

## IN SEARCH OF REMOVAL JURISDICTION

Scott Dodson\*

I.	INTRODUCTION.....	55
II.	FRAMING JURISDICTIONAL CHARACTERIZATIONS .....	59
	A. <i>A Primer on Jurisdiction</i> .....	59
	B. <i>Jurisdictional Possibilities in the Removal Statutes</i> .....	61
III.	CONSTRUCTING A FRAMEWORK FOR RESOLVING THE JURISDICTIONAL CHARACTERIZATION ISSUES IN REMOVAL.....	66
	A. <i>Congressional Designation of Jurisdiction</i> .....	66
	B. <i>The Functions of the Provision</i> .....	71
	C. <i>The Effects of the Characterization</i> .....	77
	D. <i>Doctrinal and Cross-Doctrinal Consistency</i> .....	78
IV.	A CASE STUDY IN JURISDICTIONAL CHARACTERIZATION: THE FORUM DEFENDANT RULE.....	79
	A. <i>The Lively v. Wild Oats Markets, Inc. Litigation</i> .....	80
	B. <i>The Other Side of the Split: The Hurt v. Dow Chemical Co. Litigation</i> .....	84
	C. <i>How the Framework Provides a More Reasoned Approach</i> .....	85
V.	CONCLUSION AND THOUGHTS FOR THE FUTURE.....	88

### I. INTRODUCTION

“Jurisdiction,” it has been bemoaned, “is a word of many, too many, meanings.”<sup>1</sup> For some, it means nothing more than any other authorization or limit.<sup>2</sup> For others, the term denotes something more fundamental and

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\* Assistant Professor of Law, University of Arkansas. Thanks to Kimberly Brown, Paul Carrington, Mark Graber, Alex Lees, Brian W. Portugal, Philip Pucillo, Steve Sheppard, Gordon Silverstein, and Howard Wasserman for comments on prior drafts. This Article was presented at the Southeastern Association of Law Schools annual conference in August 2007.

<sup>1</sup> *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted).

<sup>2</sup> See, e.g., Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1613–14, 1620 (2003) (arguing that there is no conceptual difference between jurisdiction and merits because both deal with demarcating the legitimate authority of a court).

represents the legitimate power of a court.<sup>3</sup> The latter is the traditional view,<sup>4</sup> and the Supreme Court has long adhered to it.<sup>5</sup>

The classification of statutes as jurisdictional or procedural—what this Article calls “jurisdictional characterization”—has important consequences for litigants. Questions of subject matter jurisdiction in federal court, unlike merits questions or procedural irregularities, can be raised by any party or the court *sua sponte*; may not be consented to by the parties; are not subject to principles of estoppel, forfeiture, or waiver; and may be raised at any time, including for the first time on appeal.<sup>6</sup> In the common first-year civil procedure case of *Capron v. Van Noorden*,<sup>7</sup> for example, the Supreme Court, on an appeal by the plaintiff, reversed a judgment against the plaintiff for lack of diversity jurisdiction because the plaintiff had failed to allege his own diverse citizenship.<sup>8</sup>

Of additional importance for my purposes here, the distinction has specific statutory implications in the removal context. If a federal district court determines at any time prior to final judgment that it lacks subject matter jurisdiction over a removed case, the case must be remanded.<sup>9</sup> Nonjurisdictional defects in removal, however, must be raised within thirty days of removal or are forfeited.<sup>10</sup> This particular feature of removal pressures plaintiffs who prefer to litigate in state court to discover procedural defects in removal quickly, as opposed to jurisdictional defects, which can be raised at a later stage.

Thus, whether a particular question is jurisdictional or not means a great deal. The problem is that determining whether a particular issue is jurisdictional is often difficult. And the ubiquitous and somewhat careless

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<sup>3</sup> See, e.g., Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981) (“The concept of subject-matter jurisdiction in our legal system refers to the motive force of a court, the root power to adjudicate a specified set of controversies.”).

<sup>4</sup> See THE FEDERALIST NO. 81, at 551 n.\* (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that jurisdiction is the power of “speaking or pronouncing . . . the law”).

<sup>5</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) (defining jurisdiction as “the power of the courts to entertain cases concerned with a certain subject”); *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (Holmes, J.) (“The foundation of jurisdiction is physical power . . . .”); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”).

<sup>6</sup> See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

<sup>7</sup> 6 U.S. (2 Cranch) 126 (1804).

<sup>8</sup> *Id.* at 126–27.

<sup>9</sup> 28 U.S.C. § 1447(c) (2000).

<sup>10</sup> *Id.*

use of the term jurisdictional by the Supreme Court and lower courts<sup>11</sup> has spawned confusion over what is and is not jurisdictional.<sup>12</sup>

Perhaps partly in response to this confusion, the Court, in recent years, has begun resolving jurisdictional characterization issues outside the removal context. For example, the Court has held that the time to file a notice of appeal is jurisdictional,<sup>13</sup> whereas generic time bars in rules promulgated under the Rules Enabling Act<sup>14</sup> or in substantive statutes are not jurisdictional.<sup>15</sup> The Court also has held that the definition of “employer” in Title VII is an element of proof of the substantive claim rather than a jurisdictional condition.<sup>16</sup>

The Court’s clarifications in these areas, however, do not extend comfortably to the removal statutes.<sup>17</sup> Unlike the time limit for filing a notice of appeal, the removal provisions are a convoluted scheme that lacks a single, uniform historical pedigree of consistent jurisdictional treatment.<sup>18</sup> Unlike the Federal Rules, the removal statutes are not constrained by the limita-

<sup>11</sup> *Bowles v. Russell*, 127 S. Ct. 2360, 2363 n.2 (2007) (criticizing “this Court’s past careless use of [jurisdictional] terminology. . .”); *id.* at 2367 (Souter, J., dissenting) (“This variety of [jurisdictional] meaning has insidiously tempted courts, this one included, to engage in less than meticulous, sometimes even profligate use of the term.” (internal quotation marks, citations, and ellipses omitted)); *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 127 S. Ct. 1184, 1193 (2007) (admitting that phrases from prior precedent using the term “jurisdiction” were “less than felicitously crafted” (internal quotation marks omitted)); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (confessing that federal courts, itself included, had “sometimes been profligate in its use of the term [jurisdictional]”); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (noting that the lower court’s improper characterization of a federal rule as jurisdictional “is an error shared among the circuits, and that it was caused in large part by imprecision in our prior cases”); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (“Courts, including this Court, it is true, have been less than meticulous . . . ; they have more than occasionally used the term ‘jurisdictional’ to describe emphatic time prescriptions in rules of court.”).

<sup>12</sup> For discussions of the lower court confusion over the jurisdictional characterization of certain issues, see generally Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1 (1994) (discussing the jurisdictional characterization of deadlines); Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399 (1986) (discussing the jurisdictional characterization of the time to appeal); Philip A. Pucillo, *Rescuing Rule 3(c) from the 800-Pound Gorilla: The Case for a No-Nonsense Approach to Defective Notices of Appeal*, 59 OKLA. L. REV. 271 (2006) (discussing the jurisdictional characterization of the contents of a notice of appeal); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005) (discussing the distinctions between jurisdictional elements of a statute and merits elements); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457 (2006) (addressing jurisdictional characterization issues generally).

<sup>13</sup> See *Bowles*, 127 S. Ct. at 2362.

<sup>14</sup> 28 U.S.C. § 2072 (2000).

<sup>15</sup> See *Eberhart*, 546 U.S. at 13; *Scarborough v. Principi*, 541 U.S. 401, 414 (2004); *Kontrick*, 540 U.S. at 454–55; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). For more detail on the reasoning in these and other non-removal cases, see *infra* text accompanying notes 94–118.

<sup>16</sup> See *Arbaugh*, 546 U.S. at 515.

<sup>17</sup> I use the term “removal statutes” generically. There is a general removal statute found in 28 U.S.C. §§ 1441–47 (2000). There also are additional rights of removal or prohibitions of removal specified in narrower circumstances. The term “removal statutes” refers to all of these provisions.

<sup>18</sup> See *infra* text accompanying notes 124–27.

tions in the Rules Enabling Act, but rather are themselves quasi-judicial.<sup>19</sup> Unlike time bars, statutes of limitations, and merits elements, which generally run with the substantive merits or are tied to historical considerations of equity, the removal statutes generally are not tied to the merits of a claim and implicate significant federalism concerns.<sup>20</sup> In addition, the characterization of removal provisions contains a unique consequence: all defects in removal other than a lack of subject matter jurisdiction must be raised within thirty days of removal or be forfeited.<sup>21</sup>

In short, the Court's recent pronouncements in these specific areas do not answer conclusively the jurisdictional characterization issues in the removal statutes. Yet the Court continues to avoid addressing the removal issues. Indeed, earlier this year, the Court denied certiorari in a case that would have addressed a jurisdictional characterization issue in the removal statute<sup>22</sup>—the “forum defendant rule,” the very issue that I showcase later in this Article.

In light of the confusion that still surrounds removal characterization issues, the Court's failure to address them, and the critical practical effects they have for litigants and the judicial system, now is the time to start developing a methodical, reasoned framework for resolving the complicated characterization issues in removal. Beginning a conversation about that development and laying some initial groundwork is the modest task of this Article.

In this first Part, I have introduced the problem of jurisdictional characterizations and the specific jurisdictional and procedural character of the removal statutes. In Part II, I take a close look at the removal statutes and describe select portions that reasonably could be described as either jurisdictional or procedural, setting the stage for the later analysis. Part III methodically develops a framework for tackling the characterization issues in the removal statutes, synthesized from previous clarifications and modified to account for the quasi-judicial nature of removal and its implications for federalism. I intend it to be the initial groundwork for resolving these issues and to invite additional discussion. In that spirit, Part IV uses the “forum defendant rule” of § 1441(b) as a case study for demonstrating how the initial framework developed in Part III provides a more reasoned basis for resolving the jurisdictional characterization issues than the confused approaches taken by the courts of appeals. Finally, in Part V, I conclude with some additional thoughts for the future, including how my framework

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<sup>19</sup> See *infra* text accompanying notes 105–12.

<sup>20</sup> See *infra* text accompanying notes 76–93.

<sup>21</sup> See 28 U.S.C. § 1447(c).

<sup>22</sup> See *Lively v. Wild Oats Mkts., Inc.*, 127 S. Ct. 1265 (2007). In the interest of full disclosure, I was one of the attorneys assisting Ms. Lively on her petition for certiorari, along with Jeff Fisher and Pam Karlan of Stanford Law School (Supreme Court Litigation Clinic), Amy Howe of Howe & Russell, P.C., and Lenny Tavera of Lowle, Denison, Smith & Tavera, LLP.

might affect jurisdictional questions that are currently debated, as well as others that have yet to be confronted.

## II. FRAMING JURISDICTIONAL CHARACTERIZATIONS

A discussion of the characterization issues in the removal statutes cannot begin without a primer on jurisdiction and a summary of the removal statutes.

### A. *A Primer on Jurisdiction*

As a formal matter, jurisdiction is the power or authority of a court to issue legitimate, binding, and enforceable orders. Procedure is the regulation of that power or authority once obtained. These concepts are not always simple to separate, and, as Evan Tsen Lee argues, may be analytically indistinguishable.<sup>23</sup> Nevertheless, as Perry Dane has stated, “Law is a world of words. Law also depends upon a singular confidence in the power of words. . . . [One aspect] is its belief that legal ideas and categories are real things,”<sup>24</sup> such as, in his words, “[t]he Idea of Jurisdiction.”<sup>25</sup> That is, a separation of jurisdiction from nonjurisdiction matters—even Lee acknowledges that that historical distinction, whether a true distinction or not, is indelible<sup>26</sup>—and thus the historical differences between what is jurisdictional and what is not must drive the inquiry.

As “power,” jurisdiction embodies societal values, such as federalism, separation of powers, and a limited national government.<sup>27</sup> All are relevant to removal. With respect to federalism, removal takes a case properly filed in state court away from state authority, ending that state authority abruptly and without recourse from the state, and places the case under the authority of a federal court.<sup>28</sup> With respect to separation of powers, removal reflects

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<sup>23</sup> See Lee, *supra* note 2, at 1614–15 (outlining the argument that “jurisdiction is conceptually indistinct from the merits”).

