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Removal, Remands, and Reforming Federal Appellate Review

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Removal, Remands, and Reforming Federal Appellate Review

*Michael E. Solimine**

I. INTRODUCTION

On January 13, 1992, the United States Supreme Court denied certiorari to a decision of the Fifth Circuit in *Castillo v. Shell Oil Co.*,¹ over the dissent of Justice White.² About two months later, the Court, without recorded dissent, denied certiorari to a Third Circuit decision in *Gumby v. General Public Utilities Corp.*³ Neither action was particularly extraordinary, for on those two days the Court declined to review over 400 other cases while granting review in sixteen.⁴ Moreover, the Solicitor General opposed the granting of review in *Gumby*,⁵ an action highly correlated in the past with the Court's denial of review.⁶

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1. 112 S. Ct. 914 (1992), *denying cert. to In re Shell Oil*, 932 F.2d 1518 (5th Cir. 1991).

2. *Id.*

3. 112 S. Ct. 1262 (1992), *denying cert. to In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991).

4. *See* 60 U.S.L.W. 3464 (Jan. 14, 1992) (summarizing orders of January 13, 1992); 60 U.S.L.W. 3593 (Mar. 3, 1992) (summarizing orders of March 2, 1992). Thus, on those days the Court granted review in only four percent of the cases, about matching the number of petitions granted in recent Terms. *See* 61 U.S.L.W. 3098 (Aug. 11, 1992) (compiling data from 1989, 1990, and 1991 Terms).

5. Brief for the United States in Opposition to the Certiorari Petition at 9-18, *Gumby v. General Pub. Utils. Corp.*, 112 S. Ct. 1262 (1992) (No. 91-676) [hereinafter Solicitor General's Brief].

6. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES

That the Supreme Court of necessity largely leaves law development to the federal appellate courts, and state courts, is not particularly noteworthy.⁷ Such circumstances, however, make it important for students of federal jurisdiction not to be fixated on Supreme Court decisions, to the exclusion of lower court opinions. This article focuses on lower court interpretation of one statute circumscribing the jurisdiction of the federal appellate courts. Section 1447(d) of the Judicial Code states that an order of a district court remanding a case to a state court from which it was removed "is not reviewable on appeal or otherwise."⁸ Despite that seemingly clear language,⁹ the Supreme Court in 1976 in *Thermtron Products, Inc. v. Hermansdorfer*¹⁰ held that appellate review of such an order was available when the district judge remanded for reasons not authorized by Section 1447(c). Section 1447(c) generally provides that cases improperly removed can be remanded.¹¹

Since most federal judges will, presumably, act lawfully when remanding cases, post-*Thermtron* commentary has ritualistically characterized the decision as a narrow or a very limited one.¹² But a review of the post-*Thermtron* era in the lower federal courts belies that assertion. The *Castillo* and *Gumby* cases, as well as many others, permit federal appellate review of district court

SUPREME COURT 137-38 (1991); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 83 AM. POL. SCI. REV. 1109, 1121 (1988).

7. See generally SAMUEL ESTREICHER & JOHN E. SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986).

8. 28 U.S.C. § 1447(d) (1988). The Section in full reads as follows:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, 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.

9. Indeed, some judges have characterized the language in § 1447(d) as "pellucid" (i.e., extremely clear). See, e.g., *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 298 (9th Cir. 1992); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 556 (9th Cir. 1991) (Noonan, J., dissenting); *Rothner v. City of Chicago*, 879 F.2d 1402, 1422 (7th Cir. 1989) (Easterbrook, J., dissenting); cf. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (Easterbrook, J.) ("'Straightforward' is about the last word judges attach to § 1447(d) these days, however.").

10. 423 U.S. 336, 351 (1976).

11. The text of § 1447(c) as it existed at the time of the *Thermtron* decision is found in note 40 *infra*. Section 1447(c) was amended in 1988, the significance of which is addressed *infra* Part II.B.

12. E.g., *Bregman v. Alderman*, 955 F.2d 660, 662 (11th Cir. 1992) (per curiam); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 841 (3d Cir. 1991), cert. denied, 112 S. Ct. 1262 (1992); PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1826 (3d ed. 1988); HOWARD P. FINK & MARK V. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 525 (2d ed. 1987); 14A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3740 (1985); Charles Rothfield, *Rationalizing Removal*, 1990 B.Y.U. L. REV. 221, 242; Robert T. Markowski, Comment, *Remand Order Review After Thermtron Products*, 1977 U. ILL. L. REV. 1086, 1104.

remand orders in a wide variety of circumstances. The evisceration of the bar of Section 1447(d) initiated by *Thermtron* continues to have an impressive and largely unreviewed ripple effect in the doctrine of lower federal courts.

Nor is this doctrine a mere academic curio. In recent years, about eleven percent of the total civil docket of federal district courts consist of cases removed from state court to federal court, on grounds of the existence of diversity or federal question jurisdiction.¹³ The numbers are large enough to prompt recent calls for restricting or eliminating the right to so remove.¹⁴ Of the total number removed, about fifteen percent are then remanded back to the state court—a total of about 3000 cases each year.¹⁵ The decreasing scope of the Section 1447(d) bar makes a significant percentage of the latter subject to federal appellate review.

This Article critiques this largely unnoticed expansion of federal appellate jurisdiction. Part I of the Article focuses on the *Thermtron* case. The initial portion of Part I reviews the tortured history of Section 1447(d). Part I then examines the *Thermtron* opinion, and considers whether the case would likely be decided in the same way today, given the renewed focus on legislative text (as opposed to other interpretative sources) by the Supreme Court.

Part II of the Article considers both doctrinal and statutory developments in the wake of *Thermtron*. First, Part II reviews what little the Court has said about *Thermtron* since 1976. The second section of Part II examines a 1988 amendment to Section 1447(c), and considers what significance that amendment does or should have for the continued viability of the *Thermtron* interpretation of Section 1447(d). The third and final section of Part II surveys and subjects to critical comment the lower court decisions, such as *Castillo* and *Gumby*, which have considerably and simultaneously expanded *Thermtron* and contracted Section 1447(d).

Part III of the Article takes a step back from doctrine and suggests if and how, ideally, federal appellate courts should review remand decisions. While the previous portions of the Article were largely critical of *Thermtron* and its progeny, Part III demonstrates that the results of many of those cases were sound. That is, there should be appellate review available over such orders,

13. See 1990 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 79 (compiling data from 1980 through 1990).

14. E.g., FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 43-44 (Apr. 2, 1990) (recommending that the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1988), should be amended to forbid removal from state to federal court in cases in which the amount in controversy is less than \$10,000) [hereinafter FEDERAL COURTS REPORT].

15. See Jerome I. Braum, *Reviewability of Remand Orders: Striking the Balance in Favor of Equality Rather than Judicial Expediency*, 30 SANTA CLARA L. REV. 79, 89 (1990); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 392 (1992).

but a more principled basis to accomplish that end is available: amend the relevant statutes, rather than torture their language via doctrinal interpretation. Part III considers several avenues a reform effort can take. Finally, the Article concludes by placing the review of *Thermtron* and its progeny in the larger context of federal courts scholarship.

II. DECONSTRUCTING AND RECONSTRUCTING *THERMTRON*

A. A Short History of Section 1447(d)

Though removal is not mentioned in the Constitution, since the Judiciary Act of 1789, Congress has statutorily provided for the removal of certain types of cases from state to federal court. The history of removal jurisdiction is found elsewhere¹⁶ and need not be recounted in depth here, other than for its relevance to remand orders and to appellate review of these orders. The 1789 Act did not forbid appellate review (at the time, directly to the Supreme Court), but the Court held that remand decisions were not "final orders" subject to appeal, and could only be reviewed by a writ of mandamus.¹⁷

Legislation in 1875 considerably revised removal to and remand from the federal courts. Substantively, the legislation permitted removal of virtually all

16. Useful summaries of the development of removal jurisdiction and remand procedure can be found in CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* 219-37 (4th ed. 1983); BATOR ET AL., *supra* note 12, at 33, 481-84, 1767-69; Markowski, *supra* note 12, at 1088-94. Historically, passage of the removal statutes appears to have been largely motivated by the perceived need for a federal forum (in the face of a hostile state forum) for at least certain types of cases. BATOR ET AL., *supra* note 12, at 1767; Markowski, *supra* note 12, at 1088-89. This motivation seems virtually identical for the rationales underlying original federal question and diversity jurisdiction.

17. *Chicago & Alton R.R. v. Wiswall*, 90 U.S. (23 Wall.) 507 (1875); *Knickerbocker Ins. Co. of Chicago v. Comstock*, 83 U.S. (16 Wall.) 258 (1873).

Although the brevity of analysis in these decisions has been properly criticized, *see* 15A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3914.11 at 701 n.13 (1992), they still are regarded as good law today, despite the considerable intervening statutory and doctrinal developments. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 353 (1976); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir. 1992) (Easterbrook, J.); WRIGHT ET AL., *supra*, at 696. A good case can be made that under modern principles of finality jurisprudence, a remand in this context *is* a final order, since while it does not terminate the case (which lives on in state court), it ends it in *federal* court. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10-11 (1983); WRIGHT ET AL., *supra*, at 702; Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 KAN. L. REV. 863, 953 n.341 (1990). Of course, if § 1447(d) were read to bar *all* review of remand decisions, this distinction makes little difference. But once § 1447(d) is interpreted (or amended) to permit at least some appellate review of remand decisions, the issue of finality does assume significance. The reason is that a final decision, under 28 U.S.C. § 1291 (1988), is subject to plenary appellate review. In contrast, a non-final order can usually only be reviewed by a writ of mandamus, which is regarded as a far narrower type of appellate review. *See infra* Part III.B.

actions that would be within the original jurisdiction of federal district courts.¹⁸ The provisions remain largely intact today.¹⁹ Procedurally, remands to state court were authorized in cases involving collusive or improper joinder of parties, or when the district court lacked "jurisdiction."²⁰ Finally, the statute provided for direct appellate review, apparently overruling the precedent holding remand decisions not to be final orders.²¹ Twelve years later, Congress restricted the scope of removal jurisdiction in a number of ways.²² For our purposes, the most pertinent restriction was a repeal of the appellate review provision of the 1875 Act, and its replacement by language forbidding review by "appeal or writ of error."²³

The Congressional purpose for the change is obscure. At the time, there was great concern over the burgeoning caseloads of federal courts (sound familiar?), and the 1887 law (as well as other contemporary legislation) restricted access to federal courts.²⁴ Thus, the appellate restriction can be seen as an effort to lessen the caseload of the Supreme Court, during an era when intermediate federal courts of appeals were unavailable.²⁵ Modern cases, however, seem to have added other rationales for the change. It is now

18. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470. The same act in § 1 also provided for original jurisdiction in district courts of federal question cases. This provision is the predecessor of 28 U.S.C. § 1331 (1988).

19. See 28 U.S.C. §§ 1441-1452 (1988).

20. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 472.

21. *Id.* Section 5 provided in part that the order of the district court (then called the circuit court) remanding a case "shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be." *Id.*

22. For example, the 1887 Act restricted removal to defendants. See *BATOR ET AL.*, *supra* note 12, at 1768.

23. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552. This provision read as follows: Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

24. *Missouri Pac. Ry. v. Fitzgerald*, 160 U.S. 556, 583 (1896); *BATOR ET AL.*, *supra* note 12, at 38; *FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 93-96 (1928).

Frankfurter and Landis also point out that there was pressure from southern members of Congress to limit the considerable original and removal jurisdiction granted federal courts in 1875. *FRANKFURTER & LANDIS, supra*, at 85-93.

25. *FRANKFURTER & LANDIS, supra* note 24, at 86; Markowski, *supra* note 12, at 1112. The federal appellate courts were created by the Evarts Act of 1891. *BATOR ET AL.*, *supra* note 12, at 38.

usually said that the 1887 amendment was intended to "prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues."²⁶

The prohibition on appellate review took a bumpy road to arrive at its present codification in Section 1447(d). The limit was embodied in sections 71 and 80 of the Judicial Code of 1911,²⁷ inadvertently left out during recodification in 1948,²⁸ and reinstated in substantially its present form in 1949.²⁹ During this period, a number of Court decisions construed the various codifications and seemed to read the prohibition on review fairly

26. *Thermtron*, 423 U.S. at 351. For similar statements, see *United States v. Rice*, 327 U.S. 742, 751 (1946). For acknowledgments of the shift in rationales for the bar on review, see Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 997 (1988); Project, *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, LAW & CONTEMP. PROBS., Spring 1984, at 13, 109.; see also *infra* Part III.A. (discussing additional modern rationales for bar on review).

27. Judicial Code of 1911, ch. 231, §§ 28, 37, 36 Stat. 1094, codified at 28 U.S.C. §§ 71, 80 (1946). Section 71 read:

Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.

Section 80 read:

If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

28. 28 U.S.C. § 1447 (1948).

29. Act of May 24, 1949, ch. 139, § 84, 63 Stat. 102. Under the 1948 revision, there was apparently "no intent to change the prior law substantively, although the prohibition of appellate review of remand orders contained in § 71 of the old Code was inexplicably omitted." *Thermtron*, 423 U.S. at 350 n.15. The House Report on the 1949 amendments stated that: "This section strikes out subsections (c) and (d) of section 1447 of title 28, U.S.C., as covered by the Federal Rules of Civil Procedure, and adds a new subsection to Section 1447 to remove any doubt that the former law as to the finality of an order of remand to a State court is continued." H.R. REP. NO. 352, 81st Cong., 1st Sess. 15 (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1268. According to the *Thermtron* majority, "[t]he plain intent of Congress, which was accomplished with the 1949 amendment, was to recodify the pre-1948 law without material change insofar as the provisions of §§ 71 and 80 of the old Code here relevant were concerned." *Thermtron*, 423 U.S. at 350 n.15.

expansively.³⁰ The textual evolution of Section 1447(d) came to an end in 1964, when the Civil Rights Act of that year permitted review of remands of cases removed pursuant to Section 1443.³¹ The latter change was influenced by a perception that remands of civil rights cases were particularly injurious to defendants in those cases, and that appellate exposition of Section 1443 was necessary.³²

30. *E.g.*, *United States v. Rice*, 327 U.S. 742 (1946) (1911 Act applies to all removed cases, even those removed under a law passed in 1926 concerning removal by the United States of an action involving Indian lands in state court); *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374 (1937) (under 1911 Act, §§ 71 and 80 were to be construed *in pari materia*, so prohibition of review in § 71 was applicable to an order of remand made pursuant to § 80); *Ex parte Matthew Addy S.S.*, 256 U.S. 417 (1921) (same with respect to 1911 Act); *In re Pennsylvania Co.*, 137 U.S. 451 (1890) (prohibition of 1887 Act includes a writ of mandamus); *Morey v. Lockhart*, 123 U.S. 56, 58 (1887) ("Its language is broad enough to cover all cases, and such was evidently the purpose of Congress.").

Mark Herrmann prefers to read these cases as having broad dicta but narrow holdings. Mark Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 ARIZ. ST. L.J. 395, 398-401 (1987). In these cases, he argues, the remanding district courts held that they lacked subject-matter jurisdiction. Thus it was dicta for the Supreme Court to hold that the statutory bar on review extended to *all* cases—even those where the district court remanded for a reason other than subject matter jurisdiction. His reading arguably supports the *Thermtron* majority's analysis, considered *infra*. Herrmann's interpretation of these cases is not totally implausible, but his reading is somewhat beside the point. The pre-*Thermtron* cases did indeed view the prohibition broadly, and it is by no means clear that the supposedly limited nature of the reasons for remand, had the Court thought more about it, would have changed the wording of the opinions. Nor did the majority opinion in *Thermtron* adopt Herrmann's interpretation of the cases (though it did not reject it, either).

