

10-1988

Removal, Remand, and Review in Pendent Claim and Pendent Party Cases

Joan Steinman

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Joan Steinman, Removal, Remand, and Review in Pendent Claim and Pendent Party Cases, 41 *Vanderbilt Law Review* 923 (1988)

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Removal, Remand, and Review in Pendent Claim and Pendent Party Cases

*Joan Steinman**

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I. INTRODUCTION

Since 1789 litigants have enjoyed the statutory right to remove to federal court certain cases initiated in state court.¹ New issues in the proper construction of the removal statutes nevertheless continue to arise. The United States Supreme Court recently ruled upon some of the issues raised by the interplay of the removal statutes and the doctrines of pendent and ancillary jurisdiction that have burgeoned over the last twenty-two years.² In the interim, the federal courts of appeals had developed conflicting views as to the sets of claims that are removable, the circumstances under which the federal courts are empowered to remand particular claims or entire civil actions that were properly re-

1. Section 12 of the Judiciary Act of 1789 permitted removal by a defendant of any suit "commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs. . . ." Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79. "A removal jurisdiction has existed since that time; and, while the constitutionality of some particular provision may be questioned, the general power of Congress to provide for removal cannot be doubted." 1A J. MOORE & B. RINGLE, *MOORE'S FEDERAL PRACTICE* ¶ 0.156[1], at 13-14 (2d ed. 1987) (footnote omitted) [hereinafter 1A MOORE'S]. Over a hundred years ago, the Supreme Court wrote,

The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of Sept. 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution

Tennessee v. Davis, 100 U.S. 257, 265 (1879); *see also id.* at 269-71.

The removal statutes are traced in: 1A MOORE'S, *supra*, ¶ 0.156[1], at 14-19; P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 35, 40 & n.44, 422-23, 836-37, 845-50, 872-73, 883 & n.1, 890, 1056-57, 1192-1205 (2d ed. 1973) [hereinafter *HART & WECHSLER*].

2. The modern formulation of pendent jurisdiction doctrine dates from *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The parallel expansion of ancillary jurisdiction is traced in *Aldinger v. Howard*, 427 U.S. 1, 9-13 (1976) to: *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861); *Stewart v. Dunham*, 115 U.S. 61 (1885); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276 (1925); and *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926). Although the Supreme Court has acknowledged some basic similarities between pendent and ancillary jurisdiction, it has not decided whether there are any "principled" differences between them. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 n.8 (1978); *see also Aldinger*, 427 U.S. at 13.

moved, and the permissible occasions for appellate intervention. One such conflict concerned the handling of cases presenting federal questions and pendent state law claims.

This Article examines the removability of civil actions that include either pendent claims or pendent parties joined in addition to parties against whom federal questions are alleged. It discusses the remandability of those civil actions or segments of them, and comments on the law governing appellate review of district court remands to state court.³ In an effort to reach the wisest resolutions of the various issues posed, it confronts issues of statutory construction, interprets Supreme Court cases, especially *Thermtron Products, Inc. v. Hermansdorfer*,⁴ and wades in the murky waters of federalism. In the course of this enterprise, the Article analyzes and strongly takes issue with the recent decision of the Supreme Court in *Carnegie-Mellon University v. Cohill*.⁵ The implications of *Carnegie-Mellon* also are explored.

The Article focuses on the problems that have arisen and can arise in federal question cases removable, if at all, under 28 U.S.C. sections 1441(a) and (b).⁶ It is noteworthy that these issues arise frequently, as evidenced by the number of pertinent decisions, and promise to continue to plague the federal courts in view of the substantial number of cases removed to federal court.⁷ The issues of removal jurisdiction, remandability, and reviewability tackled here are questions of federal court jurisdiction, powers, and discretion, that broadly implicate our federalism.

3. The issues arise in cases removable by virtue of the courts' federal question jurisdiction. The basic grant of federal question jurisdiction is 28 U.S.C. § 1331 (1982). Grants of specialized aspects of federal question jurisdiction appear in 28 U.S.C. §§ 1333-40, 1343-58, 1361-62, and elsewhere in the United States Code [hereinafter the Code]. See 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 3561-3600 (2d ed. 1984) [hereinafter 13B WRIGHT & MILLER]. The general authorization for removal of both federal question and diversity cases lies in 28 U.S.C. § 1441 (1982), with additions to and subtractions from that authorization in 28 U.S.C. §§ 1442-45, 1452, and elsewhere in the Code. For a discussion of removal provisions located elsewhere in the Code, see 1A MOORE's, *supra* note 1, ¶ 0.164[4], at 411-25.

4. 423 U.S. 336 (1976).

5. 108 S. Ct. 614 (1988).

6. The Article discusses removal and remand under 28 U.S.C. § 1441(c)-(e), and under such specialized removal provisions as § 1442, only to the extent that doing so sheds light on the issues of removal, remand, and review that arise as to § 1441(a) and (b) removals, or provides an interesting contrast with the legal developments under § 1441(a) and (b).

7. In the twelve-month period ended June 30, 1987, there were 21,070 cases filed in the federal district courts as removals from state courts. 1987 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 109. This constituted 8.8% of the cases filed that year. *Id.* The percentage of new filings represented by removals has been increasing in recent years. *Id.*

II. A QUICK PRIMER ON THE NATURE OF REMOVAL

The Constitution of the United States does not specifically grant the right to remove an action from a state court to a federal court. The Judiciary Act of 1789, however, provided for removal of certain suits, and removal jurisdiction has existed continuously since that time, although Congress periodically has altered its scope.⁸ While particular removal statutes, of course, may be challenged as beyond the powers of Congress,⁹ Congress clearly acts constitutionally when it authorizes the removal of both civil actions arising under the Constitution or laws of the United States¹⁰ and civil actions that could have been commenced in a federal court pursuant to diversity jurisdiction.¹¹ The ability of Congress to grant or to restrict the right of removal derives from the article I grant of power to constitute tribunals inferior to the Supreme Court,¹² augmented by the "necessary and proper" clause.¹³ Article III of the Constitution limits the jurisdiction that Congress may confer upon the lower federal courts.¹⁴

The jurisdiction exercised by federal courts on removal is original, not appellate.¹⁵ Until the addition of 28 U.S.C. section 1441(e) in 1986, removal jurisdiction also was "derivative;" a federal court could hear, on removal, only cases over which the "forwarding" state court had had jurisdiction.¹⁶ Consequently, a federal court had to dismiss any removed action that fell within the exclusive subject matter jurisdiction of the federal courts.¹⁷ This result was much criticized. By the addition of 28 U.S.C. section 1441(e), Congress abrogated the doctrine of derivative

8. See *supra* note 1.

9. See generally 1A MOORE'S, *supra* note 1, ¶ 0.157[1.-2], at 36-38. The constitutionality of 28 U.S.C. § 1441(c), in the context of federal question cases, has been questioned, for example. See *infra* note 71 and accompanying text.

10. *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987); *City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966); *Tennessee v. Davis*, 100 U.S. 257, 265 (1879); see 1A MOORE'S, *supra* note 1, ¶ 0.157[1.-2], at 36-38.

11. See, e.g., *Caterpillar Inc.*, 107 S. Ct. at 2429; *Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270 (1871).

12. U.S. CONST. art. I, § 8.

13. Congress is empowered: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art I, § 8.

14. Article III, § 1, states, in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." See also 1A MOORE'S, *supra* note 1, ¶ 0.157[1.-1], at 34.

15. *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 452 (1943); *Whitton's Adm'r*, 80 U.S. (13 Wall.) at 287.

16. *Minnesota v. United States*, 305 U.S. 382, 389 (1939); *General Inv. Co. v. Lake Shore & M.S. Ry.*, 260 U.S. 261, 288 (1922); *Lambert Run Coal Co. v. Baltimore & O. Ry.*, 258 U.S. 377, 382 (1922).

17. See cases cited *supra* note 16.

jurisdiction in order to eliminate the resultant waste of judicial resources.¹⁸ Section 1441(e) applies to claims in civil actions commenced in state court on or after June 19, 1986.¹⁹

III. THE ISSUES OF REMOVABILITY AND REMANDABILITY GENERATED BY CLAIMS SUBJECT TO PENDENT OR ANCILLARY JURISDICTION IN "FEDERAL QUESTION" CASES

Article III, section 2, of the Constitution states in part that, "[t]he judicial Power [of the United States] 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."²⁰ Article III, section 1, of the Constitution mandates that, "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."²¹ Pursuant to this authorization and to that in article I,²² Congress in fact has conferred on federal district courts jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States.²³ In addition, Congress has provided as follows:

§ 1441. Actions removable generally

(a) 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.

(b) Any civil action of which the district courts have original jurisdiction

18. For criticism of the consequences of derivative jurisdiction, see 1A MOORE's, *supra* note 1, ¶ 0.157 [3.-2], at 58-61 and cases cited therein, and H.R. REP. NO. 423, 99th Cong., 2d Sess. 13, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1553, 1553. Section 1441(e) provides: "The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

19. Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3(b), 100 Stat. 637 (1986).

20. U.S. CONST. art. III, § 2.

21. U.S. CONST. art. III, § 1.

22. See *supra* text accompanying notes 12-13. Some scholars, including Justice Story, expressed the view that article III was more than permissive, and that it obligated Congress to vest the entire judicial power of the United States in the Supreme Court and the lower federal courts. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-30 (1816). This view was rejected in the first Judiciary Act. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923); HART & WECHSLER, *supra* note 1, at 313-15.

23. 28 U.S.C. § 1331 (1982). The Court, however, has long construed the congressional grant of general federal question jurisdiction, 28 U.S.C. § 1331, more narrowly than it construes article III's grant of judicial power over cases "arising under" federal law. See *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807-08 (1986). The courts of the states have concurrent jurisdiction over these civil actions, except as to those which Congress has placed into the exclusive jurisdiction of the federal courts. See, e.g., 28 U.S.C. § 1333 (admiralty, maritime, and prize cases), § 1334 (bankruptcy cases), § 1338 (patent, plant variety protection, and copyright cases) (1982).

founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.²⁴

As previously noted, these provisions are unquestionably constitutional.²⁵

Most, if not all, of the operative language quoted above has generated interpretive case law.²⁶ Most pertinent to this Article is the grant of jurisdiction over civil actions "of which the district courts [of the United States] have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States."²⁷

A continuing debate about the proper construction of 28 U.S.C. section 1331, the basic grant of "federal question" jurisdiction, focuses on the circumstances under which a civil action should be regarded as "arising under" the Constitution, laws, or treaties of the United States. The debate has raged since passage of a general federal question provision in 1875.²⁸ There also is controversy over the proper interpretation of specialized grants of original federal jurisdiction that are within the sweep of 28 U.S.C. sections 1441(a) and (b).²⁹ Because the general removal statute (section 1441) is keyed to these grants of original federal question jurisdiction,³⁰ however, the statutory grants and the common-law constructions thereof effectively are incorporated by reference into 28 U.S.C. sections 1441(a) and (b). Hence, a federal court to which a case is removed must respect these legislative enactments and judicial precedents regardless of the wisdom of our present grants of original

24. 28 U.S.C. § 1441(a), (b) (1982). Regarding the statutory predecessors of § 1441(a) and (b), see *supra* note 1.

25. See *supra* note 1 and text accompanying notes 10-11.

26. Case law construes "civil action," see 1A MOORE's, *supra* note 1, ¶ 0.157[4.-3], at 72-76; "brought," *id.* ¶ 0.157[4.-10], at 100-04; in a "state court," *id.* ¶ 0.157[4.-6], at 80-85; removed by "defendant, or defendants," *id.* ¶ 0.157[7], at 139-44.

27. 28 U.S.C. § 1441(a), (b) (1982).

28. See *Merrell Dow*, 478 U.S. at 810 (stating that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system"); see also *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). In *Franchise Tax Board*, the Court rejected federal jurisdiction "for reasons involving perhaps more history than logic." *Id.* at 4. The Court observed that the "limited legislative history suggests that the 44th Congress may have meant to 'confer the whole power which the Constitution conferred' . . . Nevertheless, we have only recently reaffirmed . . . that 'Art. III "arising under" jurisdiction is broader than federal question jurisdiction under § 1331.'" *Id.* at 8-9 n.8 (citation omitted). See generally HART & WECHSLER, *supra* note 1, at 967-1071.

29. See, e.g., 1A MOORE's, *supra* note 1, ¶ 0.157[5], at 121 (observing that the reference in § 1441 to the original jurisdiction of the federal courts is not limited to that granted in §§ 1331-1332, but is "as broad as the district courts' original jurisdiction").

30. *Id.*

jurisdiction, or the soundness of the interpretations given them. Thus, for example, the judicial gloss establishing that, to "arise under" the Constitution, laws, or treaties of the United States, a federal issue must appear on the face of a well-pleaded complaint³¹ and constitute an essential element³² that is basic, rather than merely a collateral, to the plaintiff's cause of action,³³ governs the application of 28 U.S.C. sections 1441(a) and (b) as firmly as it governs the application of 28 U.S.C. section 1331.³⁴

The foregoing discussion is not intended to suggest that all of the judicial gloss on sections 1441(a) and (b) is borrowed from the interpretation of original grants of jurisdiction. The contrary is true. Indeed, some problems in determining whether a civil action arises under federal law emerge uniquely in the context of removed cases. When a defendant removes a case in which the complaint, on its face, asserts only a state law claim, the court may have to determine whether the real nature of the claim is federal, despite plaintiff's effort to artfully plead it as a state law claim.³⁵ Such issues never arise in cases originally brought in federal court because a plaintiff who sought to invoke the jurisdiction of a federal court would not disguise the federal nature of his or her claim.

Neither does the earlier discussion mean that the universe of cases that is removable under sections 1441(a) and (b)'s "arising under" language is identical to the universe of cases over which the federal courts have original jurisdiction under 28 U.S.C. section 1331 and the specialized grants of federal question jurisdiction. A lack of congruence exists because the grant of removal jurisdiction in section 1441(a) is limited by the language "[e]xcept as otherwise expressly provided by Act of

31. *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987); *Franchise Tax Board*, 463 U.S. at 10 & n.9 (citing *Taylor v. Anderson*, 234 U.S. 74 (1914)).

32. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 117-18 (1936).

33. *Id.* at 112-13, 118.

34. Indeed, some of the cases giving rise to these requirements were cases removed to federal court. *See, e.g.*, cases cited *supra* notes 31-32.

35. *E.g., Caterpillar Inc.*, 107 S. Ct. at 2430. Once an area of law has been completely preempted so as to convert a state common-law complaint into one stating a federal claim, any claim purportedly based on that preempted state law arises under federal law. In *Caterpillar Inc.* the Court rejected the argument that a complaint asserting breach of individual employment contracts was completely preempted by federal labor law. *See also Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1546 (1987) (holding that state contract and tort claims were completely preempted by parts of ERISA); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 560-61 (1968) (concluding that a state claim for breach of contract between an employer and a labor organization was completely preempted by the Labor Management Relations Act); *but see Franchise Tax Board*, 463 U.S. at 20-22 (determining that a state tax authority's suit to enforce its tax levies is not completely preempted by ERISA); *see also* 1A MOORE's, *supra* note 1, ¶ 0.160[3.-3], at 233.

Congress;³⁶ and Congress has otherwise provided.³⁷

Bearing in mind that some questions raised by sections 1441(a) and (b) do not arise in applying section 1331 and the specialized grants of original federal question jurisdiction, and that congressionally dictated differences do exist in the set of cases that these statutes permit to be adjudicated in federal district court, by and large it remains true that the cases over which federal courts have original jurisdiction under 28 U.S.C. section 1331 and the following sections are cases which may be removed to federal court pursuant to sections 1441(a) and (b).

In the context of litigation commenced in federal court under the authority of 28 U.S.C. section 1331, the 1966 decision of the Supreme Court in *United Mine Workers v. Gibbs*³⁸ established that the federal district courts have power under the Constitution and section 1331 to hear not only a plaintiff's claims arising under the Constitution, laws or treaties of the United States,³⁹ but also any of plaintiff's state law claims that derive from a common nucleus of operative fact with a federal claim and that a court ordinarily would expect a plaintiff to try with his federal claim in one judicial proceeding.⁴⁰ Such state law claims are deemed to be part of the constitutional "case" that article III empowers the federal courts to hear,⁴¹ as well as part of the "civil action" that 28 U.S.C. section 1331 empowers the federal courts to hear.⁴² By similar reasoning, federal courts ordinarily have "ancillary" jurisdiction over compulsory counterclaims,⁴³ cross-claims,⁴⁴ third-party claims,⁴⁵

36. 28 U.S.C. § 1441(a) (1982).

37. See 1A MOORE's, *supra* note 1, ¶ 0.167[1], at 455-58 (discussing the exceptions, which include, but are not limited to, those provided for in § 1445).

38. 383 U.S. 715 (1966).

39. A plaintiff's federal claims must be substantial in the sense that they would survive a motion to dismiss for lack of jurisdiction, under FED. R. CIV. P. 12(b)(1). See *Gibbs*, 383 U.S. at 725.

40. *Gibbs*, 383 U.S. at 725.

41. *Id.* Article III, § 2 of the Constitution reads in 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 . . ." U.S. CONST. art. III, § 2.

42. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (Supp. 1988).

43. See, e.g., *Moore v. New York Cotten Exch.*, 270 U.S. 593, 609-10 (1926) (allowing state law counterclaim to federal antitrust claim); *Revere Copper & Brass, Inc. v. Aetna Casualty & Sur. Co.*, 426 F.2d 709, 715-16 (5th Cir. 1970) (discussing counterclaims by a third-party defendant against the original defendant or original plaintiff). See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3523, at 106-07 (2d ed. 1984) [hereinafter 13 WRIGHT & MILLER].

44. See, e.g., *Skevoiflax v. Quigley*, 810 F.2d 378, 385-86 (3d Cir.), *cert. denied*, 107 S. Ct. 1956 (1987); *Allstate Ins. Co. v. James*, 779 F.2d 1536, 1539 (11th Cir. 1986); 13 WRIGHT & MILLER, *supra* note 43, § 3523, at 109.

45. See, e.g., *United States v. City of Twin Falls*, 806 F.2d 862, 867-68 (9th Cir. 1986), *cert. denied sub nom. City of Twin Falls v. Envirotech Corp.*, 107 S. Ct. 3185 (1987); *Finkle v. Gulf &*

and the claims of intervenors of right.⁴⁶ In some circumstances, they also have ancillary jurisdiction over the claims of permissive intervenors.⁴⁷

A combination of federal and state law claims over which a federal court would have jurisdiction may be asserted in state court. A number of related questions arise in this situation: 1) Under sections 1441(a) and (b), may the defendant(s) remove all the claims filed in the action? 2) When, if at all, may the federal district court remand some or all of the claims properly removed under sections 1441(a) and (b)? 3) When, if ever, may the federal district court dismiss without prejudice some or all of the claims properly removed under sections 1441(a) and (b)? and 4) Under what circumstance will a federal appellate court review such remands and dismissals? This Article turns to those questions, guided by the Supreme Court's advice that jurisdictional legislation should be construed "in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which . . . emerge[] from the Act's function as a provision in the mosaic of federal judiciary legislation."⁴⁸ In avoiding treatment of the statutes "as a wooden set of self-sufficient words,"⁴⁹ this Article seeks to interpret them "with an eye to practicality and necessity,"⁵⁰ informed by recognition of the increased complexity and volume of federal litigation and the need for careful scrutiny of legislative intent.⁵¹ As the Court has recognized, "[e]specially when considered in light of section 1441's removal jurisdiction, the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system."⁵²

A. Removability

Sections 1441(a) and (b) authorize the removal of described "civil actions."⁵³ The courts almost unanimously agree that this language requires pendent and ancillary claims to be removed along with the sub-

Western Mfg. Co., 744 F.2d 1015, 1018-19 (3d Cir. 1984); *H.L. Peterson Co. v. Applewhite*, 383 F.2d 430, 433 (5th Cir. 1967); 13 WRIGHT & MILLER, *supra* note 43, § 3523, at 109-10.

46. *See, e.g., Phelps v. Oaks*, 117 U.S. 236, 241 (1886); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 792 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); 13 WRIGHT & MILLER, *supra* note 43, § 3523, at 113.

47. *Usery v. Brandel*, 87 F.R.D. 670, 677 (W.D. Mich. 1980).

48. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959).

49. *Id.*

50. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 (1983); *see also City of Greenwood v. Peacock*, 384 U.S. 808, 832-34 (1966) (describing the logistical problems that would result from a "strained interpretation" of 28 U.S.C. § 1443(1)).

51. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 811 (1986).

52. *Franchise Tax Board*, 463 U.S. at 8.

53. *See text accompanying note 24.*

stantial federal claim with which they share a common nucleus of fact.⁵⁴ An amicus curiae brief filed by eighteen states in *Carnegie-Mellon University v. Cohill*⁵⁵ recently made a contrary argument: Sections 1441(a) and (b) are silent with respect to removal of cases in which federal and state claims are joined. Section 1441(a) "is primarily concerned with identifying the parties that can remove cases and with establishing the venue"⁵⁶ in federal court. Section 1441(b) "is primarily concerned with defining the extent to which diversity of citizenship affects removability, rather than with establishing a federal claim as a separate ground for removal."⁵⁷ In section 1441(c), and there alone, Congress defined the circumstances in which defendants may remove cases involving both removable and nonremovable claims. Section 1441(c) authorizes removal only if the removable claim is "separate and independent" from the nonremovable claim. "[I]f a federal claim is not so 'separate and independent,' neither claim is removable."⁵⁸ In the view of those who filed the amicus curiae brief, the provisions of section 1441 must be so read to avoid a "conflict" between sections 1441(a) or (b) and 1441(c). Any other reading of the former subsections would authorize removal of cases that cannot properly be removed under the latter. Such a reading would render section 1441(c) a nullity and the restrictions it imposes meaningless.⁵⁹ The amicus curiae states argued that their construction

54. See, e.g., *Thomas v. Shelton*, 740 F.2d 478, 482 (7th Cir. 1984); *Charles D. Bonanno Linen Serv., Inc. v. McCarthy*, 708 F.2d 1, 11 (1st Cir.), cert. denied, 464 U.S. 936 (1983); *Sheet Metal Workers Int'l Ass'n v. Seay*, 696 F.2d 780, 782 (10th Cir. 1983); *Contemporary Servs. Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885, 889-92 (C.D. Cal. 1987); accord 1A MOORE'S, *supra* note 1, ¶ 0.160[6], at 245; 14A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3724, at 399-401 (2d ed. 1985) [hereinafter 14A WRIGHT & MILLER]. The only arguable exceptions found by the Author to the rule in question appear in two district court opinions from the Ninth Circuit. In *Kinsey v. Nestor Exploration Ltd.*—1981A, 604 F. Supp. 1365 (E.D. Wash. 1985), the court held that removal was simply improper because federal courts have exclusive jurisdiction over RICO claims. In the alternative, it said that § 1441(c) barred removal of any part of the case because the RICO claim was not "separate and independent" from plaintiffs' tort claims. 604 F. Supp. at 1370-71. In *Skaw v. Lady Pacific, Inc.*, 577 F. Supp. 2 (D. Alaska 1983), the court had admiralty jurisdiction (28 U.S.C. § 1333) over a maintenance and cure claim, but plaintiff's Jones Act claim could not be removed. As to the unremovability of Jones Act cases, see generally 1A MOORE'S, *supra* note 1, ¶ 0.167[3-2], at 466-68. The district court held that § 1441(c) blocked removal of either claim because the two were not "separate and independent." 577 F. Supp. at 3. This reading of § 1441(c) is approved in Smith, *Removal and Remand: Unraveling the Mysteries*, 8 CEB CIV. LIT. REP. 277, 280-83 (1986). The Ninth Circuit rejected it in *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195-96 (9th Cir. 1988).

55. Amicus Curiae Brief of States of Alabama, Alaska, Arkansas, California, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Nevada, New Mexico, Ohio, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin in Support of Respondents at 4-16, *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614 (1988).

56. Amicus Curiae Brief, *supra* note 55, at 12 n.4.

57. *Id.* at 11.

58. *Id.* at 6.

59. *Id.* at 11, 12 & n.4.

of section 1441 furthers congressional intent to narrow the circumstances for removal of federal claims to federal court and to allow state courts to adjudicate federal claims that arise from the same facts as state law claims.⁶⁰

These arguments are erroneous and should be rejected for a number of reasons. First, the amicus curiae states' characterization of the primary purpose of section 1441(a) is unwarranted, if not disingenuous. While that provision does dictate both proper venue and who may remove actions, most fundamentally it authorizes removal to federal court of civil actions of which the district courts have original jurisdiction. Second, the courts' understanding of "civil action," as that term is used in jurisdictional statutes generally,⁶¹ supports the interpretation of sections 1441(a) and (b) to authorize removal of civil actions including both federal questions and claims deemed to be within the federal courts' pendent or ancillary jurisdiction. The "civil action" over which the district courts have jurisdiction is construed ubiquitously to include both types of claims. One therefore should presume that Congress intended "civil action" to carry its ordinary denotation and connotations in section 1441, unless that presumption is rebutted by evidence clearly to the contrary. In the Reviser's Note to section 1441, one finds instead support for the proposition that it was Congress' intent that section 1441's "civil action" be construed in the ordinary way. The Reviser's Note explains that the words "civil action" were substituted for words such as "case," "cause," and "suit" so that section 1441 would harmonize with Rules 2⁶² and 81(c)⁶³ of the Federal Rules of Civil Procedure ("Rules").⁶⁴ Although the Rules do not purport to deal with questions of jurisdiction,⁶⁵ the concept of "civil action," as used in the Rules,

60. *Id.* at 8-9.

61. See *Aldinger v. Howard*, 427 U.S. 1, 16-17 (1976) (interpreting 28 U.S.C. § 1343(3), and rejecting "pendent party jurisdiction" over a defendant excluded from liability under 42 U.S.C. § 1983, but not rejecting the petitioner's assumption that "civil action" includes related state law claims, absent congressional negation of particular forms of pendent or ancillary jurisdiction); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (interpreting 28 U.S.C. § 1331); see also *Williams v. City of Atlanta*, 794 F.2d 624, 628-29 (11th Cir. 1986) (holding that § 1442 creates ancillary jurisdiction over state claims against codefendants sued with a federal officer); *Swett v. Schenk*, 792 F.2d 1447, 1450-51 (9th Cir. 1986); *Bushman v. Seiler*, 755 F.2d 653, 654 (8th Cir. 1985); *Murphy v. Kodz*, 351 F.2d 163, 165-67 (9th Cir. 1965); cf. *Garcia v. Public Health Trust*, 657 F. Supp. 99, 100 (S.D. Fla. 1987) (finding that § 1441(d) creates ancillary jurisdiction over state claims against codefendants sued with a foreign state), *aff'd*, 841 F.2d 1062 (11th Cir. 1988).

62. "There shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 2.

63. "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal . . ." FED. R. CIV. P. 81(c).

64. 28 U.S.C. § 1441 (1982) (Historical and Revision Notes).

65. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . ." FED. R. CIV. P. 82. See FED. R. CIV. P. 18 (Committee Note of 1937) (stating that "[t]he provisions of this Rule for the joinder of claims are subject to Rule 82"); see

clearly must include pendent and ancillary claims asserted with federal questions,⁶⁶ so that the Rules will govern all the claims brought to federal court, whether under 28 U.S.C. section 1331 or specialized federal question jurisdictional statutes, or by removal.

Third, the predecessors of section 1441(c) and its legislative history furnish no support for the states' contention that Congress intended section 1441(c) *alone* to define the circumstances in which defendants may remove cases entailing both federal question claims and state law claims. As the courts have recognized, "While the revisors intended section 1441(c) to reduce removals to federal court, section 1441(c) can and has had this effect without blocking removal of cases with federal and pendent state claims."⁶⁷ The predecessor provisions to section 1441(c) applied only in contexts where diversity jurisdiction existed over some of the claims in a state court action.⁶⁸ As Congress intended, section 1441(c) retains its full force in decreasing the volume of federal litigation of diversity cases.⁶⁹

Until 1948 defendants could remove cases entailing both federal questions and state law claims only under sections 1441(a) and (b).⁷⁰ The legislative history of section 1441(c) reflects no congressional intent to abrogate those precedents approving removal of civil actions including both federal questions and pendent state claims. Moreover, while removal of pendent or ancillary claims together with federal questions does allow removal in circumstances that do not fit the requirements of section 1441(c) (as the *amicus curiae* states say), this result need not be viewed as creating a conflict between sections 1441(a) and (b), and section 1441(c); the two can be seen as complementing one another. If the requirements imposed by section 1441(c) are nullified in federal question cases, they are nullified not by sections 1441(a) and (b), but by the Constitution. It frequently has been argued that section 1441(c) is unconstitutional as applied to federal question cases because it purports

also FED. R. CIV. P. 18 (Committee Note of 1966) (stating that the Rule "does not purport to deal with questions of jurisdiction").

66. See 3A J. MOORE, J. LUCAS & G. GROTHEER, *MOORE'S FEDERAL PRACTICE* ¶ 18.07[1.-1], at 18-22 (2d ed. 1987) (stating that "the power and duty to construe the statutory provisions [confering federal jurisdiction] is exercised with an eye to the practical aspects of the function of courts under the Rules") [hereinafter 3A MOORE'S].

67. *Contemporary Servs. Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885, 890 (C.D. Cal. 1987).

68. Section 2 of the Judiciary Act of 1875 (as amended), the forerunner of § 1441(c), provided that "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court . . ." 28 U.S.C. § 71 (1946).

69. See *Contemporary Servs. Corp.*, 655 F. Supp. at 890-91.

70. Section 1441(c) was codified in its present form in June 1948.

to allow the federal courts to hear more than a constitutional "case" arising under the Constitution, laws, or treaties of the United States.⁷¹ If this argument is correct, it eliminates section 1441(c) as a channel for removing federal claims to federal court. If the amicus curiae states' construction of 1441(a) and (b) were nonetheless adopted, the result would be that defendants *never* could remove actions in which the plaintiff asserted both federal question claims and a state law claim, not when the claims arose from a common nucleus of operative fact, nor when they were separate and independent. There is no reason to believe that Congress intended or desired such a result.

