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## Creating Diversity Jurisdiction in Removal Actions through the Improper Use of Federal Rule of Civil Procedure 21: Procedural Blackjack or Judicial Bust

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# CREATING DIVERSITY JURISDICTION IN REMOVAL ACTIONS THROUGH THE IMPROPER USE OF FEDERAL RULE OF CIVIL PROCEDURE 21: PROCEDURAL BLACKJACK OR JUDICIAL BUST?

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## I. INTRODUCTION

There is an art to the game of Blackjack. The rules are fixed, and while lady luck surely plays her role, the rules and odds are well known to a wise player before he places his bet on the green felt table-top. But what if one day the dealer changed the rules in the middle of the game? What if the dealer simply declared that any combination of cards it dealt to itself equaled twenty-one? No doubt, the player would cry foul, and with good and honest reason. “Rules are rules,” says the player, trying to reason with the dealer. The player opens his rulebook to show the dealer that there is no such rule. Then, to add insult to injury, the dealer simply declares that he has always had this power, only he had forgotten it for several years. The dealer explains that his power transcends the rulebook. Does this situation seem fair?

Unfortunately, this story’s parallel is occurring today in many federal district courts with a “rediscovered” use of Federal Rule of Civil Procedure 21.<sup>1</sup> Recently, federal district courts have held that Federal Rule 21 bestows upon them the power to sever nondiverse parties or claims to create diversity jurisdiction without first finding that a party or claim is improperly joined.<sup>2</sup> Severance may mean that a plaintiff who brings a state court action against multiple parties, one or more of which is not diverse, runs the risk of a federal court severing the action in a removal analysis, even where the plaintiff has committed no improper joinder of parties. Severance may leave a plaintiff with the need to conduct simultaneous suits—one in state court and one in federal court. Other federal district courts, however, have correctly declined to sever properly joined nondiverse parties.<sup>3</sup>

<sup>1</sup> See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 824 (2006).

<sup>2</sup> See *Safeco Ins. Co. v. City of White House*, 36 F.3d 540, 545 (6th Cir. 1994) (“Rule 21 of the Federal Rules of Civil Procedure permits a district court to retain diversity jurisdiction over a case by dropping a nondiverse party if that party’s presence in the action is not required . . . .”); *Joseph v. Baxter Int’l Inc.*, 614 F. Supp. 2d 868, 872 (N.D. Ohio 2009) (“I can retain jurisdiction by severing claims against nondiverse dispensable defendants.”); *DeGidio v. Centocor, Inc.*, No. 3:09-CV-721, 2009 WL 1867676, at \*4 (N.D. Ohio June 29, 2009); *Williams v. Knoll Pharm. Co.*, No. 5:03-CV-8030, at \*6 (N.D. Ohio July 11, 2003) (PACER) (“Rule 21 applies to the dismissal of properly joined parties as well as misjoined parties.”).

<sup>3</sup> See *Hughes v. Sears Roebuck & Co.*, No. 2:09-CV-93, 2009 U.S. Dist. LEXIS 82550 (N.D. W. Va. Sept. 2, 2009) (requiring a finding of misjoinder before utilizing Federal Rule 21 to sever claims); *Ash v. Providence Hosp.*, No. 08-0525-WS-M, 2009 U.S. Dist. LEXIS 12794, at \*44 (S.D. Ala. Feb. 17, 2009) (declining to sever parties because of the court’s

Through an analysis of the purposes and limitations of removal and the proper role of the Federal Rules of Civil Procedure (“Federal Rule”), this Note concludes that the use of Federal Rule 21 to create diversity jurisdiction where all parties are properly joined is improper. Parts III and IV of this Note review the qualifiers necessary for diversity jurisdiction, the history and parameters of removal, and the judicial doctrines of fraudulent joinder and procedural misjoinder. Parts V and VI demonstrate that the misuse of Federal Rule 21 to create diversity jurisdiction in removal actions where parties are properly joined has been supported by either a misreading of or an unwarranted extension of the Supreme Court’s holding in *Newman-Green, Inc. v. Alfonzo-Larrain*,<sup>4</sup> a disregard for the proper role of the Federal Rules in relation to the interplay of judicial exercise and Congressional oversight, and by ignoring the unfair consequences that misuse of the Rule places on the parties to the action.

Arguably, such a misuse of Federal Rule 21 not only flouts the separation of powers by treading into territory that Congress controls, but it also conflicts with the self-limitations imposed by the Federal Rules themselves<sup>5</sup> and can result in undue hardship on plaintiffs.<sup>6</sup> Part VII examines the possible solutions to the problem and ultimately concludes that the best solution is for the judiciary to exercise self-restraint in its application of Federal Rule 21. Alternatively, Congress could either amend the removal or diversity statutes, or it could exercise its oversight powers with regard to the Federal Rules themselves to remedy this misuse of Federal Rule 21.<sup>7</sup>

## II. THE EVOLUTION OF FEDERAL RULE 21

### A. *The English Rules & The Judicature Acts*

Originally, the English common law produced dismissal in most cases where courts found misjoinder and nonjoinder of parties.<sup>8</sup> This harsh effect, however, was largely alleviated in the process of the codification of procedural rules.<sup>9</sup> Codification of civil procedure in the federal equity rules and the English rules of practice allowed corrections to complaints to cure joinder defects where corrections would produce no adverse effects on the parties to the action.<sup>10</sup> The historical antecedent

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“reluctance to manufacture federal jurisdiction via artificial means in a case where none exists . . . .”); *Etheridge v. Liberty Mut. Ins.*, No. 3:08CV004-SA-DS, 2008 U.S. Dist. LEXIS 67244, at \*9 (declining to sever under Federal Rule 21 where the court found no misjoinder); *Culhane Commc’ns v. Fuller*, 489 F. Supp. 2d 959, 962 (D. S.D. 2007) (refusing to sever under Federal Rule 21 where the court found no misjoinder of parties).

<sup>4</sup> *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

<sup>5</sup> See *infra* Parts VI.D-E.

<sup>6</sup> See *infra* Part VI.E.

<sup>7</sup> See *Hanna v. Plummer*, 380 U.S. 460, 473 (1965) (stating that Congress has a “long-recognized power . . . to prescribe . . . rules for federal courts . . .”).

<sup>8</sup> See 7 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1681 (3d ed. 2010).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

rule to Federal Rule 21 existed in the English procedural rules, later codified in The Judicature Act of 1937.<sup>11</sup> But even before the Judicature Acts, the rules of procedure recognized that there were instances when parties or claims had been improperly joined or omitted, and that judicial action may be necessary to add or drop one or more parties or claims in the interest of efficient justice.<sup>12</sup>

The Common Law Procedure Act of 1852 discussed when claims and parties were improperly joined under the heading of “Nonjoinder and Misjoinder.”<sup>13</sup> In the interest of efficiency, it was not necessary that every defendant joined in an action be responsible for either the entire amount claimed by the plaintiff or every cause of action.<sup>14</sup> Courts and judges had the power to either drop misjoined parties and claims or to order separate trials, but only if no injustice would result and only if the party to be dropped were added to the action without her consent.<sup>15</sup> The principle of efficiency guided all early procedural rules. “[T]he sooner the parties get at the truth of the matter the better for both of them, that it may end litigation . . . And . . . this vital essence is infused into all civil procedure.”<sup>16</sup> Therefore, then, as today, civil procedure sought to maintain the spirit of efficiency; limited, however, by the possibility of injustice to the parties.

The English Supreme Court Judicature Act of 1875, though it simplified the language of the earlier acts, largely paralleled them in regard to dropping misjoined claims and parties.<sup>17</sup> Rule 13 of this Act continued the directive that a finding of misjoinder was a necessary qualifier to exercising the judicial procedural power to drop claims or parties.<sup>18</sup> For instance, when two plaintiffs brought suit against a

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<sup>11</sup> See FED. R. CIV. P. 21, advisory committee’s note (citing English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16 r. 11).

<sup>12</sup> See The Common Law Procedure Act of 1852, O. XXXIV - XLI, *reprinted in* THE COMMON LAW PROCEDURE ACTS OF 1852, 1854, AND 1860 74-80 (W.F. Finlason ed., 1860).

<sup>13</sup> See *id.*

<sup>14</sup> See W.F. FINLASON, AN EXPOSITION OF OUR JUDICIAL SYSTEM AND CIVIL PROCEDURE AS RECONSTRUCTED UNDER THE JUDICATURE ACTS INCLUDING THE ACT OF 1876 WITH COMMENTS ON THEIR EFFECT AND OPERATION 283 (1877). “And where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he may be entitled to redress, he may join two or more defendants, to the intent that in the action the question as to which if any of them is liable, and to what extent, may be determined as between all parties to the action.” *Id.*

<sup>15</sup> THE COMMON LAW PROCEDURE ACTS, *supra* note 12, at 74 (“It shall and may be lawful for the court or judge . . . to order . . . any person[s] . . . originally joined as plaintiff[s] . . . struck out . . . if it shall appear to such court or judge that injustice will not be done by such amendment . . . and that the person[s] . . . to be struck out . . . were originally introduced without his[] [or] her, or their consent . . .”). The same rule applied to defendants. See *id.* at 77.

<sup>16</sup> FINLASON, *supra* note 14, at 274.

