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Are Rules Just Meant To Be Broken? The One-Year Two-Step in Tedford v. Warner- Lambert Co.

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I. Introduction

Federal law allows for the removal from state court to federal court of any case that originally would have qualified for federal jurisdiction,[1] either by federal question[2] or diversity[3] jurisdiction. The general removal statute sets forth various time frames and deadlines for when a party must notice removal.[4] One of these time limits states 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."[5] Section 1332 defines diversity jurisdiction.[6] Thus, the one-year provision of 28 U.S.C. § 1446(b) (§ 1446(b)) seems to mandate that, if the sole basis for federal jurisdiction is diversity of citizenship, a defendant may not remove more than one year after the commencement of the case.[7]

This one-year time limit allows a plaintiff to engage in manipulative gamesmanship in order to defeat removal. Consider the following hypothetical: Plaintiff from State *X* gets into a car accident within the borders of State *X* with Defendant, a resident of State *Y*. Plaintiff suffers serious physical injury and wants to sue Defendant solely under a state-law tort claim for $100,000. Because the two parties have diverse citizenship and the amount in controversy is greater than $75,000, the case qualifies for federal diversity jurisdiction.[8] If Plaintiff files the suit "as is" in the courts of State *X*, Defendant may remove the case to federal district court in State *X*.[9] Plaintiff is fully aware of this

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1. *See* 28 U.S.C. § 1441 (2000) (setting forth the requirements for removal).

2. *See id.* § 1331 (providing for federal jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States").

3. *See id.* § 1332 (providing for federal jurisdiction of state law claims when the amount in controversy is greater than $75,000 and the adverse parties are completely diverse).

4. *See, e.g., id.* § 1446(b) (requiring that a defendant notice removal within thirty days of receiving the initial pleading); *id.* § 1446(c)(1) (requiring notice of removal within thirty days of arraignment in state court for any criminal case).

5. *Id.* § 1446(b).

6. *See id.* § 1332 (defining diversity of citizenship).

7. *See, e.g.*, Hedges v. Hedges Gauging Serv., 837 F. Supp. 753, 755 (M.D. La. 1993) (refusing to allow a defendant to remove after one year has passed when the only basis for federal jurisdiction was diversity). *But see* Shiver v. Sprintcom, Inc., 167 F. Supp. 2d 962, 963–64 (S.D. Tex. 2001) (applying an equitable exception to the one-year time limit, thus allowing removal after the one-year anniversary).

8. *See* 28 U.S.C. § 1332 (2000) (defining diversity of citizenship and mandating that the amount in controversy must exceed $75,000 in order to qualify for federal diversity jurisdiction).

9. *See id.* § 1441(a) (providing that a case may be removed to "the district court of the United States for the district and division embracing the place where such action is pending"); *see also* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity*

procedure and wants to remain in state court. Thus, Plaintiff finds some way to join[10] a defendant from State *X*—perhaps the owner of the car that the defendant was driving at the time of the accident—in the suit, which destroys the complete diversity necessary for removal.[11] In reality, Plaintiff does not really want to pursue the claim against the nondiverse defendant and is keeping her in the suit merely to wreck diversity and prevent removal. Then, after a year has passed from the filing of the suit, Plaintiff settles with or otherwise drops the nondiverse defendant from the action. Once again, complete diversity exists, but a year has passed and the removal statute seems to foreclose the remaining defendant from gaining access to the federal courts.

The plaintiff's actions are clearly manipulative and the situation is arguably unfair for the remaining defendant.[12] The remaining defendant is stuck in state court and still may want to get into the federal forum.[13] The question remains, however, whether, in the face of such manipulative action by the plaintiff, the defendant should still have access to the federal courts after a year has passed. Stated differently, should the courts apply some form of equitable exception to the one-year time limit in the event that the plaintiff manipulatively acts only to defeat removal?

This situation and resulting question arose in *Tedford v. Warner-Lambert Co.*[14] In fact, this question has surfaced many times before *Tedford*, with some

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and Federal Question Jurisdiction, 41 AM. U. L. REV. 369, 389 (1992) (finding that 69% of all cases removed from state court to federal court in 1987 were diversity-based cases). States do not keep track of how many cases filed in their courts actually qualify for diversity jurisdiction, thus making an accurate determination of the percentage of diversity-qualified cases that are removed impossible. *Id.* at 385.

10. *See* FED. R. CIV. P. 20 (stating that a plaintiff may join multiple defendants in one action if the claims against each defendant arise out of the same transaction or occurrence).

11. *See, e.g.*, Caterpillar Inc. v. Lewis, 519 U.S. 61, 70–72 (1996) (stating that proper diversity-based removal requires that complete diversity exist at the time of removal).

12. *See, e.g.*, Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 645–47 (2004) (calling the nondiverse defendant in this situation a "bogus part[y]" and arguing that this gamesmanship is unfair to the remaining defendant).

13. *Compare* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA 127 (1992) (describing the desire to remove or remain in state court by stating in the diversity context that, "The nature of the forum [helps] determine both the likelihood that plaintiffs might win and, if they did, the amounts they would receive.") *with* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1672–73 (1992) (discussing the various arguments for abolishing diversity jurisdiction, which include, among others, insufficient proof of local bias in state court and the non-outcome determinative nature of forum choice).

14. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 424 (5th Cir. 2003) (deciding whether to provide equitable relief to a defendant that was arguing that the plaintiff's gamesmanship prevented the defendant from exercising the right of removal). In *Tedford*, the original plaintiffs, Tedford and Castro, were citizens of Texas, from Eastland County and

district courts allowing removal and others refusing to allow removal after a year has passed.[15] The *Tedford* court, however, was the first circuit court of appeals to directly address the issue,[16] and concluded that the time limit is subject to an equitable exception in the face of manipulative conduct.[17] In almost all cases, the central debate is whether to adhere strictly to the language of the removal statute or to negate a plaintiff's gamesmanship by recognizing an equitable exception to the time limit.[18]

Johnson County respectively. *Id.* They filed a products liability suit in Texas state court against Warner-Lambert, the manufacturer of the prescription drug Rezulin, as well as against Dr. Johnson, a citizen of Johnson County. *Id.* The initial complaint did not specify which plaintiff Dr. Johnson treated, but Warner-Lambert learned that Dr. Johnson treated only Castro and moved in state court to sever the two plaintiffs. *Id.* at 424–25. The state court granted Warner-Lambert's motion and transferred Tedford's claim to Eastland County. *Id.* at 425. Warner-Lambert informed Tedford that the company intended to remove the case to federal court on the basis of diversity jurisdiction as Warner-Lambert was not a Texas citizen and Dr. Johnson was not a proper defendant in Tedford's claim. *Id.* Three hours later, Tedford amended her complaint to add as a defendant her own doctor, Dr. DeLuca, a citizen of Eastland County. *Id.* Warner-Lambert, arguing that the doctor was fraudulently joined, removed the case to federal court. *Id.* The federal court, however, rejected Warner-Lambert's argument and remanded the case to state court. *Id.* The case proceeded between Tedford and Warner-Lambert, and at some point before the one-year anniversary of the beginning of the case, Tedford signed and postdated a Notice of Nonsuit against Dr. DeLuca without ever taking discovery from Dr. DeLuca. *Id.* Tedford notified Warner-Lambert of the nonsuit after the one-year anniversary, and Warner-Lambert again removed the case to federal court ten days after the anniversary. *Id.* Upon Tedford's motion to remand on the basis that the one-year time limit barred removal, the federal court applied an equitable exception because it found that Tedford had engaged in forum manipulation. *Id.* at 428–29.

15. *Compare* Jenkins v. Sandoz Pharm. Corp., 965 F. Supp. 861, 869 (N.D. Miss. 1997) (refusing to allow removal after the one-year anniversary), *and* Russaw v. Voyager Life Ins. Co., 921 F. Supp. 723, 724–25 (M.D. Ala. 1996) (refusing to reach the issue of whether diversity was present because the removal had occurred more than one year after the commencement of the action), *with* Shiver v. Sprintcom, Inc., 167 F. Supp. 2d 962, 963–64 (S.D. Tex. 2001) (applying an equitable exception to the one-year time limit, thus allowing removal after the one-year anniversary), *and* Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 601–03 (N.D. Tex. 1998) (finding that the one-year bar is subject to an equitable exception, but refusing to apply the exception because the defendant had not vigilantly pursued its own interests).

16. *See Tedford*, 327 F.3d at 425–26 (recognizing that this opinion would be the first published circuit court opinion directly addressing the question of an equitable exception as applied to the one-year removal bar). *But see* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 n.12 (11th Cir. 1994) (acknowledging the possibility of plaintiff misuse inherent in the time limit, but eventually asserting that the one-year time limit was a jurisdictional mandate rather than a congressional suggestion).

17. *See Tedford*, 327 F.3d at 426–27 (holding that the one-year time limit is subject to an equitable exception).

18. *See, e.g.*, Brock v. Syntex Labs., 791 F. Supp. 721, 722 (E.D. Tenn. 1992) (highlighting the debate of whether the time limit is jurisdictional, and thus an unbending mandate, or procedural, and thus subject to an equitable exception).

The plaintiff in *Tedford* initially filed a products liability suit with another plaintiff, but the state court severed the two claims.[19] After the severance, the defendant notified the plaintiff that it intended to remove the case to federal court on the basis of diversity.[20] Three hours later, the plaintiff amended her complaint to join her doctor as a defendant, which destroyed complete diversity.[21] Some time later, the plaintiff signed and postdated a Notice of Nonsuit against the doctor, but did not file it until after the one-year mark.[22] The remaining defendant removed the case to federal court, and when the plaintiff asserted the one-year time limit, the defendant argued that the court should recognize an equitable exception to the time limit because of the plaintiff's manipulative practices.[23] The district court agreed and retained jurisdiction even though removal had occurred more than one year after the commencement of the action.[24] On appeal, the Fifth Circuit agreed with the district court and held that the one-year time limit was subject to an equitable exception.[25]

This Note will discuss the merits of the equitable exception applied in *Tedford*. Part II of this Note analyzes the removal and diversity statutes by examining their language, detailing their respective histories, and presenting the stated policies behind the time limit. Part III presents the different ways that courts have treated the question of whether the one-year time limit is subject to an equitable exception and points out the divergence of analysis between those courts that reject the equitable exception and those courts that accept the exception. Then, in Part IV, this Note evaluates the suggested revision to the removal statute propounded by the American Law Institute (ALI).[26] Part V considers the impact and implications of an equitable exception by focusing on post-*Tedford* decisions within the Fifth Circuit to demonstrate the lack of uniformity and predictability inherent in leaving the decision to individual judges. Part VI synthesizes all of the separate pieces of this issue into possible

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19. *See Tedford*, 327 F.3d at 424 (describing the initial suit in state court).

20. *See id.* at 425 (explaining the events that led to complete diversity existing).

21. *See id.* (discussing the addition of the doctor to destroy diversity).

22. *See id.* (stating the circumstances of the doctor's dismissal from the suit).

23. *See id.* (describing the argument that occurred at the removal hearing in federal court).

24. *See id.* (explaining the district court's decision to retain jurisdiction).

25. *See id.* at 424 (agreeing with the district court and applying an exception to the time limit).

26. *See* FED. JUDICIAL CODE REVISION PROJECT 339–41, 453 (2004) (proposing a deletion of the one-year time limit in § 1446(b) in favor of a new provision in § 1447—new § 1447(b)—that would leave the decision to allow removal after a year has passed up to the district judge's discretion "in the interest of justice").

implications for the future of removal practice. Finally, Part VII concludes that, in light of the plain language of the statute, the deeply entrenched history of removal, and the practical implications of an equitable exception, neither Congress nor the courts should allow equity to play a role in the one-year time limit.

II. Statutory Construction

The starting point in the analysis of whether equitable principles play a role in the removal time limit is the statute that creates the time limits.[27] The requirements, qualifications, and procedures for removal are codified at 28 U.S.C. §§ 1441–1448,[28] with the time limit in question found at § 1446(b).[29] Before analyzing the statutes themselves, this Note must establish the methodology for the analysis. The scholarship shows that the methods of statutory construction are varied and that the seemingly empirical endeavor of statutory analysis depends, in many cases, on the desired result of the individual interpreter.[30] Reasonable and intelligent minds can differ on the point of whether the one-year time limit is subject to an equitable exception.[31] Thus, this Part does not argue that the language of the statute definitely does or does not allow for an equitable exception or that the legislative histories provide any clear answer to the question. Rather, this Part simply states and parses the language of the relevant statutes and then presents the history of the removal statute and of diversity jurisdiction. At the end of this Part, this Note presents two competing conclusions that arise as a result of the statutory analysis and it adopts the conclusion that goes against the *Tedford* decision.

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27. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340–41 (1997) (stating that the starting point for addressing an issue is the statute itself).

28. 28 U.S.C. §§ 1441–1448 (2000).

29. *See id.* § 1446(b) (prescribing various time limits for when a party must notice removal).

30. *See, e.g.*, Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 236–37 (2004) (discussing the failure of the plain language rule of statutory construction to yield uniform and predictable results and stating that "how the rule functions varies dramatically from case to case, depending on the jurist and/or type of case").

31. *Compare* Russaw v. Voyager Life Ins. Co., 921 F. Supp. 723, 724–25 (M.D. Ala. 1996) (holding that the plain language of the statute does not allow for an equitable exception to the one-year time limit) *with* Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 601–03 (N.D. Tex. 1998) (holding that the statute does not prohibit courts from applying equitable considerations to the enforcement of the one-year time limits).

A. Plain Language

The "Procedure for Removal" section of the removal statute is located at § 1446.[32] Section 1446(a) provides the necessary content of the removal petition and designates the correct federal court to which the removing party must notice removal.[33] The first paragraph of § 1446(b) states that, in a civil action, the removing party must notice removal within thirty days of receipt of the initial pleading in the action.[34] Alternatively, if state law allows for the filing of a claim without delivery of a copy of the pleading to all parties, the party wishing to remove must notice removal within thirty days of receipt of summons.[35] Of these alternatives, the operative time period is whichever one is shorter.[36]

The second paragraph of § 1446(b) contains the time limit that this Note discusses.[37] This paragraph states:

> 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.[38]

At the outset, this paragraph confines itself to cases that are not initially removable.[39] In other words, this paragraph deals only with cases in which the initial pleading in state court joins a nondiverse defendant, requests less than $75,000, is unclear about whether the claim arises from federal or state law, or is unclear as to the citizenship of a particular party.[40] If any of these factors are

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32. 28 U.S.C. § 1446 (2000).

33. *See id.* § 1446(a) (requiring that the removal petition be filed in the federal district court for the district and division in which the state court sits, contain a plain statement of the grounds for removal, and be signed pursuant to Rule 11 of the Federal Rules of Civil Procedure).

34. *See id.* § 1446(b) (setting forth the time frame for removal at the onset of a suit).

35. *Id.* (providing the procedure for removal when state law allows delayed service of process).

36. *Id.* (mandating the operative time limit to determine when removal must occur).

37. *See id.* (providing a one-year cap on the availability of removal in situations in which the case was not initially subject to removal).

38. *Id.*

39. *See id.* ("If the case stated by the initial pleading is not removable . . . .").

