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Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project

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Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project[†]

JOAN STEINMAN*

INTRODUCTION	76
I. ISSUES ARISING UNDER 28 U.S.C. § 1367(a), IN ITS INTERPLAY WITH THE REMOVAL STATUTES	78
A. <i>The Applicability of § 1367 to Removed Cases Generally</i>	78
B. <i>Federal Question Cases</i>	80
1. What is Removable?	80
a. Suits that Include Claims Whose Adjudication in Federal Court May Be Barred by the Eleventh Amendment—and How They Compare with Suits that Include Claims Beyond Federal Subject-Matter Jurisdiction	82
(1) The Two Lines of Authority Preceding <i>International College of Surgeons</i> and <i>Schacht</i>	82
(2) The Impact of <i>International College of Surgeons</i>	86
(3) The Impact of <i>Schacht</i>	90
(4) Remand or Dismissal	93
(5) What Effect Would Enactment of the Revisions Proposed by the ALI Federal Judicial Code Revision Project Have on These Issues?	94
(6) Jurisdictional Problems Raised After Judgment	95
b. Suits That Include Claims Made Non-Removable by § 1445	96
c. Summary	98
2. Who Has to Join in the Notice of Removal?	99
C. <i>Diversity Cases</i>	100
II. ISSUES ARISING UNDER 28 U.S.C. § 1367(b), IN ITS INTERPLAY WITH THE REMOVAL STATUTES	102
A. <i>The Applicability of § 1367(b)</i>	102
B. <i>When Current § 1367(b)'s Restrictions Do Apply</i>	106
III. ISSUES ARISING UNDER CURRENT 28 U.S.C. § 1367(c), IN ITS INTERPLAY WITH THE REMOVAL STATUTES	107
IV. INTERPRETATION OF § 1441(c)	110
V. ISSUES ARISING UNDER 28 U.S.C. § 1367(d) (THE TOLLING PROVISION), IN ITS INTERPLAY WITH THE REMOVAL STATUTES	113

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VI. HOW THE ALI FEDERAL JUDICIAL CODE REVISION PROJECT, DRAFTS T.D. NO. 2 AND P.D. NO. 2, OTHERWISE WOULD ALTER THE INTERACTIONS BETWEEN THE REMOVAL/REMAND SCHEME AND SUPPLEMENTAL JURISDICTION	114
<i>A. Post-Removal Joinder of Nondiverse Defendants</i>	114
<i>B. Remands of Claims, Rather than Cases, Outside Original Jurisdiction</i>	116
<i>C. Appellate Review of Remand Decisions</i>	117
VII. CONCLUSION	122
APPENDIX A. CURRENT STATUTES	124
§ 1367. Supplemental jurisdiction	124
§ 1441. Actions removable generally	124
§ 1445. Non-removable actions	125
§ 1446. Procedure for removal	125
§ 1447. Procedure after removal generally	127
APPENDIX B. STATUTES AS PROPOSED IN THE ALI FEDERAL JUDICIAL CODE REVISION PROJECT	128
TENTATIVE DRAFT NO. 2 (APRIL 14, 1998)	128
§ 1367. Supplemental jurisdiction	128
PRELIMINARY DRAFT NO. 2 (SEPTEMBER 3, 1997)	129
§ 1441. Right of removal of civil actions—in general	129
§ 1445. Restriction of right of removal in civil actions	130
§ 1446. Procedure for removal of civil actions or proceedings ...	130
§ 1447. Procedure after removal generally	131
PRELIMINARY DRAFT NO. 3 (SEPTEMBER 16, 1998)	133
§ 1441. Right of removal in civil actions—in general	133
§ 1446. Procedure for removal of civil actions	134
§ 1447. Procedure after removal generally	135
APPENDIX C: CROSS-REFERENCE TABLE FOR PRELIMINARY DRAFT NO. 2 AND PRELIMINARY DRAFT NO. 3	137

INTRODUCTION

When Congress enacted the federal supplemental-jurisdiction statute, it gave little or no consideration to how that law would operate when it intersected with the statutes governing removal of actions from the state to the federal courts. In part as a result of that inattention to detail and in part simply because the courts and commentators faced new statutory convergences, the enactment of 28 U.S.C. § 1367 posed a variety of questions concerning its effects on removability and remand and concerning its application in removed cases generally. In this Article, I will survey the issues that commentators saw in the intersections between the removal and the supplemental-jurisdiction statutes, and examine the cases that have raised these issues. I will investigate the manner in which the courts have resolved additional intersectional issues they have faced. Finally, I will look into whether and how the draft proposals of the American Law Institute (“ALI”) Federal Judicial Code Revision Project (“Revision Project” or “Project”) address the previously identified issues, and at how they otherwise would alter the

interactions between the removal/remand scheme and supplemental jurisdiction.¹ Both the pertinent present statutes and revisions proposed in Project drafts are set out in Appendices A and B for the reader's convenience.

I have described, and in some instances commented upon, the effects that the Project proposals—as of Spring, 1998—would have if they were to become law,² in part because the ALI's consideration of the federal judicial code, and supplemental jurisdiction in particular, was part of what prompted the reappraisal of supplemental jurisdiction at the meeting of the Civil Procedure section of the Association of American Law Schools in January, 1998. I do want to emphasize, however, that the Project proposals, and particularly those concerning removal, are at a very preliminary stage. They should not be taken to reflect even the Reporter's own firm views and considered judgments, much less the views and judgments of ALI Advisers or members of the Consultative Group for this Project, ALI Council members, or the membership of the ALI generally. Indeed, neither the Council nor the general membership has even been formally provided a draft of recommendations concerning the removal statutes. My intention here is to inform those unaware of this work in progress, and to help improve the final product, if I can.³

Because of the breadth of the issues canvassed, this Article is not knit together by a unifying theme. I have, however, focused only on civil actions removed under the general removal statute, 28 U.S.C. § 1441, and on the provisions governing remands in such cases.⁴

1. I am an advisor to the ALI Federal Judicial Code Revision Project and as such have had an opportunity to influence the content of its draft proposals on both supplemental jurisdiction and removal/remand.

2. When this Article was written, Preliminary Draft No. 2 was the latest ALI Project draft to address removal. *See* AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, PRELIMINARY DRAFT NO. 2 (1997) [hereinafter P.D. NO. 2]. In September, 1998, Preliminary Draft No. 3 was circulated. *See* AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, PRELIMINARY DRAFT NO. 3 (1998) [hereinafter P.D. NO. 3]. Where P.D. 3 is materially different from P.D. 2, I have noted that difference, usually in a footnote.

3. It is also important to note that this Article refers to documents distributed by the ALI that are at various stages of completion. None of them represents the position of the Institute. To avoid any misunderstanding of the status of the various documents referred to herein and to elucidate the ALI's processes, I quote the caveat that appears on the inside cover of each ALI publication:

The bylaws of the American Law Institute provide that "Publication of any work as representing the Institute's position requires authorization by the membership and approval by the Council." Each portion of an Institute project is submitted initially for review to the project's Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute's Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission.

4. 28 U.S.C. § 1441 (1994). Thus, I have not addressed federal officer/agency removal under 28 U.S.C. § 1442 (1994 & Supp. II 1996), removal in civil rights cases under 28 U.S.C. § 1443 (1994), removal of foreclosure actions against the United States under 28 U.S.C. § 1444

I. ISSUES ARISING UNDER 28 U.S.C. § 1367(a), IN ITS
INTERPLAY WITH THE REMOVAL STATUTES

A. *The Applicability of § 1367 to Removed Cases
Generally*

Although the language and legislative history of § 1367 left some question whether that statute even applies to removed cases,⁵ the courts have had no difficulty in concluding that it does. No court concluded otherwise and the Supreme Court, in 1997, declared that § 1367 “applies with equal force” to removed cases and cases initially filed in federal court.⁶ For reasons I have discussed previously, this is clearly the preferable result.⁷

(1994), removal of criminal prosecutions, or any other removals pursuant to specialized provisions.

5. *See City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 535 n.1 (1997) (Ginsburg, J., dissenting) (noting that § 1367 does not expressly cover cases removed to federal court). The lack of clarity arose because the statute provides that it applies to cases commenced, not “commenced or removed” on or after the effective date; it grants supplemental jurisdiction only in civil actions of which the district courts have “original” jurisdiction; and in providing for tolling of the statute of limitations, it ties the toll to the time at which claims were dismissed, never mentioning the possibility of remand. Moreover, the initial language of the bill specifically referred to removed cases, and those words were dropped. *See Richard D. Freer, Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 485 (1991); Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 58-60 (1992); Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress’ Handiwork*, 35 ARIZ. L. REV. 305, 308-09 (1993) (all commenting on one or more of these matters).

6. *International College of Surgeons*, 118 S. Ct. at 530.

7. *See Steinman, supra* note 5, at 309-10. As a matter of policy, it would make no sense for § 1367 not to govern removed cases.

If it did not do so, the federal courts would have to apply to removed cases a body of law governing supplemental jurisdiction that would not only be different from that which they apply when they adjudicate cases filed in federal court, but some aspects of which it was the very purpose of § 1367 to overturn.

Id. at 310.

The failure of § 1367 to mention removal while pegging its effective date to the time actions were commenced also raised a question whether the supplemental-jurisdiction statute should apply to cases commenced in state court *before* § 1367’s enactment date, December 1, 1990, but removed to federal court on or after that date. My own view was that the current supplemental-jurisdiction statute should be held applicable to this category of cases. Because the involvement of the federal court system commences at the time of removal, reliance on the removal date better serves the statutory purpose of supplanting the state of the law of supplemental jurisdiction immediately post-*Finley v. United States*, 490 U.S. 545 (1989), and for other related reasons. *See Steinman, supra* note 5, at 311-12. The only judicial decision (that I know of) to address this issue also so concluded. *See Cedillo v. Valcar Enters. & Darling Del. Co.*, 773 F. Supp. 932, 939 (N.D. Tex. 1991) (finding that § 1367 applied to such a case—initiated in state court before, but removed after, the effective date of the Judicial Improvements and Access to Justice Act of 1990, Pub. L. No. 101-650, tit. III, § 310, 104 Stat.

The revisions of § 1367 proposed by the ALI Revision Project, Tentative Draft No. 2,⁸ make substantially clearer than the present statute that the section applies to removed cases. Although the Supreme Court's recognition that § 1367 applies to removed cases makes it unnecessary to belabor this point, I describe here how the Project proposal is clear where present § 1367 was not.

No provision makes the section applicable to cases "commenced" in federal court;⁹ on the other hand, no provision of the ALI draft addresses when the revised statute would become effective. It would be advisable for the drafters to caution Congress not to frame the effective date in terms of when civil actions are commenced in federal court, but rather to tie the effective date to the date on which cases are commenced in *or removed to* federal court.

The draft statute also does not grant supplemental jurisdiction only "in civil actions of which the district courts have original jurisdiction," a phraseology that caused some commentators and courts to wonder whether the current statute might be interpreted not to apply to removed actions.¹⁰ Moreover, the draft Commentary to Preliminary Draft No. 2 (which addresses removal as well as supplemental jurisdiction) is clear that actions that come to federal court through removal are within the district courts' original jurisdiction.¹¹ Along the same lines, although proposed § 1367(c), dealing with limits on supplemental jurisdiction, speaks of freestanding claims¹² within the court's jurisdiction "solely on the basis of the jurisdiction conferred by section 1332," that language ought not be taken to make the subsection inapplicable to removed diversity cases, and

5089, 5113—because the pertinent time for determining federal jurisdiction is the date on which such jurisdiction is invoked). Because few, if any, current cases and future judicial decisions will raise this issue, I will not pursue it here.

8. AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, at 1-4 (1998) [hereinafter T.D. NO. 2].

9. This contrasts with current § 1367. *See supra* note 5.

10. *See Freer, supra* note 5, at 485; *Moore, supra* note 5, at 58-60; *Steinman, supra* note 5, at 308-10.

11. P.D. NO. 2, *supra* note 2, at 14-18. See also the proposed 28 U.S.C. § 1441, providing in part that, "any civil action brought in a state court in which every claim pleaded in the complaint . . . is within the original jurisdiction of the district courts, including the supplemental jurisdiction conferred by section 1367 . . . may be removed." *Id.* at 5. *See also International College of Surgeons*, 118 S. Ct. at 530 (noting that a removed case is necessarily one of which the district courts have original jurisdiction). *See generally* Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 926 (1988) (asserting that the jurisdiction exercised by federal courts on removal is original, not appellate) (citing *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 452 (1943) and *Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 287 (1871)). P.D. NO. 3 has dropped the adjective "original" prefacing "jurisdiction," but the intent remains to refer to the subject-matter jurisdiction of the district courts upon which the right to remove is predicated. *See* P.D. NO. 3, *supra* note 2, at 18-19 & n.18.

12. "A 'freestanding' claim means a claim for relief that is within the original jurisdiction of the district courts independently of [§ 1367 supplemental jurisdiction]." T.D. NO. 2, *supra* note 8, at 1.

courts interpreting like language in the current statute have not so construed it.¹³ More tellingly, proposed § 1367(e) indicates the applicability of the statute as a whole to removed cases in stating that

[i]f after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may either deny such joinder, or permit such joinder and remand the entire action to the State court . . . or permit such joinder without remanding the action.¹⁴

Proposed § 1367(f) also makes clear that the statute applies to removed cases in stating that, “[w]hen a district court lacks or declines to exercise supplemental jurisdiction, the court shall dismiss the supplemental claim *unless it was joined before removal of the action*, in which case the district court shall remand the claim to the State court from which it was removed.”¹⁵

B. Federal Question Cases

1. What is Removable?

Here are matters of far greater substance. Because present 28 U.S.C. § 1441(a) authorizes the removal of “civil action[s]” of which the district courts have jurisdiction, it always has been necessary for courts to decide the scope of a removable civil action. Under pre-§ 1367 law, the courts almost unanimously agreed that § 1441(a) both allowed and required pendent and ancillary claims to be removed along with the substantial federal claim(s) with which they shared a

13. See, e.g., *ARE Sikeston Ltd. Partnership v. Weslock Nat'l, Inc.*, 120 F.3d 820, 833 (8th Cir. 1997) (explaining that although removal was based on 28 U.S.C. § 1441, the court's original jurisdiction was based solely on § 1332; § 1367(b)'s limitations therefore applied); *Casas Office Machs., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 674 (1st Cir. 1994) (looking to § 1367(b), as well as to § 1447(e), and concluding that jurisdiction was temporarily defeated when, after removal, fictitious defendants were replaced with nondiverse named defendants); *Yniques v. Cabral*, 985 F.2d 1031, 1034-35 (9th Cir. 1993) (holding that the addition of nondiverse defendants after removal destroyed diversity jurisdiction over the case and making no reference to § 1367); *Parker v. Crete Carrier Corp.*, 914 F. Supp. 156, 158-59 (E.D. Ky. 1996) (applying § 1367(b) to a removed diversity case). See generally, Moore, *supra* note 5, at 58; Steinman, *supra* note 5, at 328-30.

14. T.D. No. 2, *supra* note 8, at 3 (emphasis added). Proposed § 1367(e) thus supersedes present 28 U.S.C. § 1447(e) (1994) in, among other options, permitting district courts to exercise supplemental jurisdiction over claims against nondiverse defendants whom or which the courts permit to be added after removal. See *infra* text accompanying notes 158-61; see also P.D. No. 2, *supra* note 2, at 11 (indicating a substantively identical provision in proposed § 1447(g)). Council Draft No. 2 does not address the removal statutes. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, COUNCIL DRAFT NO. 2 (1997) [hereinafter C.D. No. 2].

15. T.D. No. 2, *supra* note 8, at 3 (emphasis added). Among the claims eligible for a toll of the statute of limitations under this same subsection are claims that are voluntarily dismissed following dismissal or remand of a supplemental claim over which the court lacks, or declines to exercise, jurisdiction. See *id.* at 4.

common nucleus of operative fact.¹⁶ In light of this history and § 1367's limitation of supplemental jurisdiction to claims within the same case or controversy, it seemed to follow that § 1441(a) would authorize the removal of both the claims over which there is an independent basis of federal subject-matter jurisdiction and the claims within supplemental jurisdiction by virtue of § 1367. For the most part, the courts have recognized this.¹⁷ They also have seen that, primarily because of § 1367's authorization of pendent *party* jurisdiction, the combinations of claims that now are removable include some combinations that would not have been removable before § 1367.¹⁸ I will discuss here some issues that have been particularly controversial.

16. *See, e.g.*, *Thomas v. Shelton*, 740 F.2d 478, 482 (7th Cir. 1984); *Charles D. Bonanno Linen Serv., Inc. v. McCarthy*, 708 F.2d 1, 11 (1st Cir. 1983); *Sheet Metal Workers Int'l Ass'n v. Seay*, 696 F.2d 780, 782 (10th Cir. 1983); *Contemporary Servs. Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885, 889-92 (C.D. Cal. 1987). *Accord* 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3724, at 399-401 (2d ed. 1985).

17. *See, e.g.*, *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 533-34 (1997); *Gossmeyer v. McDonald*, 128 F.3d 481, 488 (7th Cir. 1997) (supplemental state law claims are properly removed); *Dahn v. United States*, 127 F.3d 1249, 1255 (10th Cir. 1997) (implicitly recognizing propriety of removing supplemental claims in discussing district court's discretion to dismiss or remand such claims after all federal claims had been dismissed); *In re City of Mobile*, 75 F.3d 605, 607 (11th Cir. 1996) (presuming that a case which included federal question and state law claims that shared a common nucleus of operative fact was properly removed); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 785 (3d Cir. 1995) (holding that a case which included a federal question and pendent state law claims was properly removed); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543 (5th Cir. 1991) (particular claims were removable pursuant to pendent jurisdiction when other claims could have been brought in federal court and were removable); *Texas Hosp. Ass'n v. National Heritage Ins. Co.*, 802 F. Supp. 1507, 1511 (W.D. Tex. 1992) (noting that, under the authority of § 1441(a) and (b), entire cases may be removed when they include federal question claims and state law claims that form part of the same case or controversy).

18. *See, e.g.*, *Rodriguez v. Pacificare of Tex. Inc.*, 980 F.2d 1014, 1018 (5th Cir. 1993) (holding that pendent party jurisdiction would be used in this removed case and noting that pendent party jurisdiction was not available before the enactment of § 1367); *Kaiser v. Memorial Blood Ctr. of Minneapolis, Inc.*, 977 F.2d 1280, 1283 n.1 (8th Cir. 1992) (observing in dicta that, with the enactment of § 1367, pendent party jurisdiction is now available, thus expanding the realm of cases that a federal court may hear).

a. Suits that Include Claims Whose
Adjudication in Federal Court May Be
Barred by the Eleventh Amendment—and
How They Compare with Suits that Include
Claims Beyond Federal Subject-Matter
Jurisdiction

(1) The Two Lines of Authority Preceding
International College of Surgeons and
Schacht

One of the more controversial sets of cases has involved suits in which pendent or pendent party claims are asserted, federal adjudication of which may be barred by the Eleventh Amendment to the U.S. Constitution.¹⁹ That federal adjudication of those claims is barred if the state successfully asserts its Eleventh Amendment immunity is clear, *inter alia*, from *Pennhurst State School & Hospital v. Halderman*,²⁰ which held that “neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.”²¹

Defendants sometimes sought to remove similarly configured lawsuits before the enactment of § 1367. Although the courts then might have rejected the removal of suits encompassing pendent party claims on the ground that such claims were outside federal subject-matter jurisdiction (whether barred by the Eleventh Amendment or not) and hence that the civil action as a whole was unremovable, most focused on the bar of claims subject to the Eleventh Amendment and analyzed in the same ways that courts more recently have analyzed under §§ 1367 and 1441.²²

19. The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” It long has been held to bar suits against a state by citizens of the same state as well. *See Papasan v. Allain*, 478 U.S. 265, 276 (1986) (citing *Hans v. Louisiana*, 134 U.S. 1, 5 (1890)). Examples include claims against the Director of the Illinois Department of Aging, in her official capacity, retrospectively seeking reimbursement of certain public funds that the Public Guardian had expended, brought along with claims for prospective relief, *see Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994), and claims asserted under 42 U.S.C. § 1983 to redress alleged deprivations of due process, equal protection and privacy rights, brought against a state agency and officers in their official capacities, along with claims asserted against individual defendants sued in their individual capacities, *see Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332 (6th Cir. 1990).

20. 465 U.S. 89 (1984).

21. *Id.* at 121.