<sup>17</sup> See Supreme Court of Judicature Act 1875, O. 16 r. 13, *reprinted in* THE NEW SYSTEM OF PRACTICE AND PLEADING UNDER THE SUPREME COURT OF JUDICATURE ACTS, 1873, 1875, 1877, THE APPELLATE JURISDICTION ACT, 1876, AND THE RULES OF THE SUPREME COURT 463 (William Thos. Charley ed., 1877).

<sup>18</sup> *Id.* (“[A] Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just,

defendant company for polluting a stream for which both plaintiffs had an interest,<sup>19</sup> the judge proceeded as if the claims were separate, but only after finding that they had been misjoined because the interest was not common between them.<sup>20</sup> Rule 13 required misjoinder prior to the judge's action of separating these claims. While these English rules were statutorily created, the process for rule creation in America today is guided by the judiciary.

### B. American Rule Creation

While the Constitution grants Congress the power to prescribe procedural rules for inferior federal courts,<sup>21</sup> Congress, by enacting the Rules Enabling Act in 1934,<sup>22</sup> delegated this power to the Supreme Court. Later, in 1958, Congress transferred the bulk of rulemaking power from the Supreme Court to the Judicial Conference of the United States.<sup>23</sup> The Judicial Conference submits its rules to the Supreme Court for approval, and Congress can either approve the rules or allow them to become law by inaction.<sup>24</sup> The enacted Federal Rules have "the force and effect" of law, and they supersede prior inconsistent statutes.<sup>25</sup>

Since the passage of the Rules Enabling Act and the implementation of Federal Rule 21, the rule-making process has trended away from Supreme Court centralization and more toward a multi-layered and formalistic process.<sup>26</sup> In 1958, Congress required the Judicial Standing Committee to "carry on a continuous study of the operation and effect" and to recommend "changes in and additions to those rules as . . . desirable to promote simplicity . . . , fairness . . . , the just determination of litigation, and the elimination of unjustifiable expense and delay."<sup>27</sup> Currently,

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order that the . . . parties, whether as plaintiffs or as defendants, *improperly joined* be struck out . . .") (emphasis added).

<sup>19</sup> See *Appleton v. The Chapel Town Paper Co.*, 45 L.J. Ch. 276 (1877), reprinted in *THE NEW SYSTEM OF PRACTICE AND PLEADING UNDER THE SUPREME COURT OF JUDICATURE ACTS, 1873, 1875, 1877, THE APPELLATE JURISDICTION ACT, 1876, AND THE RULES OF THE SUPREME COURT* 463 (William Thos. Charley ed., 1877).

<sup>20</sup> See *id.*

<sup>21</sup> See U.S. CONST. art III, § 1; U.S. CONST. art I, § 8.

<sup>22</sup> Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (codified in current form at 28 U.S.C.A. §§ 2071-77 (West 2010)).

<sup>23</sup> See *A Brief History of the Federal Rulemaking Process*, THE THIRD BRANCH (Newsletter of the Federal Courts, Washington, D.C.), Oct. 2009, at 7, available at <http://www.uscourts.gov/News/TheThirdBranch/TTBViewer.aspx?doc=/uscourts/News/TTB/archive/2009-10%20Oct.pdf?page=7>.

<sup>24</sup> See 28 U.S.C.A. §§ 2074, 2075 (West 2010).

<sup>25</sup> See *Henderson v. United States*, 517 U.S. 654, 656 (1996) ("In the Rules Enabling Act, Congress ordered that, in matters of 'practice and procedure,' the Federal Rules shall govern, and '[a]ll laws in conflict with such rules shall be of no further force or effect . . .'" (citation omitted)).

<sup>26</sup> Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1105 (2002).

<sup>27</sup> *Id.* at 1107 (citation omitted).

amendments to the Federal Rules proceed through the Advisory Committee, the Standing Committee, the Judicial Conference, the Supreme Court, and if approved by these entities, amendments become effective unless Congress acts to prevent them.<sup>28</sup> Therefore, the process to amend a Rule has changed dramatically since the implementation of Federal Rule 21, and it now involves more than simple Supreme Court approval.

### C. Modern Federal Rule 21

The plain language of Federal Rule 21 is clear. Federal Rule 21 is entitled *Misjoinder and Nonjoinder of Parties*, and it states: “Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.”<sup>29</sup> By its title and plain language, Federal Rule 21 applies when parties are misjoined or nonjoined; here, the court may add a party, drop a party, or sever claims, if these actions are just. Such a reading is consistent with Federal Rule 21’s historical ancestors.<sup>30</sup> The historical purpose of Federal Rule 21 coincides with the plain language of the Rule itself.

Federal Rule 21 is a derivative of the English rules of procedure in practice at the time the American Federal Rules became effective.<sup>31</sup> One purpose of the Rule is to “promote liberal joinder of parties.”<sup>32</sup> In 1940, Judge Kalodner wrote that “Rule[] . . . 21 . . . evidence[s] the general purpose . . . to eliminate the old restrictive and inflexible rules of joinder designed for a day when formalism was the vogue and to allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided.”<sup>33</sup> In 1958, the Second Circuit explained the purpose of Federal Rule 21 as an “obviate[ion of] the harsh common law adherence to the technical rules of joinder and not in order to deal with problems of defective federal jurisdiction.”<sup>34</sup> Fairness and efficiency comprised Federal Rule 21’s original intent in handling nonjoined and misjoined parties. To understand this Note’s context of the misuse of Federal Rule 21, it is first important to understand the present day situations in which claims or parties are properly joined, when they are misjoined, and the removal process based on diversity jurisdiction.

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<sup>28</sup> *Id.*

<sup>29</sup> FED. R. CIV. P. 21.

<sup>30</sup> *See supra* Part II.A.

<sup>31</sup> WRIGHT, ET. AL., *supra* note 8; *see also* FED. R. CIV. P. 21 advisory committee’s note (citing English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16 r. 11).

<sup>32</sup> WRIGHT, ET. AL., *supra* note 8.

<sup>33</sup> *Soc’y of European Stage Authors & Composers v. WCAU Broad. Co.*, 1 F.R.D. 264, 266 (E.D. Pa. 1940).

<sup>34</sup> *Kerr v. Compagnie De Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958) (citation omitted). *But see* *Safeco Ins. Co. of Am. v. City of White House*, 36 F.3d 540, 545-46 (6th Cir. 1994) (declining to follow *Kerr* because “most courts have not restricted the application of Rule 21 and continue to apply the rule to retain federal diversity jurisdiction over a case.”) (citation omitted).

## III. PROCEDURAL CONTEXT: REMOVAL &amp; DIVERSITY JURISDICTION

Removal is not a constitutional power of the federal courts; rather, it is a power granted to the federal courts by Congress.<sup>35</sup> Congress first established the removal process in 1789 as a means of granting civil suit defendants a level of control over forum selection.<sup>36</sup> A defendant may remove to federal court any civil action that a plaintiff files against him in state court but over which the federal district court has original jurisdiction.<sup>37</sup> Federal courts have original jurisdiction if the claim fulfills the elements necessary for either federal question<sup>38</sup> or diversity jurisdiction.<sup>39</sup> For a federal court to exercise diversity jurisdiction over an action, no plaintiff can be a citizen of the same state as any defendant,<sup>40</sup> and the amount in controversy must exceed \$75,000.<sup>41</sup> Because the existence of original jurisdiction is a requirement of removal, the court must evaluate the case for diversity jurisdiction at the time in which the defendant files his notice of removal.<sup>42</sup> To properly consider removing a case, the federal court must thoroughly examine the joinder of all parties.

## IV. THE FEDERAL JOINDER RULES &amp; THE MISJOINDER DOCTRINES

Courts have developed two doctrines by which they measure improper joinder. These two doctrines are: (1) the fraudulent joinder doctrine<sup>43</sup> and (2) the procedural misjoinder doctrine.<sup>44</sup> If the court finds a party to be improperly joined, the court will ignore that party in its determination of whether it has subject matter jurisdiction over the action.<sup>45</sup> A finding of misjoinder, therefore, may confer diversity jurisdiction upon the court where the face of the complaint shows a lack of complete diversity.

## A. Federal Rule 19: Required Joinder

Federal Rule 19 governs required joinder of parties.<sup>46</sup> Subsection (a) governs when a party is necessary for just adjudication.<sup>47</sup> If the party is necessary, but her

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<sup>35</sup> 28 U.S.C.A. § 1441 (West 2010).

<sup>36</sup> Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79.

<sup>37</sup> 28 U.S.C.A. § 1441(a) (West 2010); *see also* *Jefferson Cnty. v. Acker*, 527 U.S. 423, 430 (1999) (“[A]n action may be removed . . . to federal court only if a federal district court would have original jurisdiction over the claim in suit.”).

<sup>38</sup> 28 U.S.C.A. § 1331 (West 2010).

<sup>39</sup> 28 U.S.C.A. § 1332 (West 2010).

<sup>40</sup> *See* *Strawbridge v. Curtiss*, 7 U.S. 267 (1806) (requiring complete diversity of parties).

<sup>41</sup> 28 U.S.C.A. § 1332(a) (West 2010).

<sup>42</sup> *See* *Harper v. AutoAlliance Int’l, Inc.*, 392 F.3d 195, 210 (6th Cir. 2004); *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 (5th Cir. 1985).

<sup>43</sup> *See infra* Part IV.C.

<sup>44</sup> *See infra* Part IV.D.

<sup>45</sup> *See, e.g.,* *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904 (6th Cir. 1999).

