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Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?

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APPELLATE REVIEW OF REMAND ORDERS IN REMOVED CASES: ARE THEY LOSING A CERTAIN APPEAL?

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The removal of lawsuits from state to federal courts is a litigation privilege and tactic as old as the Federal Constitution and the Federal Judiciary it contemplated.[1] Removal is purely statutory, having no roots or precursors in the common law[2] and no express mention in the Constitution.[3] As a set of jurisdictional statutes, the removal right is both wooden and malleable. The right is "wooden" in the sense that the right must be exercised in strict conformity with the language of the statutes,

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1. The right to remove a cause from state to federal court was first provided within § 12 of the Judiciary Act of 1789, an Act passed the same year the Federal Constitution went into effect and by which the first United States Congress created the federal judicial system. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79; *see also* JOHN F. DILLON, REMOVAL OF CASES FROM STATE TO FEDERAL COURTS § 1, at 1 (4th ed. 1887) ("The Act of September 24, 1789 . . . styled by way of eminence the Judiciary Act, was passed the same year in which the Constitution went into effect, and organized the National or Federal Judicial System, ..."); JAMES H. LEWIS, REMOVAL OF CAUSES FROM STATE TO FEDERAL COURT 5 (1923) ("The history of the law relating to 'Removal of Causes' is identical and co-extensive with the creation of the Federal Judiciary.").

2. "The right to remove a suit from a State court to a Federal court is purely statutory. When claimed, it must be found in the statute, or the claim is unfounded." LEWIS, *supra* note 1, § 1 at 103. "The statute of removal of causes is no part of the common law. It cannot even be said to be either a modification or extension of a common law right or remedy." Wenzler v. Robin Line S. S. C., 277 Fed. 812, 819 (W.D. Wash. 1921). That removal was a new idea lacking precedent in the common law recalls the fact that the concept of a national or federal judiciary, operating concurrently with an existing state judiciary, was itself a new idea. "Although today we take it for granted, we should be reminded that the concept that two sovereigns could occupy the same territory and govern at the same time was an invention of 18th century political philosophy that was remarkable at the time." Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835, 857 (Summer 1995).

3. "Although some courts have described the litigant's right to remove as constitutional, it is more properly statutory. The Constitution merely authorizes enactment of a removal statute by granting Congress authority to define the jurisdiction of the federal courts." Robert T. Markowski, Note, *Remand Order Review After Thermtron Products*, 4 U. ILL. L. F. 1086, 1088 (1977) (footnotes omitted).

and any doubt as to the validity of a particular removal will be construed negatively against removal.[4] The right is "malleable" in the sense that the right is not fundamental, and thus has been and should be changed over time to suit prevailing views of both our State and Federal Judiciaries.[5] These contradictory aspects of the removal privilege helped

4. *See* Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993); *see also* LEWIS, *supra* note 1, § 35, at 131 ("The jurisdiction of the Federal court must be clear, and a doubt as to the jurisdiction is sufficient ground for remanding a removed case to the State court from which it has been removed."). Historically, however, not all courts adhered to this general presumption. Indeed, the fact that most remand orders are not appealable—the general subject of this Article—leads an occasional court to conclude that the presumption in close cases should be in favor of removal, in order to preserve the issue for more authoritative review by a circuit court of appeals. *See* LEWIS, *supra* note 1, § 35, at 132 ("In the eighth circuit, however, the rule seems to be that where the question of removability is doubtful it is the court's duty to resolve the doubt against the motion to remand, because from such order an appeal will lie, while from an order remanding the case the parties have no right of appeal."); *see also* Markowski, *supra* note 3, at 1093-94 n.69 ("To circumvent the 1447(d) bar of remand review some district courts have refused to remand cases which involve substantial questions concerning removability. Thus by certifying its order denying remand, the district court may allow the parties to have the court of appeals decide the issue of the removal's propriety.").

5. The various ways in which the United States Congress modified the removal statutes over the years to reflect transitory developments or attitudes are gleaned from a review of the many articles and older treatises written on the subject, too numerous to list here. Consider, for example, the Acts of March 3, 1875 and March 3, 1887. The 1875 Act, coming on the heels of the Civil War, passed at a time when Congress was concerned that state courts, particularly in the South, were hostile to the new federal rights that were an outgrowth of the War. *See* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L. J. 83, 91-92 (1994). The Act expanded dramatically both the original and removal jurisdiction of federal courts, *e.g.*, adding federal question jurisdiction, permitting plaintiffs—as well as defendants—to remove state court suits to federal court, allowing entire suits to be removed if there was at least one controversy between diverse parties, creating an express right to appellate review of remand orders, etc. *See id.* Only twelve years later, reacting to severe docket congestion in the federal court system, Congress passed the 1887 Act, which "radically restricted" the removal rights Congress had recently expanded, *e.g.*, increasing the jurisdictional amount from $500 to $2,000, eliminating a plaintiff's right to remove, abolishing appellate review of remand orders, etc. *See* Markowski, *supra* note 3, at 1090; Wasserman, *supra*. Such legislative flip-flopping might be cause for concern if it involved something fundamental, but here it does not. As suggested by (Supreme Court Justice) Felix Frankfurter, rudiments of removal and other issues concerning judicial fora are details only, subject to periodic adjustment:

> The indispensability of the federal judicial system to the maintenance of our federal scheme may be taken as a political postulate. But the details of jurisdiction are, after all, details. As such, their specific functions ought to submit to the judgment of appropriateness to the needs and sentiments of the time . . . . The only enduring tradition represented by the voluminous body of congressional enactments governing the federal judiciary is the tradition of questioning and compromise, of contemporary adequacy and timely fitness.

Wasserman, *supra*, at 83 (quoting Felix Frankfurter, *Distribution of Judicial Power Between*

spawn a body of statutory case law and that confuses courts and commentators alike and lays traps for the unwary practitioner.[6] An exasperating example of this confusion has been, and continues to be, the question concerning appellate review of remand orders in removed cases. As a general rule, appellate review of such orders is barred by statute, 28 U.S.C. § 1447(d), subject only to narrow exceptions carved out by the United States Congress and the Supreme Court of the United States.[7]

Admittedly, remand orders in removed cases constitute a small portion of the large and growing universe of federal judicial decisionmaking.[8] Despite this relative insignificance—indeed, at times because

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United States and State Courts, 13 CORNELL L.Q. 499, 503, 514-15 (1928).

6. As one early commentator lamented, quoting others of his time,

> [t]he law relating to the removal of causes from State to Federal Courts may be justly characterized as a snare and a delusion. Judge Smith McPherson of the United States District Court of Iowa says: "That there is no other phase of American Jurisprudence with so many subtleties, as relate to removal proceedings, is known by all who have to deal with them." . . . Mr. Boston speaks of it as follows: "In the whole field of judicial administration, I know no confusion resembling it; and in the whole field of physical analogy nothing like it except the everchanging aspects through the kaleidoscope. One is at once prompted to ask, what is the trouble and why is it not remedied? The answer itself is complex. Lamentable indifference somewhere is the reason it is not forcibly remedied. Lack of systematic judicial organization and effort is the reason it is not judicially remedied. Lack of studied presentation seems the reason there is no overwhelming demand that it should be remedied."

LEWIS, *supra* note 1, at 8.

7. 28 U.S.C. § 1447(d) provides that "[a]n 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 § 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d) (1994). The statutory exceptions permit review of remand orders in certain civil rights cases involving the United States and the property of various Native American tribes, and cases involving the Resolution Trust Corporation ("RTC") or the Federal Deposit Insurance Corporation ("FDIC"). *See* Wasserman, *supra* note 5, at 104-08. The judicial exceptions, discussed in more detail *infra*, are found in two lines of cases beginning, respectively, with the Supreme Court's decisions in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

8. Available statistics vary. One commentator reports that roughly 11% of the total civil docket of the federal district courts are cases removed from state courts, and that roughly 15% of those cases are eventually remanded. *See* Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287, 289 (Spring 1993). Others report that removal cases comprise roughly eight to nine percent of the federal district court docket, *see* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 388-89 (Winter 1992); Wasserman, *supra* note 5, at 136 n.206, and one puts the remand rate somewhere between 17-20%. *See* Wasserman, *supra* note 5, at 136 n.206. Ultimately, Professors Wasserman and

of it—there have been several calls over the years to either repeal or reform the statutory bar against appellate review.[9] Neither the Judicial Conference of the United States nor the United States Congress show any inclination to heed those calls.[10] To the contrary, a recent amendment to the removal statutes—to the provision governing the remand of cases wrongly removed[11]—undermines one of the two judicial exceptions to the appellate bar. That judicial exception, and the corresponding statutory amendment, are the principal subjects of this Article.

Part I of this Article provides a brief history of the statutory provisions governing appellate review of remand orders in removed cases. Part II reviews the judicial exception to the bar against appellate review created by the Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer*[12] and discusses how subsequent Supreme Court decisions have maintained the exception even while rejecting its underlying logic. Part III discusses a recent amendment to the removal statutes and how that amendment further undermines—and perhaps negates— the logic and effect of the *Thermtron* exception.[13] Part IV discusses judicial treatment of the recent amendment and predicts how federal courts may interpret the new language to preserve the *Thermtron* exception.

I. HISTORY OF STATUTES ON REVIEW OF REMAND

The early removal statutes, beginning with the Judiciary Act of 1789 and continuing through to the Revised Statutes of 1874,[14] spoke only

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Solimine both conclude that motions to remand are granted in fewer than two percent of the cases on the district courts' docket. *See id.*; Solimine, 58 MO. L. REV. at 325; Wasserman, *supra* note 5, at 136 n.206.