22. *See, e.g., Henry*, 922 F.2d at 338 (holding that when a claim is barred by the Eleventh Amendment, only that specific claim must be remanded); *Cowan v. University of Louisville Sch. of Med.*, 900 F.2d 936, 940-43 (6th Cir. 1990) (implicitly taking the view that the inclusion of a claim barred by the Eleventh Amendment does not divest a court of jurisdiction over pendent party claims that have been removed); *McKay v. Boyd Constr. Co.*, 769 F.2d

Until the U.S. Supreme Court's decision in *Wisconsin Department of Corrections v. Schacht*²³ on June 22, 1998, there was a conflict among the courts of appeals. According to one line of authority, when a district court does not have original jurisdiction over particular claims whose adjudication in federal court is barred by the Eleventh Amendment, it does not have jurisdiction over any element of the civil action of which those claims are a part, when defendants purport to remove such a civil action—since such a combination of claims does not constitute a civil action of which the district courts have original jurisdiction within the meaning of 28 U.S.C. § 1441(a). Consequently, if such an action nonetheless has been removed, the entire action must be remanded to state court under 28 U.S.C. § 1447(c).²⁴ This view is supported, *inter alia*, by the judicial

1084, 1088 (5th Cir. 1985) (holding that when a claim against a state entity is barred by the Eleventh Amendment, the entire action including the claim against the private actor is unremovable pursuant to § 1441(a)); *Oyler v. City of Denver*, Civ. A. No. 90-A-1255, 1990 WL 134485, at *4-5 (D. Colo. Sept. 13, 1990) (holding that, in its discretion, the court would remand the entire case where some claims were barred by the Eleventh Amendment and state law predominated in the remaining claims); *Shepard v. Egan*, 767 F. Supp. 1158, 1162 (D. Mass. 1990) (holding that, in its discretion, the court would decline to exercise jurisdiction over non-barred pendent state law claims, in a case where some claims were barred by the Eleventh Amendment); *Simmons v. California, Dep't of Indus. Relations*, 740 F. Supp. 781, 785-86 (E.D. Cal. 1990) (holding the same as *McKay*).

23. 118 S. Ct. 2047 (1998).

24. *See, e.g.*, *Gossmeyer v. McDonald*, 128 F.3d 481, 487 (7th Cir. 1997) (stating in dicta that “[i]f an action includes claims barred by a state’s sovereign immunity, it cannot be removed . . . because it does not satisfy the requirements of 1441(a)—it is not within the original jurisdiction of the district courts”); *Schacht v. Wisconsin Dep’t of Corrections*, 116 F.3d 1151, 1152-53 (7th Cir. 1997) (ordering remand of the entire action to state court even though the state court might dismiss all claims except those outside the bar of the Eleventh Amendment and duplicate the analysis done by the district court on the remaining claims, and noting that when, in previous cases, it had remanded only the barred claims, the jurisdictional issue had not been called to the court’s attention), *vacated and remanded*, 118 S. Ct. 2047 (1998); *Frances J.*, 19 F.3d at 340-42 (rejecting the idea that the problem could be cured by dismissal or remand of the barred claims only); *McKay*, 769 F.2d at 1086-87 (holding additionally that removal could not be rendered proper by dismissal of the state agency where plaintiff had alleged a nonspecious claim against that agency and that where plaintiff had alleged that defendants were jointly liable for plaintiff’s injuries, the claim could not be resolved unless both defendants were present). It should be noted, however, that joint tortfeasors are not indispensable parties, so that plaintiff’s claim against one *could* be resolved without the presence of the alleged joint tortfeasor state agency. *See Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (*per curiam*) (stating that “it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit”).

See also Teter v. Warder, No. 3:94-CV-1234-D, 1997 U.S. Dist. LEXIS 4913, at *1, *4-9 (N.D. Tex. Feb. 20, 1997) (holding that a removed case that included claims barred by the Eleventh Amendment had to be remanded in its entirety, as a matter of statutory interpretation supported by the policies of furthering judicial economy, not compelling plaintiff to litigate in two fora, and because it was not unfair to relegate a state defendant to suit in the courts of its own state, and concluding that those interests were not outweighed by defendant’s interest in having a federal court resolve a federal claim); *Ta v. Neimes*, 927 F. Supp. 977, 980-86 (W.D. Tex. 1996) (holding that entire action containing claim barred by Eleventh Amendment must be remanded); *Flores v. Long*, 926 F. Supp. 166 (D.N.M. 1995) (holding same as *Ta*), *appeal dismissed and mandamus denied*, 110 F.3d 730 (10th Cir. 1997); *Simmons*, 740 F. Supp. at

economy of keeping together claims that arose from a common nucleus of operative fact and protecting a plaintiff from having to litigate factually related claims in multiple fora.²⁵ Of course, the plaintiff will be able to proceed with all its claims in state court only if the defendant State has waived its immunity to suit in state court.

A contrary line of authority regarded the removal as proper, and customarily responded to it by remanding only the claims whose adjudication in federal court was barred by the Eleventh Amendment.²⁶ In support of this approach, some courts had pointed out that if a plaintiff originally filed in federal court, the court would be permitted to retain jurisdiction over claims within its original jurisdiction while dismissing those barred by the Eleventh Amendment; that the Eleventh Amendment bars the adjudication of claims, not entire civil actions; and

786-88 (recognizing that the doctrine of fraudulent joinder could apply in a federal question case *inter alia* where a claim is brought against the State although a cause of action clearly does not exist, but holding that the State was not fraudulently joined here); *see also* *Stephans v. Nevada*, 685 F. Supp. 217, 219-21 (D. Nev. 1988) (finding that the court was without jurisdiction over the case so long as the State was a defendant, but refusing to remand the case because the State had been fraudulently joined, and concluding that it would dismiss the State and maintain jurisdiction over the case).

25. The position advocated here in support of keeping claims together is entirely consistent with the severance of claims approved below, *see infra* text accompanying notes 143-51, in connection with the proposed handling of claims that now fall under 28 U.S.C. § 1441(c). In the contexts here under discussion, all the removed claims are part of the same constitutional case or controversy whereas in the contexts discussed *infra* the claims are *not* part of the same constitutional case or controversy. That difference justifies a different response.

26. *See, e.g.,* *Kruse v. Hawai'i*, 68 F.3d 331, 334-36 (9th Cir. 1995) (holding that Eleventh Amendment bar against some claims does not prevent removal of an action and, where defendants could not be sued upon these claims in state court, affirming their dismissal, citing other Ninth Circuit cases); *Henry*, 922 F.2d at 338-39 (holding that claims barred by the Eleventh Amendment should be remanded, not dismissed, but the federal court had jurisdiction to address other claims in the action); *Silver v. Baggiano*, 804 F.2d 1211, 1215-19 (11th Cir. 1986) (remanding claims held to be barred from federal court by the Eleventh Amendment, but entertaining other removed claims); *Brewer v. Purvis*, 816 F. Supp. 1560, 1570-71 (M.D. Ga.), *aff'd*, 44 F.3d 1008 (11th Cir. 1993) (holding that Eleventh Amendment bar of claims against state defendants did not warrant remand of federal claims against other defendants or of claims against state defendants not barred by the Eleventh Amendment); *Texas Hosp. Ass'n v. National Heritage Ins. Co.*, 802 F. Supp. 1507, 1514-16 (W.D. Tex. 1992) (holding that district court had jurisdiction to decide claims brought along with claims barred by Eleventh Amendment, while latter would be remanded); *see also* *Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 1013 (E.D. Mich. 1996) (holding the removal of plaintiff's federal claim to be authorized by § 1441(a) although removal of plaintiff's state claims, which did not lie within the boundaries of an Article III "case," was improper and those claims had to be remanded pursuant to § 1447(c)).

that 28 U.S.C. § 1447²⁷ does not preclude the remand of claims that were part of a larger action.²⁸

In my view, the first-described line of authority would have been correct under our current statutes *if* the cases had involved a lack of subject-matter jurisdiction over the claims said to be barred by the Eleventh Amendment; that situation would translate into the district court not having original jurisdiction over the “civil action[s]” filed in state court. The fact that a different allocation of claims, between state and federal courts, is possible and might be statutorily required when cases are commenced in federal court rather than removed there—or vice versa—is commonplace,²⁹ and would provide no reason to disregard or distort the application of the removal statutes. Moreover, the first-described approach is consistent with recognizing that the Eleventh Amendment bars the adjudication of claims, not of entire civil actions: Other claims in a suit could not be heard in federal court, not because their adjudication there is barred by the Amendment, but because the governing statute restricts removal to civil actions of which the district courts have jurisdiction. Even if, in some circumstances, present § 1447(c) were interpreted to permit the remand of individual claims, that would not render proper the removal of a set of claims that includes one or more whose adjudication in federal court is precluded by a lack of subject-matter jurisdiction.³⁰ And present § 1447(c) may well preclude the remand of individual claims that were part of a larger action: It requires the remand of “cases” when the district court lacks subject-matter jurisdiction.³¹ Policy reasons in support of the result reached under the first line of authority, such as those that relate to judicial economy, avoiding the potential for inconsistent results and avoiding res

27. 28 U.S.C. § 1447(c) (Supp. II 1996) states in pertinent part:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction 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.

28. *See, e.g., Texas Hosp. Ass’n*, 802 F. Supp. at 1514-16. *But see* *Archuleta v. Lacuesta*, 131 F.3d 1359, 1360-63 (10th Cir. 1997) (holding under 28 U.S.C. § 1447(d) that the court lacked power to review remand of an entire action to state court, purportedly under 28 U.S.C. § 1441(c), where the remand was predicated on the presence of claims barred by the Eleventh Amendment and thus was for lack of jurisdiction, and therefore declining to decide which of the two competing approaches described in the text the Tenth Circuit would follow). In dissent, Judge Baldock argued that the court had the power and the duty to review the remand of claims not barred by the Eleventh Amendment because their remand was not “to a fair degree” based on lack of subject-matter jurisdiction. *Id.* at 1363-68.

29. For example, in some situations the statutes give plaintiffs a non-trumpable choice of forum such that claims that plaintiffs could assert in federal court nonetheless may not be removed there. *See* 28 U.S.C.S. § 1445(a)-(d) (Law. Co-op. 1989 & Supp. 1998). By contrast, § 1441(c) has purported to allow defendants to remove to federal court combinations of claims that a plaintiff could not assert there. *See infra* text accompanying note 137.

30. *See* *Frances J. v. Wright*, 19 F.3d 337, 341 (7th Cir. 1994); *Flores v. Long*, 926 F. Supp. 166, 169-70 (D.N.M. 1995).

31. *But see* *Wisconsin Dep’t of Corrections v. Schacht*, 118 S. Ct. 2047, 2054 (1998) (noting that “[c]onceivably, one might . . . read [§ 1447(c)]’s reference to a ‘case,’ to include a claim within a case”).

judicata and collateral estoppel issues, may have undergirded Congress's choice of language in the removal statutes, authorizing removal of "civil actions of which the district courts . . . have original jurisdiction" and the remand of "cases."

(2) The Impact of *International College of Surgeons*

The Supreme Court's recent opinion in *Chicago v. International College of Surgeons*³² casts some doubt upon this analysis because at times the Court there spoke as if particular *claims* (freestanding claims under 28 U.S.C. § 1331) alone constitute a removable civil *action*, even when factually related state law claims also are pleaded in the same complaint.³³ If freestanding claims are removable civil actions, it might be proper to remove them while leaving behind, or while utilizing current § 1447(c) to remand only, claims outside both independent and supplemental federal jurisdiction (although such a construction would be both a break from long historical practice³⁴ and—I believe—inconsistent with the language of § 1447(c)). However, because (wisely or not) the Court concluded that the state law claims asserted in *International College of Surgeons* were part of the same Article III case or controversy as the freestanding federal claims,

32. 118 S. Ct. 523 (1997) (cited approvingly in *Schacht*, 118 S. Ct. at 2051).

33. For example, the Court stated:

[*International College of Surgeons*] federal claims suffice to make the actions "civil actions" within the "original jurisdiction" of the district courts for purposes of removal. . . . Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that ICS's complaints, by virtue of their federal claims, were "civil actions" within the federal courts' "original jurisdiction."

Id. at 530. Further, the Court characterized as "mistaken" the idea that the "nonfederal claims somehow [could and did] take the complaints in their entirety . . . out of the federal courts' jurisdiction." *Id.* at 531; *see also* *Cardenas v. Fire & Police Comm'n*, 990 F. Supp. 645 (E.D. Wis. 1998) (relying on *International College of Surgeons* and upholding the removal of constitutional claims joined with claims seeking review of an administrative decision).

34. *See, e.g.*, *Maine Ass'n of Interdependent Neighborhoods v. Commissioner, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1056 (1st Cir. 1989) (interpreting § 1447(c) to require remand of entire case, even when state court is likely unable to address some remanded claims); *Kunzi v. Pan Am. World Airways, Inc.*, 833 F.2d 1291, 1294 (9th Cir. 1987) (dismissing appeal where district court had remanded an entire case for lack of jurisdiction where it lacked jurisdiction over the claims against particular defendants); *see also* 16 ROBERT C. CASAD ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 107.41[1][f], 107-201 to 107-204 (3d ed. 1998) (noting that when a case has been removed pursuant to § 1441(a), the only bases for remand are § 1447(c) and § 1367(c)); Edward Hartnett, *A New Trick From an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 *FORDHAM L. REV.* 1099, 1155-56 (1995) (arguing that § 1441(a) permits removal only if an entire case is within the district court's original jurisdiction and provides no statutory authority for piecemeal removal); Steinman, *supra* note 11, at 985 (noting that, until recent years, litigants had assumed that under § 1447(c) all that was removed had to be remanded when removal was improper).

(unlike claims barred by the Eleventh Amendment)³⁵ were within supplemental federal jurisdiction, and were part of a civil action that was removable in its entirety, the Court's opinion does not directly address how the federal courts should handle removal and remand in lawsuits that contain claims *beyond* federal subject-matter jurisdiction. Thus, the Court there did not confront whether or how courts should "divide" removed cases that contain claims beyond federal subject-matter jurisdiction.

I believe the *International College of Surgeons* Court to be in error in stating that the mere presence of federal claims renders actions "civil actions" within the original jurisdiction of the federal courts for purposes of removal.³⁶ Although a thorough discussion of the reasons for my belief would entail too great a diversion from the main tasks of this Article, I do want to make some pertinent points here.

First, claims and actions are not the same thing. While an action may consist of a single claim, a single civil action pending in federal court may consist of multiple claims, some or all of which are asserted by plaintiffs and some of which are asserted by other parties. This is clear from the Federal Rules of Civil Procedure including Rule 2,³⁷ Rule 3,³⁸ Rule 7,³⁹ Rules 13 and 14,⁴⁰ Rule 18,⁴¹ Rule 20,⁴² Rules 23 and 24,⁴³ and Rule 54(b).⁴⁴

35. For other criticisms of *Surgeons*, see T.D. NO. 2, *supra* note 8, at xix-xx, 56-57; Ray C. Schrock, *Strange Interpretations, Unforeseeable Consequences: Marshaling the Meaning of "Civil Action" under § 1367*, City of Chicago v. International College of Surgeons, (unpublished manuscript on file with the author) (arguing that the Court endorsed an incorrect definition of "civil action" which led it to erroneously conclude that federal claims within a larger suit themselves constitute a "civil action," having likely been led astray by the phraseology of § 1367; also arguing that the Court incorrectly concluded that supplemental jurisdiction is not a form of original jurisdiction, incorrectly interpreted prior Court decisions not to distinguish between de novo and deferential review in determining whether a state administrative "appeal" is a civil action within the federal courts' original jurisdiction, and afforded insufficient weight to federalism policies in upholding federal district court authority to conduct deferential review of state administrative agency decisions).

36. *Accord Hartnett, supra* note 34, at 1156 ("From the Judiciary Act of 1789 forward, it has been clear that the general removal statutes do not permit removal of an entire case on the basis that a part of the case is removable; that is precisely why the Separable Controversy Act and its successors were passed.").

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

38. FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

39. FED. R. CIV. P. 7 (listing the pleadings that are allowed and contemplating counterclaims, cross-claims, and third-party complaints).

40. FED. R. CIV. P. 13, 14 (concerning, respectively, claims by parties other than the plaintiffs and by plaintiffs against parties other than defendants).

41. FED. R. CIV. P. 18 (permitting the joinder of multiple claims by any party who asserts any claim).

42. FED. R. CIV. P. 20 (permitting the joinder of multiple plaintiffs and defendants, who may assert claims severally or in the alternative).

43. FED. R. CIV. P. 23, 24 (concerning, respectively, class actions (in which claims may be asserted severally) and intervention by *inter alia* persons who have a claim that raises a question of law or fact that is in common with the main action).

44. FED. R. CIV. P. 54(b) (beginning with the phrase "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim").

Second, although I agree with Professor Oakley that we analyze federal-question subject-matter jurisdiction on a claim-specific basis, looking to see whether each claim in an action constitutes a claim arising under the Constitution, laws, or treaties of the United States, and whether any claim that does not do so falls within the supplemental jurisdiction of the district courts,⁴⁵ it is perfectly conceivable that in fact a plaintiff may file in federal court (or a defendant may remove to federal court) an action that contains claims that are not within the original jurisdiction of the federal court as either freestanding or supplemental claims. When such a set of claims is brought to the district court, that civil action is not within the original jurisdiction of the federal courts, notwithstanding that particular claims within it are within that jurisdiction.⁴⁶ Arguably, federal courts should dismiss such sets of claims in their entirety when plaintiffs have sought federal jurisdiction,⁴⁷ and ordinarily should grant plaintiffs leave to amend to bring a civil action that asserts only claims within federal jurisdiction.

By the same token, because Congress made removable “[a]ny civil action of which the district courts have original jurisdiction”⁴⁸ (subject to exceptions provided elsewhere), the many courts that have held removal to be improper when a civil action, as filed in state court, included claims that were beyond federal subject-matter jurisdiction (either in and of themselves or supplementally) have acted correctly. When Congress has wanted to authorize removal of individual claims asserted within the context of a larger civil action, it has known how to clearly express its intention.⁴⁹

As an aside, the same kind of analysis works if one considers diversity cases. A civil action falls within diversity jurisdiction only if each plaintiff who “counts” is diverse from each defendant who “counts”⁵⁰ and if the requisite

45. See T.D. NO. 2, *supra* note 8, at 101-25.

46. See generally Steinman, *supra* note 11, at 943-46 (arguing that the jurisdiction exercised by federal courts on removal is original, not appellate).

47. But see *infra* text accompanying notes 54-55, 151.

48. 28 U.S.C. § 1441(b) (1994).

49. See 28 U.S.C. § 1452(a) (1994) stating in pertinent part:

A party may remove any claim or cause of action in a civil action other than . . . [here particular kinds of proceedings are described] to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

Id.

50. Certain defendants, including those sued under fictitious names, those fraudulently joined, and unnamed members of a defendant class, do not “count” in determining diversity jurisdiction. See 28 U.S.C. § 1441(a) (“For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.”); *Moore v. General Motors Pension Plans*, 91 F.3d 848, 850 (7th Cir. 1996) (treating “Doe” defendants as nominal parties whose presence did not affect diversity jurisdiction, where plaintiff was not merely uncertain of the names of additional defendants he wished to sue but had included them in the event that he later came to identify any additional defendants he wished to add); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 72-73 (7th Cir. 1992) (disregarding fraudulently joined defendants in determining diversity jurisdiction); *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983) (holding that fraudulently joined parties are disregarded in determining diversity jurisdiction). With respect to defendant class members, see generally 7A WRIGHT ET AL., *supra* note 16, § 1755, at 63 (stating that for purposes of diversity jurisdiction, the citizenship of the

amount is in controversy under the principles that govern valuation and aggregation of claims. If any plaintiff who "counts" is not diverse from any defendant who "counts," the civil action is not within diversity jurisdiction. Consequently, defendants may not remove to federal court selected claims that, if filed alone, would constitute civil actions within diversity jurisdiction but which in fact are components of a larger state court case that as an entirety is not a civil action of which the district courts have original jurisdiction.⁵¹

It is true that, in both federal-question and diversity cases commenced in federal court, the courts often order dismissal of only the particular claims that are jurisdiction spoilers.⁵² And there does seem to be inconsistency between the federal courts' practice of "lopping off" only jurisdiction-spoiling claims when suits are commenced in federal court but in remanding in their entirety identical actions purportedly removed under § 1441(a) and (b), when in both situations the suits filed exceed the boundaries of a civil action within original federal jurisdiction.⁵³ However, if parties put before the federal court a group of claims

representative parties is determinative). Similarly, certain plaintiffs, including those who are merely nominal parties and unnamed members of a plaintiff class, do not "count" in determining diversity jurisdiction. *See generally id.* at 61-63 (regarding plaintiff class members); 13B *id.* § 3606, at 409-11 (regarding nominal or formal parties who have no interest in an action).