<sup>24</sup> Dane, *supra* note 12, at 3.

<sup>25</sup> *Id.* at 21; see also Lees, *supra* note 12, at 1461 (suggesting that the term can be used expressively to emphasize clear divisions between law-speaking institutions).

<sup>26</sup> Lee, *supra* note 2, at 1628 (noting that “[c]enturies of Anglo-American jurisprudence” have relied on “something called ‘jurisdiction’” and that abolishing the jurisdictional doctrines would undermine “[t]he relative consensus underlying the legal order”).

<sup>27</sup> See Dane, *supra* note 12, at 36–37 (“Commentators sometimes say that parties cannot control jurisdictional issues because jurisdictional rules embody societal interests that go beyond the interests of the parties and that none of the parties might have an adequate incentive to advance. For example, both parties to a lawsuit might prefer their case to be heard in a fast, efficient, clean federal court [rather] than in a slow, clumsy, dingy state court. But the larger social interest in federalism might dictate otherwise.”); Hall, *supra* note 12, at 423 (referencing “important political principles that underlie the jurisdictional limits in a federal system”); see also Lees, *supra* note 12, at 1460 (proposing reserving “jurisdictional” for those limits that divide authority between law-speaking institutions, such as state and federal courts, the judiciary and the other branches, or trial and appellate courts).

<sup>28</sup> See generally 28 U.S.C. §§ 1441–47 (2000).

the authority of Congress under Article III to control the jurisdiction of the lower courts.<sup>29</sup> And, with respect to a limited national government, removal broadens the scope of federal authority at the expense of state courts of competent jurisdiction and the plaintiff's choice of forum.

Procedure, on the other hand, is regulation of a court's lawful exercise of power. Procedure deals not with whether but with how. In contrast to the jurisdictional separation of authority among institutions, procedure serves the largely litigant and systematic values of efficiency, cost-effectiveness, autonomy, predictability, and fairness. It is true that, in serving litigant values, procedural rules also promote broader societal values, but these generally are secondary effects of the procedural rules.<sup>30</sup>

Jurisdiction and procedure have functional differences as well. Defects in subject matter jurisdiction cannot be forfeited, waived, or consented to; they are not subject to principles of estoppel; and they can be raised at any time and by any party, including a court *sua sponte*.<sup>31</sup> Procedural defects, on the other hand, usually are waivable, may be avoided, and are the sole responsibility of the litigants. In the removal context, the distinction has a statutory effect: procedural defects must be raised in a motion to remand within thirty days after removal or they are waived.<sup>32</sup>

One of the reasons for the functional differences is that the adversarial process relies on litigants to assert those procedural rights or values that they deem worthy to raise, thereby promoting judicial efficiency by requiring resolution of only those issues deemed worthy of decision by the parties.<sup>33</sup> Jurisdictional rules, on the other hand, protect the larger societal interests discussed above, even when they are not deemed worthy of protection by the litigants.<sup>34</sup> As Perry Dane has put it, "both parties to a lawsuit might prefer their case to be heard in a fast, efficient, clean federal court [rather] than in a slow, clumsy, dingy state court. But the larger social interest in federalism might dictate otherwise."<sup>35</sup>

Another reason for the functional differences is that the values served by the procedural rules may not be promoted by strict application of the procedural rules and, indeed, may be hindered in certain situations by their strict application. If the procedural rule in question is designed to promote fairness or equitable administration, then it is reasonable to allow courts to bend or break the procedural rules in certain cases when equity or fairness demands it.

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<sup>29</sup> U.S. CONST. art. III, § 1.

<sup>30</sup> See Lees, *supra* note 12, at 1488 ("Those broad societal ends are ancillary concerns of [procedural] rules, and, moreover, those ends can be accomplished in any number of ways.").

<sup>31</sup> See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

<sup>32</sup> See 28 U.S.C. § 1447(c) (2000).

<sup>33</sup> Hall, *supra* note 12, at 419.

<sup>34</sup> *Id.*

<sup>35</sup> Dane, *supra* note 12, at 36–37.

In short, jurisdiction and procedure have both formal and functional differences. With these differences in mind, I now turn to analyzing the jurisdictional and procedural character of the removal statutes.

### B. *Jurisdictional Possibilities in the Removal Statutes*

Analyzing the removal statutes from a jurisdictional vantage point is facilitated by classifying the various provisions into three rough categories: (1) those that permit removal to the extent of original jurisdiction, (2) those that expand jurisdiction, and (3) those that narrow removal authorization (and consequently could be seen as narrowing jurisdiction).

First, there are what I call “derivative jurisdiction” provisions.<sup>36</sup> Section 1441(a), under the section title of “Actions Removable Generally,” states:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.<sup>37</sup>

If this is a grant of jurisdiction to the federal courts,<sup>38</sup> it is derivative of original federal jurisdiction already granted elsewhere. Section 1441(a) permits removal only of cases that a federal court could assert jurisdiction over *ex ante*. Indeed, § 1441(a) incorporates the well-pleaded complaint rule,<sup>39</sup> the complete diversity rule,<sup>40</sup> and rules for calculating the amount in controversy,<sup>41</sup> all of which have been judicially grafted onto the general

<sup>36</sup> I use this term differently from the way it has been used in the removal context in the past. Prior to the 1986 amendments to the general removal statute, courts considered federal removal jurisdiction to exist only derivatively to original state court jurisdiction. Under this doctrine of derivative jurisdiction, removal was effective only if the state court had jurisdiction over the case in the first instance. *See Lambert Run Coal Co. v. Balt. & Ohio R.R.*, 258 U.S. 377, 382 (1922). The 1986 amendments eliminated that doctrine of derivative jurisdiction, at least in the context of 28 U.S.C. § 1441. *See* Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986) (codified at 28 U.S.C. § 1441(f)). I use the term “derivative jurisdiction” differently here to refer to federal removal authority that is coextensive with original *federal* jurisdiction.

<sup>37</sup> 28 U.S.C. § 1441(a).

<sup>38</sup> But is it? Is removal at all jurisdictional? After all, the Constitution speaks only of original and appellate (but not removal) jurisdiction. It strikes me that perhaps removal “jurisdiction” is not an affirmative form of “jurisdiction” at all but instead is merely a nonjurisdictional procedure for bringing a case already within federal original or appellate jurisdiction before a federal court. This question is intriguing, but it seems to lead to an entirely different kind of argument than the one I make here, for even if removal is not a separate grant of jurisdiction, nothing precludes Congress from using its Article III powers to enact removal statutes that *restrict* the original or appellate jurisdiction that is granted elsewhere.

<sup>39</sup> *See* *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 n.2 (2002); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10–11 & n.9 (1983).

<sup>40</sup> *See* *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996).

<sup>41</sup> *See* *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291–92 (1938).

original jurisdiction grants in § 1331 and § 1332.<sup>42</sup> Other examples of derivative jurisdictional provisions include the removal provision in the Class Action Fairness Act of 2005<sup>43</sup> and the removal provision for bankruptcy actions.<sup>44</sup>

In these cases, if there would be original subject matter jurisdiction, there is removal jurisdiction under these provisions; contrapositively, if there is no removal jurisdiction, there could never have been original subject matter jurisdiction either. Regardless of whether the act of removal is procedural or not, the practical effects are the same because any defect ultimately is one of jurisdiction.<sup>45</sup>

Second, there are undeniable grants of jurisdiction, which are provisions permitting a particular case that could not have been heard in federal court originally to be heard there by removal. For example, § 1441(c) allows for removal of “otherwise non-removable claims or causes of action” that are joined with “a separate and independent claim or cause of action within the jurisdiction conferred by section 1331.”<sup>46</sup> There is no comparable statutory authorization of original jurisdiction because supplemental jurisdiction applies only to claims that are *not* separate and independent.<sup>47</sup> As

<sup>42</sup> 28 U.S.C. §§ 1331–32. A case brought originally in federal court is not identical to one removed there. For original diversity cases, the amount in controversy is determined at the time of filing, *see St. Paul Mercury*, 303 U.S. at 289–90, and the plaintiff’s claimed amount is presumed to satisfy the amount in controversy, *see id.* at 288–89. By contrast, in a case removed on the basis of diversity, the amount in controversy is determined at the time the removal notice is filed, *see Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939), and the defendant has the burden of proving that the amount in controversy is satisfied, *see McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (imposing the burden on the party invoking federal jurisdiction). For federal question cases, the plaintiff’s well-pleaded complaint controls for original jurisdiction purposes, but the doctrine contains an “exception” for removal purposes if a federal statute wholly displaces the state claim through complete preemption. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 207–08 (2004).

<sup>43</sup> Compare 28 U.S.C. § 1453 (providing for removal of a CAFA class action and mass actions based on diversity jurisdiction even if only minimal diversity is satisfied), *with id.* § 1332(d) (providing for original jurisdiction over a CAFA class action based on diversity jurisdiction even if only minimal diversity is satisfied).

<sup>44</sup> Compare *id.* § 1452 (providing for removal of bankruptcy cases), *with id.* § 1334 (providing for original jurisdiction over bankruptcy cases).

<sup>45</sup> Derivative jurisdiction provisions are those that are truly coextensive with original jurisdiction requirements. I do not mean to argue that all of § 1441(a) is derivative. To the contrary, its requirement that the case could have been filed in federal court originally *as of the time of removal* is, for example, a procedural time-of-filing requirement that does not go to a court’s subject matter jurisdiction. *See Caterpillar*, 519 U.S. at 73.

<sup>46</sup> 28 U.S.C. § 1441(c).

<sup>47</sup> *Id.* § 1367(a) (requiring claims to be so related that they form one constitutional case). As Edward Hartnett has pointed out, § 1441(c) can give rise to at least two unique and constitutional removals that otherwise would not have been permitted by statute: (1) a case in which both claims are federal question claims but one is otherwise nonremovable, such as a FELA claim; and (2) a case in which the nonremovable claim is one that satisfies neither § 1331 nor § 1332 but contains “minimal diversity” supporting Article III jurisdiction. *See* Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 *FORDHAM L. REV.*

another example, § 1442(a) provides for removal of a civil or criminal prosecution against certain federal entities or officers.<sup>48</sup> These kinds of suits reflect an independent statutory grant of federal question jurisdiction because they may be removed even if only the defense depends on federal law, notwithstanding the rule of § 1331 that a federal defense cannot alone give rise to original jurisdiction.<sup>49</sup> As the Supreme Court explained: “Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant.”<sup>50</sup> Other removal provisions provide for similar grants of statutory jurisdiction.<sup>51</sup>

In contrast to the derivative jurisdiction provisions like § 1441(a), these kinds of removal provisions provide independent jurisdictional authorization; the case can be removed to federal court, but it could not have been brought there originally. They are therefore pure grants of federal subject matter jurisdiction.

Third, and most important for my purposes here, there are provisions narrowing removal authority such that cases that could have been brought in federal court originally may not be removed there. I focus particularly on the forum defendant rule of § 1441(b), which prohibits removal of a diversity case if at least one defendant is a citizen of the state in which the case is filed.<sup>52</sup> But the general removal statute also expressly excludes certain specific claims from removal in § 1445.<sup>53</sup> Civil actions under the Jones Act<sup>54</sup> and suits under the 1933 Securities Act<sup>55</sup> also may not be removed. And other restrictions in the general removal statute create additional barriers to

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1099, 1150–52 (1995). The second scenario would also appear to extend to a nondiverse claim that contains a federal “ingredient” sufficient to support Article III “arising under” jurisdiction but not § 1331 “arising under” jurisdiction. In each case, § 1441(c) acts as a nonderivative grant of statutory subject matter jurisdiction.

<sup>48</sup> 28 U.S.C. § 1442(a).

<sup>49</sup> *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

<sup>50</sup> *Mesa v. California*, 489 U.S. 121, 136 (1989).

<sup>51</sup> *See, e.g.*, 28 U.S.C. § 1441(d) (permitting removal by a foreign state of any civil action brought against it without regard to any amount in controversy); *id.* § 1442a (permitting removal of a civil or criminal prosecution for official conduct against a member of the U.S. armed forces); *id.* § 1444 (providing for removal of interpleader actions against the United States); 9 U.S.C. § 205 (2000) (providing for removal of cases arising out of international or foreign banking); 12 U.S.C. § 1441a (2000) (providing for removal of cases involving the Resolution Trust Corporation, even if the RTC is not a formal party); *id.* § 1819(b) (providing for removal of cases involving the Federal Deposit Insurance Corporation); 15 U.S.C. § 6614(c)(3) (2000) (providing for removal of Y2K actions); 22 U.S.C. § 286g (2000) (providing for removal of cases involving the International Monetary Fund).