9. *See, e.g*, Jerome I. Braun, *Reviewability of Remand Orders: Striking the Balance in Favor of Equality Rather than Judicial Expediency*, 30 SANTA CLARA L. REV. 79, 80-91 (1990); Markowski, *supra* note 3, at 1107-12; Solimine, *supra* note 8, at 323-31; Wasserman, *supra* note 5, at 130-50. Some argue that the small number of remand orders, and the presumably smaller number that would be appealed absent a statutory bar against appellate review, counsels in favor of abolishing the bar. *See* Wasserman, *supra* note 5, at 130-31, 136 n.206; Braun, *supra* at 89-91. Doing so, it is argued, would add little to the federal caseload, and concern for the size of the federal caseload is one of the principal and continuing justifications for the bar against appellate review. *See id.*

10. *See* Solimine, *supra* note 8, at 327, 330 (noting that the Judicial Conference rejected a recommendation from the Ninth Circuit Court of Appeals that the former propose a repeal of the statutory bar against appellate review, and voicing only muted "[e]nthusiasm for the prospects of Congressional action.").

11. *See* 28 U.S.C. § 1447(c) (1994).

12. 423 U.S. 336 (1976).

13. *See* Act of October 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022.

14. On June 27, 1866, Congress passed legislation authorizing the President to appoint a commission "to revise, simplify, arrange, and consolidate all statutes of the United States,

once of any power federal courts had to remand a removed case to state court, and not at all of any right to appellate review of such an order.[15] Notwithstanding this silence, federal courts remanded cases whenever subject matter jurisdiction was lacking or removal procedures were not followed properly.[16] Moreover, during this period the Supreme Court of the United States entertained appellate review of remand orders on several occasions, in the form of a writ of error, writ of appeal, or writ of mandamus.[17] Thus, at least initially, appellate review of remand orders, in one form or another, was presumed valid.[18]

Congress did not make this presumption explicit until passage of the Act of March 3, 1875.[19] The Act came on the heels of the Civil War and capped a dramatic expansion of federal jurisdiction—both as a matter of original jurisdiction and removal jurisdiction—motivated by the trauma

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general and permanent in their nature, ..." *See* Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74. Some eight years later, on June 20, 1874, Congress passed the fruit of this endeavor, the so-called Revised Statutes. *See* Act of June 20, 1874, ch. 333, 18 Stat. app. at 1090-91; *see also* Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws"*, 67 GEO. WASH. L. REV. 51, 57-59 (1998). As passed, §§ 639-647 of the Revised Statutes technically repealed and then substantially re-enacted in codified form the removal statutes enacted prior thereto. *See* Revised Statutes §§ 639-647, as reprinted in LEWIS, *supra* note 1, at 528-36; *see also* DILLON, *supra* note 1, § 8 at 10.

15. The only statute from the period referencing a remand power in removed cases was the Act of July 13, 1866, ch. 184, § 68, 14 Stat. 97, 172. Specifically, section 68 of that Act repealed "the fiftieth section" of an act passed two years earlier, and then provided that "any case which may have been removed from the courts of any State, under said fiftieth section, to the courts of the United States, shall be remanded to the State court from which it was so removed . . . ." *Id.* The Act said nothing, however, concerning a right to appellate review of such a remand order. *See id.; see also* Wasserman, *supra* note 5, at 89-90 (noting the early Congressional silence on the question of remands and appellate review of the same).

16. *See* Wasserman, *supra* note 5, at 89-90 n.27 (citing cases) ("Although the Judiciary Act did not expressly authorize the circuit courts to remand actions to state court, they would do so in cases in which subject matter jurisdiction was lacking or in which the defendant had failed to comply with the statutory procedures for removal.").

17. *See id.* at 90 nn.29-30 (citing cases). The Supreme Court entertained these appeals because the intermediate appellate courts were not created until the Act of March 3, 1891 (the Evarts Act), ch. 517, 26 Stat. 826. The cases cited by Professor Wasserman in this regard involved writs of error and writs of appeal, the distinction resting on whether the appeal stemmed from a suit at law or a suit in equity, respectively. *See* Wasserman, *supra* note 5, at 90 n.30. None of the cases involved a writ of mandamus, yet in 1875 the Supreme Court declared that the only method for challenging a remand order was the writ of mandamus. *See* Railroad Co. v. Wiswall, 90 U.S. (23 Wall.) 507 (1874); Wasserman, *supra* note 5, at 93.

18. One could even say it was taken for granted. The cases cited by Professor Wasserman contain no indication that the Supreme Court's authority to entertain such review was challenged, and the Court apparently saw no need to discuss the issue *sua sponte*. *See* Wasserman, *supra* note 5, at 90 nn.29-30.

19. Ch. 137, § 5, 18 Stat. 470.

and lingering hostilities associated with the War and Reconstruction.[20] Important here is what the Act said about remand orders in removed cases. First, the Act established a general remand power applicable to any suit removed from state to federal court.[21] Second, the Act created a formal right of appellate review, stating that "the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the supreme court on writ of error or appeal, as the case may be."[22]

The statutory right to appellate review of remand orders was short-lived. Twelve years after passage of the 1875 Act, Congress passed the Act of March 3, 1887.[23] The Act was a compromise bill enacted by a divided Congress in an effort to restrict the recently-expanded jurisdiction

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20. *See* Wasserman, *supra* note 5, at 91-92 (noting that "[t]he Civil War irrevocably altered both the relationship between the federal government and the states and the role of the federal judiciary," and citing a series of statutes, culminating with the Act of 1875, by which "Congress enlarged the circuit courts' original and removal jurisdiction to protect federal officers and freedmen from hostile southern courts and to ensure enforcement of a growing panoply of federal rights."); *see also* Bradford Gram Swing, Comment, *Federal Common Law Power to Remand a Properly Removed Case*, 136 U. PA. L. REV. 583, 588 n.21 (1987) ("Congress passed twelve removal provisions during this period" *i.e.*, during the War and Reconstruction.).

21. Section 5 of the Act provided as follows:

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

Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470, 472.

22. *Id.* There is no legislative history explaining Congress's motivation in enacting the provision for appellate review. *See* Wasserman, *supra* note 5, at 92-94. Professor Wasserman speculates that Congress, motivated by a desire to foster and protect the federal question jurisdiction it had just created via another provision of the 1875 Act, wanted to make sure that any decision interpreting such jurisdiction be reviewable by the Supreme Court. *See id.*

As an aside, the removal statutes discussed to this point refer to the removal of cases to federal *circuit courts*. Prior to the creation of the intermediate federal appellate courts (now known as *circuit courts of appeals*), federal trial courts (now known as *district courts*) were referred to as *circuit courts*.

23. *See* Act of March 3, 1887, ch. 373, 24 Stat. 552, *corrected by* Act of August 18, 1888, ch. 866, 25 Stat. 433.

of the federal courts.[24] It seems members of Congress, as well as the federal judiciary, experienced a slight hangover from the jurisdictional binge of Reconstruction, a binge culminating in the radical expansion of federal jurisdiction brought about by the Act of 1875. Cases were pouring into federal courts at a rate faster than could be handled, creating severe docket congestion in the federal trial courts and the Supreme Court.[25] The Act of 1887 tried to alleviate this problem, principally by raising the jurisdictional amount from $500 to $2,000 in all cases of diversity, federal question, or removal jurisdiction,[26] and by restricting the right of removal to defendants only (and, in diversity cases, to nonresident defendants only).[27] More to the point, the Act repealed that portion of the 1875 Act authorizing appellate review of remand orders, enacting in its place a contrary provision barring appellate review altogether:

> Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.[28]

Congress provided no explanation at the time for this dramatic reversal of course—dramatic, because it did not simply rescind the right of appellate review enacted twelve years earlier, but also reversed a silent presumption of appellate review that had existed for almost a century,

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24. *See* Wasserman, *supra* note 5, at 95-100 nn.70-71 (setting forth the spate of bills considered and tabled by the warring House and Senate prior to the eventual compromise which was the Act of 1887, and quoting contemporary descriptions of the Act as a "reactionary" effort to "decrease and weaken the jurisdiction of the Federal courts . . . ."); *see also In re* Pennsylvania Co., 137 U.S. 451, 454 (1890) ("The general object of the act is to contract the jurisdiction of the federal courts.").

25. *See* Wasserman, *supra* note 5, at 95-96, 99 n.71. Congress still had not created the intermediate appellate courts. *See supra* note 17 and accompanying text. Indeed, it was the docket congestion created by Reconstruction which gave rise to a formal call for appellate courts in a bill passed by the Senate in 1882, but which later failed to find support in the House. *See* Wasserman, *supra* note 5, at 98. House resistance eventually subsided, and nine years later the intermediate appellate courts were created. *See supra* note 17 and accompanying text.

26. *See* Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552.

27. *See* Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552, 553.

28. *Id.* The repeal of the clause in the 1875 Act authorizing appellate review is found in § 6 of the 1887 Act. *See id.* at § 6.

beginning with passage of the foundational Judiciary Act of 1789.[29] There is no legislative history explaining the development of this provision.[30] There is no similar language in any of the previous bills passed by the House and rejected by the Senate during the contentious years immediately preceding passage of the compromise 1887 Act.[31] Plausible explanations exist,[32] but explanations are not as important as the clear result: For roughly the next fifty years, the Supreme Court[33]—and, be-

29. *See supra* notes 17-18 and accompanying text.

30. *See* Wasserman, supra note 5, at 100.

