FROM CHAOS TO CLARITY: PROCEDURAL MISJOINDER REVISITED

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As every first-year law student learns, one of the most important issues in early case planning is deciding on the forum. For plaintiffs, this often means structuring the lawsuit to remain in state court. For defendants, it concerns how to remove the case to federal court. One way to prevent removal is to join a non-diverse party to destroy complete diversity. But while courts uniformly agree that the plaintiff cannot join a non-diverse defendant against whom it has no claim, they are split on whether the plaintiff can join a non-diverse defendant against whom it has a claim that is wholly unrelated to the claim against the diverse defendant. There is not only a split between the two circuits courts to address the issue, but a deep split amongst the district courts in those circuits who have not.

On one side, the Eleventh Circuit has held that where the misjoinder is egregious, the federal court can sever the claims and exercise jurisdiction. On the other is the Fifth Circuit, who held the exact opposite, that the federal court cannot exercise jurisdiction no matter how egregious the misjoinder. The remaining circuits have steadfastly refused to pick a side, leaving it to each district court judge to decide for themselves which rule to follow. The result is a deeply troubling state of affairs where the defendant does not know if the federal court will tacitly approve of the plaintiff manipulating the rules of civil procedure to prevent removal or what standard the federal court will apply in deciding the issue.

This Article renews the call for courts to recognize that procedural misjoinder is just as necessary as its cousin, fraudulent joinder,

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I also wish to thank the staff of The Review of Litigation for their efforts in editing this Article and for allowing me to join Professor Paul Lund (Charleston School of Law) in the debate on this issue. Paul E. Lund, *Procedural Misjoinder After Thirty Years: Closing the Door on A Failed Removal Doctrine*, 45 REV. LITIG. 1 (2025).

for respecting the balance between plaintiffs' and defendants' rights and proposes a framework for courts to apply it.

INTRODUCTION

Diversity jurisdiction is enshrined in the Constitution to protect out-of-state litigants from local biases, and removal is statutorily provided because diversity jurisdiction is "not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum."[1] Yet all too often, a large part of the plaintiff's early litigation strategy concerns how to deny the defendant the ability to remove the case to federal court. One such tactic is to join claims against an out-of-state defendant with wholly unrelated claims against an in-state defendant (known as a jurisdictional spoiler).[2] The out-of-state defendant cannot remove the case because there is not complete diversity. And even if an out-of-state defendant moves the state court to sever the misjoined claims, the plaintiff can simply claim that the severance was involuntary, and the voluntary-involuntary rule prevents removal.[3]

What, then, is a defendant to do when a plaintiff can manipulate the rules of civil procedure to destroy diversity, and any attempt by the defendant to create diversity by properly applying the rules of civil procedure is deemed an involuntary act? Enter the doctrine of

1. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).

2. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) (referring to the non-diverse defendant as a "jurisdictional spoiler").

3. *E.g.*, Matteo v. Progressive Advanced Ins. Co., No. 2:12-cv-5012, 2012 WL 13018245, at *3–4 (E.D. Pa. Sep. 27, 2012) (remanding the case even though the state court's severance created complete diversity because "[t]he second purpose [of the voluntary-involuntary rule], that of giving due recognition and deference to the plaintiff's choice of forum, remains just as relevant to severance orders as to dismissal orders").

procedural misjoinder, which says that the federal court may disregard the presence of a jurisdictional spoiler unrelated to the claims against the diverse defendant in determining if it has jurisdiction.[4] Attributed to the Eleventh Circuit's decision in *Tapscott v. MS Dealer Service Corporation*,[5] the doctrine of procedural misjoinder is a natural extension of the improper joinder doctrine. "While traditional fraudulent joinder applies if the plaintiff has no *substantive* legal claim against the diversity spoiler, fraudulent misjoinder applies if a plaintiff has no valid *procedural* basis for joinder of the diversity spoiler."[6] Or to put it another way, "procedural misjoinder occurs when there is no reason to join the claims, and fraudulent joinder occurs when there is no claim."[7] The courts that have accepted the procedural misjoinder doctrine have done so out of recognition that a defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the [facts of the] controversy" with the non-resident defendant.[8]

Ten years after *Tapscott*, Professor Percy (University of Mississippi School of Law) provided a comprehensive review of the doctrine for the Harvard Journal of Law and Public Policy.[9] That same year, Professors Hines (University of Kansas School of Law) and Gensler (University of Oklahoma College of Law) provided a

4. Just as fraudulent joinder and improper joinder are used interchangeably to refer to the same concept, fraudulent misjoinder and procedural misjoinder are used interchangeably to refer to the same concept. *See, e.g.*, Lee v. Rafael Andres Heredia-Gallegos, No. 23-cv-01184-RMR-STV, 2023 WL 6904542, at *2 n.2 (D. Colo. Sep. 7, 2023) ("Although the doctrine is sometimes called 'fraudulent misjoinder,' the Court will use 'procedural misjoinder' instead of 'fraudulent misjoinder' to avoid confusion with the related concept of fraudulent joinder."); Sehovic v. Pfizer, Inc., No. 2:14-3254-RMG, 2015 WL 12831697, at *1 n.1 (D.S.C. Jan. 27, 2015) ("The courts have not been consistent in whether this doctrine should be styled 'procedural misjoinder' or 'fraudulent misjoinder', with some courts even using the terms interchangeably. For purposes of consistency only in this opinion, the Court has referred to the doctrine as 'procedural misjoinder.'" (citation omitted)). This Article will take its lead from Judges Varholak and Marchant and use the terms improper joinder and procedural misjoinder, when possible, to avoid confusion.

5. 77 F.3d 1353, 1360 (11th Cir. 1996).

6. Klintworth v. Valley Forge Ins. Co., No. 17-CV-448-JHP-JFJ, 2018 WL 4945237, at *3 (N.D. Okla. Aug. 15, 2018) (emphasis in original).

7. Jason Harmon, *Procedural Misjoinder: The Quest for a Uniform Standard*, 62 U. KAN. L. REV. 1429, 1434 (2014) (emphasis omitted).

8. *Tapscott*, 77 F.3d at 1360 (quoting Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921)).

9. E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J. L. & PUB. POL'Y 569 (2006).

similarly comprehensive review of the doctrine for the Alabama Law Review.[10]

Although Professors Percy, Hines, and Gensler all advocated for courts to adopt the doctrine,[11] in the nearly two decades since, courts have become even more split on both the procedural misjoinder doctrine and removal jurisprudence as a whole. The Fifth Circuit outright rejected procedural misjoinder (and later "all but eviscerate[d] the voluntary-involuntary rule").[12] Meanwhile, the Eighth, Ninth, and Tenth Circuits have steadfastly avoided adopting or rejecting the doctrine, and the First Circuit joined every other circuit, except the Fifth, in concluding the voluntary-involuntary rule survived the 1949 amendment to the removal statute. Thus, we have not one but two circuit splits over heavily litigated doctrines of removal jurisprudence.[13] This uncertainty about what should be a "uniform nationwide application"[14] cries out for intervention from the Supreme Court. This Article joins the chorus and proposes a framework for courts to adopt procedural misjoinder.

Part I details the evolution of the removal statute and the foundational doctrines implicated in discussions of procedural misjoinder. Part II discusses *Tapscott* in depth as a foundation for the doctrine and how the other circuits have responded to *Tapscott*. Part III addresses the unresolved questions plaguing the doctrine by contrasting the Fifth

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10. Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779 (2006).

11. Percy, *supra* note 10, at 575–76, 621–23; Hines & Gensler, *supra* note 11, at 783, 803–11.

12. Advanced Indicator and Mfg. Grp., Inc. v. Acadia Ins. Co., 50 F.4th 469, 478 (5th Cir. 2022) (Engelhardt, J., concurring). In full disclosure, the author was appellate counsel for Acadia Insurance Company in this case and, specifically, briefed the jurisdictional issues on appeal.

13. The first circuit split is the Fifth and Eleventh Circuits on procedural misjoinder. *Compare* Williams v. Homeland Ins. Co., 18 F.4th 806, 814 (5th Cir. 2021), *with Tapscott*, 77 F.3d at 1353. The second circuit split is the Fifth and First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits on the viability of the voluntary-involuntary rule. *Compare Advanced Indicator*, 50 F.4th at 474, 478, *with* Caribe Chem. Distribs., Corp. v. So. Agric. Insecticides, Inc., 96 F.4th 25, 31 (1st Cir. 2024) (collecting cases).

14. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941) ("The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied."); Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972) ("While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application.").

and Eleventh Circuits' competing views on each question before proposing an answer that balances the rights of plaintiffs and defendants while remaining faithful to jurisprudential considerations underlying the various removal doctrines. Finally, Part IV advocates for courts to adopt the doctrine.

I. THE EVOLUTION OF REMOVAL JURISPRUDENCE

Removal jurisprudence has a long and tortured history.[15] From the earliest days of the federal court system, courts were protective of a defendant's right to remove. The prevailing view was that "the right to remove an action which falls within the jurisdiction of the federal courts is a substantial right."[16] It was viewed as a

> very dangerous doctrine, one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship, if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship, and thereby destroy, the rights of the parties in federal courts.[17]

It was against this backdrop that the court developed the voluntary-involuntary rule and the improper joinder doctrine as a way to respect the plaintiff's right as master of its complaint while also protecting the defendant's right of removal.

A. Removal Jurisprudence Leading Up to the 1949 Amendments

Removal has been a feature of federal jurisdiction since the country's foundation when the first Congress provided for removal in the Judiciary Act of 1789, which stated that a defendant could remove

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15. *See* Valverde v. Maxum Cas. Ins. Co., 558 F. Supp. 3d 385, 393 (2021) (recounting the doctrinal genesis of removal jurisprudence, beginning in 1898). This article covers significant developments in removal jurisprudence as they relate to the question of procedural misjoinder. For a more encompassing review of the history of removal jurisprudence, turn to Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609 (2004).

16. Jones v. Mosher, 107 F. 561, 564 (8th Cir. 1901).

17. Arapahoe Co. v. Kan. Pac. Ry. Co., 1 F. Cas. 1080, 1082 (C.C.D. Colo. 1877) (No. 502).

to federal court any suit "commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and [where] the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs."[18]

Over the next century, the removal statute was modified somewhat, but it was not until Reconstruction that any significant changes occurred. Through the Separate Controversy Acts of 1866,[19] the Prejudice of Local Influence Act of 1867,[20] and the Removal Act of 1875,[21] Congress brought about significant changes to the removal statute by: (1) expanding removal jurisdiction to include the newly conferred federal question jurisdiction, (2) allowing plaintiffs to remove cases as well as defendants, and (3) providing for removal of an entire suit containing any separate controversy between citizens of different states. The removal statute remained largely the same between Reconstruction and the end of World War II.

But although the statute itself did not significantly change, the Supreme Court created two of the doctrines that still govern removal today: the voluntary-involuntary rule and the improper joinder doctrine.

1. The Voluntary-Involuntary Rule

Prior to the 1949 amendments, a defendant could remove the case at any time before the deadline to respond to the complaint under state law.[22] Cases were often removed on the eve of trial, or even later.[23] But once a defendant answered, that was it; the statute did not have any exceptions to remove a case after the defendant answered, even if the case was not removable before then. Yet the lack of statutory exceptions did not prevent the Supreme Court from judicially creating one to protect the important right of removal.

18. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80.

19. Act of July 27, 1866, ch. 288, 14 Stat. 306 (amended 1867).

20. Act of Mar. 2, 1867, ch. 288, 14 Stat. 558.

21. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 471.

22. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 351 (1999).

23. *E.g.*, Am. Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 313–14 (1915) (describing a case where the plaintiff moved to non-suit two defendants at the close of his case in chief and the remaining defendants then removed the case); Yulee v. Vose, 99 U.S. 539, 540 (1878) (describing a case where the case went to trial in state court, the complaint was dismissed as to all defendants but, on appeal, the dismissal was reversed as to that defendant, and the sole remaining defendant removed following appeal).

The most significant case in this respect is *Powers v. Chesapeake & Ohio Railway Co.*[24] In *Powers*, the question before the Supreme Court was not whether the plaintiff's voluntary act was required to make a case removable, but whether a case that becomes removable after the statutory time for removal has passed could still be removed. The Supreme Court reasoned that to construe the removal statute "as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute, but it would utterly defeat all right of removal in many cases . . . ."[25] According to the Court:

> The reasonable construction of the act of [C]ongress, *and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control*, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right . . . .[26]

The holding of *Powers* is only that a case that is not initially removable may later become removable even if the initial deadline for removal has passed. The Court did not consider how diversity was created, only that it was created—there is nothing in the opinion to suggest that the plaintiff's voluntary dismissal had any bearing on the Court's decision. To the contrary, the opinion, particularly the portion quoted above, is clear that the rule was founded upon preserving a defendant's right to removal.

Two years later, however, in *Whitcomb v. Smithson*,[27] the Supreme Court focused on how diversity was created. In *Whitcomb*, the plaintiff sued the Chicago, Great Western Railway Company as well as Whitcomb and Morris, receivers for the Wisconsin Central Company, for personal injuries related to a collision between two trains. Whitcomb and Morris removed, arguing that the railway was fraudulently joined to prevent removal while the plaintiff argued he had good faith claims against the railway. After remand, the state court proceeded to trial. At the close of evidence, Whitcomb and Morris

24. 169 U.S. 92 (1898).
25. *Id.* at 100.
26. *Id.* at 100–01 (emphasis added).
27. 175 U.S. 635 (1900).

requested leave to file a supplement to their previously denied petition for removal. The trial court denied the request and then granted a directed verdict to the railway. After the jury returned a verdict in favor of the plaintiff and the Supreme Court of Minnesota affirmed, Whitcomb and Morris sought review in the United States Supreme Court, alleging they should be granted a new trial in federal court. The Court disagreed, noting the plaintiff had not voluntarily dismissed the railway and instead all defendants were jointly liable until the close of trial.[28] Explaining the Court's holding, Chief Justice Fuller wrote:

> This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried.[29]

This distinction between the focus in *Powers* and *Whitcomb* reflects a difference between historical and modern litigation. Both cases predate the Federal Rules of Civil Procedure and were decided at a time when each lawsuit could involve only one cause of action.[30] Thus, it was the cause of action that was "the subject-matter of the controversy."[31] Under the common law rule, if the plaintiff wanted to proceed against multiple individuals, he must allege they are either jointly, severally, or alternatively liable for the same cause of action—at risk of losing any right to recovery under some causes of action if the plaintiff improperly alleges joint liability.[32] In *Powers*, the plaintiff, by discontinuing his suit against the employees, admitted that they were not jointly liable with the railway company. But in *Whitcomb*, the plaintiff insisted until trial that the employees were jointly liable

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28. *Id.* at 636.

29. *Id.* at 638.

30. Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 794 (2004).

31. Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 215 (1906).

32. *E.g.*, *id*. at 218 ("The language is used of an action begun in the state court, and it is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. I[f] he has improperly joined causes of action, he may fail in his suit.").

with the railway company, and only after the state court disagreed was complete diversity created. But the state court's directed verdict altered the fundamental structure of the plaintiff's lawsuit in a way that could be reversed if the state appellate court disagreed.[33]

The Supreme Court later provided the two rationales underlying the voluntary-involuntary rule that Courts still apply today. The first, which originates from *American Car & Foundry Company v. Kettelhake*,[34] is that it provides finality by ensuring that a defendant who was removed from the case against the plaintiff's wishes is not later added back by the state appellate courts, which would require remand of the case.[35] The second, which originates from *Great Northern Railway Company v. Alexander*,[36] is that it provides deference to the plaintiff's role as the master of the complaint.[37] This second rationale, however, has an important caveat: the plaintiff's role of master of the complaint must be respected only to the extent the plaintiff is able to structure the complaint within the rules of civil procedure.[38] As Justice Black put it, "if a plaintiff *properly* elects under State practice to sue defendants jointly," then "[e]ven a separate defense, which may defeat a joint recovery, cannot create a separable controversy *when the plaintiff has a right to make his cause of action joint*."[39]

2. The Improper Joinder Doctrine

The second doctrine, created around the same time, is the improper joinder doctrine, which is often described as an exception to the voluntary-involuntary rule.[40] Unlike the voluntary-involuntary

33. *Whitcomb*, 175 U.S. at 635.
34. 236 U.S. 311 (1915).
35. *Id.* at 315–17.
36. 246 U.S. 276 (1918).
37. *Id.* at 281–82.
38. Jeff Fisher, *Everybody Plays the Fool, Sometimes; There's No Exception to the Rule: Procedural Misjoinder is Not an Exception to the Voluntary-Involuntary Rule*, 60 BAYLOR L. REV. 993, 1013 (2008) ("The raison d'etre of the [voluntary-involuntary] rule is to preserve the plaintiff's initial choice of forum *if he is able to properly build his case to avoid federal jurisdiction*." (emphasis added)).
39. Pullman Co. v. Jenkins, 305 U.S. 534, 544–45 (1939) (Black, J., concurring) (emphasis added).
40. E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 207 (2005) ("Courts established the fraudulent joinder doctrine and the voluntary/involuntary rule over the same period of time, and the former is an exception to the latter in the sense that in the absence of fraudulent joinder, a case can become removable only by a voluntary act of the plaintiff."). *But see* Fisher, *supra* note 39, at 1013 (arguing

rule, which serves to protect a plaintiff's right to choose the cause of action he sues under, improper joinder was explicitly designed to protect the defendant's right to access federal court from gamesmanship by the plaintiff.[41] "Stated simply, fraudulent joinder is a doctrine that permits federal courts to essentially ignore the inclusion in a lawsuit of a nondiverse party who would otherwise destroy federal diversity jurisdiction when the district court concludes that the party's joinder is a sham."[42]

As one leading treatise explains, improper joinder "tries to strike a reasonable balance among the policies to permit plaintiffs the tactical prerogatives to select the forum and the defendants they wish to sue, but not to reward abusive pleading by plaintiffs, and to protect defendants' statutory right to remove."[43] Traditionally, improper joinder is established in one of two ways: the removing party must show either "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the nondiverse party in state court."[44] Although earlier cases discussed that removal was determined on the basis of the pleadings without consideration for the truth or falsity of the pleadings "unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court,"[45] the improper joinder doctrine is often credited to the Supreme Court's 1906 decision in *Alabama Great Southern Railway Co. v. Thompson*.[46]

Thompson, like many of the cases discussed so far, was a wrongful death case against a railway company. The plaintiff sued both the railway company and two of its employees.[47] The railway company removed the case, arguing there was a separable controversy between it and the plaintiff, and the plaintiff's motion to remand was

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that calling improper joinder an exception to the voluntary-involuntary rule "is incorrect and dangerously misleading" because "[c]onsideration of the purpose and application of the rules demonstrates that they work perfectly in conjunction; neither is truly an 'exception' to the other").

41. Travis v. Irby, 326 F.3d 644, 647 (5th Cir. 2003).

42. James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1018 (2006).

43. 14C WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE, § 3723.1 (4th ed. 2008).

44. Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (quoting *Travis*, 326 F.3d at 646–47).