Thus, courts should not construe sections 1441(a) and (b) so as to render them useless whenever a plaintiff pleads pendent federal and state claims, leaving the constitutionally vulnerable 1441(c) as the only means of removing actions asserting both federal and state law claims. Moreover, if 1441(a) and (b) do conflict with 1441(c), then 1441(c) ought to go, in the context of federal question cases, because of its questionable constitutionality. Sections 1441(a) and (b) should not be weakened, as the amicus curiae states' advocate, in order to avoid a conflict with 1441(c). Even if section 1441(c) is constitutional as applied to federal question cases,⁷² the reasons articulated above⁷³ firmly support the prevailing construction of 1441(a) and (b) to permit the re-

71. See, e.g., *Thomas v. Shelton*, 740 F.2d 478, 483 (7th Cir. 1984); *Adolph Coors Co. v. Sickler*, 608 F. Supp. 1417, 1428 (C.D. Cal. 1985); Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action."* 46 MINN. L. REV. 1, 25-26 (1961); Ireland, *Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts*, 11 IND. L. REV. 555, 571 (1978); Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 431-32 (1953); 14A WRIGHT & MILLER, *supra* note 54, § 3724, at 402-03. Basically, the argument of § 1441(c)'s unconstitutionality is that a common nucleus of operative fact between a federal claim and nonfederal claims is the constitutional requirement for exercise of jurisdiction by a federal court over a nonfederal claim, absent diversity jurisdiction. Otherwise, there is no "case" arising under federal law. "Separate and independent" claims could not meet that test.

72. Arguments in support of the constitutionality and the unique utility of § 1441(c) do exist. For example, it can be argued under *Gibbs*, 383 U.S. at 715, that a claim may be pendent (and hence within the contours of an article III "case") either if it arises from a nucleus of fact shared in common with a federal claim or if plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding. The latter may be true though a common nucleus is absent, when a plaintiff sues a single defendant. Quite consistently with the case law, one can construe § 1331 as impliedly revoking, or not conferring on the federal courts, jurisdiction over claims as to which there is only "expectation pendency." This is consistent with the goals of pendent jurisdiction to foster judicial economy and convenience.

At the same time, one can construe § 1441(c) as conferring jurisdiction over claims that fall within "expectation pendency." By expressly authorizing the federal court to remand "all matters not otherwise within its original jurisdiction," Congress has provided a way for the federal courts to rid themselves of state law claims whose adjudication in federal court would not serve judicial economy or be wise. So far as I know, this argument was devised by my colleague, Margaret Stewart.

73. See text accompanying notes 67-70.

removal of federal question claims and pendent state law claims.

Fourth, the *amicus curiae* states argue that it would be "illogical and indeed unconstitutional" for Congress to provide that "a state claim joined with a federal claim could be removed only if the two claims are 'separate and independent,' and hence if the state claim is *not* within pendent federal jurisdiction," but that "if the two claims are *not* 'separate and independent'—and hence, if the state claim *is* within pendent federal jurisdiction—the state claim could *not* be removed."⁷⁴ Precisely this illogical and probably unconstitutional scheme, however, would be the result under the *amicus curiae* states' reading of the statute. Moreover, under the *amicus curiae*'s approach, plaintiffs could defeat defendants' ability to have even the federal claims against them adjudicated in federal court simply by adding a related state cause of action to their complaints. That result seems contrary to the intent behind sections 1441(a) and (b).⁷⁵ For reasons elaborated later, such an outcome does violence to the policies that support our system for allocating judicial business between the federal and state courts.⁷⁶

One might object that the federal courts ought to narrowly construe their removal jurisdiction in due regard for the rightful independence of the state courts. This thought is implicit, if not explicit, in the *amicus curiae*'s argument, and as a general proposition it is well supported by precedent.⁷⁷ This prescription, however, is really just a corollary of the doctrine that federal courts always ought to narrowly construe their subject matter jurisdiction.⁷⁸ There is no reason to believe that Congress intended removal jurisdiction under sections 1441(a) and (b) to be any less encompassing than original jurisdiction under sections 1331 and 1332. When Congress has desired to render particular claims unremovable it has done so unambiguously.⁷⁹ Outside the areas in which Congress has expressly afforded special treatment, the courts, including the Supreme Court, have proceeded on the understanding that the same claims and combinations of claims are removable as are within the federal courts' original jurisdiction.⁸⁰ The courts

74. *Amicus Curiae Brief*, *supra* note 55, at 12 n.4 (emphasis in original).

75. *Contemporary Servs. Corp.*, 655 F. Supp. at 889.

76. *See infra* text accompanying notes 89-97.

77. *See, e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 407 (1981) (Brennan, J., dissenting); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380 (1959); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (commenting that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined").

78. *See, e.g.*, *Healy*, 292 U.S. at 270 (stating that the policy of the jurisdictional statutes calls for strict construction).

79. *See supra* notes 3, 37.

80. *See, e.g.*, *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (af-

should operate no differently in determining the removability of pendent and ancillary claims. Contrary to the arguments of the amicus curiae states, Congress has not expressly, or by implication, made unremovable either those portions of civil actions that are pendent and ancillary claims or the entirety of civil actions that are comprised of federal questions accompanied by pendent claims.

Until the *Carnegie-Mellon* appeal, the Supreme Court had not reached any articulated decision on the removability of pendent state claims. It had, however, tentatively indicated its approval of the practice. In the recent case of *Caterpillar Inc. v. Williams*,⁸¹ for example, the Court held that certain of plaintiffs' state law claims were not removable because they were not completely preempted, and hence did not arise under federal law. The lack of a federal question mandated that the case be remanded to state court. The Court, however, did not criticize the simultaneous removal of additional state causes of action.⁸² In *Metropolitan Life Insurance Co. v. Taylor*,⁸³ the Court held that ERISA preempted some of plaintiff's common-law contract and tort claims so as to require their recharacterization as claims arising under federal law and within federal subject matter jurisdiction. The Court therefore reversed the court of appeals' decision that the district court had lacked removal jurisdiction. The removed suit contained pendent state law claims as well.⁸⁴

More telling still, in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,⁸⁵ the Court rejected an effort to remove cases in which the violation of a federal statute formed an element of a state cause of action, but where Congress had determined that there should be no private federal claim for the violation. Both the majority and the four dissenting Justices expressly agreed, however, that if there were federal question jurisdiction over that pivotal state law claim, then the plaintiff could join additional state claims meeting the test for pendent jurisdiction.⁸⁶

firming remand where requirements of 28 U.S.C. § 1331 were not met); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 7-12 (1983); *Moitie*, 452 U.S. at 406. Consequently, it is difficult to understand why some courts seem to believe that exercises of removal jurisdiction are greater infringements upon state sovereignty than are exercises of original federal jurisdiction. When a case is removed, state sovereignty has been exercised and is terminated, whereas when a case is begun in federal court, the state sovereign is rejected without ever being called upon to exercise jurisdiction. There is no reason, however, to view the former as a greater infringement on state sovereignty than the latter.

81. 107 S. Ct. 2425 (1987).

82. *See id.* at 2428 n.3.

83. 107 S. Ct. 1542 (1987).

84. *Id.* at 1545.

85. 478 U.S. 804 (1986).

86. *Id.* at 817 n.15, 823 n.2. *See also Romero*, 358 U.S. at 380-81 (after rejecting an argument

In *Carnegie-Mellon* itself both the Court's majority and the dissenters responded to the arguments of the amicus curiae with a deafening silence. Not even a footnote addressed their contentions. The Justices simply stated, as if it were uncontroverted and uncontrovertible, that "[t]he state-law claims fell within the jurisdiction of the District Court to which the action was removed because they derived from the same nucleus of operative fact as the federal law claim."⁸⁷

The foregoing discussion has focused on the removability of pendent state law claims and of the federal claims to which they are appended, primarily as a matter of correct statutory interpretation. More deserves to be said on the policy question of what the removal statutes ought to provide. One can question the wisdom of federal question removability altogether by emphasizing the ability of state courts to adjudicate federal claims competently and fairly and Congress' vote of confidence in the state judiciaries reflected in the grants of concurrent jurisdiction. A far more trusting attitude toward the state courts' handling of federal claims certainly prevails in the federal judicial opinions of the 1980s than prevailed in the 1960s.⁸⁸ Under this view, Congress' ability to vest exclusive jurisdiction in the federal courts would be the sole appropriate means of expressing any systemic interests in having particular kinds of questions adjudicated by federal courts. Absent an applicable grant of exclusive federal jurisdiction, plaintiffs' choice of forum would be determinative.

While such a system would be possible and constitutional, it is not and should not be our system. In such a system, a plaintiff could sue a defendant exclusively on federal claims, and yet deprive the defendant of a federal forum. The defendant may have good reasons to involve the

for federal jurisdiction over claims based on the general maritime law, under 28 U.S.C. § 1331 the Court held that, in conjunction with adjudicating plaintiff's Jones Act claims, the district court could exercise pendent jurisdiction to determine whether those general maritime claims stated a cause of action).

87. 108 S. Ct. 614, 619 (1988).

88. Compare *NAACP v. Flowers*, 377 U.S. 288, 297 (1964) (where the Alabama Supreme Court refused to consider constitutional claims by the NAACP, based upon an asserted failure of its brief to conform to rules of the court, the Court responded, "[t]he consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense") with *Deakins v. Monaghan*, 108 S. Ct. 523, 530 (1988) (commenting that it is inappropriate to assume that the states cannot be trusted to enforce federal rights diligently) and *Stone v. Powell*, 428 U.S. 465 (1976). In a footnote to *Stone* the court stated:

Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Id. at 493-94 n.35 (citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816)).

federal court in his particular case. The defendant may fear a particular state court's misunderstanding of the federal law or hostility toward his federal defenses,⁸⁹ or the defendant may prefer the federal court system because of its procedural incidents: the scope of discovery, the principles governing summary judgment, the ability of the court to comment on the evidence, or the requirement of a unanimous jury verdict, among many possible examples.⁹⁰

The presence of such reasons in particular cases, however, generally is not a sufficient reason for Congress to create exclusive federal jurisdiction for cases of that genre. In order to avoid undue diminution of state judicial power and as a federal docket control device, Congress has confined the areas of exclusive jurisdiction. Exclusive jurisdiction is now reserved for areas in which it is particularly important to diminish the likelihood of conflicting decisions in order to promote uniformity, to enhance the experience and competence of the federal judges, and to afford a sympathetic tribunal.⁹¹ Thus, the vehicle of exclusive jurisdiction cannot and should not be expected to carry the full weight of governmental interest in having particular kinds of questions adjudicated in federal court. Removal is an important mechanism by which Congress delegates the decision of whether a federal tribunal ought to be available to decide civil actions arising under federal law to those who are most directly interested and affected.

In addition, the legal counsel of the adversary parties can compare the quality of the two court systems, taking into account the "particular

89. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 192 (1969) [hereinafter A.L.I. STUDY OF THE DIVISION]. The American Law Institute (A.L.I.) wrote that:

[F]ederal law may be misapplied through misunderstanding as well as through lack of sympathy. If the theory is to be strictly applied, defendant should be permitted to remove to guard against the danger that the state court, through lack of familiarity with the federal law or otherwise, will give an unduly expansive construction to the plaintiff's claim.

Id.

Another expression of the recognition that federal defenses "deserve" federal court consideration for the same reasons that federal claims "deserve" it is found, *inter alia*, in the proposal by the A.L.I. that civil actions generally be removable if "a substantial defense arising under the Constitution, laws, or treaties of the United States is properly asserted that, if sustained, would be dispositive of the action or of all counterclaims therein." *Id.* at 188-89.

90. For additional reasons, see 1A MOORE'S, *supra* note 1, ¶ 0.157[13], at 193-99.

91. See Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 511-12 (1957). This Note also ventures that "[a] grant of exclusive jurisdiction may not be warranted in fields where the effect of an erroneous decision can be partially remedied by subsequent litigation." *Id.* at 516 (emphasis added). Thus, for example, if other litigants can enjoin the conduct of a victorious defendant in a patent infringement case, "the need for uniformity is lessened, since an incorrect decision will not necessarily legalize the defendant's course of action thereafter." *Id.* Also, "[w]hen a large number of cases are [sic] expected to arise under a particular statute . . . efficient distribution of the case burden suggests that exclusive jurisdiction is inappropriate." *Id.*

ability, integrity, bias or judiciousness of the judge or judges likely to deal with his case in the state or in the federal forum," particularly when cases involve political or unpopular issues, or where the state judges are elected.⁹² The very fact that the real and the perceived quality of state court justice varies from place to place and from time to time strongly suggests that Congress should not lessen the flexibility and responsiveness of the system by eliminating removal procedures for federal question cases or by increasing the scope of exclusive federal jurisdiction.

Maintaining a large field of operations for concurrent jurisdiction and permitting the litigants to vote with their feet on the quality of justice available from state and federal courts has many advantages. It allows plaintiffs or defendants to choose federal court, while compelling neither to do so. It thereby indulges a systemic preference for federal adjudication of federal claims, without forcing a federal forum on the parties when neither the plaintiffs nor all the defendants want it. It allows observers to track dissatisfaction with particular state or federal courts, broadly or in some categories of cases.⁹³ That information may lead to desirable changes in the conduct of the courts. Moreover, such a system reflects far more respect for state courts generally than would a broadening of exclusive federal jurisdiction. The pressure for such expansion might well increase if the ability to remove were denied to defendants.⁹⁴

92. 1A MOORE'S, *supra* note 1, ¶ 0.157[13], at 199.

93. See A.L.I., STUDY OF THE DIVISION, *supra* note 89, app. C, at 488. The A.L.I. stated that: The existing rules do not test jurisdiction by the possibility of prejudice in the state court and it is difficult to visualize any rules that could. A federal right that is unpopular in one part of the country may be highly popular in another. . . . No rule could be drafted that would permit [such] suits to be brought in federal court in [one] state, but require them to be prosecuted in state court in the second state. Nor is it feasible to condition access to federal court on a showing of a danger of prejudice in the particular case. For eighty-one years, prior to 1948, there were statutory provisions permitting removal of actions on a showing of local prejudice, but the statutes were little used, because of the difficulty of making such a showing and the proper reluctance of federal judges to attribute unfairness to the state courts.

Even if the drafting problem were not insuperable, it would not be desirable to limit federal question jurisdiction to those cases in which there was a risk that the state courts would not give impartial treatment. The purpose of federal question jurisdiction is to promote uniformity in the application of federal law. Misunderstanding of federal law is as grave a threat to uniformity as is hostility toward that law, and it is a far more likely threat.

Id. (citation omitted).

94. See *id.* at 477-78. The A.L.I. noted that:

If the purpose of giving the federal courts original jurisdiction is to protect the national interest in the application of federal law, it is arguable that the parties should have no choice in the matter, and that the jurisdiction of the federal courts should be exclusive in those matters thought to require a federal forum. The existing pattern of law proceeds in large part on a different premise. . . . Although the national government may have a strong interest in the application of national law in some cases between private litigants, the primary interest in all

Whenever a plaintiff asserts one or more state law claims in addition to related federal claims, either both court systems must get involved, each handling its "own" claims, or one court system must make a foray into "foreign" law.⁹⁵ Even if the plaintiff's choice of forum is not always to be determinative, when concurrent jurisdiction exists, one can imagine a system in which the plaintiff's choice of forum would be final when plaintiff pleads related federal and state law claims. The system urged by the amicus curiae brief in *Carnegie-Mellon*, however, would make a plaintiff's choice of forum final in that situation. The *Carnegie-Mellon* amici argued that the plaintiff's choice of a state court should be unalterable when the plaintiff has asserted state law claims and pending federal claims. Certainly, the legitimacy of plaintiff's choice of the state court is heightened when plaintiff asserts state law claims, as compared to when plaintiff asserts only federal questions. State law claims belong in state court for the same reasons that, and in the same respects as, federal claims belong in federal court.⁹⁶ A plaintiff who chooses the state forum may have reason to fear a federal court's misunderstanding of the state law or hostility toward his state claims, or the plaintiff may prefer the state court system because of its procedural incidents. The relative quality of the two systems also may play a part in plaintiff's choice.

Nonetheless, in this situation as well, removal should be available. First, the arguments marshalled above in favor of removability in pure federal question cases remain persuasive. Exclusive federal jurisdiction cannot shoulder the entire weight of the governmental interest in federal adjudication of federal claims. The strengths of defendants' reasons for seeking a federal forum are undiminished by the joinder of state law claims. A stand-off might appear to exist between defendants, armed with presumably strong reasons for desiring a federal forum for the claims against them (which include federal claims and state claims whose "relatedness" makes a case for joint adjudication), and plaintiffs, armed with reasons for desiring a state forum that are presumably of

such cases, and the only interest in most of them, is that of the litigants themselves. Thus in general the present pattern is to provide a federal forum to those litigants who prefer it in federal question cases. As a matter of logic, it might seem that the choice should be that of the party who is relying on some federal right, since the danger to be guarded against is that of uninformed or unsympathetic treatment of his federal right by a state court.

Id. The drafters also acknowledge, however, that one should not take for granted that state courts will afford impartial treatment to federal defenses either, particularly when those defenses are interposed against state created claims. *Id.* at 487.

95. The text oversimplifies somewhat; a state court will not always be applying its "own" law. Its choice of law doctrine may dictate that it apply the law of another state to state law claims.

96. See, e.g., *Cianci v. Superior Court*, 40 Cal. 3d 903, 915, 710 P.2d 375, 381, 221 Cal. Rptr. 575, 581 (1985) (stating that federal courts are presumed to have greater expertise over federal claims, state courts greater expertise over state claims).

equal strength. Under our present jurisdictional scheme, however, the stand-off is broken in favor of the party who prefers federal court. If a plaintiff sues in federal court, defendants cannot defeat plaintiff's choice. But if plaintiff sues in state court, defendant can trump that selection, by removing. This arrangement is desirable because it enhances the ability of the federal court system to fulfill its responsibility to interpret federal constitutional, statutory, and common law. It gives the federal courts the greatest opportunity, consistent with litigant choice, to fulfill their premier role of deciding federal questions.

At the same time, some safeguards remain for plaintiffs. If the federal claims they have alleged are so insubstantial that they will not support federal jurisdiction, remand is required. If their federal claims are jurisdictionally substantial but weak or add nothing to their state claims, plaintiffs can choose to forego them. By pleading only state law claims, plaintiffs can assure themselves of the state tribunal. Alternatively, plaintiffs who seek to guarantee a state court for their state law claims can institute two separate state court actions, one asserting their state law claims and the other asserting their federal claims. Finally, if plaintiffs prefer a combined state court action and their federal claims are substantial and serve distinct purposes, they will have the opportunity to persuade the federal court to remand the state law claims or to dismiss them without prejudice if reasons exist why the court should not exercise pendent jurisdiction. The narrowness of this escape is justified by the appropriate trumping power of the federal court selection where substantial and distinct federal claims have been asserted.

This overall scheme is far superior to that which would result if Congress or the courts were to make removal of hybrid cases impossible. That course would invite plaintiffs to assert merely colorable state law claims as a tactical device to defeat removal. Any attempt to parry this tactic by having the federal courts determine removability by reference to the dominant or primary claim would be ill-advised because it would create endless litigation over the application of abstractions that have proven unworkable in other contexts.⁹⁷ A clear rule is needed,

97. Compare, for example, the difficulty courts had in determining whether legal issues were incidental to equitable issues or vice versa, for purposes of deciding whether a seventh amendment right to jury trial attached, *see Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 488-89 (5th Cir. 1961) (attempts to apply the "basic nature" of the case test led to inconsistent results), and in determining whether legal relief was incidental to injunctive relief for purposes of deciding whether class certification pursuant to Fed. R. Civ. P. 23(b)(2) was appropriate. Compare cases cited in American Bar Association Section on Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 204 (1986) (*Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979); *Alexander v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977); *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir.

whatever the rule is to be. Most importantly, such unremovability would substantially undermine the role of the federal courts as our mainstay in the interpretation of federal law.

Ultimately, whether the right to remove should survive in these hybrid suits may depend on the strength of one's view that federal claims should be heard in federal court if either side so wishes, or that state claims should be heard in state court if the plaintiff so desires, and on one's confidence in the quality of state and federal courts, across the fifty states and over the long term. Of course, it would be possible to allow federal claims to be removed while related state claims remain in state court, or to allow removal of the entire civil action but grant discretion to the federal court to remand any claims not within its original jurisdiction. Particularly the former of these alternatives would foster duplicative litigation and, therefore, is undesirable. Close evaluation of the latter possibility appears later in this Article in connection with the exploration of remand. For the present, this Article concludes that the removability of pendent state claims and the federal claims to which they are appended is both correct as a matter of statutory interpretation and desirable as a matter of policy.

B. A Short Detour: The Unremovability of Claims Outside Pendent or Ancillary Jurisdiction

The foregoing discussion was premised upon the plaintiff's state law claims falling within the federal courts' pendent or ancillary jurisdiction. For that to be so, a collection of federal and state claims must constitute one constitutional "case" arising under the Constitution, laws, or treaties of the United States.⁹⁸ Furthermore, it must be that "Congress in the statutes conferring jurisdiction has not expressly or by implication negated . . . [the] existence"⁹⁹ of the particular form of pendent or ancillary jurisdiction in question.

Because of the general jurisdiction of state courts,¹⁰⁰ combinations of federal and state claims can be asserted there that would not fall within the federal courts' jurisdiction under 28 U.S.C. section 1331 and the following sections, as those statutes have been construed, although sometimes the federal courts constitutionally could assert jurisdiction over those combinations of claims. For example, in *Aldinger v. How-*

1977); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976); *Sarafin v. Sears, Roebuck & Co.*, 446 F. Supp. 611 (N.D. Ill. 1978)).

98. See *supra* text accompanying note 41.

99. *Aldinger v. Howard*, 427 U.S. 1, 18 (1976).

100. Some courts in each state are courts of general subject matter jurisdiction. They can hear any kind of case, except those specifically committed to another court or administrative tribunal. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 1.13, at 36 (3d ed. 1985).

ard,¹⁰¹ by virtue of the Court's constructions of 28 U.S.C. section 1343(3) and 42 U.S.C. section 1983, it held a "set" of section 1983 claims against county officers and a related state law claim against the county to be beyond the original jurisdiction of the federal courts.¹⁰² The question arises whether a defendant ever could properly remove such a combination of claims under sections 1441(a) and (b).

By hypothesis, such a civil action is *not* one over which the district courts have original jurisdiction, as required by section 1441(a), unless Congress otherwise expressly has provided. The exception language of section 1441(a) could be read to permit Congress to restrict or eliminate the removability of particular types of civil actions over which the district courts have original jurisdiction,¹⁰³ but not to permit Congress to extend removability to civil actions or claims that are beyond the district courts' original jurisdiction. In fact, the proviso in section 1441(a) has been interpreted to permit Congress both to restrict and to expand the universe of removable actions beyond the set of cases within the district courts' original jurisdiction. Examples of Congress' expansion of removal jurisdiction include sections 1441(c) and 1442.¹⁰⁴

Having established the expansive potential of section 1441(a)'s proviso, the Article returns to the question posed above, whether defendants may remove combinations of federal and state claims under sections 1441(a) and (b) that are beyond the district courts' original jurisdiction under section 1331 and the following sections. The answer seems to be "no." Sections 1441(a) and (b) themselves are not acts of Congress that "expressly provide" for removal of civil actions other than those over which the district courts have original jurisdiction.¹⁰⁵

101. 427 U.S. 1 (1976).

102. *Id.* at 15-19. The Court did not need to decide, and did not decide, whether the set of claims asserted fell within the contours of the cases and controversies over which the federal courts have judicial power under Article III. It carefully left the question open, refusing to "disclaim the applicability of *Gibbs* to the question of federal pendent-party jurisdiction." *Id.* at 21-22 (Brennan, J., dissenting). The three dissenting Justices, Brennan, Marshall, and Blackmun, all took the affirmative position that "no reason appears why the identical principles [of *Gibbs*] should not equally apply to pendent state-law claims involving the joinder of additional parties." *Id.* at 20.

103. Congress has exercised its power to restrict removability in such statutes as 28 U.S.C. § 1445; see *supra* notes 3, 37.

104. Section 1441(c) provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c). Section 1442 authorizes removal of civil actions and criminal prosecutions against federal officers, and persons acting under such officers, for acts done under color of office. See generally 14A WRIGHT & MILLER, *supra* note 54, § 3727.

105. *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987) (stating that under § 1441(a),

Insofar as other statutes otherwise expressly provide, removal is effectuated pursuant to them, not pursuant to sections 1441(a) and (b). For example, in a case involving a single defendant, removal may well be available pursuant to section 1441(c), although the action could not have been commenced in federal court. Imagine a lawsuit in which P sues D on two claims, a federal question asserting that defendant railroad violated federal statutory duties in negligently failing to afford proper care to a perishable interstate shipment of fruit, as well as a state law negligence claim arising out of an entirely separate intrastate shipment of vegetables. The fruit claim is a "separate and independent claim," which would be removable if sued on alone, and which is joined with an otherwise nonremovable claim. Section 1441(c) permits the entire case to be removed,¹⁰⁶ although sections 1441(a) and (b) do not.

A further question that demands attention is whether the defendant can, pursuant to sections 1441(a) and (b), remove only the federal question claim, leaving the state claim in state court. The general understanding has been "no;" the entire civil action is the unit that either is or is not subject to removal under section 1441.¹⁰⁷ The question has not been of great practical significance, however, in a case of the sort illustrated above, for a single defendant who really wanted the federal court to hear only the federal question could remove the entire case under section 1441(c) and then ask the court to exercise its express discretion under (c) to remand all matters not otherwise within its original jurisdiction. In the previous example, the remanded question would be the vegetable claim.

The question of the removability of only the federal question claim is more important in a case in which multiple defendants have been sued. Imagine that a plaintiff sued one defendant on a federal question and another defendant on a state law claim arising out of the same nucleus of operative fact, essentially as in *Aldinger v. Howard*.¹⁰⁸ In this situation, the entire conglomeration of claims often will not be removable under sections 1441(a) and (b), nor under section 1441(c).¹⁰⁹ Can

"[o]nly state court actions that originally could have been filed in federal court may be removed").

106. See *supra* note 71 and accompanying text as to the constitutionality of such an application of § 1441(c).

107. Contrast this understanding with the bankruptcy removal provision, 28 U.S.C. § 1478, for example, which authorizes removal of "any claim or cause of action in a civil action . . . if the bankruptcy courts have jurisdiction over such claim or cause of action." 1A MOORE'S, *supra* note 1, ¶ 0.157[1.-5], at 47.

108. 427 U.S. 1 (1976); see *supra* text accompanying note 102.

109. The claims will not be removable under §§ 1441(a) or (b) unless there is pendent party jurisdiction, such that the action is within the original jurisdiction of the federal courts. The claims will not be removable under § 1441(c) because their factual relationship will preclude them from being "separate and independent." *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614, 621 (1988).

the federal-claim defendant remove the claim against him, leaving the state-claim defendant in state court? On this fact pattern, one could argue that the federal claim constitutes the "civil action" that section 1441(a) makes removable, because joinder of the state law claim against a distinct defendant creates something more than a "civil action" for federal jurisdictional purposes. That is not how section 1441(a) has been construed, however.¹¹⁰ Consequently, both defendants must remain in state court, unless both defendants remove and the federal court can be persuaded to exercise pendent party jurisdiction upon removal. That possibility will be further explored later in the Article.

For now, the point is this: The federal district courts may adjudicate upon section 1441(a) and (b) removal all of those combinations of federal and state claims over which the district courts would have original adjudicatory authority—but for any exceptions Congress has carved out elsewhere—but the district courts may not adjudicate upon sections 1441(a) and (b) removal any additional combinations of such claims, nor may defendants remove under sections 1441(a) or (b) only a portion of the lawsuit brought in state court.

C. Remandability

Two subsections of the general removal statutes address remandability. Section 1441(c) states:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the *district court* may determine all issues therein, or *in its discretion, may remand all matters not otherwise within its original jurisdiction.*¹¹¹ (emphasis added).

Section 1447(c) provides:

*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. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.*¹¹² (emphasis added).

This Article first considers cases that present one or more federal questions and state law claims, all of which are pendent or ancillary thereto. In that context, section 1441(c) has no application and affords

110. In support of the same conclusion, it has been suggested that if Congress had intended to authorize partial removal in pendent party cases, it easily could have done so. Adolph Coors Co. v. Sickler, 608 F. Supp. 1417, 1426 (C.D. Cal. 1985). However, Congress may never have thought about the question at all. The last time it revised §§ 1441(a), (b), or (c) was in 1948, before the modern formulation of even simple pendent jurisdiction had been announced and long before any litigant had confronted the courts with the challenge of pendent party jurisdiction.

111. 28 U.S.C. § 1441(c) (1982).

