NOTE

A CALL FOR THE END OF THE DOCTRINE OF REALIGNMENT

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In Indianapolis v. Chase National Bank*, 1941, the Supreme Court established the doctrine of realignment, requiring federal courts to examine the issues in dispute and realign each party as plaintiff or defendant if necessary. Due to the complete diversity requirement, realignment gave the federal courts the ability to both create and destroy diversity jurisdiction. Since 1941, the federal courts have struggled to interpret the central holding in* Indianapolis*, and have created several competing "tests" for realignment. This confusion has made the doctrine of realignment unworkable. Realignment—along with each of the present tests—encourages jurisdictional abuses by forcing the federal courts to examine the merits of jurisdictionally questionable cases. The doctrine also discourages party joinder because parties fear jurisdictionally altering realignment. Rather than focusing on the language of* Indianapolis *and the current realignment tests, courts wary of improperly aligned pleadings should make use of newer jurisdictional statutes enacted after* Indianapolis*. In light of realignment's infirmity and the availability of newer, effective legislation, the federal courts should wholly abandon the doctrine of realignment.*

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INTRODUCTION

Diversity jurisdiction has long been a bane of the federal judiciary. Since its inception,[1] jurists have regularly called for restrictions on its manufacture, imposed a number of judicially created barriers, and called for its general demise.[2] *Indianapolis v. Chase National Bank* may serve as the high

1. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to . . . Controversies . . . between Citizens of different States . . . .").

2. *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 53–54 (1954) (Frankfurter, J., concurring) (finding the Court's result—although correct—a "glaring perversion of the purpose to which the original grant of diversity jurisdiction was directed that it ought not to go without comment, as further proof of the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction"); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 651 (1949) (Frankfurter, J., dissenting) ("An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (finding Constitutional Congressional limits on assignment for the purposes of manufacturing diversity jurisdiction); CHARLES W. ELIOT ET AL., PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE 28 (1914) ("[C]oncurrent jurisdiction of state and federal courts on the ground of diverse citizenship often causes much delay, expense, and uncertainty."); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 139–47 (1985) (discussing the current movement toward the elimination of diversity jurisdiction); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928) ("How far, if at all, the United States courts should be left with jurisdiction merely because the parties are citizens of different states is a question which calls for critical reexamination of the practical bases of diversity jurisdiction.").

water mark for such judicially created barriers.[3] In 1941, led by Justice Felix Frankfurter, the Supreme Court created a judicial remedy—realignment—in what was probably an effort to dispose of the most complex, multiparty cases whose access to the federal courts was based solely on the "accident" of complete diversity. To aid the federal judiciary in determining whether the specific alignment of parties was intended to "manufacture" complete diversity, the Court held as follows:

> To sustain diversity jurisdiction there must exist an "actual," "substantial" controversy between citizens of different states . . . . Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to "look beyond the pleadings and arrange the parties according to their sides in the dispute." Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary "collision of interests" exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit," and the "primary and controlling matter in dispute."[4]

At its core, this holding gave the federal courts the power to control their own dockets. The Court's request that federal courts " 'look beyond the pleadings and arrange the parties according to their sides in the dispute' "[5] possessed with it the ability to create and destroy complete diversity, and consequently, diversity jurisdiction. This is the "doctrine of realignment."

Despite close to three-quarters of a century of precedent, the precise contours of the doctrine of realignment remain unsettled. Currently, the Courts of Appeals are split on the proper application of *Indianapolis*. Perhaps finding the idea of "a transposition of parties" too "radical,"[6] the Second, Seventh, and Eighth Circuits look only toward the first half of *Indianapolis*'s holding, refusing to realign litigants as coparties where there is "an actual, substantial controversy between [them]."[7] The realignment of, or refusal to realign, coparties on the basis of a "substantial controversy" has become known as the "substantial controversy test." The Third, Fourth, Fifth, Sixth, and Ninth Circuits, as well as the District Court for the District of Columbia, however, read *Indianapolis* to require realigning the parties "in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment."[8] The realignment

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3. 314 U.S. 63 (1941).

4. *Id.* at 69 (citations omitted).

5. *Id.* (quoting City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 180 (1905)).

6. *Id.* at 78 (Jackson, J., dissenting).

7. *Id.* at 69 (majority opinion) (citations omitted) (internal quotation marks omitted); *see also* Md. Cas. Co. v. W.R. Grace & Co., 23 F.3d 617 (2d Cir. 1994) (adopting the substantial controversy test); Am. Motorists Ins. Co. v. Trane Co., 657 F.2d 146 (7th Cir. 1981) (adopting the same); Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 870 (8th Cir. 1966) (adopting the same).

8. U.S. Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992); *see also* U.S. Fid. & Guar. Co. v. A & S Mfg. Co., 48 F.3d 131 (4th Cir. 1995) (adopting the principal purpose test); Employers Ins. of Wausau v. Crown Cork & Seal Co. (*Crown I*), 905 F.2d 42 (3d Cir.

of parties on the basis of a singular, principal purpose of a lawsuit has become known as the "principal purpose test." The First Circuit uses an amalgam of the two,[9] while courts within Tenth and Eleventh Circuits use yet another analysis.[10]

Sixty-seven years later, *Indianapolis* has had a perverse effect. The doctrine of realignment has created more room for the abuse of diversity jurisdiction, rather than less. The multitude of realignment tests and the current unsettled state of the law have done little to achieve the "practical ends" the Court so desperately sought in *Indianapolis*. Modern realignment, far from providing federal courts the power to control their dockets, has become fodder for "an imaginative lawyer [to] find some adversity between [the parties] to achieve federal jurisdiction or to defeat it in circumstances where diversity jurisdiction was intended to apply."[11] Clever litigants, especially insurance companies, have increasingly moved for realignment in order to create and destroy diversity jurisdiction as they see fit.[12] Today, almost half of realignment cases have one insurance company as a named party.[13] Commentators roundly reject the doctrine.[14] Despite the *Indianapolis* Court's admonishment that "[l]itigation is the pursuit of practical ends, not a game of chess,"[15] its present-day result has been directly to the contrary.

1990) (adopting the same); Zurn Indus., Inc. v. Acton Constr. Co., 847 F.2d 234 (5th Cir. 1988) (adopting the same); Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519 (9th Cir. 1987) (adopting the same); Saylab v. Harford Mut. Ins. Co., 271 F. Supp. 2d 112 (D.D.C. 2003) (adopting the same).

9. U.S.I. Props. Corp. v. M.D. Constr. Co., 860 F.2d 1 (1st Cir. 1988) (advocating for use of the substantial controversy test to determine if there are any substantial controversies that would prevent realignment, and then, if there are none, using the principal purpose test to realign the parties).

10. Symes v. Harris, 472 F.3d 754 (10th Cir. 2006) (realigning parties based on their "actual interests" in the suit); Earnest v. State Farm Fire & Cas. Co., 475 F. Supp. 2d 1113 (N.D. Ala. 2007) (applying the same analysis).

11. William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1117 (1993).

12. Forty-three percent of realignment cases have at least one insurance company as a named party. This was calculated by first searching all published federal decisions from January 1, 1998 to September 7, 2008 on Westlaw (database: allfeds) using the following string: "Indianapolis v. Chase" & Realign!". Seventy-nine results were obtained. The number of cases that included an insurance company as a named party was calculated from there through an examination of each case, yielding thirty-four cases with an insurance company as a named party. *See, e.g.*, *Thomas Solvent*, 955 F.2d 1085 (using the principal purpose test, realigning the parties to destroy diversity); Siteworks Contracting Corp. v. W. Sur. Co., 461 F. Supp. 2d 205 (S.D.N.Y. 2006) (using the substantial controversy test, realigning the parties to destroy diversity); Boland v. State Auto. Mut. Ins. Co., 144 F. Supp. 2d 1282 (M.D. Ala. 2001) (using the principal purpose test, realigning the parties to create diversity); U.S. Fid. & Guar. Co. v. Algernon-Blair, Inc., 705 F. Supp. 1507 (M.D. Ala. 1988) (using a modified substantial controversy test, realigning the parties to create diversity). *See generally* April N. Everette, United States Fidelity and Guaranty Co. v. A&S Manufacturing Co.*: Realignment of Parties in Diversity Jurisdiction Cases*, 74 N.C. L. REV. 1979, 1979 (1996) (decrying insurance companies' abuse of the doctrine).

13. *See supra* note 12.

14. *See* Braverman, *supra* note 11; Everette, *supra* note 12.

15. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941).

This Note argues that federal courts should wholly abandon the doctrine of realignment in light of jurisdictional statutory enactments made since *Indianapolis*. Part I discusses the history behind diversity jurisdiction that colored the majority opinion in *Indianapolis*, and examines the current state of the doctrine of realignment. Part II criticizes both the principal purpose test and the substantial controversy test as procedurally defective and unsound as a matter of policy. In particular, Section II.A condemns both tests for delving too deeply into the merits of a lawsuit to resolve the jurisdictional question; Section II.B shows how the mechanics of either test discourage litigants from joining additional claims and parties; and Section II.C argues that a third realignment test seeking to avoid these traps would nevertheless fail for the same reasons. Part III proposes a solution: courts can use 28 U.S.C. § 1359, barring cases in which parties have been "improperly" joined, and 28 U.S.C. § 1332(c)(1), destroying complete diversity in "direct actions" against insurers, to curb abuses of diversity jurisdiction similar to those *Indianapolis* sought to eliminate. This Note concludes by calling for an end to the doctrine of realignment.

I. THE LEGACY OF *INDIANAPOLIS*

Like other judicial jurisdictional remedies, the story of realignment is woven in the intellectual history of the power and purpose of the federal courts. Section I.A gives a brief account of the history of diversity jurisdiction. Section I.B analyzes the history of and the Court's opinion in *Indianapolis*, which gave root to the modern doctrine of realignment. Section I.C describes the modern schism resulting from courts' varied interpretations of *Indianapolis*.

A. *A Brief History of Diversity Jurisdiction*

Diversity jurisdiction has met loathing, in part, because it remains fairly unclear why the Framers included it the Constitution. The Records of the Federal Convention provide little guidance on its inclusion.[16] The only satisfactory historical explanation so far has been that the debt crisis of the 1780s made the Framers fearful that state courts would not allow out-of-state creditors to collect judgments from in-state debtors.[17] Federal jurisdiction was thought to rectify this problem by employing a jurist whose allegiances lay not to a particular state, but to the federal government.[18]

16. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601, at 337 (2d ed. 1984) ("Neither the debates of the Constitutional Convention nor the records of the First Congress shed any substantial light on why diversity jurisdiction was granted to the federal courts by the Constitution or why the First Congress exercised its option to vest that jurisdiction in the federal courts.").

17. Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 132–35 (2003); Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421.