45. Louisville & N.R. Co. v. Wangelin, 132 U.S. 599, 601 (1890).

46. 200 U.S. 206, 218 (1906).

47. *Id.* at 211.

denied.[48] At trial, the jury found for the plaintiff only against the railway company.[49] The railway company appealed to the Sixth Circuit, which raised the question whether the federal court even had jurisdiction over the case and certified that question to the Supreme Court.[50] Consistent with its application of the voluntary-involuntary rule, the Court said that "a defendant has no right to say that an action shall be several which a plaintiff elects to make joint" and that, while a separate defense may defeat a joint recovery, "it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way."[51] But although the Supreme Court based its decision on the *Powers* Court's statement of the voluntary-involuntary rule, it added that the plaintiff's right to decide the structure of its claims is premised on his good faith in alleging joint liability.

> The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders, which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.[52]

But because there was no evidence of fraudulent intent—merely that federal common law would not allow joint liability under these facts and Tennessee law was not clear on the subject—the removal was improper. Nevertheless, *Thompson* is often credited as the origin of the improper joinder doctrine.[53]

48. *Id.* at 211–12.
49. *Id.* at 212.
50. *Id.* at 212–13.
51. *Id.* at 216 (quoting Louisville & Nash. R.R. v. Ide, 114 U.S. 52, 56 (1885)).
52. *Id.* at 218.
53. Weeping Hollow Ave. Tr. v. Spencer, 831 F.3d 1110, 1112–13 (9th Cir. 2016) ("In the early 1900s, the Supreme Court created the fraudulent-joinder doctrine as a gloss on the complete-diversity rule.") (citing *Thompson*, 200 U.S. at 208).

The following year the Supreme Court applied the doctrine for the first time in *Wecker v. National Enameling & Stamping Co.*[54] *Wecker* is significant not only because the Court applied the improper joinder doctrine, but also because it held that a plaintiff cannot defeat allegations of improper joinder by willful ignorance.[55] *Wecker* involved a suit against a stamping company and two of its employees, Schenck and Wettengel.[56] The plaintiff alleged that Schenck and Wettengel were negligent in their handling of pots filled with boiling lubricant and in ensuring the safety of the hoisting apparatus for lifting the lubricant, resulting in the plaintiff falling into one of the pots.[57] Specifically, the plaintiff alleged that Schenck and Wettengel were superintendents and responsible for oversight of the factory.[58] In support of their removal, the defendants submitted affidavits that Wettengel was merely a drafter with no oversight or authority over any other employees.[59] The plaintiff argued that even if this were true, he could not be said to have fraudulently joined Wettengel because there was no evidence that he knew Wettengel was not in a supervisory role.[60] The Court disagreed, stating "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach."[61] In affirming the district court's refusal to remand the case, the Supreme Court reiterated that "[w]hile the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right."[62] Moreover, the Supreme Court admonished that federal courts "should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."[63]

54. 204 U.S. 176 (1907).
55. *Id.* at 185.
56. *Id.* at 178.
57. *Id.* at 178–79.
58. *Id.* at 179.
59. *Id.* at 183–84.
60. *Id.* at 184.
61. *Id*. at 185.
62. *Id*. at 185–86.
63. *Id*. at 186. This equal vigilance is noticeably absent when courts consider procedural misjoinder. *See* Hines & Gensler, *supra* note 11, at 819–21, 825 (arguing that courts rejecting procedural misjoinder give insufficient weight to defendants' statutory removal rights and overread strict construction as hostility to removal).

Finally, in *Wilson v. Republic Iron & Steel Co.*,[64] the Supreme Court again found a fraudulent joinder to defeat diversity.[65] The plaintiff sued his employer and another employee, alleging that the employer negligently directed the employee, resulting in the plaintiff's injury.[66] Although, standing alone, this would not suggest a fraudulent joinder, the Supreme Court said that even if the joinder appears "fair upon its face," if the defendant can prove it "to be only a sham or fraudulent device to prevent a removal" then the defendant may still remove the case.[67] And in the case before it, the plaintiff had previously sued the employer alone for his injuries in federal court and, at trial, "had taken a voluntary nonsuit because it appeared that he probably could not recover in that court on the evidence presented."[68] He then refiled in state court and added the other employee as a defendant to prevent removal. The defendant removed, alleging the other employee was added solely to defeat diversity, and the plaintiff never disputed this allegation. As a result, the federal court denied his motion to remand. In affirming this ruling, the Supreme Court reiterated that the defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."[69] The Supreme Court has not addressed the subject since *Wilson*.[70]

In the wake of the Supreme Court's silence, lower courts have struggled with the doctrine. The Eighth Circuit put it best: "While fraudulent joinder—the filing of a frivolous or otherwise illegitimate claim against a non-diverse defendant solely to prevent removal—is rather easily defined, it is much more difficulty applied."[71] Regardless which standard courts employ, "the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case."[72] In other words, if the plaintiff's claims are infirm as to all defendants, then there is no improper joinder, just a suit " 'wholly' lacking merit" and the district court "lacks the jurisdiction to dismiss the case on its merits" and must remand the case.[73]

64. 257 U.S. 92 (1921).
65. *Id.* at 98–99.
66. *Id.* at 93.
67. *Id*. at 97.
68. *Id*. at 94.
69. *Id.* at 96.
70. Percy, *supra* note 41, at 214.
71. Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 809 (8th Cir. 2003).
72. Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004).
73. *Id*. at 576.

The most common approach is the Rule 12(b)(6) style approach, where the court looks at the pleadings to determine if the plaintiff has stated a claim against the jurisdictional spoiler. Under this approach, the court's review is limited to the plaintiff's complaint and any documents attached to it.[74] Some courts also include documents attached to the defendant's notice of removal or motion to dismiss, provided they are referenced in the complaint and essential to the plaintiff's cause of action.[75] As one court explains, the "linchpin of the fraudulent joinder analysis is whether the joinder of the non-diverse party has a reasonable basis in law and fact."[76]

Although styled as a 12(b)(6)-type analysis, it "is significantly more forgiving than that used to decide a motion to dismiss."[77] In applying this test, the district court resolves all doubt in state law in favor of remand.[78] The Fifth Circuit explains that the district court's review "is an *Erie* problem in part, but only part."[79] Whereas "[i]n the usual diversity situation a Federal Court, no matter how difficult the task,

74. *Id.* at 573; *see also* Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001) (finding fraudulent joinder if "there has been outright fraud committed in the plaintiff's pleadings, or there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court").

75. *E.g.*, Johnson v. City of Atlanta, 107 F.4th 1292, 1300–01 (11th Cir. 2024); Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

76. Mills v. Allegiance Healthcare Corp., 178 F. Supp. 2d 1, 4 (D. Mass. 2001).

77. Little v. Doe, No. 09–5183 (WHW), 2010 WL 3812364, at *3 (D.N.J. Sep. 28, 2010) (quoting Freichs v. Lifestar Response Corp., No. 09-4460, 2009 WL 3754190, at *2 (D.N.J. Nov. 5, 2009)).

78. Kuperstein v. Hoffman-LaRoche, Inc., 457 F. Supp. 2d 467, 471 (S.D.N.Y. 2006) ("If state case law or legislation removes all reasonable possibility that the plaintiff would be permitted to litigate the claim, then remand must be denied. If the answer is doubtful, that doubt must be resolved in favor of the plaintiff and the case must be remanded."); Duncan v. Exxon Mobil Corp., 968 F. Supp. 2d 996, 1000 (W.D. Ark. 2013) ("All doubts should be resolved in favor of remand. This includes resolving all fact disputes and ambiguities in state law in the plaintiff's favor.").

79. Badon v. RJR Nabisco Inc., 236 F.3d 282, 285–86 (5th Cir. 2000). It is important to note the procedural posture of *Badon* as well. There, the Fifth Circuit had certified the question to the Louisiana Supreme Court, who declined to answer it. *Id*. at 285. Thus, the Fifth Circuit, even though it made an *Erie* guess that there would be no liability under Louisana law, still held the district court erred in denying remand because "there is at least an arguable basis for predicting that Louisiana" would permit liability. *Id*. at 286 ("Lest we be misunderstood, we stress that we are *not* predicting that the Louisiana Supreme Court would or even probably would actually so hold or that in our opinion Louisiana law *does* indeed afford plaintiffs a redhibition or article 2475 claim against the wholesalers in these circumstances. As the cited passages of our prior opinion reflect, Louisiana law on these points is simply not reasonably clear." (emphasis in original)).

must ascertain (and then apply) what state law is," in the improper joinder context, "the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved."[80] Likewise, the Third Circuit explains, "[a] claim which can be dismissed only after an intricate analysis of state law is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction."[81] And the Ninth Circuit has similarly cautioned that courts must be cognizant of the procedural posture of the case before undertaking the Rule 12(b)(6) inquiry:

> A standard that equates fraudulent joinder with Rule 12(b)(6) conflates a jurisdictional inquiry with an adjudication on the merits. Because the purpose of the fraudulent joinder doctrine is to allow a determination whether the district court has subject matter jurisdiction, the standard is similar to the "wholly insubstantial and frivolous" standard for dismissing claims under Rule 12(b)(1) for lack of federal question jurisdiction.[82]

But because courts choose to style this approach as a Rule 12(b)(6)-type inquiry, that is the language with which we are stuck, even if it is inexact.[83]

Although an extended discussion of the benefits and drawbacks of each test is beyond the scope of this Article,[84] it is enough to say that the 12(b)(6) approach is "most consistent with Supreme Court precedent and also most sensitive to federalism concerns."[85] Regardless of which standard the courts use, the prevailing consensus is that

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80. *Id*. at 285–86.

81. Batoff v. State Farm Ins. Co., 977 F.2d 848, 853 (3d Cir. 1992).

82. Grancare, LLC v. Thrower, 889 F.3d 543, 549 (9th Cir. 2018).

83. *See* Montano v. Allstate Indem., No. 99-2225, 2000 WL 525592, at *2 (10th Cir. Apr. 14, 2000) (cautioning that the Rule 12(b)(6) standard "entails the kind of merits determination that, absent fraudulent joinder, should be left to the state court" (citing *Batoff*, 977 F.2d at 851–53)).

84. For such an extended discussion, see Underwood, *supra* note 43, and Percy, *supra* note 41.

85. Percy, *supra* note 10, at 579; *see also* Underwood, *supra* note 43, at 1023 ("[The 12(b)(6) standard] appears to be the closest standard to what the rather ancient Supreme Court opinions on the topic had in mind, and is arguably the majority approach today.").

the proper test for improper joinder is an objective one.[86] That is, improper joinder does not require a showing of actual fraudulent intent on the part of the plaintiff. This makes sense as it avoids the need for satellite litigation as to the plaintiff's state of mind and, in particular, avoids the district court having to wrestle with complex issues of a party's subjective intent without a full evidentiary record. Yet as one commentator pointed out, this "is not to say that intent is unimportant. Federal courts should be attuned to attempts by strategic plaintiffs' lawyers to block removal in defiance of the will of Congress as expressed in the removal statute."[87]

B. Removal Jurisprudence After the 1949 Amendment

It was against this backdrop, alongside the promulgation of the Federal Rules of Civil Procedure in 1938, that Congress amended the removal statute in 1949. This amendment was the most significant change to the removal statute since 1875 and modified it in two ways. First, Congress created a statutory exception for cases that are not initially removable but later become removable. This led to debate about the continued viability of the voluntary-involuntary rule. Second, due to considerable confusion as to what constituted a "separate controversy," particularly after the adoption of the Federal Rules of Civil Procedure providing for combining multiple causes of action in a single suit, Congress modified that language to instead say that a case was removable where there was a "separate and independent claim or

86. *E.g.*, Weeping Hollow Ave. Tr. v. Spencer, 831 F.3d 1110, 1113 (9th Cir. 2016) ("[W]hile a showing of actual fraud would be sufficient to invoke the doctrine, the term 'fraudulent joinder' is somewhat of a 'misnomer.'"); Brazell v. Waite, 525 F. App'x 878, 881 (10th Cir. 2013) ("Fraudulent joinder need not involve actual fraud in the technical sense."); Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc., 436 F. App'x 888, 893 n.3 (11th Cir. 2011) ("Thus, the fraudulent joinder analysis turns on the objective validity of the plaintiff's theories of jurisdiction and liability as to the non-diverse defendant, not on its subjective motivations for joining that defendant."). Earlier this year, the Supreme Court joined the Fifth Circuit in using the term "improper joinder" rather than "fraudulent joinder." Hain Celestial Grp., Inc. v. Palmquist, 607 U.S. 421, 426 n.1 (2026); Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 571 n.1 (5th Cir. 2004) ("We adopt the term 'improper joinder' as being more consistent with the statutory language than the term 'fraudulent joinder,' which has been used in the past.").

87. James F. Archibald III, *Reintroducing Fraud to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1388 (1992).

cause of action."[88] The district court could still, however, choose to retain the entire case or remand in whole or part as justice required.[89]

The statute was again modified in 1990 to limit the language that a case was removable if there was a "separate and independent claim or cause of action" to federal question cases. This change brought the question of procedural misjoinder to the forefront and, although the legislative history suggests it was intended to be a minor change addressing only those edge-cases, became a rallying point for opponents of procedural misjoinder.

1. The Voluntary-Involuntary Rule After the 1949 Amendments

The 1949 amendment added an exception for cases that become removable after the deadline, which the legislative history explicitly states is intended to codify the holding of *Powers*, for cases that were not initially removable but later became removable. Litigants and courts quickly noticed that the amendment was silent as to whether it mattered *how* the case became removable, an issue that *Powers* addressed only in passing.[90] There was considerable debate among the district courts about whether the 1949 amendments preserved, abolished, or abrogated the voluntary-involuntary rule.[91] In 1967, however, the Fifth Circuit became the first circuit court to address the viability of the voluntary-involuntary rule after the removal statute's amendment.[92] Considering the cases that gave rise to the rule, the Fifth Circuit concluded that "it . . . has merit in that it prevents removal of those cases in which the issue of the resident defendant's dismissal has not been finally determined in the state courts."[93] The Fifth Circuit explained that this interpretation serves to avoid the "duplication and expense which would result if a resident defendant was

88. J.C. Johnson, Jr., *Federal Jurisdiction—Removal—Separate Claim or Cause of Action*, 28 N.C. L. REV. 327, 329 (1950).

89. *Id.* at 327.

90. Weems v. Louis Dreyfus Corp., 380 F.2d 545, 547–48 (5th Cir. 1967).

91. *E.g.*, Parkhill Produce Co. v. Pecos Valley S. Ry. Co., 196 F. Supp. 404, 406 (S.D. Tex. 1961) (confronting the effect of the 1949 amendments on the voluntary-involuntary rule and concluding that continued application of the rule "would defeat the purpose of the statute and would thwart the right of a trial in a federal court when the jurisdictional amount permits").

92. *See Weems*, 380 F.2d at 547–49 (discussing the various interpretations and legislative history of the 1949 amendments to conclude that "the voluntary-involuntary rule survived the 1949 amendment").

93. *Id*. at 546.

dismissed on an appealable ground, the nonresident was permitted to remove, and the plaintiff then obtained a reversal of the dismissal in the state appellate courts" and that this "danger does not arise where a plaintiff voluntarily drops a resident defendant since appeal then is not available."[94] In other words, the Fifth Circuit relied on the rationale set forth in *Kettelhake*.

Other circuits soon followed the Fifth Circuit and agreed that the voluntary-involuntary rule had survived the 1949 amendment.[95] In adopting the rule, the Tenth Circuit noted that "it is logical to conclude . . . that the underlying policy problem is avoidance of manipulation of a jurisdictional change by a defendant."[96] In discussing the origins of the voluntary-involuntary rule, the Tenth Circuit took care to note that the ruling in *Whitcomb*, which the Tenth Circuit credited as the origin of the rule, "was a ruling on the merits which was not initiated by the plaintiff nor approved by the plaintiff. It was adverse to the plaintiff."[97] Those circuits that have addressed the rule since the 1949 amendment have similarly relied on *Kettelhake*'s finality rationale as reason the rule survived.[98] The Seventh Circuit went as far as to say that its analysis of the rule led it to express some sympathy to the view that the sole purpose is to prevent the "yo-yo" situation that could result if an involuntary dismissal were later overturned on appeal.[99]

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94. *Id.*

95. *See* Caribe Chem. Distributors, Corp. v. So. Agricultural Insecticides, Inc., 96 F.4th 25, 29–30 (1st Cir. 2024) (stating "[t]he rule has been adopted in some form by the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits— which by our count is every circuit to have considered the issue" and collecting cases).

96. DeBry v. Transamerica Corp., 601 F.2d 480, 488 (10th Cir. 1979).

97. *Id.* at 487.

98. *See* Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 n.2 (2d Cir. 1980) ("The purpose of this distinction is to protect against the possibility that a party might secure a reversal on appeal in state court of the non-diverse party's dismissal . . . producing renewed lack of complete diversity in the state court action, a result repugnant to the requirement in 28 U.S.C. § 1441 that an action, in order to be removable, be one which could have been brought in federal court in the first instance."); Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988) ("If the plaintiff voluntarily dismissed the state action against the non-diverse defendant, creating complete diversity, the state action may be removed because there is no risk that diversity will be destroyed later on."); Poulos v. Naas Foods, Inc., 959 F.2d 69, 72 (7th Cir. 1992) ("Removal following an involuntary dismissal may only be temporary: the plaintiff may appeal the dismissal in state court, and success on appeal would lead to the reinstatement of the non-diverse party, destroying federal jurisdiction and compelling remand to the state court.").

99. *Poulos*, 959 F.2d at 72 n.3.

The Supreme Court has not addressed the voluntary-involuntary rule since the 1949 amendment and there is a growing criticism of the rule.[100] In 2022, the Fifth Circuit added to the debate by eliminating the voluntary-involuntary rule in that circuit, creating a circuit split about the continued viability of the voluntary-involuntary rule,[101] a split that has significant implications for procedural misjoinder because, in those courts that still apply the voluntary-involuntary rule, plaintiffs argue (often successfully) that even if the state court severed their claims, that was an involuntary act and so the non-diverse defendant still cannot remove the case against it. It is the continued viability of the voluntary-involuntary rule that makes procedural misjoinder necessary to defend a defendant's right of removal.

Nonetheless, until 1990, courts did not need to consider procedural misjoinder because the statute provided for removal for cases that contained claims that "would be removable if sued upon alone."[102] The district court could then decide to retain the entire case, remand the entire case, or retain only those claims that would be removable if sued upon alone.

2. The 1990 Amendments to the Removal Statute

The most significant change for procedural misjoinder came about in 1990 when Congress struck the words "which would be removable if sued upon alone" and replaced them with "within the jurisdiction conferred by section 1331 of this title."[103] The effect of this amendment was that the district court had discretion to retain the entire case or remand portions of it in its discretion only when the case

100. Bolger v. Utermohlen, 485 F. Supp. 3d 588, 590 (E.D. Pa. 2020) ("Despite this, for more than 70 years, courts have ignored the written words in 28 U.S.C. § 1446(b)(3) in favor of a judge-made rule, the 'voluntary-involuntary' rule."); *see also* Debra Lyn Bassett & Rex R. Perschbacher, *The Roots of Removal*, 77 BROOK. L. REV. 1, 24–25 (2011) (noting that the Congressional report on which most courts relied to conclude the rule survived the 1949 amendments "is more ambiguous than the courts have suggested" and a "closer look at the cited report illustrates that the courts have lifted one particular quotation out of context"); Underwood, *supra* note 43, at 1025 (reviewing the origins and usages of fraudulent joinder and demonstrating that the justifications used by federal courts are deficient); *id.* at 1028 (collecting cases calling the rule "baseless," "antiquated," and "arbitrary").

