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# ARTICLES

## The Roots of Removal\*

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*Academic observers of federal litigation generally describe the field by reference to its constitutional and statutory foundations. Also at play within this landscape are powerful normative policy elements recognized by scholars and practitioners—at least implicitly—as essential to an adequate description of the litigation choices available to the participants. One of these policy features is the oft-repeated maxim that the plaintiff is the master of the claim. Although this basic premise quietly dominates both academic discussions and practice realities, a number of factors operate to impose very real limitations on that principle. These limitations, in turn, shape how we approach federal litigation and include, specifically, how we approach federal court jurisdiction. One of these limitations on a plaintiff's power that implicates federal jurisdiction is removal—and removal provides an instructive example of the exceptionally rich environment where policy elements interact with constitutional and statutory features. Removal is a means of moving a state court lawsuit into federal court, and approximately thirty thousand civil cases are transferred in this manner annually. Through removal, under certain circumstances, a defendant is able to defeat the plaintiff's choice of forum. Thus, removal inherently raises questions about what limitations should be placed on a plaintiff's choice of forum. These questions have been answered in different ways depending on the specific issue and the timing, which includes both the historical context and the litigation point in time. Three particular aspects of removal law illustrate the dramatic way in which these differences unfold. As a general matter, when removal occurs at the very outset of a lawsuit, the procedures are quite straightforward. However, removal instituted after the initial*

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*thirty-day removal period raises more issues and has the potential to become more complicated. Three of the most difficult issues in removal law arise in such a subsequently instituted removal context—the first- (versus last-) served defendant rule, the voluntary-involuntary rule, and the one-year limitation for removing diversity cases. Courts and commentators typically have discussed these issues separately, without realizing that these issues share an underlying commonality that yields a surprisingly effective analytical framework: the inherent tension between deferring to the plaintiff's choice of forum versus the defendant's right of removal.*

## INTRODUCTION

The law of removal is a study in contradictions. The United States Constitution expressly authorizes arising-under and diversity jurisdiction,<sup>1</sup> without mentioning removal. Yet removal is regularly classified as one of the bases for federal court subject-matter jurisdiction. Because removal is a procedure rather than a true form of jurisdiction, the Constitution makes no direct mention of removing cases from state court to federal court.<sup>2</sup> However, the U.S. legal landscape has included removal since the creation of federal courts; the First Congress enacted removal procedures in the first Judiciary Act of 1789.<sup>3</sup> This gives removal a unique place in federal court jurisprudence—a statutory regime of quasi-constitutional character.

At the same time, removal runs directly contrary to one of the most deeply embedded, yet implicit, maxims of United States adversarial procedure: the plaintiff is the master of his or her claim.<sup>4</sup> The unresolved and ongoing tension between

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<sup>1</sup> U.S. CONST. art. III, § 2.

<sup>2</sup> See 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2009) (“The right to remove a case from a state court to a federal court is purely statutory . . .”); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816) (“This power of removal is not to be found in express terms in any part of the constitution . . .”).

<sup>3</sup> Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79; 14B WRIGHT ET AL., *supra* note 2, § 3721.

<sup>4</sup> Despite the lack of scholarly commentary, those who are involved in the practice of law in this country, and those of us teaching it, each accept the baseline norm that among the choices available by law, plaintiffs have the initial choice of judicial system (federal or state depending upon the limits of subject-matter jurisdiction), the parties who will join as plaintiffs, the parties to be named as defendants (assuming personal jurisdiction is available for court process to reach them), and the place of trial (venue). This plaintiff-choice system has been acknowledged by no less than the U.S. Supreme Court. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242 (1982); *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960). Moreover, plaintiffs are able to take advantage of any jurisdiction in which the action can be brought and where the statute of limitations against the plaintiff's claim has not run, even if only one such state remains. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984).

these two concepts—that of the defendant’s right to remove versus the plaintiff as master of the claim—continues to be seen in court decisions characterizing the defendant’s ability to remove as inferior to the plaintiff’s choice of forum.<sup>5</sup>

Despite the continuing debate over the historical purpose of diversity jurisdiction<sup>6</sup> and the paucity of historical documentation,<sup>7</sup> the theories as to diversity’s purpose originate in the concept of local bias or prejudice.<sup>8</sup> Diversity offers a rich context in the conflict between removal, a defendant’s tool, and the plaintiff’s traditional role as master of the claim.

Strict application of the rule that gives plaintiffs absolute mastery of the litigation would allow plaintiffs, but not defendants, the right to choose to invoke federal diversity jurisdiction in qualifying cases and avoid the dangers of local bias, or nevertheless to select the state forum and its attendant risks of local bias. Defendants would simply have to live with the plaintiff’s forum (and other) choices. Removal provides a significant counterbalance. Rather than according the plaintiff exclusive control over the choice between a federal forum versus a state forum, as would be consistent with the “plaintiff as master of the claim” maxim, the Judiciary Act of 1789 provided for removal, which expressly permits a defendant to defeat the plaintiff’s forum choice. The original draft bill authorized

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<sup>5</sup> See, e.g., *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 219 n.11 (5th Cir. 1998) (“The defendant’s right to remove and the plaintiff’s right to choose the forum are not equal . . .” (quoting 16 JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 107.05 (3d ed. 1997)), *rev’d*, 526 U.S. 574 (1999); *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) (“The plaintiff’s right to choose his forum is superior to the defendant’s right of removal.”).

<sup>6</sup> Compare *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938) (“Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state.”), with Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496-97 (1928) (“The desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction.”); see also 13E CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3601, at 13, 15 (3d ed. 2009) (noting “the traditional explanation, and the one most often cited by federal judges and legal scholars, of the purpose of the constitutional provision for diversity of citizenship jurisdiction and its immediate congressional implementation—the fear that state courts would be prejudiced against out-of-state litigants”). *But see id.* § 3601, at 15-16 (“Several historians have suggested . . . that the real fear . . . was not of the state courts, but of the state legislatures . . . . The fear of state legislatures may have arisen less from interstate hostility than from a desire to protect commercial interests from class bias.”).

<sup>7</sup> See Friendly, *supra* note 6, at 484-85 (noting that diversity jurisdiction “had not bulked large” in the eyes of the Constitution’s framers, “[n]or are the records of the Convention fruitful to a student of the diversity clause”). See generally Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 122-36 (2003) (providing historical background of diversity jurisdiction).

<sup>8</sup> Bassett, *supra* note 7, at 119-32.

removal of any lawsuit for which diversity jurisdiction existed,<sup>9</sup> the final version authorized removal only when the plaintiff filed suit in her home state against an out-of-state defendant.<sup>10</sup>

The Supreme Court weighed in early on removal and supported removal in no uncertain terms, expressly rejecting any contention that only the plaintiff's forum choice was entitled to protection:

The [C]onstitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. . . . [A]s the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted congress possess to remove suits from state courts to the national courts . . . .<sup>11</sup>

The view that a defendant's right of removal has equal stature and the same constitutional dimension as a plaintiff's right to select the forum<sup>12</sup> runs contrary to the plaintiff as master of the claim maxim, because removal's very purpose lies in defeating the plaintiff's choice of forum. However, this should not be seen as surprising, given the number of limitations on the plaintiff as master of the claim principle, both within and without the removal context.<sup>13</sup>

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<sup>9</sup> Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 90-91 (1923).

<sup>10</sup> *Id.* at 91; Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (authorizing the removal of any action "commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and [where] the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs").

<sup>11</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348-49 (1816).

<sup>12</sup> *See Tex. & Pac. Ry. Co. v. Cody*, 166 U.S. 606, 609 (1897) (referring to "defendant's constitutional right as a citizen of a different state than the plaintiff, to choose a federal forum"); *Boatmen's Bank of St. Louis v. Fritzlen*, 135 F. 650, 655 (8th Cir. 1905) (stating that a defendant's right of removal "is of sufficient value and gravity to be guaranteed by the Constitution and the acts of Congress"); *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 425 (E.D. Pa. 2002) (stating that a defendant's right of removal "emanates from Article III, Section 2 of the Constitution").

<sup>13</sup> *See, e.g.*, 28 U.S.C. § 1404(a)-(b) (2006) (authorizing motions for change of venue, through which a party may transfer an action to a different federal judicial district from that where the plaintiff originally filed the suit); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (despite plaintiff's election to sue in state court on a state law-based claim, defendant permitted to remove on the basis of arising under jurisdiction because the case raised a contested and substantial federal question

In yet another element of removal's contradictory nature, the popular maxim that the courts must construe the removal statutes strictly does not alter this interpretation. A strict construction of the removal statutes does not suggest a bias against removal, nor does it restore the plaintiff as master of the claim to a superior position. Supreme Court case law indicates that the strict construction approach has nothing to do with subjugating defendants or elevating plaintiffs but instead has everything to do with basic concepts of federalism,<sup>14</sup> and thus actions should be removed from state court jurisdiction only to the extent authorized by federal statute.<sup>15</sup>

When removal comes within the statutory authority of 28 U.S.C. § 1441, the general removal statute, by definition the suit is one in which the federal and state courts have concurrent jurisdiction, so the federal and state courts have overlapping authority.<sup>16</sup> This concurrent power means that removal does not offend the dignity of state judiciaries unless, again, the plaintiff as master of the claim is superior to a defendant's right to remove—and thus removal serves to circumvent the state court's superior claim to adjudicate the case. This position cannot prevail in a legal regime that allows removal in order to defeat the plaintiff's choice of forum under

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that the federal court could hear "without disturbing any congressionally approved balance of federal and state judicial responsibilities"); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (despite plaintiff's election to sue in state court on a state law based claim, federal preemption of state law resulted in recharacterization of plaintiff's claim); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (stating that although the plaintiff had pleaded his claim solely in terms of state law, "at least some of the claims had a sufficient federal character to support removal").

<sup>14</sup> See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (stating, in the removal context, that "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" (citations omitted)).

<sup>15</sup> *Shamrock Oil* has been cited for the proposition that a plaintiff's right to select the forum is superior to the defendant's right to removal. See, e.g., *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) (citing *Shamrock Oil* as authority in stating that "[t]he plaintiff's right to choose his forum is superior to the defendant's right of removal"); see also *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 366 (S.D.N.Y. 2003) (citing *Shamrock Oil* for "the right of plaintiffs to choose the forum in which to bring suit"). But *Shamrock Oil* said no such thing. Indeed, *Shamrock Oil* merely held that a plaintiff cannot remove a state court lawsuit to federal court on the basis of a counterclaim. See *Shamrock Oil*, 313 U.S. at 106-07.

<sup>16</sup> See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 189 (2010) (noting that concurrent powers between the federal government and the states refers "to a structure in which multiple levels of government within a single polity possess[] overlapping authority to regulate, legislate, or adjudicate").

specified circumstances. As expressed by one commentator, “Stating that a plaintiff has a superior ‘right’ to select a forum is merely an unsupported claim, not a self-evident fact.”<sup>17</sup>

The concurrent jurisdiction of the federal and state courts where removal is properly invoked, removal’s history, and the statutory authorization of removal all serve to reduce the plaintiff’s power. “Master of the claim” becomes the minimalist axiom that the plaintiff chooses the initial court in which to file the claim subject, whenever federal jurisdiction is available, to the defendant’s right to rely on the removal statutes’ authority. The defendant’s right to remove does, and should, rightfully defeat the plaintiff’s selected forum.

