Charting a Course for Federal Removal through the Abstention Doctrine: A Titanic Experience in the Sargasso Sea of Jurisdictional Manipulation

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INTRODUCTION

It is well known within the legal community that plaintiffs prefer to argue their cases in state court. This preference is more than whimsical fancy. Litigation in federal court is perceived as “more expensive and time consuming.”¹ Plaintiffs are also rightfully concerned that federal judges with overburdened dockets² will look for ways to quickly unload their cases. Federal judges have increasingly disposed of cases by exercising stringent control of discovery, aggressively encouraging settlement, and granting summary judgment more frequently.³

Plaintiffs’ fear of federal court is borne out by statistics. Two Cornell law professors authored a study in 1998, which concluded that the plaintiff “win rate” in removed federal civil cases was 36.77%, com-

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² See Abner J. Mikva, It’s Time to “Unfix” the Criminal Justice System, 20 HASTINGS CONST. L.Q. 825, 829 (1993) (arguing the so-called war on drugs has so overburdened the federal judiciary that getting a civil case tried in federal court is almost impossible).
pared to an overall win rate in federal civil cases of 57.97%. The statistics in diversity cases were even more startling. The win rate in original diversity cases was 71%, compared to a 34% win rate in removed cases. This disparity may also be the result of forum impact, since “[r]emoved plaintiffs fare relatively worse before judges than before juries.” Plaintiffs are thus confronted with problematic options in federal court. On the one hand, they face federal judges who may be more ambivalent toward plaintiffs because they are insulated from local election pressures. On the other hand, they face the unanimity requirement of jury trials, which leaves them little room for error.

Enterprising plaintiffs’ attorneys have developed numerous strategies for defeating the removal of their lawsuits to federal court. A new method for defeating removal is developing in the context of the Federal Declaratory Judgment Act (FDJA) and involves the broad use of the abstention doctrine. Some circuit courts have expanded the application of the Brillhart v. Excess Insurance Co. of America abstention doctrine to defeat removal in declaratory judgment actions where no procedural defect existed in a removal based on diversity. These decisions have broad implications beyond the FDJA and may result in courts employing this abstention power in all cases being removed from state to federal court.

The constitutional purpose of diversity jurisdiction is to protect out-of-state defendants from possible local or state bias by judges and juries. Procedural manipulation interferes with defendants’ right to federal jurisdiction for claims of large value between citizens of different states. Moreover, interference with diversity jurisdiction gives rise to concerns about whether state judges will actually enforce the interests of the public at large for a claim or class action affecting nationwide interests. Manipulation of procedural rules to affect jurisdiction often gives rise to criticism focused on the plaintiffs’ bar. However, manipu-

5. Id.
6. Id. at 601.
9. See infra Part II.B.
12. See infra Part III.
lation of the abstention doctrine requires direct judicial involvement by the federal bench and presents a serious challenge to federalism.

Part II of this Article discusses the most commonly used and well-recognized procedural strategies to defeat removal.\(^{13}\) Part II.A gives a general explanation of removal and highlights the various procedural mechanisms available to defeat removal.\(^{14}\) Part II.B discusses the specific procedural requirements that attorneys have manipulated in their quest to avoid federal court.\(^{15}\)

Part III of this Article discusses the manner in which some federal courts are utilizing the abstention doctrine to defeat removal.\(^{16}\) Part III.A reviews the abstention doctrine and its variants including the *Railroad Commission of Texas v. Pullman Co.*,\(^{17}\) *Burford v. Sun Oil Co.*,\(^{18}\) *Younger v. Harris*,\(^{19}\) and *Brillhart* variants.\(^{20}\) In Part III.B, the Article discusses how the courts have expanded *Brillhart* abstention to prevent effective removal.\(^{21}\)

II. *Procedural Challenges to Removal*

A. Understanding Removal

The original Judiciary Act of 1789 provided for removal of cases from state to federal court in limited situations.\(^{22}\) Removal of cases to

13. See *infra* notes 22–208 and accompanying text.
14. See *infra* notes 22–54 and accompanying text.
15. See *infra* notes 55–208 and accompanying text.
16. See *infra* notes 209–323 and accompanying text.
17. 312 U.S. 496 (1941).
20. See *infra* notes 220–314 and accompanying text.
21. See *infra* notes 315–323 and accompanying text.
22. 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3721 (3d ed. 1998). Removal had limited application in the early nineteenth century as a result of the landmark Supreme Court decision of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The Court in *Strawbridge* held that the Judiciary Act of 1789 required complete diversity of citizenship between the parties as a prerequisite to federal diversity jurisdiction. *Id.* at 267–68. In 1866, Congress enacted the Separable Controversy Act, which allowed an out-of-state defendant to remove part of a case filed in state court provided that the removed part was "separable" from the rest of the suit and diversity existed between the parties to the "separable" case. Ch. 288, 14 Stat. 306 (1866).

The Supreme Court established the test for determining whether a separate independent claim existed within a lawsuit in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). The Court explained that "where there is a simple wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." *Id.* at 14. See generally 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.* 1099 (1995) (providing historical analysis of § 1441(c)). A separate and independent claim is one that stands on its own facts and does not rely on other claims within the lawsuit to justify the application of supplemental jurisdiction. See Carnegie-Mellon Univ. v.
federal court must be predicated on either subject-matter jurisdiction or diversity jurisdiction. The bulk of disputes regarding removal, therefore, involve jurisdictional issues.

The federal removal statutes are strictly construed; all doubts regarding removability are resolved in favor of a remand to state court. The burden of establishing removal jurisdiction rests with the party seeking removal, and the burden includes both establishing federal jurisdiction and showing that the appropriate removal procedures have been followed.

Federal question jurisdiction exists over “all civil actions arising under the Constitution, laws, or treaties of the United States.” A case is deemed to “arise under” federal law when federal law either explicitly or implicitly “creates the cause of action” upon which the plaintiff is suing. The suit must “really and substantially involve[ ] a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.” The “well-pleaded complaint rule” requires the federal question to appear on the face of the complaint. Under this rule, only federal claims—not federal defenses—permit federal court review.

Cohill, 484 U.S. 343, 355 n.11 (1998) (providing an analysis of supplemental jurisdiction). Compare Richard D. Freer, Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute, 40 EMORY L.J. 445 (1991) (criticizing the supplemental jurisdiction statute), with Thomas D. Rowe, Jr. et al., Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 EMORY L.J. 943 (1991) (supporting the supplemental jurisdiction statute). Where the claim involves “substantially the same facts” as other claims in the lawsuit, it is not separate and independent under § 1441(c). See, e.g., Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100, 104 (5th Cir. 1996). Thus, “if one claim depends on establishing liability under the other, the two cannot be found to be independent.” Id.; see also Moore v. United Servs. Auto. Ass’n, 819 F.2d 101, 104 (5th Cir. 1987).

31. Shulthis v. McDougall, 225 U.S. 561, 569 (1912); see also Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112 (1936) (stating that federal question jurisdiction requires that the federal issue “be an element, and an essential one, of the plaintiff's cause of action”).
33. The “well-pleaded complaint rule” has been criticized. See, e.g., CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 18 (5th ed. 1994) (“If the basis for original federal-question jurisdiction is that the federal courts have a special expertise in applying federal law . . . it would
mval of a claim based on the presence of a federal question requires that the claim at issue in the state proceeding arise under the laws of the Constitution of the United States.\textsuperscript{34} The presence of a federal defense or counterclaim is an insufficient basis for removing a case to federal court on federal question grounds.\textsuperscript{35}

Diversity jurisdiction exists over controversies between citizens of different states, or between a state and its citizens and a foreign state and its citizens, where the amount in controversy exceeds $75,000, exclusive of interest and costs.\textsuperscript{36} Once a case is removed, "the federal court acquires full and exclusive subject-matter jurisdiction over the litigation."\textsuperscript{37} Although state law will still apply after removal, the federal court is not "bound by any rule of state practice that conflicts with one of the federal rules."\textsuperscript{38} State court interlocutory rulings are not binding upon a federal court,\textsuperscript{39} but litigants must abide by those rulings until they are vacated by a federal court.\textsuperscript{40}

Any act demonstrating "unequivocal assent" to federal jurisdiction waives a plaintiff's right to seek remand.\textsuperscript{41} Due to the fact that a trial judge has broad discretion in determining whether defects in the removal process have been waived,\textsuperscript{42} courts have taken varying views on the question of what constitutes waiver. Some courts have concluded that the filing of an amended complaint or the serving of discovery seem that the courts should have jurisdiction where there is some federal issue regardless of which pleading raises it."). \textit{See generally} Donald L. Doernberg, \textit{There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction}, 38 Hastings L.J. 597 (1987) (explaining why the rule ought to be abandoned).

38. Redfield v. Cont'l Cas. Corp., 818 F.2d 596, 605 (7th Cir. 1987).
39. Daniels v. McKay Mach. Co., 607 F.2d 771, 773-74 (7th Cir. 1979) (holding that a state court's denial of summary judgment was an interlocutory order and was not the law of the case, thus permitting the federal court to reconsider the denial following removal).
41. \textit{See, e.g.}, Courville v. Texaco, Inc., 741 F. Supp. 108, 111 (E.D. La. 1990) (holding that a plaintiff's affirmative conduct and acquiescence to a federal forum in an identical action involving the same parties constituted unequivocal assent to federal jurisdiction, thereby waiving any right to seek remand); Reed v. Chesney, 709 F. Supp. 792, 794 n.3 (E.D. Mich. 1989) ("A party may waive objections to procedural defects when there is 'affirmative conduct or unequivocal assent of a sort which would render it offensive to fundamental principles of fairness to remand.'" (quoting Feller v. Nat'l Enquirer, 555 F. Supp. 1114, 1121 (N.D. Ohio 1983))).
requests can be deemed a waiver. \textsuperscript{43} Other courts have taken a more limited view of waiver, holding that an act by a plaintiff can be considered "unequivocal assent" only if that act was initiated by the plaintiff. Pursuant to this reasoning, for example, it has been held that a plaintiff's filing of a responsive brief to a motion for summary judgment did not constitute waiver because the brief was filed in response to a matter initiated by the defendant. \textsuperscript{44}

Federal courts are courts of limited jurisdiction\textsuperscript{45} and, therefore, any case which is removed must be one which, at the time of removal, could have been brought initially in federal court. \textsuperscript{46} There has been a "torrent of litigation" involving disputes over subject-matter jurisdiction that has threatened to overwhelm the federal judicial system. \textsuperscript{47} In response, Congress enacted the comprehensive Judicial Improvements Act of 1988. \textsuperscript{48} The Act expanded the court's authority to sanction defendants who improperly remove their cases to federal court. \textsuperscript{49}

Once a case is removed under 28 U.S.C. § 1447(c), only "a defect in removal procedure or a lack of subject matter jurisdiction" will support a remand. \textsuperscript{50} Removal defects based on a lack of subject-matter jurisdiction can be raised at any time, but if the removal defect is pro-

\begin{itemize}
\item \textsuperscript{45} Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996).
\item \textsuperscript{46} See, e.g., Cervantez v. Bexar County Civil Serv. Comm’n, 99 F.3d 730, 733 (5th Cir. 1996). A defendant's removal of a case to federal court is subject to two general remand statutes. See 28 U.S.C. §§ 1441(c), 1447(c) (2000). Both the plaintiff and the court may question the propriety of the removal under these statutes. See generally Mark Herrmann, Thermtron Revisited: When and How Federal Trial Court Remand Orders Are Reviewable, 19 ARIZ. ST. L. J. 395 (1987).
\item \textsuperscript{50} Jamison v. Wiley, 14 F.3d 222, 239 (4th Cir. 1994); accord Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 345 (1976) ("The District Court exceeded its authority in remanding on grounds not permitted by [28 U.S.C. § 1447(c)].")
\end{itemize}
cedural, a plaintiff has thirty days to file a notice of remand or the procedural defect is waived.51

There is a split of authority over whether a district court can remand *sua sponte* on the basis of a procedural defect.52 On one hand, a court has no discretion to avoid a remand where a procedural or jurisdictional defect has been asserted.53 On the other hand, where "jurisdiction exists and was properly invoked, the Court has no discretion to remand."54

B. Procedural Attempts to Defeat Federal Jurisdiction

Plaintiffs can manipulate procedural rules to create obstacles to the removal of a state-based proceeding. These procedural obstacles include (1) eliminating federal claims or disguising federal claims as state claims;55 (2) delaying service on defendants and manipulating the unanimous consent rule;56 (3) suing nondiverse defendants;57 (4) manipulating the amount in controversy;58 (5) using the nonaggregation rule in class actions;59 and (6) manipulating the time requirements.60

1. Avoiding or Disguising Federal Claims

Federal courts will not read federal claims into a complaint that alleges only state law claims—provided state law affords a remedy.61


52. Compare Page v. City of Southfield, 45 F.3d 128, 129 (6th Cir. 1995), with *In re Cont'l Cas.* Co., 29 F.3d 292, 294 (7th Cir. 1994).