<sup>46</sup> FED. R. CIV. P. 19.

presence destroys diversity jurisdiction, subsection (b) provides a balancing test to determine whether the party is indispensable to the action.<sup>48</sup> If the party is found to be dispensable, then the court may continue to hear the case without that party.<sup>49</sup> If the party is indispensable, the court may dismiss the case,<sup>50</sup> but it may proceed even without the required party.<sup>51</sup> Dismissal should be “employed only sparingly.”<sup>52</sup> Only upon the impossibility of just resolution of the case should the absence of nondiverse parties terminate an action.<sup>53</sup>

#### B. Federal Rule 20: Permissive Joinder

Federal Rule 20 governs when parties may properly permissively join or be joined to an action.<sup>54</sup> Permissively joined parties must have an interest in claims that arise out of the same transaction or occurrence, or series of transactions or occurrences, and the parties must share a common question of law or fact.<sup>55</sup> Generally, this requirement is fulfilled “[if t]here is a substantial logical relationship between the transactions or occurrences at issue.”<sup>56</sup> Once the requirements for

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<sup>47</sup> Under Federal Rule 19(a), “a party is [necessary] if: (1) complete relief cannot be given to existing parties in his absence; (2) disposition in his absence may impair his ability to protect his interest in the controversy; or (3) his absence would expose existing parties to substantial risk of double or inconsistent obligations.” *Safeco Ins. Co. v. City of White House*, 36 F.3d 540, 546 (6th Cir. 1994) (citing FED. R. CIV. P. 19(a)(1) & (2)(i)-(ii)).

<sup>48</sup> A party is determined to be dispensable or indispensable by weighing the following factors:

- (1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided . . . ; (3) whether a judgment rendered in the person’s absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

FED. R. CIV. P. 19(b). *But see* *Soberay Mach. & Equip. Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 765 (6th Cir. 1999) (“[T]here is no prescribed formula for determining whether a party is indispensable[.]”) (citation omitted).

<sup>49</sup> FED. R. CIV. P. 19(b).

<sup>50</sup> *Id.*

<sup>51</sup> *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008) (“The Rule instructs that nonjoinder even of a required person does not always result in dismissal.”).

<sup>52</sup> *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915, 918 (4th Cir. 1999).

<sup>53</sup> *Jaser v. New York Prop. Ins. Underwriting Ass’n*, 815 F.2d 240, 242 (2d Cir. 1987).

<sup>54</sup> “Persons . . . may be joined in one action as defendants if[] any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action.” FED. R. CIV. P. 20(a)(2).

<sup>55</sup> *Jaloy Mfg. Co., v. U.S. Fid. & Guar. Co.*, 736 F.2d 1131, 1133 (6th Cir. 1984).

<sup>56</sup> *DLX, Inc., v. Reid Brothers Inc.*, No. 5:09-CV-341-FL, 2010 WL 4496794, at \*3 (E.D.N.C. Oct. 28, 2010).

permissive joinder are met, it is the plaintiff's option to permissively join the party.<sup>57</sup> If the requirements of Federal Rule 20 are not met as to a named defendant, then joinder is improper.<sup>58</sup>

### C. The Doctrine of Fraudulent Joinder

It is inevitable that plaintiffs will join nondiverse parties in state actions to prevent the removal of a claim that would otherwise fulfill diversity; they have attempted to do so for more than a century.<sup>59</sup> The fraudulent joinder doctrine focuses the validity of a claim brought against a non-diverse defendant or on the validity of a claim between a joined non-diverse plaintiff and the defendant. Although the standard for finding fraudulent joinder is not uniform,<sup>60</sup> the fraudulent joinder doctrine generally applies when a plaintiff joins either a nondiverse defendant against whom the plaintiff has no reasonable basis for the claim, or where a nondiverse co-plaintiff is joined who has no reasonable basis for the claim against the defendant.<sup>61</sup>

The right of a defendant to remove a case cannot be trumped by the "fraudulent joinder of a resident defendant [or non-diverse plaintiff] having no real connection with the controversy."<sup>62</sup> If a court finds fraudulent joinder, this finding operates as an exception to the necessity of diversity jurisdiction, and the court may disregard the improperly joined nondiverse party in considering how to proceed.<sup>63</sup> The court may then utilize Federal Rule 21 to drop the fraudulently joined party and retain diversity jurisdiction between the diverse parties.<sup>64</sup> Here, it cannot be said the court *creates* diversity jurisdiction by dropping the fraudulently joined party; rather, it simply already enjoyed diversity jurisdiction because the plaintiff did not properly join the nondiverse defendant.

### D. The Doctrine of Fraudulent Misjoinder

While the fraudulent joinder doctrine focuses on the validity of the claims brought against a nondiverse defendant, fraudulent misjoinder focuses on the

<sup>57</sup> *Applewhite v. Reichhold Chem. Inc.*, 67 F.3d 571, 574 (5th Cir. 1995).

<sup>58</sup> *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006).

<sup>59</sup> E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569, 620 (2006).

<sup>60</sup> For a discussion of the different standards for fraudulent joinder, see *id.* at 578-79.

<sup>61</sup> See *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 183-84 (1906).

<sup>62</sup> *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 152 (1914).

<sup>63</sup> *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904 (6th Cir. 1998). It is important to note that although the term "fraudulent joinder" encompasses actual fraud by plaintiffs and attorneys, it is a broader term that also includes actions in which plaintiffs hold a genuine belief that the nondiverse defendant is properly joined. See *Rose v. Giomatti*, 721 F. Supp. 906, 914 (S.D. Ohio 1989) ("[T]he term 'fraudulent joinder' is a term of art and is not intended to impugn the integrity of a plaintiff or plaintiff's counsel.").

<sup>64</sup> See *Smith v. Planned Parenthood*, 225 F.R.D. 233, 246 (E.D. Mo. 2004) (finding misjoinder and severing the nondiverse party); *Disparate v. Corporate Exec. Bd.*, 233 F.R.D. 7, 12 (D.D.C. 2004); *Hanna v. Gravett*, 262 F. Supp. 2d 643, 647 (E.D. Va. 2003); *Hines & Gensler*, *supra* note 1, at 796.

relationship of the plaintiff's claims against the diverse defendant to the plaintiff's claims against the nondiverse defendant.<sup>65</sup> Under this doctrine, neither may a non-diverse co-plaintiff with a valid but unrelated claim against the defendant be joined to defeat diversity.<sup>66</sup> Here, all claims are valid, but the relationships between the various claims do not meet the necessary requirements for permissive joinder under Federal Rule 20.<sup>67</sup> For two parties to be properly permissively joined, the claims must "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences," and they must share a common question of law or fact.<sup>68</sup> For example, the court, by applying the fraudulent misjoinder doctrine, may exercise diversity jurisdiction in removal over a plaintiff's claim against a diverse defendant by finding that the claim against the nondiverse defendant is not sufficiently related to the claim against the diverse defendant.<sup>69</sup> The court can then sever the claims pursuant to Federal Rule 21.<sup>70</sup> Once the court severs the claims, it must remand the claim against the nondiverse defendant to state court.<sup>71</sup>

Unlike the doctrine of fraudulent joinder, the doctrine of fraudulent misjoinder has not been adopted uniformly by federal or circuit courts, and some courts refuse to recognize the doctrine altogether.<sup>72</sup> A court should not proceed to severance

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<sup>65</sup> See generally *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996). *Tapscott* is often credited as the first case to utilize the fraudulent misjoinder doctrine.

<sup>66</sup> Stacey L. Drentlaw, *Procedural Misjoinder: A New Avenue to Federal Court?*, 2010 A.B.A. SEC. MASS TORTS LITIG. COMM. 3.

<sup>67</sup> See *supra* Part IV.B.

<sup>68</sup> FED. R. CIV. P. 20(a).

<sup>69</sup> *Tapscott*, 77 F.3d at 1360 (finding "no real connection" between the claims against a diverse and nondiverse defendant).

<sup>70</sup> *In re Fosomax Prods. Liab. Litig.*, 2008 U.S. Dist. Lexis 57473, at \*43-44 (S.D.N.Y. July 28, 2008) ("Where fraudulent misjoinder is found, courts sever the misjoined party pursuant to Federal Rule of Civil Procedure 21, thereby preserving diversity jurisdiction over the remainder of the action."); *Frankland v. State Farm Fire & Cas. Co.*, No. 2:07-cv-1767, 2008 U.S. Dist. Lexis 105534, at \*9 (W.D. La. July 2, 2008) ("[I]n cases such as this in which the court is able to determine whether claims are misjoined on the basis of the pleadings, the court may choose to sever claims on its own initiative, in the interest of judicial efficiency, and remand *only the improperly joined claims*, while retaining those claims properly within its jurisdiction.") (emphasis added).

<sup>71</sup> 28 U.S.C.A. § 1447 (West 2010).

