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I. INTRODUCTION

Smith, a resident of California, sues Jones and White in state court, alleging causes of action based solely on state law.[1] Jones removes the case to federal court, claiming the parties to be diverse. Smith moves to have the case remanded to state court on the grounds that White is also a resident of California, therefore the parties are not diverse and the federal court is without jurisdiction to hear the case. Jones, on the other hand, claims that White was fraudulently joined and that the claim against him is a sham; therefore his citizenship should be ignored for purposes of diversity jurisdiction.

How will a court rule on the "fraudulent joinder" claim in the context of Smith's remand motion? Should it evaluate the merits of Smith's claim against White to determine if it was fraudulent? Can it retain jurisdiction until the issue is clearly resolved?

For the vast majority of federal courts, Smith's remand motion, based on the absence of diversity, will be evaluated under a standard militating against federal jurisdiction except under quite narrow constitutional grounds. The court will look at the complaint to determine if it presents a colorable claim under state law.

A few courts, however, have suggested that the standard for evaluating a remand motion should vary depending on the nature of the claim.[2] For these courts, the presumption that a case should be litigated in state court is subsumed by a presumption favoring a federal court's presence when the suit touches upon important issues of federal concern.

Should there be two standards? Can there be two standards? Should the deference ordinarily accorded to plaintiffs and their complaints yield in degrees

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1. The issue of whether Smith's claims could potentially raise federal claims is beyond the scope of this article.

2. *See infra* notes 67-87 and accompanying text.

varying with the type of claim?[3]

Sources of federal diversity jurisdiction as well as opinions from various courts support a single unified approach to remand motions, one in which there is a presumption that unless the basis for federal jurisdiction can be adequately established, a case must be returned to the state from which it was removed. The basis for federal diversity jurisdiction is not so uncertain as to require exceptions under which that jurisdiction will be evaluated. Furthermore, to set aside presumptions created in the context of fundamental constitutional principles in favor of a doctrine of hypothetical jurisdiction would risk grievous injury to the balance between state and federal interests.

Only a single, unified approach provides certainty to the bar and judiciary, and could likely survive constitutional scrutiny. The unified perspective on review of remand motions focuses on whether a complaint can state a claim for which the plaintiff would be entitled to relief. Should this inquiry be answered in the affirmative, a court engages in no further review of a suit's merits. This standard faithfully adheres to federalism principles that make removal and concomitant imposition of federal court and law upon state claims the exception rather than the rule.

Under this unified theory, a "fraudulent joinder" claim is not a free pass to removal but, instead, an invitation to be accepted only where there is no possibility that any claim can be established. So long as Smith's complaint sets forth a claim cognizable under state law, regardless of the federal interests, the case should be returned to the state court from which it came.

II. FEDERAL DIVERSITY JURISDICTION–A BRIEF OVERVIEW

A. Constitutional Limits of Federal Courts

The United States Constitution[4] defines the absolute limits of a federal court's

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3. Or, asked another way, is the inquiry on a motion to remand similar to that of a motion to dismiss under Federal Rule of Civil Procedure 12(b) or a motion for summary judgment under Rule 56?

4. Article III of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

jurisdiction.[5] Congress may ordain and establish inferior courts,[6] and confer jurisdiction in federal courts by statute.[7] However, before a federal court may exercise jurisdiction over a case, the controversy must fall within both the statutory grant of jurisdiction and Article III, section 2 of the Constitution.[8]

The lower federal courts are courts of limited jurisdiction. Their subject matter jurisdiction is determined by Congress "in the exact degrees and character which to Congress may seem proper for the public good."[9] As such, lower federal courts do not have inherent subject matter jurisdiction. These courts can only adjudicate those cases which they are authorized to adjudicate by the Constitution and Congress.[10]

> Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the

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5. *See* Ankenbrandt v. Richards, 504 U.S. 689, 695 (1992).

6. *See* U.S. CONST. art. III, § 1. As Richard Fallon has stated, the language of section 1:

> reflects a deliberate compromise, [the Madisonian Compromise,] reached at the Constitutional Convention between those who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there should be no federal courts at all except for a Supreme Court with, *inter alia*, appellate jurisdiction to review state court judgments.

RICHARD H. FALLON, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 348 (4th ed. 1996).

7. *See* 28 U.S.C. § 1331 (1994) (conferring federal question jurisdiction); 28 U.S.C. § 1332 (1994) (conferring diversity jurisdiction).

8. *See* Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867). In *Mayor*, the Court held as follows:

> As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way.

Id.; *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807) ("[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.").

9. *See* Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); *see also* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701-02 (1982) (maintaining that lower federal courts are additionally limited by a statutory grant of jurisdiction); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799) (observing a circuit court to be of limited jurisdiction, cognizant of only a few, special circumstances as opposed to the innumerable cases that unlimited jurisdiction would embrace).