51. *See, e.g., Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68-69 (1996) (indicating that defendants cannot remove a case that contains claims against a nondiverse defendant); *In re Norplant Contraceptive Prods. Liab. Litig.*, 976 F. Supp. 559 (E.D. Tex. 1997) (holding that defendants could not remove claims of diverse intervenor plaintiffs, leaving the claims of nondiverse plaintiffs pending in state court, unless and until the former claims were severed from the civil action in which they had been asserted); *see also Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2052 (1998) (explaining in dicta that the presence of nondiverse parties automatically destroys diversity so as to render an action unremovable, absent a non-diversity basis of subject-matter jurisdiction).

52. *See Finley v. United States*, 490 U.S. 545 (1989) (holding that a pendent party claim was not within the jurisdiction of the federal courts in a suit where jurisdiction was predicated on the Federal Tort Claims Act); *Aldinger v. Howard*, 427 U.S. 1 (1976) (holding that a pendent party claim was not within the jurisdiction of the federal courts in a suit where jurisdiction was predicated on 28 U.S.C. § 1343). In each case the Court dismissed only the claim held to be outside federal subject-matter jurisdiction. *See also, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832-38 (1989) (calling "well-settled" the principle that district courts have authority to allow a dispensable nondiverse party to be dropped and recognizing appellate court power to do the same); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873) (approving the trial court's dismissal of jurisdictional spoilers and maintenance of diversity jurisdiction over claims between diverse parties); *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 188 (1825) (finding that jurisdictional spoilers, improperly made defendants, should be dismissed and that the case should proceed between diverse parties, the court's jurisdiction being unaffected as to the claims between them); T.D. No. 2, *supra* note 8, at 124 (The rule of complete diversity allows the exercise of jurisdiction over a claim between diverse parties that is joined in the complaint with a claim between nondiverse parties; the court simply cannot adjudicate the latter and must dismiss the "jurisdictional spoilers.").

53. *See Archuleta v. Lacuesta*, 131 F.3d 1359, 1367 (10th Cir. 1997) (Baldock, J., dissenting) (arguing that the view that actions containing Eleventh Amendment-barred claims are not civil actions of which the district courts have original jurisdiction is belied by the fact that actions containing such claims are routinely filed in federal court and only the Eleventh

that Congress has not authorized them to hear or which it would be unconstitutional for the federal court to adjudicate as a single case or controversy, Congress's power under the Necessary and Proper Clause⁵⁴ together with Article III likely would allow Congress to authorize the courts to supplant the plaintiff as master of his lawsuit and to alter the contours of the litigation by dismissing or remanding only the particular claims that render a particular civil action something more than a statutory "civil action" or a constitutional "case" or "controversy."⁵⁵ As a practical matter, in the federal question context, the suit that contains claims outside § 1367-authorized supplemental jurisdiction may be removable under § 1441(c), which allows the federal courts to retain jurisdiction over federal question and supplemental claims. As a result, a defendant typically will not be significantly less able than a plaintiff to obtain a federal forum for those claims. In the diversity context, § 1441(c) does not apply, so defendants are less able than plaintiffs to obtain a federal forum for claims between diverse parties when a suit as framed by the plaintiff involves minimal, but not complete, diversity.

Returning to the main line of argument,⁵⁶ while one might question the policies underlying the Eleventh Amendment or the policies that render unwaivable objections to lack of subject-matter jurisdiction, given the current realities of those aspects of our law, I believe that the first-described line of cases (which required simultaneous remand of the claims viewed as barred by the Eleventh Amendment and the other claims that comprised a civil action) would have reached the right result *if* the Eleventh Amendment bar were absolute, rather than waivable by the state, and if the bar imposed by the Eleventh Amendment is jurisdictional within the meaning of the removal and remand statutes.

(3) The Impact of *Schacht*

The Supreme Court, in *Wisconsin Department of Corrections v. Schacht*,⁵⁷ resolved the conflict in the circuits by concluding that cases involving claims that may be barred by the Eleventh Amendment *are* removable and that federal courts can decide the nonbarred claims. In reaching this conclusion, the Court relied primarily on its view of the Eleventh Amendment as granting to each state a waivable "legal power to assert a sovereign immunity defense *should it choose to do so*."⁵⁸ Because the Amendment may or may not be invoked by a state, the mere availability of an Eleventh Amendment immunity "does not automatically destroy original jurisdiction."⁵⁹ Moreover, at the time of removal, which typically is prior to the time a defendant files an answer and consequently is prior to

Amendment-barred claims are dismissed).

54. U.S. CONST. art. I, § 8.

55. This idea was suggested to me by my colleague, Professor Margaret Stewart of Chicago-Kent College of Law.

56. The Article departed from the main line of argument after the text accompanying note 49.

57. 118 S. Ct. 2047 (1998).

58. *Id.* at 2052 (emphasis added).

59. *Id.*

defendant's filing of an answer *in federal court*, the defendant State may well not yet have asserted its Eleventh Amendment immunity. Indeed, until the case is in federal court, such an assertion would be premature. At removal time, which is the relevant time, if a federal question claim has been asserted against the State and the State has not yet asserted an Eleventh Amendment immunity, the civil action *is* within the original jurisdiction of the federal courts, and consequently is removable under § 1441, assuming no other problems with federal jurisdiction. (By the same token, any claim asserted against the State which, but for a possible Eleventh Amendment defense, would meet the requirements for pendent claim or pendent party jurisdiction could be part of a civil action within the original jurisdiction of the federal courts, removable under § 1441, assuming no defect in the removal.) In this situation, any post-removal invocation of the Eleventh Amendment places particular *claims* beyond the federal courts' power, but does not render the entire civil action one over which the federal courts lack jurisdiction such that remand of the entire case is required by § 1447(c).⁶⁰ Indeed, the Court suggested that the Eleventh Amendment may not even be a matter of subject-matter jurisdiction, pointing out that it has not decided that question.⁶¹

60. *See id.* at 2053. The *Schacht* Court described the situation as somewhat similar to cases in which there occurs a post-removal event such as the change in citizenship of a party (so that all plaintiffs are no longer diverse from all defendants) or a reduction in the amount in controversy below the jurisdictional minimum. In those instances, federal courts retain jurisdiction over the cases. *See id.* However, those really are not very apt analogies because in those instances the federal courts retain diversity jurisdiction over *all* the parties and *all* the claims whereas, in the context presented by cases like *Schacht*, the Court contemplates that federal courts will have to relinquish jurisdiction over the Eleventh Amendment-barred claims, although they may retain jurisdiction over the other claims in the civil action.

The Court also noted that if § 1447(c)'s reference to remand of a "case" were read to include a claim within a case, then it too would not require remand of an entire case but only of the relevant (Eleventh Amendment-barred) claims. *See id.* at 2054.

61. *See id.* at 2054; *see also* *Patsy v. Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (Citing the importance of state law in analyzing Eleventh Amendment questions and states' ability to waive this defense, the Court declined to reach Eleventh Amendment issues that had not been briefed to the Court, stating, "[W]e have never held that [the Eleventh Amendment] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."). *But cf.* *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (approving the court of appeals' resolution on the merits of an Eleventh Amendment defense that had not been raised in the district court because "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court").

The circuit courts were divided on the issue, although it appears that more had regarded it as appropriate to raise Eleventh Amendment immunity *sua sponte*, because of its jurisdictional nature, than had taken the opposing view. Compare the cases raising the issue *sua sponte*, *Sullivan v. Barnett*, 139 F.3d 158, 179-80 (3d Cir.) (raising the issue *sua sponte* and remanding to the district court the issue of whether the Eleventh Amendment allows redress against commonwealth defendants in federal court), *cert. granted sub nom.*, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 29, *and cert. denied*, 119 S. Ct. 69 (1998), *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1419 (10th Cir. 1997) (considering the Eleventh Amendment bar *sua sponte*, as it had done in prior cases), *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997) (raising the issue *sua sponte* and reversing the denial of a motion to dismiss a claim that a state official violated state law), and *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993) (raising the issue *sua sponte* and dismissing some claims

The weight of authority in the lower courts seems to have been that the Eleventh Amendment *is* jurisdictional.⁶²

Concurring in *Schacht*, Justice Kennedy emphasized that the Court had not decided or even considered whether a state waives its Eleventh Amendment immunity by expressly consenting to removal.⁶³ Before leaving this question for another day, Justice Kennedy offered several legal and policy arguments in support of such a waiver.

This is not the place for an extended discussion of the *Schacht* case. I would like to note however that the primary line of the Court's reasoning (described above) leaves intact *the predicate* of the earlier described first-line of lower court authority: That under our current statutes *if* a suit includes claims that the federal courts lack jurisdiction to hear, the district court does not have original jurisdiction over the "civil action" filed in state court. If that predicate has been

for lack of subject-matter jurisdiction), with *Bouchard Transp. Co. v. Florida Dep't of Env'tl. Protection*, 91 F.3d 1445, 1448 (11th Cir. 1996) (stating that the Eleventh Amendment is not jurisdictional in the sense that courts *must* raise it sua sponte). *Schacht's* emphasis on the State's power to waive the Eleventh Amendment immunity indicates that courts need not raise it sua sponte and may suggest that they should not do so. See *Schacht*, 118 S. Ct. at 2052.

62. See *supra* note 61. The initial language of the Eleventh Amendment ("The Judicial power of the United States shall not be construed to extend to . . .") appears to impose a constitutional limit on federal subject-matter jurisdiction. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Missouri v. Fiske*, 290 U.S. 18, 25 (1933). In the view of some commentators and U.S. Supreme Court Justices, the Amendment correctly construed limits only diversity subject-matter jurisdiction. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 301-02 (1985) (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.). See generally William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033-38, 1090, 1130-31 (1983) (arguing that the Eleventh Amendment was intended to require Article III's state-citizen diversity clause to be construed to confer jurisdiction on the federal courts only when states sued out-of-state defendants); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1894, 2004 (1983) (arguing that the Eleventh Amendment eliminated the power of federal courts to hear suits against states in which the sole basis of jurisdiction was the parties' status).

Yet, the Amendment is unlike limits on federal subject-matter jurisdiction because states may waive Eleventh Amendment immunity while other limits on subject-matter jurisdiction are not waivable, and courts appear *not* to have the same duty to raise and determine Eleventh Amendment objections sua sponte as they have with respect to defects in subject-matter jurisdiction. See *supra* note 61. It is particularly difficult to justify the view that the prohibition on federal courts hearing suits against a state by its own citizens is a constitutional limit on federal subject-matter jurisdiction, because the Amendment does not, by its literal terms, address such suits. Other theories of the Eleventh Amendment view it as something other than a limit on subject-matter jurisdiction, such as a common law immunity from suit. See generally ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 7.3 (2d ed. 1994) (discussing a theory of the Eleventh Amendment as reinstating a common law immunity from suit enjoyed by states in the 18th century). The Court seems convinced that the Amendment represents a constitutional principle, however. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

63. *Schacht*, 118 S. Ct. at 2054-57 (Kennedy, J., concurring).

undermined, it was undermined by *International College of Surgeons*,⁶⁴ rather than by *Schacht*.

(4) Remand or Dismissal

Prior to *Schacht*, a subsidiary conflict in the circuits had arisen regarding whether removed claims whose adjudication in federal court is barred by the Eleventh Amendment must be remanded or may be dismissed.⁶⁵ In view of the Supreme Court's conclusion in *Schacht* that § 1447(c) is inapplicable when a civil action is removed some claims in which *may* prove to be beyond the federal judicial power, none of the remand statutes appear to govern.⁶⁶ In that circumstance, dismissal of the Eleventh Amendment-barred claims would be

64. *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997).

65. Compare *Bruns v. National Credit Union Admin.*, 122 F.3d 1251, 1257-58 (9th Cir. 1997) (holding § 1447(c) to be mandatory and therefore reversing a dismissal without prejudice of claims against nonfederal defendants and ordering their remand to state court), *Schacht v. Wisconsin Dep't of Corrections*, 116 F.3d 1151 (7th Cir. 1997) (vacating a district court order dismissing claims barred by sovereign immunity and remanding with instructions to remand entire action to state court), *vacated and remanded*, 118 S. Ct. 2047 (1998), *Roach v. West Va. Reg'l Jail & Correctional Facility Auth.*, 74 F.3d 46, 48-49 (4th Cir. 1996) (remanding case containing claims barred by the Eleventh Amendment), *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 338 (6th Cir. 1990) (remanding claims barred by the Eleventh Amendment, as preferable to dismissing those claims without prejudice), and *Gwinn Area Community Schs. v. Michigan*, 741 F.2d 840, 847 (6th Cir. 1984) (holding it preferable to remand claims barred by the Eleventh Amendment), *with Kruse v. Hawai'i*, 68 F.3d 331, 332-33, 337 (9th Cir. 1995) (affirming the dismissal of claims barred by Eleventh Amendment in a removed action), and *Brown v. Composite State Bd. of Med. Exam'rs*, 960 F. Supp. 301 (M.D. Ga. 1997) (dismissing claims barred by the Eleventh Amendment while retaining jurisdiction over other claims in the case in a removed action).

At least some of the dismissals may have been attributable to a belief by some federal courts that sovereign immunity or other legal doctrine would require dismissal of the claims by a state court and that remand therefore would be a wasted gesture. See *Kruse*, 68 F.3d at 334 & n.2 (affirming the dismissal of claims against the State and officials because they were not "persons" within the meaning of 42 U.S.C. § 1983 and thus could not be sued in state court either); *Straus v. Straus*, 987 F. Supp. 52 (D. Mass. 1997) (dismissing a removed case pursuant to the doctrine of *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466-67 (1939), because a New York court—not a Massachusetts court—would have exclusive jurisdiction over the trust res in question). Compare those cases decided before the enactment of § 1441(e), when federal courts lacked jurisdiction upon removal to hear cases within exclusive federal jurisdiction, and dismissing, rather than remanding, such federal claims because there was no point in remanding to a state court that was not empowered to hear them. See *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 288 (1922); *Daley v. Town of New Durham*, 733 F.2d 4, 6-7 (1st Cir. 1984); see also 14A WRIGHT ET AL., *supra* note 16, § 3722, at 284. But arguably it is for the state court to make such determinations.

66. According to the *Schacht* Court, the removal was not defective for lack of subject-matter jurisdiction over the case, nor was there a defect in removal procedure. *Schacht*, 118 S. Ct. at 2053-54. These are the grounds for remand under 28 U.S.C. § 1447(c). The remand provisions of § 1441(c) ordinarily would not apply because, under *Schacht*, claims that might later be protected from federal adjudication by the Eleventh Amendment nonetheless would not be "non-removable," a predicate for application of § 1441(c). See *Schacht*, 116 F.3d at 1151.

appropriate; whether remand would be an appropriate alternative would depend on whether remand grounded in common law, such as the Court recognized in *Carnegie-Mellon University v. Cohill*,⁶⁷ would be permissible.

(5) What Effect Would Enactment of the Revisions Proposed by the ALI Federal Judicial Code Revision Project Have on These Issues?

Preliminary Draft No. 2 ("P.D. No. 2") rewrites the basic removal provision, § 1441(a), to reflect the claim-specific nature of the underlying grants of original jurisdiction⁶⁸ while maintaining and reinforcing the notion that, outside the contexts in which current 28 U.S.C. § 1441(c) operates⁶⁹ or in which removal is predicated on 28 U.S.C. §§ 1442-1444,⁷⁰ § 1441(a) removal will be proper only when every claim pleaded in the state court complaint against a properly joined defendant is within the original jurisdiction of the federal district courts, either as a "freestanding" claim or by virtue of the supplemental jurisdiction conferred by § 1367.⁷¹ Thus, the right to remove is "action-specific."⁷² As the Commentary explains, the proposed statute would not authorize removal of an action subject to later dismissal of claims as to which the district court lacks original jurisdiction.⁷³ However, unlike current § 1447(c),⁷⁴ the proposal (in proposed § 1447(e)(3)) requires the district court to remand *any claim* that it determines is not within its original jurisdiction. Under this scheme then, the position that P.D. No. 2 takes with respect to removed cases that include claims outside original federal subject-matter jurisdiction is somewhat equivocal: While proposed § 1441(a) does not authorize removal of a civil action that includes such claims, proposed § 1447(e)(3) appears to indicate that, if a removed civil action includes

67. 484 U.S. 343 (1988).

68. This theme was first introduced in connection with the revision of 28 U.S.C. § 1367 (1994). See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 1, at 33-79 (1997) [hereinafter T.D. NO. 1]. The most recent rendition of this commentary appears in T.D. NO. 2, *supra* note 8, at 31-35, 101-51. T.D. NO. 2 does not address the removal statutes.

69. See 28 U.S.C. § 1441(c) (1994), the proposed analogue of which is discussed *infra* text accompanying notes 143-48.

70. 28 U.S.C. §§ 1442 (1994 & Supp. II 1996), 1443-1444 (1994).

71. See P.D. NO. 2, *supra* note 2, at 5.

72. *Id.* at 14.

73. *Id.* at 15. Although P.D. NO. 2 adds in a footnote, *id.* at 15 n.2, that, as a practical matter, a defendant *could* remove an action that encompasses non-removable claims if no timely motion to remand were made, the placement of this footnote renders it somewhat misleading. A district court is required by proposed § 1447(e)(3), *see id.* at 11, to remand any claim that it determines is not within its original jurisdiction. Hence, the non-removable claims that waivers would allow district courts to hear would be claims that are within original federal jurisdiction and non-removable for some other reason such as untimeliness of the removal, failure of all defendants to join the notice of removal, or violation of some other nonjurisdictional restriction on, or procedure for exercising, the right to remove.

74. See *supra* text accompanying notes 24 and 31.

such claims, the court is required to remand only the claims beyond federal subject-matter jurisdiction.

An effort to utilize proposed § 1447(e)(1) to change this result (to require remand of the entire action) seems not to work. While it authorizes the remand of entire actions, it is designed for situations involving violations of nonjurisdictional restrictions on the right to remove or violations of procedures for removing, and it permits the district courts to remand actions on the basis of such improprieties only when either a timely motion to remand or a timely order to show cause has been filed.⁷⁵ Thus, § 1447(e)(1) ill fits actions that include claims outside federal subject-matter jurisdiction. So, we seem to be left with the “equivocation” that I noted above.

It should be noted however that this equivocation does not affect removed cases that contain claims as to which an Eleventh Amendment immunity is available. Under the teaching of *Schacht*, those cases may be constituted of claims every one of which is within the original jurisdiction of the federal courts. Proposed § 1447(e)(3) will authorize the remand of claims that come to be barred by the Eleventh Amendment if but only if the Eleventh Amendment bar is held to render those claims outside original federal subject-matter jurisdiction. If the Eleventh Amendment bar is held nonjurisdictional, the authority to remand claims subject to that bar will either have to be separately legislated or judicially created—or the power will not exist and federal courts will be able only to dismiss them.

(6) Jurisdictional Problems Raised After Judgment

Returning to claims outside federal jurisdiction, if a jurisdictional problem is first raised after judgment following trial or after summary judgment on all claims, an additional “wrinkle” arises because of the doctrine that, at that point, the question on appeal becomes, not whether the action was properly removed, but whether the district court would have had original jurisdiction of the case as it is configured at final judgment had *it* been filed in federal court.⁷⁶ At that juncture, the claims beyond federal subject-matter jurisdiction would have to be

75. Proposed § 1447(d) and (e)(1)’s allowance of remand, in the absence of a motion or order to show cause, when a required declaration of service and of filing of the notice of removal were not timely filed, *see* P.D. NO. 2, *supra* note 2, at 10, has been eliminated in P.D. NO. 3, *supra* note 2, at 6-7 (proposed § 1447(c)(1)). Under the latest proposal, however, the time for filing a motion to remand for improper removal or an analogous order to show cause commences upon the filing of the required proof of service of the notice of removal upon all other parties and the state court. As the Commentary explains,

[u]ntil proper service is made and proof of such proper service has been filed with the district court, there is no time limit applicable either to a motion for remand or to a sua sponte order to show cause why the action should not be remanded. Moreover, the filing of a procedurally defective proof of service would in and of itself provide the requisite ground for remanding the action as improperly removed.

P.D. NO. 3, *supra* note 2, at 92 n.81.