<sup>72</sup> The Eleventh Circuit adopted the procedural misjoinder doctrine, while the Fifth and Ninth Circuits have both cited *Tapscott* favorably without definitively adopting fraudulent misjoinder. Stacey L. Drentlaw, *Procedural Misjoinder: A New Avenue to Federal Court?*, 2010 A.B.A. SEC. MASS TORTS LITIG. COMM. 4 (citing *Tapscott*, 77 F.3d 1353 (adopting the fraudulent misjoinder doctrine)); *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002) ("[W]ithout 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."); *California Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. App'x 727, 729 (9th Cir. 2001) ("For purposes of discussion we will assume, without deciding, that this circuit would accept the doctrines of fraudulent and egregious joinder as applied to plaintiffs."). The Eighth Circuit has declined to adopt or reject the doctrine. *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 622 (8th Cir. 2010) ("We make no judgment on the propriety of the [fraudulent misjoinder]

under Federal Rule 21 without first finding fraudulent joinder or misjoinder. To understand how district courts have arrived at improperly utilizing Federal Rule 21, it is first important to understand the Supreme Court's *Newman-Green v. Alfonzo Larrain* decision, on which a number of these district courts rely.<sup>73</sup>

## V. THE SOURCE OF THE PROBLEM

### A. *Newman-Green, Inc. v. Alfonzo-Larrain*<sup>74</sup>

The issue presented in *Newman-Green, Inc. v. Alfonzo-Larrain* was whether a non-diverse defendant that spoils diversity jurisdiction could be dropped from an action thus allowing the federal court to retain jurisdiction over the remainder of the action.<sup>75</sup> *Newman-Green*, an Illinois corporation, alleged failure to pay contractual royalties and filed suit against a Venezuelan corporation and five individuals.<sup>76</sup> The trial court proceeded to the merits and granted summary judgment for the defendants, and *Newman-Green* appealed.<sup>77</sup>

At a Seventh Circuit panel hearing, the court questioned whether the district court had established jurisdiction to proceed to the merits of the case because one defendant was "stateless."<sup>78</sup> Under the statutory jurisdiction invoked by the plaintiff, jurisdiction exists when a citizen of one state sues a citizen of a foreign country and a citizen of a state diverse from the plaintiff's state.<sup>79</sup> Bettison, one of the named defendants, was a citizen of the United States, but was domiciled in Venezuela,<sup>80</sup> and the other four individual defendants were citizens of Venezuela.<sup>81</sup> Bettison was neither a citizen of Venezuela, nor was he a citizen of any state; therefore, the plaintiff did not meet the statutory qualifications for jurisdiction. The Seventh Circuit panel, finding a lack of jurisdiction, then held that Federal Rule 21 conferred upon them the power to dismiss Bettison as a dispensable party, thereby perfecting the court's jurisdiction under 28 U.S.C. § 1332(a)(2).<sup>82</sup>

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doctrine in this case, and decline to either adopt or reject it at this time."). The Supreme Court has not yet heard the issue.

This Note proceeds under the notion that the doctrine of misjoinder, when adopted by a federal court, is an appropriate means of activating Rule 21's severance power. Whether the doctrine of misjoinder is itself an appropriate or efficient use of judicial power is beyond the scope of this Note. For further discussion on the propriety of the doctrine of misjoinder, see generally, Hines & Gensler, *supra* note 1 and Percy, *supra* note 59.

<sup>73</sup> *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

<sup>74</sup> *Id.*

<sup>75</sup> See generally *id.*

<sup>76</sup> *Id.* at 828.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 28 U.S.C.A. § 1332(a)(3) (West 2010).

<sup>80</sup> *Newman-Green*, 490 U.S. at 828.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 829.

The Seventh Circuit, sitting en banc, however, came to a different conclusion, and reversed that decision.<sup>83</sup> Judge Posner wrote that Federal Rule 21 does not “empower[] appellate courts to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction.”<sup>84</sup> The Seventh Circuit, however, believed that as the Federal Rules apply to district courts, the district court *could* dismiss Bettison, and it remanded the case for that court to consider dropping him.<sup>85</sup>

The Supreme Court granted certiorari to resolve the conflict of whether an appellate court could “dismiss jurisdictional spoilers like Bettison.”<sup>86</sup> The Supreme Court then reversed the en banc Seventh Circuit opinion and held that *appellate courts* have the power to dismiss dispensable non-diverse parties from an action.<sup>87</sup> It is important, however, to observe what the Court *did not* hold in *Newman-Green*. The Court declined to decide in a definitive manner whether Federal Rule 21 grants district courts the power to confer jurisdiction retroactively by dismissing a non-diverse party.<sup>88</sup> The Court, instead, stated that it is “well-settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.”<sup>89</sup>

This reasoning is circular. The Court cites one interpretation of Federal Rule 21 by only *some* inferior federal courts as determinative.<sup>90</sup> But widespread misuse of a Federal Rule by lower courts may hardly be “well-settled.” Indeed, if anything is well-settled, it is that circuit courts and district courts are inferior to the Supreme Court, and the Supreme Court could have specifically held that Federal Rule 21 grants this power to a district court if it deemed such a holding appropriate. Instead, the circular reasoning of the Court represents that this power is well-settled not because Federal Rule 21 itself confers this power, but because a number of courts have previously exercised this power.

As Justice Kennedy’s dissent notes, however, “it has never been the rule that federal courts, whose jurisdiction is created and limited by statute, acquire power by adverse possession.”<sup>91</sup> Further, the dissent recognizes that Federal Rule 21 governs

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 830.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 837. Dicta, however, placed restrictions upon such a ruling. *See id.* at 837-38.

<sup>88</sup> *Id.* at 839 (Kennedy, J., dissenting). In refusing to explicitly hold that Federal Rule 21 grants this power, the majority wrote, “[a]lmost every modern Court of Appeals faced with this issue has concluded that it has the authority to dismiss a dispensable nondiverse party by virtue of Rule 21. . . . [W]e are reluctant to disturb this well-settled judicial construction . . . .” *Id.* at 833 (majority opinion).

<sup>89</sup> *Id.* at 832 (majority opinion).

<sup>90</sup> *Id.* at 832, n.6; *see also* *Fritz v. Am. Home Shield Corp.*, 751 F.2d 1152, 1154-55 (11th Cir. 1985); *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1068-69 (3rd Cir. 1979); *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 691-92 (4th Cir. 1978).

<sup>91</sup> *Newman-Green*, 490 U.S. at 839 (Kennedy, J., dissenting) (footnotes omitted). The doctrine of adverse possession provides that one who exercises open and notorious, continuous, exclusive, and adverse dominion and control over a property legally owned by another for a jurisdictionally determined period of time, will have a valid legal claim to

misjoinder and nonjoinder of parties, neither of which was present in this case.<sup>92</sup> It is no coincidence, then, that the majority's citation of Federal Rule 21 omits the rule's qualifying title.<sup>93</sup>

*B. The Sins of the Father: The Progeny Problems*

For a time after *Newman-Green*, the federal courts largely did not sever parties without a misjoinder analysis, but in more recent years, the federal courts have taken the holding to a new level. In 2009, plaintiff Anthony DeGidio brought suit in Ohio state court for products liability and medical malpractice against three drug companies and two individuals respectively for injuries allegedly caused by a prescription drug.<sup>94</sup> The three companies' principal places of business<sup>95</sup> were in states diverse from Ohio, while a doctor, one of the individual defendants was a citizen of Ohio.<sup>96</sup> The drug company defendants, without the participation of the individual defendants, removed the case to federal court on the basis of diversity jurisdiction.<sup>97</sup> DeGidio then filed a motion to remand the action to state court.<sup>98</sup> The federal court acknowledged that complete diversity did not exist on the face of the complaint since both DeGidio and the defendant doctor were citizens of the state of Ohio.<sup>99</sup>

The drug company defendants asserted three theories for why diversity jurisdiction had nonetheless been fulfilled: 1) the federal court's power to sever dispensable parties under Federal Rule 21; 2) the fraudulent misjoinder doctrine; and

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ownership rights of that property. *JESSE DUKEMINIER ET AL.*, PROPERTY 124-29 (6th ed. 2006). The metaphor suggests that the Court's majority has recognized a power so exercised by the lower courts as valid, not because the lower court followed the Federal Rules, but because of the manner in which it inconsistently exercised a power not granted therein.

<sup>92</sup> *Newman-Green*, 490 U.S. at 839 (Kennedy, J., dissenting).

<sup>93</sup> *Id.* at 832 (majority opinion). The Court's citation states that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." *Id.* The Court did not include the title of Federal Rule 21, "Misjoinder and Nonjoinder of Parties." FED. R. CIV. P. 21.

<sup>94</sup> *DeGidio v. Centocor, Inc.*, No. 3:09-CV-721, 2009 WL 1867676, at \*1 (N.D. Ohio June 29, 2009).

<sup>95</sup> In 2010, the Supreme Court clarified the meaning of "principal place of business." *See Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010).

And we conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often metaphorically called that place the corporation's "nerve center." We believe that the "nerve center" will typically be found at a corporation's headquarters.

*Id.* at 1186.

<sup>96</sup> *DeGidio*, 2009 WL 1867676, at \*3. The citizenship of the second individual, a nurse, was unknown. *Id.*

<sup>97</sup> *Id.* at \*1.

<sup>98</sup> *Id.* at \*3.

<sup>99</sup> *Id.* at \*4.

3) the fraudulent joinder doctrine.<sup>100</sup> Without any initial examination of either fraudulent joinder or fraudulent misjoinder, the court cited *Newman-Green* to simply assert that “under Rule 21 . . . [it could] retain jurisdiction by severing claims against nondiverse dispensable defendants.”<sup>101</sup>

Whether a party is properly joined and whether it is dispensable, however, are two very different analyses. While refusing to overtly apply the fraudulent misjoinder doctrine, *DeGidio* nonetheless reasoned that the drug company defendants were “not necessary” because the medical malpractice claims against the individuals involved “different legal standards and different factual allegations” than the product liability claim against the companies.<sup>102</sup> This standard is analogous to the Federal Rule 20 misjoinder analysis because the court reasoned that while all the claims were valid, they did not arise from the same transaction or occurrence.<sup>103</sup> The court, however, proceeded to an analysis of whether the drug companies were “necessary” or “indispensable” under Federal Rule 19.<sup>104</sup> Federal Rule 19 governs required joinder, however, and *DeGidio* exercised his right to *permissively* join the drug companies under the state joinder rule analogous to Federal Rule 20. The implication, then, in such an examination of whether the party is “indispensable” under Federal Rule 19, is that permissively joined parties in state court are likely dispensable parties in federal court. Under this assumption, permissively joined parties in state court actions would often be severable by discretion under Federal Rule 21 when a defendant seeks to remove the case to federal court.