40. *See, e.g.*, Tedford v. Warner-Lambert Co., 327 F.3d 423, 425 (5th Cir. 2003) (explaining that a nondiverse defendant's presence rendered the case not initially removable); Cofer v. Horsehead Research & Dev. Co., 805 F. Supp. 541, 542 (E.D. Tenn. 1991) (explaining

present, the pleading does not contain the requirements for federal jurisdiction, whether it is based on a federal question or diversity,[41] and, thus, the case is not removable on the face of the complaint.[42]

In the instance of an initially unremovable case, something may occur subsequent to the initial pleading that allows the case to meet the requirements for federal jurisdiction.[43] If such an occurrence happens, the second paragraph of § 1446(b) gives the party that wishes to remove thirty days from the date that the party learns of the occurrence that allows for federal jurisdiction to notice removal.[44] The last clause of this paragraph states that when the occurrence allows for removal based on diversity jurisdiction, the case "may not be removed" more than one year after the beginning of the suit.[45]

The issue in this Note is whether the language may not be removed[46] allows for an equitable exception to the one-year time limit. The U.S. Supreme Court has stated that the meaning of the words in a statute derives from the common usage of those words as well as from the context in which the legislature has used them.[47] In stating that the removal notice "shall be filed" no more than thirty days after the initial pleading,[48] the first paragraph of § 1446(b)[49] uses "obligatory" language.[50] This language operates to limit the

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that an original *ad damnum* of $49,999 prevented removal at the onset of the suit).

41. *See* 28 U.S.C. § 1331 (2000) (allowing federal jurisdiction of cases arising under federal law); *id.* § 1332 (allowing federal jurisdiction of state law cases in which the parties are diverse and the amount in controversy is greater than $75,000).

42. *See id.* § 1441 (allowing removal of only those cases over which the federal system would have had original jurisdiction).

43. *See, e.g.*, *Tedford*, 327 F.3d at 425 (discussing the sequence of events that rendered the case removable when the state court severed the cases, then rendered the case unremovable when the plaintiff joined another nondiverse defendant).

44. *See* 28 U.S.C. § 1446(b) (2000) ("[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 . . . .").

45. *See id.* (stating "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").

46. *Id.*

47. *See, e.g.*, McCarthy v. Bronson, 500 U.S. 136, 139 (1991) (stating that "statutory language must always be read in its proper context. 'In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'").

48. *See* 28 U.S.C. § 1446(b) (2000) (placing a thirty-day time limit on the availability of removal if the case was removable at the onset of the suit, as determined by the complaint).

49. *Id.*

50. *See* WEBSTER'S NEW WORLD DICTIONARY 1232 (3d Coll. ed. 1988) (defining "shall" as "used in the second or third person, esp. in formal speech or writing, to express

availability of removal by placing a time constraint on when a litigant may notice removal.[51] Then, in the second paragraph, Congress keeps the option of removal open to litigants if the case was not initially qualified for federal jurisdiction.[52] Congress states that if the case was not initially removable but later becomes removable, a removal notice "may be filed" within thirty days of first learning of the presence of federal jurisdiction.[53]

Congress did not use "shall" in the second paragraph, and instead opted for "may."[54] May has a permissive connotation,[55] whereas shall connotes mandatory language. Yet, in the first paragraph Congress clearly did not intend that the defendant must remove the case if federal jurisdiction is available.[56] Removal is optional.[57] Thus, the use of the word shall in the first paragraph does not imply an absolutely mandatory action.[58] In other words, the first paragraph of § 1446(b) could begin, "If the defendant wishes to remove" and then continue with the current language of the first paragraph. In any case, Congress's usage of shall does not have as much of a mandatory implication as it may seem, thus casting a shadow of ambiguity over the entire statute.

The next question is whether Congress's usage of the language "may not" forbids any form of exception. As stated above, may tends to imply a permissive act. As a matter of pure language and vocabulary, whether may not has the same permissive nature is debatable.[59] Arguably, may not is

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determination, compulsion, obligation, or necessity").

51. *See, e.g.*, Dahiya v. Talmidge Int'l, Ltd., 371 F.3d 207, 208 (5th Cir. 2004) (stating that the thirty-day time limit in the first paragraph of § 1446(b) usually prevents removal more than thirty days after initial notice of the suit).

52. *See* 28 U.S.C. § 1446(b) (2000) (allowing removal to occur more than thirty days after the beginning of the suit if the case was not initially removable).

53. *Id.*

54. *Id.*

55. *See* WEBSTER'S NEW WORLD DICTIONARY 837 (3d Coll. ed. 1988) (defining "may" as "used to express ability or power . . . used to express permission").

56. *See, e.g.*, 28 U.S.C. § 1441(a) (2000) (stating that a civil action brought in state court may be removed, not that it must be removed).

57. *See, e.g.*, 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 107.03 (3d ed. 2004) (discussing the option of removing from state to federal court).

58. 28 U.S.C. § 1446(b) (2000).

59. *See* WEBSTER'S NEW WORLD DICTIONARY 837 (3d Coll. ed. 1988) (defining may as "used to express permission," but in the legal sense defining the word to mean "shall; must"). *Compare* Russaw v. Voyager Life Ins. Co., 921 F. Supp. 723, 724–25 (M.D. Ala. 1996) (holding that the plain language of the statute does not allow for an equitable exception to the one-year time limit) *with* Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 601–03 (N.D. Tex. 1998) (holding that the statute does not prohibit courts from applying equitable considerations to the enforcement of the one-year time limits).

ambiguous; therefore, the next focus will be on legislative history and congressional intent to determine whether the statute allows for an equitable exception.

A discussion of the statute that provides for diversity jurisdiction should precede an analysis of the history of the removal statute.[60] The one-year time limit deals only with removal based on diversity jurisdiction.[61] The issue in *Tedford* is the right of removal after a year has passed.[62] For this question even to be an issue, however, diversity jurisdiction must exist.[63] Thus, a full understanding of the one-year time limit requires an understanding of the text and history of the diversity statute.

The diversity statute deals with controversies grounded in a state-law cause of action between parties from different states or countries.[64] Congress has placed parameters on the constitutionally-based original diversity jurisdiction by setting an amount in controversy minimum and by defining the process for determining citizenship.[65] The language of the statute is relatively clear and, in any case, is of no real consequence to this Note. Rather, the more interesting facet of the diversity statute is its evolution and history as it relates to removal.[66]

B. Statutory Histories

As stated above, the issue of the one-year time limit necessarily depends on diversity jurisdiction. Thus, the evolution of the removal statute depends, in part, upon the evolution of the diversity statute.[67] In other words, the way various courts have construed congressional intent regarding diversity and removal, as well as congressional reaction to those judicial constructions, has

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60. *See* 28 U.S.C. § 1332 (2000) (setting forth the requirements of diversity jurisdiction).

61. *See id.* § 1446(b) (restricting the one-year time limit for removal to cases in which federal jurisdiction is based on diversity jurisdiction).

62. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 424 (5th Cir. 2003) (deciding whether to allow defendant to remove on the basis of diversity jurisdiction more than one year after the commencement of the action).

63. *See* 28 U.S.C. § 1446(b) (2000) (making the presence of diversity jurisdiction a precondition of the operation of the one-year time limit).

64. *See id.* § 1332(a) (granting original jurisdiction to the federal courts "of all civil actions" when the monetary and citizenship requirements are met).

65. *See id.* § 1332 (setting forth the mechanics of diversity jurisdiction).

66. *See* Haiber, *supra* note 12, at 613 (stating that the histories of the removal statute and the diversity statute are inseparable).

67. *Id.*

greatly influenced the present issue of whether courts should allow equitable principles to play a role in the one-year time limit.[68]

1. The Early Stages of Removal

Diversity jurisdiction is a result of Article III, Section 2 of the Constitution, that defines the power of the federal judiciary as including controversies between citizens of different states, as well as other enumerated classes of cases.[69] The Framers included diversity jurisdiction in the Constitution because of a fear of local bias in the state courts against out-of-state litigants.[70] The Framers did not, however, designate which federal court would exercise this jurisdiction or how the case would reach federal court.[71] Thus, almost immediately after the ratification of the Constitution, Congress enacted the Judiciary Act of 1789 to create both a federal court system and the procedures to be used in those courts.[72]

The 1789 Act defined original diversity jurisdiction as a case in which more than $500 was in dispute, the parties were diverse, and at least one of the parties resided in the forum state.[73] The Act also provided the option of removal in the instance of a plaintiff bringing suit in state court if the suit met the requirements of diversity.[74] This option existed only for defendants sued in the state courts of the plaintiff's residence.[75] The courts viewed this procedural

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68. *See id.* at 612–34 (putting forth the chronological histories, both legislative and judicial, of the removal and diversity statutes). A large part of the following historical section comes from Mr. Haiber's thorough and comprehensive treatment of removal. Though this Note eventually draws an opposite conclusion than Mr. Haiber's Article, his research into the histories of the two statutes is extremely informative and well organized.

69. *See* U.S. CONST. art. III, § 2 (defining the outer limits of the federal judicial power).

70. *See* THE FEDERALIST NO. 80, at 502 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966) (arguing in favor of federal jurisdiction in cases between citizens of different states in order to avoid state court bias); *see also* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483–500 (1927) (describing the debates during the ratification process that led to the presence of diversity jurisdiction in the Constitution).

71. *See* U.S. CONST. art. III, § 1 (stating that Congress has the power to determine which lower courts, if any, will have jurisdiction to hear the cases and controversies in § 2).

72. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (setting forth the original congressional establishment of the judicial system and grant of jurisdiction).

73. *See id.*, ch. 20, § 11, 1 Stat. at 78 (setting forth the requirements for original diversity-based jurisdiction in federal courts).

74. *See id.*, ch. 20, § 12, 1 Stat. at 79 (allowing for removal if the requirements of § 11 are present).

75. *See id.* ("[T]he defendant shall, at the time of entering his appearance in such state court, file a petition for the removal . . . .").

device as a way to ensure equal access to diversity jurisdiction between plaintiffs and defendants.[76] For quite a long while after the passage of the 1789 Act, the courts were sympathetic toward removal.[77]

The Union victory in the Civil War brought about several congressional acts that expanded federal jurisdiction, and many of these acts related to removal.[78] The most extensive of these acts was the Removal Act of 1875.[79] The 1875 Act gave original and removal federal question jurisdiction to the federal courts.[80] The Act also amended the removal statute to allow plaintiffs, as well as defendants, to remove[81] and to provide appellate review of orders to remand.[82] The courts continued to look favorably upon removal, considering it a proper method for invoking federal jurisdiction.[83] This favorable view of removal and federal jurisdiction in general, combined with the creation of federal question jurisdiction, increased federal legislation, and a rise in interstate mobility, led to a dramatic increase in the federal caseload.[84]

2. *Removal's Retreat*

Congress quickly reacted to this increase in federal litigation with the Judiciary Act of 1887.[85] The 1887 Act took the right of removal away from all

76. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816) (describing the removal option as a device to allow equal access to the federal forum for plaintiffs and defendants); *see also* Haiber, *supra* note 12, at 618 (discussing Justice Story's opinion in *Martin* and the subsequent adoption of this sentiment throughout the judiciary).

77. *See* Haiber, *supra* note 12, at 618–19 (stating that the courts viewed removal as a necessary means of attaining the constitutional end of federal jurisdiction for close to a century after the 1789 Act).

78. *See id.* at 620–21 (detailing the post-Civil War increase in congressional expansion of federal jurisdiction).

79. *See* Act of March 3, 1875, ch. 137, 18 Stat. 470, 470–73 (determining the jurisdiction of the circuit courts and revising the procedure for removal from state courts).

80. *See id.*, ch. 137, § 1, 18 Stat. at 470 (granting original jurisdiction to the circuit courts of cases arising under the Constitution or United States law and of controversies between citizens of different states).

81. *See id.*, ch. 137, § 2, 18 Stat. at 471 ("[E]ither party may remove said suit into the circuit court of the United States.").

82. *See id.*, ch. 137, § 5, 18 Stat. at 472 (allowing review by the Supreme Court of any order remanding a case to state court).

83. *See* Haiber, *supra* note 12, at 621 (asserting that the courts continued to view removal as a necessary and favored means of exercising valid federal jurisdiction).

84. *See id.* at 622 (stating that these factors led to a dramatic increase in the federal docket).

85. *See* Act of March 3, 1887, ch. 373, 24 Stat. 552 (beginning with the preamble "An act to amend the act of Congress approved March third, eighteen hundred and seventy five . . . .").

plaintiffs, as well as defendants residing in the forum state.[86] The Act also set the amount in controversy for all federal cases, federal question and diversity, at $2,000.[87] The result of this Act was a jurisdictional landscape more restrictive than that provided for in the 1875 Act.[88] On the other hand, the breadth of federal jurisdiction was still greater than it was under the 1789 Act because of the advent of federal question jurisdiction.[89]

Starting close to the passage of the 1887 Act, and for some time thereafter, a split arose as to the correct way to construe the removal provisions.[90] One side of the split approached removal with a skeptical eye, opting in favor of remand if jurisdiction was doubtful.[91] Observing the administrative burden of the ever-increasing federal caseload, these courts sent cases back to state court if the removal requirements were not clearly present.[92] One court explained the

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86. *See id.*, ch. 373, § 2, 24 Stat. at 553 (stating that cases in state court "may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of that state").

87. *See id.*, ch. 373, § 1, 24 Stat. at 552 (allowing original federal jurisdiction of cases arising under federal law or controversies between citizens of different states when the amount in controversy is greater than $2,000).

88. *Compare* Act of March 3, 1875, ch. 137, 18 Stat. 470, 470–73 (allowing plaintiffs and resident defendants to remove) *with* Act of March 3, 1887, ch. 373, 24 Stat. 552, 552–55 (restricting removal to nonresident defendants and raising the amount in controversy requirement to $2,000).

89. *Compare* Act of March 3, 1887, ch. 373, 24 Stat. 552, 552–55 (allowing original jurisdiction of both diversity and federal question cases) *with* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (allowing original federal jurisdiction in the lower federal courts of only controversies satisfying the diversity requirements). *But see* Mark R. Killenbeck, *In(re) Dignity: The New Federalism in Perspective*, 57 ARK. L. REV. 1, 21–22 (2004) (arguing that the Judiciary Act of 1789 provided for federal question jurisdiction throughout the Act rather than in a single statement).

90. *See* Haiber, *supra* note 12, at 626–29 (explaining the development of the disagreement within the judiciary about whether the 1887 revisions to the jurisdiction and removal provisions implied a congressional disfavor of removal).

91. *See, e.g.*, Fitzgerald v. Mo. Pac. Ry. Co., 45 F. 812, 819–20 (D. Neb. 1891) ("It is urged by counsel for the defendant that if it is doubtful whether the cause is removable, the doubt should be resolved in favor of the jurisdiction of this [federal] court. But the converse is the rule.").

92. *See, e.g.*, W. Union Tel. Co. v. Louisville & Nashville R.R. Co., 201 F. 932, 945 (E.D. Tenn. 1912) (explaining the reasons for remanding the case). The court reasoned that remand was proper by stating:

> I am strengthened in this conclusion by the well-settled rule, growing in part out of the great practical hardship of protracted and fruitless litigation resulting to litigants from a ruling by a Federal trial court erroneously retaining jurisdiction of a removed cause . . . that if there be any substantial doubt as to Federal jurisdiction the cause should be remanded, and jurisdiction retained only where it is clear.

Id.

rationale by stating, "[i]t is the safer and wiser course to send a cause for trial to a court of unquestionable jurisdiction, rather than retain it [in federal court], and go through all the forms of trial when the jurisdiction is doubtful."[93] These courts reasoned that because jurisdiction over diversity cases was definitely proper in state court as the underlying substantive law was state law, expending finite judicial resources on cases in which federal jurisdiction was clearly proper rather than on those in which jurisdiction was questionable was the wiser option.[94]

The other side of the split based its rationale on the fact that federal jurisdiction is a privilege granted by the Constitution.[95] Article III allows for both federal question and diversity jurisdiction,[96] and Congress had implemented rules and procedures for exercising this jurisdiction.[97] These courts reasoned that the mere aims of efficiency and administrative ease may not justify ignoring a constitutional and congressional grant of jurisdiction.[98] Thus, these courts concluded that the presumption in favor of remand is not well-founded and is, in effect, a denial of a constitutional right of the party seeking the federal forum.[99]

In 1941, the Supreme Court addressed the split in *Shamrock Oil & Gas Corp. v. Sheets*.[100] The Court reviewed the history of the removal statute and

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93. *Fitzgerald*, 45 F. at 821.