76. *See* *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702, 705 (1972); *Campbell v. Aerospace Corp.*, 123 F.3d 1308, 1311 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1794 (1998).

remanded under proposed § 1447(e)(3) but, in light of the lens through which one views the case as well as *Schacht*, the federal court judgment on the other claims would stand.⁷⁷

b. Suits That Include Claims Made Non-Removable by § 1445

Current § 1367's authorization of supplemental jurisdiction in general and pendent *party* jurisdiction in particular also has given rise to questions about the removability of civil actions that include claims that arise under state law and share a common nucleus of operative fact with federal question claims asserted against other defendants, but which have been made non-removable by § 1445. (Section 1445 lists several kinds of actions that may not be removed.) At least one district court held to *be* removable an action that included a worker's compensation retaliation claim made non-removable by § 1445(c) but which satisfied the requirements for supplemental jurisdiction.⁷⁸ By contrast, P.D. No. 2 makes the general removal authorization (in § 1441(a)) expressly subject to § 1445, with the result that actions that contain claims made unremovable by § 1445 are *unremovable* in their entirety, so far as removal pursuant to § 1441(a) is concerned. However, under the proposed new statute (§ 1447(e)(1), in particular), as under most current case law, removal in violation of § 1445 can be waived.

Although removal in violation of proposed § 1445 *is* waived by plaintiff's failure to promptly move for remand,⁷⁹ an innovation of proposed § 1447(e)(1)

77. It has been held however that the *Grubbs* rule does not apply when the trial court grants a partial summary judgment and remands state law claims. *See* *Kruse v. Hawai'i*, 68 F.3d 331, 334 (9th Cir. 1995) (citing *Stone v. Stone*, 632 F.2d 740, 742 (9th Cir. 1980)).

78. *See* *Cedillo v. Valcar Enter. & Darling Del. Co.*, 773 F. Supp. 932 (N.D. Tex. 1991); *see also* *Graef v. Chemical Leaman Tank Lines*, 860 F. Supp. 1770, 1775-76 (E.D. Tex. 1994) (holding that although, in the Fifth Circuit, retaliatory discharge claims are held to "arise under" the workers' compensation laws and thus are not removable, plaintiffs had waived this procedural defect by not filing a timely motion to remand, and because the court could have taken supplemental jurisdiction over the retaliatory discharge claim had the plaintiff originally filed it in federal court, the claim could be heard on removal); *Nabors v. City of Arlington*, 688 F. Supp. 1165, 1169-70 (E.D. Tex. 1988) (asserting pendent jurisdiction over a retaliatory discharge claim joined with a § 1983 claim, despite the nonremovability of the former under § 1445(c)). *But see* *Hummel v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 749 F. Supp. 1023, 1028-30 (D. Haw. 1990) (refusing to exercise pendent jurisdiction over state law claims joined with a claim rendered non-removable by 28 U.S.C. § 1445(c) or over the latter claim—removal of which was held "improvident"—despite their joinder with civil rights claims under 42 U.S.C. §§ 1983 and 1985 over which the court retained jurisdiction). For more on claims that arise under workers' compensation laws and are thus not removable, see *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991). *But see* *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 725 (7th Cir. 1994) (holding that a retaliatory discharge claim did not "arise under" the workers' compensation laws so as to render it unremovable).

79. *See* P.D. No. 2, *supra* note 2, at 10. With respect to current law, see *id.* at 37, n.21. Proposed § 1445's restrictions are not regarded as jurisdictional and hence unwaivable. The courts have disagreed as to whether *current* § 1445 is jurisdictional, denying the district courts power to hear the claims within the statute's ambit and perhaps also the claims with which they

is to reduce the “porosity” of § 1445’s restriction by permitting district courts to remand actions removed in violation of § 1445 if the court timely requires the removing defendants to show cause why the action should not be remanded for improper removal and determines that cause has not been shown. Thus, under the proposed scheme, when the removal of a civil action that includes supplemental claims made non-removable by § 1445 is timely challenged by either the plaintiff or the court, remand of the entire suit would be required.

Putting together the two results we have discussed under the new scheme, federal courts *could* end up hearing claims that § 1445 theoretically makes unremovable but that otherwise are within federal subject-matter jurisdiction (as well as other claims that are part of the same case and within federal subject-matter jurisdiction), but if the § 1445-barred claims are remanded, so are all the other claims in the civil action. On the other hand, if civil actions that include claims outside federal subject-matter jurisdiction are erroneously removed, it appears that the federal court is to remand only the claims outside its jurisdiction. This combination of results seems suspect because of the inconsistency but is defensible if each set of provisions results in factually related claims being litigated together while those not part of the same case or controversy are separated. That does seem to be the consequence.

By virtue of proposed § 1447(b)⁸⁰ and the exception that proposed § 1445 makes to its prohibition against the § 1441(a) removal of civil actions in which the complaint pleads § 1445 enumerated claims,⁸¹ if § 1445 enumerated claims are pleaded in state court in the same civil action as claims within original federal

are joined. *Compare* *Gamble v. Central of Ga. Ry. Co.*, 486 F.2d 781 (5th Cir. 1973) (holding that § 1445 denied the federal court jurisdiction over a suit under the Federal Employers’ Liability Act), *overruled in part* by *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987) (en banc) (relying on *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972), and holding that § 1445’s bar to removal is waived by a plaintiff’s failure to timely object where action could have been brought in federal court and the proceedings resulted in an entry of judgment on the merits), *and* *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1096 & n.5 to 1097 (11th Cir. 1997) (holding that § 1447(d) precludes appellate review of a remand granted pursuant to § 1445(c), because the latter is a jurisdictional limit on removal power), *with* *Williams v. AC Spark Plugs Div. of Gen. Motors Corp.*, 985 F.2d 783 (5th Cir. 1993) (holding that § 1445’s bar to removal is a procedural defect that is waived by a plaintiff’s failure to move for remand within 30 days of removal).

80. Proposed § 1447(b) provides that “[i]n any civil action removed by operation of section 1441(b)(2) of this title, the district court shall forthwith sever any claim thus disregarded and remand it to the State court from which the action was removed.” P.D. NO. 2, *supra* note 2, at 10. Proposed § 1441(b)(2) provides in part that:

(b) In determining whether an action may be removed under subsection (a), the following claims shall be disregarded:

....

(2) Claims joined to, but not part of the same case or controversy under Article III of the Constitution as, claims within the district court’s original jurisdiction under section 1331 of this title.

Id. at 5.

81. Proposed § 1445’s prohibition against § 1441(a) removal of civil actions in which the complaint pleads enumerated kinds of claims excepts removal permitted by virtue of proposed § 1441(b). *See id.* at 7.

jurisdiction but are *not* part of the same case or controversy under Article III of the Constitution as the latter claims, the § 1445 claims *can* be removed along with the other claims with which they were pleaded in state court,⁸² but they would have to be severed and remanded.⁸³ The question of the constitutionality of such a removal is addressed below, in connection with the discussion of the proposed treatment of what now are § 1441(c) removals.⁸⁴

c. Summary

In summary, because 28 U.S.C. § 1441(a) authorizes the removal of “civil action[s]” of which the district courts have jurisdiction, it always has been necessary for courts to decide the scope of a removable civil action. As construed by most courts, § 1367 altered the scope of what is removable only insofar as it altered the scope of supplemental jurisdiction.

However, both before and after the enactment of § 1367, controversy had arisen over the proper handling of removed state court cases that included (1) claims whose adjudication in federal court might be barred by the Eleventh Amendment though the claims otherwise were freestanding claims or within supplemental jurisdiction, (2) claims that for any other reason are beyond original federal jurisdiction, or (3) claims made non-removable by § 1445. The Supreme Court’s decision in *Schacht* gives federal courts some instruction in handling removed cases that may contain claims barred by the Eleventh Amendment, but it does not govern the handling of removed suits that include claims that are statutorily unremovable or that are unconditionally beyond federal jurisdiction because they do not themselves satisfy the requirements for a federal question, do not share a common nucleus of operative fact with freestanding federal claims, or otherwise fail the requirements for freestanding or supplemental claims.

Having rejected the propriety of § 1447(c) remand of cases for lack of jurisdiction when a state may have an Eleventh Amendment immunity on certain claims, *Schacht* also left unanswered whether claims later held to be barred by the Eleventh Amendment must be dismissed or may be remanded, either on some statutory basis or based on a remand power grounded in common law.

Unfortunately, because the Court in *International College of Surgeons* spoke as if freestanding claims alone constitute a removable civil action even when

82. In the majority of courts, this is how the law currently works upon § 1441(c) removals of actions that include § 1445 claims. *See id.* at 98-102.

83. According to Reporter’s Note A, under current law:

Most cases allowing for § 1441(c) removal simply deny plaintiff’s motion for remand, thereby implicitly finding it proper to retain any removed statutorily non-removable claims. Other cases . . . expressly make clear that severance and remand of the statutorily nonremovable claims is unnecessary. Finally, some cases . . . suggest that such claims should be severed and remanded.

Id. at 101-02 (footnote omitted).

Although P.D. No. 3 does not use the device of disregarding claims that are not part of the same case or controversy as claims within 28 U.S.C. § 1331, its effects would continue to be those described in the text accompanying notes 82-83. *See* P.D. No. 3, *supra* note 2, § 1441(c), at 1; *see also infra* text accompanying notes 143-48.

84. *See infra* text accompanying notes 149-51.

factually related state law claims are pleaded in the same complaint, its language in that opinion muddies removability under § 1441(a) when state court suits that include claims that are unconditionally beyond federal jurisdiction or are statutorily unremovable also contain claims *within* federal jurisdiction. Current § 1441(c) helps by informing the federal courts what may be removed when otherwise non-removable claims are separate from and independent of any accompanying freestanding claim under § 1331, but the Supreme Court's language in *International College of Surgeons* nonetheless poses a threat to the historic understanding of a removable civil action, and could well affect the application of the statutes governing remand as well.

On the positive side, the ALI Revision Project would restore the pre-*Surgeons* concept of a § 1441 removable civil action, making the right to remove depend on the content of an entire action. It makes some changes—that require further clarification⁸⁵—in the scope of what would be remanded if a collection of claims were removed that exceeds the bounds of a civil action within the original jurisdiction of the federal courts. It also would change the outcome of some cases involving § 1445 claims that fall within supplemental jurisdiction by strengthening § 1445's prohibition against removal when plaintiffs or the courts timely object to the removal.

2. Who Has to Join in the Notice of Removal?

In earlier writing I submitted that courts and Congress should consider whether the long-standing construction of § 1446(a) to require all properly joined and served defendants to join in the notice of removal should be altered to eliminate the need for mere pendent party defendants to join in the notice.⁸⁶ Most courts do not appear to have considered the policy arguments for or against this position; they have continued to apply the “rule of unanimity” interpretation of § 1446(a), apparently without thought as to whether § 1367's grant of supplemental jurisdiction over pendent party claims makes appropriate a re-thinking of the construction of § 1446(a)'s “defendant or defendants” language.⁸⁷ The Advisors to the ALI Revision Project did discuss this question in September 1997, but the consensus seemed to be to retain the unanimity requirement as a matter of policy (to defer to the state court as the choice of plaintiff and at least one defendant) and/or to avoid opposition that might result in the failure of the ALI's effort to modify the current statutes.

Of course, it has long been the rule that when removal is effectuated under current § 1441(c) concerning the removal of “separate and independent claims,” only the defendants on the federal question claim need join in the notice of

85. See *supra* text accompanying notes 73-74; see also *infra* text accompanying notes 162-64.

86. See Steinman, *supra* note 5, at 314-16.

87. See, e.g., *Dunn v. Ayre*, 943 F. Supp. 812, 814 (E.D. Mich. 1996); *Alexander v. Goldome Credit Corp.*, 772 F. Supp. 1217, 1221-22 (M.D. Ala. 1991).

removal.⁸⁸ Nothing about § 1367 altered that precedent, and nothing in the proposed ALI revisions would alter it.⁸⁹

C. Diversity Cases

The enactment of § 1367(a), broadly conferring supplemental jurisdiction, has provoked some opinions in diversity cases that, so far as I know, no commentator anticipated. For example, the risks of manipulative behavior by plaintiffs and the policies supporting removal, supplementing other policies that favor early and final resolution of subject-matter jurisdiction issues, led the Court to hold fifty years ago that a plaintiff's post-removal amendment of the complaint to seek less than the jurisdictional amount will not defeat a removal.⁹⁰ By analogy, such an amendment also does not defeat federal jurisdiction in a case commenced in federal court.⁹¹ However, the Court of Appeals for the Fourth Circuit in *Shanagan v. Cahill*⁹² held that, in the face of § 1367, this rule should be abandoned in favor of the view that claims that remain after a partial dismissal that lowers the amount in controversy below the statutory minimum are merely within supplemental jurisdiction which the court, in its discretion, may choose not to exercise.⁹³ The court so held in a non-removed case, but its decision easily could have ramifications for removed cases.⁹⁴ The decision might lead courts to remand claims that have come to have insufficient value by virtue of post-removal events. Such an outcome would be flatly contrary to the holding of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*⁹⁵ (which admittedly long-preceded the enactment of § 1367), where the Court concluded that, "the circumstance that the rulings of the district court after removal reduce the amount recoverable below the

88. See *Henry v. Independent Am. Sav. Ass'n*, 857 F.2d 995, 999 (5th Cir. 1988) (holding that when removal is effectuated through § 1441(c) only the federal question claim defendants need join the notice of removal); *Thomas v. Shelton*, 740 F.2d 478, 483 (7th Cir. 1984) (noting in dicta that only the federal question claim defendants need join the notice of removal); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 183 (7th Cir. 1984) (noting the same as *Thomas*); *Zaustinsky v. Allied Van Lines, Inc.*, No. C 95-20848 RMW (PVT), 1996 WL 193856, at *2 (N.D. Cal. Apr. 18, 1996) (stating that only defendants to the separate and independent federal question claim need join the notice of removal); *Dunn*, 943 F. Supp. at 814 (observing the rule in dicta); *Alexander*, 772 F. Supp. at 1223 (holding that only the federal question claim defendants need join the notice of removal); *Knowles v. American Tempering, Inc.*, 629 F. Supp. 832, 835-36 (E.D. Pa. 1985) (observing the same as *Dunn*).

89. See P.D. No. 2, *supra* note 2, at 20-21 (indicating the intention to retain the interpretation that defendants to claims that, in the constitutional sense, involve a different "case or controversy" than the removable claims need not join in the notice of removal).

90. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 286, 290-94 (1938) (observing that if the plaintiff could reduce the amount of his demand to defeat federal jurisdiction, the defendant's supposed right to remove would be subject to the plaintiff's caprice).

91. See *id.* at 290, 294.

92. 58 F.3d 106 (1995).

93. *Id.* at 109-12.

94. See also *infra* notes 157-61 with regard to post-removal changes that may affect jurisdiction.

95. 303 U.S. 283 (1938).

jurisdictional requirement, will not justify remand."⁹⁶ This decision was consistent with the more general principle that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction."⁹⁷ While the *Shanagan* court rested its conclusion on the discretion that accompanies supplemental jurisdiction, a discretion that may be influenced by post-removal events, *Shanagan* leads to a completely different outcome than *St. Paul Indemnity*. Moreover, the basis of *Shanagan's* reasoning is the position that when the amount in controversy falls below the dollar threshold "the jurisdictional basis of the action fades away."⁹⁸ However, under *St. Paul Mercury* the predicate of this reasoning is lacking: the jurisdictional basis of the action is *unaffected* by post-removal reductions in the amount in controversy. Inexplicably (to me), the *Shanagan* court finds that the retention of jurisdiction mandated by *St. Paul Mercury* "cannot be squared" with § 1367(c).⁹⁹ *Shanagan* also takes a rather peculiar view of supplemental jurisdiction in that it apparently regards the claims that remain as supplemental to themselves, plus one or more additional claims that no longer are in the case and none of which individually ever satisfied the jurisdictional amount requirement. That is, to say the least, a novel construction of supplemental jurisdiction.¹⁰⁰

96. *Id.* at 292 (footnote omitted).

97. *Id.* at 292-93.

98. *Shanagan*, 58 F.3d at 110. The court reasons that it then has discretion whether to hear state law claims which do not aggregate to the jurisdictional amount. *Id.*

99. *Id.* at 111. I believe that most courts continue to regard *St. Paul Mercury* as binding precedent. *See, e.g.*, Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2053 (1998) (citing *St. Paul Mercury* with approval for the proposition that federal courts will keep removed cases in which, after removal, the amount at issue is reduced to below jurisdictional levels); Grinnell Mut. Reinsurance Co. v. Shierk, 121 F.3d 1114, 1117 (7th Cir. 1997). *Grinnell* noted that a post-removal decrease in the amount in controversy does not create a jurisdictional defect, rejecting the argument that *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), implicitly overruled *St. Paul Mercury*. *See Grinnell*, 121 F.3d at 1117. *Caterpillar* had stated that if, at the end of a case, a jurisdictional defect remained uncured, the judgment had to be vacated. 519 U.S. at 76-77. *But see* Bailey v. Wal-Mart Stores, Inc., 981 F. Supp. 1415, 1416 (N.D. Ala. 1997); Goodman v. Wal-Mart Stores, Inc., 981 F. Supp. 1083, 1084-85 (M.D. Tenn. 1997). As revised, § 1447(c) states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (1994). The *Bailey* case, followed in *Goodman*, concluded that the revisions to 28 U.S.C. § 1447(c) overruled *St. Paul Mercury*. *See Bailey*, 981 F. Supp. at 1416-17; *Goodman*, 981 F. Supp. at 1085.

100. For additional criticism of *Shanagan*, see T.D. NO. 2, *supra* note 8, at 76-77, and Amanda M. Dalton, Note, *Shanagan v. Cahill: Supplementing Supplemental Jurisdiction*, 1996 BYU L. REV. 281 (arguing, *inter alia*, that in diversity cases aggregated claims together confer jurisdiction and that the supplemental-jurisdiction statute does not apply to these claims but to others asserted in the action and part of the same case or controversy).

II. ISSUES ARISING UNDER 28 U.S.C. § 1367(b), IN ITS INTERPLAY WITH THE REMOVAL STATUTES

There are a great many issues raised by present § 1367(b) generally, concerning both its interpretation and application and the policy judgments that underlie it. My focus here will be on issues that are unique to removed litigation or whose analysis and resolution may be influenced by the removal context.

A. The Applicability of § 1367(b)

Because current § 1367(b) declares that district courts shall *not* have supplemental jurisdiction over specified claims in civil actions of which the district courts “have original jurisdiction founded solely on section 1332,” some commentators questioned whether the limitations imposed by § 1367(b) apply to removed diversity cases over which the district courts arguably have jurisdiction *not solely* by virtue of § 1332, but by virtue of the combination of §§ 1332 and 1441(a) and (b).¹⁰¹ In light of strong policy considerations, § 1367’s legislative history,¹⁰² and the fact that removal typically is a technique or mechanism for bringing a case to federal court rather than a *source* of original jurisdiction,¹⁰³ commentators concluded that § 1367(b) most definitely should be held to apply to removed diversity cases.¹⁰⁴ The courts have not hesitated to do so, showing no signs of doubt that it applies.¹⁰⁵

However, because current § 1367(b) qualifiedly denies supplemental jurisdiction¹⁰⁶ only over claims by plaintiffs against persons made parties under

101. See Freer, *supra* note 5, at 485; Moore, *supra* note 5, at 58.

102. See Moore, *supra* note 5, at 59; Steinman, *supra* note 5, at 329-30.

103. See T.D. No. 2, *supra* note 8, at 102-04; Moore, *supra* note 5, at 58; Steinman, *supra* note 5, at 328-29.

104. See Hartnett, *supra* note 34, at 1168 (noting that there is no doubt that supplemental jurisdiction is available in removed cases); Moore, *supra* note 5, at 58 (concluding that § 1367 applies in removed diversity cases); Steinman, *supra* note 5, at 328-39. *But see* Michael D. Moberly et al., *Penetrating The Thicket, Pendent Party Removal Jurisdiction in the Ninth Circuit*, 30 IDAHO L. REV. 1, 28 (1993-94) (stating that it is unclear whether Congress intended to authorize pendent party jurisdiction in removed cases and offering no opinion as to whether § 1367 *should* apply in removed cases).

105. See, e.g., *Shanagan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995) (applying § 1367(b) in the context of a removed diversity case); *In re Abbott Labs.*, 51 F.3d 524, 527-30 (5th Cir. 1995) (holding the same as *Shanagan*); *Ascension Enters., Inc. v. Allied Signal, Inc.*, 969 F. Supp. 359, 361 (M.D. La. 1997) (holding the same as *Shanagan* and *Abbott Laboratories*); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 714-17 (C.D. Cal. 1995) (holding the same as previously cited cases); *Guaranteed Sys., Inc. v. American Nat’l Can Co.*, 842 F. Supp. 855, 856-57 (M.D.N.C. 1994) (applying § 1367(b) without hesitation in a removed diversity case and noting that original jurisdiction was based on § 1332 and not § 1441).