53. See 28 U.S.C. § 1447(c) (2000). However, a few courts have created a practical exception to this rule, allowing the removing party thirty days to correct a procedural defect after removal. *See O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988); *Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985); Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980); *Computer People, Inc. v. Computer Dimensions Int'l, Inc.*, 638 F. Supp. 1293, 1296–97 (M.D. La. 1986).

54. *Burnette v. Godshall*, 828 F. Supp. 1439, 1444 (N.D. Cal. 1993), *aff'd sub nom.* Burnette v. Lockheed Missiles & Space Co., 72 F.3d 766 (9th Cir. 1995); *see also Davis v. Joyner*, 240 F. Supp. 689, 690 (E.D.N.C. 1964) ("[W]here Congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to the state court." (citing *Vann v. Jackson*, 165 F. Supp. 377, 381 (E.D.N.C. 1958))).

55. See infra Part II.B.1.

56. See infra Part II.B.2.

57. See infra Part II.B.3.

58. See infra Part II.B.4.

59. See infra Part II.B.5.

60. See infra Part II.B.6.

61. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 & n.7 (1987). The mere fact that a complaint refers to a federal statute does not mean that the claim arises under federal law.
Even if a claim may also be brought under a federal statute, federal courts will not disrupt the plaintiff’s choice of law if state law provides relief. Federal courts will not go beyond the pleadings to ascertain what the plaintiff could or should have pleaded.

There exists a well-entrenched judicial belief that a plaintiff has a superior right to the selection of a forum. This supposed “right” has little jurisprudential basis. No such right is expressed in the Constitution, because the Constitution draws no distinction between plaintiffs and defendants. The Constitution creates categories of potential federal jurisdiction and reserves for Congress the general authority to implement that jurisdiction. The Constitution “was designed for the common and equal benefit of all the people of the United States.” The judicial belief that the plaintiff possesses a superior right to select the forum creates significant tension between a constitutional system that envisions equal access to federal courts and a judicial presumption that provides greater access to one class of citizens at the expense of another.

Presumptions against removal have created a system in which procedural gamesmanship is rewarded. Justice Scalia has criticized judicial presumptions because they necessarily import judicial bias into the simple act of construing language; he has observed that “[a] text should not be construed strictly, and it should not be construed leni-
ently; it should be construed reasonably, to contain all that it fairly means."67

The defendant has the burden of proving that a case, although disguised as a state law claim, actually requires a determination of federal law.68 A plaintiff can make this task nearly impossible by disclaiming a federal cause of action in the complaint. Courts frequently cite such disclaimers as evidence that a complaint does not invoke federal question jurisdiction.69 But even if the court finds that the complaint implicates a federal question, a plaintiff can seek dismissal of the federal cause of action and move for remand.70

2. Delaying Service and Manipulating the Unanimous Consent Rule to Defeat Removal

After receiving the complaint "through service or otherwise," the defendant has thirty days to effect removal.71 Because the removal deadline is statutory, it cannot be extended by stipulation.72

Under federal law, all defendants must explicitly consent to the removal of a lawsuit.73 This so-called "unanimous consent rule" is a judicial creation74 and is predicated upon the belief that all defendants have an equal right to remain in state court.75 The effect of this rule is to "give[ ] each defendant an absolute veto over removal."76 A removal notice will be deemed defective if, for unexplained reasons, one of the defendants refuses to join in the petition or otherwise indicate

70. The Fifth Circuit has held that a district court abuses its discretion by retaining jurisdiction over a lawsuit when all federal claims have been dismissed early in the proceedings. See, e.g., Robertson v. Neuromedical Ctr., 161 F.3d 292, 296 (5th Cir. 1998) (per curiam); Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 587-90 (5th Cir. 1992).
72. Ortiz v. Gen. Motors Acceptance Corp., 583 F. Supp. 526, 531 (N.D. Ill. 1984). But see Ayers v. Watson, 113 U.S. 594, 598-99 (1885) (stating that the time limit on removal could be waived by the plaintiff because "it is not, in its nature, a jurisdictional matter, but a mere rule of limitation").
73. See, e.g., Doe v. Kerwood, 969 F.2d 165, 168 (5th Cir. 1992); Hewitt v. City of Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986) (per curiam).
its approval. It is insufficient to merely allege that all defendants consent to removal.

Federal courts have taken different approaches to the unanimity requirement and the thirty-day limitation on removal. Some courts require all defendants to remove or otherwise join in the removal petition within thirty days of the service of process upon the last defendant served. Other courts hold that the removal clock runs from the time of service on the first defendant served. Still others hold that a separate removal "clock" runs for each defendant based on the date that defendant received service. Most courts follow the "first-served" defendant rule for calculating the start of the thirty-day removal time limit.

The requirement of consent, coupled with the thirty-day time limitation, allows a plaintiff to manipulate the system by "staggering" service. For example, a plaintiff may first serve the defendant deemed least likely to remove, and then serve the other defendants in the order of their expected likelihood to seek removal. In circuit courts that have adopted the "first-served" defendant rule, the first defendant may have already waived the right to remove before the other
defendants have been served. By carefully timing service of process upon different defendants, plaintiffs can effectively strip later defendants of their right to removal.

Recently, Congress created a limited exception to the unanimous consent rule in the context of class actions. Under the Class Action Fairness Act (CAFA), defendants in a class action qualifying under the requirements set forth in that Act can unilaterally remove the action to federal court without the consent of any other defendants.

3. Suing Nondiverse Defendants to Defeat Removal

Joinder of a nondiverse party as a defendant may be used by a plaintiff to defeat a diverse defendant’s ability to remove a case to federal court. The federal courts will treat a nominal nondiverse defendant as a real defendant, unless no claim could possibly be brought against a nondiverse defendant under state law. The court, however, has an obligation and duty to protect the diverse defendant’s right to be in federal court. It is the joinder of an indispensable party under Federal Rule of Civil Procedure 19 that destroys diversity jurisdiction. A joinder is fraudulent if the plaintiff lacks any possibility of having a joint claim against a joined party. Even though a plaintiff has a claim arising under the same area of law against common defendants, if the facts that form the basis for the claim are unique, there is no significant identity between the claim from a factual or legal standpoint that would justify joinder.

The plaintiff may also assert that multiple defendants are alternatively liable. In order to present an alternative claim against multiple defendants, there must be a clear statement that there was harm to the plaintiff and a showing that the plaintiff is unable to identify which defendant should be liable. If a nondiverse defendant, for example,
is joined in a lawsuit with a diverse defendant based on the breach of a contract, the nondiverse defendant is considered a necessary and proper party only if the nondiverse defendant is a signatory to the contract.\textsuperscript{94} If a nondiverse defendant commits a tort separate and apart from the contract, then that defendant is not a necessary party to the lawsuit and cannot be joined pursuant to Rule 19.\textsuperscript{95}

One court explained, "[t]he proper remedy in case of misjoinder is to grant severance or dismissal to the improper party [pursuant to Federal Rule of Civil Procedure 21] if it will not prejudice any substantial right."\textsuperscript{96} Rule 21 authorizes a state court to sever a claim even if there is no improper joinder.\textsuperscript{97} If a plaintiff could improperly join a nondiverse defendant, thereby precluding the diverse defendant from removing to federal court, state court jurisdiction would encroach upon federal matters in violation of the applicable procedural rules.\textsuperscript{98} Once the state court has granted a motion to sever or to drop a nondiverse defendant, the diverse defendant can then remove the case to federal court.

The Supreme Court has held that "it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered."\textsuperscript{99} Thus, a district court has the authority to determine issues of improper joinder after the lawsuit is removed:\textsuperscript{100}

[A] defendant may remove a civil action on the basis of diversity jurisdiction and seek to persuade the district court that any nondiverse defendants were fraudulently joined. A non-diverse defen-

\textsuperscript{94} See Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975); Nason v. Voight, 625 P.2d 974, 975 (Ariz. Ct. App. 1981) (explaining that a joint tenant who was a party to the agreement was a "necessary and proper party" to the lawsuit).

\textsuperscript{95} Fid. & Cas. Co. of N.Y. v. Tillman Corp., 112 F.3d 302, 304 (7th Cir. 1997) (holding that a broker who stole premium payments was not an "indispensable party" in workers' compensation insurer's suit against insured to recover premium).

\textsuperscript{96} Sabolsky v. Budzanoski, 457 F.2d 1245, 1249 (3d Cir. 1972); accord Anrig v. Ringsby United, 603 F.2d 1319, 1325 (9th Cir. 1979) (holding that courts should either sever or dismiss dispensable parties pursuant to Rule 21); Am. Fid. Fire Ins. Co. v. Construcciones Werl, Inc., 407 F. Supp. 164, 190 (D.V.I. 1975) (noting Rule 21 allows the court to sever unrelated claims and to proceed separately with the misjoined claims).

\textsuperscript{97} Wyndham Assocs. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968).

\textsuperscript{98} See Fed. R. Civ. P. 82; see also Locke Mfg. Co. v. Sabel, 244 F. Supp. 829, 830-31 (W.D. Ky. 1965) (holding that Rule 82 was created to avoid the unwarranted extension or diminution of federal court jurisdiction through misuse of the joinder provisions).