94. *See id.* (making an efficiency-based argument when ordering remand to state court of a case in which federal jurisdiction was not completely clear).

95. *See, e.g.*, Boatmen's Bank of St. Louis v. Fritzlen, 135 F. 650, 654–55 (8th Cir. 1905) (rejecting the sentiment against removal, in part, because access to the federal forum is a constitutionally-prescribed right).

96. *See* U.S. CONST. art. III, § 2 (defining the outer limits of the federal judicial power).

97. *See* Act of March 3, 1887, ch. 373, 24 Stat. 552, 552–55 (providing for original federal question and diversity jurisdiction, and for removal of causes from state to federal court).

98. *See, e.g.*, *Boatmen's Bank*, 135 F. at 653–54 (rejecting the argument that efficiency is a sufficient reason to deny access to the federal forum and pointing out the fact that reflexive remand may result in greater inefficiency than would allowing removal); Niccum v. N. Assurance Co., 17 F.2d 160, 164 (D. Ind. 1927) (citing *Boatmen's Bank* and stating that doubt should be resolved in favor of removal because removal is a constitutional right); Drainage Dist. No. 19 v. Chi., M. & St. P. Ry. Co., 198 F. 253, 264 (W.D. Mo. 1912) (citing *Boatmen's Bank* to reject the argument that courts should resolve doubt in favor of remand).

99. *See Boatmen's Bank*, 135 F. at 654 (taking the federal judges that reflexively remand a case to state court to task for denying their oath and duty to hear cases properly before them and for denying a litigant her rightful appearance in the federal forum).

100. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106 (1941) (discussing removal as set forth in the Judiciary Act of 1887). The petitioner in *Shamrock Oil* was the original plaintiff in a state court suit. *Id.* at 103. The defendant in that suit filed a counterclaim, which the plaintiff removed to federal court. *Id.* The defendant objected to the removal on the grounds that petitioner, the original plaintiff, was not a defendant and thus not entitled to removal. *Id.* The federal district court, however, agreed with petitioner that, as a result of the

viewed the 1887 Act as clear congressional intent to return removal to its 1789 status.[101] The Court also found two new policy reasons for limiting removal.[102] The first justification was a perceived congressional aversion to expanded federal jurisdiction beginning in 1887.[103] The Court looked to congressional acts between the 1887 Act and 1941 and found the policies of those acts to mandate a strict construction of federal jurisdictional legislation.[104] Thus, the *Shamrock Oil* Court reasoned that courts should strictly construe the removal statute against federal jurisdiction.[105]

The second new justification was a federalism argument suggesting that an expansive view of federal jurisdiction impinges upon the independence and dignity of the state courts.[106] The Court stated that "[d]ue regard for the rightful independence of state governments . . . requires that [federal courts] confine their own jurisdiction to the precise limits which the statute has defined."[107] In other words, respect for the sovereignty of the individual states counsels against doing anything that would expand federal jurisdiction over state law issues, and

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counterclaim, petitioner was a defendant entitled to removal. *Id.* The question on appeal in the Supreme Court was whether, under the Judiciary Act of 1887, a counterclaim renders the original plaintiff in an action a defendant entitled to removal. *Id.* at 103–04. The Court began with a review of the various amendments that had been added to the removal statute. *Id.* at 104–05. This review revealed that, from 1875 to 1887, removal was available to either party in the suit. *Id.* Prior to 1875, removal was open only to "defendants," and the 1887 amendment returned to this language. *Id.* at 105–06. The Court took this statutory revision, along with others, as clear congressional intent to restrict the option of removal to the way Congress understood removal in 1789, that only original defendants may remove. *Id.* at 107. In closing, the Court made two other observations justifying its conclusion: First, that the policies behind the successive congressional revisions of federal jurisdiction statutes require strict, narrow construction of these statutes; and second, that "due regard" for the individual states' interests in adjudicating controversies in their own courts requires federal courts to adhere strictly and narrowly to congressional jurisdictional mandates. *Id.* at 108–09.

101. *See id.* at 107 (stating that the 1887 revision indicated an intent to return to the removal practice of the 1789 Act).

102. *See* Haiber, *supra* note 12, at 630 (highlighting the two further justifications for favoring remand as put forth by the *Shamrock Oil* Court).

103. *See Shamrock Oil*, 313 U.S. at 108 ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").

104. *See id.* at 108–09 (reviewing congressional action on different aspects of federal jurisdiction and finding an intent to restrict that jurisdiction).

105. *See id.* (deciding that the intent to restrict federal jurisdiction required a restriction of the option of removal).

106. *See* Haiber, *supra* note 12, at 631 (discussing the federalism argument given by the *Shamrock Oil* Court).

107. *Shamrock Oil*, 313 U.S. at 108–09.

thus the courts should construe the removal statute against removal.[108] An important aspect of the *Shamrock Oil* Court's decision is that it does not discuss the main issue that gave rise to the circuit split: whether the goal of administrative efficiency can justify a presumption against removal.[109] Instead, the Court recast the presumption against removal in a constitutional and statutory light.[110] By reframing the issue, the Court effectively undercut the argument that efficiency cannot justify denial of a constitutional and statutory right[111] because after *Shamrock Oil*, the presumption against removal was itself a creature of Congress and the Constitution.

3. Removal in the Modern Era

After *Shamrock Oil*, Congress began taking steps to unify and standardize removal practice across jurisdictions.[112] This process began with the Judicial Code of 1948, which set the time period for removal as the later of twenty days after either the commencement of the suit or service of process.[113] Prior to this revision, the defendant could remove at any time prior to the due date of her responsive pleading.[114] This situation led to a lack of uniformity because the due dates for responsive pleadings differed across jurisdictions.[115] Congress, citing the impracticality of a twenty-day time limit in modern litigation,[116] again

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108. *See* Haiber, *supra* note 12, at 631 (discussing how the lower courts interpreted the *Shamrock Oil* Court's federalism argument as being a fear that increased removal would undermine the federal constitutional framework).

109. *See id.* at 630 (pointing out the lack of an efficiency rationale in the *Shamrock Oil* decision).

110. *See Shamrock Oil*, 313 U.S. at 108–09 (grounding the presumption in federalism and legislative history terms rather than in terms of administrative efficiency).

111. *See, e.g.*, Boatmen's Bank of St. Louis v. Fritzlen, 135 F. 650, 654 (8th Cir. 1905) (rejecting the efficiency-based argument because efficiency alone cannot justify the abrogation of a constitutional right).

112. *See* Haiber, *supra* note 12, at 632–33 (discussing congressional action after the *Shamrock Oil* decision and concluding that the action was an effort to make removal practice fair and uniform).

113. *See* Act of June 25, 1948, ch. 646, § 4, 62 Stat. 869, 939 (setting a firm time limit for removal).

114. *See* Haiber, *supra* note 12, at 633 (stating the time period for removal prior to the 1948 Act (citing to 28 U.S.C. § 72 (1940))).

115. *See id.* (noting the differences across jurisdictions as to the due date for responsive pleadings).

116. *See* S. REP. NO. 89-712 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3245, 3247 (blaming the impracticability of a twenty-day time limit as the cause for the ten-day extension).

revised the time period in 1965 by lengthening the removal window from twenty days to thirty days.[117]

The express ability to remove a case that was not initially removable came about in an amendment to the removal statute in 1949.[118] This revision presented an interesting question about the viability of a judicially-created rule of construing the removal statute that had been present since at least 1900.[119] The Supreme Court held in 1900 that a case did not become removable if the occurrence that qualified the case for federal jurisdiction was not a voluntary act of the plaintiff.[120] In the diversity context, the holding implied that "cases with nondiverse parties did not become removable just because a nondiverse defendant was [involuntarily] dismissed from the case."[121] This holding became known as the "voluntary/involuntary rule" because only a voluntary act by the plaintiff could render a case removable.[122] The rule was in effect before the 1949 revision of the removal statute, which expressly provided for removal of a claim that was not initially removable.[123] Thus, courts began to question whether the voluntary/involuntary rule still applied after the 1949 revision.[124] Though the Supreme Court has not addressed this question, all of the circuits seem to agree that the rule still applies to the current language of § 1446(b).[125] Thus, as the law currently stands, the involuntary dismissal of a nondiverse defendant does not thereby make a case removable on diversity grounds. An important exception to this rule is that dismissal due to fraudulent joinder is not

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117. *See* Act of September 29, 1965, Pub. L. No. 89–215, 79 Stat. 887 (lengthening the time period for filing a removal notice from twenty days to thirty days).

118. *See* Act of May 24, 1949, ch. 139, § 83, 63 Stat. 89, 101 (amending § 1446(b) to contain two separate paragraphs, the second paragraph dealing with removal of a case that was not initially removable).

119. *See* Poulos v. Naas Foods, Inc., 959 F.2d 69, 71–72 (7th Cir. 1992) (highlighting the question of whether the voluntary/involuntary rule still applied after the 1949 amendment).

120. *See* Whitcomb v. Smithson, 175 U.S. 635, 638 (1900) (holding that a case does not become removable when the occurrence that conferred federal jurisdiction was not a voluntary act of the plaintiff).

121. *Poulos*, 959 F.2d at 71.

122. *See id.* at 71–72 (discussing the voluntary/involuntary rule).

123. *See* Act of May 24, 1949, ch. 139, § 83, 63 Stat. 89, 101 (amending § 1446(b) to contain two separate paragraphs, the second paragraph dealing with removal of a case that was not initially removable).

124. *See Poulos*, 959 F.2d at 71–72 (detailing the reactions of various courts to the 1949 revision with regards to the voluntary/involuntary rule).

125. *See* FED. JUDICIAL CODE REVISION PROJECT 510–11 (2004) (discussing the voluntary/involuntary rule and citing to circuit court of appeals opinions from eight of the circuits and district court opinions from the remaining three circuits that affirm the application of the rule to the removal statutes).

deemed an involuntary act, thus allowing removal after a dismissal for fraudulent joinder.[126]

The most significant post-*Shamrock Oil* revision to the removal statute occurred in 1988,[127] and this revision instituted the one-year time limit at issue in this Note.[128] The major revisions were the ability to disregard the citizenship of fictitious or unnamed defendants for the removal process,[129] a relaxing of the pleading requirements for the removal notice,[130] and the imposition of the one-year time limit for diversity-based removal if the case was not initially removable.[131] The Committee Note accompanying this revision describes the one-year time limit as "a means of reducing the opportunity for removal after substantial progress has been made" and as a "modest curtailment in access to diversity jurisdiction."[132] The Committee Note also states that under § 1446(b) before the 1988 amendment, settlement with a nondiverse defendant on the eve of trial would allow the remaining defendants to remove on the eve of trial and asserts that the one-year time limit will address this problem.[133] Congress again amended the removal statutes in 1991[134] but did not address the one-year time limit.

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126. *See* Insinga v. LaBella, 845 F.2d 249, 254 (11th Cir. 1988) (stating that fraudulent joinder is a uniformly accepted exception to the voluntary/involuntary rule). Applying the voluntary/involuntary rule to the one-year provision, a pre-one-year summary judgment or motion to dismiss for failure to state a claim that results in the nondiverse defendant being dropped from the suit would not be a voluntary act of the plaintiff. Thus, the case would not be removable under the rule. Rather, only a showing that the plaintiff had joined the nondiverse defendant fraudulently would render the case removable.

127. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669 (1988) (amending 28 U.S.C. §§ 1441, 1446).

128. *See id.* § 1016(b)(2)(B), 102 Stat. at 4669 (inserting the clause "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" at the end of the paragraph dealing with cases that were not initially removable).

129. *See id.* § 1016(a), 102 Stat. at 4669 (amending § 1441 to require courts to disregard for removal purposes the citizenship of defendants sued under fictitious names).

130. *See id.* § 1016(b)(1), 102 Stat. at 4669 (amending § 1446(a) to require only a "short and plain statement of the grounds for removal" with the notice of removal).

131. *See id.* § 1016(b)(2)(B), 102 Stat. at 4669 (amending the second paragraph of § 1446(b) to include a one-year time limit on removal).

132. H.R. REP. NO. 100-702, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032.

133. *See id.* at 6032–33 (stating that the amendment addresses problems arising from a change of parties late in the stages of the state-court process, and pointing to removability on the eve of trial as one of those problems).

134. *See* Act of December 9, 1991, Pub. L. No. 102-198, § 10, 105 Stat. 1623, 1626 (amending § 1446 to require a prompt disposition of a notice of removal petition, either by summary approval or remand or by a prompt evidentiary hearing).

Aside from amending the removal statutes, Congress has also amended the diversity statute several times since the *Shamrock Oil* decision. Significant changes have occurred to the amount in controversy requirement and the citizenship requirements. Congress amended the statute in 1958 to define the citizenship of a corporation to be any state of incorporation as well as the corporation's principal place of business.[135] Prior to this amendment, a corporation was only a citizen of the state or states in which it was incorporated.[136] As a result, diversity would exist between a plaintiff injured in the corporation's principal place of business and that corporation only if the corporation was incorporated in another state.[137] By amending the statute, Congress foreclosed this situation by stating that a corporation is also a citizen of its principal place of business.[138] Congress also amended the diversity statute in 1988 to raise the statutory minimum to $50,000[139] and again amended the statute in 1996 to raise the amount to $75,000.[140] In other words, Congress has thrice decided since the *Shamrock Oil* decision that qualification for diversity jurisdiction should be more difficult.

Many possible conclusions may arise from the foregoing history. One scholar recently argued that the legislative and judicial histories of removal and diversity jurisdiction lead to the conclusion that the courts should not view removal as a disfavored option.[141] This argument is as follows: Diversity jurisdiction comes from the Constitution and is, thus, an important part of the federal judicial scheme.[142] Immediately after the ratification of the

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135. *See* Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415 (redefining the citizenship of a corporation).

136. *See* Louisville, C. & C.R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (holding that a corporation is a citizen of the state in which it is incorporated).

137. *See* S. REP. NO. 85-1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101–02 (describing this situation as a "fiction" that led to the "evil whereby a local institution, engaged in a local business and . . . locally owned, [was] enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State").

138. *See id.* at 3102 (stating that the purpose of the amendment is to restrict a corporation's ability to reach the federal forum simply because the corporation is incorporated in another state).

139. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (increasing the amount in controversy requirement for diversity jurisdiction from $10,000 to $50,000).

140. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (raising the amount in controversy requirement for diversity jurisdiction from $50,000 to $75,000).

141. *See* Haiber, *supra* note 12, at 655 (calling current removal practice "unfair, unseemly, and inefficient").

142. *See id.* at 613–16 (highlighting the preratification debate over the jurisdiction of the judiciary and pointing out the importance of diversity jurisdiction in the final constitutional

Constitution, the first Congress enacted the Judiciary Act of 1789 and expressly provided for removal.[143] Contemporary court decisions viewed removal as a necessary and acceptable mechanism for ensuring equal access to the federal forum.[144] Subsequent legislation expanded access to removal and to original federal jurisdiction, and the courts continued to view removal favorably.[145] Legislative restriction of access to removal did not occur until the 1887 Act.[146] Moreover, not until after this restriction did some courts begin to view removal unfavorably.[147] The *Shamrock Oil* Court set the stage for disfavoring removal and the lower courts took the Court's decision to its most extreme application.[148] Since the *Shamrock Oil* decision, Congress has amended the removal statute to make the procedure fair and efficient and has placed a substantive restriction on removal only once.[149] Thus, the argument goes that the current presumption against removal is not the product of any clear congressional intent to limit the availability of removal.[150] Rather, the presumption and disfavor are the result of the judiciary overreacting to the 1887 revision and the *Shamrock Oil* decision.[151] As a consequence, the courts should drop the presumption against removal and instead view removal as a necessary

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compromise).

