability but on the more basic issue of whether the plaintiff states a possible claim against the alleged spoiler. But with that adjustment, fraudulent joinder survives (if not thrives) today. Every circuit has reaffirmed the doctrine at some point in the last few years.⁶⁴ The burden remains high: the defendant must show that there is no reasonable possibility of a claim under applicable state law.⁶⁵ But, when the required showing is made, the federal court will disregard the fraudulently joined defendant and assess diversity based on the remaining parties.

2. *Post-Removal Cures*

A second judge-made exception to the complete diversity requirement in removal centers on timing. In order to remove a case based on diversity jurisdiction, there must be complete diversity at the time of removal. This can occur either because the plaintiff's initial state court suit met the complete diversity requirement,⁶⁶ or because the plaintiff later created complete diversity by voluntarily dismissing the nondiverse parties.⁶⁷ In the latter

114 (1913) (finding irrelevant joined defendant's status as "a man of small means"); *Schwyzhart*, 227 U.S. at 193 (finding joined defendant's poverty irrelevant).

62. The last Supreme Court case sustaining removal due to principles of fraudulent joinder was *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). Even then, the Court did not specifically find fraudulent joinder, but rather it sustained removal based on the plaintiff's failure to contest the defendant's specific allegations of fraudulent joinder in the removal petition. *Id.* at 98-99. Although the 1939 case of *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), is often cited for the doctrine of fraudulent joinder, the Court specifically notes in that case that "there was no charge that the joinder was fraudulent." *Id.* at 541. The real issue was whether the defendant could remove under the separable controversy doctrine. *Id.* at 538. Subsequent Supreme Court cases have acknowledged the doctrine of fraudulent joinder and restated its terms, but only in dicta. Indeed, the Court's most recent reference to fraudulent joinder hardly even qualifies as dicta. See *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 581 n.5 (1999) (noting that the Fifth Circuit had rejected the defendant's fraudulent joinder argument).

63. As one leading treatise states, "[I]t is well-settled that the district court will not allow removal jurisdiction to be defeated by the plaintiff's destruction of complete diversity of citizenship by the collusive or improper joinder of parties . . ." 14B WRIGHT ET AL., *supra* note 6, § 3723, at 625.

64. See, e.g., *Fulford v. Transp. Servs.*, 412 F.3d 609, 614 (5th Cir. 2005); *Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 455 (7th Cir. 2005); *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302-03 (2d Cir. 2004); *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 762-63 (11th Cir. 2004), *rev'd on other grounds*, 125 S. Ct. 2611 (2005); *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1247-49 (10th Cir. 2004); *Filla v. Norfolk S. Ry.*, 336 F.3d 806, 809 (8th Cir. 2003); *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 761 (9th Cir. 2002); *In re Diet Drugs*, 282 F.3d 220, 231-32 (3d Cir. 2002); *Mayes v. Rapoport*, 198 F.3d 457, 461-62 (4th Cir. 1999); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875 (1st Cir. 1983).

65. 14 WRIGHT ET AL., *supra* note 6, § 3641, at 6 (Supp. 2005) ("The party seeking the federal forum is said to bear a heavy burden: to demonstrate the absence of a cognizable claim by clear and convincing evidence.").

66. See 14B WRIGHT ET AL., *supra* note 6, § 3723, at 571-72 (3d ed. 1998). This, apparently, is to prevent a defendant from moving after the suit is filed to create diversity in order to remove. *Id.* at 574.

67. See 28 U.S.C. § 1446(b) (2000). Two observations about "new removal" are in order. First, while the statute does not explicitly limit "new removal" to voluntary changes, the Supreme Court has long held that involuntary changes—such as the court granting summary judgment for the nondiverse

case, the spoiler must be voluntarily dismissed within one year of when the suit was filed in state court.⁶⁸ But in either situation, complete diversity must exist at the time the defendant removes the case to federal court.

During the last few decades, however, the Supreme Court has recognized (or, perhaps, rehabilitated) a limited theory of jurisdictional cure under which incomplete diversity at the time of filing can be “cured” by the deletion of the spoiler later in the lawsuit.⁶⁹ The court invoked this theory in *Newman-Green, Inc. v. Alfonzo-Larrain*,⁷⁰ a case in which an Illinois corporation brought a breach of contract claim against a Venezuelan corporation, four Venezuelan citizens, and an American citizen domiciled in Venezuela. On appeal, the Seventh Circuit found that the American defendant destroyed diversity as he was neither a foreign citizen nor a citizen of any state as required by 28 U.S.C. § 1332(a)(2)-(3). Rather than dismiss the case for lack of subject matter jurisdiction, however, the Seventh Circuit panel held that the lower court had the authority to dismiss the nondiverse American defendant from the suit, thereby ensuring complete diversity.⁷¹ The en banc Seventh Circuit reversed the panel’s decision, holding that only district courts have the authority to drop a dispensable nondiverse party and that Rule 21 does not extend that power to appellate courts.⁷²

The Supreme Court sided with the original Seventh Circuit panel, finding that appellate courts do indeed “have the power to dismiss jurisdictional spoilers” thereby preserving diversity jurisdiction.⁷³ While federal subject matter jurisdiction “ordinarily depends on the facts as they exist when the complaint is filed,” the Court noted that “[l]ike most general principles . . . this one is susceptible to exceptions.”⁷⁴ In this case, the Court found that federal courts may “allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.”⁷⁵

In *Caterpillar, Inc. v. Lewis*,⁷⁶ the Supreme Court extended the jurisdictional cure doctrine to removed cases. In *Caterpillar*, the district court had

defendant—do not qualify. See AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 509 (2004). Second, as a practical matter, the only way a plaintiff can create complete diversity by voluntarily changing the party line-up is by deleting the nondiverse parties. A plaintiff cannot create complete diversity by adding parties; if the existing parties have overlapping citizenships, the addition of more parties cannot alter that fact.

68. See § 1446(b). This provision was added in 1990 under the view that, after one year, it just was not worth the disruption and inefficiency to allow diversity removal. See Oakley, *supra* note 41, at 747.

69. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 572-73 (2004); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989), *superseded by statute*, Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 203, 102 Stat. 4642, *as recognized in Singh v. Daimler-Benz AG*, 9 F.3d 303 (3d Cir. 1993).

70. 490 U.S. 826.

71. *Newman-Green, Inc. v. Alfonzo-Larrain*, 832 F.2d 417, 420 (7th Cir. 1987), *rev'd*, 854 F.2d 916 (7th Cir. 1988) (en banc), *rev'd*, 490 U.S. 826 (1989).

72. *Newman-Green, Inc.*, 854 F.2d at 919-20.

73. *Newman-Green, Inc.*, 490 U.S. at 830.

74. *Id.*

75. *Id.* at 832. The Court did, however, caution that appellate courts should use this authority “sparingly,” with an eye toward preventing undue prejudice to existing parties in the suit. *Id.* at 837-38.

76. 519 U.S. 61 (1996).

erroneously allowed removal (over the plaintiff's timely objection) of a case in which the parties were not completely diverse. However, the defect was "cured" prior to trial when the spoiler was settled out.⁷⁷ Writing for a unanimous Supreme Court, Justice Ginsburg acknowledged the district court's erroneous exercise of subject matter jurisdiction at the time of the removal but held that the post-removal settlement of the claim against the service company prior to trial cured that jurisdictional error:⁷⁸ "[A] district court's error in failing to remand a case improperly removed [for lack of complete diversity] is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered."⁷⁹

In extending the jurisdictional cure doctrine to removal, the *Caterpillar* Court made clear that it saw the problem as presenting two separate questions. First, it viewed the core jurisdictional cure question as going to the court's original diversity jurisdiction under § 1332.⁸⁰ Second, it noted that, even when § 1332 is satisfied by an eventual cure, there still remained the question of what to do about the violation of § 1441(a)'s requirement that the court have subject matter jurisdiction at the time of removal.⁸¹ On this point, the Court was clear: the technical statutory violation of § 1441 does not require remand if the jurisdictional defect is later cured.⁸² Thus, *Caterpillar* stands as yet another judge-made exception to the requirement that complete diversity exist prior to removal.

77. The facts are a bit convoluted. A Kentucky plaintiff brought a product liability action against a diverse bulldozer manufacturer and a nondiverse defendant that serviced the bulldozer. *Id.* at 61. An insurance company then intervened as a plaintiff in the suit, bringing subrogation claims against both the manufacturer and the service company. *Id.* Although the plaintiff settled his claim against the nondiverse service company, the insurance company's claim against the company remained in the case when the manufacturer removed the case to federal court. *Id.* The plaintiff objected to removal on the grounds of incomplete diversity—the insurance company's claim against the nondiverse service company destroyed complete diversity. *Id.* The district court rejected this argument, denying the plaintiff's motion to remand. *Id.* Later, the insurance company also settled its claim against the service company, leaving only diverse parties in the case for the trial and entry of judgment. *See id.*

78. *Id.* at 77. This holding follows in part from earlier cases in which removing defendants challenged removal jurisdiction after adverse judgments, when at the time of trial the parties were completely diverse. *See Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699 (1972), *superseded by statute*, Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4642; *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, §312, 10 Stat. 5089, 5114.

79. *Caterpillar*, 519 U.S. at 64. Justice Ginsburg emphasized that "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75 (citing *Newman-Green, Inc.*, 490 U.S. 826 (1989)). *Id.* *But see Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-72 (2004) (holding that a postfiling change in a plaintiff's citizenship could not cure a defect in diversity jurisdiction, which is to be determined at the time of filing).

80. *Caterpillar*, 519 U.S. at 73.

81. *Id.*

82. *Id.* at 75-78; *see also Grupo Dataflux*, 541 U.S. at 574 (stating that the holding of *Caterpillar* was that the statutory defect under § 1441(a) did not require remand when the lack of complete diversity was cured later).

II. JOINDER AND SEVERANCE UNDER THE FEDERAL RULES

We now turn to joinder. While procedural misjoinder is, at its core, a removal maneuver, it is a maneuver that pivots on party joinder. This Part, accordingly, looks at party joinder under the Federal Rules of Civil Procedure. It first considers permissive joinder under Rule 20. It then examines misjoinder and severance under Rule 21, paying special attention to how courts use severance to cure diversity defects by omitting jurisdictional spoilers after—sometimes long after—the federal court assumes jurisdiction.

A. *Permissive Joinder Under Federal Rule 20*

Federal Rule of Civil Procedure 20 is the basic rule defining plaintiff-initiated joinder in federal court. It provides, in pertinent part:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.⁸³

Thus, Rule 20 provides for both the joinder of multiple plaintiffs and the joinder of multiple defendants, and the standard for both is the same: (1) the joined claims must arise out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there must be a question of law or fact common to all of the joined claims. In both cases, party joinder is permissive rather than mandatory.⁸⁴ The “joinder of . . . parties . . . is strongly encouraged” in order to achieve the “broadest possible scope of action consistent with fairness to the parties.”⁸⁵ But, unless the additional

83. FED. R. CIV. P. 20(a).

84. See, e.g., 7 WRIGHT ET AL., *supra* note 6, § 1652, at 397 (Rule 21 “permits the joinder of persons whose presence is procedurally convenient but is not regarded as essential to the court’s complete disposition of any particular claim”).

85. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 3101(a), 104 Stat. 5113; see also 7 WRIGHT ET AL., *supra* note 6, § 1652, at 395 (“The purpose of the rule is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.”) (footnotes omitted); Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1728-29 (1998) (“[M]odern joinder policy is to encourage resolving controversies in one lawsuit rather than many, and that policy underlies the determination of what may constitute a transaction for purposes of Federal [Rule 20].”).

party is deemed to be “necessary,”⁸⁶ the plaintiff may choose to proceed with or without him.

There is no definitive standard for what constitutes a transaction under Rule 20.⁸⁷ Most courts seem to define the transaction as a set of logically related events.⁸⁸ But rather than establish any hard and fast rules, courts have preferred to analyze transactional relatedness on a case-by-case basis informed by policy considerations like efficiency, convenience, and fairness.⁸⁹ The result is a highly flexible standard that eludes fixed boundaries, with courts reaching quite conflicting results as to its meaning.⁹⁰ This has been particularly true, for example, with respect to product liability cases as courts confront attempts to utilize Rule 20 to join the claims of numerous plaintiffs injured in similar circumstances by a defendant’s product or drug.⁹¹ The struggle to consistently apply the same transaction requirement is also evident in employment discrimination cases.⁹²

86. See FED. R. CIV. P. 19.

87. 4 MOORE ET AL., *supra* note 39, § 20.05[1]. The reference to “occurrences” in Rule 20 appears to be historical, and courts have viewed “transaction” and “occurrence” to be synonymous. *Id.*; see also 7 WRIGHT ET AL., *supra* note 6, § 1653, at 412.

88. See *Alexander v. Fulton County*, 207 F.3d 1303, 1323 (11th Cir. 2000); *Disparte v. Corporate Executive Bd.*, 223 F.R.D. 7, 10 (D.D.C. 2004); see generally 4 MOORE ET AL., *supra* note 39, § 20.05[2] (noting the lack of a fixed standard for determining transactional relatedness); 7 WRIGHT ET AL., *supra* note 6, § 1653, at 409.

89. Thirty years ago, the Eighth Circuit described transactional relatedness in terms still often quoted today: “‘Transaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.” *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (quoting *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926)); see also *Insolia v. Phillip Morris, Inc.*, 186 F.R.D. 547, 549 (W.D. Wis. 1999).