\textsuperscript{100} Lee v. Lehigh Valley Coal Co., 267 U.S. 542, 543 (1925) ("When a defendant seeks to remove a suit from a State Court to the District Court, of course he is entitled to contend that a party joined by the plaintiff is not a necessary party and therefore does not make the removal impossible by defeating the jurisdiction."); see also Tex. Employers Ins. Ass'n v. Felt, 150 F.2d 227, 230-31 (5th Cir. 1945).
dant is fraudulently joined, if it can be shown that no cause of action has been alleged by the plaintiff and the plaintiff's failure is obvious under settled state law.\textsuperscript{101}

The notice of removal should indicate that the nondiverse defendant is improperly or fraudulently joined.\textsuperscript{102} If the federal court finds that there is an improper joiner or misjoinder, the court may order the pleadings reformed or remand the portion of the case that relates to the nondiverse defendant.\textsuperscript{103}

4. Manipulating the Amount in Controversy

Incredibly, the defendant's attorney often argues that the damages exceed the statutory limit, while the plaintiff's attorney often argues that they are less than the statutory limit. In Shaw v. Dow Brands, Inc.,\textsuperscript{104} the court explained the comical scene it witnessed during oral argument: "[P]laintiff's personal injury lawyer protests up and down that his client's injuries are as minor and insignificant as can be, while attorneys for the manufacturer paint a sob story about how plaintiff's life has been wrecked."\textsuperscript{105}

The amount in controversy in diversity cases is determined from the record existing at the time the removal petition is filed.\textsuperscript{106} At this stage of the proceedings, a wide variety of resources may be available to establish the amount in controversy, including affidavits, statements of counsel, settlement offers, and other correspondence between the parties.\textsuperscript{107}

\begin{enumerate}
\item Zogbi v. Federated Dep't Store, 767 F. Supp. 1037, 1041 (C.D. Cal. 1991) (citing McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987)).
\item The notice of removal may incorporate by reference arguments contained in pleadings filed in state court, notwithstanding that it did not contain any specific reference to misjoinder. See, e.g., United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003) (holding that the court may consider documents referenced extensively in pleading when ruling upon motion); O'Bryan v. Chandler, 496 F.2d 403, 410-11 (10th Cir. 1974) (determining the ability to remove by considering the state court complaint, the petition to remove, and any other documents). In addition, the notice of removal can be construed as implicitly amended by state court pleadings. Willingham v. Morgan, 395 U.S. 402, 407 n.3 (1969) ("[I]t is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits.") (citing 28 U.S.C. § 1653 (1964))); Cohn v. Petsmart, Inc., 281 F.3d 837, 840 n.1 (9th Cir. 2002) (construing the petition to remove amended so as to properly allege jurisdiction under § 1441(a)); Harper v. Nat'l Flood Insurers Ass'n, 494 F. Supp. 234, 236 (M.D. Pa. 1980) (same).
\item Lee, 267 U.S. at 543.
\item 994 F.2d 364 (7th Cir. 1993).
\item Id. at 366.
\item See, e.g., Gardynski-Leschuck v. Ford Motor Co., 142 F.3d 955, 958 (7th Cir. 1998) ("Unless the amount in controversy was present on the date the case began, the suit must be dismissed for want of jurisdiction.").
\end{enumerate}
The Supreme Court has not established a framework to determine the amount in controversy, and circuit courts are split on this issue. In *Mississippi & Missouri Railroad v. Ward*, a steamboat owner brought a nuisance claim against the defendant who built a bridge across a river used by the steamboat owner, and the Court did not clarify whether the "value of the object" referred to the value of the bridge, the value of the steamboat business, the cost of removing the bridge, or the value of the plaintiff's right to be free of the obstruction. Most federal courts adopt one of the following viewpoints: (1) the plaintiff's viewpoint; (2) the viewpoint of the party seeking jurisdiction; or (3) the "either party" viewpoint.

a. Plaintiff's Viewpoint Rule

The Second Circuit, Third Circuit, Fifth Circuit, Eighth Circuit, and Eleventh Circuit have adopted the plaintiff's viewpoint approach. Under the longstanding rule adopted by the Supreme Court, the amount in controversy: (1) plaintiff's insurance policy, (2) other cases and state laws regarding punitive damages, (3) other cases involving awards for emotional distress, and (4) plaintiffs' refusal to sign an agreement not to execute a judgment in excess of $75,000." 101 F. Supp. 2d 737, 740 (S.D. Ind. 2000). Although the court conceded this evidence suggested a possibility that the amount in controversy was satisfied, the court ultimately held that "defendants [did] not provide sufficient factual information" to estimate the amount of damages potentially recoverable under the specific case at bar. *Id.* at 741.


109. 67 U.S. (2 Black) 485, 492 (1862); see also Glenwood Light, 239 U.S. at 126 (finding that the plaintiff's right to be free from interference exceeded the amount in controversy).

110. Kheel v. Port of N.Y. Auth., 457 F.2d 46, 49 (2d Cir. 1972) ("[T]he amount in controversy is calculated from the plaintiff's standpoint . . . .").

111. *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 65 (3d Cir. 1994) ("[A]mount in controversy in an injunctive action is measured by the value to plaintiff to conduct his business or personal affairs free from the activity sought to be enjoined.").

112. Alfonso v. Hillsborough County Aviation Auth., 308 F.2d 724, 727 (5th Cir. 1962) ("The value to the plaintiff of the right to be enforced or protected determines the amount in controversy.").

113. Mass. State Pharm. Ass'n v. Fed. Prescription Serv., Inc., 431 F.2d 130, 132 (8th Cir. 1970) ("The amount in controversy is tested by the value of the suit's intended benefit to the plaintiff."). The Eighth Circuit view is somewhat unclear. For example, the court allows compensatory damages, the value of injunctive relief, punitive damages, and attorney's fees to be considered in calculating the amount in controversy. See *Burns v. Mass. Mut. Life Ins. Co.*, 820 F.2d 246, 248 (8th Cir. 1987) (value of injunctive relief); *Allison v. Sec. Benefit Life Ins. Co.*, 980 F.2d 1213, 1215 (8th Cir. 1992) (punitive damages); *Capitol Indem. Corp. v. Miles*, 978 F.2d 437, 438 (8th Cir. 1992) (attorney's fees).

114. Ericsson GE Mobile Comm'ns, Inc. v. Motorola Comm'ns & Elecs., Inc., 120 F.3d 216, 218-19 (11th Cir. 1997) (holding that "uncertainty as to whether the plaintiff-viewpoint rule governs in this circuit or whether courts are free to consider the value of the object of the litigation to either party," is resolved by adoption of plaintiff's viewpoint rule).
MISUSE OF THE ABSTENTION DOCTRINE

Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,¹¹⁵ a plaintiff can prevent geographically diverse defendants from removing to federal court if the plaintiff is willing to seek damages below the federal jurisdictional limits.¹¹⁶ The plaintiff's viewpoint rule is anchored in the traditional belief that the plaintiff is the master of the forum.¹¹⁷ Under this belief, the plaintiff is entitled to select the court system in which to bring the claim.¹¹⁸

Under the plaintiff's viewpoint rule, a plaintiff may manipulate the pleadings to defeat the constitutional purpose of diversity jurisdiction.¹¹⁹ A plaintiff can initially undervalue the claim while actually seeking and obtaining damages in excess of the requirement.¹²⁰ A plaintiff can later amend the complaint to increase the value of damages sought.¹²¹ If the amendment occurs more than one year after the cutoff date, the defendant will be powerless to remove, notwithstanding that diversity of citizenship and the amount in controversy exist.¹²²

Federal diversity jurisdiction should secure "a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."¹²³ Diversity jurisdiction was created to protect out-of-state defendants from possible local bias by judges.¹²⁴ Manipulating

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¹¹⁵. 303 U.S. 283 (1938).
¹¹⁶. Id. at 294 (stating that to avoid removal a plaintiff "may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove").
¹¹⁷. De Aguilar v. Boeing Co., 47 F.3d 1404, 1411–12 (5th Cir. 1995) (explaining that in order for a defendant to overcome the presumptive accuracy of plaintiff's alleged damage figure, the defendant must establish the threshold jurisdictional amount is a "legal certainty").
¹¹⁸. 14C WRIGHT, MILLER & COOPER, supra note 40, § 3725.
¹²¹. FED. R. CIV. P. 15(a).
¹²². Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100, 106 (5th Cir. 1996) ("[R]emoval statutes are to be construed strictly against removal . . ."); see also Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").
¹²³. Barrow Steamship Co. v. Kane, 170 U.S. 100, 111 (1898).
¹²⁴. Pease v. Peck, 59 U.S. (18 How.) 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."); Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 797 (11th Cir. 1999) ("An important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court."); In re Prudential Ins. Co. of Am. Sales Pracs. Litig., 148 F.3d 283, 305 (3d Cir. 1998). Commentators are divided on whether bias exists among state court judges. *Compare* Neuborne, supra note 7, at 1120–21 (arguing that elected state judges are more affected by majoritarian pressure than life-tenured federal judges), *with* Henry J. Friendly,
the amount in controversy by misrepresenting the true value of relief sought, only to increase the demand after the threat of removal has passed, can have wide-reaching consequences.

The plaintiff's viewpoint rule interferes with Congress's intent to provide federal jurisdiction for claims of large value between citizens of different states.¹²⁵ One concern is whether a state judge would actually enforce the interests of the public at large for a claim or class action affecting nationwide interests.¹²⁶ Under the plaintiff's viewpoint rule, a state court could decide claims where the outcome might affect the practices and policies of companies engaged in interstate commerce.¹²⁷ This is of particular concern where a plaintiff requests injunctive relief that could later alter the national policy of large corporations or affect the commercial activities in several states. In the area of insurance, such wide-sweeping authority could impinge upon the prerogative of other states to regulate the business of insurance within their own borders. In this type of situation, federal courts would provide more efficient decisionmaking than state courts.¹²⁸

Recently, federal courts adopting the plaintiff's viewpoint rule are permitting defendants to challenge the validity of a specifically pleaded damage amount.¹²⁹ This approach requires the court to de-

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¹²⁵ See BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 548, 553 (7th Cir. 2002); In re Ford Motor Co./Citibank, 264 F.3d 952, 961 (9th Cir. 2001); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 815 (8th Cir. 1969).

¹²⁶ See John H. Beisner & Jessica Davidson Miller, They're Making a Federal Case out of It ... in State Court, 25 HARV. J.L. & PUB. POL'Y 143, 176–77 (2001) (“The ability of one locally elected judge to exercise that much power raises serious federalism questions.”). Commentators studying this issue have noted its interesting results:

The willingness of certain Illinois state courts to serve as free-roving insurance commissioners and issue edicts that affect the way insurance companies can do business in forty-nine other states may explain why twenty-six class action lawsuits have been filed in Madison County against insurance companies in the last few years.

Id. at 175. Commentators further note that “[o]ne Madison County judge could be single-handedly responsible for dramatically increasing the price of automobile insurance . . . and adversely affecting the . . . automobile parts industry.” Id. at 176.

¹²⁷ See id.

¹²⁸ Proponents of strict removal limitations argue that the federal dockets are overloaded and backlogged. See 14C WRIGHT, MILLER & COOPER, supra note 40, § 3725. However, this criticism ignores the difference in resources available between federal and state courts, and that state court dockets are also crowded.

termine the appropriate burden of proof a defendant must meet to establish that the true amount in controversy exceeds the jurisdictional minimum. These courts have formulated three different standards to establish the burden: (1) the “reverse legal certainty” standard; (2) the “preponderance of the evidence” standard; and (3) the “legal certainty” standard.

Under the “reverse legal certainty” standard, a defendant must establish that it is not legally certain that the plaintiff will recover less than the jurisdictional amount, or that there is a probability that the plaintiff will recover more than the jurisdictional amount. This is the most lenient of the three approaches because it posits that the removing defendant has substantially the same burden that a plaintiff has under the “legal certainty” test.

The “preponderance of evidence” standard requires a defendant to show that it is more likely than not that the amount in controversy

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724, 731–32 (S.D. Ala. 1994) (allowing challenge because plaintiff may manipulate pleadings to defeat diversity jurisdiction); Corwin Jeep Sales & Serv., Inc. v. Am. Motor Sales Corp., 670 F. Supp. 591, 596 (M.D. Pa. 1986) (plaintiff may not defeat removal by seeking less than the jurisdictional amount when court is informed that amount in controversy exceeds required amount); Steele v. Underwriters Adjusting Co., 649 F. Supp. 1414, 1416 (M.D. Ala. 1986) (“A plaintiff should not be allowed to deprive a defendant of his right to remove through artful pleading practices.”).

130. See Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095–96 (11th Cir. 1994) (“So, the critical question is to what extent must defendant prove jurisdiction exists despite plaintiff’s express claim to less than the minimum jurisdictional sum?”).

131. See Kliebert v. Upjohn Co., 915 F.2d 142, 147–48 (5th Cir. 1990) (Jolly, J., dissenting), vacated for rehearing en banc 923 F.2d 47 (5th Cir.), appeal dismissed per stipulation of settlement 947 F.2d 736 (5th Cir. 1991).


133. See Burns, 31 F.3d at 1095–96.

134. Courts have also referred to the “reverse legal certainty” standard as the “converse legal certainty” standard. See De Aguilar, 47 F.3d at 1411.