106. I say it “qualifiedly” denies supplemental jurisdiction because the final clause, which indicates that the courts shall not have supplemental jurisdiction over listed claims “when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332,” qualifies the denial of jurisdiction. 28 U.S.C. § 1367(b) (1994).

any of several of the Federal Rules of Civil Procedure, and over claims by persons proposed to be joined as plaintiffs or seeking to intervene as plaintiffs under other of the Federal Rules, § 1367's limitations, taken literally, do not govern analogous claims asserted in a state court action, prior to removal. The federal courts will have supplemental jurisdiction over all claims filed before removal that are so related to the claims within statutory diversity jurisdiction that they form part of the same case or controversy under Article III of the Constitution.¹⁰⁷

One application of this reading is that if a state law class action were filed in state court and the named parties were diverse and had the requisite amount in controversy, the case would be removable. Because only the requirements of § 1367(a) would apply, the court would have supplemental jurisdiction over the claims of class members regardless of their citizenship *and* regardless of the size of their claims.¹⁰⁸ Moreover, this would be the result whether or not analogous supplemental jurisdiction would exist over the claims of class members in actions filed in federal court.¹⁰⁹ (There has been some dispute over the latter because

107. See Steinman, *supra* note 5, at 330. Of course, on a less literal reading of § 1367(b), after removal, claims that had been asserted in state court could be regarded as (or as if) joined pursuant to the Federal Rules of Civil Procedure, thereby avoiding the consequences described in the text.

108. This argument apparently was not made to and did not occur to the court in *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709 (C.D. Cal. 1995). *Borgeson* was a removed diversity case, in which the court refused to exercise supplemental jurisdiction over the class members' claims for less than the requisite amount in controversy on the ground that doing so was prohibited by *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The *Zahn* Court held that, even where the named representative plaintiffs can show damage in the jurisdictional amount, each member of a Rule 23(b)(3) plaintiff class with separate and distinct claims must satisfy the jurisdictional amount requirement for diversity actions. However, the court reasoned in *Borgeson* that the language in § 1367(a), "[except] as expressly provided otherwise by Federal statute," rendered *Zahn* operative notwithstanding the failure of § 1367(b) to mention Rule 23 as an exception to the broad grant of supplemental jurisdiction in § 1367(a). See *Borgeson*, 909 F. Supp. at 714. On that reading of the statute, my argument in the text would fail. I have found no other court that has so construed § 1367(a), however, and the *Borgeson* court's interpretation of § 1367(a) seems wrong because while *Zahn* provides judicial gloss on a statute, § 1332, it is hardly fair to say that § 1332 expressly provides that separate and distinct claims that each are insufficient to meet the jurisdictional amount requirement may not be aggregated with claims that are jurisdictionally sufficient, for purposes of satisfying the jurisdictional amount requirement. For a more persuasive opposing view, see James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism* (1998) (unpublished manuscript on file with the author) (arguing that § 1367(a) preserves the rule of complete diversity elaborated in *Zahn* by incorporating it into the requirement that the district courts obtain original jurisdiction before they can assert supplemental jurisdiction).

109. Compare *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997) (holding that § 1367 authorizes supplemental jurisdiction over claims of class members that do not meet the amount in controversy requirement, so long as at least one named plaintiff satisfies the jurisdictional minimum) (Although this decision was made in the context of a removed case that was part of a consolidation under 28 U.S.C. § 1407 (1993), there is no indication whatsoever that the court regarded the action's commencement in state court as at all relevant to the supplemental-jurisdiction issue.), *cert. denied*, *Abbott Lab v. HJB, Inc.*, 118

§ 1367(b) does not mention claims asserted pursuant to Rule 23, the Federal Rule governing class actions, in its list of claims over which the district courts shall not have supplemental jurisdiction, but some legislative history indicated a lack of intent to change pre-existing law concerning such claims.¹¹⁰) The controversial decision in *In re Abbott Laboratories*,¹¹¹ holding that § 1367 authorizes supplemental jurisdiction over claims of class members that do not meet the amount in controversy requirement, itself was rendered in a removed case in which the class allegations had been made in state court.¹¹² As such, *Abbott Laboratories* could be limited to stand for the proposition that § 1367 authorizes supplemental jurisdiction over class members' claims for less than the federal jurisdictional amount only when they have been asserted in state court prior to removal. Clearly, that was not the intent of the Fifth Circuit, however; nor would I endorse such a narrow reading of the case.

Another application of the reading discussed above is that if a third-party complaint were filed before removal, § 1367(a) would authorize supplemental jurisdiction over a claim by the plaintiff against the third-party defendant *filed before removal*, notwithstanding the codification of *Owen Equipment & Erection*

S. Ct. 1337 (1998), *cert. denied*, *AmeriSource Corp. v. HJB, Inc.*, 118 S. Ct. 1336 (1998), and *cert. denied*, *Abbott Lab. v. Huggins*, 118 S. Ct. 1178 (1998), *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996) (holding that federal courts are authorized to exercise supplemental jurisdiction over claims of a diverse co-plaintiff whose loss does not meet the amount in controversy requirements, where another plaintiff's claim is jurisdictionally adequate and the two claims form part of the same Article III case or controversy), *Gandolfo v. U-Haul Int'l, Inc.*, 978 F. Supp. 558, 561-62 (D.N.J. 1996) (following *Stromberg*), *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1415-16 (N.D. Fla. 1996) (following the Fifth and Seventh Circuit's construction of the effect of § 1367 on *Zahn*, but holding that where no single plaintiff's claim satisfied the amount in controversy requirement, supplemental jurisdiction could not be exercised and the federal court did not have jurisdiction over any of the claims of the plaintiffs in a proposed class action removed to federal court), and *Garza v. National Amer. Ins. Co.*, 807 F. Supp. 1256, 1257-58 (M.D. La. 1992) (finding in a non-class action that § 1367 "repealed" *Zahn*, and upholding supplemental jurisdiction over co-plaintiffs' monetarily inadequate claims, as in *Stromberg*), with *Borgeson*, 909 F. Supp. at 716-17 (concluding that § 1367 did not overrule *Zahn* and hence that every member of a class asserting separate and distinct claims must independently satisfy the amount in controversy requirement of § 1332; although the case had been removed from state court, the federal court did not recognize how that might affect the § 1367 analysis), and *Mayo v. Key Fin. Serv., Inc.*, 812 F. Supp. 277, 278 (D. Mass. 1993) (relying on the legislative history of § 1367 in remanding an as yet uncertified diversity class action in which members asserted individual claims, where plaintiffs had not shown that each member could satisfy the jurisdictional amount requirement).

110. See 28 U.S.C. § 1367(b); cf. H.R. REP. NO. 101-734, at 29 (1990) ("The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as . . . interpreted prior to *Finley*."), reprinted in 1990 U.S.C.C.A.N. 6860, 6875.

111. 51 F.3d 524 (5th Cir. 1995).

112. *Id.* at 525.

Co. v. Kroger,¹¹³ in § 1367(b). I have not discovered any cases so holding, however.¹¹⁴

Proposed § 1367(c),¹¹⁵ which (like current § 1367(b)) restricts supplemental jurisdiction in diversity litigation, clearly would apply to removed cases.¹¹⁶ Except as provided in proposed § 1367(e) concerning the joinder of nondiverse defendants after removal, proposed § 1367(c) authorizes supplemental jurisdiction over only specified claims, but it describes those claims generically so as to authorize supplemental jurisdiction whether they were asserted before or after removal. Drafted in this way, the statute *denies* supplemental jurisdiction over all other claims that “depend[] upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332,”¹¹⁷ regardless of whether those other claims were asserted before or after removal. In this way, the new statute would eliminate a probably unintended difference that inheres in the current statutory scheme between the operation of supplemental jurisdiction in diversity cases

113. 437 U.S. 365 (1978).

114. The argument made above would not subvert the basic complete diversity requirement. For example, if *P* sued a diverse *D* for more than \$75,000 and a nondiverse *D* in the same state court action, this set of claims still would be non-removable because, viewed as a totality as it should be, it is not an action of which the district courts have original jurisdiction under §§ 1332 and 1367(b), and hence would not be removable under current § 1441(a) and (b); therefore, the entire case should be remanded pursuant to current § 1447(c). *See Steinman, supra* note 5, at 331-32. Under the Project proposal, the law would remain that claims by plaintiffs against nondiverse defendants will be beyond supplemental jurisdiction, *see T.D. NO. 2, supra* note 8, at 2, and consequently that an action configured as described here would not be removable if the two claims were part of the same case or controversy, *see P.D. NO. 2, supra* note 2, at 5. If the two claims were not part of the same case or controversy, their removal also would not be authorized by proposed § 1441(b) which (like current law) restricts removal of separate and independent claims to situations in which they are joined with federal question claims. *See id.*

115. Proposed § 1367(c) states:

(c) *Restriction of supplemental jurisdiction in diversity litigation.* When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim only if it—

(1) is asserted representatively by or against a class of additional unnamed parties; or

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or

(3) has been joined to the action by the intervention of a party whose joinder is not indispensable to the litigation of the action.

T.D. NO. 2, *supra* note 8, at 2.

116. This is clear, *inter alia*, because the general grant of supplemental jurisdiction applies to diversity cases; proposed § 1367(c) explicitly restricts supplemental jurisdiction in diversity litigation; and proposed § 1367(e) and (f) explicitly contemplate § 1367(c)'s applicability in removed cases. *See id.* at 2-4.

117. *Id.* at 1-2.

commenced in federal court and its operation in diversity cases removed to federal court.

B. When Current § 1367(b)'s Restrictions Do Apply

In earlier writing, I examined whether the invocation of federal jurisdiction by defendants who remove cases within diversity jurisdiction (as contrasted with the invocation of federal diversity jurisdiction by plaintiffs who file such cases in federal court) should alter the rules and doctrines that govern the existence and exercise of supplemental jurisdiction over claims asserted by plaintiffs or would-be plaintiffs or over claims asserted by defendants or would-be defendants.¹¹⁸ Arguments are available that concerns about circumvention of the complete diversity requirement have greater or lesser relevance in the removal context (than in the context of actions commenced in federal court) as applied to particular kinds of claims,¹¹⁹ and that current § 1367(b)'s final clause, qualifying the denials of supplemental jurisdiction that appear earlier in that sub-section,¹²⁰ provides latitude to reflect these differences in relevance. Nonetheless, the courts

118. See Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1822 (1992); Steinman, *supra* note 5, at 333-61.

119. For example, it might be argued that when defendants have removed a case, the plaintiff who asserts a claim against a third-party defendant has made no effort to circumvent the complete diversity requirement. Rather, the plaintiff has been haled into federal court by his or her adversary, and consequently—the reason for the rule of *Owen Equipment* being absent—the court should be held to have power to exercise supplemental jurisdiction over that claim. For additional arguments along these lines, as well as counter-arguments, see Steinman, *supra* note 5, at 333-61.

On the other hand, it might be argued that when defendants have removed a case, their ability to use supplemental jurisdiction should be curtailed in situations for which § 1367 fails to provide any restriction, such as when the defendant seeks to assert a state law claim against a nondiverse person made a party on the plaintiffs' side under Rule 19 or Rule 24 of the Federal Rules of Civil Procedure. See Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 SETON HALL LEGIS. J., 157, 181-84 (1994) (acknowledging that § 1367 does apply in removed diversity cases but noting that the last clause in § 1367(b) has not given the courts the flexibility in applying the statute in removed cases that the drafters may have intended and instead has been applied in a mechanical fashion in much the same way as it has been applied in cases initiated in federal court); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 949-51 (1992) (arguing that in the diversity context, courts should heed the purpose of § 1367(b) and allow jurisdiction over claims by plaintiffs against parties that are otherwise properly joined by another party or who properly intervene in a removed action); Redish, *supra* note 118, at 1822; Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960 n.90 (1991) (arguing that supplemental jurisdiction should apply in removed diversity actions but that courts should take into account the purpose of § 1367(b) in deciding which § 1367(b) restrictions to apply); Steinman, *supra* note 5, at 358-59.

120. The final clause states that the district courts shall not have supplemental jurisdiction over the claims there listed, "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. § 1367(b) (1994).

do not appear to have adjusted their thinking about what § 1367(b) requires, depending upon whether cases were removed to, rather than commenced in, federal court, although I did find one case in which a court did this kind of thought adjustment when analyzing the permissibility of an exercise of supplemental jurisdiction in a declaratory judgment case.¹²¹

With one exception discussed below¹²² and as observed above,¹²³ as of this writing, under the ALI Revision Project proposal, the operation of proposed § 1367(c)'s restrictions would not change depending upon whether actions were commenced in or removed to federal court.

III. ISSUES ARISING UNDER CURRENT 28 U.S.C. § 1367(c), IN ITS INTERPLAY WITH THE REMOVAL STATUTES

So far as I discovered, commentators did not foresee that current § 1367(c) would pose any particular or peculiar problems in removed cases.¹²⁴ Section 1367(c) authorizes district courts to decline to exercise supplemental jurisdiction over claims in specified circumstances.¹²⁵ It does not authorize district courts to decline to exercise jurisdiction over “freestanding” claims, in other words, claims within federal jurisdiction without regard to supplemental jurisdiction.¹²⁶

121. See *Mutual Life Ins. Co. v. Adams*, 972 F. Supp. 1386, 1391-92 (N.D. Ala. 1997) (denying supplemental jurisdiction over a declaratory judgment defendant's counterclaim against an additional, nondiverse “plaintiff,” where in the “displaced coercive action” the court would not have had supplemental jurisdiction over the claim that the declaratory judgment defendant sought to assert).

122. See *infra* text accompanying notes 157-61 regarding the allowance of supplemental jurisdiction over claims by plaintiffs against nondiverse defendants added after removal.

123. See *supra* text accompanying note 117.

124. I did observe that the statutes do not provide for remand of claims rejected under § 1367(c), that there are some reasons to question the viability of the authority of district courts to remand such claims under the pre-§ 1367 common law of supplemental jurisdiction (an authority recognized or created in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)), and that the decision to remand, rather than to dismiss, claims within supplemental jurisdiction has ramifications for the reviewability of the order knocking such claims out of federal court. See Steinman, *supra* note 5, at 318-20; see also *infra* text accompanying notes 171-76. That was as close as any commentator apparently came to foreseeing issues peculiar to removed cases in connection with § 1367(c).

125. Current § 1367(c) states: “The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . .” It then lists four circumstances.

126. See *In re City of Mobile*, 75 F.3d 605, 607-08 (11th Cir. 1996) (stating that § 1367(c) does not bestow on district courts the discretion to remand properly removed federal claims, and reversing a district court remand of a federal question claim where that claim was not separate and independent from the plaintiffs' state law claims and § 1441(c) was therefore inapplicable); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 785-87 (3d Cir. 1995) (reversing a district court remand of a federal question claim where that claim was not separate and independent from the plaintiffs' state law claims, § 1441(c) was therefore inapplicable, in any event the discretion it conferred could apply only to state law claims and the district court had to retain the federal claim, and nothing in § 1367(c) authorized a district court to decline to hear a claim over which it has original jurisdiction); *Hickerson v. City of New York*, 932 F. Supp. 550, 558-59 (S.D.N.Y. 1996) (denying remand of federal claims where § 1441(c) was inapplicable given the relationship between the federal and state law claims, concluding in

Nonetheless, some district courts have analogized to—or confused the authority they have under § 1367(c) with—the authority they have thought they have under § 1441(c) (the section permitting removal of cases that included separate and independent federal question claims),¹²⁷ with the result that they have dismissed “freestanding” claims and, in removed cases, have remanded properly removed “freestanding” claims, purportedly pursuant to § 1367(c).¹²⁸

The ALI Revision Project continues to authorize district courts to decline to exercise supplemental jurisdiction over claims in specified circumstances.¹²⁹ It makes explicit, however, that nothing in proposed § 1367 ordinarily authorizes district courts to decline to exercise jurisdiction over “freestanding” claims. It does so by providing, in proposed § 1367(d) that, “this section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided in subsection (e) [concerning the district court’s options upon joinder of a nondiverse defendant after removal].”¹³⁰ This seems to me to be the correct resolution, as a matter of policy. In the abstention doctrines, the district courts have adequate tools to deal with the exceptional circumstances in which they ought not to fulfill their generally “unflagging obligation” to exercise their jurisdiction over freestanding claims.¹³¹

In addition, the proposed sections that would replace existing § 1441(c) would no longer confer discretion to remand all matters in which state law predominates;

dicta that even where § 1441(c) applies, the better view is that it does not authorize the remand of federal claims, and holding that nothing in § 1367(c) authorizes a district court to decline to hear a claim over which it has original jurisdiction); *Hunter by Conyer v. Estate of Baecher*, 905 F. Supp. 341, 344-45 (E.D. Va. 1995) (stating that federal question claims may not be remanded pursuant to § 1367(c)); *see also Stephens v. LJ Partners*, 852 F. Supp. 597, 600 (W.D. Tex. 1994).

127. *See infra* text accompanying notes 137-41.

128. *See, e.g., Libertyville Community High Sch. Dist. 128 v. North Chicago Unit Sch. Dist.* 187, No. 93-C2464, 1993 WL 222488, at *3 (N.D. Ill. June 21, 1993) (remanding the entire case (including both federal and state claims) to state court, purportedly via application of § 1367(c), in a case removed pursuant to 28 U.S.C. § 1441(c)—where the court failed to recognize that the claims were not “separate and independent,” as required by that section); *Bodenner v. Graves*, 828 F. Supp. 516 (W.D. Mich. 1993) (relying (apparently by analogy) on cases decided under 28 U.S.C. § 1441(c) to justify dismissal of the federal question claim in an action filed in federal court, where state law claims were held to substantially predominate in the action—constituting 28 of 29 counts); *see also Hartnett, supra* note 34, at 1176-78, 1181 (arguing that, where state law claims predominate and novel issues of state law are involved, federal courts should be viewed as having authority to remand an entire case, removed under § 1441(a), by analogy to § 1441(c)).

129. *See* T.D. NO. 2, *supra* note 8, at 2-3; *see also id.* at 163-65.

130. *Id.* at 2. Proposed § 1367(e) provides in pertinent part that

[i]f after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may . . . [*inter alia*] permit such joinder and remand the entire action to the State court from which the action was removed.

Id. at 3.

131. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976).

they would mandate severance and remand of any claims joined with, but not part of the same Article III case or controversy as, claims within original jurisdiction under § 1331.¹³² Hence, if the proposed revisions were enacted, it would not be possible for a district court to find by analogy to or through confusion with these replacement sections that it has power under proposed § 1367(d) to decline to adjudicate freestanding claims.

Current § 1367's grant of discretion not to exercise supplemental jurisdiction also has given rise to questions about the courts' duty to hear claims that are in essence pendent party claims. While the courts have the usual discretion (described in current § 1367(c)) to decline to hear pendent party claims in actions removed under current § 1441(a) and (b), the calculus is, or may be, different in actions removed pursuant to current § 1441(d) or other special removal provisions. For example, while the Eleventh Circuit and other courts have held that district courts have no discretion to decline to exercise jurisdiction over the entirety of actions properly removed by a third-party defendant foreign state pursuant to § 1441(d),¹³³ one judge on the Eleventh Circuit argued that claims not involving a foreign state are subject to pendent-party (supplemental) jurisdiction, the exercise of which is discretionary.¹³⁴ There is greater controversy concerning the remandability of claims against non-foreign defendants after the foreign defendant has been held to be immune from suit, and as to whether remand is mandatory or discretionary.¹³⁵

The ALI Revision Project would reenact § 1441(d), for the most part making merely technical changes in style and phrasing, and making no changes that address whether or when a district court must, may, or must not adjudicate the claims not involving the foreign state.¹³⁶

132. See P.D. No. 2, *supra* note 2, at 5, 10.

133. See *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1260 (11th Cir. 1992) (stating that there is no such discretion unless the court lost jurisdiction over the foreign defendant, for example via dismissal, but that was not the situation in the case); see also *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1099 (9th Cir. 1990) (noting that § 1441(d) requires that the "federal court initially exercise jurisdiction over claims against co-defendants even if such claims otherwise could not be heard in federal court"). According to the P.D. NO. 2 Reporter's Note D. Removal Of Suits Against Foreign Sovereigns Under Present § 1441(d), "it is generally accepted that district courts have no discretion to remand claims against non-foreign defendants so long as any claims against foreign defendants remain pending." P.D. NO. 2, *supra* note 2, at 122-23.