90. See, e.g., Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1487 (2005) (lamenting that “although the policies underlying Rule 20 favor joinder whenever possible to serve goals of expediency, efficiency, and convenience, the courts themselves have taken mixed and, in some cases, contradictory approaches to Rule 20”).

91. In one line of cases, courts have rejected such attempts, requiring “at a minimum that the central facts of each plaintiff’s claim arise on a somewhat individualized basis out of the same set of circumstances.” *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL 1014, 1995 WL 428683, at *2 (E.D. Pa. July 17, 1995). These courts have denied Rule 20 joinder where the alleged same transaction consisted of plaintiffs suffering injuries from a medical device in different states at different times, *id.*, or being exposed to asbestos or tobacco products at different times in different circumstances. See, e.g., *Malcom v. Nat’l Gypsum Co.*, 995 F.2d 346, 351 (2d Cir. 1993) (asbestos); *Insolia*, 186 F.R.D. at 549 (tobacco); see also *Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (4th Cir. 1983) (rejecting joinder where plaintiff’s warranty claims are based on different cars purchased at different times).

Faced with similarly disparate individual circumstances, however, other courts have permitted plaintiffs to sue defendant manufacturers on product liability claims, finding that the same transaction standard could be met simply by a defendant’s failure to warn or to produce a defective product. See, e.g., *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 579, 581 (E.D. Tex. 1996); see also Cabraser, *supra* note 90, at 1487-90 (describing the split among courts considering product liability claims).

92. Compare *Bailey v. N. Trust Co.*, 196 F.R.D. 513, 515-16 (N.D. Ill. 2000) (denying Rule 20 joinder of employment discrimination claims due to “factual differences” among claimants), and *Smith v. N. Am. Rockwell Corp. Tulsa Div.*, 50 F.R.D. 515, 522 (N.D. Okla. 1970) (same), with *Streeter v. Joint Indus. Bd. of Elec. Indus.*, 767 F. Supp. 520, 529 (S.D.N.Y. 1991) (holding that the plaintiffs’ hostile work environment claims amounted to a single transaction), and *Best v. Ormer & Wasserman*, Nos. 92 C 6477, 93 C 2875, 1993 WL 284145, at *1 (N.D. Ill. July 27, 1993) (finding the same transaction test met even when the plaintiffs’ claims arose out of separate time periods).

B. Misjoinder and Severance Under Federal Rule 21

When parties have been misjoined, the judge may turn to Rule 21. Historically, in actions at common law, defects in party joinder could be fatal to a plaintiff's claims.⁹³ Under Rule 21, however, misjoinder is no longer grounds for dismissal of the entire action.⁹⁴ Rather, the rule simply vests district (and appellate)⁹⁵ courts with discretion to drop or add parties "at any stage of the action and on such terms as are just."⁹⁶

One of the principal reasons to dismiss a party as "misjoined" is because Rule 20 has been violated—i.e., the claims against that party are not part of the same transaction or occurrence as the claims against the other parties.⁹⁷ But Rule 21 authorizes severance even of properly joined parties in the interest of justice.⁹⁸ The purpose of Rule 21 is not merely to police joinder, but to allow federal courts "to continue and determine an action on its merits whenever that can be done without prejudice to the parties."⁹⁹ Thus, Rule 21 is the party equivalent of Rule 42(b), which grants federal courts broad discretion to separate claims and issues for litigation "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."¹⁰⁰

As discussed above, the federal courts have recently "re-discovered" their ability to use Rule 21 as a tool to cure diversity defects, including, as seen in *Caterpillar*, in removed cases.¹⁰¹ We think that this is particularly significant for procedural misjoinder because of what it represents. Under the jurisdictional cure doctrine, federal courts can manipulate a party line-up in order to manage their jurisdiction. In particular, they rely on their procedural power under Rule 21 to sever parties as a basis to carve up a larger

93. 7 WRIGHT ET AL., *supra* note 6, § 1681, at 472-73. Equity practice was much more forgiving, ordinarily allowing misjoinder of parties to be corrected by a plaintiff through an amendment to the complaint. *Id.* When the Federal Rules were adopted, however, law and equity were placed under a uniform set of procedural rules that sided with equity practice. See Stephen Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987).

94. FED. R. CIV. P. 21.

95. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

96. FED. R. CIV. P. 21.

97. See, e.g., *Smith v. Planned Parenthood*, 225 F.R.D. 233, 246 (E.D. Mo. 2004) (severing misjoined party); *Disparte v. Corporate Executive Bd.*, 223 F.R.D. 7, 12 (D.D.C. 2004) (same); *Hanna v. Gravett*, 262 F. Supp. 2d 643, 647 (E.D. Va. 2003) (same).

98. See *Tab Express Int'l Inc. v. Aviation Simulation Tech., Inc.*, 215 F.R.D. 621, 623 (D. Kan. 2003); see also *Wyndam Assoc. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968) (holding that Rule 21 "authorizes the severance of any claim, even without a finding of improper joinder, where there are sufficient other reasons for ordering a severance"); *Bridgeport Music, Inc. v. 11C Music*, 202 F.R.D. 229, 232 (M.D. Tenn. 2001) (noting that even if it had not found the joinder of parties improper, "the Court would exercise the discretion afforded it to order a severance"); *Rappoport v. Steven Spielberg, Inc.*, 16 F. Supp. 2d 481, 496-97 (D.N.J. 1998) (noting that severance is appropriate where the administration of justice is materially advanced).

99. 7 WRIGHT ET AL., *supra* note 6, § 1681, at 474.

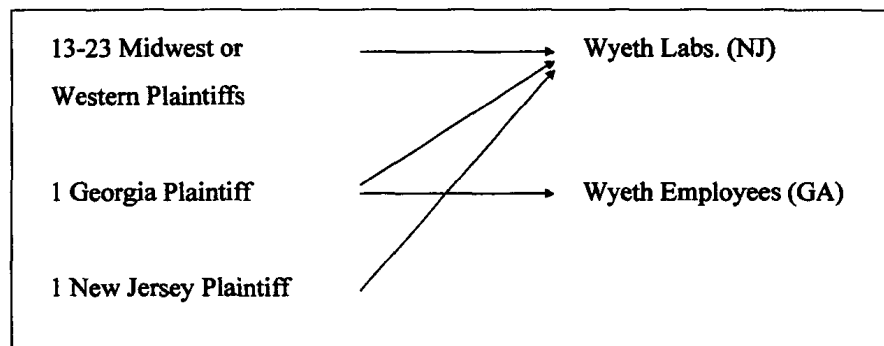
100. FED. R. CIV. P. 42(b).

101. See *supra* notes 76-82 and accompanying text.

“incomplete diversity” case into a smaller “complete diversity” case.¹⁰² And, while the federal judge is doing this, the complete diversity requirement contained in both § 1332 and § 1441(a) appears to temporarily yield to accommodate the carving period. Add it all together and it starts to sound something like this: federal courts may temporarily exercise incomplete diversity jurisdiction, either as originally filed matters or in removed matters, in the course of using their broad Rule 21 severance powers to pare down a case into a jurisdictionally proper complete diversity suit.

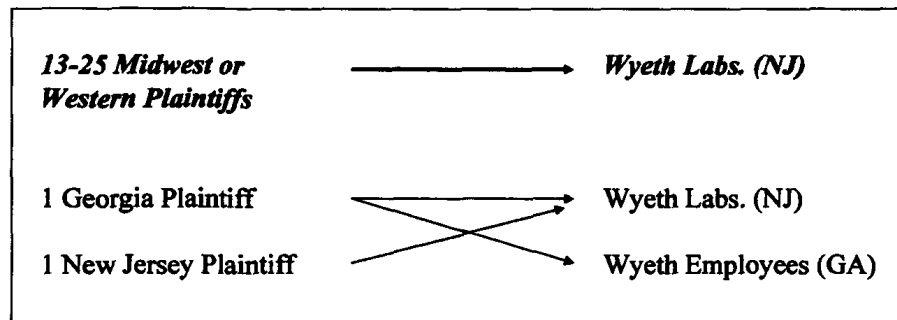
III. THE NEW GAME IN TOWN: PROCEDURAL MISJOINDER

We now return to Fulton County, Georgia and the Fen-Phen litigation against Wyeth. As set forth above, the lead case looked like this:



The case as a whole thus could not be removed because it failed to satisfy the complete diversity test. All but two of the joined plaintiffs, however, assert claims only against completely diverse defendants. If they were separated out, the result would look like this:

102. See 7 WRIGHT ET AL., *supra* note 6, § 1685, at 491-96. “Courts frequently employ Rule 21 to preserve diversity jurisdiction over a case by dropping a nondiverse party if the party’s presence in the action is not required under Rule 19.” *Id.* at 491. “The courts also have used Rule 21 to drop a party who was joined in an action for the purpose of preventing removal to a federal court.” *Id.* at 496 (footnote omitted). See also *id.* § 1684, at 486 (“When misjoinder involves the joining of a party who would be proper but whose presence destroys diversity . . . the court [may] . . . avoid dismissing the action by eliminating the party whose presence causes the jurisdictional defect, if this can be done without running into difficulty under the compulsory-joinder provisions of Rule 19.”) (footnote omitted).



In a recent flurry of cases, several district courts have held that, in circumstances like this, federal courts may sever the misjoined parties before determining whether removal is appropriate.¹⁰³ If the properly joined parties satisfy the complete diversity requirement, the court will retain that portion of the case and remand the rest to state court. Several questions surround this emerging doctrine: Should it be recognized at all, either as a legitimate extension of the fraudulent joinder doctrine or as an independent ground for removal jurisdiction? Should misjoinder be defined by state joinder standards (because the case was initially filed in state court) or by federal joinder standards (because federal jurisdiction should turn on federal law)? Should courts require some degree of bad faith beyond mere misjoinder? This Part explores the doctrine and the thorny issues it has raised.¹⁰⁴

A. Origins of the Doctrine

Procedural misjoinder seems to have originated with the Eleventh Circuit's opinion in *Tapscott v. MS Dealer Service Corp.*¹⁰⁵ *Tapscott* involved the joinder of two class actions. One of the classes (the "automobile class") alleged, inter alia, violations of Alabama common law and statutory fraud in connection with the sale of automobile service contracts. The other class (the "merchant class") asserted the same claims in connection with the sale of retail products service contracts. The named class representative for the automobile class, Gregory Tapscott, was an Alabama citizen. He joined sixteen additional named plaintiffs and over twenty defendants, one of whom was an Alabama resident. With respect to the merchant class, a separate group of plaintiffs, including two Alabamians, asserted claims against several nondiverse defendants and Lowe's Home Centers, Inc., a diverse North Carolina citizen. Lowe's removed the case to federal court, seeking diversity jurisdiction under 28 U.S.C. § 1332, and filed a motion to sever

103. See *infra* notes 119-32 and accompanying text.

104. For another recent article exploring the doctrine of procedural misjoinder, see E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y (forthcoming 2006).

105. 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds* by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); see also 14B WRIGHT ET AL., *supra* note 6, § 3723, at 656 (attributing the procedural misjoinder doctrine to the *Tapscott* decision).

the claims against it from the claims against the other defendants. The district court granted the motion to sever pursuant to Rule 20, finding “an improper and fraudulent joinder, bordering on a sham.”¹⁰⁶ Plaintiffs had failed to assert any joint liability or conspiracy between Lowe’s and the nondiverse defendants, and the court determined that the alleged transactions in the automobile class had no commonality with the transactions alleged in the merchant class, except for the fact that both classes alleged violations of the same Alabama Code provisions.¹⁰⁷ The court then asserted jurisdiction over the plaintiff claims against Lowe’s and remanded the claims against the remaining defendants to state court.¹⁰⁸

Affirming the district court, the Eleventh Circuit rejected the plaintiffs’ argument that misjoinder may never rise to the level of fraudulent joinder.¹⁰⁹ In other words, so long as plaintiffs state a valid claim against a defendant, joinder of that claim with a transactionally unrelated (and therefore, pursuant to Rule 20, misjoined) claim cannot be regarded as fraudulent joinder. The Eleventh Circuit held that “[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action.”¹¹⁰ The court cautioned, however, that not all misjoinders by plaintiffs will rise to such an “egregious” level that it may be regarded as fraudulent joinder.¹¹¹ Unfortunately, the court did not provide additional guidance for distinguishing between ordinary misjoinder and “egregious” misjoinder that would permit a court to disregard the citizenship of nondiverse misjoined defendants in considering removal from state courts of otherwise completely diverse parties.¹¹²

The Fifth Circuit, in *In re Benjamin Moore & Company*,¹¹³ signaled its amenability to the fraudulent misjoinder theory. In *Benjamin Moore*, the court rejected defendants’ request for a writ of mandamus ordering the district court to consider the possibility of fraudulent misjoinder, but did so in an opinion that favorably cited *Tapscott*’s language regarding fraudulent misjoinder and suggested the application of the theory to the joinder of multiple plaintiffs “who have nothing in common with each other.”¹¹⁴ The Fifth Circuit panel acknowledged that it “might be concluded that misjoinder of plaintiffs should not be allowed to defeat diversity jurisdiction,” but ex-

106. *Tapscott*, 77 F.3d at 1360 (quoting *Tapscott v. MS Dealer Serv. Corp.*, No. CV 94-PT-2027-S, 1994 WL 910953, at *2 (N.D. Ala. Nov. 1, 1994) (memorandum opinion)).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*; see also *id.* (“A defendant’s ‘right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy.’” (quoting *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921))).