Removal is a popular procedure, transferring approximately thirty thousand cases annually out of state courts and into federal courts.<sup>18</sup> When a plaintiff files a civil lawsuit in state court, federal statutes authorize the defendant to remove the suit from the state court to federal court under certain specified circumstances and pursuant to specified procedures.<sup>19</sup> The basic removal provisions, especially for lawsuits that involve a single defendant, are relatively straightforward and unremarkable. Only a defendant can remove,<sup>20</sup> and a defendant can only effect removal from a state court to a federal court.<sup>21</sup> The federal court to which the lawsuit is removed must be the federal court for the district and division encompassing the state court.<sup>22</sup> As is true for any lawsuit that seeks to proceed in federal court, the action must

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<sup>17</sup> Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 638 (2004).

<sup>18</sup> See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 50 tbl.S-7 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf> (reflecting that 30,161—approximately 11%—of the total filings in federal district courts were removals).

<sup>19</sup> The basic removal provisions are those governed by 28 U.S.C. §§ 1441, 1446, and 1447 (2006). There are other removal statutes that govern specialized circumstances. See, e.g., 28 U.S.C. § 1453 (modifying removal provisions for certain class actions pursuant to the Class Action Fairness Act of 2005).

<sup>20</sup> See 28 U.S.C. § 1441(a) (specifically referring to defendants); Chi., R.I. & P.R. Co. v. Stude, 346 U.S. 574, 580 (1954) (“The plaintiff under 28 U.S.C. § 1441(a) . . . cannot remove.”); see also *Or. Egg Producers v. Andrew*, 458 F.2d 382, 383 (9th Cir. 1972) (“A plaintiff who commences his action in a state court cannot effectuate removal to a federal court even if he could have originated the action in a federal court and even if a counterclaim is thereafter filed that states a claim cognizable in federal court.”). See generally 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3730, at 429 (4th ed. 2009).

<sup>21</sup> 28 U.S.C. § 1441(a).

<sup>22</sup> *Id.*

have a basis for federal subject-matter jurisdiction.<sup>23</sup> A defendant has thirty days from the date of service to effect removal by filing a notice of removal in the appropriate federal court and serving copies on the other parties and the clerk of the state court.<sup>24</sup> If diversity provides the basis for federal subject-matter jurisdiction, then the defendant may not remove the lawsuit if he is a citizen of the state where the plaintiff filed the suit.<sup>25</sup>

Removal becomes more complicated, and its contradictory nature becomes more apparent in a manner that has bedeviled the courts and commentators, when it does not occur within the initial thirty-day period. Indeed, three different removal issues have the potential to come into play in a subsequently instituted removal situation: the first- (versus last-) served defendant rule; the voluntary-involuntary rule; and the one-year limit for removing suits on the basis of diversity. Encompassing a contradictory variety of underlying principles and policies, these issues—one expressly created by statute and the other two judicially created—have resulted in a disjointed and inconsistent approach to removal that has obscured the underlying tension intrinsic to the removal concept: a tension between according deference to the plaintiff's choice of forum and honoring the defendant's right to remove. An examination of these three subsequently instituted removal issues illustrates the dramatic way that this underlying tension unfolds.

This article analyzes these three issues as they arise in the subsequently instituted removal context and identifies an overarching and unifying framework. Part I presents and analyzes the first-served, last-served, and intermediate rules.<sup>26</sup> Part II presents and analyzes the voluntary-involuntary rule.<sup>27</sup> Part III presents and analyzes the one-year limit on diversity-based removal.<sup>28</sup> Finally, Part IV identifies the common factors that motivate these removal issues, analyzes the reach of deference to the plaintiff's forum choice and of the defendant's right to remove, and proposes an overarching framework for analyzing these three removal issues.<sup>29</sup>

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<sup>23</sup> 28 U.S.C. § 1441(b).

<sup>24</sup> *Id.* § 1446(b), (d).

<sup>25</sup> *Id.* § 1441(b). *But see id.* § 1453 (eliminating this restriction for certain class actions pursuant to the Class Action Fairness Act of 2005).

<sup>26</sup> *See infra* notes 30-98 and accompanying text.

<sup>27</sup> *See infra* notes 99-137 and accompanying text.

<sup>28</sup> *See infra* notes 138-54 and accompanying text.

<sup>29</sup> *See infra* notes 155-69 and accompanying text.

## I. THE FIRST-SERVED, LAST-SERVED, AND INTERMEDIATE RULES

Title 28 of the United States Code, at section 1446, requires a defendant to file a notice of removal within thirty days of service,<sup>30</sup> and case law interpreting section 1441 requires that all defendants joined and served in the action must consent to removal.<sup>31</sup> When a complaint names multiple defendants, the potential exists that—whether due to the plaintiff’s intentional staggering of service or unanticipated service difficulties—all defendants will not be served on the same day. The removal statutes are silent as to how to reconcile the thirty-day time limit with differences in the timing of service of multiple defendants. Accordingly, the federal courts created the first-served, last-served, and intermediate rules as interpretations of how courts should implement the statutory removal timing restrictions.<sup>32</sup> The significance of these rules stems from their connection to still another judicially created rule—the rule of unanimity.<sup>33</sup> The rule of unanimity<sup>34</sup> requires all defendants joined and served to consent to removal subject to some limited exceptions.<sup>35</sup> Because all defendants must join in the removal petition and the removal statute imposes a thirty-day removal window, courts have struggled to determine how to reconcile these provisions in multiple-defendant situations when the defendants were served on different dates.

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<sup>30</sup> 28 U.S.C. § 1446(b).

<sup>31</sup> See, e.g., *Mathews v. Cnty. of Fremont*, 826 F. Supp. 1315, 1318 (D. Wyo. 1993). See 14C WRIGHT ET AL., *supra* note 20, § 3730, at 440, 462.

<sup>32</sup> See Lindsay E. Hale, *Triggering Removal Under 28 U.S.C. § 1446: The Eleventh Circuit’s Adoption of the Last-Served Defendant Rule in Bailey v. Janssen Pharmaceutica, Inc.*, 32 AM. J. TRIAL ADVOC. 363, 364 (2008) (noting that as a result of the lack of clarification within 28 U.S.C. § 1446(b) regarding how to calculate the thirty-day removal period when there are multiple defendants who were served at different times, the federal courts have created their own interpretations, including the first-served and last-served defendant rules); see also *infra* notes 36-38.

<sup>33</sup> See Haiber, *supra* note 17, at 648-49 (noting that the rule of unanimity “is not found in the text for the removal statutes,” but has “long [been] required” by the federal courts).

<sup>34</sup> See, e.g., *Beardsley v. Torrey*, 2 F. Cas. 1188, 1189 (C.C.D. Pa. 1822) (No. 1190) (“[I]t is not competent to one defendant to remove the cause without the consent of his co-defendants.”).

<sup>35</sup> See *Mathews*, 826 F. Supp. at 1318-19 (listing exceptions to the rule of unanimity, including nominal parties and “where federal jurisdiction of a party is based on a separate and independent jurisdictional grant”). In addition, certain class actions need not satisfy the rule of unanimity pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1453.

The circuit courts are divided as to the practical ramifications of such staggered service. The Fifth Circuit Court of Appeals has adopted the first-served defendant rule, whereby the time for removal expires thirty days after the first defendant is served without regard to when other defendants are served.<sup>36</sup> Courts of Appeals for the Sixth, Eighth, Ninth, and Eleventh Circuits have adopted the alternative and contradictory last-served defendant rule, whereby the time for removal is calculated from the date of service upon the defendant who attempts removal, regardless of when the first defendant was served.<sup>37</sup> The Fourth Circuit Court of Appeals has adopted a third view, the so-called intermediate rule, which requires the filing of the notice of removal within the first-served defendant's thirty-day window but permits later-joined defendants to join that original removal notice within thirty days of the date of their own, subsequent service.<sup>38</sup> The circuit courts, in choosing among these three alternatives, have grounded their approaches upon those principles and policies to which the circuit gives priority.

A. *The Articulated Principles and Policies Motivating the First-Served Defendant Rule*

The first-served defendant rule attempts to reconcile three general, undisputed removal principles: (1) the statutory provision for a thirty-day window within which a defendant must effect removal; (2) the axiom that courts should interpret the removal statutes strictly; and (3) the rule of unanimity. Under the first-served defendant rule, the time for removal expires thirty days after the first defendant is served. This interpretation is in accord with both the thirty-day window and a strict statutory construction. The first-served defendant rule also comports with the rule of unanimity, because if the first-served defendant prefers to remain in state court and thus does not remove the action, then this indicates a lack of unanimity among all the defendants, whenever served, over whether to remove the

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<sup>36</sup> See *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986). See generally 14C WRIGHT ET AL., *supra* note 20, § 3731, at 586.

<sup>37</sup> See *Destfino v. Reiswig*, 630 F.3d 952, 955-56 (9th Cir. 2011); *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202 (11th Cir. 2008); *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753 (8th Cir. 2001); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527 (6th Cir. 1999). See generally 14C WRIGHT ET AL., *supra* note 20, § 3731, at 597-99.

<sup>38</sup> *Barbour v. Int'l Union*, 640 F.3d 599, 607 (4th Cir. 2011).

lawsuit. The Fifth Circuit, in adopting the first-served defendant rule, expressly relied on these three principles.<sup>39</sup>

In *Brown v. Demco, Inc.*,<sup>40</sup> the plaintiff sued various defendants in Louisiana state court after suffering an employment-related injury. The plaintiff was a Louisiana domiciliary, no defendant was a citizen of Louisiana, and the plaintiff sought more than \$2 million in damages, so federal diversity jurisdiction was clearly available. Although the plaintiff served all the defendants promptly, no defendant removed the action to federal court. Four years later, the plaintiff amended his complaint to add another defendant. Within thirty days of service, the newly added defendant filed a notice of removal in which the other original defendants all concurred. The Fifth Circuit concluded that removal was improper because it fell outside the thirty days allotted to the first-served defendant to remove.

[The first-served defendant rule] follows logically from the unanimity requirement, the thirty-day time limit, and the fact that a defendant may waive removal by proceeding in state court. Moreover, by restricting removal to instances in which the statute clearly permits it, the rule is consistent with the trend to limit removal jurisdiction and with the axiom that the removal statutes are to be strictly construed against removal.<sup>41</sup>

With respect to the effect of the first-served rule upon the ability of later-served defendants to remove, the court stated that it did not perceive any unfairness to later-served defendants<sup>42</sup> and observed that an alternative approach would introduce delay and uncertainty.<sup>43</sup>

Although *Brown* involved distinctive facts due to the four-year interim before the addition of the final defendant, the Fifth Circuit reached the same conclusion in a subsequent case involving a much smaller disparity in the timing of service. In *Getty Oil Corp. v. Insurance Co. of North America*,<sup>44</sup> the plaintiff served one defendant on September 3, another defendant on September 5, and the third defendant on September 24.<sup>45</sup> The

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<sup>39</sup> *Brown*, 792 F.2d at 478, 481-82.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 482 (citation omitted).

<sup>42</sup> However, of course, under the first-served defendant rule, a belatedly served defendant has no opportunity to remove in such an instance despite the statutory removal authority.

<sup>43</sup> *Brown*, 792 F.2d at 482.