112. *Id.* § 1447(c).

no discretion to remand the state law claims.¹¹³ A court remanding any of the removed claims would have to find justification in section 1447(c), unless the court recognized grounds for remand that are not embraced by the notion of a removal that is improvident or without jurisdiction.¹¹⁴

1. The Backdrop to *Carnegie-Mellon University v. Cohill*

In 1976, in *Thermtron Products, Inc. v. Hermansdorfer*,¹¹⁵ the Supreme Court addressed the exclusivity of section 1447(c) in the context of a diversity suit. The district judge had remanded the case in light of his heavy docket, which he believed would unjustly delay a trial on the merits of the action.¹¹⁶ The Supreme Court emphatically explained that these considerations were irrelevant under section 1447(c)¹¹⁷ and explicitly stated that: "The District Court exceeded its authority in remanding on grounds not permitted by the controlling statute."¹¹⁸ The Court continued this thought in a footnote, commenting with apparent approval: "Lower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute."¹¹⁹

113. *Carnegie-Mellon*, 108 S. Ct. at 621; see also 1A MOORE's, *supra* note 1, ¶ 0.163[4.-5], at 339 & n.33 (viewing pendent jurisdiction and § 1441(c) as dovetailing so that "if a state suit contains at least one claim over which a federal court would have original federal question jurisdiction and any other claims are properly joined, the entire suit is removable under either § 1441(a) or (b) or § 1441(c).") (citation omitted) (emphasis in original). Although Moore says that it can be argued that pendent jurisdiction and § 1441(c) can overlap, *id.* at 339-40 n.33, "[i]t seems reasonable to conclude that claims involving common questions and stemming from the same transaction do not qualify as separate and independent claims or causes of action under the Supreme Court's formulation." 14A Wright & Miller, *supra* note 54, § 3724, at 368; see also *id.* at 400. One commentator recently has proposed that "[i]f state claims can be remanded [under § 1441(c)] so long as they are not intertwined with federal claims, remand arguably should also be permitted when the federal claims are dismissed and the state claims thus left 'separate and independent.'" Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 Ariz. St. L.J. 395, 422 (1987). However, he acknowledges that that interpretation may well unreasonably strain the language of the statute. *Id.*

114. Although § 1447(c) speaks of remanding cases removed "improvidently and without jurisdiction," it is read disjunctively, to authorize remand of cases removed either improvidently or without jurisdiction. *FDIC v. Alley*, 820 F.2d 1121, 1124 (10th Cir. 1987) (noting that the Supreme Court's discussion in *Thermtron* treated the propriety of removal and the jurisdiction of the court as disjunctive bases for removal, and that in *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977), the Court declared that "where the order is based on one of the enumerated grounds, review is unavailable" (emphasis added)); *Robertson v. Ball*, 534 F.2d 63, 65 n.2 (5th Cir. 1976).

115. 423 U.S. 336 (1976).

116. *Id.* at 339-41, 344.

117. *Id.* at 344.

118. *Id.* at 345 (footnote omitted).

119. *Id.* at 345 n.9 (citing *Romero v. ITE Imperial Corp.*, 332 F. Supp. 523, 526 (D.P.R. 1971) (stating that a court may not order remand on discretionary grounds once the statutory require-

Nothing in the Court's language or reasoning suggested that the Court would hold any differently in the context of federal question cases. In accord with that reading, federal courts generally regarded themselves as bound to remand only on the grounds enumerated in the removal statutes.¹²⁰ The controversy and uncertainty in the courts as to whether *Thermtron* prohibits district courts from remanding claims for nonstatutory reasons emerged in cases involving pendent or ancillary claims.¹²¹ The lower federal courts accepted the proposition that *Thermtron* prohibits them from remanding claims which the court would have no legally sufficient grounds to dismiss, had the claims originally been brought in federal court.¹²² The controverted question was whether district courts properly might remand for reasons that would support a dismissal without prejudice.¹²³

Some plaintiffs and amicus curiae argued that federal district courts have the authority to remand removed claims that are within the courts' pendent or ancillary jurisdiction. Some among them argued that this power was encompassed in the federal courts' inherent power to administer their jurisdiction. That is, they argued that the federal courts have discretion to remand such claims even if the removal statutes do not provide for their remand.¹²⁴ Others among them argued that remands of pendent and ancillary claims fall *within* the statutory

ments for right of removal have been met)); *Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 256 F. Supp. 68, 77 (E.D.N.Y. 1966) (finding no discretionary power to order remand in the absence of a call for abstention); *Davis v. Joyner*, 240 F. Supp. 689, 691 (E.D.N.C. 1964) (noting court's authority to remand limited only to cases removed improvidently and without jurisdiction); *Vann v. Jackson*, 165 F. Supp. 377, 381 (E.D.N.C. 1958) (finding no discretionary power to remand where Congress has provided that actions first brought in state court could be removed to federal court).

120. See, e.g., *Sheet Metal Workers Int'l Ass'n v. Seay*, 696 F.2d 780 (10th Cir. 1983). The district court erred in remanding the entire case on the theory that the state court was the most equitable forum in view of the possibility that the Norris-LaGuardia Act might limit the injunctive remedies available in this action for breach of obligations under a collective bargaining agreement, and for tortious interference with business relationships. Such a ground was impermissible because not authorized by 28 U.S.C. § 1447(c). See also *Levy v. Weissman*, 671 F.2d 766, 768-69 (3d Cir. 1982) (concluding that the district court violated *Thermtron* in remanding case as a sanction for *pro se* petitioner's failure to obey a local rule and the court's order that he do so); *In re Shell Oil Co.*, 631 F.2d 1156, 1157-58 (5th Cir. 1980) (finding that remand for failure to oppose the motion for remand was improper under *Thermtron*).

121. E.g., *In re Romulus Community Schools*, 729 F.2d 431, 435-40 (6th Cir. 1984); *Fox v. Custis*, 712 F.2d 84, 89 n.4 (4th Cir. 1983); *IMFC Professional Servs., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152 (Former 5th Cir. 1982); *Litka v. University of Detroit Dental School*, 610 F. Supp. 80, 82 (E.D. Mich. 1985).

122. See, e.g., *In re Romulus*, 729 F.2d at 436-37.

123. See cases cited *supra* note 121.

124. Amicus Curiae Brief, *supra* note 55, at 16, 21; *In re Romulus*, 729 F.2d at 439; *Fox*, 712 F.2d at 89 n.4 (stating that to insist that only dismissal without prejudice lies because of lack of specific statutory authority for remand seems an unduly rigid reading of the statutes).

authorization of remand in section 1447(c).¹²⁵

Several district courts and some courts of appeals were persuaded. Their decisions represented the view that, either pursuant to section 1447(c) or notwithstanding it and *Thermtron*, district courts may remand state law claims once the basis for removal jurisdiction has been eliminated. A number of these courts merely assumed that the federal courts have power to remand under the doctrines of pendent and ancillary jurisdiction. Often they relied without analysis on prior decisions that may or may not have been well reasoned.¹²⁶ The most carefully reasoned cases included some combination of the following arguments.

125. *E.g.*, *Williams v. City of Atlanta*, 794 F.2d 624, 628 (11th Cir. 1986) (a § 1442 case); *IMFC Professional Servs.*, 676 F.2d at 159-60.

126. *E.g.*, *Price v. PSA, Inc.*, 829 F.2d 871, 876 (9th Cir. 1987), *cert. denied sub nom. P.S. Group v. United States Dist. Court*, 108 S. Ct. 1732 (1988); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 866 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988); *Survival Sys. Div. v. United States Dist. Ct.*, 825 F.2d 1416, 1419 (9th Cir. 1987) (merely asserting that once the federal claim is gone, district court has discretion to remand a state claim) (citing *Swett v. Schenk*, 792 F.2d 1447, 1450 (9th Cir. 1986) (*see infra* note 261)), *cert. denied*, 108 S. Ct. 774 (1988). In *Hofbauer v. Northwestern National Bank*, 700 F.2d 1197, 1201 (8th Cir. 1983), the appellate court, having held that there was no implied right of action for damages for violations of certain provisions of the Flood Disaster Protection Act of 1973 and the National Flood Insurance Act, directed remand to state court of plaintiffs' negligence claim. It reasoned simply that the NFIA claim was to be dismissed and "the prudent course" was to send the state law claim back so that the state court could determine the questions of Minnesota law, including whether the federal statutes had created a standard of conduct which, if broken, gave rise to an action for negligence. In support of remand, it cited *Till v. Unifirst Federal Savings & Loan Association*, 653 F.2d 152 (5th Cir. Unit A Aug. 1981). *Till* itself also held that the federal flood insurance statutes imply no private right of action. *Id.* at 154. Despite the Fifth Circuit's characterization of plaintiffs' fraud and negligence claims as pendent, *id.* at 155 n.2, it purported to rely on the federal courts' discretion under 28 U.S.C. § 1441(c)—regarding separate and independent causes of action—in directing remand of the pendent state law claims to state court. *Id.* at 161-62. Its reasoning in this regard was clearly erroneous. *See Carnegie-Mellon*, 108 S. Ct. at 621. The *Till* court also relied on *Gibbs* for the proposition that, where the federal claim is dismissed before trial, the pendent state claims should be left to state tribunals, *Till*, 653 F.2d at 161-62 n.24, and opined without elaboration that "it would be unreasonable to dismiss without prejudice and require appellants to file anew in state court." *Id.* at 162. Note also the opinion in *Brough v. United Steelworkers of America*, 437 F.2d 748 (1st Cir. 1971). The *Brough* court found that although the original complaint was not properly removable because it raised only state law issues, plaintiff waived his objection to the denial of remand by adding a count alleging breach of the union's duty of fair representation, a duty that arises under federal law. After granting summary judgment for defendant on that second count, the district court in *Brough* should have exercised its discretion under *Gibbs*. On this basis, and citing *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965) (*infra* note 254), the court remanded the first count to state court. Another relevant decision is the opinion of *Kazor v. General Motors Corp.*, 585 F. Supp. 621, 623 (E.D. Mich. 1984). All the federal claims having been eliminated prior to trial by summary judgment or voluntary and involuntary dismissals, 585 F. Supp. at 622 & n.1, the district court exercised its perceived discretion under *Gibbs* to remand the remaining state law claim to state court. The court stressed both the lack of a significant expenditure of federal judicial resources and the dearth of Michigan authority interpreting the state statute in question. *See also Moses v. Banco Mortgage Co.*, 778 F.2d 267, 274-75 (5th Cir. 1985) (finding the district court had had the option to remand pendent claims (*dictum*); their dismissal without prejudice was not error, so a Rule 60(b)(1) amendment of the judgment to order remand was error).

When the basis of federal jurisdiction has been eliminated from a case:

1. *Thermtron* does not prohibit discretionary remand of pendent or ancillary state claims;
2. Nor does section 1447(c) prohibit such remands. In the view of some courts, section 1447(c) actually authorizes such remands;
3. Federal court refusal to hear the state law claims is consistent with our federalism and with comity between the federal and state court systems;
4. While dismissal of the state law claims would satisfy these last-noted concerns, remand to state court often is preferable because it avoids the possible interdiction of the statute of limitations, avoids federal courts choosing to hear state claims out of concern that the claims would be time-barred from the state courts, is more direct and less costly to the litigants than dismissal and re-filing, generally is more protective of plaintiffs and better serves judicial economy, and can be refused, in the discretion of the court, when dismissal would be more appropriate.

Each of these positions is examined in the Article's critique of the Supreme Court's opinion in *Carnegie-Mellon*. First, however, the history of that case is discussed.

2. *Carnegie-Mellon University v. Cohill*

William and Carrie Boyle commenced an action in Pennsylvania state court against Carnegie-Mellon University ("C-MU") and John Kordesich, the C-MU employee who was William Boyle's supervisor. They presented a set of claims arising out of C-MU's termination of William Boyle's employment. These claims included alleged violations of federal and state age discrimination laws, wrongful discharge constituting both a tort and breach of contract, and several additional, related tort claims. Defendants removed the action pursuant to sections 1441(a) and (b).¹²⁷ Seven months later, in April 1985, after a period of discovery, the Boyles filed a motion for leave to amend their complaint to delete, *inter alia*, the federal age discrimination cause of action, stating that they now believed the claim to be untenable. Simultaneously, they moved for remand.¹²⁸

The district court granted both of plaintiffs' motions. It held that the removal had been proper, and that section 1447(c) therefore did not

127. *Boyle v. Carnegie-Mellon Univ.*, 648 F. Supp. 1318 (W.D. Pa. 1985), *reh'g granted en banc and mandamus denied sub nom. Carnegie-Mellon Univ. v. Cohill*, 41 Fair Empl. Prac. Cas. (BNA) 1046 (3d Cir. 1986), *aff'd*, 108 S. Ct. 614 (1988).

128. *Carnegie-Mellon*, 108 S. Ct. at 616.

afford a ground for remanding.¹²⁹ The court reasoned, further, that it continued to have jurisdiction over the remaining state law claims under the doctrine of pendent jurisdiction, notwithstanding plaintiffs' voluntary dismissal of their federal claim. As a matter of discretion, however, it declined to exercise that jurisdiction.¹³⁰ Confronting the question of whether to dismiss or remand, the district court decided to remand, although it recognized that neither section 1447(c) nor section 1441(c) was applicable, and that *Thermtron* strongly implied that, in remanding, district courts are limited by the reasons provided in the governing statutes. Noting the split in the circuits on the issue presented, the district court chose to follow the decisions that had approved the remand of pendent claims when the federal law claims that provided the basis for removal had been eliminated.¹³¹

C-MU and Kordesich then filed a petition for writ of mandamus with the Court of Appeals for the Third Circuit. A panel of the appellate court granted the petition and the panel majority directed the district court to vacate its remand order.¹³² The panel first confirmed that the removal had been proper and that neither section 1447(c) nor section 1441(c) authorized remand.¹³³ It held, however, that the district court had no discretion to remand a properly removed case. In its view, the controlling precedent of *Thermtron* prohibited remand, even if policy arguments supporting a discretion to remand outweighed the policies militating against recognition of such discretion. The court, moreover, was not convinced that the policy arguments favoring discretion to remand predominated.¹³⁴

129. *Id.* at 617.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. The court explained:

If we were to hold that federal courts may remand cases to state courts for reasons not specified in federal statutes, we would nullify Congress' effort to delineate the narrow circumstances in which remand is to be permitted. We would also frustrate Congress' purpose in providing a right of removal, since a defendant who exercises that right might thereafter be subject to duplicative and costly subsequent state proceedings. *See Cook v. Weber*, 698 F.2d at 909. Furthermore, allowing plaintiffs to obtain remands by dropping their federal claims could encourage manipulative and strategic remands. Indeed, in this case, Carnegie-Mellon suggests that the amendment and remand was sought because, after much effort and expense to it, the case was now ripe for summary judgment or trial.

Finally, if the district court can remand solely as a matter of its discretion, as distinguished from pursuant to narrowly drawn statutory authority, there will be no effective boundaries to the exercise of its discretion. "The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'" *See Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964) (quoting *Parr v. United States*, 351 U.S. 513, 520 (1956)).

Carnegie-Mellon, 41 Fair Empl. Prac. Cas. (BNA) at 1051.

Finally, in response to concerns that the statute of limitations might bar an innocent plaintiff from refiling a state law claim dismissed by the district court in an exercise of discretion, the Third Circuit panel noted the ability of the district courts to retain a pendent claim, and the ability of the states that had not already done so to enact a savings clause to preserve affected claims.¹³⁵

Judge Stapleton dissented.¹³⁶ He opined that specific statutory authorization of remand is not necessary and that remand is proper under *United Mine Workers v. Gibbs*.¹³⁷ In support of these conclusions, he argued that *Thermtron* applies only when a party has a right to have a claim adjudicated by a federal court. Here, after dismissal of plaintiffs' federal claim, the parties had no such right. He argued too that, by inference from section 1441(c), Congress would prefer the "common sense" result of a remand. Remand is "the more direct, economical and otherwise desirable alternative."¹³⁸ Judge Stapleton believed that the district courts would be able to protect against manipulative plaintiffs, and that the federal courts should not be compelled by statute of limitations considerations to litigate state claims. While recognizing that appellate review could more frequently be afforded to dismissals than to remands,¹³⁹ he regarded "the risk of meritorious claims being forfeited upon dismissal as too high a price to pay for automatic review

... "140

Within a month of issuance of the writ of mandamus, the court of appeals granted the Boyles' petition for rehearing in banc, and vacated the panel opinion and the writ.¹⁴¹ By order of November 24, 1986, the Third Circuit, equally divided, denied the petition for writ of mandamus, without opinion.¹⁴² C-MU and Kordesich then filed a petition for a writ of certiorari, which the Supreme Court granted.¹⁴³

135. *Id.*; see also *Cooley v. Pennsylvania Hous. Fin. Agency*, 830 F.2d 469 (3d Cir. 1987) (finding that the district court abused its discretion in failing to consider that the time-bar of plaintiff's state claims compelled retention of jurisdiction over them, after removal of the action and summary judgment for defendants on plaintiff's federal claims); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984) (indicating that if the statute of limitations has run, dismissal of state claim would be an abuse of discretion); *O'Brien v. Continental Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54, 64-65 (7th Cir. 1979) (stating that pendent claim should not be foreclosed by the passage of time required to dispose of federal claim where plaintiff has pursued federal claim in good faith and with diligence).

136. 41 Fair Empl. Prac. Cas. (BNA) at 1052 (Stapleton, J., dissenting).

137. *Id.* at 1052; see also *Gibbs*, 383 U.S. at 726-27.

138. 41 Fair Empl. Prac. Cas. (BNA) at 1053 (Stapleton, J., dissenting).

139. See *infra* text accompanying notes 335-41, 348-55, 359-63.

140. 41 Fair Empl. Prac. Cas. (BNA) at 1053 (Stapleton, J., dissenting).

141. See Petition For a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit at 27a-28a, *Carnegie-Mellon Univ. v. Cohill*, 41 Fair Empl. Prac. Cas. (BNA) 1046 (3d Cir. 1986).

142. *Id.* at 1a-2a; language from 9; 41 Fair Empl. Prac. Cas. (BNA) at 1046.

143. *Carnegie-Mellon*, 107 S. Ct. 1283 (1987).

By a vote of five to three, the Supreme Court affirmed, which approved the remand of the Boyles' remaining claims. The Court read *Thermtron* not to prohibit discretionary remand of pendent state claims.¹⁴⁴ It construed the removal statutes, and section 1447(c) in particular, not to prohibit such remands, but indeed to support district court authority to order such remands.¹⁴⁵ It found that *United Mine Workers v. Gibbs* "establishes that the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and . . . that the judicial branch is to shape and apply the doctrine in that light."¹⁴⁶ Finally, the Court concluded that, "[b]ecause in some circumstances a remand of a removed case involving pendent claims will better accommodate these values than will dismissal of the case, the animating principle behind the pendent jurisdiction doctrine supports giving a district court discretion to remand when the exercise of pendent jurisdiction is inappropriate."¹⁴⁷ The details of the opinion will be fleshed out as each of these basic steps in the reasoning is examined.

3. A Critique of the Reasoning of *Carnegie-Mellon University v. Cohill*

a. *The position that Thermtron does not prohibit discretionary remands of pendent or ancillary state claims*

As previously noted, in *Thermtron* the Supreme Court emphatically rejected the remand of a case to expedite its trial on the merits, declaring that the district court had exceeded its authority in remanding the case for discretionary reasons not authorized by the controlling statute. In *Carnegie-Mellon* the Court acknowledged that the remand of plaintiff's pendent state law claims was not authorized explicitly by the removal statute, but it nonetheless found that *Thermtron* does not prohibit discretionary remands of pendent state law claims.¹⁴⁸

The Court's position in *Carnegie-Mellon* is a corollary of the view that *Thermtron* prohibits only remands for reasons that would not support a dismissal without prejudice. That is, it interprets *Thermtron* to

144. 108 S. Ct. at 614, 621-22.

145. *Id.* at 621.

146. *Id.* at 619.

147. *Id.*

148. *Id.* at 620-21. The Court did not rely on its construction of the removal statute to distinguish *Thermtron* by arguing that here, unlike there, the court had remanded pursuant to the statute. Instead, it distinguished *Thermtron* by reference to the fact that the district court there had relied upon a ground that was not a proper basis for eliminating the case from the federal docket, whether by remand or dismissal. *See id.* at 621-22.

say only that a federal court may not remand claims which the court would have no grounds to dismiss if they had been commenced in federal court.¹⁴⁹ This interpretation discounts the forceful and broad language of the *Thermtron* opinion, and relies upon the facts of that case, in particular the fact that the district court had relied on grounds—its heavy docket—that would not have supported a dismissal without prejudice of the same claim, had it been commenced in federal court.¹⁵⁰ It also emphasizes the Court's remark that a case "may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason."¹⁵¹ Indeed, the *Carnegie-Mellon* Court tried to elevate this remark, which seemed rather inconsequential in context, to a position of grand and portentous significance, declaring, "The implication of this statement . . . is that an entirely different situation is presented when the district court has clear power to decline to exercise jurisdiction."¹⁵²

Thermtron can be distinguished on the bases just described, but doing so emphasizes aspects of the fact situation that the Court itself did not rely on and, in effect, rewrites the opinion. The Court in *Thermtron* did not conclude that the district judge had erred in "remanding on grounds insufficient to justify dismissal." Its focus was that the judge had remanded on grounds not authorized by the controlling statute, section 1447(c).¹⁵³ That very same objection applies to remands made under the guidance of the principles governing when a federal court should dismiss rather than exercise its discretion to adjudicate pendent or ancillary claims. The dissenters' view in *Carnegie-Mellon* that *Thermtron* controlled and required the decision that plaintiffs' state law claims could not be remanded is more convincing.¹⁵⁴

Before leaving this point, it is important to note that in interpreting *Thermtron* to permit remands for extra-statutory reasons that support dismissal without prejudice, the Court has opened a Pandora's Box. The Court's comment in a footnote, addressing a different concern, that "[t]he remand power that we recognize today derives from the doctrine of pendent jurisdiction and applies only to cases involving pendent claims,"¹⁵⁵ will not keep the lid on the box. A whole range of

149. *Accord In re Romulus Community Schools*, 729 F.2d 431, 436-37 (6th Cir. 1984); *Contemporary Servs. Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885, 896 (C.D. Cal. 1987).

150. *Accord In re Romulus*, 729 F.2d at 436-47.

151. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976).

152. *Carnegie-Mellon*, 108 S. Ct. at 622.

153. *Thermtron*, 423 U.S. at 343-45.

154. *Carnegie-Mellon*, 108 S. Ct. at 623-24 (White, J., dissenting).

155. *Id.* at 621 n.11.

doctrines permits federal courts to dismiss cases without prejudice. *Carnegie-Mellon* asks which of them should be held to permit remand of removed cases, in lieu of dismissal?

Until the Court's decision in *Carnegie-Mellon*, the federal district courts and courts of appeals, acting under the dictates of the removal statutes and *Thermtron*, generally had limited themselves to dismissal, and rejected requests for remands to state court on grounds such as nonjusticiability, mootness, and abstention. In *McIntyre v. Fallahay*,¹⁵⁶ for example, the Court of Appeals for the Seventh Circuit was faced with a dispute arising out of state recount proceedings after a congressional election in Indiana. The case had been removed under section 1441(a) on the theory that only federal law can be used to determine which ballots count in an election for federal office.¹⁵⁷ Agreeing, the district court had dismissed, because of its belief that the state court had lacked jurisdiction and because of the derivative nature of federal jurisdiction upon removal.¹⁵⁸ The court of appeals concluded that the dispute was not justiciable because nothing the courts could do could affect the outcome of the election. The House of Representatives had made an unconditional and final judgment as to who had won and had seated plaintiff's opponent.¹⁵⁹ The court recognized, however, that the suit nonetheless might proceed in Indiana state court.

A dispute remained over the procedures and rules Indiana should use in future ballot counts, which was "capable of repetition, yet evading review."¹⁶⁰ The court of appeals believed it desirable to allow the courts of Indiana to decide whether to conduct such proceedings, and believed that they would have no opportunity to do so if the federal court dismissed the case.¹⁶¹ It appreciated, however, that it had no discretion to remand to the Indiana courts on grounds of nonjusticiability or mootness, and that it could order a remand only if the removal was improper—that is, improvident or without jurisdiction.¹⁶² The court, therefore, examined the arguments concerning federal subject matter jurisdiction. It ultimately concluded that state and federal rules for

156. 766 F.2d 1078 (7th Cir. 1985).

157. *Id.* at 1080.

158. *Id.*; see *supra* text accompanying notes 16-17.

159. *McIntyre*, 766 F.2d at 1080-81.

160. *Id.* at 1082 (quoting *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)).

161. *Id.* at 1083. The court did not consider the possibility that the suit might be refiled in state court.

162. *Id.* at 1082-83. Senior Circuit Judge Swygert dissented from the decision in *McIntyre*, but not from this aspect of Judge Easterbrook's opinion. Judge Swygert argued that any further state action would contravene the principles of federal supremacy and separation of powers and inhibit the right of Indiana citizens to be represented in Congress. *Id.* at 1088.

counting ballots can coexist; hence, the complaint had not artfully pleaded a federal claim in the guise of a state law claim. Rather, the complaint validly asked only for an adjudication of state law issues. Therefore, the case was improvidently removed, and section 1447(c) directed its remand to state court.¹⁶³

Although *McIntyre* did not involve issues of remanding pendent or ancillary claims, it is instructive because of its recognition that the federal courts have no authority, under section 1447(c) or otherwise, to remand to state court on grounds of nonjusticiability or mootness. Such considerations are beyond the scope of removal that is improvident or without jurisdiction.

A second Seventh Circuit case, *Ryan v. State Board of Elections*,¹⁶⁴ held that a properly removed state action could not be remanded for a discretionary reason, abstention, that was not authorized by section 1447(c). Senior Circuit Judge Swygert explained:

Abstention is a judicially-created doctrine; its application is discretionary. Under *Thermtron* a federal court with jurisdiction over a removed case may not remand it on discretionary grounds. Congress never intended "to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 . . . The remand order was, therefore, without authority and in error.¹⁶⁵

The Court of Appeals for the First Circuit agreed in *Pueblo International, Inc. v. De Cardona*,¹⁶⁶ in which the federal courts were urged to abstain from deciding claims arising under Puerto Rico's Constitution, antitrust statutes, and civil rights statutes, all of which were pendent to claims arising under the Constitution and statutory laws of the United States.¹⁶⁷ The First Circuit did not even consider the abstention question in concluding that the district court had power to hear the pendent state claims. It thus implicitly distinguished abstention doctrine from matters of subject matter jurisdiction. It held, moreover, that because the case was before the court on an interlocutory appeal, decision of the abstention issue was inappropriate in the context of determining the discretionary aspects of the pendent jurisdiction decision.¹⁶⁸

163. *Id.* at 1087.

164. 661 F.2d 1130 (7th Cir. 1981). The suit asserted the unconstitutionality of Illinois congressional districts in light of the 1980 census, and sought declaratory and injunctive relief to effect a reapportionment. Pendent and ancillary claims were not involved.

165. *Id.* at 1134; *accord* *Adams v. Attorney Registration & Disciplinary Comm'n*, 600 F. Supp. 390, 393 (N.D. Ill. 1984), *aff'd*, 801 F.2d 968 (7th Cir. 1986).

166. 725 F.2d 823 (1st Cir. 1984).

167. *Id.* at 825-26.

168. *Id.* at 826. The court apparently believed it inappropriate to bring abstention considerations into the discretionary pendent jurisdiction doctrine because: the proceedings below were not

It concluded that all of plaintiff's claims were properly removed, except for the federal antitrust claims, which had to be dismissed for lack of derivative jurisdiction.¹⁶⁹

These cases all reflect the view that district courts may not remand for even those extra-statutory reasons that support a dismissal without prejudice. In deciding *Carnegie-Mellon*, the Supreme Court disregarded the views of these courts of appeals. Thus the Court undermined the authority of decisions such as these and left the lower federal courts with little guidance as to how to make the choice between dismissal and remand in contexts outside of pendent jurisdiction problems. One court of appeals already has relied upon *Carnegie-Mellon* in ruling that a district court that has decided not to hear a removal case on grounds of abstention need not dismiss but instead may remand.¹⁷⁰ One has to wonder whether the Court has not inadvertently extended substantial authority to the district courts to remand cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

The arguments below¹⁷¹ furnish additional reasons why the Court should not have distinguished *Thermtron* in the manner under scrutiny.

b. *The position that section 1447, and the removal statute generally do not prohibit discretionary remands of pendent or ancillary state claims*

Even if *Thermtron*, construed narrowly, permits the remands under discussion, the question remains whether section 1447 itself prohibits them. Section 1447(c) directs remand of a case "[i]f at any time before judgment it appears that the case was removed improvidently and without jurisdiction." Having concluded that *Thermtron* does not limit the courts to remands predicated on the grounds authorized by the removal statute, the Court held that the statute does not limit the

over—the case was up on an interlocutory appeal of the jurisdictional question; after remand the district court still could abstain or certify questions to the Supreme Court of Puerto Rico; and the district court had not yet addressed the abstention issue. *Id.* at 826. *But see* *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 563-65 (2d Cir. 1978) (stating that the federal court should have abstained from deciding question of plaintiff's standing to sue under the Connecticut Unfair Trade Practices Act and abstention could be exercised through remand). *Naylor*, however, is not strong precedent for the proposition that abstention is a proper ground for remand because the appellate court already had decided that a proper exercise of the district court's discretion required remand of the state claim after the voluntary dismissal, without prejudice, of plaintiff's federal claim, unless diversity of citizenship authorized retention of jurisdiction. *Id.* at 562.

169. *Pueblo Int'l*, 725 F.2d at 827.

170. *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 36 (2d Cir. 1988).

171. *See infra* text accompanying notes 171-224.

courts either. Despite the focus in *Thermtron* on the grounds "permitted by the controlling statute,"¹⁷² the Court in *Carnegie-Mellon* rejected the argument that the removal statutes disallow remands that they fail to authorize. In other words, the Court rejected the argument that the grounds for remand specified in the removal statute are exclusive. The Court reached this conclusion as a product of two arguments.