<sup>52</sup> 28 U.S.C. § 1441(b).

<sup>53</sup> Those include damages actions under the Federal Employers’ Liability Act (FELA), suits brought against a common carrier under the Interstate Commerce Act for damages less than \$10,000, civil actions arising under state workmen’s compensation laws, and actions under the Violence Against Women Act. *See id.* §§ 1445(a)–(d).

<sup>54</sup> 46 U.S.C. app. § 688 (2000).

<sup>55</sup> 15 U.S.C. § 77v (2000).

removal that do not exist for original jurisdiction, such as the requirement that all defendants join in or consent to the removal<sup>56</sup> and the limitation that no diversity case may be removed more than one year after filing,<sup>57</sup> just to name a few. These narrowing provisions describe situations in which a case could be filed in federal court originally but cannot be removed there.

It is this third category that brings the jurisdictional characterization issues to a head. It is clear from the statutes that a violation of these provisions means that removal was improper and that the case should be remanded to state court. But is that result because of a jurisdictional defect or a procedural defect? Both require a remand, so we cannot tell which is which merely by looking at the effects. But the distinction is critical because a remand based on a procedural defect must be made within thirty days of removal, whereas a remand based on a jurisdictional defect must be made whenever the defect is discovered.

The difficulty of resolving the distinction is exacerbated by the fact that courts,<sup>58</sup> commentators,<sup>59</sup> and even Congress<sup>60</sup> use the phrase “removal jurisdiction” casually and often without definition. The term would cause far less confusion if used in conjunction with, say, the derivative jurisdiction provisions of the removal statutes or those provisions that clearly expand subject matter jurisdiction. But the casual use of this term implies coverage beyond these two clear areas of applicability and has caused great confusion about what removal “jurisdiction” means in the context of the actual language of the statutory provisions governing removal.

The resulting confusion among the lower courts on jurisdictional characterization issues in this third category is rampant. Courts disagree about whether the forum defendant rule of § 1441(b) is jurisdictional or procedural,<sup>61</sup> whether the nonremovable actions bar of § 1445 is jurisdictional or

<sup>56</sup> See *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900) (“[A]ll defendants must join in the application [for removal].”).

<sup>57</sup> 28 U.S.C. § 1446(b).

<sup>58</sup> A Westlaw search on April 24, 2007, in the database CTA for the term “removal jurisdiction” yielded 971 cases, including 300 since 2000. Although the Supreme Court has used the term less—understandably so, given its more limited docket—a Westlaw search on April 24, 2007, in the database SCT for the term “removal jurisdiction” still yielded 33 cases, including 8 since 2000, roughly one a year.

<sup>59</sup> See, e.g., 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 107(B), at 107–30 (3d ed. 2006) (titling a section “Basis of Removal Jurisdiction” without defining that jurisdiction); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 5.5, at 342 (4th ed. 2003) (titling, within a section on subject matter jurisdiction, a section “Removal Jurisdiction”); Brian W. Portugal, Comment, *More than a Legal Nicety: Why the Forum Defendant Rule of 28 U.S.C. § 1441(b) is Jurisdictional*, 56 BAYLOR L. REV. 1019, 1037 (2004) (titling a section “Removal Jurisdiction and its Subject Matter Limitations”).

<sup>60</sup> See, e.g., 45 U.S.C. § 822(e) (1997) (mentioning “original and removal jurisdiction”).

<sup>61</sup> Compare *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 939–40 (9th Cir. 2006) (holding the rule to be procedural), *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 380 (7th Cir. 2000) (same), *Korea Exch. Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995) (same), *In re Shell Oil Co.*, 932 F.2d 1518, 1523 (5th Cir. 1991) (same), *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir.

procedural,<sup>62</sup> whether the unanimity requirement is jurisdictional or procedural,<sup>63</sup> and whether the one-year limitation for removal of diversity cases in § 1446 is jurisdictional or procedural.<sup>64</sup> In short, uncertainty over the jurisdictional or procedural character of the removal statutes has left lower courts confused, split, and calling for guidance. The Supreme Court has repeatedly declined to provide that guidance,<sup>65</sup> and it is for that reason a

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1987) (same), *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880, 882–83 (2d Cir. 1970) (same), *Am. Oil Co. v. McMullin*, 433 F.2d 1091, 1093 (10th Cir. 1970) (same), *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 437–38 (6th Cir. 1924) (same), *Green v. Chetpatananont*, No. CIV-05-0317-HE, 2005 WL 1503438, at \*1 (W.D. Okla. June 24, 2005) (same), *Murphy v. Aventis Pasteur, Inc.*, 270 F. Supp. 2d 1368, 1374–75 (N.D. Ga. 2003) (same), and *Ravens Metal Prods., Inc. v. Wilson*, 816 F. Supp. 427, 429 (S.D.W. Va. 1993) (same), *with Snapper, Inc. v. Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999) (stating the rule to be procedural in dictum), *Borg-Warner Leasing v. Doyle Elec. Co.*, 733 F.2d 833, 835 n.2 (11th Cir. 1984) (same), *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.4 (11th Cir. 1998) (stating that the rule is both jurisdictional and waivable), *Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1144–45 (8th Cir. 1992) (holding the rule to be jurisdictional), *Dellinger v. Atlas Techs., Inc.*, 9 F.3d 107, No. 92-2091, 1993 WL 438648, at \*1 (6th Cir. Oct. 28, 1993) (unpublished table decision) (same), *Lindsey v. Ky. Med. Investors, Ltd.*, No. Civ.A.05-116-DLB, 2005 WL 2281607, at \*2 & n.3 (E.D. Ky. Sept. 19, 2005) (same), *Gilbert v. Choo-Choo Partners II, LLC*, No. 1:05-CV-99, 2005 WL 1719907, at \*2 (E.D. Tenn. July 22, 2005) (same), *Elias v. Am. Nat'l Red Cross*, 271 F. Supp. 2d 1370, 1373 (N.D. Ala. 2003) (same), and *Farm Bureau Mut. Ins. Co. v. Eighmy*, 849 F. Supp. 40, 42–43 (D. Kan. 1994) (same).

<sup>62</sup> *Compare Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1060–62 (9th Cir. 2002) (workmen's compensation bar is procedural), *In re Excel Corp.*, 106 F.3d 1197, 1201 n.4 (5th Cir. 1997) (same), *Williams v. AC Spark Plugs Div. of Gen. Motors Corp.*, 985 F.2d 783, 786–88 (5th Cir. 1993) (same), *Feichko v. Denver & Rio Grande R.R. Co.*, 213 F.3d 586, 589–90 (10th Cir. 2000) (FEA bar is procedural), *Albarado v. S. Pac. Transp. Co.*, 199 F.3d 762, 765–66 (5th Cir. 1999) (same), and *Carpenter v. Balt. & Ohio R.R.*, 109 F.2d 375, 379–80 (6th Cir. 1940) (same), *with New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1096–97, 1095 n.5 (11th Cir. 1997) (holding § 1445 jurisdictional), and *Gamble v. Cent. of Ga. Ry. Co.*, 486 F.2d 781, 783 (5th Cir. 1973) (same), *overruled in part by Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 118 (5th Cir. 1987) (en banc).

<sup>63</sup> *Compare, e.g., Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (holding the plaintiff waived the right to remand by failing to object to the failure of unanimity within thirty days of removal), *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 653–54 (7th Cir. 1998) (holding the procedural defect of failing to join all defendants waived absent a failure to object to the defect within thirty days of removal), and *Cornwall v. Robinson*, 654 F.2d 685, 686 (10th Cir. 1981) (stating that a failure to join all defendants may render the removal procedurally defective), *with Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001) (refusing to recognize a fairness exception to the unanimity requirement because the requirement is a bright-line limitation on federal jurisdiction).

<sup>64</sup> *Compare Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 614–15 (2d Cir. 2003) (procedural), and *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992) (same), *with Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081, 1086–88 (S.D.W. Va. 1993) (jurisdictional), *Brock v. Syntex Labs., Inc.*, 791 F. Supp. 721, 723 (E.D. Tenn. 1992) (same), *aff'd*, 7 F.3d 232 (6th Cir. 1993), *Perez v. Gen. Packer, Inc.*, 790 F. Supp. 1464, 1470–71 (C.D. Cal. 1992) (same), *Smith v. MBL Life Assurance Corp.*, 727 F. Supp. 601, 602–04 (N.D. Ala. 1989) (same), *Foiles by Foiles v. Merrell Nat'l Labs.*, 730 F. Supp. 108, 110 (N.D. Ill. 1989) (same), and *Gray v. Moore Forms, Inc.*, 711 F. Supp. 543, 544–45 (N.D. Cal. 1989) (same). *See also* 16 MOORE ET AL., *supra* note 59, § 107.41[1][c][iv], at 107–97 (concluding that the better view is that the bar is procedural); *cf. Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (referring to the one-year limit in dictum as “a nonjurisdictional argument”).

<sup>65</sup> *See, e.g., Lively v. Wild Oats Mkts., Inc.*, 127 S. Ct. 1265, 1266 (2007); *Waugh v. Horton*, 127 S. Ct. 60 (2006).

framework for resolving the issue is needed. The next Part suggests some initial proposals for the development of such a framework.

### III. CONSTRUCTING A FRAMEWORK FOR RESOLVING THE JURISDICTIONAL CHARACTERIZATION ISSUES IN REMOVAL

My framework for resolving characterization issues in removal uses four factors: (1) whether Congress has specifically designated a provision as jurisdictional; (2) whether the function of the particular provision supports a jurisdictional characterization; (3) whether the effects of a jurisdictional characterization are consistent with the purpose and function of the provision; and (4) whether a jurisdictional characterization is doctrinally consistent as a matter of historical treatment and cross-doctrinally consistent with the characterization of similar provisions. I explain each in more detail below.

#### A. Congressional Designation of Jurisdiction

1. *A Presumption of Jurisdiction.*—Congress’s specific designation of a provision as jurisdictional should raise a strong presumption of jurisdictional character for two reasons. First, Congress—and no one else—has the constitutional authority to restrict the jurisdiction of the lower courts<sup>66</sup> and has done so in a multitude of ways. As a matter of separation of powers, courts should defer to Congress’s clear statements of jurisdiction unless overriding considerations point to a contrary congressional intent, as I explain more fully below. Second, a jurisdictional rule often entails heavy costs on the litigants and legal system. Because jurisdiction can be raised at any time and even obligates courts to monitor it sua sponte, a jurisdictional defect discovered well into trial causes disruption, unfairness, and tremendous waste of time and resources. A specific designation of jurisdiction by Congress ensures that Congress has duly considered these effects and deemed them outweighed by the need for or benefits of a jurisdictional bar. In short, if Congress has limited removal by demarcating a particular limitation as a jurisdictional bar, and no other circumstances call that demarcation into doubt, then the courts need not spend time with the remaining factors in my framework. The bar is jurisdictional.<sup>67</sup>

The imposition of a presumption raises two questions. First, how “clear” must Congress be in order to trigger the presumption? The Court has imposed rigorous “clear statement rules” on Congress before, particu-

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<sup>66</sup> See U.S. CONST. art. III, § 1.

<sup>67</sup> Cf. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 502 (2006) (“If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.”); *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397, 1405 (2007) (reasoning that a “clear and explicit withdrawal of jurisdiction . . . undoubtedly [withdraws jurisdiction]” (emphasis omitted)).

larly in the context of congressional attempts to balance state and federal power.<sup>68</sup> But the federalism cases presume limits on federal power *absent* a clear statement to the contrary, whereas here the presumption of a federal jurisdictional limit on removal arises only in the *presence* of a clear statement. Thus, a stringent clear statement rule in the removal context broadens federal jurisdiction—the opposite effect of a stringent clear statement rule in the federalism context.