<sup>44</sup> 841 F.2d 1254 (5th Cir. 1988).

<sup>45</sup> *Id.* at 1256.

first defendant filed a notice of removal on September 26, within the thirty-day window and after the plaintiff had served all defendants.<sup>46</sup> However, the last-served defendant did not consent to removal until October 24—within thirty days of its own service, but not within thirty days of service upon the first-served defendant.<sup>47</sup> The Fifth Circuit found removal improper:

It follows that since all served defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served. This rule . . . promotes unanimity among the defendants without placing undue hardships on subsequently served defendants. Indeed, if a removal petition is filed by a served defendant and another defendant is served after the case is thus removed, the latter defendant may still either accept the removal or exercise its right to choose the state forum by making a motion to remand.<sup>48</sup>

The last-served defendant rule offers an alternative approach, although motivated by exactly the same principles and policies.

*B. The Articulated Principles and Policies Motivating the Last-Served Defendant Rule*

The last-served defendant rule attempts to reconcile the same three removal principles as the first-served rule, albeit with a different emphasis and conclusion: (1) the statute provides a thirty-day window within which a defendant must effect removal; (2) the axiom that courts should interpret the removal statutes strictly; and (3) the rule of unanimity. More recent cases have also asserted that the U.S. Supreme Court's decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,<sup>49</sup> supports the last-served defendant rule.

In *Brierly v. Alusuisse Flexible Packaging, Inc.*,<sup>50</sup> the plaintiff sued two defendants in state court. The first-served defendant removed the suit to federal court, but the federal court remanded the case when the defendant could not prove the citizenship of the codefendant and thus could not

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1263 (footnotes omitted).

<sup>49</sup> 526 U.S. 344 (1999).

<sup>50</sup> 184 F.3d 527, 528 (6th Cir. 1999).

demonstrate the existence of complete diversity.<sup>51</sup> After remand, the plaintiff served the second defendant, who filed a notice of removal within thirty days of that service; the first defendant filed a notice of consent to the removal on the same day.<sup>52</sup> The Sixth Circuit found removal proper.

In reaching its conclusion, the Sixth Circuit stated that each defendant must be accorded thirty days in which to remove, because an alternative construction (i.e., the first-served rule) “would require us to insert ‘first’ before ‘defendant’ into the language of the statute.”<sup>53</sup> The court viewed the rule of unanimity as permitting the earlier-served defendant to consent to the last-served defendant’s removal, even though the first defendant had failed in its removal attempt, because “holding otherwise would vitiate the removal application of the later-served defendants and thereby nullify our holding that later-served defendants are entitled to 30 days to remove the case to district court.”<sup>54</sup>

In *Bailey v. Janssen Pharmaceutica, Inc.*,<sup>55</sup> an Eleventh Circuit decision, the plaintiff sued three defendants in state court and served the defendants on three different dates: May 12, May 15, and June 22. All three defendants were represented by the same lawyer, who filed a notice of removal on July 24.<sup>56</sup> The Eleventh Circuit noted the circuit split with respect to the first- and last-served defendant rules,<sup>57</sup> but concluded that “both common sense and considerations of equity favor the last-served defendant rule. The first-served rule has been criticized by other courts as being inequitable to later-served defendants who, through no fault of their own, might, by virtue of the first-served rule, lose their statutory right to seek removal.”<sup>58</sup>

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<sup>51</sup> *Id.* at 530.

<sup>52</sup> *Id.* at 530-31.

<sup>53</sup> *Id.* at 533 (citation omitted). The Ninth Circuit has adopted a similar construction. See *Destfino v. Reiswig*, 630 F.3d 952, 955 (9th Cir. 2011) (“The removal statute speaks of ‘the defendant’—not ‘first defendant’ or ‘initial defendant’—and its most straightforward meaning is that each defendant has thirty days to remove after being brought into the case.”).

<sup>54</sup> *Brierly*, 184 F.3d at 534.

<sup>55</sup> 536 F.3d 1202, 1204 (11th Cir. 2008).

<sup>56</sup> *Id.* The notice of removal was within the last-served defendant’s thirty-day window because thirty days from receipt of service was July 22, 2006, a Saturday. Thus, pursuant to FED. R. CIV. P. 6(a), the last day for filing was Monday, July 24, 2006. *Id.* at 1204 n.1.

<sup>57</sup> *Id.* at 1205.

<sup>58</sup> *Id.* at 1206. The Ninth Circuit has also endorsed this rationale. See *Destfino*, 630 F.3d at 955 (stating that the last-served defendant rule is “grounded in statutory construction, equity and common sense” and that the approach “treats all defendants equally, regardless of when they happen to be served”).

The Eleventh Circuit further noted that the last-served rule was consistent with both the rule of unanimity and a strict construction of the removal statutes:

[T]he last-served rule is not inconsistent with the rule of unanimity. Earlier-served defendants may choose to join in a later-served defendant's motion or not, therefore preserving the rule that a notice of removal must have the unanimous consent of the defendants. The unanimity rule alone does not command that a first-served defendant's failure to seek removal necessarily waives an unserved defendant's right to seek removal; it only requires that the later-served defendant receive the consent of all then-served defendants at the time he files his notice of removal. . . . [W]e do not find that a strict construction of the removal statute necessarily compels us to endorse the first-served defendant rule . . . .<sup>59</sup>

In addition, the Eleventh Circuit emphasized that the Supreme Court's *Murphy Brothers* decision<sup>60</sup> supported the last-served defendant rule and stated that absent the *Murphy Brothers* decision, "the issue of which rule to endorse would be a closer call."<sup>61</sup> In light of *Murphy Brothers*' significance to the Eleventh Circuit, and its mention by both the Eighth and Ninth Circuits,<sup>62</sup> some brief exploration of that case is warranted at this juncture.

The issue in *Murphy Brothers* involved which of two events triggered the thirty-day removal window: the date that the defendant was formally served with process, or a previous date when the defendant had been faxed a courtesy copy of the complaint. The answer might have seemed obvious until one reviewed the relevant statutory language, which states that "[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service *or otherwise*, of a copy of the initial pleading

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<sup>59</sup> *Bailey*, 536 F.3d at 1207. The Ninth Circuit has endorsed this rationale as well. See *Destfino*, 630 F.3d at 956 (observing that "the fact that a defendant hasn't taken the initiative to seek removal doesn't necessarily mean he will object when another defendant does").

<sup>60</sup> *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

<sup>61</sup> *Bailey*, 536 F.3d at 1208.

<sup>62</sup> See *Destfino*, 630 F.3d at 956 (citing *Murphy Bros.* as exemplifying the Supreme Court's relaxation of the traditional axiom that the removal statutes are to be strictly construed); see also *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756 (8th Cir. 2001) (concluding that *Murphy Brothers* indicated that "if faced with the issue before us today, the [Supreme] Court would allow each defendant thirty days after receiving notice within which to file a notice of removal, regardless of when—or if—previously served defendants had filed such notices").

setting forth the claim for relief upon which such action or proceeding is based . . . .”<sup>63</sup>

On the basis of the reference to “or otherwise,” the Eleventh Circuit had held that the defendant’s receipt of the faxed courtesy copy of the complaint started the thirty-day removal window.<sup>64</sup> The Supreme Court reversed and stated that the removal provisions are subject to the “bedrock principle” that “[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court’s authority, by formal process.”<sup>65</sup> The Court went on to explain that the statutory language reflected Congress’s attempt to create a uniform rule that would accommodate the vagaries of state provisions—in particular, under the practices of some states, service of process was considered to commence the action and service could precede the filing of the complaint, which created the potential that the removal window could close before the defendant had seen the complaint.<sup>66</sup> However, the majority observed, “Nothing in the legislative history . . . so much as hints that Congress, in making changes to accommodate atypical state commencement and complaint filing procedures, intended to dispense with the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant.”<sup>67</sup> Further, the majority noted, fax machines did not exist at the time that Congress drafted this provision, so it could not have anticipated this specific scenario.<sup>68</sup>

*Murphy Brothers* involved a single defendant rather than multiple defendants, and thus did not discuss the first- or

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<sup>63</sup> 28 U.S.C. § 1446(b) (2006) (emphasis added).

<sup>64</sup> See *Murphy Bros.*, 526 U.S. at 349.

<sup>65</sup> *Id.* at 347.

<sup>66</sup> *Id.* at 351. The Senate Report explained the problem and the statutory accommodation as follows:

In some States suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. . . . [T]his places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20 [now 30] days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all the States.

S. REP. NO. 81-303, at 6 (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1254.

<sup>67</sup> *Murphy Bros.*, 526 U.S. at 352-53.

<sup>68</sup> *Id.* at 353 n.5.

last-served defendant rules. Moreover, by emphasizing service of process as critical to triggering the thirty-day removal window, the Court expressed no opinion in support or opposition to the competing first- and last-served defendant rules, both of which rely upon timing rules dating from service of process and nothing else. Nevertheless, the Eighth, Ninth, and Eleventh Circuit Courts of Appeals have relied on the case in endorsing the last-served defendant rule.<sup>69</sup> All three circuits have characterized *Murphy Brothers* as representing a shift away from the traditional strict construction of the removal statutes and relied on language in *Murphy Brothers* in stating that defendants “are not required to take action . . . until they are properly served, ‘regardless of when—or if—previously served defendants had filed such notices.’”<sup>70</sup> Therefore, according to these three circuits, the first-served defendant rule adopts a construction that would obligate a defendant to seek removal before receiving formal process.<sup>71</sup>

This leads us to the third view addressing removal in the context of the staggered service of multiple defendants, referred to by its proponent circuit as “the intermediate rule.”

### C. *The Articulated Principles and Policies Motivating the Intermediate Rule*

In what is now a familiar theme, the intermediate rule once again attempts to reconcile (1) the statutory thirty-day window within which a defendant must effect removal; (2) the axiom that courts should strictly interpret the removal statutes; and (3) the rule of unanimity. The intermediate rule, as described by the U.S. Court of Appeals for the Fourth Circuit, “requires a notice of removal to be filed within the first-served defendant’s thirty-day window, but gives later-served defendants thirty days from the date they were served to join the notice of removal.”<sup>72</sup>

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<sup>69</sup> See *supra* note 62 and accompanying text.

<sup>70</sup> See *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1208 (11th Cir. 2008) (quoting *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756 and citing *Murphy Bros.*, 526 U.S. 344); see also *Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011). *Murphy Bros.* takes no side in the first- versus last-served defendant debate. It simply rules out as a triggering date something *other* than service of process.

<sup>71</sup> See Amy G. Doehring, *Eleventh Circuit Adopts Last-Served Defendant Rule for Removal*, A.B.A. LITIG. NEWS, Oct. 9, 2008, at 2. However, such a defendant might—for a variety of reasons, including the plaintiff’s default—never be served and thus play no role in removal.

<sup>72</sup> *Barbour v. Int’l Union*, 640 F.3d 599, 607 (4th Cir. 2011).

The Fourth Circuit's en banc decision in *Barbour v. International Union*<sup>73</sup> is the official source of the intermediate rule and builds upon language in a previous decision from the same circuit.<sup>74</sup> Despite labeling this position as an intermediate rule, which suggests that it adopts a compromise position between the first-served and last-served defendant rules, the intermediate rule does not operate as a compromise measure—it is, in effect, consistent with the first-served defendant rule.