31. *See id.*

32. Professor Wasserman suggests that Congress adopted the bar against appellate review to reduce the Supreme Court's burden directly, because at the time the Supreme Court heard all appeals from remand orders. *See* Wasserman, *supra* note 5, at 101. This seems the most plausible explanation. The bar against appellate review was an idea originating in the Senate, first appearing in Senate amendments to a fifth House bill limiting the jurisdiction of the federal courts. *See id.* at 100. The Senate had previously tried to limit the Supreme Court's appellate jurisdiction, albeit on a larger scale. One of the Senate's first and principal ideas for relieving the Supreme Court overload was a bill creating intermediate appellate courts, forwarded by the Senate five years prior to the 1887 Act and rejected by the House. *See supra* note 24 and accompanying text. The subsequent provision proscribing appellate review of remand orders may have been a political compromise whereby the Senate obtained indirectly, albeit on a much smaller scale, what it could not obtain directly. Professor Wasserman also suggests that Congress adopted the appellate bar to prevent non-resident or federally-chartered corporations from using the appeal process as a weapon to delay proceedings and increase their opponents' litigation costs. *See* Wasserman, *supra* note 5, at 94-97, 101. This explanation is less convincing. While corporations used removal as a delay tactic, and such tactics "outraged" the Democratically-controlled House of Representatives, it was not the Democratically-controlled House that proposed the bar against appellate review. *Id.* at 96-97. As indicated, the "still largely Republican [Senate]" initiated the idea, and this particular body was "more closely allied to eastern financial and industrial concerns" and "reluctant to decrease the immediate availability of federal courts, particularly for out-of-state or federally-chartered business concerns." *Id.* at 97 n.59 (quoting Michael Q. Collings, *The Unhappy Question of Federal Question Removal*, 71 IOWA L. REV. 717, 739 (1986)). It seems unlikely that the Republican Senate proposed the appellate bar in order to restrict access to the Supreme Court of the United States, and the federal courts as a whole, for one of the Republican Party's most important constituencies at the time.

33. *See In re* Matthew Addy Steamship & Commerce Corp., 256 U.S. 417 (1921) (dismissing writ of mandamus); Yankaus v. Feltenstein, 244 U.S. 127 (1917) (dismissing writ of error); German National Bank v. Speckert, 181 U.S. 405 (1901) (dismissing direct appeal); Whitcomb v. Smithson, 175 U.S. 635 (1900) (stating writ of error may not lie against remand order); Missouri Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556 (1896) (dismissing writ of error); Illinois Cent. R.R. Co. v. Brown, 156 U.S. 386 (1895) (dismissing writ of error); Joy v. Adelbert College of Western Reserve University, 146 U.S. 355 (1892) (dismissing direct appeal); Chicago, St. P., M. & O. Ry. Co. v. Roberts, 141 U.S. 690 (1891) (dismissing writ of error); Birdseye v. Shaeffer, 140 U.S. 117 (1891) (dismissing writ of error); *In re* Pennsylvania Co., 137 U.S. 451 (1890) (denying writ of mandamus); Gurnee v. Patrick County, 137 U.S. 141 (1890) (dismissing writ of error); Richmond & D. R. Co. v. Thouron, 134 U.S. 45 (1890) (dismissing direct appeal); Chicago, B. & Q. Ry. Co. v. Gray, 131 U.S. 396 (1889) (dismissing writ of error); Wilkinson v. Nebraska, 123 U.S. 286 (1887) (dismissing writ of error); Morey v. Lock-

ginning in 1892, the federal circuit courts of appeals[34]—issued consistent and firm decisions stating that remand orders in removed cases were not subject to appellate review, whether such review took the form of a direct appeal, writ of error, or writ of mandamus.[35]

The breadth and finality of these early decisions provoked no contrary reaction from Congress. Quite the opposite, the statutory bar against appellate review remains in place over a century later.[36] While

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hart, 123 U.S. 56 (1887) (dismissing direct appeal).

34. *See* Humphreys v. Love, 61 F.2d 908 (5th Cir. 1932) (dismissing direct appeal); Pickwick-Greyhound Lines v. Shattuck, 61 F.2d 485 (10th Cir. 1932) (dismissing writ of certiorari); National Farmers' Bank v. Moulton, 32 F.2d 78 (8th Cir. 1929) (dismissing direct appeal); Wabash Ry. Co. v. Woodbrough, 29 F.2d 832 (8th Cir. 1928) (dismissing writ of mandamus); Wabash Ry. Co. v. Lindley, 29 F.2d 829 (8th Cir. 1928) (dismissing writ of error); Hammond Hotel & Improvement Co. v. Finlayson, 6 F.2d 446 (7th Cir. 1925) (dismissing direct appeal); Vaughan v. McArthur Bros. Co., 227 F. 364, 366 (8th Cir. 1915) (stating that from the time the Act of 1887 was passed "it was uniformly held no appeal or writ of error will lie to an order to remand."); Cole v. Garland, 107 F. 759 (7th Cir. 1901) (dismissing writ of error); *In re* Aspinwall's Estate, 90 F. 675 (3rd Cir. 1898) (dismissing direct appeal); *In re* Coe, 49 F. 481 (1st Cir. 1892) (dismissing writ of mandamus).

35. The strongest statements are found in the earliest cases, those immediately following passage of the 1887 Act. Presumably, these cases reflect a contemporaneous (and therefore more reliable?) understanding of Congress's intentions:

> It is difficult to see what more could be done to make the action of the circuit court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case; and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.

Morey v. Lockhart, 123 U.S. 56, 57-58 (1887).

> In terms, [the 1887 Act] only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case, we think, it was the intention of congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words, "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process.

In re Pennsylvania Co., 137 U.S. 451, 454 (1890).

36. Professor Wasserman provides a good statutory history of the appellate bar subse-

there have been changes in language and codification over the years, Congress recognizes few exceptions to the bar.[37] Those exceptions are limited to isolated causes of action and do not affect the vast majority of cases removed to federal court.[38] The remaining changes cannot reasonably be read to limit the scope of the bar. If anything, the principal

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quent to its passage. *See* Wasserman, *supra* note 5, at 103-108 nn.85-100.

37. In 1911, Congress passed a substantial revision and codification of the laws relating to the federal judiciary—the Judicial Code of 1911—and therein re-enacted the bar against appellate review. *See* Act of March 3, 1911, ch. 231, § 28, 36 Stat. 1087, 1095 (subsequently codified at 28 U.S.C. § 71). The language of the 1911 revision was identical to the language of the 1887 Act, set forth above, except that the term "district court" was substituted for the prior designation of "circuit court." *Id.*; *see also* Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, *corrected by* Act of August 18, 1888, ch. 866, 25 Stat. 433. The 1911 Act also carried forward (again, with technical modifications) the language of the 1875 Act giving federal trial courts the express power to remand to state court any suit that "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court," or where "the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter." Act of March 3, 1911, ch. 231, § 37, 36 Stat. 1087, 1098 (28 U.S.C. § 80); *see also* Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470, 472.

In 1948, Congress undertook another revision and re-codification of the Judicial Code (codified at Title 28 of the United States Code), including those provisions concerning the removal of cases from state to federal court. *See* Wasserman, *supra* note 5, at 103-104 and n.86; *see also* Act of June 25, 1948, ch. 646, 62 Stat. 869, 937-940. In the 1948 revision, the express remand provisions contained in the Judicial Code of 1911, 28 U.S.C. §§ 71 & 80, and carried forward from virtually identical provisions contained in the Acts of 1875 and 1887, were merged into one provision stating that "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case." *See* Act of June 25, 1948, ch. 646, § 1447(e), 62 Stat. 869, 939, *renumbered by* Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89,102. Congress, however, neglected to carry forward the bar against appellate review. *See* Wasserman, *supra* note 5, at 103-104 and n.86; *see also* Act of June 25, 1948, ch. 646, § 1447, 62 Stat. 869, 939. Recognizing this mistake (and many others), Congress passed amendatory legislation the following year, which, *inter alia*, added a clause to §1447 providing that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Wasserman, *supra* note 5, at 104; Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102 (subsequently codified at 28 U.S.C. § 1447(d)). Legislative history confirms that the latter section was added "to remove any doubt that the former law as to the finality of an order to remand to a State court is continued." Wasserman, *supra* note 5, at 104 (quoting H.R. REP. NO. 352 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, 1268).

38. The statutory exceptions—*see supra* note 7—permit review of remand orders in certain civil rights cases, cases involving the United States and the property of various Native American tribes, and cases involving the RTC or the FDIC. *See* Wasserman, *supra* note 5, at 104-08. The exception for civil rights cases is codified within § 1447(d) itself. *See* 28 U.S.C. § 1447(d) (1994). The remaining exceptions are codified at 25 U.S.C. §§ 487(d), 642(b) & 670 (1994) (granting the United States the right to appeal remand orders entered in cases involving the property of the Spokane, Hopi, and Southern Ute Indians), 12 U.S.C. § 1441a(1)(3)(C) (1994) (granting the RTC the right to appeal any remand order entered by a federal district court), and 12 U.S.C. § 1819(b)(2)(C) (1994) (granting the FDIC the right to appeal any remand order).

language of the current statute is broader and less susceptible to limitations than prior versions. The current provision, codified at 28 U.S.C. § 1447(d), reads as follows:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise.[39]

II. THE *THERMTRON* EXCEPTION

Despite the clear history and import of § 1447(d), the Supreme Court of the United States recognizes certain exceptions to the bar against appellate review.[40] The exception pertinent to this Article stems from the Supreme Court's decision in *Thermtron Products, Inc. v. Hermansdorfer.*[41] *Thermtron* was a significant departure from prior interpretations of the appellate bar. To appreciate the nature of this departure, consider briefly two earlier Supreme Court decisions on the subject.

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39. 28 U.S.C. § 1447(d) (1994).