Nevertheless, a similarly stringent clear statement rule in removal is justified for several reasons. The foremost reason is the need for clarity in this area, and a clear statement rule whose standard is unclear seems particularly unhelpful. In addition, as mentioned above, a clear statement would provide assurances that Congress considered the difficulties that might arise from a jurisdictional characterization. Also, the framework for resolving the issue is not the presumption alone; if Congress does not make a bar unmistakably jurisdictional in the statute, the framework provides additional guideposts for finding the bar jurisdictional nonetheless. Finally, to prevent doctrinal confusion, the normal standard for finding a clear statement rule satisfied should apply to all clear statement rules, absent some overriding reason to the contrary, as explained below. For these reasons, the presumption should apply only if Congress makes the jurisdictional character of a removal bar unmistakably clear.

The second question that arises is what overrides the presumption of jurisdiction? A statutory expression of jurisdiction could be deemed non-jurisdictional when it is clear that Congress did not mean to impose such a bar. For example, if Congress attempts to impose a jurisdictional bar where the Constitution would not allow it, or if Congress uses the term “jurisdictional” merely to emphasize the mandatory nature of the rule rather than impose a jurisdictional bar, then the presumption of jurisdictionality would be overridden, and courts need not defer to it. It should be the very rare case indeed when Congress uses such an important word to mean something other than its traditional meaning,<sup>69</sup> and it should be rarer still that a court is convinced that Congress’s clear statement does not mean what it so clearly states, but I leave it to be applied as an escape hatch in those extremely rare cases in which the presumption simply is not warranted.

2. *The Converse Presumption.*—That a clear statement of jurisdiction presumptively controls does not mean, however, that the converse is true, at least not in the removal context. In other words, the absence of a clear

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<sup>68</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 274–75 (1985) (imposing a clear statement rule for abrogation of state sovereign immunity); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (imposing a clear statement rule for spending clause legislation that purports to regulate the states).

<sup>69</sup> The Court has recognized that “the word ‘jurisdiction’ does not in every context connote subject-matter jurisdiction,” even in congressional statutes. See *Rockwell Int’l*, 127 S. Ct. at 1405.

statement of jurisdiction does not raise a presumption that the provision is a nonjurisdictional bar of procedure.

Rejecting this converse presumption departs from a number of clear statement rules, including one articulated in the recent Supreme Court case *Arbaugh v. Y & H Corp.*<sup>70</sup> *Arbaugh* concerned the distinction between federal subject matter jurisdiction and elements of the federal claim for relief.<sup>71</sup> At issue was the employee-numerosity requirement of Title VII—the restriction that the statute cover only employers with fifteen or more employees.<sup>72</sup> The Court unanimously held the employee-numerosity requirement to be merely a part of the merits of the plaintiff’s case, not a bar to subject matter jurisdiction.<sup>73</sup>

In so holding, the Court noted that the requirement appears in a provision that “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.”<sup>74</sup> Given the unfairness and waste of judicial resources entailed in tying the employee-numerosity requirement to subject matter jurisdiction, the Court followed the “sounder course” of imposing a clear statement rule on Congress: “If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue.”<sup>75</sup> That much adapts well to the removal context. *Arbaugh*, to this extent, supports the positive presumption in the framework.

But *Arbaugh* then adopted the converse presumption, that “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”<sup>76</sup> Applying this converse presumption to removal would ignore the value of the other factors that I describe more fully below, factors that could point persuasively to a jurisdictional characterization even absent a clear statement from Congress. The Supreme Court recently sanctioned this reasoning in *Bowles v. Russell*,<sup>77</sup> finding that statutory time limits for filing a notice of appeal are jurisdictional despite the lack of specific jurisdictional words in the statute. The Court reasoned that the long historical treatment of appellate time limits as jurisdictional demanded a jurisdictional characterization despite the lack of a clear statement of jurisdictionality from Congress.<sup>78</sup>

In addition, applying this converse presumption to removal would overlook at least five significant differences between a jurisdictional versus

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<sup>70</sup> 546 U.S. 500 (2006).

<sup>71</sup> *Id.* at 503.

<sup>72</sup> *Id.* at 503–04 (quoting 42 U.S.C. § 2000e (2000)).

<sup>73</sup> *Id.* at 504.

<sup>74</sup> *Id.* at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

<sup>75</sup> *Id.* at 515–16 (footnote and internal citation omitted).

<sup>76</sup> *Id.* at 516.

<sup>77</sup> 127 S. Ct. 2360 (2007).

<sup>78</sup> *Id.* at 2363–66.

merits characterization in a substantive statute like Title VII and the jurisdictional versus procedural characterization in removal.

First, jurisdiction and procedure are, in some respects, more closely aligned than jurisdiction and merits. The Supreme Court itself made this point just last term in *Sinochem International Co. v. Malaysia International Shipping Corp.*<sup>79</sup> Prior precedent had created a sharp distinction between jurisdictional preconditions and merits, and the Court had directed lower courts to resolve jurisdictional questions before merits questions, regardless of the relative difficulty of the questions.<sup>80</sup> That precedent had eliminated the practice of lower courts of assuming jurisdiction (a doctrine called “hypothetical jurisdiction”) in the face of difficult jurisdictional questions if the case could be resolved easily in favor of the defendant on the merits.<sup>81</sup>

In contrast, *Sinochem* confronted the issue whether a difficult jurisdictional question had to be resolved prior to an easier procedural question, namely dismissal under the doctrine of forum non conveniens.<sup>82</sup> The Court unanimously answered no.<sup>83</sup> Characterizing forum non conveniens as essentially a supervening venue provision, the Court drew a sharp line between merits adjudications, for which jurisdiction is essential, and procedural dismissals, for which jurisdiction is nonessential.<sup>84</sup> The end result is that a district court can dismiss a case on grounds of forum non conveniens without reaching jurisdictional questions “when considerations of convenience, fairness, and judicial economy so warrant.”<sup>85</sup>

Although these cases deal with decisional sequencing, they suggest that the Court considers jurisdictional issues to logically (even definitionally) precede merits questions as a jurisprudential matter, while jurisdictional issues do not have the same rigid priority over procedural issues. *Arbaugh*, which dealt with the separation of jurisdictional preconditions from merits elements, then, may not speak to the more difficult separation of jurisdiction and procedure.

Second, as Howard Wasserman has argued, because normal trial structure tends to cause jurisdictional issues to arise in separate contexts from and prior to merits questions, the two types of issues are more appropriately resolved at different times in the formal litigation.<sup>86</sup> By contrast, jurisdictional and procedural defects in the removal process come up simultaneously. Indeed, the general removal statute places a priority on resolving

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<sup>79</sup> 127 S. Ct. 1184 (2007).

<sup>80</sup> *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998).

<sup>81</sup> *Id.* at 93–94.

<sup>82</sup> *Sinochem*, 127 S. Ct. at 1188.

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

<sup>84</sup> *Id.* at 1191–92 (“Jurisdiction is vital only if the court proposes to issue a judgment on the merits.”).

<sup>85</sup> *Id.* at 1192.

<sup>86</sup> See Wasserman, *supra* note 12, at 649–55.

procedural defects within thirty days of removal to solidify the forum. Thus, the disparity in formal placement within the dispute resolution process that exists in the jurisdictional versus merits characterization does not similarly animate the jurisdictional versus procedural characterization of the general removal statute.

Third, as Wasserman also points out, the jurisdictional versus merits characterization problem implicates the identity of the proper decision-maker.<sup>87</sup> *Arbaugh* recognized this as well.<sup>88</sup> Jurisdictional questions are decided by judges, whereas merits questions, at least in jury trials, are decided by jurors. By contrast, all issues in the removal statutes—procedural or jurisdictional—are decided by judges. Therefore, the removal context lacks the concern for identifying the proper decisionmaker that exists with substantive statutes.

Fourth, also drawing upon Wasserman's arguments, the confusion between merits and jurisdiction is often grounded in a misconception of whose jurisdiction is at issue.<sup>89</sup> Congress must be wary of its own authority to legislate. In *Arbaugh*, for example, the employee-numerosity requirement of Title VII could be interpreted as a proxy for activity that affects interstate commerce, thereby allowing Congress to regulate it.<sup>90</sup> Congress is bound by that requirement when legislating under its Commerce Clause powers. It is not so bound when legislating under its Article III powers to control the lower courts. Congress has no need to designate proxies supporting its own jurisdiction to provide for and regulate removal.

Fifth, substantive statutes like Title VII implicate federalism values to a lesser degree than does removal. Removal plucks a case from a state court of competent jurisdiction, without the state court's consent, and deposits the case in the federal system, all at the whim of one of the parties. Removal can occur years into the case, after the state court has become invested in it and expended judicial resources overseeing it. Once removal has been effectuated, the general removal statute then directs the state court to "proceed no further unless and until the case is remanded."<sup>91</sup> Thus, unlike merits-stripping requirements such as Title VII's employee-numerosity requirement, in which *no* court would be able to provide relief, removal usually addresses a conflict between two courts that are *both* competent to provide relief, and it creates this conflict in the middle of the case, to the great disruption of both state authority over the case and the plain-

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<sup>87</sup> *See id.* at 662–65 (arguing that “the identity of the decision-maker on an issue remains significant”).

<sup>88</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–15 (2006).

<sup>89</sup> *See Wasserman*, *supra* note 12, at 680–83 (arguing that a statutory jurisdictional element may point to the constitutional authorization of Congress to legislate in the subject matter rather than that of the courts to hear the case).

<sup>90</sup> *See id.* at 680–81.

<sup>91</sup> 28 U.S.C. § 1446(d) (2000).

tiff's choice of forum. It is for these reasons that removal historically has been viewed narrowly.<sup>92</sup> Applying the *Arbaugh* converse presumption in the removal context would create tension with this view. A presumption of nonjurisdictionality would transform virtually every removal provision into a rule of procedure whose noncompliance is waived if not asserted within thirty days of removal. That would eliminate, in most cases, any chance for remand thirty days after removal, even if the defendant should not have been allowed to take the case from state court. Such a presumption slights the delicate role that removal plays in the federal-state balance.<sup>93</sup>

For these reasons, *Arbaugh*'s converse presumption—that the absence of a clear statement of jurisdiction gives rise to a presumption of nonjurisdictionality—while perhaps appropriate in jurisdiction versus merits characterization issues in substantive statutes because of the broader distinctions between jurisdiction and merits, is unwarranted in the jurisdiction versus procedural characterization issues of removal, in which the concepts are closer and have significant federalism implications.

Nevertheless, *Arbaugh*'s positive presumption—that a clear statement of jurisdiction raises a presumption of jurisdiction—remains an important part of the framework by deferring to separation of powers and by simplifying the complicated inquiry where Congress has clearly demarcated a provision as jurisdictional. Absent such a clear statement, a court should not end the inquiry in favor of a procedural characterization but instead should consider the other factors in the framework discussed below.

### B. The Functions of the Provision

1. *Parsing the Functions.*—Absent a presumption of jurisdiction, a court should turn to the other factors in the framework, the first of which is an evaluation of the functions of the rule at issue. The functions should be analyzed with two features in mind. First, does the rule separate classes of cases, or does it merely process claims and relate to modes of proceedings? Second, is the rule directed primarily at the power of the court and underlying societal values such as federalism, or is it directed at the rights, obligations, or conveniences of the parties? Based on the natures of jurisdiction and procedure discussed above in the primer, a rule separating classes of

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<sup>92</sup> See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941) (“Not only does the language of the [removal statute] evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.”).

<sup>93</sup> The Court has imposed clear statement rules to protect federalism in the past, see, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (imposing a clear statement rule for abrogation of state sovereign immunity); *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (imposing a clear statement rule for spending clause legislation that purports to regulate the states), though some have doubted their utility in providing reliable safeguards for federalism values, see Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules after Gonzalez v. Raich*, 45 CATO SUP. CT. REV. 113 (2007).

cases or directed at the power of the court or underlying societal values serves jurisdictional purposes, whereas a rule regulating the process or mode of the case and directed to the rights and obligations of the parties serves procedural purposes.