18. *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to . . . Controversies . . . between Citizens of different States . . . ."); Martin H. Redish, *Reassessing the Allocation of Judicial*

This logic has become increasingly brittle today.[19] The worry that state court judges have a home-state bias has simply not held up empirically.[20] Further, there is no reason to believe that federal judges would be any more impartial toward out-of-state defendants than state court judges would be. "After all, federal judges, like state court judges, are drawn from the communities in which they live and work."[21] The practical realities of the federal judicial nomination process—befriending a Senator—bolster this counterargument.[22]

Perhaps because of this ambiguity, both Congress and the federal judiciary have sought to restrict the operation of diversity jurisdiction. Since its inception, Congress has successively restricted diversity jurisdiction by raising the amount-in-controversy requirement.[23] These enactments were made specifically "to check . . . the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction."[24] Congress has also attempted—rather unsuccessfully—to eliminate diversity jurisdiction in garden variety insurance actions by making an insurer a citizen "of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."[25] In addition, Congress has given judges some discretion to restrict diversity jurisdiction's operation by allowing them to impose costs on successful plaintiffs whose awards amount to less than the statutory minimum for diversity cases.[26]

Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles", 78 VA. L. REV. 1769, 1802 (1992) ("[P]rimary sovereign allegiance will always distinguish state from federal judges [to] justify the continuation of some form of diversity jurisdiction.").

19. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 141 (1973) ("There is simply no analogy between today's situation and that existing in 1789 . . . .").

20. Bassett, *supra* note 17, at 137 ("Hard evidence of the phenomenon of local bias does not exist because local bias does not lend itself to empirical measurement.").

21. *Id.* at 138.

22. Alex Kozinski, *So You Want to Become a Federal Judge by 35?*, NAT'L L.J., Aug. 19, 1996, at C6 ("Get to know your senators. You won't get a federal judgeship if a senator from your state objects, particularly if the senator belongs to the same party as the president.").

23. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (imposing a $500 amount-in-controversy requirement); Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 552 (raising the amount-in-controversy requirement to $2,000); Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (raising it to $3,000); Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415 (raising it to $10,000); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (raising it to $50,000); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (raising it to $75,000).

I note that while the current amount-in-controversy is $75,000, the value of the original amount-in-controversy requirement, $500, would only be approximately $11,000 today. Samuel H. Williamson, *Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present*, MEASURING WORTH, http://www.measuringworth.com/uscompare/ (last visited Sept. 1, 2008).

24. Snyder v. Harris, 394 U.S. 332, 339–40 (1969).

25. 28 U.S.C. § 1332(c)(1) (2000); *see infra* Section III.B (discussing the difficulty of this approach because of courts' narrow reading of the statute).

26. 28 U.S.C. § 1332(b) ("[W]here the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000 . . . the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.").

The federal judiciary has also played a role in restricting the operation of diversity jurisdiction. In 1806, less than ten years after Congress passed the Federal Judiciary Act, *Strawbridge v. Curtiss* established the complete diversity requirement.[27] *Sheldon v. Sill*, in 1850, found that congressional limitations on the assignment of claims in diversity cases were, in fact, constitutional.[28] The Supreme Court's affirmation of *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.* in 1928, which infamously upheld federal courts' rights to create "federal common law,"[29] prompted several prominent jurists to begin an academic campaign against diversity jurisdiction. Judge Charles E. Clark, appointed to the Second Circuit Court of Appeals in 1939 after serving as dean of Yale Law School, conducted a massive empirical study to undermine the use of diversity jurisdiction.[30] Justice Felix Frankfurter was a frequent academic contributor to attacks on diversity jurisdiction.[31] His law school mentee, Judge Henry J. Friendly, also lent his pen to the cause.[32] By 1941, the year *Indianapolis* was handed down, attacks against diversity jurisdiction, even from the High Court, had become common.[33]

B. Indianapolis v. Chase National Bank

1. *The Indianapolis Gas Crisis of 1900*

In 1900, the Indianapolis Gas Company faced a financial crisis: so many of its customers were stealing gas by cutting a small hole in the gas pipeline, a process known as "boring out," that the company was not able to pay dividends to its shareholders.[34] The dividend deferral caused such a stir that twice-ex-President Grover Cleveland, who was an Indianapolis Gas shareholder, publicly complained.[35] Maligned in the business community, Indianapolis Gas sought drastic measures: a bond auction secured by deeds to its plant property, with Chase National Bank of New York as the trustee.[36] The City of Indianapolis, however, could not afford to wait until Indianapolis

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27. 7 U.S. (3 Cranch) 267 (1806).

28. 49 U.S. (8 How.) 441 (1850).

29. 276 U.S. 518 (1928).

30. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 79 (2000).

31. *E.g.*, Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Felix Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. 1097 (1931).

32. *E.g.*, Friendly, *supra* note 2.

33. PURCELL, *supra* note 30, at 78–81.

34. *Charge Thefts of Gas—Indianapolis Company's Reason for Deferring Dividend Action*, N.Y. TIMES, Dec. 13, 1900, at 1.

35. *Mr. Cleveland's Gas Stocks: Ex-President a Shareholder in Indianapolis Co. and Wants Dividends Paid*, N.Y. TIMES, July 26, 1902, at 1.

36. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 70 (1941); *see also Securities at Auction*, N.Y. TIMES, Feb. 27, 1902, at 12.

Gas righted itself. And so, in 1906, the City entered into a franchise agreement with the newly formed Citizens Gas Company of Indianapolis for the purpose of "compet[ing] with Indianapolis Gas."[37] The agreement included a provision that after approximately twenty-five years, "the company should be wound up and its property conveyed to the City."[38] Still struggling financially in 1913, Indianapolis Gas agreed to lease its properties to Citizens Gas for a ninety-nine-year term, unloading some of its bond indebtedness onto Citizens Gas in the process.[39] Citizens Gas was still bound by its franchise agreement with the city, however, and in 1935, attempted to wind up its business and pass off the debts it incurred from Indianapolis Gas to the city.[40] Naturally, the city refused. Trying to resolve the dispute amicably, Indianapolis Gas agreed to put a certain amount of the debt in escrow while the city contested its agreement with Citizens Gas.[41]

Chase, however, was still owed interest on Indianapolis Gas's bond issue. Rather than going after the recalcitrant Indianapolis Gas alone, Chase sued the city, Citizens Gas, and Indianapolis Gas in Indiana federal court in diversity.[42] Chase sought declaratory relief on the validity of the agreements between Indianapolis Gas and Citizens Gas, and between Citizens Gas and the city, giving Chase its pick of debtors.[43] Indianapolis Gas and Citizens Gas, however, never claimed that their agreement was invalid. If there were any controversy at all, pled Citizens Gas, it "existed solely between Indianapolis Gas and the City."[44] Realizing this to be the case, and perhaps viewing Chase's alignment of the parties as little more than a jurisdictional ruse, the district court realigned Indianapolis Gas as a plaintiff, which placed Indiana parties on each side, and dismissed the case for a lack of jurisdiction.[45]

The circuit court, however, disagreed on appeal, holding that the "relation existing between [Chase] and the Indianapolis Company is such that the latter should not be realigned with [Chase]";[46] the tangled web of contracts virtually guaranteed that "a controversy of some proportions [was] calculated to develop."[47] Immune to the circuit court's reprimand, the district court held on remand that the lease between Indianapolis Gas and Citizens Gas was unenforceable, and consequently, that Indianapolis Gas was alone in its indebtedness to Chase.[48] Both Indianapolis Gas and Chase appealed to

37. *Indianapolis*, 314 U.S. at 70.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 71.

42. *Id.*

43. *See id.*

44. *Id.*

45. *Id.*

46. Chase Nat'l Bank v. Citizens Gas Co. (*Chase I*), 96 F.2d 363, 368 (7th Cir. 1938).

47. *Id.*

48. *Indianapolis*, 314 U.S. at 71–72.

the circuit court, which again reversed, concluding that the lease was enforceable, and, as a result, that all three Indiana parties owed Chase.[49] The City of Indianapolis, now liable for debts incurred by the very gas company it had attempted to put out of business, successfully petitioned for certiorari in 1940.[50]

2. *The Majority Opinion*

In some respects, the Supreme Court's grant of certiorari in *Indianapolis* was surprising. The legal issues presented were not novel. Though the district court and circuit court disagreed on whether the federal courts had jurisdiction, both agreed that the disposition of the issue arose solely from the interpretation of Indianapolis Gas's obligations under its own lease agreement.[51] Nor were the facts giving rise to the litigation unique or particularly fascinating. The case was little more than a bankers' spat over the validity of a municipal utilities lease. Yet, the Supreme Court may have seen realignment, a rarely used egress from federal court, as an attractive tool with which to control diversity jurisdiction, and consequently, the federal docket. The Supreme Court granted certiorari, therefore, not to decide the validity of the utilities leases or the rights of foreign creditors to municipal debtors, but rather to decide "the important jurisdictional issue involved in the litigation."[52]

This jurisdictional issue cut to the very heart of the diversity statute, which gave federal jurisdiction to all completely diverse civil suits in which the matter in controversy exceeded three thousand dollars.[53] Focusing on the "matter in controversy" language, the Court framed the "specific question [as] this: Does an alignment of the parties in relation to their real interests in the 'matter in controversy' satisfy the settled requirements of diversity jurisdiction?"[54] With the question posed in this manner, the Court gave itself the opportunity to carve out an exception to diversity jurisdiction: denying access to a district court sitting solely in diversity if the "alignment of the parties" was not "in relation to their real interests."[55] The Court reasoned:

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49. Chase Nat'l Bank v. Citizens Gas Co. (*Chase II*), 113 F.2d 217, 232 (7th Cir. 1940).

50. Indianapolis v. Chase Nat'l Bank, 311 U.S. 636 (1940).

51. *See Indianapolis*, 314 U.S. at 71 ("Finding no collision between the interests of the plaintiff and the interests of the Indianapolis Gas Company, the District Court realigned the latter as a party plaintiff . . . ." (internal quotation marks omitted)); *Chase I*, 96 F.2d at 367 ("If it be conceded, however, that appellant and the Indianapolis Company occupy a similar position with respect to the validity and enforcement of the lease against the city, yet we think there are sufficient matters in controversy between them to prevent the latter from being realigned with appellant as plaintiff.").

52. *Indianapolis*, 314 U.S. at 72.

53. Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (codified as amended at 28 U.S.C. § 1332 (2000)) ("Of all suits of a civil nature . . . where the matter in controversy exceeds . . . three thousand dollars, and . . . is between citizens of different States . . . .").

54. *Indianapolis*, 314 U.S. at 69.