In *Barbour*, Chrysler Corporation retirees sued the International Union and two local unions—Local 1183 and Local 1212—in state court for alleged negligence and negligent misrepresentation in advising the plaintiffs to retire, which caused the plaintiffs to lose eligibility for a retirement incentive package known to the defendants but not publicly announced until two weeks after the plaintiffs retired.<sup>75</sup> The three defendants filed a joint notice of removal on April 28, more than thirty days after service upon the first defendant, within thirty days of service upon the second defendant, and before service upon the third defendant.<sup>76</sup> The en banc Fourth Circuit concluded that “because [the first-served defendant] did not seek removal within its thirty-day window, the plain language of [section] 1446(b) dictates that it forfeited its right to removal.”<sup>77</sup> Thus, under the so-called intermediate rule, the time for removal expires thirty days after the first defendant is served, without regard to when other defendants are served—the same result required by the first-served defendant rule.

Although *Barbour* makes much of according later-served defendants a full thirty days under the intermediate rule in which to decide whether to join or challenge the existing removal notice,<sup>78</sup> the distinction between the intermediate rule and the first-served defendant rule in this regard is more subtle than *Barbour* suggests. Under the rule of unanimity, the

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<sup>73</sup> *Id.*

<sup>74</sup> See *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992).

<sup>75</sup> *Barbour*, 640 F.3d at 602-03.

<sup>76</sup> *Id.* at 604.

<sup>77</sup> *Id.* at 611.

<sup>78</sup> *Id.* at 607 (“Like the First-Served Defendant Rule, the *McKinney* Intermediate Rule requires a notice of removal to be filed within the first-served defendant’s thirty-day window, but gives later-served defendants thirty days from the date they were served to join the notice of removal.”); see also *id.* at 611 (“If the first-served defendant files a notice of removal, later-served defendants have ample time—thirty days from the date that each such defendant is served—to decide whether to join the notice of removal . . .”).

defendants who have been joined and served must all consent to removal. Later-served defendants, however, are not bound by the removal notice—they may move to remand and thereby defeat removal. Accordingly, the distinction between the intermediate rule and the first-served defendant rule is seen when subsequently served defendants are served after the first defendant, but before the expiration of the first-served defendant's thirty-day window. For example, if Defendant #1 is served on Day 1 and Defendant #2 is served on Day 10, under the first-served defendant rule Defendant #2 has twenty days to decide whether to join the notice of removal, whereas under the intermediate rule he would have thirty days. This difference is hardly a compromise between the first-served and last-served defendant rules. The intermediate rule offers a relatively minor difference of statutory interpretation by giving every subsequently served defendant a full thirty days to evaluate whether to join an existing removal notice, but adds nothing to the statute's motivating principles and policies.<sup>79</sup>

In sum, due to section 1446(b)'s silence on the issue, and despite ostensibly relying on the same principles and policies, the circuits are divided in their application of the statute in the multiple-defendant context. Indeed, even some of the challenges in reading the statute are the same: one of the justifications sometimes proffered in favor of the last-served rule—that the alternative first-served approach would require reading “first served” into the statute's text<sup>80</sup>—is itself subject to the same challenge (i.e., the last-served defendant approach similarly requires reading “last served” into the statute).

Choosing among these approaches has been made more difficult because the courts' decisions have failed to recognize the practical and conceptual dilemma that underlies all the analyses: the tension between plaintiff control and defendant-initiated removal.

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<sup>79</sup> See *id.* at 605 (“Removal statutes . . . must be strictly construed, inasmuch as the removal of cases from state to federal court raises significant federalism concerns.”); *id.* at 613 (stating that the intermediate rule is consistent with “constru[ing] removal statutes narrowly and that doubts concerning removal should be resolved in favor of state court jurisdiction”); *id.* at 611 (noting that 28 U.S.C. § 1446(b) provides a thirty-day removal window and “[i]f you do not seek removal within the thirty-day window, you have forfeited your right to remove”); *id.* (rule of unanimity); *id.* at 614 (“All three of the rules before the court are consistent with the rule of unanimity, because each of them requires all of the defendants at some point in time to unanimously agree to removal.”).

<sup>80</sup> See, e.g., *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999).

D. *The Unseen Tension Behind the Rules: The Power to Select the Forum*

Although the majority of federal courts addressing the issue follows the first-served defendant rule,<sup>81</sup> some courts and commentators have referred to the alternative last-served rule as the current “trend.”<sup>82</sup> All but a few court decisions fail to acknowledge the unexpressed rationale or concern underlying the choice between the first-served, last-served, and intermediate rules: limiting the defendant’s opportunity to remove (the first-served and intermediate rules) versus maximizing the defendant’s opportunity to remove (the last-served rule). In selecting which rule to follow, courts must strike a balance between a plaintiff’s right to select the forum versus a defendant’s right to remove to federal court, and this ultimate choice drives judicial policy. Often—and certainly more often than is acknowledged—the outcome may depend on the court’s normative approach as more pro-plaintiff or more pro-defendant.

1. Plaintiff’s Control of the Forum

In *Brown v. Demco, Inc.*,<sup>83</sup> discussed above,<sup>84</sup> the U.S. Court of Appeals for the Fifth Circuit elected to follow the first-served defendant rule and characterized it as “[t]he general rule.”<sup>85</sup> Although *Brown* was cast in an unusual posture—the matter had been proceeding in state court for four years and removal was sought only after the plaintiff added a new defendant—concerns that removal would unfairly benefit the defendants and cause an unfair detriment to the plaintiff

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<sup>81</sup> See C. Todd Hagins, *Sands in an Hourglass: Solving the Puzzle of Time Limits for Removal to Federal Court*, 68 DEF. COUNS. J. 421, 423 (2001) (“[A] majority of federal district courts follow the first-served defendant rule . . .”).

<sup>82</sup> See *Destfino v. Reisinger*, 630 F.3d 952, 956 (9th Cir. 2011) (“The trend in recent case law favors the later-served defendant rule.”); *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1205 (11th Cir. 2008) (observing that “the trend in recent case law favors the last-served defendant rule.”); *Gen. Pump & Well, Inc. v. Laibe Supply Corp.*, No. CV607-30, 2007 WL 3238721, at \*2 (S.D. Ga. Oct. 31, 2007) (“More recently, . . . the trend in the case law has been toward the later-served rule.”); Hagins, *supra* note 81, at 426 (“There is a trend away from the first-served defendant rule.”); *Hale*, *supra* note 32, at 381 (noting that a “concern often cited as supportive of the last-served rule is the need to prevent a tactical advantage by the plaintiff in manipulating the removal statute in order to prevent removal to federal court”); *Matthew C. Lucas, Diversity Jurisdiction Removal in Florida*, 77 FLA. B.J. 54, 57 (2003) (noting that the last-served defendant rule “appears to be gaining acceptance in the courts”).

<sup>83</sup> 792 F.2d 478 (5th Cir. 1986).

<sup>84</sup> See *supra* notes 39-43 and accompanying text.

<sup>85</sup> *Brown*, 792 F.2d at 481.

clearly influenced the court. The court noted “the axiom that the removal statutes are to be strictly construed against removal,” and stated, in a particularly revealing passage,

Here all of the appellees but [one] not only let the thirty-day period elapse, but also defended this action in state court for four years. . . . To permit the defendants in this case to obtain removal after they have tested state-court waters for four years would give them a second opportunity to forum-shop and further delay the progress of the suit. The unfairness of this to the plaintiff outweighs the unfairness, if any, to the last-joined defendant. The forum for a suit ought to be settled at some time early in the litigation.<sup>86</sup>

The *Brown* Court’s analysis is worth a deeper review. First, the court relied on the strict construction rule, referring to construing the statutes “strictly . . . against removal,” thus indicating its preference for protecting the plaintiff’s choice of forum.<sup>87</sup> Second, the court followed the strict construction rule with the characterization that the last-joined defendant’s attempt to remove presented an opportunity to “forum-shop and further delay the progress of the suit.”<sup>88</sup> Third, after characterizing the defendants in an unfavorable manner (i.e., as seeking to delay the proceedings and employ a procedural route to a more favorable outcome), the court said such forum shopping and delay were unfair to the plaintiff, who should have assurances as to the forum “early in the litigation.”<sup>89</sup> In *Brown*, the plaintiffs did not benefit from section 1446(b)’s one-year limitation on diversity-based removal; Congress did not enact the one-year provision until two years after the *Brown* decision.<sup>90</sup> However, the absence of any outer time limit for removal at the time of the *Brown* decision arguably should have resulted in greater protection of the defendant’s right to remove, not less. The deference accorded to the plaintiff’s choice of forum is thus a powerful policy that has the ability not only to skew certain outcomes in a plaintiff’s favor, but to actually overcome the defendant’s statutory right to removal.

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<sup>86</sup> *Id.* at 482.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Brown v. Demco, Inc.* was decided in 1986. *See id.* Congress added the one-year limitation to 28 U.S.C. § 1446(b) in 1988. *See Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 515 n.7 (5th Cir. 1992) (noting that the one-year limitation was enacted on November 19, 1988).

## 2. Defendant's Right to Removal and Potential Plaintiff Manipulation

The potential for manipulation by plaintiffs appears to play a role in many of the decisions that have chosen the last-served rule.<sup>91</sup> As explained below, the first-served and intermediate rules encompass the possibility that a plaintiff suing multiple defendants might strategically use service of process to defeat removal. In contrast, the last-served rule eliminates this potential for manipulation by leaving open the removal option for later-served defendants.

One of the cases expressing concern about plaintiff manipulation most directly was *White v. White*,<sup>92</sup> a federal district court decision in which circuit law bound the district court to follow the first-served defendant rule.<sup>93</sup> However, due to concerns about plaintiff manipulation, the district court concluded that "exceptional circumstances" permitted removal.<sup>94</sup> The district court stated that the plaintiff set a "removal trap" through "first serving an unsophisticated defendant who is least likely to attempt removal. Then the trap is sprung by not serving the more sophisticated defendants who are likely to attempt removal until 30 days has elapsed. Snap, removal is barred . . . ."<sup>95</sup> Although *White* is one of the few cases to find the "exceptional circumstances" exception to the first-served defendant rule satisfied, its rationale fits justifications for the last-served defendant rule. As one commentator observed, *White's* broad use of "forum manipulation" as an exceptional circumstance "hints that any plaintiff failing to serve every known defendant promptly at the same time runs the risk of failing in a motion to remand a removed case back to state court."<sup>96</sup>

The plaintiff manipulation concern has two alternative potential sources. On the one hand, when a court frames the issue as plaintiff manipulation, the court may view deference to

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<sup>91</sup> See, e.g., *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992); *White v. White*, 32 F. Supp. 2d 890, 893 (W.D. La. 1998), *abrogated in part by* *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999); see also *Hale*, *supra* note 32, at 381 ("[A] concern often cited as supportive of the last-served rule is the need to prevent a tactical advantage by the plaintiff in manipulating the removal statute in order to prevent removal to federal court.").

<sup>92</sup> 32 F. Supp. 2d at 893.

<sup>93</sup> *Id.* at 892-93.

<sup>94</sup> *Id.* at 893.