135. Kliebert, 915 F.2d at 146 (observing that several district courts have adopted the “reverse legal certainty” test where plaintiff has not specified the damages being sought). The defendant must show that there is a probability that the amount in controversy exceeds the jurisdictional minimum. Id.; see also Corwin Jeep Sales & Serv., Inc. v. Am. Motor Sales Corp., 670 F. Supp. 591, 595 (M.D. Pa. 1986) (explaining that the claim is not legally certain to be less than the jurisdictional amount if there is a probability that the claim exceeds the jurisdictional amount).

136. Kliebert, 915 F.2d at 149 (Jolly, J., dissenting). This rationale was rejected by the court in Burns. 31 F.3d at 1095 (“Defendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly . . . .”). The Sixth Circuit and Ninth Circuit have also found this standard to be too permissive. See, e.g., Gafford v. Gen. Elec. Co., 997 F.2d 150, 158–59 (6th Cir. 1993); Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403 (9th Cir. 1996). These courts have opined that adoption of the “some possibility” standard, even where the plaintiff has not specified damages in the complaint, unreasonably expands federal diversity jurisdiction. See, e.g., Burns, 31 F.3d at 1096–97.
exceeds the jurisdictional minimum. It has been favorably viewed by commentators as an equitable standard that establishes equilibrium between a plaintiff's initial right to select a forum and a removing defendant's right to seek a federal forum in a jurisdictionally qualifying case. This approach has been used primarily in cases where the damages are unspecified because courts utilizing this approach believe that the defendant's burden should be lighter than it is when insufficient damages have actually been alleged.

Courts have also utilized the "legal certainty" standard where a plaintiff pleads damages in excess of the jurisdictional amount. Under this standard, it has been held that the sum claimed by the plaintiff will control if the claim is made in good faith. The defendant must therefore prove to a legal certainty that the claim does not in fact satisfy the jurisdictional amount. Courts adhering to this standard give significant weight to the amount claimed by the plaintiff. This is especially true where the complaint was originally filed in state court because these courts believe that it is "highly unlikely in that instance that the plaintiff would have inflated his request for damages solely to obtain federal jurisdiction."


138. See Lawrence W. Moore, Federal Jurisdiction & Procedure, 41 Loy. L. Rev. 469, 481 (1995) (concluding that the "preponderance of evidence" approach "seems a sensible and durable equilibrium point on which to balance the parties' interests"); Quentin F. Urquhart, Jr., Amount in Controversy and Removal: Current Trends and Strategic Considerations, 62 Def. Couns. J., 509, 515-19 (1995). Courts have shared this view. See Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996) ("The proper balance between a plaintiff's right to choose his forum and a defendant's right to remove, without unnecessarily expanding federal diversity jurisdiction, is struck by a 'preponderance of the evidence' standard."); Gafford, 997 F.2d at 160 ("We believe that the mean between the extremes unsettles to the least extent the balance struck between the defendant's right to remove and the federal interest in limiting diversity jurisdiction.").

139. See Tapscott, 77 F.3d at 1356-57 ("Where a plaintiff has made an unspecified demand for damages, a lower burden of proof is warranted because there is simply no estimate of damages to which a court may defer."); Sanchez, 102 F.3d at 403 (noting that the "preponderance of the evidence" burden represents an appropriate balance between competing interests where unspecified damages are at issue at the time of removal); Gafford, 997 F.2d at 160 (holding that "strict legal certainty" should not apply where amount in controversy is indeterminate).

140. See, e.g., Sanchez, 102 F.3d at 402 (holding test applicable where plaintiff pleads damages in excess of the jurisdictional amount); Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995); McCorkindale v. Am. Home Assurance Co., 909 F. Supp. 646, 650-51 (N.D. Iowa 1995).

141. See, e.g., Sanchez, 102 F.3d at 402.

142. Id.

b. Viewpoint of Party Seeking Jurisdiction

Some courts consider only the defendant's perspective on the amount in controversy. The defendant then has the burden of proving the amount in controversy based on "the sum or value of that which the defendant will lose if the complainant succeeds in his suit." This viewpoint has been adopted by some district courts, but it does not have circuit court acceptance. Where courts have adopted this viewpoint, a plaintiff cannot manipulate the amount in controversy requirement to defeat removal.

c. Either Party Viewpoint

The either party viewpoint has been adopted by the First Circuit, the Seventh Circuit, the Ninth Circuit, and the Tenth Circuit. The either party viewpoint permits a reconciliation of the scattered case law in which lower courts have given acceptance to both the plaintiff's viewpoint and the defendant's viewpoint in assessing the amount in controversy. The either party viewpoint is most
consistent with the general framework used by the Supreme Court for determining the amount in controversy.\textsuperscript{152}

This viewpoint allows the court flexibility in determining the true amount in controversy where either an "indeterminate complaint" or a "lowball complaint" are in question.\textsuperscript{153} This approach minimizes the manipulation of the amount in controversy requirement except in those situations where the true damages are reasonably close to the $75,000 threshold.\textsuperscript{154}

5. Using the Nonaggregation Rule to Defeat Removal in Class Actions

The nonaggregation rule precludes the aggregation of the claims of class members to establish the threshold jurisdictional amount.\textsuperscript{155} In \textit{Troy Bank v. Whitehead & Co.},\textsuperscript{156} the Court stated the nonaggregation rule as follows: "When two or more plaintiffs, having separate and distinct demands, unite for a convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount . . . ."\textsuperscript{157} The Court also recognized in \textit{Troy Bank} an oft-stated exception to the rule: "[W]hen several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."\textsuperscript{158} Thus, commentators have observed that claims by multiple plaintiffs may not be aggregated unless the claims are "joint," "common," or "undivided."\textsuperscript{159}

The Court noted in \textit{Snyder v. Harris}\textsuperscript{160} that aggregation has been permitted in two circumstances: ``(1) in cases in which a single plain-

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\textsuperscript{153} See Alice M. Noble-Allgire, \textit{Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts}, 62 Mo. L. Rev. 681, 699-728, 754 (1997) (concluding that the federal judiciary can begin to resolve much of the conflict by adopting a single, uniform standard for determining whether the amount in controversy requirement has been satisfied”).


\textsuperscript{156} 222 U.S. 39 (1911).

\textsuperscript{157} \textit{Id.} at 40.

\textsuperscript{158} \textit{Id.} at 40-41.


\textsuperscript{160} 394 U.S. 332.
tiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest."\textsuperscript{161} Thus, aggregation is allowed when two or more plaintiffs join together in a suit out of necessity because they have one right to enforce, but may not be allowed in class actions when plaintiffs with separate and distinct rights are allowed to join similar claims for reasons of judicial economy.\textsuperscript{162}

In those jurisdictions which have rejected the defendant's viewpoint in class actions, the courts typically hold that the "common and undivided interest" exception to the nonaggregation rule does not apply because "[r]ecovery by one plaintiff . . . would not, as a legal matter, either preclude or reduce recovery by another."\textsuperscript{163} The exception applies only "where a defendant 'owes an obligation to the group of plaintiffs as a group and not to the individuals severally.'"\textsuperscript{164} This exception typically applies in those jurisdictions where there is a "single indivisible res" jointly owned by the plaintiffs that creates an undivided obligation to them.\textsuperscript{165} Under this approach, where the claims of the class members are "cognizable, calculable, and correctable individually," the class members—or the removing defendant—may not aggregate claims to meet the amount in controversy.\textsuperscript{166}

Aggregation is beneficial from a defendant's perspective because the defendant can aggregate to establish jurisdiction for a federal forum when individual plaintiffs could not do so relative to their claims. The Third Circuit\textsuperscript{167} and Eleventh Circuit\textsuperscript{168} have rejected the defendant's viewpoint approach in class actions.

In order to permit a defendant's viewpoint approach in class actions, the court must alternatively (1) apportion among the plaintiffs the value alleged by the defendant; (2) reject the nonaggregation rule

\textsuperscript{161.} Id. at 335.
\textsuperscript{162.} Id. at 334-35; see also Zahn v. Int'l Paper Co., 414 U.S. 291, 298-99 (1973).
\textsuperscript{163.} Gibson v. Chrysler Corp., 261 F.3d 927, 945 (9th Cir. 2001).
\textsuperscript{164.} Id. at 944 (quoting Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1262 (11th Cir. 2000)).
\textsuperscript{165.} Id.; see also Eagle v. Am. Tel. & Tel. Co., 769 F.2d 541, 546 (9th Cir. 1985).
\textsuperscript{166.} Gibson, 261 F.3d at 945; accord Potrero Hill Cmt'y Action Comm. v. Hous. Auth. of S.F., 410 F.2d 974, 978 (9th Cir. 1969).
\textsuperscript{167.} See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). However, the Seventh Circuit has allowed the defendant's costs of compliance to provide a basis for federal subject-matter jurisdiction. See In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 609-10 (7th Cir. 1997).
\textsuperscript{168.} See Cohen v. Office Depot, Inc., 204 F.3d 1069, 1077 (11th Cir. 2000).
or limit it to specific case type; or (3) expand the concept of the common and undivided right.\(^ {169}\)

The most prevalent view requires a defendant to prorate its compliance costs among all class members.\(^ {170}\) This approach prevents trivial claims from being brought to a federal forum. Some courts have applied the nonaggregation rule to claims for compensatory damages while suspending its application in cases where injunctive relief is sought.\(^ {171}\) Other courts have expanded the scope of the nonaggregation rule's exception. These courts define a "common and undivided interest" to include claims where the remedy would be the same regardless of the number of plaintiffs joined in the suit.\(^ {172}\) However, under CAFA, there is a subset of class actions in which the aggregation of claims is not permitted.\(^ {173}\) CAFA provides that "a mass action shall be deemed to be a class action removable" under the Act if it otherwise satisfies the qualifying requirements set forth therein.\(^ {174}\) CAFA defines the term "mass action" as "any civil action .... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."\(^ {175}\) In other words, mass actions are


\(^ {171}\) See, e.g., Justice v. Atchison, Topeka & Santa Fe Ry., 927 F.2d 503, 505 (10th Cir. 1991); McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 492 (S.D.W. Va. 2001) ("[A]mount in controversy can be satisfied by demonstrating that the injunctive relief would require the defendant to alter his method of doing business in such a manner that would cost at least the statutory minimum." (quoting McInnis, *supra* note 154, at 1016)).

\(^ {172}\) See *In re Brand Name*, 123 F.3d at 610 (applying the "one plaintiff" test). A district court has also addressed the issue:

Plaintiffs seek injunctive relief that will benefit the class as a whole. Defendants' costs of compliance [did] not depend upon the size of the class or the identity of its members. Accordingly, it is based upon a common and undivided interest and constitutes an integrated claim; its entire value may be considered when determining whether the amount-in-controversy requirement for diversity jurisdiction is satisfied . . . .

*In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 836 (E.D. Mich. 1999); accord Edge v. Blockbuster Video, Inc., 10 F. Supp. 2d 1248, 1254–56 (N.D. Ala. 1997) (stating that where a "course of conduct as a whole" would be prohibited by injunction or would inure to the "collective good" of the class was common and undivided, the case should be valued from the defendant's viewpoint for purposes of the amount in controversy); Earnest v. Gen. Motors Corp., 923 F. Supp. 1469, 1472 (N.D. Ala. 1996) (holding that a class has undivided interest); Loizon v. SMH Societe Suisse De Microelectronics, 950 F. Supp. 250, 254 (N.D. Ill. 1996) (holding that class members "have a common and undivided interest in the injunctive relief" because "only the class, and not individual class members, could request the injunctive relief").


\(^ {174}\) Id.

\(^ {175}\) Id.
those actions involving one hundred or more named plaintiffs. Nevertheless, while mass actions may qualify as class actions under CAFA, CAFA does not permit the aggregation of claims in mass actions. Instead, each of the named plaintiff's claims must exceed the $75,000 amount in controversy requirement of 28 U.S.C. § 1332(a).

CAFA fails to specifically address which party has the burden of proving that the jurisdictional requirements have been satisfied. Courts are split as to whether the burden remains with the removing party or whether the burden shifts to the party seeking remand.