55. *Id.*

> To sustain diversity jurisdiction there must exist an "actual," "substantial" controversy between citizens of different states . . . . Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to "look beyond the pleadings and arrange the parties according to their sides in the dispute." Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary "collision of interests" exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit," and the "primary and controlling matter in dispute." These familiar doctrines governing the alignment of the parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court.[56]

In light of its holding, the Court sought to "ascertain[] [only] the 'principal purpose of the suit.' "[57] Framed in this manner, and despite the complexity of the litigants' contract schemes, the Court found only a single question in the Indianapolis dispute: "Is the lease whereby Indianapolis Gas in 1913 conveyed all its gas plant property to Citizens Gas valid and binding upon the City?"[58] Everything else, it declared, "is window-dressing designed to satisfy the requirements of diversity jurisdiction."[59] The Court concluded that because Indianapolis Gas and Chase had the most to gain by proving the lease's validity, they should be aligned:

> Chase and Indianapolis Gas are, colloquially speaking, partners in litigation. . . . What Chase wants, Indianapolis Gas wants, and the City does not want. . . . Therefore . . . Indianapolis Gas and Chase are on the same side of the controversy not only for their own purposes but also for purposes of diversity jurisdiction.[60]

Having Indianapolis Gas and Chase as coplaintiffs destroyed complete diversity, and erased the entire mess from the federal docket.[61]

Despite nullifying ten years of litigation, the Court rebuffed concerns that its ruling was a "sacrifice of justice to technicality."[62] Rather, the majority found the result wrought in the "constitutional limitations upon the judicial power of the federal courts."[63] With this in mind, the Court proclaimed that Congress had intended "to keep [the federal courts] free for their distinctive federal business,"[64] and that federal courts, therefore, must

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56. *Id.* at 69–70 (footnotes omitted) (citations omitted).

57. *Id.* at 69 (citation omitted).

58. *Id.* at 72.

59. *Id.*

60. *Id.* at 74.

61. *Id.*

62. *Id.* at 76.

63. *Id.*

64. *Id.*

" 'scrupulously confine their own jurisdiction to the precise limits which the [diversity] statute has defined.' "[65]

3. *Justice Jackson's Dissent*

The majority's opinion provoked a pointed dissent from Justice Jackson, joined by Justices Reed, Roberts, and Stone. The dissent labeled the entire practice of realignment "radical," and found unbelievable the majority's pronouncement that Chase and Indianapolis Gas were coparties, especially after the district court had awarded Chase over a million dollars, solely payable by Indianapolis Gas.[66] The dissent reasoned that jurisdictional constraints, if any were to be found, cut in favor of adjudicating the case on its merits.[67] In dissent, Justice Jackson stated:

> The plaintiff cannot rightly be deprived of the benefit of [diversity] jurisdiction, conferred upon him by laws enacted pursuant to the Constitution of the United States, because the court may think that such a cause of action is relatively less important than that asserted against another defendant, or because one action "dominates" the other, or because one is more "actual" or "substantial" than the other.[68]

This, the dissent concluded, was an exaggeration of the Court's role in combating jurisdictional abuses, "the remedy [to which] would be found in Congressional withdrawal of such jurisdiction, rather than in the confusing process of judicial constriction."[69]

The dissent pointed to two problems with the majority's reasoning. First, the majority substantively discussed the validity of the parties' contracts while the Court simultaneously "[held] itself to be without jurisdiction."[70] The dissenters found this paradoxical: If the majority's underlying concern was the burden of the federal docket, it seemed counterintuitive to allow courts to carefully weigh the substance of parties' claims when they were without jurisdiction.[71] Second, if the majority's underlying concern was judicial efficiency, it seemed plainly wrong to deny jurisdiction to the whole of a lawsuit where, "[i]f the plaintiff had asserted [its] demands in two separate actions, no one would doubt that both were within the jurisdiction of the District Court."[72] The dissent aptly concluded: "We would follow the words of the jurisdictional statute when it is sought to restrict its application, quite

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65. *Id.* at 77 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).

66. *Id.* at 78–79 (Jackson, J., dissenting).

67. *Id.* at 79–80.

68. *Id.* at 80.

69. *Id.* at 84.

70. *Id.* at 79.

71. *Id.*

72. *Id.*

as faithfully as when the effort is to enlarge it by recourse to doctrines which conflict with its words."[73]

C. *The Schism Following* Indianapolis

The central holding in *Indianapolis* initially provided less than clear guidance to the lower courts, and ultimately led to a schism among the circuit courts. On one hand, the opinion intimated that "'collision of interests'" among parties was "not to be determined by mechanical rules."[74] On the other hand, whether there was a "collision of interests" was to be determined "from the 'principal purpose of the suit,' and the 'primary and controlling matter in dispute'"[75]—a rather mechanical rule. Coloring the lower courts' interpretations were some of the concerns voiced by the dissent: that party realignment was itself "radical," that the majority's reasoning would wrongfully deprive litigants of the federal forum, and that such extreme measures of altering jurisdiction should be left to Congress, not the Court, to decide.

At first, the lower courts struggled to extract a principled rule from the *Indianapolis* decision. In one of the first realignment cases after *Indianapolis*, *Thomson v. Butler*, the Eighth Circuit interpreted *Indianapolis* to mean that "the court must align [the parties] for jurisdictional purposes on the basis of their actual legal interests and the apparent results to them."[76] Where such language springs from *Indianapolis* is wholly unclear. Parties' "actual legal interests" are not the same as whether they possess a "collision of interests," or whether a court should determine such a collision exists from the "principal purpose" of the suit. A later case from the Fifth Circuit made similar muck of the language of *Indianapolis*, holding "that the realignment cannot take place until it has been made to appear that . . . [the parties'] rights are so identical as to necessitate their being placed on the same side."[77] Yet another read "the law as set forth in the Indianapolis case [as] strengthen[ing] the conclusion that the parties . . . must be realigned in accordance with their community of interests."[78]

Despite these initial deviations from the text, the lower courts eventually narrowed their focus to the central holding in *Indianapolis*. Such focus, however, was not uniform. Several circuits focused on *Indianapolis*'s seemingly clear directive that realignment "must be ascertained from the

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73. *Id.* at 84.

74. *Id.* at 69 (quoting City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 180 (1905)).

75. *Id.* (citations omitted).

76. 136 F.2d 644, 647 (8th Cir. 1943) (citing *Indianapolis*, 314 U.S. at 69, as supporting the construction).

77. Thomas v. Thomas, 165 F.2d 332, 334 (5th Cir. 1947).

78. B.J. Van Ingen & Co. v. Burlington County Bridge Comm'n, 83 F. Supp. 778, 793 (D.N.J. 1949).

'principal purpose of the suit.' "[79] Some focused on the Court's pronouncement over the requirement for diversity jurisdiction: "To sustain diversity jurisdiction there must exist an 'actual,' 'substantial' controversy between citizens of different states."[80] Yet others created similar variants. Without any comment from the Court since, the analyses adopted in each circuit have become ingrained over the years. Ironically, *Indianapolis*'s intention to do away with jurisdictional artifice has given it a multitude of forms. As this panoply of analyses widens, it is clear that *Indianapolis* did little to " 'scrupulously confine' " diversity jurisdiction.[81] Rather, it has sacrificed justice to capriciousness.

1. *The Principal Purpose Test*

Currently, the Third, Fourth, Fifth, Sixth, and Ninth Circuits and the District Court for the District of Columbia use what can be described as the "principal purpose test" in realignment analysis.[82] Judges in these jurisdictions examine the facts of a case and ascertain the " 'primary and controlling matter in dispute.' "[83] Based on this singular purpose, the courts then realign the parties according to their interest in the outcome of that matter. At least one court has gone so far as to perform this task "even where a different, legitimate dispute between the parties supports the original alignment [and] despite the fact that there may be actual and substantial ancillary or secondary issues to the primary issue."[84]

United States Fidelity & Guaranty Co. v. A & S Manufacturing Co. provides an example of primary purpose realignment in action.[85] The Environmental Protection Agency ("EPA") initially filed suit against A & S Manufacturing and several other firms for costs associated with environmental contamination at several sites. A & S's insurance company, United States Fidelity and Guaranty, a Virginia corporation, then brought suit in Maryland federal court seeking a declaratory judgment as to its responsibilities were the EPA to be successful in its suit against A & S. Its basis for jurisdiction was diversity: neither A & S, nor any of the other firms targeted by the EPA, were Virginia citizens. A & S promptly moved for realignment, arguing that "the principal issue in this case [is] whether any of the insurers owe A & S a duty to defend and/or indemnify it for the underlying environmental lawsuit."[86] This had the potential to categorize A & S, along with the

79. *Indianapolis*, 314 U.S. at 69; *see also* cases cited *supra* note 8.

80. *Indianapolis*, 314 U.S. at 69 (citations omitted).

81. *Id.* at 77 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).

82. *See* cases cited *supra* note 8.

83. *Indianapolis*, 314 U.S. at 69 (quoting Merchs.' Cotton Press Co. v. Ins. Co. of N. Am., 151 U.S. 368, 385 (1894)).

84. U.S. Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992) (citations omitted).

85. 839 F. Supp. 347 (D. Md. 1993), *aff'd*, 48 F.3d 131 (4th Cir. 1995).

86. *Id.* at 350.

other firms cited by the EPA, as defendants, and the insurance companies as plaintiffs. Shared New Jersey citizenship between A & S and another of the insurance companies, therefore, threatened to destroy jurisdiction. Looking toward United States Fidelity's own admission that the purpose of the suit was "[to] determin[e] questions of actual controversy between the parties,"[87] the district court agreed with A & S that the primary purpose in the suit was to determine the various insurance companies' duties toward the polluters, and that "disputes that may exist among the insurers are simply ancillary to the primary issue of the rights and obligations set forth in the liability insurance contracts."[88] Upon this determination, the court realigned the parties and dismissed the case for lack of jurisdiction.

2. *The Substantial Controversy Test*

The Second, Seventh, and Eighth Circuits, however, have adopted the "substantial controversy test."[89] This analysis focuses only on the first part of the central holding in *Indianapolis*, "sustain[ing] diversity jurisdiction [only when] there [is] an 'actual,' 'substantial' controversy between citizens of different states."[90] Courts employing the substantial controversy test examine whether there is an "actual" or "substantial" conflict between adverse litigants, and, if the answer is "Yes," refuse realignment of any of the parties. The substantial controversy test is thought to avoid the rigors of the principal purpose test, which ultimately constricts even the most complex litigation into a single-issue posture. At the same time, it gives the courts almost unlimited leeway in determining what conflicts count as "actual" or "substantial" enough to sustain jurisdiction.

American Motorists Insurance Co. v. Trane Co. serves as the seminal case in applying substantial controversy analysis.[91] Trane, a Wisconsin subcontractor, was in the business of selling large quantities of heat exchanger units for cars.[92] After a contract dispute gone awry, Trane's principal insurer, American Motorists from Illinois, brought a declaratory action in Wisconsin federal court against Trane and several of Trane's other insurers.[93] One of Trane's insurers, American Home, was on the verge of settling the contract dispute, and in an effort to dispose of the declaratory action, moved to realign another of Trane's insurers, Employers Insurance from Wisconsin, as a plaintiff.[94] This would have placed Trane and Employers, both from

87. *Id.* at 351 (alterations in original) (quoting Complaint at ¶ 1, *A & S Manuf. Co.*, 839 F. Supp. 347).