40. One exception, not germane to this Article, is found in a line of cases beginning with the Supreme Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), and rejuvenated and expanded by the Ninth Circuit's decision in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984). This exception allows appellate review of a remand order whenever "a district court's remand order is based on a resolution of the merits of some matter of substantive law 'apart from any jurisdictional decision . . . .'" Clorox Co. v. United States District Court for the Northern District of California, 779 F.2d 517, 520 (9th Cir. 1985); *see also* Solimine, *supra* note 8, at 312 n.136 (citing cases); *see also* Wasserman, *supra* note 5, at 123-24 n.159 (citing cases). For example, in the *Clorox* case, the Ninth Circuit entertained appellate review of a remand order that was based on the district court's conclusion that the defendant employer had waived its right to remove via language contained in an employee handbook. *See Clorox*, 779 F.2d at 520. Other circuit courts have reviewed remand orders that were based on decisions regarding the enforceability of forum selection clauses. *See* Wasserman, *supra* note 5, at 122 n.153 (citing cases).

Another apparent exception, rarely discussed by either courts or commentators, is found in the Supreme Court's decisions in *Gay v. Ruff*, 292 U.S. 25 (1934) and *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464 (1947). Those cases hold that the bar against appellate review only applies to remand orders issued by a federal district court; remand orders issued by circuit courts of appeals are subject to review. These decisions overruled, or at least run contrary to, the Supreme Court's earlier decision in *German Nat'l Bank v. Speckert*, 181 U.S. 405 (1901). The *Gay* and *Flowers* decisions are reinforced, though without discussion, by the Supreme Court's decision in *Willingham v. Morgan*, 395 U.S. 402 (1969).

41. 423 U.S. 336 (1976).

The first, *Morey v. Lockhart*,[42] was issued shortly after passage of the 1887 Act. In its original form, the appellate bar appeared at the end of a long statutory section listing the types of cases that could be removed to federal court.[43] The three sentences immediately preceding the bar, however, dealt with one particular type of removal: A non-resident defendant's right to remove a case to federal court on grounds of "prejudice or local influence."[44] In *Morey*, the removing defendant argued that placement of the appellate bar immediately following these sentences indicated that Congress intended to limit application of the bar to these types of cases.[45] Relying upon the broad and comprehensive wording of the bar, the Supreme Court rejected any limitation based on the same's provision's placement within the statutory scheme:

> The section of the statute in which the provision occurs has relation to removals generally,—those for prejudice or local influence, as well as those for other causes, —and the prohibition has no words of limitation. It is, in effect, that no appeal or writ of error shall be allowed from an order to remand in "any cause" removed "from any state court into any circuit court of the United States." The fact that it is found at the end of the section, and immediately after the provision for removals on account of prejudice or local influence, has, to our minds, no special significance. Its language is broad enough to cover all cases, and such was evidently the purpose of congress.[46]

The second Supreme Court decision on exceptions to the bar against appellate review is *Employers Reinsurance Corp. v. Bryant*.[47] *Bryant* construed the appellate bar as it existed under the old Judicial Code of 1911. The Judicial Code carried forward the statutory section and language of the 1887 Act interpreted in *Morey*. That language—then codified at 28 U.S.C. § 71—provided that any case "improperly removed" could be remanded to state court and that any order "so remanding" a removed case was not subject to appeal.[48] The Code also carried forward the provision of the 1875 Act—then codified at 28 U.S.C. § 80—allowing federal district courts to remand any removed case which was

42. 123 U.S. 56 (1887).

43. *See* Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, 553, *corrected by* Act of August 18, 1888, ch. 866, 25 Stat. 433.

44. *Id.*

45. *See Morey*, 123 U.S. at 56.

46. *Id.*

47. 299 U.S. 374 (1937).

48. 28 U.S.C. § 71.

owing federal district courts to remand any removed case which was not "properly within the jurisdiction of said district court . . . ."[49] In *Bryant*, the district court remanded under § 80, citing a lack of jurisdiction.[50] On appeal, it was noted that § 80, unlike § 71, did not contain a separate appellate bar, but the circuit court thought it "extremely doubtful" that this discrepancy opened the door to an appeal.[51] The Supreme Court agreed, finding § 71's appellate bar applicable to § 80 remand orders:

> The provisions in the act of 1887 on which that decision and others to the same effect were based are still in force as parts of sections 71 and 80, title 28, U.S. Code (28 U.S.C.A. ss. 71, 80). They are *in pari materia*, are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey v. Lockhart*, . . . that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter.[52]

Note that while *Bryant* cites and is consistent with the result in *Morey*, there is a subtle change in reasoning. *Morey* interpreted the appellate bar as applying to a remand order issued under any removal provision, citing the broad and comprehensive wording of the bar itself. *Bryant* reached the same conclusion, focusing not on the language of the bar, but on the notion that removal statutes were *in pari materia* and should be read together.[53] As will be shown, this change proved important, because while the language of the appellate bar allowed for no exceptions, the *in pari materia* canon of construction created an opening for one.

Forty years after the *Bryant* decision, the Supreme Court issued its

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49. 28 U.S.C. § 80.

50. *See Bryant*, 299 U.S. at 381.

51. *In re* Employers Reinsurance Corporation, 82 F.2d 373, 374 (5th Cir. 1936).

52. *Bryant*, 299 U.S. at 380-81 (citation omitted).

53. This approach surfaced again ten years later in *United States v. Rice*, 327 U.S. 742 (1946):

> As we have already indicated, and as the legislative history shows, these provisions of the Act of 1887 were intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well.

Id. at 752.

decision in *Thermtron*.[54] In that case, two Kentucky residents sued an Indiana corporation and one of its employees, also an Indiana resident, in Kentucky state court for injuries arising out of an automobile accident.[55] The defendants removed the matter to federal court on diversity grounds.[56] Plaintiffs did not object to the removal.[57] Roughly eight months after the case had been removed, the district judge issued an order, *sua sponte*, stating that he had no available trial time "in the foreseeable future" and directing the defendants "to show cause 'why the ends of justice do not require this matter to be remanded to the [state court]'" where—presumably—it could be "expedited."[58] Defendants responded that they could not receive a fair trial in the state courts, that the case had been properly removed, that they had a federal right to proceed in federal court, and that the district court had no discretion to remand the case merely because of a crowded docket.[59] The district court conceded that defendants had a right to be in federal court, but reasoned that the right must be balanced against the plaintiffs' right to a forum of their choice and a speedy decision on the merits.[60] The district court remanded the case, concluding that the defendants made no showing of prejudice in the state court and that plaintiffs' rights to prompt redress would be "severely impaired" if the case remained in federal court.[61] Defendants sought a writ of mandamus from the Sixth Circuit, but the court of appeals concluded that it lacked jurisdiction pursuant to § 1447(d).[62]

After almost ninety years of denying virtually any form of appellate review of remand orders, the Supreme Court granted certiorari and heard the case. Writing for a narrow 5-3 majority,[63] Justice White said the case presented two questions: First, may a district court remand a properly removed case for reasons not authorized by statute?[64] Second, if the answer to the first question is no, may an appellate court review

54. By this time, the current version of § 1447(d) was in place.
55. *See Thermtron*, 423 U.S. at 337.
56. *See id.* at 338.
57. *See id.*
58. *Id.* at 339.
59. *See id.* at 339-40.
60. *See id.* at 340.
61. *Id.* at 340-41.
62. *See id.* at 341-42.
63. Justice Stevens did not take part in the consideration or decision of the case. *See id.* at 353.
64. *See id.* at 337.

such an order through a writ of mandamus?[65] The answers to both questions reopened an issue thought closed since Congress passed the Act of 1887.

On the first question, Justice White concluded that "[t]he District Court exceeded its authority in remanding on grounds not permitted by the controlling statute;" *i.e.*, specifically on grounds not referenced in 28 U.S.C. § 1447(c).[66] When *Thermtron* was decided, the latter statute authorized remand in any case "removed improvidently and without jurisdiction," meaning any case where subject matter jurisdiction was lacking or removal procedures were not followed properly.[67] The district court's crowded docket was neither a jurisdictional defect nor a defect in removal procedure.[68] Using strong language, Justice White stated that the Court was "not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute."[69]

On the second question concerning the appellate bar, Justice White,

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65. *See id.*

66. *Id.* at 345.

67. 28 U.S.C. § 1447(c) (1976). Markowski, shortly after *Thermtron* was decided, suggested how the phrase "improvidently and without jurisdiction" should be interpreted in light of its legislative evolution and history:

> Although section 1447(c) phrases the terms "improvidently and without jurisdiction" in the conjunctive, courts interpret the standard disjunctively and will remand either if removal was improvident or if jurisdiction is defective. The bases for a district court's determination that removal was improvident are unclear. Black defines a judicial order as improvidently issued when decided without adequate consideration or proper information, or when based on a mistaken assumption. A district court applying this definition might claim broad discretion in determining the propriety of removal. The legislative history of 1447(c), however, implies that the district court's discretion is more circumscribed. Prior to the 1948 revisions, the removal act directed remand only if the action was "improperly" removed. "Improper" connotes a legally defective removal rather than a removal that was merely imprudent or unfair to the plaintiff. The Supreme Court has held as a general rule that changes in statutory language made by the Judicial Code of 1948 are not presumptive changes of policy or law absent an explicit expression of congressional intent. The substitution of "improvidently" for "improperly" is not an explicit expression of congressional intent to make a policy change. The district courts, therefore, should interpret "improvidently" to mean legally defective.

Markowski, *supra* note 3, at 1092-93.

68. *See Thermtron*, 423 U.S. at 343-44.