This functional factor draws heavily on recent Supreme Court jurisdictional clarifications in non-removal areas. In *Kontrick v. Ryan*,<sup>94</sup> for example, the Court held that Bankruptcy Rule 4004, which gives a Chapter 7 creditor sixty days after the first date set for the meeting of creditors to file a complaint objecting to the debtor's discharge,<sup>95</sup> is not jurisdictional.<sup>96</sup> The Court reasoned that the courts already have general subject matter jurisdiction over bankruptcy cases falling under the bankruptcy statute.<sup>97</sup> The Bankruptcy Rules, meanwhile, "shall not be construed to extend or limit the jurisdiction of the courts."<sup>98</sup> Instead, such rules "merely prescribe the method by which the jurisdiction granted the courts by Congress is to be exercised."<sup>99</sup> Such "claim-processing rules" are not, therefore, limits on federal jurisdiction; rather, such jurisdictional limits are reserved for "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."<sup>100</sup> A year later, in *Eberhart v. United States*,<sup>101</sup> the Court applied *Kontrick* to Federal Rule of Criminal Procedure 33(b)(2), which sets a time deadline to file a motion for a new trial,<sup>102</sup> and concluded that *Kontrick* settled the issue that such a claim-processing rule is not jurisdictional.<sup>103</sup> Thus, after *Kontrick* and *Eberhart*, it seems settled that the claim-processing rules of the federal rules are nonjurisdictional.<sup>104</sup>

There are good reasons to resist the temptation to read *Kontrick* and *Eberhart* as mandating a procedural characterization of removal limitations. The federal rules at issue in those cases were adopted under the auspices of

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<sup>94</sup> 540 U.S. 443 (2004).

<sup>95</sup> FED. R. BANKR. P. 4004(a).

<sup>96</sup> *Kontrick*, 540 U.S. at 447 ("[A] debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge.").

<sup>97</sup> *Id.* at 452–53.

<sup>98</sup> FED. R. BANKR. P. 9030.

<sup>99</sup> 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 3141, at 485 (2d ed. 1998).

<sup>100</sup> *Kontrick*, 540 U.S. at 455.

<sup>101</sup> 546 U.S. 12 (2005) (per curiam).

<sup>102</sup> *Id.* at 13.

<sup>103</sup> *Id.* at 15–17.

<sup>104</sup> *But see* Philip A. Pucillo, *Jurisdictional Prescriptions, Nonjurisdictional Processing Rules, and Federal Appellate Practice: The Implications of Kontrick and Eberhart*, 59 RUTGERS L. REV. (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=970050](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970050) (arguing that the timing prescriptions of Rule 4(a) of the Federal Rules of Appellate Procedure are jurisdictional because they reflect the jurisdictional prescriptions of 28 U.S.C. § 2107).

the Rules Enabling Act,<sup>105</sup> under which the rules are drafted by an advisory committee in consultation with the bar and other groups, are transmitted to the Supreme Court, which adopts, rejects, or modifies them, and then become law unless specifically rejected by Congress. Such rules do not, therefore, have the kind of congressional imprimatur that a statute such as the removal statute, enacted under the constitutional requirements of bicameral passage and presidential presentment, has.<sup>106</sup> This difference is particularly acute in the jurisdictional context because only Congress—not the Court—has the constitutional authority to limit the jurisdiction of the lower courts.<sup>107</sup> The Rules Enabling Act itself recognizes and reserves this power, characterizing the delegated power as one to adopt “general rules of practice and procedure”<sup>108</sup> and limiting the adopted rules to those that do not “abridge, enlarge or modify any substantive right.”<sup>109</sup> The federal rules of bankruptcy and civil procedure confirm this limitation by affirming that they “shall not be construed to extend or limit the jurisdiction” of the courts.<sup>110</sup> It would raise constitutional concerns for a federal rule adopted under the Rules Enabling Act to limit the subject matter jurisdiction of a federal court without some express authorization by Congress.

By contrast, the removal statutes are acts of Congress specifically authorized under Congress’s Article III power to control the jurisdiction of the lower courts. They do not fall under the procedures of the Rules Enabling

<sup>105</sup> 28 U.S.C. § 2072 (2000).

<sup>106</sup> The Supreme Court has hinted as much in other contexts. See *Bowles v. Russell*, 127 S. Ct. 2360, 2364 & n.2 (2007) (recognizing a “jurisdictional significance of the fact that a time limitation is set forth in a statute”); *Schacht v. United States*, 398 U.S. 58, 63–64 (1970) (“We cannot accept the view that . . . [Supreme Court Rule 20.1’s] time requirement is jurisdictional and cannot be waived by the Court. [The rule] contains no language that calls for so harsh an interpretation, and it must be remembered that this rule was not enacted by Congress but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases. The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.” (internal citation omitted)); *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 10 (1941) (observing that court rules cannot extend or restrict the jurisdiction conferred by statute).

<sup>107</sup> U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish.”).

<sup>108</sup> 28 U.S.C. § 2072(a).

<sup>109</sup> *Id.* § 2072(b). The two exceptions—delegations to set rules regarding finality and interlocutory appeals, see 28 U.S.C. § 2072(c), § 1292(e)—are statutorily based and therefore prove the rule.

<sup>110</sup> See FED. R. BANKR. P. 9030; FED. R. CIV. P. 82. The Federal Rules of Criminal Procedure do not contain such expressive language, but Rule 1 appears to restrict them to “procedure” and not to “jurisdiction.” FED. R. CRIM. P. 1(a)(1) (“These rules govern the procedure in all criminal proceedings in the [federal courts] . . . .”); cf. *Eberhart v. United States*, 546 U.S. 12, 15–17 (2005) (per curiam) (concluding, on the basis of *Kontrick*, which relied in part on the language of Rule 82 of the Federal Rules of Civil Procedure and Rule 9030 of the Federal Rules of Bankruptcy Procedure, that Rule 33 of the Federal Rules of Criminal Procedure is not jurisdictional). The Federal Rules of Appellate Procedure previously contained a jurisdiction-disavowing rule, see FED. R. APP. P. 1(b), but that Rule has been abrogated in light of the 1990 amendments to the Rules Enabling Act authorizing the Court to set rules regarding finality and interlocutory appeals. See 28 U.S.C. § 2072(c), § 1292(e).

Act, but rather became law through bicameral passage and presentment. Thus, the constitutional concerns of a jurisdictional federal rule do not apply to the removal statutes. The removal statutes have no internal limitation to matters of procedure and do not disavow jurisdictional tinkering—indeed, it would be difficult for the removal statutes to be construed that way in light of their jurisdiction-expanding provisions, identified above in Part II. As the Court has acknowledged, a congressional statute that regulates the jurisdiction of the lower courts stands on different footing than a rule of procedure adopted under the Rules Enabling Act.<sup>111</sup> Thus, it would be a mistake to apply *Kontrick* and *Eberhart* to removal without further thought.

But, after further thought, I see no reason why the analysis in *Kontrick* and *Eberhart* should not at least play a role in the removal characterization context. The reasoning of those decisions has its foundation in the differing natures of jurisdiction and procedure and their roles in litigation. Those considerations apply broadly and equally to removal. Indeed, the Court itself has used similar reasoning beyond the federal rules.<sup>112</sup> Accordingly, analyzing the function of a particular removal provision in light of the natures of and differences between jurisdiction and procedure, as did *Kontrick* and *Eberhart*, is appropriate, and this analysis is an important tool in resolving jurisdictional characterization issues.

2. *Potential Difficulties.*—There are, however, three potential and related difficulties that the Court failed to resolve in *Kontrick* and *Eberhart* but that may have to be addressed when using this framework. The first is what in the world “claim-processing,” “modes of proceeding,” and “separating classes of cases” really mean. Neither *Kontrick* nor *Eberhart* provides much insight into the meanings of those phrases beyond categorizing the particular provisions at issue in those cases.

A little uncertainty here is not fatal. Commonsense application of even these admittedly unclear terms should be relatively easy in most cases. For

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<sup>111</sup> *Bowles*, 127 S. Ct. at 2364–65; *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004).

<sup>112</sup> *See, e.g.*, *Scarborough v. Principi*, 541 U.S. 401, 413–14 (2004) (holding a time limitation on an Equal Access to Justice Act fee claim was procedural rather than jurisdictional because it concerned a “mode of relief” rather than a separation of classes of claim); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–94 (1982) (holding a time prescription of Title VII to be procedural rather than jurisdictional because it did not speak in jurisdictional terms and because it was akin to a statute of limitations rather than a jurisdictional bar). *Bowles* is not to the contrary. Although the result in *Bowles* is arguably in tension with that of cases like *Arbaugh*, *Kontrick*, *Eberhart*, *Scarborough*, and *Zipes*, *Bowles* relied heavily on another factor in the framework, a long historical tradition of treating the provision at issue as jurisdictional. Thus, *Bowles* can be read as leaving intact the analysis of those prior cases. *Bowles*, 127 S. Ct. at 2364 (“Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional.”). To the extent that it does not, as I explain below, *Bowles* should be modified to account for the other important factors of the framework. *See infra* note 126 and accompanying text.

example, the § 1446(a) requirement that the notice of removal be signed pursuant to Rule 11 is easily characterized as a rule of process under any commonsense application of the term. By comparison, the prohibition of removal of workman's compensation cases under § 1445(c) does separate out a kind of case for exclusion from removal. Section 1445(c) separates out a "class" of cases that is meaningfully different from a "class" of cases defined by notices of removal that are defective under § 1446(a).

For issues that are closer to the line between jurisdictional and procedural, applying this factor may be more difficult, but that does not mean that convincing arguments do not exist. In addition, as different courts apply the framework to specific instances, the guideposts in this factor should become clearer and easier to apply. To the extent that a particular issue that arises is just too difficult to characterize as a claim-processing rule or one that separates classes of cases, then this factor in the framework may be less helpful than the other factors, but that does not mean that the framework as a whole cannot be effective.

The second potential difficulty is separating out primary functions from secondary functions and effects. A particular provision's primary function of limiting the power of the court by excluding certain classes of cases may have collateral effects on the parties by, for example, providing one party with a more favorable forum. On the flipside, a different provision's primary function of defining the rights or obligations of a party may have ancillary effects on broader societal values.<sup>113</sup> The challenge will be in determining which purposes are primary and which are ancillary.

Section 1445's prohibition on removal of worker's compensation cases provides just one example of this difficulty. The Supreme Court has recognized that Congress made these cases nonremovable to lessen the "trial burdens that claimants might suffer by having to go to trial in federal rather than state courts due to the fact that the state courts are likely to be closer to an injured worker's home and may also provide him with special procedural advantages in workmen's compensation cases."<sup>114</sup> On the other hand, the nonremovability provision also achieved the intended effect of reducing the number of workmen's compensation cases that were clogging the federal courts, when state courts were just as—if not more—competent to resolve them.<sup>115</sup> Parsing out which of these functions is primary and which is secondary may be very difficult indeed.

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<sup>113</sup> See generally *Lees*, *supra* note 12, at 1488 (making this point).

<sup>114</sup> *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 351–52 (1961); see also S. REP. NO. 85-1830, at 9 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3106 ("Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court.")

<sup>115</sup> S. REP. NO. 85-1830, at 9, reprinted in 1958 U.S.C.C.A.N. at 3105 ("[T]he workload of the Federal courts has greatly increased because of the removal of workmen's compensation cases from the State courts . . ."); *Horton*, 367 U.S. at 350–51 ("[T]he purpose and effect of the 1958 amendment were

The third potential difficulty is separating out jurisdictional rules from merely mandatory rules, a difficulty that has plagued even the Supreme Court.<sup>116</sup> A mandatory rule restricts the discretion of the court to deviate from the rule when one party timely objects, but that does not mean that it is jurisdictional.<sup>117</sup> As the Court has recognized, nonjurisdictional but mandatory legal rules have a functional role to play:

The provision is not discretionary only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defence. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with.<sup>118</sup>

The difficulty arises when the statute provides no clear guidance for determining whether a provision is jurisdictional or merely mandatory.

Thus, analyzing the function of the removal provision in question both is appropriate and may be critical for resolving its character as jurisdictional

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to reduce congestion in the Federal District Courts partially caused by the large number of civil cases that were being brought under the long-standing \$3,000 jurisdictional rule.”).