Courts placing the burden on the party seeking remand have observed that “[i]n cases of statutory construction, the Court's task is to 'interpret the words of the statute in light of the purposes Congress sought to serve.'” These courts have turned to CAFA's legislative history and found that its purpose was “to expand substantially federal court jurisdiction over class actions,” and thus, “[i]ts provisions should be read broadly, with a strong preference that interstate class

176. A case will not be deemed a “mass action” when: (1) all of the actionable events occurred in the state where the action was filed, and injuries occurred in the forum state or in contiguous states; (2) “the claims [were] joined upon motion of a defendant”; (3) all of the claims are asserted solely on behalf of the general public under state law; or (4) “the claims have been consolidated or coordinated solely for pretrial proceedings.” Id.

177. Id.

178. Id.


181. Waitt, 2005 WL 1799740, at *1 (quoting Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va., 464 U.S. 30, 36 (1983)). The court in Berry also turned to the legislative history:

First, a statute cannot address all possible outcomes and situations, and language inevitably contains some imprecision; where the text does not provide a clear answer, a faithful interpretation of the statute necessarily involves more than the text itself. Second, if legislative intent is clearly expressed in Committee Reports and other materials, judicial disregard for the explicit and uncontradicted statements contained therein may result in an interpretation that is wholly inconsistent with the statute that the legislature envisioned.

381 F. Supp. 2d at 1122.
actions should be heard in a federal court if properly removed by any defendant." These courts believe that although the statute is itself silent on the issue of the burden of proof, Congress's intent is clear—CAFA is "to be interpreted expansively." This belief is consistent with a Senate Judiciary Committee report generated during the passage of CAFA, which provides that "if a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)." In accordance with this legislative history, these courts have held that it is the plaintiff's responsibility to demonstrate that removal from state court was improvident.

In contrast, those courts that place the burden of proving jurisdiction on the party seeking removal have observed that legislative history is used to assist in the interpretation of a statute only where the language is ambiguous. They argue that CAFA is not ambiguous but simply silent on this issue. The absence of a burden of proof standard in CAFA does not create an ambiguity, because Congress is presumed to know the settled law on the burden of proof. Congress specifically discussed the issue in the Committee Report, so its failure to address this issue suggests that it did not intend "to change the settled case law on that issue." Otherwise, Congress would have explicitly changed the Act's language. Therefore, since there is no explicit language in CAFA that shifts the burden to the party seeking remand, these courts have held that the burden remains with the removing party.

183. Waitt, 2005 WL 1799740, at *2; accord Berry, 381 F. Supp. 2d at 1122.
6. Manipulating Time Requirements to Defeat Removal

A defendant has thirty days from the date of formal service to file a notice of removal. In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, the Supreme Court resolved the split in the lower federal courts as to whether receipt of a courtesy copy of a complaint alone (the "receipt rule") or formal service upon a defendant commenced the thirty-day period. The court struck down the receipt rule and held that only formal service triggered the removal clock.

However, the question of when the thirty-day clock is triggered after the amendment of the original complaint remains unclear. If the original complaint was removable, a subsequent amendment will not revive the thirty-day time period for removal. But where an amendment creates a removal claim, the majority view starts the clock at the moment the state court grants the permission to amend. Judge Posner, in *Sullivan v. Conway*, articulated the majority view:

> Until the state judge granted the motion to amend, there was no basis for removal. Until then, the complaint did not state a federal claim. It might never state a claim, since the state judge might deny the motion. . . . When the motion was granted, the case first became removable . . . . It would be fantastic to suppose that the time for removing a case could run before the case became removable . . . . 

Judge Posner determined that "[t]he statutory language that we quoted speaks of a motion or other paper that discloses that the case is or has become removable, not that it may sometime in the future become removable if something happens, in this case the granting of a motion by the state judge."
A significant minority finds that the statute's plain language supports the idea that the filing of the motion to amend triggers the thirty-day clock.\textsuperscript{199} The minority position, therefore, treats a motion to amend, whether granted or pending, as tantamount to an actual amendment. This view "encourage[s] defendants to seek removal before the filing of an amended complaint to avoid forfeiting their right to remove even though such a complaint might never be filed."\textsuperscript{200}

In most jurisdictions, if the first-served defendant does not remove in a timely fashion, that defendant waives the right to removal and cannot subsequently "consent to removal by a later-served defendant."\textsuperscript{201} Several courts have rejected this "first-served defendant" rule as unfair.\textsuperscript{202} For example, the court in \textit{Eltman v. Pioneer Communications of America, Inc.}\textsuperscript{203} held that "[t]he policies behind the thirty-day requirement simply do not justify implication of a strict, mandatory first-served defendant rule into section 1446(b)."\textsuperscript{204}

Section 1446(b) has a bright-line cutoff that precludes removal in diversity cases more than one year after commencement of the action.\textsuperscript{205} Some courts apply the strict one-year cutoff only to cases that


\begin{quote}
Congress did not condition the running of the twenty [now thirty] day period upon receipt by defendant of knowledge that a motion had been allowed but, rather, on the receipt by defendant of a document which would bring home to that defendant the fact that plaintiff had changed his claim . . . .
\end{quote}

\textit{Id.} Because a motion is an express statutory trigger, the minority asserts that the plain meaning of the statute moots the majority's concern that the minority approach compels defendants to remove prematurely. \textit{See}, e.g., \textit{Webster v. Sunnyside Corp.}, 836 F. Supp. 629, 630–31 (S.D. Iowa 1993) ("But to accept [the majority's] reading of the statute is to ignore its clear language—language that does not make the commencement of the thirty-day period conditional on the motion being granted.").


\textsuperscript{203.} 151 F.R.D. 311 (N.D. Ill. 1993).

\textsuperscript{204.} \textit{Id.} at 317; cf. \textit{Higgins v. Ky. Fried Chicken}, 953 F. Supp. 266, 270 (W.D. Wis. 1997) (holding that the removal statutes are to be strictly construed, therefore, the later-served defendant could not remove the action because his notice of removal was untimely).

\textsuperscript{205.} \textit{But cf. Brierly v. Alusuisse Flexible Packaging, Inc.}, 184 F.3d 527 (6th Cir. 1999) (removing defendant was not served until eighteen months after the action was commenced). The court held that, based upon its review of the legislative history and statutory interpretation, the one-year limitation on removal in diversity cases applied only to those cases that were initially removable. \textit{Id.} at 534–35. Because the unserved defendant in \textit{Brierly} would have created diversity if served, the case was initially removable and therefore fell outside the purview of § 1446(b). \textit{Id.}

The \textit{Brierly} court observed that "[i]f Congress had intended to place a one-year limitation on
were not initially removable. The courts are split on whether the one-year limitation is procedural or jurisdictional. If it is procedural, it can be waived for equitable reasons. If it is jurisdictional, it cannot be waived.

III. CHALLENGING REMOVAL THROUGH THE ABSTENTION DOCTRINE

Federal courts sitting in equity have original power to abstain from exercising jurisdiction. The abstention doctrine was judicially formulated to maintain balance between state and federal sovereignty. A case will not merit abstention unless there is some discernable state interest or state law implicated in the proceeding. While the state interest test has been substantially mitigated recently, it still requires at least a superficial state interest to trigger abstention.

In the context of declaratory judgment actions, plaintiffs' attorneys were initially unsuccessful in using the abstention doctrine to defeat federal court removal. The principal impediment has been creating a sustainable, parallel state court proceeding when an insurance company initially filed a declaratory judgment action in federal court. In those situations where plaintiffs initiate a state court declaratory judgment action, diversity jurisdiction typically exists because the in-
surance company's place of incorporation and principal place of business are not within the foreign state. Most state declaratory judgment acts are not discretionary and require invocation of jurisdiction by the state court.\textsuperscript{215} When the state court declaratory judgment action is removed to federal court on the basis of diversity, the federal court does not have discretion to remand the state court proceeding absent a procedural defect in the removal itself.\textsuperscript{216}

In those situations where the insurance company initiated a declaratory judgment action in federal court, plaintiffs attempted to defeat the discretionary authority of the federal court to hear the declaratory judgment action by creating a parallel state court proceeding and arguing for federal abstention in favor of a state court resolution.\textsuperscript{217} Initially, this procedural maneuver was unsuccessful because the insurance company would simply remove the state court proceeding under diversity principles.\textsuperscript{218} However, recent federal court decisions have given the use of parallel state court proceedings new vitality as a method of defeating removal by invoking federal abstention.\textsuperscript{219}

A. An Overview of the Federal Abstention Doctrine

1. Understanding Abstention

There are many variations of the abstention doctrine that overlap to differing degrees.\textsuperscript{220} The principal approaches include the \textit{Railroad Commission of Texas v. Pullman},\textsuperscript{221} \textit{Burford v. Sun Oil Co.},\textsuperscript{222} and \textit{Younger v. Harris}\textsuperscript{223} approaches.

Under \textit{Pullman} abstention, "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the pos-

\begin{footnote}
\textsuperscript{216} See 28 U.S.C. § 1447(c) (2000).
\textsuperscript{217} See, e.g., \textit{Longwell}, 735 F. Supp. at 1192.
\textsuperscript{218} See, e.g., \textit{id.}
\textsuperscript{219} See, e.g., \textit{Sherwin-Williams Co. v. Holmes County}, 343 F.3d 383, 394 (5th Cir. 2003); \textit{Huth v. Hartford Ins. Co. of the Midwest}, 298 F.3d 800, 802–03 (9th Cir. 2002); \textit{Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.}, 139 F.3d 419, 423 (4th Cir. 1998) (per curiam).
\textsuperscript{220} See \textit{Pennzoil Co. v. Texaco Inc.}, 481 U.S. 1, 11 n.9 (1987) ("The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.").
\textsuperscript{221} 312 U.S. 496 (1941).
\textsuperscript{222} 319 U.S. 315 (1943).
\textsuperscript{223} 401 U.S. 37 (1971).
\end{footnote}
sibility of unnecessarily deciding a constitutional question."\(^{224}\) Later, in *Moore v. Sims*,\(^{225}\) the Court declared "that a federal action should be stayed pending determination in state court of state-law issues central to the constitutional dispute."\(^{226}\) Finally, in *Ohio Bureau of Employment Services v. Hodory*,\(^{227}\) the Court remarked that "Pullman abstention[] involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented."\(^{228}\)

The *Burford* abstention doctrine has its origin in the equitable powers of the court.\(^{229}\) Lower federal courts have disagreed on the propriety of abstention in cases involving legal rather than equitable claims.\(^{230}\) *Burford* abstention considers the independence of state governments in carrying out domestic policy, and seeks to avoid conflict between state and federal courts.\(^{231}\) *Burford* abstention is not based on a need to defer to a concurrent state court proceeding.

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\(^{226}\) Id. at 427-28.


\(^{230}\) Compare Tribune Co. v. Abiloa, 66 F.3d 12, 16 (2d Cir. 1995) ("Burford abstention is generally appropriate only in cases where equitable relief is sought."), and Garamendi v. Allstate Ins. Co., 47 F.3d 350, 356 (9th Cir. 1995) ("[A] district court may not abstain under *Burford* when the plaintiff seeks only legal relief."), and Riley v. Simmons, 45 F.3d 764, 777 (3d Cir. 1995) (Nygaard, J., concurring) ("Burford abstention is simply not available when legal, rather than equitable or declaratory, relief is sought."). and Fragoso v. Lopez, 991 F.2d 878, 882 (1st Cir. 1993) (abstention is improper in cases asserting only inequitable claims), and Univ. of Md. at Balt. v. Peat Marwick Main & Co., 92 F.2d 265, 271 (3d Cir. 1991) ("Burford abstention applies to 'a federal court sitting in equity.'" (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 361 (1989)), with Riley, 45 F.3d at 772 n.7 (expressing doubt that the restriction against applying *Burford* abstention in nonequitable suits is still good law), and Gen. Glass Indus. Corp. v. Monsour Med. Found., 973 F.2d 197, 202 (3d Cir. 1992) ("Decisional authority remains inconclusive as to whether *Burford* abstention may be ordered only in cases of an inequitable nature . . . ."). and Taffet v. S. Co. 930 F.2d 847, 853 n.4 (11th Cir. 1991) ("Though abstention rulings premised upon principles of comity and federalism were originally developed in the context of actions seeking equitable relief, those principles have also been applied to actions seeking monetary damages."). and Lec D'Amiante du Quebec, Ltee v. Am. Home Assurance Co., 864 F.2d 1033, 1044 (3d Cir. 1988) ("If the relief sought is legal and the disruption is of the extent and character suggesting that *Burford* abstention is appropriate, a refusal to abstain simply because the federal court is not sitting as a court of equity makes no sense.").