143. *See id.* at 617–18 (discussing the timing and importance of the 1789 Act as it related to the exercise of the constitutionally-prescribed federal jurisdiction).

144. *See id.* at 620 ("The period between the ratification of the Constitution and the end of the Civil War thus established removal as a simple procedural mechanism that allowed all citizens equal access to the federal judiciary.").

145. *See id.* at 621–22 (describing the expansion of original jurisdiction in the 1875 Act and the judicial response to that expansion as evidence that the original and historic understanding of removal was very favorable).

146. *See id.* at 623–24 (explaining the 1887 revision of the removal provisions but asserting that the revision simply aimed to return removal to its status after the 1789 Act).

147. *See id.* at 627–28 (describing the emerging sentiment against removal as "subtle yet radical" and stating that many federal judges began to view removal as a "procedural anomaly" that should be subjugated to the plaintiff's right to select the forum).

148. *See id.* at 631–32 (arguing that the lower federal courts overreacted to the *Shamrock Oil* decision by creating new obstacles to removal).

149. *See id.* at 633–34 (describing the 1948, 1965, and 1988 revisions as being efforts at making removal practice fair rather than an effort to restrict removal).

150. *See id.* at 634 ("There is no evidence that Congress intended to restrict opportunities for removal by creating procedural landmines that would favor plaintiffs at the expense of defendants.").

151. *See id.* at 655–56 (discussing the current status of removal law and stating, "[t]he aforementioned obstacles do not . . . result from laws enacted by Congress; rather, they result from judicial gloss created by the application of presumptions against removal to statutory language").

tool for equal footing in the federal forum, and the *Tedford* decision is a large step in the right direction.[152]

Another plausible conclusion would be that congressional action after the *Shamrock Oil* decision does nothing to indicate that the judicial impression of removal is incorrect. That removal and diversity jurisdiction enjoyed favorable status for the first century of the nation's existence seems beyond question.[153] Moreover, the 1887 revisions[154] were unquestionably a congressional reaction to an overburdened federal judiciary.[155] Thus, the contention with the previous conclusion begins at whether the Court's decision in *Shamrock Oil* was correct.[156] The specific holding of *Shamrock Oil* seems to be the correct answer to the question presented.[157] Arguably,[158] however, the Court went too far in the dicta about congressional disfavor of removal and diversity jurisdiction and the primacy of federalism interests.[159] Moreover, the lower federal courts were possibly too zealous in their implementation of the *Shamrock Oil* dicta and the reflexive recitation of the remand presumption went beyond the aims of Congress in the 1887 revisions.[160] The fact remains, however, that the Supreme Court decided *Shamrock Oil* in 1941,[161] and courts have been reacting to that decision ever

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152. *See id.* at 664 ("The single most important step the courts could take to prevent procedural manipulation would be to follow *Tedford* and allow equitable exceptions when necessary.").

153. *See id.* at 616–23 (putting forth a persuasive description of congressional and judicial treatment of removal between The Judiciary Act of 1789 and The Judiciary Act of 1887).

154. *See* Act of March 3, 1887, ch. 373, 24 Stat. 552, 552–55 (restricting removal to nonresident defendants and raising the amount in controversy requirement to $2,000).

155. *See* Haiber, *supra* note 12, at 622–23 (detailing the negative judicial and scholarly reaction to the sharp increase in federal litigation caused by the 1875 expansion of federal jurisdiction).

156. *See id.* at 630–31 (analyzing the *Shamrock Oil* decision and criticizing it for going further than it needed to go yet still leaving too many questions unanswered).

157. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 105–06 (1941) (stating that the 1887 amendment acted to return removal practice to its status before 1875, and that removal thus was open only to original defendants in an action and not to plaintiffs made defendants by a counterclaim).

158. *See* Haiber, *supra* note 12, at 630–32 (arguing that the Court went too far in the *Shamrock Oil* dicta).

159. *See Shamrock Oil*, 313 U.S. at 108–09 (justifying the holding of the Court with the policy arguments that Congress, in general, disfavors federal jurisdiction and that respect for state sovereignty requires that all questionable cases be remanded to their proper place in state court).

160. *See* Haiber, *supra* note 12, 631–32 (arguing that the lower federal courts "ignored" *Shamrock Oil*'s direction to simply return removal to its position prior to the 1875 amendment).

161. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941).

since.[162] The disfavor of removal has been present for more than sixty years. Thus, if Congress disagreed with this interpretation by the judiciary, all it had to do was react accordingly.

In fact, Congress has made three substantial revisions of the removal provisions since the *Shamrock Oil* decision.[163] None of these revisions have addressed the judicial preference for remand in cases when jurisdiction is not clear. Rather, one of these revisions placed the time limit at issue in this Note into the statute.[164] Congress acknowledged that this time limit would result in decreased access to the federal forum and that the time limit would prevent removal after a year if the plaintiff settled with a nondiverse defendant.[165] Moreover, Congress had a chance to rectify the situation in 1991 if it felt that courts were misconstruing the time limit.[166] Thus, the lack of congressional attention to the status of removal versus remand in the federal judiciary after *Shamrock Oil* and its progeny demonstrates that Congress approves of the current sentiment. In other words, the fact that the current disfavor of removal is a product of judicial construction rather than congressional mandate makes little difference now because the lack of congressional clarification acts to ratify the judicial disfavor of removal. In applying this conclusion to the one-year time limit, an expansive reading of the statute seems to contravene the trend of congressional restriction of removal.

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162. *See, e.g.*, Wilbur v. H. & R. Block, Inc., 170 F. Supp. 2d 480, 481–82 (M.D. Pa. 2000) (prefacing the decision whether to retain jurisdiction or remand with the assertion that courts construe removal statutes narrowly and resolve all doubt in favor of remand).

163. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669 (1988) (amending 28 U.S.C. §§ 1441, 1446); Act of September 29, 1965, Pub. L. No. 89-215, 79 Stat. 887 (lengthening the time period for filing a removal notice from twenty days to thirty days); Act of June 25, 1948, ch. 646, § 4, 62 Stat. 869, 939 (setting a firm time limit for removal).

164. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(2)(B), 102 Stat. 4642, 4669 (1988) (inserting the clause "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" at the end of the paragraph dealing with cases that were not initially removable).

165. *See* H.R. REP. NO. 100-702, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032–33 (recognizing the restrictive effect of the one-year time limit).

166. *See* Act of December 9, 1991, Pub. L. No. 102-198, § 10, 105 Stat. 1623, 1626 (amending § 1446 to require a prompt disposition of a notice of removal petition, either by summary approval or remand or by a prompt evidentiary hearing).

III. Exemplary Judicial Treatment of the Issue

An understanding of two fundamental judicial presumptions will aid the review of how courts have treated this issue. The first presumption is that the plaintiff is the master of her own claim.[167] If multiple proper jurisdictions or venues exist, the plaintiff has the right to choose the jurisdiction and venue that she desires.[168] The plaintiff may assert as many or as few claims for relief as she thinks are proper given the situation.[169] Similarly, the plaintiff may join,[170] and in some situations must join,[171] as many defendants as the rules allow and as she so chooses.

This presumption of plaintiff control inherently invites strategic decisions.[172] For instance, deciding which parties to sue is an analysis of the potential recovery from a defendant versus the cost of litigating against that defendant.[173] Yet, even in the face of this inherent gamesmanship, the presumption that the plaintiff is the master of her suit remains a fundamental concept of American jurisprudence.[174]

The second judicially mandated presumption is that courts should construe the removal statute narrowly and should resolve all doubt in favor of remand.[175]

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167. *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (stating that the plaintiff is the master of the complaint under the well-pleaded complaint rule).

168. *See, e.g.*, 28 U.S.C. § 1391(a)–(b) (2000) (providing the plaintiff with various choices of appropriate venue depending on the nature of the claim and the domicile status of the parties).

169. *See* FED. R. CIV. P. 18(a) (allowing, but not requiring, any claimant to join as many claims for relief against an opposing party as the claimant has).

170. *See* FED. R. CIV. P. 20(a) (allowing, but not requiring, multiple parties to join in one action as plaintiffs or any plaintiff to join in one action as many defendants as the plaintiff desires provided that all of the claims arise out of the same transaction or occurrence).

171. *See* FED. R. CIV. P. 19(a) (requiring the joinder of any party whose presence will not deprive the court of jurisdiction and without which complete relief may not be granted).

172. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 12 (2003) (Scalia, J., dissenting) (pointing out the fact that the well-pleaded complaint rule allows a plaintiff to allege only a state law claim even when an analogous federal claim exists if the plaintiff wants to avoid the federal court system).

173. *See, e.g.*, Eddy v. V.I. Water & Power Auth., 369 F.3d 227, 236–37 (3d Cir. 2004) (dismissing a plaintiff's claim against her employer because the workers' compensation statute barred the plaintiff from recovery). Because the plaintiff had no chance at recovery from the employer, the decision to proceed with the litigation proved to be a waste of resources. *Id.*

174. *See* The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) (stating that "[o]f course the party who brings a suit is master to decide what law he will rely upon"); Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (stating that the plaintiff is the master of his complaint under the well-pleaded complaint rule).

175. *See, e.g.*, Lupo v. Human Affairs Int'l, 28 F.3d 269, 274 (2d Cir. 1994) (stating that the congressional intent to restrict federal jurisdiction requires courts to read the removal statute

This presumption stems from *Shamrock Oil*,[176] when the Court stated that the presumption against removal is a result of clear congressional intent to restrict access to the federal courts.[177] As a result of *Shamrock Oil*, the ideas of narrow construction and preference for remand more or less have become boilerplate in any opinion discussing whether to remand or allow removal.[178] The presumption is an overwhelmingly prevalent sentiment, and in fact, the *Tedford* court considered the presumption before summarily dismissing it.[179] With these presumptions in mind, the analysis proceeds next to discuss the different ways courts have treated the issue of untimely removal in the face of forum manipulation.

A. Equitable Exception Applies

The U.S. District Court for the Northern District of Texas provided an introductory treatment of the issue in *Ferguson v. Security Life of Denver Insurance Co.*[180] The court first found that neither the plain language of the

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narrowly and resolve any question against removal); *see also supra* Part II.B.2 (discussing the development of the presumption against removal).

176. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106 (1941) (discussing removal as set forth in the Judiciary Act of 1887); *see also supra* note 100 and accompanying text (providing the facts and analysis of the *Shamrock Oil* decision).

177. *See id.* at 108 ("[T]he language of the Act of 1887 evidence[s] the Congressional purpose to restrict the jurisdiction of the federal courts on removal, [and] the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").

178. *See, e.g.*, Wilbur v. H. & R. Block, Inc., 170 F. Supp. 2d 480, 481–82 (M.D. Pa. 2000) (prefacing the decision whether to retain jurisdiction or remand with the assertion that courts construe removal statutes narrowly and resolve all doubt in favor of remand); Conference Am., Inc. v. Q.E.D. Int'l, Inc., 50 F. Supp. 2d 1239, 1241 (M.D. Ala. 1999) (same); Barber v. Albertsons, Inc., 935 F. Supp. 1188, 1189 (N.D. Okla. 1996) (same); Gramc v. Millar Elevator Co./Schindler Enters., 3 F. Supp. 2d 1082, 1083 (E.D. Mo. 1998) (same); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 107.05–06 (3d ed. 2004) (discussing the mandate to strictly construe the removal statutes and to resolve all doubt in favor of remand).

179. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 427 (5th Cir. 2003) (stating that Congress intended to restrict access to the federal courts through diversity jurisdiction, yet going on to decide that this intent of restriction did not extend to cases where gamesmanship was present).

180. *See* Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 603–04 (N.D. Tex. 1998) (holding that, although the one-year time limit is subject to an equitable exception, the defendants did not prove fraudulent joinder and thus the exception was inapplicable to this case). The plaintiff in *Ferguson* sued an insurance company for claims arising from the sale of an insurance policy. *Id.* at 599. In the amended pleading, the plaintiff named the individual salesman as a defendant, thereby destroying diversity. *Id.* The insurance company, arguing that the plaintiff simply joined the salesman to defeat diversity, removed to federal court. *Id.* The

statute nor the legislative history was dispositive of the issue.[181] Turning away from the language and history of the statute, the court concluded that the policies behind the time limit counseled in favor of an equitable exception.[182] The court then rested its conclusion on an extension of another Fifth Circuit case that held that other time limits in § 1446(b) were subject to waiver.[183] The court reasoned that if one time limit in a statute is subject to an exception, so too should the other time limits.[184]

The U.S. District Court for the Southern District of Mississippi provided a more technical treatment of whether an equitable exception applies to § 1446(b) in *Morrison v. National Benefit Life Insurance Co.*,[185] and eventually

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plaintiff replied that the amended complaint stated a claim against the salesman and the court agreed, thus remanding the case to state court. *Id.* Sixteen months after the commencement of the suit, the insurance company again sought to remove the case as a result of information uncovered through discovery that shed some doubt on the viability of the claim against the salesman. *Id.* at 600. The plaintiff argued that the one-year time limit barred removal, while the insurance company urged the court to apply an equitable exception. *Id.* The court eventually concluded that the time limit was subject to an equitable exception, but that the insurance company had failed to uphold its end of the equitable bargain by not deposing the plaintiff until sixteen months after the beginning of the suit. *Id.* at 603.

181. *See id.* at 601–02 (finding the legislative history to be of little help and then stating that, although the plain language of the statute seems absolute on its face, many time limits seem absolute but are still subject to an equitable exception).

182. *See id.* at 602–03 (analyzing the policies of the time limit and concluding that the statute allowed for an equitable exception).

183. *See* Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992) (holding that the thirty-day time limit in § 1446(b) was procedural rather than jurisdictional, and thus subject to waiver).

184. *See Ferguson*, 996 F. Supp. at 603 ("[T]his Court is unaware of any authority that allows a statute to be subject to one type of equitable exception but not another.").

185. *See* Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 950–51 (S.D. Miss. 1995) (addressing whether in the face of unequivocal forum manipulation, the one-year time limit precludes removal after a year has passed). The plaintiffs in *Morrison* filed separate but identical actions in state court against an identical defendant on April 19, 1994. *Id.* at 946. Both plaintiffs prefaced their complaint with a paragraph that stated regardless of anything that may appear otherwise, the maximum amount of relief requested by each plaintiff was $49,000. *Id.* at 947. The parties conducted discovery, and throughout the entire discovery process, the plaintiffs repeatedly denied that their damages exceeded the jurisdictional threshold of $50,000. *Id.* Then, on April 27, 1995, one year and seven days after filing the original complaints, plaintiffs moved in state court to amend their complaints to request $2,000,000 per plaintiff. *Id.* Defendant immediately removed the case to federal court on the basis of diversity jurisdiction. *Id.* Upon plaintiffs' motion to remand on the grounds that the one-year time limit precluded removal, defendant argued first that one year had not passed and, second, that even if a year had passed, the blatant forum manipulation should preclude the plaintiffs from taking advantage of the one-year cap. *Id.* The federal court quickly dismissed the argument that one year had not passed. *Id.* at 948. The court then held that the time limit was subject to an equitable exception and denied the motion to remand. *Id.* at 951.

concluded that the time limit is subject to an exception.[186] The plaintiffs in *Morrison* began their state-court complaints with a conspicuous clause notifying everyone of their intent to stay below the statutory amount in controversy threshold for diversity jurisdiction.[187] Then, one year and seven days after the filing of the original complaint, plaintiffs moved in state court to increase their *ad damnum* to $2,000,000.[188] In response to defendant's argument in federal court that this amendment showed clear forum manipulation, plaintiffs openly admitted that they were taking advantage of the one-year time limit.[189] Thus, the question before the federal court was whether, in a case involving admitted forum manipulation, the one-year time limit still denied a defendant access to the federal forum.[190]

The district court centered its analysis on whether the time limit was jurisdictional, and thus not subject to any waiver, or was procedural and subject to waiver.[191] Without offering any independent analysis of the question, the court, citing to the same Fifth Circuit case[192] that the district court relied upon

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186. *See id.* at 949–51 (holding that the time limit is procedural rather than jurisdictional and thus subject to an equitable exception).