69. *Id.* at 351.

relying on the *Bryant* decision, explained that §§ 1447(c) and 1447(d) are *in pari materia* and should be read together.[70] However, whereas *Bryant* read these provisions together to *broaden* the reach of the appellate bar, Justice White read them together to *limit* the reach of the bar. Justice White concluded that § 1447(d) only bars appellate review of remand orders authorized by § 1447(c), *i.e.*, those based on procedural or jurisdictional defects.[71] Because the district court's remand order was based on neither, the order was subject to appellate review:

> Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d)....
>
> [T]his Court has not yet construed the present or past prohibition against review of remand orders so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal. We decline to construe § 1447(d) so woodenly as to reach that result now.[72]

Thus ended ninety years of consistent precedent suggesting that appellate courts could not review the remand orders of district courts under any circumstances. The change did not come without criticism, and the strongest criticism came from within the Supreme Court itself.

Then-Justice Rehnquist wrote an incredulous dissent, joined in by Chief Justice Burger and Justice Stewart, chiding the majority for "undermin[ing] the accepted rule . . . adhered to for almost 90 years" and

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70. *See id.* at 345-46.

71. *See Thermtron*, 423 U.S. at 345-351.

72. *Id.* at 351-52. Regarding whether mandamus relief was the proper vehicle for appellate review, Justice White noted that, historically, the writ of mandamus was used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id.* at 352 (citations omitted). Indeed, the writ had been used to direct subordinate federal courts to decide or reinstate pending cases. *See id.* Moreover, precisely because an order remanding a removed action is not a "final" judgment reviewable by direct appeal, "[t]he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done." *Id.* at 352-53 (quoting Railroad Co. v. Wiswall, 90 U.S. (23 Wall.) 507, 508 (1874)). Recently, however, the Supreme Court "disavow[ed]" this aspect of *Thermtron*, at least where the remand order is based on a *Burford* abstention, holding that in such cases the remand order can be the subject of a direct appeal under 28 U.S.C. § 1291, without the need for mandamus review. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

for "hold[ing] that Congress did not mean what it so plainly said."[73] The dissent pointed out several deficiencies in the majority opinion. For starters, the opinion created various practical and logical problems. The dissent recalled the oft-repeated belief that Congress's purpose in enacting the bar against appellate review was "to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand."[74] While the majority opinion created only a narrow exception to the appellate bar, the exception necessarily allowed an appeal in every case in order to determine whether the exception applies, thereby creating the very delays Congress intended to prevent.[75] Moreover, the dissent questioned the majority's proffered distinction between "unauthorized" remand orders, which are reviewable, and merely "erroneous" remand orders, which are not.[76] The dissent did not accept the majority's position that a remand order based on grounds not listed in § 1447(c) is somehow "more unauthorized" than a remand order erroneously invoking the grounds listed therein.[77] Indeed, "what if the district court . . . state[s] that it finds no jurisdiction, using the rubric of § 1447(c), but the papers plainly demonstrate such a con-

73. *Thermtron*, 423 U.S. at 355, 356 (Rehnquist, J., dissenting).

74. *Id.* at 354 (Rehnquist, J., dissenting). As indicated earlier, there are questions surrounding Congress's original purpose in 1887 for creating the appellate bar, and good reason to doubt that it was intended to prevent a removing party from seeking delay for delay's sake. *See supra* note 32 and accompanying text. This says nothing, of course, for the motivations of subsequent Congress's in re-enacting the provision. The Supreme Court first gave voice to Congress's alleged desire to prevent "interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction" in its 1946 decision in *United States v. Rice*, 327 U.S. 742, 751 (1946). Recently, the Third Circuit reiterated that "[w]ithout § 1447(d), a party to a state action could remove the action to federal court, await remand, request reconsideration of the remand, appeal, request rehearing, and then file a petition for a writ of certiorari, all before being forced to return to state court several years later." Hudson United Bank v. Litenda Mortgage Corp., 142 F.3d 151, 156 (3d Cir. 1998). The prevention of such delays is one of the strongest reasons for keeping the appellate bar in place, and commentators who propose modifying or removing the appellate bar usually propose some form of expedited review in recognition of this valid concern. *See* Wasserman, *supra* note 5, at 139-40, 146-49; Solimine, *supra* note 8, at 325-329; Markowski, *supra* note 3, at 1109-1112.

75. *See Thermtron*, 423 U.S. at 355, 356 (Rehnquist, J., dissenting) ("It is clear that the ability to invoke appellate review, even if ultimately unavailing on the merits, provides a significant opportunity for additional delay..... If the party opposing a remand order may obtain review to litigate whether the order was properly pursuant to the statute, his ability to delay and to frustrate justice is wide ranging indeed.").

76. *Id.* at 356-57 (Rehnquist, J., dissenting).

77. *Id.* at 356 (Rehnquist, J., dissenting) ("Surely such an error equally contravenes congressional intent to extend a 'right' of removal to those within the statute's terms. Yet such an error, until today, never has been thought subject to challenge by appeal or extraordinary writ.").

clusion to be absurd?"[78] Can an appellate court question whether the statute is invoked in good faith? If not, the *Thermtron* exception is meaningless because it only requires the invocation of magic words.[79] If it can, how does the appellate court divine the subjective intentions of a district court to determine whether the latter acted in error or in spite? Under the majority's reasoning, such a distinction is necessary in order to ensure that the *Thermtron* exception remains only an exception.[80]

The majority opinion also played "fast and loose" with prior Supreme Court case law.[81] In order to legitimize the holding, and to rebut the accusation that it was abandoning ninety years of clear precedent, the majority needed historical support for the linchpin of its opinion: The proposition that §§ 1447(c) and 1447(d) should be construed together to limit the reach of the appellate bar. While *Bryant* enabled the majority to read the two provisions together, it did not provide support for imposing limits on the appellate bar. Looking elsewhere, the majority seized upon two words contained in the version of the bar in effect at the time of the *Morey* and *Bryant* decisions. That version provided that any case "improperly removed" could be remanded to state court and that any order "*so remanding*" a removed case was not subject to appeal.[82] The "so remanding" language provided the textual hook the majority needed. Recalling the result of *Bryant*—the appellate bar in § 71 of the old Judicial Code was applied to remand orders issued pursuant to § 80—the majority maintained that the *Bryant* Court must have concluded that cases remanded under § 80 for jurisdictional reasons were also cases "improperly removed" under § 71.[83] The majority then explained that, under the plain language of § 71, only cases "so remanded"—*i.e.*, only cases that were remanded under §§ 71 or 80—were subject to the bar against appellate review.[84] Because §§ 1447(c) and

78. *Id.* at 357 (Rehnquist, J., dissenting).

79. *See id.* (Rehnquist, J., dissenting)("If the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open . . . ."); *see also* Braun, *supra* note 9, at 84 ("This ritualistic reliance on boilerplate statutory language elevates form over substance and, in effect, renders *Thermtron*'s exception virtually toothless.").

80. *See id.* (Rehnquist, J., dissenting) ("Yet it is equally clear that such devices would soon render meaningless Congress's express, and heretofore fully effective, directive prohibiting such tactics because of their potential for abuse . . . .").

81. *See* Wasserman, *supra* note 5, at 115 ("[T]he *Thermtron* Court appears to have played 'fast and loose' with the precedent upon which it relied.").

82. 28 U.S.C. § 71 (emphasis added).

83. *See Thermtron*, 423 U.S. at 348.

84. *See id.*

1447(d) represented the 1948 re-codification of §§ 71 and 80, and because the 1948 revision was allegedly intended to carry forward the prior law without material change, the majority concluded that § 1447(c) defined and limited the reach of the appellate bar contained in § 1447(d).[85]

The dissent penned a devastating critique of the majority's use of the phrase "so remanding." First, if the latter phrase was originally intended to limit the reach of the appellate bar, placement of the phrase became crucial. Found exclusively within § 71, it should have limited the appellate bar to § 71 remand orders and excluded remand orders based on § 80.[86] But the old statute was never interpreted this way. *Morey* rejected the approach almost ninety years earlier, completely ignoring the "so remanding" language in the process.[87] The majority tried to get around this problem by positing that *Bryant* applied the appellate bar to a § 80 remand order because the latter also qualified as a § 71 remand order, an interpretation which renders Bryant consistent with the majority's use of "so remanding."[88] But as the dissent pointed out, "there is no such statement anywhere in *Bryant*. . . ."[89] To the contrary, *Bryant* ignored the "so remanding" language and applied the appellate bar to a § 80 remand order because the former was "intended to reach and include all cases removed from a state court into a federal court and remanded by the latter."[90] This is a much broader interpretation of the appellate bar than that allowed by the majority's crabbed reliance upon the "so remanding" language. Second, even if "so remanding" could be interpreted to limit the reach of the appellate bar, the language no longer existed and was therefore irrelevant to an interpretation of the current version of the statute.[91] The majority tried to get around *this* problem by contending that the 1948 revision and re-codification was intended to restate the prior law, but the dissent countered with legislative history stating that the new statutes contained "important changes in substance and phraseology."[92] Moreover, as demonstrated by *Morey* and *Bryant*, the prior law which the 1948 revision purportedly carried

85. *See id.* at 349-51 n.15.

86. *See id.* at 358 (Rehnquist, J., dissenting).

87. *See id.*

88. *Id.* at 348.

89. *Id.* at 359 (Rehnquist, J., dissenting).

90. *Bryant*, 299 U.S. at 381; *see also Thermtron*, 423 U.S. at 359 (Rehnquist, J., dissenting).

91. *See Thermtron*, 423 U.S. at 359 (Rehnquist, J., dissenting).