10. *See* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). In *Kokkonen*, the Court insisted as follows:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other [federal] court . . . derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

case is within the competence of that court.[11]

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[12] The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."[13] There is a presumption that a cause of action will be beyond the court's limited jurisdiction unless proven otherwise by the party asserting jurisdiction.[14]

B. Diversity of Citizenship as a Source of Federal Jurisdiction

The source of federal jurisdiction relevant to this article is diversity of citizenship.[15] The rationale for this source of federal jurisdiction is the desire to protect an out-of-state litigant from the dangers of bias that might find their way into state court proceedings.[16] Because presumably no such danger would exist where both plaintiffs and defendants are from the same state, there is no federal jurisdiction without complete diversity[17] absent some other ground upon which to base jurisdiction.[18]

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11. 13 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3522 (2d ed. 1984).

12. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

13. Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884).

14. *See* McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-83 (1936).

15. *See* 28 U.S.C. § 1332. Article III of the United States Constitution provides that "[t]he judicial Power shall extend to . . . Controversies . . . between Citizens of different States." U.S. CONST. art. III, § 2.

16. *See* Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898); Burgess v. Seligman, 107 U.S. 20, 34 (1882). However, the existence of bias, whether actual or theoretical, does not mean that state courts are less capable of resolving state or federal issues. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990); Robb v. Connolly, 111 U.S. 624, 637 (1884). "Upon the state courts equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States." *Robb*, 111 U.S. at 637.

17. In *Caterpillar, Inc. v. Lewis*, the Supreme Court explained that complete diversity exists only in cases "in which the citizenship of each plaintiff is diverse from the citizenship of each defendant." *See* 519 U.S. 61, 68 (1996).

18. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806), *overruled in part by* Louisville, L & C.R. Co. v. Letson, 45 U.S. 497 (1844).

> The Constitution provides, in Article III, § 2, that '[t]he judicial Power [of the United States] shall extend . . . to Controversies . . . between Citizens of different States.' Commencing with the Judiciary Act of 1789, . . . Congress has constantly authorized the federal courts to exercise jurisdiction based on the diverse citizenship of parties. In *Strawbridge v. Curtiss*, . . . this Court construed the original Judiciary Act's diversity provision to require complete diversity of citizenship. . . . We have adhered to that statutory interpretation ever since.

Caterpillar, Inc., 519 U.S. at 67-68 (citations omitted).

C. Removal as a Method For Acquiring Jurisdiction

A civil case between parties from different states may reach the federal court in one of two ways. The first method is where the complaint is originally filed in federal court.[19] The second method is where a case, originally filed in state court, is removed by the defendant to federal court under certain narrow circumstances.[20] However, the ability to remove a case from state to federal court is not unlimited.[21]

The decision to remove a case belongs exclusively to the defendant,[22] subject to the important limitation that only cases that could originally have been brought in federal court may be removed.[23] Therefore, there must be complete diversity of citizenship and the amount in controversy must meet or exceed that required in order to confer federal jurisdiction.

Furthermore, every case originally filed in or removed to federal court must properly state a claim over which a federal court could exercise original jurisdiction.[24]

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19. The federal court must have original jurisdiction over the parties or subject matter. *See* 28 U.S.C. §§ 1330-68 (1994) (providing for the jurisdiction of district courts over, in addition to others, parties of diverse citizenship and foreign states, as well as subject matter granting federal jurisdiction, such as federal questions; admiralty, maritime and prize cases; bankruptcy cases under Title 11; Acts of Congress regulating commerce; patents, copyrights, trademarks; civil rights; election disputes; suits brought by the United States as plaintiff or defendant; and corporations organized under federal law).

20. 28 U.S.C. § 1446(a) provides in relevant part:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1446(a).

21. "This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. . . . The time, the process, and the manner, must be subject to [Congress'] absolute legislative control." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816).

22. "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

23. *See id.*; *Caterpillar, Inc.*, 482 U.S. at 392; Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 702 (1972) (deciding "whether the federal district court would have had original jurisdiction of the case had it been filed in that court."); Jackson v. Southern Cal. Gas Co., 881 F.2d 638, 641 (9th Cir. 1989); Hyles v. Mensing, 849 F.2d 1213, 1215 (9th Cir. 1988).

24. *See* 28 U.S.C. § 1367. The basis for this discretionary authority on the part of the federal courts to hear state claims, provides in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district

Under certain conditions, a federal court may be precluded from hearing state claims, even where there is diversity between the parties and the jurisdictional amount is pled.[25]

Since its enactment, the Supreme Court has interpreted the diversity statute[26] to require "complete diversity" of citizenship.[27] Thus, federal courts strictly construe the removal statute against federal jurisdiction.[28]

III. REMOVAL IN SPITE OF NON-DIVERSITY–FRAUDULENT JOINDER

If federal jurisdiction rests on diversity, the removing party bears the burden of demonstrating that diversity exists.[29] In our hypothetical case, Jones removes the case to federal court, claiming the parties to be diverse, notwithstanding the fact that Smith and White are both residents of California. Jones claims that White was "fraudulently joined." In other words, Jones claims that White was named as a defendant solely to defeat diversity jurisdiction. In essence, Jones is asking the court to disregard White's citizenship and look only to the citizenship of Smith and Jones.

The rationale behind looking beyond the citizenship of parties when fraudulent joinder is alleged is that doing so may provide the only protection to an alien defendant seeking federal refuge from state courts.[30] The United States Supreme Court has held that if a nondiverse defendant could not possibly be liable, joinder will not defeat federal jurisdiction based on diversity.[31] In such instances, the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."[32]

The claim of fraudulent joinder is not easily made. "Fraudulent joinder is a term

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courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Id.