88. *Id.* at 350.

89. *See* cases cited *supra* note 7.

90. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (citations omitted).

91. 657 F.2d 146 (7th Cir. 1981).

92. *Id.*

93. *Id.*

94. *Id.* at 149.

Wisconsin, on opposite sides of the suit, and destroyed jurisdiction. Finding the principal purpose of the suit to be between Trane and *all* of its insurers, the district court obliged American Home and consequently dismissed the declaratory action.[95] On appeal, however, the Seventh Circuit found the dismissal unwarranted: American Motorists had established at least *some* controversy between it and each of the defendants, enough to sustain an action in diversity. With little discussion, the court adopted the substantial controversy test and reversed, declaring: "Realignment is proper when the court finds that no actual, substantial controversy exists between parties on one side of the dispute and their named opponents."[96] Because there was, in fact, an actual and substantial controversy between American Motorists and the defendants, realignment seemed improper.[97] The court brushed away arguments that realignment should be determined by the parties' "attitude"[98] toward the controversy, stating: "It does not follow that a court must realign a party whenever it shares an interest with an opposing party."[99] Rather, "it is the points of substantial antagonism, not agreement, on which the realignment question must turn."[100]

3. *Variants of Either Test*

Other circuits have created two variants of realignment analysis. The First Circuit has recently adopted an amalgam of both tests in what can be called a "principal-purpose-first-substantial-controversy-second test."[101] Courts in the Tenth and Eleventh Circuits, meanwhile, have adopted an "actual interests test."[102] Both analyses, while purporting to be grounded in *Indianapolis*, have little textual support. Neither, moreover, drastically alters the calculus for party realignment as compared to principal purpose or substantial controversy analyses.

In *U.S.I. Properties Corp. v. M.D. Construction Co.*, the First Circuit declared that on a motion for realignment "[o]ur task is to determine 'the primary and controlling matter in dispute' *and then* determine whether any actual collision in interests remains."[103] This analysis combines both the principal purpose and substantial controversy test, potentially realigning on principal purpose grounds only after passing the case through the spectrum of substantial controversy analysis. The court cites no cases other than

95. *Id.* at 150.

96. *Id.* at 149.

97. *Id.* at 151.

98. *Id.* at 150; *see also* Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 75 n.4 (1941) (quoting Sutton v. English, 246 U.S. 199, 204 (1918)).

99. *Trane*, 657 F.2d at 150.

100. *Id.* at 151.

101. *See* U.S.I. Props. Corp. v. M.D. Constr. Co., 860 F.2d 1, 4–6 (1st Cir. 1988).

102. *E.g.*, Symes v. Harris, 472 F.3d 754 (10th Cir. 2006); Earnest v. State Farm Fire & Cas. Co., 475 F. Supp. 2d 1113 (N.D. Ala. 2007).

103. *U.S.I. Props. Corp.*, 860 F.2d at 4 (emphasis added) (citation omitted).

Indianapolis for this proposition.[104] Ruling on a case concerning a construction contract gone awry, the court found that the principal purpose of the suit was to determine "[which] party [was] ultimately *responsible* for the breach."[105] This, combined with a settlement agreement between the plaintiff and one of the defendants, made two of the parties, U.S.I. and M.D. " 'partners in litigation.' "[106]

It does not appear that such an approach resolves the issue of realignment any differently than the substantial controversy test alone. Because the court is ultimately basing its decision to realign parties on "whether any actual collision in interests remains,"[107] it matters little how it decides the question of the suit's principal purpose.[108]

Courts within the Tenth and Eleventh Circuits, however, ask the following question: Are the parties "aligned to match their *actual interests*?"[109] A 2006 case from the Tenth Circuit examined a shareholders' derivative lawsuit brought against a corporation, REL, and several outside investors.[110] In an effort to preserve diversity, the plaintiffs moved to realign the corporation as an involuntary plaintiff. The district court denied the motion, dismissed for want of jurisdiction, and plaintiffs appealed. The Tenth Circuit reversed, holding that realignment was proper because the plaintiffs' and the corporation's "actual interests" were identical. The court stated:

> This case presents the ideal set of facts for aligning REL as a plaintiff. REL is owned entirely by the plaintiffs. There is no one within the company that would oppose bringing the suit, and REL's legal position would be aligned *against the defendants' interests.* Moreover, unlike in many derivative lawsuits, the defendants are not officers or directors within the company being joined. The defendants . . . have *opposite financial and legal interests* in this litigation. Thus, the nature of the controversy would permit styling REL as a plaintiff.[111]

Despite relying on *Indianapolis* to make such a move, the court did not include any mention as to whether such an action was based on the principal purpose of the suit, or whether a substantial controversy existed between the corporation and the shareholders. Rather, it looked toward a nebulous but practical concept of a relationship between the parties, so close that one's grievance may effectively have been called the other's.

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104. *Id.*

105. *Id.* (emphasis added).

106. *Id.*

107. *Id.*

108. Thanks to Professor Gil Seinfeld for this suggestion.

109. Symes v. Harris, 472 F.3d 754, 761 (10th Cir. 2006) (emphasis added); *see also* Earnest v. State Farm Fire & Cas. Co., 475 F. Supp. 2d 1113, 1117 (N.D. Ala. 2007) ("It is clear to this Court that [defendant] Thomas has *actual interests* that are closely aligned with [plaintiff] Mr. Earnest's . . . therefore realignment is necessary." (emphasis added)).

110. *Symes*, 472 F.3d 754.

111. *Id.* at 761 (emphases added).

II. Realignment Encourages, Rather than Prevents, Jurisdictional Abuses

Rather than providing the federal courts with the discretion needed to dispose of speciously pled multiparty lawsuits, *Indianapolis* and the various doctrines of realignment have encouraged new jurisdictional abuses. Specifically, principal purpose and substantial controversy analyses force both courts and litigants to engage in jurisdictional strategizing that ultimately defeats several underlying mechanisms of judicial efficiency. Section II.A demonstrates that under either regime, courts must address difficult, substantive issues of the parties' claims simply to determine the supposedly simpler jurisdictional questions. Section II.B argues that the *Indianapolis* standards frustrate the purpose behind procedural rules designed to preserve judicial economy, namely those allowing for liberal claim and party joinder. Section II.C posits that an alternative realignment test will likely fail for similar reasons.

A. *Realignment Forces Courts to Address Difficult Questions of Substance Simply to Determine Easier Questions of Jurisdiction*

It is axiomatic that jurisdiction is an absolute necessity for a federal court to hear the case before it. "Without [it,] the court cannot proceed at all in any cause."[112] As a procedural outgrowth of this directive, federal courts have long addressed the jurisdictional question before any others.[113] This habit does not arise simply from a desire for docket control, in an effort by federal courts to avoid wasting time examining cases upon which they would be powerless to act, but " 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' "[114] Any determination of the substance of a case while jurisdiction is in doubt "is, by very definition, for a court to act ultra vires."[115] To avoid this, courts often confine an examination of the jurisdictional question to the face of the pleadings.[116] Difficulty in assessing jurisdiction, therefore, does not usually permit the courts to consider the substance, as opposed to the validity, of claims.[117]

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112. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

113. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (entertaining a historical discussion on jurisdiction being "established as a threshold matter").

114. *Id.* (alteration in original) (quoting Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)).

115. *Id.* at 102.

116. *E.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 20 (2003) (Scalia, J., dissenting) ("Federal jurisdiction is ordinarily determined—invariably determined, except for *Avco* and *Taylor*—on the basis of what claim is pleaded, rather than on the basis of what claim can prevail.").

117. *See Citizens for a Better Env't*, 523 U.S. at 99–102.

Indianapolis's command, to " 'look beyond the pleadings' . . . for purposes of determining diversity [jurisdiction],"[118] therefore remains a curious one. It is odd that the Court, in its effort to " 'scrupulously confine [its] own jurisdiction to the precise limits' "[119] of the diversity statute, would engage in a practice that accidentally expanded those limits. This concern was not lost on the minority, who commented that "whether either of [two] rights asserted is more substantial than the other depends on the outcome of the litigation, which can hardly be used to determine jurisdiction which must exist at the beginning of the litigation."[120] Realignment's expansion of diversity jurisdiction has been made worse by the current adoption of the principal purpose and substantial controversy tests, both of which force the courts to make substantive legal conclusions in the face of questionable jurisdiction.

1. *The Principal Purpose Test*

The principal purpose test requires the court to determine " 'the primary and controlling matter in dispute.' "[121] At its core, this requires the court to weigh the parties' claims; to choose from a complicated web of litigation a single "dominating controversy" and to declare the rest "window-dressing."[122] This can hardly be accomplished by only looking at the pleadings. Complaints rarely conclude by stating, for example: "Plaintiff would like to impress upon the Court that Count Three is its principal purpose for litigating." The court must look beyond the rather straightforward question of claim validity—as discussed, its usual line of inquiry for jurisdictional questions—and ask the much more nebulous question of "What's *really* going on here?" Such a determination is invariably one of substance as opposed to procedure.

Consider the following scenario: *A*, a resident of state *Z*, is the owner of a condo worth $1,000,000. *A*'s condo is managed by *A*'s condo association, *B*, incorporated in state *Z*. *B* holds an insurance policy for the benefit of *A* bought from *C*, an insurance company incorporated in state *Y*. One day, *A*'s condo burns down. *A* tries to collect from *B* but because of some hard and possibly illegal bargaining from *C*, *B* offers *A* only $500,000. *A* then sues *B* for breaching its duty of care, as is required by it in the condominium agreement, and *C* for its possibly illegal tactics in dealing with *B*, both in state court. Wanting to litigate in federal court, *C* then removes the case to federal court, arguing that the principal purpose of the suit is for *A* to collect from *C*, and therefore, *B* should be made a plaintiff. This would create complete

118. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69–70 (1941) (citation omitted).

119. *Id.* at 77 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).

120. *Id.* at 80 (Jackson, J., dissenting).

121. *Id.* at 69 (majority opinion) (quoting Merchs.' Cotton Press Co. v. Ins. Co. of N. Am., 151 U.S. 368, 385 (1894)).

122. *Id.* at 72.

diversity—*A* and *B*, residents of *Z*, as plaintiffs; *C*, a resident of *Y*, as defendant—and, therefore, federal jurisdiction.