<sup>95</sup> *Id.*

<sup>96</sup> *Hagins*, *supra* note 81, at 426 (expressing disbelief that "such a broad exception" would be considered "an exceptional one").

the plaintiff's choice of forum as desirable, but may view this particular plaintiff as undeserving because she engaged in manipulative behavior.<sup>97</sup> On the other hand, courts may use broad-brush characterizations of plaintiff manipulation that reflect a more generalized distrust of plaintiffs with corresponding greater sympathy for defendants. In the specific context of adopting the last-served defendant rule, several federal courts have employed rationales reflecting a concern that the first-served rule was simply too pro-plaintiff.<sup>98</sup>

## II. THE VOLUNTARY-INVOLUNTARY RULE

Section 1446(b)—the underlying source of the first- and last-served defendant rules—is also the source of the voluntary-involuntary rule. Section 1446(b) provides, as relevant to this discussion,

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .<sup>99</sup>

Although this statutory language suggests that the defendant has an entitlement to remove upon the specified receipt of a paper reflecting that a case initially nonremovable has become removable, there is a judicially created precondition: the case must have become removable due to the

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<sup>97</sup> More generally in the field of federal subject-matter jurisdiction, courts have relied on statutory authority to defeat manipulative efforts to *invoke* federal court jurisdiction, *see* 28 U.S.C. § 1359 (2006), but often have tolerated manipulative efforts to *defeat* federal court jurisdiction. *See* *Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 161, 163 (D. Me. 1969) (noting that 28 U.S.C. § 1359 prohibits improper or collusive joinder to create federal jurisdiction but no similar statute bars collusive action to defeat federal jurisdiction); *see also id.* at 165-66 (noting that “many, though not all, federal courts have sustained the use of assignments to defeat diversity”). There is no pretense of balanced treatment in this area.

<sup>98</sup> *See, e.g.,* *Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011) (stating that the first-served defendant rule could “encourage plaintiffs to engage in unfair manipulation by delaying service on defendants most likely to remove”); *Collings v. E-Z Serve Convenience Stores, Inc.*, 936 F. Supp. 892, 894 (N.D. Fla. 1996) (stating that each defendant must be allowed thirty days in which to remove because to hold otherwise “[o]pens the way for the plaintiff to deliberately avoid removal by delayed service upon a defendant anticipated to seek removal”); *see also* *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992) (stating that under the first-served defendant rule, “the rights of defendants generally could be rather easily overcome by tactical maneuvering by plaintiffs”).

<sup>99</sup> 28 U.S.C. § 1446(b).

plaintiff's voluntary action.<sup>100</sup> Unlike the first- versus last-served defendant rules, there is no circuit split here—every circuit addressing the issue has followed the voluntary-involuntary rule,<sup>101</sup> although there are some differences among the circuits in the specifics of applying the rule.<sup>102</sup> Accordingly, in a lawsuit filed in state court and based on state law, if the plaintiff voluntarily dismisses a nondiverse defendant, the remaining defendant(s) may remove the suit based on diversity. But if the court dismisses that same nondiverse defendant without the plaintiff's consent, then the remaining defendant(s) may not remove because the plaintiff's voluntary action did not accomplish the dismissal. The death of a nondiverse defendant is the sole exception to the voluntary-involuntary rule and permits removal.<sup>103</sup>

The voluntary-involuntary rule—characterized by one commentator as having “a questionable pedigree” and “suspect” justifications<sup>104</sup>—is a particularly interesting contradiction in removal jurisprudence. The rule's origins ostensibly come from two U.S. Supreme Court decisions a century ago. In *Powers v. Chesapeake & Ohio Railway Co.*,<sup>105</sup> the Supreme Court held that the case became removable after the plaintiff voluntarily dismissed the nondiverse defendants.<sup>106</sup> Subsequently, in

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<sup>100</sup> See generally John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 998-99 (1998) (“Under the voluntary-involuntary rule, when a court dismisses a removal-defeating claim with the plaintiff's consent, the case becomes removable. However, when such a dismissal is without the plaintiff's consent, the case does not become removable despite the change in its structure.”).

<sup>101</sup> See FEDERAL JUDICIAL CODE REVISION PROJECT 510 & n.10 (2004) (citing eight circuit courts affirming the voluntary-involuntary rule).

<sup>102</sup> See Heather R. Barber, *Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1583 (2004) (explaining that the Second Circuit defines “voluntary” more broadly than the other circuits to include situations “where the removability of the case is the result of a decision of the court,” and where the plaintiff elects not to appeal the court's decision); Jeff Fisher, *Everybody Plays the Fool, Sometimes; There's No Exception to the Rule: Procedural Misjoinder Is Not an Exception to the Voluntary-Involuntary Rule*, 60 BAYLOR L. REV. 993, 999-1000 (2008) (noting that the circuit courts “sometimes disagree about what constitutes a voluntary act”).

<sup>103</sup> See *Bradley v. Halliburton Oil Well Cementing Co.*, 100 F. Supp. 913, 917-18 (E.D. Okla. 1951).

<sup>104</sup> James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1026 (2006). Others have similarly criticized the rule. See *Jenkins v. Nat'l Union Fire Ins. Co. of Pa.*, 650 F. Supp. 609, 614 (N.D. Ga. 1986) (describing the voluntary-involuntary rule as “antiquated” or “arbitrary”); James F. Archibald III, Note, *Reintroducing “Fraud” to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1384 (1992) (describing the “apparent baselessness” of the voluntary-involuntary rule).

<sup>105</sup> 169 U.S. 92 (1898).

<sup>106</sup> *Id.* at 102.

*Whitcomb v. Smithson*,<sup>107</sup> the Supreme Court determined that the case did not become removable when the trial court dismissed the nondiverse defendant without the plaintiff's assent.<sup>108</sup> As summarized by the Eleventh Circuit,

[T]he long-standing, judicially created "voluntary-involuntary" rule . . . is a rule developed in diversity cases "that if the resident defendant was dismissed from the case by the voluntary act of the plaintiff, the case became removable, but if the dismissal was the result of either the defendant's or the court's action against the wish of the plaintiff, the case could not be removed."<sup>109</sup>

Although the court in the excerpt above seems to suggest that the voluntary-involuntary rule is limited to diversity cases, courts have applied the rule to both diversity and arising-under cases.<sup>110</sup>

Congress amended the removal statutes in 1948 and again in 1949.<sup>111</sup> Some courts and commentators have argued that the voluntary-involuntary rule did not survive the amendments because amended section 1446(b) states that "an amended pleading, motion, order or other paper" could render a case removable;<sup>112</sup> the reference to an "order" as rendering a case removable, without more, seemed to suggest that voluntariness (or involuntariness) played no role.<sup>113</sup>

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<sup>107</sup> 175 U.S. 635 (1900).

<sup>108</sup> *Id.* at 638.

<sup>109</sup> *Insinga v. LaBella*, 845 F.2d 249, 252 (11th Cir. 1988) (citing *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 546 (5th Cir. 1967)).

<sup>110</sup> *See People v. Keating*, 986 F.2d 346, 348 (9th Cir. 1993) ("Here, this case was transformed into an action 'arising under' federal law not by the voluntary action of the plaintiff, but instead by action of a defendant. Since a voluntary act by the plaintiff has not rendered the case removable, it must remain in state court.>").

<sup>111</sup> *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351-52 (1999).

<sup>112</sup> 28 U.S.C. § 1446(b) (2006); *see also Lyon v. Ill. Cent. R.R.*, 228 F. Supp. 810, 811 (S.D. Miss. 1964) ("There is nothing in [amended section 1446(b)] from which it can be properly inferred that Congress intended that a removal could be effected only in the event the plaintiff voluntarily did something which removed the local defendant from the case."); *Weems*, 380 F.2d at 546-47 (noting that "[t]he effect of [the 1949] amendment has been variously interpreted," and that "[i]t is contended . . . that the [voluntary-involuntary] rule did not survive an amendment to the Judicial Code in 1949").

<sup>113</sup> *See Weems*, 380 F.2d at 547-49; *see also Joan Steinman, Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 U. KAN. L. REV. 863, 872 n.25 (1990) ("[C]ommentators had observed that it was not entirely clear whether the voluntary-involuntary distinction had survived the 1949 amendments to § 1446."); Underwood, *supra* note 104, at 1100, 1106 (stating that "there is nothing in the language of the statute to suggest any intent to require federal courts to continue utilizing the voluntary/involuntary rule—the bare language of the statute at least hinting at the inverse," and urging that the rule be abandoned).

The Supreme Court has explained the basic history leading up to the 1948 and 1949 amendments to section 1446(b); the concerns that motivated the amendments did not involve the voluntary-involuntary rule, but rather centered on the concern that the defendant have access to the complaint before the removal period commenced.<sup>114</sup>

Despite the potential argument that the statutory amendments eliminated the voluntary-involuntary rule, the federal circuit courts ultimately rejected this contention.<sup>115</sup> One court explained,

We will not buck the trend, nor will we rehash the legislative history. Suffice it to say that when Congress referred to “a case which is or has become removable” in section 1446(b), Congress apparently intended to incorporate the existing definition of “removable,” a definition that included the voluntary/involuntary rule.<sup>116</sup>

This offers a plausible, but not a mandated, interpretation of the 1948 and 1949 amendments. The congressional report, which courts have cited for the proposition that Congress

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<sup>114</sup> *Murphy Bros.*, 526 U.S. at 351-52.

Prior to 1948, a defendant could remove a case any time before the expiration of her time to respond to the complaint under state law. Because the time limits for responding to the complaint varied from State to State, however, the period for removal correspondingly varied. To reduce the disparity, Congress in 1948 enacted the original version of § 1446(b), which provided that “[t]he petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later.” . . . Congress soon recognized, however, that § 1446(b), as first framed, did not “give adequate time and operate uniformly” in all States. In States such as New York, most notably, service of the summons commenced the action, and such service could precede the filing of the complaint. Under § 1446(b) as originally enacted, the period for removal in such a State could have expired *before* the defendant obtained access to the complaint. To ensure that the defendant would have access to the complaint before commencement of the removal period, Congress in 1949 enacted the current version of § 1446(b): “The petition for removal of a civil action or proceeding shall be filed within twenty days [now thirty days] after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.”

*Id.* (citations omitted).

<sup>115</sup> See *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71-72 (7th Cir. 1992) (noting that although defendants argued that section 1446(b) had eliminated the rule, “[e]very court of appeals that has addressed the voluntary/involuntary rule has held that it survived the enactment of section 1446(b)” (citation omitted)).

<sup>116</sup> *Id.* at 72.

intended to retain the rule, is more ambiguous than the courts have suggested.<sup>117</sup>

A closer look at the cited report illustrates that the courts have lifted one particular quotation out of context. In fact, although we have set out the relevant portion of the report in full in the footnote below,<sup>118</sup> the simple addition of the sentence preceding and the sentence following the lifted quotation make the context apparent:

The second paragraph of the amendment to [section 1446,] subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed. This is declaratory of the existing rule laid down by the decisions. (See for example, *Powers v. Chesapeake etc., Ry. Co.*, 169 U.S. 92.)<sup>119</sup>

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<sup>117</sup> *Id.* (citing a quote from the Senate Report that the amendment is “declaratory of the existing rule laid down by the decisions”).

<sup>118</sup> The relevant description of the bill in full states:

Subsection (b) of section 1446 of title 28, U.S.C., as revised, has been found to create difficulty in those States, such as New York, where suit is commenced by the service of a summons and the plaintiff’s initial pleading is not required to be served or filed until later.