187. *See id.* at 947 (quoting the first paragraph of the plaintiffs' complaint). The plaintiffs began their complaint as follows:

> Notwithstanding anything in this Complaint which might in any way be construed to the contrary, the total amount demanded herein by plaintiff from the defendant, exclusive of interest and costs, does not exceed Forty Nine Thousand U.S. dollars ($49,000.00). All together, even if aggregated with those in any other case(s) before this court with which this case could be consolidated, the claims and demands made in this case and the other case(s), added together, would not exceed the total sum of Forty Nine Thousand U.S. dollars ($49,000.00). If any statements hereafter in this Complaint or elsewhere are inconsistent with the foregoing, all such statements are hereby withdrawn and deleted, and the amount demanded is limited to the sum of Forty Nine Thousand U.S. dollars ($49,000.00).

Id.

188. *Id.*

189. *See id.* ("In the case at bar, by initially demanding only $49,000.00 in the original complaint, and waiting until after a year had run to request an increase of that demand, plaintiff did no more than avail himself of his statutory rights, which he was entitled under the law to do.").

190. *See id.* at 949 (addressing whether the time limit was subject to an equitable exception when the plaintiffs' actions verged on fraud against the courts).

191. *See id.* (recognizing that a jurisdictional time limit would preclude any exception, regardless of the egregious nature of the plaintiffs' actions).

192. *See* Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992) ("We have noted that the word 'procedural' in section 1447(c) refers to 'any defect that does not go to the question of whether the case originally could have been brought in federal district court.' . . . This distinction . . . is applicable to Section 1446(b) . . . . '[T]he time limitation for removal is not jurisdictional; it is merely "modal and formal and may be waived. "'").

in *Ferguson*,[193] concluded that the time limit was procedural.[194] Once the court cleared the jurisdictional-versus-procedural hurdle, the next question was whether blatant forum manipulation could constitute the waiver of the procedural time limits of § 1446(b).[195] The court, aware that the Fifth Circuit had never addressed the issue directly, pieced together two independent Fifth Circuit cases to determine that forum manipulation could trigger a time-limit waiver.[196] The most important aspect of *Morrison* is that, at least according to the court, forum manipulation can trigger the waiver of the procedural time limits of § 1446(b).[197]

B. Equitable Exception Does Not Apply

In *Cofer v. Horsehead Research & Development Co.*,[198] the U.S. District Court for the Eastern District of Tennessee held that, even in the face of clear

193. *See* Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 603–04 (N.D. Tex. 1998) (holding that, although the one-year time limit is subject to an equitable exception, the defendants did not prove fraudulent joinder and thus the exception was inapplicable to the case).

194. *See* Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 949–50 (S.D. Miss. 1995) (stating that Fifth Circuit case law required the court to view the time limit as procedural).

195. *See id.* at 950 (addressing whether equitable estoppel may apply to the one-year time limit in the face of forum manipulation).

196. *See id.* at 949–51 (combining the holding of *Barnes*, that the time limits are subject to waiver, with dicta from Brown v. Demco, Inc., 792 F.2d 478 (5th Cir. 1986)). The *Brown* court enforced the thirty-day provision of § 1446(b), but noted that "in the absence of waiver of the time limit by the plaintiff, or some equitable reason why that limit should not be applied, however, a defendant who does not timely assert the right to remove loses that right." *Brown*, 792 F.2d at 481–82. This suggestion of the possibility of equitable consideration becomes the block upon which the *Morrison* court rests its holding that forum manipulation can trigger a waiver. *Morrison*, 889 F. Supp. at 951.

197. *See Morrison*, 889 F. Supp. at 951 ("[T]he *Barnes* ruling that both time limitations contained in section 1446 are procedural rather than jurisdictional makes the rationale of the court in *Brown* applicable to the case at bar.").

198. *See* Cofer v. Horsehead Research & Dev. Co., 805 F. Supp. 541, 543–44 (E.D. Tenn. 1991) (analyzing the force of the one-year time limit for removal contained in § 1446(b)). The plaintiffs in *Cofer* were individual landowners that filed separate nuisance claims in state court against the same defendant in October of 1989, with each plaintiff requesting $49,999 in relief. *Id.* at 542. The state court consolidated the individual claims into one case with several plaintiffs and one defendant in May or June of 1990. *Id.* After this consolidation, a considerable amount of time passed and in July of 1991 the plaintiffs amended their pleadings to request $150,000 per plaintiff in compensatory damages. *Id.* Soon thereafter, the defendant noticed removal of the case to federal court on the grounds that complete diversity existed as defined by statute. *Id.* The initial question for the judge in federal court was whether the removal was proper as it occurred well beyond a year after the initial commencement of the individual claims in state court. *Id.*

forum manipulation, the plain language of § 1446(b) precludes removal after a year has passed.[199] The *ad damnum* for each plaintiff was $49,999, one dollar below the statutory requirement for diversity jurisdiction at the time the case began.[200] After a year had passed since the initial filing of the individual claims in state court, the plaintiffs amended the *ad damnum* in their complaint to request substantially greater than $50,000 per plaintiff.[201] As a result, the case met all of the requirements for diversity jurisdiction.[202] The defendant noticed removal to the federal court, and the plaintiffs moved to remand to state court on the grounds that more than one year had passed, thus precluding removal under the § 1446(b) time limit.[203]

The *Cofer* court ultimately granted the plaintiff's motion to remand.[204] In the opinion granting the motion for remand, the judge took note of the defendant's argument that the plaintiffs had engaged in forum manipulation.[205] The court, however, read the removal statute to be a jurisdictional mandate that always precludes removal after a year has passed.[206] According to the court, the plain language of the statute was dispositive and the time limit was not subject to any equitable exceptions.[207] The court also noted that the Supreme Court allowed plaintiffs to request less than the jurisdictional amount in order to prevent removal and that Congress knew of this fact when it enacted the one-year time limit.[208] Because Congress enacted the one-year time limit knowing that the possibility for manipulation existed and declined to be explicit about an

199. *See id.* at 544 (recognizing that the one-year time limit allows for forum manipulation but stating that the remedy, if a remedy is necessary, must come from Congress rather than an expansive reading of the current statute).

200. *Id.* at 542.

201. *Id.*

202. *Id.* at 542 n.2.

203. *Id.* at 542.

204. *Id.* at 544.

205. *See id.* at 542–43 (quoting 28 U.S.C.A. § 1446, Commentary on 1988 Revision of § 1446 (West 1994), in which David Siegel points out that the one-year time limit might "invite tactical chicanery").

206. *See id.* at 543 ("The one year provision in 28 U.S.C. § 1446(b) is jurisdictional and must be noticed by the court *sua sponte*." (quoting Molden v. Firestone Tire & Rubber Co., 754 F. Supp. 521, 523 (M.D. La. 1990))).

207. *See id.* at 544 ("The Court is constrained to apply the plain language of § 1446(b) as amended.").

208. *See id.* (stating that the Supreme Court allows for parties to request less than the jurisdictional amount in order to defeat removal, even when it is obvious that more money is recoverable (citing Iowa Cent. Ry. Co. v. Bacon, 236 U.S. 305 (1915))).

equitable exception, the court concluded that Congress, rather than the courts, should amend the statute.[209]

Like the *Cofer* court, the U.S. District Court for the Northern District of Oklahoma, in *Caudill v. Ford Motor Co.*,[210] held that the one-year time limit did not allow for equitable considerations.[211] The plaintiff in *Caudill* engaged in two forms of forum manipulation by intentionally pleading an amount below the statutory minimum for diversity jurisdiction and by joining a nondiverse defendant for just more than one year for the sole purpose of defeating diversity.[212] As a result of these two forms of manipulation, the court squarely addressed the issue of whether the one-year time limit was subject to an equitable exception.[213] The court addressed the *Tedford*[214] decision along with other district court decisions allowing an equitable exception,[215] but eventually

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209. *See id.* The court stated:

> If this has the effect of permitting a plaintiff to lie in wait with his or her amended complaint containing an increased *ad damnum*, and thereby to keep diversity litigation in a State court, the remedy, if one is warranted, must come from Congress, which superimposed this effect on existing law permitting prayers for damages purposefully less than the jurisdictional amount.

Id.

210. *See* Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324, 1325–26 (N.D. Okla. 2003) (addressing a situation where the plaintiffs misrepresented the amount in controversy and, arguably, fraudulently joined a nondiverse defendant). The plaintiff, an Oklahoma citizen, sued Ford, a noncitizen company, and Sunday, an Oklahoma citizen, in state court under products liability and negligence claims on May 24, 2002. *Id.* at 1325–26. The plaintiffs requested relief in excess of $10,000 in damages, as an Oklahoma law stated that any claim for relief greater than $10,000 meant that damages are in excess of $10,000 but did not require a more specific or realistic figure. *Id.* at 1325 n.1; *see also* OKLA. STAT. tit. 12, § 2008(A)(2) (2004) (stating that a plaintiff may request $10,000 in her complaint and still prove and receive a higher amount). Discovery showed that the actual damages were more than $1.2 million, and then, one year and six days after the original complaint, the plaintiff dismissed Sunday from the suit without ever taking discovery. *Caudill*, 271 F. Supp. 2d at 1325–26. The defendant removed to federal court on diversity jurisdiction grounds and the plaintiff moved the court to remand because more than one year had passed. *Id.* at 1326. The defendant cited *Tedford* when arguing that the plaintiff's actions were manipulative. *Id.* The court declined to follow the *Tedford* decision and held that the one-year time limit "should be strictly interpreted and enforced." *Id.* at 1327.

211. *See id.* at 1327–28 (refusing to allow removal after a year had passed since the beginning of the suit).

212. *See id.* at 1326 (stating that the plaintiff's *ad damnum* was lower than actual damages and that the nondiverse defendant's presence was dubious).

213. *See id.* ("Thus, the issue for the Court is whether the case may be removed even though more than one year has passed since it was filed in state court.").

214. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 424 (5th Cir. 2003) (disregarding the one-year time limit in the face of forum manipulation by the plaintiff).

215. *See Caudill*, 271 F. Supp. 2d at 1326–27 (reviewing cases that allow equity to play a role in the one-year time limit).

sided with the line of authority suggesting that the one-year limit is a cap on removal even when forum manipulation is clear.[216] The court seemed to adhere first to the presumption articulated in *Shamrock Oil*[217] that courts should strictly construe the plain language of the removal statute and implement a presumption against removal.[218] After recognizing this presumption, the court focused on the defendant's failure to attempt to cure the problem before a year had passed.[219] Though the opinion seems to imply that the court would never allow removal after one year,[220] the court stated that it had even less incentive to sympathize with the defendant when the defendant never attempted to cure the fraudulent joinder before the year had passed.[221]

C. Irreconcilable Differences in Analysis

These four cases illustrate the different arguments for and against the equitable exception to the one-year time limit. Courts that recognize an equitable exception to the one-year time limit focus on the perceived unfairness and impropriety of forum manipulation. These courts try to find a way to right the wrongs of forum manipulation. Many of these cases do not review the language of the statute or the legislative history of the time limits in detail.[222]

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216. *See id.* at 1327–28 (agreeing with the cases that refuse to extend the time limit for equitable reasons).

217. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941) (introducing the requirement of strict construction of the removal statute and the presumption against removal).

218. *See* Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324, 1327–28 (N.D. Okla. 2003) (recognizing the judicial mandate of strictly construing the removal statute against removal).

219. *See id.* at 1328 (stating that Ford could have moved for dismissal against Sunday in state court, taken discovery to prove fraudulent joinder, or timely removed and argued fraudulent joinder prior to the one-year mark).

220. *See id.* (stating that the court was constrained to follow the plain language of the removal statute).

221. *See id.* ("There is no good reason for a federal court to 'create' removal jurisdiction outside the one-year period when the issue could have been addressed before the deadline set by Congress. Even if Ford were not successful on its fraudulent joinder argument, at least it would have forced plaintiffs' hand and perhaps eliminated some of the gamesmanship that § 1446(b) permits in its present form.").

222. *See, e.g.*, Shiver v. Sprintcom, Inc., 167 F. Supp. 2d 962, 963 (S.D. Tex. 2001) (failing to conduct an independent review of the language and history of the time limit and instead proceeding straight into a discussion of whether the time limit is procedural or jurisdictional).

Instead, these courts rest their analysis on the assertion that the time limits are procedural rather than jurisdictional and thus subject to waiver.[223]

On the other hand, courts refusing to apply equitable principles to the one-year time limit focus on the language of the statute, the policies and legislative history behind the time limit, and the fact that Congress knew of the potential for manipulation when it enacted the time limit and did nothing to prevent manipulation.[224] These courts reason that the language of the statute makes clear that removal may not occur after a year has passed, and that the whole point of the time limit is to determine the final forum for a particular case within a reasonable amount of time.[225] With that understanding of the time limit in mind, the courts then address the possibility of manipulation and come to the conclusion that if Congress intended to allow equity to play a role in the time limit, Congress would have so provided.[226]

The most important aspect of this divergence in analysis is that most cases dealing with the potential waiver have to do with a failure to assert a time limit in a timely manner.[227] For example, courts have held that a failure to object to removal in a timely manner, when the removing party has removed after one year, will constitute a waiver of the right to object to removal.[228] These cases deal with the plaintiff's actions after the defendant notices removal rather than the plaintiff's actions prior to removal. *Morrison* was the first case to state directly that a plaintiff's actions prior to the notice of removal may be the action necessary to trigger a waiver of the right to assert the time limits.[229] This

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223. *See id.* (following other cases from the district courts of the Fifth Circuit in holding that because the time limits are procedural and subject to waiver, equitable considerations could trigger the waiver).

224. *See, e.g.*, Russaw v. Voyager Life Ins. Co., 921 F. Supp. 723, 724–25 (M.D. Ala. 1996) (finding that the plain language of § 1446(b), the legislative history, and the policies behind the time limits all speak against any equitable exception to the one-year time limit, even in the face of fraudulent joinder).

225. *See id.* at 725 ("Congress chose a one-year time period as indicating that substantial progress had been made. Congress explicitly noted that settlement with a diversity-destroying defendant on the eve of trial would create diversity but should nevertheless not allow removal if the case had been commenced more than a year earlier.").

226. *See id.* (reasoning that Congress was aware of the possibility of misuse and forum manipulation inherent in the one-year time limit but made the conscious decision that predictability and judicial economy were more important than the defendant's choice of forum, especially when the substantive law would remain the same in state and federal court).

227. *See* Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992) (refusing plaintiff's motion to remand because the plaintiff failed to assert the procedural defect of the removal in a timely fashion).

228. *See id.* (refusing to grant the remand motion because the plaintiff waited over twenty months to object to the untimely removal).