25. Eleventh Amendment claims of immunity may preclude certain state claims from being litigated in a federal forum, absent a finding that the immunity was waived. *See* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Hans v. Louisiana, 134 U.S. 1, 15 (1890). A state's waiver of Eleventh Amendment immunity is not lightly inferred. *See* Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1282 (9th Cir. 1979).

26. In its current form, the diversity statute provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $75,000 . . ., and is between . . . citizens of different States . . . ." 28 U.S.C. § 1332(a).

27. *See* Carden v. Arkoma Assoc., 494 U.S. 185, 187 (1990); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267-68 (1806).

28. *See* Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 818 (9th Cir. 1985).

29. *See* Carson v. Dunham, 121 U.S. 421, 425 (1887).

30. This conclusion that citizenship should be ignored in the instance of "fraudulent joinder" makes sense to the extent that there is a legitimate federal interest in protecting foreign defendants from possible bias in local state courts. *See* Apelian v. United States Shoe Corp., 664 F. Supp. 1370, 1372 (C.D. Cal. 1987).

31. *See* Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 186 (1907).

32. Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921).

of art. If the plaintiff fails to state a cause of action against a resident defendant, and the *failure is obvious* according to the settled rules of the state, the joinder of the resident defendant is fraudulent."[33] However, "[b]ecause a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists, a removing party who charges that a plaintiff has fraudulently joined a party to destroy diversity jurisdiction has a 'heavy burden of persuasion.'"[34]

IV. REMAND–TESTING THE "FRAUDULENT JOINDER" CLAIM

A. Smith's Motion to Remand

It is one thing to claim fraudulent joinder, but quite another to meet the standard of proof required to prevent a case once removed from being remanded. First, in support of his remand motion, Smith asserts that White was a properly named defendant and that, in the absence of a compelling showing by Jones, the court should presume White's presence in the suit is proper. Second, he asserts that under liberal federal pleading standards, the court should presume his complaint against White sets forth claims upon which he may be entitled to relief. Third, under state substantive law, Smith's claims must withstand the degree of scrutiny appropriate for purposes of his motion to remand. What burden does Jones bear in resisting remand based on his "fraudulent joinder" theory?

There is a schism in the federal courts regarding the standards used to determine whether joinder is fraudulent.[35] Under the ordinary standard, almost universally applied to remand motions, Jones will have a hard time defeating remand. A number of courts embrace a more aggressive approach. Depending on the subject matter of the claim, these federal courts lessen the burden of proof placed upon a removing defendant. This lessened burden prolongs the court's review and, in the process, dispenses with the presumption that a federal court should not hear state claims.[36]

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33. McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987) (emphasis added) (citations omitted).

34. *See* Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) (quoting Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010, 1012 n.6 (3d Cir. 1987)). In fact, numerous federal decisions apply a "clear and convincing" standard of proof to this evidentiary burden. *See infra* notes 37-54 and accompanying text.

35. More precisely, the schism relates to how hard and long a federal court will look for justification to retain a case.

36. *See, e.g.*, Batoff v. State Farm Ins. Co., 977 F.2d 848, 851-52 (3d Cir. 1992).

B. *The "Ordinary" 12(b)(6) Burden*

"The removing party bears the heavy burden of proving fraudulent joinder."[37]

> In order to show that naming a non-diverse defendant is a 'fraudulent joinder' effected to defeat diversity, the defendant must demonstrate, *by clear and convincing evidence*, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court.[38]

Compared with the removing party's formidable task of demonstrating the utter impossibility of any claim against a nondiverse defendant, the plaintiff's burden is substantially lighter. The plaintiff must demonstrate only the possibility of stating a valid cause of action; he need not demonstrate that the case has any likelihood of success on the merits.[39] "The defendant seeking removal bears a heavy burden of proving fraudulent joinder, and *all factual and legal issues must be resolved in favor of the plaintiff*."[40] In *Scheuer v. Rhodes*,[41] the United States Supreme Court explained that the test is not whether recovery is remote or unlikely.[42] "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[43]

The burden imposed upon removing defendants claiming "fraudulent joinder" under the ordinary standard is not too dissimilar from that under a Federal Rule 12(b)(6) motion, the purpose of which is to test the "legal sufficiency of the claim or claims stated in the complaint."[44] Such motions presume "that general allegations embrace those specific facts that are necessary to support the claim."[45] The complaint is construed in the light most favorable to the plaintiff.[46] The court accepts as true all

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37. Madison v. Vintage Petroleum, Inc., 114 F.3d 514, 516 (5th Cir. 1997).

38. Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998) (emphasis added); *accord* Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998) (stating that the removing party must demonstrate either that the plaintiff has no possibility of establishing a cause of action against the defendant or that the plaintiff has committed outright fraud in pleading jurisdictional facts); *Madison*, 114 F.3d at 516 (same); Gottlieb v. Westin Hotels Co., 990 F.2d 323, 327 (7th Cir. 1993) (same); Coley v. Dragon, Ltd., 138 F.R.D. 460, 466 (E.D. Va. 1990) (same).