111. *Id.*

112. See, e.g., *In re Bridgestone/Firestone, Inc.*, 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) (noting that although *Tapscott* required “something more” than mere misjoinder, “[p]recisely what the ‘something more’ is was not clearly established in *Tapscott* and has not been established since”).

113. 309 F.3d 296 (5th Cir. 2002), *mandamus denied on reh’g*, 318 F.3d 626, 631 (5th Cir. 2002).

114. *Id.* at 298 (citing *Tapscott*, 77 F.3d at 1360).

pressed “confiden[ce] that the able district court did not intend to overlook a feature critical to jurisdictional analysis.”¹¹⁵

In a second denial of mandamus relief in the *Benjamin Moore* litigation, the Fifth Circuit found that it did not have jurisdiction to review the district court’s subsequent rejection of the defendants’ fraudulent misjoinder objection.¹¹⁶ The court once again, however, indicated apparent support for the theory: “[t]hus, without detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case.”¹¹⁷

B. Development and Opposition to Procedural Misjoinder

In the last several years, as one district court noted, the procedural misjoinder doctrine “has not met with resounding approval.”¹¹⁸ Yet district courts in a number of jurisdictions have followed *Tapscott*’s lead,¹¹⁹ and some have expanded it even further to eliminate the requirement of “egregious” misjoinder.¹²⁰ The doctrine has proved most attractive to courts grappling with complex product liability suits, where plaintiffs routinely join nondiverse physicians or retailers as defendants to defeat diversity jurisdiction, or join the claims of plaintiffs from multiple states with nothing in common except a common (or similarly situated) defendant.¹²¹

Expanding on *Tapscott*, district courts have applied its procedural misjoinder doctrine to the improper joinder of plaintiffs. For example, in *Greene v. Wyeth*,¹²² the district court determined that while the claims all of the Nevada plaintiffs against the non-Nevada (and therefore diverse) manu-

115. *Id.*

116. *In re Benjamin Moore & Co.*, 318 F.3d 626, 631 (5th Cir. 2002).

117. *Id.* at 630-31.

118. *Jamison v. Purdue Pharm. Co.*, 251 F. Supp. 2d 1315, 1319 (S.D. Miss. 2003); *see also infra* notes 135-37 and accompanying text.

119. *See, e.g., Ashworth v. Albers Medical, Inc.*, 395 F. Supp. 2d 395, 412 (S.D.W. Va. 2005); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651 (S.D. Tex. 2005); *Asher v. Minn. Mining & Mfg. Co.*, No. Civ.A. 04CV522KKC, 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005); *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684 (D. Nev. 2004); *Reed v. Am. Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 804 (S.D. Miss. 2004); *Jones v. Natestch Pharm.*, 319 F. Supp. 2d 720, 725 (S.D. Miss. 2004); *Grennell v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 390, 400 (S.D.W. Va. 2004); *Burns v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D.W. Va. 2004); *Smith v. Nationwide Mut. Ins. Co.*, 286 F. Supp. 2d 777, 781 (S.D. Miss. 2003); *In re Diet Drugs Prod. Liab. Litig.*, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003); *Coleman v. Conesco, Inc.*, 238 F. Supp. 2d 804, 817 (S.D. Miss. 2002), *abrogated by Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868 (S.D. Miss. 2004); *In re Rezulin Prod. Liab. Litig.*, 168 F. Supp. 2d 136, 148 (S.D.N.Y. 2001).

120. *See Asher*, 2005 WL 1593941, at *5; *Burns*, 298 F. Supp. 2d at 403; *Greene*, 344 F. Supp. 2d at 685; *Grennell*, 298 F. Supp. 2d at 397; *In re Rezulin*, 168 F. Supp. 2d at 148.

121. *See generally* John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35, 36 (2001) (“[L]iberal joinder rules, combined with the high cost of litigation and strict rules of claim and issue preclusion, have made the typical modern federal civil action a multi-claim, multi-party action which often involves exquisitely complex clusters of claims and massively sprawling sets of parties.”) (footnotes omitted).

122. 344 F. Supp. 2d 674.

facturers of the diet drug combination Fen-Phen shared a sufficient transactional nexus, only two of the plaintiffs asserted claims against an in-state physician and a sales representative.¹²³ The remedy for this misjoinder was to utilize Rule 21 to sever and remand the suits brought by the two plaintiffs who asserted claims against the nondiverse defendants, retaining diversity jurisdiction over the other plaintiffs' claims.¹²⁴

Similarly, in *Jones v. Nastech Pharmaceutical*,¹²⁵ the court found procedural misjoinder where only one of the Mississippi plaintiffs suing diverse defendant pharmaceutical companies could assert a claim against the diversity-destroying Mississippi physician defendant.¹²⁶ The court retained the claims of the plaintiffs not treated by the Mississippi physician (all of whom were completely diverse from the pharmaceutical defendants), while remanding the claim of the sole plaintiff who alleged a claim against the Mississippi physician.¹²⁷

The court in *In re Rezulin Products Liability Litigation*,¹²⁸ explained that pharmaceutical cases may raise "more complicated issues of causation and exposure" than "pure product defect" cases where "an identical product defect allegedly caus[es] identical results."¹²⁹ Rather, the court explained, the Rezulin litigation plaintiffs

allege a defect (or defects) the precise contours of which are unknown and which may have caused different results—not merely different injuries—in patients depending on such variables as exposure to the drug, the patient's physical state at the time of taking the drug, and a host of other known and unknown factors that must be considered at trial with respect to each individual plaintiff. . . . Joinder "of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the adjudication of asserted claims."¹³⁰

123. *Id.* at 683.

124. *Id.*

125. 319 F. Supp. 2d 720 (S.D. Miss. 2004).

126. *Id.* at 727-28.

127. *Id.* at 728-29. In strikingly similar circumstances, however, other courts have declined to apply the doctrine of procedural misjoinder. The court in *Jamison v. Purdue Pharmaceutical Co.*, 251 F. Supp. 2d 1315 (S.D. Miss. 2003), for example, rejected procedural misjoinder where five Mississippi plaintiffs filed suit against diverse Oxycontin manufacturers and marketers, as well as nondiverse pharmacies and a Mississippi physician. *Id.* at 1319. The court held that although only two of the plaintiffs asserted medical malpractice claims against the nondiverse physician, not every plaintiff need bring a claim against every defendant. *Id.* at 1323. According to the court, all of the claims were logically related under Mississippi joinder law, and the complaint alleged conspiracy between the defendants (unlike the two classes in *Tapscott* who had no defendants in common and did not assert any claims of conspiracy). *Id.* at 1322-23; *see also* *Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868, 873-74 (S.D. Miss. 2004) (rejecting removal based on procedural misjoinder in products liability action against manufacturers of lead-based paint where nondiverse retailers sold paint to at least one plaintiff).

128. 168 F. Supp. 2d 136 (S.D.N.Y. 2001).

129. *Id.* at 146.

130. *Id.* at 146. (quoting *In re Diet Drugs Prod. Liab. Litig.*, No. Civ.A. 98-20478, 1203, 1999 WL

Courts have also applied the doctrine of procedural misjoinder in cases where plaintiffs in one state join a plaintiff from the defendant's home state for the purpose of defeating removal.¹³¹ The problem with such joinder, according to one court, is that the nondiverse out-of-state plaintiffs' claims "'occurred in complete factual, temporal and geographic isolation' from the claims of the [in-state plaintiffs]. Plaintiffs presented no evidence to the Court that their transactions were related in any way."¹³²

Despite this apparent trend toward acceptance of the procedural misjoinder doctrine, the authors of *Federal Practice and Procedure*, a leading civil procedure treatise, have been far less enthusiastic. Voicing concerns about the development of procedural misjoinder, and the creative use of Rule 21 to exclude nondiverse parties from the diversity jurisdiction decision in removal cases, the treatise authors suggest that the better response to such misjoinder may be to require

the removing party challenge the misjoinder in state court before seeking removal. Because removal is not possible until the misjoined party that destroys [diversity] jurisdiction is dropped from the action, the thirty-day time limit for removal (but not the overall one-year limit for diversity cases) would not begin to run until that had occurred and thus a requirement that misjoinder be addressed in the state court would not impair the ability of an individual to remove an action following the elimination of the improperly joined party.¹³³

Concurring with this approach, one court emphasized that "the last thing the federal courts need is more procedural complexity," including uncertainty regarding when misjoinder rises to the level of "egregiousness" justifying the disregard of nondiverse parties for removal purposes.¹³⁴

554584, at *3 (E.D. Pa. July 16, 1999)); see also *Simmons v. Wyeth Lab., Inc.*, Nos. 96-CV-6631, 96-CV-6686, 96-CV-6728, 96-CV-6730, 1996 WL 617492, at *4 (E.D. Pa. Oct. 24, 1996).

131. See *Jackson v. Truly*, 307 F. Supp. 2d 818, 822-24 (N.D. Miss. 2004); *Burns v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 401, 402-03 (S.D.W. Va. 2004); *Grennell v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 390, 397-400 (S.D.W. Va. 2004); *In re Diet Drugs Prod. Liab. Litig.*, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003); *In re Bridgestone/Firestone, Inc.*, 260 F. Supp. 2d 722, 729-31 (S.D. Ind. 2003).

132. *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 818 (S.D. Miss. 2002) (citing *Rudder v. K Mart*, No. 97-0272-BH-S, 1997 WL 907916, at *5 (S.D. Ala. Oct. 15, 1997)); see also *In re Diet Drugs*, 294 F. Supp. 2d at 678-79 (finding fraudulent misjoinder of New Jersey diet drug consumers with claims of Georgia plaintiffs as the defendant pharmaceutical company was a citizen of New Jersey). But see *Galati v. Eli Lilly & Co.*, No. 05-4338-CV-C-NKL, 2005 WL 3533387 (W.D. Mo. Dec. 22, 2005).

133. 14B WRIGHT ET AL., *supra* note 6, § 3723, at 658; see also 14 *id.* § 3641, at 7 (Supp. 2005) ("Another technique used by some district courts is to remand the case and require the diverse defendant to resolve the claimed misjoinder in state court. If the state court later severs the case so diversity exists, the defendant could again seek removal."); *Bowling v. Kerry, Inc.*, 406 F. Supp. 2d 1057, 1061 (E.D. Mo. 2005).

134. *Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127-28 (E.D. Cal. 2004); see also *Hewitt v. AAA Ins. Co.*, Nos. 98-3711, 99-0596, 1999 WL 243642, at *2 (E.D. La. Apr. 23, 1999); *infra* notes 210-17 and accompanying text.

Indeed, courts have applied inconsistent standards to the question of egregiousness.¹³⁵ Guided by *Tapscott's* language, the majority of courts demand more than simply the presence of nondiverse, misjoined parties, but rather a showing that the misjoinder reflects an egregious or bad faith intent on the part of the plaintiffs to thwart removal.¹³⁶ More recently, however, some courts have begun to reject an egregiousness requirement, holding that misjoinder alone justifies the severance of nondiverse parties in removal cases involving otherwise diverse citizens.¹³⁷

IV. PROCEDURAL MISJOINER: A FEDERAL DOCTRINE TO PROTECT FEDERAL INTERESTS

Once again, joinder and jurisdiction cross paths at removal. This time, they are colliding when plaintiffs push (or exceed) the customary transactional limits of joinder in order to add parties who will destroy complete diversity and thereby prevent removal. Lacking any statutory tool to respond, federal judges have begun to develop their own tool—the doctrine of procedural misjoinder—both to clean up the existing wreckage and prevent future collisions.

We support them. We think federal judges can and should take action, but we think their authority to take action on their own must be examined. That this question has received virtually no attention so far is surprising, to say the least. As set forth above, the current removal statute contains no exception for incomplete diversity cases; indeed, Congress has *repealed* similar mechanisms on several occasions. Taking as a given that federal courts cannot persist in practices that Congress has discarded, we attempt to reconcile the development of a limited procedural misjoinder doctrine with both the current text of the removal statute and with history.

We then turn to the developing content of the procedural misjoinder doctrine. Here we are more critical, because we believe that the various approaches the courts are taking contain numerous mistakes and wrong turns that, ultimately, might severely undermine the usefulness of the doctrine. First, we specifically reject the idea that defendants should be required to seek severance in state court. Second, we conclude that federal courts should apply Federal Rule 20 (rather than state joinder rules) to assess

135. See, e.g., *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684-85 (D. Nev. 2004).

136. See *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by* *Cohen v. Office Depot, Inc.*, 204 F. 3d 1069 (11th Cir. 2000); *Ramey v. Gilbert*, No. 5:05-CV-244 (CAR), 2005 WL 3149381, at *3 (M.D. Ga. Nov. 23, 2005) (rejecting procedural misjoinder because a defendant merely alleged “blatant” as opposed to “egregious” misjoinder); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651-52 (S.D. Tex. 2005); *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 697 (N.D. Miss. 2004); *Jones v. Nasteck Pharm.*, 319 F. Supp. 2d 720, 725 (S.D. Miss. 2004); *Jackson*, 307 F. Supp. 2d at 824; *Burrell v. Ford*, 304 F. Supp. 2d 883, 888 (S.D. Miss. 2004); cf. *Bright v. No Cuts, Inc.*, No. 03-640, 2003 WL 22434232, at *4-*6 (E.D. La. Oct. 27, 2003).