229. *See* Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 951 (S.D. Miss. 1995)

distinction is significant because it demonstrates the departure from the typical understanding of the § 1446(b) time limits that led to the decision in *Tedford*.[230]

IV. The ALI's Suggested Revision of the Removal Statutes

The *Tedford* opinion briefly mentioned what the court called a "solution to this removal riddle" as propounded by the ALI.[231] The court cited to a tentative draft of the Federal Judicial Code Revision Project released in 1999.[232] Since the drafting of the *Tedford* opinion, the ALI published the final version of the Revision Project.[233] This proposed revision of Title 28 of the U.S. Code focuses on three main topics—supplemental jurisdiction, venue, and removal.[234] This Part analyzes only the proposed revisions to the removal statute and, specifically, deals only with this proposal as it relates to the policy set forth in the *Tedford* opinion.

A. The Nuts and Bolts of the Revision

The relevant revisions occur in §§ 1446 and 1447.[235] New § 1446 is entitled "Procedure for removal of civil actions."[236] New § 1446(a) greatly elaborates on the pleading requirements of the notice of removal.[237] New § 1446(b) somewhat mirrors current § 1446(b) in that it sets forth thirty-day time limits for noticing removal and differentiates between cases removable at commencement and cases that are not immediately removable.[238] Most

(allowing plaintiffs' manipulative behavior prior to the notice of removal to trigger the waiver of the procedural time limits of § 1446(b)).

230. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 425–29 & n.6 (5th Cir. 2003) (citing *Morrison* and other district court opinions and eventually allowing for an equitable exception).

231. *See id.* at 427 n.10 (citing the Federal Judicial Code Revision Project).

232. *See id.* (quoting from the 1999 tentative draft of the Federal Judicial Code Revision Project).

233. *See generally* FED. JUDICIAL CODE REVISION PROJECT (2004) (suggesting revisions of the supplemental jurisdiction, venue, and removal statutes).

234. *Id.* at 2.

235. *See id.* at 339–43 (putting forth the suggested text of §§ 1446 and 1447).

236. *Id.* at 435.

237. *See id.* at 435–36 (setting forth the precise requirements of the removal notice in new § 1446(a)).

238. *Compare id.* at 436–37 (allowing thirty days for removal beginning from the point at which the case is "ascertainably removable" in new § 1446(b)) *with* 28 U.S.C. § 1446(b) (2000) (providing a thirty-day window for removal in cases initially removable and a similar thirty-day

importantly, new § 1446(b)(2), that deals with cases not immediately removable, codifies the "voluntary/involuntary" rule and makes no mention of any one-year time limit for diversity-based removal.[239]

New § 1447 is entitled "Procedure after removal generally."[240] New § 1447(a) sets forth the general powers of the federal district court after removal has been noticed.[241] Then, new § 1447(b), entitled "Remand in the interest of justice," states:

> If a civil action has been removed under sections 1441(a) and 1446(b)(2) of this chapter more than one year after the commencement of the action, and if the sole basis for removal is the jurisdiction conferred by sections 1332 or 1367 of this title, the district court may in the interest of justice remand the action to the State court from which it was removed. No such remand shall be ordered except upon motion of a party filed within the time permitted for a motion to remand under subsection (c)(1).[242]

This subsection is an elaboration on the second paragraph of current § 1446(b),[243] in that it deals only with cases not initially removable in which the underlying claim is based on state law.[244] Thus, if this proposed revision governed removal, the *Tedford* court would have looked to this section in deciding whether to remand or allow removal.[245] At first glance, this proposal resembles the holding of *Tedford* in that it allows removal to occur more than one year after the commencement of the action.[246] If the ALI's

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window for cases not initially removable beginning at the time that the case becomes removable).

239. *See* FED. JUDICIAL CODE REVISION PROJECT 437 (2004) (stating that "[t]he notice of removal of a civil action that is not removable when commenced . . . shall be filed within 30 days . . . from which it may first be ascertained that the action is *or by voluntary act of the plaintiff has become* removable" but declining to incorporate the current one-year time limit of § 1446(b)) (emphasis added).

240. *Id.* at 463.

241. *See id.* (giving the district court the power to issue orders necessary for the handling of the removal notice in new § 1447(a)).

242. *Id.*

243. *See* 28 U.S.C. § 1446(b) (2000) (discussing, in the second paragraph, the availability of removal of cases that did not initially qualify for original federal jurisdiction).

244. *See* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (confining application of new § 1447(b) to actions removed under new § 1446(b)(2), which discusses cases not ascertainably removable at the commencement of the action, and in which jurisdiction is conferred solely by supplemental or diversity jurisdiction).

245. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 424–25 (5th Cir. 2003) (stating facts that show that the action as originally filed did not satisfy the requirements for diversity jurisdiction but later qualified for diversity jurisdiction).

246. *Compare id.* at 429 (holding that the facts of the case require an extension of the one-year time limit) *with* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (allowing diversity-

suggestion is simply a codification of the *Tedford* ruling, or if the *Tedford* ruling is nothing more than a judicial adoption of the ALI's suggestion, the analysis of the ALI suggestion would be the same as the analysis applied in *Tedford*. A comparison of the *Tedford* holding and the ALI proposal, however, shows that the two procedural mechanisms differ materially. Thus, a description of the procedure implied by the *Tedford* opinion will aid a comparison of the *Tedford* analysis to the workings of the ALI proposal.

The core implication of the *Tedford* decision is that courts in the Fifth Circuit may disregard the one-year bar against removal currently found in § 1446(b) when the plaintiff has engaged in forum manipulation.[247] This escape device is a judicially created exception to a congressionally enacted statute.[248] For courts in the Fifth Circuit, the starting point in analyzing the hypothetical case set forth in Part I of this Note would be the statute.[249] After determining that the correct provision for the case would be the second paragraph of § 1446(b),[250] the court then would determine whether the defendant was attempting to remove more than one year after the commencement of the action.[251] If the answer to this inquiry was "yes," only then would the court determine whether the case resembled *Tedford* closely enough to disregard the congressional mandate to remand if more than one year has passed.[252] This situation, in which a judicially created exception applies to a congressional mandate, necessarily implies a presumption in favor of applying the statutory directive to remand. In other words, the court would have to clear a high hurdle to justifiably apply an equitable exception under the *Tedford* framework.

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based removal to occur more than one year after the commencement of the action in new § 1447(b)).

247. *See Tedford*, 327 F.3d at 428–29 (stating that a district court may use its equitable powers to extend the one-year time limit in § 1446(b) when the plaintiff has engaged in manipulative conduct).

248. *See id.* (creating an exception to § 1446(b)).

249. *See* 28 U.S.C. §§ 1441–1448 (2000) (governing the removal of a case from state court to federal court).

250. *See id.* § 1446(b) (dealing in the second paragraph with cases that have only become removable at some point after the commencement of the action).

251. *See id.* (requiring remand if removal is occurring more than one year after the commencement of the action).

252. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 428–29 (5th Cir. 2003) (creating an exception to the one-year time limit rather than attempting to completely supersede it).

B. How the Revision Works

The ALI suggestion, although obviously aimed at the same practices that the *Tedford* court found objectionable,[253] operates differently than does the *Tedford* mechanism. The ALI suggestion, if enacted, would render the *Tedford* exception moot. Thus, no judicially created exception exists under the ALI framework. Instead, the statute itself purports to control the whole situation.[254]

Applying the ALI revision to the hypothetical discussed in Part I, a court governed by the ALI statute would still have to make preliminary determinations before looking to the ALI's proposed § 1447(b). First, the federal court would have to determine that the defendant was trying to remove a case that was not initially removable but that had become removable sometime after the commencement of the suit.[255] Second, the court would have to find that the defendant was trying to remove more than one year after the commencement of the action.[256] Finally, the court would have to find that the defendant was removing a case based on a state-law claim to federal court.[257] New § 1447(b) would begin to control only after the court made these preliminary findings.[258]

Apart from these judicial findings of fact, new § 1447(b) would also need an affirmative act on the part of the plaintiff before the statute began to control.[259] The plaintiff would have to move the court within thirty days of removal to remand the case back to state court.[260] This requirement would

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253. *Compare id.* (providing the equitable exception to negate plaintiff's manipulative behavior) *with* FED. JUDICIAL CODE REVISION PROJECT 466–67 (2004) (replacing the one-year time limit with new § 1447(b) because the time limit is "easily abused").

254. *See* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (handling, in new § 1447(b), cases that were not initially removable and in which a party is seeking to remove more than one year after the commencement of the action, which is the only scenario to which *Tedford* could apply).

255. *See id.* ("If a civil action has been removed under sections 1441(a) [qualifies for federal jurisdiction] and 1446(b)(2) [was not ascertainably removable at the commencement of the action] . . . .").

256. *See id.* ("If a civil action has been removed . . . more than one year after the commencement of the action . . . .").

257. *See id.* ("[A]nd if the sole basis for removal is the jurisdiction conferred by sections 1332 [diversity] or 1367 [supplemental jurisdiction] of this title . . . .").

258. *See id.* (preconditioning operation of new § 1447(b) on the presence of the three requisite factors).

259. *See id.* ("No such remand shall be ordered except upon motion of a party filed within the time permitted . . . .").

260. *See id.* (referencing the time limits in new § 1447(c)(1)).

settle the debate over whether the time limit was jurisdictional or procedural.[261] If new § 1447(b) was jurisdictional, the court would be bound to invoke the statute *sua sponte* if it found that removal was occurring more than one year after commencement of the action and justice required remand.[262] This duty exists because jurisdictional requirements operate throughout the entire course of litigation and may be asserted by any actor.[263] On the other hand, by requiring a motion from the party seeking remand, the ALI necessarily makes the workings of new § 1447(b) procedural.[264]

If the plaintiff timely moves the court, remand would be neither automatic nor even presumptive. Rather, new § 1447(b) requires the court to remand only if remand would be "in the interest of justice."[265] Far from the statutorily mandated presumption in favor of remand under the *Tedford* mechanism, the ALI revision seems to favor retention of jurisdiction by the federal court.[266] In effect, the court must remand only if the plaintiff timely moves for remand and justice requires such remand.[267] Otherwise, new § 1447(b) seems to view removal more than one year after commencement of the action as an acceptable, and perhaps even preferred, option.[268] This view is a sharp departure from the current congressional stance on removal more than one year after commencement of the action.[269]

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261. *Compare* Tedford v. Warner-Lambert Co., 327 F.3d 423, 426 (5th Cir. 2003) (stating that the one-year time limit is procedural and thus subject to waiver) *with* Price v. Messer, 872 F. Supp. 317, 320 (S.D. W. Va. 1995) (viewing the one-year time limit as jurisdictional in nature).

262. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93–94 (1998) (noting that a court cannot proceed if it lacks jurisdiction and must dismiss the case whenever jurisdiction is deemed defective).

263. *Id.*

264. *See* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (requiring a motion by a party to invoke the workings of new § 1447(b)). Arguably, this issue is moot as new § 1447(b) does away with a strict time limit, and, thus, the new statute eliminates the need to discuss whether the one-year aspect of new § 1447(b) is procedural or jurisdictional in nature. The fact remains, however, that if new § 1447(b) did not contain the last sentence requiring a motion by a party, a court could construe the statute as being jurisdictional in nature. In that case, the court would be bound to remand if it found that the interest of justice required remand, regardless of what the parties said or did. Thus, this requirement of a motion is very important in constricting a court's power, and is not moot.

265. *Id.*

266. *See id.* (stating that the district court may remand in the interest of justice, thus implying that the court should otherwise retain jurisdiction).

267. *Id.*

268. *See id.* (stating that the court may remand but giving no indication that the court should remand).

269. *See* 28 U.S.C. § 1446(b) (2000) (stating that a case may not be removed more than

C. Questions and Answers About the Revision

Obviously, the ALI removal revision is only a scholarly suggestion at this point. The proposal presents as many questions as it does answers because no case law on the matter exists. The ALI responds to some of the most obvious questions after it puts forth the language of the proposed statute.[270] The biggest question is clearly how to quantify the interest of justice. In other words, what factor or set of factors tips the scale of justice in favor of remand? The ALI points to the judicial construction of the interest of justice clauses contained in §§ 1404 and 1406 as useful guidance.[271] This suggestion presents a few problems. First, the courts struggle to find a uniform interpretation and application of the interest of justice language in the current statutes.[272] As the ALI admits, this standard is inherently discretionary,[273] so one court's justified remand could be another court's clear case for retaining jurisdiction.

The other large problem with pointing to existing statutes as guidance for applying the interest of justice standard is that the subject matter of the current statutes differs from the subject matter of the ALI proposal.[274] The current

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one year after the commencement of the action).

270. *See* FED. JUDICIAL CODE REVISION PROJECT 465–71 (explaining the effect and implementation of the revision and offering illustrations).

271. *See id.* at 467 ("Cases construing the 'interest of justice' standard under . . . § 1404 and § 1406 will provide some guidance to the district court in the exercise of its discretion."); *see also* 28 U.S.C. § 1404(a) (2000) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); *id.* § 1406(a) (concerning cases in which venue is improper and giving the district court the option to dismiss or, in the interest of justice, transfer the case to a proper venue).

272. *See* David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 446 (1990) (describing the current state of the law regarding the interest of justice standard as being "in chaos" and preventing any prediction on how a court will decide a given motion to transfer). Professor Steinberg's Article provides a detailed analysis of the cases dealing with the interest of justice standard. The Article concludes that the standard has little or no effect on the decision whether to transfer venue and that the interest of justice transfer motion has become nothing more than a tool for delay. *Id.* at 447. *Compare* Campbell v. Mitsubishi Aircraft Int'l, Inc., 416 F. Supp. 1225, 1226–27 (W.D. Pa. 1976) (stating that a transfer in the interest of justice should not be liberally granted) *with* Exps. Refinance Corp. v. Marden, 356 F. Supp. 859, 860 (S.D. Fla. 1973) (stating that the language of § 1404(a) should be liberally construed).

273. *See* FED. JUDICIAL CODE REVISION PROJECT 468 (2004) (recognizing the discretionary nature of the interest of justice remand decision).

274. *But see* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4 (amending the diversity statute to contain a section dealing with federal jurisdiction of class actions and allowing the federal court to decline jurisdiction in various circumstances "in the interest of justice"). The Class Action Fairness Act of 2005 splits potential class actions into three categories—those in which less than one third of class members are nondiverse as to the

statutes, §§ 1404 and 1406, deal with venue, and, specifically, whether to transfer venue or whether to dismiss a case if venue is improper.[275] These inquiries seem to concentrate on fairness to the parties involved.[276] Moreover, these inquiries presuppose federal jurisdiction.[277] In other words, the question in these current statutes is not whether to retain jurisdiction or remand to state court, but rather which federal court should hear the case.[278]

On the other hand, the ALI interest of justice question arises in the removal context.[279] The ALI statute hinges the decision whether to remand or retain jurisdiction on whether remand would be in the interest of justice.[280] The obvious question is, justice as to whom? Should the courts look to the litigants involved in the instant case and make a decision based only on their interests?[281] Another plausible reading of the statute, especially given the judicial history of removal,[282] would allow a court to decide whether to remand based on the interests of the parties as well as of the states and the federal system. In other words, the courts could decide that retention of jurisdiction in the federal system in a given case would deprive the state court of a chance to

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primary defendant, those in which between one third and two thirds of the class members are nondiverse as to the primary defendant, and those in which more than two thirds of the class members are nondiverse as to the primary defendant. *Id.* In the second category, those class actions in which between one and two thirds of the class members are nondiverse as to the primary defendant, Congress has allowed the federal court to decline jurisdiction in the interest of justice according to a list of factors. *Id.* This interest of justice inquiry may be more helpful than the venue statutes in construing the ALI revision because, similar to the ALI revision, the Class Action Fairness Act deals with the question of whether to retain jurisdiction or to remand to the state courts. Notably, many of the listed factors that courts should consider in making the decision to retain or decline jurisdiction of a class action pertain to matters of administrative efficiency and federalism. *Id.*

275. *See* 28 U.S.C. § 1404(a) (2000) (discussing the proper situations in which to transfer venue); *id.* § 1406(a) (defining the options of a court in a case where venue in that court is improper).