The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff’s initial pleading.

This provision, however, without more, would create further difficulty in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff’s initial pleading and the issuance and service of summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant. Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.

The first paragraph of the amendment conforms to the amendment of rule 81(c) of the Federal Rules of Civil Procedure, relating to removed actions, adopted by the Supreme Court on December 29, 1948, and reported by the Court to the present session of Congress.

The second paragraph of the amendment to subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed. This is declaratory of the existing rule laid down by the decisions. (See for example, *Powers v. Chesapeake etc., Ry. Co.*, 169 U.S. 92.)

In addition, this amendment clarifies the intent of section 1446(e) of title 28, U.S.C., to indicate that notice need not be given simultaneously with the filing, but may be given promptly thereafter.

H.R. REP. NO. 81-352, at 11 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1268.

<sup>119</sup> *Id.*

The federal courts have concluded that the reference to “removable” in the quotation above was intended to incorporate all existing case law refinements. This is certainly a plausible construction—in these amendments, Congress was focused primarily on addressing one particular issue (ensuring that defendants would have access to a copy of the complaint before the removal period commenced), and secondarily on clarifying that removal due to changed circumstances could occur late in the case proceedings. However, it is at least equally plausible that due to these same foci, Congress would have expressly included the voluntary-involuntary rule if it intended to preserve it.<sup>120</sup> The lack of any statutory reference to the voluntary-involuntary rule—especially in an era of “plain meaning” statutory construction—suggests that courts should exercise extreme caution in continuing to import the rule in the absence of any specific statutory language. In particular, *Powers*, cited in the congressional report, had permitted the defendant to remove after the plaintiff dismissed claims against the nondiverse defendants despite the fact that these dismissals occurred, and thus removal was sought “when [the case] was called for trial.”<sup>121</sup>

Thus, *Powers* serves as an example of authorizing a defendant to remove on the basis of subsequent removability at a very late point in the proceedings, namely the eve of trial, but it is far less clear that Congress intended this reference to affirm the continued viability of the voluntary-involuntary rule. Lacking any clear statutory direction, the continued viability of the voluntary-involuntary distinction—if any justification remains—must rest on the articulated principles and policies

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<sup>120</sup> Cf. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566-67 (2005) (concluding that 28 U.S.C. § 1367 by its plain text overruled both *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)). Despite a vigorous dissent, the Court rejected arguments that congressional reports indicated an intention to leave the holdings from those prior decisions intact:

Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. . . . [J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

*Id.* at 568.

<sup>121</sup> *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 98 (1898).

that courts have used to justify the rule. The next section addresses these policy pillars.

A. *The Articulated Principles and Policies Motivating the Voluntary-Involuntary Rule*

The voluntary-involuntary rule appears to have two primary directing purposes: (1) promoting judicial economy<sup>122</sup> and (2) deferring to the plaintiff's choice of forum.<sup>123</sup> The judicial-economy rationale comes entirely from circuit court decisions; the Supreme Court has never proffered a judicial-economy rationale for the rule.<sup>124</sup> This judicial-economy rationale appears to stem from finality concerns. If a court dismisses a nondiverse defendant from the action through an involuntary dismissal and the dismissal is appealed, the potential exists that the appellate court could set aside the dismissal, which would destroy complete diversity.<sup>125</sup>

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<sup>122</sup> See, e.g., *Poulos*, 959 F.2d at 72.

<sup>123</sup> See *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("The obvious principle . . . is that . . . the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.").

<sup>124</sup> *Jenkins v. Nat'l Union Fire Ins. Co.*, 650 F. Supp. 609, 613-14 (N.D. Ga. 1986) ("Study of the Supreme Court cases that developed the rule discloses that the voluntary-involuntary rule is not based upon an appealability/finality rationale . . ."); Archibald, *supra* note 104, at 1386 ("Predictably, courts continuing to adhere solely to the Supreme Court's stated rationale for the rule have rejected these cases and, accordingly, have deemphasized the role of federal courts in allocating cases between state and federal forums.").

<sup>125</sup> *Higgins v. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988).

[I]f the non-diverse party has been involuntary dismissed by order of the state judge[, t]he plaintiff may choose to appeal the dismissal. Although complete diversity may temporarily exist between the parties, suggesting that removal is proper, diversity jurisdiction may ultimately be destroyed if the state appellate court reverses the dismissal of the non-diverse party. Therefore, some cases are not removable despite complete diversity between the parties.

*Id.*; see also *Am. Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915) ("[W]here there is a joint cause of action against defendants resident of the same state with the plaintiff and a nonresident defendant, it must appear, to make the case a removable one as to a nonresident defendant because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of the plaintiff, and that such action has taken the resident defendants out of the case, so as to leave a controversy wholly between the plaintiff and the nonresident defendant.").

In addition to the finality/appealability concern, “[t]here also appears to be a policy favoring a plaintiff’s right, absent fraudulent joinder, to determine the removability of his case.”<sup>126</sup> The Supreme Court decisions that address the voluntary-involuntary rule cite only this second purpose.<sup>127</sup> Courts have analogized the deference accorded to the plaintiff’s forum choice by the voluntary-involuntary rule to the *Mottley* rule<sup>128</sup> in arising-under cases, whereby the presence (or absence) of arising-under jurisdiction is determined by the allegations in the plaintiff’s well-pleaded complaint, without regard to the defendant’s pleadings or the defendant’s anticipated defenses.<sup>129</sup> However, the analogy of the voluntary-involuntary rule to *Mottley* raises its own issues and ultimately leads right back to the underlying tension between according deference to the plaintiff’s choice of forum and the defendant’s right to remove.

#### B. *Mottley and the Deference Debate*

Courts have analogized the voluntary-involuntary rule, founded upon deference to the plaintiff’s choice of forum, to the *Mottley* “well-pleaded complaint” rule in arising-under cases.<sup>130</sup> However, the *Mottley* analogy is less helpful—and less apt—than it appears initially. First, the *Mottley* rule is not always clear in application. In applying the *Mottley* rule, a court should disregard the defendant’s pleadings and examine only

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<sup>126</sup> *Insinga v. LaBella*, 845 F.2d 249, 253 (11th Cir. 1988). Concerns regarding plaintiff manipulation have been partially addressed by declining to apply the voluntary-involuntary rule to situations involving fraudulent joinder. *See id.* (“absent fraudulent joinder”); *see also Great N. Ry. Co.*, 246 U.S. at 282 (“The obvious principle of [the voluntary-involuntary rule] is that, in the absence of fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . .”). With respect to fraudulent joinder, *see generally Fisher, supra* note 102, at 1012-15 (arguing that “[p]rocedural misjoinder and fraudulent joinder behave almost identically,” and that neither is technically an “exception” to the voluntary-involuntary rule; rather, the voluntary-involuntary rule simply “should not be applied to those claims”); *see also Underwood, supra* note 104, at 1018 (“Stated simply, fraudulent joinder is a doctrine that permits federal courts to essentially ignore the inclusion in a lawsuit of a nondiverse party who would otherwise destroy federal diversity jurisdiction when the district court concludes that the party’s joinder is a sham.”).

<sup>127</sup> *See Jenkins*, 650 F. Supp. at 613-14 (“What emerges from an examination of the Supreme Court cases on the voluntary-involuntary rule is the conclusion that the rule is not based upon an appealability/finality rationale but upon a policy favoring the plaintiff’s ‘power to determine the removability of his case.’”).

<sup>128</sup> *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

<sup>129</sup> *See Insinga*, 845 F.2d at 253 (noting “[t]he common origins of the voluntary-involuntary rule with *Mottley* and its progeny in federal question cases”).

<sup>130</sup> *See supra* notes 123, 126-30 and accompanying text.

the complaint.<sup>131</sup> Next, the court must ascertain whether the complaint's allegations support arising-under jurisdiction as "well pleaded" and that the complaint does not include anticipated federal defenses. This review can be more difficult than one might think,<sup>132</sup> and a plaintiff may draft her complaint in a manner specifically intended to keep the action in state court by scrupulously avoiding the inclusion of any apparent basis for federal subject matter jurisdiction—yet nevertheless find herself in the very federal court that she had sought to avoid. One prominent example of such a circumstance occurred in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.<sup>133</sup> In *Grable*, the plaintiff constructed its lawsuit as a quiet title action filed in Michigan state court, only to find its suit removed to federal court on the basis of arising-under jurisdiction.<sup>134</sup> According to the U.S. Supreme Court, the quiet title action, although a state-law claim, necessarily raised the federal issue of whether the Internal Revenue Service had given Grable the notice required by section 6335 of the Tax Code before seizing Grable's property to satisfy a federal tax delinquency and then subsequently selling the property to Darue.<sup>135</sup> The Court held that this federal issue was of sufficient importance to invoke arising-under jurisdiction.<sup>136</sup> The fact that a sufficiently necessary, albeit latent, federal issue lay within the state claim took away the plaintiff's preferred state forum and substituted a federal one.

Of course, *Grable's* federal issue, although latent, existed from the very outset of the litigation, whereas situations involving the voluntary-involuntary rule, by definition, arise due to some change occurring subsequent to the filing of the lawsuit. And if this distinction is not enough,

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<sup>131</sup> *Mottley*, 211 U.S. at 152.

<sup>132</sup> *Id.* at 152-53.

<sup>133</sup> 545 U.S. 308 (2005).

<sup>134</sup> *Id.* at 311.

<sup>135</sup> *Id.* at 314-15.

<sup>136</sup> *Id.* at 315-16. Similarly, a plaintiff may draft her complaint in a manner intended to permit her to litigate in federal court, and yet nevertheless find that the federal court she desired will not allow her to remain. An example of this circumstance occurred in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), in which the dissent observed, "There is little about this case that is not federal." *Id.* at 702 (Breyer, J., dissenting). A private insurance carrier, providing health insurance to federal employees pursuant to a contract with the federal government as authorized by a federal statute, sought reimbursement from one such federal employee in accordance with the terms of the federal contract. The Court's majority held that the action was merely a contractual claim for reimbursement, and thus lacking arising-under jurisdiction, it could not proceed in federal court. *Id.* at 692-93 (majority opinion).

analysis of the *Mottley* rule arises in a contextually distinct environment from the voluntary-involuntary analysis. The *Mottley* rule always concerns the four corners of the complaint and thus always has as its vantage point the outset of the litigation, whereas the voluntary-involuntary rule always concerns some later change in the contours of the litigation. Moreover, although the *Mottley* rule applies only to arising-under jurisdiction, the voluntary-involuntary rule applies to both arising-under and diversity, which creates the potential for a plaintiff to “double dip”—to obtain the benefit of the *Mottley* rule in determining the existence of arising-under jurisdiction in the first instance, plus the benefit of the voluntary-involuntary rule after subsequent changes. So even assuming that the *Mottley* analogy is still apt, it appears that the voluntary-involuntary rule as currently applied may accord too much deference to the plaintiff’s choice of forum. Just as the *Mottley* rule cannot insulate a plaintiff from arising-under jurisdiction that actually exists, so too the voluntary-involuntary rule should not generally insulate a plaintiff from removal when federal jurisdiction actually exists.