137. See *Greene*, 344 F. Supp. 2d at 685; *In re Rezulin Prod. Liab. Litig.*, 168 F. Supp. 2d 136, 147-48 (S.D.N.Y. 2001); *Burns v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D.W. Va. 2004); *Grennell v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 390, 396 (S.D.W. Va. 2004).

whether improperly joined parties may be disregarded in determining complete diversity. Third, we argue that the “egregiousness” requirement adopted by some courts is unwarranted and should be abandoned.

A. Authority to Adopt Procedural Misjoinder

The procedural misjoinder doctrine as we know it surfaced in the Eleventh Circuit in 1996.¹³⁸ Roughly ten years later, courts (and some commentators) are still exploring their options and refining the doctrine. But the debate has been about policy and content—that is, about whether the courts *should* adopt it and, if so, in what form. Virtually no attention has been given to whether federal judges possess the power to create this new branch of removal jurisdiction.

The starting point, of course, is that nothing in the current removal statute explicitly authorizes federal judges to disregard “misjoined” parties.¹³⁹ Nor does anything in the current removal statute authorize federal judges to sever parties joined in state court—either conceptually or through a Rule 21 order—and then treat them as separate cases for purposes of removal. Fi-

138. See *supra* notes 105-112 and accompanying text (discussing *Tapscott*, 77 F.3d at 1353).

139. One academic commentator reads 28 U.S.C. § 1441(b) as authorizing the procedural misjoinder doctrine. See Percy, *supra* note 104. A handful of district courts have also entertained the notion. See *Juneau v. Ducote*, No. 04-0789, 2005 WL 2648861, at *4 (Oct. 17, 2005 W.D. La.); *Jones v. Nastech Pharm.*, 319 F. Supp. 2d 720, 726 (S.D. Miss. 2004). This is a critical point. If Congress authorized procedural misjoinder, then our task as commentators changes in two fundamental respects. First, we need not worry about whether federal judges are engaged in an unauthorized jurisdiction grab. Second, our task would not be to determine how procedural misjoinder should operate, but rather to determine what Congress intended. But we do not think § 1441(b) addresses procedural misjoinder.

First, § 1441(b) has a distinct and completely separate purpose—it bars defendants from removing diversity cases from their home states. As such, it is an additional limit on, rather than expansion of, removal jurisdiction. See *supra* note 45.

Second, this narrow reading of § 1441(b) is more faithful to the history of the removal statutes. Congress created § 1441(b) as part of the revision of the U.S. Code to create Title 28, which revised and collected the statutes dealing with the federal judiciary. See SURRENCY, *supra* note 29, at 75-77. When Congress created Title 28, however, it also enacted § 1441(c), which directly addressed the removal of incomplete diversity cases by authorizing removal of “separate and independent claims.” See *supra* notes 29-33 and accompanying text. The legislative history of § 1441(c) reveals that Congress was quite cognizant of this mechanism and that the shift from “separate and independent claim” removal to “separable controversy” removal was quite deliberate. See S. REP. NO. 1559, at 1854-55 (1948), reprinted in NEW TITLE 28—UNITED STATES CODE JUDICIARY AND JUDICIAL PROCEDURE (1948); *Hearing Before Subcomm. No. 1 of the H. Judiciary Comm. on H.R. 1600 and H.R. 2055*, 80th Cong. 1940, 1969 (1947) (statement of James William Moore, Professor of Law, Yale Univ.) (discussing transition to separable controversy removal effected by § 1441(c)), reprinted in NEW TITLE 28—UNITED STATES CODE JUDICIARY AND JUDICIAL PROCEDURE (1948). In contrast, nothing in the legislative history of § 1441(b) that we are aware of makes any mention of it being a means for incomplete diversity removal. We think it would be rather surprising if Congress had silently intended for § 1441(b) to overlap with the well-known provisions of § 1441(c).

Third, if § 1441(b) was meant to address the problem of procedural misjoinder, then it was very poorly drafted. By its terms, § 1441(b) would address only those situations in which the misjoined party was (1) a defendant (2) sued in his home state. Section 1441(b) says nothing about misjoined plaintiffs, nor does it apply when a plaintiff misjoins an out-of-state defendant. (For example, § 1441(b) would not apply in a case where a Tennessee plaintiff sued an Alabama defendant and a misjoined Tennessee defendant in Mississippi state court.) We interpret these omissions as further evidence that Congress wrote § 1441(b) to address home-state diversity removal, and not to address the problem of incomplete diversity removal.

nally, although we perhaps question the rule,¹⁴⁰ we must acknowledge the general prescription that the removal statutes are to be construed narrowly.¹⁴¹

But it seems too late in the day to stand ceremoniously on strict construction and insist that only cases that satisfy complete diversity at the time of removal can be removed. The removal statutes do not differentiate between parties based on the merits, yet the judge-made doctrine of fraudulent joinder allows removal of an incomplete diversity case when the court is satisfied that the claim against the spoiler is wholly without merit.¹⁴² The removal statutes similarly contain no provision allowing for the removal of cases that will be completely diverse *sometime in the future*, yet the Supreme Court extended its jurisdictional cure doctrine to cases removed in technical violation of § 1441(a).¹⁴³ Thus, given the right circumstances, the complete diversity requirement incorporated into § 1441 can bend to accommodate need and common sense when the result appears consistent with Congress's purpose and intent.

The more compelling question, it seems to us, is whether the doctrine of procedural misjoinder can be reconciled with the past. Peeking back just six years before the Eleventh Circuit gave birth to the procedural misjoinder doctrine in *Tapscott*, one finds a long string of ultimately failed and abandoned statutory mechanisms dealing with the problem of incomplete diversity removal. One also finds highly visible proposals for statutory reform. In 1969, the American Law Institute entered the fray with a set of diversity reforms, one being a proposal to fully embrace incomplete diversity removal by allowing any defendant to remove if he would have been able to remove had he been sued alone.¹⁴⁴ But Congress never acted on this proposal. Instead, rather than breathing new life into incomplete diversity removal, Congress chose to follow Professor Currie's advice and, after 115 years and several failures, amended § 1441(c) to eliminate the last statutory mechanism for incomplete diversity removal.¹⁴⁵ And now the lower federal

140. See, e.g., Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609 (2004).

141. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); see also *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 10-12 (1951) (applying a narrow construction of the removal statute).

142. Moreover, while we say that the court "disregards" the fraudulently joined party, the reality is that the court takes jurisdiction over that party and enters a binding order—i.e., one that carries preclusive effect—dismissing the claim on the merits. See *Carey v. Sub Sea Int'l, Inc.*, 121 F. Supp. 2d 1071, 1075 (E.D. Tex. 2000).

143. See *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75-77 (1996).

144. AM. LAW INST., *supra* note 19, § 1304(b), at 16-17 ("Any defendant . . . who would have been able to remove under subsection (a) of this section if sued alone by any party making claim against him in the State court action may remove the entire action to the district court."). In making this proposal, the American Law Institute explicitly acknowledged the tortured history of minimal diversity removal, including the gutting of § 1441(c) by *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), but advocated reinvigorating minimal diversity removal because "[a] statutory scheme under which a plaintiff can by joining an in-state defendant effectuate the purpose of depriving an out-of-stater of his right of removal to a federal court calls for thoughtful scrutiny." AM. LAW INST., *supra* note 19, § 1304(b), at 142.

145. See *supra* notes 40-43 and accompanying text.

courts appear to be bringing it back. But if Congress killed incomplete diversity removal, are the lower federal courts, by adopting the doctrine of procedural misjoinder, resurrecting the jurisdictional dead?

We think the answer lies in the scope of those failed removal mechanisms and the reasons for their demise. Separable controversy removal (original and as amended) and separate and independent claim removal were ambitious efforts to address the most vexing of all removal problems: when to allow an out-of-state defendant to remove despite the presence of a *related* local co-defendant. It appears that many in Congress, like many commentators, did not entirely subscribe to *Strawbridge's* theory that the presence of a local co-defendant would always protect the out-of-state party from local prejudice.¹⁴⁶ But unless Congress was willing to abandon the complete diversity requirement for all cases, it had to find some method for sorting out which cases should be let into federal court and which ones should be left in state court. That alone represented a very challenging task. And even if it could do so successfully, Congress would still have to choose between potential inefficiency (if related suits were split between state and federal court) and a burgeoning federal docket (if the whole suit gets placed on the federal docket). Ultimately, the challenge simply proved too difficult, the costs proved too great, and Congress gave up.¹⁴⁷

If the doctrine of procedural misjoinder represented a broad attempt to solve the problem of incomplete diversity, then we might have grave doubts about the power of federal judges to adopt it. But procedural misjoinder addresses a narrower question—how to respond when *unrelated* parties have been joined and are preventing removal. On this point, there is no reason to think that Congress has placed the issue off limits. Indeed, there is scant evidence to suggest that Congress ever gave the issue a second thought.

To be sure, when Congress amended § 1441(c) to limit it to federal question cases, it was known that unrelated parties might be joined in state court and that their joinder might block removal.¹⁴⁸ But most commentators

146. See, e.g., *id.* at 22. Professor Currie openly saw these removal mechanisms as Congress trying to quell its own inner demons about the complete diversity rule. See *id.* at 22 (Congress would have no reason to enact such removal provisions if it really believed that the presence of a same-state co-party insulated the out-of-state party from local prejudice.). Ironically, Chief Justice Marshall, the author of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), also was not convinced that the mere presence of a same-state co-party would protect the out-of-state party from local prejudice. *Id.* at 267. The joined plaintiffs in *Strawbridge* held their rights jointly. *Id.* While a local citizen's protective shield might be expected to extend to joint interest holders, Chief Justice Marshall was careful to note that "the court does not mean to give an opinion in the case where several parties represent several distinct interests." *Id.* at 267; see generally Floyd, *supra* note 10, at 658-59 (discussing *Strawbridge* and AM. LAW. INST., *supra* note 19).

147. See *supra* notes 20-45 and accompanying text (discussing repeated failures of various incomplete diversity removal mechanisms).

148. Indeed, this was one of the few scenarios to which separate and independent claim removal continued to apply after *Finn*. See 16 MOORE ET AL., *supra* note 39, § 107 App. 106[2], at -111; Moore & VanDercreek, *supra* note 28, at 494-95; Cohen, *supra* note 27, at 15 n.58.

viewed such situations as rare and aberrational.¹⁴⁹ A working paper submitted to the Federal Courts Study Committee put it this way:

Virtually all state joinder rules allow multiple parties to be joined in a single proceeding only if their claims involve common questions of law and fact. As a result, the factor that makes aggregation of parties in a single proceeding possible—commonality of facts and law—makes removal under § 1441(c) inappropriate.¹⁵⁰

Thus, it is clear that when Congress amended § 1441(c) the focus was not on the few cases in which § 1441(c) might still yield some benefit, but on the far greater mass of cases for which the remnants of § 1441(c) hung as a heavy anchor.¹⁵¹

Moreover, one finds nary a hint that Congress repealed its incomplete diversity mechanisms because it thought that plaintiffs *should* be able to defeat removal by joining unrelated parties in state court. We are aware of no case or academic commentary contending that sound jurisdictional policy should allow diversity-based removal but permit plaintiffs to defeat such removal through the joinder of unrelated claims.¹⁵² Even Professor Currie—an outspoken critic of Congress's efforts at incomplete diversity removal mechanisms—conceded that plaintiffs ought not be able to defeat removal by combining unrelated matters.¹⁵³ But § 1441(c) seems to have carried too much baggage to inspire another statutory venture into incomplete diversity removal, or even a salvage operation. Two decades earlier, Professor Currie had already reached the conclusion that Congress was better off discarding § 1441(c) than trying to fix it: "I would simply repeal § 1441(c); the chance that state courts would allow joinder of wholly unrelated claims involving different parties seems too remote, and the harm done to defendants, if it occurred, too small on the *Strawbridge* assumption, to justify attempting

149. See, e.g., Rothfeld, *supra* note 31, at 240 ("Indeed, the danger at which existing section 1441(c) explicitly is aimed (that 'separate and independent' claims will be joined to otherwise removable actions) is made wholly illusory in diversity cases by state joinder rules.").

150. 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 533 (1990).

151. See FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95 (1990) ("For complex reasons, however, the statute causes much litigation apart from the merits as defendants try and mostly fail to qualify for separate-claim removal. As one court has said of § 1441(c), this field 'luxuriates in a riotous uncertainty.'). The unenacted ALI proposal was also clearly focused on the joinder of related parties. AM. LAW INST., *supra* note 19, at 141 & n.33. That proposal avoided the line-drawing problems encountered by separable controversy removal and separate claim removal by not drawing any lines—the defendant did not need to show that his claim was separable or separate from the joined claims—under the belief that it was better to expand jurisdiction than to breed litigation over it. *Id.* at 144-45.

152. We acknowledge that § 1441(c) may also have been under attack as part of the larger effort to eliminate diversity jurisdiction in general. See Siegel, *supra* note 43, at 77. Obviously, those individuals who saw no continued need for any form of diversity jurisdiction would likely have no objection to plaintiffs defeating diversity removal by joining unrelated claims.

153. Currie, *supra* note 31, at 25 n.120.

once more to make the necessary painful distinctions.”¹⁵⁴ In 1990, Congress appears to have reached the same conclusion.¹⁵⁵

So, what to make of all this. Indulging a baseball metaphor, Congress appears to have taken a seat on the bench after striking out swinging on three pitches.¹⁵⁶ Congress may have missed so badly, however, because it swung so hard, trying to hit a home run with every pitch. The federal courts have now stepped into the batter’s box, but they are not trying to hit that same home run. The limited procedural misjoinder doctrine they are developing makes no attempt to address the “big question” of incomplete diversity removal. It is directed solely at cases involving the joinder of unrelated parties. We see nothing to make us think that Congress would want to take the bat out of the federal courts’ hands for that purpose.