31. Title IX of the 1964 Civil Rights Act, Pub. L. No. 88-352, § 901, 78 Stat. 266. Title 28 U.S.C. § 1443 (1988) permits removal of certain civil rights cases from state to federal court, i.e., of civil actions or criminal prosecutions where a person is being denied "equal rights" provided by federal law. The potentially broad scope of § 1443 has been considerably narrowed by Supreme Court opinions. *E.g.*, *Georgia v. Rachel*, 384 U.S. 780 (1966) (interpreted language of § 1443(1) to require that federal law providing for the "equal civil rights" must concern specific civil rights stated in terms of racial equality; First and Fourteenth Amendments not covered, but public accommodations provisions of 1964 Civil Rights Act were); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966) (interpreted § 1443(2) to permit removal only by federal officers and those assisting such officers); see generally *BATOR ET AL.*, *supra* note 12, at 1067-71.

32. A good review of the legislative history of the civil rights exception to § 1447(d) appears in Markowski, *supra* note 12, at 1095-97.

B. Thermtron

Other than the civil rights exception, found in the statute itself, it seemed to be the accepted view that Section 1447(d) barred review of any remand order, no matter what rationale the order was based upon.³³ That accepted view was considerably modified by the Supreme Court's decision in 1976 in *Thermtron Products, Inc. v. Hermansdorfer*.³⁴

In *Thermtron*, plaintiffs had filed a tort action in the state court of Kentucky, and defendants removed it on the basis of diversity jurisdiction. Almost a year later, District Judge Hermansdorfer sua sponte remanded the case to state court. He conceded that defendant had properly removed the case as a diversity action.³⁵ What he did not concede was that he was powerless to remand under these circumstances. The right to remove, the judge said, must be "balanced" against plaintiffs' rights to choose their forum and to a speedy decision on the merits.³⁶ Given the crowded docket of his court and lack of available trial time (sound familiar, again?), coupled with the lack of local prejudice demonstrated by the defendant (the original purpose of removal), the judge held that a remand to state court was appropriate.³⁷ Defendants filed a petition for a writ of mandamus in the Sixth Circuit, which denied the petition on the basis that it had no jurisdiction to review the order under Section 1447(d).³⁸

The Supreme Court granted certiorari and reversed. In an opinion by Justice White, the Court said that two questions were presented: whether a remand of a properly removed diversity case could be based on reasons not authorized by statute and, if not, whether such an order could be reviewed by a writ of mandamus.³⁹ The majority had little trouble with the first question. In 1976, Section 1447(c) of the Judicial Code (the descendant of Section 80 of the 1911 Code) stated that a district "shall remand the case" if it was "removed improvidently and without jurisdiction."⁴⁰ According to the Court,

33. See, e.g., *In re Shell Oil Co.*, 966 F.2d 1130, 1132 (7th Cir. 1992) (Easterbrook, J.); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 417 (1969) [hereinafter ALI Study]; PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1324 (2d ed. 1973); Herrmann, *supra* note 30, at 405 & n.48.

34. 423 U.S. 336 (1976).

35. *Id.* at 340.

36. *Id.*

37. *Id.* at 340-41. In this order of remand, the court documented the docket pressures under which the judge was operating. *Id.* at 340 n.3. He had also entered similar orders of remand in other diversity cases on his docket. *Id.* at 341 n.4.

38. *Id.* at 341-42.

39. *Id.* at 337.

40. Section 1447(c) provided: "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

it was "unquestioned" that Section 1447(d) prohibited review of a remand order made pursuant to section 1447(c) "whether erroneous or not."⁴¹ Here, the Court concluded, the remand was not authorized by Section 1447(c), since the district judge did not purport to rely on it and since caseload considerations are irrelevant to the right to remove.⁴²

Nor did the majority have much trouble with its second question, concerning whether a writ of mandamus could issue. The district judge's lack of authority to remand proved crucial in distinguishing the seemingly absolute bar of appellate review contained in Section 1447(d). Subsections (c) and (d) must be construed together (i.e., *in pari materia*), meaning "that only remand orders issued under Section 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)."⁴³

This interpretation, the Court found, was supported by a review of the history of the numerous recodifications of what is now subsection (d) between 1887 and 1949. In particular, the Court focused on statutory language in the 1887 and 1911 Acts. That language, the Court said, confirmed that the review bar assumed an "improperly" removed case—that is, one remanded because it was not removed properly or with an insufficient jurisdictional base in federal court.⁴⁴ Finding that Congress did not intend to give district judges "carte blanche authority" to remand cases on grounds not found in the statute,⁴⁵ the Court "decline[d] to construe § 1447(d) so woodenly as to" forbid appellate review in such circumstances.⁴⁶ With these predicates, the Court held that a writ of mandamus was an appropriate vehicle of appellate review. Recognizing the old rule that remand orders were not final decisions subject to appeal,⁴⁷ the Court held a writ of mandamus to be the proper mode of review.⁴⁸

Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, dissented.⁴⁹ According to Justice Rehnquist, the only question in the case was whether the Sixth Circuit lacked jurisdiction to consider the writ of

may order the payment of just costs." 28 U.S.C. § 1447(c) (1982).

41. *Thermtron*, 423 U.S. at 343.

42. *Id.* at 343-45.

43. *Id.* at 345-46. The Court relied on *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374 (1937) for the invocation of the *in pari materia* canon of statutory construction in this context. See *supra* note 30 (summarizing holding in *Bryant*).

44. *Thermtron*, 423 U.S. at 347-51.

45. *Id.* at 351.

46. *Id.* at 352.

47. See *supra* note 17 and accompanying text.

48. *Thermtron*, 423 U.S. at 352-53.

49. Justice Stevens did not participate in the case. *Id.* at 353.

mandamus. If that were so, then the propriety of the remand order was irrelevant.⁵⁰ The dissent construed Section 1447(d) to be clear—a complete bar to *any* appellate consideration of a remand order.⁵¹ Acknowledging that the district judge may have erred in ordering a remand, Justice Rehnquist nonetheless found that to permit review would contravene Congress' desire to prevent delay and interference with state court litigation.⁵² It did not matter that the remand was not predicated on Section 1447(c), for the district judge's disposition here was the same as when a judge erroneously applies the criteria of subsection (c). Yet the majority found the former to be reviewable and the latter not.⁵³

Justice Rehnquist found the majority's *in pari materia* construction of subsections (c) and (d) unconvincing. It is true, the dissent conceded, that the review bar in the 1911 Code (section 71) states that it applies to a district court "so remanding" an "improperly removed" case.⁵⁴ But, according to Justice Rehnquist, cases interpreting the 1887 and 1911 codes found the bar to apply to all remands.⁵⁵ At any rate, the "so remanding" language is not found in current Section 1447(d), and the dissent was less sure than the majority that the 1948 and 1949 Judicial Codes simply reenacted the prior law.⁵⁶ To the extent that they did, the dissent contended that the prior law barred review of any and all remand orders.⁵⁷ Finally, the dissent noted that, in Title IX of the 1964 Civil Rights Act, Congress had shown it could

50. *Id.* at 353-54 (Rehnquist, J., dissenting).

51. *Id.* at 354 (§ 1447(d) "means what it says"); *id.* at 355 (Congress meant "what it so plainly said."); *id.* ("plain language" of § 1447(d)); *id.* at 357 ("Congress' express, and heretofore fully effective, directive"); *id.* at 360 ("express directive of Congress").

52. *Id.* at 354-55.

53. *Id.* at 356. Justice Rehnquist also found the distinction "unworkable" since it would seem to require that district judges issue explanations for their decisions, or would encourage them to simply cite subsection (c), even if "such a conclusion [were] absurd." *Id.* at 357; *cf. In re Shell Oil Co.*, 966 F.2d 1130, 1133 (7th Cir. 1992) (Easterbrook, J.) (granting mandamus to require district judge to state reasons for remand); *In re Decorator Indus., Inc.*, 980 F.2d 1371, 1373 (11th Cir. 1992) (assuming that district court relied on § 1447 (c) despite lack of citation to that Section in district court's opinion).

54. *Thermtron*, 423 U.S. at 358 (Rehnquist, J., dissenting).

55. *Id.* at 358-59. Justice Rehnquist cited and discussed *Morey v. Lockhart*, 123 U.S. 56 (1887) and *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374 (1937).

56. *Thermtron*, 423 U.S. at 359-60 (Rehnquist, J., dissenting). Here, the dissent quoted legislative history from the 1948 Code that new § 1447 "consolidates procedural provisions of sections 71, 72, 74, 76, 80, 81 and 83 of title 28, U.S.C. 1940 ed., with important changes in substance and phraseology." *Id.* at 360 (quoting H.R. REP. NO. 308, 80th Cong., 1st Sess. A-136 (1948)). The majority, in contrast, cited legislative history from the 1949 Amendment. *Thermtron*, 423 U.S. at 349 n.15; *see supra* note 29 (quoting latter history).

57. *Thermtron*, 423 U.S. at 360.

statutorily "protect against judicial abuses of removal rights,"⁵⁸ and the Court should not write another exception into the statute.

C. *Thermtron Revisited*

Thermtron was subject to extensive commentary, almost all of it critical and in agreement with the dissent.⁵⁹ Instead of reviewing these arguments, it would be more useful to reexamine *Thermtron* in light of the extensive Supreme Court and scholarly discussion of statutory interpretation since 1976. That enterprise will not only provide a firmer basis upon which to draw conclusions about the correctness of the decision, but will permit a more lucid analysis of the post-*Thermtron* statutory and doctrinal developments.

1. *Thermtron* and the New Textualism

When *Thermtron* was decided, the Supreme Court in statutory construction cases seemed to follow an eclectic approach, emphasizing to varying degrees the purported plain meaning of the text, legislative history, the overall purpose of the statute, and other factors.⁶⁰ In the past decade, however, numerous decisions of the Court have with varying degrees of explicitness rejected that approach, emphasizing the interpretation of the statutory text to the apparent exclusion of other interpretative sources.⁶¹ The new

58. *Id.* at 361.

59. For critical reaction, see BATOR ET AL., *supra* note 12, at 1826; DAVID P. CURRIE, *FEDERAL COURTS* 594 n.3 (4th ed. 1990); Joseph T. Carruthers, Note, *Civil Procedure—Review of Renewal Orders Issues on Grounds Outside The Remand Statute*, 12 *WAKE FOREST L. REV.* 1031 (1976); Tony M. Graham, Note, *Federal Courts—Order Remanding Case for Reasons Not Recognized by Statute Reviewable by Written Mandamus: Thermtron Products, Inc. v. Hermansdorfer*, 12 *TULSA L.J.* 194 (1976); C. Lee, Note, *Federal Courts—Removal—Writ of Mandamus Authorized to Review Non-Statutory Remand Order—Thermtron Products, Inc. v. Hermansdorfer*, 10 *CREIGHTON L. REV.* 521, 534-38 (1977). More sympathetic reaction can be found in Herrmann, *supra* note 30, at 405-12, and Markowski, *supra* note 12.

60. Generalizations like this one are hazardous to make, since the Court's jurisprudence in the 1960's and 1970's in this regard seems to defy categorization. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 591-95 (1988) (reviewing and discussing numerous examples from the period in question); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 347 n.38 (1991) (noting difficulty of identifying Court's primary reasoning in statutory interpretation cases, in empirical study of decisions from 1967 to 1990 overridden by Congress). Nonetheless, there appears to be sufficient empirical data to support the characterization of the Court's jurisprudence made in the text. See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 *HARV. L. REV.* 892 (1982) (discussing numerous examples and finding shift from broad approach of 1950's to mid-1970's to more textual approach from that time to the present).

61. Oft-cited examples are *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct.

textualism⁶² is not necessarily a myopic focus on one word or phrase in a statute. Rather, it takes the entire statutory text as its starting and ending points for interpretation. In between those points, however, the new textualism also considers evolution of and changes in the text,⁶³ the language and structure of the statute as a whole,⁶⁴ and utilizes long-standing canons of statutory construction.⁶⁵

How does the result in *Thermtron* fare under the new textualism? In my view, not very well. At first blush, the conclusion may seem dubious, since both the majority and dissenting opinions spend considerable time on the statutory text, the evolution of the statutory text, and the structure of Section 1447(c)-(d). Though the majority, in part, ostensibly utilized the tools of the new textualism, that alone does not mean that the majority opinion can be wrapped in the imprimatur of textual analysis.

The majority opinion relied on two principal textual bases to overcome the seemingly absolute bar to review found in subsection (d). First, Justice White took the reader through the changes to the various predecessor statutes of Section 1447. He concluded that these changes meant that Congress only intended to bar review of remands made pursuant to reasons found in the statute (i.e., subsection (c) and its predecessors).⁶⁶ The conclusion he drew from this textual evolution is problematic. As the dissent observed, none of the prior cases which considered these changes spoke of subsection (d), or its predecessors so narrowly, and in any event the operative language from the

1138, 1143 (1991); *Demarest v. Manspeaker*, 111 S. Ct. 599, 604 (1991); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989). From the 1991 Term, one could also cite *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *Patterson v. Shumate*, 112 S. Ct. 2242, 2246 (1992); *Morales v. TWA, Inc.*, 112 S. Ct. 2031, 2036-37 (1992); *Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). For an excellent summary and critique of the recent cases emphasizing sole resort to the text, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

62. I borrow the term from Professor Eskridge. See Eskridge, *supra* note 61.

63. *E.g.*, *United States v. R.L.C.*, 112 S. Ct. 1329, 1334 (1992).

64. *E.g.*, *Gade v. United Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2382 (1992); *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1633-40 (1992); *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2107 (1992); *Crandon v. United States*, 494 U.S. 152, 158 (1990).

65. *E.g.*, *United States Dep't of Energy v. Ohio*, 112 S. Ct. at 1633 (presumes Congressional familiarity with long-standing rules of statutory construction); *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2165 (1992) (presumes that when statutes use a term of art, Congress intended it to have its established meaning); *Hilton v. South Carolina Pub. Ry. Comm'n*, 112 S. Ct. 560, 564-66 (1991) (reiterating rule that Congress must in certain situations provide clear statement that it intended to impose obligations on state governments); see also *Thompson/Center Arms Co.*, 112 S. Ct. at 2110 (rule of lenity presumption applies once Court determines statute is ambiguous).

66. *Thermtron*, 423 U.S. at 345-52.

1911 Judicial Code disappeared in the recodification in 1948 and 1949.⁶⁷ So, at best, the conclusion to be drawn from textual evolution alone is ambiguous.

Justice White stood on firmer ground when invoking the *in pari materia* canon of statutory construction—that is, reading the statute as a whole. Based in part on textual evolution and prior case law, the majority held that subsection (d) could only be read in light of the immediately preceding subsection. This meant that the bar of review was only intended to apply to the types of remands authorized by Congress (i.e., those mentioned in subsection (c)). But for several reasons, this conclusion is also unconvincing.

First, the *in pari materia* canon has come under recent attack.⁶⁸ The canon seems to assume that when drafting statutes, Congress is aware of and takes into account the provisions of the entire statute, whether the latter are undergoing revision or not. These assumptions are dubious, since drafters may not be taking such an omnibus approach, particularly if only one part of a multi-part section is being revised. It may be more accidental than not that certain subsections end up codified together in the United States Code.⁶⁹ The canon may be appropriate if standard interpretative guides, like the text itself or legislative history, make plain that sections are to be read together. But to determine that makes the utility of a canon suspect in the first instance.