Although courts have expressly applied the *Mottley* analogy only to the plaintiff’s control rationale, the *Grable* decision serves as a reminder that forum selection is a two-way, rather than a one-way, street. If plaintiffs were accorded complete control over forum selection, the removal statutes would be rendered pointless. As noted by one commentator, “Removal does not deprive plaintiffs of any ‘right,’ but merely affords defendants an equal opportunity to litigate in federal court. . . . Additionally, removal does not expand federal jurisdiction, but merely allows cases involving federal jurisdiction to be heard in a federal court.”<sup>137</sup> Accordingly, the voluntary-involuntary rule would appear to rest on a largely empty analytical basis.

### III. THE ONE-YEAR LIMITATION

In 1988, Congress amended section 1446(b) to provide that “a case may not be removed on the basis of [diversity jurisdiction] more than 1 year after commencement of the action.”<sup>138</sup> This generates questions over a third issue of belated removal and yet another contradiction within the doctrine—an

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<sup>137</sup> Haiber, *supra* note 17, at 611-12.

<sup>138</sup> 28 U.S.C. § 1446(b) (2006).

absolute cutoff that applies to some, but not all, removal circumstances. Perhaps the primary issue with respect to this provision is why defendants seeking to remove on the basis of arising-under jurisdiction have no outer time limit, whereas defendants seeking to remove on the basis of diversity face a one-year time limit. The legislative history to the 1988 amendment suggests that “[t]he amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. . . . Removal late in the proceedings may result in substantial delay and disruption.”<sup>139</sup>

However, imposing a one-year limitation on diversity removal, but not arising-under removal, indicates that the concern is not the potential disruption of ongoing state proceedings but simply reflects disfavor toward diversity jurisdiction.<sup>140</sup> Despite the seemingly straightforward nature of this provision, two interpretive issues have plagued the courts: first, whether the one-year limitation reflects a jurisdictional bar<sup>141</sup> or merely a procedural defect,<sup>142</sup> and second, whether the one-year limitation applies to all diversity removals<sup>143</sup> or only to those that were not removable originally.<sup>144</sup> Although not as obvious, these issues once again expose the underlying tension between plaintiff’s-deference and defendant’s-right-to-remove.

The legislative documents reveal that in enacting the one-year limitation on diversity-based removal, Congress intended to reduce “the opportunity for removal after substantial progress has been made in state court.”<sup>145</sup> Rather than attempting to define “substantial progress,” Congress

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<sup>139</sup> H.R. REP. NO. 100-889, at 44 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032-33; *see also* *Riverdale Baptist Church v. Certaineed Corp.*, 349 F. Supp. 2d 943, 950 (D. Md. 2004) (quoting same).

<sup>140</sup> *See* *Oakley*, *supra* note 100, at 1002 (“This [one-year limitation] rule has been strongly and aptly criticized as a backhanded attack on diversity jurisdiction . . .”); *see also* *Underwood*, *supra* note 104, at 1105 (“The fact that this concern does not pertain to federal question cases demonstrates an anti-diversity bias on the part of Congress.”).

<sup>141</sup> *See* *Howell v. St. Paul Fire & Marine Ins. Co.*, 955 F. Supp. 660, 662-63 (M.D. La. 1997); *Price v. Messer*, 872 F. Supp. 317, 320 (S.D.W. Va. 1995); *Foiles v. Merrell Nat’l Labs.*, 730 F. Supp. 108, 110 (N.D. Ill. 1989).

<sup>142</sup> *See In re Uniroyal Goodrich Tire Co.*, 104 F.3d 322, 324 (11th Cir. 1997); *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992); *Kinabrew v. Emco-Wheaton, Inc.*, 936 F. Supp. 351, 352-53 (M.D. La. 1996); *see also* *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426-28 (5th Cir. 2003) (approving an equitable tolling exception when circumstances suggest possible manipulation by plaintiff).

<sup>143</sup> *See Foiles*, 730 F. Supp. at 110.

<sup>144</sup> *See* *Brown v. Tokio Marine & Fire Ins. Co.*, 284 F.3d 871, 873 (8th Cir. 2002); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534-35 (6th Cir. 1999); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998).

<sup>145</sup> *Judicial Improvements & Access to Justice Act*, Pub. L. No. 100-702, § 1016(b), 102 Stat. 4669 (1988).

adopted a flat one-year limit and thereby created a provision simultaneously underinclusive and overinclusive. The provision is underinclusive because it does not apply to removal based on arising-under jurisdiction even if the state court has made substantial progress in the case; the provision is also overinclusive by preventing diversity-based removal after one year even in those cases where no substantial progress has been made in state court. As a court reviewing one such case observed, “It is very difficult to see how a removal under the facts of this case can interfere with the state court proceedings when none have occurred because of plaintiffs’ decision to withhold service until the one year time limitation has expired.”<sup>146</sup>

With respect to the competing jurisdictional versus procedural interpretations applicable to the one-year limitation, a jurisdictional approach to the one-year limit serves to bar outright any attempt to remove after one year.<sup>147</sup> Such an approach results when courts apply a strict statutory construction to the removal statutes—a construction that, as we have seen, exalts the plaintiff-deference policy over the defendant’s statutory right to remove. This jurisdictional approach is far from uniform, however, with a number of courts concluding that the one-year limit is procedural and thus potentially subject to equitable considerations.<sup>148</sup> Indeed, dicta

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<sup>146</sup> *Martine v. Nat’l Tea Co.*, 837 F. Supp. 749, 750 (M.D. La. 1993).

<sup>147</sup> *See Caudill v. Ford Motor Co.*, 271 F. Supp. 2d 1324, 1328 (N.D. Okla. 2003) (concluding that statutory language was clear and refusing to “create” jurisdiction beyond the one-year period); *Mantz v. St. Paul Fire & Marine Ins. Co.*, No. Civ. A. 2:03-0506, 2003 WL 21383830, at \*2 (S.D.W. Va. June 13, 2003) (concluding that the “plain language of the statute . . . ‘erect[s] an absolute bar to removal’” (quoting *Lovern v. GMC*, 121 F.3d 160, 163 (4th Cir. 1997))); *Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081, 1088 (S.D.W. Va. 1993) (one-year limit divests the court of jurisdiction); *Brock v. Syntex Labs., Inc.*, 791 F. Supp. 721, 723 (E.D. Tenn. 1992) (ability to remove lapses after one year), *aff’d*, 7 F.3d 232 (6th Cir. 1993). Recent Supreme Court decisions have expressed a strong preference for finding rules to be nonjurisdictional unless they govern “a court’s adjudicatory capacity, that is, its subject-matter or personal jurisdiction. . . . Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.” *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011) (citing *Reed Elsevier, Inc. v. Munchnick*, 130 S. Ct. 1237, 1243-44 (2010); *Union Pacific R.R. Co. v. Bhd. of Locomotive Eng’rs*, 130 S. Ct. 584, 596 (2009)).

<sup>148</sup> *See Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992) (one-year limit is procedural, not jurisdictional, and thus can be waived); *see also Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426 (5th Cir. 2003) (court may consider parties’ conduct in determining whether it is equitable to apply the one-year limit strictly); *id.* at 426 n.4 (citing cases concluding that the one-year limit was subject to equitable exceptions); *Wise v. Gallagher Bassett Servs., Inc.*, No. Civ. JFM-02-2323, 2002 WL 2001529, at \*1 (D. Md. Aug. 27, 2002) (finding that plaintiff had “engaged in ‘forum manipulation’ in an effort to defeat the defendant’s removal right,” and stating, “[i]t

in the U.S. Supreme Court's *Caterpillar, Inc. v. Lewis* decision referring to the one-year provision as "nonjurisdictional"<sup>149</sup> suggest that the Court viewed the one-year limit as procedural.<sup>150</sup> Perhaps an even more interesting issue is whether the one-year limit applies both to cases initially removable and those not initially removable.

A fuller excerpt from section 1446(b) aids in understanding the debate between applying the one-year limit to all cases or only those that were not initially removable. In its entirety, section 1446(b) provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.<sup>151</sup>

The one-year limitation for diversity-based removals appears as the final clause of the second paragraph above. By appearing in this particular place within the statute, the one-year limitation seems to act as a modifying or qualifying phrase only with respect to the second paragraph of section 1446(b), and some courts have therefore applied it only to cases that initially were nonremovable.<sup>152</sup> However, other courts have

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would be disrespectful to Congress to conclude that it contemplated that a litigant's right to a federal forum could be defeated simply by an adverse party employing the strategem of secreting the federal nature of a claim by failing to claim before the one-year limit established by § 1446(b) the true amount of damages she is seeking").

<sup>149</sup> *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996); see also *Henderson ex rel. Henderson*, 131 S. Ct. at 1202-03 (noting that rules other than those governing a court's subject-matter or personal jurisdiction should be deemed nonjurisdictional); *Reed Elsevier, Inc.*, 130 S. Ct. at 1243-44 (same); *Union Pac. R.R. Co.*, 130 S. Ct. at 596 (same).

<sup>150</sup> See *Caterpillar, Inc.*, 519 U.S. at 75 n.13 (referring to the one-year provision as "nonjurisdictional").

<sup>151</sup> 28 U.S.C. § 1446(b) (2006).

<sup>152</sup> See, e.g., *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534-35 (6th Cir. 1999) (concluding that if Congress had intended the one-year limit to apply to all diversity-based removals it would have stated so more clearly).

applied the one-year limit to all diversity-based removals, thereby interpreting the limitation to apply both to initially removable cases as well as to those that were not initially removable.<sup>153</sup> The courts that have offered this interpretation have emphasized that they must strictly construe the removal statutes against removal—an approach, as we have seen, used to accord deference to the plaintiff's choice of forum over the defendant's right to remove.<sup>154</sup>

With the competing policies of the plaintiff's right to forum selection and the defendant's right to remove to federal court now more fully revealed, we can now set out a framework that will generate a more consistent approach to the complex set of issues generated by removal involving section 1446(b).

#### IV. TOWARD A MORE CONSISTENT CONSTRUCTION OF SECTION 1446(b)

This article has examined three contradictory provisions within section 1446(b), two implied and one express, that arise within the removal context: the first-served/last-served/intermediate rules, the voluntary-involuntary rule, and the one-year limitation on diversity-based removal. A key insight into the resolution of these issues, whether by the courts or by Congress, is recognizing that the debates are not simply disputes over removal doctrine, but reflect the underlying tension in American procedure between plaintiff choices and defendant responses. In this part, we will analyze and synthesize the issues raised by these provisions in order to set out a more consistent analytical framework for considering late-arising removal efforts.

##### A. *Underlying Policies*

We begin with a review of policies, again both express and implied, that underlie and motivate these provisions. There are at least six such policies: (1) the statutory language itself, in its provision for removal by defendants as a general matter and in its more specific provisions of a thirty-day window for removal and of the one-year limitation on diversity-based removal; (2) the axiom

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<sup>153</sup> See *Rezendes v. Dow Corning Corp.*, 717 F. Supp. 1435, 1437 (E.D. Cal. 1989).

<sup>154</sup> To the extent that one might question whether the one-year limitation negatively impacts defendants, one need only look to the Class Action Fairness Act of 2005, which was heavily promoted by defendant interests and resulted in eliminating the one-year rule in certain class actions. See 28 U.S.C. § 1453.

that courts should interpret the removal statutes strictly; (3) the judicially imposed rule of unanimity; (4) the promotion of judicial economy; (5) deference to the plaintiff's choice of forum; and (6) an apparent disfavor of diversity jurisdiction. These policies reflect at least three inherent contradictions critical to the construction of a more consistent framework.