B. The Need for a Federal Court Response

We now turn to whether the federal courts *should* recognize the doctrine of procedural misjoinder. The Federal Practice and Procedure treatise, for example, questions whether it is necessary, pointing out that the defendant could seek severance in state court.¹⁵⁷ Given that option, perhaps federal courts should not do anything to further complicate the already messy jurisdictional area of removal.¹⁵⁸ While we appreciate the costs of adding another branch to the removal thicket, we think it is a needed and ultimately quite helpful addition.

First, we are persuaded that misjoinder is a real problem for diversity removal. The reported cases are not random or isolated. Rather, they appear in courts from across the country and span nearly a decade. We suspect they reflect a more widespread strategy in which some lawyers design their litigation packages around keeping the case in state court rather than for purposes of efficiency or convenience. Our confidence in this unsurprising assertion is bolstered by history. The doctrine of procedural misjoinder may only have been “discovered” in the last ten years, but federal courts have been dealing with the problem of unrelated parties and removal for over a

154. *Id.*

155. *See* 28 U.S.C. § 1441(c) comments to 1990 amendment (2000).

156. Those three “pitches” were the first separable controversy removal act, the amended separable controversy removal act, and separate and independent claim removal, respectively.

157. *See* 14B WRIGHT ET AL., *supra* note 6, § 3723, at 658.

158. Some might object to the doctrine of procedural misjoinder solely on the basis that federal judges should not do anything to add more diversity cases to the federal docket. Though it seems to have subsided lately, a debate about the current need for diversity jurisdiction has led to proposals that diversity jurisdiction be abolished altogether, both as a basis for original filings and for removal. *See, e.g.*, FED. COURTS STUDY COMM., *supra* note 151, at 39 (recommending that Congress abolish general diversity jurisdiction with limited exceptions for complex multi-state suits); *see also* 1 FED. COURTS STUDY COMM., *supra* note 150, at 417-54 (summarizing arguments made for and against diversity jurisdiction). We assume that diversity jurisdiction remains an important part of the federal docket and that, at the very least, federal judges should not affirmatively shy away from otherwise valid proposals simply because they add to the diversity docket.

century.¹⁵⁹ One is hard-pressed to identify a more enduring problem in removal than the deliberate joinder of nondiverse parties for the express purpose of blocking removal.

Recent developments in class action jurisdiction may well exacerbate the problem. Under the newly enacted Class Action Fairness Act¹⁶⁰ (CAFA), Congress broadly expanded diversity jurisdiction over interstate class actions and so-called “mass actions.”¹⁶¹ Under prior practice, it was relatively easy for a plaintiff to structure a non-removable multi-state class action; two common techniques were to include a nondiverse class member as a named plaintiff or to join a local defendant.¹⁶² Those techniques will no longer work since class action defendants now can remove such actions based on minimal diversity—defined by all class members, not just the named plaintiffs—and without regard to the presence of a local defendant.¹⁶³ While some opportunities still exist to structure non-removable state court class actions and mass actions, they are few and narrowly drawn.¹⁶⁴ In order to escape these liberalized jurisdiction and removal provisions, one suspects that plaintiffs will file ever more joined-but-not-mass actions. And having taken that step to avoid class action and mass action removal under CAFA, it seems likely that many such plaintiffs will also join spoiler parties to defeat ordinary diversity removal.

Second, and most importantly, we think federal courts are in the best position to respond to the problem of misjoined parties and removal. Specifically, we part company with the view that the possibility of seeking severance in state court is an adequate substitute.¹⁶⁵ In our view, requiring defendants to seek relief in state court puts the diversity removal docket in jeopardy and fails adequately to protect defendants’ access to federal court.

If a defendant’s sole recourse is to seek severance in state court, then access to the federal courthouse becomes dependent on the peculiar party structure practices of the states. For example, imagine a state that allowed unlimited defendant joinder—i.e., a rule that allowed plaintiffs to join completely unrelated defendants. Under that system, further imagine a plaintiff from that state with a product liability claim against a non-resident drug

159. See Moore & VanDercreek, *supra* note 28 (charting the development of “separate claim” removal to respond to unrelated joinder in state court and discussing how, after *Finn*, § 1441(c) continued to permit removal in the cases of unrelated parties).

160. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified in scattered sections of 28 U.S.C.).

161. A mass action is generally defined to include cases of a hundred or more plaintiffs joined to pursue monetary relief claims that involve common questions of law or fact. See 28 U.S.C. § 1332(d)(1)(B) (Supp. 2005).

162. See Steven S. Gensler, *Diversity Class Actions, Common Relief, and the Rule of Individual Valuation*, 82 OR. L. REV. 295, 298 (2003).

163. See § 1332(d)(2)(A) (minimal diversity); *id.* § 1453(b) (removal allowed even if local defendant is sued).

164. See, e.g., *id.* § 1332(d)(3) (setting forth situations where federal judge may decline to exercise jurisdiction); *id.* § 1332(d)(4) (setting forth situations where federal judge must decline jurisdiction).

165. See, e.g., *Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127-28 (E.D. Cal. 2004); see also 14B WRIGHT ET AL., *supra* note 6, § 3723, at 658.

company. On these facts, complete diversity would be satisfied. But instead, the state plaintiff could avail himself of his state's unlimited joinder law and add a claim against his local plumber for faulty repair of his leaking toilet. In that case, there would be no "misjoinder" as defined by state law, and the defendant, being unable to obtain a severance in state court, would be locked into state court.

It is no answer to say that, in most cases, state joinder standards are not this permissive. The fact that state and federal joinder standards usually overlap provides little comfort when states do adopt comparatively broad joinder rules, as did Mississippi until very recently.¹⁶⁶ And state and federal joinder standards do differ. While most states have adopted party joinder rules modeled after Federal Rule 20, some follow different standards.¹⁶⁷ Moreover, even in those states that generally follow Federal Rule 20, the real test lies not in the text of the Rule but in its interpretation. State court cases emphasizing the breadth of transactional party joinder abound,¹⁶⁸ and one finds many reported state court cases allowing party joinder in circumstances where one would expect it to fail in federal court.¹⁶⁹ In short, party joinder practices in state court and federal court, while generally similar, are far from co-extensive, and any removal framework that relies on states to sever "misjoined" parties as a prelude to removal necessarily incorporates these differences.

We also have serious doubts about whether, under the current removal statutes, it would be practicable to require defendants to seek severance in

166. See *Janssen Pharm., Inc. v. Armond*, 866 So. 2d 1092, 1096-97 (Miss. 2004) (discussing revision to MISS. R. CIV. P. 20).

167. See, e.g., CAL. CIV. PRO. CODE § 378-379 (West 2004) (separating plaintiff and defendant joinder and allowing transactional joinder and joinder based on a party's interest in the subject of the action); FLA. R. CIV. P. R. 1.210(a) ("All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs . . ."); MICH. COMP. LAWS ANN. § 2.206(A) (2004) (allowing plaintiff joinder for transactional relatedness or "if their presence in the action will promote the convenient administration of justice"); 12 OKLA. STAT. ANN. § 2020(A) (Supp. 2005) (allowing transactional joinder and joinder "if the claims are connected with the subject matter of the action").

168. See, e.g., *United of Omaha v. Hieber*, 653 N.E.2d 83, 87 (Ind. Ct. App. 1995) ("Indiana courts give T.R. 20(A) the broadest possible reading, especially in light of T.R. 20(B) and T.R. 42(B), which allow for separate trials after all parties have been joined."); *Breslauer v. Fayston Sch. Dist.*, 659 A.2d 1129, 1136 (Vt. 1995) ("The rule must be liberally construed to facilitate joinder of actions and parties whenever possible."); *Kluth v. Gen. Cas. Co. of Wis.*, 505 N.W.2d 442, 446 (Wis. Ct. App. 1993) ("Rules governing permissive joinder should be interpreted to allow 'the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.'" (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 & n.10 (1966))).

169. See, e.g., *Young v. Bryco Arms*, No. 98 L 6684, 98 L 1365, 99 L 5628, 2001 WL 34136070, at *20 (Ill. Cir. Ct. Jan. 17, 2001) (allowing joinder of unrelated victims of handgun violence on theory that the relevant "transaction" was not their own shootings but the "Defendants' practice of marketing and distributing handguns in a fashion which makes handguns available to juveniles and the criminally oriented"); *Catalogna v. Copley Pharm., Inc.*, Civ.A. No. 94-6662, 1995 WL 510145, at *3 (Sup. Ct. Mass. Aug. 11, 1995) (allowing joinder of plaintiffs from multiple states in suit against drug manufacturer on the theory that "they allege injury arising out of Copley's negligence in the manufacture of Albuterol, and such negligence constitutes a single transaction or occurrence or series of transactions or occurrences"); *Eicher v. Mid Am. Fin. Inv. Corp.*, 702 N.W.2d 792, 802 (Neb. 2005) (allowing plaintiff joinder in suit alleging that the defendant fraudulently obtained title to their homes through a sham loan scheme on the theory that the claims arose out of the same series of transactions).

state court. A removal petition must be filed either (1) within thirty days of service of the state court complaint, if the case is removable as pleaded; or (2) within thirty days after a change to the case in state court makes the case removable.¹⁷⁰ The proposal to have the defendants seek severance in state court assumes the second route—that the case will become “newly removable” once the state court severs out the unrelated and misjoined spoilers. However, the ability to get a new removal period based on what happens in state court has long been limited to *voluntary* changes made by the plaintiff, such as the voluntary addition of a federal question or the voluntary dismissal of the nondiverse party.¹⁷¹ The few cases that address the question so far suggest that a severance in state court that the plaintiffs oppose is not a voluntary change triggering a new removal period.¹⁷² Thus, unless the state court severs out the misjoined parties within the first thirty days—something we regard as highly unlikely—the time to remove will have passed.

Even assuming state severance would trigger a new removal period, a second timing problem would stand in the way. As the removal statutes now stand, a petition to remove a suit based on diversity of citizenship must be filed within one year of the time the suit is filed in state court.¹⁷³ Events that make a state court action removable after the one-year deadline are immaterial.¹⁷⁴ This means that the defendant contesting misjoinder in state court would have to obtain the severance in state court within the first year the suit is filed in order to meet the one-year window for diversity removal. We fear that this would cause trouble for many defendants.¹⁷⁵ Even the clearest act of misjoinder could fall victim to a slow docket, an indecisive judge, or get lost behind a host of other motions (some perhaps strategically timed to divert the state court’s energy and attention for one year).¹⁷⁶

170. § 1446(a)-(b).

171. See 14C WRIGHT ET AL., *supra* note 6, § 3732, at 311-16; 16 MOORE ET AL., *supra* note 39, § 107.14[2][h]. For an extended discussion of the voluntary/involuntary change rule, see AM. LAW INST., *supra* note 67, 509-13.

172. See *Herschberger v. ACandS*, No. 1:05CV168WJG-JMR, 2005 WL 1221203, at *4 (S.D. Miss. May 23, 2005); *Miller v. Fulton*, 113 F. Supp. 2d 1035, 1039-40 (S.D. Miss. 2000); *Cont’l Oil Co. v. PPG Indus., Inc.*, 355 F. Supp. 1183, 1185-86 (S.D. Tex. 1973). Cases that have allowed a new removal period based on a state court’s severance order have either found that the severance was a voluntary act by the plaintiff, see *Johnson v. Snapper Div. of Fuqua Indus., Inc.*, 825 F. Supp. 127, 129-31 (E.D. Tex. 1993), or involved the severance of claims made by the defendant against parties other than the original plaintiff. See *Mahl Bros. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 307 F. Supp. 2d 474, 486-87 (W.D.N.Y. 2004) (severed third-party claim); *Crump v. Wal-Mart Group Health Plan*, 925 F. Supp. 1214, 1219-20 (W.D. Ky. 1996) (severed cross-claim).

173. § 1446(b). Some courts have recently held that the one-year limit will not be enforced in certain equitable circumstances. See, e.g., *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426-28 (5th Cir. 2003).

174. See 14C WRIGHT ET AL., *supra* note 6, § 3732, at 344-47.

175. See, e.g., *Herschberger*, 2005 WL 1221203, at *4 (removal based on severance in state court was barred by a one-year limit on diversity removal).

176. Cf. *Oakley*, *supra* note 41, at 747-48 (questioning the practical and policy benefits of the one-year removal limit because “[p]laintiffs are encouraged to frustrate a federal right of removal through deceptive tactics”). Moreover, as with any removal topic, it is difficult to predict what other complications might arise given the disparate practices and procedures that one confronts in the state courts across

In sum, we think that adopting procedural misjoinder as part of the removal framework is superior to relying on state court severance remedies. Even if state joinder standards could be counted on to advance federal jurisdictional policy, the “voluntary change” rule and the current one-year cap on diversity removal combine to make it unrealistic and unfair to demand that defendants seek severance in state court. In contrast, under a federal doctrine of procedural misjoinder, the defendant need only file a timely removal petition to present the question of proper joinder to the federal judge. And, as set forth below, when the question of joinder is presented to the federal court by way of removal, it then can and should be assessed under uniform federal joinder standards that more fully and more consistently advance federal jurisdictional policy.