Second, even accepting the notion of an *in pari materia* rule, it does little to aid the *Thermtron* majority. Between the codifications in 1948 and 1949 and the *Thermtron* decision, Congress had demonstrated that it was aware of the bar to review in Section 1447(d) and could legislate an exception. This was, of course, Title IX of the 1964 Civil Rights Act, which in subsection (d) itself specifically exempted cases removed under Section 1443.⁷⁰ Likewise,

67. *Id.* at 357-60 (Rehnquist, J., dissenting).

68. It is worth noting that virtually *all* the traditional canons of statutory construction (including many not mentioned in this Article) have come under attack for various reasons, for example that they are based on dubious policy rationales, premised on unrealistic assumptions about the legislative process, or are in opposition to *other* canons of construction. See ESKRIDGE & FRICKEY, *supra* note 60, at 689-95; RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 276-86 (1985). As an example of the last criticism, the *in pari materia* canon used in *Thermtron* is opposed by the rule that the canon is not applicable if the scope and aim of the two provisions are distinct. ESKRIDGE & FRICKEY, *supra* note 60, at 690. Interestingly, the latter exception was adopted by the three dissenting justices in *United States v. Rice*, 327 U.S. 742, 753-55 (1945) (Douglas, J., dissenting) (arguing that a 1926 statute exempted the United States in certain types of cases from the bar of review in § 71 of the 1911 Judicial Code).

69. ESKRIDGE & FRICKEY, *supra* note 60, at 653-54; POSNER, *supra* note 68, at 281.

As an apt example, consider the 1988 amendment to § 1447(c), the legislative history of which makes not even an allusion to subsection (d) or the *Thermtron* case. See *infra* Part II.B.

70. See *supra* notes 31-32 and accompanying text.

Interestingly, one of the proponents of the amendment argued that "improper remands were more likely to occur in civil rights actions." Markowski, *supra* note 12, at 1097 (citing 110 Cong. Rec. 2784 (1964) (remarks of Rep. Edwards)). This suggests that the speaker thought all remands, even improper ones, were barred by pre-amendment § 1447(d). On the other hand, it

post-*Thermtron*, Congress in 1989 in the Financial Institutions Reform, Recovery and Enforcement Act (FIFRE)⁷¹ specifically provided that in cases removed by the Federal Deposit Insurance Corporation from state court, remand orders could be reviewed by federal appeals courts.⁷² Apparently, this action was taken in part on the understanding that if no such provision were enacted, Section 1447(d) would bar review of remand orders.⁷³ Thus, in two special instances, Congress proved to be aware of and able to legislate around the review bar, which suggests (indirectly, at least) that Section 1447(d) is considered somewhat separate, operating with force notwithstanding other statutory provisions.⁷⁴

Another favorite tool of textual exegesis is the use of presumptions of statutory construction.⁷⁵ While neither opinion in *Thermtron* expressly relied upon such presumptions,⁷⁶ they arguably are a source of support for the

is not clear whether the speaker meant to confine "improper" to remands incorrectly applying the criteria of § 1447(c), which presumably applies since § 1443 makes no mention of remands. Probably the speaker never thought of the distinction. Maybe no one else did either. See *supra* note 33 and accompanying text.

71. Pub. L. No. 101-73, 103 Stat. 183 (1989).

72. 12 U.S.C. §§ 1441a(l)(3), 1819(b)(2)(C) (Supp. III 1991).

73. The massive legislative history of FIFRE (excerpts of which take up over 400 pages in U.S.C.C.A.N. alone), apparently makes only fleeting reference to the remand provision. H.R. REP. NO. 54(1), 101st Cong., 1st Sess. 328-29 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 124-25. However, courts have inferred that the provisions were intended to overcome the usual bar to review found in § 1447(d). See *In re Meyerland Co.*, 960 F.2d 512, 514 (5th Cir. 1992) (en banc) (discussing § 1819(b)(2)(C)), cert. denied, 113 S. Ct. 967 (1993); *Maniar v. FDIC*, 979 F.2d 782, 784 n.2 (9th Cir. 1992) (same); *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297-98 (9th Cir. 1992) (discussing § 1441a(l)(3)). But see *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 848 n.10 (3d Cir. 1991) (discounting significance of Congress making exceptions to § 1447(d) in 1989, for purposes of determining scope of *Thermtron*), cert. denied, 112 S. Ct. 1262 (1992).

74. See also Elizabeth Slusser Kelly, Note, CIVIL PROCEDURE—FEDERAL—28 U.S.C. § 1447(D) BARS REVIEW OF ORDERS REMANDING TO STATE COURT ONLY WHEN REASON FOR REMAND IS A JURISDICTIONAL DEFECT—*Thermtron Products, Inc. v. Hermansdorfer*, 2 S. ILL. U. L.J. 541, 550-52 (1976) (arguing that majority in *Thermtron* stretched applicability of *in pari materia* rule).

75. See generally ESKRIDGE & FRICKEY, *supra* note 60, at 655; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451-62 (1989); Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

76. Both opinions briefly alluded to the canon that no "changes of law or policy are to be presumed from changes of language in the [1948] revision [of the Judicial Code] unless an intent to make such changes is clearly expressed." *Thermtron*, 423 U.S. at 350 n.15 (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)) (majority opinion). The dissent initially expressed uncertainty whether this canon made sense, but argued that even if it did in general, it did not aid the majority here, since (as the dissent read it) the pre-1948 Code as interpreted barred *all* review of remand orders. *Id.* at 359-60 (Rehnquist, J., dissenting). For more recent invocations of this canon, see *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2213 (<https://scholarship.law.missouri.edu/mlr/vol58/iss2/1>)

holding in the case. One relevant presumption could be the canon that removal statutes are to be construed narrowly.⁷⁷ But this presumption does little to add to the majority's analysis. The presumption is intended to reflect Congress' desire to limit the number of cases removed.⁷⁸ Yet permitting review of district court orders to remand such cases increases the chances that more removed cases will stay in federal court.⁷⁹ One writer has also argued in favor of *Thermtron* on the basis that there should be a presumption in favor of appellate review.⁸⁰ Such a canon might indeed have aided the *Thermtron* majority, but it is doubtful that any such presumption exists in this context. There appears to be a presumption of review by Article III judges of certain administrative action,⁸¹ but the dissent's interpretation of Section 1447(d) does permit review of the remand motion by *an* Article III judge—namely, the district court.

It may well be that textualism fails in hard cases.⁸² But purely within the textualist framework, *Thermtron* does not seem a particularly hard case. For good or ill, a plain reading of Section 1447(d) bars appellate review of all remand orders, and applying traditional tools of textual analysis should not change that result.

(1992); *Finley v. United States*, 490 U.S. 545, 554 (1989). *Cf. Ankenbrandt*, 112 S. Ct. at 2217 n.1 (Blackmun, J., concurring) (expressing skepticism that this principle would "affirmatively authorize an inference that Congress' recodification was designed to approve of prior constructions of the [diversity] statute."). This canon does little to advance analysis, of course, when there is disagreement over the scope of prior interpretations. *See id.* at 2220 (canon should be limited to "explicit" holdings of pre-1948 cases).

77. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). The presumption was based on the understanding that Congress since the 1887 Act has consistently sought to restrict removal. *Id.* It may also be a corollary of the narrow construction typically given to grants of jurisdiction, *see Steinman, supra* note 26, at 936, or derived from respect for the operation of state governments and state courts. *Somlyo v. J. Lu-Rob Enters., Inc.*, 932 F.2d 1043, 1045-46 (2d Cir. 1991).

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

79. *Cf. Steinman, supra* note 26, at 936-37 (skeptical of the rationale for this canon, given general correlation of removal jurisdiction with original district court jurisdiction).

80. *Herrmann, supra* note 30, at 414. The writer referred to 28 U.S.C. § 1291 and a federal practice treatise as sources for the presumption. *Id.*

81. *See, e.g., McNary v. Haitian Refugee Ctr., Inc.*, 111 S. Ct. 888, 898 (1991); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1982); *see also Webster v. Doe*, 486 U.S. 592, 603 (1988) (constitutional claims); Joseph L. Faber, Note, *Law's Politic: Webster v. Doe and Judicial Review of Agency Decisions Affecting the Constitutional Rights of Individuals*, 71 B.U. L. REV. 819, 844-45 (1991); *see generally* William N. Eskridge, Jr. & Phillip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 601-02 (1992); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743 (1992).

82. *ESKRIDGE & FRICKEY, supra* note 60, at 571.

2. *Thermtron* and Practical Reasoning

Despite the considerable attention afforded textual analysis by the Supreme Court, many (perhaps most) Court cases are willing to go beyond the text of the statute to consider legislative history or purpose.⁸³ Descriptively, it seems fair to say that most statutory construction cases are not animated by grand theory but by practical reasoning, which considers text, legislative history and purpose, and evolutive evidence according to the strength of each and the facts of the particular case.⁸⁴

In retrospect, *Thermtron* is one of those cases and the result can be better justified as one of practical reasoning rather than strict textual analysis. Indeed, many jurisdictional statutes akin to Section 1447(d) have long been interpreted by sources beyond the text. At the trial court level, interpretations of the diversity⁸⁵ or federal question⁸⁶ statutes have not proceeded on strict

83. *E.g.*, *Rowland v. California Men's Colony*, 113 S. Ct. 716, 726 n.12 (1993); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *United States v. Burke*, 112 S. Ct. 1867, 1870 (1992); *United States v. R.L.C.*, 112 S. Ct. 1329, 1334 (1992); *Union Bank v. Wolas*, 112 S. Ct. 527, 529 (1991); *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2484 n.4 (1991); *Crandon v. United States*, 494 U.S. 152, 160 (1990); *see* T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey, and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 700-01 (1992) ("despite frequent invocations of the "plain meaning" canon, in none of these cases does the Court rely on plain meaning in the face of statutory purposes that point in an opposite direction."); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 242-46 (plain meaning is primary focus but Court will consider other interpretative sources when it is subject to dispute); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1119-20 (1992) (review of sample of Supreme Court statutory decisions from 29 Terms from 1890 to 1990 indicates, *inter alia*, that most cases explicitly or implicitly use a dynamic approach); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1006 (1992) (other than Justice Scalia, most Justices do not purport to follow strict textualism in statutory construction).

84. *See generally* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322-23 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

85. 28 U.S.C. § 1332 (1988); *see, e.g.*, *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2208 (1992) (reading domestic relations exception into § 1332 in some cases, despite lack of textual basis); *Carden v. Arkoma Assoc.*, 494 U.S. 185, 187 (1990) (§ 1332 traditionally read to require complete diversity of citizenship despite lack of textual basis for requirement).

86. 28 U.S.C. § 1331 (1988); *see, e.g.*, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (determining that what "arises under" federal law for purposes of § 1331 requires "sensitive judgments about congressional intent, judicial power, and the federal system"); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 2 (1983) (well-pleaded complaint rule applies to removed cases); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (imposing well-pleaded complaint rule despite lack of textual basis); *cf. American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2466-67 (1992) (relying on text and legislative history to hold that statute permitting Red Cross to "sue and be sued," 36 U.S.C. § 2

textual grounds. Likewise, on the appellate level, courts have not confined themselves to text when interpreting the final order statute⁸⁷ or the statute permitting Supreme Court review of state court decisions.⁸⁸ In this light, then, going beyond the plain meaning of Section 1447(d) is both less startling and is more consistent with precedent.⁸⁹

The order by the much-maligned Judge Hermansdorfer is an example of practical reasoning. Recall that in remanding, he purported to balance the defendant's right to statutory removal with the plaintiff's desire to a forum of choice, the apparent lack of evidence of a hostile forum, and his own docket concerns.⁹⁰ While sternly admonished by the *Thermtron* majority as incorrect, Judge Hermansdorfer's reasoning is not entirely irrational. True, he did not point to any statutory language or legislative history. But he might

(1988) confers federal jurisdiction over tort suit against Red Cross); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146 (1992) (literal interpretation of 28 U.S.C. §§ 158(d), 1292(b) (1988), holding that former (governing appeals in bankruptcy cases) does not apply to exclusion of latter (permitting interlocutory appeals in certain circumstances)); see Zeppos, *supra* note 83, at 1100 & n.109.

87. 28 U.S.C. § 1291 (1988); see, e.g., *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (permitting "collateral order" exception to finality requirement of § 1291 despite apparent lack of textual basis for exception).

88. 28 U.S.C. § 1257 (1988); see, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975) (utilizing multi-factor test to determine which state cases fall under § 1257).

89. Steinman, *supra* note 26, at 931 (arguing that if other jurisdictional statutes are interpreted flexibly, then § 1447(d) should be also).

In a similar vein, one writer has suggested that the *Thermtron* majority was engaging in a dialogue with Congress, given that Congress could respond by amending § 1447(d). Kelly, *supra* note 74, at 553-54. The dialogue thesis, with respect to many other jurisdictional provisions, has been fully articulated in Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990). With regard to whether the dialogue works, it is worth noting that Congress responds with some frequency to jurisdictional decisions of the Court by amending the (or a) relevant statute. E.g., *Judicial Improvements Act of 1990*, Pub. L. 101-650, 104 Stat. 5089 (1990) (*inter alia*, enacting 28 U.S.C. § 1367 (Supp. II 1990) which overrules *Finley v. United States*, 490 U.S. 545 (1990) (limiting pendent party jurisdiction)). For other examples, see Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 423 & n.223 (1991). For general empirical commentary on Congress' statutory response to jurisdictional decisions, see Eskridge, *supra* note 60, at 344-45; Solimine, *supra*, at 421-24; Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 451 n.120 (1992).

With respect to appellate matters, Congress has virtually codified the dialogue itself by enacting 28 U.S.C. § 2072(c) (Supp. II 1990) in 1990, which permits the Supreme Court, in exercising its rulemaking power (itself subject to veto by Congress), to define what district court orders are "final" for purposes of § 1291. Section 2072(c) is subject to extensive and critical comment in Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. (forthcoming 1993) (manuscript on file with author).

90. See *supra* notes 35-37 and accompanying text.

have constructed an argument that the Congressional purpose behind removal was not served in this particular case, and might have relied on the "narrow construction" canon⁹¹ or abstention doctrines⁹² to boot. All of which is not to say that he would necessarily have been correct, but his opinion would have been in the tradition of flexible interpretation of jurisdictional statutes.

The two opinions in *Thermtron* itself are examples of practical reasoning. Not surprisingly, the majority went beyond the text of Section 1447(d) and relied on its understanding of the evolution and prior judicial interpretations of subsection (d) and related provisions. The majority also relied on legislative history and overall Congressional purpose. It concluded that Congress did not intend to give district judges unreviewable "carte blanche authority" to remand cases on grounds unauthorized by subsection (c).⁹³ Similarly, the dissent spent much time on its strongest point, the language of Section 1447(d) itself. But the dissent also considered the evolution of the statute, prior judicial interpretations, Congressional purpose, and the practical effects of the decision.

The *Thermtron* majority fares better under the lens of practical reasoning. Even so, in my view the dissent has the better of the argument. I have already considered both opinions' textual arguments. Not much more can be said about legislative history or purpose. Both opinions cited the former,⁹⁴ to little effect, since the history is silent on the specific issue raised in *Thermtron*. Of more interest is the more general purpose ascribed to Section 1447(d) and related provisions. Acknowledging the apparent purpose of preventing delay by "protracted litigation of jurisdictional issues,"⁹⁵ the majority nonetheless held that Congress could not have possibly intended to immunize *all* district court opinions from appellate review. The dissent concluded that Congress' purpose was served by such a bar.

While not irrational, the majority's perception of Congressional purpose is faulty. If the purpose was to limit "protracted litigation," it matters not that a remand might be for incorrect reasons. Restrictions on review are of little utility if they can be circumvented by initially asking (as did the majority) if the decision under review is "correct."⁹⁶ Put another way, it is not illogical to simultaneously expect district judges to make correct decisions yet to

91. See *supra* notes 77-79 and accompanying text.

92. See BATOR ET AL., *supra* note 12, at 1452 n.18 (conceptualizing Judge Hermansdorfer's decision as an exercise of abstention); Carruthers, *supra* note 59, at 1038 (same).