First, the Court characterized the argument that the removal statute prohibits a district court from remanding properly removed cases involving pendent claims as based not on the language of Congress, but on its silence, its omission of a provision for removed cases involving pendent claims.¹⁷³ It then responded that the argument

fails to recognize that the removal statute does not address specifically *any* aspect of a district court's power to dispose of pendent state-law claims after removal: just as the statute makes no reference to a district court's power to remand pendent claims, so too the statute makes no reference to a district court's power to dismiss them. Yet petitioners concede, as they must, that a federal court has discretion to dismiss a removed case involving pendent claims. Given that Congress's silence in the removal statute does not negate the power to dismiss such cases, that silence cannot sensibly be read to negate the power to remand them.¹⁷⁴

This argument is fundamentally flawed. Rule 81(c) of the Federal Rules of Civil Procedure makes those Rules applicable to civil actions removed to the district courts from state courts, and provides that the Rules govern procedure after removal.¹⁷⁵ Those Rules, in turn, authorize dismissals, with and without prejudice, on a broad range of grounds.¹⁷⁶ In addition, the courts historically have possessed "inherent power" to dismiss cases for discretionary reasons.¹⁷⁷ Consequently, any special congressional grant of the power to dismiss a removed case would have been redundant, and hence superfluous. In stark contrast, the Federal Rules do not authorize remands, nor had there ever (before *Carnegie-Mellon*) been any recognized inherent power of federal courts to remand cases back to state court. To the contrary, removal and remand always were regarded as statutory phenomena.¹⁷⁸ In view of all

172. *Thermtron*, 423 U.S. at 345.

173. *Carnegie-Mellon*, 108 S. Ct. at 620-21 (emphasis in original).

174. *Id.* at 620-21.

175. FED. R. CIV. P. 81(c).

176. *See, e.g.*, FED. R. CIV. P. 12(b)(1)-(7), 41(a)-(c), 56.

177. *Carnegie-Mellon*, 108 S. Ct. at 624 (White, J., dissenting); *see Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962). The Court in *Link* stated:

The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Id.

178. *See, e.g.*, *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 580 n.17 (N.D. Cal. 1981), *aff'd in part, rev'd in part*, 731 F.2d 1423 (9th Cir. 1984).

this, a congressional silence that does not negate the power to dismiss can very sensibly be read to negate the power to remand.

The Court's second argument in support of the nonexclusivity of sections 1441(c) and 1447(c) also is unpersuasive. The Court finds in section 1441(c), quoted above, a clear manifestation of the belief "that when a court has discretionary jurisdiction over a removed state-law claim and the court chooses not to exercise its jurisdiction, remand is an appropriate alternative."¹⁷⁹ Hence, it infers that the removal statute actually supports authority to remand pendent claims and suggests that if Congress had addressed the proper disposition of removed cases involving pendent claims, it would have authorized the district courts to remand the pendent claims.¹⁸⁰

As the Court acknowledged, however, section 1441(c) does *not* apply to suits involving pendent claims, and one can as easily (and reasonably) reach the opposite conclusion about congressional intent or desire. Congress obviously knew how to authorize remands of claims brought to federal court under discretionary jurisdiction. The fact that it made such an authorization in section 1441(c) but not in section 1447(c) may just as well indicate that Congress did not intend federal courts to have power to remand pendent state law claims removed pursuant to sections 1441(a) and (b). If Congress has thought about the question, it may well have been satisfied to have the courts do on removal what they have been doing in cases begun in federal court, *i.e.*, dismiss the state law claims if the court concludes that maintenance of its jurisdiction would be inappropriate.

Finally, despite the majority's verbal efforts to limit the scope of its decision and to reassure the dissenting Justices that the decision would not render superfluous the two provisions of the removal statute that authorize remand,¹⁸¹ the dissenters are correct: "There would have been little reason for Congress to have enacted either section 1447(c) or section 1441(c) had Congress perceived the federal courts to possess an inherent authority to remand claims that might better be decided by the state courts."¹⁸²

Having found an extra-statutory source of authority to remand pendent claims once the federal questions have been eliminated from a case, the Court did not need to find a basis for remand in section 1447(c). Because I believe that the Court was wrong in its construction of the removal statutes—the grounds for remand explicitly stated in the

179. *Carnegie-Mellon*, 108 S. Ct. at 621.

180. *Id.*; accord Comment, *Federal Common Law Power to Remand a Properly Removed Case*, 136 U. PA. L. REV. 583, 616 (1987).

181. 108 S. Ct. at 621 n.11.

182. *Id.* at 624 (White, J., dissenting).

statutes *are* exclusive—and wrong in its view of the judicial authority available under *Gibbs*,¹⁸³ this Article will now explore when, if ever, section 1447(c) remands may be ordered pursuant to the discretionary aspects of the doctrines of pendent and ancillary jurisdiction that have grown up in cases originally filed in federal court. Again, section 1447(c) directs remand “[i]f at any time before judgment it appears that the case was removed improvidently and without jurisdiction.”

It is apparently uncontroverted that the notion of “improvident” removal is wholly inapplicable to the problem at hand. Removals are improvident only when they are legally defective in the sense that “one of the statutory, nonjurisdictional requirements for removal has not been satisfied.”¹⁸⁴ The courts have taken the view that “the term ‘improvidently’ has a specific, narrow meaning. A case is not ‘improvidently’ removed . . . if all procedural requirements, such as timely filing of removal petition, have been met.”¹⁸⁵ Thus, cases are regarded as improvidently removed when the removal petition is filed beyond statutory limits,¹⁸⁶ when all necessary defendants have failed to join in the removal petition,¹⁸⁷ and when all necessary papers have not been filed in the district court.¹⁸⁸

By contrast, the courts have rejected the argument that removal was improvident when it substantially limited the remedies available to the plaintiffs, for example.¹⁸⁹ This conclusion is consistent with the opinion of commentators that the term “improvident” was not intended by Congress to include removals that were merely imprudent or unfair to the plaintiff.¹⁹⁰ In *Thermtron* the Supreme Court agreed with the parties that a remand to expedite adjudication of the merits of the case did not implicate the authorization of remand for cases removed improvidently.¹⁹¹ The Court characterized as “of no moment” the substi-

183. See *infra* text accompanying notes 231-37.

184. *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 647 n.8 (5th Cir. 1978); accord Note, *Remand Order Review After Thermtron Products*, 1977 U. ILL. L. F. 1086, 1093 (conclusion based on review of the legislative history of § 1447(c)).

185. *Sheet Metal Workers Int'l Ass'n v. Seay*, 693 F.2d 1000, 1005 (10th Cir. 1982) (citation omitted), approved in relevant part, 696 F.2d 780, 781 (10th Cir. 1983).

186. *E.g.*, *Royal v. State Farm Fire & Casualty Co.*, 685 F.2d 124, 127 (5th Cir. 1982); *Wilkins v. Rogers*, 581 F.2d 399, 403 (4th Cir. 1978); *London v. United States Fire Ins. Co.*, 531 F.2d 257, 258-60 (5th Cir. 1976).

187. *E.g.*, *Cornwall v. Robinson*, 654 F.2d 685 (10th Cir. 1981); *McKinney v. Rodney C. Hunt Co.*, 464 F. Supp. 59 (W.D.N.C. 1978).

188. *E.g.*, *California v. Gibson-Rondon Corp.*, 421 F. Supp. 149 (C.D. Cal. 1974); see *FDIC v. Alley*, 820 F.2d 1121, 1123 n.1 (10th Cir. 1987) (concluding that appellate court could not review whether the district court had erred in equating failure to satisfy the rules governing documentation of removed cases with improvident removal).

189. *Sheet Metal Workers*, 693 F.2d at 1003-06.

190. Note, *supra* note 184, at 1093.

191. *Thermtron*, 423 U.S. at 343-44 & n.8; but see *Herrmann*, *supra* note 113, at 418 n.129

tution of the word "improvidently" for the word "improperly" in the old law, and reiterated that no change in the law or policy was to be presumed since no intent to make such a change had been expressed.¹⁹² In view of the Court's unsolicited dicta rejecting a construction of "improvident" that would have implied that district courts have broad discretion in determining the propriety of removals, there is good reason to believe that the Supreme Court shares the narrow view of improvident removal that prevails in the lower federal courts.¹⁹³

The word "improvident" could be interpreted more loosely; law dictionaries define judicial orders as improvidently issued with a rather open-ended formulation—having been entered without adequate consideration or information, or when based on a mistaken assumption.¹⁹⁴ When the Supreme Court dismisses a writ of certiorari as improvidently granted, its action is discretionary and may be grounded in any of several considerations.¹⁹⁵

Legislative history, judicial precedents, and sound policy, however, all counsel against a broad and highly subjective construction of improvident removal. The role and responsibility of a federal district court on removal is to hear any case properly put before it, obviously a very different role and responsibility than that of the Supreme Court regarding cases reviewable only upon the grant of writs of certiorari. A broad reading of "improvident" in section 1447(c) would allow an exception to swallow the rule. It would undermine the intent of Congress to impose on the district courts the duty to hear cases within the federal courts' jurisdiction and removed in accordance with statutory prescriptions. Consequently, a broad reading of improvident removal in section 1447(c) would be erroneous and unwise.

The advocates of remand of no-longer-pendent claims have not sought to legitimize their desired outcome by means of an "improvident" removal argument, and in *Carnegie-Mellon* the Court made no effort to utilize the language of improvidence. It found, to the contrary, that the case had been properly removed, and had remained properly

(observing that the *Thermtron* respondent had argued that an action is removed "improvidently" if defendant fails to establish that the state forum was partial, citing Brief & Appendix of Respondent at 3).

192. *Thermtron*, 423 U.S. at 351 n.15.

193. See, e.g., *Sheet Metal Workers*, 693 F.2d at 1005 n.7.

194. E.g., BLACK'S LAW DICTIONARY 682 (5th ed. 1979).

195. See R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 5.15 (6th ed. 1986) (citing such factors as it becoming apparent that the basis on which review was granted is in fact nonexistent, a change in circumstances lessening the importance of the case, an apparent conflict of decisions disappearing on closer analysis, the certified question not being presented with sufficient clarity, or an unsuspected jurisdictional defect surfacing).

removed.¹⁹⁶ Furthermore, there is no justification for concluding that section 1447(c) authorizes the remand of pendent claims on the theory that they were removed "without jurisdiction."

The Supreme Court in *Gibbs* created the primary modern elaboration of a notion that already was consistently recognized,¹⁹⁷ that pendent jurisdiction is a doctrine of discretion:¹⁹⁸

Its justification lies in considerations of judicial economy, convenience and fairness to litigants; . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong . . . Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed. Rule Civ. Proc. 42(b). If so, jurisdiction should ordinarily be refused.¹⁹⁹

A few years later, in *Rosado v. Wyman*,²⁰⁰ the Court modified one of these guidelines,²⁰¹ but certainly adhered to the position that when a federal court has power to adjudicate a state claim, the decision whether to exercise that jurisdiction is a matter of discretion.²⁰² In *Rosado* the Court held that the mootness of plaintiffs' constitutional challenge to a New York statute did not destroy a federal court's power to determine a pendent claim²⁰³ and, further, that the district court had not abused its discretion in hearing the latter claim despite the dismissal before trial of the constitutional claim.²⁰⁴

The Court distinguished between the existence of judicial power and the exercise of that power. The first is a "yes or no" question as to whether jurisdiction exists; the second is merely a matter of discretion. Where there is power, a decision not to hear the state claim is purely a discretionary decision not to exercise that power. Hence, a remand ordered as a matter of discretion not to exercise conceded judicial power is *not* a remand predicated on a lack of jurisdiction. Particular empha-

196. *Carnegie-Mellon*, 108 S. Ct. at 616.

197. *Gibbs*, 383 U.S. at 726 & n.14.

198. *Id.* at 726.

199. *Id.* at 726-27.

200. 397 U.S. 397 (1970).

201. It modified that guideline regarding dismissal of state claims if federal claims are dismissed before trial. See *infra* text accompanying notes 203-04.

202. *Rosado*, 397 U.S. at 402-03; accord *Aldinger v. Howard*, 427 U.S. 1, 9 (1976).

203. The pendent claim was a challenge to the New York Social Services Law, based upon its incompatibility with the federal Social Security Act of 1935. *Rosado*, 397 U.S. at 399.

204. *Id.* at 403-05.

sis deserves to be placed on the proposition, illustrated by *Rosado*, that elimination of the federal question claim does not destroy a federal court's jurisdiction, its power to determine a pendent or ancillary state law claim.²⁰⁵ It follows that a remand of the state claims that survive after elimination of a federal claim is *not* authorized by section 1447(c) as a remand of a case removed "without jurisdiction." All the canons of strict construction of removal statutes,²⁰⁶ even when applied to justify expansive construction of remand provisions,²⁰⁷ cannot shatter this truth.

Some earlier decisions considering whether to remand pendent or ancillary claims focused on the meaning of "without jurisdiction," referring particularly to the time at which a basis of federal jurisdiction needs to be absent to meet section 1447(c)'s requirements for remand. Two schools of thought emerged. One school purported to bring remands of certain pendent or ancillary claims within section 1447(c) by taking the position that (under certain circumstances) when the federal claim that made the case removable itself was eliminated, the case became one that was removed without jurisdiction.²⁰⁸ The strength of this

205. *Accord* *Bale v. General Tel. Co.*, 795 F.2d 775, 778 (9th Cir. 1986) (citing *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) and *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 681 (9th Cir. 1980)).

206. *E.g.*, *Cook v. Weber*, 698 F.2d 907, 909 (7th Cir. 1983) (stating that removal statutes are to be strictly construed in keeping with congressional intent to limit the right, out of concern for state courts' independent jurisdiction); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979); *see* *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). In *Shamrock Oil* the Court held:

Not only does the language of the [removal statute, 28 U.S.C. § 1441] evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270[(1934)].

313 U.S. at 108-09. *See also* *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 10 (1951) (noting that "our consideration of the meaning and effect of 28 U.S.C. § 1441(c) should be carried out in the light of the congressional intention to abridge the right of removal"); *Westmoreland Hosp. Ass'n v. Blue Cross*, 605 F.2d 119, 123-24 (3d Cir. 1979) (finding that removal procedure reflects a congressional policy of severe abridgement of the right to remove), *cert. denied*, 444 U.S. 1077 (1980).

207. *Baucom v. Pilot Life Ins. Co.*, 674 F. Supp. 1175, 1178 (M.D.N.C. 1987) (commenting that courts should construe removal statutes strictly against removal and in favor of remand); *Boland v. Bank Sepah-Iran*, 614 F. Supp. 1166, 1169 (S.D.N.Y. 1985).

208. *E.g.*, *Carnegie-Mellon*, 41 Fair Empl. Prac. Cas. (BNA) at 1052 (Stapleton, J., dissenting), *aff'd*, 108 S. Ct. 614 (1988); *IMFC Professional Servs., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 157 (Former 5th Cir. 1982); *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 645-46 (5th Cir. 1978). The prior law, codified in 28 U.S.C. § 80 (1940), stated: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district

position was reflected in the fact that no court of appeals had upheld the discretion of a district court to remand state claims while retaining a related federal claim.²⁰⁹ Indeed, the fact that 1447(c) authorizes the remand of a "case," not of "claims" or "causes of action" or "matters," would pose still another obstacle to remand of state law claims if a federal claim to which they were appended remained in federal court.

Is this interpretation of section 1447(c) correct? Its advocates argue that section 1447(c) was intended to restate, not to change, the prior law and therefore that section 1447(c) permits examination of post-removal developments to determine whether jurisdiction has been lost and a case may be remanded.²¹⁰ The second school of thought disagrees. Back in 1950 the Court of Appeals for the Fourth Circuit wrote:

Under the provision of the old judicial code relating to remand, 28 U.S.C.A. § 80, there was some conflict in the decisions, but the revised code has used language which should remove all controversy and clearly establish the rule that the case is not to be remanded if it was properly removable upon the record as it stood at the time that the petition for removal was filed.²¹¹

Section 1447(c) asks whether the case "*was removed* improvidently and without jurisdiction." But even if section 1447(c) was intended merely to restate the prior law, that concession really does not take one very far. Even the advocates of the "second look" school of thought acknowledged that, under prior law, a court deciding whether to remand was to use the same analysis as it would use in deciding whether to dismiss a case initially filed in district court.²¹²

Under general jurisdictional principles, many subsequent developments in a case do not destroy the court's jurisdiction.²¹³ In particular, the elimination of a federal claim by virtue of its failure to state a claim on which relief can be granted,²¹⁴ by dint of its being held nonjusticia-

court shall remand the case."

209. See *Contemporary Servs. Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885, 896 (C.D. Cal. 1987); see also *Aben v. Dallwig*, 665 F. Supp. 523, 525 n.3 (E.D. Mich. 1987) (doubting its authority to remand pendent claims so long as the federal claim was properly before the court).

210. E.g., *Carnegie-Mellon*, 41 Fair Empl. Prac. Cas. (BNA) at 1053 (Stapleton, J., dissenting); *IMFC Professional*, 676 F.2d at 157-58; *In re Merrimack*, 587 F.2d at 646; see *Comstock v. Morgan*, 165 F. Supp. 798, 800 (W.D. Mo. 1958). This interpretation of § 1441(c) sometimes is referred to as advocating a "second look."

211. *Brown v. Eastern States Corp.*, 181 F.2d 26, 28-29 (4th Cir.) (citation omitted), cert. denied, 340 U.S. 864 (1950); accord *Murphy v. Kodz*, 351 F.2d 163, 167 (9th Cir. 1965).

212. E.g., *IMFC Professional*, 676 F.2d at 157.

213. See, e.g., *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 866 (9th Cir. 1987) (concluding that dismissal of federal claim as time-barred did not oust district court of jurisdiction), cert. denied, 108 S. Ct. 2819 (1988); *Westmoreland Hosp. Ass'n v. Blue Cross*, 605 F.2d 119, 123-24 (3d Cir. 1979) (stating that federal jurisdiction does not depend on what theory was relied upon at trial but on the face of the complaint), cert. denied, 444 U.S. 1077 (1980). See generally 13B WRIGHT & MILLER, *supra* note 3, § 3608, at 449-57.

214. *Bell v. Hood*, 327 U.S. 678, 682 (1946) (stating that "[j]urisdiction . . . is not defeated

ble or becoming moot,²¹⁵ or by grant of a motion for summary judgment,²¹⁶ does *not* destroy a federal court's power or jurisdiction to entertain pendent or ancillary claims. Consequently, in most instances, the involuntary elimination of a federal claim after removal will not qualify the case as one which was or has become removed "without jurisdiction."

When one examines the effect of a plaintiff's voluntary dismissal of his federal claim on federal subject matter jurisdiction, one finds little law in cases of original jurisdiction, but a good many decisions in removed cases. The Court of Appeals for the Fifth Circuit said in May 1985, "We have been unable to locate any case that squarely faced the issue whether, in a case of original jurisdiction, the voluntary amendment of the complaint to drop a federal question removes that claim as a basis for jurisdiction."²¹⁷ It concluded that because the burden is on the plaintiff to establish jurisdiction, "the plaintiff must be held to the jurisdictional consequences of a voluntary abandonment of claims that would otherwise provide federal jurisdiction."²¹⁸ However, the court made clear that this rationale did not apply to removed cases, in which different considerations fully justified the majority view that "a plaintiff's voluntary amendment to a complaint after removal to eliminate the federal claim . . . will not defeat federal jurisdiction."²¹⁹ If the law were otherwise, a plaintiff could destroy the jurisdictional choice that

. . . by the possibility that the averments might fail to state a cause of action . . . [T]he failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction").

215. *Rosado v. Wyman*, 397 U.S. 397, 404 (1970).

216. *Scott v. Machinists Auto. Trades Dist. Lodge No. 190*, 827 F.2d 589, 592 (9th Cir. 1987); *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152, 155-56 (5th Cir. Unit A Aug. 1981).

217. *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 506 (5th Cir. 1985). *But cf.* *Texas Transp. Co. v. Seeligson*, 122 U.S. 519, 522 (1887). The *Seeligson* Court stated that where suit had been removed under the predecessor of 28 U.S.C. § 1441(c), and plaintiff voluntarily dismissed the claim against the defendant entitled to remove, it was "right to remand" under § 5 of the Act of March 3, 1875. Section 5 stated that

[I]f it shall appear to the satisfaction of said Circuit Court at any time after such suit has been . . . removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, . . . the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand to the court from which it was removed, as justice may require.

122 U.S. at 522. The *Seeligson* case, however, is generally regarded as no longer good law. In *IMFC Professional*, 676 F.2d at 159 n.13, the court stated, "*Seeligson* predates the modern concepts of ancillary and pendent jurisdiction . . . and it is 'difficult to reconcile' with subsequent Supreme Court authority . . . its authority appears to have been limited to its general facts. Finally, the specific holding of *Seeligson* was nullified by the 1948 revision." See also 1A MOORE's, *supra* note 1, ¶ 0.160[7], at 246 n.1 (stating that "*Seeligson* is not in accord with the accepted view").

218. 759 F.2d at 506.

219. *Id.* at 507.

Congress intended to afford defendants.²²⁰

One may well ask: If the plaintiff wants to give up her federal question, what legitimate role remains for the federal court and what legitimate interest of the defendant is harmed by remand? If the plaintiff truly is willing to give up her federal question, or the court can compel her to do so, then the interest of the federal court and of the defendant in preventing the jockeying of cases from state to federal court and back is of slight magnitude. The concomitant expenditure of the courts' and the litigants' time and resources will be relatively small. Moreover, there no longer will be a federal claim that belongs in federal court. Thus, in *Austwick v. Board of Education*,²²¹ the court was willing to allow Austwick to file an amended complaint that included only state claims, saying, "[t]o do otherwise would be to force plaintiff to litigate a federal claim which he now does not wish to litigate (and, of course, require defendant to defend a claim which plaintiff chooses not to pursue)."²²² Because the action had been properly removed, the court refused to remand. Consistent with the policy of *Gibbs*, it dismissed the plaintiff's remaining claims without prejudice. It was not willing, however, to run the risk that plaintiff would refile his federal claims in state court. Those it dismissed with prejudice.²²³

220. *Id.*

221. 555 F. Supp. 840 (N.D. Ill. 1983).

222. *Id.* at 842.

223. *Id.* at 843; see also *Price v. PSA, Inc.*, 829 F.2d 871, 876-77 n.6 (9th Cir. 1987) (inviting the district court to entertain a motion for costs and expenses if, after remand, plaintiffs were to amend their complaint to reallege federal claims), *cert. denied sub nom. P.S. Group v. United States Dist Court*, 108 S. Ct. 1732 (1988). Additional cases taking the majority view that voluntary dismissal of a federal claim does not deprive a federal court of power to adjudicate pendent state claims include: *Price*, 829 F.2d at 876; *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 681 (9th Cir. 1980); *In re Greyhound Lines, Inc.*, 598 F.2d 883, 884 n.1 (5th Cir. 1979) (after noting that neither *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965), nor any of the authorities cited in it as supporting discretion to remand state claims, entailed a voluntary, tactical dismissal by plaintiff of the federal claims, the court granted a writ of mandamus, vacating an order remanding nonfederal claims after plaintiff's voluntary dismissal of the federal claim); *Brown v. Eastern States Corp.*, 181 F.2d 26, 28-29 (4th Cir.), *cert. denied*, 340 U.S. 864 (1950); *Laga v. University of Health Sciences/The Chicago Medical School*, 542 F. Supp. 23, 24 (N.D. Ill. 1982); *Espino v. Volkswagen de Puerto Rico, Inc.*, 289 F. Supp. 979, 982 (D.P.R. 1968) (stating that "[a]mendments sought to cure defects fatal to the right to remand are not permitted to circumvent jurisdiction previously acquired at the time of removal"); *Jacks v. Torrington Co.*, 256 F. Supp. 282, 287 (D.S.C. 1966) (noting that "[t]he continued jurisdiction of a federal court after proper removal will not be allowed to be determined at the whim and caprice of the plaintiff by manipulation of the complaint by amendment"). See also *Hazel Bishop, Inc. v. Perfemme, Inc.*, 314 F.2d 399, 403 (2d Cir. 1963) (that plaintiff apparently had abandoned its claims of trademark infringement and unfair competition during the lawsuit did not affect the court's jurisdiction on removal, once acquired). See generally 1A MOORE'S, *supra* note 1, ¶ 0.160[7], at 246 (noting that jurisdiction is not lost when, after removal, plaintiff amends complaint, eliminating federal questions); 14A WRIGHT & MILLER, *supra* note 54, § 3722, at 570 (stating that "plaintiff cannot precipitate a remand of the action by amending the complaint to eliminate the federal claim").

By contrast, a plaintiff who voluntarily dismisses her federal claim may not be surrendering it for all time. Under the Federal Rules, a plaintiff may unilaterally dismiss one or more of her claims, without prejudice, by amending her complaint at any time before service of the adverse party's answer.²²⁴ Thus, the following sequence of events would be possible if federal courts required remand, for lack of jurisdiction, following the voluntary dismissal of a federal claim: Plaintiff files a federal question and pendent state law claims in state court; defendant removes the action; plaintiff voluntarily dismisses the federal question claim; federal court remands to state court; plaintiff there reinstates her federal claim; defendant removes the action. At this point, plaintiff might seek again to dismiss her federal question without prejudice and use that dismissal as the predicate for a mandatory remand of the remaining state law claims to state court. However, Rule 15(a) permits an amendment of course only once. Hence, plaintiff will be able to continue a ricochet battle for state court only if the defendant is willing to give written consent to repeated amendments eliminating the federal question, or if the federal court is willing to repeatedly grant plaintiff leave to make such amendments.²²⁵ Even absent such unlikely cooperation from the court or defendant, the federal court would be likely to permit plaintiff to dismiss her federal question with prejudice, for the reasons cited in *Austwick* and noted above. A second remand (representing a third appearance in state court) would then follow.

This wasteful scenario helps to explain why the majority view, that plaintiff's voluntary dismissal of a federal claim does not defeat federal jurisdiction, is the better view. The majority position is consistent with the principle that subject matter jurisdiction is determined by the complaint as it existed at the time the petition for removal was filed.²²⁶ It is supported by the policy basis noted by the Fifth Circuit that a plaintiff should not be able, unilaterally, to destroy removal jurisdiction, particularly when he might reassert his federal claims.²²⁷ The majority position also helps to avoid costly and unseemly ricocheting of cases back

224. FED. R. CIV. P. 15(a). Technically, Rule 41(a), concerning voluntary dismissals, does not govern dismissal of fewer than all the claims against a particular defendant. Rule 41(a) governs voluntary dismissal of entire civil actions. See 5 J. MOORE, J. LUCAS & J. WICKER, *MOORE'S FEDERAL PRACTICE*, ¶ 41.06-1, at 41-82 to 41-84 (2d ed. 1987) [hereinafter 5 MOORE'S].

225. See FED. R. CIV. P. 15(a).

226. *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292-93 (1938); *Westmoreland Hosp. Ass'n v. Blue Cross*, 605 F.2d 119, 123-24 (3rd Cir. 1979) (concluding that where hospitals' complaint was based in part on federal statutes, regulations, and interpretations, the federal court had jurisdiction and the case was properly removed; it was immaterial that at trial plaintiffs relied solely on state law principles), *cert. denied*, 444 U.S. 1077 (1980).

227. See *supra* text accompanying note 217 (referring to *Boelens v. Redman Homes, Inc.*, 759 F.2d 504 (5th Cir. 1985)).

and forth between federal and state courts.

A court that rejects the "second look" approach, and that understands section 1447(c) to be the exclusive source of power to remand when a federal question and pendent or ancillary claims were properly removed (contrary to *Carnegie-Mellon*), logically would always deny remand. Even a court that accepts the "second look" doctrine and understands section 1447(c) to be exclusive usually would deny remand for the reasons just elaborated. That is to say, remands of pendent state claims generally would not be permissible under section 1447(c) as remands of cases removed without jurisdiction.

Only a court that narrowly reads *Thermtron*, and construes section 1447(c)'s commands not to exhaust federal power to remand, often could remand state claims (removed under sections 1441(a) and (b)) with some claim to legitimacy. In *Carnegie-Mellon* the Supreme Court became just such a court, making the district courts followers, if not believers. It should be noted that when these courts remand state law claims, following *Carnegie-Mellon*, they will be doing so in the exercise of discretion, and not for lack of jurisdiction. Consequently, while the voluntary dismissal of federal questions often may trigger remands in the future, that result will not follow ineluctably and at a plaintiff's unfettered whim. The district courts can follow *Carnegie-Mellon* without abrogating the principle that jurisdiction is determined by the complaint at removal time, and they can take steps to deter harassing dismissals and refilings of federal claims. Later, more will be said on that subject.²²⁸ For now, this Article examines the affirmative reasons the *Carnegie-Mellon* Court found for discretion to remand once it had disposed of the statutory and precedential obstacles to that discretion.

c. *The position that justifies remand by reference to the Gibbs doctrine and the policies of economy, convenience, fairness, and comity which underlie it*

Undeniably, there are occasions when federal court adjudication of state law claims is ill-advised. Because the justification of pendent and ancillary jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants[,] if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . ." ²²⁹ The proposition that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law," ²³⁰ is as

228. See *supra* text accompanying note 223; *infra* text accompanying notes 403-04.

229. *Gibbs*, 383 U.S. at 726.

230. *Id.*

valid in cases removed to federal court as in cases commenced there.

The rub is that none of this argumentation justifies remand. There may be great intuitive appeal in remanding to the state court from which they came any state claims inappropriate for the federal court to hear. However, all legitimate concerns that should lead a federal court to relinquish jurisdiction can be equally satisfied by federal courts dismissing without prejudice state law claims over which it is inappropriate for the federal courts to continue to exercise jurisdiction. The great advantage of this course is that no statutory prohibitions bar the door. Contrary to the Court's view, section 1447(c) does stand in the way of remand in the many instances when it cannot be said, with intellectual honesty, that the removal was improvident or "without jurisdiction."

The Supreme Court in *Carnegie-Mellon*, having rationalized away the barriers posed by *Thermtron* and the removal statutes, found a source of power to remand in its own *Gibbs* decision. In one power-packed sentence, the Court declared that

Gibbs establishes that the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and *Gibbs* further establishes that the judicial branch is to shape and apply the doctrine in that light.²³¹

Even if the Court is correct in finding that "in some circumstances a remand . . . will better accommodate these [aforementioned] values than will dismissal of the case,"²³² there are serious problems with the Court's position.