Reporter's Note D. Removal Of Suits Against Foreign Sovereigns Under Present § 1441(d), *id.* at 117-27, also discusses such controversies concerning § 1441(d) as whether the entire action, including claims against non-foreign defendants, are removed. See *id.* at 121-22.

134. See *Surinam Airways*, 974 F.2d at 1261-62 (Cox, J., dissenting) (stating that nothing in § 1441(d) indicates that Congress "intended to give foreign defendants an *absolute* right to have pendent party claims heard in federal [court]" nor does its legislative history indicate that established principles of supplemental jurisdiction do not apply) (emphasis in original).

135. See P.D. NO. 2, *supra* note 2, at 123 (Reporter's Note D. Removal of Suits Against Foreign Sovereigns Under Present § 1441(d)); see also *id.* at 123 nn.247-48 (cases cited therein).

136. The Project also would make express that, upon removal, only claims against foreign states are to be tried without a jury. See *id.* at 22-23.

IV. INTERPRETATION OF § 1441(c)

Current § 1441(c) grants a distinct sort of supplemental jurisdiction, allowing entire cases to be removed and the district courts to determine all issues therein (or, in their discretion, to remand all matters in which state law predominates), whenever a separate and independent claim within the jurisdiction conferred by § 1331 is joined with one or more otherwise non-removable claims.¹³⁷ Arguably, any question that arises under current § 1441(c) relates to the intersection between removal and supplemental jurisdiction (although not the supplemental jurisdiction authorized by § 1367) and so could be within the scope of this Article. However, many of the issues generated by § 1441(c), including its constitutionality, are long-standing.¹³⁸ Other issues it raises are a function of changes in terminology from the pre-1990 version of the section to its present formulation. For example, the present authorization of remand of "all matters in which State law predominates," which replaced an authorization of remand of "all matters not otherwise within its original jurisdiction,"¹³⁹ has raised the question whether current § 1441(c) allows district courts to remand federal question

137. See 28 U.S.C. § 1441(c) (1994).

138. See, e.g., *Thomas v. Shelton*, 740 F.2d 478, 483 (7th Cir. 1984) (holding that multiple claims, one of which is unrelated to any within original jurisdiction, may not be one constitutional "case"); *Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 1010 (E.D. Mich. 1996) (stating that because any state claims sufficiently separate and independent from a federal claim to qualify for removal under § 1441(c) are beyond federal jurisdiction, § 1441(c) is unconstitutional); *Moore v. DeBiase*, 766 F. Supp. 1311, 1320 n.16 (D.N.J. 1991) ("[A] federal court may not constitutionally adjudicate a state law claim totally unrelated to the federal law claim when the parties are not diverse."); *Samaroo v. Samaroo*, 743 F. Supp. 309, 317 (D.N.J. 1990) (discussing the unconstitutionality of a prior version of § 1441(c) if construed to permit a federal court to hear unrelated state claims not within original or pendent jurisdiction). See generally 14A WRIGHT ET AL., *supra* note 16, § 3724, at 402-03; William Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 MINN. L. REV. 1, 34-40 (1961) (citing additional articles at page 34 in note 158); Hartnett, *supra* note 34, at 1149-58; Marilyn J. Ireland, *Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts*, 11 IND. L. REV. 555, 571 (1978); John Henry Lewin, *The Federal Court's Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 431-37 (1953); Douglas D. McFarland, *The Unconstitutional Stub of Section 1441(c)*, 54 OHIO ST. L. J. 1059 (1993).

139. 28 U.S.C. § 1441(c) (1994), amended by Act of Dec. 1, 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5114.

claims.¹⁴⁰ In and of itself, that issue is independent of anything in current § 1367 and will not be addressed here.

The enactment of § 1367 did, however, raise questions about the relationship between the two statutes, including whether present § 1441(c) has been rendered superfluous by the combination of § 1441(a) and § 1367, whether the two statutes (§§ 1441(c) and 1367) complement one another without conflict, whether one supersedes the other in any aspect, and whether there are lessons to be learned from one in interpreting the other.¹⁴¹

140. Compare *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 787 (3d Cir. 1995) (finding that the discretionary remand provision of § 1441(c) does not authorize remand of claims arising under federal law and further that “the district court’s discretion to remand under § 1441(c) can pertain to only those *state law claims* which the district court could decline to hear under 28 U.S.C. § 1367(c)”) (emphasis in original), *Buchner v. F.D.I.C.*, 981 F.2d 816, 819 (5th Cir. 1993) (finding the discretionary remand provision of § 1441(c) to be inapplicable in suit where, by virtue of the F.D.I.C.’s inclusion as a party, all the claims were deemed to arise under federal law), and *Kabealo v. Davis*, 829 F. Supp. 923, 926 (S.D. Ohio 1993) (holding that the new remand clause does not authorize remand of claims arising under federal law and that “matters” here means “claims”), with *Alexander v. Goldome Credit Corp.*, 772 F. Supp. 1217, 1223-25 (M.D. Ala. 1991) (holding that the new remand clause allows the court to remand the entire case including the separate and independent federal claim), *Morales v. Meat Cutters Local 539*, 778 F. Supp. 368, 370-71 (E.D. Mich. 1991) (holding that when a case is removed under § 1441(c), a court may remand all matters, including federal claims, in which state law predominates), and *Moore*, 766 F. Supp. at 1315, 1320-21 & n.17 (Notwithstanding that the court found that subject-matter jurisdiction existed over the plaintiff’s state law claims on the basis of pendent jurisdiction and that the factual allegations in the federal and state law claims were related and largely the same, the court considered whether the action should be remanded under § 1441(c). It found that the change of language implied a change in the scope of what a district court may remand, and that courts now may remand claims over which they have original jurisdiction so long as state law somehow predominates in those claims. The court here remanded the entire action.). See generally *Hartnett*, *supra* note 34, at 1167-75 (arguing that there is good reason to interpret § 1441(c) to permit district courts to remand entire cases in which state law predominates).

141. See, e.g., *Alexander*, 772 F. Supp. at 1223 (concluding that because § 1367 goes to the constitutional limit, § 1441(c) is no longer needed, but finding removal under § 1441(c) proper where the failure of all defendants to join in the notice of removal had rendered removal pursuant to § 1441(a) and (b) unavailable, and holding the federal claim to be separate and independent from the state law claims, but nonetheless remanding the entire case to state court). See generally LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 154-55 (1994) (addressing the relationship between supplemental jurisdiction and separate and independent claim removal); *Steinman*, *supra* note 5, at 321-25 (explaining how the two provisions can be read to complement and not to contradict each other, with neither being superfluous or unconstitutional).

Some courts have thought that § 1441(c) and § 1367(c) are so analogous that it is appropriate to rely on cases decided under the former in construing the latter. See, e.g., *Bodenner v. Graves*, 828 F. Supp. 516, 518 (W.D. Mich. 1993) (relying on § 1441(c) cases allowing remand of entire cases to dismiss freestanding federal claims under § 1367(c)). I believe that this reasoning is entirely ill-founded. Not only is it questionable whether the language in § 1441(c) allowing remand of all matters in which state law predominates permits the remand of federal question claims, see *supra* text accompanying notes 139-40, but § 1367(c) explicitly provides for the declination of exercises of *supplemental* jurisdiction only. See *supra* text accompanying notes 125-26; see also *Lancaster*, 45 F. 3d at 787 (Having

Although the enactment of § 1367 has altered the debate, the essence of some of the questions enumerated just above was debated when we had only decisional pendent and ancillary jurisdiction. Moreover, as indicated by the citations in the margin, other commentators and some lower federal courts have wrestled with these questions as framed after § 1367.¹⁴² Hence, I will forego delving into this morass here and refer the reader to the discussions elsewhere.

Instead, I will address the novel manner in which P.D. No. 2 proposes to handle the § 1441(c) problem. Proposed § 1441(b)(2) commands that claims that are joined with, but are not part of the same case or controversy under Article III of the Constitution as, claims within original jurisdiction under § 1331 shall be disregarded in determining the removability of an action under § 1441(a).¹⁴³ Then, proposed § 1447(b) provides, in pertinent part, that, “[i]n any civil action removed only by operation of section 1441(b)(2) . . . , the district court shall forthwith sever any claim thus disregarded and remand it.”¹⁴⁴

This approach avoids using the term “separate and independent claim” and thus any interpretive baggage it carries, and neatly dovetails with § 1367 by addressing joinder of claims that are *not* part of the same case or controversy under Article III as claims within original jurisdiction. Proposed § 1447(b) follows present law by protecting the removability of federal-question claims, but not of claims within only diversity jurisdiction, that are joined with claims that are so unrelated as to be beyond the same case or controversy.¹⁴⁵ As currently framed, it differs from present law as practiced in some courts, however, in that it clearly provides no authority to remand freestanding federal question claims¹⁴⁶ and it *commands* severance and remand of the state law claims that are not part of the same case or controversy under Article III as claims within original jurisdiction, rather than apparently conferring discretion to hear or to remand them.¹⁴⁷ One application of this command that will differ from current law is that

emphasized the pertinence of § 1441(c) to state law claims only, the court observed that discretion to remand under § 1441(c) can pertain only to those state law claims that the court could decline to hear under § 1367(c). It later noted that, “§ 1441(c) analysis cannot serve as a surrogate for a § 1367(c) analysis that was not conducted.”) *See generally* Hartnett, *supra* note 34, at 1139-47 (discussing the interactions between § 1441(c) and pendent jurisdiction).

142. *See, e.g.*, Hartnett, *supra* note 34, at 1167-75; McFarland, *supra* note 138, at 1079-85; Moberly et al., *supra* note 104, at 19-26, 33-34; Steinman, *supra* note 5, at 312-25; Michael S. Massengale, Note, *Riotous Uncertainty: A Quarrel With the “Commentators’ Rule” Against Section 1441(c) Removal for Counterclaim, Cross-Claim, and Third-Party Defendants*, 75 TEX. L. REV. 659 (1997); Jason C.N. Smith, Comment, *Update on Changes in Federal Jurisdiction: Supplemental Jurisdiction, Venue, and Removal*, 23 TEX. TECH. L. REV. 571, 586-90 (1992).

143. P.D. NO. 2, *supra* note 2, at 5.

144. *Id.* at 10. Although P.D. NO. 3 does not use the device of disregarding claims that are not part of the same case or controversy as claims within 28 U.S.C. § 1331, its effects would continue to be those described in the text accompanying notes 82-83, 145-48. *See* P.D. NO. 3, *supra* note 2, § 1441(c), at 1.

145. *See id.* at 58-59.

146. *See supra* text accompanying notes 139-40.

147. *Cf.* 28 U.S.C. § 1441(c) (1994) (currently providing that the district court “may determine all issues [in the removed case], or, in its discretion, may remand all matters in which State law predominates”).

the revision will require the remand of § 1445-barred claims that are wholly unrelated to federal question claims with which they might be pled, whereas now a § 1445(a), (b) or (d)-barred claim that is removed pursuant to current § 1441(c) might be heard because state law will not predominate in its resolution.¹⁴⁸

The Reporter for the Revision Project, Professor John Oakley, has defended the constitutionality of removal of such cases, subject to mandatory remand of the claims that are not part of the same Article III case or controversy and that may be beyond the Article III power of the federal courts, characterizing this procedure as an instance of "jurisdiction to determine jurisdiction," no different in principle from that invoked whenever a civil action is removed only to be remanded under present § 1447(c) for lack of subject-matter jurisdiction.¹⁴⁹ However, in the latter instance, the presupposition of the removal is that the civil action as a whole *is* removable because *inter alia* all the pleaded claims form part of a single Article III case or controversy. If the district court holds that predicate to be erroneous or that the statutory requirements for subject-matter jurisdiction are lacking, it rids itself of the entire action by remand. In the context now under discussion, the presupposition of the removal is that the removed civil action as a whole *does not* constitute a single Article III case or controversy, a predicate that the district court confirms. Having concluded that the removed civil action as a whole is not a single Article III case or controversy, arguably the court should remand the action as a whole and lacks authority to do anything else, for exercise of jurisdiction to determine jurisdiction cannot and does not create subject-matter jurisdiction where none exists.¹⁵⁰ By analogy to federal court dismissal of only those claims whose inclusion would spoil federal subject-matter jurisdiction in actions commenced in federal court, however, the court can remand only the spoiler claims brought to federal court by removal. Moreover, even if some removals under these provisions would briefly put before the federal court a group of claims that it would be unconstitutional for the federal court to adjudicate, Congress' power under the Necessary and Proper Clause¹⁵¹ together with Article III likely would suffice to allow Congress to authorize the courts to supplant the plaintiff as master of his lawsuit and to alter the contours of the litigation by remanding only the particular claims that render a particular civil action something more than a constitutional "case."

V. ISSUES ARISING UNDER 28 U.S.C. § 1367(d) (THE
TOLLING PROVISION), IN ITS INTERPLAY WITH THE
REMOVAL STATUTES

I found no difficult issues to have arisen under § 1367(d), governing tolling, in its interplay with the removal statutes, although courts sometimes use the availability of a toll as a ground for dismissing, rather than remanding, removed claims that the court has decided not to hear. In *Naragon v. Dayton Power &*

148. See P.D. NO. 2, *supra* note 2, at 63-64.

149. *Id.* at 62.

150. See *Leblanc v. Cleveland*, 979 F. Supp. 142, 146 (N.D.N.Y. 1997).

151. U.S. CONST. art. I, § 8.

Light Co.,¹⁵² for example, the court concluded that, in light of § 1367(d)'s preservation of the tolling period available under state law upon a voluntary dismissal from federal court, discretionary remand pursuant to *Carnegie-Mellon University v. Cohill*¹⁵³ was not necessary to avoid unfairness to the remand-seeking plaintiff.

The proposed revision of § 1367(d)—found in proposed § 1367(f)—commands remand of removed claims over which a district court lacks supplemental jurisdiction or as to which a district court declines to exercise supplemental jurisdiction.¹⁵⁴ It does not provide a toll of the limitations period for removed claims, no toll being necessary since either the claims were timely filed in the state court to which they will be remanded or the claims were filed in state court after the limitations period had run, in which case a toll would not help. Proposed § 1367(f) does provide a toll for specified claims that are finally dismissed from federal court. The claims given the benefit of this toll include claims whose voluntary dismissal is sought within thirty days after: (1) a § 1367(f) remand of a supplemental claim or (2) a decision to refuse to permit the post-removal joinder of a supplemental claim against a nondiverse defendant.¹⁵⁵ The section provides tolling to a larger universe of claims than are protected by current § 1367(d)¹⁵⁶ but, in this respect, its operation is no different in removed cases than in cases commenced in federal court.

VI. HOW THE ALI FEDERAL JUDICIAL CODE REVISION
PROJECT, DRAFTS T.D. NO. 2 AND P.D. NO. 2, OTHERWISE
WOULD ALTER THE INTERACTIONS BETWEEN THE
REMOVAL/REMAND SCHEME AND SUPPLEMENTAL
JURISDICTION

A. Post-Removal Joinder of Nondiverse Defendants

The current proposals for revision of the supplemental jurisdiction and the removal statutes offered by the ALI Revision Project would alter the interactions between the removal/remand scheme and supplemental jurisdiction in additional respects. I will try to survey the most important aspects of those changes here.¹⁵⁷

152. 934 F. Supp. 899, 901-02 (S.D. Ohio 1996).

153. 484 U.S. 343 (1988) (holding that district courts may remand removed claims that they decline to hear, in their discretion under § 1367(c)).

154. See T.D. No. 2, *supra* note 8, at 3. This revision would change the result in *Naragon*. See *supra* text accompanying note 152.

155. See T.D. No. 2, *supra* note 8, at 4.

156. See *id.* at 8-9, 99-100. Proposed § 1367(f) is, however, more limited than current § 1367(d) in that it affords tolling only when voluntary dismissal is sought within 30 days after occurrence of the predicate events listed in § 1367(f)(2)(A) or (B). See *id.* at 3-4.

157. The current proposals for revision would change the removal/remand scheme in a number of additional respects which have only indirect consequences, if any, for supplemental jurisdiction. For example, the proposed provision to give courts discretion (rather than direction) to remand diversity cases removed more than one year after their commencement in state court will affect the courts' hearing of supplemental claims in those cases, but the effect

First, proposed §§ 1367(e) and 1447(g) would give to courts facing a post-removal motion to join a claim against a nondiverse defendant a little guidance as to what to consider in deciding whether to allow the proposed amendment. These sections invoke “due regard for considerations of judicial economy, convenience, and fairness to litigants.”¹⁵⁸ The current statute affords not even this very general guidance.¹⁵⁹ In order to better enable district courts to deal equitably and efficiently with such a post-removal motion, the proposed sections cited above also would increase the options that district courts have by adding (to the current options to deny joinder or permit joinder and remand the action to state court) the option to permit the joinder and exercise supplemental jurisdiction over the claim against the additional defendant.¹⁶⁰ I agree with this proposal. Under it, if the court believes that a plaintiff tried to manipulate federal jurisdiction and circumvent the complete diversity requirement by suing in state court, anticipating removal, and then moving to add a nondiverse defendant, the court can refuse to permit the amendment or can permit it and remand the case. But if

on supplemental jurisdiction is incidental. *See* P.D. NO. 2, *supra* note 2, at 10. Similarly, the proposed provision recognizing that district courts may remand removed claims as to which abstention is required or which the court should decline to adjudicate because of failure to join an indispensable party, *see id.* at 10, may affect the courts’ hearing of supplemental claims, but the effect is again incidental. I do not address such incidental effects in this Article. The proposed provision (also in proposed § 1447(e)(2)) for district courts to remand removed claims which the courts decline to adjudicate under § 1367 codifies the Supreme Court’s decision in *Cohill*, 484 U.S. at 357.

158. P.D. NO. 2, *supra* note 2, at 11; T.D. NO. 2, *supra* note 8, at 3 (“[T]he district court shall consider judicial economy, convenience, and fairness to litigants.”). Courts generally have recognized that they have discretion to allow or disallow such proposed amendments and have taken such considerations into account. *See* ARE Sikeston Ltd. Partnership v. Weslock Nat’l Inc., 120 F.3d 820, 832-34 (8th Cir. 1997) (finding that where a proposed amendment to assert claims by the plaintiff against a nondiverse third-party defendant was proffered late in the proceedings, without good reason for the delay, and the third-party defendant was not an indispensable party, the district court did not abuse its discretion in denying leave to amend); *El Chico Restaurants, Inc. v. Aetna Cas. & Sur. Co.*, 980 F. Supp. 1474, 1484-85 (S.D. Ga. 1997) (considering the extent to which the purpose of the amendment is to defeat federal jurisdiction, the validity of plaintiff’s reasons to name additional defendants, whether plaintiff was dilatory in seeking to amend, whether plaintiff would be significantly injured if amendment were not allowed, whether existing defendants would be prejudiced by amendment, the prospect of multiple litigation, and other factors bearing on the equities); *Lederman v. Marriott Corp.*, 834 F. Supp. 112, 114-16 (S.D.N.Y. 1993) (stating that whether to allow the addition of parties who would destroy diversity jurisdiction is in the discretion of the trial court which should be guided by the objective of just, speedy and inexpensive determination of every action, and on those grounds, disallowing the addition of nondiverse defendants who were not necessary parties). *See generally* Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 U. KAN. L. REV. 863, 927-40 (1990) (arguing that courts deciding whether to allow a plaintiff to add nondiverse defendants after removal should consider the plaintiff’s deservedness, the prejudice to existing defendants and to the proposed new party, and systemic interests).

159. *See* 28 U.S.C. § 1447(e) (1994 & Supp. II 1996), which allows courts to permit or deny joinder of nondiverse defendants but provides no advice as to the standards that should govern the decision.

160. *See* T.D. NO. 2, *supra* note 8, at 95-97.

the court concludes that no such machinations were involved and that it would serve the interests of justice and efficiency to allow the amendment and adjudicate the claim against the nondiverse defendant as a matter of supplemental jurisdiction, this provision would allow the court to do so.¹⁶¹

*B. Remands of Claims, Rather than Cases, Outside
Original Jurisdiction*

Another change is proposed § 1447(e)(3)'s provision that, "[a]t any time before final judgment the district court shall remand to the State court . . . any claim in a civil action or proceeding . . . that it determines is not within its original jurisdiction."¹⁶² It seems ambiguous whether the court is to remand any *claim* that is not within its original jurisdiction or any, that is, every claim in a civil *action* that is not within its original jurisdiction. In light of the claim-specific conception of the original jurisdiction of the district courts which underlies the proposed revisions, the former appears to be intended.¹⁶³ If so, then as observed above,¹⁶⁴ this revision may alter the scope of what is remanded, with effects on whether supplemental claims, among others, are heard in federal court. As the Commentary indicates, the change in terminology also may alter current law in the context of actions removed as within diversity jurisdiction despite the presence of nondiverse defendants.¹⁶⁵

While the proposed revision would curtail the scope of some remands, if misunderstood it also could lead to increased remands. Specifically, it will be imperative to assure that courts understand that claims within supplemental jurisdiction are within the federal courts' "original" jurisdiction, and hence not subject to remand pursuant to proposed § 1447(e)(3). The proposed language, correctly understood, allows remand of only those claims that are neither freestanding nor within § 1367 supplemental jurisdiction.¹⁶⁶

It also remains to be seen whether courts would rely on the proposed language to remand claims in a diversity action when, after removal, the amount in

161. Although in earlier work I argued against liberal allowance of post-removal joinder of nondiverse defendants, *see* Steinman, *supra* note 158, at 908-40, the authorization of supplemental jurisdiction over claims asserted against nondiverse defendants joined after removal would largely eliminate the grounds of my objections.