<sup>116</sup> Compare *Bowles*, 127 S. Ct. at 2362 (holding the time limit for filing a notice of appeal to be jurisdictional based on prior cases calling the limit “mandatory and jurisdictional”), with *Eberhart v. United States*, 546 U.S. 12, 17–20 (2005) (per curiam) (discouraging the mantra “mandatory and jurisdictional” as an imprecise phrase that obscures the mandatory but *nonjurisdictional* characterization of the rules), *Becker v. Montgomery*, 532 U.S. 757, 767 (2001) (noting that “imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court,” in holding an omitted signature on a notice of appeal was not fatal because the notice did not fail to identify the parties taking the appeal), and *Foman v. Davis*, 371 U.S. 178, 180–81 (1962) (holding that a court of appeals could not dismiss an appeal sua sponte for a violation of the requirement in the Federal Rules of Appellate Procedure that the notice specify which judgment was the subject of the appeal when the parties fully briefed the appeal and neither party was prejudiced by the violation), and with *United States v. Robinson*, 361 U.S. 220, 224 (1960) (characterizing a time limit in the Federal Rules of Appellate Procedure for filing a notice of appeal as “mandatory and jurisdictional,” and holding the limit not subject to extension for reasons of excusable neglect). Commentators are well aware of the Court’s imprecision. See, e.g., *Dane*, *supra* note 12, at 39 (“[T]he phrase ‘mandatory and jurisdictional’ is one of those standard doubles (‘null and void,’ ‘cease and desist’) that so fill legal poetries. But there is less to this than one might think. First, legal rules can be mandatory without being jurisdictional.” (footnotes omitted)); *Hall*, *supra* note 12, at 410 (“In each instance where the Supreme Court has referred to the thirty-day appeal period as ‘mandatory and jurisdictional,’ it might have simply said ‘mandatory,’ for the only issue was whether the court of appeals had authority to relax the exact requirements of Rule 4(a).”); *Pucillo*, *supra* note 12, at 316 (explaining that the Supreme Court’s own confusing language has caused the enforcement of Rule 3(c)’s requirements by the courts of appeals to become “mired in confusion and unpredictability”).

<sup>117</sup> See, e.g., *Scott Dodson*, *Jurisdictionality and Bowles v. Russell*, 102 NW. U. L. REV. COLLOQUY 42 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/21/> (acknowledging the distinction and arguing that it could improve doctrinal consistency); *Hall*, *supra* note 12, at 410 (analyzing the Supreme Court cases reciting the mantra “mandatory and jurisdictional” and concluding that, in each, the word “jurisdictional” was superfluous and that the Court could have reached the same result simply by construing the statute as “mandatory”).

<sup>118</sup> *Logan v. United States*, 144 U.S. 263, 304 (1892).

or procedural. Though the analysis may not be easy, it can be facilitated by the next factor in the framework.

### C. *The Effects of the Characterization*

In addition to considering the functions of the removal provision at issue, a court should consider the effects of characterizing the provision as jurisdictional or procedural. Those effects should give clues as to whether a jurisdictional or procedural characterization makes sense in the statutory scheme.

In *Arbaugh*, the Court undertook just such an inquiry, albeit in the context of a jurisdictional versus merits characterization and on a relatively narrow scale. There, the Court asked whether Congress intended the rule to have the effects that a jurisdictional characterization would give it.<sup>119</sup> Noting that a jurisdictional characterization of the employee-numerosity requirement would require courts to raise and address the issue *sua sponte*,<sup>120</sup> the Court reasoned that nothing in Title VII suggested that Congress intended courts to have such a responsibility.<sup>121</sup>

The same reasons discussed above that caution against applying *Arbaugh* to the removal context apply here.<sup>122</sup> After all, *Arbaugh* also considered the effect of classifying the employee-numerosity requirement as jurisdictional on the traditional understanding that merits questions are decided by juries rather than judges,<sup>123</sup> a concern that is inapplicable to removal, which is overseen only by judges. Nevertheless, the methodology seems to be entirely appropriate in the removal context: look to the effects of characterizing a provision as jurisdictional or procedural to determine whether that characterization makes sense in light of the general removal statute as a whole.

Thus, in applying this factor of the framework, courts may consider a wide range of implications, some of which might be the following: (1) the burdens on courts to monitor compliance *sua sponte*, (2) the benefits of allowing parties to consent to noncompliance, (3) the burden on the party opposing removal to discover and prove a violation within the thirty days required for procedural defects, (4) the effects on federalism values, (5) the resulting inefficiencies and equities of a particular characterization, and (6) the underlying purposes of removal. I do not mean this to be an exhaustive list but rather merely illustrative of the kinds of features of the characterization inquiry that may be relevant under this factor.

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<sup>119</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513–16 (2006).

<sup>120</sup> *Id.* at 513–14 (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)).

<sup>121</sup> *Id.*

<sup>122</sup> See *supra* text accompanying notes 76–93.

<sup>123</sup> *Arbaugh*, 546 U.S. at 514.

*D. Doctrinal and Cross-Doctrinal Consistency*

Finally, a court should consider the effects of a particular characterization on doctrinal and cross-doctrinal consistency.

*1. Doctrinal Consistency.*—Doctrinal consistency asks how the particular provision and its doctrinal equivalents have been characterized historically. Akin to stare decisis, this factor takes historical treatment and settled expectations into account. If a particular type of provision has been characterized as jurisdictional uniformly over a long period of time, doctrinal consistency would suggest that it should continue to be held jurisdictional. The same inertial force applies to provisions long and uniformly held to be nonjurisdictional.

*Bowles v. Russell*<sup>124</sup> illustrates this factor. There the Court, in characterizing the time limit for filing a notice of appeal codified in 28 U.S.C. § 2107 as jurisdictional, relied on the fact that the Court had “long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature.”<sup>125</sup>

The existence of a uniform historical treatment is a relevant factor in the jurisdictional characterization analysis. Such doctrinal consistency helps streamline litigation, reduce uncertainty, and control costs. And, as for ease of application, this factor usually should be fairly straightforward: either there is a long, consistent historical pedigree or there is not.

Doctrinal consistency, however, is just one factor in the framework. If the other factors discussed above strongly point to a characterization unsupported by an historical pedigree, then the historical pedigree should give way. I therefore disagree with *Bowles* to the extent that it considers the existence of an historical pedigree to exclude other considerations.<sup>126</sup> Similarly, if the presumption discussed above applies, then the historical pedigree should not control.

*Bowles*, however, is an example of an extreme case. The historical pedigree of the time limit for filing a notice of appeal, according to *Bowles*, was a single, unbroken jurisdictional characterization spanning over 150 years. Not all provisions have such an historical pedigree of jurisdictional or procedural characterization. If a statute is new or has recently been amended, a characterization pedigree may not exist. Even longstanding statutes may have scant historical pedigree simply because opportunities to determine their characterizations are limited. Still other provisions may

<sup>124</sup> 126 S. Ct. 2360 (2007).

<sup>125</sup> *Id.* at 2362; see also *id.* at 2364 n.2 (“[I]t is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.”).

<sup>126</sup> For more on why I believe *Bowles* is poorly reasoned and doctrinally flawed, see Dodson, *supra* note 117. That I disagree with its characterization of § 2107 and much of its reasoning, however, does not mean that the historical treatment of a statute, as noted by *Bowles*, has no place in a framework for resolving jurisdictional characterization issues in removal.

have received extensive—but inconsistent—treatment.<sup>127</sup> In short, unless the provision at issue and its doctrinal equivalents have a clear, consistent, and long historical pedigree of being characterized as jurisdictional or procedural, this factor should be given less weight than the others. Even if such a pedigree does exist, doctrinal consistency is just one factor, which may be overridden by the other factors in the framework.

2. *Cross-Doctrinal Consistency*.—Akin to but slightly different from doctrinal consistency is cross-doctrinal consistency. Doctrinal consistency looks at the particular provision and its doctrinal equivalents, such as the statutes of limitations. Cross-doctrinal consistency, on the other hand, looks at how doctrinally analogous provisions have been treated.

The Court used a cross-doctrinal approach in *Zipes v. Trans World Airlines, Inc.* by comparing the Title VII time bar at issue to statutes of limitations, which have long been held to be nonjurisdictional.<sup>128</sup> *Kontrick* did the same, reasoning that the bankruptcy rule in question was similar to other time bars that must be raised in an affirmative defense or be forfeited.<sup>129</sup> These might suggest, for example, that the thirty-day time bar for removal<sup>130</sup> is likewise a nonjurisdictional procedural rule.

As another example, take the old 1875 version of removal, which allowed any civil case removable under Article III to be removed by either party, subject to a \$500 amount-in-controversy requirement.<sup>131</sup> Characterizing the amount-in-controversy requirement as jurisdictional would follow the well-tread footsteps of the diversity statute's analogous amount-in-controversy requirement,<sup>132</sup> long held to be jurisdictional. Characterizing two similar requirements similarly both makes good commonsense and fosters cross-doctrinal consistency in jurisdictional determinations.

#### IV. A CASE STUDY IN JURISDICTIONAL CHARACTERIZATION: THE FORUM DEFENDANT RULE

To provide an example of why the characterization of removal provisions as jurisdictional or procedural matters, the disarray that the issue has engendered among the lower courts, and how this framework could be used to resolve the issues in a more reasoned way, I present a case study of the

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<sup>127</sup> For example, the characterization of the forum defendant rule of the removal statute, which I discuss in Part IV, has a relatively short pedigree, and its historical meaning is complicated by recent amendments to the removal statute. No Supreme Court case has decided the issue, but the circuits have given it extensive and conflicting treatment. As I conclude below, these features suggest that doctrinal consistency may not be a strong factor in determining the characterization of the forum defendant rule. See *infra* text accompanying notes 183–84.

<sup>128</sup> 455 U.S. 385, 394 (1982).

<sup>129</sup> *Kontrick v. Ryan*, 540 U.S. 443, 458–59 (2004).

<sup>130</sup> See 28 U.S.C. § 1446(b) (2000).

<sup>131</sup> 18 Stat. 470, Ch. 137, § 2 (1875).

<sup>132</sup> See 28 U.S.C. § 1332.

forum defendant rule, comparing two litigations that dealt with its characterization. The forum defendant rule falls in the third category of authorization-narrowing provisions, those that border the line between jurisdictional and procedural in the general removal statute. These two cases illustrate the split between the Ninth and Eighth Circuits regarding the characterization of the forum defendant rule.

A. *The Lively v. Wild Oats Markets, Inc. Litigation*

1. *The Facts.*—Emma Lively sued Wild Oats Markets, Inc. in California state court for negligence and premises liability under state law after slipping in one of their California food stores.<sup>133</sup> Because Lively was a citizen of New York and Wild Oats was not, in January 2004 Wild Oats timely filed a notice of removal to the Central District of California on the basis of diversity of citizenship.<sup>134</sup> In its removal papers, Wild Oats claimed that it was a Delaware corporation with its principal place of business in Colorado.<sup>135</sup>

State court ostensibly was preferable to Lively and detrimental to Wild Oats for a number of reasons. First, California requires only a three-fourths jury majority for a verdict, whereas the federal rules require unanimity.<sup>136</sup> Second, the county jury pool was likely to be more favorable to individual plaintiffs and hostile to business defendants than the district pool.<sup>137</sup> A host of other strategic reasons may have animated Lively's decision to file in state rather than federal court.<sup>138</sup> Lively, however, having no reason to doubt the veracity of Wild Oats' claims of its own citizenship (and, in any

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<sup>133</sup> *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 936 (9th Cir. 2006).

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

<sup>135</sup> *Id.*

<sup>136</sup> Appellee's Answering Brief at 5–6, *Lively*, 456 F.3d 933 (No. 04-56682), 2005 WL 4121126; *cf.* *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900) (“[A]ll the defendants must join in the application [for removal] . . .”).

<sup>137</sup> Appellee's Answering Brief, *supra* note 136, at 5–6 (stating that Wild Oats filed for removal to “avoid . . . potentially liberal state court juries”).

<sup>138</sup> For example, her attorney may have been more knowledgeable of local courts and more integrated into the local bar, whereas Wild Oats' attorneys may have felt more comfortable in federal court with nationally followed federal procedures, *see* 16 MOORE ET AL., *supra* note 59, § 107.03, at 107–25; Lively may have seen state court as less receptive than federal courts to summary judgments or dismissals in favor of defendants, *see* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 39–41 (2003); Lively may have viewed state-court litigation as less expensive, *see* Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand was Imminent? Post-Removal Litigation and The Waiver of the Right to Seek a Remand Grounded on Removal Defects*, FLA. B.J., Feb. 2000, at 22–24; or both Lively and Wild Oats simply may have believed that defendants generally have a higher win rate in removed cases, *see* Kevin M. Clermont & Theodore Eisenberg, *Do Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998).

case, no evidence on which to base any doubt),<sup>139</sup> did not object to the removal,<sup>140</sup> and the case proceeded to discovery.