The Court conceded that *Gibbs* did not directly address the issue presented in *Carnegie-Mellon*; the plaintiff in *Gibbs* had filed in federal court so remand was not a possibility.²³³ In order to reach its desired result in *Carnegie-Mellon*, the Court proposed the very broad reading of *Gibbs*, quoted above. When Congress has been silent, the Court has crafted common-law doctrines, like that of pendent jurisdiction, as it has thought appropriate. That is, indeed, what the Court did in *Gibbs*.²³⁴ The Court, however, has distinguished situations in which Congress has spoken, expressly or impliedly revoking authorization for particular varieties of pendent jurisdiction.²³⁵

Carnegie-Mellon presented an analogous situation. However broad the judicial power to shape and apply the pendent jurisdiction doctrine may be in the face of congressional silence, when federal question cases

231. *Carnegie-Mellon*, 108 S. Ct. at 619.

232. *Id.* at 619.

233. *Id.*

234. See *Aldinger v. Howard*, 427 U.S. 1, 12-14 (1976).

235. *Id.* at 14-18.

have been removed to federal court, Congress has constrained the courts' freedom so that they may not handle pendent state law claims in whatever way they believe would best accommodate the values of economy, convenience, fairness, and comity. Congress spoke and limited the federal courts' options when it authorized remands of only those cases removed improvidently and without jurisdiction. Ultimately, this Article's disagreement with this third aspect of the Court's decision relates to the Article's position that the grounds for remand stated in sections 1441(c) and 1447(c) are exclusive. The Court seems to have trampled the statute and distorted its own *Thermtron* decision to reach what it believed to be the desirable result. The dissenters are correct when they warn that

the Court itself grants the district courts virtual carte blanche to remand pendent claims for the amorphous reasons of "economy, convenience, fairness, and comity" that may seem justifiable to the majority but that have not been recognized by Congress. This action cannot be reconciled with the holding in *Thermtron* that cases cannot be remanded for nonstatutory reasons.²³⁶

One of the important implications of this aspect of the Court's decision is that it appears to open the door to discretionary remand of pendent state law claims even when federal questions continue in federal court. Under the doctrine of pendent jurisdiction, federal courts are free to relinquish their jurisdiction over pendent claims while they retain jurisdiction over federal questions. Certainly, nothing in *Carnegie-Mellon* indicates that the doctrine should operate any differently when it is applied after a removal. If district courts take advantage of this opening, that will represent a change in practice. Until *Carnegie-Mellon*, no court of appeals had upheld the discretion of a district court to remand state claims while retaining a related federal claim.²³⁷ Moreover, if the federal courts choose this route, their orders will be inconsistent with section 1447(c) in still another respect. It authorizes remand of the "case," not of "claims." That, of course, will not concern the Court, because such remands find their basis outside of section 1447(c).

d. The position that remand often is preferable to dismissal without prejudice

As had a number of lower courts, the Supreme Court in *Carnegie-Mellon* explained its preference for an option to remand by reference to the benefits inherent in avoiding the possible interdiction of the statute of limitations, and in avoiding federal court adjudication of state claims

236. *Carnegie-Mellon*, 108 S. Ct. at 624 (White, J., dissenting).

237. See *supra* text accompanying note 209.

out of concern that the claims would be time barred from the state courts. It also relied upon the directness of remand and reduced costs to the litigants as compared with those entailed in dismissal and refiling.

These concerns have been exaggerated. The savings clauses and tolling doctrines of many states would prevent any state law claim that had been dismissed without prejudice by a federal court after removal from being time-barred.²³⁸ In such states, discretion to remand is not necessary to avoid statute of limitations problems. In those states in which the present law does not so provide, institution by the federal courts of a practice of dismissing removed state law claims when it became inappropriate for the federal court to exercise pendent jurisdiction over them might trigger state legislative or judicial action to save the state law claims. If this approach is too severe because it visits the sins of legislators or judges upon innocent plaintiffs, then the decision of a federal judge that particular claims should be heard in state court still may be effectuated by his conditioning dismissal of the pendent claims upon the defendants' waiver of the statute of limitations defense in a promptly recommenced state court suit.²³⁹ The defendant who wants to remain in federal court, though only state law claims remain against him, could refuse to comply with the condition and force the federal court to adjudicate the pendent claims. But it seems rather unlikely that many defendants would choose to antagonize the federal judge who would hear those state claims if the defendant were intransigent. Having the federal court hear the state law claims in these instances may not be satisfying, but it is a course that is available when necessary. This Article disagrees with the Court's view that "the alternative of a remand is readily available."²⁴⁰

A majority of the Court also opined that a dismissal of claims that then would be time barred might conflict with the principle of comity

238. See, e.g., ILL. ANN. STAT., ch. 110, ¶ 13-217 (Smith-Hurd 1984) (allowing a case dismissed by a federal court on jurisdictional grounds to be refiled within a year in state court); cf. 42 PA. CONS. STAT. ANN. § 5103 (Purdon 1981 & Supp. 1988) (permitting preservation of claims erroneously filed in federal court). Equitable tolling doctrines also may apply. See *Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D. Cal. 1987).

239. See, e.g., *Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985) (directing dismissal of pendent claim only if defendants agree to waive their statute of limitations defense in state court), cert. denied, 107 S. Ct. 71 (1986); *Financial Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982) (instructing lower court not to dismiss until defendant filed waiver of statute of limitations defense, in state court); *Saulsberry v. Atlantic Richfield Co.*, 673 F. Supp. 811, 817 (N.D. Miss. 1987) (promising dismissal of pendent state claims, conditional on defendant "waiv[ing] or toll[ing] all statutes of limitations for the period from the date of filing of this action to the date of this order"); *Brewer*, 666 F. Supp. at 1346 (dismissing pendent claims on the condition, *inter alia*, that defendants waive the statute of limitations for a prescribed period).

240. *Carnegie-Mellon*, 108 S. Ct. at 620 n.10.

to states and undermine a state's interest in enforcing its law.²⁴¹ But, as the dissenters in *Carnegie-Mellon* pointed out, this solicitude seems incongruous. After all, it is the state that has imposed the time bar. Any state that perceives its interests, or the interests of suitors in its courts, to be impaired by application of the state's own statute of limitations can enact a savings clause to enable claims removed and dismissed to proceed in state court.²⁴²

The Supreme Court also was concerned that dismissals result in parties having to refile their papers in state court, at some expense of time and money, and in state courts having to reprocess cases. It asserted that dismissals, as compared to remands, would increase the expense and the time involved in enforcing state law.²⁴³ Here again, the Court's concerns were exaggerated, and its appraisal of the relative costs of dismissal and remand may well have been unsubstantiated. The dissenting Justices stated that the record contained no support for the Court's assertion.²⁴⁴ The briefs also contained none.

Filing fees certainly are not so substantial that federal courts ought to distort federal law in significant respects in order to save a plaintiff from having to pay them twice. Moreover, state legislatures, and perhaps even state courts, could waive such fees upon the refile of a claim that had been removed to federal court.

The refile of a state law claim in state court also need not generate more inefficiency, duplication of effort, or delay than a remand of the claim would generate. State courts can give whatever priority to handling such claims they deem appropriate. Refiled cases do not have to be sent to the end of the line. They might be permitted to reassume their initial docket numbers, if necessary. Similarly, whatever pretrial work up of the claims had been done in federal court by means of discovery or rulings could be used in the renewed state court proceedings, whether the state claims were remanded or refiled.²⁴⁵ Thus, the supposed inefficiencies of dismissal, as compared to remand, may well be illusory.²⁴⁶

241. *Id.* at 620.

242. *Id.* at 625-26 (White, J., dissenting).

243. *Id.* at 620.

244. *Id.* at 625 n.2 (White, J., dissenting).

245. See, e.g., *Saulsbury*, 673 F. Supp. at 817 (premising dismissal of pendent state claims on defendant's consent to the use of discovery taken in the federal case, in the state court case to be refiled); see generally 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-2], at 701:

Orders entered by the district court prior to a remand order are not nullities. Insofar as they are interlocutory and are included within the action or the part of the action remanded, they would ordinarily remain in effect, following the remand, until the state court took appropriate action to modify or set them aside.

Id. (footnotes omitted).

246. In dissent Justice White stated:

Finally, the Court responded to defendants' policy concern that giving district courts discretion to remand pendent claims would encourage plaintiffs to manipulatively delete their federal law claims in order to regain the state court forum. While agreeing that forum manipulation concerns are legitimate and serious, the Court declined to find that they justify a categorical prohibition on remands.²⁴⁷

The defendants' concerns had received sympathetic treatment from some courts. The Third Circuit panel that had decided *Carnegie-Mellon*, for example, had feared that remand would frustrate Congress' purpose in providing a right of removal, since a defendant who exercised the right might thereafter be subject to duplicative and costly state proceedings.²⁴⁸ It worried too about encouraging manipulative and strategic remands.²⁴⁹ The dissenting Justices on the Court added that the decision allowing remand, after the elimination of federal question claims, is difficult to reconcile with *St. Paul Mercury Indemnity Co. v. Red Cab Co.*²⁵⁰

Carnegie-Mellon does not undercut *St. Paul Mercury*: it remains the law that events occurring subsequent to removal do not destroy the

I would think that the cost to the state courts of processing a new case are not appreciably different from the costs of processing a remanded case. Furthermore, to the extent that the federal courts will now remand pendent claims that they previously would have retained, today's holding may result in increased costs for the state courts.

Carnegie-Mellon, 108 S. Ct. at 625 n.2 (White, J., dissenting).

247. *Id.* at 622 n.12.

248. 41 Fair Empl. Prac. Cas. (BNA) 1046, 1051 (3d Cir.), *reh'g granted*, 41 Fair Empl. Prac. Cas. (BNA) 1888 (1986). An actual variation of this scenario was played out in *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208 (1st Cir. 1987). After defendants successfully moved to dismiss what they characterized as an artfully pled federal antitrust claim and the state claims that accompanied it, plaintiff tendered an amended complaint that omitted the antitrust count and sought remand of the truncated complaint. The district court refused reconsideration. Plaintiff then simultaneously filed a notice of appeal and a fresh action in state court, with a complaint virtually the same as that it had tendered to the federal court. Defendants then sought a stay of the new state court proceeding, pending the federal appeal. The stay was denied, so both courts proceeded.

249. *Carnegie-Mellon*, 41 Fair Empl. Prac. Cas. (BNA) at 1051; see quotation cited *supra* note 134; see also *Austwick v. Board of Educ.*, 555 F. Supp. 840 (N.D. Ill. 1983). In *Austwick* the court stated:

A federal forum for federal claims is certainly a defendant's right. If a state forum is more important to the plaintiff than his federal claims, he should have to make that assessment before the case is jockeyed from state court to federal court and back to state court. The jockeying is a drain on the resources of the state judiciary, the federal judiciary and the parties involved; tactical manipulation [by the] plaintiff . . . cannot be condoned.

Id. at 842. *Accord Price v. PSA, Inc.*, 829 F.2d 871, 876-77 n.6 (9th Cir. 1987) (characterizing plaintiffs' elimination of federal claims after removal as abuse of the judicial process, and quoting *Austwick*); but see *Highway Constr. Co. v. McClelland*, 15 F.2d 187, 188 (8th Cir. 1926) (stating that if plaintiff voluntarily changes his pleading so that the court will no longer have jurisdiction, it is the duty of the court to remand the case); *Solanics v. Republic Steel Corp.*, 34 F. Supp. 951 (N.D. Ohio 1940).

250. 303 U.S. 283 (1938); see *Carnegie-Mellon*, 108 S. Ct. at 624-25 (White, J., dissenting).

jurisdiction of the federal court. Events occurring after removal, however, properly can affect the district court's discretionary decision of whether to exercise its jurisdiction to hear pendent claims. This Article already has commented on the low level of federal interest in hearing state law claims once federal claims are out of a case for all time. But the federal courts do have an interest in preventing litigants from jockeying for position in a way that drains the resources of their opponents and the judiciary. The federal courts can and should vindicate that interest by dismissing with prejudice the removed federal claims that plaintiffs wish to dismiss, and by imposing sanctions on plaintiffs who seek to dismiss federal claims after removal and to reassert them after the return to state court.

The ability to argue for a remand of state law claims, rather than their dismissal without prejudice, should not greatly affect the manipulative incentives to plaintiffs whose claims are not time barred. Through either device those plaintiffs can subject defendants to whatever duplication and cost or disfavor may be entailed in going back to state court. It is for plaintiffs whose state law claims could not be refiled on time that the right to remand has tactical implications. Absent remand, they presumably would not manipulatively seek to eliminate their federal claims, for doing so would not regain the state court. With remand, they can play the game and request remand, if they are willing to give up their federal claims. The prospect of this scenario might discourage some defendants from removing,²⁵¹ but it may well not, since such maneuvers by the plaintiff always will be speculative when defendants must decide whether to remove.

The dissenting Justices in *Carnegie-Mellon* observed that the Court's decision will encourage plaintiffs with claims arising under both federal and state law to sue in state court, thus lessening the opportunities for federal courts to act as the primary guardian of federal rights.²⁵² This may be an accurate prediction, but an advantage flows to plaintiffs who choose state court only if defendants remove, and plaintiffs later decide to dismiss their federal claims, and those claims would be time barred on refiling, and the federal court would not retain them as the lesser of two evils. The majority was concerned that a plaintiff who knew that a federal court, upon removal, would have to dismiss the case upon deciding that the exercise of pendent jurisdiction would be inappropriate, might forego asserting any federal law claims at all. It believed that the dismissal-only rule would have a chilling effect.²⁵³ The

251. See *Carnegie-Mellon*, 108 S. Ct. at 625 (White, J., dissenting).

252. *Id.* (White J., dissenting).

253. *Id.* at 619-20 n.9.

Court does seem to have the better of the argument in concluding that manipulative motivations can be taken into account, but that they do not justify a categorical prohibition on remands.

Even if one believes that an option to remand pendent state claims would be desirable, the policy arguments do not change the effect of section 1447(c). Policy arguments may justify a change in the legislation, but "[r]emand is a creature of statute."²⁵⁴ Policy arguments do not legitimize judicial amendment of the law.²⁵⁵

4. Distinguishing the Problems Posed by Pendent Party Jurisdiction

Even before *Carnegie-Mellon* the weight of authority favored the option to remand pendent and ancillary claims after elimination of linchpin federal questions.²⁵⁶ A significant number of the cases cited by

254. *Salveson v. Western States BankCard Ass'n*, 525 F. Supp. 566, 580 n.17 (N.D. Cal. 1981), *aff'd in part, rev'd in part*, 731 F.2d 1423 (9th Cir. 1984).

255. Additional cases subscribing to the views expressed in the text are: *Laga v. University of Health Sciences/The Chicago Medical School*, 542 F. Supp. 23, 24-25 (N.D. Ill. 1982) (exercising discretion under *Gibbs* by dismissing without prejudice the state claims left after plaintiff moved to voluntarily dismiss with prejudice his § 1983 claim in order to eliminate the predicate for federal jurisdiction); *Salveson*, 525 F. Supp. at 580-81 n.17. In dictum the district court stated that unless one accepts authority to remand as within a district court's inherent power, the courts are limited to retaining jurisdiction over state claims or dismissing them, after dismissal of a federal claim that was properly removed. The court noted, "[t]he issue can be of substantial importance; it affects the application of the statute of limitations, the priority of the case upon its return to the state court, and the reviewability of the . . . order itself." *Id.*

256. See cases cited *supra* notes 124-26. Similar results also abound in removals pursuant to 28 U.S.C. § 1442, which provides for the removal of actions against U.S. officers and agencies, for acts under color of their office or in the performance of their duties. *E.g.*, *Williams v. City of Atlanta*, 794 F.2d 624, 625, 628 (11th Cir. 1986) (concluding that when plaintiffs' federal civil rights claims were dismissed because barred by the statute of limitations, the district court had discretion to decline to exercise jurisdiction over the state law claims against nonfederal defendants. If it did so, it would have to remand the claims to state court as removed improvidently and without jurisdiction; it had no discretion to dismiss the claims); *District of Columbia v. Merit Sys. Protection Bd.*, 762 F.2d 129, 131-33 (D.C. Cir. 1985) (once the trial court had determined, on sovereign immunity grounds, that the District could not name the MSPB as a respondent in an action to secure judicial review of a fee award ordered by the MSPB (that action being the sole basis for removal), the district court was left with a local law claim between an intervenor (whose termination from his job and appeal of that termination to the MSPB had begun the legal battles) and the District, which it should have remanded to superior court. It was for that superior court to decide whether the MSPB was an indispensable party); *Bushman v. Seiler*, 755 F.2d 653, 654-55 (8th Cir. 1985) (stating in dictum that when removal is premised on a federal defendant who subsequently is dismissed, the decision to remand remaining claims is committed to the district court's discretion; here, the court properly retained jurisdiction); *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 732 F.2d 38, 42 (2d Cir. 1984) (noting that after dismissal of third-party complaint against U.S. officers, court had discretion to remand remaining claims); *Overman v. United States*, 563 F.2d 1287, 1291-92 (8th Cir. 1977) (where, by virtue of sovereign immunity, garnished federal defendants were entitled to a dismissal of the claim against them for failure to state a claim on which relief could be granted, the balance of the controversy was to be remanded to state court because it concerned matters, alimony and child support, within the exclusive province of the state courts); *Murphy v. Kodz*, 351 F.2d 163, 167-68 (9th Cir. 1965) (stating in dictum that where federal basis of

the courts as exemplifying that position, however, actually may not have done so. For example, in some cases the federal claims upon which removal was predicated were claims within the exclusive subject matter jurisdiction of the federal courts. Strange as it may seem, the accepted perspective has been that these cases are properly removed,²⁵⁷ but that the federal courts are without jurisdiction to hear them upon a removal.²⁵⁸ The rule is that such federal claims should be dismissed²⁵⁹ because there would be no point in remanding them to a state court that is not empowered to hear them. It is said that the district court can, however, remand any pendent or ancillary state law claims because the civil action was removed "without jurisdiction," as required by section 1447(c).²⁶⁰ Cases of this description present a situation different from that presented in *Carnegie-Mellon*, in which all the removed claims were within the federal courts' removal jurisdiction. Consequently, *Carnegie-Mellon* has no impact on these cases. It should be

jurisdiction has vanished, and there has been no substantial commitment of judicial resources to the nonfederal claims, the district court has discretion to remand to state court. The court referred to the dictates of § 1447(c) as "not dispositive, but indicative of the correct judicial approach." *Id.* at 168 n.3. Here, the district court had not erred in adjudicating the state law claims); *Behre v. United States*, 659 F. Supp. 747, 749-51 (D.N.H. 1987) (where federal defendants had a right to remove the civil action under § 1442(a)(1), and sovereign immunity entitled several of them to dismissal, while the eleventh amendment barred the federal court from hearing the suit against the State of New Hampshire and its agencies, the court would remand the state defendants and the nongovernmental defendants—who had been sued mostly under state law—though the claims against them had been properly removed, while retaining the claims against the federal officers); *Ewell v. Petro Processors of La., Inc.*, 655 F. Supp. 933, 936-37 (M.D. La. 1987) (the grant of the EPA's motion to dismiss for failure to state a claim did not destroy the court's jurisdiction; however, the court would exercise its discretion to remand the ancillary claims based on clearly articulated authority); see also *Garcia v. Public Health Trust*, 657 F. Supp. 99, 101 (S.D. Fla. 1987) (after removal by Iberia Airlines under § 1441(d) and summary judgment in its favor, the court remanded to state court for resolution of the remaining claims—state law claims against Florida defendants—saying "this Court's jurisdiction has ended"), *aff'd*, 841 F.2d 1062 (11th Cir. 1988).

257. *General Inv. Co. v. Lake Shore & M. S. Ry.*, 260 U.S. 261, 288 (1922); *Washington v. American League*, 460 F.2d 654, 658 (9th Cir. 1972).

258. *General Inv. Co.*, 260 U.S. at 288; see *Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377, 382-83 (1922); *Pueblo Int'l, Inc. v. Cardona*, 725 F.2d 823, 827 (1st Cir. 1984); *Kelly v. Carr*, 691 F.2d 800, 805 n.14 (6th Cir. 1980). See generally 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3722, at 574 (1976) [hereinafter 14 WRIGHT & MILLER].

259. *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 449 (1943); *General Inv. Co.*, 260 U.S. at 288; *Lambert Run*, 258 U.S. at 382-83; *Daley v. Town of New Durham*, 733 F.2d 4, 6 (1st Cir. 1984); *Kelly*, 691 F.2d at 805-06. See generally 14 WRIGHT & MILLER, *supra* note 258, § 3722, at 574.

260. This view of the matter is not universally accepted. See, e.g., *Salveson*, 731 F.2d at 1430. In *Salveson* the district judge correctly dismissed pendent state law claims as barred either by res judicata or by the statute of limitations. The district court stated, "These claims were within the court's jurisdiction even though the antitrust claim, the basis for federal jurisdiction, was ordered dismissed." *Id.*; see also *Intel Corp. v. Hartford Acc. and Indem. Co.*, 662 F. Supp. 1507, 1512 (N.D. Cal. 1987) (dismissing state claims that were pendent to a federal RICO claim that had been held to be within exclusive federal jurisdiction; the court said it had discretion to retain the state claims, but chose to dismiss them without prejudice).

noted that, because of the enactment of section 1441(e),²⁶¹ fewer and

261. See *supra* text accompanying notes 18-19. *E.g.*, *Daley v. Town of New Durham*, 733 F.2d 4 (1st Cir. 1984). Daley sued the town, four of its selectmen, and a telephone company, alleging that defendants had conspired to restrain and monopolize the cable television business in the town, in violation of §§ 1 & 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. He also alleged a civil rights conspiracy under 42 U.S.C. §§ 1983 & 1985(3), on the ground that the defendants' conduct deprived him of property without due process of law, and state claims for breach of fiduciary duty to the town residents in failing to act in good faith in the allocation of cable television franchises, and for defamation. *Id.* at 6, 8. Because the antitrust claims had to be dismissed for lack of jurisdiction, and the civil rights claim was "insubstantial as a matter of law," remand of the state law claims was directed. *Id.* at 8. If Daley's civil rights claim was so insubstantial as to warrant a dismissal pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, the federal court would have been altogether without jurisdiction, and remand of the state law claims arguably would have been authorized by § 1447(c).

Despite the language of the court quoted above, however, it seems that the civil rights claim was dismissed merely for failure to state a claim upon which relief could be granted. See *id.* at 7-8. In that circumstance, the district court did have removal jurisdiction over the civil rights claim, see *id.* at 7 n.1, and claims pendent thereto, unless the presence of the antitrust claims put the entire collection of claims beyond the removal jurisdiction of the court. If there was removal jurisdiction, then under *Carnegie-Mellon* the remand was proper. The confusion of the court was further manifested in its citation of § 1441(c) in support of remand. Nothing in the opinion suggests that the state law claims were separate and independent from the federal causes of action. The breach of fiduciary duty claim certainly arose out of a common nucleus of operative fact with the federal questions, and the defamation claim seems to have done so as well. Daley claimed he was defamed when a selectman allegedly told a newspaper reporter that "the committee was not sure of Daley's financing." 733 F.2d at 8; see also *American League*, 460 F.2d at 654. Again, Sherman Act claims, complemented by state claims arising out of the same set of facts, had been removed. *Id.* at 657-59. Actually, the court assumed *arguendo* that plaintiffs had stated one or more claims under the Sherman Act. *Id.* Here, however, where the federal antitrust claims were "inseparably intertwined" with some of the state claims, the Ninth Circuit concluded that the only practical way to remand the state claims was to remand the whole action. *Id.* at 659. Looking to the language of § 1447(c) authorizing remand of "the case," it held that § 1447(c) permitted that result, rather than dismissal of the federal antitrust claims and remand of the rest of the case. *Id.* at 659-60.

See also *Essington Metal Works v. Retirement Plans of Am.*, 609 F. Supp. 1546 (E.D. Pa. 1985). In one of the cases before the court in these consolidated actions, plaintiffs had set forth several tort claims and a breach of contract claim arising out of the preparation and implementation of an employee benefits plan for use by the Essington plaintiffs. Defendants removed on the theory that one of the claims could be brought only under ERISA (29 U.S.C. §§ 1001-1461), and that the other claims were pendent to that federal question. The court held that an ERISA claim of that sort asserted fell within the exclusive jurisdiction of the federal courts. 609 F. Supp. at 1548-49. After rejecting several inventive arguments as to why the federal court should retain jurisdiction of the litigation, see *id.* at 1550-54, Judge Pollak cited his power to remand cases that have been removed without jurisdiction. He remanded the state law claims, while concluding that the ERISA claim should be dismissed "because this court did not obtain jurisdiction on removal and the state court would have no jurisdiction to consider the claim on remand." *Id.* at 1555; see also *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208 (1st Cir. 1987) (where a claim assumed *arguendo* to be an artfully plead federal antitrust claim was dismissed as moot, and otherwise would have had to be dismissed under the doctrine of derivative jurisdiction, the state law claims would be remanded on the ground that the suit had been improperly removed).

Similar cases decided under 28 U.S.C. § 1442 include: *Swett v. Schenk*, 792 F.2d 1447, 1450-51 (9th Cir. 1986) (when separate captions had not been used and the state court had issued a bench warrant for a federal officer, it was permissible for district court to "remove" a wrongful death action along with the contempt action brought against a federal officer for failure to comply with a state court order to answer deposition questions propounded to him in the wrongful death action,

fewer of these cases will arise.

Some cases include efforts to persuade the federal courts to exercise pendent party jurisdiction²⁶² upon removal. When the federal courts reject these exhortations on the basis of a lack of constitutional or statutory authority to hear pendent party claims, they are concluding that these claims were removed "without jurisdiction" within the meaning of section 1447(c), and hence are to be remanded under section 1447(c). This Article will explore whether courts facing configurations that include pendent party claims ought to remand all of the claims that were removed, as a civil action that was removed without jurisdiction, or whether they may remand fewer than all of the claims.²⁶³ The immediate points, however, are these. First, decisions that remand pendent party claims *as beyond the constitutional or statutory jurisdiction of the federal courts* afford no support for the proposition that federal courts, as a matter of discretion, may remand claims within their pendent or ancillary jurisdiction. Second, because cases of this description present a situation different from that

and then to exercise its discretion to remand the wrongful death action, in conjunction with dismissing the contempt action for lack of derivative jurisdiction); *Spencer v. New Orleans Levee Bd.*, 737 F.2d 435, 438 (5th Cir. 1984) (finding that once third-party complaints against National Weather Service and its area manager were dismissed for lack of derivative jurisdiction and immunity, respectively, district court had discretion to remand the main action under § 1447(c)); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385, 1387-89 (11th Cir. 1982) (affirming the action of the district court in dismissing as premature suits for contribution and indemnity, but in remanding other issues, after the third-party complaint against the United States (under the Suits in Admiralty Act) was dismissed for lack of derivative jurisdiction).

In some cases cited in support of an option to remand, the courts may have believed that they did not have the choice of dismissing without prejudice. *See, e.g., Gwinn Area Community Schools v. Michigan*, 741 F.2d 840, 847 (6th Cir. 1984) (in which the court believed that the decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), may have required remand of the state constitutional claims to state court).

Another case that rejected dismissal in favor of remand, *Ondis v. Barrows*, 538 F.2d 904 (1st Cir. 1976), did so pursuant to the discretion made available by § 1441(c), which had provided the original basis for removal. Initially, a corporate defendant who was diverse from the plaintiff had been able to remove the entire civil action because of separate and independent claims. After voluntary dismissal of these claims, only a state law tort action against a nondiverse defendant remained, but plaintiff was permitted to add a defendant and to assert a federal claim. *Id.* at 906. After summary judgment was granted to the defendants on the federal claim, the district court dismissed the remaining state law claim, without prejudice. The First Circuit held this to be error:

[T]he options . . . were to proceed to the merits or, in its discretion, [to] remand. The temporary interjection of a federal question claim . . . did not . . . supercede the jurisdictional basis of the state law count entirely An exercise of discretion to relinquish jurisdiction . . . could . . . take the form of no action more drastic than a remand to the state court In dismissing, the district court may have viewed the first amended complaint in isolation; but the state law count had not lost its heritage.

Id. at 908 (footnotes omitted). Since *Carnegie-Mellon* did not involve the interpretation or application of § 1441(c) in any way now relevant, nothing in *Carnegie-Mellon* would affect this decision.

262. *See supra* text accompanying notes 108-10.

263. *See infra* text accompanying notes 301-20.

presented in *Carnegie-Mellon*, in which all the removed claims were within the federal courts' removal jurisdiction, *Carnegie-Mellon* does not answer the questions posed by these cases; it has no direct impact upon them.

It is true that litigants may, in the future, cite to the language of *Carnegie-Mellon* that broadly construes *Gibbs* to establish that, "the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and . . . that the judicial branch is to shape and apply the doctrine in that light."²⁶⁴ But that will be a citation invoked in trying to persuade a court that a particular exercise of pendent party jurisdiction is constitutional and permitted by Congress, as well as wise as a matter of discretion. If one succeeded in that argument, one would no longer be in the situation that is the present focus, when the court has concluded that it lacks constitutional or statutory authority to hear the pendent party claims.

*Charles D. Bonanno Linen Service, Inc. v. McCarthy*²⁶⁵ is one of a number of cases that have wrestled with the issues raised when pendent party jurisdiction is rejected in a remand case. Bonanno and other linen companies sued a Teamsters Union local and several local members in state court, asserting a claim under the Taft-Hartley Act²⁶⁶ against the local and related state law claims against both the local and the individual defendants. On appeal after trial, the individual defendants sought justification for removal of the claims on the theory that those claims were pendent to the federal claim against the local. The First Circuit was willing to assume that the whole group of claims constituted one constitutional "case."²⁶⁷ It concluded, however, that Congress had not vested in the federal courts the power to hear Bonanno's claims against the individual defendants.²⁶⁸ The removal statute, sections 1441(a) and (b), did not provide a basis for jurisdiction that otherwise would be lacking,²⁶⁹ and section 1441(c) was inapplicable, for the claims were not separate and independent from the claims against the local.²⁷⁰ Consequently, since the district court lacked jurisdiction over the claims

264. *Carnegie-Mellon*, 108 S. Ct. at 619.