101. Advanced Indicator and Mfg. Co. v. Acadia Ins. Co., 50 F.4th 469, 474 (5th Cir. 2022).

102. 28 U.S.C. § 1447(c) (1952), amended by Pub. L. 101–650 (1990).

103. Kiang v. Nationwide Life & Annuity Ins. Co., No. 3:23-cv-04861-JSC, 2023 WL 8018254, at *4 (N.D. Cal. Nov. 23, 2023) (quoting the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089).

involves federal and state law claims but not in diversity cases. There is nothing in the language of the statute to indicate Congress intended for the amendment to allow plaintiffs to join wholly unrelated claims to defeat removal.

Some, however, have taken the 1990 amendment as a rejection of procedural misjoinder in diversity cases.[104] This argument misses the mark. The Congressional Committee Reports do not contain any discussion of the intended effect of this change in language,[105] which opponents of procedural misjoinder contend was a sweeping rejection of more than one hundred years of jurisprudence.[106] Certainly, had Congress intended to make such a drastic change, that would bear at least mentioning.[107] But instead, Congress suggested that the purpose of the amendment was to "eliminate most of the problems that have

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104. *E.g.*, Bird v. Carteret Mortg. Corp., No. 2:06-cv-0588, 2007 WL 43551, at *5 (S.D. Ohio Jan. 5, 2007) ("By changing the statute, and doing so in a plain effort to reduce the number of diversity cases removed to federal court, Congress may well have intended to make cases such as the present one non-removable. Thus, it can reasonably be questioned whether the federal courts should create a new doctrine that circumvents that intention."); Ronald A. Parsons, *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L. REV. 52, 62–64 (2008) ("[In the 1990 amendment] Congress specifically intended that removal on grounds of diversity would no longer be authorized where the removing defendants contend that diverse state law claims have been joined with nondiverse state law claims that are separate and independent from each other.").

105. *See generally* H.R. REP. NO. 101-123 (1990); H.R. REP. NO. 101-733 (1990); H.R. REP. NO. 101-734 (1990); S. REP. NO. 101-416 (1990).

106. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 583–84 (2005) (Ginsburg, J., dissenting) (commenting that the House Committee on the Judiciary described the 1990 amendments as "modest" and "noncontroversial" rather than the complete curtailment of diversity jurisdiction that some had called for). *Cf.* Sullivan v. Novartis Pharm. Corp., 575 F. Supp. 2d 640, 645 (D.N.J. 2008) (rejecting snap removal and reasoning that "the very lack of discussion in the legislative history strongly suggests that Congress intended nothing more than to bolster the already existing efforts of lower federal courts to prevent improper joinder").

107. *Cf.* Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 346 (1999) ("In sum, it would take a clearer statement than Congress has made to read its endeavor to extend removal time (by adding receipt of the complaint) to effect so strange a change—to set removal apart from all other responsive acts, to render removal the sole instance in which one's procedural rights slip away before service of a summons, i.e., before one is subject to any court's authority."); *see also Exxon Mobil Corp.*, 545 U.S. at 587 (Ginsburg, J., dissenting) ("The Court should assume, as it ordinarily does, that Congress legislated against a background of law already in place and the historical development of that law."); *id.* at 575 (Stevens, J., dissenting) ("In Congress, committee reports are normally considered the authoritative explication of a statute's text and purposes, and busy legislators and their assistants rely on that explication in casting their votes.").

been encountered in attempting to administer the 'separate and independent claim or cause of action' test" and the example Congress used is one where the plaintiff sues "a diverse defendant for breach of contract and joins a claim against a nondiverse defendant for inducing the breach."[108] This type of case would clearly not be removable under the procedural misjoinder framework but was removable under the pre-1990 statute. The type of difficulties in administering the separate and independent claim or cause of action test, like the separate controversy test before it, stem from efforts to argue what is or is not an independent cause of action even where the causes of action arise from the same transaction or occurrence.[109] It should not be used to justify depriving a diverse defendant of its right of removal simply because the plaintiff included wholly unrelated claims against a different, non-diverse defendant in violation of the joinder rules.

The better interpretation of the Congressional intent with this amendment is not that Congress sought to encourage gamesmanship and violation of state procedural rules, but that Congress was intending to limit removals where the plaintiff properly joined claims in state court, but the defendants removed anyway.[110] This is supported both by the absence of legislative history suggesting a sweeping change in removal jurisprudence as well as contemporary commentary on the new law.

Writing on the effect of the new law shortly after its enactment, Professor Siegel of Albany Law School—the "preeminent authority on matters of civil practice in the entire universe" according to Chief Justice Kaye of the New York Court of Appeals,[111]—wrote that "Subdivision (c) of § 1441, which allows a claim that hasn't a federal jurisdictional basis to ride into federal court on the coattails of a claim that has, is made unavailable in diversity cases, which had probably used

108. H.R. REP. NO. 101-734, at 22–23 (1990).

109. For discussion of the sort of difficulties that arose under the former rule, see David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 75–77 (1991).

110. *See In re* Johnson and Johnson Cases, No. 2:15-CV-5311-JGB (Spx), 2015 WL 5050530, at *5 (C.D. Cal. Aug. 24, 2015) ("In order for Plaintiff to prevail on her theory of the 'voluntary-involuntary' rule, she would have to show that, when this removal provision was amended in 1990, the amendment not only altered the removal provision itself, but also significantly expanded the 'voluntary-involuntary' rule beyond the scope originally articulated by the Supreme Court. The Court is unaware of any controlling precedent to support such an extraordinary interpretation of 104 Stat. 5089.").

111. Judith S. Kaye, *Remarks*, 72 ALB. L. REV. 397, 398 (2009).

the statute the most."[112] Just as with the change from "separate controversy" to "separate and independent claim or cause of action" in the 1949 amendment, the changed language in the 1990 amendment should be read as limiting an overly expansive case of removals, not entirely foreclosing a defendant's right to removal where the plaintiff joins entirely unrelated claims.[113] Any argument to the contrary must contend with the fact that the logical extension of that argument is that Congress was also eliminating the improper joinder doctrine, but the improper joinder doctrine continues to thrive.[114]

This interpretation of the amendment is also consistent with the 1988 amendments two years prior, which were viewed as a victory for proponents of diversity jurisdiction. First, the 1988 amendments added what is now § 1441(b)(1), which says that "In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded."[115] This amendment addressed the practice of suing a fictitious defendant in order to prevent removal.[116] Plaintiffs would sue a John Doe defendant because the burden of establishing diversity fell on the removing party, and the defendant could not establish the citizenship of an unidentified party.[117] In amending the statute in this way, Congress was signaling that it opposed this type of gamesmanship to defeat removal. Second, the 1988 amendments added what is now § 1447(e), which says that

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112. Siegel*, supra* note 110, at 75.

113. *Id.*; *see also* Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases; The Old Law, the New Law, and Rule 19*, 38 U. KAN. L. REV. 863, 884 (1990) (analyzing the 1988 amendment and arguing "[b]ecause Congress has chosen to preserve diversity removal, the courts similarly should preserve and protect the statutory right to remove such cases").

114. *See In re Johnson and Johnson Cases*, 2015 WL 5050530, at *5.

115. 28 U.S.C. § 1441(b)(1).

116. David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements Act*, 123 F.R.D. 399, 403 (1989).

117. *Id.* (citing Bryant v. Ford Motor Co., 844 F.2d 602 (9th Cir. 1987) (en banc)). Under California law at the time, the plaintiff would have three years to discover the identity of the John Doe defendant and amend the complaint, a significant amount of time particularly in light of the 1988 amendments barring removal on diversity after one year. *See Bryant*, 844 F.2d at 604. In *Bryant*, the plaintiff sued Ford as well as fifty Doe defendants, each of whom was alleged to be Ford's "agents, servants, employees, and/or joint venturers" and had some unspecified role in the "design, production, inspection and distribution of the van which Bryant was driving at the time of the accident." *Id.* at 603. Apart from this vague assertion, the complaint "contained no factual allegations against any such Doe." Petition for Writ of Certiorari at *1, Ford Motor Co. v. Bryant, 488 U.S. 816 (1988).

where the plaintiff seeks to add a diversity-destroying party after removal, "the court may deny joinder, or permit joinder and remand the action to the state court," but it may not permit the amendment and still keep the case.[118] Although the amendments also added the one-year bar on diversity, this was intended as a "a modest curtailment in access to diversity jurisdiction" designed to promote judicial efficiency by prohibiting removal "after substantial progress has been made in state court."[119]

There is simply nothing in the legislative history to suggest that Congress intended the 1990 amendment to create an opportunity for manipulating federal jurisdiction by joining wholly unrelated claims. Nor has anything in the thirty-five years since suggested that Congress intended such a result. Instead, Congress has consistently expanded diversity jurisdiction and shown a clear legislative intent to protect the right of removal.[120]

II. *TAPSCOTT* AND THE GENESIS OF PROCEDURAL MISJOINDER

Until 1990, the removal statute was clear: Separable controversies or separate and independent controversies provided a basis for removal. It was only after the 1990 amendment that courts needed to ask whether procedural misjoinder was a viable tool for courts to police abusive tactics intended to deprive a defendant of their statutory right of removal. In 1996, the Eleventh Circuit issued its decision in *Tapscott v. MS Dealer Service Corporation,* squarely addressing that

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118. 28 U.S.C. § 1447(e).

119. H.R. Rep. No. 100-889, at 72 (1988), *as reprinted in* U.S.C.C.A.N. 5982, 6032.

120. *See* Haiber, *supra* note 16, at 632–34 (tracing the amendments to the removal statute from 1948 to 2004 and explaining how 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"); Michelle S. Simon, *Hogan vs. Gawker II: A Statutory Solution to Fraudulent Joinder*, 70 BAYLOR L. REV. 1, 24 (2018) ("Over the last 25 years, there has been a significant statutory expansion of federal jurisdiction . . . . Despite recommendations from the Federal Courts Study Committee, which recommended that Congress eliminate diversity jurisdiction completely, this recent activity seems to demonstrate a willingness by Congress to expand diversity jurisdiction."); James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 180 (2006) ("[In the 1990 amendments,] Congress ignored the primary recommendation [of the Federal Courts Study Committee] and, in three respects, began to legislatively expand diversity jurisdiction in unprecedented ways. These last two decades—in particular, the last few years—have thus witnessed not only a rejection by Congress of the calls for limiting diversity jurisdiction but an unprecedented expansion of the tenet.").

question and establishing the rule—at least in that circuit—that misjoinder "may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action."[121]

A. *Tapscott v. MS Dealer Service Corporation*

In *Tapscott*, a group of plaintiffs filed a class action suit against four defendants alleging various forms of statutory and common law fraud and civil conspiracy arising from the sale of service contracts on cars sold or financed in Alabama.[122] The plaintiffs' counsel then filed an amended pleading adding new plaintiffs and defendants and alleging statutory fraud against these defendants arising from the sale of service contracts in connection with the sale of retail products in Alabama.[123] None of the new plaintiffs asserted claims against the original defendants, and none of the original plaintiffs asserted claims against the new defendants.[124] In essence, these were two wholly separate lawsuits combined into one pleading for the sole purpose of defeating federal jurisdiction. All but one of the newly added defendants were later dismissed.[125]

The remaining new defendant, Lowe's, removed the case to the Northern District of Alabama and filed a motion to sever the claims against it from the claims against the original defendants.[126] The district court granted the motion to sever, denied the motion to remand against Lowe's, and remanded the claims against the original defendants.[127] In reaching this result, the district court concluded that there was "no allegation of joint liability between Lowe's and any other defendant and no allegation of conspiracy."[128] Thus, "there was an 'improper and fraudulent joinder, bordering on a sham.'"[129] The district court rejected the plaintiffs' argument that "a mere allegation of a common business practice subjects all defendants to joinder."[130] As a result, the district court "disregard[ed] the citizenship of the improperly joined parties,. . . . asserted jurisdiction, and severed & remanded

121. 77 F.3d 1353, 1360 (11th Cir. 1996).
122. *Id.* at 1355.
123. *Id.*
124. *Id.*
125. *Id.* at 1355 n.1.
126. *Id.* at 1355–56.
127. *Id.*
128. *Id.* at 1355.
129. *Id.* at 1360 (quoting the district court's opinion).
130. *Id.* (quoting the district court's opinion).

the remainder of the action to state court."[131] Recognizing the novel approach it had taken, the district court certified its order for interlocutory appeal.[132]

The Eleventh Circuit began its discussion of diversity by repeating the rule that "Diversity jurisdiction under 28 U.S.C. § 1332 requires complete diversity—every plaintiff must be diverse from every defendant," but added the caveat that "an action may nevertheless be removable if the joinder of the non-diverse party is fraudulent."[133] The Eleventh Circuit next found it "important to note" that the plaintiffs did not argue the joinder was proper.[134] Instead, they claimed that "while a court may disregard the citizenship of fraudulently joined parties, a misjoinder, no matter how egregious, is not fraudulent joinder."[135] In other words, the plaintiffs admitted that they had violated the rules but said the court was powerless to do anything about this blatant gamesmanship. The Eleventh Circuit disagreed. Quoting the Supreme Court's phrasing of the improper joinder rule, that "a defendant's 'right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy,'" the Eleventh Circuit concluded that although "certain putative class representatives may have colorable claims against resident defendants in the putative 'automobile' class, these resident defendants have no real connection with the controversy involving Appellants Davis and West and Appellee Lowe's in the putative 'merchant' class action."[136] Because the claims were misjoined, the Eleventh Circuit held "that the district court did not err in finding an attempt to defeat diversity jurisdiction by fraudulent joinder."[137]

The Eleventh Circuit added a caveat that it was not holding that "mere misjoinder" is fraudulent joinder, but it agreed with the district court that under the facts of the case before it, the plaintiffs' "attempt to join these parties is so egregious as to constitute fraudulent joinder."[138] Ultimately, the Eleventh Circuit did not need to explain what made this particular structuring of parties egregious because it was obvious on its face that these were two lawsuits that happened to be filed under the same cause number. But this caveat has generated

131. *Id.*
132. *Id.* at 1356 n.4.
133. *Id.* at 1359.
134. *Id.*
135. *Id.* at 1359–60.
136. *Id.* (quoting Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921)).
137. *Id.*
138. *Id.*

significant debate among other courts. Many read this statement as the Eleventh Circuit expressly holding that mere misjoinder would not invoke the doctrine, even though it could just as fairly be read as the Eleventh Circuit saying it was not making any comment on whether mere misjoinder would be sufficient to invoke the doctrine.[139] As the following sections discuss, the other courts have struggled with where to draw the line between "mere misjoinder" and "egregious misjoinder."[140]

In *Tapscott*, the Eleventh Circuit acknowledged the procedural misjoinder as a way for courts to balance the defendant's right to remove with the plaintiff's right to structure their lawsuit. The purpose of the procedural misjoinder doctrine, like the improper joinder doctrine, "is to prevent parties from manipulating their pleadings to deprive diverse defendants of the federal forum to which they are statutorily entitled."[141]

B. Reactions to Tapscott Outside the Eleventh Circuit

The reaction to *Tapscott* outside the Eleventh Circuit has been mixed. Some district courts have fully embraced the doctrine "as a means of ensuring defendants their statutory right of removal to the federal courts and precluding plaintiffs from preventing removal to federal court" while others "have criticized *Tapscott*, arguing that questions of joinder under state law do not implicate federal subject matter jurisdiction, federal jurisdiction is to be narrowly construed, and the fraudulent misjoinder doctrine has created an unpredictable and complex jurisdictional rule."[142]

The only circuit court to squarely address the doctrine is the Fifth Circuit, which rejected it.[143] The First, Eighth, Ninth, and Tenth

139. *Cf.* Johnson v. Curry, No. 3:21-cv-726-MMH-PDB, 2023 WL 3854985, at *3 n.6 (11th Cir. Apr. 4, 2023) (acknowledging that it was unclear whether the liberal-amendment standard applies to the case but determining it "need not decide whether the standard applies because the result is the same regardless").

140. Part II.B discusses the other courts reactions to *Tapscott* while Part III.A discusses the debate about how egregious misjoinder must be to invoke the doctrine.

141. Williams v. Homeland Ins. Co. of N.Y., 18 F.4th 806, 825 (5th Cir. 2021) (Jones, J., dissenting).

142. *In re* Prempro Prods. Liab. Litig., 591 F.3d at 621–22 (collecting cases).

143. *Williams*, 18 F.4th at 815 n.12 (noting that several district courts and the dissenting opinion seem to believe the Fifth Circuit "endorsed some sort of *Tapscott*-based fraudulent misjoinder in [*In re Benjamin Moore* and *Crockett*]" but expressly stating that not only did it not do so, and explaining that "*Crockett* is more properly read for the exact opposite proposition: that a defendant contemplating removal can

Circuits have considered the doctrine but determined it was unnecessary to the resolution of the cases before them and, as a result, declined to decide that issue. The remaining appellate courts would likely do the same. Thus, outside the Fifth and Eleventh Circuits, the district courts are without much-needed guidance on whether to apply the doctrine and, if so, which form of the doctrine to apply.[144]

1. The First Circuit

The First Circuit was the most recent circuit to be asked to weigh in on the doctrine and the most recent circuit to refuse to do so in *Kress Stores of Puerto Rico, Inc. v. Wal-Mart Puerto Rico, Inc.*[145] The primary issue in the case was whether CAFA's local controversy exception applied, preventing removal of the putative class action against Wal-Mart of Puerto Rico and Costco.[146] Costco also argued that even if the claims against Wal-Mart were remanded, the claims against it should remain in federal court because the plaintiffs had misjoined claims based solely on an alleged violation of the same law.[147] Because the First Circuit held that CAFA's local controversy exception applied, it moved on to Costco's alternative argument.[148] Without addressing procedural misjoinder directly, the court held that there was a logical connection between the claims that would satisfy Rule 20's transaction or occurrence requirement.[149] Only briefly addressing Costco's argument that it would be prejudiced by the loss of a federal forum, the First Circuit commented that it would not overturn the district court's denial of a motion to sever on prejudice grounds and that Costco could still file a motion to sever in Puerto Rico court on remand.[150] This was reviewed under an abuse of discretion standard, however, and the majority found the district court's conclusion that the claims were related to be reasonable.[151] So, the majority's response

(and should) ask the *state court* to resolve party misjoinder questions *and then remove*") (emphasis in original).

144. The lingering questions this has created for the district courts are greater depth in Part III.

145. 121 F.4th 228 (1st Cir. 2024).

146. *Id.* at 231.