93. *Thermtron*, 423 U.S. at 351.

94. *Id.* at 349 n.15 (majority); *id.* 359-60 (Rehnquist, J., dissenting).

95. *Id.* at 351.

96. See Friedman, *supra* note 89, at 50 n.246; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 64 (1975).

insulate any such decisions (whether "correct" or not) from appellate review.⁹⁷ The bar to review does little good if the putative reviewing authority is forced to ask in every case if the remand order is within the bounds of "correctness."⁹⁸

In sum, the *Thermtron* majority opinion legitimately has the aura of practical reasoning. Having that aura, of course, does not make the opinion a good example of such reasoning.⁹⁹ While the arguments might be regarded as somewhat close, ultimately the dissent's view of the text, legislative history and purpose is more convincing than that of the majority. Perhaps the majority opinion could have been better justified on the basis of evolutive considerations. The bar on review was enacted at a time of relatively little practical review of district court decisions. By 1976, the federal system had moved away from the "single judge/finality" model,¹⁰⁰ and Section 1447(d)

97. For an example of an argument contrary to that posited in the text, consider:

We note that we are not considering the pre-*Thermtron* question of whether Congress intended to allow review of remand orders. If one focuses on that question, one might ask, "did not Congress, by prohibiting review of remand orders, in effect extend carte blanche authority to district courts?" We find the answer is no, for we can assume that Congress would expect district courts to follow the provisions of the removal statutes, regardless of whether their decisions were reviewable.

Rothner v. City of Chicago, 879 F.2d 1402, 1410-11 (7th Cir. 1989).

The *Rothner* court's analysis seems correct, but it does not necessarily support *Thermtron*. The posited Congressional expectation can be obtained without appellate review, by the act of district judges following the appropriate law.

98. However, there are parallels in administrative law to the *Thermtron* construction of § 1447(d). The Administrative Procedure Act (APA) precludes judicial review of administrative decisions when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1988). This requires the reviewing court to examine the organic statute in question (i.e., the analog to § 1447(c)) to determine if review is precluded. *E.g.*, *Webster v. Doe*, 486 U.S. 592 (1988); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The parallel only goes so far, since § 701(a)(1) expressly contains the extra meaning which § 1447(d), by its literal terms, does not. For another example, see *Teague v. Lane*, 489 U.S. 288, 301-11 (1989) (new rules of criminal procedure may not be applied retroactively to a pending habeas case; "newness" to be determined by, *inter alia*, examining precedent at the time the defendant's conviction became final).

99. See *ESKRIDGE & FRICKEY*, *supra* note 60, at 362-83 (evaluating practical reasoning decisions of the Court).

100. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 861 (1984); *supra* note 25 and accompanying text.

While not mentioned in either *Thermtron* opinion, perhaps an underlying rationale was the knowledge that, under current doctrine, the decision to remand is unreviewable even if the case, upon removal, works its way up the state court system to the United States Supreme Court. In 1941, the Court unanimously interpreted the predecessor to § 1447(d) to preclude review "directly" or "indirectly." *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941); *cf.* *Board of Educ. of City of New York v. City-Wide Comm. for the Integration of Schs.*, 342 F.2d 284, 284 (2d Cir. 1965) (*per curiam*) (suggesting that exception for § 1443 cases found in § 1447(d) means such cases are exempt from *Stevens* holding). The *Stevens* opinion is

might have been seen as an embarrassing vestige of the earlier era. It thus made sense to construe the statute narrowly to permit greater appellate review. The dissent did not address such evolutive factors either, perhaps believing that such a consideration was ruled out by the plain meaning canon. The evolution of appellate review of remand orders is worth pondering,¹⁰¹ but the relatively blunt wording of Section 1447(d) makes it difficult to rely on such factors when interpreting the statute.

III. POST-*THERMTRON* DEVELOPMENTS

A. Supreme Court Cases

For twelve years the Court had little to say about *Thermtron*. One in-chambers decision by Justice Rehnquist reiterated the bar on remand review when the district judge purported to rely on Section 1447(c),¹⁰² a holding consistent with a summary reversal a short time later by the full Court in another case.¹⁰³

The Court's next (and latest) exposition of *Thermtron* was in *Carnegie-Mellon University v. Cohill*.¹⁰⁴ There, plaintiffs sued the university in state court on both federal question and state law claims. After the defendant removed the case as a federal question, plaintiffs moved to amend their complaint to delete their federal claims, and to remand the remaining claims to state court. The district judge granted both motions. While acknowledging that no statutory provision seemed to authorize a remand in the case, the judge nonetheless found authority in a court's discretion to deal with pendent state law claims.¹⁰⁵ Defendant unsuccessfully sought review in the Third Circuit,¹⁰⁶ and the Court affirmed.

The majority opinion by Justice Marshall held that a district court can remand to state court (rather than dismiss the case outright) in this situation, given the discretionary underpinnings of the doctrine of pendent jurisdic-

problematic, since the statute does not speak to the issue at all (28 U.S.C. § 1257 governs Court review of state court decisions), and the legislative history is entirely silent on the matter. On the other hand, the *Stevens* result is arguably supported by the purpose of limiting protracted litigation over the remand decision.

101. See *infra* Part III.A.

102. *Volvo of Am. Corp. v. Schwarzer*, 429 U.S. 1331 (1976) (Rehnquist, J., in chambers).

103. *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723-24 (1977) (per curiam).

104. 484 U.S. 343 (1988).

105. *Boyle v. Carnegie-Mellon Univ.*, 648 F. Supp. 1318, 1321 (W.D. Pa. 1985).

106. The Third Circuit dismissed an appeal, given the bar of § 1447(d), *Carnegie-Mellon*, 484 U.S. at 347 n.4, and while sitting en banc divided equally on whether a writ of mandamus should issue, thus effectively denying the writ. *Id.* at 347-48.

tion.¹⁰⁷ It did not matter not that the removal statutes were silent on the point.¹⁰⁸ As for *Thermtron's* statements that remands must be on grounds specified by statute,¹⁰⁹ the Court held that those statements "lose[] controlling force" when read in context.¹¹⁰ The context was that, unlike here, the remand in *Thermtron* was "clearly impermissible,"¹¹¹ so *Thermtron* was not controlling. In dissent, Justice White thought it was and adhered to his opinion in that case that remands were only permissible when authorized by statute.¹¹²

Carnegie-Mellon thus expanded the permissible bases upon which a district court may remand a removed case. What impact did it have on the scope of appellate review of remands? According to the prevailing view, none. That is, remands not predicated on Section 1447(c) are subject to review by mandamus, as was the case in *Thermtron*.¹¹³ This result, howev-

107. *Id.* at 348-53.

108. *Id.* at 353-55. As of 1990, there is a statute governing pendent (now called supplemental) jurisdiction. 28 U.S.C. § 1367 (Supp. II 1990). The statute permits district courts to "decline to exercise" such jurisdiction under certain circumstances, § 1367(c), but does not use the word "remand." It is unclear if § 1367 thus codifies the holding in *Carnegie-Mellon*. The legislative history apparently makes no reference to *Carnegie-Mellon* or to § 1447(c)-(d). See H.R. REP. NO. 734, 101st Cong., 2d Sess. 27-30 (1990), reprinted in 1990 U.S.C.A.N. 6860, 6873-76. Given this silence, the better interpretation is that § 1367(c) leaves the holding in *Carnegie-Mellon* intact. See also Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 59 (1992) (§ 1367 fails to address "the special considerations relevant in removed cases").

This reading of § 1367(c) is supported by the recent decision of *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992). There, the district judge remanded certain claims in a case, concluding that he was empowered to do so by § 1367. *Id.* at 1257. The appellate panel held this decision to be reviewable by mandamus, since a partial remand order, pursuant to § 1367(c), fell within the "*Thermtron* exception to § 1447(d)." It was, according to the panel, "a discretionary decision declining the exercise of *expressly acknowledged jurisdiction*." *Id.* Thus, it was "not a remand premised on either a defect in removal procedure or a lack of jurisdiction." *Id.* The court also found this holding to be consistent with *Carnegie-Mellon*. *Id.*

109. See *supra* notes 40-43 and accompanying text.

110. *Carnegie-Mellon*, 484 U.S. at 355.

111. *Id.* at 356.

112. *Id.* at 358-64 (White, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined in the dissent.

113. Thus, in *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989), the court stated: The other two *Thermtron* rulings were not disturbed — *i.e.*, (1) because the remand of the remaining pendent state law claims was a non-1447(c) remand, the § 1447(d) bar on review was inapplicable, and (2) the Court, after a merits review, affirmed the appellate court's denial of mandamus.

Id. at 1406. The court held that a remand based on a "judge-made rule" (in *Rothner*, a rule permitting the right to remove to be waived) was reviewable by mandamus. *Id.* at 1416-18. Similarly, the dissenting opinion by Judge Easterbrook observed:

Carnegie-Mellon left us with three categories of grounds for remand: (1) those authorized by § 1447(c) and beyond the power of appellate review; (2) those not

er, does not inexorably follow. Recall that the *Thermtron* holding of reviewability was predicated, in large part, on the majority's perception that Congress did not intend to permit remands unauthorized by statute. Section 1447(d) was read not to bar review of unauthorized remands. *Carnegie-Mellon* expanded the scope of authorized remands. It follows that the availability of review should be contracted, that the sort of remand in *Carnegie-Mellon* should be barred from review under *Thermtron*'s understanding of Section 1447(d).¹¹⁴

This argument is subject to its own conceptual problems.¹¹⁵ Under this revisionist standard, how is the appellate court to determine if the remand is authorized? To some extent, the court must peek at the merits of the remand to determine whether it was authorized or not. This is just the sort of look required by *Thermtron* and *Carnegie-Mellon*. A quick look would determine only if the remand order were authorized, not if the order were correct.¹¹⁶

Carnegie-Mellon did not purport to explicitly reach these issues.¹¹⁷ But the lower courts have chosen to interpret the case as expanding, rather than contracting, appellate review. This interpretation is perhaps understandable given the reasons for remand and the exception to the bar of review. A careful review of that joinder, however, reveals that expanding authorization for remand should contract review. The lower courts' failure to do so is

authorized by § 1447(c) but nonetheless lawful in principle and reviewable for error in execution [e.g., *Carnegie-Mellon*]; (3) those not authorized by § 1447(c) or anything else, and subject to automatic reversal [e.g., *Thermtron*].

Id. at 1420 (Easterbrook, J., dissenting); see also *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (Easterbrook, J.).

Likewise, the Fifth Circuit appears to hold that the "permissible grounds and means of reviewing remand orders have expanded considerably" by the *Carnegie-Mellon* decision. *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 n.1 (5th Cir. 1991).

114. See Steinman, *supra* note 26, at 1004; cf. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991) (Easterbrook, J.) (in case involving remand by bankruptcy court, "[i]t makes little sense to take this increase of discretion [regarding a 1978 law] as enlarging appellate powers."). In contrast, see Judge Easterbrook's opinion in *Rothner*, *supra* note 113.

115. Similar problems were raised by the *Thermtron* dissent. *Thermtron*, 423 U.S. at 357 (Rehnquist, J., dissenting).

116. There is ample precedent for such a quick look. *E.g.*, Friedman, *supra* note 89, at 50 n.228 (court has some initial power to determine if a Congressional restriction on jurisdiction applies to the case; once it so determines, the restriction bars further adjudication); *supra* note 98 (addressing preclusion of judicial review under § 701(a)(1) of the APA); cf. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 150-51 (1989) (arguing that court would retain jurisdiction to determine constitutionality of the restriction on jurisdiction).

117. Steinman, *supra* note 26, at 991. The writ of certiorari in *Carnegie-Mellon* only concerned the "authorized" aspect of *Thermtron*, and did not mention the effect, if any, on reviewability. *Carnegie-Mellon*, 484 U.S. at 348 (stating why certiorari was granted).

indicative of their expansion of review in the post-*Thermtron* era, as the remainder of Part II will demonstrate.

B. *The 1988 Amendment to Section 1447(c)*

In 1988, as one of several revisions to the Judicial Code,¹¹⁸ Congress amended Section 1447(c). At the time of *Thermtron*, that subsection stated that a district court shall remand if "at any time before final judgment it appears that the case was removed improvidently and without jurisdiction."¹¹⁹ As revised, the subsection states that a motion to remand based on a "defect in removal procedure" must be made within 30 days after removal, and the case "shall" be remanded if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction."¹²⁰ Subsection (d) was not revised.

How does this amendment affect the *Thermtron* interpretation of subsection (d)? Most authorities seem to think not at all, premised on the amendment's failure to mention subsection (d).¹²¹ However, the Fifth Circuit in *In re Shell Oil Co.*¹²² recently took a different view. According to that court, the changes

reflect a congressional intent to delete improvident removal as an unreviewable basis for remand, at least when a motion to remand based on such improvident removal is made outside the 30-day time limit. This leaves remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders.¹²³

118. Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, 102 Stat. 4642 (codified in scattered sections of the U.S. Code).

119. See *supra* note 40.

120. The subsection provides:

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under Section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(c) (1988).

121. See Solicitor General's Brief, *supra* note 5, at 11 n.5; WRIGHT ET AL., *supra* note 17, at 700-01 n.11; Alan B. Rich, *Current Issues in Removal Jurisdiction*, 57 J. AIR L. & COM. 395, 421 (1991); Steinman, *supra* note 19, at 899-900.

122. 932 F.2d 1518 (5th Cir. 1991), cert. denied, 112 S. Ct. 914 (1992). This is the *Castillo* case referred to earlier in this Article. See *supra* notes 1-2 and accompanying text.

123. *Shell Oil*, 932 F.2d at 1520 (footnote omitted).

In *Shell Oil*, the district judge had granted a motion to remand, made 30 days after removal, on the basis that local citizens, whose presence defeated complete diversity, had not been fraudulently joined.¹²⁴ Removal was thus arguably improper under Section 1441(b).¹²⁵ Finding this to be a "defect in removal procedure," not a lack of "subject matter jurisdiction," the Fifth Circuit found the matter reviewable under a writ of mandamus.¹²⁶ The court also allowed that the result may have been different prior to the amendment, since the remand was arguably based on "improvident removal."¹²⁷

The Fifth Circuit's interpretation of the 1988 amendment does not survive close analysis. Textually, the amendment substituted the "improvidently and without jurisdiction" language with two sentences. One sentence states that motions to remand for defects in removal procedure must be made within 30 days of removal; the other states that remands for lack of subject matter jurisdiction can be made at any time before final judgment. On its face, this language appears to permit remands for two reasons, one of which must be made within 30 days. As long as we follow *Thermtron's in pari materia* canon, then *any* remand predicated on new section 1447(c) should be barred from review by subsection (d). Presumably, the district judge will be cognizant of and follow the requirements of new Section 1447(c)—including the time limit with respect to one type of motion. Perhaps the judge calculates the 30-day limit incorrectly, or thinks it can be waived under certain circumstances, or even ignores it. But as long as her action is purportedly based on Section 1447(c), then it should be insulated from review.¹²⁸

This result is also supported by the legislative history of the new subsection (c).¹²⁹ That history makes clear that the drafters sought to limit

124. *Id.* at 1518-19.

125. 28 U.S.C. § 1441(b) (1988 & Supp. II 1990) (*inter alia*, restricts removability of certain diversity actions).

126. *Shell Oil*, 932 F.2d at 1520-21.