39. *See Triggs*, 154 F.3d at 1287.

40. *Pampillonia*, 138 F.3d at 461 (emphasis added); *accord* Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) ("[A]ll doubts should be resolved in favor of remand.").

41. 416 U.S. 232 (1974).

42. *See id.* at 236.

43. *Id.*

44. SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 9:187 (1998) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978)).

45. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990) (citing *Conley*, 355 U.S. at 45-46).

46. *See* Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980).

material allegations in the complaint, as well as reasonable inferences to be drawn therefrom.[47] "A complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[48] The Supreme Court has consistently adhered to this low threshold standard for purposes of reviewing the sufficiency of pleadings under Rule 12(b)(6).[49]

In a recent opinion, the United States Court of Appeals for the Eleventh Circuit struck a balance that a court must achieve when considering the issue of "fraudulent joinder" and federal jurisdiction.[50] In deciding the issue, the Court recognized that the pleading hurdle standard is what must be surmounted, emphasizing that

> the jurisdictional inquiry must not subsume substantive determination. Over and over again, we stress that the trial court must be certain of its jurisdiction before embarking upon a safari in search of a judgment on the merits. When considering a motion for remand, federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an *arguable one under state law*. If there is *even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants*, the federal court must find that joinder was proper and remand the case to state court.[51]

The high standard for the party claiming "fraudulent joinder" may be due to the

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47. *See* NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); 2A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 12.07 (2d ed. 1987); 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (1990).

48. Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997) (quoting Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)); *accord* McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246-47 (1980) (noting that it was error to dismiss Sherman Act claim where plaintiff pled sufficient basis for satisfying Act's jurisdictional requirements under effect-on-commerce theory).

49. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811 (1993) (Scalia, J., concurring) (noting that the action should not be dismissed because "other allegations in the complaints describe conduct that may amount to [a claim] if the plaintiffs can prove certain additional facts").

50. *See* Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997).

51. *Id.* (citations and internal quotations omitted) (emphasis added). Other courts have followed this "pleading hurdle" standard of review for remand motions. *See, e.g.*, Coley v. Dragon, Ltd., 138 F.R.D. 460, 466 (E.D. Va. 1990); Delatte v. Zurich Ins. Co., 683 F. Supp. 1062, 1064 (E.D. La. 1988); Brusseau v. Electronic Data Sys. Corp., 694 F. Supp. 331, 333 (E.D. Mich. 1988). Some courts have held, however, that removal is defeated upon a demonstration of "no reasonable basis" for asserting that state law might impose liability on the nondiverse defendants under the facts alleged. *See, e.g.*, Ball v. Martin Marietta Magnesia Specialties, Inc., 130 F.R.D. 77, 80 (W.D. Mich. 1990) (characterizing this latter approach as the "majority" view on fraudulent joinder challenges). There would seem to be little to distinguish these approaches because the federal rules require a reasonableness analysis in determining if a viable or cognizable claim is pled.

notice pleading system under the Federal Rules of Civil Procedure.[52] There is "a powerful presumption against rejecting pleadings for failure to state a claim."[53] However, the reason for not going beyond the complaint may be more pragmatic, motivated by a federal court's concern that it may be required to hear all of the arguments necessary to adjudicate the claims on the merits, only to find itself ultimately without jurisdiction to hear the case.[54]

C. The Fraudulent Joinder Inquiry Under a "Pleading Hurdle" Standard

A defendant may remove a case with a nondiverse defendant on the basis of diversity jurisdiction, and seek to persuade the district court that the defendant was fraudulently joined.[55] However, to succeed on a claim of fraudulent joinder, the plaintiff must fail to state a cause of action against the nondiverse defendant, and the failure must be obvious according to the settled rules of the state.[56]

The removing defendant may present a statement of facts in the petition for removal showing the joinder to be fraudulent.[57] The defendant may also submit affidavits and deposition transcripts.[58] However, whether a complaint states a cause of action against the nondiverse defendant must be determined by examining facts pled in the complaint at the time the petition for removal was filed.[59] The district

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52. Federal Rule of Civil Procedure 8(a) provides: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." FED. R. CIV. P. 8(a).

53. Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985).

54. In *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 87 (1991), the Supreme Court held that once a court determined it lacked jurisdiction, it was required under 28 U.S.C. § 1447(c) to remand the case. In *International Primate Protection League*, the National Institute of Health, having removed the case, convinced a lower court to dismiss the suit on the grounds that the plaintiff could not prevail and that remand of the case would be futile. *See id.* Disagreeing, the Supreme Court observed that deciding the futility of remand would require the federal court to speculate as to the result in state court. *See id.* at 89; *see also* Bruns v. National Credit Union Admin., 122 F.3d 1251, 1257-58 (9th Cir. 1997) (holding that it was error for the district court not to remand all claims against all defendants); Roach v. West Virginia Reg'l Jail & Correctional Auth., 74 F.3d 46, 49 (4th Cir. 1996) (holding that the district court must remand to state court even if futile where subject jurisdiction is lacking); Smith v. Wisconsin Dep't of Agric., Trade & Consumer Protection, 23 F.3d 1134, 1142 (7th Cir. 1994) (noting that remand is mandatory under section 1447(c)).