*DeGidio* and similar cases<sup>105</sup> are also distinguishable from *Newman-Green* on other grounds. First, *Newman-Green* did not involve removal from state to federal court.<sup>106</sup> The process of removal involves important concerns regarding federalism which are not present in actions filed originally in federal court.<sup>107</sup> Second, plaintiff *Newman-Green* did not object to the dropping of Bettison, the nondiverse defendant, which indicates that the plaintiff may not have suffered prejudice under such an action. Third, the *Newman-Green* Court warned that inferior courts should “carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation.”<sup>108</sup> Fourth, the Court warned that the power to dismiss a

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at \*4.

<sup>102</sup> *Id.* at \*3.

<sup>103</sup> FED. R. CIV. P. 20. This is not, however, a perfect analogy because under FED. R. CIV. P. 20(a)(2)(B), “[p]ersons . . . may be joined in one action as defendants if [] any question of law or fact common to all defendants will arise in the action.” In *DeGidio*, there is at least one issue of fact common to both the drug company defendants and the individual defendants—whether the prescription drug was indeed defective. Therefore, a Rule 20 analysis for misjoinder might result in finding that the parties were properly permissively joined, thus negating severance under Federal Rule 21.

<sup>104</sup> *DeGidio*, 2009 WL 1867676.

<sup>105</sup> See *supra* note 2 and accompanying text.

<sup>106</sup> See generally *Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

<sup>107</sup> *DeGidio*, 2009 WL 1867676, at \*3.

<sup>108</sup> *Newman-Green*, 490 U.S. at 838.

dispensable nondiverse party should be “exercised sparingly.”<sup>109</sup> Fifth, the Court warned against abuse, stating that it was “reluctant to disturb [the power to dismiss dispensable nondiverse parties] . . . particularly when there is *no evidence that this authority has been abused . . . by district courts . . .*”<sup>110</sup> Sixth, the Court noted that the failure to drop the defendant would have resulted in a waste of time and judicial resources.<sup>111</sup>

## VI. THE PROBLEMS EXPOUNDED

### A. *No Outlet: The Limits of Inherent Power*

Since the language of Federal Rule 21 clearly applies only to misjoined and nonjoined parties, from what source does this power to proceed past jurisdictional satisfaction to sever parties flow? As the dissent in *Newman-Green* points out, we are in a modern procedural era where the Federal Rules of Civil Procedure and Title 28 provisions, not the common law, govern the procedure and jurisdiction of the federal district courts.<sup>112</sup> The majority, however, cites to two cases from the 1800s for support, a time in which the modern Federal Rules did not exist. The first case the Court cites is *Carneal v. Banks*,<sup>113</sup> but this case does not support the notion that a court may drop properly joined parties. In *Carneal*, Chief Justice Marshall wrote “[t]hat they have been *improperly made defendants* in his bill, cannot affect the jurisdiction of the Court as between those parties who are properly before it.”<sup>114</sup> Such a finding of improperly joined parties would justify the present day use of Federal Rule 21 to sever misjoined parties under either the fraudulent joinder or fraudulent misjoinder doctrines.<sup>115</sup>

The second case the *Newman-Green* Court cites is more supportive of dropping a misjoined party to retain jurisdiction, but it proceeds from an argument of inherent power. In *Horn v. Lockhart*,<sup>116</sup> the Court reasoned, “the question always is . . . whether . . . [nondiverse parties] are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.”<sup>117</sup> Although supportive of the majority’s proposition, the language “*should be retained*” indicates only that the *Lockhart* Court believed that it had discretion under its inherent power to dismiss a nondiverse and dispensable party. In present day, however, although the Federal Rules appropriately allow judges wide latitude of discretion, the power to

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<sup>109</sup> *Id.* at 837.

<sup>110</sup> *Id.* at 833 (emphasis added).

<sup>111</sup> *Id.* at 838.

<sup>112</sup> *Id.* at 842 (Kennedy, J., dissenting).

<sup>113</sup> *Carneal v. Banks*, 23 U.S. 181 (1825).

<sup>114</sup> *Id.* at 188 (emphasis added).

<sup>115</sup> *See supra* Parts IV.C-D.

<sup>116</sup> *Horn v. Lockhart*, 84 U.S. 570 (1873).

<sup>117</sup> *Id.* at 579.

dismiss properly joined parties to retroactively create jurisdiction for removal is not discretionary; it is imaginary.<sup>118</sup>

While the use of judicial inherent power has a long history in the procedural scheme, no clarity exists as to the exact nature of a court's inherent power.<sup>119</sup> Since the implementation of the modern scheme of creating federal rules, courts have been vague in articulating the delineation between and the coexistence of inherent power and the rules of procedure.<sup>120</sup> Federal Rules of procedure, however, should at least temper a court's inherent power. If a federal court maintains unlimited inherent power even where relevant procedural rules exist, this could render procedural rules meaningless. Any exercise of inherent power should extend only to those areas that the rules do not address, and a court should not claim inherent power to change the history, purpose, and plain language of a federal rule.

The *Newman-Green* Court proceeded under the assumption that the power to sever lies somewhere beyond what is plainly sanctioned within the Federal Rules themselves, and in so doing, the Court substituted the rule amendment process with its inherent power. By judicial decree, the Supreme Court sanctioned the use of Federal Rule 21, with caveats, to drop properly joined parties despite the Rule's purpose. If the Court can exercise its inherent power to change the operation of a federal rule, then it has circumvented Congress' intended mechanism for a multi-layered rule-creation process<sup>121</sup> and the systematic checks and balances that such a framework provides.

Alternatively, some federal courts have held that they have inherent power to perfect jurisdiction by dropping a nondiverse defendant where the plaintiff is amenable to the option.<sup>122</sup> But where a plaintiff is amenable to dismissing a nondiverse defendant, this is not an exercise of "inherent power;" the court simply bypasses the plaintiff's need to file a motion to voluntarily dismiss the nondiverse

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<sup>118</sup> See Percy, *supra* note 59, at 620 ("Newman-Green does not support the proposition that district courts may use Rule 21 to dismiss properly joined dispensable parties in order to create removal jurisdiction.").

<sup>119</sup> Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 312 (2010).

<sup>120</sup> *Id.* Professor Samuel P. Jordan places a court's inherent power into two categories: 1) gap-fillers; and 2) escape valves. *Id.* at 313-16. Gap-filling inherent powers "permit courts to use their inherent power to fill gaps left by an existing but incomplete procedural framework." *Id.* at 313. Escape valve inherent power is "used as an alternative source of authority in situations where a more formal procedure also applies . . . to circumvent the answer provided by a competing source of authority." *Id.* at 315. Such a use of inherent power as an escape valve flouts the rule-creation process and frustrates litigants' expectations. *Id.*

<sup>121</sup> *Id.* at Part I.B.3.

<sup>122</sup> *Neeld v. Am. Hockey League*, 439 F. Supp. 459, 462 (W.D.N.Y. 1977) ("It has long been established . . . that a federal court, *on plaintiff's motion*, may drop a non-diverse defendant and retain jurisdiction if that party is [dispensable]. Although plaintiff has not made a motion to dismiss the state claim . . . this court has inherent power to perfect its jurisdiction and it would be needlessly ritualistic to require plaintiff to make such a motion prior to dismissing the state claim.") (citing *Horn v. Lockhart*, 84 U.S. 570 (1873)) (emphasis added); *see also* *Planning and Investing Co. v. Hemlock*, 50 F.R.D. 48 (S.D.N.Y. 1970); *Karakatsanis v. Conquestador Cia. Nav., S.A.*, 247 F. Supp. 423 (S.D.N.Y. 1965).

defendant.<sup>123</sup> These courts simply recognize the efficiency of bypassing the ritualism of requiring the plaintiff to first file a motion to dismiss where the court is aware that if given the chance, the plaintiff would have filed a motion to voluntarily dismiss the claim against the nondiverse party.<sup>124</sup> An argument of inherent power here is misleading. This exercise of discretion is merely a preemptive strike to promote efficiency and not an exercise of an inherent jurisdiction-perfecting power.

The failure of the *Newman-Green* Court to specifically hold that Federal Rule 21 itself empowers a district court to sever a properly joined nondiverse dispensable party represents a calculated hesitation by the majority. The Court probably understood that the title and text of Federal Rule 21 did not support its holding, and this is likely the reason that the Supreme Court referred to the use of this tactic as “well-settled” by the lower courts rather than affirmatively asserting that Federal Rule 21 grants this power.<sup>125</sup>

### *B. Suspending Jurisdiction: Bypassing Complete Diversity*

Removal requires complete diversity.<sup>126</sup> The doctrines of fraudulent joinder and, to a somewhat lesser extent, fraudulent misjoinder, have provided successful rationales for a court to drop improperly joined parties under Federal Rule 21 before finding complete diversity and proceeding to the merits of an action. Because Congress has approved Federal Rules 19, 20 and 21, this judicial exercise is within the bounds of the power of the federal courts. When, however, a federal court proceeds to severance under Federal Rule 21 without a finding of any recognized class of misjoinder, it takes action which is improper because complete diversity does not exist, and the court therefore has no power to act.<sup>127</sup> Indeed, to take such an action, the court must first suspend the requirement for complete diversity under

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<sup>123</sup> *Neeld*, 439 F. Supp. at 462.