To determine the "principal purpose" in this suit, if there is one, the court must initially examine the following: the condominium agreement, the insurance policy, and any relevant state law as to whether *C*'s alleged negotiation tactics are actionable. After a thorough examination of these, the court then must speculate, and rule, as to what *A*'s motivations were in bringing the suit in the first place. Revisiting the principle that all that is required to bring a diversity claim is complete diversity between plaintiffs and defendants, and that the plaintiff has pled at least the amount-in-controversy, this seems like a significant, and wholly unnecessary, amount of work. If we take the above hypothetical and add another insurance company, the court might find itself entangled in a discussion of partial liability simply to answer what is otherwise a two-part jurisdictional question. As cases become increasingly complicated, a court applying the principal purpose test must engage more and more deeply into resolving complicated questions of fact and law.[123]

Analyses like these upset the twin reasons federal courts tread carefully where jurisdictional ground is thin: the federal courts' power and docket control. In the hypothetical above, the legality of *C*'s actions does not speak to either of the requirements for diversity jurisdiction. It seems strange, then, to require the courts to employ a test to decide an issue that is only tangential to either question. More practically, forcing courts to undergo the rigor of such analyses defeats the purpose of using jurisdiction as a docket control device. Constitutional authority aside, if federal courts are forced to undergo such protracted determinations to determine jurisdiction, the interests of judicial efficiency dictate that the courts might as well just try the whole of every case.

Admittedly, not every case is complex, and sometimes the principal purpose of the suit is, in fact, readily apparent. But analyses that directly take this into consideration only complicate the problem. If courts were to adopt the principal purpose approach, but only when a principal purpose was readily discernable, courts then must engage in yet another lengthy determination: whether the principal purpose is resolved enough to be clearly seen. This surely does no better than a principal purpose analysis alone. In any event, courts would still have to undergo substantive legal determinations simply to answer straightforward jurisdictional questions.

2. *The Substantial Controversy Test*

The substantial controversy test similarly violates principles of jurisdictional jurisprudence by forcing courts to engage in time-wasting analysis in order to answer a question designed to reduce the workload of the courts.

123. *See, e.g.*, Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1178 (5th Cir. 1984) (examining a plaintiff's settlement agreement and whether a plaintiff's claim was restricted by the remedies provided in the Longshoremen's and Harbor Worker's Compensation Act simply to determine the suit's principal purpose).

The analysis requires that, for realignment to proceed, "no actual, substantial controversy exists between parties on one side of the dispute and their named opponents."[124] Just as the principal purpose test requires courts to conjure up a "principal" reason for litigation, the substantial controversy test requires courts to validate the absence of a "substantial" claim between two hypothetically aligned parties. This analysis, in turn, often rests on the merits of the parties' claims, and the court must make the determination for every possible permutation of parties in the suit.[125]

Ironically, the substantial controversy test arose as an alternative to the rigors of a principal purpose test. Compared to principal purpose analysis, the Second Circuit has lauded the substantial controversy test as "more flexible because it permits courts deciding whether diversity exists to consider the multiple interests and issues involved in the litigation."[126] This flexibility, however, is precisely its defect. A test which "permits courts . . . to consider the *multiple interests and issues involved in the litigation*"[127] holds anathema the principle that federal courts should be restrained from delving into the merits of a case simply to decide the jurisdictional question. Courts uncomfortable with the principal purpose test's "single-issue posture"[128] would do no better in attempting to limit their jurisdictional inquiries under the substantial controversy test. If courts must spend their time on philosophizing the parties' internal reasons for litigation, one dissertation is better than many. Under these circumstances, the substantial controversy test becomes exponentially more difficult as the parties join additional litigants and claims. A substantial controversy regime may very well require substantive legal analysis for every possible claim per two-party permutation.

Much of the support for the substantial controversy test derives from a desire to "ensure that the case truly involves the kind of adversarial relationship constitutionally required in a case or controversy in the federal courts."[129] To be sure, the Constitution does demand that federal courts may only hear actual "cases or controversies."[130] But linking the substantial controversy test to the case or controversy requirement speciously equates the word "controversy" in the two contexts. First, the constitutionally demanded case or controversy requirement speaks only to the justiciability of an

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124. Am. Motorists Ins. Co. v. Trane Co., 657 F.2d 146, 149 (7th Cir. 1981).

125. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998); Md. Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 622–23 (2d Cir. 1994); *Trane*, 657 F.2d at 149.

126. *Md. Cas. Co*., 23 F.3d at 622.

127. *Id.* (emphasis added).

128. *Id.*

129. *Id.* (quoting 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.74[1], at 771 (2d ed. 1996)).

130. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies . . . ."); *see also* 13 WRIGHT ET AL., *supra* note 16, at § 3529.

action; whether "[a] 'controversy' in [the constitutional] sense must be one that is appropriate for judicial determination."[131] Substantial controversy analysis makes no such determination, examining only whether a controversy is substantial enough to "render[] realignment 'inappropriate and impermissible.' "[132] These definitions of "controversy" speak past each other: a controversy may be constitutionally appropriate for adjudication but not substantial enough to prevent realignment, or substantial enough to prevent realignment but otherwise constitutionally inappropriate for judicial determination.[133] Second, whereas limiting federal courts' power to hear only *actual* cases or controversies seeks to conserve judicial resources, expanding courts' pre-adjudicatory determinations to *substantial* controversies encourages waste. It is one thing to see if *a* controversy actually exists; it is another to see whether *every* controversy is substantial enough to prevent party realignment.

B. *Realignment Disincentivizes Efficient Party Joinder*

Prior to the enactment of the Federal Rules of Civil Procedure ("Rules") in 1938, one of the primary grievances with litigation in the United States was procedural inefficiency.[134] A substantial purpose of the Rules was to "to obviate a multiplicity of suits and to provide economy, efficiency and convenience in judicial procedure."[135] Even the Rules themselves dictate that "[t]hey should be construed and administered to secure the *just*, *speedy*, and inexpensive determination of every action."[136] In particular, the Rules concerning liberal claim and party joinder ardently strive to achieve these goals, and promote judicial economy by essentially letting litigants throw it all to the wall to see what sticks. Charles Alan Wright, of *Federal Practice and Procedure* fame, advised: "if there is any reason why bringing in another party or another claim might get matters settled faster, or cheaper, or more justly, then join them."[137] Unfortunately, neither the principal purpose test nor the substantial controversy test affords courts the opportunity to heed Wright's advice. With the prospect of realignment over litigants' heads, both tests create serious, strategic joinder conflicts sought to be eliminated by the Rules.

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131. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (citing Osborn v. Bank of the U.S., 22 U.S. (9 Wheat) 738, 819 (1824)).

132. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3607 n.51 (Supp. 2008) (quoting Syms, Inc. v. IBI Sec. Serv., Inc., 586 F. Supp. 53, 56 (S.D.N.Y. 1984)).

133. *Haworth*, 300 U.S. at 240.

134. *See, e.g.*, ELIOT ET AL., *supra* note 2, at 18–28.

135. Robinson Bros. & Co. v. Tygart Steel Prods. Co., 9 F.R.D. 468, 469 (W.D. Pa. 1949).

136. FED. R. CIV. P. 1 (emphasis added).

137. Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 632 (1952).

1. *Party Joinder*

The Rules allow the litigants to join additional parties liberally, be they plaintiffs or defendants.[138] In particular, Rule 20 allows the joinder of both plaintiffs and defendants on the basis of any claim "arising out of the same transaction, occurrence, or series of transactions or occurrences."[139] Where it may appear that outside parties do not wish to join in the instant litigation, Rule 19 requires joinder in certain cases and grants courts broad discretion in determining whether they are plaintiffs or defendants.[140] These rules command a rather expansive concept of judicial entitlement, raising only a short hurdle for outside parties to enter the litigation. The rules on party joinder set such a low bar for entry in order to "promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits."[141] Even the Supreme Court has called for "entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[142]

Judicial expediency, however, does not trump the jurisdictional requirement of complete diversity; parties whose joinder destroys complete diversity abrogate federal jurisdiction.[143] Therefore, when considering joinder in a diversity action, movants must weigh their preference for the federal forum against the relief they are seeking. The inquiry is a relatively simple one: if joinder would not affect jurisdiction, then it should proceed; if it would, then the party seeking to join another may want to reconsider.

The doctrine of realignment, however, complicates this analysis, and ultimately discourages some joinder. Even where the original alignment of parties would satisfy complete diversity, litigants seeking to join additional parties subject themselves to potential diversity-destroying realignment. Where two parties are citizens of the same state, each instance of joinder has the potential to destroy jurisdiction. Rather than promoting judicial economy, the *Indianapolis* doctrines discourage litigants from litigating the entire "transaction or occurrence" by failing to join parties who, despite the litigants' best intentions, may fall on the wrong side of the "v."

We can examine this puzzle using the hypothetical from Section II.A.1. Imagine now that *A* sues *C* alone in federal court on diversity. *C* prefers state court, but since *A* meets the diversity and amount-in-controversy requirements, there is little *C* can do. After some discovery, however, *A* realizes that he may also have a claim against *B* for failing in its duty of care in negotiating with *C*. Because *A* believes *B*'s duties require it to pursue *A*'s claims, *A*

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138. FED. R. CIV. P. 20.

139. *Id.*

140. FED. R. CIV. P. 19(a)(2) ("A person who refuses to join as a plaintiff may be made either a defendant, or, in a proper case, an involuntary plaintiff.").

141. 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1652 (3d ed. 2001) (footnotes omitted).

142. United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

143. 28 U.S.C. § 1367 (2000); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

joins *B* as an involuntary coplaintiff under Rule 19.[144] *C*, desiring to litigate in state court, then moves for *B* to be realigned as a defendant, which, given that *A* and *B* are both citizens of state *Z*, would destroy diversity.

C's motion can be supported easily under a principal purpose regime. *C* may argue, for example, that the principal purpose of the suit is ultimately for *A* to recover for his condo fire. Whether the recovery is predicated on *C*'s failure to negotiate in good faith with *B*, or *B*'s failure in its duty of care to *A*, either can be construed as secondary to *A*'s desired outcome, an "ancillary or secondary issue[] to the primary issue."[145] This falls squarely within the Fourth and Ninth Circuit's language that a plaintiff's recovery is the principal purpose of similar lawsuits, making issues of duty or indemnification secondary.[146]

This same maneuvering is possible under a substantial controversy regime. Here, *C* may argue that because *B* has not lodged any claim against it, there is not a "substantial controversy" between them, and therefore, realignment is appropriate. *C* may argue further that because *B* is joined as an *involuntary* plaintiff, *B*'s reluctance to join in claims against *C* can hardly be considered a *substantial* controversy, even if such a controversy does exist. This comports with the reasoning behind a substantial controversy regime. Should the court find "that no actual, substantial controversy exists between"[147] *B* and *C*, realignment could very well proceed, and diversity would be destroyed. In the end, *C*'s strong state-forum preference coupled with the hopelessly equivocal language of the various realignment doctrines discourages *A* from joining *B*, despite *A*'s legitimate belief that without *B* acting as a coplaintiff, "the court cannot accord complete relief."[148]

2. *Claim Joinder*

Rule 18(a), perhaps the superlative example of liberal joinder, allows a party to "join . . . as many claims as it has against an opposing party."[149] Joined claims under Rule 18(a) need not arise from the same transaction or occurrence.[150] Once jurisdiction has been properly established, "there is no restriction on the claims that may be joined in actions brought in the federal

144. *See* FED. R. CIV. P. 19(a)(2) ("A person who refuses to join as a plaintiff may be made either a defendant, or, in a proper case, an involuntary plaintiff.").