\(^{231}\) Quackenbush, 517 U.S. at 726-28.
Rather, *Burford* counsels that a district court should abstain from hearing a case if the case involves a different question of state law or if it implicates a state regulatory scheme, regardless of the presence of an ongoing state proceeding.\(^2\)

Under *Younger* abstention, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."\(^3\) Although the *Younger* doctrine has equitable origins, the Supreme Court has, in large part, abandoned the equitable foundation in subsequent cases.\(^4\) Numerous lower courts have characterized *Younger* as a case based on comity and federalism as opposed to equity.\(^5\)

Many commentators argue that the Court is moving towards merging the various abstention doctrines.\(^6\) Indeed, in *Colorado River Water Conservation District v. United States*,\(^7\) the Court tied the three principal abstention variations together under the broader category of "exceptional circumstances."\(^8\) The Court found that there are exceptional circumstances relating to "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,"\(^9\) and that these exceptional circumstances should be weighed against the duty to exercise federal

\(^2\) *New Orleans Pub. Serv.*, 491 U.S. at 360-61.

\(^3\) Samuels v. Mackell, 401 U.S. 66, 69 (1971); accord Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976) (observing that "abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings").


\(^7\) 424 U.S. 800 (1976).

\(^8\) Id. at 814–17.

\(^9\) Id. at 817 (alteration in original) (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)).
jurisdiction. But even if a case does not fall within the Pullman, Burford, or Younger categories of exceptional circumstances, other principles may give rise to the application of abstention.

240. Id. A plurality of the Court in Will v. Calvert Fire Insurance Co., 437 U.S. 655, 665-67 (1978) contradicted the Colorado River “exceptional circumstances” doctrine. Writing for the plurality, Justice Rehnquist observed that the district court had discretion to accept concurrent jurisdiction of a state court matter. Id. at 664. Justice Rehnquist found that “[i]t is well established that ‘the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.’” Id. at 662 (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)). Justice Rehnquist noted that “[i]t is equally well settled that a district court is ‘under no compulsion to exercise that jurisdiction’ where the controversy may be settled more expeditiously in the state court.” Id. at 662-63 (quoting Brillhart v. Excess Ins. Co., 316 U.S. 491, 494 (1942)). He emphasized that the “right to proceed with a duplicative action in a federal court can never be said to be ‘clear and indisputable.’” Id. at 666 n.8. The plurality in Calvert established the principle that any likelihood of duplicative litigation was sufficient to justify abstention. Id. at 663-64. The reasoning of this plurality contradicted the “exceptional circumstances” doctrine later espoused by the Court.

The conflicting holdings of Colorado River and Calvert were clarified in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 14-19 (1983). The Court in Moses held that the “exceptional circumstances” test of Colorado River should be used by district courts in determining whether to stay an action in favor of state court proceedings. Id. The Moses Court formulated two additional factors for the “exceptional circumstances” test: (1) the determination of which forum’s substantive law would govern the merits of the litigation; and (2) the adequacy of the state forum to protect the parties’ rights. Id. at 23-27. The Moses Court reaffirmed the doctrine “that the federal courts have a ‘virtually unflagging obligation . . . to exercise the jurisdiction given them.’” Id. at 15 (alteration in original) (quoting Colorado River, 424 U.S. at 817).

After Moses, the circuit courts were divided over which standard governed a district court’s decision to stay or dismiss a declaratory judgment action where there were parallel state proceedings. The Third Circuit, Fourth Circuit, Fifth Circuit, and Ninth Circuit applied the discretionary standard articulated in Brillhart and Calvert. See, e.g., Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1224 (3d Cir. 1989); Mitcheson v. Harris, 955 F.2d 235, 237-38 (4th Cir. 1992) (the “exceptional circumstances” test of Colorado River and Moses is inapplicable in declaratory judgment actions); Travelers Ins. Co. v. La. Farm Bureau Fed’n, Inc., 996 F.2d 774, 778 n.12 (5th Cir. 1993) (same); Chamberlain v. Allstate Ins. Co., 931 F.2d 1361, 1366 (9th Cir. 1991) (explaining that Colorado River test does not apply to declaratory relief actions because they have “special status”).

However, other circuit courts applied the narrow exceptional circumstances tests developed in Colorado River and expanded in Moses. See, e.g., Employers Ins. of Wausau v. Mo. Elec. Works, Inc., 23 F.3d 1372, 1374 n.3 (8th Cir. 1994) (following Colorado River and Moses the district court was not justified in staying or dismissing a declaratory relief action absent “exceptional circumstances”); Lumbermens Mut. Cas. Co. v. Conn. Bank & Trust Co., 806 F.2d 411, 413 (2d Cir. 1986) (same). A middle ground between these two positions can be found. See, e.g., Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306, 308-11 (1st Cir. 1986) (where the state court has expended significant resources through the adjudicatory process of the state law claims, federal courts may decline to exercise jurisdiction over a declaratory judgment action).

241. Colorado River, 424 U.S. at 817 (“Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts.”).
2. Abstention and Federal Declaratory Judgment Actions

A separate line of cases addressing the abstention doctrine in relation to federal declaratory judgment actions has also developed. Problems occur when a federal district court is asked to exercise jurisdiction under the FDJA while a parallel case is pending in state court. Jurisdiction under the FDJA is discretionary and not compulsory. The Act states that the district court "may declare the rights and other legal relations of any interested party." In these situations, courts have generally found that the decision to exercise their discretion and accept jurisdiction should be guided by the Supreme Court's Brillhart decision.

In Brillhart, an insurance company brought suit for declaratory relief in federal court to determine its obligation in a pending state court proceeding. The Court noted that "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." In determining whether to abstain, the Court indicated that district courts should assess whether the controversy would be better resolved in state court. This assessment requires "inquiry into the scope of the pending state court proceeding and the nature of defenses open there." Further, "[t]he federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc."

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242. In Quackenbush, the Court found that the various forms of the abstention doctrine had been extended to "certain classes of declaratory judgments, the granting of which is generally committed to the courts' discretion." 517 U.S. 706, 718 (1996) (citations omitted). It is interesting to note that in Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297 (1943), and Samuels v. MacKell, 401 U.S. 66, 69-70 (1971), the Supreme Court recognized that the actions were brought pursuant to the FDJA but did not apply the discretion under this statute, but rather applied different forms of the abstention doctrine. See generally Lewis Yelin, Note, Burford Abstention in Actions for Damages, 99 COLUM. L. REV. 1871 (1999) (discussing the effects of Quackenbush on diversity jurisdiction).


244. See Wilton v. Seven Falls Co., 515 U.S. 277, 286-87 (1995); Gov't Employees Ins., Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998).


247. Id. at 495.

248. Id.

249. Id.

250. Id.
In *Wilton v. Seven Falls Co.*, the Supreme Court established that the *Brillhart* test—and not the *Colorado River* exceptional circumstances test—should govern a district court's exercise of discretion in a federal declaratory judgment action brought during the pendency of parallel state court proceedings. Thus, the *Brillhart* test was established as a self-contained division of the abstention doctrine applicable to the FDJA.

3. The Questions Left Open by Wilton

While *Wilton* set the standard for applying the abstention doctrine where there was a pending parallel state action, it did not establish the exact boundaries of discretion when there was no state court action. Accordingly, *Wilton* left a void that has not been filled by subsequent Supreme Court jurisprudence. Falling into this void are those cases that have been removed from state to federal court pursuant to diversity jurisdiction.

As a general rule, only limited circumstances will support remand once a case is removed. Under the original version of 28 U.S.C. § 1447(c), only a lack of subject-matter jurisdiction or a defect in the removal procedures allowed for remand. Therefore, courts have held that "if jurisdiction exists and was properly invoked, the Court has no discretion to remand." However, the statutory language has since changed, and the abstention doctrine has evolved along with it.

252. Id. at 289–90. The Ninth Circuit has recognized that the *Wilton* decision was silent as to the boundaries of discretion in this scenario, and also recognized the need for guidance on the issue. See *Budget Rent-A-Car v. Crawford*, 108 F.3d 1075, 1080 (9th Cir. 1997). In *Crawford*, the Ninth Circuit failed to set clear guidelines for asserting discretion in declaratory judgment actions when there were no parallel state court cases pending. Instead, the *Crawford* court held that a district court must first weigh whether existing state court remedies will provide adequate remedies. *Id.* *Crawford* also held abstention could be justified if the declaratory judgment action was filed in anticipation of the filing of a state court proceeding and in fact was a form of forum shopping. *Id.* at 1080–81. However, *Crawford* was overruled one year later by *Government Employees Insurance Co. v. Dizol*, 133 F.3d 1220, 1227 (9th Cir. 1998). With *Crawford* overturned, the Ninth Circuit is once again left without guidance for the boundaries of discretion in actions like those presented in *Huth v. Hartford Insurance Co.*, 298 F.3d 800 (9th Cir. 2002).

253. *Wilton*, 515 U.S. at 289–90. The *Brillhart* test exists to support important issues of "judicial economy, comity and federalism." *Dizol*, 133 F.3d at 1226. The *Brillhart* analysis focuses on whether a state case involving the same parties would be able to also address the controversy in the declaratory judgment action. See *Wilton*, 515 U.S. at 282–83. These questions imply the existence of a separate state court action, which could also add a request for declaratory relief as an additional claim, as opposed to the situation where the "state case" is identical to the federal court action. *Id.*


Prior to 1988, 28 U.S.C. § 1447(c) provided that "if at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs." However, the statute was amended in 1988:

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

As commentators have noted, the amendment allowed courts to recognize other bases for remand other than jurisdictional and procedural defects:

There was a special reason for the inclusion of the phrase "any defect in removal procedure." In one sense it wasn't necessary; the amendment could have been phrased merely to impose the 30-day limit on all remand motions except one based on subject matter jurisdiction. There may be occasion to remand a case, however, on a ground that constitutes neither a defect of subject matter jurisdiction nor a defect in procedure. Congress cites here the special remand problem that can arise in cases involving the case law doctrines of pendent and ancillary jurisdiction.

... [T]he remand in the situation described need not be made within the 30-day period prescribed in the new subdivision (c) of § 1447. While the dropping out of the claim on which the other claims depended does not bring about a defect of subject matter jurisdiction—because the court has discretion to retain and try the remaining claims and a defect in subject matter jurisdiction can never allow that—neither is it to be deemed a mere defect of "procedure" that would trigger the 30-day rule.

Supp. 689, 690 (E.D.N.C. 1964) (observing that "where Congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to the state court" (quoting Vann v. Jackson, 165 F. Supp. 377, 381 (E.D.N.C. 1958))).


Subsection (c) amends 28 U.S.C. 1447(c) and adds a new subsection (e). Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand...
A further statutory amendment in 1996 solidified this viewpoint. The 1996 amendment changed the basis of removal from "any defect in removal procedure" to "any defect other than lack of subject matter jurisdiction." By using the phrase "any defect other than lack of subject matter jurisdiction," Congress implicitly recognized situations that are neither procedural nor concerned with subject matter jurisdiction.