162. P.D. NO. 2, *supra* note 2, at 11. The analogous provision in current law, § 1447(c), states that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, *the case shall be remanded.*" 28 U.S.C. § 1447(c) (emphasis added).

163. P.D. NO. 3, § 1447(c)(3), eliminates the ambiguity in favor of the interpretation suggested above. It provides: "If at any time before final judgment the district court determines that it lacks subject-matter jurisdiction of any claim in a civil action or of any count in a criminal prosecution, it shall remand the claim or count to the State court from which it was removed." P.D. NO. 3, *supra* note 2, at 7.

164. *See supra* text accompanying notes 73-75.

165. *See* P.D. NO. 2, *supra* note 2, at 82-84.

166. P.D. NO. 3, *supra* note 2, § 1447(c)(3), at 7 now speaks of "subject-matter jurisdiction," rather than "original jurisdiction." The language in P.D. NO. 3 should be less susceptible to misinterpretation.

controversy falls below the jurisdictional amount. Under *St. Paul Mercury*,¹⁶⁷ I believe that such remands would be error, but I can imagine courts invoking the proposed statutory language, if it became law, in support of such remands.¹⁶⁸ If the drafters' (and ultimately the ALI's) intention is to maintain the doctrine of *St. Paul Mercury*, the wisest course might be to make explicit that properly removed claims remain within original federal subject-matter jurisdiction even if, after removal, they fall below the amount in controversy requirement.¹⁶⁹

C. Appellate Review of Remand Decisions

Under current law, broadly speaking, if a district court *denies* a motion to remand which is predicated on alleged defects in subject-matter jurisdiction or in removal procedure, review of that decision must await final judgment, absent certification pursuant to § 1292(b), mandamus, or application of another exception to the final judgment rule, each of which would be unusual. That is, orders refusing remands typically are interlocutory, carrying no right to immediate appeal, but are reviewable after final judgment.¹⁷⁰ Review after final judgment entails the risk that the parties and the court will have invested in the case for naught, but our system has accepted this waste (in both removed cases and cases commenced in federal court) because of the overriding importance of the constitutional and statutory limits on the subject-matter jurisdiction of our federal courts.

If a removed case is dismissed in whole or in part, the same doctrines govern the appealability of the dismissal as would apply had the case been commenced in federal court.¹⁷¹ However, if a district court remands a case under the present § 1447(d) for lack of subject-matter jurisdiction or because of defects in the

167. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938); see *supra* text accompanying notes 95-97.

168. Indeed, some district courts have construed the present language of § 1447(c), see *supra* text accompanying note 27, to authorize remand of claims which fall below the amount in controversy requirement after removal, see *supra* note 99. Under current law and proposed § 1447(f), remands for lack of jurisdiction ordinarily are not and would not be reviewable, even after final judgment. See *infra* text accompanying notes 172-73, 179-82.

169. Other proposed changes to the removal/remand scheme, such as the elimination of the absolute bar to removal of diversity cases more than one year after commencement of the action and changes concerning grounds for remand, also are important. Compare present § 1446(b), with proposed § 1447(c), P.D. NO. 2, *supra* note 2, at 10, and compare present § 1447(c), with proposed § 1447(b) and (e), P.D. NO. 2, *supra* note 2, at 10. Changes concerning grounds for remand are discussed *infra* text accompanying notes 179, 185-87.

170. See *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers*, 132 F.3d 824, 829 (1st Cir. 1997); see also *Kabealo v. Davis*, No. 94-4103, 1995 WL 712793, at *3 (6th Cir. Dec. 1, 1995) ("A denial of a motion to remand when no attempt has been made to obtain interlocutory review of the denial is limited on appellate review to a determination of whether the district court would have had jurisdiction had the case initially been filed in that court.") (per curiam) (citing *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1275 (9th Cir. 1990)).

171. See Steinman, *supra* note 11, at 994-95.

removal procedure,¹⁷² review is permanently barred by § 1447(d), despite the existence of a final decision.¹⁷³ At the same time, review is available, by appeal or mandamus, if a remand is predicated on a different ground—including a ground that is not authorized anywhere¹⁷⁴ and a ground that is legitimate but has its roots outside the removal statutes (as is the situation when claims within the district courts' supplemental jurisdiction are remanded, under *Carnegie-Mellon University v. Cohill*,¹⁷⁵ in the discretion of the district court).¹⁷⁶ Review also may be available under *Waco v. United States Fidelity & Guaranty Co.*¹⁷⁷ *Waco* held

172. Remand is mandatory in those circumstances; the courts do not have the option to dismiss. See *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257-58 (9th Cir. 1997) (citing cases in support).

173. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-15 (1996) (holding that absent a statutory bar to appellate review, remand orders—in this case predicated upon *Burford* abstention—may be appealed as collateral orders under § 1291, because the remand conclusively and effectively puts the litigants out of federal court, is separate from the merits, and would not be subsumed in any other appealable order); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1361-63 (10th Cir. 1997) (finding that remand on the ground that the district court lacked jurisdiction over the action because the Eleventh Amendment barred some claims was made in good faith, and remand was thus unreviewable); *Ariail Drug Co., Inc. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 933-34 (11th Cir. 1997) (holding that it could not revisit the district court's conclusion that RICO claims were not within its jurisdiction on removal, whatever the viability of the district court's theories, and that there was no appellate jurisdiction over an order remanding a suit for either lack of subject-matter jurisdiction or procedural defects in removal); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 623-25 (8th Cir. 1997) (having interpreted the district court's holding to be that it lacked subject-matter jurisdiction, the appellate court lacked jurisdiction to review its remand), *cert. denied*, 118 S. Ct. 852 (1998); *Zuniga v. Blue Cross & Blue Shield*, 52 F.3d 1395, 1344-1401 (6th Cir. 1995) (finding that a statutory bar precluded review of remand based on the conclusion that, because certain claims were not preempted, the court lacked subject-matter jurisdiction over them).

174. See, e.g., *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345 (1976) (holding that mandamus was appropriate where the district court had remanded because of its crowded docket).

175. 484 U.S. 343 (1988).

176. See, e.g., *First Union Nat'l Bank v. Hall*, 123 F.3d 1374, 1378 (11th Cir. 1997) (stating that because the district court's remand order was predicated on a decision not to exercise supplemental jurisdiction, the order was not unreviewable under § 1447(d), and the district court was free to reconsider its decision and resolve the claims on the merits), *cert. dismissed*, 118 S. Ct. 1836 (1998); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223-24 (3d Cir. 1995) (holding that remand pursuant to § 1367(c) is not a remand under § 1447(c) and is reviewable); *Executive Software N. Am. v. United States Dist. Court*, 24 F.3d 1545, 1549 (9th Cir. 1994) (finding that review via mandamus of an order remanding pendent state claims on discretionary grounds was not barred by § 1447(d)); *Thompson v. Farmer*, 945 F. Supp. 109, 116-17 (W.D.N.C. 1996) (denying a motion to certify as frivolous a defendant's interlocutory appeal from the court's decision not to exercise supplemental jurisdiction, because, under *Quackenbush*, the latter decision was a final decision within § 1291 and properly subject to interlocutory appeal).

177. 293 U.S. 140, 143-44 (1934). See also *First National Bank v. Genina Marine Services*, 136 F.3d 391, 394 (5th Cir. 1998) (reviewing the dismissal of a third-party claim, which was contained in the same order that remanded the remaining claims to state court, on the principle that the court could review any aspect of a judgment containing a remand order that is distinct

that separable decisions on the merits that logically precede and underlie a remand may be reviewed, and some courts have extrapolated from *Waco* to allow review of the remand order as well as the underlying decision, although the *Waco* Court itself did not view the remand order as reviewable.¹⁷⁸

Proposed § 1447 authorizes remand of (1) claims that have been severed by virtue of having been joined with, but that are not part of the same Article III case or controversy as, claims over which the federal courts have jurisdiction pursuant to 28 U.S.C. § 1331, (2) actions removed in violation of restrictions on the right to remove or in violation of procedures for exercising the right to remove, (3) diversity actions removed more than one year after they were commenced in state court, (4) claims as to which abstention is required or that a court declines to adjudicate under Federal Rule 19(b), for failure to join an indispensable party, or under the supplemental-jurisdiction statute, 28 U.S.C. § 1367, and (5) any claim in a civil action that is not within the court's jurisdiction.¹⁷⁹

Under proposed § 1447(f), the § 1447 remand of a case or any claim is not reviewable by appeal except as provided by 28 U.S.C. § 1292(b) or by a rule that might be prescribed under 28 U.S.C. § 1292(e).¹⁸⁰ Any such remand is deemed interlocutory for purposes of § 1292(b) and (e).¹⁸¹ In addition, the proposed statute contemplates the possibility of review by extraordinary writ, when appropriate.¹⁸²

This provision on review of remand decisions would be important well outside the context of supplemental claims, but it also would have ramifications for such claims. As explored in the Commentary to P.D. No. 2, this section follows current law in disallowing appellate review of § 1447 remands but not of remands that are

and separate from the remand itself), a recent case following *Waco*, and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984), an early case relying on *Waco*.

178. See, e.g., *Trans Penn Wax Corp.*, 50 F.3d at 223 (citing *Carr v. American Red Cross*, 17 F.3d 671, 680 (3d Cir. 1994)). See generally Michael E. Solimine, *Removal, Remands and Reforming Federal Appellate Review*, 58 MO. L. REV. 287, 316-19 (1993) (noting the creation by the Court of Appeals for the Third Circuit of a "constitutional issue" exception to the bar of § 1447(d)); Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 119-25 (1994) (discussing the *Waco* exception to § 1447(d) and the split of authority as to whether the remand order itself is reviewable).

179. See P.D. No. 2, *supra* note 2, at 10-11.

180. 28 U.S.C. § 1292(e) (1994) provides: "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)." *Id.* The proposed statute also departs from current law in that it would not permit unrestricted review of remands of civil rights cases removed under § 1443, as current § 1447(d) does. See P.D. No. 2, *supra* note 2, at 10-11. I will not comment here upon this policy decision.

181. See P.D. No. 2, *supra* note 2, at 11.

182. See *id.* at 86. P.D. No. 3 continues to contemplate the possibility of review by extraordinary writ but it eliminates any reference to 28 U.S.C. § 1292(b) and makes remand orders unreviewable by appeal except as provided by a rule that might be prescribed pursuant to 28 U.S.C. § 1292(e), concerning interlocutory appeals, or 28 U.S.C. § 2072(c) (1994), allowing rules to define when a district court ruling is "final" for purposes of 28 U.S.C. § 1291 (1994). See P.D. No. 3, *supra* note 2, § 1447(d), at 7.

based on other grounds.¹⁸³ However, because proposed § 1447 would authorize some categories of remands that now are based on non-statutory grounds and hence are now reviewable, the effect of the revision would be to foreclose some appeals, absent either § 1292(b) certification, a rule-based authorization of appeal promulgated under § 1292(e), or a grant of mandamus.¹⁸⁴ For example, appeals courts now afford immediate review to § 1367 discretionary decisions to decline to exercise jurisdiction over supplemental claims and therefore to remand supplemental claims and to § 1441(c) discretionary decisions to decline to exercise jurisdiction over certain claims and therefore to remand them,¹⁸⁵ but because such § 1367 remands would be expressly authorized by proposed § 1447(e)(2), they would hereafter be subject to § 1447(f)'s qualified prohibition on appellate review.¹⁸⁶ The same is true of decisions remanding claims (including claims within supplemental jurisdiction) on abstention grounds: At least on some occasions, they are now immediately appealable as collateral orders,¹⁸⁷ but because such remands would be expressly authorized by proposed § 1447(e)(2), they would hereafter be subject to § 1447(f)'s qualified prohibition on appellate review.

183. P.D. No. 2, *supra* note 2, at 85-86.

184. As indicated, *supra* note 182, P.D. No. 3 eliminates the possibility of § 1292(b) appeal of § 1447 remand orders while adding rule making power pursuant to § 2072(e) as a potential source of authority to review § 1447 remand orders. See P.D. No. 3, *supra* note 2, at 7.

185. See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *First Union Nat'l Bank v. Hall*, 123 F.3d 1374, 1378 (11th Cir. 1997) (allowing the direct appeal of an order remanding pursuant to 28 U.S.C. § 1367(c)), *cert. dismissed*, 118 S. Ct. 1836 (1998); *Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 103 (5th Cir. 1996) (holding that § 1447(d) does not bar review of discretionary remands pursuant to § 1441(c), and such remands are reviewable as collateral orders); *Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n*, 90 F.3d 797, 801 (3d Cir. 1996) (holding same as *Hall*), *cert. denied*, 117 S. Ct. 947 (1997); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 542 (8th Cir. 1996) (holding same as *Hall*); see also cases cited *supra* note 176; cf. *Hopkins v. Dolphin Titan Int'l, Inc.*, 976 F.2d 924, 926 (5th Cir. 1992) (holding that § 1447(d) does bar review of remands predicated on the non-applicability of § 1441(c) for lack of "separate and independent" claims, for such remands are based on a defect in the removal procedure within the meaning of § 1447(c)).

186. I believe that, under P.D. No. 2, remands of any *supplemental* claims removed pursuant to proposed § 1441(b) would occur under proposed § 1447(e)(2), whereas insofar as remands under proposed § 1447(b) are mandatory and are ordered to avoid an unconstitutionally unrelated set of claims being retained by a federal court, see 136 CONG. REC. 36,292 (1990) (statement of Sen. Grassley: "[A] district court must remand state claims that are so unrelated to the federal claim that they do not form part of the same Article III case or controversy. . . ."), the remands would be jurisdictional and hence unreviewable under both current law and that proposed by the ALI Project, see P.D. No. 2, *supra* note 2, § 1447(e)(3), at 11. P.D. No. 3 would operate in the same fashion if the mandatory remands prescribed in proposed § 1441(c) were regarded as remands for lack of subject-matter jurisdiction within proposed § 1447(c)(3). See P.D. No. 3, *supra* note 2, at 1, 7. If not so regarded, then § 1441(c) remands would not be subject to the bar on appeals of § 1447 remands that is proposed in § 1447(d) of P.D. No. 3. See *id.* at 7.

187. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 715 (1996) (holding the district court's order to remand a case to state court to effectuate a *Burford* abstention to be an immediately appealable final decision, under the collateral order doctrine).

The Reporter recognizes that proposed § 1447(f) may narrow the existing right to appeal a remand order on abstention grounds.¹⁸⁸ Arguably it would narrow the right to appeal remands based on other grounds that also place orders within the collateral order doctrine.¹⁸⁹ However, P.D. No. 2 takes the position that the best way to provide for appellate review of the aforementioned as well as other § 1447 remands, while avoiding the litigation delay and burden that review-of-right of many remand orders would impose on the appellate courts, is to create a regime of discretionary appellate review.¹⁹⁰ P.D. No. 2's proposed § 1447(f) seeks to encourage the courts to use § 1292(b) certifications and invites the promulgation of rules pursuant to § 1292(e) as the mechanisms for affording appellate review of remand orders (concerning either particular claims or whole civil actions) when that will serve the interests of justice.¹⁹¹ By contrast, P.D. No. 3 leaves exclusively to rulemakers the decisions as to whether any or all § 1447 remand orders should be appealable.¹⁹²

I personally have doubts about these recommendations. Historically, courts have not freely granted mandamus nor generously exercised their discretion under § 1292(b), and I doubt that the requirements for § 1292(b) certification typically would be met by remand orders.¹⁹³ Certainly, it takes a lot of time for new rules to be promulgated. Thus, I believe that either of the proposed systems would substantially curtail the appeal of remand orders that only very recent Supreme Court case law has made immediately appealable as of right, as collateral orders. I fear that appellate supervision of remand orders would suffer under this regime, and would do so when such supervision would be particularly desirable, in light

188. See P.D. NO. 2, *supra* note 2, at 89.

189. Remand of an entire civil action may be a collateral order, immediately appealable of right under the reasoning of *Quackenbush*. See, e.g., *Pennsylvania Nurses Ass'n*, 90 F.3d at 801 (finding that *Quackenbush* supported the view that when the district court's remand order divested the court of all control over the action, the appellate court had jurisdiction under § 1291).

190. See P.D. NO. 2, *supra* note 2, at 87.

191. See *id.* at 88-89.

192. See P.D. NO. 3, *supra* note 2, § 1447(d), at 7.

193. See 28 U.S.C. § 1292(b) (1994) which provides in part that

[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing.

Id.; see also Wasserman, *supra* note 178, at 146 (proposing an amendment of § 1292 to permit the discretionary review of remand orders but which: (1) would not confine review to questions of law; (2) would not require the trial judge to certify that an appeal would "materially advance the ultimate termination of the litigation," because review of a remand order rarely would do so; and (3) would not confine review to "controlling" questions because of the courts' tendency to suppose that a question is controlling only if a particular decision would materially advance the termination of the litigation). Wasserman's proposal contemplates having district judges "flag" the remand orders they believe to be particularly worthy of appellate review but allows courts of appeals to grant appeals in their discretion, regardless of the district court's recommendation. *Id.* at 145.

of the many proposed changes to the removal/remand scheme.¹⁹⁴ This proposal does help to cure the anomaly of routinely allowing review of discretionary remands while denying review of possibly erroneous remands for lack of jurisdiction,¹⁹⁵ by allowing review of both those kinds of decisions (as well as others), in the discretion of the district and appellate courts (under P.D. No. 2, but not P.D. No. 3) and pursuant to yet-to-be-formulated rules, or by extraordinary writ. But I believe that at a minimum the ALI Project should propose a relaxed version of § 1292(b) to facilitate discretionary review of remand orders.¹⁹⁶

VII. CONCLUSION

The enactment of 28 U.S.C. § 1367 created new statutory convergences between that prescription of the law governing supplemental jurisdiction and the statutes governing removal and remand, and posed a variety of questions concerning § 1367's effects on removability and remand. This Article has traced the issues that have arisen and the manner in which the courts have resolved them. It also has examined how the current, preliminary, draft proposals of the ALI Revision Project address those issues, and how they otherwise would alter the interactions between the removal/remand scheme and supplemental jurisdiction, were they to become law.

As construed by most courts, § 1367 altered the scope of what is removable only insofar as it altered the scope of supplemental jurisdiction. The Supreme Court's decision in *International College of Surgeons* poses a threat to the historic understanding of a removable civil action, however, and could well also affect the application of the statutes governing remand. The ALI Revision Project would do a great service by restoring the pre-*Surgeons* concept of a § 1441 removable civil action, while making some changes in the scope of that which would be remanded if a collection of claims were removed that exceeds a civil action within the original jurisdiction of the federal courts.

Although the lower federal courts have been reasonably consistent in their applications of § 1367 in the context of removed actions, some areas of disagreement have emerged. Some of these concern the (1) removability of actions containing claims that are beyond original federal jurisdiction, (2) the scope of what must be remanded (or dismissed) when such actions have been removed, and (3) (as mentioned in the preceding paragraph) even the very definition of a civil action of which the district courts have original jurisdiction, a core concept under § 1441. The ALI Revision Project proposes clear (and I believe sound) answers to the first and third of these questions. While in its present preliminary form it is equivocal as to the scope of what must be remanded—entire actions or only “offending” claims—when actions have been

194. This is a result that Professor Oakley has said that he does not desire. See P.D. NO. 2, *supra* note 2, at 85 (stating that it would be particularly unwise to absolutely prohibit the review of remand orders, in light of the changes proposed).

195. See Steinman, *supra* note 11, at 1007 (arguing that this combination of results, among others, is anomalous).

196. See, e.g., Wasserman, *supra* note 178, at 141-50 (offering another proposal).

removed which contain claims that are beyond original federal jurisdiction, this equivocation should be resolved in later drafts.