127. *Id.* at 1520. Several cases have followed *Shell Oil*. See *In re International Paper Co.*, 961 F.2d 558, 561 (5th Cir.), *cert. denied*, 113 S. Ct. 326 (1992); *In re Administrators of the Tulane Educ. Fund*, 954 F.2d 266, 268-69 (5th Cir. 1992); *FDIC v. Loyd*, 955 F.2d 316, 319-21 (5th Cir. 1992); *cf. Bregman v. Alderman*, 955 F.2d 660, 663 n.2 (11th Cir. 1992) (*per curiam*) (finding it unnecessary to decide whether to follow *Shell Oil*). Also as *Shell Oil* noted, the Third Circuit seemed to follow a similar approach in *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989). *Shell Oil*, 932 F.2d at 1520.

128. This follows from the *Gravitt* case. See *supra* note 103; see also *In re Decorator Indus. Inc.*, 980 F.2d 1371, 1373 (11th Cir. 1992) (assuming that district court relied on § 1447(c) despite lack of citation to that section in district court's opinion); Rich, *supra* note 121, at 421.

Subsequent to *Shell Oil*, the Fifth Circuit has held that remand orders premised on *timely* remand motions are insulated from review by § 1447(d). *In re Medscope Marine Ltd.*, 972 F.2d 107 (5th Cir. 1992); *Hopkins v. Dolphin Titan Int'l, Inc.*, 976 F.2d 924 (5th Cir. 1992).

129. The entirety of the legislative history of the new § 1447(c) is contained in two paragraphs, which state:

remands shortly before trial in federal court, and did not narrowly confine the meaning of "defects" in removal procedure. The term "subject matter jurisdiction," rather than just "jurisdiction," was apparently utilized to emphasize that defects in the former in federal court are not waivable or subject to time limits. Finally, that history makes no reference to Section 1447(d) or *Thermtron*.

Thus, it is reasonable to interpret the text and history of new Section 1447(c) as having no substantive impact on the availability of *Thermtron*-like review of remand orders.¹³⁰ Once again, however, a lower court took

Subsection (c) amends 28 U.S.C. 1447(c) and adds a new subsection (e). Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction. The amendment is written in terms of a defect in "removal procedure" in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that might instead be remanded.

The proposal also would amend section 1447(c) to ensure that the court may order payment of actual expense caused by an improper removal. As noted above, this provision would replace the bond provision now set out in section 1446(d), which covers payment of "all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

H.R. REP. NO. 100-889, 100th Cong., 2d Sess. 72 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6033. The language also appears virtually unchanged in *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 97-98 (1987-88) (prepared statement of Judge Elmo B. Hunter), and in 134 CONG. REC. S16284, S16308 (daily ed. Oct. 14, 1988) (section-by-section analysis submitted in lieu of a Senate Report).

130. For similar readings of the legislative history, see *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1348 n.11 (6th Cir. 1993); *Rothner v. City of Chicago*, 879 F.2d 1402, 1411 (7th Cir. 1989); Rich, *supra* note 121, at 420-21. While the legislative history does not seem to refer to *Carnegie-Mellon*, the last sentence of the first paragraph of the excerpt quoted in note 129, *supra*, arguably endorses the result in that case. Even assuming that to be so, there is little in *Carnegie-Mellon* itself which speaks to appellate review. See *supra* note 117 and accompanying text.

More recently, the Fifth Circuit, after reviewing the legislative history of the new § 1447(c), "brief that it is," concluded that "the 'removed improvidently' language of pre-1988 section 1447(c) was replaced, without intent to change the meaning, with the 'defect in removal procedure' in current section 1447(c)." *Medscope Marine*, 972 F.2d at 110. While this case cited *Shell Oil* earlier in the opinion, *id.* at 108 nn.3-4, its conclusion is seemingly at odds with

a more expansive view and expanded the availability of appellate review of remand orders.

C. *Thermtron in the Lower Courts*

The previous portions of Part II considered how lower federal courts responded to post-*Thermtron* doctrinal and statutory developments. In the remaining portions of Part II, I consider three other doctrinal exceptions carved out by the lower courts which permit appellate review even of issues seemingly not covered by the *Thermtron* exception.

1. The Substantive Issue Exception

One line of cases has held that review is permitted when the district judge, in remanding the case, in effect makes a substantive decision on the merits. The lodestar case is the Ninth Circuit's opinion in 1984 in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*¹³¹ There, a case removed on the basis of diversity jurisdiction was remanded given the existence of a forum selection clause in a contract between the parties, which directed all disputes to be litigated in state court.¹³² The court held that the decision was reviewable, although the rationale is less than a model of clarity.

Initially, the court held that since the remand was predicated on the forum selection clause and not on "subject matter jurisdiction," it was not on a ground specified in Section 1447(c).¹³³ Given *Thermtron*, that should have ended the matter and review by mandamus could have proceeded. However, the court went on to hold that the district judge had "reached a substantive decision on the merits apart from any jurisdictional decision."¹³⁴ This made the former decision a reviewable one, and to hold otherwise would deprive the defendant "of its right to appeal a substantive determination of contract law."¹³⁵ Several other circuits have followed *Pelleport* and found remand decisions reviewable when a "substantive" decision proceeded and formed the basis of the remand.¹³⁶ Other courts are less sure, arguing that the Section

language in *Shell Oil*. See *supra* notes 122-27 and accompanying text.

131. 741 F.2d 273 (9th Cir. 1984).

132. *Id.* at 275.

133. *Id.* at 276.

134. *Id.*

135. *Id.* at 277.

136. See, e.g., *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344 (10th Cir. 1992) (forum selection clause); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1204 (5th Cir. 1991) (same); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 554 (9th Cir. 1991) (forum selection clause contained in contract other than one under dispute in case); *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1211 (3d Cir.) (contract purportedly

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1447(d) bar holds when the "substantive" issue is "intrinsic" to the remand order, at least when the latter is based on jurisdictional grounds.¹³⁷

The courts skeptical of *Pelleport* have the better argument. At the outset, it is by no means clear that the "substantive" issues in the *Pelleport* line of cases, like a clause designating a state court as an exclusive forum, or waiving the right to remove, are not covered by either version of Section 1447(c). For example, if the defendant executed such clauses in contracts, would not removal then be "improvident" (pre-1988), or constitute a "defect in removal procedure" (post-1988)?¹³⁸ As Judge Easterbrook has suggested, the common usage of "improvident" suggests that it "ought not have been done"—the right was waived in some manner.¹³⁹ The term is not necessarily confined to not following the precise procedural steps required by the removal statutes. From this, the *Pelleport* distinction might stand on better footing given the language of the 1988 amendment, which seems somewhat narrower than the word "improvident." But the legislative history of that provision makes fairly clear that no (for lack of a better word) substantive change was intended—that with respect to the bases for remand, the old and new versions of Section 1447(c) are in accord.¹⁴⁰

waived right to remove), *cert. denied*, 112 S. Ct. 302 (1991); *Regis Assocs. v. Rank Hotels Mgt. Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990) (same); *Rothner v. City of Chicago*, 879 F.2d 1402, 1416-17 (7th Cir. 1989) (dicta); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656 (2d Cir. 1988) (forum selection clause); *Clorox Co. v. United States Dist. Court for N. Dist. of Cal.*, 779 F.2d 517, 520 (9th Cir. 1985) (contract purportedly waived right to remove). *But see Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1349-50 (6th Cir. 1993) (holding the *Pelleport* exception does not encompass remand for lack of jurisdiction when district court held that plaintiff's claims were not preempted by federal laws); *Ferrari*, 940 F.2d at 557 (Noonan, J., dissenting) (arguing that *Pelleport* ought to be overruled).

Some courts have extended the substantive issue exception to matters apart from issues embodied in contractual papers. *E.g.*, *Miami County Municipal Court v. Wright*, 963 F.2d 876, 879 n.3 (6th Cir. 1992) (remand order "was based on a substantive determination that [a state court defendant] had no colorable federal defense to the state contempt proceedings," making removal improper under 28 U.S.C. § 1442(a)(1) (1988)), *vacated*, 963 F.2d 880 (6th Cir. 1992).

137. *Calderon v. Aerovias Nacionales de Colombia*, 929 F.2d 599, 602 (11th Cir.) (remand based on lack of complete federal question preemption), *cert. denied*, 112 S. Ct. 376 (1991); *Harris v. Blue Cross/Blue Shield of Ala., Inc.*, 951 F.2d 325, 329 (11th Cir. 1992) (remand based on lack of a substantial federal question sufficient to confer jurisdiction).

138. As noted by Judge Noonan, the district judge in *Ferrari*, who remanded on the basis of a forum selection clause, thought so, since the judge cited § 1447(c). *Ferrari*, 940 F.2d at 555 (Noonan, J., dissenting) (quoting district court opinion).

139. *Rothner*, 879 F.2d at 1421 (Easterbrook, J., dissenting); *see also Ferrari*, 940 F.2d at 557 (Noonan, J. dissenting) (similar analysis).

140. *See In re Medscope Marine Ltd.*, 972 F.2d 107, 109-10 (5th Cir. 1992); *Rothner*, 879 F.2d at 1411 (Easterbrook, J., dissenting); *supra* notes 121-30 and accompanying text; *cf. Shell Oil*, 932 F.2d at 1521-22 (discussing meaning of "any defect in removal procedure" and suggesting that it includes grounds present before removal).

Even granting the premise of *Pelleport*—that some "substantive" decisions for remands lie outside Section 1447(c)—the rule of that case is problematic.¹⁴¹ The core reasoning of *Pelleport*—that the remand was based on "a substantive decision on the merits apart from any jurisdictional decision"—would surely strike most lawyers as unremarkable. From the first year of law school, most attorneys differentiate between jurisdictional or procedural issues and the merits of the underlying dispute between the parties.¹⁴² What is odd is the *Pelleport* court's application of that principle. The district court in that case remanded on the basis of a forum selection clause that appears to have been entirely unrelated to the substantive dispute between the parties (for breach of contract).¹⁴³ Thus, it is difficult to discern how the issue of the forum selection clause is unrelated to jurisdiction, or is a decision on the "merits."¹⁴⁴

To be sure, care must be taken to avoid question-begging definitions of the "merits," "jurisdiction" and related terms.¹⁴⁵ Difficulty in distinguishing these concepts can also arise when jurisdictional issues are intertwined with the merits.¹⁴⁶ But when the reason for the remand (call it "substantive" or

141. Concededly, the concession made here is significant, since under the apparent prevailing view of *Carnegie-Mellon*, see *supra* notes 113-14 and accompanying text, the sort of remand rationale found in *Pelleport* and related cases is arguably subject to appellate review. That is, given that there is authority in general to remand removed cases based on the enforcement of forum selection clauses, or contractual waivers of the right to remove, see Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 89-90 (1992) (reviewing cases), it seems to follow under the prevailing view that at least mandamus review is available. If so, is not the "substantive" exception developed by *Pelleport* (decided prior to *Carnegie-Mellon*) now superseded and unnecessary? Perhaps, but the post-*Carnegie-Mellon* cases do not seem to recognize this argument, and *Pelleport* itself appeared to indirectly argue that § 1447(d) was not intended to bar non-"jurisdictional" remands (as *Pelleport* called it). *Pelleport*, 741 F.2d at 276-77. For these reasons, the internal logic of the *Pelleport* exception is still worth examining.

142. Cf. WRIGHT, *supra* note 16, at 26 ("And a distinction must be drawn between lack of jurisdiction and want of merits.").

143. *Pelleport*, 741 F.2d at 275.

144. One commentator has summarized and approved of this aspect of *Pelleport* without explaining how the enforcement of the clause is a "merits" decision. Herrmann, *supra* note 30, at 415 & n.112; see also WRIGHT ET AL., *supra* note 17, at 707 (describing Ninth Circuit cases, including *Pelleport*, as "sensible").

145. One is reminded of the long-standing confusion over differentiating "substance" from "procedure" in a variety of contexts.

146. For example, personal jurisdiction in a state over a non-resident defendant might be predicated on certain communications that also form the basis of a breach of contract action, which communications the defendant claims never took place. See JOHN J. COUNDET AL., CIVIL PROCEDURE 234-35 (5th ed. 1989).

what have you) is unrelated to the underlying merits, then the logic of the *Pelleport* exception to Section 1447(d) collapses.¹⁴⁷

The other reason advanced by *Pelleport* was that the defendant had a "right" to appeal a substantive determination of contract law. This rationale is as shaky as the first. Not surprisingly, *Pelleport* cited no authority for this right, for there is none. Absent the bar of Section 1447(d), the defendant could appeal every issue it raises once the case is over.¹⁴⁸ Once the case is remanded, the statutory right to appeal evaporates.¹⁴⁹

147. *Pelleport* also cited the Supreme Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) for support. *Pelleport*, 741 F.2d at 276-77. *Waco* involved a removal based on the diversity of a third-party defendant. The district court dismissed the latter and then remanded the case to state court, because of the lack of diversity jurisdiction over the remaining parties. The Court held the dismissal matter appealable, despite the bar to review of remand orders, since "in logic and in fact the decree of dismissal preceded that of remand." *Waco*, 293 U.S. at 143. *Waco* does not support *Pelleport*, since in the former case there were two separate determinations, while in the latter the "substantive" issue merged with and was the reason for the remand. *Calderon*, 929 F.2d at 602; Braun, *supra* note 15, at 87 n.44.

148. See 28 U.S.C. § 1291 (1988).

149. Nor can there be much argument that a "right" to appeal in this context is of constitutional dimension. Congress' authority to restrict the jurisdiction of the lower federal courts, U.S. CONST. art. III, § 1, carries with it the ability to restrict access to federal appellate courts. *Thermtron*, 423 U.S. at 354 (Rehnquist, J., dissenting); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) (describing 28 U.S.C. § 1291 as a Congressional limit on appellate jurisdiction). This conclusion follows since under § 1447(d) there is Article III "review" of the motion to remand, albeit by a single federal district judge, not by an appellate panel, in addition. Cf. Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1510 (1990) (arguing that constitutional framers assumed parity between trial and appellate federal judges).

2. The Constitutional Issue Exception

In 1991, the Third Circuit in *In re TMI Litigation Cases Consolidated II*¹⁵⁰ created another exception to the bar of section 1447(d), even as now liberalized by *Thermtron* and *Carnegie-Mellon*. *In re TMI* arose from the Three Mile Island (TMI) nuclear energy plant incident in 1979. Numerous plaintiffs filed suit in the state courts of Pennsylvania against the owners and operators of TMI for personal and business injuries, on various state law grounds.¹⁵¹ Much of TMI litigation centered on the import of the Price-Anderson Act,¹⁵² which limits the potential liability of nuclear facility operators due to an accident.¹⁵³ While the TMI litigation was ongoing, Congress in 1988 passed amendments to the Act¹⁵⁴ which, among other things, created a federal cause of action for nuclear facility liability, albeit one which would draw on substantive principles of state law.¹⁵⁵ The amendment also provided that such actions fell within the original federal question jurisdiction of district courts and were removable to those courts.¹⁵⁶

Shortly after the amendment, defendants removed the state court actions to federal court and plaintiffs moved to remand on the bases that the actions did not "arise under" federal law. The district judge agreed with and granted the motion under Section 1447(c), concluding that there was no subject-matter jurisdiction, and that to the extent the amendment vested jurisdiction in a federal court, it was unconstitutional.¹⁵⁷ However, she also certified an

150. 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992). This is the *Gumby* case referred to earlier in the Article. See *supra* notes 3, 5 and accompanying text.

An earlier, one page decision had stated in dicta that constitutional issues (among other things) did not constitute an exception to § 1447(d) or fall under *Thermtron*, as long as § 1447(c) was cited by the district court. See *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211, 211 (5th Cir.) (per curiam), *cert. denied*, 484 U.S. 824 (1987). This apparent conflict with *In re TMI* was part of the basis for the plaintiff's unsuccessful petition for writ of certiorari. See *Petition for Writ of Certiorari* at 10-11, *Gumby v. General Pub. Utils. Corp.*, 112 S. Ct. 1262 (1992) (No. 91-676).