<sup>124</sup> *Id.*; see also Percy, *supra* note 59, at 619-20 (“*Newman-Green* [is] binding precedent to support [federal court] use of Rule 21 to create jurisdiction retroactively in cases originally filed in federal court where the plaintiff has no objection to the dismissal of the [nondiverse defendant] and where dismissal for lack of jurisdiction would waste judicial resources.”) (emphasis added).

<sup>125</sup> See *supra* notes 88-90 and accompanying text.

<sup>126</sup> *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (“The current general-diversity statute . . . applies only [where] the citizenship of each plaintiff is diverse from the citizenship of each defendant.”); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (“[D]iversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff”); *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

<sup>127</sup> *Shannon v. Mejias*, No. 06-1191-MLB, 2006 U.S. Dist. Lexis 80793, at \*15-16 (E.D. Kan. Nov. 3, 2006) (refusing to sever because the court must first have jurisdiction to consider severance); *Melton v. Merck & Co.*, No. 7:06-45-JMH, 2006 U.S. Dist. Lexis 37376, at \*14 (E.D. Ky. June 1, 2006) (“With no support for alleging misjoinder under Rule 20, [the] argument that Rules 19 and 21 can be employed after removal to create complete diversity and avoid remand is without merit.”); *Gonzalez v. J.C. Penny Corp., Inc.*, No. 05-22254, 2005 U.S. Dist. Lexis 44840, at \*7 (S.D. Fla. Nov. 7, 2005) (“Until and unless a situation arises in which there exists complete diversity of citizenship, this court may not sever claims, it may not dismiss parties, it may do nothing but remand this action . . .”).

both sections 1332 and 1441(a), and it must act in spite of this requirement.<sup>128</sup> This use of Federal Rule 21, then, circumvents the statutes that Congress has passed to regulate the jurisdiction of inferior federal courts. Indeed, it is a temporary exercise of diversity jurisdiction where none exists.<sup>129</sup>

### C. *Stealing Jurisdiction: The Concern for Federalism*

There are two levels on which a federal court severance of properly joined nondiverse parties improperly ignores the state court system. The first level concerns the application of the Federal Rules instead of state rules to find misjoinder.<sup>130</sup> Most federal courts utilize the state joinder rule, while some utilize the federal joinder rule to evaluate fraudulent misjoinder.<sup>131</sup> In many states, the corresponding rule is identical or similar to the Federal Rule so that same result will occur, but in other states the rule is different and the court could come to a different result in applying that standard.<sup>132</sup> In this instance, an application of the federal rule ignores the state's authority to formulate and enforce its own joinder rules.<sup>133</sup> The state may utilize its own joinder rules to find that no nondiverse party was improperly joined. If the plaintiff properly joined a nondiverse defendant in state court, but the federal court measures misjoinder by the Federal Rules, then a federal court must ignore the plaintiff's state court procedural rights.

The second level of federal dominance concerns the use of Federal Rule 21 to sever parties where the federal court does not find, or it claims that it need not at all examine misjoinder.<sup>134</sup> Where there is no finding of misjoinder, the federal court, by carving up an action that may have been properly joined in a state court into separate actions, seizes a case from the jurisdiction of the state court with no regard for the operation of the state court.<sup>135</sup> Moreover, even cases that employ Federal Rule 21 in

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<sup>128</sup> Hines & Gensler, *supra* note 1, at 797; *see also* Shannon v. Mejias, No. 06-1191-MLB, 2006 U.S. Dist. Lexis 80793, at \*16 (E.D. Kan. Nov. 3, 2006) (“A court simply cannot create diversity jurisdiction by carving out the non-diverse parties in a case removed from the state system.”).

<sup>129</sup> *See Shannon*, 2006 U.S. Dist. Lexis 90793, at \*16 (finding that using Rule 21 to sever actions originally brought in federal court is distinct from cases that are removed to federal court from state court); *see also* Hines & Gensler, *supra* note 1, at 797.

<sup>130</sup> There is controversy surrounding which standard to apply. For further reading, see Percy, *supra* note 59, at 590.

<sup>131</sup> *Id.* at 591.

<sup>132</sup> Hines & Gensler, *supra* note 1, at 812.

<sup>133</sup> *See Percy supra*, note 59, at Part V.A.

<sup>134</sup> DeGidio v. Centocor, Inc., No. 3:09CV721, 2009 WL 1867676, at \*4 (N.D. Ohio June 29, 2009) (stating that because Federal Rule 21 allows the court the power to drop dispensable parties, it need not examine whether diversity jurisdiction exists under an analysis of fraudulent joinder or misjoinder).

<sup>135</sup> Cassens v. Cassens, 430 F. Supp. 2d 830, 838 n.4 (S.D. Ill. 2006) (conceding that there is authority to support dropping parties to preserve jurisdiction in actions brought originally to the federal court, but stating “the Court is not aware of any controlling authority authorizing the use of Rule 21 to permit a federal court to exercise jurisdiction in a removed case over the objections of a plaintiff.”).

this manner acknowledge that the principles of federalism require that the removal statute be strictly construed, and that any doubts should be resolved against removal from the state court system.<sup>136</sup>

By acknowledging the federalism concerns raised by removal and nevertheless severing nondiverse properly joined parties, some federal courts have decided that there is no doubt about the propriety of their use of Federal Rule 21 and that this use does not interfere with state jurisdiction. A federal court, however, acting without jurisdiction to take an action which the state otherwise would have the power to adjudicate, deprives the state court of its jurisdiction. Not only does severance under these circumstances infringe upon state authority, but it conflicts with other provisions in the Federal Rules themselves.

#### D. Federal Rule 82

Federal Rule of Civil Procedure 82 states that “[t]hese rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.”<sup>137</sup> The Federal Rules should not be construed in such a manner to extend the district court’s subject matter jurisdiction.<sup>138</sup> In his *Newman-Green* dissent, Justice Kennedy wrote that “[s]ince dismissing a nondiverse party confers jurisdiction retroactively on the district court, it is questionable whether relying on Federal Rule 21 is consistent with Federal Rule 82’s clear admonition.”<sup>139</sup> While dropping an improperly joined party would arguably not violate Federal Rule 82,<sup>140</sup> dropping a properly joined nondiverse party *would* violate this rule because, here, the court acts without subject matter jurisdiction to create subject matter jurisdiction.<sup>141</sup>

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<sup>136</sup> *Thomas v. Bank of Am. Corp.*, 570 F.3d 1280, 1282 n.4 (11th Cir. 2009); *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1294 (11th Cir. 2008); *Queen ex rel. Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989).

<sup>137</sup> FED. R. CIV. P. 82.

<sup>138</sup> *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 840 (1989) (Kennedy, J., dissenting) (“It must be remembered . . . that Federal Rule of Civil Procedure 82 expressly provides that the other Rules must not be construed to extend or limit the jurisdiction of the district courts.”); *see also Henderson v. United States*, 517 U.S. 654, 664 (1996); *Cantanella v. California*, 404 F.3d 1106, 1113 (9th Cir. 2005); *Easter v. Am. W. Fin.*, 381 F.3d 948, 963 (9th Cir. 2004); *United States v. Eleven Vehicles, Their Equip. and Accessories*, 200 F.3d 203, 216 (3d Cir. 2000).

<sup>139</sup> *Newman-Green*, 490 U.S. at 840 (Kennedy, J., dissenting).

<sup>140</sup> *But see Palermo v. Letourneau Techs., Inc.*, 542 F. Supp. 2d 499, 517 (S.D. Miss. 2008) (“[A] district court may run afoul of Rule 82 if it uses a federal rule to determine if the plaintiff’s claims were properly joined under state law at the time of removal.”); Percy, *supra* note 59, at 595 (applying federal joinder rules instead of state joinder rules to determine misjoinder may violate Rule 82).

<sup>141</sup> *Gonzalez v. J.C. Penney Corp.*, No. 05-22254, 2005 U.S. Lexis 44840, at \*6 (S.D. Fla. Nov. 7, 2005) (“Using Rule 21 in [this] manner . . . would allow a district court to ‘create’ jurisdiction on removal simply by dismissing nondiverse, dispensable [parties] . . .”) (citation omitted).

*E. Federal Rule 1 and Undue Hardship on Plaintiffs*

Federal Rule of Civil Procedure 1 states that the Federal Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>142</sup> The district courts have an affirmative duty to utilize procedure to ensure a fair resolution of matters without excessive cost or delay.<sup>143</sup> When a federal court utilizes Federal Rule 21 to sever a properly joined dispensable nondiverse party, the court runs the risk of violating Federal Rule 1.<sup>144</sup> Upon severing, the court will either dismiss without prejudice<sup>145</sup> or remand the nondiverse party to state court. Subdividing a case into multiple actions where they arise from the same transaction or occurrence,<sup>146</sup> however, may frustrate Federal Rule 1 by requiring the inefficiency of separate cases — one in federal court and one in state court.<sup>147</sup> Moreover, even *Newman-Green* recognizes that such a use of Federal Rule 21 might prejudice parties to the litigation.<sup>148</sup>

Courts have found severance to be improper where the severance causes prejudice or delay, produces judicial inefficiency, or precipitates fundamental unfairness.<sup>149</sup> Some courts, however, have recently reasoned that the creation of multiple actions by severing a nondiverse party does not produce results egregious enough to violate the Federal Rule 1 mandate of efficient, cost-effective

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<sup>142</sup> FED. R. CIV. P. 1.