147. Brief of Defendant-Appellee Costco Wholesale Corp. at *16–19, Kress Stores of P.R. Inc. v. Wal-Mart P.R., Inc., 121 F.4th 228 (1st Cir. 2024) (No. 23-1060).

148. *Id.* at 243.

149. *Id.* at 244–46.

150. *Id.* at 249.

151. *Id.* at 244–46.

that Costco will not be prejudiced by the loss of a federal forum because it can seek severance after remand suggests the First Circuit would follow the Fifth Circuit's approach of having the state court grant severance and dispense with any egregiousness analysis.

Judge Hamilton disagreed and would have affirmed the district court's grant of summary judgment to Costco but reversed with orders to remand the claims against the remaining defendants.[152] According to Judge Hamilton, whether the joinder would deprive the only non-local defendant of a federal forum is a factor courts must consider and "examine whether permissive joinder would comport with the principles of fundamental fairness or would result in prejudice to either side."[153] Here, according to Judge Hamilton, "the case fails the requirements for permissive joinder of defendants under Rule 20(a)(2) and borders on fraudulent misjoinder."[154] This would imply, at least under Judge Hamilton's view, that courts should not look solely at whether the joinder is allowed in state court but also whether one defendant would be entitled to a federal forum in the absence of joinder.[155]

Kress was a per curiam opinion that contains dicta both sides can argue suggests the First Circuit would adopt procedural misjoinder. On the one hand, the court need not have dealt with the propriety of the joinder—and probably should have ignored it—if it did not have jurisdictional implications. On the other, the court cited the Eighth Circuit's decision in *In re Prempro Products Liability Litigation* with the parenthetical "noting that, when federal diversity jurisdiction depends on a question of joinder, 'the proper procedure' may be for the parties to argue the joinder issue in state court."[156]

152. *Id.* at 249 (Hamilton, J., concurring in part and dissenting in part). Adding to the confusion, Judge Hamilton of the Seventh Circuit was sitting by designation in this case. Because the Seventh Circuit has never been asked to consider *Tapscott*, it remains to be seen whether Judge Hamilton's opinion reflects a generally more permissive view of procedural misjoinder in the Seventh Circuit or is an outlier on that court.

153. *Id.* at 256 (quoting Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000)).

154. *Id.*

155. This far more defendant-friendly rule is probably a bridge too far, however, and would prove far too difficult and unpredictable for courts to use as a guidepost for determining jurisdiction.

156. *Kress*, 121 F.4th at 249 (quoting *In re* Prempro Prods. Liab. Litig., 591 F.3d 613, 623–24 (8th Cir. 2010)).

2. The Fifth Circuit

The Fifth Circuit is the only circuit court to squarely address the doctrine and emphatically rejected it just a few years ago.[157] Before 2021, however, the Fifth Circuit's history with the doctrine was murky at best. For many years courts and commentators alike thought the Fifth Circuit agreed with the Eleventh Circuit and had adopted procedural misjoinder.[158]

The first time the Fifth Circuit was confronted with the doctrine was 2002 in *In re Benjamin Moore & Co.*[159] *Benjamin Moore* involved seventeen plaintiffs who filed suit against diverse paint manufacturers and distributors as well as retail establishments, asserting product liability claims alleging the paint contained lead.[160] Some of the non-diverse defendants removed, arguing that the retail establishments were fraudulently joined as defendants because the claims did not arise out of the same transaction or occurrence, nor the same series of transactions or occurrences.[161] The district court granted remand and then denied reconsideration.[162]

The defendants sought a writ of mandamus in the Fifth Circuit asking the Fifth Circuit to order the district court to do three things: (1) address the joinder of plaintiffs; (2) sever the plaintiffs who are clearly improperly joined; and (3) retain jurisdiction where the remaining plaintiffs have complete diversity.[163] The Fifth Circuit concluded that it lacked jurisdiction to grant mandamus relief but said that "without detracting from the force of the *Tapscott* principle that [procedural] misjoinder of plaintiffs is no more permissible than [procedural] misjoinder of defendants to circumvent diversity jurisdiction," it could not "reach its application in this case."[164] Following the Fifth Circuit's decision in *Benjamin Moore*, many other courts took it as

157. Williams v. Homeland Ins. Co. of N.Y., 18 F.4th 806 (5th Cir. 2021).

158. *See, e.g.*, Hines & Gensler, *supra* note 11, at 812 & n.178 (describing the Fifth Circuit's decision in *In re Benjamin Moore* as having "tacitly endorsed the procedural misjoinder doctrine"); Lafalier v. State Farm Fire & Cas. Co., 391 F. App'x 732, 739 (10th Cir. 2010) (stating that the Fifth Circuit "may also accept procedural misjoinder" and citing *Crockett* and *In re Benjamin Moore*).

159. 318 F.3d 626 (5th Cir. 2002).

160. *Id.* at 628.

161. *Id.*

162. *Id.* at 628–29.

163. *Id.* at 630.

164. *Id.* at 630–31.

fact that the Fifth Circuit had adopted or would soon adopt the doctrine.[165]

A few years after *Benjamin Moore*, the Fifth Circuit issued its opinion in *Crockett v. R.J. Reynolds Tobacco Co.*,[166] in which it compared improper joinder to procedural misjoinder.[167] In *Crockett*, the state court severed the claims and then tobacco defendants removed the case. The plaintiffs argued the severance was an involuntary act, but the Fifth Circuit reasoned that the improper joinder exception to the voluntary-involuntary rule is "designed to prevent plaintiffs from blocking removal by joining nondiverse and/or in-state defendants who should not be parties. That salutary purpose is also served by recognizing an exception to the voluntary-involuntary rule where defendants are improperly, though not fraudulently, joined."[168] If there were any doubts that the Fifth Circuit had adopted the doctrine, *Crockett* appeared to have dissipated them.[169]

Yet fifteen years later, the Fifth Circuit announced in *Williams v. Homeland Insurance Company of New York* that courts and commentators across the country had misinterpreted *Benjamin Moore* and *Crockett*.[170] Writing for the majority, Judge Haynes wrote that a number of district courts mistakenly read *Benjamin Moore* and *Crockett* as

165. *See, e.g.*, Greene v. Wyeth, 344 F. Supp. 2d 674, 684–85 (D. Nev. 2004) ("[T]his Court agrees with the Fifth and Eleventh Circuits that the rule is a logical extension of the established precedent that a plaintiff may not fraudulently join a defendant in order to defeat diversity jurisdiction in federal court."); Boddie v. Walker, 312 F. Supp. 3d 541, 543 (N.D. Miss. 2018) ("Most district courts in [Mississippi] have read *Benjamin Moore* as an indication that the Fifth Circuit would adopt the fraudulent misjoinder doctrine in an appropriate case . . . .").

166. 436 F.3d 529 (5th Cir. 2006).

167. *Id.* at 533 (citing Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996)).

168. *Id.*

169. *E.g.*, Stratford Mokan Dev. Corp. v. Nat'l Fire Ins. of Hartford, No. 09-CV-00990-W-DGK, 2010 WL 11619024, at *4 (W.D. Mo. Apr. 2, 2010) (citing *Crockett* and *Tapscott* for the claim that "[s]ome courts recognize fraudulent misjoinder absent fraud 'where a diverse defendant is joined with a nondiverse defendant as to whom there is no joint, several or alternative liability and where the claim against the diverse defendant has no real connection to the claim against the nondiverse defendant'"); Bankcroft v. Bayer Corp., No. 09-787-GPM, 2009 WL 3156706, at *3 n.2 (S.D. Ill. Sep. 29, 2009) (citing *Crockett* and *Benjamin Moore* for the claim that "[t]here is some evidence that the fraudulent misjoinder doctrine is controlling law in the Fifth Circuit").

170. Williams v. Homeland Ins. Co. of N.Y.,18 F.4th 806, 815 (5th Cir. 2021) ("Although we have cited *Tapscott* without disapproving it, this circuit has not adopted it or any other form of the fraudulent misjoinder doctrine, and we refuse the invitation to do so now.").

endorsing *Tapscott* when they were not.[171] According to Judge Haynes, "*Crockett* is more properly read for the exact opposite proposition: that a defendant contemplating removal can (and should) ask the *state court* to resolve party misjoinder questions *and then remove*."[172]

Williams was a divided decision, however, and Judge Jones's dissent possibly provides the strongest argument in favor of procedural misjoinder.[173] In support of the doctrine, Judge Jones wrote:

> My position is that this unconventional alignment could yield federal jurisdiction because a non-diverse, in-state defendant's citizenship destroys diversity-based removal jurisdiction only if that defendant is "*properly* joined."
>
> . . . .
>
> It is implied, though the majority does not really contend, that Rule 21 cannot be used to "extend" federal jurisdiction. But improper joinder cannot deprive the federal courts of jurisdiction. Diversity jurisdiction exists for the suit between the Class-as-CorVel assignee and Homeland. Thus, using Rule 21 to sever the improperly joined parties and claims does not extend or create federal jurisdiction, it merely reinforces the statutorily prescribed balance between state and federal courts. This result discourages artful joinder schemes devised around anchor plaintiffs. This is not different from using a Rule 12(b)(6)-type analysis to determine that there is "no possibility of recovery" against an in-state defendant who is therefore improperly joined. "[T]he Federal courts should not sanction devices intended to prevent the removal . . . where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state

171. *Id.* at 815 n.12 ("Homeland (along with a number of district courts in our circuit and the dissenting opinion here) seems to believe that we endorsed some sort of *Tapscott*-based fraudulent misjoinder doctrine in [*In re Benjamin Moore* and *Crockett*]. We did not.").

172. *Id.*

173. *Id.* at 822 (Jones, J., dissenting).

courts, in proper cases, to retain their own jurisdiction."[174]

It seems hard to square the Fifth Circuit's decision in *Williams* with its dicta in *Smallwood* and *Crockett* (decided before *Williams*) and *Advanced Indicator* (decided after *Williams*). In *Smallwood*, the Fifth Circuit said that the doctrine of improper joinder "rests on these statutory underpinnings, which entitle a defendant to remove to a federal forum unless an in-state defendant has been 'properly joined'" and that "Federal courts should not sanction devices intended to prevent the removal to a Federal court where one has that right."[175]

In *Crockett*, the Fifth Circuit clarified "[a] party, however, can be improperly joined without being fraudulently joined."[176] If the requirements for joinder are not met, "joinder is improper even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants."[177] And *Crockett* even cited to *Tapscott* for this point.[178] And in *Advanced Indicator*, the Fifth Circuit quoted *Crockett*'s acknowledgement that "[c]ourts have long recognized an exception to the voluntary-involuntary rule where a claim against a nondiverse or in-state defendant is dismissed on account of fraudulent joinder" in holding that the district court properly denied removal where the state court had not dismissed the claim against the non-diverse defendant while, although valid at the time of filing, was subsequently rendered invalid by diverse defendant's election to accept any liability the spoiler may have.[179] Taken together, these cases would seem to suggest that the *Williams* court's focus on whether the state court created diversity or if the federal court is being asked to do so is not significant to the jurisdictional analysis.

It seems likely that, given the opportunity to consider whether to adopt procedural misjoinder in the first instance, a different panel of the Fifth Circuit would conclude that *Benjamin Moore*, *Smallwood*, *Crockett,* and *Advanced Indicator* support the doctrine. Because a

174. *Id.* at 823 (Jones, J., dissenting) (citations omitted) (first quoting 28 U.S.C. § 1441(b); then citing FED. R. CIV. P. 82; and then quoting Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004) (en banc)).

175. *Smallwood*, 385 F.3d at 573 (quoting 14 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3641 (3d ed. 1998)).

176. Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529, 533 (5th Cir. 2006).

177. *Id.*

178. *Id.* at 533 n.5.

179. Advanced Indicator and Mfg. Inc. v. Acadia Ins. Co., 50 F.4th 469, 474 (5th Cir. 2022).

panel of the Fifth Circuit has expressly rejected the doctrine, however, and one panel may not overrule another, the only way for the Fifth Circuit to adopt the doctrine is by hearing a case en banc.[180] But it is unlikely that a different panel, let alone the en banc Fifth Circuit, will ever have a chance to consider the correctness of *Williams* because an order remanding a case on the basis of diversity is generally not appealable.[181] Unless a district court chooses to adopt the doctrine in spite of *Williams*, perhaps in anticipation that the Fifth Circuit would later vindicate its decision, procedural misjoinder is dead in the Fifth Circuit unless and until the Supreme Court takes up the issue.

3. The Eighth Circuit

The Eighth Circuit's first foray into procedural misjoinder was in *In re Prempro Products Liability Litigation*[182] where it concluded that, even if it adopted the doctrine, the alleged misjoinder was "not so egregious as to constitute fraudulent misjoinder."[183] Because procedural misjoinder would not have affected the results in that case, the Eighth Circuit made "no judgment on the propriety of the doctrine" and "decline[d] to either adopt or reject it."[184]

Nevertheless, the Eighth Circuit's dicta in *Prempro* suggests how the Eighth Circuit may view the doctrine. First, the Eighth Circuit's conclusion that it need not address the doctrine because the joinder was "not so egregious as to constitute fraudulent misjoinder"[185] suggests the Eighth Circuit would apply the Eleventh Circuit's egregiousness standard. Second, the Eighth Circuit noted the tension in whether the state or federal joinder rules apply but, like the Eleventh Circuit, concluded that because the state and federal rules were "identical in all significant respects" and so applied the federal rules.[186]

180. Gahagan v. U.S. Citizenship & Immigr. Servs., 911 F.3d 298, 302 (5th Cir. 2018) ("In considering these questions, we follow the well-settled rule of orderliness: '[T]hree-judge panels . . . abide by a prior Fifth Circuit decision until the decision is overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc.'" (quoting Cent. Pines Land Co. v. United States, 274 F.3d 881, 893 (5th Cir. 2001))).

181. *See* 28 U.S.C. § 1447(d) (providing that the only remand orders that may be reviewed by appeal are those arising under § 1442 (suits against federal officers or agencies) and § 1443 (civil rights cases)).

182. 591 F.3d 613 (8th Cir. 2010).

183. *Id.* at 622.

184. *Id.*

185. *Id.*

186. *Id.* at 622 n.6.

The Eighth Circuit then did not consider the doctrine for a decade until *Graham v. Mentor Worldwide LLC*.[187] Unlike *Prempro*, however, in *Graham*, the Eighth Circuit affirmed the district court.[188] This result was less about procedural misjoinder and more about the way the plaintiff framed her appeal.[189] The district court granted the motion to remand in part, severing the misjoined claim under Federal Rule 21 and remanding the negligence claim to state court.[190] After it became clear the district court was likely to grant summary judgment against her, the plaintiff moved to voluntarily dismiss her claim against the remaining defendant.[191] After the district court dismissed the case with prejudice, the plaintiff filed her notice of appeal but, importantly, she did "not appeal the severance and remand rulings," choosing only to "challenge the district court's decision to adopt and apply the doctrine of fraudulent misjoinder."[192] Because the "district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered," and it was affirming the district court's dismissal with prejudice, the Eighth Circuit decided it "need not determine whether remand would be required if [it] reversed the district court's final judgment on the merits *and* determined that remand had been improperly denied."[193]

The Eighth Circuit has been presented two opportunities to address procedural misjoinder and, both times, has elected to resolve the case on issues that do not implicate the doctrine. These cases seem to suggest that the Eighth Circuit will continue to avoid reaching the merits of the doctrine in future cases, leaving district courts and litigants without necessary guidance.

187. Graham v. Mentor Worldwide LLC, 998 F.3d 800 (8th Cir. 2021).

188. *Id*. at 805.

189. *Id.* at 803–04 ("Even if this court recognizes the doctrine of fraudulent misjoinder, she argues, her disparate claims against Mentor and Haley arise out of the same transaction or occurrence and therefore the 'alleged misjoinder [of Haley] is not so egregious as to constitute fraudulent misjoinder.' We decline to consider this argument because, procedurally, it is not properly before us." (quoting *In re Prempro*, 591 F.3d at 622)).

190. *Id.* at 803.

191. *Id.*

192. *Id.* at 803–04.

193. *Id.* at 804 (emphasis in original) (quoting Junk v. Terminix Int'l Co., 628 F.3d 439, 447 (8th Cir. 2010)).

4. The Ninth Circuit

In its sole discussion of procedural misjoinder, the Ninth Circuit also chose not to adopt or reject the doctrine.[194] Instead, the Ninth Circuit said that, assuming it were to adopt the doctrine, the joinder before it "was not so improper as to be considered egregious."[195] The Ninth Circuit's decision was based on the fact that "28 U.S.C. § 1441 is 'strictly construed against removal.'"[196] Thus, the Ninth Circuit concluded that "the state court, not the federal court," should decide if the claims were misjoined.[197]

The Ninth Circuit's opinion poses more questions than it answers, however. At first glance, it seems like the Ninth Circuit was adopting the egregiousness standard. But it then suggested that the state court, not the federal court should decide if the joinder was proper. If, after remand, the state court severed the claims without making a finding one way or another on whether the joinder was egregious, could the case then be removed? And if it is removed, must the district court then undertake to resolve the egregiousness question or is the mere fact of state court severance sufficient? What if, in a different case, the joinder was as egregious as the facts in *Tapscott*, could the federal court retain the case, or would it still need to wait for the state court to sever the claims? The opinion provides no guidance on how the Ninth Circuit would address these questions.

5. The Tenth Circuit

Like the Eighth and Ninth Circuits, the Tenth Circuit has not yet adopted or rejected the doctrine, but it has included dicta in other cases which looks favorably upon the doctrine in a way the other circuits have not.

Historically, the Tenth Circuit has indicated its willingness to examine the propriety of joinder on removal. For example, in *Dodd v. Fawcett Publications, Inc.*,[198] a pre-*Tapscott* case, the Tenth Circuit held that "upon specific allegations of fraudulent joinder the court may pierce the pleadings, consider the entire record, and determine the

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194. Cal. Dump Truck Owners Ass'n v. Cummins Engine Co., Inc., 24 F. App'x 727, 729 (9th Cir. 2001).

195. *Id.* at 730.

196. *Id.* (quoting O'Halloran v. Univ. of Wash., 856 F.2d 1375, 1380 (9th Cir. 1988)).

197. *Id.*

198. 329 F.2d 82 (10th Cir. 1964).

basis of joinder by any means available."[199] *Dodd* was a suit by a group of players from the 1956 Oklahoma Football Team concerning an article in *True Magazine* titled "The Pill That Can Kill Sports."[200] In the article, *True Magazine* referenced the 1956 Oklahoma Football team in a way that the team members alleged was libelous per se.[201] The players sued not only *True Magazine*'s parent company, Fawcett Publications, Inc., but also another defendant Mid-Continent News Company.[202] While Fawcett was a foreign corporation, Mid-Continent had its principal place of business in Oklahoma City.[203] Thus, complete diversity was lacking. After trial and appeal to the Oklahoma Supreme Court, Mid-Continent was eliminated from the case, creating complete diversity.[204] Fawcett sought removal again, arguing that Mid-Continent was fraudulently joined to defeat diversity.[205] The district court denied remand and the Tenth Circuit affirmed.[206]

Although the basis for the Tenth Circuit's decision was that the plaintiffs could not successfully maintain a cause of action against Mid-Continent, nothing in the Court's opinion limited the district court's consideration only to the traditional improper joinder doctrine. Quite the opposite, in *DeBry v. Transamerica Corp.*,[207] the Tenth Circuit said the *Dodd* court reached the result it did because it "was determined that this was a manipulative joinder to prevent removal to the federal court, and on this basis it was ruled that the jurisdiction being exercised by the United States District Court for the Western District of Oklahoma was valid."[208] This footnote in *DeBry* is particularly significant because *DeBry* is the case in which the Tenth Circuit first held that the voluntary-involuntary rule survived the 1949 amendments. In other words, at the moment it embraced the voluntary-involuntary rule, the Tenth Circuit also stated that it did not apply when the plaintiff engages in "manipulative joinder."