151. The procedural history is considerably more complicated than my brief summary, and greater detail can be found in *In re TMI*, 940 F.2d at 836-38.

152. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified in scattered sections of 42 U.S.C.).

153. The Price-Anderson Act is described in greater detail in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63-67 (1978); *In re TMI*, 940 F.2d at 851-54.

154. Pub. L. No. 100-408, 102 Stat. 1066 (1988).

155. 42 U.S.C. § 2014(hh) (1988).

156. 42 U.S.C. § 2210(n)(2) (1988). These aspects of the 1988 amendments were in part responsive to decisions of the Third Circuit, in prior litigation arising from TMI, that had held that the Act did not create a federal tort cause of action and was not intended to confer original federal question or removal jurisdiction upon district courts. *In re TMI*, 940 F.2d at 837, 844 & n.8.

157. *TMI*, 940 F.2d at 837-38.

interlocutory appeal under Section 1292(b) of the Judicial Code,¹⁵⁸ and defendants sought review on that basis as well as on a writ of mandamus.¹⁵⁹

The Third Circuit spent ten published pages addressing the plaintiffs' argument that it lacked appellate jurisdiction given the bar of Section 1447(d). The court acknowledged that neither the *Thermtron* nor the *Pelleport* exception could be relied upon.¹⁶⁰ Unlike *Thermtron*, the district judge, in remanding, specifically relied upon the lack of subject-matter jurisdiction mentioned in Section 1447(c). And unlike *Pelleport*, the district court's "substantive" decision was squarely a jurisdictional one.¹⁶¹

Notwithstanding the lack of precedent, the Third Circuit nonetheless found another exception to Section 1447(d), this one purportedly rooted in congressional intent. The court asserted that in enacting Section 1447(d), "Congress did not intend to vest the district courts with the authority to make final determinations regarding the constitutionality of federal statutes."¹⁶² The basis for this assertion was the observation that constitutional rulings were not "the type of determination routinely and regularly made pursuant to Section 1447(c)."¹⁶³ To so hold, the court held, would conflict with the presumptions that Congressional intent to bar judicial review, or appellate review, must be clearly expressed.¹⁶⁴ The court found no such clear intent in these circumstances.¹⁶⁵ Moreover, if the remand order could not be reviewed, then potentially inconsistent results of various district courts would stand.¹⁶⁶ If the *Thermtron* and *Pelleport* results are reflective of Congressional intent, the court thought it "inconceivable" that Congress would have desired to insulate constitutional issues from appellate review.¹⁶⁷ For these

158. 28 U.S.C. § 1292(b) (1988), described in greater detail *infra* Part II.C.3.

159. Defendants also sought to rely on the collateral order doctrine, described *infra* Part II.C.3.

160. *TMI*, 940 F.2d at 843.

161. *Id.*

162. *Id.*

163. *Id.* at 844.

164. *Id.* at 845. The court relied on *Webster v. Doe*, 486 U.S. 592 (1988) and *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) as the source of the respective presumptions. *TMI*, 940 F.2d at 845.

165. *TMI*, 940 F.2d at 845.

166. *Id.* at 846. The court also pointed out that the present understanding was that review of the remand decision by the Supreme Court from a state court was also barred by § 1447(d). *Id.* at 845; see *supra* note 100.

167. *TMI*, 940 F.2d at 846.

reasons, the court concluded that an appeal was available through Section 1292(b).¹⁶⁸

While I am sympathetic to the policy reasons advanced by the *In re TMI* court,¹⁶⁹ the court's analysis is not a convincing example of statutory interpretation. Nowhere did the court rely on legislative text or history for creating yet another exception to Section 1447(d)—one which permitted it to review a district court decision that expressly invoked the language of Section 1447(c). Rather, the court seemed to argue that had Congress really thought about the issue, it never would have wanted a constitutional decision, which resulted in a remand, to be insulated from appellate review.¹⁷⁰ While the court did not invoke the term, the court appeared to rely on the "absurd result" exception to the plain meaning canon of statutory construction.¹⁷¹

Would precluding constitutional issues embodied in remand orders from federal appellate review be so absurd as to justify another departure from Section 1447(d)? While amounting to poor policy, the specter raised by *In re TMI* does not constitute an irrational or absurd result. The court claimed that such issues are not the ordinary stuff of remand decisions, but in fact many such orders raise difficult issues of statutory construction,¹⁷² some of which may postpone Supreme Court consideration of important problems if the matter is remanded.¹⁷³ If important statutory issues are barred from review by Section 1447(d), there seems to be no principled basis to differentiate such cases from ones which happen to involve constitutional issues.¹⁷⁴

168. *Id.* at 847-48. While the district judge had taken the liberty of staying her remand decision while it was being appealed, the court stated that its analysis would probably hold even if that were not the case. *Id.* at 847 n.9.

169. *See infra* Part III.

170. The court seemed to be engaging in the sort of "imaginative construction" of Congressional intent advocated by Judge Posner. *See* POSNER, *supra* note 68, at 286-93; *see also* ESKRIDGE & FRICKEY, *supra* note 60, at 329-32 (critiquing Posner's theory). More recently, the Third Circuit, relying on *In re TMI*, held that a remand was unauthorized by the Federal Employees Liability Reform and Tort Compensation Act (Westfall Act), 28 U.S.C. § 2679(d) (1988), and was reviewable notwithstanding § 1447(d), since the two statutes were to be read together. *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993).

171. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); ESKRIDGE & FRICKEY, *supra* note 60, at 339 n.69.

172. *See infra* Part III.

173. A point made in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 4 (1983) (finding case had been improperly removed).

174. Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFITC v. Schor Era*, 68 B.U. L. REV. 85, 142 n.322 (1988). Perhaps one could better argue in favor of the distinction by observing that the apparently unreviewable statutory decision by a district judge is subject to modification by Congress, while a constitutional decision is of course much more difficult to rectify.

The *In re TMI* court also alluded to the statutory canons presuming judicial reviewability. As I suggested before,¹⁷⁵ these canons lend little weight to the court's arguments. The presumption in favor of judicial review is satisfied here, since at least one Article III judge will decide the motion to remand. To be sure, if the motion is granted, then, absent exception, Section 1447(d) prevents the remaining apparatus of appellate review from engaging. Assuming it is sensible to read that apparatus into a presumption in favor of judicial review,¹⁷⁶ Section 1447(d) is explicit enough to rebut the presumption. The Third Circuit's effort to engage in practical statutory reasoning thus is unpersuasive.

3. The Interlocutory Appeals Exception

A final exception to the bar of review in Section 1447(d) has been developed by lower courts under the rubric of interlocutory appeals. Recall that *Thermtron* had reiterated the long-standing rule that remand orders were not final, appealable orders. Therefore, some form of interlocutory review had to be utilized, such as the writ of mandamus.¹⁷⁷ Since then, other courts have had occasion to utilize other vehicles of interlocutory review.¹⁷⁸

One method is Section 1292(b) of the Judicial Code. It permits a district judge to certify to the appellate court an interlocutory order that involves a "controlling question of law as to which there is substantial ground for difference of opinion," and the resolution of which "may materially advance

175. See *supra* notes 80-81, 148-49 and accompanying text.

176. The *In re TMI* court referred to *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) as embodying such a presumption. *TMI*, 940 F.2d at 838; see also *supra* note 166. *Pacor* involved an appeal from a bankruptcy court to federal district court. The *Pacor* court held that the general removal provisions did not apply to cases removed to the former court, since the bankruptcy code had specific provisions dealing with that issue. Hence, despite the bar to review found in 28 U.S.C. § 1452(b) (1988) (which reads much like § 1447(d)), appellate review was available. *Pacor*, 743 F.2d at 990-92. *Pacor* has apparently been accepted by one other circuit, *In re Federal Savings & Loan Insurance Corp.*, 837 F.2d 432 (11th Cir. 1988), and rejected in two others. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225 (7th Cir. 1991); *Sykes v. Texas Air Corp.*, 834 F.2d 488, 490 (5th Cir. 1987). *In re TMI* itself chose to read *Pacor* as confined to the bankruptcy context. *TMI*, 940 F.2d at 838-39 n.4.

In the course of its opinion, *Pacor* seemed to fashion a presumption in favor of appellate judicial review, but the only authority it cited were cases finding a presumption of judicial review generally. *Pacor*, 743 F.2d at 992. Thus, this aspect of *Pacor* stands on shaky doctrinal ground. Nonetheless, one can posit such a presumption. Probably, if most legislators or lawyers were to think about it, "judicial review" would include some sort of appellate review (if an appeal is initially lodged in a trial court). For these and other reasons, see *infra* Part III, one could develop a statutory canon of construction presuming in favor of appellate review.

177. See *supra* notes 47-48 and accompanying text.

178. The scope of review of some of these other devices can be broader than that of mandamus. See *infra* Part III.B.

the ultimate termination of the litigation.¹⁷⁹ The appropriate circuit may accept the certification in its discretion.¹⁸⁰ Both the district court¹⁸¹ and the Third Circuit¹⁸² in *In re TMI* held that Section 1292(b) was an avenue of appeal, other than mandamus. Other courts have disagreed, on the basis that since Section 1447(d) excludes review "by appeal or otherwise," certification appeals are not available.¹⁸³

There was little explication of Section 1292(b) in the *In re TMI* opinions. If one were to read section 1447(d) literally, then it seems to bar *all* appellate review. Nor is there anything in the text or legislative history of Section 1292(b) (enacted in 1958) which would carve out an exception to Section 1447(d).¹⁸⁴ Once literalism is discarded by *Thermtron*, however, there

179. 28 U.S.C. § 1292(b) (1988). The meaning of this text is considered in Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1171-74, 1193-96 (1990).

180. 28 U.S.C. § 1292(b) (1988).

181. *In re TMI Coordinated Proceedings II*, 735 F. Supp. 640, 646-47 (M.D. Pa. 1990), *rev'd on other grounds*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992).

182. *TMI*, 940 F.2d at 847-48.

183. See *Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914, 916 (9th Cir. 1992) (per curiam) (disagreeing with *In re TMI*); see also *Ivy v. Diamond Shamrock Chemicals Co.*, No. 92-7487, slip op. (2d Cir. June 16, 1992), *cert. denied*, 113 S. Ct. 599 (1992); *National Audubon Soc'y v. Department of Water*, 858 F.2d 1409, 1417 (9th Cir. 1988); *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959).

184. See Solimine, *supra* note 179, at 1194-95 (discussing legislative history of § 1292(b)); ALI Study, *supra* note 33, at 417 (apparently assuming that present § 1292(b) does not provide an exception to § 1447(d)).

It has recently been suggested, in an unsuccessful certiorari petition, that § 1292(b) does limit § 1447(d), and that such a reading is compelled by the Court's recent decision in *Connecticut National Bank v. Germain*, 112 S. Ct. 1146 (1992). See *Petition for Writ of Certiorari at 17-20, Dow Chemical Co. v. Brown*, 113 S. Ct. 599 (1992) (No. 92-438). For several reasons this argument is not compelling.

First, it is difficult to contend that § 1292(b) is more narrowly drawn than § 1447(d) and therefore controls over the latter. Section 1292(b) governs interlocutory appeals in *all* civil cases, while § 1447(d) limits appeals of a narrow type of order in civil cases, i.e., those remanding a case back to state court after removal. Hence, the latter provision is more properly viewed as narrower than the former. *Accord Bear River*, 267 F.2d at 851. Similarly, a review of the legislative history of § 1292(b), as noted above, reveals no reference to § 1447(d) or a limitation on that provision.

Second, it would not necessarily serve the underlying purposes of the present statutes to permit § 1292(b) to be an exception to § 1447(d). Section 1292(b) is generally thought to permit trial time to be saved by allowing potentially case-dispositive issues to be definitively resolved by the court of appeals prior to trial. Solimine, *supra* note 179, at 1173. In contrast, section 1447(d) serves the time-saving goal by (on its face) not permitting any appeal at all. See *supra* note 26 and accompanying text. It embodies no inherent error correction mechanism as does § 1292(b).

Finally, the *Germain* case does not stand for a contrary proposition. In that case, the Court unanimously held that 28 U.S.C. § 158(d) (1988), which gives courts of appeals jurisdiction over

seems no good reason to confine review permitted by that case and *Carnegie-Mellon* to mandamus.¹⁸⁵ Instead, other models of review are appropriate, especially if the Court adheres to the assumption that remand orders are not final under Section 1291 of the Judicial Code.

Another type of interlocutory review is the collateral order doctrine. That doctrine permits decisions not otherwise final to be immediately appealed if the order would "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."¹⁸⁶ The Ninth Circuit in *Pelleport* held that these criteria had been satisfied,¹⁸⁷ a ruling followed by several other courts.¹⁸⁸ Other courts are less persuaded.¹⁸⁹

appeals from final orders of district courts sitting as appellate courts in bankruptcy, did not prohibit § 1292(b) from being used to permit appellate review of an interlocutory decision of a district court in the same capacity. *Germain*, 112 S. Ct. at 1148-50. The Court was split in its rationale. A five-member majority, in an opinion by Justice Thomas, found the result compelled by the plain meaning of the respective statutes. *Id.* Finding the provisions ambiguous, Justice Stevens looked to legislative history of § 158(d) which, he said, contained "no mention of an intent to limit the scope of § 1292(b)." *Id.* at 1150 (Stevens, J., concurring). Three other Justices concurred on the basis that any purported redundancy between the statutes was inadvertent. *Id.* at 1151 (O'Connor, J., concurring).

Germain is at best indirectly relevant to the intersection of § 1292(b) and § 1447(d), for those provisions on their face, unlike those in *Germain*, work at cross purposes. In *Germain*, both statutes permitted appellate review, albeit under different circumstances, of district court decisions in certain bankruptcy matters. In contrast, § 1447(d) prohibits review of certain final orders, while § 1292(b) in some circumstances permits review of certain non-final orders. Moreover, finality in the bankruptcy context is thought to be more flexible than usual, given the ongoing nature of many bankruptcy proceedings and the necessity of resolving discrete issues at various points in those proceedings. 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3926 (Supp. 1992). *Germain* might well have been informed by such considerations, *see In re Gould*, 977 F.2d 1038, 1041 n.2 (7th Cir. 1992), which have less relevance for the non-bankruptcy cases governed by § 1447(d).

185. *TMI*, 940 F.2d at 847 (making same point); WRIGHT ET AL., *supra* note 17, at 715 (§ 1292(b) should be available in this context as long as district judge stays order of remand to allow appellate proceedings to take place).

186. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The collateral order doctrine is generally discussed in Solimine, *supra* note 179, at 1169-71, 1184-92.

187. *Pelleport*, 741 F.2d at 277-78.

188. *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201-04 (5th Cir. 1991); *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1211 n.6 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991); *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344-45 (10th Cir. 1992); *Regis Assocs. v. Rank Hotels Mgt. Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988); *cf. TMI*, 940 F.2d at 848 n.11 (finding it unnecessary to reach the issue).