92. *Id.* at 359-60 (Rehnquist, J., dissenting) (quoting H.R. REP. NO. 308, 80th Cong., 1st Sess., 6, A136.).

forward enforced a broad bar against appellate review, not the limited bar recognized by the majority.[93]

Perhaps the strongest criticism of the majority opinion, however, lies not in what was said in support of the holding, but in what was neglected. Justice White did not have to rely upon repealed statutory language and a dubious intimacy between §§ 1447(c) and 1447(d) to reach the desired result. *Bryant* and *Rice*[94] had previously held that the appellate bar of § 1447(d) should be construed together with other removal statutes, *i.e.*, that the various removal statutes were *in pari materia*. While use of this canon *extended* the reach of the appellate bar to remand orders issued pursuant to other removal provisions, it was only a small additional step to say that the same also *limited* the reach of the appellate bar to such orders. Thus, there was a simple and defensible basis for the result in *Thermtron*: Because the district court remanded the case on grounds which were not found in any removal statute, the bar against appellate review did not apply.

There are problems with this approach as well. As noted by many commentators, the *in pari materia* canon is frequently criticized—along with other canons of statutory construction—for resting upon unrealistic assumptions concerning the legislative process.[95] These criticisms, though, often seem unrealistic themselves, rejecting in the aggregate what is often, in a special case, a simple and defensible application of common sense.[96] A more difficult problem lies in the way the canon is used. The canon is intended only as an aid in determining the meaning of doubtful or ambiguous statutory language.[97] The language of §

93. *See id.* at 360 (Rehnquist, J., dissenting).

94. *See supra* note 53.

95. *See* Solimine, *supra* note 8, at 299-301; *see also* Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621, 679-80 (1990) (quoting Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 651 (1987) ("[B]ill drafters are generally not aware of the canons of construction or other guidelines for interpretation. More importantly, even if they were, it would make no difference, since the logic of the canons is not applicable to the process from which legislation emerges and could not be applied."); Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 682-83 (1987) (criticizing in pari materia rule); Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983) (criticizing the canons of construction as resting upon unrealistic view of legislative process)).

96. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25-27 (1997).

97. *See* Olympus Aluminum Prod., Inc. v. Kehm Enter., Ltd., 930 F. Supp. 1295, 1312-13 (N.D. Iowa 1996) ("Courts resort to the rule of *in pari materia* only in search of legislative intent. It is 'only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and . . . it cannot be invoked where the language of a statute is clear and unambiguous.'") (quoting 82 C.J.S. *Statutes* § 366, at 813 (1953)).

1447(d) and its predecessors, on its face, is certainly not ambiguous. The language has always stated quite plainly that a remand order in a removed case cannot be reviewed on direct appeal or otherwise, and for ninety years prior to *Thermtron* the federal courts enforced that language as comprehensive and free of exceptions. Even in *Bryant* and *Rice*, where the *in pari materia* canon was used to interpret the scope of the appellate bar, it was used to give the same a broad and comprehensive sweep consistent with the general import of the statutory language. Conversely, use of the canon is sometimes rejected where it leads to an interpretation that contradicts the plain language of a statute. This approach reflects "the good sense of taking the statutory language as meaning what it says rather than attempting to divine the legislative intention by departing from the plain meaning of the amendment."[98] Relying upon the *in pari materia* canon to limit the reach of § 1447(d) contradicts the plain language of the statute and the tenor of the *Bryant* and *Rice* decisions.

Because of its many analytical problems, the *Thermtron* decision provoked a spate of commentary, "almost all of it critical and in agreement with the dissent."[99] Stripped of logic and precedent by the latter, the majority opinion seems a rather naked "decision to ignore the express directive of Congress in favor of what it [the majority] personally perceives to be 'justice' in this case."[100] The decision recalls the old maxim that bad facts make for bad law, or at least for dubious reasoning in support of (presumably) good law. As usually happens with such decisions, the underlying reasoning proved difficult to sustain over time. Evidence of this latter point came only twelve years later with the Supreme Court's decision in *Carnegie-Mellon University v. Cohill*.[101]

In *Carnegie-Mellon*, William and Carrie Boyle sued Carnegie-Mellon University ("CMU"), William's former employer, in Pennsylvania state court alleging, *inter alia*, age discrimination under federal and state law.[102] CMU removed the case to federal court, invoking federal question jurisdiction.[103] The Boyles did not contest the removal.[104] In-

98. C.W. Lattimer v. Sears Roebuck & Co., 285 F.2d 152, 157 (5th Cir. 1960); *see also id.* ("'There is no canon against using common sense in construing laws as saying what they obviously mean.'") (quoting Roschen v. Ward, 279 U.S. 337, 339 (1928)(Holmes, J.)).

99. Solimine, *supra* note 8, at 297 n.59.

100. *Thermtron*, 423 U.S. at 360 (Rehnquist, J., dissenting).

101. 484 U.S. 343 (1988).

102. *See id.* at 345.

103. *See id.*

104. *See id.* at 346.

stead, six months later they moved to amend their complaint to delete the allegations of age discrimination—eliminating the sole federal claim in suit and the sole basis for removal jurisdiction—and at the same time moved to remand the suit to state court, conditional upon the proposed amendment of the complaint.[105] The district court granted both motions, remanding the case to state court despite the fact that such a remand was not authorized by § 1447(c) or any other removal statute.[106] CMU sought a writ of mandamus from the Third Circuit, arguing that *Thermtron* precluded the district court from remanding a removed case for any reason not found in § 1447(c).[107] The Third Circuit, sitting *en banc*, split evenly on the issue, leaving the remand order intact.[108] The Supreme Court granted certiorari to resolve a split among the circuits.[109]

Reviewing the matter, the Supreme Court found itself in a bind. Ten years prior to *Thermtron*, the Supreme Court issued its landmark decision in *United Mine Workers v. Gibbs*,[110] which established the modern doctrine of pendent or supplemental jurisdiction.[111] Under *Gibbs*, a federal court exercising its federal question jurisdiction also had pendent jurisdiction to decide any related state law claims.[112] In such cases, if the federal claims were dismissed before trial, federal courts had the discretion to either keep jurisdiction over the remaining state law claims or dismiss the same without prejudice.[113] Subsequent to *Gibbs,* several lower federal courts concluded that, if they had the power *to dismiss* pendent state law claims when the federal claims disappear, they, also had the alternative power *to remand* those claims in lieu of dismissal; particularly where dismissal, even without prejudice, would foreclose a plaintiff from litigating those claims, such as where the applicable statute of limitations has expired.[114] Such orders are called "*Gibbs* remands," one piece of a larger set of orders sometimes referred to as

105. *See id.*

106. *See id.* at 346-47. There was no procedural defect in the actual removal of the case from state court, nor did dismissal of the federal claim deprive the federal court of subject matter jurisdiction over the pendant state law claims. *See id.*

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

108. *See id.* at 348.

109. *See id.* at 348 n.5.

110. 383 U.S. 715 (1966).

111. The common law doctrine of pendent jurisdiction is now codified at 28 U.S.C. § 1367 and called "supplemental jurisdiction."

112. *See Gibbs,* 383 U.S. at 725.

113. *See id.* at 726-27. The presumption, however, is in favor of dismissal.

114. *See Carnegie-Mellon*, 484 U.S. at 351-52.

"discretionary remands."[115] The Supreme Court certainly agreed with the concept of the *Gibbs* remand,[116] but in the specific context of cases removed from state to federal court, such a remand clashed with the express reasoning of *Thermtron*. *Thermtron* stated, quite clearly and more than once, "that a district court may not remand a case to a state court on a ground not specified in the removal statute."[117] At the time, a *Gibbs* remand was entirely discretionary and not authorized by § 1447(c) or any other statute. Accordingly, if the Supreme Court wanted to be consistent with its reasoning in *Thermtron*, it had to reject the viability of the *Gibbs* remand in the removal context. If it wanted to establish the availability of the *Gibbs* remand and apply it to removed cases, it had to overrule or at least downplay certain critical language in *Thermtron*.

The Court chose the latter option, concluding that "when a district court may relinquish jurisdiction over a removed case involving pendant claims, the court has discretion to remand the case to state court."[118] Justice Marshall, writing for a 6-3 majority, acknowledged that prior language in *Thermtron*—to the effect that a district court may not remand a removed case on grounds not contained in the removal statutes—was "far-reaching" and "could be read to support the opposite conclusion."[119] Nevertheless, Justice Marshall insisted such language was not "controlling." Why not? Because the remand order in *Thermtron* was "clearly impermissible," while the order under consideration in *Carnegie-Mellon* was within the district court's discretionary power under *Gibbs*, which presumably means that it was only potentially impermissible.[120] Justice White, who wrote the majority opinion in *Thermtron*, issued a strong dissent joined in by Chief Justice Rehnquist and Justice Scalia.[121] Justice White reiterated his belief, first expressed in his *Thermtron* opinion, "that cases may be remanded only for reasons authorized by statute," and on that basis charged that the majority

115. Another example of a "discretionary remand" is an order based on abstention grounds. The district judge's order in *Thermtron* is an extreme example of a "discretionary remand."

116. *See Carnegie-Mellon*, 484 U.S. at 351-53.

117. *Id.* at 355. Indeed, that was an essential part of the *Thermtron* decision, the initial premise enabling the Court to justify its review of a non-statutory—or discretionary—remand order.

118. *Id.* at 351.

119. *Id.* at 355.

120. *Id.* at 356.