55. *See* McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).

56. *See id.*

57. *See id.* (citing Smith v. Southern Pac. Co., 187 F.2d 397, 400 (9th Cir. 1951).

58. *See* B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981); *see also* Burden v. General Dynamics Corp., 60 F.3d 213, 217 (5th Cir. 1995) (holding that the district court did not err in looking beyond the pleadings to determine removal jurisdiction).

59. *See Smith*, 187 F.2d at 401 (holding that there was no issue of fraudulent joinder before the court because the petition failed to include a statement of facts showing joinder to be a fraudulent means to prevent removal); *see also* Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939) (holding that the motion to remand should not have been based on the second amended complaint because it was not

court must "evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff."[60] At that point, the court may "pierce the pleadings" to determine if the joinder was fraudulent; that is, "whether under any set of facts alleged in the petition, a claim against the defendants could be asserted under [state] law."[61] This inquiry must be conducted in the context of the state law that controls the substantive issues, and under which a cause of action must exist.[62] Further, this inquiry will always amount, to some degree, to a pre-trying of the case.[63] However, to the extent that there is any possibility that the facts set forth in the complaint could support a claim, remand is required.[64] The inquiry is not "a safari in search of a judgment on the merits."[65] The courts do not weigh the merits of the claim beyond determining whether it is an arguable one under state law.[66]

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the plaintiff's pleading at the time of the petition for removal).

60. *B., Inc.*, 663 F.2d at 549 (citing Keating v. Shell Chem. Co., 610 F.2d 328 (5th Cir. 1980)); *see* Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997). There is language in *B., Inc.* indicating that the Fifth Circuit endorses a "summary judgment-like procedure for disposing of fraudulent joinder claims." *See* Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir. 1990). *See generally* Alan B. Rich, *Current Issues in Removal Jurisdiction*, 57 J. AIR L. & COM. 395, 399-400 (1991) (discussing the summary judgment approach used in *Carriere*). At first blush, this would seem to indicate that a mini-trial review could be appropriate for determining whether a party was fraudulently joined to prevent removal. However, other courts have properly avoided expanding *B., Inc.* to invite full, in-depth review of a case. *See, e.g.*, Green v. Amerada Hess Corp., 707 F.2d 201, 204 (5th Cir. 1983) (holding that the trial court erred in holding a full evidentiary hearing); Brusseau v. Electronic Data Sys. Corp., 694 F. Supp. 331, 334 (E.D. Mich 1988). A faithful reading of *B., Inc.* reveals support for a much narrower level of scrutiny, under which a court does not engage in a trial of any sort and avoids weighing evidence. *See generally* James F. Archibald III, Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1392 (1992) (discussing the "pierce the pleading" approach in *B., Inc.*). A court may, however, examine evidence that might also be used in a summary judgment proceeding such as affidavits and deposition testimony. Such examination may be necessary because the party resisting removal may make admissions that contradict pleading averments. Further examination may establish a viable claim or may provide testimony that negates a necessary element of a state law claim justifying remand. *See also* Archibald, *supra*, at 1389 (noting the advantage of looking at the entire record when there is a fraudulent joinder allegation).

61. *Keating*, 610 F.2d at 331; *see also* Archibald, supra note 60, at 1389; Kimberly G. Winter, Comment, *Maintaining the Home Field Advantage: Rose vs. Federal Court*, 10 LOY. ENT. L.J. 695, 707 (1990) (discussing the meaning of "pierce the pleading").

62. *See* Park v. New York Times Co., 308 F.2d 474, 478 (5th Cir. 1962) (quoting Chicago, Rock Island & Pac. Ry. Co. v. Schwyhart, 227 U.S. 184 (1913)).

63. *See Keating*, 610 F.2d at 331-32.

64. *See B., Inc.*, 663 F.2d at 550.

65. *See id.* at 548-49.

66. *See id.* at 551.

D. *A Second Heightened Standard: Mini-Trial of the Fraudulent Joinder Issue?*

In opposition to Smith's remand motion, Jones asserts that he is entitled to deference on his fraudulent joinder claim under a "heightened" standard that necessitates a review of more than just the pleadings. He points to a recent decision of a district court in California, *Lewis v. Time, Inc.*,[67] where the court accorded substantially less deference towards a plaintiff's claims against a defendant allegedly fraudulently joined.[68] Jones asks the court to determine, under this less deferential standard, whether Smith's claims against White are nothing more than a trick to defeat federal diversity jurisdiction.