First, the policies mix deference to the plaintiff's choice of forum with the defendant's statutory entitlement to removal. Second, the policies mix strict statutory construction principles with the addition of judicially created conditions and rules. Third, the policies mix an articulated goal of judicial economy with the potential for removing cases to a new federal forum after they have long lingered in a state forum. Our next step is to ask whether any of these contradictions yields ready answers or contributes to a potential analytical framework.

The mix of strict statutory construction with judicially created conditions and rules is a somewhat common situation<sup>155</sup> without a ready solution, because it does not necessarily require compromise. Instead, courts and legislators could pursue a range of possible options. Courts could strictly construe the removal statutes and prohibit any supplementation with judicially created conditions and rules. Alternatively, they could honor any number of judicially created rules in addition to, or in explication of, the statutory language. In light of the current prevalence of a "plain language" approach to statutory construction, and for the sake of clarity, Congress could amend section 1446(b) to include any desired judicially created rules expressly and mandate that any rules not so included are expressly rejected.

The mix of judicial-economy concerns with the potential for late removal similarly does not yield any ready resolution: some sort of compromise appears required, yet the strength of these competing interests yields a range of choices. This leaves the mix of deference to the plaintiff's forum choice with the defendant's right to remove.

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<sup>155</sup> See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 153 (1908) (creating "well pleaded complaint" rule in federal arising-under cases, despite the absence of any such express requirement in the federal arising-under statute); *Chi., Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900) (reaffirming "rule of unanimity" when defendants seek to remove a civil action from state to federal court, despite the absence of any such express requirement in the federal removal statute); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (creating "complete diversity" rule in federal diversity jurisdiction cases, despite the absence of any such express requirement in the federal diversity statute).

In examining the conflict between preserving the plaintiff's choice of forum and honoring the defendant's right to remove to federal court when the statutory preconditions are satisfied (which also implicates interpreting the removal statutes strictly), compromise is an absolute necessity. If the policy of deferring to the plaintiff's forum choice was not subject to compromise, then the plaintiff's forum choice would become absolute and the removal statutes would serve no purpose—deferring to the plaintiff's choice of forum would, absent compromise, constitute both the beginning and the end of the discussion and would displace any potential for removal. Accordingly, courts must recognize the axiom regarding deference to the plaintiff's choice of forum for what it is—a starting point but not the only point of consideration. The defendant's right of removal is exactly that—a right, so long as the defendant satisfies the statutory prerequisites. A 1907 U.S. Supreme Court decision stated this plainly and directly:

[T]he Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals. . . . Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right.<sup>156</sup>

Some cases have expressly articulated a mistaken belief that the plaintiff's choice of forum should trump the defendant's statutory right of removal.<sup>157</sup> Those cases stand in stark contrast to other, older case decisions clearly stating that a defendant's right of removal is equal in stature, and of the same constitutional dimension, as a plaintiff's right to select a forum.<sup>158</sup> As the Supreme Court has said, to allow plaintiffs to

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<sup>156</sup> *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 182-83, 186 (1907).

<sup>157</sup> *See, e.g.,* *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 219 n.11 (5th Cir. 1998) ("The defendant's right to remove and the plaintiff's right to choose the forum are not equal."), *rev'd*, 526 U.S. 574 (1999); *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) ("The plaintiff's right to choose his forum is superior to the defendant's right of removal.")

<sup>158</sup> *See* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

*Id.* at 348; *see also* *Tex. & Pac. Ry. Co. v. Cody*, 166 U.S. 606, 609 (1897) (referring to "defendant's constitutional right as a citizen of a different State than the plaintiff, to

“always elect the state court” renders the protection of diversity jurisdiction ineffective for defendants and “[s]uch a state of things can, in no respect, be considered as giving equal rights.”<sup>159</sup> Rather, Congress authorized removal so that defendants would not be “deprived of all the security which the constitution intended in aid of [their] rights.”<sup>160</sup> By virtue of the fact that a defendant cannot automatically thwart the plaintiff’s choice of forum in every instance but instead can remove only under the circumstances prescribed by statute, the removal statutes constitute a congressional compromise between the interests of plaintiffs and defendants. It remains to apply this framework to resolve the issues that arise in the context of statutory construction—and accordingly, the next question becomes the extent to which a strict statutory construction should be modified by judicially created conditions and rules, which brings us full circle. At this point, a return to each of the three identified removal issues will provide the context necessary for our framework.

### *B. Applying Policies to the Rules*

This section applies the policies identified above and illustrates how these policies impact each of the rules explored.

#### 1. The First-Served, Last-Served, and Intermediate Rules

Returning first to the first-served, last-served, and intermediate rules, and assuming that the rule of unanimity is here to stay, the question becomes which of the three approaches strikes the better compromise between deferring to the plaintiff’s choice of forum and the defendant’s right to removal. The conclusion appears straightforward: the last-served defendant rule honors both the plaintiff’s right of forum selection and the defendant’s right of removal. Although some courts have claimed that the first-served rule does no injustice to defendants due to the rule of unanimity,<sup>161</sup> the first-served

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choose a federal forum”); *Boatmen’s Bank of St. Louis v. Fritzlen*, 135 F. 650, 655 (8th Cir. 1905) (stating that a defendant’s right of removal “is of sufficient value and gravity to be guaranteed by the Constitution and the acts of Congress”); *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 425 (E.D. Pa. 2002) (stating that a defendant’s right of removal “emanates from Article III, Section 2 of the Constitution”).

<sup>159</sup> *Hunter’s Lessee*, 14 U.S. (1 Wheat.) at 349.

<sup>160</sup> *Id.*

<sup>161</sup> *See, e.g., Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986).

rule is susceptible to potential manipulation: the plaintiff might serve less sophisticated defendants first in an attempt to preclude removal.<sup>162</sup> The last-served rule deprives the plaintiff of no valid right or privilege—the plaintiff loses only the ability to manipulate the timing of service so as to potentially reduce the likelihood of removal—whereas the first-served rule potentially deprives later-served defendants of their right to removal. Accordingly, the last-served defendant rule appears to offer the better compromise.<sup>163</sup>

## 2. The Voluntary-Involuntary Rule

The voluntary-involuntary rule presents the contradiction between deferring to the plaintiff's choice of forum and the defendant's right to removal in a very direct manner. Remember that deference to the plaintiff's choice of forum is the Supreme Court's sole articulated justification for the voluntary-involuntary rule.<sup>164</sup> But it is unclear why deference to the plaintiff's choice of forum should trump the defendant's right to remove in the context of a subsequent change in circumstances.<sup>165</sup>

Although the plaintiff is said to be the master of her claim,<sup>166</sup> no obvious reason explains why the plaintiff should maintain ongoing control after filing the complaint, especially when such ongoing control implicates concerns that a plaintiff could manipulate amendments and dismissals in such a manner as to defeat the defendant's right to removal. The

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<sup>162</sup> See *supra* note 91 and accompanying text (providing examples).

<sup>163</sup> See Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 202 (2002) (opining that it "is undoubtedly correct that the first-served defendant rule unfairly shifts [the] balance in favor of plaintiffs"); see also *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 927-28 (4th Cir. 1992) ("Congress created the removal process to protect defendants. It did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." (quoting *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 713 F. Supp. 185, 189 (W.D.N.C. 1989))).

<sup>164</sup> See *Jenkins v. Nat'l Union Fire Ins. Co. of Pa.*, 650 F. Supp. 609, 613-14 (N.D. Ga. 1986) ("What emerges from an examination of the Supreme Court cases on the voluntary-involuntary rule is the conclusion that the rule is not based upon an appealability/finality rationale but upon a policy favoring the plaintiff's 'power to determine the removability of his case.'" (quoting *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918))).

<sup>165</sup> See Underwood, *supra* note 104, at 1098 ("The voluntary/ involuntary rule is not just antiquated, but lacking any principled bases. It acts as merely another court-created doctrine designed to limit the ability of litigants to utilize the services of the federal tribunals, trampling on principles of federalism.").

<sup>166</sup> See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (referring to plaintiff as "the master of the complaint" (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1996))).

plaintiff is entitled to the initial forum choice and permitted to attempt to structure her lawsuit in such a manner as to avoid federal subject-matter jurisdiction, such as by suing under state law rather than federal law, suing nondiverse defendants, or limiting the recovery sought to one below the jurisdictional threshold. However, the extreme deference to the plaintiff's choice of forum reflected in the voluntary-involuntary rule seems especially incongruous in light of other ways that we permit defendants to alter the litigation, such as by adding parties,<sup>167</sup> asserting counterclaims and cross-claims,<sup>168</sup> and moving for transfers of venue.<sup>169</sup> Extending the plaintiff's control beyond the initial filing, so that defendants cannot exercise their right of removal in an instance where federal subject-matter jurisdiction plainly exists, unduly defers to the plaintiff's forum selection at the expense of the defendant's right of removal.

### 3. The One-Year Limitation

Finally, we turn to the one-year limitation on diversity-based removal. As an initial matter, no obvious rationale explains the purpose of imposing an outer one-year time limit on the removal of diversity cases, but no outer time limit whatsoever on the removal of arising-under cases. This presents two potential options: eliminating the one-year limitation on diversity-based removal so that there is no time limit for either diversity or arising-under cases, or imposing an outer time limitation on both diversity and arising-under removal.

In answer to concerns about the one-year limitation as tending to encourage plaintiff manipulation (such as waiting until the expiration of the one-year limit before dismissing a nondiverse defendant), the elimination of the one-year limit would remove this concern and put all bases for removal on the same footing. However, the lack of any outer time limit would permit removal after state courts have potentially invested substantial time and resources in the case, which is inconsistent with judicial-economy concerns. An appropriate compromise in this instance might be for Congress to implement an outer time limitation for all removal, regardless of whether the basis for federal subject-matter jurisdiction is diversity or arising-under. This would eliminate the apparent

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<sup>167</sup> See, e.g., FED. R. CIV. P. 14.

<sup>168</sup> See FED. R. CIV. P. 13.

<sup>169</sup> See 28 U.S.C. § 1404(a) (2006).

bias against diversity jurisdiction, would address the articulated concern about removal after state courts have made substantial investments in the case, and would resolve the current dispute as to whether the time limit applies to all cases or only to those not initially removable. Further, Congress could specify that the time limitation is subject to equitable considerations. This would eliminate the current dispute about whether the provision is jurisdictional or procedural; it would also serve to clarify that courts will not look favorably upon the perpetrators of strategic manipulation (e.g., failure to investigate by defendants, or delays in serving defendants or amending pleadings by plaintiffs). Importantly, Congress, as the creator of the statutory limitation on diversity-based removal, must make the choice about applicable amendments to current removal provisions.

#### CONCLUSION

When removal from state to federal court is delayed beyond the initial thirty days after the action is commenced, such subsequently instituted removal potentially implicates three complicating issues that are all rooted in section 1446(b): the first-served/last-served/intermediate rules, the voluntary-involuntary rule, and the one-year limitation on diversity-based removal. These three issues have developed independently, which has masked the potential for a unifying analytical framework. This article has identified the underlying policies, analyzed the inherent contradictions, and proposed resolutions more consistent with the dual and equal goals of honoring the plaintiff's choice of forum and honoring the defendant's right of removal.