Prior to the 1988 and 1996 amendments, Supreme Court precedent, as well as several circuit court decisions, required a strict construction of 28 U.S.C. § 1447 that allowed for remand only where there was a lack of subject-matter jurisdiction or a procedural defect. Following these amendments, however, courts recognized the possibility of non-statutory justifications for remand. More specifically, a significant number of courts held that remand based on the abstention doctrine was proper.

Despite these changes, there was a judicial recognition that the use of the abstention doctrine to remand cases that have been removed on the basis of diversity should proceed cautiously. As the Second Circuit noted in Minot v. Eckardt-Minot, "[t]he possibility of prejudice to out-of-state litigants, which provides whatever diminishing justification for federal diversity jurisdiction remains, suggests that courts

260. David D. Siegel, Commentary on 1996 Revision of Section 1447, 28 U.S.C.A. § 1447 (Supp. 2006). Siegel further discussed this point:

A statement in a House Report says that Congress was told that the intent was "not entirely clear" from the "procedure" wording. So Congress was persuaded in 1996 to amend the statute to resolve the ostensible ambiguity. It is Congress's hope, or in any event that of Congress's advisors, that this will resolve the ambiguity. If it does, however, it may exact a price on other fronts. The "other than lack of subject matter jurisdiction" net is indeed a wide one, but like the tuna net that incidentally kills the porpoise, this one would also appear to inflict some unintended casualties. At least on its face, it's like a residuary clause that has the curious side effect of cancelling some specific bequests.

Id. (citation omitted).
262. Id. at 1224–25 (collecting cases).
263. Id. at 1225 (collecting cases); see also IMFC Prof. Servs. of Fla., Inc. v. Latin Am. Home Health, Inc., 676 F.2d 152, 159–60 (5th Cir. 1982); Todd v. Richmond, 844 F. Supp. 1422, 1425 (D. Kan. 1994).
should be wary of using judicially-crafted abstention doctrines to deny out-of-state litigants a federal forum that they prefer."

The Supreme Court initially placed limits on the use of abstention as a means of remanding a properly removed state court action. In *Quackenbush v. Allstate Insurance Co.*, the Supreme Court limited the applicability of the abstention doctrine to cases brought in equity:

> In cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court. By contrast, while [the Court has] held that federal courts may stay actions for damages based on abstention principles, [the Court has] not held that those principles support the outright dismissal or remand of damages actions.

In other words, the Court supported abstention to remand an otherwise properly removed action to state court *only* where the subject action arose in equity or was otherwise discretionary.

Initially, courts appeared in favor of limiting the application of the abstention doctrine in remand situations. For example, in *Allstate Insurance Co. v. Longwell*, an insurance company filed a declaratory judgment action against its insured in federal court. The insured responded by filing a declaratory judgment action in state court. The insurer subsequently removed the state action to federal court based on diversity jurisdiction and the insured moved to remand a portion of the case back to state court.

The *Longwell* court rejected the argument that the *Burford* abstention doctrine applied because the declaratory judgment action involved only contract law and did not interfere with specialized

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267. Id. at 721.

268. Webb v. B.C. Rogers Poultry, Inc., 174 F.3d 697, 701 (5th Cir. 1999); see also Miller Brewing Co. v. ACE U.S. Holdings, Inc., 391 F. Supp. 2d 735, 741 (E.D. Wis. 2005) ("[I]n the Seventh Circuit, a district court may not remand or dismiss a properly removed case based on an abstention doctrine."); Koken v. Viad Corp., 307 F. Supp. 2d 650, 653-54 (E.D. Pa. 2004) ("[W]hen the remedy sought is legal rather than equitable, a district court may not abstain under Burford and remand the complaint to state court. When the relief sought is equitable in nature, however, abstention principles allow a federal court to stay the action, dismiss the suit, or remand . . . .").


270. Id. at 1189.

271. Id. at 1189-90.

272. Id.
ongoing state regulatory schemes. More significantly, the court held that the Colorado River abstention doctrine did not apply under those circumstances. The court stated that the doctrine given in Colorado River is “predicated on the existence of pending state litigation on parallel issues, and, thus, [is] inapposite since there is no longer anything pending in the state courts—both lawsuits are now here.”

Subsequently, the Second Circuit and Ninth Circuit followed this cautious approach. The Second Circuit in Piekarski v. Home Owners Savings Bank found that the abstention doctrine was inapplicable because there was only “one case, which originally was in state court, but now has been properly removed to federal court.” In the Ninth Circuit case, Kirkbride v. Continental Casualty Co., the state case had been removed in its entirety to federal court. The district court remanded the declaratory judgment action to state court based on the abstention doctrine. The Ninth Circuit reversed the district court’s decision. The court held that “[t]he [abstention] doctrine is ‘available only in situations involving the contemporaneous exercise of concurrent jurisdictions, either by the federal courts or by state and federal courts.’” The court continued that the abstention doctrine was not applicable because the case had been removed to federal court in its entirety and thus “there was no concurrent or pending state court proceeding when the appellees moved for remand.”

Despite these initial decisions limiting the application of the abstention doctrine, the Brillhart abstention variation has provided courts

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273. Id. at 1191.
274. Id. at 1191-92.
277. Id. at 42; accord Dittmer v. County of Suffolk, 146 F.3d 113, 117-18 (2d Cir. 1998) (recognizing that abstention could be applied only where there was the contemporaneous exercise of concurrent jurisdiction, which would not include where a case had been removed to federal court).
278. 933 F.2d 729 (9th Cir. 1991).
279. Id. at 730.
280. Id. at 734.
281. Id. at 730.
282. Id. at 734 (internal quotation marks omitted) (quoting Fed. Deposit Ins. Corp. v. Nichols, 885 F.2d 633, 638 (9th Cir. 1989)).
283. Id.; accord Int’l Bhd. of Elec. Workers Local 1357 v. Am. Int’l Adjustment Co., 955 F. Supp. 1218, 1220 n.1 (D. Haw. 1997) (observing that there was no pending state action where the state action had been properly removed). Both the Tenth Circuit and Eleventh Circuit have similarly stated that dismissing a declaratory judgment action where there is no pending parallel state proceeding is an abuse of discretion. See Fed. Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1247 (11th Cir. 2000); ARW Exploration Corp. v. Aguirre, 947 F.2d 450, 454-55 (10th Cir. 1991).
with another opportunity to speak on this issue. As previously discussed, the Supreme Court decisions in *Brillhart* and *Wilton* provide a broad power of abstention over federal declaratory judgment actions where there are pending parallel state actions. These decisions, however, left a glaring void in relation to the proper and valid application of the abstention doctrine when the parallel state action is no longer pending because it has been removed. Some courts have attempted to fill this void by significantly expanding the application of the *Brillhart* variation of the abstention doctrine, in direct contrast to the previous line of cases.

The Fourth Circuit started this trend in 1998. In *Aetna Casualty & Surety Co. v. Ind-Com Electric Co.*, the court held that the existence of a parallel state proceeding is not dispositive:

> There is no requirement that a parallel proceeding be pending in state court before a federal court should decline to exercise jurisdiction over a declaratory judgment action. Rather, as the district court stated, "[t]he existence or nonexistence of a state court action is simply one consideration relevant to whether to grant declaratory relief." To hold otherwise would in effect create a per se rule requiring a district court to entertain a declaratory judgment action when no state court proceeding is pending. Such a rule would be inconsistent with our long-standing belief that district courts should be afforded great latitude in determining whether to grant or deny declaratory relief.

In essence, this decision expanded the abstention doctrine to circumstances where there are no pending parallel state proceedings.

This reasoning was subsequently adopted by the Ninth Circuit in *Huth v. Hartford Insurance Co. of the Midwest*, and applied to situations involving remand from federal court where there are no pending parallel state proceedings. In the district court, Hartford Insurance brought an action pursuant to the FDJA. Approximately one week after Hartford filed the suit, Huth filed an identical action in Arizona state court pursuant to the Declaratory Judgment Act. Unlike the FDJA, Arizona's Declaratory Judgment Act is not discretionary. See [ARIZ. REV. STAT. ANN. § 12-1832 (2003)](https://www.azleg.gov/2003RS/pdf/chap0012.pdf). Based on the existence of diversity jurisdiction, Hartford subsequently removed the state declaratory judgment action to the Arizona federal district court, which consolidated the state and federal actions. Huth filed

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284. 139 F.3d 419 (4th Cir. 1998).
285. Id. at 423 (alteration in original) (citation omitted).
287. 298 F.3d 800 (9th Cir. 2002).
288. Id. at 802.
290. *Huth*, 298 F.3d at 802.
a motion with the district court to remand the state portion of the consolidated action and simultaneously stay the federal portion of the consolidated action. Huth argued that the Brillhart and Wilton abstention doctrines applied. The court agreed. Basing its decision on the Brillhart standards, the district court granted both the motion to remand and the motion to stay. It found that despite the fact that the Arizona declaratory judgment action had been properly removed to federal court, that action was still a "pending" state action and could thus be remanded pursuant to the court's discretion under the FDJA.

Hartford appealed to the Ninth Circuit, asserting that the district court had abused its discretion by remanding the state court action and staying the federal court action. The Ninth Circuit affirmed this decision, reasoning that the absence of a pending state action was, according to Brillhart, simply one of the "balancing factors the district court must weigh." The Ninth Circuit thus sanctioned the lower court's evasive maneuver of initially remanding the state court action based upon the Brillhart abstention doctrine, and then abstaining from hearing the federal action in deference to the "pending" state action. Thus, after Huth, when a party seeks to defeat removal, it can simply create a parallel state court proceeding and then ask the federal court to either stay its proceedings or dismiss them altogether.

The two Huth decisions are unique in that they deferred to parallel state court proceedings that were created by federal decision. Both Brillhart and Wilton addressed only situations in which a federal declaratory judgment action was brought at the same time a parallel state proceeding was pending. In Wilton, the Supreme Court concluded its decision by stating "[w]e do not attempt at this time to delineate the outer boundaries of [federal court] discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings."

291. Id.
292. Id.
293. Id.
294. Id.
295. Id. at 803–04.
296. Huth, 298 F.3d at 803.
297. Id. at 800.
299. Wilton, 515 U.S. at 290 (emphasis added).
The Fifth Circuit has since agreed with the reasoning of the Ninth Circuit in *Huth*. In *Sherwin-Williams Co. v. Holmes County*, the court held that “[t]he lack of a pending parallel state proceeding should not automatically require a district court to decide a declaratory judgment action, just as the presence of a related state proceeding does not automatically require a district court to dismiss a federal declaratory judgment action.” The Fifth Circuit, like the Fourth Circuit and Ninth Circuit, concluded that the existence of a pending parallel state court proceeding was only one factor in the overall abstention analysis. It was, however, an important factor. Specifically, the court observed that “[t]he absence of any pending related state litigation strengthens the argument against dismissal of the federal declaratory judgment action.... [A]lthough the lack of a pending parallel state proceeding [does] not require the district judge to hear the declaratory judgment action, it is a factor that weighs strongly against dismissal.”

The Supreme Court also expressly left open the question of the proper application of abstention to declaratory judgment actions when a federal question exists. The lower courts have addressed this issue on only a few occasions. In *Youell v. Exxon Corp.*, the Second Circuit considered a district court’s dismissal of a declaratory judgment action that had been brought after the related state court suit. It reversed the lower court’s dismissal of the declaratory judgment action on the ground that the issue presented in the declaratory judgment action was a “novel issue of federal admiralty law” which should have been heard in federal court, at least under the Brillhart factors.