In *Lewis*, the district court held that where a strong claim of fraudulent joinder of a nondiverse defendant was made in a case implicating First Amendment rights, the court could properly retain jurisdiction unless it could be demonstrated before trial that the claim against the nondiverse defendant was in fact a viable claim.[69] Jerome Lewis sued Time Magazine and its California distributor in state court for libel, slander, invasion of privacy, and intentional infliction of emotional distress.[70] When Lewis learned that the California distributor was an out-of-state corporation that would not destroy diversity, for removal purposes, he dismissed that defendant and, instead, served Lucky Stores, Inc., a California corporation, as a John Doe distributor defendant.[71] Time removed and alleged that the joinder of Lucky Stores was fraudulent, and therefore, that its citizenship should be ignored.[72] The court, denying plaintiff's remand motion, agreed.[73]

In *Lewis*, the court noted that "[w]hile normally in a removal action the District Court must take the plaintiff's pleadings as it finds them, a different approach is utilized when a *colorable* claim of fraudulent joinder is raised."[74] The court continued that "as in any removal action, doubt arising from merely unartful, ambiguous, or technically defective pleadings should be resolved in favor of remand. . . . Additionally, ordinarily a fraudulent joinder claim must be *capable of summary determination*."[75]

Then, departing from the generalized rule regarding remand and fraudulent joinder claims, the *Lewis* court held that there exists a class of cases for which these

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67. 83 F.R.D. 455 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983). *See generally* James T. Fousekis & James F. Brelsford, *Removal*, LITIGATION, Summer 1985, at 39, 41 (discussing how *Lewis* resolved its doubts about fraudulent joinder in favor of removal, unlike most courts).

68. *See Lewis*, 83 F.R.D. at 458.

69. *See id.* at 466.

70. *See id.* at 457.

71. *See id.* at 461.

72. *See id.* at 458.

73. *See id.*

74. *Id.* at 460 (emphasis added).

75. *Id.* (citations omitted) (emphasis added).

rules are inapplicable.[76]

> [T]here are certain cases in which, due to the *peculiarly federal interests involved*, or the particularly sensitive issues raised, it would be inappropriate to apply a rule resolving every doubt against retaining jurisdiction. In such a case, the correct resolution is not to remand the case at the first whisper of a doubt, but rather to retain jurisdiction, at least until such time as slight doubt ripens into something of substance.[77]

In *Lewis*, the peculiarly federal interests involved implicated the First Amendment.[78] *Lewis* was not "merely a private libel case,"[79] but one relating to the publication of "a matter of profound public importance."[80] Furthermore, regarding the merits of Lewis' joinder of Lucky Stores and Time's claim of fraudulent joinder, the court found that the broad brush allegations against a distributor who had no editorial control over the allegedly libelous publication, coupled with heightened constitutional scienter requirements, meant the complaint was unlikely to state a claim so as to prevail against a demurrer.[81] The court concluded that plaintiff's claims against Lucky Stores, the nondiverse party, were susceptible on both First Amendment and fraudulent joinder grounds.[82] The opinion, as well as a "heightened standard theory" for First Amendment cases, made sense in light of the strong policy considerations regarding free speech set forth in *New York Times Co. v. Sullivan*,[83] a case upon which the *Lewis* court relied heavily.

The *Lewis* court concluded that

> [t]he proper course where a *strong claim* of fraudulent joinder is made *in a case implicating First Amendment rights* is for the court to retain jurisdiction for the present without prejudice to plaintiff's right to move for remand at any point in the litigation when it can be demonstrated that the cause of action which is assertedly without substance is in fact a viable claim. The court itself, of course, can remand at any time if it appears the case was improvidently removed.[84]

According to *Lewis* and other courts, the court should do more than rely upon the complaint to determine whether federal jurisdiction is present. Thus, the court may

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76. *See id.* at 461.
77. *Id.* (emphasis added).
78. *See id.* at 458.
79. *Id.* at 466.
80. *Id.*
81. *See id.* at 464.
82. *See id.*
83. 376 U.S. 254 (1964).
84. *Lewis*, 83 F.R.D. at 462 (citing 28 U.S.C. § 1447(c)) (emphasis added).

"'pierce the pleadings' to determine if the joinder was fraudulent; that is, whether under any set of facts alleged in the petition, a claim against the defendants could be asserted under [state] law."[85] This inquiry must be conducted in the context of the state law that controls the substantive issues and under which a cause of action must exist,[86] and will always amount, to some degree, to a "pre-trying" of a case.[87] Under this elevated standard, Smith would most likely be forced into the position of having to controvert any proof or allegations by Jones of fraudulent joinder, and would therefore, be subjected to the whim of a federal court. This is something akin to a "smell" test that believes a state law claim to be weak or federal interests to be great.

V. ONE CONSTITUTIONAL STANDARD–NO ROOM FOR *LEWIS*

Lewis purported to create an exception to the deferential, pro-state court approach to remand motions. However, its acceptance does not appear to be widespread; it is limited to cases involving First Amendment issues.[88] Two courts expressly approve of the result in *Lewis*, construing it to apply to First Amendment situations.[89] Another court specifically declined to apply the "heightened standard" in *Lewis* in the absence of a paramount federal interest such as a free speech issue.[90]

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85. *Keating v. Shell Chem. Co.*, 610 F.2d 328, 331 (5th Cir. 1980).

86. *See* Park v. New York Times Co., 308 F.2d 474, 477 (5th Cir. 1962) (citing Chicago, Rock Island & Pac. Ry. Co. v. Schwyhart, 227 U.S. 184 (1913)); *accord* Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1964); Rose v. Giamatti, 721 F. Supp. 906, 914 (S.D. Ohio 1989).