145. U.S. Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992).

146. U.S. Fid. & Guar. Co. v. A & S Mfg. Co., 48 F.3d 131, 134 (4th Cir. 1995) ("The dispute among . . . insurers is secondary to whether [they] are liable to [the plaintiff] and is hypothetical until the insurers' liability is determined."); Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 & n.2 (9th Cir. 1987) (concluding that the primary issue rested in the plaintiff's desire for recovery, despite a dispute over whether plaintiff's insurance company would indemnify it).

147. Am. Motorists Ins. Co. v. Trane Co., 657 F.2d 146, 149 (7th Cir. 1981).

148. FED. R. CIV. P. 19(a)(1)(A).

149. FED. R. CIV. P. 18(a).

150. 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1582 (2d ed. 1990).

courts."[151] The policy behind liberal claim joinder rules, like that behind party joinder rules, is motivated by "economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of 'piecemeal decisions.' "[152]

Despite these virtues, the rule becomes vice for the strategic minded. Rule 18(a)'s underlying policy concerns do little to influence parties for whom waste, inefficiency, delay, unfairness, or the potential for multiple, conflicting decisions may confer some advantage. While joinder under Rule 18(a) is not mandatory, the doctrine of claim preclusion discourages parties from such strategies by "prevent[ing] litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."[153] Rule 13(a) adds muscle to the doctrine by making compulsory "any claim . . . the pleader has against an opposing party if [it] arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[154] Thus, parties seeking to circumvent Rule 18(a)'s invitation for expediency may not later raise claims from the same cause of action that they could have brought before the court in a prior proceeding. The doctrine does not preclude all unlitigated claims, however, and "the preclusive scope of a judgment [ultimately] depends on defining the breadth of the claim or cause of action hazarded in the first suit."[155] Nevertheless, the efficiency, expediency, and permissibility of joining claims, combined with the threat of preclusion, greatly incentivizes parties to bring all they have before the court in a single lawsuit.[156]

Both *Indianapolis* doctrines throw a wrench in this process by discouraging parties from joining all of their available claims. Facing the threat of realignment, and a potential corresponding change in forum, parties must scrutinize which claims they bring forward lest the court construe their intentions for expediency as a distraction from the reason they came to court in the first place. In a principal purpose jurisdiction, parties may be hesitant to litigate all of their available claims in the fear that their "additional" claims will water down their "principal" claim, risking an undesirable realignment around the nexus of an "additional" claim. Since realignment proceeds on what the court deems the principal purpose, "even where a

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151. *Id.*

152. Cogdell v. Hosp. Ctr. at Orange, 560 A.2d 1169, 1173 (N.J. 1989).

153. Brown v. Felsen, 442 U.S. 127, 131 (1979).

154. FED R. CIV. P. 13(a).

155. 18 CHARLES ALAN WRIGHT ET AL., 18 FEDERAL PRACTICE AND PROCEDURE § 4406, at 141 (2d ed. 2002).

156. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 954–56 (1998) (discussing the effects of preclusive doctrines on joinder); Geoffrey C. Hazard, Jr., *An Examination Before and Behind the "Entire Controversy" Doctrine*, 28 RUTGERS L.J. 7, 24 (1996) ("Standard res judicata and joinder doctrines and standard litigating incentives under permissive joinder rules handle most problems quite adequately.").

different, legitimate dispute between the parties supports the original alignment,"[157] parties may be concerned that different, legitimate disputes joined simply for convenience will be construed as the principal claim. Further, where the party seeking to join additional claims may have several different, legitimate disputes, the risk of wrongful realignment substantially increases.

Taking the facts from the condo fire hypothetical, we can imagine a situation where *A* sues *B* and *C* in state court for one claim each. After *A* files his suit, *A* realizes that he may be able to recover from *C* for additional harms, but that *B*'s liability rests only on *A*'s sole claim against *B*. *A* joins additional claims in order to increase his chances of recovery against *C*, but joins no additional claims against *B*. *C* then files for removal to federal court on the theory that the principal purpose of *A*'s suit is to recover the fire damage to his condo from *C*, and that *B* has no interest in whether or not *A* recovers. As proof, *C* demonstrates to the court the litany of claims *A* brings against *C* compared to the single claim *A* brings against *B*. *A* must now choose whether to litigate in federal court or to risk claim preclusion in an effort to avoid the federal forum.

The substantial controversy test also affects parties' incentives to join additional claims, though less so than does the principal purpose test. Under a substantial controversy regime, coparties are discouraged from joining cross-claims against each other lest an opposing party use the conflict as a basis for realignment. Substantial claims against coparties, even where their disputes against the opposing parties are legitimate, could be construed to indicate that a substantial controversy exists between the coparties, thus not precluding realignment of the coparties as adverse parties. Where the issue is close, courts may engage in a weighing test concerning the number of claims, rather than their substance. Thus where ten claims are lodged between coparties *A* and *B*, each of whom has a single claim against defendant *C*, courts may be inclined to define a greater substantial controversy in the coparties' cross-claims than in the two claims against *C*.

These concerns are not mere theory. In the most complex of cases, with numerous claims and parties, courts have struggled with joinder disincentives in the face of realignment. In *In re Olympic Mills*, for instance, the First Circuit confronted the question of whether to realign intervening defendants, who were suspiciously left out of the original litigation, as involuntary coplaintiffs, framing the case as a "factual and procedural knot of Gordian complexity."[158] While nothing in the record explains why the original, nondiverse plaintiff chose not to join the intervening defendants, the specter of realignment, given the appellate court's discussion, seems like a possible answer. Though ultimately refusing to realign the parties, the court recognized that

> the proper alignment of [the two defendants] becomes more than an academic exercise because the intervention of a nondiverse party as a *plaintiff*

157. U.S. Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992).

158. 477 F.3d 1, 3 (1st Cir. 2007).

> raises a suspicious judicial eyebrow . . . . [T]his is a close call (perhaps because it is difficult to quantify and compare the parties' competing and complex interests) . . . .[159]

Other courts have dealt with these complexities in similar fashion.[160]

C. *Alternative Realignment Tests Fail for the Same Reason*

Courts and commentators have repeatedly criticized the doctrine of realignment on numerous grounds.[161] Several have adopted or proposed alternative tests to current realignment analyses. The First Circuit uses both analyses in deciding the realignment question.[162] One commentator has proposed a similar, two-part test based on footnote three of *Indianapolis*: "requir[ing] a court to (1) align the parties with respect to the primary purpose of the suit, and (2) investigate any other conflicts that might justify aligning the parties differently."[163] Courts in the Tenth and Eleventh Circuits, meanwhile, sidestep *Indianapolis*, asking whether "the parties are aligned to match their actual interests."[164] Each of these alternative tests, however, still suffers from the same problems the principal purpose and substantial controversy analyses suffer from, namely, jurisdictional infirmities and joinder disincentives. The problems with these alternative approaches, it seems, do not rest with the tests themselves, but with the problem of realignment in general.

Each of the alternative tests still examines the merits of a case too deeply. As previously discussed, any reliance on principal purpose analysis, as is undertaken by the First Circuit and the "footnote three test," still forces courts to address the question of which of the plaintiff's claims is "principal" and which is "secondary," an inquiry which "depends on the *outcome*

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159. *Id.* at 12 n.9.

160. Krueger v. Cartwright, 996 F.2d 928, 932 n.5 (7th Cir. 1993) (discussing the issue); Zurn Indus., Inc. v. Acton Constr. Co., 847 F.2d 234, 237 (5th Cir. 1988) (juxtaposing the jurisdictional requirements for realignment and joinder); Reed v. Robilio, 376 F.2d 392, 394 (6th Cir. 1967) ("The dispute here centers around the propriety of the test employed by the District Court in realigning the Bank. Appellant's contention is basically that the Bank, because of its antagonism—evidenced by its refusal to sue and by its joinder with defendants in affirmatively trying to defeat the claim asserted on its behalf—is properly a party defendant."); Prime Income Asset Mgmt Co. v. Waters Edge Living LLC, No. 3:07-CV-0102-D, 2007 WL 2229050, at *4 (N.D. Tex. Aug. 3, 2007) ("[R]ealignment to permit removal . . . when a defendant has relied on improper joinder . . . would impermissibly enable a removing defendant to substitute an 'ultimate interest' test for the typically more onerous burden imposed by the doctrine of improper joinder."); Fisherman's Harvest, Inc. v. United States, 74 Fed. Cl. 681 (Fed. Cl. 2006) (refusing to join parties as involuntary plaintiffs for similar reasons).

161. *E.g.*, Washington v. Ernster, 551 F. Supp. 2d 568 (E.D. Tex. 2007); Schwartz v. Liberty Mut. Ins. Co., No. 01-2049, 2001 WL 1622209 (E.D. Pa. Dec. 18, 2001); Hancock v. Nelson, No. C-97-1952 SI, 1997 WL 601431 (N.D. Cal. Sept. 16, 1997); Braverman, *supra* note 11; Everette, *supra* note 12, at 1979.

162. *See supra* notes 103–106 and accompanying text.

163. Braverman, *supra* note 11, at 1119.

164. Symes v. Harris, 472 F.3d 754, 761 (10th Cir. 2006); *see supra* notes 109–111 and accompanying text.

of the litigation, which can hardly be used to determine jurisdiction."[165] Determining the parties' "actual interests," meanwhile, resolves an issue that itself may be central to the substance of a case, such as corporate ownership,[166] fraud,[167] or inheritance.[168] Ruling on such issues first, and jurisdiction second, is surely worse than the principal purpose test alone.

This illustrates the practical problem with any test for realignment. A realignment test, by its very nature, runs afoul of the axiom that jurisdiction should be determined, whenever possible, as the threshold matter in a federal inquiry.[169] Realignment analyses can be thought of as occupying a spectrum of how far a particular analysis demands the court look beyond the pleadings. At one extreme, an analysis requires the court to go as far as it can beyond the pleadings—to resolve the entire case—before realignment. At the other, an analysis requires that the court not look beyond the pleadings at all. Realignment analyses that require the court to resolve legal issues in contention, as in the first case, do violence to the notion of jurisdiction as a threshold inquiry. An analysis on the other extreme of the spectrum, where courts are not required to examine any contested issues beyond the pleadings, can hardly be called realignment analysis at all: cases in which jurisdiction is in doubt from the pleadings can be summarily dismissed without resorting to any extra statutory analysis. In fact, such an analysis simply abrogates the rule announced in *Indianapolis* to " 'look beyond the pleadings.' "[170] Any realignment test, therefore, must choose between rejecting the Supreme Court's directive to " 'scrupulously confine their own jurisdiction,' "[171] or rejecting the Supreme Court's directive to rearrange the parties based on the "actualities of [the] litigation."[172] These competing commands force the lower courts to choose which Supreme Court directive to follow—and which to violate.