C. Federal or State Joinder Standards

Having established that federal courts should recognize procedural misjoinder, we now turn to a question that has occupied a great deal of attention among the lower courts—whether the joinder at issue should be judged by state or federal joinder standards. When the Eleventh Circuit started all of this in *Tapscott* in 1996, it applied Federal Rule 20 without discussion.¹⁷⁷ The Fifth Circuit’s opinion in *Moore* which tacitly endorsed the procedural misjoinder doctrine said even less on the subject.¹⁷⁸ Perhaps those courts thought it did not matter. In many cases, the state and federal standards will be sufficiently alike—if not identical—so that the result will be the same under either.¹⁷⁹ But in other cases the state and federal joinder standards will differ considerably.¹⁸⁰ The district courts applying the doctrine since *Tapscott* have varied significantly on this important question.

the country. Without attempting to canvass the field, we suspect that some state’s practices would present other challenges to the defendant’s ability to obtain a clean break from the misjoined parties.

177. See *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds* by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000).

178. See *In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002) *mandamus denied on reh’g*, 318 F.3d 626, 631 (5th Cir. 2002).

179. See, e.g., *Asher v. Minn. Mining & Mfg. Co.*, No. Civ.A. 04CV522KKC, 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005) (“Here, the Court need not decide whether federal or state joinder rules apply . . . because the Kentucky and federal rules regarding misjoinder are, in all significant respects, identical.”); *Reed v. Am. Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 803-04 (S.D. Miss. 2004) (stating that, under Mississippi’s new joinder rule, “the difference between applying federal and state standards for joinder could fairly be said, at least for purposes of this case, to be more theoretical than practical”); *Grennell v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 390, 397 (S.D.W. Va. 2004) (“[T]his Court need not decide whether to apply federal or state law regarding permissive joinder, as the two are identical in West Virginia.”); *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 673-78 (E.D. Pa. 2003) (finding that federal and Georgia state joinder standards were “virtually identical”); *Conk v. Richards & O’Neil, LLP*, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) (“[T]he difference between applying federal and state standards for joinder may be more theoretical than practical in this case.”).

180. See, e.g., *Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1128-29 (E.D. Cal. 2004) (noting that joinder would be improper under Federal Rule 20 but proper under California’s more liberal joinder practice). Until 2004, the difference was particularly acute in Mississippi. Before then, it was generally held that Mississippi state practice allowed “virtually unlimited” party joinder, largely to offset the fact that Mississippi does not have a class action mechanism. See *Jamison v. Purdue Pharm. Co.*, 251

We begin by examining the possibility that Federal Rule 20 might govern of its own force. One early district court opinion invoked the *Erie* doctrine on its way to holding that Federal Rule 20 would control a procedural question such as this in federal court.¹⁸¹ In *Coleman v. Conseco, Inc.*,¹⁸² the court concluded that, because “the joinder provisions of [Federal] Rule 20 are procedural in nature,”¹⁸³ Federal Rule 20 must be followed as a valid exercise of the Rules Enabling Act process.¹⁸⁴

While we do not dispute the general authority of the Federal Rules in federal court, we do not think they directly address the question at hand. The question is not whether federal joinder standards apply in federal court, but, rather, whether the case may be removed to federal court consistent with 28 U.S.C. § 1441(a). Nothing in *Hanna v. Plumer*,¹⁸⁵ the Rules Enabling Act,¹⁸⁶ or any other component of the *Erie* doctrine interjects the Federal Rules into the interpretation or application of the federal jurisdictional statutes. Not surprisingly, *Coleman* and its *Erie* rationale appear to have been abandoned.¹⁸⁷ The district courts that have discussed *Coleman* have universally rejected its reasoning and instead have assessed joinder under state law.¹⁸⁸ Indeed, the victory has been so complete that even the author of *Coleman* switched sides.¹⁸⁹

The next possibility to explore—and the one that is most widely followed—is that federal judges must look to state joinder rules when determining whether any parties have been procedurally misjoined. The courts that follow state joinder rules do so for two principal reasons. First, they often analogize to fraudulent joinder. Because courts look to state law to determine whether a party was fraudulently joined, they reason that they should also look to state law to determine if a party has been misjoined.¹⁹⁰

F. Supp. 2d 1315, 1320 (S.D. Miss. 2003). In 2004, an amendment to Mississippi’s version of Rule 20 and a path-breaking decision by the Mississippi Supreme Court converged to bring Mississippi joinder practice more aligned with federal joinder practice, at least in personal injury cases. See *Janssen Pharm., Inc. v. Armond*, 866 So. 2d 1092, 1097 (Miss. 2004). It would be premature, however, to say that Mississippi and federal joinder practice are now identical. Moreover, it is not yet clear whether these reforms also reach joinder in low-damage consumer fraud cases. See *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 695-96 & n.5 (N.D. Miss. 2004).

181. See *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 815-16 (S.D. Miss. 2002), *abrogated by* *Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868 (S.D. Miss. 2004).

182. *Id.*

183. *Id.* at 816.

184. *Id.*

185. 380 U.S. 460 (1965).

186. 28 U.S.C. § 2072 (2000).

187. A few other district courts have applied Federal Rule 20, but not for *Erie* reasons. Rather, they have done so either because they were following *Tapscott* or without discussion. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 651 n.141 (S.D. Tex. 2005) (following *Tapscott*); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 144 (S.D.N.Y. 2001) (no discussion).

188. See *Conk v. Richards & O’Neil, LLP*, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999); see also *Jackson v. Truly*, 307 F. Supp. 2d 818, 824 (N.D. Miss. 2004); *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003); *In re Bridgestone/Firestone, Inc.*, 260 F. Supp. 2d 722, 729 (S.D. Ind. 2003); *Jamison v. Purdue Pharm. Co.*, 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003).

189. *Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868, 875 (S.D. Miss. 2004) (abrogating *Coleman*).

190. One court put it this way:

Second, the courts that follow state joinder law argue that misjoinder must refer to state joinder rules because “the question is whether the parties were misjoined in state court.”¹⁹¹ As one court explained, “[a]fter all, when [the plaintiff] filed his complaint in [state] court, he was not required to comply with the Federal Rules of Civil Procedure in terms of joinder of parties or claims or any other aspect of the case.”¹⁹² Following this line of reasoning, one court added that “[i]t makes little sense to say that the [nondiverse party’s] joinder became fraudulent *only after removal and only under the federal rule*.”¹⁹³

Though these arguments have a superficial appeal, closer scrutiny shows them to be flawed. First, the analogy to fraudulent joinder is misleading. Distilled to its essence, the fraudulent joinder doctrine states that courts should disregard bogus claims against nondiverse defendants when assessing whether diversity is complete. Thus, substantive merit becomes a jurisdictional filter, and the courts look to state law to define merit. But what is the alternative in a diversity suit, where the substantive merits are set by state law? When the federal courts use substantive merit as a gatekeeper for diversity jurisdiction, they have no choice but to use state law to define merit.

While procedural misjoinder acts as another jurisdictional gatekeeper, it does not use substantive merit to guard the gate. Under the procedural misjoinder doctrine, courts disregard *unrelated* claims against nondiverse parties when assessing whether diversity is complete. Whether the claims are weak or strong is irrelevant. All that matters is whether the claims are sufficiently related (or unrelated).¹⁹⁴ In this context, federal law does supply a relevant standard—Federal Rule 20—and following it in no way disturbs the state-defined merits.

The argument that only state joinder rules can define whether a case is “misjoined” while pending in state court simply misunderstands the role of procedural misjoinder. The point of procedural misjoinder is not for federal judges to enforce state joinder rules. It is to provide a remedy when joinder

Federal law does not govern whether a plaintiff has stated a viable claim against a non-diverse defendant for purposes of fraudulent joinder. Similarly, we do not see how federal joinder rules should apply when the issue is fraudulent misjoinder of non-diverse plaintiffs in a state court action so as to defeat our diversity jurisdiction.

In re Diet Drugs, 294 F. Supp. at 673-74; see also *Jackson*, 307 F. Supp. 2d at 824; *Jamison*, 251 F. Supp. 2d at 1321 n.6; *Conk*, 77 F. Supp. 2d at 971.

191. *Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004); see also *Percy*, *supra* note 104, at 24.

192. *Conk*, 77 F. Supp. 2d at 971.

193. *Jamison*, 251 F. Supp. 2d at 1321 n.6; see also *Asher v. Minn. Mining & Mfg. Co.*, No. Civ.A. 04CV522KKC, 2005 WL 1593941, at *7 n.3 (E.D. Ky. June 30, 2005) (“If the plaintiffs’ claims were properly joined under state rules, then there was no basis for removing the action to federal court in the first place because there was no diversity jurisdiction.”).

194. Substance intersects with relatedness under Rule 20 insofar as it requires that the claims against joined parties share a common question of law or fact. See FED. R. CIV. P. 20(a). Obviously, federal courts sitting in diversity would refer to state law to see if a common question of law exists between the joined parties.

in state court is unfairly restricting access to the federal courts. Whether the state thinks the party structure is acceptable is wholly beside the point. For this reason, courts must be careful not to be distracted by the terminology. We could just as easily use the phrase “diversity spoiling” instead of “procedural misjoinder.” It would still do no more than convey the court’s conclusion that removal is proper despite the party structure chosen by the plaintiff in state court.

Which brings us back to the core point. Procedural misjoinder may turn on the relatedness of claims by or against joined parties, but it is ultimately a jurisdictional doctrine. And when it comes to defining federal court jurisdiction, Congress has never deferred to the peculiarities of state practice. Under modern removal practice, for example, only defendants may remove, and plaintiffs may not.¹⁹⁵ On two occasions, the Supreme Court has rejected removal on the basis that the parties attempting to remove were plaintiffs, even though state practice denominated them as defendants. As the Supreme Court succinctly explained, “[f]or the purpose of removal, the federal law determines who is plaintiff and who is defendant. It is a question of the construction of the federal statute on removal, and not the state statute. The latter’s procedural provisions cannot control the privilege of removal granted by the federal statute.”¹⁹⁶

In these cases, the Supreme Court shows that it understands the real task at hand—identifying Congress’s intent. And the Court recognizes that there is no reason to think that Congress ever intended to delegate to states the question of “who” can remove. Indeed, blindly following state practice on who qualifies as a defendant would frustrate Congress’s intent by making removal practice vary based on which state was involved:

The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.¹⁹⁷

Moreover, although the Supreme Court has not explicitly weighed in on this subject, there is good evidence that the Court does not think that federal

195. 28 U.S.C. § 1441(a) (2000); *see also* 14B WRIGHT ET AL., *supra* note 6, § 3723.

196. *Chi., R. I. & P. R. Co. v. Stude*, 346 U.S. 574, 580 (1954); *see also* *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (“[A]t the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions.” (citing *Mason City & Ft. Dodge Ry. Co. v. Boynton*, 204 U.S. 570 (1907))).

197. *Sheets*, 313 U.S. at 104; *see also* *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 705 (1972) (“While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application.”).

removal should incorporate state joinder practices.¹⁹⁸ In *Grubbs v. General Electric Credit Corp.*,¹⁹⁹ the United States was made party to a lawsuit when the original defendant filed a counter-claim and joined the United States as a co-defendant. The United States removed the entire case, including the claims asserted between the original plaintiff and defendant, and the claims brought by the counter-claim plaintiff involving other potential creditors, some of whom were not diverse. Ultimately, the Supreme Court upheld removal jurisdiction despite the presence of the satellite nondiverse parties, stating:

It would serve no purpose to require that in order to sustain jurisdiction in such a case, the prevailing party in the original two-sided litigation must go further and show that there was likewise jurisdiction as to virtually unrelated claims that the state court had permitted to be joined in the same lawsuit.²⁰⁰

The Supreme Court's reasoning for this holding is telling:

While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application. "Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."²⁰¹

To summarize: (1) Federal Rule 20 does not apply of its own force. While Federal Rule 20 no doubt defines joinder in cases once they are properly part of the federal docket, the Federal Rules are not automatically incorporated into the statutory scheme defining federal subject matter jurisdiction. (2) State joinder rules certainly could be incorporated into the jurisdiction scheme defining procedural misjoinder, but courts should not do so. Unlike fraudulent joinder—a merits-based analysis that *must* look to state substantive law—procedural misjoinder turns on litigation structure, where federal standards do properly exist. More critically, procedural misjoinder is ultimately a jurisdictional doctrine designed to identify those cases where

198. In the context of diversity jurisdiction generally, the Supreme Court has made clear that federal policy—not state interests—determines whether a case may properly go forward in federal court. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n.22 (1968) ("To be sure, state-law questions may arise in determining what interest the outsider actually has, but the ultimate question whether, given those state-defined interests, a federal court may proceed without the outsider is a federal matter.") (citation omitted).

199. 405 U.S. 699 (1972). In truth, the counter-claim plaintiff was not asserting any claim for relief against the United States but instead added the United States as a party because the United States had a pre-existing judgment against the counter-claim plaintiff and wanted the state court to sort out priorities among the potential creditors. *Id.* at 701.

200. *Id.* at 706-07.

201. *Id.* at 706 (quoting *Sheets*, 313 U.S. at 104).

removal jurisdiction is appropriate despite the presence of a nondiverse co-party. It is the policy underlying diversity jurisdiction and removal that is the key to this analysis, not whether the state has deemed the party structure acceptable for its internal litigation packaging purposes.