It would seem then that the Tenth Circuit would adopt procedural misjoinder if given the chance. Yet, in *Lafalier v. State Farm*

199. *Id.* at 85 (citations omitted).
200. *Id.* at 83.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 83, 85.
207. 601 F.2d 480 (10th Cir. 1979).
208. *DeBry*, 601 F.2d at 487 n.3.

Fire & Casualty Co.,[209] the Tenth Circuit considered the issue in a post-*Tapscott* decision and declined to adopt or reject it.[210] Instead, the Tenth Circuit acknowledged that "[t]here may be many good reasons to adopt procedural misjoinder" but, because the doctrine would not have changed the results it "need not decide that issue."[211] Specifically, because even assuming improper joinder applied, the district court said it was not clear that at least one hundred plaintiffs with claims totaling $5 million have claims against the insurer defendants and so it "would be speculating if it determined that it had an independent basis for subject matter jurisdiction over the severed claims."[212]

Four years after *Lafalier*, the Tenth Circuit again declined to adopt or reject the doctrine in *Parson v. Johnson & Johnson*.[213] *Parson* involved "702 plaintiffs from twenty-six different states and the Commonwealth of Puerto Rico fil[ing] twelve nearly identical product liability actions in the District Court of Pottawatomie County, Oklahoma."[214] Attempting to defeat the "mass action" provision in CAFA, which provided for removal where claims of more than one hundred people are tried jointly, none of the individual actions contained one hundred or more plaintiffs.[215] In deciding which plaintiffs to include in which of the twelve identical complaints, the plaintiffs' attorneys took care to ensure that each of the individual actions included at least one New Jersey plaintiff.[216] Because the defendants removed both on the basis of CAFA and procedural misjoinder, the Tenth Circuit had jurisdiction to review the district court's order granting remand.[217] The court's CAFA discussion centered on whether the plaintiffs proposed to try the cases jointly.[218] Because the Tenth Circuit took the plaintiffs at their word that they did not intend to try the cases jointly, the cases were not removable under CAFA.[219] The Tenth Circuit next acknowledged that it had jurisdiction to address the remaining arguments for removal.[220] But because that jurisdiction is discretionary, the court

209. 391 F. App'x 732 (10th Cir. 2010).
210. *Lafalier*, 391 F. App'x at 739–40.
211. *Id.* at 739.
212. *Id.* at 740.
213. 749 F.3d 879 (10th Cir. 2014).
214. *Id.* at 885.
215. *Id.*
216. *Id.*
217. *Id.* at 885–86.
218. Id. at 888–91.
219. *Id.* at 892.
220. Id. at 892–93.

declined to exercise jurisdiction, in part because it would require the court to adopt or reject procedural misjoinder.[221]

Although the Tenth Circuit has tacitly approved of *Tapscott*'s reasoning, district courts within the Tenth Circuit remain free to reject *Tapscott* or adopt any one of the multiple competing tests, creating a patchwork regime within the circuit.

III. UNRESOLVED QUESTIONS PLAGUING PROCEDURAL MISJOINDER

Tapscott was a watershed decision for procedural misjoinder, but the opinion leaves many unanswered questions about the doctrine-—questions that have fallen to the district courts to answer. But even the district courts that have adopted the doctrine have been unable to establish a uniform framework for applying it. In fact, some courts have stated that part of their reluctance to adopt procedural misjoinder is that it comes with its own baggage in the form of questions they would prefer not to grapple with.[222]

Chief among these unresolved questions are: (1) what degree of misjoinder is sufficient to invoke the doctrine; (2) must the state court grant the severance or is the federal court able to do so; (3) assuming the federal court is empowered to grant the severance, under what joinder rules does the federal court make its determination; and (4) if the federal court does find misjoinder, what does it do with the non-diverse defendant?[223] The Eleventh and Fifth Circuits have reached different answers to these questions, with the district courts across the country landing somewhere on the spectrum between them. This Article tackles each question by first summarizing the respective positions of the Eleventh and Fifth Circuits before suggesting an

221. *Id.* at 893.

222. *E.g.*, Bloodworth v. Durant HMA Physician Mgmt., LLC, No. CIV-23-172-EFM-GLJ, 2023 WL 6035688, at *3 (E.D. Okla. July 21, 2023) ("In sum, there are basic and fundamental questions that remain unresolved and the undersigned Magistrate Judge further agrees that courts applying the doctrine have struggled to advance a coherent articulation of the standard. This is in contrast to Justice Ginsburg's admonishment that in most instances subject-matter jurisdiction will involve no arduous inquiry. Indeed, the last thing the federal courts need is more procedural complexity." (internal quotations omitted)).

223. These unresolved questions were first articulated by Judge Karlton of the Eastern District of California in 2004. Osborn v. Metro. Life Ins. Co., 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004). The past two decades have failed to establish a consensus. *Bloodworth*, 2023 WL 6035688, at *3 (quoting *Osborn*, 341 F. Supp. 2d at 1127).

answer grounded in Supreme Court jurisprudence, statutory text, and litigation fairness to propose a uniform framework.

A. How Egregious Must the Misjoinder Be?

The first question that must be resolved is what level of misjoinder is sufficient to invoke the doctrine? If the plaintiff joins two claims but there is a legitimate question whether the joinder is proper, does the mere fact that the court determines they were misjoined make the case against the nondiverse defendants removable? The Eleventh Circuit says no while the Fifth Circuit says yes. The district courts cannot agree on whether "mere misjoinder" is sufficient, or a higher standard is required and, if so, what exactly is that higher standard?

1. Eleventh Circuit Approach: The Misjoinder Must Be Egregious

In *Tapscott*, the district court found egregious misjoinder because there was "no allegation of joint liability between Lowe's and any other defendant and no allegation of conspiracy."[224] The only alleged basis for joinder was that the two groups of defendants allegedly violated the same consumer protection law. Unfortunately, the Eleventh Circuit did not explain where courts should draw the line between "mere misjoinder" and joinder that was "so egregious as to constitute fraudulent joinder."[225] As one leading treatise states, this is a "somewhat cryptic passage" that "injects a considerable degree of ambiguity into its holding by intimating that there is some threshold above simple misjoinder that needs to be passed to constitute the new form of fraudulent joinder that it was recognizing in its decision."[226] District courts in the Eleventh Circuit have settled upon a rule that the joinder is not egregious if there is "some factual nexus between the claims," even if it does not rise to the level that would satisfy Rule 20(a).[227] This still injects considerable uncertainty, however, and courts have struggled to articulate when misjoinder is sufficiently egregious to trigger the

224. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996).
225. *Id.*
226. 14C WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3723.1 (Rev. 4th ed. 2025).
227. Ruiz v. Ringling Coll. of Art and Design, Inc., 656 F. Supp. 3d 1340, 1357 (M.D. Fla. 2023).

doctrine.[228] In the words of one commentator, litigants "are left knowing that egregious misjoinder probably cannot defeat removal. But just what constitutes egregiousness is anyone's guess.[229]

The courts that have adopted the Eleventh Circuit's egregiousness requirement have done so as a means of deferring to the plaintiff's choice of forum and status as the master of his complaint. But even those courts have similarly struggled to articulate when misjoinder is sufficiently egregious to trigger the doctrine.[230] Without a clear and rational standard for what constitutes egregious misjoinder, however, that deference risks becoming determinative.

2. Fifth Circuit Approach: Any Misjoinder Is Sufficient

Under the Fifth Circuit's approach, "jurisdictional facts are determined at the time of removal."[231] Thus, the inquiry extends only to whether the parties are joined at the time of removal, not whether that joinder was egregious or merely the result of a difference of opinion

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228 In re Bridgestone/Firestone, Inc., 260 F.Supp.2d 722, 728 (S.D. Ind. 2003) ("Precisely what the 'something more' is was not clearly established in *Tapscott* and has not been established since."); *see also*, Rutherford v. Merck & Co., 428 F. Supp. 2d 842, 852–54 (S.D. Ill. 2006) (collecting cases highlighting the inconsistent application of procedural misjoinder and stating "[m]any courts have foundered on shoals of tautology in trying to define fraudulent misjoinder"); Parsons, *supra* note 105, at 59 ("Numerous district courts have chosen to adopt the doctrine in one form or another, though disagreeing on the extent to which misjoinder must be 'egregious' in order to be considered fraudulent and therefore warrant the denial of a motion to remand the action for lack of diversity."); Fisher, *supra* note 439, at 1019 ("Very few courts have bothered to articulate anything more substantial than *Tapscott's* egregiousness.").

229 Harmon, *supra* note 8, at 1442.

230. *In re* Bridgestone/Firestone, Inc., 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) ("Precisely what the 'something more' is was not clearly established in *Tapscott* and has not been established since."); *see also* Rutherford v. Merck & Co., 428 F. Supp. 2d 842, 852–54 (S.D. Ill. 2006) (collecting cases highlighting the inconsistent application of procedural misjoinder and stating many courts "have foundered on shoals of tautology in trying to define fraudulent misjoinder"); Parsons, *supra* note 105, at 59 ("Numerous district courts have chosen to adopt the doctrine in one form or another, though disagreeing on the extent to which misjoinder must be 'egregious' in order to be considered fraudulent and therefore warrant the denial of a motion to remand the action for lack of diversity."); Fisher, *supra* note 39, at 1019 ("Very few courts have bothered to articulate anything more substantial than *Tapscott's* egregiousness.").

231. Williams v. Homeland Ins. Co. of N.Y., 18 F.4th 806, 816 (5th Cir. 2021) (quoting Flagg v. Stryker Corp., 819 F.3d 132, 137 (5th Cir. 2016) (en banc)).

as to whether the claims were sufficiently related. In fact, under the Fifth Circuit's approach, even if the claims were properly joined at the time of filing, if the state court severed the claims for convenience, then the case becomes removable.

Some courts that have adopted the Fifth Circuit's approach have concluded that requiring an "egregiousness" element to the procedural misjoinder analysis "would add a very subjective and troublesome element of complexity to an already knotty calculus."[232] According to these courts, this approach makes sense because jurisdictional rules "direct . . . traffic" and adding "what would be in essence a state-of-mind element to the procedural misjoinder inquiry would overly complicate what should be a straightforward jurisdictional examination."[233]

3. Resolving the Differences: Any Misjoinder Is Sufficient, but Any Doubts About the Propriety of the Joinder Should Be Resolved in Favor of Remand

Neither the Fifth nor Eleventh Circuits' approach provides a workable framework for procedural misjoinder. Under the Eleventh Circuit's approach, only the most extreme cases are removable, and many courts have "foundered on the shoals of tautology in trying to define fraudulent misjoinder."[234] The egregiousness standard rests on a presumption against removal that is, at best, questionable and unnecessarily complicates what should be a simple jurisdictional test. Under the Fifth Circuit's approach, any severance—even if the parties were properly joined and the state court merely severed the case for convenience and efficiency—makes the case removable. This does not provide sufficient deference to the plaintiff's role as master of its complaint. The better standard lies in the middle, looking to whether the plaintiff had a reasonable basis for the joinder and resolving all doubts about the propriety of joinder in favor of remand.

232. Burns v. W.S. Life Ins. Co., 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004).
233. *Id.* (quoting Hartley v. CSX Transp., Inc., 187 F.3d 422, 425 (4th Cir. 1999)).
234. *Rutherford*, 428 F. Supp. 2d at 853.

a. *The Egregiousness Standard Wrongly Relies on a Presumption Against Removal*

More than two hundred years ago, Chief Justice Marshall wrote that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[235] This principle has been repeatedly reaffirmed as the judicial system has evolved.[236] Although this obligation is not absolute, the Supreme Court recognizes few exceptions to it.[237] Yet it is seemingly ignored when courts are faced with a motion to remand.

Instead, courts frequently employ a "strong presumption in favor of remand."[238] This presumption is not limited to procedural misjoinder but infects the whole of removal jurisprudence.[239] One judge

235. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

236. *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); Adkins v. VIM Recycling, Inc., 644 F.3d 483, 496 (7th Cir. 2011) ("Accordingly, a federal court's ability to abstain from exercising federal jurisdiction 'is the exception, not the rule,' and can be justified only in exceptional circumstances." (quoting Ankenbrandt v. Richards, 505 U.S. 689, 705 (1992))).

237. *See Quackenbush*, 517 U.S. at 728 (describing abstention doctrines as "extraordinary and narrow exception[s]"); Martin v. Stewart, 499 F.3d 360, 363 (4th Cir. 2007) ("To cabin that discretion and ensure that abstention 'remains the exception, not the rule,' the Supreme Court has 'carefully defined . . . the areas in which such abstention is permissible.'" (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989))).

238. *E.g.*, *Rutherford*, 428 F. Supp. 2d at 846, 851 (relying on the "strong presumption" against removal in holding that "whether viable state-law claims have been misjoined—even 'egregiously' misjoined—is a matter to be resolved by a state court"); Ramirez v. San Miguel Hosp. Corp., 591 F. Supp. 3d 1028, 1037 (D.N.M. 2022) ("Because the removal statutes are to be strictly construed, and all doubts are to be resolved against removal, the Court declines to consider the application of the procedural misjoinder doctrine in this matter and under these circumstances." (citations omitted)); Geffen v. Gen. Elec. Co., 575 F. Supp. 2d 865, 873 (N.D. Ohio 2008) ("Additionally, Mallinckrodt's removal, as previously recounted, should be viewed through the lens of the well-settled law that the removal statutes are to be construed narrowly and all uncertainties as to removal jurisdiction are to be resolved in the favor of remand.").

239. *E.g.*, Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (determining that because plaintiff did not plead an amount in controversy, the court presumed the amount in controversy requirement was not met); Cellport Sys., Inc. v. Peiker Acustic GMBH & Co. KG, 335 F. Supp. 2d 1131, 1133–34 (D. Colo. 2004) (deciding whether to follow the first-served or last-served defendant rule based on the "strong public policy against removal and separation of powers considerations that support protection of state sovereignty and maintenance of a state's own judicial

went so far as to claim that it "should go without saying that statutes governing removal must be strictly construed, and that any doubts must be resolved against federal jurisdiction."[240] This presumption against removal, however, is "a questionable doctrine whose 'basis has never been very clearly explained.'"[241] When relying on it, courts seem to frequently forget that *Powers* was a case where the Supreme Court liberally construed the removal statute, holding that the "incidental provision as to the time must, when necessary to carry out the purposes of the statute, yield to the principal enactment as to the right."[242]

The Supreme Court itself has never expressly adopted this presumption.[243] Rather, lower courts adopted the presumption from dicta in *Shamrock Oil*.[244] But, as with the voluntary-involuntary rule, this divorces the Supreme Court's holding from its essential context. In *Shamrock Oil*, the issue was whether a plaintiff could remove the case to federal court if the defendant filed a counterclaim. The Supreme Court held it could not. In reaching this conclusion, the Supreme Court found it persuasive that from 1875 to 1887, the removal statute gave either party the right to remove. When Congress later amended the

integrity").Interestingly, *Gaus* and *Cellport Systems* both relied on the presumption against removal to reach their decisions, but Congress later amended the removal statute in a way that would have allowed removal in *Gaus* and *Cellport*. Federal Court Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011). Both cases would be removable under the post-2011 removal statute. At every turn, Congress seems to act contrary to the supposed strong public policy against removal. *See supra* notes 116-121 and accompanying text.

240. Cason v. Princeton Baptist Med. Ctr., No. 08-AR-1583-S, 2008 WL 11379973, at *2 (N.D. Ala. Sep. 29, 2008).

241. Cook v. Wikler, 320 F.3d 431, 436 n.6 (3d Cir. 2003) (quoting Thomas v. Shelton, 740 F.2d 478, 488 (7th Cir. 1984) (Posner, J.)). According to Judge Posner, although in 1887 and 1948 Congress sought to "cut back on the broad right of removal that it had created . . . in the wake of the Civil War, ... a maxim that requires the restrictive feature of the new statute to be construed broadly merely risks overcorrection." *Thomas*, 740 F.2d at 488. Judge Posner's concerns have rung true; as the following pages explain, the "presumption" against removal has become all but irrefutable.

242. Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 101 (1898).

243. *See* Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 89 (2014) ("We need not here decide whether such a presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.").

244. *E.g.*, Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979) ("[R]emoval statutes are strictly construed against removal." (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941))).

removal statute to replace "either party" with "defendant or defendants," the Supreme Court reasoned, it was intending to narrow removal jurisdiction.[245] This, along with "the policy of the successive acts of Congress regulating the jurisdiction of federal courts," the Court said, called for the "strict construction of such legislation."[246] When the Court concluded that Congress did not intend for a counter-defendant to remove, it did so in the face of legislation that expressly limited the ability of plaintiffs to remove a case to federal court. *Shamrock Oil*'s presumption was that the specific question before it should be considered in light of Congressional actions limiting removal, including an amendment addressing the specific issue raised in the case.

To the extent this presumption against removal ever had significant force, it no longer does. The presumption was born of several acts of Congress reflecting an intent to restrict removal. But for the last 35 years, Congress has resisted calls to limit removal, and in fact expanded it at every turn.[247] As the Ninth Circuit commented more than a decade ago, "the Supreme Court has recently relaxed its presumption against removal."[248]

In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,[249] the Supreme Court construed the removal statute in favor of removal by considering the interpretation that "assures defendants adequate time to decide whether to remove an action to federal court."[250] Quoting the Seventh Circuit, Justice Ginsburg noted that the removal statute must be considered in light of the drafters "quest for evenhandedness and promptness in the removal process"[251] Although the majority did not directly cite *Shamrock Oil* or the supposed strict construction against removal, Chief Justice Rehnquist expressly stated that his dissent is based on the majority's departure from the "Court's practice of strictly construing removal and similar jurisdictional statutes."[252]

This is not to say that the federalism concerns raised by removal do not warrant some deference to the state court's right to

245. *Shamrock Oil*, 313 U.S. at 108.

246. *Id.*

247. *See supra* notes 105–121 and accompanying text (discussing Congress's approach to removal jurisprudence).

248. Destfino v. Reiswig, 630 F.3d 952, 956 (9th Cir. 2011) (citing Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347 (1999)).

249. 526 U.S. 344 (1999).

250. *Id.* at 354.

251. *Id.* at 355 (quoting Silva v. Madison, 69 F.3d 1368, 1376–77 (7th Cir. 1995)).