Further, it is doubtful that a third test for realignment would somehow alter the disincentives for joinder inherent in the current doctrine of realignment. Despite the approaches advanced by the First Circuit[173] and the footnote three test,[174] both rely on "[re]align[ing] the parties with respect to

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165. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 80 (1941) (Jackson, J., dissenting) (emphasis added).

166. *See Symes*, 472 F.3d at 761 (resolving "actual interests" based on disputed corporate ownership).

167. *See* Tracy Broad. Corp. v. Spectrum Scan, LLC, No. 8:06-CV-336, 2007 WL 1825174, at *5 (D. Neb. June 22, 2007) (resolving "actual interests" by assuming plaintiff's complicity in its director's alleged fraud).

168. *See* Fla. First Nat'l Bank of Jacksonville v. Bagley, 508 F. Supp. 8, 10 (M.D. Fla. 1980) (resolving "actual interests" based on a contested will).

169. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998).

170. *Indianapolis*, 314 U.S. at 69 (citation omitted).

171. *Id.* at 77 (citation omitted).

172. *Id.* at 70.

173. *See supra* notes 103–106 and accompanying text.

174. *See supra* note 163 and accompanying text.

the primary purpose of the suit."[175] Joinder of a claim or party that may appear to alter the primary purpose of the suit disincentivizes forum-mindful parties from engaging in joinder if it would affect jurisdiction, no matter how robust the secondary analysis. Criticism that litigants will undervalue this risk forgets about those litigants whose cases are inordinately complex, and whose forum preferences are extremely strong. While robust issue analysis with respect to joinder incentives is certainly better than analysis predicated on a single issue posture, realignment analyses invariably weigh claims relative to each other, often forcing courts to examine some controversies as "secondary" relative to a "single issue."

At this point, where the Courts of Appeals engage in four different tests for realignment, and commentators have seriously proposed yet another, it seems wholly unrealistic to believe that an *additional* realignment test would cure the federal courts of the jurisdictional illness of realignment. New treatments, in the form of statutory amendments to title 28, have come along since *Indianapolis* that now give the federal courts the power—that *Indianapolis* sought—to curb the abuse of jurisdiction. Reliance on these obviates the need for *Indianapolis*—and for courts to seriously consider realignment.

III. Current Jurisdictional Statutes Provide Existing Solutions to the Problem of Realignment

Ultimately, the discretion *Indianapolis* afforded courts exacerbates, rather than solves, the problem of diversity jurisdictional abuse. Lower courts looking to free themselves of this problem, however, must grapple with the decision's weight as binding authority. Simply ignoring the decision, no matter its practical effects, does harm to the principles of precedent and stare decisis prevalent in American jurisprudence. Since the opinion's release, Congress has amended several jurisdictional statutes that appear to apply to the problem of realignment. A much more elegant solution, therefore, could be obtained by appropriately using these statutes to rid the courts of cases in which realignment is sought. This has the effect of circumventing *Indianapolis* without ignoring it.

Such a method has several advantages: First, the lower courts need not worry about upsetting Supreme Court precedent; the solution is a workaround to the problems invited by *Indianapolis*, not an overhaul of the entire court-designed doctrine. Second, courts need not engage at all in the procedure of party realignment, a process which offends the judicial sensibilities of many courts.[176] And third, in contrast to complicated tests or analyses, the procedure involved in relying on the statutes described is a clean, powerful, and effective method to combat diversity jurisdiction abuse. Unlike *Indianapolis*,

175. Braverman, *supra* note 11, at 1119.

176. *See, e.g.*, Washington v. Ernster, 551 F. Supp. 2d 568 (E.D. Tex. 2007); Schwartz v. Liberty Mut. Ins. Co., No. 01-2049, 2001 WL 1622209 (E.D. Pa. Dec. 18, 2001); Hancock v. Nelson, No. C-97-1952 SI, 1997 WL 601431 (N.D. Cal. Sept. 16, 1997).

which relied too much on the courts' determination of intangibles, such as a party's "wants"[177] and "attitude,"[178] the courts' application of these jurisdictional statutes focuses only on the pleadings. Used appropriately, this method would give federal courts the opportunity to free themselves of the troublesome doctrines of realignment.

A. *28 U.S.C. § 1359: Defining Realignment as an "Improper" Invocation of Jurisdiction*

One of the Court's primary concerns in *Indianapolis* was the potential for manufactured diversity jurisdiction in multiparty litigation: the possibility that plaintiffs would either "misjoin" or conveniently leave out parties to the alleged conflict simply to ensure complete diversity.[179] At the time of *Indianapolis*, the statute proscribing misjoinder limited dismissal to instances where a party wrongly assigned its interest to another for the purposes of securing, or evading, diversity jurisdiction.[180] Thus, there existed many instances where, although parties were intentionally misjoined for the purpose of manufacturing diversity jurisdiction, the court had no statutory ability to deny the suit jurisdiction because no assignment of interests had occurred.[181] Realignment, therefore, may have seemed like an appropriate way to combat this by depriving the plaintiff of the very statutory right he sought to abuse.

Revisions to title 28 of the United States Code since *Indianapolis* now provide the federal courts with powerful tools to combat abuses of party alignment and joinder. In particular, § 1359, amended seven years after

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177. *Indianapolis*, 314 U.S. at 74.

178. *Id.* at 75 n.4 (citing Sutton v. English, 246 U.S. 199, 204 (1918)).

179. *See id.* at 69 ("The specific question is this: Does an alignment of the parties in relation to their real interests in the 'matter in controversy' satisfy the settled requirements of diversity jurisdiction?").

180. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79; *see also* Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 ILL. L. REV. 566, 569–71 (1941).

181. *See, e.g.*, *In re* Metro. Ry. Receivership, 208 U.S. 90, 99–100 (1908) (" 'There is no collusion apparent in any legal sense. It is of course manifest that complainants and defendants were entirely in accord and arranged together that the suit should be brought in the Federal court and that the averments of the bill should be admitted by the answer. But there was no colorable assignment of some claim to a citizen of another State, nor any misrepresentation or distortion of facts to mislead the court.' " (citation omitted)); Benedict v. Seiberling, 17 F.2d 841, 853 (N.D. Ohio 1927) ("Collusion in the sense of fraud does not necessarily exist even if the plaintiff's justiciable interest was manipulated into existence and action thereon incited by a defendant . . . ."); Harris v. Brown, 6 F.2d 922, 926 (W.D. Ky. 1925) (quoting *In re Metro. Ry. Receivership*, 208 U.S. at 99–100); Stephens v. Ohio State Tel. Co., 240 F. 759, 765 (N.D. Ohio 1917) ("There is no evidence of collusion between the parties in this case; that the original parties may be friendly antagonists is not, however, improbable. Counsel's surmise may be correct, but something more than this is necessary to make their 'collusion' reprehensible."); *see also* Lester v. McFaddon, 415 F.2d 1101, 1104 (4th Cir. 1969) (concluding that although misjoinder of receiver was not legally an assignment, "[w]e think his appointment for the purpose of creating apparent diversity of citizenship was an improper manufacture of jurisdiction within the meaning of § 1359 [which post-dates *Indianapolis*]. Any other interpretation would render a portion of the statute impotent because it was clearly intended for the statute to apply to manufactured situations created by other means than assignments.").

Indianapolis in 1948, relieves the district courts of jurisdiction "in which any party, *by assignment or otherwise*, has been improperly or collusively made or joined to invoke the jurisdiction of such court."[182] The modification, specifically including "or otherwise," was created to avoid the very situations described above.[183] Where such improprieties have occurred, courts may address the issue sua sponte[184] or decide the issue by motion.[185] Examples of parties "improperly or collusively made or joined"[186] may include an assignment of claims between a corporation's directors and the corporate body,[187] a private settlement between a plaintiff and defendant of the same state,[188] and a case in which the plaintiff has " 'no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.' "[189] It is unclear whether such cases could have been dismissed for "collusion" prior to the 1948 amendment.

The statute grants the federal courts broad powers to deal with diversity cases in which party alignment or joinder appears suspect. Congress placed no limit on which parties fell under § 1359's purview: "*any* party" includes parties improperly or collusively joined as either plaintiffs or defendants.[190] Nor does the statute mandate a time period for the addition of the misjoined parties: they may have been "made" as part of the original complaint,[191] or "joined" by amendment.[192] Once a case falls under the ambit of the statute, § 1359 delivers a powerful remedy: the district court must dismiss the entire action rather than sever the misjoined parties.[193] This is not discretionary: the court "*shall not have jurisdiction* of [the] civil action" in such a case.[194] The statute's historical notes give credence to these interpretive intuitions, stat-

182. 28 U.S.C. § 1359 (2000) (emphasis added).

183. *See, e.g.*, Edgar E. Bethell & Herschel Friday, *The Federal Judicial Code of 1948*, 3 ARK. L. REV. 146, 147 (1949); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 11 (1964).

184. *E.g.*, E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 935–36 (2d Cir. 1998).

185. *E.g.*, Airlines Reporting Corp. v. S & N Travel, Inc., 58 F.3d 857, 860 (2d Cir. 1995).

186. 28 U.S.C. § 1359.

187. *Airlines Reporting Corp.*, 58 F.3d at 863.

188. *E.g.*, Walk Haydel & Assocs. v. Coastal Power Prod. Co., 934 F. Supp. 209, 212 (E.D. La. 1996).

189. Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir. 1985) (quoting Goldberg v. CPC Int'l, Inc., 495 F. Supp. 233, 239 (N.D. Cal. 1980)) (concluding, however, that improper joinder existed on other grounds).

190. *E.g.*, Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568 (5th Cir. 2004) (collusive joining of a defendant); Aetna Cas. & Sur. Co. v. Hillman, 796 F.2d 770 (5th Cir. 1986) (collusive joining of a plaintiff).

191. *E.g.*, *Airlines Reporting Corp.*, 58 F.3d 857.

192. *E.g.*, *Hillman*, 796 F.2d 770.

193. *See* Toste Farm Corp. v. Hadbury, Inc., 70 F.3d 640, 642–43 (1st Cir. 1995) ("[Section] 1359 barred jurisdiction—not only over plaintiffs' claim but over the entire action . . . .").