In August 2004, during oral argument on Wild Oats' motion for summary judgment, the district court *sua sponte* questioned whether Wild Oats' principal place of business was truly Colorado. After requesting and obtaining additional evidence on the question, the district court found that Wild Oats' principal place of business was in fact California, making it a citizen of that state for diversity and removal purposes.<sup>141</sup>

Because Wild Oats was a citizen of the state in which the case was originally filed, the district court held a show cause hearing to determine whether the case should be remanded for lack of subject matter jurisdiction under the forum defendant rule of § 1441(b),<sup>142</sup> which states that any action that could be filed in federal court originally based on diversity of citizenship "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."<sup>143</sup> Despite the passage of time in federal court, if the forum defendant rule was deemed to be jurisdictional, then the case had to be remanded.<sup>144</sup>

At the hearing, Wild Oats argued that the forum defendant rule is procedural, not jurisdictional. Because it was procedural, Wild Oats argued, Lively had forfeited her right to object to the violation by failing to raise it within thirty days of removal as required by § 1447(c).<sup>145</sup> The district court disagreed and remanded the case, holding the defect to be jurisdictional and thus not forfeitable. Wild Oats appealed.<sup>146</sup>

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<sup>139</sup> Corporate citizenship is founded both on the state of incorporation and the corporation's principal place of business. Unlike the state of incorporation, which generally is readily discernable from, among other sources, the Internet, *see, e.g.,* *Belleville Catering Co. v. Champaign Mkt. Place, L.L.C.*, 350 F.3d 691, 693 (7th Cir. 2003), a corporation's principal place of business often is very difficult to discern; indeed, courts are not even in consensus on the applicable legal test. *Compare, e.g.,* *Scot Typewriter Co., Inc. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959) (using the "nerve center test"), *with* *Kelly v. U.S. Steel Co.*, 284 F.2d 850 (3d Cir. 1960) (rejecting the "nerve center test" in favor of what some have called the "muscle test"), *and* *Harris v. Black Clawson Co.*, 961 F.2d 547 (5th Cir. 1992) (using a "total activity test").

<sup>140</sup> *Lively*, 456 F.3d at 936.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 936–37.

<sup>143</sup> 28 U.S.C. § 1441(b) (2000).

<sup>144</sup> *Id.* § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

<sup>145</sup> *Lively*, 456 F.3d at 936. Section 1447(c) states: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within [thirty] days after the filing of the notice of removal . . . ." 28 U.S.C. § 1447(c).

<sup>146</sup> *Lively*, 456 F.3d at 937.

2. *The Ninth Circuit's Decision.*—The Ninth Circuit reversed, concluding that the forum defendant rule is procedural on three grounds.<sup>147</sup> First, the court determined that the legislative history of § 1447(c) supported its procedural character.<sup>148</sup> As originally written, that section provided that remand must be made at any time if the case was “removed improvidently and without jurisdiction.”<sup>149</sup> In 1988, Congress changed that language to provide that “any defect in removal procedure” must be made within thirty days of removal, but that remand must be made at any time if the court “lacks subject matter jurisdiction.”<sup>150</sup> Finally, in 1996, Congress adopted the current language, which provides for remand only within thirty days of removal for “any defect other than lack of subject matter jurisdiction.”<sup>151</sup> The Ninth Circuit, surveying these transformations, concluded that Congress’s substitution of “defect other than lack of subject matter jurisdiction” for “defect in removal procedure” represented a narrowing of defects that should be considered “jurisdictional.”<sup>152</sup> The court concluded that that narrowing excluded the forum defendant rule from the jurisdictional realm.<sup>153</sup>

Second, the Ninth Circuit concluded that a procedural characterization of the forum defendant rule comported with the rule’s purpose.<sup>154</sup> The court noted that removal based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court, and that the need for this protection is absent when the removing defendant is in-state.<sup>155</sup> The court reasoned that a procedural characterization of the forum defendant rule would return to the plaintiff the ultimate choice of forum because the plaintiff could either move to remand to state court (within the thirty-day window) or choose to stay in federal court by not moving to remand within the thirty days.<sup>156</sup> By contrast, reasoned the Ninth Circuit, a jurisdictional characterization of the forum defendant rule would allow the court to remand the case to state court even if the plaintiff preferred to remain in federal court.<sup>157</sup>

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<sup>147</sup> The Ninth Circuit also concluded that it had jurisdiction to review the district court’s remand order under 28 U.S.C. § 1447(d). *Lively*, 456 F.3d at 937–39.

<sup>148</sup> *Id.* at 939.

<sup>149</sup> 28 U.S.C. § 1447(e) (1948), amended by Act of May 24, 1949, ch. 139 § 84(a) (redesignating subsection (e) as subsection (c)).

<sup>150</sup> 28 U.S.C. § 1447(c) (1988).

<sup>151</sup> 28 U.S.C. § 1447(c) (Supp. II 1996).

<sup>152</sup> *Lively*, 456 F.3d at 939.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 940.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

Third, the Ninth Circuit relied upon a Supreme Court case, *Grubbs v. General Electric Credit Corp.*,<sup>158</sup> which held that where a removed case is tried on the merits without objection and the federal court enters judgment, the jurisdictional issue on appeal is not whether removal was proper, but whether the district court would have had original jurisdiction over the case.<sup>159</sup> The Ninth Circuit reasoned that the Supreme Court's comment that the defect could not be raised *after* judgment, contrary to most defects of subject matter jurisdiction, suggested that the Supreme Court considered removal defects to be procedural, not jurisdictional.<sup>160</sup>

3. *Analysis of the Ninth Circuit's Opinion.*—The Ninth Circuit's opinion is flawed on its own terms for several reasons. First, the court's legislative history argument merely begs the question. It is true that § 1447(c)'s iterations demonstrate an attempt to broaden the category of nonjurisdictional defects subject to its thirty-day remand window, but it does not and has never attempted to define which defects are jurisdictional and which are not. The conclusion of the Ninth Circuit—that the broadening of the nonjurisdictional category encompassed the forum defendant rule—does not logically follow from the changes to § 1447(c) unless the forum defendant rule was seen as nonjurisdictional in the first place, the very question presented.

Second, the Ninth Circuit's "purpose" argument seems backwards. Even assuming that the purpose of the forum defendant rule is to protect the plaintiff's preferred choice of forum, a jurisdictional characterization promotes this purpose far more than a procedural characterization. A jurisdictional rule would require remand back to the plaintiff's preferred forum in all cases, whereas a procedural rule would require remand only if the plaintiff timely moved for remand within thirty days of removal. True, as the Ninth Circuit pointed out, a jurisdictional characterization will require remand even if the plaintiff prefers federal court, but it seems extremely unlikely that a plaintiff, having initially chosen state court over federal court, would later prefer to litigate in the defendant's choice of forum.

Third, *Grubbs* is irrelevant, though the Ninth Circuit's confusion is understandable. *Grubbs* dealt with two separate defects and stands for two separate propositions regarding them, neither of which have to do with the process of characterizing rules as jurisdictional or procedural: (1) a jurisdictional defect will not void a judgment if it is "cured," i.e., the court obtains jurisdiction, by the time it enters judgment; and (2) nonjurisdictional defects can be overcome by countervailing prudential considerations such as economy, efficiency, and finality.<sup>161</sup> In line with these two positions, the Court

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<sup>158</sup> 405 U.S. 699 (1972).

<sup>159</sup> *Id.* at 702.

<sup>160</sup> *Lively*, 456 F.3d at 941–42.

<sup>161</sup> See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 573–74 (2004) (stating that dismissal of the defendant cured the jurisdictional defect, and that the statutory defect of failing to comply

has reaffirmed that “if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated.”<sup>162</sup> Thus, the fact that a nonjurisdictional defect could not be raised for the first time on appeal is an unremarkable statement. It does not answer the question of whether the forum defendant rule should be characterized as jurisdictional or procedural.

*B. The Other Side of the Split: The Hurt v. Dow Chemical Co. Litigation*

The case for the other side of the split, held by the Eighth Circuit and a few commentators, is also unpersuasive. *Hurt v. Dow Chemical Co.*<sup>163</sup> stands against the tide in holding that the forum defendant rule is a matter of subject matter jurisdiction. There, an Illinois citizen filed suit in Missouri state court against a citizen of Delaware and a citizen of Missouri for personal injuries.<sup>164</sup> The defendants removed on the basis of federal question jurisdiction.<sup>165</sup> The plaintiff filed an amended complaint in federal court but then moved to remand to state court, asserting that the case presented no federal question.<sup>166</sup> The district court denied the motion, holding removal proper under federal question jurisdiction and that, even if it were not, diversity jurisdiction existed.<sup>167</sup>

The Eighth Circuit reversed and remanded. First, it held that federal question jurisdiction was lacking.<sup>168</sup> It then addressed the defendant’s argument that diversity jurisdiction could support federal jurisdiction. In a formalistic opinion, the court proceeded with the following syllogism: (1) federal courts require statutory authorization to exercise jurisdiction;<sup>169</sup> (2) original jurisdiction was not invoked because the case was filed in state court;<sup>170</sup> (3) removal jurisdiction based on diversity was restricted by the forum defendant rule;<sup>171</sup> (4) therefore, statutory jurisdiction was lacking.<sup>172</sup> The Eighth Circuit concluded the district court lacked jurisdiction and should have granted the remand motion.<sup>173</sup>

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with the time of removal rules was overridden—rather than cured—by prudential considerations); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996) (“The *jurisdictional* defect was cured, *i.e.*, complete diversity was established before the trial commenced. . . . [What remained was] a statutory flaw—[the] failure to meet the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed.”).

<sup>162</sup> *Caterpillar*, 519 U.S. at 76–77 (emphasis omitted).

<sup>163</sup> 963 F.2d 1142 (8th Cir. 1992).

<sup>164</sup> *Id.* at 1143, 1145.

<sup>165</sup> *Id.* at 1143.

<sup>166</sup> *Id.* at 1143–44.

<sup>167</sup> *Id.* at 1144.

<sup>168</sup> *Id.* at 1144–45.

<sup>169</sup> *Id.* at 1145.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1146.

<sup>173</sup> *Id.*

Like *Lively*, *Hurt* also is flawed, though for different reasons. *Hurt*'s resort to formalism stands in some tension with the Supreme Court's more functional approach to characterization inquiries, as described above.<sup>174</sup> In addition, the Eighth Circuit's own precedent does not support such formalism, for it holds the thirty-day time requirement for removal to be a non-jurisdictional procedural bar.<sup>175</sup> If *Hurt*'s formalist syllogism is to hold water on its own, it must also deem the time bar to removal to be jurisdictional. Because the Eighth Circuit is not willing to go so far, *Hurt* must do more to explain either formal justifications for the differences or abandon its formalism and look to a more functional approach.

### C. How the Framework Provides a More Reasoned Approach

In short, neither the Ninth Circuit nor the Eighth Circuit persuasively justifies its characterization of the forum defendant rule. To the contrary, their opinions approach the characterization inquiry in a misguided way. The Supreme Court missed the opportunity to clarify the character of the forum defendant rule as jurisdictional or procedural when it denied certiorari in *Lively* earlier this year.<sup>176</sup>

A more reasoned approach would have followed the framework developed in Part III of this Article. First, the courts should have considered whether Congress has specifically denoted the forum defendant rule of § 1441(b) as jurisdictional. Section 1441(b) states, in relevant part, "[a]ny [action other than one founded on a claim arising under federal law] shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."<sup>177</sup> The section does not use the term "jurisdictional" but instead uses the language "shall be removable only if." "Shall" can mean mandatory, but there is nothing within that phrase that indicates that it also means jurisdictional.