We think that diversity and removal policy strongly point towards incorporating the Federal Rule 20 transactional joinder standards into the jurisdictional analysis that is procedural misjoinder.²⁰² The historical reason for removal of diversity suits is to afford out-of-state defendants the refuge of a supposedly less biased federal forum.²⁰³ Procedural misjoinder arises in precisely this context: the removing defendant is from out of state²⁰⁴ and seeks refuge in federal court but is blocked by the joinder in state court of a nondiverse plaintiff or a nondiverse co-defendant. Under traditional diversity jurisdiction theory, the presence of the nondiverse party is thought to protect the defendant from bias on the premise that the jury cannot disadvantage the defendant without simultaneously harming other parties as well.²⁰⁵ That proposition is questionable—it certainly has been oft-questioned—even when the claims involving the joined parties are related.²⁰⁶ It is a non-sequitur when the claims involving the joined parties are unrelated to the claims against the out-of-state defendant. Simply put, if the transactions concerning the joined parties are indeed different, then the jury may single out the out-of-state defendant for biased treatment with no negative spillover onto other, more favored parties. By incorporating Federal Rule 20 and its transactional relatedness criteria for joinder,²⁰⁷ the proce-

202. Some have voiced concern that using Federal Rule 20's joinder standard to define misjoinder would violate Federal Rule 82, which states, "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . ." FED. R. CIV. P. 82; *see, e.g.*, Percy, *supra* note 104, at 26; *Jamison v. Purdue Pharm. Co.*, 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003). We think these concerns are misplaced. The import of Rule 82 is to remind practitioners (and perhaps judges too) that the Rules Enabling Act did not delegate authority to the rulemaking process to change federal subject matter jurisdiction. *See* FED. R. CIV. P. 82 advisory committee's note (1937). As a result, Federal Rules cannot directly extend or limit federal subject matter jurisdiction, and lawyers should not argue that the federal court has subject matter jurisdiction over a claim or party simply because it is properly joined with a claim or party over which the court undeniably has subject matter jurisdiction. That does not mean, of course, that federal jurisdiction may not borrow concepts set forth in the Federal Rules, either directly or indirectly. As we made clear above, we do not argue that Federal Rule 20 applies of its own force, *see supra* notes 181-89, but rather that the jurisdictional doctrine of procedural misjoinder should incorporate the transactional relatedness test set forth in Federal Rule 20.

203. *See* 15 MOORE ET AL., *supra* note 39, § 102App.03[1]; Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 79 (1993) ("[T]he consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts.").

204. An in-state defendant cannot profit from procedural misjoinder because even if his case is severed from the nondiverse party his removal will still be blocked by the statutory ban on removal by home-state defendants. 28 U.S.C. § 1441(b) (2000).

205. *See* Currie, *supra* note 31, at 18 ("The assumption apparently underlying *Strawbridge* is that the presence of Massachusetts people on both sides of a case will neutralize any possibility of bias affecting litigants from other states.").

206. *See* 15 MOORE ET AL., *supra* note 39, § 102.12[1]; Currie, *supra* note 31, at 18-19.

207. One alternative that might yield a substantially similar result would be for the doctrine of procedural misjoinder to adopt the "common nucleus of operative fact[s]" standard that defines the availability of supplemental jurisdiction under 28 U.S.C. § 1367(a). While § 1367(a) itself refers to claims that "form part of the same case or controversy under Article III," *id.*, the Supreme Court reads that language as

dural misjoinder doctrine aligns with diversity theory so that defendants are not barred from removal by the presence of nondiverse parties when those parties, because of the unrelatedness of their claims, fairly offer no protection from local bias.

Accordingly, we think the doctrine of procedural misjoinder should look to federal joinder standards as a matter of federal jurisdictional policy. State joinder rules cannot do the job. To realize this, one need only recall that even properly applied state joinder standards can thwart federal diversity policy if they allow unrelated or loosely related claims to be joined in one action.²⁰⁸ If you believe—as we do—that there is a value to giving out-of-state defendants access to federal court when sued by a home-state plaintiff, and if you believe—as we do—that the presence of a wholly unrelated nondiverse party should not foreclose that access to federal court,²⁰⁹ then you cannot blindly defer to whatever joinder rules the states might decide to follow, however permissive.

In contrast, there are many advantages to using Federal Rule 20 to define relatedness. Federal courts make Rule 20 joinder decisions routinely in cases invoking original jurisdiction and are thus far more familiar with its requirements and scope than they would be with state joinder rules. Using Federal Rule 20 to define relatedness would yield a nationally uniform standard for disregarding “unrelated” state court parties, whereas using state joinder law would make federal jurisdiction different in districts located in states with strict joinder rules than those located in states with liberal joinder rules. Using Federal Rule 20 to define relatedness would also result in greater equality among parties with regard to access to a federal forum. If a particular party alignment would have been improper if filed in federal court, but proper if access to federal court is sought by a defendant through removal, defendants would be unfairly disadvantaged in asserting federal court protection.

codifying the “common nucleus of operative fact[s]” test from *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). See *Jinks v. Richland County, S.C.*, 538 U.S. 456, 465 (2003); *Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156, 165 (1997). In turn, *Gibbs* referred to the liberalized joinder practices in federal court, including Rule 20, for defining those claims that a plaintiff “would ordinarily be expected to try . . . all in one judicial proceeding.” *Gibbs*, 383 U.S. at 725. So it might be thought that the common nucleus of operative facts standard could serve the same purposes as a reference to Federal Rule 20. However, we view this as an inferior approach. As proceduralists, we have long been cautioned against assuming that transaction-based standards are identical across different contexts, since the policies underlying the different rules may vary in obvious or sometimes subtle ways. See *Kane*, *supra* note 85, at 1723. Here, we are wary of importing the § 1367(a) standard—which is designed to identify the constitutional limits of the federal judicial power—into a doctrine that speaks not to whether federal judicial power exists but rather to when it should be exercised. Our concerns in this regard may seem to be confirmed by recent caselaw suggesting that the “common nucleus of operative fact” test is in fact broader than the “same transaction or occurrence” test for compulsory counterclaims under Federal Rule of Civil Procedure 13. See *Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406, 410 (7th Cir. 2004); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 214 (2d Cir. 2004).

208. See *supra* notes 167-69 and accompanying text.

209. See *Ashworth v. Albers Med. Inc.*, 395 F. Supp. 2d 395, 412 (S.D.W. Va. 2005) (disregarding improperly joined, nondiverse defendant because to do otherwise would “unfairly defeat the diverse defendants’ right to have the action against them heard in [federal] court”).

D. Rejection of the Egregiousness Test

We now turn to one final matter concerning the content of the procedural misjoinder doctrine. A number of courts have restricted its application to cases involving “egregious” or bad faith misjoinder.²¹⁰ Under this interpretation, the federal judge would continue to count, for diversity purposes, parties who were not wholly unrelated, or perhaps even the completely unrelated, if the mistake was made in good faith. We strongly oppose this extra hurdle to procedural misjoinder. At best, it is an unwarranted and unnecessary addition. At worst, it threatens to weaken severely the ability of federal judges to police misjoinder by setting the trigger for finding misjoinder at an artificially high level.

It is easy enough to see why courts started applying an egregiousness test. Initially, it was imported from the fraudulent joinder doctrine by the *Tapscott* court, which considered procedural misjoinder to be a species of fraudulent joinder.²¹¹ As discussed above, for a court to find fraudulent joinder, it is not enough for the court to find that the claim fails as a matter of law, but rather the court must find that the claim was wholly without merit. Following that lead, courts requiring egregious misjoinder ask not whether they think the joinder was proper, but whether there is any reasonable possibility that the joinder could be viewed as proper.²¹²

There is no reason, however, to import any of the fraudulent joinder standards into the procedural misjoinder analysis. Procedural misjoinder is not a species or sub-category of fraudulent joinder, but rather it is an independent exception to the requirement of complete diversity at the time of removal. Fraudulent joinder turns on the substantive merit of the claim against the spoiler. The viability of the claim by or against a nondiverse party is utterly irrelevant in the context of procedural misjoinder, which focuses solely on the relatedness of the claims plaintiffs seek to join. As discussed above, the relevant question for procedural misjoinder is not whether a state might conceivably permit joinder under those circumstances, but whether federal jurisdiction should view that case as a whole or by its parts. If courts have adopted the egregiousness requirement because they think it is in procedural misjoinder’s bloodlines, then they have erred in assigning parentage.

210. See *supra* note 136 and accompanying text.

211. See, e.g., *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (finding the misjoinder of parties to be “so egregious as to constitute fraudulent joinder”), *abrogated on other grounds by* *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000).

212. See, e.g., *Asher v. Minn. Mining & Mfg. Co.*, No. Civ.A. 04CV522KKC, 2005 WL 1593941, at *7 (E.D. Ky. 2005) (asking “whether there is even arguably a reasonable basis for predicting that the state court would find that the claims were properly joined”); *Reed v. Am. Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 804 (S.D. Miss. 2004) (asking whether there is any “reasonable possibility that [a Mississippi] court would” allow the joinder at issue (quoting *Conk v. Richards & O’Neil, LLP*, 77 F. Supp. 2d 956, 972 (S.D. Ind. 1999))) (alteration in original); *In re Diet Drugs Prod. Liab. Litig.*, 294 F. Supp. 2d 667, 677 (E.D. Pa. 2003) (asking whether there was “any reasonable basis” for joinder).

Nor is there any obvious reason why, as a policy matter, federal courts should avoid making difficult decisions about whether the claims against the joined parties arise out of the same transaction. In the fraudulent joinder context, federal courts give plaintiffs the benefit of the doubt because, ultimately, the court is ruling on the substantive merit of a state law claim. A finding that a party was fraudulently joined has preclusive effect for that claim.²¹³ There is no corresponding dynamic warranting a cautious approach to procedural misjoinder; any finding of misjoinder presumes that the severed claims will continue in the state forum.²¹⁴

Finally, we suspect that many of the courts that require egregious misjoinder are influenced by the fact that they have elected to apply state joinder standards. Under that approach, courts understandably might view a decision on misjoinder as defining the outer limits of what might be proper procedure under another jurisdiction's laws, with the egregiousness test representing an effort to approach that question as deferentially as possible. It goes without saying, of course, that if procedural misjoinder incorporates federal joinder standards, then there is no need for federal judges to be squeamish about making close calls.

The idea that misjoinder should be excused if done in "good faith" is even less warranted. The defendant need not prove fraudulent intent to establish fraudulent joinder. As one court explained, fraudulent joinder is simply a "term of art which 'does not impugn the integrity of plaintiffs or their counsel and does not refer to an intent to deceive.'"²¹⁵ Similarly, the purpose of procedural misjoinder is not to search the hearts of plaintiffs to uncover their motives for adding nondiverse parties.²¹⁶ Plaintiffs are free to bring suit in the forum of their choice—structuring their actions and joining claims and parties as they wish—so long as the resulting lawsuit comports with the applicable joinder rules and asserts nonfrivolous claims. All that

213. See *Carey v. Sub Sea Int'l, Inc.*, 121 F. Supp. 2d 1071, 1075 (E.D. Tex. 2000).

214. See *Ashworth*, 395 F. Supp. 2d at 412 (refusing to enter a merits dismissal over a procedurally misjoined claim, saying the only proper course of action is to sever and remand it); *Grennell v. W.S. Life Ins.*, 298 F. Supp. 2d 390, 397 (S.D.W. Va. 2004) (Because procedural misjoinder leads to severance and remand rather than a merits dismissal, "a plaintiff's ability to recover when a court denies a motion to remand based on [procedural misjoinder] is much less at risk than when the court takes the same action because of fraudulent joinder of defendants.").

215. *Greene v. Wyeth*, 344 F. Supp. 2d 674, 685 (D. Nev. 2004) (quoting *King ex rel King v. Aventis Pasteur, Inc.*, 210 F. Supp. 2d 1201, 1214 (D. Or. 2002)); see also *supra* notes 60-61 and accompanying text (discussing early Supreme Court cases establishing that the plaintiffs motive is immaterial to whether the joinder is "fraudulent").

216. Indeed, application of an egregiousness test would impose an unnecessarily burdensome and subjective inquiry into the plaintiffs' state of mind, a problematic exercise at best. See *Burns v. W. S. Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D.W. Va. 2004) ("Adding what would be in essence a state-of-mind element to the procedural misjoinder inquiry would overly complicate what should be a straightforward jurisdictional examination."). How should a court draw the line between egregious and non-egregious misjoinder of nondiverse parties? Can that line be drawn solely from the face of the pleadings, or will courts need to delve more deeply into plaintiffs' psyches? See, e.g., 14B WRIGHT ET AL., *supra* note 6, § 3723, at 658 (criticizing procedural misjoinder doctrine in part because of the increased complexity implicit in *Tapscott's* contention that "not all procedural misjoinder rises to the level of fraudulent joinder" (citing *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000))).

matters is whether the plaintiff meets or fails that burden. A properly joined nondiverse party counts towards the complete diversity test even if the plaintiff added him deliberately to prevent removal.²¹⁷ But if the party was misjoined, he should be disregarded whether the plaintiff was trying to game removal or not.

This analysis reveals the inaptness of terms like “fraudulent misjoinder” or the requirement of an egregiousness element. The doctrine of procedural misjoinder supplies an important limit on the ability of plaintiffs to use party joinder to deny defendants a federal forum. If those limits are not observed, removal is thwarted whether the joinder was improper by a little or by a lot. The focus, therefore, must be on the protection of defendants’ right of access to federal courts and the proper joinder structure of a lawsuit. Accordingly, the doctrine of procedural misjoinder must not be misinterpreted to require a showing of bad faith on the part of the plaintiff, and it should not be limited to the worst offenders.