252. *Id.* at 357 (1999) (Rehnquist, C.J., dissenting) (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941)).

resolve controversies arising under state law. It simply means that the presumption cannot itself be used to avoid difficult questions. According to Chief Justice Marshall, using the presumption against removal in this manner is "treason to the Constitution."[253] Federal courts have an obligation to exercise the jurisdiction that is given to them and should not evade that obligation by resorting to an ahistorical presumption against removal.

b. The Egregiousness Standard Unnecessarily Complicates the Analysis, While the Fifth Circuit's Standard Does Not Show Proper Deference to the Plaintiff's Choice of Forum

Under the traditional improper joinder doctrine, the court may disregard the citizenship of the jurisdictional spoiler if (1) there is actual fraud in the pleading of jurisdictional facts or (2) there is no reasonable basis to predict the plaintiff may recover against the jurisdictional spoiler.[254] In other words, the plaintiff's subjective intent is a *sufficient* but not necessary condition to invoking the doctrine. As one court explained in rejecting an egregiousness requirement, "fraudulent joinder is simply a term of art which 'does not impugn the integrity of plaintiffs or their counsel and does not refer to an intent to deceive.'"[255]

The courts that adopt the Eleventh Circuit's egregiousness approach, however, seem to make the subjective intent a *necessary* condition to invoke the doctrine of procedural misjoinder.[256] There is little reason to make the plaintiff's subjective intent a necessary condition to procedural misjoinder where it is not a necessary condition to improper joinder.[257] Not only does this demonstrate a marked deviation

253. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

254. Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (en banc).

255. Greene v. Wyeth, 344 F. Supp. 2d 674, 685 (D. Nev. 2004) (quoting King *ex rel.* King v. Aventis Pasteur, Inc., 210 F. Supp. 2d 1201, 1214 (D. Or. 2002)); *see also supra* notes 87–88 and accompanying text.

256. *See In re* Prempro Prods. Liab. Litig., 591 F.3d 613, 623 (8th Cir. 2010) ("Without any evidence that the plaintiffs acted with bad faith, we decline to conclude they egregiously misjoined their claims.").

257. *See* Burns v. W.S. Life Ins. Co., 298 F. Supp. 2d 401, 403 (S.D.W. Va. 2004) ("Perhaps the best reason for Judge Chambers' approach is its consistency with our Court of Appeals' very direct, juridical approach to jurisdictional disputes, especially in the area of fraudulent joinder.").

between the improper joinder analysis, but adding "what would be in essence a state-of-mind element to the procedural misjoinder inquiry would overly complicate what should be a straightforward jurisdictional examination."[258] For this reason, "the majority of district courts that have considered the issue have rejected the need to make an additional finding of egregiousness."[259]

On the other hand, the courts that adopt the Fifth Circuit's approach that any severance is sufficient to warrant removal do not provide sufficient deference to the plaintiff's ability to structure his complaint as he sees fit. For example, under the Texas Rules of Civil Procedure, the court may sever claims "when (1) the controversy involves more than one cause of action; (2) the severed claim is one that *could be* asserted independently in a separate lawsuit; and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues."[260] The decision to sever claims is soundly within the trial court's discretion and that discretion is exercised "to do justice, avoid prejudice[,] and further convenience."[261] If a plaintiff properly joins two defendants and asserts the same cause of action against both, the fact that the claims are factually related does not preclude severance unless they are so intertwined that they essentially involve the same issues.[262] But should that mean the case is removable? The only way to say it would be to agree that the voluntary-involuntary rule is not good law. In *Alexander*, the Supreme Court noted that in the absence of a "fraudulent purpose to defeat removal," whether a case becomes removable "depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion."[263] If the joinder was proper under the state rules as filed by the plaintiff but was severed for judicial

258. *Id.* at 403.

259. Stephens v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc., 807 F. Supp. 2d 375, 380 (D. Md. 2011).

260. *In re* Stutsman, 612 S.W.3d 695, 698 (Tex. App.—Texarkana 2020) (emphasis added) (quotations omitted).

261. *Id.*

262. *E.g.*, State v. Morello, 547 S.W.3d 881, 889 (Tex. 2018).

263. Great N. Ry. Co. v. Alexander, 246 U.S. 276, 282 (1918) (in the absence of "fraudulent purpose to defeat removal," whether a case becomes removable "depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion").

convenience, then there was clearly not "a fraudulent purpose to defeat removal" and the case should not be removed simply because the state court believed that separating the claims would be more convenient.[264]

c. Applying a Reasonable Basis Test Preserves a Defendant's Right to Remove While Also Deferring to the Plaintiff's Ability to Structure His Lawsuit Within the Rules of Civil Procedure

The better standard is the middle-ground approach suggested by Professor Percy, in which the court looks at whether the plaintiff had a reasonable basis for the joinder.[265] Not only is the reasonable basis standard "familiar [and] easy to apply," but it also "tracks a popular standard used for the related doctrine of fraudulent joinder."[266] As Professor Percy proposes, "a jurisdiction using the 'no possibility of recovery' test to identify traditional fraudulent joinder would use a 'no possibility of proper procedural joinder' test to identify fraudulent misjoinder."[267] Under that test, the defendant would have to prove that there is no reasonable possibility that the state court would find the joinder of the jurisdictional spoiler to be proper.

And just as in the improper joinder context, any doubts about the possibility of recovery against the jurisdictional spoiler are resolved in favor of remand, any doubts about the propriety of the joinder would be resolved in favor of remand.[268] By adopting this reasonable basis approach, coupled with any doubts about the state joinder rules being resolved in favor of remand, the federal court does not

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264. *Id.*

265. Percy, *supra* note 10, at 614–15.

266. Fisher, *supra* note 39, at 1008–09; *see also* Jon O. Newman, *On Reasonableness: The Many Meanings of the Law's Most Ubiquitous Concept*, 21 J. APP. PRAC. & PROC. 1, 1–3, 23, 45, 62–63 (2021) (describing how some form of the "reasonableness" invades nearly every aspect of law and surveying legal approaches to the concept).

267. Percy, *supra* note 10, at 614 n.241; *see also* Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 809 (8th Cir. 2003) ("We believe that, despite the semantical differences, there is a common thread in the legal fabric guiding fraudulent-joinder review. It is reason. Thus, a proper review should give paramount consideration to the reasonableness of the basis underlying the state claim.").

268. This largely resolves the debate over which joinder rules to apply, as there would rarely be a situation in which under one set of rules there is no reasonable basis to even predict the joinder would be proper without it being similarly clear that the joinder is improper under the other set of rules.

usurp the right of state courts to interpret their own joinder rules—there is nothing stopping a party from seeking severance in the state court following remand.[269]

This approach best balances the rights of plaintiffs to choose the initial forum and defendants to remove the case while simultaneously respecting the federalism concerns implicated by removal.

B. Can the Federal Court Sever the Claims or Must It Wait for the State Court to Do So?

Assuming the joinder was unreasonable, does the federal court have the authority to sever the claims and remand those against the jurisdictional spoiler or must it wait for the state court to sever the claims? This is the primary disagreement between the Eleventh and Fifth Circuits. The Eleventh Circuit says the federal court can create the severance. The Fifth says the state court must do so. No other circuit has weighed in, and the district courts have reached differing results, creating potential traps for litigants.[270]

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269. *Cf.* Hsin-Chi-Su v. Vantage Drilling Co., 474 S.W.3d 284, 303 (Tex. App.—Houston [14th Dist.] 2015) (explaining there is no collateral estoppel effect from bankruptcy court's order because the first element, whether the matter was fully and fairly litigated, was not satisfied). And it is axiomatic that in a transferred case, the new judge may reconsider the prior judge's orders.

270 *Compare* Kiang v. Nationwide Life & Annuity Ins. Co., No. 3:23-cv-04861-JSC, 2023 WL 8018254 (N.D. Cal. Nov. 23, 2023) (denying motion to remand where the state court granted severance prior to removal), *with* Barrett v. Liberty Ins. Corp., No. 19-CV-0129-CVE-FHM, 2019 WL 2152515 (N.D. Okla. May 17, 2019) (granting motion to remand where defendant sought dismissal in state court and removed within 30 days of dismissal because defendant could have removed upon receipt of the original pleading). Although *Barrett* arose in the context of improper joinder, not procedural misjoinder, its discussion of timeliness applies with equal force to procedural misjoinder. If a federal court determines the Fifth Circuit's procedure is the better one, then a defendant who removes and asks the federal court to sever will instead be remanded. But if the federal court determines that the Eleventh Circuit's procedure is the better one, a defendant who seeks severance in state court before removing will have find their removal untimely. Without knowing which procedure the district judge favors—either because the district judge has not entertained the issue or because a particular district has judges that have opined on both sides—the defendant can only guess how to invoke their statutory right of removal.

1. Eleventh Circuit Approach: The Federal Court Can Sever the Claims

In *Tapscott*, the Eleventh Circuit affirmed the district court's order severing the claims against the diverse defendant from the claims against the jurisdictional spoilers and remanding the latter.[271] Although the Eleventh Circuit did not discuss this aspect of the case, that silence makes its position clear: The district court can sever the claims.

2. Fifth Circuit Approach: The Federal Court Must Wait for the State Court to Sever the Claims

In *Williams*, the Fifth Circuit held that "misjoinder issues should be addressed in state court prior to removal."[272] According to the Fifth Circuit, to hold otherwise would put federal courts "in the position of resolving procedural matters . . . more appropriately resolved in state court" and would "usurp a state court's ability to decide whether parties have been misjoined under a state court's own procedural rules."[273]

3. Resolving the Differences: The Federal Court Has the Authority to Sever the Claims

The better argument is that the federal court does have the authority to sever the claims. This is true for four reasons. First, it maintains the consistency between improper joinder and procedural misjoinder. Second, it is supported by Supreme Court precedent. Third, it is consistent with the underlying policy rationale of diversity jurisdiction. And fourth, it does not threaten the voluntary-involuntary rule the same way that requiring severance in state court would.

a. Permitting the Federal Court to Sever the Claims Keeps Procedural Misjoinder Analogous to Improper Joinder

Because procedural misjoinder is an extension of improper joinder, opinions on improper joinder may provide the answer. In the

271. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353,1359–60 (11th Cir. 1996).
272. Williams v. Homeland Ins. Co. of N.Y., 18 F.4th 806, 817 (5th Cir. 2021).
273. *Id.* at 816–17.

improper joinder context courts have engaged in a legal fiction that as long as the district court dismissed the non-diverse party without prejudice, the dismissal is not ultra vires because the district court was simply dismissing certain claims for lack of jurisdiction.[274] That same legal fiction can be applied to the procedural misjoinder context, where the district court's order granting severance and then remanding the claims against the non-diverse defendant is "used to resolve the issue of jurisdiction, not merits."[275]

This was one basis for Judge Jones's dissent in *Williams*.[276] In her dissent, Judge Jones criticized the majority for concluding that the court lacked jurisdiction because:

> [r]etaining federal jurisdiction in the face of improper joinder is premised on the idea that defendants may remove an entire lawsuit to federal court, and the district court can sever the portion that does not belong under the Federal Rules. Whether Rule 12(b)(6), *i.e.* the "no possibility" test, or the joinder Rules underlie the severance makes no difference.[277]

According to Judge Jones, there is no functional difference between removing under improper joinder or procedural misjoinder, at least as to whether the district court is empowered to structure the litigation to correct attempts to defeat federal court jurisdiction. And as one commentator noted, if the egregiousness debate is resolved in favor of the reasonable basis test, then the test for procedural misjoinder "is a near-perfect analog to the test for fraudulent joinder."[278]

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274. *See, e.g.*, Int'l Energy Mgmt. Ventures, L.L.C. v. United Energy Grp., Ltd., 818 F.3d 193, 209–10 (5th Cir. 2016) (holding the district court correctly determined that a non-diverse defendant was improperly joined but erred by dismissing the claims against that defendant with prejudice on grounds that the court only had authority to dismiss the non-diverse defendant without prejudice because "to dismiss on any other basis would require the presence of jurisdiction that does not exist"); Wivell v. Wells Fargo Bank, N.A., 773 F.3d 887, 896 (8th Cir. 2014) ("The claims against Kozeny, however, should have been dismissed without prejudice for lack of subject matter jurisdiction. As mentioned above, the doctrine of fraudulent joinder allowed the district court only temporary jurisdiction to determine whether Kozeny, a facially nondiverse defendant, was fraudulently joined.").

275. *Int'l Energy*, 818 F.3d at 210.

276. *Williams*, 18 F.4th at 825 (Jones, J., dissenting).

277. *Id.*

278. Fisher, *supra* note 39, at 1010. Although jurisdictional rules should not be decided on the basis of what is easier to teach, such a test "would be a civil procedure professor's dream of clarity." *Id.*

And although not directly on point, the Third Circuit's opinion in *Avenatti v. Fox News Network LLC*[279] is instructive. After the defendant removed the case to federal court, the plaintiff filed an amended petition adding a jurisdictional spoiler. Because the amended pleading was filed within twenty-one days of the initial complaint, the plaintiff did not need leave of court. Had the plaintiff needed leave, 28 U.S.C. § 1447(e) would apply and the district court could deny joinder or permit joinder and remand the case.[280] Because § 1447(e) did not apply, the district court called upon its discretionary authority under Rule 21 to drop the spoiler and restore complete diversity.[281] Affirming the district court, the Third Circuit explained that remand "is not automatic whenever a nondiverse party is present in the case: Rule 21 empowers courts to police the litigation's cast of characters."[282] Provided the spoiler is not an essential party under Rule 19 and the severance would not prejudice any party, the district court has discretion to order severance on what it deems just terms. The Third Circuit joined the Fourth, Seventh, and Eighth Circuits who have previously recognized that whether the amendment is done as a matter of right under Rule 15(a) or through leave of Court, the district court has discretion to reject attempts to manipulate federal jurisdiction by adding new parties.[283] Even though there was no statutory basis for the district court to reject the amendment that was made as a matter of right, the Third Circuit acknowledged the need to "be on guard against forum manipulation in removal cases," and concluded district courts "should have pragmatic, flexible tools to face down these problems."[284] The same should be true when guarding against forum manipulation to prevent removal in the first place.

The same purposes underlying the improper joinder doctrine support providing the federal court with the tools to police forum manipulation in the procedural misjoinder context. As the Third Circuit eloquently explained, "[f]ar from granting plaintiffs unlimited rights, the Federal Rules of Civil Procedure and the removal statutes recognize the interests of defendants too."[285]

279. 41 F.4th 125 (3d Cir. 2022).

280. *Id.* at 130.

281. *Id.*

282. *Id*. (collecting cases).

283. Mayes v. Rapoport, 198 F.3d 457, 462 n.11 (4th Cir. 1999); Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 762 (7th Cir. 2009); Bailey v. Bayer CropScience L.P., 563 F.3d 302, 308–09 (8th Cir. 2009).

284. *Avenatti*, 41 F.4th at 134.

285. *Id.*

b. Long-Standing Supreme Court Precedent Supports the Federal Court's Power to Sever the Non-Diverse Claims

Section 1441 speaks of removal of actions and not claims.[286] But does the district court have jurisdiction to remand only part of the action? In *Tapscott*, the Eleventh Circuit avoided this question by severing the claims into two actions and remanding one to state court.[287] While this seems on its face to resolve the jurisdictional problem, it ignores that "once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue."[288] Therefore, it is not enough to simply say that the claims are severed and the district court may remand part of the severed claim. Or is it?

If the district court severs the claims so that it has jurisdiction at the time it enters final judgment then is there any harm, particularly when it was the plaintiff's violation of the rules of civil procedure that made the severance necessary? This argument is not only logical in that it flows from the way courts treat the issue in the related improper joinder context, but it finds support in the Supreme Court's opinions in *Newman-Green, Inc. v. Alfonzo-Larrain*[289] and *Caterpillar Inc. v. Lewis*,[290] where the Supreme Court expressly approved of this type of "jurisdiction saving."[291]

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286. 28 U.S.C. § 1441(a).

287. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996).

288. Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999) (citing *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

289. 490 U.S. 826 (1989).

290. 519 U.S. 61 (1996).

291. While this article was being edited, the Supreme Court decided *Hain Celestial Group, Inc. v. Palmquist*, 607 U.S. 421 (2026), which addressed a question left open by *Caterpillar* and *Newman-Green*: "whether a district court's erroneous dismissal of a nondiverse party before final judgment can cure a jurisdictional defect that existed when the case was removed to federal court." *Id.* at 424. Although at first blush this would seem fatal to procedural misjoinder, a closer reading reveals that it does not alter the procedural misjoinder analysis. Central to the Court's decision in *Hain* was the fact that the district court *wrongly* found an improper joinder. *Id.* at 427 (noting it is "important to emphasize at the outset" that neither party challenged "the Fifth Circuit's holding that the District Court's improper-joinder decision was incorrect."). In other words, the Court only answered the question of what happens if a district court creates jurisdiction by dismissing a properly joined party, whether a district court could "create jurisdiction through its own mistake." *Id.* at 732. When considering Hain's alternative argument that the district court could sever under Rule 21, the Court again focused on the fact that the joinder was proper. *Id.* at 433 ("The Palmquists exercised their right to choose a state forum by purposefully and *properly joining a nondiverse defendant* against whom they could not

Newman-Green is not a removal case, but it still contains important lessons on a federal court's ability to structure litigation when jurisdictional problems arise. In *Newman-Green*, the plaintiff sued a Venezuelan corporation and five individuals.[292] The trial court granted summary judgment to the defendants and the plaintiff appealed.[293] On appeal, the Seventh Circuit questioned whether the district court had jurisdiction because one of the defendants was a United States citizen but domiciled in Venezuela, making him stateless.[294] As a result, the federal court could not exercise jurisdiction under § 1332(a)(3), the section relied upon in the plaintiff's complaint.[295] A panel of the Seventh Circuit resolved this by dismissing that defendant as a dispensable party, thereby perfecting the court's jurisdiction.[296] The en banc Seventh Circuit reversed, holding that Rule 21 does not "empower[] appellate courts to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction."[297] The en banc court said the case should be remanded to the district court for that purpose.

The Supreme Court agreed with the panel opinion and held that a court of appeals may grant a motion to dismiss a dispensable party who destroys diversity. Reaching this conclusion, the Supreme Court emphasized that "Newman-Green should not be compelled to jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity."[298] Importantly, even though the presence of the stateless defendant threatened the district court and Seventh Circuit's jurisdiction to hear the case at all, the Supreme Court noted approvingly that the Seventh Circuit dismissed the stateless defendant with prejudice.

Although *Newman-Green* was not a removal case, its holding can be applied in the context of removal, as seen in *Caterpillar, Inc. v. Lewis*.[299] In *Caterpillar*, the question presented was whether the absence of complete diversity at the time of removal is fatal to federal-

proceed in federal court, and diligently asserted that right by promptly moving to remand the case to state court. *The decision to structure their case in this way was the Palmquists' to make; Rule 21 does not permit a court or a defendant to override their choice in these circumstances*.") (emphasis added).