276. *See, e.g., id.* § 1404(a) ("*For the convenience of parties and witnesses*, in the interest of justice, a district court may transfer . . . .") (emphasis added).

277. *See id.* (allowing transfer only to any other district where the case might have been brought originally).

278. *See id.* (discussing only transfer from one federal court to another federal court); *id.* § 1406(a) (discussing only whether to dismiss a case completely or transfer to another federal court).

279. *See* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (allowing remand in the interest of justice in new § 1447(b)).

280. *Id.*

281. *See, e.g.*, 28 U.S.C. § 1404(a) (2000) (basing the decision whether to transfer in the interest of justice on the convenience of the parties and witnesses).

282. *See supra* Part II.B (discussing the history of the removal statute and highlighting the deference paid to the sovereignty of the states).

handle an important state law issue and, thus, remand based on that interest of justice. Because the current statutes deal with venue and the ALI revision deals with removal,[283] the interest of justice inquiry will vary across these different subject matters. Thus, the judicial construction of the venue statutes will be of little help in advancing justice in the removal arena.

The ALI responds to the possibility that courts will use this grant of broad discretionary power as a way to clear a heavy docket by pointing to three factors that limit this discretion.[284] The ALI first argues that new § 1447(b) applies only to that group of cases in which removal is currently prohibited.[285] Thus, courts cannot use this interest of justice discretion to remand a case unless it meets the very narrow preliminary conditions of new § 1447(b).[286] The ALI next points out that remand would be possible only if a party made a motion to remand.[287] Thus, the courts cannot simply invoke the interest of justice discretion *sua sponte* as a way to dispose of unwanted cases.[288] Finally, the ALI further argues that the remand motion must occur within the strict thirty-day window allowed for remand based on procedural grounds.[289] As a result of this limited amount of time, a court cannot exercise its discretion at some future point in time beyond thirty days just to clear the docket.[290]

One question that the ALI does not address is how the obligation to strictly construe the removal statutes and to resolve all doubt in favor of remand would factor into the implementation of new § 1447(b).[291] As stated above, new

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283. *Compare* 28 U.S.C §§ 1404(a), 1406(a) (2000) (setting forth the rules of transfer of venue) *with* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (discussing removal of a case more than one year after commencement of the action in new § 1447(b)).

284. *See* FED. JUDICIAL CODE REVISION PROJECT 467 (2004) (discussing three ways the revision would act to prevent a court from abusing its discretion).

285. *See id.* (highlighting the small class of cases to which this provision would apply, specifically to "those that do not become removable until a year or more since their commencement in state court").

286. *See id.* at 463 (restricting, by its own terms, application of new § 1447(b) to cases that were not ascertainably removable at the commencement of the action, were removed more than one year after commencement, and in which jurisdiction is based solely on diversity or supplemental jurisdiction).

287. *See id.* at 467 (highlighting the suggested revision's requirement of a motion for the statute to apply).

288. *See id.* ("[*S*]*ua sponte* remand is not permitted.").

289. *See id.* (pointing out the strict time limit for the motion to remand).

290. *See id.* (describing the time limit as a means of preventing courts from using the statute to clear the docket).

291. *See, e.g.*, Lupo v. Human Affairs Int'l, 28 F.3d 269, 274 (2d Cir. 1994) (stating that the congressional intent to restrict federal jurisdiction requires courts to read the removal statute narrowly and resolve any question against removal).

§ 1447(b) seems to impose a presumption in favor of retention of jurisdiction in cases that fit the § 1447(b) prerequisites.[292] This presumption would apply only to cases governed by § 1447(b), leaving the previous judicial mandate to construe the removal statutes narrowly in place for removal in general. Thus, a court applying the narrow construction mandate to § 1447(b) could, if the court still adhered to the *Shamrock Oil* principles,[293] reason that it should resolve all doubtful cases against removal. Stated differently, a court facing a new § 1447(b) situation would have to apply the new statute against the backdrop of the previous mandate to narrowly construe the removal statutes in favor of remand. The result of this awkward juxtaposition could be a court deciding to resolve all doubt about whether remand would be in the interest of justice, an inherently doubt-ridden standard, in favor of remand. At the very least, this situation would be extremely confusing and lead to a lack of uniform implementation, and may even lead to a nullification of the principle behind the interest of justice standard.[294]

A full and detailed analysis of the ALI's revisions to the removal statute is far beyond the scope of this Note. Rather, this Part seeks only to present the revision as it relates to the equitable exception found in *Tedford*. On the most basic level, the equitable exception and the ALI's new § 1447(b) both seek to cure the same perceived problem.[295] Both mechanisms attempt to prevent plaintiffs from engaging in manipulative practices by greatly decreasing the

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292. *See* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (stating that the court may—not must—remand in the interest of justice in new § 1447(b), thus implying that the court should otherwise retain jurisdiction).

293. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107 (1941) (stating that courts should narrowly construe the removal statutes in favor of remand because of a perceived congressional intent to do so and a healthy respect for federalism).

294. *See* FED. JUDICIAL CODE REVISION PROJECT 466–67 (2004) (describing the interest of justice standard as a flexible mechanism allowing the individual courts to make decisions based on fairness in each individual case).

295. *Compare id.* (replacing the one-year time limit with new § 1447(b) because the time limit is "easily abused") *with* Tedford v. Warner-Lambert Co., 327 F.3d 423, 428–29 (5th Cir. 2003) (providing an equitable exception to negate plaintiff's manipulative behavior). Standing alone, new § 1447(b) may encompass many more situations than just instances of alleged forum manipulation. For instance, a district court could remand a case to state court in the interest of justice due to some consideration regarding accessibility of evidence or witnesses. The state courts are located in the individual cities and counties whereas the federal district courts are spread sparsely throughout the state. Thus, justice might counsel in favor of remanding to the more geographically specific state court. Such remand in the interest of justice would have nothing to do with forum manipulation. Though the ALI commentary accompanying new § 1447(b) deals exclusively with the interest of justice standard as it pertains to forum manipulation, the text of the revision may be overly broad.

incentive in those practices.[296] Though the two "solutions" operate differently, they both give a large amount of discretion to the district judges. In the case of the equitable exception, a question still exists about whether *Tedford*'s reading of the current statute is a permissible construction. On the other hand, a question in common for the equitable exception and the ALI revision is whether either of them would work in practice.

*V. Post-*Tedford *Treatment in the Fifth Circuit*

Though the concept of an equitable exception to the one-year time limit is not new to the federal courts,[297] its binding effect in the Fifth Circuit is a new development.[298] The *Tedford* court only recently published its decision in April 2003,[299] so the lower courts of the Fifth Circuit have not had a long time to adapt to the equitable exception's binding presence throughout the circuit. Moreover, the ALI removal revision[300] is just a suggestion, thereby making it impossible to determine how the revision has worked in practice. Since the *Tedford* decision, however, several of the district courts in the Fifth Circuit have addressed removal occurring more than one year after commencement.[301] This Part analyzes those recent cases to highlight how the courts are handling the equitable exception as put forth in *Tedford*, and the conclusions of this Part do not pertain to the ALI revision.

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296. *See Tedford*, 327 F.3d at 427 (opting for an equitable application of the one-year time limit because a strict application would invite manipulation and gamesmanship by the plaintiff); FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (allowing remand only when remanding would further the interest of justice in new § 1447(b)).

297. *See, e.g.*, Kite v. Richard Wolf Med. Instruments Corp., 761 F. Supp. 597, 601 (S.D. Ind. 1989) (recognizing an equitable exception to the one-year time limit in § 1446(b) just one year after the 1988 revision that added the time limit).

298. *See Tedford*, 327 F.3d at 429 (recognizing the equitable exception as a valid rule of decision in the Fifth Circuit).

299. *Id.*

300. *See* FED. JUDICIAL CODE REVISION PROJECT 463 (2004) (revising the removal procedure to allow remand of a case removed more than one year after the commencement of the action only if remand would be in the interest of justice).

301. *See* Ardoin v. Stine Lumber Co., 298 F. Supp. 2d 422, 429 (W.D. La. 2003) (granting an equitable exception to the one-year time limit after finding that the plaintiff had joined nondiverse defendants to defeat removal). *But see* Clark v. Nestle USA, Inc., No. 04-1537, 2004 U.S. Dist. LEXIS 14224, at *5 (E.D. La. July 23, 2004) (refusing to grant an equitable exception to the one-year time limit because, in the court's opinion, the plaintiff's actions did not meet the level of manipulation found in *Tedford*); Foster v. Landon, No. 04-2645, 2004 U.S. Dist. LEXIS 22440, at *7 (E.D. La. Nov. 4, 2004) (refusing to grant an equitable exception to the one-year time limit because the plaintiff's actions were not egregiously manipulative enough).

A. The Few, the Proud, the Cases

The U.S. District Court for the Western District of Louisiana applied an equitable exception to the one-year time limit in *Ardoin v. Stine Lumber Co.*[302] because, in the court's opinion, the primary purpose of the presence of nondiverse defendants was to defeat removal.[303] At various points during the course of litigation, several different representatives were attempting to litigate the same class action, all with the same counsel.[304] The plaintiffs in these parallel actions engaged in very blatant attempts to avoid federal court.[305] Whenever an attempt to avoid federal court failed, plaintiffs' counsel simply dismissed that suit and proceeded with another class representative.[306] In the *Ardoin* action, plaintiffs joined several nondiverse defendants.[307] After a year had passed, plaintiffs began dismissing various defendants, and after several rounds of dismissals complete diversity existed.[308] The remaining defendants noticed removal, thus leading to the instant decision.[309] The plaintiffs offered various nonmanipulative explanations as to why they had begun dismissing defendants after a year had passed.[310] Specifically, the plaintiffs argued that

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302. *See Ardoin*, 298 F. Supp. 2d at 428–29 (applying the equitable exception set forth in *Tedford*). The plaintiffs in *Ardoin* were pursuing a class action suit against various defendants involved with the treating and selling of lumber. *Id.* at 426. The court previously had denied a notice of removal because complete diversity did not exist. *Id.* at 424. The defendants again removed nine months later, and this time complete diversity was present. *Id.* The plaintiffs argued that, though subject matter jurisdiction was proper, § 1446(b) barred removal. *Id.* The defendants responded that the *Tedford* exception applied to their case. *Id.* The court discussed the equitable exception argument at great length. *Id.* at 425–28. After comparing the facts of *Tedford* to the facts of the present case, the magistrate judge found that the plaintiffs' actions were primarily motivated by a desire to avoid federal court. *Id.* at 428. Thus, the magistrate judge recommended that the court apply an equitable exception. *Id.* at 429. The district judge agreed with that recommendation and denied the motion to remand, but immediately certified the issue for interlocutory appeal to the Fifth Circuit. *Id.* at 423–24. The Fifth Circuit denied the appeal. Ardoin v. Stine Lumber Co., 885 So. 2d 43, 47 (La. Ct. App. 2004).

303. *See Ardoin*, 298 F. Supp. 2d at 428 (finding that, more probably than not, the plaintiff had engaged in forum manipulation sufficient to apply the equitable exception set forth in *Tedford*).

304. *See id.* at 426 (discussing the parallel class action claims being pursued by the same group of plaintiffs).

305. *See id.* at 426–27 ("[P]laintiffs employed every known tactic and artiface [sic] to secure remand to state court.").

306. *See id.* at 426 (discussing the successive dismissals of the parallel actions).

307. *See id.* at 427 (discussing the alignment of parties in the *Ardoin* action).

308. *See id.* (describing the timing of the dismissal of various groups of defendants).

309. *See id.* (stating that the remaining defendants removed when complete diversity existed).

310. *See id.* (discussing the justifications given for the dismissals of the nondiverse

discovery had revealed that the dismissed defendants were small entities.[311] Thus, the plaintiffs argued, the class could pursue its interests more manageably against a smaller group of key defendants.[312] After considering the various arguments, the court rejected all of the plaintiffs' arguments as "pretext to cover their efforts to prevent removal."[313] Thus, the court found that the weight of the evidence dictated that the *Tedford* exception should apply and that the federal court should retain jurisdiction.[314]

The U.S. District Court for the Eastern District of Louisiana refused to apply the *Tedford* equitable exception in *Clark v. Nestle USA, Inc.*[315] because the evidence of forum manipulation was not as clear cut as the *Tedford* facts.[316] The court stated that initially stipulating an amount in controversy lower than the statutory minimum and then drastically increasing the amount more than four years later "could reflect an effort to manipulate the forum."[317] The court went on to state, however, that the evidence of manipulation was not as "clear cut" as was the pattern of manipulation in *Tedford* and other cases that applied the equitable exception.[318] Moreover, the court asserted that the defendant had

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defendants).

311. *See id.* (explaining the plaintiffs' argument that the timing of the dismissals was merely coincidental to the strategic decision to dismiss the smaller defendants).

312. *See id.* (citing the plaintiffs' argument that the presence of the dismissed defendants was unnecessary for a full recovery for the class).

313. *Id.* at 428.

314. *See id.* at 428–29 (finding that the manipulative conduct of the plaintiffs warranted an equitable exception to the one-year time limit).

315. *See* Clark v. Nestle USA, Inc., No. 04-1537, 2004 U.S. Dist. LEXIS 14224, at *5 (E.D. La. July 23, 2004) (refusing to apply the *Tedford* exception). The plaintiff in *Clark* brought suit in state court and stipulated in her complaint that the amount in controversy was less than the statutory minimum for federal diversity jurisdiction. *Id.* at *1. Four years after commencement of the suit and three months before trial, the plaintiff sought to amend her complaint to withdraw the stipulation. *Id.* The defendant objected to this motion in state court, and the state court declined to issue a ruling until the defendant filed and resolved its removal notice. *Id.* at *2. The defendant removed the case to federal court on diversity grounds and the plaintiff timely moved to remand because the one-year time limit had passed. *Id.* The defendant argued that the plaintiff's actions were manipulative and that the court should equitably extend the one-year time limit. *Id.* After reviewing the *Tedford* case and the cases that *Tedford* cited favorably, the court addressed the plaintiff's actions. *Id.* at *3–5. The court found that, though the plaintiff's action could have been manipulative, the evidence of manipulation was not as clear as it was in *Tedford*. *Id.* at *5. The court also accepted plaintiff's explanation that subsequent psychological treatment was the cause of the increase in amount in controversy. *Id.*

316. *See id.* (refusing to grant an equitable exception to the one-year time limit because, in the court's opinion, the plaintiff's actions did not meet the level of manipulation found in *Tedford*).

317. *Id.* at *5.

318. *See id.* (comparing the plaintiff's actions to those of the plaintiffs in cases that allowed

not been vigilant in seeking removal because defendant had known of the increase for nine months before removing.[319] Thus, defendant's removal was procedurally defective because it occurred more than thirty days after the case had become removable.[320] Despite this separate procedural deficiency, the court seemed to imply that it would not have granted an equitable exception to the one-year bar on the facts of this case.[321]

Finally, the U.S. District Court for the Eastern District of Louisiana refused to apply an equitable exception to the one-year time limit in *Foster v. Landon*[322] because, again, the manipulative conduct was not egregious enough.[323] The court stated that plaintiff's actions had an "aroma of manipulation," but that the operative question was "whether this aroma of manipulation [was] sufficient to trigger the rarely used exception."[324] The court responded to this question by asserting that the plaintiff's actions did not "present the egregious, clear pattern of forum manipulation as in [*Tedford*]."[325] The court felt that the plaintiff's actions in *Tedford* were blatantly manipulative and, thus, required no speculation as to the motives behind the action.[326] The *Foster* facts, apparently, did require speculation as to the motives behind the delayed sending of the settlement letter.[327] As a result, the court resorted to the

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the exception).