The Revision Project as it now stands also would answer, for the most part negatively, the controverted question whether actions that contain claims made non-removable by § 1445 may nonetheless be entertained by the federal courts when § 1367 would permit the exercise of supplemental jurisdiction over the § 1445-barred claims.

In the context of diversity cases, § 1367(a) has spawned some aberrant decisions concerning the effects of post-removal reduction of the amount in controversy but, for the most part, it is § 1367(b)'s limitations that raise questions in the removal context. While courts generally have not utilized the special opportunities that the language of the current statute affords to exercise supplemental jurisdiction in removed cases over claims that would be beyond supplemental jurisdiction had they been asserted under the Federal Rules in cases commenced in federal courts, the ALI Revision Project would eliminate the probably unintended differences that inhere in the current statutory scheme.

In applying present § 1367(c), some district courts have analogized to, or confused the authority they have under § 1367(c) with, the authority they believed themselves to have under § 1441(c) with the result that they have dismissed freestanding claims and, in removed cases, have remanded properly removed freestanding claims, purportedly pursuant to § 1367(c). The current ALI Revision Project proposal (with which I agree on this point) takes the position that this is undesirable and makes explicit that nothing in proposed § 1367 ordinarily authorizes district courts to decline to exercise jurisdiction over freestanding claims. In addition, the sections proposed to replace existing § 1441(c) would mandate severance and remand of any claims joined with, but not part of the same Article III case or controversy as, claims within original jurisdiction under § 1331. They are written to prevent district courts from finding power under proposed § 1367(d) to decline to adjudicate freestanding claims. This is as I believe the law should be.

In other areas, existing § 1367 had no effect on removal and remand law, but the ALI Revision Project may eventuate in proposals of some importance. Among these are its recommended authorization of pendent party jurisdiction over nondiverse defendants joined after removal, in the exercise of the courts' sound discretion, and tentative suggestions to alter the law governing appellate review of remand decisions so as to liberalize such review in some circumstances and to narrow it in others.

How the ALI ultimately will resolve the many issues raised by this Revision Project remains to be seen, as does Congress's reaction to what the ALI ultimately will recommend. But this reconsideration presents an ideal opportunity for those interested in these issues to give new thought to them and to express their views.

APPENDIX A

CURRENT STATUTES

28 U.S.C. § 1367 (1994)

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Procedure; or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1441 (1994)

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the

district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 U.S.C. §§ 1441-1452], the citizenship of defendants sued under fictitious names shall be disregarded.

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

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1445 (1994 & Supp. II 1996)

§ 1445. Non-removable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. §§ 51-54, 55-60) may not be removed to any district court of the United States.

(b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds \$10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

28 U.S.C. § 1446 (1994 & Supp. II 1996)

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States

for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930 [19 U.S.C. § 1337(c)], the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act [19 U.S.C. § 1337].

28 U.S.C. § 1447 (1994 & Supp. II 1996)

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction 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.

(d) 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.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

APPENDIX B

STATUTES AS PROPOSED IN THE ALI FEDERAL JUDICIAL
CODE REVISION PROJECT

TENTATIVE DRAFT NO. 2 (APRIL 14, 1998)

§ 1367. **Supplemental jurisdiction**(a) *Definitions.* As used in this section:

(1) A “freestanding” claim means a claim for relief that is within the original jurisdiction of the district courts independently of this section.

(2) A “supplemental” claim means a claim for relief, not itself freestanding, that is part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action.

(3) “Asserted in the same pleading” means that the relevant claims have been joined either in the pleading as originally filed with the court, or by amendment of the pleading, or by the pleader’s assertion of a claim against a third party impleaded in response to the pleading, or by order of the court reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had joined a claim by or against that intervenor.

(4) The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) *General grant of supplemental jurisdiction.* Except as provided by subsection (c) or as otherwise expressly provided by statute, a district court shall have original jurisdiction of all supplemental claims, including claims that involve the joinder or intervention of additional claiming or defending parties.

(c) *Restriction of supplemental jurisdiction in diversity litigation.* When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim only if it—

(1) is asserted representatively by or against a class of additional unnamed parties; or

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or

(3) has been joined to the action by the intervention of a party whose joinder is not indispensable to the litigation of the action.

(d) *Discretion to decline to exercise jurisdiction.* This section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided by subsection (e). A district court may decline to exercise jurisdiction of a supplemental claim if—

(1) all freestanding claims that are the basis for its jurisdiction of a supplemental claim have been dismissed before trial of that claim; or

(2) the supplemental claim raises a novel or complex issue of State law that the district court need not otherwise decide; or

(3) the exercise of supplemental jurisdiction would substantially alter the character of the litigation; or

(4) in exceptional circumstances, there are other compelling reasons for declining supplemental jurisdiction.

(e) *Joinder of additional defendant after removal.* If after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may either deny such joinder, or permit such joinder and remand the entire action to the State court from which the action was removed, or permit such joinder without remanding the action. In exercising its discretion the district court shall consider judicial economy, convenience, and fairness to litigants, as well as the reasons permitting supplemental jurisdiction to be declined under subsection (d). If the district court decides to permit such joinder without remanding the action, it may exercise supplemental jurisdiction of the claim so joined as provided by subsections (b) and (d) without regard to the jurisdictional restriction of subsection (c).

(f) *Disposition of supplemental claims; tolling of limitations period.* When a district court lacks or declines to exercise supplemental jurisdiction, the court shall dismiss the supplemental claim unless it was joined before removal of the action, in which case the district court shall remand the claim to the State court from which it was removed. The period of limitations for the following claims shall be tolled until 30 days after their dismissal becomes final, unless the applicable law provides for a longer tolling period:

(1) any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction; and

(2) any other claim in the same civil action that is voluntarily dismissed as the result of a notice or stipulation of dismissal, or motion for order of dismissal, filed within 30 days after—

(A) the dismissal or remand of a supplemental claim because the district court lacks or declines to exercise supplemental jurisdiction; or

(B) the court's decision under subsection (e) to refuse to permit the joinder of a supplemental claim against an additional defendant.

PRELIMINARY DRAFT NO. 2 (SEPTEMBER 3, 1997)

§ 1441. Right of removal of civil actions—in general

(a) Except as provided in section 1445 of this title or as otherwise expressly provided by statute, any civil action brought in a State court in which every claim pleaded in the complaint against a properly joined defendant is within the original jurisdiction of the district courts, including the supplemental jurisdiction conferred by section 1367 of this title, may be removed by the defendant or defendants to the district court of the United States for the district in which it is pending. Where removal is based on this subsection, all defendants properly joined and served with process must join in the removal.

(b) In determining whether an action may be removed under subsection (a), the following claims shall be disregarded:

(1) Claims against defendants sued under fictitious names.

(2) Claims joined to, but not part of the same case or controversy under Article III of the Constitution as, claims within the district court's original jurisdiction under section 1331 of this title.

(c) A civil action may not be removed under subsection (a) on the basis of the original jurisdiction of the district courts of the United States over a claim that is within such jurisdiction solely on the basis of the citizenship of the parties, unless:

(1) the claim was also within such original jurisdiction at the time the action was commenced; and

(2) no defendant required to join in the removal is a citizen of the State where the action is brought.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district in which it is pending. Where removal is based upon this subsection:

(1) The time limitations of section 1446 of this title may be enlarged at any time for cause shown.

(2) Any claim against a foreign state shall be tried by the court without a jury.

(e) The court to which a civil action is removed is not precluded from hearing and determining any claim in such action because the State court from which it was removed did not have jurisdiction over that claim.

§ 1445. Restriction of right of removal in civil actions

Except as permitted by section 1441(b)(2) of this title, a civil action may not be removed under section 1441(a) of this title if the complaint pleads a claim:

(a) Against a railroad or its receivers or trustees arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60).

(b) Against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments under section 11706 or 14706 of Title 49, unless the value of the claim exceeds \$10,000, exclusive of interest and costs.

(c) Arising under the workers' compensation laws of the State in which the action was commenced.

(d) Arising under section 40302 of the Violence Against Women Act of 1994.

§ 1446. Procedure for removal of civil actions or proceedings

(a) A civil action or proceeding shall be removed from a State court by the filing of a notice of removal by the defendant or defendants in the district court of the United States for the district in which the action or proceeding is pending.

(1) The notice of removal shall contain a short and plain statement of the grounds for removal and a copy of all process, pleadings, and orders served upon the defendant or defendants.

(2) The notice of removal shall be signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. The attorney of record for one defendant may sign on behalf of other defendants who must join in the removal provided that such attorney has received the prior written authorization of each defendant, in

person or through counsel, on whose behalf the attorney signs the notice of removal.

(b) The notice of removal of a civil action or proceeding that is removable when commenced shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(c) The notice of removal of a civil action or proceeding that is not removable when commenced, or cannot then be ascertained to be removable, shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the action or proceeding is or by voluntary act of the plaintiff has become removable.

(d) The filing of a notice of removal shall effect the removal of the civil action or proceeding. The State court shall thereby be divested of jurisdiction, and shall proceed no further unless and until the action is remanded. Immediately upon the filing of a notice of removal of a civil action or proceeding, the clerk of the district court shall notify the State court that the removal has occurred. Promptly after filing the notice of removal the defendant or defendants removing a civil action or proceeding shall serve a copy of the notice of removal on all adverse parties pursuant to Rule 5 of the Federal Rules of Civil Procedure and shall file a copy of the notice of removal with the clerk of the State court from which the action or proceeding was removed. A declaration that such service and filing has occurred, signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, shall be filed in the district court within 10 days of the filing of the notice of removal.

(e) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court:

(1) May issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(2) May require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(b) In any civil action removed only by operation of section 1441(b)(2) of this title, the district court shall forthwith sever any claim thus disregarded and remand it to the State court from which the action was removed.

(c) The district court to which a civil action has been removed under section 1446(c) of this title on the basis of jurisdiction conferred by section 1332 of this title may, if the action was removed more than one year after it was

commenced in State court, remand the action to the State court from which it was removed on any equitable ground.

(d) If the declaration of service and filing required by § 1446(d) of this title is not timely filed, the district court to which any civil action or proceeding has been removed may remand the action or proceeding to the State court from which it was removed and, in addition or alternatively to remand, may impose an appropriate sanction on the responsible attorneys, law firms, or unrepresented parties.

(e)(1) If a civil action or proceeding in which any claim is within the original jurisdiction of the district courts has been removed in violation of any restriction of the right of removal or any procedure for exercising that right, a motion to remand the action or proceeding on the basis of such improper removal must be filed within 30 days after the filing in the district court of the declaration of service and filing required by section 1446(d) of this title. Within the time allowed for such motion, the district court may enter an order to show cause why the action or proceeding should not be remanded on the basis of such improper removal. If the district court grants the motion or determines that cause has not been shown as ordered, it shall remand the action or proceeding to the State court from which it was removed. If no such motion or order is timely filed, the district court may not remand the action or proceeding on the basis of such improper removal except as provided in subsection (d).

(2) At any time before final judgment the district court may remand any claim in a civil action or proceeding to the State court from which it was removed if it determines as to that claim that abstention is required, or that it should decline to adjudicate the claim under section 1367 of this title or Rule 19 of the Federal Rules of Civil Procedure.

(3) At any time before final judgment the district court shall remand to the State court from which it was removed any claim in a civil action or proceeding, or any count in a criminal prosecution, that it determines is not within its original jurisdiction.

(4) An order remanding a case or any claim or count therein on the ground of improper removal or a lack of original jurisdiction may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

(5) A certified copy of the order of remand shall be mailed by the clerk of the district court to the clerk of the State court. The State court may thereupon proceed with such case, or with any claim or count remanded.

(f) The remand of a case or any claim or count therein as provided by this section or section 1446a of this title shall not be reviewable by appeal except as provided by section 1292(b) of this title or by rule prescribed under section 1292(e) of this title. Any such remand of a civil action or proceeding shall be deemed to be an interlocutory decision for purposes of sections 1292(b) and 1292(e) of this title.

[(g) If after removal of a civil action that is within the original jurisdiction of the district courts on the basis of the citizenship of the parties the plaintiff seeks to join a claim against an additional defendant that is part of the same case or controversy under Article III of the Constitution but is not within the original jurisdiction conferred by sections 1332 and 1367 of this title, the district court

may deny such joinder, may permit such joinder and exercise supplemental jurisdiction over the claim against the additional defendant, or may permit such joinder and remand the entire action to the State court from which the action was removed. In exercising its discretion under this subsection, the district court shall act with due regard for considerations of judicial economy, convenience, and fairness to litigants.]

PRELIMINARY DRAFT NO. 3 (SEPTEMBER 16, 1998)

§ 1441. Right of removal of civil actions—in general

(a) *Basic right of removal.* Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court may be removed by the defendant or defendants to the district court of the United States for the district in which it is pending if every claim asserted in the initial pleading against a party properly joined or aligned as a defendant is within the jurisdiction of the district court, including the supplemental jurisdiction conferred by section 1367 of this title.

(b) *Removal based on diversity of citizenship.* A civil action may be removed under subsection (a) without regard to the jurisdictional status of claims against defendants sued under fictitious names. A civil action may not be removed under subsection (a) on the basis of the jurisdiction of the district court over a claim that is within such jurisdiction solely on the basis of citizenship of the parties if the defending party is subject to the jurisdiction of the State court and is a citizen of the State in which the action was brought.

(c) *Removal based on claim arising under federal law.* If the initial pleading in a civil action brought in a State court jointly asserts two or more claims that are not part of the same case or controversy under Article III of the Constitution, the entire action may be removed by the defendant or defendants against whom has been asserted a claim within the jurisdiction of the district court under section 1331 of this title, provided that such claim and all other claims that are part of the same case or controversy could have been removed under subsection (a) but for the joinder of claims not part of the same case or controversy. Upon such removal the district court shall sever from the action all claims that are not part of the same case or controversy as the claim or claims upon which removal was based, and shall remand the severed claims to the State court from which the action was removed.

(d) *Removal by foreign state.* Any civil action brought in a State court in which a claim is properly asserted against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district in which it is pending. Where removal is based upon this subsection:

(1) The time limitations of section 1446 of this title may be enlarged at any time for cause shown.

(2) Any claim against a foreign state shall be tried by the court without a jury.

(e) *Removal not affected by lack of jurisdiction of State court.* The court to which a civil action is removed is not precluded from hearing and determining

any claim in such action because the State court from which it was removed did not have jurisdiction over that claim.

(f) *Nonremovable actions.* A civil action may not be removed under subsection (a) if the initial pleading properly asserts any claim:

(1) Against a railroad or its receivers or trustees arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60).

(2) Against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments under section 11706 or 14706 of Title 49, unless the value of the claim exceeds \$10,000, exclusive of interest and costs.

(3) Arising under the workers' compensation laws of the State in which the action was commenced.

(4) Arising under section 40302 of the Violence Against Women Act of 1994.

§ 1446. Procedure for removal of civil actions

(a) *Notice of removal.* A civil action shall be removed from a State court by the filing of a notice of removal by the defendant or defendants in the district court of the United States for the district in which the action is pending.

(1) The notice of removal shall contain a short and plain statement of the grounds for removal and a copy of all process, pleadings, and orders served upon the defendant or defendants.

(2) The notice of removal shall be signed in the same manner and to the same effect as a pleading or written motion in a civil action pending in a district court of the United States.

(3) If the action is removed pursuant to section 1441(a), all defendants properly joined and effectively served must join in the removal. If the action is removed pursuant to section 1441(c), all defendants properly joined and effectively served against whom has been asserted a claim with the jurisdiction of the district court under section 1331 of this title must join in the removal.

(4) The attorney of record for one defendant may sign on behalf of other defendants who must join in the removal provided that such attorney has received the prior written authorization of each defendant, in person or through counsel, on whose behalf the attorney signs the notice of removal.

(5) Copies of the notice of removal shall promptly be served on all other parties and on the clerk of the State court in which the action is pending, and proof of such service shall be filed with the district court.

(b) *Time limits for notice of removal*

(1) The notice of removal of a civil action that is ascertainably removable when commenced shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2) The notice of removal of a civil action that is not removable when commenced, or cannot then be ascertained to be removable, shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be

ascertained that the action is or by voluntary act of the plaintiff or plaintiffs has become removable.

(c) *Effect of notice of removal.* The filing of a notice of removal shall effect the removal of a civil action. Immediately upon the filing of a notice of removal of a civil action, the clerk of the district court shall notify the State court that the removal has occurred. The State court shall thereby be divested of jurisdiction, and shall proceed no further unless and until the action is remanded.

(d) *Removal of Tariff Act counterclaims.* With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

§ 1447. Procedure after removal generally

(a) *Powers of district court.* In any case removed from a State court, the district court:

(1) May issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(2) May require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by appropriate writ issued to such State court.

(b) *Remand in interests of justice.* If a civil action has been removed under sections 1441(a) and 1446(b)(2) of this chapter more than one year after the commencement of the action, and if the sole basis for removal is the jurisdiction conferred by sections 1332 and 1367 of this title, the district court may in the interests of justice remand the action to the State court from which it was removed. No such remand shall be ordered except upon motion of a party filed within the time permitted for a motion to remand under subsection (c)(1).

(c) *Remand on procedural or jurisdictional grounds.*

(1) If a civil action in which any claim is within the jurisdiction of the district courts has been removed in violation of any restriction of the right of removal or any procedure for exercising that right, a motion to remand the action on the basis of such improper removal must be filed no later than 30 days after the filing with the district court of the proof of service required by section 1446(a)(5) of this chapter. Within the time allowed for such motion, the district court may enter an order to show cause why the action should not be remanded on the basis of such improper removal. If the district court grants the motion or determines that cause has not been shown as such motion or order is timely filed, the district court may not remand the action on the basis of such improper removal.

(2) At any time before final judgment the district court may remand any claim in a civil action to the State court from which it was removed if it determines as to that claim that abstention is required, or that it should decline to adjudicate the claim in the absence of a necessary party or in the exercise of its discretion under section 1367 of this title.

(3) If at any time before final judgment the district court determines that it lacks subject-matter jurisdiction of any claim in a civil action or of any count in a criminal prosecution, it shall remand the claim or count to the State court from which it was removed.

(4) An order remanding a civil action or criminal prosecution or any claim or count therein on the ground of improper removal or a lack of jurisdiction may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal.

(5) A certified copy of the order of remand shall be transmitted by the clerk of the district court to the clerk of the State court. The State court may thereupon proceed with such case, or with any claim or count remanded.

(d) *Appellate review of remand orders.* An order remanding a civil action or criminal prosecution or any claim or count therein as provided by this section shall not be reviewable by appeal except as provided by rule pursuant to section 1292(e) or section 2072(c) of this title.

[(e) If after removal of a civil action that is within the jurisdiction of the district courts on the basis of the citizenship of the parties the plaintiff seeks to join a claim against an additional defendant that is part of the same case or controversy under Article III of the Constitution but is not within the jurisdiction conferred by sections 1332 and 1367 of this title, the district court may deny such joinder, may permit such joinder and exercise supplemental jurisdiction over the claim against the additional defendant, or may permit such joinder and remand the entire action to the State court from which the action was removed. In exercising its discretion under this subsection, the district court shall act with due regard for considerations of judicial economy, convenience, and fairness to litigants.]

APPENDIX C

CROSS-REFERENCE TABLE FOR PRELIMINARY DRAFT NO. 2
AND PRELIMINARY DRAFT NO. 3

P.D. No. 2	P.D. No. 3
1441(a)	1441(a)
1441(b), (c)	1441(b)
1441(a), (b)	1441(c)
1441(d)	1441(d)
1441(d)(1)	1441(d)(1)
1441(d)(2)	1441(d)(2)
1441(e)	1441(e)
1445	1441(f)
1445(a)	1441(f)(1)
1445(b)	1441(f)(2)
1445(c)	1441(f)(3)
1445(d)	1441(f)(4)
1446(a)	1446(a)
1446(a)(1)	1446(a)(1)
1446(a)(2)	1446(a)(2)
1441(a)	1446(a)(3)
1446(a)(2)	1446(a)(4)
1446(d)	1446(a)(5)
1446(b)	1446(b)(1)
1446(c)	1446(b)(2)
1446(d)	1446(c)
1446(e)	1446(d)
1447(a)(1)	1447(a)(1)
1447(a)(2)	1447(a)(2)
1447(b)	-----
1447(c)	1447(b)
1447(d)	-----
1447(e)(1)	1447(c)(1)
1447(e)(2)	1447(c)(2)
1447(e)(3)	1447(c)(3)
1447(e)(4)	1447(c)(4)
1447(e)(5)	1447(c)(5)
1447(f)	1447(d)
1447(g)	1447(e)