121. *See id.* at 358-64 (White, J., dissenting).

opinion "cannot be reconciled with the holding in *Thermtron*. . . ."[122] Moreover, the majority opinion gave district courts "carte blanche" authority to remand pendent claims on amorphous grounds very similar to those rejected in *Thermtron*, *i.e.*, judicial economy, convenience, fairness, and comity.[123] In so doing, the majority discarded the first foundation of the *Thermtron* exception.[124]

The judicial evisceration of *Thermtron*'s logic did not end with *Carnegie-Mellon*. The Supreme Court recently addressed the reach of § 1447(d) in *Things Remembered, Inc. v. Petrarca*.[125] In *Things Remembered*, Anthony Petrarca filed suit in an Ohio state court against his lessee and a guarantor seeking rent due on two commercial leases.[126] Things Remembered, Inc. ("TRI") was the successor-in-interest on the guaranty.[127] Two months after suit was filed, the lessee filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York.[128] Four months after the bankruptcy petition, TRI removed the court action to the United States District and Bankruptcy Courts for the Northern District of Ohio.[129] TRI based removal on the federal bankruptcy removal statute, 28 U.S.C. § 1452(a),[130]

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122. *Id.* at 358, 361 (White, J., dissenting).

123. *Id.* at 360-61 (White, J., dissenting).

124. However one judges the merits of the majority and dissenting opinions in *Carnegie-Mellon*, there is irony, and perhaps humor, in the resulting confusion. First, in order to prohibit all non-statutory remands in removed cases, the *Thermtron* Court declares that § 1447(d) does not mean what it plainly says. Then, in order to permit some non-statutory remands in removed cases, the *Carnegie-Mellon* Court says that *Thermtron* does not mean what it plainly says. *See In re* Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992). No matter how defensible these decisions are from a policy perspective—and reasonable minds may differ on that point—they are an eyesore analytically. *See* Solimine, *supra* note 8, at 323-24 (suggesting that *Thermtron* and *Carnegie-Mellon* are "dubious" cases from the standpoint of statutory construction, but are "far more defensible" from the perspective of "sound judicial policy.").

125. 516 U.S. 124 (1995).

126. *See id.* at 125.

127. *See id.*

128. *See id.* at 125-26.

129. *See id.* at 126.

130. Section 1452(a) provides that

> [a] party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, 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.

28 U.S.C. § 1452(a)(1994). 28 U.S.C. § 1334(a) provides that "[e]xcept as provided in subsec-

and the general federal removal statute, 28 U.S.C. § 1441(a).[131] TRI also moved the Ohio District Court to transfer venue of the removed action to the Bankruptcy Court in the Southern District of New York, so that the guaranty claims could be decided within the same proceedings as the underlying lease claims.[132] Petrarca responded by filing motions to remand with both the Ohio District and Bankruptcy courts.[133] The District Court consolidated the motions in the Bankruptcy Court.[134] The Bankruptcy Court held that TRI's removal petition was untimely under § 1452(a), but timely under §§ 1441 and 1446, and thus removal was proper.[135] The Bankruptcy Court then granted TRI's motion to transfer venue to the Bankruptcy Court in the Southern District of New York.[136] Petrarca appealed these decisions to the District Court in the Northern District of Ohio.[137] The District Court reversed, concluding that TRI's removal petition was untimely under both §§ 1441(a) and 1452(a) and that the Bankruptcy Court lacked jurisdiction over the case.[138] The reversal left the Bankruptcy Court no option but to remand the case to state court.[139] TRI appealed the remand order to the Sixth Circuit Court of Appeals.[140] The Sixth Circuit dismissed the appeal for lack of jurisdiction, concluding that §§ 1447(d) and 1452(b)[141] barred appellate review of the remand order.[142]

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tion (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a) (1994).

131. *See Things Remembered*, 516 U.S. at 126.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.* at 127.

140. *See id.*

141. 28 U.S.C. § 1452(b) contains a separate bar against appellate review of remand orders applicable to cases removed pursuant to section 1452(a):

> The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1452(b).

142. *See Things Remembered*, 516 U.S. at 127.

The Supreme Court granted certiorari and affirmed.[143] TRI argued to the Court as follows: Because the matter was a bankruptcy case removed pursuant to § 1452(a), the remand power and corresponding appellate bar contained in §§ 1447(c) and 1447(d) did not apply.[144] Rather, the remand power and appellate bar contained in § 1452(b) applied.[145] The latter provision allowed the district court to remand the case to state court "on any equitable ground."[146] It made no reference to remands on the basis of jurisdictional or procedural defects.[147] Because the district court remanded on a procedural defect, the order fell outside the statutory authority conferred by § 1452(b), and therefore the latter statute's appellate bar did not apply.[148]

The Supreme Court rejected this argument. Justice Thomas, writing for a unanimous Court, stated that § 1447(d) applies "not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under any other statutes, as well."[149] This statement contradicts the linchpin of the *Thermtron* analysis. *Thermtron* declared a special relationship between §§ 1447(c) and 1447(d) based on a reading of prior statutory language linking the predecessors of these two statutes together. This link provided the basis for *Thermtron*'s conclusion that the former defines and limits the reach of the latter. This same link does not exist between §§ 1452(a) and 144(d), but Justice Thomas rejected the need for the link altogether, thereby discarding the second foundation of the *Thermtron* exception. Hearkening back to the *Bryant* and *Rice* decisions, Justice Thomas reasoned that § 1447(d) is *in pari materia* with all removal statutes, not just § 1447(c), and thus has a broad application to any remand order issued under a removal statute. This development signals acceptance of the stronger analytical approach, discussed above, which *Thermtron* neglected. The flip side of *Things Remembered* is that any remand order which is not based on a removal statute is not subject to the bar against appellate review.[150] The latter stands as the current for-

143. *See id.* at 127, 129.

144. *See id.* at 128-29.

145. *See id.*

146. *Id.*; *see also supra* note 141 (quoting statute).

147. *See Things Remembered*, 516 U.S. at 128-29.

148. *See id.* In other words, if TRI's position prevailed, *Things Remembered* would limit the scope of § 1452(b) the way *Thermtron* limited the scope of § 1447(d).

149. *Id.* at 128 (quoting United States v. Rice, 327 U.S. 742 (1946)(brackets in original)). Three justices wrote or joined in separate concurring opinions. *Id.* at 124.

150. *See In re* Matter of Florida Wire & Cable Co., 102 F.3d 866, 868 (7th Cir. 1996) ("The Court's opinion in *Things Remembered*, as well as Justice White's dissenting opinion in

mulation of the *Thermtron* exception. It places the same on stronger footing, a welcome development in this confusing area of removal jurisdiction.

III. THE 1996 AMENDMENT

Unfortunately, just as the Supreme Court seemed to be sorting out the confusion underlying the *Thermtron* exception and articulating a more defensible basis for the same, Congress stepped in and injected a new source of confusion. In late-1996, Congress amended § 1447(c) in a way that can be read to negate the *Thermtron* exception almost in its entirety.

Before addressing the details of the 1996 amendment, it is helpful to consider the recent evolution of § 1447(c). Beginning in 1948, and continuing to the time that *Thermtron* and *Carnegie-Mellon* were decided, § 1447(c) provided as follows:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.[151]

The phrase "improvidently and without jurisdiction" was read disjunctively, such that remand was proper if removal was improvident or if jurisdiction was lacking.[152] The word "improvidently" was interpreted "legally defective," meaning there were either procedural defects in the manner of removal or substantive, non-jurisdictional defects in the nature of the removal.[153] This version of § 1447(c) was enabling in nature, establishing the contours of a district court's power to remand a case removed from state court. When read in conjunction with § 1447(d) as required by *Thermtron* and *Carnegie-Mellon*, it limited the appellate bar to remand orders based on a lack of subject matter jurisdiction or the presence of legal or procedural defects. It is important to note, however, that the latter categories were not exhaustive. To the contrary, as evidenced by the *Carnegie-Mellon* decision, there were valid grounds to remand a case which fell outside the scope of § 1447(c). When a district

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[*Carnegie-Mellon*], make it clear that the important distinction is between remand orders authorized by statute, which are nonreviewable, and those that are not, which are reviewable.").

151. 28 U.S.C. § 1447(c) (1976 & 1987).

152. *See supra* note 67 and accompanying text.

153. *See id.*

court remanded on such grounds, the decision fell outside the scope of the appellate bar.

In 1988, ten months after *Carnegie-Mellon* was decided, Congress amended § 1447(c).[154] The new language altered the phrasing of the grounds for removal and imposed a thirty-day time limit for filing a motion to remand based on a procedural defect:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .[155]

This version of § 1447(c), unlike its predecessor, was more procedural than enabling in nature. It shifted the emphasis from the bases for remanding a case to the timing of such a remand. The shift in emphasis had no effect upon the validity of the *Thermtron* exception, because the statute still referenced two distinct grounds for remanding a case to state court.[156] In fact, the amended language actually expanded the scope of the *Thermtron* exception. Expansion came about through Congress's substitution of the phrase "any defect in removal procedure" for the prior reference to cases "removed improvidently." "Improvident[]" removals included cases that were either procedurally defective or legally defective in some non-jurisdictional manner. For instance, a remand order based on pre- or post-litigation conduct amounting to a waiver of the removal right is based on a legal defect which is neither procedural

154. *See* Act of November 19, 1988, Pub. L. No. 100-702, Title X, § 1016(c), 102 Stat. 4642, 4670.