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<sup>174</sup> *Hurt*'s syllogism depends upon a premise that removal jurisdiction is independent of and mutually exclusive of original and appellate jurisdiction, a premise in some tension with the Court's (admittedly inconsistent) conception of removal "jurisdiction" as being some form of appellate or original jurisdiction. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816) (characterizing removal as an exercise of appellate jurisdiction); *Ry. Co. v. Whitton*, 80 U.S. (13 Wall.) 270, 287 (1871) ("We may doubt, with counsel, whether such removal before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the Federal court acquires original jurisdiction of the causes."); *Tennessee v. Davis*, 100 U.S. 257, 265 (1879) ("Whether removal from a State to a Federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, Sect. 1745, or an indirect mode of exercising original jurisdiction, as intimated in *Railway Company v. Whitton* (13 Wall. 270), we need not now inquire."); *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 452 (1943) ("The jurisdiction exercised on removal is original not appellate.")

<sup>175</sup> See, e.g., *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528 (8th Cir. 1996); *Nolan v. Prime Tanning Co.*, 871 F.2d 76, 78 (8th Cir. 1989).

<sup>176</sup> See *Lively v. Wild Oats Mkts., Inc.*, 127 S. Ct. 1265, 1266 (2007).

<sup>177</sup> 28 U.S.C. § 1441(b) (2000).

When read in conjunction with § 1441(a), however, the section may take on new meaning. Section 1441(a) states: “*Except as otherwise expressly provided by Act of Congress*, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . .”<sup>178</sup> Section 1441(b)’s forum defendant exception therefore could be read, in conjunction with its sister subsection (a), as an express exception to subsection (a)’s general authorization for removal.<sup>179</sup> Assuming § 1441(a) is a jurisdictional provision,<sup>180</sup> reading § 1441(b) as an express exception to § 1441(a) may turn § 1441(b) into a jurisdictional limitation by reference. Whether the language is unmistakably clear enough to give rise to the presumption of jurisdiction is a question I do not resolve here; the point is that both the Ninth Circuit and the Eighth Circuit should have begun their analyses by addressing these issues and determining whether or not to apply the presumption of jurisdiction.

Second, the courts then should have turned to the function of the forum defendant rule. On the one hand, the rule is not a claim-processing rule that directs the parties to take certain actions. Rather, it restricts the application of diversity jurisdiction to removal by separating those diversity cases that involve a forum defendant from those that do not. It focuses the availability of a federal forum in diversity cases to those removed cases that most justify the invocation of diversity jurisdiction. This latter effect is a broader societal goal and has strong justification in federalism values. These factors support a jurisdictional characterization of the rule.

On the other hand, the forum defendant rule is designed to benefit an individual litigant: the plaintiff’s right to choose either a state or federal forum in a diversity case, though normally subject to a defendant’s ability to choose a federal forum, cannot be overridden by a forum defendant. Because it is a rule that inures to the plaintiff’s benefit, it may be appropriate to allow the plaintiff to waive the benefit or to require the plaintiff to assert it within a certain time period. The courts of appeals should have analyzed these factors, paying close attention to which are primary and which are secondary purposes, and, ultimately, should have weighed all these factors to determine which characterization is best supported.

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<sup>178</sup> *Id.* § 1441(a) (emphasis added).

<sup>179</sup> Brian Portugal has made this point. See Portugal, *supra* note 59, at 1036 (“This specific language [of the forum defendant rule] controls the general jurisdictional language of Subsection (a). The forum defendant rule falls under the specific statutory exception of Subsection (a) . . . .”). So has Judge Friendly. See *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880, 882 n.3 (2d Cir. 1970) (Friendly, J.) (“[T]he provision limiting removal for diversity to a non-resident defendant was in the same sentence authorizing removal itself, and a rather sharp scalpel was needed to dissect out one part of the sentence as jurisdictional and leave the other as not.”).

<sup>180</sup> See *supra* note 38.

Third, the courts then should have considered all of the effects of a particular characterization of the rule.<sup>181</sup> The Ninth Circuit did analyze the effects of a procedural characterization of the rule on the plaintiff's ultimate choice of forum,<sup>182</sup> but even if that analysis avoided the problems discussed above, the Ninth Circuit still failed to consider other relevant effects of a particular characterization.

For example, a procedural characterization would place the burden of raising and proving the violation on the plaintiff, the party least likely to know the facts relevant to making the determination of the defendant's citizenship. And, under § 1447(c), the plaintiff would have to do so within thirty days of removal, usually prior to any discovery, and constrained by the requirements of Rule 11 of the Federal Rules of Civil Procedure. That burden seems unwarranted and likely to result in many violations slipping through the cracks. By contrast, a jurisdictional characterization would require courts to raise the issue *sua sponte* and would insulate the issue from waiver and estoppel. A jurisdictional characterization would ensure that the plaintiff has adequate time to discover the relevant facts and return the case to her preferred state forum. It also would deter defendants from attempting to remove the case in violation of the forum defendant rule in the hopes that the plaintiff will not suspect a violation until after the thirty-day window has passed. Finally, *sua sponte* judicial scrutiny of defendant citizenship in such a situation is not anomalous; the defendant, after all, receives the benefit of similar scrutiny of the plaintiff if the plaintiff originally files a diversity case in federal court. The courts of appeals should have at least considered these effects in their analyses.

Finally, the courts then should have considered whether the forum defendant rule has an historical pedigree of one characterization and, if not, whether analogous rules have been settled to be procedural or jurisdictional. The Supreme Court has not addressed the characterization of the forum defendant rule, the circuits are split, and only one case had addressed it prior to 1970. This suggests that its historical pedigree is not nearly as long nor as consistent as that deemed significant in *Bowles*.<sup>183</sup> In addition, amendments to the general removal statute have complicated any attempt to view its pedigree with uniformity.<sup>184</sup> Nevertheless, the courts of appeals should

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<sup>181</sup> Evan Lee suggests that all hard jurisdictional questions should be viewed in this light (and this light alone). See Lee, *supra* note 2, at 1614 ("In a hard case, where it is unclear whether the rules denominate a particular issue 'jurisdictional,' the court should not try to resolve the question by asking whether the issue is 'in the nature of' jurisdiction, or whether it 'seems' jurisdictional. . . . Instead, the court should look to the effects (notice, reliance, finality, and justice) of treating that particular issue as if it were jurisdictional (capable of being raised for the first time on appeal, analytically prior to other issues in the case, and so on).").

<sup>182</sup> *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 939–40 (9th Cir. 2006).

<sup>183</sup> See cases cited *supra* note 61.

<sup>184</sup> See *Lively*, 456 F.3d at 939 (arguing that recent amendments to § 1447 were designed to change the characterization of the forum defendant rule).

have analyzed these issues to determine whether doctrinal consistency supports a characterization of the forum defendant rule as jurisdictional.

Turning to cross-doctrinal analysis, although the forum defendant rule is rather unique, its purpose of preserving the plaintiff's choice of forum is similar to the express nonremovability prescription of § 1445, which, as explained above, withholds removal from certain cases, such as those brought under state workmen's compensation laws, even though they originally could have been filed in federal court under certain circumstances.<sup>185</sup> If the courts found that § 1445 was not analogous and that, instead, the forum defendant rule was unique, this factor might not have much weight. Similarly, if § 1445 is analogous, but has not been settled to be procedural or jurisdictional,<sup>186</sup> this factor still might not have much weight. At the very least, the courts of appeals should have considered what analogues exist and what their settled characterizations are.

In short, the considerations outlined above and the framework from which they derive provide a sounder and more reasoned basis for analyzing the character of removal provisions like the forum defendant rule than do the approaches taken by the Ninth Circuit and the Eighth Circuit. I did not say this was easy; I only suggest that my framework is a more reasoned approach. Nor do I attempt to resolve the circuit split here and argue one way or another as to whether the forum defendant rule is jurisdictional or procedural; I mean only to set the stage for discussion of the appropriate framework courts should use to guide them through what is inherently a difficult and confusing process. My purpose is to propose a framework that will generate more meaningful discussion about what is and is not jurisdictional, rather than relying on cherry-picked and perhaps carelessly used phrases from past Supreme Court opinions.

## V. CONCLUSION AND THOUGHTS FOR THE FUTURE

My discussion of the characterization of removal provisions as jurisdictional or procedural implicates at least two other topics. First, the diffi-

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<sup>185</sup> *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 351–52 (1961) (explaining that the purpose of § 1445 is to preserve the plaintiff's choice of forum (citing S. REP. NO. 85-1830, at 8–9 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3105–06)).

<sup>186</sup> Such appears to be the case, although the majority view seems to be that § 1445 is nonjurisdictional. Compare *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1060–62 (9th Cir. 2002) (workmen's compensation bar is procedural), *Feichko v. Denver & Rio Grande W. R.R.*, 213 F.3d 586, 589–91 (10th Cir. 2000) (FELA bar is procedural), *Albarado v. S. Pac. Transp. Co.*, 199 F.3d 762, 765–66 (5th Cir. 1999) (same), *In re Excel Corp.*, 106 F.3d 1197, 1201 n.4 (5th Cir. 1997) (workmen's compensation bar is procedural), *Williams v. AC Spark Plugs Div. of Gen. Motors Corp.*, 985 F.2d 783, 786–88 (5th Cir. 1993) (same), and *Carpenter v. Balt. & Ohio R.R.*, 109 F.2d 375, 379–80 (6th Cir. 1940) (FELA bar is procedural), with *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1096–97, 1095 n.5 (11th Cir. 1997) (holding § 1445 jurisdictional), and *Gamble v. Cent. of Ga. Ry. Co.*, 486 F.2d 781, 783 (5th Cir. 1973) (same), overruled in part by *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 118 (5th Cir. 1987) (en banc) (relying on *Grubbs*).

culty of extending the Supreme Court's recent jurisdictional clarifications to the removal context<sup>187</sup> demonstrates that these cases likewise may be inadequate to resolve the jurisdictional characterization issues implicated in other doctrines such as prudential standing,<sup>188</sup> appellate certification,<sup>189</sup> exhaustion,<sup>190</sup> and the Eleventh Amendment.<sup>191</sup> In short, there are a host of characterization issues lurking in these doctrinal waters, and the current clarifications have not resolved them. The framework set forth here should contribute to the discussion in these areas as well.

Second, my discussion of the jurisdiction versus procedure dichotomy of removal should contribute, in conjunction with others' discussions of jurisdiction versus merits and procedure versus merits characterization issues,<sup>192</sup> to the broader understanding of the interrelationships and boundaries among the trichotomy of jurisdiction, procedure, and merits.

In this Article, I have explored the jurisdictional and procedural character of the removal statutes, the unique implications of its characterization for litigants and for the courts, and the lack of firm guidance for resolving the characterization issues that arise. I have proposed the beginnings of a solution—a framework of factors that draws upon the formal and functional differences between jurisdiction and procedure and upon the Supreme Court's recent guidance in other areas of jurisdictional characterization. Finally, I have shown, through application to a circuit split on the forum defendant rule, how the framework can provide a more reasoned basis for resolving removal characterization issues than do the analyses the lower courts have employed. My hope is that this Article will encourage others to

<sup>187</sup> See *supra* text accompanying notes 76–118, 124–26.

<sup>188</sup> See, e.g., *Bd. of Educ. v. Kelly E.*, 207 F.3d 931, 934 (7th Cir. 2000) (holding prudential standing requirements to be nonjurisdictional).

<sup>189</sup> See *Burton v. Stewart*, 127 S. Ct. 793, 796 (2007) (per curiam) (“[U]nder AEDPA, he was required to receive authorization from the Court of Appeals before filing his second challenge. Because he did not do so, the District Court was without jurisdiction to entertain it.”).

<sup>190</sup> The Court has avoided resolving whether appellate exhaustion is jurisdictional. See *Adams v. Robertson*, 520 U.S. 83, 90 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). But see *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (stating that the Court can decide issues that were not presented below when the respondent does not object, the issue was squarely presented and fully briefed, and it was an important, recurring issue).

<sup>191</sup> The Court has not decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction or not. See *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391–92 (1998) (“Even making the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction—a question we have not decided . . .”). It has, however, described the Eleventh Amendment as a “hybrid” of jurisdictional characteristics. *Id.* at 394 (Kennedy, J., concurring). It “sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court,” *Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974), but it can be waived and the courts need not raise it sua sponte. See *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring). Thus, it is “a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

<sup>192</sup> See, e.g., Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973 (2006); Lee, *supra* note 2; Wasserman, *supra* note 12.

join in the conversation and that the groundwork I lay here can begin to provide meaningful, principled, workable, clear, and consistent guidance to the courts.