292. 490 U.S. at 828.
293. *Id.*
294. *Id.*
295. *Id.* at 828–29.
296. *Id.* at 829.
297. *Id.*
298. *Id.* at 837.
299. 519 U.S. 61 (1996).

court adjudication.[300] When the case was removed, "complete diversity of citizenship did not exist among the parties."[301] Prior to trial, however, "all claims involving the nondiverse defendant were settled, and that defendant was dismissed as a party to the action."[302] After the jury returned a verdict in favor of the remaining defendant and judgment was entered on that verdict, the court of appeals reversed, holding that without complete diversity at the time of removal, the district court lacked subject matter jurisdiction to proceed.[303] Relying on its prior decisions in *American Fire and Casualty Co. v. Finn*,[304] *Grubbs v. General Electric Credit Corp.*,[305] and *Newman-Green*, the Supreme Court held that the error was harmless.[306]

The Court explained that, although the requirement for complete diversity at the time of judgment is jurisdictional, the failure to establish complete diversity at the time of removal is a mere "statutory flaw."[307] Thus, the failure to establish complete diversity at the time of removal is subject to equitable considerations. Because the failure to establish complete diversity is subject to equitable considerations, it seems only logical that one such equitable consideration is whether the federal court would have diversity jurisdiction but for the violation of the joinder rules. In other words, if the plaintiff violates the joinder rules in order to defeat diversity jurisdiction, it should not be allowed to complain that the federal court exercised the jurisdiction it would have had but for that violation.

Caterpillar and *Newman-Green* did not represent any departure from the traditional rules of subject matter jurisdiction. Rather, as the Supreme Court later explained in *Grupo Dataflux v. Atlas Global Group, L.P.*,[308] the exception to the time-of-filing rule espoused in *Caterpillar* and *Newman-Green* has a long history. Quoting from an 1873 decision, the Court explained:

> [T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether . . . they are

300. *Id.* at 64.
301. *Id.*
302. *Id.*
303. *Id.* at 64–65.
304. 341 U.S. 6, 17–18 (1951).
305. 405 U.S. 669 (1972).
306. *Caterpillar*, 519 U.S. at 70–71, 75.
307. *Id.* at 73.
308. 541 U.S. 567 (2004).

> indispensable parties, for if their interests are severable and a decree without prejudice to their rights may be made, the jurisdiction of the court should be retained and the suit dismissed as to them.[309]

The rule that diversity jurisdiction is determined at the time of filing applies to the citizenship of the parties to the suit, and a change in a party's citizenship will not create or destroy diversity but the addition or deletion of a party may.[310] This long-standing rule of jurisdiction traces its origins back nearly two centuries. In *Conolly v. Taylor*, the plaintiffs prevented removal by including a plaintiff who destroyed diversity. According to Chief Justice Marshall, the trial court could "strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the [c]ourt possessed."[311]

Where the federal court exercises its authority to sever the claims against the jurisdictional spoiler, thus creating diversity, it is not usurping any power. It is exercising the power that was recognized by Chief Justice Marshall in 1829 and reaffirmed by the Supreme Court as recently as 2004. In fact, the Supreme Court has long recognized that courts may realign the parties to determine whether there is federal jurisdiction.[312] Recognizing that litigation is "the pursuit of practical ends, not a game of chess," the Supreme Court admonished the courts that realignment is determined "from the principal purpose of the suit, and the primary and controlling matter in dispute."[313]

309. *Id.* at 572 (citing Horn v. Lockhart, 84 U.S. (17 Wall.) 570, 579 (1873)). In *Horn*, the Supreme Court held that there was diversity jurisdiction because the jurisdictional spoilers "were not indispensable parties" because "their interests were not so interwoven and bound up with those of complainants, or other parties, that no decree could be made without necessarily affecting them." *Id.* "The rights of the parties, other than the defendants who were citizens of Texas, could be, and were, adequately and fully determined without prejudice to the interests of those defendants." *Id.*

310. *Grupo Dataflux*, 541 U.S. at 574–75 (quoting Conolly v. Taylor, 27 U.S. (2 Pet.) 556, 565 (1829)).

311. *Conolly*, 27 U.S. at 565.

312. City of Indianapolis v. Chase Nat'l Bank of City of N.Y., 314 U.S. 63, 69 (1941) ("These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court.").

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

c. *Permitting the Federal Court to Sever the Claims is Consistent with the Purposes of Diversity Jurisdiction*

The founders enshrined diversity jurisdiction in the Constitution because of fears that an out-of-state litigant would not receive a fair trial in state court.[314] To the extent that diversity jurisdiction is predicated on fear of prejudice against an out-of-state defendant, that same rationale would support the federal court having the right to determine removability. Conversely, requiring defendants to seek severance in state court—the same state court that would supposedly be prejudiced against the out-of-state defendant—provides no protection against the fear of local prejudice that diversity jurisdiction is supposed to prevent.[315]As one commentator suggests, arguing that the defendant should seek severance in the state court "naïvely presumes that state courts will readily sever misjoined parties—a presumption contradicted by past precedent."[316]

This idea that state courts may be biased against foreign defendants was as controversial in the country's early history as it is today.[317] But although the extent of local prejudice is certainly a matter of great debate, its existence is not. Former West Virginia Supreme Court Justice Neely was remarkably candid on this point, stating:

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314. Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 111–12 (1945) (quoting Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809)).

315. *See* Hines & Gensler, *supra* note 11, at 809 ("In our view, requiring defendants to seek relief in state court puts the diversity removal docket in jeopardy and fails adequately to protect defendants' access to federal court.").

316. Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269, 294 n.104 (2012).

317. *See Deveaux*, 9 U.S. (5 Cranch) at 87 ("The tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."); Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 347 (1976) ("Even if it were to be assumed that the fear of bias against the outsider-litigant actually existed at the time of the framing of the Constitution and at the time of enactment of the first Judiciary Act, and that this apprehension continued in the nation's early days, there would still remain the question whether such a fear is presently justified.").

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will re-elect me . . . . It should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation.[318]

How many state court judges share similar sentiments to Justice Neely, and believe litigation is an effective tool to redistribute wealth to in-state plaintiffs while securing their own reelection? No one can say. The difficulty in proving that a particular judge does is precisely why diversity and removal are premised on the "fears and apprehensions" of local prejudice rather than requiring any degree of proof of local prejudice. In other words, telling the out-of-state defendant to seek severance from the state court before it can access the federal court is no solution to the fears and apprehensions of local prejudice.

To honor the promise of a federal forum to avoid local prejudice, the answer simply cannot be that the out-of-state defendant must ask permission from the local court or those like Justice Neely will deny defendants their right to a federal forum without losing any sleep.

d. Permitting the Federal Court to Sever the Claims Does Not Threaten the Voluntary-Involuntary Rule

Opponents of procedural misjoinder who argue that the severance is best accomplished in state court must accept one of two conclusions. Either their position requires accepting that a defendant has no recourse against a plaintiff's outright violation of the rules of civil procedure, or it requires that the voluntary-involuntary rule is no longer good law.

If we accept the former, then we must also acknowledge that we are doing away with more than one hundred and twenty years of

318. Victor E. Schwartz & Cary Silverman, *Protecting Victims of Fraudulent Joinder: How Congress and Federal Judges Can Help*, 45 RUTGERS L. REC. 89, 90 (2018) (citing RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1988)).

Supreme Court precedent while simultaneously encouraging gamesmanship and forum shopping of the worst kind.[319] If we accept the latter, then we should follow the Fifth Circuit's lead and simply do away with the voluntary-involuntary rule entirely and conclude that diversity is measured solely at the time of removal. Neither is appealing.

Certainly, opponents of procedural misjoinder may claim that they can refute both of these conclusions by creating a narrow exception to the voluntary-involuntary rule that applies only when the plaintiff misjoins claims against a diverse defendant and a non-diverse defendant. But they cannot. Not only does this narrow exception threaten the very foundation of the rule, but it would lead to the same sorts of confusion that they claim can be avoided by requiring the state court to evaluate the joinder in the first place.

For example, most states have a rule similar to Federal Rule 21,[320] which allows a court to sever even properly joined claims if doing so is in the interests of justice.[321] Suppose a defendant files a motion to sever in state court arguing that the plaintiff's joinder of the two defendants violated the state joinder rules or, alternatively, even

319. Although forum shopping typically has a negative connotation, not all forum shopping should be (or even can be) discouraged. *See* Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 56–57 (2009) ("Although forum shopping has a negative connotation, good faith forum shopping is widespread, responsible, and expected as a part of modern litigation."); McCuin v. Tex. Power & Light Co., 714 F.2d 1255, 1261 (5th Cir. 1983) ("Forum-shopping is sanctioned by our judicial system. It is as American as the Constitution, peremptory challenges to jurors, and our dual system of state and federal courts."). But where parties engage in manipulation of the rules of procedure and other forms of inequitable gamesmanship, forum shopping should be wholly condemned. *See generally*, Matthew A. Shapiro, *Procedural Wrongdoing*, 48 BYU L. REV. 197, 220, n.93 (2022) (discussing abuse of the legal system and, specifically, "'collusive' practices designed . . . to manufacture or defeat diversity jurisdiction").

320. *E.g.*, ARIZ. R. CIV. P. 21; DEL. R. CIV. P. 21; IDAHO R. CIV. P. 21; KAN. R. CIV. P. 21; NEV. R. CIV. P. 21; N.D. R. CIV. P. 21; TEX. R. CIV. P. 41; WY. R. CIV. P. 21.

321. *See* M.M.M. *ex rel.* J.M.A. v. Sessions, 319 F. Supp. 3d 290, 295 (D.D.C. 2018) (describing the factors a court considers, including "concerns related to judicial economy, multiplicity of litigation, and orderly and efficient resolution of disputes," "the availability of witnesses and other evidentiary proof," and "the potential for confusion, undue delay, or prejudice to any party"—none of which affect whether the joinder was proper under Rule 20); *see also In re* High Fructose Corn Syrup Antitrust Litig., 361 F.3d 439, 441 (7th Cir. 2004) (explaining that even where the technical requirements of Rule 21 are not satisfied, the district judge still retains wide discretion to manage litigation).

if the joinder was proper, the court should order a severance in the interests of efficiency and justice. If the state court grants the severance without indicating which argument it based its ruling on, is the case removable? Either the federal court must grapple with these questions of state joinder rules—the very same questions that proponents of the Fifth Circuit's approach say the federal court is unequipped to answer—or the federal court must decide to dispense of any misjoinder analysis in favor of either accepting jurisdiction even if the claims were properly joined (trampling the plaintiff's rights in the process) or rejecting jurisdiction even if the claims were misjoined (trampling the defendant's rights in the process).[322] But allowing the federal court to sever misjoined parties does not threaten the voluntary-involuntary rule the same way that opposition to procedural misjoinder does.

C. *Assuming the Federal Court Can Sever the Claims, Which Joinder Rules Apply?*

This is, arguably, the most controversial unresolved question when it comes to procedural misjoinder. As Professor Percy notes, courts have "split on the issue of whether the federal or state joinder rule controls."[323] Courts have not reached a consensus in the nearly two decades since Professor Percy opined. The Eleventh Circuit applies Federal Rule 20 while the Fifth Circuit applies the state joinder rules. But despite being the most controversial, it is also the least consequential in the vast majority of cases.

1. Eleventh Circuit Approach: The Federal Joinder Rules Apply

At first blush, it appears misleading to say that the Eleventh Circuit's approach is to apply the federal joinder rules considering that, before applying Federal Rule 20 in *Tapscott*, the Eleventh Circuit noted that "Rule 20 of the Federal Rules of Civil Procedure is identical to Rule 20 of the Alabama Rules of Civil Procedure."[324] Nevertheless, following *Tapscott*, courts have seemingly taken it for granted that the

322 The response that the defendant should instead have only argued that the joinder was improper is unavailing. The concepts of waiver and forfeiture, along with the prohibition on successive motions in some jurisdictions, essentially mandate that the defendant make both arguments in the first motion.

323. Percy, *supra* note 10, at 574.

324. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1355 n.1 (11th Cir. 1996).

Eleventh Circuit applied the federal rule.[325] Thus, the Eleventh Circuit gets to be the standard bearer for applying Federal Rule 20—plus that preserves the symmetry of addressing the Eleventh Circuit approach, the Fifth Circuit approach, and then providing a resolution.

2. Fifth Circuit Approach: The State Joinder Rules Apply

As noted above, the Fifth Circuit held in *Williams* that the federal court could not sever the claims.[326] Part of the basis for this decision was its conclusion that procedural misjoinder "poses a challenging question as to the correct source of misjoinder law—federal or state."[327] According to the Fifth Circuit, this question arises from the tension between Rules 81 and 82 of the Federal Rules of Civil Procedure. Rule 81 says that the federal rules "apply to a civil action after it is removed from a state court."[328] Rule 82, on the other hand, says that the federal rules "do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."[329] The Fifth Circuit's holding that misjoinder issues should be addressed in state court prior to removal resolves these inconsistencies. Because the joinder is addressed in state court prior to removal, under the Fifth Circuit's approach, the state joinder rules apply.

3. Resolving the Differences: Misjoinder Should Be Determined Under the State Rules

It is important to note that in most cases this will not be an issue, however, as most state joinder rules are "modeled after the federal joinder rule that authorizes permissive joinder of parties when the claims brought by or against them arise 'out of the same transaction, occurrence, or series of transactions or occurrences' and give rise to a common question of law or fact."[330]

325. *E.g.*, Thakor v. Burlington Ins. Co., No. C 09-1465 SBA, 2009 WL 1974511, at *3 (N.D. Cal. July 8, 2009).

326. Williams v. Homeland Ins. Co. of N.Y., 18 F.4th 806, 817 (5th Cir. 2021).

327. *Id.*

328. FED. R. CIV. P. 81(c)(1).

329. FED. R. CIV. P. 82.

330. Percy, *supra* note 10, at 572 (quoting FED. R. CIV. P. 20(a)); *see also* Grennell v. W. S. Life Ins. Co., 298 F. Supp. 2d 390, 397 (2004) ("West Virginia rules regarding permissive joinder are substantially similar to their federal counterparts. Therefore, this Court need not decide whether to apply federal or state law regarding permissive joinder, as the two are identical in West Virginia.").

That being said, because this issue will arise in at least some instances,[331] it must be resolved to provide a comprehensive framework for procedural misjoinder. While both sides' arguments have some merit, the better argument is that the state joinder rules should apply. If the federal court begins with the presumption that the federal rules apply, then it is, in essence, beginning with a presumption that it has jurisdiction and testing only whether that presumption is flawed. Perhaps it is for this reason that most courts that apply the doctrine look to the state joinder rules.[332]

a. Applying the State Rules Provides Deference to the Plaintiff's Role as Master of His Complaint

As the Fifth Circuit recognized, applying the federal procedural rules "puts the cart before the horse" because "as with all federal rules, Rule 20 applies *after* a federal court has jurisdiction. "[333] It would make little sense to conclude that the plaintiff joined unrelated claims as a sham or for the purpose of defeating diversity jurisdiction if the joinder were permissible under the state court rules. Because the goal of procedural misjoinder is to defeat attempts to manipulate the federal court's jurisdiction, where the plaintiff was simply following the rules of his chosen forum, the doctrine does not apply.[334] And as one district court explained:

331. *E.g.*, *In re* Bridgestone/Firestone, Inc., 260 F. Supp. 2d 722, 730–31 (S.D. Ind. 2003) (applying state joinder rules but noting that the analysis probably would have been different under Federal Rule 20).

332. *E.g.*, V.V. v. Meta Platforms, Inc., No. 3:23-CV-284 (SVN), 2023 WL 3613232, at *8 (D. Conn. May 24, 2023) ("The district courts that have thoughtfully considered the question, however, have applied the relevant state procedural rule for permissive joinder, rather than Federal Rule of Civil Procedure 20, because the fraudulent misjoinder inquiry 'looks to whether the non-diverse party was misjoined in state court before removal.'" (quoting *In re* Fosamax Prod. Liab. Litig., No. 1:06-MD-1789 (JFK), 2008 WL 2940560, at *4 (S.D.N.Y. July 29, 2008))).

333. Williams v. Homeland Ins. Co. of N.Y., 18 F.4th 806, 817 (5th Cir. 2021) (emphasis in original) (citation omitted).

334. *See* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996) (speaking in terms of "fraudulent joinder of a resident defendant having no real connection with the controversy" and an "attempt to defeat diversity jurisdiction by fraudulent joinder"); *see also* Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 218 (1906) ("It is to remembered [sic] that we are not now dealing with joinders which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such

> the underlying purpose of the improper-joinder doctrine—to prevent plaintiffs from joining nondiverse or in-state defendants for the sole purpose of defeating diversity jurisdiction—is best served by applying the state rule. For when a plaintiff complies with state joinder rules, then the sole purpose of the joinder is not to improperly defeat diversity jurisdiction; the purpose, at least in part, is to comply with state rules that expressly allow such joinder. Indeed, it would make little sense to say that the party's joinder became fraudulent only after removal and only under the federal rule. Of course, the state rules may allow for broader joinder than the federal rules, but surely, a state is entitled to adopt broader joinder principles than those embodied in the Federal Rules, and a plaintiff should not lose his choice of forum as a result of complying with such a state regime.[335]

It also provides deference to the plaintiff's right as master of his complaint. Where a plaintiff chooses to file suit in state court, he is making the choice that the suit should be governed by state procedural rules and that choice should not be disturbed simply because the suit would not be allowed had he chosen to file suit in a different forum.[336] Or in the words of one court, "[i]t makes little sense to say that the . . . joinder became fraudulent *only after removal and only under*

action as will defeat attempts to *wrongfully* deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." (emphasis added)).

335. Delphis, L.P. v. NFLP Holdings, Ltd., No. 3:10-CV-01583-F, 2010 WL 11561744, at *8 (N.D. Tex. Nov. 3, 2010) (citations omitted); *see also* Asher v. Minn. Mining & Mfg. Co., No. Civ. A. 04CV522KKC, 2005 WL 1593941, at *7 n.3 (E.D. Ky. June 30, 2005) ("If the plaintiffs' claims were properly joined under state rules, then there was no basis for removing the action to federal court in the first place because there was no diversity jurisdiction.").

336. Conk v. Richards & O'Neill, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) ("[A]fter all, when [the plaintiff] filed his complaint in [state] court, he was not required to comply with the Federal Rules of Civil Procedure in terms of joinder of parties or claims or any other aspect of the case."); *In re* Pharm. Indus. Average Wholesale Price Litig., No. 01-12257-PBS, 2006 WL 8440330, at *3 (D. Mass. Jan. 9, 2006) ("Although *Tapscott* applied the federal rule without discussion, it makes more sense to assess whether the parties have been properly joined under the state rule because plaintiffs were only required to comply with the state rule when filing the complaint in state court.").

the federal rule."[337] But holding the plaintiff to the federal rules deprives the plaintiff of the right to structure his lawsuit in a manner permitted by the state court rules and intrudes upon the state court's right to set up its own litigation.

b. History and Tradition Support Applying the State Rules

History and tradition also support applying the state rules; in some sense, the Supreme Court resolved this question over a century ago. In *Alabama Great Southern Railway Co. v. Thompson*,[338] the plaintiff attempted to join the railway company and its employees in a wrongful death suit. Under the federal common law, there was some suggestion that a suit could not be prosecuted against an employer and employee when the sole basis of liability against the employer was vicarious liability for its employees' actions. Whether this joinder was permissible under Tennessee law, however, was unclear.[339] Summarizing the issue, the Supreme Court set forth the rule that resolves this issue of which joinder rules to apply:

> The Federal courts in some states hold a different rule as to the doctrine of fellow servants from that administered in the state courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the state permits an action to be prosecuted jointly which would be held to be several only in the courts of the United States.[340]

Because the state court may find the joinder was permissible, there was no question that the plaintiff was acting in good faith, and so his decision to pursue the action as one for joint liability would not be disturbed by the federal court, even if the joinder were not permitted under federal common law.