<sup>143</sup> *Johnson v. Bd. of Cnty. Com’rs of Fremont*, 868 F. Supp. 1226, 1230 (D. Colo. 1994) (noting that even if the parties themselves do not raise objections, the courts themselves are obligated to consider the goals of Federal Rule of Civil Procedure 1).

<sup>144</sup> *Baker v. Tri-Nations Express, Inc.*, 531 F. Supp. 2d 1307, 1318 (M.D. Ala. 2008) (“[A]ny Rule 21 discretion to dismiss parties and sever claims to ‘create’ jurisdiction does not extend to the instant situation and requested action, nor does it promote judicial economy where all of the claims arise out of one accident.”).

<sup>145</sup> A dismissal “without prejudice” leaves the plaintiff with the opportunity to re-file its complaint against the nondiverse dispensable party in another action. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001).

<sup>146</sup> FED. R. CIV. P. 20.

<sup>147</sup> *See e.g.*, *Garcia v. Sandoz Inc.*, No. CV-10-87, 2010 U.S. Dist. Lexis 42505, at \* 11 (S.D. Tex. Apr. 30, 2010); *Ash v. Providence Hosp.*, No. 08-0525-WS-M, 2009 U.S. Dist. Lexis 12794, at \*43 (S.D. Ala. 2009); *Baker v. Tri-Nations Express, Inc.*, 531 F. Supp. 2d 1307, 1318 (M.D. Ala. 2008) (“[A]ny Rule 21 discretion to dismiss parties and sever claims to ‘create’ jurisdiction does not extend to the instant situation and requested action, nor does it promote judicial economy where all of the claims arise out of one accident.”).

<sup>148</sup> *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 837-38 (1989).

<sup>149</sup> *See id.*; *Garcia*, No. CV-10-87 at \* 11 (“A Court may determine that severance is improper if severance would cause prejudice and delay, decrease judicial economy, or fail to the [sic] safeguard principals of fundamental fairness.”); *see also* *Acevedo v. Allsup’s Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010) (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir 2000)); *Applewhite v. Reichhold Chems., Inc.*, 67 F.3d 571, 574 n.12 (5th Cir. 1995); *Morris v. Northrop Grumman Corp.*, 37 F. Supp. 2d 556, 581 (E.D.N.Y. 1999).

procedure.<sup>150</sup> Other courts have failed to even address the inefficiencies produced by severance and have instead relied upon the fact that the plaintiff still has a remedy against the dismissed or remanded nondiverse party in state court.<sup>151</sup> These decisions implicitly indicate compliance with Federal Rule 1. Whether a plaintiff still has a remedy against the severed party, however, does not sufficiently address the mandates of Federal Rule 1. The plaintiff is ultimately prejudiced in relation to the cost and inefficiency inevitably produced by the necessity of maintaining two related actions in separate forums.

## VII. THE POSSIBLE SOLUTIONS

Either the Federal Rules of Civil Procedure represent the full and complete procedural options available to federal district courts or they do not. If they do not represent complete procedural power, and the federal courts wield too vast inherent power beyond the rules themselves, then the level of predictability or uniformity in the federal legal system is jeopardized. At any time, a court might cite a nineteenth century case for its procedural analysis in an attempt to circumvent the Federal Rules and to give a federal district court the option of rediscovering an “inherent power.” Federal Rule 21 is either limited to misjoined parties as its plain language suggests, or it is not.

There are two possible branches of government that could solve the problems created by the Supreme Court’s ambiguous statement that the use of Federal Rule 21 to drop dispensable properly joined parties is “well-settled” by the district courts while failing to hold whether Federal Rule 21 itself actually grants this power to the district courts.<sup>152</sup> The judicial branch itself could rectify its own ambiguity by the exercise of judicial restraint by amending the current Federal Rule 21, or by following the procedures established to add a new federal rule to the Federal Rules of Civil Procedure. Changing the Federal Rules of Civil Procedure, however, is a combined approach, since congressional approval would be required. While a judicial branch solution is ideal, congressional action could also solve the problem. If the federal courts continue to ignore the plain language and purpose of Federal Rule 21, Congress should simply exercise its power to amend the grant of diversity jurisdiction to exclude this misuse of Federal Rule 21. Alternatively, Congress should amend the removal statute to define “properly joined” parties.

### A. A Restrained Approach from the Bench

First, a federal court should limit its exercise of Federal Rule 21 to sever nondiverse parties in removal actions only when they are improperly joined under either a finding of fraudulent joinder<sup>153</sup> or fraudulent misjoinder.<sup>154</sup> If the district

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<sup>150</sup> DeGidio v. Centocor, Inc., No. 3:09CV721, 2009 WL 1867676, at \*4 (N.D. Ohio June 29, 2009) (“While fighting on two fronts will no doubt be inconvenient, and probably more expensive, I do not find the maintenance of two lawsuits unfairly or unduly prejudicial.”).

<sup>151</sup> See Order Denying Plaintiff’s Motion to Remand at 7, Williams v. Knoll Pharm. Co., No. 5:03-CV-8030-JG (N.D. Ohio July 11th, 2003) (PACER) (“Further, the . . . plaintiffs have an adequate remedy if the Court drops the nondiverse Physician Defendants because the . . . plaintiffs can proceed with their claims against the . . . Defendants in state court.”).

<sup>152</sup> See *supra* notes 88-92 and accompanying text.

<sup>153</sup> See *supra* Part IV.C.

court has not adopted the doctrine of fraudulent misjoinder, it should do so before exercising Federal Rule 21 to sever improperly joined parties where the requirements of Federal Rule 20 are not met. However, in the event that a federal court turns to *Newman-Green*, it should limit this precedent to its unique set of facts. There, the Court recognized the use of Federal Rule 21 to drop a dispensable nondiverse party to create diversity jurisdiction but only where the action was originally brought in federal court, where the plaintiff was amenable to the severance, where there existed no prejudice to the parties, and where no waste of judicial resources would occur.<sup>155</sup> Moreover, the Court warned that such a procedure should be used only rarely.<sup>156</sup>

Removal actions differ from cases originally brought in federal court. A federal court should consider the principles of federalism when deciding whether to take jurisdiction from a case originally filed in state court.<sup>157</sup> The principles of federalism require the court to resolve any ambiguities or doubts in favor of remand.<sup>158</sup> A federal court, therefore, should respect the independent power of the state court to hear a case properly brought before it without manipulating the party lineup in a manner that overrides state court jurisdiction. Utilizing Federal Rule 21 to sever parties only upon a finding of misjoinder not only properly balances the right of the plaintiff to choose a state court forum and the statutory right of the defendant to remove an improperly joined case to federal court, but it also respects the plain language of Federal Rule 21 and the spirit of its historical predecessors.

A court should not exercise its inherent power to change the fundamental purpose of Federal Rule 21 as a substitute for the rule amendment process. Proponents of vast judicial discretion might reject the idea of a more narrow use of inherent power, even where existing Federal Rules regulate a procedure such as joinder.<sup>159</sup> In *Chambers v. NASCO, Inc.*, the Supreme Court asserted that federal courts necessarily enjoy a level of implied powers “which cannot be dispensed with.”<sup>160</sup> One might argue that this inherent power of the federal courts allows for liberal interpretation of procedural rules. For dropping properly joined parties, however, the Supreme Court has tied its perceived inherent power to Federal Rule 21 itself.<sup>161</sup> In this sense, the Court has not simply asserted an inherent power beyond the Rules, but has utilized its inherent power to change the meaning of a promulgated Rule.

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<sup>154</sup> See *supra* Part IV.D.

<sup>155</sup> Percy, *supra* note 59, at 619-20.

<sup>156</sup> *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (“Although we hold that the courts of appeals have the authority to dismiss a dispensable nondiverse party, we emphasize that such authority should be exercised sparingly.”).

<sup>157</sup> See, e.g., *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983).

<sup>158</sup> *Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F. Supp. 1098, 1102 (D.S.C. 1990).

<sup>159</sup> Struve, *supra* note 26, at 1130.

<sup>160</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation omitted).

<sup>161</sup> In *Newman-Green*, the Court cited two cases from the 1800s pre-dating the Federal Rules of Civil Procedure as support for an inherent power to drop properly joined parties, but then brought this inherent power into the interpretation of Federal Rule 21 despite the Rule’s plain language and historical purpose. See *supra* Part VI.A.

Instead of claiming inherent power, federal courts should first utilize Federal Rules 19, 20, and 21 to regulate joinder. While federal courts do enjoy an undetermined level of inherent procedural power,<sup>162</sup> the court should not overemphasize its inherent power where the rules creation process has produced a procedural rule or several procedural rules together to regulate a procedure such as joinder of parties. If the inherent power of the court is not at least tempered where formal rules exist, then procedural rules themselves, as well as the process that produces them, become meaningless. For these reasons, a court should rely upon the history and purpose of Federal Rule 21 to restrict its application to the severance of only misjoined parties.