194. 28 U.S.C. § 1359 (2000) (emphasis added).

ing that § 1359's "coverage against collusive jurisdiction is unlimited, and its approach is direct."[195]

One judicially created doctrine, "fraudulent joinder," provides the courts with some power to combat some of the abuses § 1359 sought to curb. In general, fraudulent joinder comes in two forms: "when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or where there has been outright fraud in a plaintiff's pleading of jurisdictional facts."[196] If a federal court concludes that parties have been fraudulently joined, it has discretion to remove the offending parties from the action and accept the jurisdictionally appropriate remainder.[197] Although it may appear that fraudulent joinder carries the same punch as § 1359, the doctrine addresses only a limited set of circumstances. First, unlike § 1359, its use does not strip federal courts of jurisdiction, but rather serves as an exception to the complete diversity requirement.[198] And second, its application is generally confined to cases where a party objects to its removal to federal court.[199] This does not mean, however, that § 1359 makes the use of fraudulent joinder moot. Where parties have engaged in "outright fraud in [the] pleading of jurisdictional facts,"[200] fraudulent joinder can clarify and remedy § 1359's ambiguities.

Courts should consider using fraudulent joinder and § 1359 complementarily in an effort to avoid party realignment based on language from *Indianapolis*. An example best illustrates the possibilities: imagine the hypothetical from before concerning *A*'s condo fire.[201] Now, *A* sues *B* and *C* in state court, and *C* attempts to remove to federal court on a theory of realignment. *C* desires to have *B* realigned as party-plaintiff with *A* such that complete diversity exists. *B*, however, has not lodged a claim against *C*. Thus if the court were to accept *C*'s proposed alignment, it would establish an action where potential plaintiff *B* does not have a claim against defendant *C*. This, however, would create a situation in which there is *no* controversy between a plaintiff and a defendant. The court, therefore, should consider the action as one falling within the ambit of § 1359: through *C*'s motion for realignment, *B* has, in essence, become a "party . . . improperly or collusively made . . . to invoke the jurisdiction of [the] court."[202] It seems well within the bounds of reasonable statutory interpretation to suggest that shuffling a party from defendant to plaintiff, who has no claim against any defendant, is a "party . . . improperly or collusively made."[203] Indeed, courts

195. *Id.* hist. & revision nn.

196. Gottlieb v. Westin Hotel Co., 990 F.2d 323, 327 (7th Cir. 1993).

197. *E.g.*, *In re* Briscoe, 448 F.3d 201, 215–16 (3d Cir. 2006).

198. *See id.*

199. *See id.*

200. *Gottlieb*, 990 F.2d at 327.

201. *See supra* Section II.A.1.

202. 28 U.S.C. § 1359 (2000).

203. *Id.*

can invoke this statute anytime a party proposes a realignment structure which would place one claimless party against any opposing party. It should be noted, however, that § 1359's language confines it to cases in which a party attempts to wrongly "*invoke* the jurisdiction of [the] court."[204] Thus, where, after proper removal to federal court, a plaintiff moves for realignment in an attempt to *destroy* diversity, § 1359 provides no power to federal courts.

At least one court has taken this approach. In *Prime Income Asset Management Co. v. Waters Edge Living*, the defendants removed the case to federal court in diversity on a theory of realignment.[205] After a lengthy discussion, the court found that the proposed realignment *itself* would constitute improper joinder, and generally questioned whether "realignment . . . is procedurally proper under circumstances such as these."[206] The court declined the invitation to hold "realignment . . . procedurally proper when a defendant has relied on improper joinder to remove a case based on diversity jurisdiction. This would impermissibly enable a removing defendant to substitute an 'ultimate interest' test for the typically more onerous burden imposed by the doctrine of improper joinder."[207] As a result, the court remanded the entire action back to state court.

Unfortunately, courts are generally hesitant to intertwine realignment with determinations of improper and fraudulent joinder. Cases have recently found the two intellectually distinct, asking *first* whether the parties have been improperly or fraudulently joined, and *second* whether the current party alignment mandates realignment.[208] The problem this thinking imposes—besides retaining the vestige of realignment—is that it focuses on the limited number of circumstances in which parties in the original action have *not* been improperly aligned but *do* require realignment. Section 1359 and *Prime Income Asset Management*, meanwhile, provide a much more elegant solution, which courts would do well to adopt.

B. *28 U.S.C. § 1332(c)(1): Expanding the Concept of a "Direct Action" Against Insurers to Ensure Incomplete Diversity*

A significant number of cases involving party realignment involve insurance actions. One search suggests that over the past ten years, forty-three percent of all realignment cases have had at least one insurance company as a named party.[209] Of these cases, 100% were brought to federal court on the

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204. *Id.* (emphasis added).

205. No. 3:07-CV-0102-D, 2007 WL 2229050, at *2 (N.D. Tex. Aug. 3, 2007).

206. *Id.* at *4.

207. *Id.*

208. *E.g.*, Walker v. Cooper Tire & Rubber Co., No. 5:06CV17-DCB-JMR, 2006 WL 2975486 (S.D. Miss. Oct. 17, 2006); Roblez v. Ramos, No. Civ.A. 301CV0366-G, 2001 WL 896942 (N.D. Tex. Aug. 1, 2001).

209. *See supra* note 12 and accompanying text.

basis of diversity jurisdiction.[210] This significant trend in the types of cases where realignment is sought has not gone unnoticed by commentators.[211] Fortunately, Congress has not been enthusiastic as of late about allowing run-of-the-mill insurance cases on the federal docket. In particular, Congress amended the diversity statute itself in 1964 by adding subsection c, which, for jurisdictional purposes, made an insurance company a citizen of the opposing party's state as well as its own in a "direct action" against it.[212] Title 28, section 1332(c)(1) states:

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business . . . .[213]

This was in direct response to a bizarre quirk in Louisiana law which allowed an injured party to bring suit against a tortfeasor's insurance company without joining the tortfeasor.[214] Because of the dearth of homegrown insurance companies, and because plaintiffs' lawyers disliked Louisiana's liberally applied judicial review of jury verdicts, this virtually ensured that every tort above the amount-in-controversy committed in Louisiana against a party with out-of-state insurance found its way to federal court.[215]

While 28 U.S.C. § 1332(c)(1) would seem to automatically dispose of the realignment cases described, its power is constrained on two fronts: first, § 1332(c)(1) only applies to "direct actions"; and second, the insured cannot be joined as a party-defendant. While the latter provision is set in stone, the former is more flexible. Since the subsection's enactment in 1964, courts have struggled to precisely define the contours of a "direct action." Despite the passage of almost fifty years since the statute's enactment, the current definition of "direct action" under § 1332(c)(1) seems little more than a patchwork quilt of procedural circumstances, haphazardly weighed for their "directness."[216]

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210. This was determined through an examination of the thirty-one cases found from the database search described *supra* note 12.

211. *See, e.g.*, Everette, *supra* note 12, at 1979 ("It is difficult to imagine that the Founding Fathers intended [diversity jurisdiction] to allow deep-pocketed insurance companies to utilize the federal courts to their advantage.").

212. Act of Aug. 14, 1964, Pub. L. No. 88-439, 78 Stat. 445 (codified as amended at 28 U.S.C. § 1332(c)(1) (2000)).

213. 28 U.S.C. § 1332(c)(1) (2000).

214. S. REP. NO. 88-1308, at 4, 7 (1964).

215. *Id.* at 4.

216. *See, e.g.*, Dairyland Ins. Co. v. Makover, 654 F.2d 1120, 1128 (5th Cir. 1981) (Clark, J., dissenting) (attempting to define "direct action" by defining " 'directness' . . . as [an action] between the injured claimant and the insurer"); Campbell v. Ins. Co. of N. Am., 552 F.2d 604 (5th Cir. 1977); Fid. & Deposit Co. of Md. v. S. Utils., Inc., 524 F. Supp. 692, 693 (M.D. Ga. 1981) (quoting *Campbell*, 552 F.2d at 605).

With this in mind, an expansion of the concept of a "direct action" could help federal courts dispose of many realignment cases. Because Congress's intention in adding the clause to the diversity statute was to avoid the situation in which the "federal courts [have become] protectors [of] insurance companies,"[217] it seems particularly apt that the same words should now be read to satisfy the same purpose. In fact, where the tortfeasor is not added as a party-defendant, as is the case when applying § 1332(c)(1), the term "direct" becomes superfluous for any case in which the plaintiff "directly" sues an adverse insurer. The Fifth Circuit held as much in *O.M. Greene Livestock Co. v. Azalea Meats, Inc.*, finding the plaintiff's action "direct" even after the insurer's beneficiaries, insured defendants under § 1332(c)(1), dropped out of the litigation.[218] Thus, at least where insurance companies are involved, this approach would give federal courts statutory authority to dispose of cases sought to be realigned.

An example illustrates this possibility: imagine, again, the condo fire hypothetical. *A* sues *B* and *C* in state court; *C* removes to federal court on a realignment theory that would make *B* a party-plaintiff. Relying on § 1332(c)(1), the court could deny the realignment on the theory that realignment itself would create a "direct action." That, in turn, would make the resulting case jurisdictionally infirm. If the court were to take up the realignment argument, the court may stress that the case would: (1) not possess an insured party-defendant, since *B* is sought to be made a party-*plaintiff*; and (2) constitute a "direct action" against a liability insurer since it is *B*, after all, who holds the insurance policy for *A*. This would run afoul of § 1332(c)(1), and *C*'s attempts to bring the case against it into federal court on a theory of diversity jurisdiction should ultimately fail. In the end, using § 1332(c)(1) to dispose of realignment cases, such as the one above, requires some tinkering with the ambiguous phrase "direct action." But considering Congress's intent in adding the provision, and the problems inherent in realignment, the effort seems well worth it.

CONCLUSION

The doctrine of realignment should simply be completely abandoned. After sixty-seven years, the doctrine is wholly unworkable. The present state of the law has become so fractionated and free-form that strategy has won over both practicality and common sense. Both the principal purpose and substantial controversy tests require federal courts to resolve difficult, substantive issues merely to address the diversity statute's simple, two-part scheme, and further discourage parties from using joinder where the rules otherwise allow. Nor does it seem apparent how some third test would alleviate this suffering. Fortunately, because of statutory enactments since

217. Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 58 (1954) (Frankfurter, J., concurring).

218. 516 F.2d 509, 510 (5th Cir. 1975) ("This Court has given [§ 1332(c)(1)] the broad interpretation it deserves in light of the harm Congress sought to remedy.").

Indianapolis, the federal courts now possess the authority to execute another solution. By creatively implementing various jurisdictional procedures under 28 U.S.C. § 1359, characterizing realignments as "improper joinder"; and 28 U.S.C. § 1332(c)(1), expanding the concept of a "direct action," the federal courts may finally free themselves from the ill effects of a century of litigation.