189. In *Calderon v. Aerovias Nacionales de Colombia*, 929 F.2d 599 (11th Cir.), *cert. denied*, 112 S. Ct. 376 (1991), the court considered a slight variation of the *Pelleport* use of the collateral order doctrine. In *Calderon*, defendant argued that a determination of a "substantive

Like my conclusion with respect to Section 1292(b), the collateral order exception should be available to the extent that remand orders are reviewable at all after *Thermtron* and *Carnegie-Mellon*. The typical remand order will satisfy all the criteria of the exception: it determines a disputed issue, resolves an issue "completely separate from the merits of the action," and given Section 1447(d) is effectively unreviewable on appeal.¹⁹⁰ Ironically, this conclusion guts the logic of the substantive issue exception of *Pelleport*. Recall that the exception was premised on the belief that the substantive issue (like the validity of a forum selection clause) was a decision on the merits apart from any jurisdictional one.¹⁹¹ If that is so, then the second criterion of the collateral order exception should not be able to be satisfied, for the disputed issue would not be separate from the "merits." Perhaps one could reconcile the apparent disparity by designating two types of "merits" or "substantive" issues—one related to the underlying action, the other concerning jurisdictional or procedural issues. The collateral order doctrine is concerned with reviewing the second, as does *Pelleport*, and thus *Pelleport*-type issues meet the test. That may be so, but it does not square with *Pelleport's* insistence that its "merits" decision was *not* jurisdictional or procedural.

issue" which preceded the remand, *see supra* Part II.C.1., would itself be appealed as a collateral order. The argument was rejected. *Calderon*, 929 F.2d at 602; *see also Rothner*, 879 F.2d at 1419 (Easterbrook, J., dissenting) (after *Thermtron*, "[r]emands may be reviewed, if at all, by mandamus . . .").

Judge Easterbrook argued in *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir. 1992), that the collateral order doctrine was not applicable since the third prong of the test was not satisfied. According to him, the holding of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 10-11 (1983) (given res judicata effect of state court suit, stay of federal court proceedings pending resolution of former suit left defendant "effectively out of court") did not control, since the "point of *Moses H. Cone* was that the litigation was (effectively) over, while a remand, like a transfer under 28 U.S.C. § 1404, continues the litigation in another forum." *Amoco Petroleum*, 964 F.2d at 712. He also argued that *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989) (denial of enforcement of forum selection clause not immediately appealable under collateral order doctrine since third prong of test not satisfied), supported this conclusion. *Amoco Petroleum*, 964 F.2d at 712. Therefore, mandamus was the only remedy available. *Id.* at 713.

190. *Moses H. Cone*, 460 U.S. at 10-11 (interlocutory order which "effectively" leaves defendant out of federal court satisfies third prong of test); Steinman, *supra* note 26, at 1006-07. Unlike Judge Easterbrook, *see supra* note 189, I am persuaded that *Moses H. Cone* is on point, and that while it is (literally) the *same* litigation that continues in another forum (unlike *Moses H. Cone*), the defendant is *still* (indeed, more so) effectively out of federal court. Similarly, *Lauro Lines* is not dispositive, since in that situation the case lived on in federal court (to be sure, the forum disliked by the defendant), but the matter was eventually appealable if embodied in a final order. Thus, the third prong is not met in *Lauro Lines*, while it is met with a typical remand order. *See Milk 'N' More*, 963 F.2d at 1345 (similar reasoning with regard to *Lauro Lines*).

191. *See supra* notes 142-47 and accompanying text.

IV. TOWARDS RATIONAL APPELLATE REVIEW OF REMAND ORDERS

A. *The Necessity of Appellate Review*

In previous parts of this Article, I have suggested that *Thermtron*, and its progeny in the Supreme Court and the lower federal courts, are dubious exceptions to the bar of appellate review of remand orders found in Section 1447(d). That conclusion is reached using standard tools of statutory construction. However, as a matter of sound judicial policy, the cases (at least considered individually) are far more defensible, for the rationales in favor of retaining a literally-read Section 1447(d) are problematic.

The bar on appellate review is indeed an anachronism in the federal court system. As Judith Resnik has observed, the trend in federal courts over the past two centuries has been away from the model of a single judge reaching a final, unreviewable decision—the sort exemplified by a pre-*Thermtron* reading of Section 1447(d).¹⁹² Appellate review is generally conceded to serve numerous salutary values, from both a litigant-oriented perspective (e.g., empowering litigants, having their day in court)¹⁹³ and a systemic perspective (e.g., diffusing power, increasing rationality and consistency, ensuring adequate law development, providing for error correction).¹⁹⁴ Section 1291 of the Judicial Code generally provides that final orders of district courts are appealable, and interlocutory appeals additionally make up a generous portion of the appellate workload.¹⁹⁵ Section 1447(d) stands out, then, as a rather stark exception.

Systemic reasons do not justify the exception. While reducing or eliminating the statutory ability to remove has become popular as of late,¹⁹⁶

192. Resnik, *supra* note 100, at 860-62.

193. *Id.* at 845-49; Scott Barclay & Jerry Goldman, Does Procedural Justice Plus Appellate Process Equal Appellate Justice? (paper presented at the annual meeting of the Law and Society Association, Amsterdam, The Netherlands, June 26-29, 1991) (on file with author).

A cautionary note in this regard is sounded by Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985), who argues that given the high rate of affirmance by appellate courts (among other reasons), it is by no means clear one appeal as of right in every case necessarily maximizes litigants' satisfaction. I have argued that Dalton somewhat overstates his case, since "[a]ppeals may give litigants the impression of fairness (even if they lose) or the satisfaction of finality (if they win)." Solimine, *supra* note 179, at 1177 (footnote omitted). For an empirical study of litigants' attitudes toward appeal, see Scott Barclay, *The Act of Appealing: Challenging a Cost/Benefit Analysis of Appealing* (1992) (on file with author).

194. Resnik, *supra* note 100, at 849-58; Solimine, *supra* note 179, at 1175-76; Martin Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629, 631-41 (1980).

195. See POSNER, *supra* note 68, at 72-73 (review of a sample of published appellate opinions in 1983 showed, inter alia, that 12% were not appeals after a final judgment).

196. See, e.g., Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54

that opportunity remains an oft-used¹⁹⁷ portion of the Code. As long as it stands, district court policing of removal and remands should be subject to the same type and scope of review as are other district court decisions.¹⁹⁸ Recently, Judge Easterbrook has suggested that Section 1447(d) simply "fortifies principles that defer review of orders allocating cases among forums."¹⁹⁹ He then referenced several illustrative collateral order cases.²⁰⁰ Judge Easterbrook's suggestion is problematic. Many district court decisions affecting fora are appealable, as long as they are embodied in final orders.²⁰¹ True, if they are not final orders, then appellate review is deferred until the time (if at all) the decision is embodied in a final order. Thus, for practical reasons appellate review may be lost entirely (not unlike with Section 1447(d)). But that is more of a function of the final order rule than of jurisdictional peculiarities.

Removals by defendants are another type of forum-shopping,²⁰² as indeed are motions to remand, and successful motions which send the litigation off to another forum ought to be appealable—as much as are successful motions to dismiss for other jurisdictional reasons. Indeed, the lack of symmetry in the present regime is accentuated by the ability of defendants

BROOK. L. REV. 1057, 1084-92 (1989) (arguing that removal of § 1983 actions should be prohibited); *supra* note 14 and accompanying text. *But see* Solimine, *supra* note 89, at 427 (arguing contra to Herman, though supporting "modest restraints on the ability to remove.") (footnote omitted).

197. *See supra* note 13 and accompanying text.

198. I am not necessarily arguing that appellate review is needed to protect some supposed inviolate "right" to a federal forum. *Cf.* Steinman, *supra* note 26, at 1008-10 (appearing to make this argument). I have elsewhere argued in favor of concurrent jurisdiction between federal and state courts. Solimine, *supra* note 89. Rather, I contend that until or unless removal jurisdiction is eliminated, then appellate review of remands should be available since other fora allocations decisions are (usually) reviewable. *See infra* notes 201-02 and accompanying text.

199. *Rothner v. City of Chicago*, 879 F.2d 1402, 1419 (7th Cir. 1989) (Easterbrook, J., dissenting); *see also In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712-13 (7th Cir. 1992) (Easterbrook, J.).

200. *Rothner*, 879 F.2d at 1419 (referring to *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989) (denying enforcement of a forum selection clause is not a collateral order)); *see also* *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (denying motion to dismiss on forum non conveniens grounds not a collateral order); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (denying stay of federal court proceedings not a collateral order).

201. Dismissals for lack of personal or subject-matter jurisdiction, on abstention grounds, and for forum non conveniens come immediately to mind.

202. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1679 (1990). There is a considerable empirical literature (consisting mostly of recorded perceptions of attorneys) which addresses why one might favor a federal court over a state court, or vice-versa, which is reviewed and supplemented in Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41 (1991). A similar survey with respect to attorneys who removed cases from state to federal court is found in Miller, *supra* note 15, at 392-423.

to eventually obtain successful review of *denial* of remand orders, typically after the merits have been litigated.²⁰³

Similarly, the policy reasons usually advanced in favor of Section 1447(d) are, at least in the present day, unconvincing. The traditional rationales have been to lessen appellate workloads and prevent delay in the resolution of remanded cases.²⁰⁴ Of course, neither purpose is a frivolous one, but they prove too much. Remanded cases take up less than two percent of the civil docket,²⁰⁵ and if all were appealed it would add but minuscule numbers to the federal appellate docket.²⁰⁶ Proposals to restrain growth in federal appeals are worth study,²⁰⁷ but more systematic curtailment is logical rather than eliminating review of one type of case. Nor is delay to the litigants a minor issue, but that cost must be measured against the possibility of having the case tried in a state forum when a federal one was statutorily available. Some additional delay does not seem too high a price to pay, given the possibility of an erroneous remand decision being corrected by the appellate court.²⁰⁸

The last point relates to another rationale for the bar on review, found in more recent writings. The argument runs that the sort of jurisdictional analysis found in most remand decisions is, relatively at least, unlikely to be erroneous and thus appellate review, if not unnecessary, is less necessary.²⁰⁹ No empirical basis for this assumption is cited, and it seems to stand on dubious grounds. It would be difficult to objectively differentiate "hard" from

203. See Rothfield, *supra* note 12, at 243; see, e.g., *Belser v. St. Paul Fire & Marine Ins. Co.*, 965 F.2d 5 (5th Cir. 1992) (summary judgment granted to defendants vacated and denial of motion to remand reversed); *Van Camp v. AT&T Info. Sys.*, 963 F.2d 119 (6th Cir.) (same), *cert. denied* 113 S. Ct. 365 (1992); *Doe v. Kerwood*, 969 F.2d 165 (5th Cir. 1992) (denial of remand reviewed under § 1292(b) and reversed); cf. *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992) (denial of motion to remand reversed following appeal by plaintiff after some of her claims were dismissed by trial court, and other claims were voluntarily dismissed by plaintiff); *Neal v. Brown*, 980 F.2d 747, 747-48 (D.C. Cir. 1992) (*per curiam*) (denial of motion to remand is not immediately appealable as a final decision, nor under the collateral order doctrine).

204. See *supra* notes 24-26 and accompanying text.

205. See *supra* notes 13 and 15 and accompanying text.

206. Braun, *supra* note 15, at 89-91 (arguing, *inter alia*, that at most repeal of § 1447(d) would increase caseload of each active federal appellate judge by about 24 per year).

207. See, e.g., Federal Courts Report, *supra* note 14, at 109-31; Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 72-74; Dalton, *supra* note 193.

208. Steinman, *supra* note 26, at 1009.

209. See, e.g., *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991) (Easterbrook, J.); *Rothner*, 879 F.2d at 1411 n.9; *id.* at 1422 (Easterbrook, J., dissenting); Herrmann, *supra* note 30, at 414.

"easy" cases.²¹⁰ Under any reasonable standard, however, it is hard to conclude that the issues raised in remand motions are "easy" ones, subject to quick and correct disposition by federal district judges. One is hard pressed to label such issues as preemption by federal law,²¹¹ whether a case arises under federal law, and the citizenship of diverse parties²¹² as particularly easy, non-controversial ones. My sense is that these issues are not systematically easier or harder than other jurisdictional or procedural issues routinely decided by federal district judges. If that is the case, then such issues should also be subject to appropriate appellate review.²¹³

210. With regard to the opinions themselves, one might measure the length of the opinion, or the number of cases cited, as indicia of the difficulty of the issues raised. See POSNER, *supra* note 68, at 73 (longer opinions may signal greater complexity of issues); Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 777-78 (length of opinion may distinguish "hard" from "easy" cases), 795 (1981) (same with respect to citation patterns).

With regard to appellate opinions, one might measure the rate of reversal of district court decisions that did not remand a case, or did remand and review was successfully obtained despite the bar of § 1447(d). See Solimine, *supra* note 179, at 1189-90 (empirical study of reversals as an indicator of whether interlocutory appeal is appropriate).

Such studies would be subject to numerous difficulties of implementation and usefulness. For example, if restricted to published opinions, the data may be skewed, and examining appellate opinions would be problematic, since many remands are presumably not appealed to the extent § 1447(d) is still alive.

211. Under certain circumstances, a defense that the plaintiff's cause of action is completely preempted by federal law subjects the case to removal. *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). Difficult questions in this regard can be raised by such statutes as § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988), e.g., *Hayden v. Reickerd*, 957 F.2d 1506 (9th Cir. 1992) (holding removal improvidently granted); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 605 (1992) (recent Supreme Court cases have "not simplified the [§ 301] preemption doctrine."), or various provisions of ERISA, e.g., *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1075 (7th Cir. 1992) (Easterbrook, J.) (noting "difficulty" of preemption inquiry in removal context).

212. Diversity cases under 28 U.S.C. § 1332 (1988) can be removed under certain circumstances to federal court. 28 U.S.C. § 1441(a) (1988). Questions with respect to measuring the amount in controversy requirement, or the citizenship of certain juridical entities, e.g., *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) (limited partnership, 5-4 decision); *Schwartz v. Electronic Data Sys., Inc.*, 913 F.2d 279 (6th Cir. 1990) (subsidiary of parent corporation; 2-1 decision), continue to generate litigation. See Deborah J. Fritsche, *Removal: Making a Federal Case Out of It*, LITIG. Fall 1990, at 38, 38-40.

213. See Steinman, *supra* note 26, at 1009 n.405.

Some have argued that if § 1447(d) is repealed or modified, appeal should be limited to remands in federal question, but not diversity cases. Braun, *supra* note 15, at 81, 88; Herrmann, *supra* note 30, at 414. While this approach would have the virtue of lessening the additional increase in appellate caseload, see Miller, *supra* note 15, at 389-92 (study of all private party cases removed in 1987 showed that federal question cases constituted 31%, and diversity cases 69%; data essentially the same for remanded cases), it rests on a faulty empirical premise. It is difficult to conclude that federal question issues are systematically more difficult than diversity

A further defense of the Section 1447(d) bastion has been raised by the Judicial Conference of the United States. In 1989, the Ninth Circuit Court of Appeals recommended that the Judicial Conference propose a repeal of Section 1447(d), for the reason that the statute, and its operation in *Thermtron* and later cases had become unfair and unclear.²¹⁴ The Judicial Conference rejected the proposal, arguing that repeal would raise federal caseloads, lead to delays, and "disrupt the existing balance between state and federal courts."²¹⁵

The concerns of the Judicial Conference are not well-founded. I have already suggested that fears of increased caseload and delay, while not inconsequential, are not compelling enough to delete an entire class of cases from appellate review.²¹⁶ Similarly, the Conference does well to respect the integrity of state courts and litigation in those courts. In a variety of contexts, the Court has recognized state court sovereignty by restricting the ability of federal courts to interfere with criminal or civil litigation in state courts.²¹⁷ In some circumstances, such sovereignty concerns may be of constitutional dimensions.²¹⁸ But those concerns are barely raised, if at all, by a repeal of Section 1447(d). The main culprit is removal jurisdiction itself, and the Court long ago rejected constitutional attacks on such jurisdiction.²¹⁹ The delay occasioned by an appeal of a remand order could only be a minor irritant, if it is perceived as problematic at all, by state courts. This is especially true given the small numbers of cases in question, relative to the amount of civil

issues, or at least different enough to justify potentially corrective review in one but not the other. To the extent the distinction rests on the greater "importance" given federal question cases, that perception is belied by the existence of the diversity statute and the ability to remove some diversity cases.