*B. Follow Procedure: Amend the Federal Rules*

Instead of exercising Federal Rule 21 in a manner inconsistent with its mandate, the federal courts should seek to amend Federal Rule 21 itself, or they should seek to create a new federal rule by splitting Federal Rule 21 into two separate rules. Since such a process would entail approval by Congress,<sup>163</sup> and because the Constitution ultimately vests Congress with the power to establish inferior federal courts,<sup>164</sup> following this process would preserve the constitutional intent for Congress to regulate the federal courts. The rules creation process as established by Congress should be preserved and followed.

In its present form, Federal Rule 21 is entitled “Misjoinder and Nonjoinder of Parties” and expressly provides that “[m]isjoinder of parties is not a ground for dismissing an action. On motion, or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.”<sup>165</sup> If, as the title suggests, the federal courts wish to expand the scope of Federal Rule 21 beyond misjoined parties, a proposed rule should expressly indicate such an expansion, and Congress should be given the opportunity to weigh the consequences of such a rule.<sup>166</sup> Following the rules creation process ensures a multi-layered review of a proposal before its implementation, as intended by Congress.<sup>167</sup>

Alternatively, a new severance rule, wholly separate from Federal Rule 21, should be introduced to encompass the recent declaration of some federal district courts that they have the power to sever nondiverse dispensable parties in order to create diversity jurisdiction whenever they deem appropriate. Such a rule, however, would still conflict with the mandate of Federal Rule 82 that the Federal Rules do

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<sup>162</sup> Jordan, *supra* note 119, at 312.

<sup>163</sup> See *supra* text and accompanying notes 21-24.

<sup>164</sup> U.S. CONST. art III, § 1; U.S. CONST. art I, § 8, cl. 9.

<sup>165</sup> FED. R. CIV. P. 21.

<sup>166</sup> Such a rule might still conflict with Federal Rule 82, *supra* Part VI.D, and with Federal Rule 1, *supra* Part VI.E.

<sup>167</sup> Struve, *supra* note 26, at 1140. “Requiring that changes take place through the rulemaking process – rather than through adjudication – at least increases the chances that amendments will be subjected to a deliberative process and informed by practical knowledge. In addition, the structure of the rulemaking process facilitates informed and deliberative decision making and permits a holistic approach to the revision of the Rules.” *Id.*

not “extend or limit the jurisdiction of the district courts.”<sup>168</sup> This solution is proposed only because it would necessitate congressional action to either grant or to ultimately deny this “procedural” power to the federal courts. If the judicial branch, having already asserted such a power, avoids the proper rule amendment process, congressional remedial action, although unlikely, remains possible.

### C. Congressional Action

There is a real possibility in the future that courts will further continue to fracture on the proper use of Federal Rule 21. If the problem worsens to the point where uniformity and predictability become severely impaired for plaintiffs, Congress could take action. In the absence of judicial restraint, Congress should exercise its authority to regulate the practice and procedure of the federal courts.<sup>169</sup> Although Congress has delegated the bulk of its rule making authority to the judicial branch through the Rules Enabling Act,<sup>170</sup> Congress retains the right to amend or to abridge the Federal Rules of Civil Procedure by statute.<sup>171</sup> The Federal Rules hold “presumptive validity,”<sup>172</sup> but may still be challenged as inconsistent with the powers delegated by Congress.<sup>173</sup> Here, the problem is not with Federal Rule 21 itself, but with the evolving interpretation of the Federal Rule. Congress has two options for amending statutes to curtail the use of Federal Rule 21 by district courts to create diversity jurisdictions in removal actions by dropping properly joined nondiverse parties: it can either amend the diversity statute or amend the removal statute.

#### 1. The Broad Approach: Amend 28 U.S.C. § 1332

Should federal courts fail to exercise the proper restraint in their application of Federal Rule 21, Congress could amend 28 U.S.C. section 1332, its diversity jurisdiction key to the federal courts. Congress should take a broad approach and require a finding of misjoinder as a prerequisite to severance under Federal Rule 21 as its text suggests. Such an approach would not only prevent severance without misjoinder in removal actions, but would abrogate *Newman-Green*, in that misjoinder would become a necessary prerequisite even for actions brought originally to the federal court. The language of 28 U.S.C. section 1441 incorporates the definition of diversity jurisdiction into section 1332. A broad approach would require a change to the grant of diversity jurisdiction in section 1332 since section 1441 is dependent upon the definition of section 1332’s jurisdictional grant on diversity grounds. Under this mechanism, then, Congress would preserve its power to hold the keys to the jurisdiction of the federal courts under both its statutory grant of diversity jurisdiction<sup>174</sup> and its statutory grant of removal.<sup>175</sup>

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<sup>168</sup> FED. R. CIV. P. 82.

<sup>169</sup> *Jackson v. Stinnett*, 102 F.3d 132, 134 (5th Cir. 1996); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10, 61 (1941); *Wayman v. Southard*, 23 U.S. 1, 21 (1825).

<sup>170</sup> See *supra* note 22 and accompanying text.

<sup>171</sup> *Jackson*, 102 F.3d at 134; *Hawkins v. United States*, 358 U.S. 74, 78 (1958).

<sup>172</sup> *Exxon Corp. v. Burglin*, 42 F.3d 948, 950 (5th Cir. 1995).

<sup>173</sup> *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

<sup>174</sup> 28 U.S.C.A. § 1332 (West 2010).

<sup>175</sup> 28 U.S.C.A. § 1441 (West 2010).

Section 1332 should be amended to expressly state that a district court may not manipulate an action to create diversity jurisdiction by dropping or severing any party or claim where the parties have been properly permissively joined in one action under the same requirements as Federal Rule 20. Such an amendment would limit the use of Federal Rule 21 to its plain language in that severance would be limited to only improperly joined parties. This amendment would allow the federal courts to retain a level of discretion to determine when parties are improperly joined under Federal Rule 20. Should the state rule of joinder in the rare instance, however, conflict with Federal Rule 20, the state rule should take precedent over the Federal Rule.<sup>176</sup> This amendment would also eliminate the illogical test of dispensability and require the courts to adopt the fraudulent misjoinder doctrine if they wish to dismiss or to sever parties against whom plaintiffs assert insufficiently related claims. Parties otherwise properly permissively joined under Federal Rule 20 or the state corollary could not be severed simply to create diversity jurisdiction. Although this is the better Congressional solution, another narrower approach would remain available to Congress.

## 2. The Narrow Approach: Amend 28 U.S.C. § 1441

While section 1441, the removal statute, already contains a requirement that parties be properly joined to be removed,<sup>177</sup> there has been disagreement as to what joinder analysis to apply.<sup>178</sup> Defining “properly joined” within section 1441 to denote compliance with Federal Rule 20 or its state corollary with an express assertion that a district court may not manipulate an action to create diversity jurisdiction by dropping or severing any party or claim where the parties have been properly permissively joined in one state court action would neuter the improper use of Federal Rule 21.<sup>179</sup> While amending the removal statute alone would not ultimately affect the current use of Federal Rule 21 to sever nondiverse dispensable parties to create diversity jurisdictions in actions brought originally in federal court, it would curtail the same application of Federal Rule 21 to actions removed by

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<sup>176</sup> See *supra* Part VI.C.

<sup>177</sup> 28 U.S.C.A. § 1441(b) (West 2010). No legislative history exists, however, as to the purpose of the phrase “properly joined and served” within the removal statute. *Sullivan v. Novartis Pharms. Corp.*, 575 F. Supp. 2d 640, 644 (D.N.J. 2008). Nevertheless, many courts have determined that the terminology is meant to prevent a plaintiff from gamesmanship designed to defeat removal by joining a party who the plaintiff does not actually intend to serve as a party to the action. *Id.* at 643; see also *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003). Under a plain language analysis, however, there may be an argument to be made that the language encompasses fraudulent joinder of parties.

<sup>178</sup> Courts that misuse Federal Rule 21 to sever nondiverse dispensable parties in removal actions utilize Federal Rule 19 governing required joinder to measure dispensability, and therefore the only way to be properly joined under this analysis is to be indispensable to the action. Courts that properly first require a finding of fraudulent misjoinder will utilize Federal Rule 20 or the comparable state joinder rule to measure whether parties have been properly *permissively* joined together in the action.

<sup>179</sup> Note, however, that in this amendment Congress should clarify whether the standard for “properly joined parties” should be measured by Federal Rule 20 or the comparable state permissive joinder rule. See *supra* note 130.

defendants from state to federal court. This solution is appropriate, however, only if Congress first determines that the current use of Federal Rule 21, as expanded by *Newman-Green*, is proper as to actions brought originally in federal court. To curtail all infractions, however, the better solution is for Congress to take the broad approach and amend its requirements for diversity jurisdiction under section 1332.

#### VIII. CONCLUSION

Federal Rule of Civil Procedure 21 and its historical ancestors support the procedural power of a federal court to drop or sever only misjoined claims or parties. The vague and circular reasoning of *Newman-Green* has led federal courts to use Federal Rule 21 to carve up removal actions where parties are properly joined in state court to create diversity jurisdiction in federal court. Since Congress ultimately controls the procedure of federal courts and has set up a multi-layered process for rule creation, a federal court should temper its use of inherent power where that process has produced sufficient procedural rules. Moreover, this misuse of Federal Rule 21 not only obstructs the principles of federalism, but it conflicts with other provisions of the Federal Rules themselves. In the absence of judicial restraint, Congress should ultimately amend its statutory grant of diversity jurisdiction to disallow the misuse of Federal Rule 21 to create jurisdiction in removal actions where there is none.