V. THE IMPACT AND LIMITS OF PROCEDURAL MISJOINDER

The previous four Parts explain why we think federal courts can and should continue to develop the doctrine of procedural misjoinder. Here, we describe the likely impact that the procedural misjoinder doctrine we envision will have on removal jurisdiction. We then explore some potential problems with the doctrine and attempt to set what we see as important boundaries defining the legitimacy of the doctrine and its proper development.

A. *The Joined Plaintiff Cases*

Procedural misjoinder will have its greatest impact on joined plaintiff cases. On occasion, one finds unrelated defendants joined in state court.²¹⁸ But most of the misjoinder cases involve the misjoinder of unrelated plaintiffs.²¹⁹ Certain scenarios are becoming familiar. Perhaps the most common scenario is product liability litigation in which multiple plaintiffs unite to

217. See *Trigg v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1291 (11th Cir. 1998) (explaining that an alleged “bad faith” intent to defeat diversity is not enough to support a finding of procedural misjoinder because “Supreme Court precedent is clear that a plaintiff’s motivation for joining a defendant is not important as long as the plaintiff has the intent to pursue a judgment against the defendant”).

218. See, e.g., *Tapscott*, 77 F.3d at 1360; *Smith v. Nationwide Mut. Ins. Co.*, 286 F. Supp. 2d 777, 781 (S.D. Miss. 2003).

219. See *Asher v. Minn. Mining & Mfg. Co.*, No. Civ.A. 04CV522KKC, 2005 WL 1593941, at *8 (E.D. Ky. 2005); *Greene*, 344 F. Supp. 2d at 684-85; *Jones v. Nastech Pharm.*, 319 F. Supp. 2d 720, 728 (S.D. Miss. 2004); *Reed v. Am. Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 805 (S.D. Miss. 2004); *Burns*, 298 F. Supp. 2d at 403; *Grennell*, 298 F. Supp. 2d at 398-99; *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 678 (E.D. Pa. 2003); *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 489 (E.D. Va. 2003); *Coleman v. Conesco, Inc.*, 238 F. Supp. 2d 804, 819 (S.D. Miss. 2002), *abrogated by Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868 (S.D. Miss. 2004); *In re Rezulin Prod. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001); *Rudder v. K Mart Corp.*, No. 97-0272-BH-S, 1997 WL 907916, at *5 (S.D. Ala. Oct. 15, 1997).

sue the defendant (and others) who manufactured the product they purchased or used.²²⁰ Also prevalent are fraud or warranty cases in which multiple plaintiffs unite to sue the defendant who sold them the same, allegedly flawed or misrepresented, financial product.²²¹ The common thread in these joined plaintiff cases is that the plaintiffs all had a similar experience with that defendant, but they all had that experience separately.

We leave for another day whether these plaintiffs are properly joined under Rule 20. When plaintiffs join together to sue a defendant based on the purchase of a common product or having engaged in a common transaction, it seems rather clear that their claims will involve some common question of law or fact, satisfying the second element of party joinder under Rule 20.²²² But the first element for plaintiff joinder under Rule 20(a) is that the claims by the joined plaintiffs must have arisen out of the same transaction or occurrence, or series of transactions or occurrences. The tendency seems to be for federal courts to find that, while the plaintiffs' transactions with the common defendant were similar or even identical, they nonetheless represent separate transactions. But Rule 20 draws no precise lines about what constitutes the "same transaction," let alone the same "series of transactions."²²³ And to the extent courts look to policy considerations like efficiency and convenience, one can justify a broader view of the relevant transaction so as to allow unitary adjudication of the common issues of law or fact.

What does seem clear, however, is that given the current trend, the procedural misjoinder doctrine we advocate likely would lead to severance and partial removal in many of these cases. Defendants faced with multi-plaintiff state court cases would, when appropriate, remove the action and ask the federal judge to evaluate the plaintiff joinder under Federal Rule 20. A finding of misjoinder would result in the severance of the misjoined parties, and a complete diversity evaluation of the remaining claims. The likely result is that the once unitary case will be carved into two components. One component will consist of the transactionally related claims that (presumably) now satisfy the complete diversity requirement for diversity-based removal. The other component will consist of the unrelated claims that (presumably) do not qualify for federal jurisdiction and will be remanded to state court. How often this scenario would repeat itself would depend on the future development of Federal Rule 20.

220. See, e.g., *Asher*, 2005 WL 1593941 (coal dust masks and respirators); *Greene*, 344 F. Supp. 2d 674 (Fen-Phen); *Jones*, 319 F. Supp. 2d 720 (Stadol); *Jackson*, 307 F. Supp. 2d 818 (Stadol); *Burrell v. Ford Motor Co.*, 304 F. Supp. 2d 883 (S.D. Miss. 2004) (car ignition systems); *Sweeney*, 304 F. Supp. 2d 868 (lead-based paint); *In re Diet Drugs*, 294 F. Supp. 2d 667 (Fen-Phen).

221. See, e.g., *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691 (N.D. Miss. 2004) (insurance products sold by housing lender); *Reed*, 324 F. Supp. 2d 798 (health insurance); *Grennell*, 298 F. Supp. 2d 390 ("vanishing premium" life insurance).

222. See FED. R. CIV. P. 20(a).

223. *Id.*; see *supra* notes 87-92 and accompanying text.

B. *The Limits of Procedural Misjoinder*

Though we think that procedural misjoinder is a good idea, it is only a good idea insofar as it is properly understood and applied. Here we prophylactically note two ways in which the limited procedural misjoinder doctrine that we envision and endorse might go astray.

1. *Pressure to Distort Rule 20*

Our first concern sounds more of a cautionary note than a perimeter alarm. As explained above, the “same transaction” test for permissive party joinder under Rule 20 is rather squishy. Courts have not tried to draw bright lines, but instead have opted for a flexible standard that focuses on policy considerations like efficiency and fairness. That flexibility makes sense, however, when Rule 20 is viewed in combination with the other federal rules governing litigation structure. Rule 20 was deliberately crafted to sweep broadly, allowing all related parties and claims to be brought together in a single case.²²⁴ As a result, Rule 20 lets most parties in. Of course, Rule 20 does not need to play the role of a bouncer; other federal rules—Rule 21 and Rule 42(b)—stand ready to usher out parties or claims who outlast their welcome.²²⁵ In short, procedural misjoinder asks Rule 20 to shoulder a jurisdictional gatekeeping role that it was never designed to serve.

Despite the pressure procedural misjoinder puts on Rule 20, we still think that Rule 20 and the “same transaction” test mark the right boundary for when a joined party should be severed for purposes of assessing complete diversity on removal. In applying the doctrine of procedural misjoinder, however, judges must remember the limited gate-keeping role that Rule 20 plays in federal practice and, therefore, appreciate that the procedural misjoinder doctrine we advocate will not be a panacea. The broad sweep of Rule 20 will continue to give plaintiffs wide latitude in determining party structure. And in many of these cases, defendants no doubt will argue that the plaintiffs have taken advantage of Rule 20’s lenient approach to joinder to construct a non-removable case.

Federal courts sympathetic to these arguments might be tempted to narrow the scope of Rule 20’s relatedness test, making it easier to declare par-

224. As the Supreme Court has explained, “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966), *superseded by statute*, 28 U.S.C. § 1367 (2000).

225. It is these rules that truly determine the scope of a federal lawsuit, granting district courts the authority to conduct fair and efficient adjudication of claims. Hence, when a case brought in federal court stretches the bounds of Rule 20’s “same transaction” test, the court can address any prejudice or loss of efficiency by severing parties or claims as needed rather than denying joinder in the first place. *See supra* notes 97-102 and accompanying text. Indeed, we suspect that, in light of the fact that any decision to allow joinder of tangentially related claims of multiple parties may be dealt with at a later stage of the litigation through Rules 42(b) or 21, courts probably have been inclined to take a “no harm, no foul” approach to sketchy joinder claims.

ties misjoined (and the case therefore removable). We must trust that federal courts will not distort the meaning of Rule 20 in order to create a more muscular doctrine of procedural misjoinder.²²⁶ The focus of Rule 20 must continue to be determined by its direct role in regulating joinder, not by the indirect role it will play in regulating removal jurisdiction.

2. *Pressure to Carve to the Limits of Rule 21*

Our second concern is more fundamental. The doctrine we propose involves federal judges severing out parties misjoined per Federal Rule 20. But Rule 20, of course, does not mark the outer limit of the power of federal judges to sever parties. As detailed above, the authority of federal judges to sever parties is not limited to misjoinder as defined by Rule 20 but includes the power to sever *properly joined parties* in the interests of justice.²²⁷ Of special note for us is the recent “re-discovery” of Rule 21 as a source of federal judicial power to dismiss jurisdictional spoilers to cure diversity defects.²²⁸

We must acknowledge the danger that defendants will attempt to expand the limited procedural misjoinder doctrine we endorse beyond misjoinder as defined by Rule 20. Overzealous defendants will no doubt put pressure on federal courts to invoke Rule 21 at its broadest to carve out even *related* claims in order to create a completely diverse set of parties.²²⁹ Indeed, several defendants have already done so, although apparently (so far) to no avail.²³⁰ As Judge Easterbrook commented in rejecting such a request,

226. One issue has already surfaced in cases involving both joined plaintiffs and joined defendants. While the plaintiffs may have all been part of the “same transaction” or same “series of transactions,” FED. R. CIV. P. 20(a), with the primary defendant, it does not follow that all plaintiffs will have had any transaction at all with other joined defendants. This can give the impression that parties have been misjoined in that their presence seems to be a deliberate attempt to defeat diversity removal. *See Jones v. Nasteck Pharm.*, 319 F. Supp. 2d 720, 727-28 (S.D. Miss. 2004). To the extent that courts want to strengthen the doctrine of procedural misjoinder, one sure way would be to require that the “same transaction” test be met by all parties for all claims. Rule 20, however, specifically states that “[a] plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.” FED. R. CIV. P. 20(a). So long as the plaintiffs are properly joined as to one defendant, and the defendants are properly joined as to one plaintiff, the fact that every plaintiff does not assert a claim against every defendant does not make joinder improper. *See, e.g., Trigg v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1288 (11th Cir. 1998); *Jamison v. Purdue Pharm. Co.*, 251 F. Supp. 2d 1315, 1322 (S.D. Miss. 2003).

227. *See supra* notes 98-102 and accompanying text.

228. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 65 (1996); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989).

229. *See supra* notes 101-02 and accompanying text (discussing potential outer limits of using Rule 21 severance to manipulate diversity).

230. *See, e.g., John S. Clark Co. v. Travelers Indem. Co.*, 359 F. Supp. 2d 429, 441 (M.D.N.C. 2004) (rejecting argument because of “considerations of fundamental fairness, judicial economy, prejudice, and undue delay, as well as the dual threat of duplicitious [sic] litigation and inconsistent verdicts”); *Ferry v. Bekum Am. Corp.*, 185 F. Supp. 2d 1285, 1290 (M.D. Fla. 2002) (rejecting argument because “[u]sing Rule 21 in the manner Defendants propose would allow a district court to ‘create’ jurisdiction on removal simply by dismissing nondiverse, dispensable plaintiffs against their wishes”); *see also Lyons v. Lutheran Hosp. of Ind.*, No. 104CV0728DFHVSS, 2004 WL 2272203, at *6 (S.D. Ind. Sept. 15, 2004) (rejecting defendant’s procedural misjoinder argument and its invitation to create diversity by severing under Rule 21).

“[n]either § 1332 nor any case of which we are aware provides that defendants may discard plaintiffs in order to make controversies removable.”²³¹

In effect, what the defendants have asked the federal courts to do in these cases is to dispense with related diversity spoilers so that a smaller, completely diverse suit may emerge and be kept in federal court. While we believe federal judges have the leeway to adopt the limited procedural misjoinder doctrine we advocate, we do not think federal judges have the authority to dispense with complete diversity insofar as related parties are concerned. That, in our view, falls far too close to the separate claim and separate and independent claim mechanisms that Congress has repealed,²³² and also to the 1969 ALI proposal that Congress failed to enact.²³³ Here, the long and tortured history of incomplete diversity removal cannot be ignored. If related parties are to be discarded to create the complete diversity necessary for removal, we believe it must be left to Congress to step back up to the plate and take its swing.

CONCLUSION

The tension between party joinder and removal of diversity cases has vexed both Congress and the courts for well over a century. We think the doctrine of procedural misjoinder provides federal judges much-needed authority to disregard improperly joined nondiverse parties whose presence would otherwise block access to federal court. States, of course, are free to make their own choices about what constitutes an appropriate litigation package in state court. But access to federal court should not turn on those state policy choices. Rather, defendants faced with diversity-destroying but transactionally unrelated parties should have access to a federal remedy guided by federal standards defining the proper scope of a multi-party lawsuit. Such a remedy, of course, cannot relieve all of the tension between our loose joinder standards and our comparatively strict jurisdictional requirements. But by eliminating the strategic benefit of adding unrelated or barely related parties, the doctrine we propose would cut down the incentive structure that is currently driving misjoinder.

231. *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000).

232. *See supra* notes 22-45 and accompanying text (discussing the nature of the various incomplete diversity removal mechanisms Congress has enacted and then repealed).

233. *See AM. LAW INST., supra* note 19, § 1304, at 16 (proposal to allow any defendant to remove if that defendant could have removed if sued alone, with the district court then exercising discretion as to whether to sever and remand any nondiverse components of the case).