87. However, one district court tried to bridge the difference between the ordinary "pleading hurdle" and elevated "mini-trial (*qua* summary judgment)" standards by formulating a two-step compromise test. *See* Katz v. Costa Armatori, S.P.A., 718 F. Supp. 1508, 1515 (S.D. Fla. 1989). The court suggested "a review of the state court record pursuant to the spirit of Fed. R. Civ. P. 11" only if a cause of action is stated to determine "whether the plaintiff's attorney has satisfied the 'continuing duty' obligation of not maintaining a frivolous suit." *See id.* Arguably, this is nothing more than a logical extension of the "pleading hurdle" test because all pleadings in federal court must comply with Rule 11. *Katz* appears to do nothing that is inconsistent with the "pleading hurdle" standard because Rule 11 requires only that a pleader aver a claim based on "existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." *See* FED. R. CIV. P. 11(b)(2). In essence, the *Katz* test does nothing more than focus on whether the pleadings set forth a viable claim under relevant state law, irrespective of whether it is framed as a one or two-part test.

88. *Lewis* itself was circumspect in holding that higher standards should be employed to remand motions where First Amendment concerns are involved. *See Lewis*, 83 F.R.D. at 462.

89. *See* Medical Lab. Management Consultants v. ABC, 931 F. Supp. 1487, 1491 (D. Ariz. 1996) ("[T]he underlying goals of diversity and removal jurisdiction strongly support the retention of jurisdiction in cases involving the First Amendment."); Spence v. Flynt, 647 F. Supp. 1266, 1272 (D. Wyo. 1986) ("[T]his Court agrees with *Lewis* that First Amendment values demand special federal protections.").

90. *See* Gateway 2000, Inc. v. Cyrix Corp., 942 F. Supp. 985, 995-96 (D.N.J. 1996) (granting motion to remand where the complaint on its face alleged only state law claims against nondiverse defendant). The court held the "heightened standard" in *Lewis* inapplicable where "[r]esolution of the [matter before the court] will not chill First Amendment rights regarding discussion of profound matters of public importance or of a public official, nor does it threaten the freedom of the press in the

However, each of the results reached by the courts applying or declining to apply *Lewis*'s "heightened standard" do not demonstrate a need or even a justification for a second standard. This is true even where there are arguably distinct federal interests that militate in favor of a unified federal approach.

First, the *Lewis* court offered little, if any, support for the proposition that it could retain a case without some showing that federal jurisdiction existed.[91] Second, the court believed it necessary to create a sliding scale for evaluating remand motions despite the fact that there was no possibility that Lewis could state a valid claim against the nondiverse defendant.[92]

A. Lewis' Erroneous Application of a "Hypothetical" Jurisdiction Analysis

The *Lewis* court presumed that it could retain jurisdiction over a case until it was satisfied of its jurisdiction rather than quickly remand unless federal jurisdiction was certain. In essence, it created the legal fiction of federal jurisdiction that would remain until jurisdiction was proven an impossibility.

Other federal courts have devised a process similar to that of the *Lewis* court, assuming Article III jurisdiction so as to reach the merits of a case.[93] In those instances, the courts, despite jurisdictional objections, proceed to the merits where these are more readily resolved, and where the prevailing party on the merits would be the same if jurisdiction were denied.[94]

What the *Lewis* court proposed, keeping a case until lack of jurisdiction is proven

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dissemination of newsworthy information." *See id.* at 996.

91. "The rule that we first address our jurisdiction is so fundamental that 'we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction.'" Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 217 (5th Cir. 1998), *cert. denied*, 118 S. Ct. 413 (1999) (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977)).

92. *See Lewis*, 83 F.R.D. at 461. In *Lewis*, the court balked at permitting a libel charge to proceed against a nondiverse defendant distributor where the defendant had no knowledge of the defamatory nature of the article, much less any control over the alleged libelous publication. *See id.* at 464-65. Under these particular circumstances, it was easy to determine that the nondiverse defendant did not belong in the suit. However, rather than craft a heightened standard applicable to cases involving important federal issues, the *Lewis* court could simply have held that plaintiff did not surmount the "pleading hurdle" since no California case, especially after *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), had held a distributor liable for merely disseminating an unaltered article. *See id.* at 465. For a discussion of the *Lewis* dicta, see *infra* notes 104-08 and accompanying text.

93. *See, e.g.*, United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996); Clow v. United States Dep't. of Hous. & Urban Dev., 948 F.2d 614, 616 (9th Cir. 1991) ("To the extent that the relief sought by the Clows implicates jurisdictional considerations of sovereign immunity, we assume—without deciding—the existence of subject matter jurisdiction over the Clow's action.").

94. *See Steel Co.*, 523 U.S. at 93.

to its satisfaction,[95] is similar at its core to cases where the courts proceed on the basis of "hypothetical jurisdiction." In either case, the federal court proceeds despite the fact that Article III jurisdiction is not demonstrated.[96] However, "the theoretical and practical dangers of recognizing [an exception to the requirement that federal courts must ascertain federal jurisdiction first] are immense."[97] Furthermore, notwithstanding the *Lewis* court's interest in certainty, the United States Supreme Court has expressly disapproved this approach that impermissibly considers the merits before resolving jurisdictional issues.[98]

In *Steel Co. v. Citizens for a Better Environment*,[99] the Supreme Court stressed the point that federal jurisdiction must be considered at the outset of a case.[100] There, the Court unequivocally rejected the notion of hypothetical jurisdiction.[101]

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. . . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.[102]

Presumably, the Court's disapproval in *Steel Co.* would extend to any instance of "jurisdiction in the absence of jurisdiction," no matter what cleverly crafted phrase is used to justify the exercise.[103]

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95. *See Lewis*, 83 F.R.D. at 461.