319. *See id.* at *5–6 (stating that the defendant had not been diligent in its effort to remove).

320. *See id.* at *6 (highlighting the separate procedural deficiency of defendant's removal).

321. *See id.* at *5 (asserting that the plaintiff's actions did not reach the level of manipulation necessitated by *Tedford*).

322. *See* Foster v. Landon, No. 04-2645, 2004 U.S. Dist. LEXIS 22440, at *7 (E.D. La. Nov. 4, 2004) (refusing to grant the *Tedford* exception). The plaintiff in *Foster* brought a personal injury claim against the defendant and the rental company that owned the car that the defendant was driving. *Id.* at *1–2. The plaintiff subsequently dismissed the driver from the suit and the remaining defendant removed on the basis of diversity jurisdiction. *Id.* at *2. The plaintiff sought remand because the removal was occurring more than one year after the commencement of the action. *Id.* at *3. The defendant responded that the court should apply an equitable exception to the time limit. *Id.* The defendant pointed out that the original complaint asserted that the amount in controversy was less than $75,000. *Id.* at *6. Then, a year later, the plaintiff sent a settlement letter, with medical records attached, that showed that the actual amount in controversy exceeded $75,000. *Id.* The court admitted that the plaintiff's actions seemed manipulative, but said that these actions were not sufficiently manipulative to warrant a *Tedford* exception. *Id.* at *8.

323. *See id.* at *8 (refusing to grant an equitable exception to the one-year time limit because the plaintiff's actions were not egregiously manipulative enough).

324. *Id.* at *7.

325. *Id.*

326. *See id.* at *8 (stating that the facts of *Tedford* did not require any speculation as to the motive behind the plaintiff's actions).

327. *See id.* ("In this case, Plaintiff may have delayed by a few months in sending a demand

presumption requiring strict construction of the removal statute in favor of remand and granted plaintiff's motion to remand.[328]

B. More Irreconcilable Differences?

The implication of these early cases is clear. The *Tedford* decision requires judges to quantify somehow the egregiousness of a plaintiff's manipulative conduct in order to resolve a *Tedford* question.[329] These cases show that some attempts at forum manipulation may be acceptable, but that at some point the gamesmanship becomes too manipulative and the equitable exception applies.[330] Arguably, however, differentiation among levels of manipulative conduct does not make sense. If the aim of the *Tedford* court was to take the incentive out of manipulative conduct,[331] it cannot follow that some manipulation is acceptable whereas other manipulation is unacceptable.

Moreover, the manipulation threshold clearly will differ from district to district and from judge to judge. Apart from the obvious disparity in application that will arise within the circuit, this individual differentiation will lead to gridlock on appeal. As the *Ardoin* court correctly states, "the denial of remand based on an interpretation of *Tedford* involves a controlling question of law as to which there is substantial ground for differences of opinion."[332] If an appellate court determines that the decision to retain jurisdiction based on

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letter and medical records indicating that the federal jurisdictional amount is satisfied. However, such conduct hardly rises to the transparent attempt to circumvent federal jurisdiction presented in *Tedford*.").

328. *See id.* (stating that the requirement to construe the removal statute against removal tipped the scale against applying the *Tedford* exception).

329. *See, e.g., id.* at *7 (refusing to apply the equitable exception because the level of manipulation was not as egregious as the manipulation in the cases that applied the equitable exception).

330. *Compare* Ardoin v. Stine Lumber Co., 298 F. Supp. 2d 422, 428 (W.D. La. 2003) (granting an equitable exception after finding that the plaintiffs had no legitimate reason for joining nondiverse defendants other than defeating diversity jurisdiction) *with* Foster v. Landon, No. 04-2645, 2004 U.S. Dist. LEXIS 22440, at *7 (E.D. La. Nov. 4, 2004) (refusing to grant an equitable exception because the "aroma of manipulation" was not strong enough).

331. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 427–28 (5th Cir. 2003) (stating that strict application of the one-year time limit would unduly reward inequitable practices by the plaintiff).

332. *Ardoin*, 298 F. Supp. 2d at 424; *see also* 28 U.S.C. § 1292(b) (2000) (allowing a district judge to certify a question for interlocutory appeal if the question is a "controlling question of law as to which there is substantial ground for difference of opinion" and if "an immediate appeal from the order may materially advance the ultimate termination of the litigation.") This procedural device requires the permission of the district judge, and also requires that the appellate court agree to hear the appeal. *Id.*

Tedford is incorrect, a new trial in state court is the only remedy,[333] a remedy that means the litigants have wasted substantial time and resources in a useless federal case because jurisdiction was improper. To resolve this problem, the *Ardoin* court immediately certified its decision for interlocutory appeal to the Fifth Circuit before the trial occurred.[334] Though this decision was prudent in this specific instance, such procedure is unacceptable as a matter of policy.

If every court that retains jurisdiction based on *Tedford* immediately certifies the ruling for interlocutory appeal, the Fifth Circuit's docket could increase significantly. This implication leads to two options. First, as the *Foster* court did, a court could continue to resolve all doubt in favor of remand,[335] thus avoiding the need for interlocutory appeal and the risk of wasting time on an improper trial. The problem with this option is that doubt seems inherent in the decision of whether a plaintiff's actions are manipulative enough to warrant a *Tedford* exception. The second option is for the Fifth Circuit to defer to the trial judge's finding and summarily affirm in most situations.[336] This option would alleviate the administrative impracticability of the interlocutory appeal option but would do nothing to cure the disparity in application from court to court.

VI. Implications for the Future

This discussion highlights two questions as the courts and Congress proceed on this issue. First is the question of whether the *Tedford* court's reading of § 1446(b) is a permissible interpretation of the statute. The second, and perhaps more important, question is whether the *Tedford* exception and the ALI revision are good policy. The answer to the first question is that *Tedford* probably takes too much license with the statutory language. The *Tedford* court

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333. *See, e.g.*, Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 (11th Cir. 1994) (remanding and vacating the lower court's retention of jurisdiction, thus requiring that the litigants go back to state court).

334. *See Ardoin*, 298 F. Supp. 2d at 424 (staying further proceedings after deciding to retain jurisdiction to allow plaintiff to immediately appeal the removal decision to the Fifth Circuit).

335. *See* Foster v. Landon, No. 04-2645, 2004 U.S. Dist. LEXIS 22440, at *8 (E.D. La. Nov. 4, 2004) (opting to follow the presumption in favor of remand instead of applying the *Tedford* exception on mere speculation).

336. *See, e.g.*, Ardoin v. Stine Lumber Co., 885 So. 2d 43, 47 (La. Ct. App. 2004) (stating that the Fifth Circuit denied the defendants' interlocutory appeal of the district court's decision to retain jurisdiction even though a year had passed). No published record of the Fifth Circuit's denial of the appeal exists, so the denial must have been a summary affirmation of the district court's findings.

bases its decision on the fact that the time limits in the removal statutes are procedural and thus subject to waiver.[337] Though a circuit split still exists on the issue,[338] the arguments supporting the procedural label are convincing. The removal statute itself provides for a thirty-day time limit on a motion for remand based on a procedural defect in removal.[339] This time limit on remand applies to the thirty-day time limits in § 1446(b) determining when notice of removal must occur. The *Ferguson* court makes a strong argument when it notes that when one time limit in a statute is subject to waiver, so too should all other time limits absent clear congressional direction otherwise.[340]

The *Tedford* court made its fatal leap when it allowed the plaintiff's preremoval actions to act as the waiver.[341] Not surprisingly, failure to assert the time limit after one year has passed would act as a waiver of the ability to rely on it. On the other hand, the *Morrison* court, which *Tedford* cited,[342] apparently invented the idea that action prior to the one-year mark can constitute a waiver.[343] Though the idea is certainly up for debate, the language of the statute and the context in which Congress enacted the one-year time limit seem to argue against the *Tedford* construction. The language of the statute is emphatic, and Congress enacted the provision against a backdrop of the presumption in favor of remand. Moreover, some courts have stated that Congress knew of the ability to manipulate when it enacted

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337. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 426 (5th Cir. 2003) (beginning the analysis with the assertion that the time limits in § 1446(b) are procedural and subject to waiver).

338. *Compare* Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992) (holding that a failure to assert the one-year time limit within the § 1447 thirty-day time limit resulted in a waiver of the right to assert the one-year time limit) *with* Brock v. Syntex Labs., Inc., No. 92-5740, 1993 U.S. App. LEXIS 25714, at *1 (6th Cir. Oct. 1, 1993) (holding that remand was proper even three months after removal because the one-year time limit was jurisdictional).

339. *See* 28 U.S.C. § 1447(c) (2000) (requiring a motion for remand within thirty days of removal to cure procedural defects in the removal).

340. *See* Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 603 (N.D. Tex. 1998) ("[T]his Court is unaware of any authority that allows a statute to be subject to one type of equitable exception but not another.").

341. *See Tedford*, 423 F.3d at 427 (stating that if a failure to assert the one-year time limit in a timely manner can act as a waiver, so too can manipulative joinder of a defendant to defeat removal).

342. *See id.* at 426 n.4 (citing *Morrison*).

343. *See* Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 950–51 (S.D. Miss. 1995) (fashioning the idea that a plaintiff's preremoval actions may constitute a waiver from a state supreme court case about equitable estoppel and a Fifth Circuit case decided before the addition of the one-year time limit).

the one-year time limit and did nothing to guard against such manipulation.[344] If these courts are correct in stating that Congress actually contemplated the ability to manipulatively defeat removal, the *Tedford* court clearly overstepped its role when it applied the equitable exception. Unquestionably, however, Congress decided that one year was the time period, on average, in which substantial progress had occurred in state court.[345] Thus, even if Congress did not actually contemplate the possibility of manipulation, *Tedford* still went too far by second guessing Congress's judgment on the one-year time period.

The second question, whether the *Tedford* decision or ALI revision are good policies, is easier to answer. The fact of the matter is that neither solution will solve the perceived problem. At the most basic level, both policies aim to prevent forum manipulation.[346] Unfortunately, neither policy will prevent the current manipulative practices, and they may create additional forum shopping.

The analysis of the post-*Tedford* cases and the ALI revision shows that the decision whether to retain jurisdiction will depend upon the court that is hearing the motion rather than a concrete rule of decision. Looking at the hypothetical in Part I, the case would qualify for diversity jurisdiction but for the nondiverse spoiler defendant. The necessary assumption in the *Tedford* decision is that the nondiverse defendant is present only to defeat diversity.[347]

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344. *See, e.g.*, Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 n.12 (11th Cir. 1994) ("[C]ongress knew when it passed the one year bar on removal that some plaintiffs would attempt to defeat diversity by . . . joining a nondiverse party."); Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324, 1327 (N.D. Okla. 2003) ("Congress has recognized and accepted that, in some circumstances, plaintiff can and will intentionally avoid federal jurisdiction." (quoting *Burns*)).

345. *See* H.R. REP. NO. 100-702, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032 (justifying the one-year time limit as "a means of reducing the opportunity for removal after substantial progress has been made"); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5(a), 119 Stat. 4 (adding new § 1453 at the end of the current removal provisions to deal with removal of class actions). Congress explicitly exempted class actions from the one-year time limit of § 1446(b). *Id.* This exemption lends credence to the argument that, absent clear congressional intent to the contrary, courts should not invent exemptions to the one-year time limit. Because class actions typically take more than a year to fully form, Congress has recognized that the one-year mark is not the point at which substantial progress has been made in class actions. This recognition is a congressional exception to the rule rather than a judicial invention.

346. *Compare* Tedford v. Warner-Lambert Co., 327 F.3d 423, 428–29 (5th Cir. 2003) (providing an equitable exception to negate plaintiff's manipulative behavior) *with* FED. JUDICIAL CODE REVISION PROJECT 466 (2004) (replacing the one-year time limit with new § 1447(b) because the time limit is "easily abused").

347. *See Tedford*, 327 F.3d at 427 ("Strict application of the one-year limit would encourage plaintiffs to join nondiverse defendants for 366 days simply to avoid federal court,

Applying this assumption to the hypothetical, if the court finds that the nondiverse defendant has no legitimate purpose, the "worst" that happens to the plaintiff, under both the *Tedford* and the ALI regime, is that the case remains in the federal system—exactly where the case would have landed if the plaintiff had not joined the spoiler defendant and the main defendant had removed. Thus, the plaintiff has no incentive to refrain from this manipulative conduct because she has the chance of drawing a court that favors remand, whereas her only risk is that she stays in the federal system where she would have ended up had she not engaged in the manipulative behavior. Over time, if the *Tedford* exception or the ALI revision become the controlling law nationally, different courts and judges will acquire a reputation of ruling one way or the other on these decisions. Plaintiffs may take note of these federal court reputations when deciding which state court to choose. Thus, by extension, the same manipulative practices will occur with the possibility of added forum shopping.

Both the *Tedford* exception and the ALI revision also require individual judges to make determinations as to the motive of joining a nondiverse defendant or pleading a specific amount in controversy. Congress has made the conscious choice to give litigants broad discretion in the joinder of parties and in the pleading requirements. Moreover, reasons other than forum manipulation, such as enhanced discovery, exist for a plaintiff to join a defendant against whom she does not intend to proceed.[348] The ALI states that these reasons are valid, therefore necessitating the judicial determination that the motive for joinder is forum shopping.[349] First, joining a party to take advantage of the discovery rules seems equally as manipulative as does joinder to take advantage of the removal rules. Second, this distinction will do nothing more than teach crafty plaintiffs to request discovery from the spoiler defendant for the year and then dismiss that defendant, thus defeating removal.

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thereby undermining the very purpose of diversity jurisdiction."); *see also supra* note 295 (discussing the overbreadth of new § 1447(b) in that the revision may apply to instances other than forum manipulation). In these nonmanipulation instances when new § 1447(b) may operate, this assumption of manipulative joinder has no bearing. Thus, this analysis focuses only on the ALI revision as it would address the situation of forum manipulation.

348. *See, e.g.*, FED. R. CIV. P. 26(a)(1) (providing for a certain amount of mandatory disclosure by a party); FED. R. CIV. P. 33(a) (allowing a party to serve written interrogatories on a party, but not on a nonparty).

349. *See* FED. JUDICIAL CODE REVISION PROJECT 466 (2004) (stating that the enhanced discovery options against a party are a legitimate reason to join a party that the plaintiff otherwise has no interest in pursuing).

VII. Conclusion

As the foregoing analysis shows, neither the *Tedford* exception nor the ALI revision will have a deterrent effect on the practice of joining a nondiverse defendant to avoid federal court. Thus, the *Tedford* decision can only be an attempt to judicially revise § 1446(b) to resemble the ALI revision. Factually, the plaintiffs in *Tedford* and the other cases applying the exception clearly were being manipulative. They joined nondiverse defendants without taking any discovery from them and then dismissed the claims against these defendants soon after the year had passed. They pleaded only slightly less than the amount in controversy threshold and then amended their request after a year. The fact remains, however, that the *Tedford* court was in no position to second guess Congress's policy determination that one year is the proper time period to bar removal. Apart from the impropriety of this judicial legislation, the analysis also shows that both of these revisions are unworkable in practice. Uniformity of implementation across the districts is unlikely, if not impossible, because the policies require individual judges to make inferences as to the motives of a particular plaintiff. Thus, if these revisions take hold, the effect will be the puzzling result that whether forum manipulation is allowed will depend on the individual forum. For these reasons, neither the courts nor Congress should allow equity or analysis of motive to play a role in the one-year time limit on removal.