265. 708 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 936 (1983).

266. 29 U.S.C. § 187. There was some question whether plaintiffs adequately had alleged such a claim, but the First Circuit held that they had. *Bonanno*, 708 F.2d at 3-6.

267. *Bonanno*, 708 F.2d at 6-7.

268. *Id.* at 7-8. Applying the analysis prescribed by the Supreme Court in *Aldinger v. Howard*, 427 U.S. 1 (1976), see *supra* text accompanying notes 101-02, the court concluded that the Taft-Hartley Act conferred jurisdiction to hear suits against labor organizations, but not against individuals. 708 F.2d at 7-8.

269. *Bonanno*, 708 F.2d at 8; see *supra* text accompanying notes 103-10.

270. *Bonanno*, 708 F.2d at 8-10.

against the individual defendants, those claims had to be remanded to state court.²⁷¹

The court acknowledged that section 1441(b) allows removal of a civil action over which the district courts have original jurisdiction and considered whether it was necessary therefore to remand Bonanno's claims against the local as well. The court decided that remand of those claims was not necessary, reasoning that: (1) to remand all the claims would be "inconsistent with the well-established rule that the removal statute embraces the same 'class of cases' as does the original jurisdiction statute;"²⁷² and (2) "before 1948, the 'arising under' defendant was allowed to remove his suit, leaving other defendants behind, if necessary,"²⁷³ and the Reviser's Note indicated that no change in substance was intended.²⁷⁴

Neither of these arguments is compelling. The first argument assumes that the *Bonanno* case was within the original jurisdiction of the federal court. Judge Breyer already had concluded that it was not. The second argument is suspect on at least two counts. *The Pacific Railroad Removal Cases*, on which the argument rested in part, has been criticized by the Supreme Court as exemplifying interpretation of jurisdictional statutes "as a wooden set of self-sufficient words."²⁷⁵ Moreover, the Reviser's substitution of "civil action" for "suit" may well indicate that a change in substance was intended.²⁷⁶ In any event, the court failed to explain why answering the question, "What may be removed?" would necessarily furnish the answer to the question, "What must be remanded?"

271. *Id.* at 11.

272. *Id.* (citing *Tennessee v. Union & Planters Bank*, 152 U.S. 454 (1894), which found that federal court lacked removal jurisdiction to hear bank's claim against the state, which did not arise under the Constitution or laws of the United States); see *Brough v. United Steelworkers of Am.*, 437 F.2d 748 (1st Cir. 1971) (concluding that the district court lacked removal jurisdiction where plaintiff raised only state law issues, but acquired removal jurisdiction when plaintiff amended complaint to allege claim within original federal jurisdiction); 1A MOORE's, *supra* note 1, ¶ 0.157[4.-1].

273. *Bonanno*, 708 F.2d at 11. The *Bonanno* court cited as examples *The Pacific Railroad Removal Cases*, 115 U.S. 1, 22-23 (1885), which held railway's separate and distinct federal claim properly removed even when its outcome could materially affect state court proceedings against defendants which were left behind; and *Galveston, Harrisburg & San Antonio Railway Co. v. Hall*, 70 F.2d 608 (5th Cir. 1934), which determined that defendant railway's claim against third-party defendant county should not have been tried in federal court, where district court had removal jurisdiction over plaintiff's federal question claim but lacked jurisdiction over defendant's third-party claim.

274. *Bonanno*, 708 F.2d at 11.

275. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Similarly, *Hall*, 70 F.2d at 608, has not met with approval. In the few instances in which the case has been cited, it usually has been distinguished or cited as a contrast with the citing court's position.

276. See 1A MOORE's, *supra* note 1, ¶ 0.157[1.-5] regarding the unit that is removable; *supra* text accompanying notes 62-64.

A second very interesting case involving removal of pendent party claims is *Adolph Coors Company v. Sickler*.²⁷⁷ Plaintiffs, the Adolph Coors Company, some of its distributors, and KQED, Inc., a public television station, brought suit in state court against two individuals, the Northern California Chapter of the AFL-CIO Coors Boycott Committee and that Committee itself, alleging state law tort claims against all defendants, and a claim of violation of secondary boycott prohibitions against the organizational defendants.²⁷⁸ After removal, the district court concluded that plaintiffs' tort claims were not so wholly preempted that they would arise under federal law.²⁷⁹ Hence, the question arose whether the district court could assert pendent party jurisdiction over the tort claims against the two individual defendants. In light of the Ninth Circuit's hostility toward such jurisdiction, the district court concluded that it could not exercise jurisdiction over those claims²⁸⁰ and had to remand them. It then considered whether to remand the entire action.

The court enumerated several arguments counseling remand of the entire suit. First, section 1441(b) makes removal proper only if the district court has original jurisdiction over the "civil action." That phrase generally is construed to mean the entire action. Because original jurisdiction was lacking over some elements of the action, removal would not be proper. The court was wary of this argument, however, because the usual effect of the broad construction of "civil action" has been to place an entire litigation in the federal court, whereas in this context the same construction would place the entire litigation in state court.²⁸¹

Second, part of the Reviser's Note to section 1441 indicates that "civil action" in sections 1441(a) and (b) should not be interpreted as "suit" in a previous version of the statute had been construed;²⁸² that is, it should not be interpreted as "cause of action."

Third, if Congress had intended to authorize partial removal in a pendent party case, it easily could have done so, as it has done elsewhere.²⁸³ Finally, the court believed that interpreting the words "civil action" to mean the entire case would promote judicial economy and efficiency, whereas under the competing approach,

277. 608 F. Supp. 1417 (C.D. Cal. 1985).

278. *Id.* at 1420. The secondary boycott prohibitions are in 29 U.S.C. § 158(b), § 8(b) of the National Labor Relations Act.

279. *Coors*, 608 F. Supp. at 1421-24.

280. *Id.* at 1424-25.

281. *Id.* at 1425 & n.8.

282. *Id.* at 1426 (citing Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 426 (1953); in contrast with the view expressed in *Bonanno*, see *supra* text accompanying notes 272-74).

283. 608 F. Supp. at 1426 (citing 28 U.S.C. § 1478(a)); see also § 1441(c).

a plaintiff in a pendent party situation . . . is incapable of litigating his claims in a single forum if the defendants desire to sever the action. Restrictive pendent party rules will preclude him from bringing his entire action in a federal forum. Alternatively, if the plaintiff attempts to pursue his litigation in a state forum, the "arising under" defendant can thwart the plaintiff's desire by removing those claims asserted against it.²⁸⁴

In view of the jurisdictional limits on the federal courts, the defendants, by removing the claims against them, could force the plaintiff into two forums, which would increase plaintiff's litigation costs and promote inefficient and duplicative expenditures of judicial resources.²⁸⁵

On the other hand, the court recognized arguments that favor remand of the pendent party claims only, while the federal questions and claims pendent thereto remain in federal court. It acknowledged the arguments made in *Bonanno*.²⁸⁶ In addition, the *Coors* court believed that retention of the federal questions would better serve the probable purposes of federal question removal, namely, protecting federal rights and providing a forum that can more accurately interpret federal law.²⁸⁷ Most compellingly, if the result were to be remand of the entire action, "a plaintiff wishing to prevent removal of his case could do so by the simple device of joining with his federal claim a related state claim against another defendant . . . [thus] taking [an] unfair advantage."²⁸⁸

Recognizing the unsatisfactory results flowing from both total remand and partial remand, the district court in *Coors* indicated that it favored adoption of the doctrine of pendent party jurisdiction in the context of removals. That result would allow the district court to adjudicate all of the claims in the action, which would serve economy and efficiency, while also affording a federal forum for the federal claims. Yet it would not open the doors of federal court to plaintiffs desiring to bring pendent party actions in federal court. It would fit with the typical pattern of ancillary jurisdiction, being available only to defending parties haled into court against their will.²⁸⁹ With that avenue closed in the Ninth Circuit, however, the court chose, as the lesser of two evils, to remand only the pendent party claims.²⁹⁰

284. *Coors*, 608 F. Supp. at 1426.

285. *Id.* at 1426, 1427 & n.10.

286. *See supra* text accompanying notes 265-74.

287. *See* *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 246 & n.13, 247 (1970) (where Justice Brennan observed that "the underlying purposes of Congress in providing for federal question removal jurisdiction remain somewhat obscure," but added that the purpose identified here in the text has been suggested).

288. *Coors*, 608 F. Supp. at 1426-27.

289. *Id.* at 1427 & n.11.

290. *Martin v. County of Kendall* is another case involving the remand of claims against pendent parties that, though decided on different grounds, still does not support the discretionary remand of pendent claims either under § 1447(c) or by virtue of inherent authority. 561 F. Supp. 726 (N.D. Ill. 1983). In *Martin*, the plaintiffs initially sued in state court, alleging both federal

Finally, there is *Contemporary Services Corp. v. Universal City Studios, Inc.*²⁹¹ Plaintiffs, who had provided security services at major sports and concert arenas, sued several defendants, claiming that their termination and replacement had been unlawful. Plaintiffs pled a federal RICO claim against five defendants, while pleading various state common-law and statutory claims against these five and three other defendants. Upon removal of the entire action to federal court, plaintiffs moved to remand.²⁹² After concluding that actions consisting of federal and pendent state claims are removable under sections 1441(a) and (b),²⁹³ and that the state court had concurrent jurisdiction over plaintiffs' RICO claim,²⁹⁴ the court considered the pendent party claims. It noted that the Court of Appeals for the Ninth Circuit takes the view that pendent party jurisdiction is unconstitutional. As a district court within that circuit, it was bound to remand those claims as having been removed "without jurisdiction."²⁹⁵

This aspect of the *Contemporary Services* decision furnishes no support for a broader right to remand pendent or ancillary claims. The court went further, however, and remanded as well the pendent claims against the defendants charged with RICO violations. It did so on the basis of the Ninth Circuit's decision in *Swett v. Schenk*,²⁹⁶ which it read to hold that district courts have discretion to remand pendent claims to state court once the basis for removal has been dropped, and for additional reasons that it believed justified remand in the circumstances of

§ 1983 claims and state tort claims against the county, an individual sheriff, and deputy sheriffs. After the voluntary dismissal of some of the § 1983 claims and involuntarily dismissal of others, a § 1983 claim remained against one individual and only state law claims survived against the county and two other individuals. *Id.* at 727-30. The court concluded it had constitutional power to adjudicate the pendent party claims, because they derived from a common nucleus of operative fact with the federal claim. *Id.* at 730-31. Strangely, it also concluded that it had statutory authority to hear the claims under § 1441(c), which allows removal when a separate and independent claim that would be removable if sued on alone is joined with otherwise nonremovable claims. *Id.* at 731. On that basis, the court had the discretion expressly conferred by § 1441(c) to remand the pendent party state law claims. It held that it had no authority under § 1441(c) or § 1447(c) to remand the entire case. *Id.* at 731 & n.13, 732.

Carnegie-Mellon makes clear beyond a doubt that claims cannot be both pendent and "separate and independent," within the meaning of the removal statute. *Carnegie-Mellon*, 108 S. Ct. at 621. Beyond that, if one views the *Martin* case as an ordinary pendent claim case and not truly a pendent party case—because initially both federal and state claims were asserted against each defendant—then *Carnegie-Mellon* lends support to its result, though not to its reasoning. If one views the case as presenting a pendent party configuration, then *Carnegie-Mellon* does not speak to the issues the district court had to confront.

291. 655 F. Supp. 885 (C.D. Cal. 1987).

292. *Id.* at 886-87.

293. *Id.* at 887-92; see *supra* text accompanying notes 53-97.

294. 655 F. Supp. at 892-93.

295. *Id.* at 894. There was no diversity between the plaintiff and defendants in question.

296. 792 F.2d 1447 (9th Cir. 1986); see *supra* note 261.

this case. The court noted that a motion to dismiss plaintiffs' RICO claim was pending and indicated that the complaint might well be insufficient.²⁹⁷ It cited, in addition, the statute of limitations problem plaintiffs otherwise might face.²⁹⁸ The court's references to the overcrowded dockets of the state court²⁹⁹ suggest that the court also may have been concerned that the pendent state law claims would go to the end of a very long queue if they were dismissed without prejudice, rather than remanded. In light of the kinship of the pendent and the pendent party claims, such an outcome would have been inconsistent with the judicial economy the court sought to foster.³⁰⁰

Because some of the factors that led to remand of pendent claims in *Contemporary Services* can exist only in cases containing claims held to be outside the federal courts' pendent party jurisdiction, even *Contemporary Services* was not precedent for a pervasive option to remand pendent or ancillary claims. Insofar as *Contemporary Services* approved the remand of ordinary pendent claims, it now has the imprimatur of the Supreme Court. Insofar as it remanded pendent party claims while retaining other aspects of the case, the Supreme Court has yet to approve.

5. The Proper Handling of Removed Cases Containing Pendent Party Claims

The initial question in a removed case containing pendent party claims should be whether it is a civil action over which the district courts have original jurisdiction. To be such an action, the claims in a pendent party action must derive from a common nucleus of operative fact and be such that plaintiff ordinarily would be expected to try them all in one judicial proceeding.³⁰¹ In order to be a civil action over which the district courts have jurisdiction, however, it also will be necessary that Congress has not expressly or by implication negated the existence of the particular proposed use of pendent party jurisdiction.³⁰² Whether Congress has done so will turn on the jurisdictional grant relied upon and upon the alignment of parties and claims involved.³⁰³

297. *Contemporary Servs.*, 655 F. Supp. at 895 n.11.

298. *Id.* at 896-97.

299. *Id.* at 895.

300. *See id.* at 895. The *Contemporary Services* court did not expressly consider the question discussed in *Bonanno*, *see* discussion *supra* text accompanying notes 272-74, and in *Coors*, *see* discussion *supra* text accompanying notes 281-90, whether the pendent party claims necessitated remand of the entire agglomeration of claims.

301. *Aldinger v. Howard*, 427 U.S. 1, 9, 13-15 (1976); *Bonanno*, 708 F.2d at 6-7. *See generally* Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 61-63.

302. *Aldinger*, 427 U.S. at 15-19.

303. *Id.* at 18.

If the Constitution or Congress has not granted to the district courts judicial power over the combination of claims in question, removal of the combination of claims under sections 1441(a) and (b) is unauthorized.³⁰⁴ As a practical matter, courts deal with contentions of unauthorized removal in the context of deciding motions to remand.³⁰⁵ The questions to be decided are whether the entire group of claims must be remanded, whether fewer than all of the claims may be remanded, and whether there are any additional alternatives.

Sections 1441(a) and (b) do not expressly address the scope of remand when a removal is unauthorized and brings before the federal court a claim or set of claims that exceeds the bounds of a civil action over which the federal courts have original jurisdiction. Section 1447(c) does address the question, directing that, “[i]f . . . the case was removed improvidently and without jurisdiction, the district court shall remand the case” Until recent years, litigants and the courts generally assumed, or construed section 1447(c) to mean, that all of what had come “up,” should go back “down,” if the removal was improper.³⁰⁶

This construction has much to recommend it. It treats the litigation unit put together by the plaintiff as the relevant unit for remand purposes, which seems to be the intent of section 1447(c). It also maintains symmetry between removal and remand. Arguably, just as no partial removals are authorized, no partial remands—creating the same results—should be permitted. This symmetry also is desirable because its absence would constitute an invitation to defendants to remove sets of claims that exceed a removable unit (i.e. a civil action of which the district courts have original jurisdiction). That ploy will fail only if the entire set of claims is remanded. If only the claims outside the district courts’ original jurisdiction are remanded, arguably the limited authorization of section 1441(a) will have been circumvented. In addition, this

304. See *supra* text accompanying notes 103-10. In part for reasons there noted, I disagree with the suggestion in *Coors* that there may be jurisdiction to hear pendent party claims on § 1441(a) and (b) removal when original jurisdiction to hear those claims would be lacking. While other removal authorizations, when applicable, allow removal of claims and combinations of claims that a plaintiff could not assert in federal court, § 1441(a) and (b) do not do so. The other arguments for pendent party jurisdiction that the *Coors* court makes—based on the “fit” with ancillary jurisdiction being available only to defending parties, and on the continuing ability to bar the door to plaintiffs seeking to assert pendent party claims—may be appropriate for a court *with jurisdiction* to consider in deciding whether to exercise jurisdiction over pendent party claims (a matter of discretion), but they do not create judicial power where it is lacking.

305. 14A WRIGHT & MILLER, *supra* note 54, § 3730, at 500 (removal does not depend on securing leave from the federal courts; the propriety of removal may be tested by a motion to remand).

306. *E.g.*, *Kunzi v. Pan Am. World Airways*, 833 F.2d 1291 (9th Cir. 1987) (in which the district court remanded entire case for lack of jurisdiction where it concluded that it lacked jurisdiction over the claims against particular defendants).

approach keeps all the claims together in one court, and thereby maintains any efficiencies that their joinder permits. It also prevents manipulative removals, through which defendants may seek to force plaintiffs into costly, duplicative litigation in both state and federal court. Some might say that this construction of the removal statutes is desirable as well, because it enhances the role of the state courts in deciding both state law claims and federal claims that arise from a common nucleus of fact.

There is an opposing set of arguments, however. One is the argument that, if remand of the entire action is required, plaintiffs who wish to prevent removal will be able to do so simply by joining with their federal claims a related state claim against another defendant.³⁰⁷ This device will not always be available to plaintiffs.³⁰⁸ But when a proper "state claim defendant" is available and plaintiffs join him, whether as a tactical move to defeat removal or for other reasons, this joinder will prevent federal claims from being heard by federal courts, despite defendants' preferences, if remand of the entire action is required.³⁰⁹ Is that result bad or unfair? If one believes that defendants, like plaintiffs, should be able to obtain what they view as the advantages of having a federal forum adjudicate federal claims, then this preclusion of the federal forum is undesirable and compulsory remand of the entire action would be bad. This preclusion can be eliminated by taking the stand that, if a plaintiff wants to prevent removal and to eliminate the risk of having to pursue actions in both state and federal court, she must refrain from asserting claims within federal jurisdiction.³¹⁰

The Supreme Court in *Carnegie-Mellon* indicated that the "rules of the game" should not be dictated by the possibility that plaintiffs may manipulate their pleadings in an effort to control the forum, but

307. See *Adolph Coors Co. v. Sickler*, 608 F. Supp. 1417, 1426-27 (C.D. Cal. 1985).

308. Of course, if plaintiffs do not have available to them a person whom they can properly make a defendant on state law claims, then no problems of pendent party jurisdiction, of the sort under discussion, will arise.

309. Improper joinder of a state claim defendant against whom plaintiff has asserted no colorable claim, or a claim whose joinder is patently improper, should not preclude removal. See, e.g., *Anderson v. Home Ins. Co.*, 724 F.2d 82 (8th Cir. 1984) (finding that joinder of nondiverse defendant who was not indispensable did not defeat removal); *Tedder v. F.M.C. Corp.*, 590 F.2d 115 (5th Cir. 1979) (concluding that the case was properly removed where there was no reasonable basis for predicting that plaintiff would prevail against nondiverse defendants).

310. *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987) (stating that the well-pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." (footnote omitted)); see also *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) (stating that "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced"); *Great N. Ry. v. Alexander*, 246 U.S. 276, 282 (1918) (stating that "the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case").

that the district courts should take account of any such manipulative maneuvers as part of the balancing of factors that goes into the decision of whether to remand particular claims over which federal courts have discretionary jurisdiction.³¹¹ This reasoning might suggest that federal courts should not blanketly refuse to remand entire actions, as a prophylactic to defeat a manipulative selection of claims and defendants. The relevance of this approach to the problem at hand depends, however, on whether the decision concerning what the federal court must not hear is also discretionary. Because the premise of our present discussion is that the Constitution or Congress has not granted to the district courts judicial *power* over the combination of claims in question, the determination of what to dislodge from federal court is not inherently discretionary. This situation then does not involve a jurisdiction whose exercise is a matter of discretion, which can be influenced by evidence of forum manipulation.

It is nonetheless possible to make the law turn on whether a plaintiff's decision to assert a related state law claim alone, against an additional defendant, was motivated by a desire to render the action unremovable. To require the federal courts to inquire into the subjective intentions of plaintiffs, or their attorneys, to determine federal jurisdiction is a poor investment of resources. Subjective motivation seems a most peculiar determinant of jurisdiction, in any event. An objective bright-line is far superior.

If one takes the bright-line stand that only the pendent party claims beyond original federal jurisdiction will be dislodged from federal court, a plaintiff who wants to prevent removal, and to eliminate the risk of having to pursue actions in both state and federal court, will have to refrain from asserting claims within federal jurisdiction. That regime may chill some plaintiffs from bringing their federal law claims, a matter of legitimate concern. The present state of the law, however, is much to the same effect. As the law stands, the plaintiff, as master of the complaint, can choose to assert federal claims and run the risk of removal, or can choose to refrain from asserting federal claims, and guarantee the state court forum.

Another argument has its roots in Congress' intention to grant removal jurisdiction over the same class or universe of cases as falls within original federal jurisdiction,³¹² except as Congress has expressly provided otherwise. Keeping this intention in mind, it is most instructive to compare what occurs when an overbroad group of claims is as-

311. *Carnegie-Mellon*, 108 S. Ct. at 622.

312. This generalization is subject to exceptions not pertinent for present purposes. See *supra* notes 3, 37.

serted in a single lawsuit commenced in federal court, ostensibly under jurisdictional statutes that themselves confer jurisdiction over "civil actions."³¹³ As a practical matter, the federal court dismisses those particular claims that are beyond its jurisdiction, while retaining the claims within its jurisdiction.³¹⁴ This procedure does not require the waste of effort entailed in dismissing the entire group of claims and having plaintiff refile only those claims within federal cognizance.³¹⁵

One may well conclude that a like result after removal—the federal court entertaining the federal claims, but ridding itself of state law claims that are beyond its authority—is most consistent with the overall mosaic of the jurisdictional statutes. That result can be achieved without doing violence to the remand language of the removal statute by the federal court dismissing, without prejudice, those claims over which original jurisdiction is lacking.³¹⁶ (If any violence is done to the limited authorization of removal, it is no greater than, but merely parallels, the violence done to section 1331 when plaintiffs are permitted to assert in federal court more than a "civil action," with the only penalty being dismissal without prejudice of those claims beyond the court's jurisdiction.) This approach will result in something approaching partial removal, but it would not operate through partial removal. Moreover, partial dismissal seems to be a reasonable reading of constructive congressional intent. That is, if Congress had considered this question, it most likely would have expected the courts to do on removal what they had long done³¹⁷ in cases begun in federal court, dismiss only those claims that put before the court more than a civil action over which it had jurisdiction.

Based on the Supreme Court's decision in *Carnegie-Mellon* that

313. *E.g.*, 28 U.S.C. §§ 1331, 1343(3).

314. *See, e.g.*, *Aldinger*, 427 U.S. at 5; *Wigand v. Flo-tek, Inc.*, 609 F.2d 1028, 1033 (2d Cir. 1979) (district court adjudicating federal securities act claim should have dismissed nonpendent breach of contract claim); *Umdenstock v. American Mortgage & Inv. Co.*, 495 F.2d 589, 593 (10th Cir. 1974) (district court adjudicating federal antitrust claims did not abuse its discretion in dismissing nonpendent state law claims); *see also* *Martin v. County of Kendall*, 561 F. Supp. 726, 730 (N.D. Ill. 1983) (noting that had the complaint been filed in this court, the court would have had to dismiss the state claims against the nonfederal defendants).

315. If the entire group of claims were dismissed, a plaintiff could choose to sue on only his state law claims in state court. When federal question claims are retained by the federal court, the plaintiff can voluntarily dismiss them, *see* FED. R. CIV. P. 41(a), and can choose to sue on only his state law claims in state court. If the plaintiff, in either of these dismissal situations, reasserted both his federal and his state law claims in state court, defendant might seek to remove, creating the situation under discussion in the text.

316. *See, e.g.*, *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 188 (7th Cir. 1984). The court dismissed a pendent party claim in a removed case after the federal claim against the codefendant had been dismissed before trial. The court also questioned whether the state law claim had the factual nexus with the federal claim to be truly pendent. *Id.* at 187.

317. *See supra* note 314.

the federal courts may remand claims in situations other than those explicitly authorized in sections 1441(c) or 1447(c), and on its argument from section 1441(c), one might suppose that the Court would take the position that section 1441(c) indicates that, if Congress had addressed the proper disposition of removed cases involving pendent party claims, Congress would have authorized the district courts to remand those claims while retaining the rest of the case. However, neither aspect of the *Carnegie-Mellon* decision necessitates that result. The Court recognized power to remand only those claims within the courts' discretionary jurisdiction, and it read section 1441(c) only to manifest the belief "that when a court has discretionary jurisdiction over a removed state-law claim and the court chooses not to exercise its jurisdiction, remand is an appropriate alternative."³¹⁸

It must be conceded that, in the removal context, a remand of the entire group of claims would not result in the same waste of effort that is invited by dismissal of the entirety commenced in federal court. The plaintiff who prefers a state court will not, on remand, amend the complaint to eliminate the claims that got in the way of federal jurisdiction. She will stand pat, leaving the defendant unable to remove. This recognition weakens the comparison to what occurs when an overbroad group of claims is asserted in a suit commenced in federal court. It does not, however, substantially undercut either the argument that defendants should be able to obtain a federal forum for federal claims or the argument that dismissal of the extraneous claims would better comport with Congress' goal of allowing defendants to bring to federal court, by way of removal, the same claims or cases a plaintiff could commence there.

If a court takes the tack just argued to be permissible, then (for so long as the federal claim remains pending) the plaintiff in a pendent party situation will be incapable of litigating all her claims in a single forum if the defendants remove. Proceeding in both state and federal court may well increase plaintiff's litigation costs, and promote inefficient and duplicative expenditures of judicial resources.

To this concern there are some partial answers. First, a plaintiff is not compelled to go forward in both fora, or even to refile in state court unless and until the statute of limitations requires that suit to be commenced. Whether or not the state suit has been rekindled, in a substantial number of instances it might well be tactically wise, as well as conservative of resources, for the plaintiff to press forward with only one of the suits. If it reaches judgment, the prevailing party may be able to collaterally estop the losing party from relitigating certain issues. To that extent, inefficient and duplicative expenditures of both

318. *Carnegie-Mellon*, 108 S. Ct. at 621.

the parties' and the courts' resources will be avoided. Even assuming that the plaintiff can derive no advantage from the doctrine of collateral estoppel,³¹⁹ success in one case might well prompt advantageous settlements with the remaining potential defendants. Increased litigation cost and inefficient and duplicative expenditures would be minimized, if not eliminated. Second, one must remember the alternative: if the federal court had to remand the entire set of claims, a plaintiff could prevent removal simply by joining with her federal claim a related state claim against another defendant.

So long as the federal claim is pending in federal court, it ordinarily will make sense for the federal court to exercise jurisdiction over the pure pendent claims asserted against the federal defendants. Particularly if the federal claim suffers the fate of an early dismissal, however, the federal court in its discretion may at some time decide that it does not want to adjudicate the pure pendent claims. Under *Carnegie-Mellon*, the court may remand or dismiss those claims that were not removed improvidently or without jurisdiction. At that point, the plaintiff can refile the state claims in state court, if necessary. The states alone should retain the option to lift the bar of the statute of limitations if necessary and appropriate. If any of the pendent or pendent party claims are dismissed rather than remanded, the state court may consolidate the actions if that is feasible and appropriate.

One should also distinguish from the situation contemplated in the last several paragraphs a circumstance in which a combination of claims is removed which the federal courts have both constitutional and statutory authority to hear—even as to the pendent party claims.³²⁰ Then, if the court chooses not to hear any of the state law claims, its choice is purely an exercise of discretion. For the reasons elaborated earlier, the court should be able to dismiss but not remand the state law claims. *Carnegie-Mellon* says the court has authority to remand. A court could rid itself of the pendent party claims while retaining the pendent claims, or at least in theory do the opposite, or retain some claims in each category while dismissing the others. Its decisions would be reviewable under an abuse of discretion standard.

319. Collateral estoppel would preclude the relitigation of issues actually litigated and necessarily decided in the first suit only if the original defendants and the defendants in the second suit were "in privity" and if the other requirements for offensive use of collateral estoppel also were met. See generally *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

320. In *Aldinger* the Court left open the possibility that it would recognize and permit pendent party jurisdiction in appropriate circumstances. 427 U.S. at 18.

D. Reviewability

When the Supreme Court decided in *Carnegie-Mellon* that district courts may remand pendent claims within their jurisdiction, it apparently did not take into account the implications with respect to appellate review, nor did it allow its decision to be influenced by those implications. In evaluating the arguments for and against the option to remand such claims, as an alternative to dismissing them, however, it is appropriate to consider the implications of remand and of dismissal, respectively, on the availability of appellate review of the trial court's decisions. Such an examination is appropriate because Congress and the courts have created a system that carefully interweaves and balances plaintiffs' rights to litigate in state court, defendants' rights of removal, the courts' duty or discretion to remand, and the availability of appellate review.

The system works as follows. Plaintiffs may sue in state court. Defendants then may remove to federal court the civil action brought against them. If the district court keeps the case, its exercise of jurisdiction is reviewable only after final judgment,³²¹ unless an interlocutory appeal is permitted pursuant to 28 U.S.C. section 1292(b) or otherwise.³²² Appellate review of the removal only after final judgment (which is the norm) carries with it the risk that the parties and the court will have invested in the case for naught. If the appellate court holds that the district court lacked subject matter jurisdiction over the case, the judgment will have to be voided and the action remanded for

321. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 8 (1951); *Jones v. Newton*, 775 F.2d 1316, 1317 (5th Cir. 1985).