214. The article by Jerome Braun is an "outgrowth" of the Ninth Circuit proposal. Braun, *supra* note 15, at 79 n.*.

215. 1989 ANNUAL REPORT PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 63.

216. Cf. Charles G. Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401, 405 (1991) (Judicial Conference particularly concerned with caseload and workload problems).

217. A list of examples would be long. The various abstention doctrines come to mind, see *BATOR ET AL. supra* note 12, at 1308-1454, as do the interpretations of the federal habeas corpus statute, *id.* at 1465-1578. For a recent overview, see Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991).

218. *New York v. United States*, 112 S. Ct. 2408, 2429-30 (1992); *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

219. *Tennessee v. Davis*, 100 U.S. 257 (1880).

litigation in state courts.²²⁰ It would be unfortunate if the Judicial Conference did not reconsider its position.

B. *The Scope of Review*

If Section 1447(d) is repealed, what *type* of appellate review should be afforded an order granting a remand motion? One proposal would simply utilize the normal appellate procedures used to review final orders.²²¹ Another, building on *Thermtron* itself, would limit review to a putatively more expeditious writ of mandamus.²²² A final suggestion is to utilize Section 1292(b), or some variant thereof.²²³

Of these options, the first and third are the most viable. If remand orders are to be upgraded to equal status to other appealable decisions, there is little reason to confine the scope of normal appellate review. Writs of mandamus, which may be placed on accelerated briefing and disposition schedules in appellate courts,²²⁴ are confined to reaching only obvious legal error by district judges.²²⁵ In contrast, ordinary appellate review, while presuming correctness of factual findings,²²⁶ is typically plenary with respect to legal issues.²²⁷ Using the writ of mandamus model may ameliorate problems of delay at the cost of unnecessarily confining appropriate appellate review of the remand order.

The remaining options for review stand on relatively equal footing in that both provide for plenary review and can be tailored to lessen the delay problem. For example, appeals of remand orders could be scheduled for accelerated disposition,²²⁸ or decided by a single circuit judge or upon a

220. Compare *supra* notes 13 & 15 and accompanying text (indicating number of cases removed and remanded) with Brian J. Ostrom, *Changing Caseloads: The View From the State Courts*, ST. CT. J., Spring 1992, at 11, 11 (18.4 million civil cases filed in state trial courts in 1990).

221. Braun, *supra* note 15, at 90-92; WRIGHT ET AL., *supra* note 17, at 709.

222. Rothfield, *supra* note 12, at 243.

223. ALI Study, *supra* note 33, at 417-18 (calling for amendment of § 1292 to cover remand orders); Markowski, *supra* note 12, at 1110-11 (use § 1292(b) as model but modify to make certification by district judge unnecessary).

224. Rothfield, *supra* note 12, at 243.

225. *Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989); CHARLES A. WRIGHT ET AL., *supra* note 184, § 3933 (1977); ROBERT J. MARTINEAU, *APPELLATE PRACTICE AND PROCEDURE* 553-62 (1987); see also *In re Glass Workers Local No. 175*, 983 F.2d 725 (6th Cir. 1993) (successful mandamus petition of a remand of pendant state law claims); *In re Sandahl*, 980 F.2d 1118, 1120 (7th Cir. 1992) (Posner, J.) (distinguishing scope of mandamus review from usual appellate review).

226. FED. R. CIV. P. 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985).

227. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991).

228. E.g., FED. R. APP. P. 2 (normal briefing rules and time limits may be suspended in

prompt recommendation by the staff attorneys office of the circuit court.²²⁹ Similarly, disposition of certification motions under Section 1292(b) generally are decided on a prompt basis,²³⁰ and once the appellate court accepts the question, briefing and disposition could be speeded up as well. Section 1292(b) also requires permission from the district judge to appeal. The American Law Institute regarded this as an appropriate measure to deter frivolous appeals and keep delay to a minimum.²³¹ The Institute's suggestion is sound, since I have previously concluded that district judges do not, in general, underuse Section 1292(b) and thus usually do not refuse to certify difficult issues on which reversal is more likely than usual.²³² As a rough compromise of the competing policy concerns, the Section 1292(b) model stands as the best choice.²³³

C. *The Costs of and Paths to Reform*

Repealing or significantly amending Section 1447(d) will not come cost-free. As outlined above, providing another avenue of appeal will increase the costs and delay of litigation of cases where there is a remand order, and add to the caseload of the federal appellate courts. Moreover, a reform would place another weapon in the hand of removing defendants, giving them more leverage to extract settlements or take other action in the case.²³⁴ But such costs are attendant to any regime which provides for appellate review of final orders, and it is difficult to argue that remand orders should be singled out for special treatment. These costs can be significantly ameliorated by placing restrictions on the ability to remove and deciding such appeals on an accelerated basis.

certain classes of cases).

229. Braun, *supra* note 15, at 90-92.

230. Solimine, *supra* note 179, at 1200.

231. ALI Study, *supra* note 33, at 417-18; *cf.* Markowski, *supra* note 12, at 1111-12 (argues that § 1292(b) model should be modified to eliminate requirement that district judge certify the question, to prevent district judges from not certifying so as to keep case off their docket); Martineau, *supra* note 89 (endorsing this model of review for interlocutory appeals in general).

232. Solimine, *supra* note 179, at 1201-04. While it is difficult to determine the attitude of many appellate judges to § 1292(b) appeals, *id.* at 1202, some courts more recently have expressly endorsed the use of certification appeals in appropriate cases. *E.g.*, *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431, 1434-35 (7th Cir. 1992).

233. The alternative certification model posited by Markowski (*see supra* note 232) is unnecessary, since it is unrealistically premised on strategic behavior by federal district judges. *See also* Solimine, *supra* note 179, at 1183 n.98 (critical of alternative model in general).

234. *Cf. Lee, supra* note 59, at 536 n.128 (reporting that *Thermtron* settled before trial in federal court for an amount "slightly in excess of what had been offered before suit was filed.") (quoting letter from defense counsel).

If some sort of reform of Section 1447(d) is thought necessary, will Congress likely respond? At first blush, it might be thought that Congress would pay relatively little attention to a seemingly esoteric subject like appellate review of remand orders.²³⁵ In fact, Congress deals with procedural and jurisdictional matters in the federal courts with some frequency,²³⁶ and its action in the 1964 Civil Rights Act shows awareness, and willingness to modify the bar of Section 1447(d). Similarly, in 1978 Congress added a provision to the bankruptcy code, apparently modeled after Section 1447(d), which bars review "by appeal or otherwise" of bankruptcy court orders remanding cases to state court.²³⁷ Congress has also demonstrated awareness of appellate review, in this context, by providing for review of district court remands in several recent (to date, unenacted) bills dealing with complex litigation.²³⁸

Enthusiasm for the prospects of Congressional action must be tempered by the negative response of the Judicial Conference, as well as by the possibility of opposition from other interest groups (like the plaintiffs' bar).²³⁹ Advocating such change, however, is a better course than simply adhering to the status quo. To be sure, *Thermtron* and its progeny do provide

235. See Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 10 (1988) ("in an area like civil procedure, . . . Congress is quite inattentive . . ."); cf. Lee, *supra* note 59, at 537 n.135 (post-*Thermtron* communication with member of House Judiciary Committee indicated that Committee did "not contemplate action on § 1447(c) or (d).").

236. See sources cited *supra* note 89.

237. 28 U.S.C. § 1452(a) (1988). Section 1452(a), passed in 1984, recodifies 28 U.S.C. § 1478(a) (1982), enacted as part of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2670 (1978). The legislative history of the 1978 Act explicitly recognizes § 1447(d) as the model. H.R. REP. NO. 595, 95th Cong., 2d Sess. 51 & n.320 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6013. However, the history also contains a cryptic citation to *Thermtron*, *id.* at 51 n.321, which one commentator apparently read to mean that § 1478(a) included a *Thermtron*-like exception (i.e., only "authorized" remands were nonreviewable). Richard B. Levin, *Bankruptcy Appeals*, 58 N.C. L. REV. 967, 993-94 n.200 (1980). For a summary of judicial interpretation of §§ 1478(a) & 1452(b), see *supra* note 178.

238. *E.g.*, H.R. 4807, 100th Cong., 2d Sess. § 304(2)-(3) (1988) (provided for some appellate review of remands to state court for damage hearings, after liability determinations in federal court); H.R. 2450, 102d Cong., 1st Sess. § 5 (3) (1991) (same provision). The legislation is generally described in Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 REV. LIT. 325 (1991); Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990). Further discussion of appellate review of remand orders when federal courts dispose of complex litigation is found in American Law Institute, *Complex Litigation Project 74-75* (Tent. Draft No. 2 1990); American Bar Association, *Commission on Mass Torts, Report to the House of Delegates 73-74* (1989).

239. The role of interest groups with respect to procedural or jurisdictional legislation in general is addressed by Geyh, *supra* note 217, and Larry Kramer, "*The One-Eyed are Kings*": *Improving Congress's Ability to Regulate the Use of Judicial Resources*, LAW & CONTEMP. PROBS., Summer 1991, at 73.

some avenues around Section 1447(d). Those exceptions have come at a high cost to doctrinal consistency, and the lower court exceptions are not followed in all the circuits.²⁴⁰ The valid policy rationales apparently driving those exceptions could be better accommodated by repealing or amending Section 1447(d).

V. CONCLUSION: DOES DOCTRINE COUNT?

Much of this Article has engaged in rather traditional doctrinal analysis. Recently, it has been suggested that such scholarship has become passé. It has become fashionable to attribute jurisdictional decisions of the Supreme Court to the ideology of the justices with respect to the type of suits being brought.²⁴¹ So much is doctrine said to be tortured to serve those values that some argue that federal courts scholarship should eschew "close doctrinal analyses" and focus on "ideology" and "political undercurrents."²⁴²

Since Legal Realism, Critical Legal Studies, and Law and Economics has subjected virtually every area of the law to this sort of analysis, it is difficult to see why procedural and jurisdictional issues should be especially immune. Taken on its own terms, however, the "doctrine doesn't count" model has limited explanatory power for analyzing *Thermtron* and its progeny. For example, some have suggested that the *Thermtron* dissent is indicative of Chief Justice Rehnquist's hostility toward diversity jurisdiction (since the

240. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (Easterbrook, J.) (noting "difficult" and "complex" task of determining in any given case whether exceptions to § 1447(d) have been satisfied).

Another reform path might simply be to overrule *Thermtron* and reinstate a "no-exceptions" application of § 1447(d). Such a development is unlikely, since the Court is loath to overrule cases of statutory interpretation since Congress can revise the statute in question. *Hilton v. South Carolina Pub. Ry. Comm'n*, 112 S. Ct. 560, 564 (1991); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1366-67 (1988). At any rate, while overruling *Thermtron* would have the virtue of serving doctrinal consistency, it would come at the high cost (for the reasons stated in Part III of this Article) of eliminating any appellate review of motions to remand.

241. E.g., ROBERT M. COVER, ET AL., PROCEDURE 1540-69 (1988); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989); Resnik, *supra* note 100, at 1007; see also David P. Bryden, *Is the Rehnquist Court Conservative?*, PUB. INTEREST, Fall 1992, at 73; Gregory Rathjen & Harold Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making*, 23 AM. J. POL. SCI. 360 (1979).

242. Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law is Politics?*, 89 MICH. L. REV. 1499, 1508-19 (1991) (book review). Other writers making the point less explicitly are Richard H. Fallon Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991).

district judge threw a diversity case back to state courts).²⁴³ However, the dissent in *Thermtron* (and the *Carnegie-Mellon* dissent) favored individual plaintiffs suing corporations in their choice of fora—hardly consistent with the usual view of ideological conservatives.²⁴⁴

The model does not fare much better when applied to *Thermtron's* progeny in the lower federal courts. At virtually every opportunity, many of the lower courts chose to expand *Thermtron* and create additional exceptions to Section 1447(d). The underlying ideology here is more difficult to discern. It seems odd that in an era of burgeoning appellate caseloads, these courts would take steps to increase that docket.²⁴⁵ Perhaps the judges were motivated to reach the underlying issues on appeal—to enforce a forum selection clause, as in *Pelleport* (in favor of the plaintiff), or uphold the constitutionality of a federal jurisdictional statute, as in *In re TMI*, (to the detriment of plaintiffs). Whatever else might be said about these cases, hard political ideology does not seem to be the central driving force. Intuitively, it seems better to conclude that political ideology (consciously or not) plays some role, though not necessarily the dominant one ascribed to it, in judicial decisionmaking.²⁴⁶

In a more general sense, "ideology" might be said to be highly explanatory of these cases, if we mean by that term the personal preferences of the justices and judges involved. It goes without saying that judges bring their own conception of judging to the task of statutory interpretation, as they do with much else in life. By the same token, most judges strive in drafting opinions to reconcile their preferences with standard legal references, such as statutory text and judicial precedent.²⁴⁷ Under this view, *Thermtron* and its progeny constitute a relatively unexceptionable case study in the impact of ideology. Congress establishes a seemingly unambiguous rule, and federal

243. *E.g.*, Braun, *supra* note 15, at 80 n.4.

244. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976); Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 467 (1992).

245. An oddity pointed out in Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 557-58 (9th Cir. 1991) (Noonan, J., dissenting).

246. Political scientists have long tested ideological influences by (among other things) correlating surrogates for ideology (such as the political party of the judge or the appointing authority) with patterns of voting in cases. There is some evidence of such correlation at the Supreme Court level, though other factors (like old-fashioned respect for precedent) are often equally explanatory. Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992). In the lower federal courts, studies have shown ideology playing even less of a role. *E.g.*, Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 44-48 (1988); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955-1986*, 44 W. POL. Q. 317, 330 (1991).

247. Solimine, *supra* note 247, at 50; Zeppos, *supra* note 83, at 1120-29.
<https://scholarship.law.missouri.edu/mlr/vol58/iss2/1>

judges find various exceptions to the rule justified on the basis of dynamic statutory interpretation. At some point (as I have argued), these exceptions have almost swallowed the rule. This progression (or regression) of a rule, its exceptions, and the swallowing of the rule by the exceptions occurs in common law and statutory analysis.²⁴⁸ A straightforward doctrinal analysis of this trend is not irrelevant to the jurisprudence of federal courts, or indeed to the impact of ideology on federal courts doctrine.

Having discounted the sweeping ideological indictment of federal courts' doctrine does not mean that doctrine is coherent. Indeed, I have argued that *Thermtron* was wrongly decided and, even if not, has been unjustifiably expanded by the lower federal courts. But to criticize doctrine is not to condemn it. None of the decisions were beyond the pale, in my view.²⁴⁹ To vigorously analyze, criticize and disagree with the rationale in court opinions does not always, or even often, mean that doctrinal development plays no role or a very limited one in judicial decision-making.

So, at least in most cases over the long term, doctrine does count, even in the law of federal jurisdiction. The doctrine interpreting Section 1447(d) is largely unsatisfactory, as it departs without good reason from the relatively clear meaning of the bar to appellate review found in that statute. Nonetheless, there are also good reasons for the results of most of these cases, since remand orders should not be carved out as an exception from appellate review. Repealing or significantly modifying Section 1447(d) would have the twin virtues of leading to that result, while bringing to an end an unsatisfactory line of doctrinal analysis.

248. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991).

249. Cf. POSNER, *supra* note 60, at 205 (decision is "principled" and not "result-oriented" if "the ground of decision can be stated truthfully in a form the judge could publicly avow without inviting virtually universal condemnation by professional opinion.").