The Eighth Circuit and the Fifth Circuit have subsequently agreed with *Youell*. In *Verizon Communications, Inc. v. Inverizon International, Inc.*, the Eighth Circuit held that it was an abuse of discretion for the district court to refuse to hear a case involving both state and federal questions. In so holding, the Eighth Circuit observed that while the lower court properly considered the factors in *Wilton* and *Brillhart*, the court “failed to mention one very significant factor

300. 343 F.3d 383 (5th Cir. 2003).
301. *Id.* at 394.
302. *Id.*
303. *Id.* (emphasis added).
305. 74 F.3d 373 (2d Cir. 1996).
306. *Id.* at 376 (quoting *Youell v. Exxon Corp.*, 48 F.3d 105, 114 (2d Cir. 1995)).
307. 295 F.3d 870 (8th Cir. 2002).
308. *Id.* at 875.
present in this case that simply was not at issue in either *Brillhart* or *Wilton*—that is, the presence of a federal question that is not present in the state court action.\(^{309}\)

Likewise, in *Sherwin-Williams*, the Fifth Circuit observed that "[n]either *Brillhart* nor *Wilton* decided whether the presence of a federal question in a declaratory judgment action limited a district court's discretion to decide or dismiss the action."\(^{310}\) While it agreed that the presence of a federal question was an important factor to consider when determining whether to exercise discretion, the Fifth Circuit discussed how this factor should be evaluated:

The presence of federal law questions, their relationship to state law questions, the ability of the federal court to resolve state law issues, and the ability of a state court to resolve the federal law issues are important to deciding whether a state or federal court should be the one to decide the issues raised in the federal court declaratory judgment action. ... The presence of federal law issues is especially important when there is no pending state court proceeding to which the federal district court can defer. If the federal law issue is important to the case, even if state law questions are also present and important to the outcome, and no state court case is pending, that weighs in favor of the federal court exercising its discretion to decide the declaratory judgment action.\(^{311}\)

In *Sherwin-Williams*, the Fifth Circuit observed that there were both state and federal issues involved—none of which were novel.\(^{312}\) While the federal issues could have been resolved in state court, there were no pending state court cases at the time the federal court dismissed the declaratory judgement action.\(^{313}\) Due to the existence of the federal questions and the lack of a pending parallel state court action, the court held that the dismissal of the declaratory judgment action by the lower court was inappropriate.\(^{314}\)

None of these cases involved the remand of a properly removed action involving a federal question. However, these cases provide some insight as to where courts may be headed on this issue. Specifically, it appears that the presence of a federal question, like the presence of a pending parallel state proceeding, is simply one factor in the abstention analysis. While it is obviously an important factor, it may no longer be determinative.

309. *Id.* at 873.
310. 343 F.3d 383, 395 (5th Cir. 2003).
311. *Id.* at 396.
312. *Id.* at 396–97.
313. *Id.* at 397.
314. *Id.*
B. Analysis of Abstention as a Procedural Challenge to Removal

In New Orleans Public Service, Inc. v. Council of New Orleans,\textsuperscript{315} the Supreme Court noted, "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."\textsuperscript{316} Where federal jurisdictional requirements have been met, an exercise of judicial discretion to abstain constitutes a judicial usurpation of legislative power.\textsuperscript{317} For American constitutional democracy to function properly, the courts must act within their congressionally-conferring jurisdictional province.\textsuperscript{318} However, invocation of jurisdic-

\textsuperscript{315.} 491 U.S. 350 (1989).
\textsuperscript{316.} Id. at 359 (citing Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922)).
\textsuperscript{317.} One leading commentator has articulated the view that abstention is antithetical to the doctrine of separation of powers:

If Congress intended that the federal courts exercise a particular jurisdiction, either to achieve substantive legislative ends or to provide a constitutionally-contemplated jurisdictional advantage, a court may not, absent constitutional objections, repeal those jurisdictional grants. But one may question why, if the courts do not possess the institutional authority to repeal the legislature's jurisdictional scheme, they possess any greater authority to modify the scheme in a manner not contemplated by the legislative body. In either repealing or modifying the legislation, the court would be altering a legislative scheme because of disagreement with the social policy choices that the scheme manifests. Thus, if a judge-made form of partial abstention is inconsistent with congressional intent to leave federal court jurisdiction unlimited, the fact that the abstention leaves intact a portion of the jurisdictional grant will not insulate it from a separation-of-powers attack.

The foundation of the separation-of-powers critique is the assumption that judge-made partial abstention conflicts with congressional goals embodied in the seemingly unlimited grants of jurisdiction. It is the validity of this assumption that arguably separates the total and partial abstention models as departures from separation-of-powers principles. Various models of implied congressional authorization may be employed to justify partial abstention, but they are incapable of supporting total abstention. While it is at least conceivable that Congress would implicitly delegate to the judiciary the authority to modify or limit a substantive statutory right or a jurisdictional grant, it is absurd to imagine that Congress would implicitly grant the courts authority effectively to repeal such legislation. The exercise of such authority would render pointless the entire legislative process.

Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 77-78 (1984) (citations omitted). Some commentators have argued for the expansion of federal judicial power for two principal reasons: (1) fear of perceived local prejudices, and (2) fear that a local forum will ignore or disregard federal law. See Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 WM. & MARY L. REV. 605, 607 (1981) (federal courts are the preferred forum for determination and analysis of constitutional principles); David A. Sonenshein, Abstention: The Crooked Course of Colorado River, 59 TUL. L. REV. 651, 651 (1985) (because federal judges have life tenure, they are "less subject to the vagaries and pressures of local public opinion").

318. In Tennessee Valley Authority v. Hill, the Court reiterated the importance of the separation of powers:

Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is" it is equally—and
tion by the federal courts has proved to be an elastic practice that has expanded and contracted unpredictably.

Common law requires that courts exercise the jurisdiction that they possess.\textsuperscript{319} Chief Justice Marshall declared that judicial conduct contrary to this principle would be in direct defiance of the prerogatives set forth in the Constitution. Marshall opined, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."\textsuperscript{320} Most federal judges today would not consider

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  \item emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.
  \item 319. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496–97 (1971) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)); see also McClellan v. Carland, 217 U.S. 268, 282 (1910) (concluding that federal courts have "no authority" to abdicate jurisdiction because of a pending state proceeding); Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.") (citation omitted)); Chicot County v. Sherwood, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.").
  \item 320. Cohens, 19 U.S. (6 Wheat.) at 404 (emphasis added). Chief Justice Marshall explained why courts should not shirk their duty to exercise jurisdiction:
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    \item It is most true that this Court will not take jurisdiction if it should not. [sic] but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. . . . Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.
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\textit{Id.} Justice Marshall's comments have found resonance with the Court. For example, see Justice Brennan's warning in \textit{Moses H. Cone Memorial Hospital v. Mercury Construction Co.} where he stated "that the federal courts have a 'virtually unflagging obligation . . . . to exercise the jurisdiction given them.'" 460 U.S. 1, 15 (1983) (alteration in original) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)). This belief has been expressed in leading scholarly publications. See, e.g., Redish, \textit{supra} note 317, at 112 ("[V]est[ing] a power in the federal courts to adjudicate the relevant claims without a corresponding duty to do so is unacceptable."); \textit{see also} Michael M. Wilson, Comment, \textit{Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River, 44 U. CHI. L. REV. 641, 641–42 (1977) (observing that the right to a federal forum is secured by the Constitution); Note, \textit{Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation, 59 YALE L.J. 978, 980 (1950) (same); Note, \textit{Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits, 60 COLUM. L. REV. 684, 687 (1960} (the right to a federal forum is secured by the Constitution and supportive judicial precedent). \textit{See generally} Barry Friedman, \textit{A Revisionist Theory of Abstention, 88 MICH. L. REV. 530 (1989); Linda S. Mullenix, \textit{A Branch
the exercise of any form of abstention to be an act of "treason." Instead, under the guise of preserving federalism, abstention has become a means of reducing the burden of crowded federal dockets. The question is just how far federal courts will stray from their proper role to lighten their loads.

Where a parallel state court proceeding is involved, considerations of abstention are valid. However, where the parallel state court action is properly removed to federal court without procedural defect or objection under diversity jurisdiction, as in *Huth*, the remand of the state court action to create a parallel state court action to support abstention creates a precedent in which defendants are foreclosed from litigating jurisdictionally appropriate cases in federal court. To accomplish this procedural maneuver, the federal court is in essence creating the parallel state court proceeding.

The Supreme Court has recognized that a decision to abstain from exercising jurisdiction must rest "on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." It seems that there is no longer a requirement to exercise their "virtually unflagging obligation" to accept jurisdiction. Instead, the federal courts have been given license to avoid jurisdiction through procedural maneuvering. With federal courts as willing partners, plaintiffs' counsel can manipulate the need for federal abstention at the expense of federalism and the separation of powers.

The diminished role played by parallel state proceedings in the overall abstention analysis is the most significant change. The trend is to view the presence or absence of a pending parallel state action as only one factor in the overall abstention analysis. This viewpoint has made it significantly easier for the federal courts to employ the abstention doctrine to remand a properly removed state action to create a parallel state court proceeding postremoval.

The emerging trend has taken place in the context of cases involving the FDJA and state declaratory judgment actions. However, the underlying reasoning in these cases may have broader implications if the trend develops further. Notwithstanding a proper removal to federal court which is not procedurally challenged, courts employing the emerging abstention trend can, at their discretion, view the removed action as a "pending" state action factored into the analysis, or the

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Too Far, Pruning the Abstention Doctrine, 75 Geo. L.J. 99 (1986); David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985).

321. Moses H. Cone Mem'l Hosp., 460 U.S. at 16. Stated differently, a district court's task "is not to find some substantial reason for the exercise of federal jurisdiction." Id. at 25.
courts can consider the absence of a pending state action postremoval as one of many factors in the overall analysis of whether abstention should be applied. This reasoning may open the door for a court to exercise absolute discretion in favor of remand of a removed, procedurally correct, state court action under abstention principles.

The Huth decision has significantly expanded the abstention doctrine in a manner contrary to the limiting principle expressed in Colorado River, by extending the Brillhart reasoning to declaratory judgment actions in which there is no pending parallel state action. This expansion of the abstention doctrine is predicated upon a proverbial puzzle: "Which came first, the chicken or the egg?" The district court in Huth explained its decision to apply the abstention doctrine in a footnote:

[T]here is no state court action as it has been removed to federal court. The Court does not find this argument persuasive. Clearly [the original state action] began in state court. Once this court decides to remand the action the case will proceed in state court rather than federal court. Hartford can not avoid the Court's jurisdictional discretion under the FDJA by removing a state court action and then arguing no state court action exists.322

The irony in this argument is that the logical fallacy of which the district court accused Hartford is exactly the reasoning the district court employed to remand the original state action. The district court remanded the original state action based upon Brillhart discretion that exists only where there is a pending parallel state court action. Accordingly, the court first had to remand in order to gain the discretion that is exercised when remanding the case. To use the court's reasoning, the court could not exercise its discretion under the FDJA by remanding a case and then arguing that a pending parallel state action existed which gives it the right to exercise such discretion. Devaluing a pending parallel state proceeding may also have an effect on removal actions involving federal questions. One of the central factors that allowed the federal court to maintain jurisdiction in Sherwin-Williams was the lack of a pending parallel state court action. The court in Sherwin-Williams observed that "[t]he presence of federal law issues is especially important when there is no pending state court proceeding to which the federal district court can defer."323 However, Sherwin-Williams did not involve a removed state action. Using the procedural maneuvering employed in the Huth decision in a removal

323. Sherwin-Williams Co. v. Holmes County, 343 F.3d 383, 396 (5th Cir. 2003).
situation, the federal court may have a state court proceeding to which it can defer. As in *Huth*, the court may view the removed action as a parallel state action due to its state origins. Thus, the devaluation of the presence of a pending parallel state proceeding may also devalue the presence of federal issues. The net effect is that all removed actions may now provide federal courts with the opportunity to defer to the state court through abstention.

IV. CONCLUSION

This Article discussed strategies for defeating removal that were exclusive to procedural manipulations. It has always been the prerogative of the federal courts to strictly enforce procedural rules that are inescapably maneuverable. However, the most recent strategy for defeating removal involves the neutralization of the federal removal process itself. This can be accomplished through manipulation of the concept of a parallel state court proceeding and its significance to the judicial exercise of jurisdictional discretion.