322. Section 1292(b) provides in pertinent part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order

28 U.S.C. § 1292(b) (1982); *see, e.g., Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180 (5th Cir. 1985) (dismissing because Aucoin had not filed a request for permissive appeal with the appellate court within ten days after the § 1292(b) order was filed); *Pueblo Int'l, Inc. v. De Cardona*, 725 F.2d 823, 825 (1st Cir. 1984) (§ 1292(b) appeal of district court order removing the case); *see also Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987) (reviewing denial of remand in conjunction with a § 1292(a)(1) appeal from the grant of a preliminary injunction), *cert. denied*, 108 S. Ct. 1302 (1988); *Three J Farms, Inc. v. Alton Box Board Co.*, 609 F.2d 112 (4th Cir. 1979) (exercising its power of mandamus, the appellate court overturned the trial court's vacatur of its own remand order), *cert. denied*, 445 U.S. 911 (1980). *See infra* text accompanying note 349. Section 1447(d) does not prohibit review of refusals to remand, whether review is by direct appeal, interlocutory appeal from an injunction against state court proceedings, appeal from a final judgment, or mandamus. 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-3], at 704-07.

lack of subject matter jurisdiction.³²³ These consequences may be unfortunate, but they flow from our "final judgment rule,"³²⁴ the absence of any statutory or common-law exception to it in the ordinary case,³²⁵ and the overriding importance of the constitutional and statutory limits upon the subject matter jurisdiction of our federal courts.³²⁶ A very similar waste of resources occurs when a federal court of appeals or the Supreme Court holds that the federal district courts lacked jurisdiction over a suit initiated in federal court.

In order to reduce the number of occasions on which review after final judgment may entail a waste of resources, the Supreme Court held in *Grubbs v. General Electric Credit Corp.*³²⁷ that

where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue . . . on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.³²⁸

By virtue of the *Grubbs* doctrine, district court judgments will be up-

323. *E.g.*, *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986).

324. Under the final judgment rule that prevails in the federal courts, appeals are allowed only after all the issues raised in a lawsuit have been finally determined by the trial court, unless a statutory or common-law exception to the rule applies. *See generally* 9 J. MOORE & B. WARD, *MOORE'S FEDERAL PRACTICE* ¶ 110.06 (2d ed. 1987) [hereinafter 9 MOORE'S]; 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3905 (1st ed. 1976) [hereinafter 15 WRIGHT & MILLER].

325. The statutory exceptions to the final judgment rule include statutes that allow interlocutory appeal of particular kinds of orders, such as 28 U.S.C. § 1292(a)(1), (2), (3), and statutes that permit interlocutory appeal when both the district judge and the appellate court agree that it would be appropriate. *See* 28 U.S.C. § 1292(b), *supra* note 322. The two best recognized common-law exceptions to the final judgment rule are the collateral order doctrine that derives from *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and the doctrine that allows immediate review if the appellant might suffer irreparable harm if review were postponed. *See Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848).

326. The absence of subject matter jurisdiction may be raised at any time, even on appeal in the United States Supreme Court, and both the trial and appellate courts are under a duty to raise it, if the parties fail to do so. *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908).

327. 405 U.S. 699 (1972).

328. *Id.* at 702; *accord Finn*, 341 U.S. at 16-17. Longstanding decisions were said to make this clear. The *Grubbs* Court, 405 U.S. at 702, 703, cited *Baggs v. Martin*, 179 U.S. 206, 209 (1900) (holding that a receiver who removed an action against him could not object to the removal after an adverse judgment, because the federal court that had appointed him would have had original jurisdiction over the action) and *Mackay v. UINTA Dev. Co.*, 229 U.S. 173, 175-77 (1913) (determining that where the parties were diverse, defendant's counterclaim met the jurisdictional amount requirement, and the court of appeals had certified the question whether defendant could remove "[a]ssuming that" his claim provided all the jurisdictional elements essential to enable the federal trial court to hear it if he had commenced action on it in that court, then any irregularities in the order of the pleadings were waivable, and did not deprive the federal court of power to adjudicate). In *Grubbs* itself, the Court upheld the judgment entered on claims between *Grubbs*, *GECC* and *General Electric*, where the requisite diversity was present and the amount in controversy requirements was met, despite the fact that removal had been permitted, under 28 U.S.C. § 1444, at the instance of the United States, which had been brought in on a spurious basis. 405 U.S. at 702, 705-06. *See generally* 14A WRIGHT & MILLER, *supra* note 54, § 3739, at 577-80.

held when the flaws in the removal are for such defects as untimely filing of the removal petition,³²⁹ removal in violation of the bar in 28 U.S.C. section 1445(a),³³⁰ removal at the instance of an unqualified party such as a nondiverse defendant-intervenor against whom no federal claim has been asserted,³³¹ removal incorrectly predicated upon the involuntary dismissal of nondiverse defendants,³³² and failure of all defendants to join the removal petition.³³³ Some judgments are saved, while the federal courts remain restricted to adjudicating cases that fall within their original jurisdiction.

Under *Grubbs*, judgments can be saved only when plaintiffs failed to make an appropriate objection to flaws in the removal. A body of case law consequently has developed defining precisely what a plaintiff must do to escape the *Grubbs* rule and to obtain an appellate ruling that the district court's decision must be vacated because of improper removal. The Court of Appeals for the Ninth Circuit, for example, has held that to escape *Grubbs* a plaintiff not only must move to remand the action to state court, but also must preserve his objection to removal by seeking an interlocutory appeal of the district court's order denying his motion to remand.³³⁴

329. *E.g.*, *Leininger v. Leininger*, 705 F.2d 727 (5th Cir. 1983) (finding that untimeliness of removal did not defeat jurisdiction so as to require reversal of district court's judgment in removed case over which court had diversity jurisdiction).

330. *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117-18 (5th Cir. 1987). Section 1445(a) bars removal of suits arising under the Federal Employer's Liability Act, including Jones Act claims. *Id.* at 117.

331. *Smith v. City of Picayune*, 795 F.2d 482, 485 (5th Cir. 1986) (finding the district court had jurisdiction at judgment time by virtue of plaintiff's constitutional claims and the presence of the FmHA (Farmers Home Administration) as an intervenor-defendant able to remove under 28 U.S.C. § 1442(a)(1)).

332. *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 773-74 (9th Cir.), *cert. denied*, 107 S. Ct. 580 (1986).

333. *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511, 518 (7th Cir. 1985).

334. *E.g.*, *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 798-99 (9th Cir. 1987). Because of plaintiff's failure to seek interlocutory appeal of the denial of his motion to remand, he could challenge the removal only on the ground that the district court would not have had jurisdiction if the case originally had been filed there. The court rejected the argument that the Supreme Court implicitly held in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), "that a litigant need not apply for an interlocutory appeal to preserve an attack on removal jurisdiction." *Id.* at 799. *See Gould*, 790 F.2d at 774 (9th Cir.) (plaintiff must have the remand issue certified for interlocutory appeal; otherwise, he bears the risk that jurisdiction will exist at final judgment), *cert. denied*, 107 S. Ct. 580 (1986); *Lewis v. Time, Inc.*, 710 F.2d 549, 552 (9th Cir. 1983) (in which plaintiff's appeal of remand denial was rejected where plaintiff failed to seek interlocutory appeal, and jurisdiction existed at time of final judgment); *Sheeran v. General Elec. Co.*, 593 F.2d 93, 97-98 (9th Cir.) (plaintiffs were precluded from arguing improper removal when they had not sought an interlocutory appeal when their motion to remand was denied, nor raised the issue upon the interlocutory appeal from the order denying their motion for summary judgment), *cert. denied*, 444 U.S. 868 (1979). *But see La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 341-42 & n.1 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975). Where plaintiffs had unsuccessfully attempted to have the

When a case has been removed to federal court under sections 1441(a) and (b) and if the district court dismisses the action, with or without prejudice, the same doctrines govern the appealability of the dismissal as would apply if the case had been commenced in federal court in the first instance. This result is evident from the removed cases that have been dismissed under the derivative jurisdiction doctrine,³³⁵ for example. In removed cases, only parts of which have been dismissed for reasons of derivative jurisdiction, the eleventh amendment, lack of power, or an exercise of discretion under pendent jurisdiction, the same doctrines as apply in cases commenced in federal court again govern the appealability of the dismissal.³³⁶ In light of the absence of a final judgment, the parties need a certification under Rule 54 of the Federal Rules of Civil Procedure,³³⁷ if applicable, or pursuant to 28 U.S.C. section 1292(b),³³⁸ or another exception to the final judgment rule in order to appeal the dismissal immediately.

It will be recalled that this Article maintains that the federal courts lack authority to remand pendent and ancillary claims in order to implement a discretionary decision not to hear them. The Supreme Court has held otherwise, but it also has sustained the power of the district

removal question certified for review under 28 U.S.C. § 1292(b), and had not raised the issue on an appeal from the denial of a preliminary injunction, reviewable under 28 U.S.C. § 1292(a), the Court of Appeals held that denial of the motion to remand could be challenged after final judgment. Three justices dissented from the denial of certiorari, urging that jurisdictional questions be reviewed at the first available opportunity and that if the appeal on the injunction was a suitable occasion for considering remand, *Grubbs* should be extended to require the question to be raised on such an appeal. 421 U.S. at 938 (White, J., dissenting). As to the suitability of the action, see *Takeda v. Northwestern National Life Insurance Co.*, 765 F.2d 815 (9th Cir. 1985) (upholding appellate jurisdiction to review refusal to remand when propriety of the removal was intertwined with the propriety of injunction against prosecution of a parallel state action, which was on appeal), and *James v. Bellotti*, 733 F.2d 989, 992 (1st Cir. 1984) (finding refusal to remand was reviewable in conjunction with § 1292(a)(1) appeal of denial of an injunction).

335. *E.g.*, *United States for Owens-Corning Fiberglass v. Brandt Constr. Co.*, 826 F.2d 643 (7th Cir. 1987), *cert. denied sub nom. Brandt v. Uptown Nat'l Bank*, 108 S. Ct. 751 (1988); *Salveson v. Western States BankCard Ass'n*, 731 F.2d 1423 (9th Cir. 1984); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385 (11th Cir. 1982); *Washington v. American League*, 460 F.2d 654 (9th Cir. 1972).

336. *E.g.*, *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680 (9th Cir. 1980). Such partial dismissals would be improper if, by virtue of some claims not belonging in federal court, the court should conclude that the whole civil action was removed without jurisdiction. *But see supra* note 261 and text accompanying notes 312-17. This criticism would not apply to discretionary dismissals.

337. FED. R. CIV. P. 54 provides in pertinent part:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Id.

338. *See supra* note 322.

courts to dismiss pendent claims (rather than remand them) when that action seems to be the more appropriate way of implementing their discretionary decisions not to hear such state law claims.³³⁹ When pendent claims are so dismissed, the dismissal is with prejudice to their reintroduction into federal court. Hence, appellate review of those dismissals is available.³⁴⁰ If the dismissal is contemporaneous with or follows the district court's disposition of all other claims in the case, the necessary final judgment exists. If other claims remain pending, then a Rule 54(b) certification is necessary, or a statutory or common-law exception to the final judgment rule needs to apply, if review is to be had before the remaining claims are finally resolved. In any of these circumstances, state court proceedings on the dismissed claims may be recommenced and proceed, unless the federal court dismissal is stayed, pending appeal. The standard of review is a hard-to-meet abuse of discretion standard, which probably will be nigh impossible to meet if reversal would require a duplication of effort already expended in the federal or state court, or both.

The system works rather differently when a district court decides to remand a civil action removed under sections 1441(a) and (b). First, section 1447(d) generally forbids review of remand orders, stating, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."³⁴¹ The Supreme Court in *Thermtron* and elsewhere has traced the roots of this provision, but that full history will not be reiterated.³⁴² Suffice it to say that, during most of the history of our judiciary, orders of remand have not been reviewable by appeal or writ of error. The Court originally rested this nonreviewability on the lack of a final judgment.³⁴³ Congress altered this system in the Judiciary Act of 1875, expressly providing for review on writ of error or appeal of any order dismissing or remanding a cause brought in or removed to federal court because the case did not really

339. *Carnegie-Mellon*, 108 S. Ct. at 619 (framing the question as whether the district court could relinquish jurisdiction only by dismissing without prejudice or could remand as well).

340. *See, e.g., Cook v. Weber*, 698 F.2d 907 (7th Cir. 1983). The district court had dismissed claims brought under 42 U.S.C. § 1983, based on a prosecutor's absolute immunity from such suits. It then had dismissed without prejudice the remaining counts, which stated pendent state law claims. In the context of a challenge to the appellate court's jurisdiction, the Seventh Circuit explained that dismissal is not the functional equivalent of remand; crucial distinctions between the two affect the availability of appellate review. On the merits, the courts affirmed the district court judgment.

341. In language not pertinent for present purposes, the statute continues, "except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d).

342. For the Supreme Court's review of the history see *Thermtron*, 423 U.S. at 346-52.

343. *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507 (1874).

or substantially involve a dispute properly within federal jurisdiction.³⁴⁴ But in 1887 Congress repealed that authorization, directing instead that "no appeal or writ of error from the decision . . . so remanding such cause shall be allowed."³⁴⁵ These provisions were included in the Judicial Code of 1911 and remained in effect until section 1447 was enacted in 1948.³⁴⁶ As originally enacted, section 1447 omitted the prohibition against appellate review, but that omission was eliminated by the addition of section 1447(d) in 1949.³⁴⁷

Consequently, the district court's remand order is ordinarily not reviewable by appeal, including interlocutory appeal under 28 U.S.C. sections 1292(a) or (b), by mandamus, or by any indirect route.³⁴⁸ Some courts hold that the remanding district court itself "is divested of jurisdiction to reconsider the matter, [so that] even if it later decides the order was erroneous, a remand order cannot be vacated. . . ."³⁴⁹ These

344. See *Thermtron*, 423 U.S. at 346 n.10.

345. See *id.* at 347 n.11.

346. See *id.* at 347-48.

347. *Id.* at 348. Because the remand order is interlocutory it was not appealable as a final judgment, even during that interim period. However, it was reviewable by a petition for writ of mandamus, see *Wiswall*, 90 U.S. (23 Wall.) 507, and *In re Pennsylvania Co.*, 137 U.S. 451 (1890), and an indirect review sometimes was possible under 28 U.S.C. § 1292(a). 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-1], at 686 n.2. As to the genesis of § 1447, see generally Herrmann, *supra* note 113, at 397-405.

348. See *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 637 F.2d 391, 396-97 (5th Cir. 1981), *appeal after remand*, 675 F.2d 1169 (11th Cir. 1982) (stating in dictum that a party cannot collaterally attack a remand order by alleging an independent action involving the same parties and claims as were present in the initial action; this suit was a permissible collateral attack); *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971) (noting that the policy against reviewing remand orders could not be avoided by invoking the declaratory judgment act; thus, the remand order was res judicata as to the further attempt to litigate the same issues in federal court by bringing a declaratory judgment action), *cert. denied*, 405 U.S. 964 (1972); *cf.* *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1303 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). In *Rath Packing*, defendant's answer and cross-complaint in state court, raising a claim for declaratory and injunctive relief under federal law, were filed after remand and did not raise issues necessarily adjudicated by the court in deciding to remand; maintenance of defendant's claim in federal court, a claim filed before remand of the state court actions, did not circumvent § 1447(d). The district court had made no decision with regard to the propriety of a federal forum for Rath's claims. See *H.J. Heinz Co. v. Oweus*, 189 F.2d 505, 508 (9th Cir. 1951) (observing that declaratory judgment legislation was not intended to enable a party to accomplish what the removal act would not permit), *cert. denied*, 342 U.S. 905 (1952); accord 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-1], at 695-96. Section 1447(d) does not, however, bar remand orders of the courts of appeals. Their orders are reviewable by the United States Supreme Court. *Aetna Casualty & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947); *Gay v. Ruff*, 292 U.S. 25 (1934). See generally 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-1], at 688-90.

349. *New Orleans Pub. Serv., Inc. v. Majoue*, 802 F.2d 166, 167 (5th Cir. 1986) (*dicta*); see also *Seedman v. United States District Court*, 837 F.2d 413, 414 (9th Cir. 1988); *Browning v. Navarro*, 743 F.2d 1069, 1078-79 (5th Cir. 1984); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279 n.3 (9th Cir. 1984); *FDIC v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979). *But see* 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-1], at 696-97. Moore noted that until the steps have been taken to carry a remand into effect, the district court has power to vacate its order. But

courts find the prohibition against such district court reconsideration in section 1447(d)'s declaration that a remand order is not reviewable "on appeal or otherwise."³⁵⁰ More importantly, they find the reasons for foreclosing review to be as applicable to trial court reconsideration as they are applicable to appellate review.

What are the reasons for the general rule of nonreviewability of remand orders? Some cases view the rule as a mechanism to contract federal subject matter jurisdiction and limit the volume of federal litigation.³⁵¹ Most often, the rule has been explained as a means of moving cases along to adjudication on the merits,³⁵² in a state court whose subject matter jurisdiction ordinarily is unquestionable. In this way, final resolution of the controversy is expedited. If the remand was in error, however, defendants are forever deprived of the federal forum to which they were entitled, because the remand order is never reviewable, not even after final judgment.³⁵³ Furthermore, an erroneous remand never

"the entry of the order of remand and the mailing of a certified copy to the clerk of the state court completely divests the federal court of jurisdiction so that it is powerless to vacate the order of remand." (footnote omitted).

350. *Three J. Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *In re La Providencia Dev. Corp.*, 406 F.2d 251, 253 (1st Cir. 1969). Possible exceptions have been recognized when the remand order has not yet been mailed to, or reentered by, the state court. *See Bucy v. Nevada Constr. Co.*, 125 F.2d 213, 218 (9th Cir. 1942) (holding that before a remand order is executed, a district court may grant a rehearing on the motion to remand); *Cook v. J.C. Penney Co.*, 558 F. Supp. 78, 79 (N.D. Iowa 1983) (in which the court reconsidered remand order when a copy of the order had not yet been sent to the state court).

351. *E.g.*, *Missouri Pac. Ry. v. Fitzgerald*, 160 U.S. 556, 581, 583 (1896). In *Fitzgerald* the Court spoke of § 2 of the Act of March 3, 1887, which provided that when a case was remanded as improperly removed, "such remand shall be immediately carried into execution, . . . and no appeal or writ of error . . . shall be allowed." *Id.* at 581-82. Nonreviewability of remand orders also saves federal judicial resources at the appellate level. *In re Carter*, 618 F.2d 1093, 1099 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981).

352. *E.g.*, *Thermtron*, 423 U.S. at 351 (stating that "in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c)"). Note also the dissenting opinion in *Thermtron*, which vigorously argued that Congress had made the district courts the final arbiters of whether removed actions were to be tried in federal court to prevent the delay that defendants might achieve by seeking appellate review of remand orders. It argued that review to remedy district court errors is not compelled, and that Congress had balanced the disruption and delay review would cause against the "minimal possible harm" to the removing party, and had concluded that no review should be permitted. 423 U.S. at 354-55 (Rehnquist, J., dissenting). *See also United States v. Rice*, 327 U.S. 742, 751 (1946) (by § 2 of the Act of 1887, Congress "established the policy of not permitting interruption of the litigation of the merits . . . by prolonged litigation of questions of jurisdiction"); *Kloeb v. Armour & Co.*, 311 U.S. 199 (1940) (finding 28 U.S.C. §§ 71, 80, limited review of remand orders to prevent delay); *Browning*, 743 F.2d at 1076, 1078 (taking guidance from the jurisprudence of § 1447(d) and its predecessors in construing 28 U.S.C. § 1478(b), making nonreviewable the bankruptcy courts' remand orders).

353. *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 565 (1941) (concluding remand order is not reviewable, directly or indirectly); *McLaughlin Bros. v. Hollowell*, 228 U.S. 278, 286 (1913); *Fitzgerald*, 160 U.S. at 582-83; *Browning*, 743 F.2d at 1077 (finding that a remand order is

has been grounds to vacate a valid state court judgment, to allow relitigation in the federal court. Defendants are protected only in that any state court decisions of federal law may be reviewed by the Supreme Court of the United States.³⁵⁴

Section 1447(c) directs remand of "the case" if a case was removed improvidently or without jurisdiction. It further directs that an order remanding "a case" not be reviewable on appeal or otherwise. Nonetheless, if a district court remands some, but fewer than all, of the claims in a case, its remand order is equally unreviewable.³⁵⁵

This whole scheme, with remand orders unreviewable except in very limited circumstances, is obviously very different from the set of procedures available when a federal court decides either that a case commenced there is beyond its subject matter jurisdiction or that a formal or technical irregularity³⁵⁶ taints the initiation of the proceedings. When such an irregularity is not or cannot be cured, as well as when the court lacks subject matter jurisdiction, the court will dismiss the case, either with or without prejudice.³⁵⁷ The plaintiff is free at that point to appeal, challenging the trial court's action as erroneous.³⁵⁸ If the appellate court holds that the trial court erred, and in particular that the case does fall within federal subject matter jurisdiction, the case will be returned to the district court for adjudication on its merits. The system is manifestly not one in which a plaintiff is relegated to state court if the district court erroneously believes either that it lacks jurisdiction over the case, or that the plaintiff failed to comply with a procedural nicety regarding service or process. Instead, the trial court's error is corrected and the case remains and proceeds within the federal court system.

Although section 1447(d) generally forbids review of remand orders, there exist important exceptions to this rule. The Supreme Court held in *Thermtron* that "only remand orders issued under section 1447(c) and invoking the grounds specified therein—that removal was

not reviewable on appeal from a final judgment in the highest court of the state).

354. *Fitzgerald*, 160 U.S. at 583-84 (stating that if state court denies rights secured by the Constitution and laws of the United States, the aggrieved party may appeal the judgment of the highest court of the state to the United States Supreme Court).

355. See *Nasuti v. Scannell*, 792 F.2d 264, 265 (1st Cir. 1986); cf. *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 866 (9th Cir. 1987).

356. Such irregularities include lack of personal jurisdiction over a party, improper venue, and defective process or service of process.

357. Under Rule 41(b), FED. R. CIV. P. 41(b), unless the court otherwise specifies, any dismissal, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication on the merits.

358. Orders granting motions to dismiss, as to all claims and all defendants, are final, and the fact that an order of dismissal is without prejudice to the institution of another proceeding does not deprive it of finality. See generally 15 WRIGHT & MILLER, *supra* note 324, § 3914, at 541-45.

improvident and without jurisdiction—are immune from review under section 1447(d).³⁵⁹ It stated that “[i]f a trial judge purports to remand a case on the ground that it was removed ‘improvidently and without jurisdiction,’ his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise.”³⁶⁰ However, the Court found in the predecessors of sections 1447(c) and (d) and in the legislative history “no indication whatsoever that Congress intended to extend the prohibition against review to reach remand orders entered on grounds not provided by the statute.”³⁶¹ The Court observed that it never had construed the prohibition against review of remand orders “so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal.”³⁶² The Court declined to reach that result. On the facts before it, where the district judge had remanded a properly removed case on grounds not recognized by section 1447(c), issuance of the writ of mandamus was not barred by section 1447(d), and was in fact appropriate.³⁶³

A substantial number of cases since have arisen in which defendants have challenged remand orders and sought to bring their cases within the exception to nonreviewability carved out in *Thermtron*. In many of these cases their efforts were quickly and easily rebuffed.³⁶⁴ In

359. *Thermtron*, 423 U.S. at 346.

360. *Id.* at 343.

361. *Id.* at 350.

362. *Id.* at 352.

363. *Id.* at 351-53; see *supra* text accompanying notes 116-18. In a subsequent decision, the Court has reiterated that “[w]here the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand.” *Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977). It has reversed a Fifth Circuit order that vacated a remand because the district court had employed erroneous principles in concluding that it was without jurisdiction. The Supreme Court found that the remand order was plainly within the bounds of § 1447(c), and hence was unreviewable. *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977). Mr. Justice Rehnquist, sitting as a Circuit Justice, has denied a stay of a remand order which was explicitly based on a finding that the district court did not have jurisdiction; it made no difference that the remand may have been erroneous. *Volvo of Am. Corp. v. Schwarzer*, 429 U.S. 1331, 1333 (1976).

364. See, e.g., *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm’n*, 829 F.2d 967, 970 n.1 (10th Cir. 1987); *Vatican Shrimp Co. v. Solis*, 820 F.2d 674, 679-80 (5th Cir.), cert. denied, 108 S. Ct. 345 (1987); *Federal Deposit Ins. Corp. v. Alley*, 820 F.2d 1121, 1123-24 (10th Cir. 1987) (refusing to review where district court remanded explicitly because the case was “improvidently removed,” but was silent on whether it was “without jurisdiction”); *Black & Decker, Inc. v. Brown*, 817 F.2d 13, 14 (3d Cir. 1987) (refusing review where district judge had filed an opinion concluding that the case was removed improvidently and without jurisdiction, but the remand order had not yet been entered); *Sanger-Harris v. Richards*, 812 F.2d 211 (5th Cir.), cert. denied, 108 S. Ct. 88 (1987) (refusing review despite fact that defendant did not receive notice of motion to remand and had no opportunity to oppose it); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540-41 (11th Cir. 1987) (refusing to create an exception to § 1447(d) where the decision to remand was clearly erroneous); *National City Bank v. Coopers & Lybrand*,

some, however, the courts of appeals have had to decide how to handle lack of specificity by the district courts as to the grounds of their remands. They have found poorly explained remands to have been based on section 1447(c), and hence unreviewable, and have imposed, as a prerequisite to review, a requirement that the district court have affirmatively stated and relied upon a non-1447(c) ground.³⁶⁵

Most interesting are the occasions on which the courts of appeals have found reasons to afford review. In a few cases the courts have found grounds to hold section 1447(d) inapplicable. In *In re Carter*,³⁶⁶ for example, the Fifth Circuit held that section 1447(d) does not bar review of a remand order issued after entry of final judgment.³⁶⁷ The

802 F.2d 990, 993 (8th Cir. 1986) (holding remand order was unreviewable to extent it was based on a lack of jurisdiction under § 1331. The court did, however, consider whether the case arose under federal bankruptcy jurisdiction, § 1334(b)); *Nasuti v. Scannell*, 792 F.2d 264, 267-69 (1st Cir. 1986) (concluding § 1447(d) barred review of remand order entered in a case removed under the Federal Drivers Act, 28 U.S.C. § 2679(d)); *In re Oximetrix, Inc.*, 748 F.2d 637, 642-43 (Fed. Cir. 1984); *Division of Archives, History & Records Management v. Austin*, 729 F.2d 1292, 1293 (11th Cir. 1984) (where district court's opinion indicated that it ordered remand because removal jurisdiction was lacking due to the "saving to suitors" clause of 28 U.S.C. § 1333, and the eleventh amendment, review was barred); *Royal v. State Farm Fire & Casualty Co.*, 685 F.2d 124, 125-27 (5th Cir. 1982); *Self v. Self*, 614 F.2d 1026, 1027-28 (5th Cir. 1980); *Wilkins v. Rogers*, 581 F.2d 399, 402-03 (4th Cir. 1978); *London v. United States Fire Ins. Co.*, 531 F.2d 257, 258-60 (5th Cir. 1976); *Midland Mortgage Co. v. Winner*, 532 F.2d 1342, 1344 (10th Cir. 1976).

365. *Vatican Shrimp Co.*, 820 F.2d at 680; *Division of Archives*, 729 F.2d at 1293 (finding review available only where district judge stated openly that he was relying on a non-section 1447(c) ground); *In re Weaver*, 610 F.2d 335, 336-37 (5th Cir. 1980) (holding review would not be afforded where judge had remanded on grounds that removal was no longer available after petitioners had obtained dissolution of a temporary injunction in state court; though the ruling was not within the grounds enumerated in § 1447(c), the judge had not stated a non-section 1447(c) ground). This very problem was predicted by Justice Rehnquist, dissenting in *Thermtron*: "[T]here is no reason to expect that district courts will always afford such explanations. . . . [I]s there now jurisdiction in the courts of appeals to compel an explanation. . . . ? Are potential challengers . . . to demonstrate that the order entered . . . was a sham . . . ?" *Thermtron*, 423 U.S. at 357 (Rehnquist, J., dissenting). *But see Herrmann*, *supra* note 113, at 407-08, 417-18 (arguing for an interpretation of *Thermtron* that would prohibit review of only those remand orders that are actually based on the grounds specified by § 1447(c), as determined by an examination going beyond the face of the remand order).

366. 618 F.2d 1093 (5th Cir. 1980), *cert. denied sub nom.* *Sheet Metal Workers' Int'l Ass'n v. Carter*, 450 U.S. 949 (1981).

367. Section 1447(c) did not provide for such a remand order because it applies only to remands entered before final judgment. *See supra* note 112; *see also Bloom v. Barry*, 755 F.2d 356 (3d Cir. 1985) (determining § 1447(d) prohibition was inapplicable where the remand order did not remand to the state court from which the action was removed, but to a state court of the state where the transferee federal court sat). Hence, in *In re Carter*, review of the remand by writ of mandamus was not inconsistent with *Thermtron*. 618 F.2d at 1099-1100. Moreover, the Fifth Circuit found that the policy underlying § 1447(d)—avoiding delay in reaching the merits—did not apply with the same force to remand orders issued after final judgment. It reasoned that:

Deliberately subjecting the state court and the litigants to any risk of error without recourse to appellate review is a gamble . . . and the stakes . . . are much greater after a case has proceeded to judgment Federal judicial resources, once expended . . . cannot be recouped [R]emand . . . no longer fosters prompt resolution of the merits . . . but

largest category of occasions in which the appellate courts have justified review is comprised of cases in which non-section 1447(c) grounds were found to have been relied upon. In some of these cases, remand was the consequence of a substantive decision on the merits, apart from any jurisdictional decision.³⁶⁸ The remand orders were held appealable

serves instead only to delay final resolution by subjecting the litigants to a second, and the state court to a possibly duplicative, trial Extending the prohibition of review in § 1447(d) to a remand order entered outside the time frame specified in § 1447(c) therefore . . . can only compound unnecessarily the undesirable consequences that ineluctably accompany any rule which makes a possible judicial error unreviewable.