To the extent that *Thompson* did not resolve this issue, the Supreme Court's opinion in *Cincinnati, New Orleans, & Texas Pacific*

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337. Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003).

338. 200 U.S. 206 (1906).

339. *Id.* at 218–19.

340. *Id.* at 219–20.

Railway Co. v. Bohon does.[341] In *Bohon*, the Supreme Court, discussing another case, said while "the case did not show an attempt to remove, the discussion of the subject by the Chief Justice strongly intimates that if the action was properly joint in the forum in which it was being prosecuted, it could not be removed as a separable controversy under the act of Congress."[342] "A state has an unquestionable right by its Constitution and laws to regulate actions for negligence" and where the state gives the plaintiff leave to proceed jointly against multiple defendants, there is "nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein, properly joined in the action under the Constitution and laws of that state."[343] Even under the separable controversies language, the Supreme Court still instructed that courts look to whether the state court would deem the dispute separate controversies or one controversy because a state may decide to regulate suits in its state courts. That same right extends to the state's right to decide how claims may be joined in its courts.

c. Arguments For Applying the Federal Rules Are Easily Refuted

Proponents of applying the federal rules generally fall into three camps. Some argue that the federal courts are not equipped to resolve questions of state procedural law. Others argue that jurisdictional issues must be decided on a national basis, irrespective of local laws. Still others argue that because joinder is a procedural issue, *Erie* commands that the federal rules apply. None are convincing.

The most common argument in favor of applying the federal rules is that federal courts are not equipped to resolve questions of state procedural law. But federal courts routinely interpret state rules of civil procedure in deciding motions to remand.[344] Federal courts must already interpret state joinder rules when they determine "if any

341. 200 U.S. 221, 225 (1906).

342. *Id.* at 225 (discussing S. Ry. Co. v. Carson, 194 U.S. 136 (1904)).

343. *Id.* at 226.

344. *E.g.*, *In re* Roundup Prods. Liab. Litig., 396 F. Supp. 3d 893, 897 (N.D. Cal. 2019) ("Thus, although this Court certainly agrees with Judge Smith's severance ruling, that ruling does not particularly help Monsanto in this context. Monsanto needs instead to show that the joinder of the plaintiffs was in obvious violation of California's joinder rules (which, incidentally, are more permissive than the federal rule).").

of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought."[345] To argue that federal courts cannot interpret state procedural rules means that the federal courts must also refrain from determining if the forum state defendant rule applies. Prior to the 1949 amendments to the removal statute, timeliness of a defendant's removal was determined by reference to state practice.[346] Federal courts also looked to state rules for necessary and indispensable parties.[347] In each of these cases, the federal courts were required to interpret state procedural rules and did so without intruding on the state courts' rights. But even if federal courts may have some difficulty interpreting state procedural rules, as Professor Percy puts it, this "byproduct of the fraudulent misjoinder doctrine, however, simply cannot be avoided on the grounds of inconvenience or judicial economy."[348]

Other proponents of applying the federal joinder rules point to the Supreme Court's statement in *Grubbs* that federal law "must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."[349] Although seemingly appealing, the Supreme Court later clarified that the federal rules "must be deemed to apply *only if their application will not impermissibly expand the judicial authority conferred by Article III*."[350] *Grubbs*, thus, does not support application of the federal rules if applying those rules would increase the federal court's jurisdiction.

Nonetheless, Professors Hines & Gensler argue that following *Grubbs* dicta makes sense because the "point of procedural misjoinder is not for federal judges to enforce state joinder rules. It is to provide

345. 28 U.S.C. § 1441(b)(2) (emphasis added).

346. Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 100 (1898). The rule was that the defendant must file the petition for removal before "the defendant is required by the laws of the state, or by rule of the state court in which such suit is brought to answer." *Id.* This necessarily required the federal courts to construe state procedural rules. *Id.*; *see also* Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 351 (1999) (federal court must construe state procedural rules for service of process).

347. Platte Cnty. v. New Amsterdam Cas. Co., 6 F.R.D. 475, 482 (D. Neb. 1946) ("The court will therefore look to the law of Nebraska in determining whether W. L. Boettcher, or his representatives, are necessary or indispensable parties to the instant actions.").

348. Percy, *supra* note 10, at 605.

349. *E.g.*, Hines & Gensler, *supra* note 11, at 815–16 (citing Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972)).

350. Willy v. Coastal Corp., 503 U.S. 131, 135 (1992) (emphasis added).

a remedy when joinder in state court is unfairly restricting access to the federal courts. Whether the state thinks the party structure is acceptable is wholly beside the point."[351] But is that wholly beside the point? Or is the point that federal courts "may and should take such action as will defeat attempts to *wrongfully* deprive parties entitled to sue in the federal courts of the protection of their rights in those tribunals"?[352] Only the latter respects the federalism and state sovereignty concerns that underlie our dual judicial system.[353] At a minimum, it strikes a better balance between the plaintiff's right to choose the forum and the defendant's right of removal. Applying the federal rule requires not only that for the plaintiff to ensure joinder is proper in its chosen forum, but also that the joinder is proper in a different forum despite not knowing if the defendant will even attempt to remove the case.

Finally, some proponents of applying the federal rules frame the issue as a question of fidelity to *Erie*'s command that state substantive law and federal procedural law apply in a suit removed on the basis of diversity.[354] But rather than provide support for applying the federal rules, *Erie* further clarifies that state joinder rules should apply.[355]

As the Supreme Court explained in *Guaranty Trust Company of New York v. York*,[356] it is "immaterial whether statutes of limitations are characterized either as 'substantive' or 'procedural,'" because *Erie* "was not an endeavor to formulate scientific legal terminology."[357]

351. Hines & Gensler, *supra* note 11, at 814–15. Professors Hines and Gensler admit that their proposed formulation "asks Rule 20 to shoulder a jurisdictional gatekeeping role that it was never designed to serve." *Id.* at 823.

352. Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 218 (1906) (emphasis added).

353. *See* Johnson v. Celotex Corp., 701 F. Supp. 553, 556 (D. Md. 1988) ("Although removal statutes are to be strictly construed with regard to the jurisdiction of state courts, proper removal does no violence to state-federal relations, and a court should not permit a plaintiff's trial tactics to deprive a non-resident defendant of a valid statutory right to removal where such is timely implemented.").

354. *E.g.*, Coleman v. Conseco, Inc., 238 F. Supp. 2d 804, 815–16 (S.D. Miss. 2002); *see also* Miller, *supra* note 317, at 291 ("The rationale offered by these courts in support of the application of federal rules of procedure invokes an *Erie*-type choice, even if the Supreme Court's decision in *Erie* is not referred to by name.").

355. And as some have pointed out, the question is actually one of subject-matter jurisdiction, and "[t]he procedural rules are simply used as proxies to answer that subject-matter jurisdiction question." Charles W. Oldfield, *Fraudulent Joinder, Federalism, and the Twombly/Iqbal Problem*, 108 KY. L.J. 431, 445 (2020).

356. 326 U.S. 99 (1945).

357. *Id.* at 109.

Rather, the intent of *Erie* "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."[358]

Later, in *Hanna v. Plumer*,[359] the Supreme Court reiterated that *Erie* "cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[360] Evaluating joinder under the state rules in a lawsuit filed in state court neither encourages forum shopping nor produces inequitable results. Just the opposite. Allowing a defendant to remove a case that was procedurally proper under the joinder rules of the plaintiff's chosen forum simply because it would not be proper under a different forum's joinder rules would be what encourages forum shopping and produces inequitable results. *Erie*'s underlying rationales support applying the state rules.[361]

D. *What Should the Federal Court Do With the Non-Diverse Defendant?*

1. Eleventh Circuit Approach: The Federal Court Should Sever and Remand the Non-Diverse Claims

Under the Eleventh Circuit's approach, the federal court should sever and remand the non-diverse claims. In *Tapscott*, the Eleventh Circuit affirmed the district court's decision to sever the claims and remand those against the non-diverse defendants.[362] The court never explored the correctness of this decision, but accepting that the joinder was so egregious as to be fraudulent, the district court had little

358. *Id.*

359. 380 U.S. 460 (1965).

360. *Id.* at 468.

361. This is particularly true considering the Supreme Court's acknowledgment that a federal court "need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts." *Id.* at 473 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1941)).

362. Tapscott v. MS Dealer Serv. Corp.,77 F.3d 1353, 1360 (11th Cir. 1996); *see also* Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1289 (11th Cir. 1998) ("There is precedent for bifurcating a class or severing claims where the claims are separable and have no logical connection.").

choice.[363] It couldn't use that joinder as a basis to exercise jurisdiction over the non-diverse claims. District courts in the Eleventh Circuit have explained that this power stems from Federal Rule 21, which they say "permits federal courts to 'sever any claim against any party,' even for the purpose of retaining jurisdiction."[364]

2. Fifth Circuit Approach: Nothing, the State Court Has Already Done It

Under the Fifth Circuit's approach, this question is somewhat superfluous. If the state court has already severed the claims, then only one of the two severed cases will be removed. If the severed case involving the jurisdictional spoiler is removed, the answer is obviously remand. Comparatively, if the severed case not involving the jurisdictional spoiler is removed, the federal court should exercise jurisdiction. Accordingly, under the Fifth Circuit approach the federal court has nothing to do except exercise jurisdiction over the removed case.

3. Resolving the Differences: The Federal Court Should Sever and Remand the Non-Diverse Claims

In the traditional improper joinder context, the federal court has determined that there is no reasonable basis for the claim against the misjoined party. Therefore, there is no harm in dismissing the fraudulently joined party. The same is not necessarily true in the procedural misjoinder context.[365] The plaintiff may have valid claims against the jurisdictional spoiler that are simply unrelated to the plaintiff's claims against the diverse defendant.

Fortunately for proponents of procedural misjoinder, 28 U.S.C. § 1447's command that "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded" is not co-extensive with 28 U.S.C. § 1441's direction that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed

363. *See* Tapscott v. MS Dealer Serv. Corp., No. CV-94-PT-02027-S, 1994 WL 910953, at *1 n.1 (N.D. Ala. Nov. 1, 1994) ("In fact, the retention of such claims would likely contravene 28 U.S.C. § 1367(b).").

364. *E.g.*, Formosa v. Lowe's Home Ctrs., Inc., 806 F. Supp. 2d 1181, 1187 (N.D. Ala. 2011) (quoting Ingram v. CSX Transp., Inc., 146 F.3d 858, 862 (11th Cir. 1998)).

365. Percy, *supra* note 10, at 620.

by the defendant . . . ."[366] Section 1447, which the Supreme Court noted is entitled "[p]rocedure after removal generally," "deals not with the question of what is removable, but with procedures that a federal court is to follow after removal occurs."[367] In *Wisconsin Department of Corrections v. Schacht* the Supreme Court affirmed the district court's order remanding claims barred by sovereign immunity while retaining claims that were not.[368]

Where a civil action contains what should be, under the state's joinder rules, two cases, the district court can and should sever the action into two cases, retain jurisdiction over the case in which there is complete diversity, and remand the case over which there is not complete diversity. Doing so offends neither the Congressional intent as expressed in the removal statutes nor the Constitutional separation of powers between state and federal courts. Rather, it serves to further Congress's intent in "creat[ing] the removal process to protect defendants."[369] As the Fourth Circuit explained, Congress "did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it."[370]

IV. COURTS SHOULD RECOGNIZE PROCEDURAL MISJOINDER AS NECESSARY TO PROTECT A DEFENDANT'S RIGHT OF REMOVAL

The procedural misjoinder doctrine is "based on the same proposition as the traditional fraudulent joinder doctrine: Courts should not permit plaintiffs to wrongfully defeat a defendant's

366. Wisc. Dep't of Corr. v. Schacht, 524 U.S. 381, 392 (1998).

367. *Id.*

368. *Id.* at 392–93. *Schacht* arose in the Eleventh Amendment context and expressly contrasted sovereign immunity with diversity. *Id.* at 390–91. Yet it also made clear that its discussion of statutory interpretation was an *additional* argument from the analogy argument it had just rejected. *See id.* at 391 ("We must consider one further argument that respondent has made. That argument is not based upon an analogy but upon the specific language of a particular statutory provision, 28 U.S.C. § 1447(c)."). Thus, although a cursory review of *Schacht* may appear that it has no bearing on diversity removals, its discussion of a district court's power to remand certain claims while retaining others can be applied in the diversity removal context.

369. McKinney v. Board of Trustees of Maryland Comm. Coll., 955 F.2d 924, 928 (4th Cir. 1992).

370. *Id.*; *see also* Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 355 (1999) ("[N]othing would justify our concluding that the drafters, *in their quest for evenhandedness in the removal process*, intended to abrogate the necessity of something as fundamental as service of process." (emphasis added) (quoting Silva v. Madison, 69 F.3d 1368, 1376-77 (7th Cir. 1995))) .

statutory right to remove a civil case based on diversity jurisdiction."[371] The idea that diversity jurisdiction is intended for the benefit of plaintiffs and defendants has existed since *Hunter's Lessee* in 1816.[372] Likewise, the idea that plaintiffs should not be able to structure their lawsuits to wrongfully defeat a defendant's right of removal has existed since at least *Plymouth Consolidated* in 1886.[373]

Beyond the historical basis for adopting procedural misjoinder, there is also a textual basis for it. The diversity jurisdiction statute provides "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different states."[374] Applying the series-qualifier canon of statutory construction, it is clear that the word "matter in controversy" applies both to the requirement that it exceed $75,000 and that it be between citizens of different states.[375] Courts routinely recognize that the "matter in controversy," as it applies to the $75,000 requirement, applies to the claims between one plaintiff and one defendant unless the claims are interrelated such that liability may be joint and several.[376] Yet when deciding if the "matter in controversy" is between citizens of different states, courts look to the citizenship of all plaintiffs and the citizenship of all defendants.[377] It defies nearly every canon of construction to conclude that "matter in controversy" means one thing in the first part of 28 U.S.C. § 1332(a) but, somehow, its meaning transforms after the word "and."[378] Yet, courts routinely treat the "matter in controversy" as if it has distinct meanings depending on which part of the sentence they are looking at. Professor Woolley at the University of Texas posits that this is because courts failed to appreciate the difference between the scope of an action at common law and the

371. Percy, *supra* note 10, at 576.

372. 14 U.S. 304.

373. 118 U.S. 264.

374. 28 U.S.C. § 1332(a)(1).

375. *Cf.* Facebook, Inc. v. Duguid, 592 U.S. 395, 402–03 (2021) (describing the series-qualifier canon).

376. *See* E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 933 (2d Cir. 1998); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (creating an exception to the rule against aggregation of claims in the class action context).

377. Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89 (2005); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

378. Patrick Woolley, *Diversity Jurisdiction and the Common-Law Scope of the Civil Action*, 99 WASH. U. L. REV. 573, 586 (2021) ("The same civil action cannot plausibly have one scope for purposes of the amount-in-controversy requirement and a separate scope for purposes of the diversity-of-citizenship requirement.").

scope of an action under the Federal Rules of Civil Procedure.[379] His concerns mirror those in this Article: that the reason the voluntary-involuntary rule and improper joinder doctrine are so confusing is because courts failed to take into account the context of early Supreme Court decisions establishing those doctrines.[380]

Still, the rule requiring complete diversity makes sense in most instances, even if it is not an entirely faithful reading of the statute, to avoid piecemeal litigation. But its logic falls apart when a plaintiff is able to join two wholly distinct claims to defeat federal jurisdiction. In that instance, there is not a single "matter in controversy" but rather multiple, unrelated matters in controversy. If the diverse defendant can show that the claims against him satisfy the requirements of § 1332(a), then as to that specific matter in controversy, he should be able to remove the claims against him. Adopting procedural misjoinder would not be a usurpation of jurisdiction by the federal court.[381]

Courts should, consistent with the Supreme Court's dicta in *Powers*, *Thompson*, *Wecker*, and *Wilson*, "take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the federal courts of the protection of their rights in those tribunals."[382] This includes recognizing that procedural misjoinder is just as necessary as its cousin, improper joinder, and adopting procedural misjoinder. This Article provides a framework for courts to do so that is consistent with long-standing Supreme Court precedent, balances the rights of plaintiffs and defendants, and avoids the need for complex and fact-intensive satellite litigation about jurisdiction.

CONCLUSION

In the nearly thirty years since *Tapscott*, the lower courts have failed to reach a consensus on procedural misjoinder. The Eleventh

379. *Id.* ("Thus, a full understanding of the statutory text and the settled law governing the amount-in-controversy requirement casts serious doubt on the modern assumption that the relevant civil action for purposes of the complete-diversity requirement is the civil action authorized by the Federal Rules.").

380. *See supra* notes 23–40 and accompanying text.

381. *See supra* notes 236–54 and accompanying text; *see also* Carneal v. Banks, 23 U.S. (10 Wheat.) 181, 188 (1825) (Marshall, C.J.) ("[T]hat they have been improperly made defendants in his bill, cannot affect the jurisdiction of the Court as between those parties who are properly before it."); Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152 (1914) ("[T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy.").

382. Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 218 (1906).

Circuit, as the originator of the doctrine, has remained its champion. The Fifth Circuit, long thought to have embraced the doctrine, has emphatically rejected it. The other circuits have steadfastly refused to take a position, leaving it to each district and judge to determine for themselves whether to exercise jurisdiction in the face of efforts to defeat diversity jurisdiction by flouting the joinder rules. This has resulted in a fractured morass where, in some places, the only way for a defendant to find out if a case is removable is to file its notice and wait to see which judge is randomly assigned the case. It goes without saying that this is an untenable situation.

Commentators on both sides of the debate agree that, at a minimum, the Supreme Court should intervene and establish a framework for the lower courts.[383] This Article joins the call, advocates for the Supreme Court to adopt procedural misjoinder, and proposes a framework by which courts can apply it.

383. *See* Percy, *supra* note 10, at 621 ("In light of the significant rise in procedural misjoinder litigation, it is crucial for courts to clearly define and articulate the contours of the emerging fraudulent misjoinder doctrine, both to protect diverse defendants' rights to remove, and to ensure that federal district courts do not overstep the bounds of their limited jurisdiction and intrude on that of state courts."); Parsons, *supra* note 105, at 70 ("And though perhaps not in the highest stratosphere of priority in our steadily collapsing universe of unresolved procedural questions, it is surely an issue that merits resolution. As demonstrated above, the federal district courts have produced widely disparate results when asked to declare that state law claims have been procedurally misjoined.").