96. Presumably, if jurisdiction is later found wanting, the case can be remanded on the theory of "no harm, no foul."

97. *Clow*, 948 F.2d at 619 (O'Scannlain, J., dissenting).

98. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

99. *Id.*

100. *See id.* at 101-02.

101. *See id.*

102. *Id.*

103. Currently raging in the courts is a debate concerning the extent to which *Steel Co.* applies to Eleventh Amendment immunity and other "quasi-jurisdictional" cases. *See, e.g.*, Parella v. Retirement Bd. of Rhode Island Employees Retirement Sys., 173 F.3d 46, 53-57 (1st Cir. 1999) (declining to apply *Steel Co.*); Kelly v. Marcantonio, 187 F.3d 192, 197 (1st Cir. 1999) (finding *Steel Co.* applies to Article III, but not statutory jurisdiction questions). *Compare In re* Sealed Case, No. 99-3091, 1999 WL 709977, at *1 (D.C. Cir. 1999) (noting that the court was not required to address "quasi-jurisdictional" federal sovereign immunity before the merits in order to avoid constitutional issue of first impression) *with* United States *ex rel.* Foulds v. Texas Tech. Univ., 171 F.3d 279, 286-88 (5th Cir. 1999) (noting that to bypass the 11th Amendment immunity issue would risk issuance of an advisory opinion).

B. No Possibility of Recovery–No Need for the Lewis Exception

That portion of the *Lewis* opinion creating a higher or sliding standard for evaluating fraudulent joinder claims when an "important federal issue" is involved was *dicta*, a comment aside from that portion of the opinion necessary to the court's holding that is generally not entitled to the same, or arguably, any degree of deference.[104] Regarding the merits of Lewis' joinder of Lucky Stores and Time's claim of fraudulent joinder, the district court found that the broadly brushed allegations against a distributor who had no editorial control over the allegedly libelous publication, coupled with heightened constitutional *scienter* requirements, meant the complaint was unlikely to state a claim so as to prevail against a demurrer.[105] The court concluded the plaintiff's claims against Lucky Stores, the nondiverse party, were susceptible on both First Amendment and fraudulent joinder grounds.[106]

Given the *Lewis* court's determination that there was no chance that a state libel claim could be alleged against the nondiverse defendant distributor, that portion of the opinion discussing an elevated standard in First Amendment situations was wholly unnecessary to the holding, and therefore *dicta*.[107] It was this type of hypothetical federal jurisdiction that the Supreme Court in *Steel Co.* expressly disapproved.[108]

VI. CONCLUSION

> [C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied.[109]

For a federal court to retain a case until some indeterminate point where federal

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104. *See* Kastigar v. United States, 406 U.S. 441, 454-55 (1972); Smith v. Orr, 855 F.2d 1544, 1550 (Fed. Cir. 1988).

105. *See* Lewis v. Time, Inc., 83 F.R.D. 455, 464-65 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983).

106. *See id.* at 464.

107. To the extent that it purported to create, but not find federal jurisdiction in the absence of any constitutional basis, it is dangerous *dicta*.

108. *See supra* notes 99-103 and accompanying text.

109. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

jurisdiction becomes more certain—to engage in an in-depth exploration of the merits of a claim without first satisfying itself that it may hear the matter—is to presume the power or authority of a federal court over a state court, in derogation of the delicate balance struck by Article III. To do so on the basis of unnecessary language of a lower federal court's opinion is to bestow upon one court power that is not even reserved unto Congress.

In the hypothetical inspiring this Article, Smith should easily prevail on his remand motion if he can demonstrate the possibility of stating a claim against the nondiverse defendant, White, cognizable under California law. Smith should not have to engage in a "mini-trial" of summary judgment proportions with Jones.[110] The opinion in *Lewis* contains the seeds of a federal doctrine soundly rejected in *Steel Co.*[111] This doctrine would impose upon Smith a heightened burden to demonstrate that the federal court, before which he was thrust, lacks jurisdiction and is not permitted under the Constitution of the United States to hear his case.

> A court has no discretion where it has no power, and to suggest otherwise is to erode a fundamental limitation on the exercise of judicial authority. . . . [T]he continued proliferation of this notion could lead to a regime in which the only check on judicial power is a court's own disinclination to reach the merits. That . . . invites judicial arrogance.[112]

110. Unless, of course, Smith has made admissions or in some other fashion conceded that the claim against White is sheer legerdemain. *See Lewis*, 83 F.R.D. at 464-65.

111. *See supra* notes 99-103 and accompanying text.

112. Clow v. United States Dep't of Hous. & Urban Dev., 948 F.2d 614, 628 (9th Cir. 1991) (O'Scannlain, J., dissenting).