Id. at 1099. Convinced that it should not allow a litigant who has had a full trial to use the remand apparatus to force further expenditure of its opponents' and the state courts' resources before review of the jurisdictional issue by an appellate court, the Fifth Circuit held review available through a petition for writ of mandamus. *Id.* at 1099-1100 n.6. The court also found strong similarities between a remand after final judgment and a remand to state court ordered by an appellate court. The latter does not come within the bar of § 1447(d). *Id.* at 1100 (citing *inter alia* *Willingham v. Morgan*, 395 U.S. 402, 404 (1969)).

On its review of the propriety of the remand order, the appellate court held that the trial court had erred in concluding that it had no jurisdiction by virtue of the status of the case at pre-trial, instead of determining its jurisdiction by reference to the complaint as it existed when the petition for removal was filed. *Id.* at 1101. The Fifth Circuit found that plaintiff had alleged two claims over which the court had had federal question jurisdiction. Despite their elimination from the suit, the district court properly could have decided to retain pendent jurisdiction over the state law claim that remained. The appellate court therefore remanded to allow district court consideration of whether to exercise that jurisdiction, which would avoid duplicative state court proceedings. *Id.* at 1105. When a court will affirm if given the opportunity, it may simply "assume" it has jurisdiction. *See, e.g., In re Iowa Mfg. Co.*, 747 F.2d 462, 463 & n.2 (8th Cir. 1984); *see also Black & Decker, Inc. v. Brown*, 817 F.2d 13 (3d Cir. 1987) (holding § 1447(d) barred review of remand decision though district court had not yet entered its remand order). This case is clearly distinguishable—no full trial yet had been held—though both this case and *In re Carter* can be viewed as involving attempts to get review based on differences in timing between the situation described in § 1447(d) and the circumstances presented. Judge Garth dissented in *Black & Decker*, arguing that § 1447(d)'s bar had not attached and that the court should perform its traditional appellate function when no statute required it to forego doing so.

Justice Rehnquist strongly disagreed with the decision in *In re Carter*, calling it "manifest disregard of the language of Congress" in § 1447(d). *Sheet Metal Workers' Int'l Ass'n v. Carter*, 450 U.S. 949 (1981) (Rehnquist, J., dissenting from denial of certiorari). He asserted that nothing in *Thermtron* suggested an exception to § 1447(d)'s prohibition based merely on the timing of the remand order and roundly criticized the Fifth Circuit's policy analysis as both inappropriate in light of the statute's "plain language" and unsound. His reasoning was that appellate affirmance of remand orders creates wasteful delay and that the benefit of avoiding state court retrial can be had only by review of *all* remand orders after final judgment. *Id.* at 952.

While that last proposition is true, a relatively small percentage of remand orders are entered after final judgment. If the avoidance of delay and conservation of judicial resources in reaching a valid binding determination on the merits is the overriding goal of § 1447(c), (d) it may well be that an appeal that can save a final federal court judgment is well worth the time and effort entailed. *In re Carter* also was criticized by Justice Brennan as failing to strictly observe the restrictions on removal jurisdiction. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 410 n.6 (1981) (Brennan, J., dissenting).

368. The underlying rationale of these cases is that the principle of nonreviewability of a district court's remand order does not preclude review of judicial action taken prior to remand, which would prejudice the rights of one of the parties if left undisturbed. 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-2], at 702.

under 28 U.S.C. section 1291 as collateral final orders.³⁶⁹ The cases of greatest interest for the purposes of this Article are those that treat the question of whether discretionary remands of pendent and ancillary claims are reviewable under section 1447(d) and *Thermtron*. Consistent with the analysis presented earlier herein to the effect that such refusals to litigate state law claims to judgment on the merits are not predicated on a lack of jurisdiction, within the meaning of section 1447(c), a number of appellate courts have held that any discretionary remand of pendent or ancillary claims is reviewable by mandamus under *Thermtron* and under the removal statutes.³⁷⁰

Most recently, in *Price v. PSA, Inc.*³⁷¹ and in *Scott v. Machinists Automotive Trades District Lodge No. 190*,³⁷² the Ninth Circuit held that the district courts' decisions not to exercise their discretion to hear pendent claims, but instead to remand them, did not constitute deci-

369. Thus, in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), review was afforded by the Ninth Circuit where the district court's validation of the parties' contractual forum selection clause (selecting a California state court) formed the basis of its remand order. To have held otherwise would have deprived a litigant of the right to appeal a determination of substantive contract law. *Id.* at 277. The Ninth Circuit ruled similarly again in *Clorox Co. v. United States District Court*, 779 F.2d 517 (9th Cir. 1985), in which the district judge's order gave no reason for the remand, and the preceding motion was described as being "pursuant to . . . § 1447(c)." *Id.* at 520. Looking to the surrounding circumstances, the appeals court found that the remand was based on a substantive decision on the merits, that Clorox, by statements in its employee handbook, had waived the right to remove. *Id.* at 520; accord *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988). *Cf.* *Price v. PSA, Inc.*, 829 F.2d 871, 873 n.1 (9th Cir. 1987). The court in *Price* rejected defendants' contention that the remand was based on a matter of substantive law: the district court's construction of the parties' stipulation-to-remand if, on filing of plaintiffs' amended complaint, it was apparent that there was no federal jurisdiction. The court found, as a fact, that the remand was based instead on discretion to remand state claims once federal claims had dropped out.

Waiver is not among the grounds of remand authorized by § 1447(c). In *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985), the Eleventh Circuit reviewed a remand in the context of reviewing the vacation of a state court judgment. *Id.* at 803. The court commented that the proper way to challenge a remand is by writ of mandamus, and it reserved the question whether it could review a non-section 1447(c) remand as part of a direct appeal over which it had independent jurisdiction. *Id.* at 802 n.3; see also *Moses v. Banco Mortgage Co.*, 778 F.2d 267 (5th Cir. 1985) (reviewing a remand in the context of reviewing an order under Fed. R. Civ. P. 60(b)) (see discussion *supra* note 126); *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 748-49 (5th Cir. 1975) (finding remand did not bar review of dismissal of third-party complaint against HUD, which removed the case pursuant to 28 U.S.C. § 1442 (relying on *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934))).

370. That position is consistent with one recently proposed by a commentator. In Herrmann, *supra* note 113, the author argues that: (1) remands for lack of jurisdiction in the classic sense are unreviewable; (2) remands grounded on independent rulings on nonjurisdictional questions are reviewable by appeal; and (3) remands based on considerations not authorized by law are reviewable by mandamus. *Id.* at 422-23. The author does not consider the possibility of remands authorized by law but not by either § 1441(c) or § 1447(c). He recognized that § 1447(d) prohibits review of only those remand orders entered pursuant to § 1447(c). *Id.* at 422.

371. 829 F.2d 871 (9th Cir. 1987).

372. 827 F.2d 589 (9th Cir. 1987).

sions that the claims were removed improvidently and without jurisdiction. Hence, the appellate court could review the district courts' dispositions of the claims before them, not on appeal but on a petition for a writ of mandamus.³⁷³ Two other decisions of the Ninth Circuit rendered earlier in 1987 also had held the bar of section 1447(d) to be inapplicable when the district court had jurisdiction over one or more federal questions and when review, by way of mandamus, was sought of remand orders entered with respect to state law claims.³⁷⁴

Earlier, the Sixth Circuit, in *In re Romulus Community Schools*,³⁷⁵ also had held that a discretionary remand of pendent state law claims is not a remand on section 1447(c) grounds. Because that discretion was the sole express reason for remand, neither *Thermtron* nor section 1447(d) prohibited review.³⁷⁶ To the same effect is the Fifth Circuit's decision in *In re Greyhound Lines, Inc.*³⁷⁷ No holdings to the contrary appear to exist, although isolated dicta can be found.³⁷⁸

A case certainly can be made for the proposition that these appellate decisions are correct and that their correctness tends to be confirmed by *Carnegie-Mellon*. *Carnegie-Mellon* held that pendent claims may be remanded, not pursuant to sections 1441(c) or 1447(c), but by dint of power in the federal court that derives from the doctrine of pendent jurisdiction. Indeed, the Court proclaimed that, "the remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all."³⁷⁹ Since *Thermtron* held that "only remand orders issued under section 1447(c) and invoking the grounds specified therein—that removal was

373. *Price*, 829 F.2d at 873 & n.1, 874; *Scott*, 827 F.2d at 592, 594. Judge Tang, who had written an opinion that was withdrawn (reported at 815 F.2d 1281 (9th Cir. 1987)), dissented in part in *Scott*. He argued that the district court had said explicitly that the tort counts were removed improvidently because they were not preempted by federal law. Although erroneous, the remand order was, in Judge Tang's view, thereby insulated from review. *Scott*, 827 F.2d at 595.

374. In both cases, the court ultimately denied mandamus, holding that it was within the district court's discretion to remand the state claims. *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 865-66 (9th Cir. 1987); *Survival Sys. Div. v. United States Dist. Court*, 825 F.2d 1416, 1418-19 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 774 (1988).

375. 729 F.2d 431 (6th Cir. 1984).

376. *Id.* at 434-35.

377. 598 F.2d 883, 884-85 (5th Cir. 1979).

378. *See, e.g.*, *Spencer v. New Orleans Levee Bd.*, 737 F.2d 435, 438 (5th Cir. 1984) (where the court concluded that "discretionary" remand of the main action was authorized under § 1447(c) and immune from review under § 1447(d)); *Cook v. Weber*, 698 F.2d 907, 908-09 (7th Cir. 1983) (where the district court had dismissed pendent state law claims, without prejudice, the Seventh Circuit said in passing that if the trial court should have remanded the state claims, the order would be nonappealable under § 1447(d)). The remand may not have been discretionary, however, because the claim upon which removal was predicated was within exclusive federal jurisdiction. *See supra* note 261.

379. *Carnegie-Mellon*, 108 S. Ct. at 621 n.11.

improvident and without jurisdiction—are immune from review under section 1447(d),³⁸⁰ it would seem to follow that the review of orders remanding pendent claims, in the discretion of the district court, is not prohibited either by *Thermtron* or by section 1447(d).

The appellate court decisions, however, may not be right. Section 1447(d) does not by its terms limit its scope to section 1447(c) remands. It merely states that “[a]n order remanding a case to the State court from which it was removed is not reviewable by appeal or otherwise. . . .” When the Court wrote the opinion in *Thermtron*, it may have failed to envision even the possibility of remand orders that were authorized by law and yet were not grounded in the statute. This failure to envision such remand orders may explain the Court’s broad statement above.³⁸¹ But the Court might actually have meant that section 1447(d) makes unreviewable only remand orders authorized by law; that while section 1447(d) does extinguish the power of an appellate court to correct a district court that has merely erred in applying the law concerning remand, it does not extinguish the power to correct a remand on grounds not warranted by law at all. (The remand order involved in *Thermtron* was not authorized by law, statutory or otherwise.) If that meaning is what the Court intended, then today, when remands of pendent claims may lawfully be ordered, section 1447(d) would forever bar review of remand orders entered pursuant to the doctrine of pendent jurisdiction even if those orders were mistaken or were abuses of discretion.³⁸²

Particularly in view of the unreviewability of remand orders based upon the holding that a removal was improvident and without jurisdiction, unreviewability of merely discretionary remands of pendent state law claims would seem to make eminent sense.³⁸³ This conclusion, however, would mean that remands of pendent claims would be unreviewable while dismissals, without prejudice, of pendent claims would be reviewable. That would be a problematic state of the law.³⁸⁴ In some

380. *Thermtron*, 423 U.S. at 346. See generally text accompanying notes 359-63.

381. 423 U.S. at 346.

382. This view is in accord with the conclusion recently reached in *Corcoran v. Ardra Insurance Co.*, 842 F.2d 31, 34-35 (2d Cir. 1988), in which the court held that review of an order remanding an action to state court on discretionary abstention grounds was not barred by § 1447(d), but that the appeal nonetheless had to be dismissed because, under *Thermtron*, the only proper vehicle for review of a remand order is mandamus. The issuance of mandamus was not warranted.

383. See *infra* text accompanying note 397.

384. As Judge Kearse recently observed,

If the district court dismisses an action on grounds that are discretionary, its order may be appealed and may be reversed if it has abused its discretion; yet the effect of denying direct appeal of a reviewable remand order is to insulate the order when the district court (1) has the power to dismiss on a discretionary ground, (2) chooses instead to remand on that ground, and (3) would have abused its discretion in dismissing on that ground, for mandamus . . . will

circumstances, this procedure might work well, allowing district courts to dismiss when they welcomed appellate review of a "hard" decision, while allowing them to remand when appellate review would accomplish little. Since the standard of review in these cases would be abuse of discretion, however, review usually would be unavailing, in any event. In addition, such a system could work less benignly, allowing district judges to avoid reversal by remanding. Finally, the choice between remand and dismissal often will be driven by statute of limitations or other considerations that have no bearing on the value of appellate review in a particular case. To the extent that this is true, it is anomalous for remand and dismissal to have different appellate consequences.

If one takes the opposite view, that section 1447(d) and *Thermtron* permit review of orders remanding pendent claims, in the discretion of the district court, the question arises, how would that review come about? Heretofore, the appellate courts that entertained such cases did so on petitions for writs of mandamus.³⁸⁵ Now that the Court has established that pendent claims may be remanded in the discretion of the district court, however, it is highly unlikely that mandamus will be granted. The worst sin a district court will have committed is an abuse of discretion, but mandamus does not lie to correct such a transgression.³⁸⁶ Remand orders therefore would have to go to the appellate court as final judgments, or pursuant to an exception to the final judgment rule, or when the final judgment of the district court comes down, if any of those routes are available.³⁸⁷ Because this Article is now proceeding on the assumption that section 1447(d) would not bar review, review should be available through the ordinary channels unless some other obstacle exists. As noted earlier, the Court originally rested the nonreviewability of remand orders on the lack of a final judgment. It said that a remand order was instead "a refusal to hear and decide," for which the remedy was mandamus.³⁸⁸ Our notions of final judgments and of the circumstances under which orders should be afforded immediate appellate review have changed substantially since that time, however. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*³⁸⁹ the Court held a district court's stay of an action to be a final

not issue to remedy an ordinary abuse of discretion. It is hardly clear to us that such insulation of a reviewable remand order is necessary or sound.

Corcoran v. Ardra Ins. Co., 842 F.2d 31, 34-35 (2d Cir. 1988).

385. See *supra* text accompanying notes 363 and 370-77.

386. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-83 (1953) (noting that the All Writs Act is meant to be used only where there is a clear abuse of discretion or usurpation of judicial power).

387. See *supra* text accompanying note 348.

388. Railroad Co. v. Wiswall, 90 U.S. (23 Wall.) 507, 508 (1875).

389. 460 U.S. 1 (1983).

order appealable under 28 U.S.C. section 1291. The Court ruled that a stay which "refuses to allow the plaintiff to litigate his claim in federal court" is final and appealable "when the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal suit to a state court."³⁹⁰ The words of the Court aptly describe remand orders.³⁹¹

In addition, remand orders should be regarded as appealable collateral orders.³⁹² The remand will finally determine the forum, a matter that is an important issue completely separate from the merits of the action. The Court held in *Moses H. Cone* that "[a]n order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits."³⁹³ Moreover, failure to allow immediate review would effectively deny any right of review.³⁹⁴ Once the pendent claims are remanded back to state court, a federal appellate court no longer has jurisdiction to review the remand,³⁹⁵ and a state appellate court lacks power to restore the claims to federal court, in the unlikely event it is so inclined.³⁹⁶

Once remand orders are recognized to be final, appealable orders, it will follow that if the discretionary remand of pendent state claims is contemporaneous with or follows the district court's disposition of all other claims in the case, the necessary final judgment will exist. Even if other claims remain pending in federal court at the time of the remand order, that order will be immediately appealable.

390. *Id.* at 10-11 n.11 (emphasis in original).

391. *Accord Corcoran*, 842 F.2d at 34 (stating that "[u]nder the surrender-of-federal-jurisdiction test used in *Moses H. Cone*, we wonder whether it can logically or prudently remain the rule that a reviewable remand order (*i.e.*, one whose review is not barred by § 1447(d)) is not reviewable by direct appeal").

392. *See National City Bank v. Coopers & Lybrand*, 802 F.2d 990, 992 n.2 (8th Cir. 1986) (remand was final collateral order); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277-78 (9th Cir. 1984) (remand, predicated on enforcement of forum selection clause, was reviewable as a collateral final order). In *Survival Systems Division v. United States District Court*, 825 F.2d 1416, 1418 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 774 (1988), the court characterized *Pelleport* as holding "that a remand order may be reviewed on appeal as a final collateral order . . . if the order resolves the merits of a matter of substantive law apart from any jurisdictional decision"; *cf.* *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 195-97 (3d Cir.), *cert. denied sub nom.* *Coastal Steel Corp. v. Wheelabrator-Frye, Inc.*, 464 U.S. 938 (1983) (denial of motion to enforce a forum selection clause reviewable as collateral final order); *but see Nasuti v. Scannell*, 792 F.2d 264, 267 (1st Cir. 1986) (ordinarily, a remand order is considered interlocutory and does not fall within appellate jurisdiction over final orders).

393. *Moses H. Cone*, 460 U.S. at 12.

394. These are the criteria for an appealable collateral order under *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1136-37 (1988).

395. The remand order ends the jurisdiction of the federal court. *United States v. Rice*, 327 U.S. 742 (1946).

396. Indeed, the state court system cannot review the federal court's decision to remand. *See Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 568-69 (1941); *Missouri Pac. Ry. v. Fitzgerald*, 160 U.S. 556, 582 (1896); *see also supra* note 353.

In the wake of *Carnegie-Mellon*, the law is yet to be developed on all of this. The discovery of mechanisms to allow appeal of the remand orders will have the virtue of making appealability the consequence of both discretionary dismissals and discretionary remands of pendent claims. With such a system, a court need not factor concerns about the reviewability of its decisions into the choice between remand and dismissal.

The overall scheme does retain some perverse aspects, however. The irony or perversity inherent in the foregoing is that the statutory scheme makes available appellate review of discretionary dismissals (and perhaps discretionary remands) of pendent and ancillary claims, while it refuses appellate review to nondiscretionary decisions against the constitutional or statutory authority of the federal courts to hear removed claims. This result is perverse because discretionary decisions, by their very nature, are such that different judges may reasonably come to different conclusions.³⁹⁷ Review of such decisions therefore would seem less essential than review of nondiscretionary conclusions as to jurisdiction, based upon holdings of law. As previously noted, the system also affords review to decisions against jurisdiction that are made in cases originated in federal court.

These anomalies could be cured by elimination of review for all discretionary dismissals and remands of pendent claims. Congress, however, should reconsider the statutory prohibition against appellate review of remand orders entered on the grounds of removal being improvident or without jurisdiction. To the extent the denial of appellate review is intended as a mechanism to limit the volume of federal litigation, it is a remarkably unprincipled tool. Congress should not rely upon judicial error in recognizing federal cases as a docket control device.

The rationale of moving cases along to judgment on the merits in a state court of unquestionable jurisdiction is far more difficult to

397. *In re Exterior Siding & Alum. Coil Antitrust Litig.*, 696 F.2d 613, 619 (8th Cir. 1982); see also *Donlon Indus. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968) (when an issue is reviewable only for abuse of discretion, the likelihood of reversal is too negligible to justify the delay, expense, and burden of an immediate appeal); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 368 (1975) (arguing that judicial discretion exists in the sense that "there is more than one decision that will be considered proper by those to whom the decision-maker is responsible, and whatever external standards may be applicable either cannot be discovered by the decision-maker or do not yield clear answers to the questions that must be decided"); Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (distinguishing primary discretion, when an adjudicator has "a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process[;]" from secondary discretion, which "comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision").

counter. The nonreview rule generally does accomplish that goal. The policy question is whether that accomplishment is worth the price of depriving some defendants of a federal forum to which they are entitled. In making that judgment, one has to place a value on the avoidance of the attendant delay, expense, and effort, as well as on the provision of a federal forum for federal question cases.

Ultimately, the belief that the time and effort expended in the appellate enterprise is worthwhile and necessary in order to afford to defendants the congressionally conferred right to a federal forum must form the basis of this Article's recommendation.³⁹⁸ In considering the dictates of federalism, it is wise to remember the reasons for federal jurisdiction³⁹⁹ and the duty of the federal courts to entertain cases within their jurisdiction.⁴⁰⁰ "Removal is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law,'"⁴⁰¹ and, if a case is one to which the judicial power of the United States extends, its removal does not invade state jurisdiction. Rather, denial of the right to remove is a denial of a conceded sovereignty.⁴⁰² The statutory provision barring appellate review of holdings against federal jurisdiction substantially undermines these weighty policies, and shifts to state court cases that belong in federal court.

One has to recognize certain additional realities, however. Not all defendants would persuade an appellate court of their entitlement to a federal forum. Delay and expense in reaching the merits therefore would be suffered by plaintiffs who successfully defend the remand order as well as by plaintiffs who, on appeal, lose on their contention that

398. Otherwise, I would urge that the anomaly be excised by elimination of appellate review of remand orders based on grounds extrinsic to § 1447(c).

399. *Tennessee v. Davis*, 100 U.S. 257, 265-66 (1880), holds that the grant to the federal courts of jurisdiction over cases involving rights under the laws of the United States is necessary for the preservation of the acknowledged powers of the government. It is essential . . . to a uniform and consistent administration of national laws. It is required for the preservation of that supremacy which the Constitution gives to the general government If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme.

Id. Cf. *Contemporary Servs. Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885, 891 (C.D. Cal. 1987) (stating that "a district court, recognizing its own comparative expertise, should at least accept removal of the federal claim while remanding the state claims").

400. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976). The Court spoke of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," citing *England v. Medical Examiners*, 375 U.S. 411, 415 (1964), in the context of analyzing when federal courts should apply the abstention doctrine, which it called "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy before it," quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959).

401. *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 560 (1968).

402. *Davis*, 100 U.S. at 266-67.

the case was not removable. The delay suffered by plaintiffs therefore will not always be offset by the provision of a federal forum to defendants who otherwise would have been wrongly deprived of that forum. Time, money, and effort will be lost and nothing gained, or at least no ruling changed, by the appellate review.

The use of sanctions to punish and deter removals that are not well grounded in fact, not warranted by existing law, not a good faith argument for the change of existing law, or that are motivated by improper purposes (including desire to cause unnecessary delay or increased cost) could help.⁴⁰³ Similarly, the use of sanctions to punish and deter frivolous appeals of remand orders⁴⁰⁴ could help. However, neither would eliminate unsuccessful appeals from remand orders, were such available.

In addition, of the defendants erroneously denied the federal court system by the district court, some will prevail in the state court. Regarding them at least, the erroneous denial of the federal forum may have been a "harmless error." Even as to the cast-off defendants who lose in state court, how many would have won in federal court? One can only speculate. Even then, would the change in result establish that the remand was prejudicial?

These arguments are weighty, and yet other notions are more compelling. A federal forum should be available to defendants in federal question cases. Having the federal forum is valuable in itself, and its value does not depend on whether the outcome in the federal court will differ from the outcome the state court would reach. Our legislation generally reflects and seeks to implement those convictions. The right to a federal forum should not be defeated or subverted by unreviewable district court error.⁴⁰⁵

403. See FED. R. CIV. P. 11. In addition, § 1447(c) permits an award of "just costs" if a case was removed improvidently and without jurisdiction. Bad faith is not required. *News-Texan, Inc. v. City of Garland*, 814 F.2d 216, 220 (5th Cir. 1987). See 14A WRIGHT & MILLER, *supra* note 54, § 3739, at 586-87 (commenting that assessing just costs is appropriate when the nonremovability of the action is obvious).

404. See FED. R. APP. P. 38 (stating that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee"). Rule 38 sanctions were imposed on appellant appealing a remand order in *News-Texan*, 814 F.2d at 221.

405. In Herrmann, *supra* note 113, at 414-15, the author recently defended the bar on review of remand orders based on lack of jurisdiction, on the ground that "[j]urisdictional issues . . . can generally be readily resolved by reference to a well-established body of law . . . [I]t is far less likely that a jurisdictional question will be decided incorrectly than most substantive questions. . . . Moreover, [such] remand orders . . . will affect only the forum. . . ." By way of response, the amount and persistence of litigation over "arising under" jurisdiction belie Herrmann's view. See, e.g., *supra* note 35 (discussing the recent group of cases regarding complete preemption); see also *Guidry v. Durkin*, 834 F.2d 1465, 1468 n.4 (9th Cir. 1987) (alluding to "the extraordinarily difficult problem of ascertaining a basis for removability in those state court actions in which no federal officers are involved as defendants"). Moreover, insofar as jurisdictional issues

Finally, it is not true that reversal of a remand order necessarily will entail the nullification of progress made in a case back in state court, after remand.⁴⁰⁶ A district judge can stay his remand order, pending appeal.⁴⁰⁷ Alternatively, so long as appellate jurisdiction attaches before the remand is executed, the federal appellate court can stay the remand, pending appeal.⁴⁰⁸ If a case has gone back to state court, there is no need to waste pretrial progress made there. If a case has gone to trial, but not yet reached judgment, it ought to be left in state court, absent extraordinary circumstances. Once it has gone to judgment, *res judicata* should determine the federal appeal.

IV. CONCLUSION

A civil action, filed in state court, that includes both state law claims and related federal claims is removable under 28 U.S.C. sections 1441(a) and (b), as long as the state law claims fall within the pendent or pendent party jurisdiction of the federal courts. The Supreme Court now has held that the lower federal courts have discretion to remand pendent state claims to state court, under *United Mine Workers v. Gibbs*. The courts are not required, by either section 1447(c) of the removal statute or *Thermtron Products, Inc. v. Hermansdorfer*, to dismiss such claims without prejudice when they have determined that adjudication by a federal court would be inappropriate. For the reasons elaborated above, the Court has misconstrued the removal statute and interpreted its *Thermtron* opinion in an unwarranted manner. More-

turn on questions of fact, there is no reason to expect that those determinations would be reversed less often than judge-made fact findings in other contexts. Finally, a change of forum can affect the enforcement of the parties' substantive rights, although not their abstract rights. That very fact is often behind removals.

406. Such nullification was a concern of the court in *Sykes v. Texas Air Corp.*, 834 F.2d 488, 490-91 (5th Cir. 1987).

407. When an appeal is taken, the appellant, by giving a supersedeas bond, may obtain a stay, subject to exceptions stated in FED. R. Civ. P. 62(a), (d). This applies to stays of remand orders. "The federal courts . . . clearly have the discretionary power to grant a stay of the remand order pending appeal to the court of appeals or petition for certiorari in the Supreme Court." 1A MOORE'S, *supra* note 1, ¶ 0.169[2.-1], at 700 n.55; *cf.* *Santa Margarita Mut. Water Co. v. State Water Rights Bd.*, 165 F. Supp. 870, 879 (S.D. Cal. 1958) (making advance announcement of intention to remand, to give government an opportunity to seek prohibition or mandamus to prevent entry of remand order).

408. Application for a stay of the judgment or order of a district court pending appeal may be made to the court of appeals. It must, however, show that application to the district court for the relief sought is not practicable, or has been denied, and for what reasons. FED. R. APP. P. 8(a). *See, e.g.*, *Board of Educ. v. City-Wide Comm. for the Integration of Schools*, 342 F.2d 284, 286 (2d Cir. 1965) (staying affirmance of remand for the time required to present issue to the Circuit Justice). The state court is forbidden from proceeding unless and until the case is remanded. 28 U.S.C. § 1446(c)(5)(e) (1982). If a case had gone back to state court, there would be no need to waste any progress made. *Cf. supra* text accompanying note 245.

over, in interpreting both section 1447(c) and *Thermtron* to permit remand upon an extra-statutory basis that supports dismissal without prejudice, the Court has opened a Pandora's Box. It now remains to be decided what doctrines, in addition to that of pendent jurisdiction, will permit the remand of properly removed cases, in derogation of the statutory authorization of remand only when a civil action was removed improvidently and without jurisdiction.

The Court's decision in *Carnegie-Mellon* also was made without consideration of its implications with respect to appellate review. That decision has heightened the importance of the question whether discretionary remands of properly removed cases will be immune from review under section 1447(d). If such remand orders are unreviewable, a problematic state of the law has been created, because dismissals, without prejudice, of pendent claims will be reviewable. The choice between remand and dismissal generally will be driven by statute of limitations or other considerations that have no bearing on the value of appellate review. On the other hand, if review of discretionary remand orders is held to be unobstructed by section 1447(d), and mechanisms are found to invoke appellate jurisdiction, then the anomaly just noted will be eliminated, but another will be created. Appellate review will be available for discretionary remands and dismissals of pendent claims, but not for nondiscretionary decisions against the constitutional or statutory authority of the federal courts to hear removed claims.

Finally, the courts need to distinguish the issues posed in pendent party cases from those resolved in *Carnegie-Mellon*. Civil actions, brought in state court, that contain combinations of state and federal claims that exceed the original jurisdiction of the federal courts pose questions of removability and remandability not touched upon by *Carnegie-Mellon*. This Article examined the responses of complete remand, partial remand, and partial dismissal. It concluded that dismissal without prejudice of the claims beyond original federal jurisdiction, with retention of those claims within the original jurisdiction of the federal courts, seems to be most consistent with congressional intent, the language of the removal statutes, and the policy of affording a federal forum to adjudicate federal claims. It is, however, a close call. This route has disadvantages. In particular, it allows defendants to force plaintiffs into two fora to pursue their federal and state claims simultaneously. To require the federal courts to remand all claims, however, would prevent federal adjudication of federal claims, in contravention of the systemic preference for federal court whenever either side selects it. Federal court availability together with the avoidance of dual proceedings can be attained only when pendent party jurisdiction is recognized. Outside that arena, difficult choices remain to be made.