155. *Id.*

156. While the shift had no actual effect on *Thermtron*, one can argue that it called into question the continuing viability of the *Thermtron* exception. Prior to the 1988 amendment, the purpose of § 1447(c) was to list, and therefore limit, the statutory grounds for remanding a case removed from state court. This purpose facilitated *Thermtron* because limiting the grounds for statutory remand orders suggested a potential basis for limiting the scope of the statutory bar against appellate review. After the 1988 amendment, the principal purpose of § 1447(c) was not to establish the potential grounds for issuing a remand order, but to prescribe the timing of seeking such an order. This shift undermined *Thermtron* because establishing procedures for seeking a remand order does not suggest a basis for limiting the scope of the appellate bar. The 1988 Amendment was never construed in this fashion, perhaps because of the perceived desirability of the *Thermtron* exception from a policy perspective. A more likely explanation is the fact that the statute still made reference to two distinct grounds for issuing a remand order, *i.e.*, procedural defects and jurisdictional defects. In this respect the amended statute was still enabling in nature and still suggested the same grounds for limiting the appellate bar as before.

nor jurisdictional in nature. Because such an order fell within the scope of an "improvident[]" removal under the previous version of § 1447(c), it fell within the scope of the appellate bar in § 1447(d). Switching to the language "any defect in removal procedure" excluded non-jurisdictional defects which were also not procedural. After the switch, a remand order based on waiver of the removal right fell outside the scope of § 1447(c) and also outside the scope of the appellate bar, thereby expanding the reach of the *Thermtron* exception.[157]

The foregoing expansion of the *Thermtron* exception provides a convenient segue into a discussion of the 1996 amendment to § 1447(c), because this expansion arguably provoked Congress to pass that amendment. After Congress passed the 1988 amendment, federal courts struggled with classifying certain types of remand motions for purposes of applying the thirty-day limit. The most common example of this struggle concerned remand motions based on 28 U.S.C. § 1441(b), which provides that diversity cases cannot be removed to federal court if any defendant is a citizen of the forum state.[158] Courts disagreed as to whether this provision imposed a procedural or jurisdictional requirement because it did not fit comfortably within either category: It was not jurisdictional, because diversity can exist in situations where one of the defendants resides in the forum state; and it was not procedural, because it had nothing to do with the "mechanics" of removal but rather concerned the citizenship of a party.[159] In an effort to clarify the statute, Congress amended § 1447(c) effective October 1, 1996.[160] The amend-

157. Another expansion came about by means of the thirty-day limit itself. Some courts now hold that even a remand order based on a procedural defect is reviewable on appeal if the motion to remand was filed outside the thirty-day time limit. *See In re* Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991); *see also* Korea Exchange Bank, New York Branch v. Trackwise Sales Corp., 66 F.3d 46, 48-51 (3rd Cir. 1995). These courts reason that, as the underlying motion was untimely, the remand order was not authorized by the governing statute and therefore is not protected by the bar against appellate review.

158. *See* 28 U.S.C. § 1441(b). *See also* David D. Siegel, *Commentary on 1996 Revision of Section 1447(c)*, 28 U.S.C.A. §1447 (1998).

159. *See Korea Exchange Bank*, 66 F.3d at 48-51 (finding provision to be a procedural requirement); Lamotte v. Roundy's Inc., 27 F.3d 314, 316 (7th Circuit recognizing split of authority without deciding issue); Hurt v. Dow Chemical Co., 963 F.2d 1142, 1145-46 (8th Cir. 1992) (finding provision to be a jurisdictional requirement); *In re* Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991) (finding provision to be a procedural requirement); *see also* David D. Siegel, *Commentary on 1996 Revision of Section 1447(c)*, 28 U.S.C.A. §1447 (1998).

The issue did not necessarily pose an "either-or" question. There was a third option available, which was to hold that a remand motion based on a defect which is neither procedural nor jurisdictional falls outside the thirty-day time limit like any other motion based on a non-procedural defect.

160. *See* Act of October 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022.

ment dropped the phrase "any defect in removal procedure" when designating the type of remand motions subject to the thirty-day limit.[161] In its place, the amendment inserted broader language making the thirty-day limit applicable to remand motions based on any non-jurisdictional defect. The statute, as amended, reads as follows:

> 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 § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.[162]

The implications of this change, as will be explained below, may be dramatic. If dramatic, such a change will come as a complete surprise to Congress. Congress did not intend or understand the new language to affect a dramatic change in the law. To the contrary, the legislative history establishes that Congress thought the amendment technical in nature, merely a clarification of prior legislative intent. Granted, it turns proper analyses backward to review the legislative history of a statute before considering its text.[163] Moreover, the value of legislative history as an interpretive tool is subject to serious debate on several fronts.[164] Consistent with these objections, the intent here is not to trumpet the legislative history of the 1996 amendment as a primary, or even proper, basis for interpretation. It is only to demonstrate the apparent gap between what Congress thought it was doing and what it actually did.

The legislative history is not ample and many statements therein simply parrot the amended language of the statute. The Senate submitted no report on the legislation and held no floor debate.[165] The House Judiciary Committee issued a report, but held no hearings on the matter.[166] Hearings were thought unnecessary "because [the Committee] viewed the bill as technical and noncontroversial, and it received broad bipartisan support."[167] When setting forth the purpose of the change, the House Report stated that the amendment "clarifies . . . the intent of

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161. *Id.*

162. 28 U.S.C.A. §1447(c) (1998) (emphasis added).

163. *See* SCALIA, *supra* note 96, at 31.

164. *See id.* at 29-37.

165. *See* H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. 3417; *see also* 141 CONG. REC. S9580-02 (June 30, 1995).

166. *See* H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. at 3417-18.

167. H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. at 3417-18.

Congress that [the] thirty-day limit applies to any 'defect' other than the lack of subject matter jurisdiction."[168] The House Report also stated that the clarification became necessary in light of the confusion generated by the 1988 amendment:

> In the Judicial Improvements and Access to Justice Act of 1988, Congress required that a "motion to remand the case on the basis of any defect in removal [procedure] must be made within 30 days after the filing of the notice of removal under section 1446(a)." The intent of this amendment was to impose a thirty-day time limit on all motions to remand except in those cases where the court lacks subject matter jurisdiction. The intent of the Congress is not entirely clear from the current wording of 28 U.S.C. § 1447(c), and it has been interpreted differently by different courts. S. 533 clarifies the intent of Congress that a motion to remand a case on the basis of any defect other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under 28 U.S.C. § 1446(a).[169]

Similar statements exist elsewhere in the legislative history. A letter included in the House Report states that the change "clarif[ies] that the thirty-day limit for remanding a case from federal court to state court applies to all motions to remand, except in cases in which the federal court lacks subject matter jurisdiction."[170] Statements made during the brief "debate" on the floor of the House confirm the corrective and technical nature of the amendment. Congressman Moorhead from Cali-

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168. H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. at 3417-18.

169. *Id.* (emphasis added).

170. *Id.* (emphasis added). The letter is written by the Director of the Congressional Budget Office ("CBO") to the Chairman of the House Judiciary Committee and generally concerns whether the bill poses "any significant impact on the federal budget." *Id.* Interestingly, the letter concludes that "the bill would effect only a small number of cases because most courts are already interpreting the law in a manner consistent with [the bill]." *Id.* For that reason, the "CBO estimate[d] that any resulting decrease in the caseload of the federal court system would be negligible . . . ." *Id.* Moreover, although courts interpreting the current law differently than the proposed bill "may experience a slight increase in the number of cases remanded to them, [the] CBO estimate[d] that the cost of this increased caseload would be minimal." *Id.* One may reasonably question, however, the value of this letter as legislative history given that the statements therein are the remarks of the CBO and not the House Judiciary Committee. For instance, the notion that the bill might increase the caseloads of state courts in federal districts employing a contrary interpretation of the prior law seems incorrect. Vis-a-vis such districts, the bill subjects more remand motions to the thirty-day limit than was previously the case. Presumably, subjecting more remand motions to the time limit will result in less remand orders, because it increases the chance that a plaintiff will waive the right to file a remand motion.

fornia essentially quoted the House Report in stating that the intent of the amendment was only to clarify the original intent of the 1988 amendment:

> Today, I rise in support of S. 533. In the Judicial Improvements and Access to Justice Act of 1988, Congress required under section 1447(c) of Title 28 of the United States Code that a "motion to remand the case on the basis of any defect in removal [sic] must be made within 30 days after the filing of the notice of removal under section 1446(a)."
>
> The intent of the Congress is not entirely clear from the current wording of § 1447(c), and courts have interpreted it differently. S. 533 merely clarifies the intent of the Congress that a motion to remand a case on the basis of any defect other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under § 1446(a).[171]

Congresswoman Schroeder from Colorado emphasized the technical nature of the amendment:

> As the gentleman from California has noted, this is a technical clarification made necessary by some language in section 1447(c) of title 28 that is not as clear as it should be.
>
> Section 1447(c) requires motions to remand based on "any defect in removal procedure" to be filed within 30 days of the filing of the notice of removal. This language is unclear because no time limit applies to motions to remand based on lack of subject matter jurisdiction. S. 533 clarifies that "defect" encompasses any defect other than subject matter jurisdiction.
>
> This correction is necessary to remove the ambiguity in the law. I urge my colleagues to support it.[172]

These statements confirm that Congress did not think it was altering the operation of § 1447(c) so much as clarifying and perhaps restoring its initial intentions when creating the thirty-day limit in 1988.

The foregoing leads to an obvious question: If the 1996 amendment to § 1447(c) is merely a "technical clarification," how does it undermine the viability of the *Thermtron* exception to the bar against appellate review? To answer that question, we may turn to Professor David Siegel,

171. 142 CONG. REC. H10459-02 (Sep. 17, 1996).

172. *Id.*

an authority on matters of federal procedure who authored the Commentaries to the 1988 and 1990 Judicial Improvements Acts and also to the 1996 Revision of § 1447(c).[173]

Professor Siegel, focusing on the text of the revised statute, explains that § 1447(c) is now worded, "[a]t least on its face, . . . like a residuary clause that has the curious side effect of cancelling some specific bequests."[174] By describing the new language as a "residuary clause," Professor Siegel suggests that the amended statute, unlike its predecessors, addresses the entire universe of remand orders—jurisdictional and all the rest—and not just a limited subset of two specific orders—jurisdictional and procedural.[175] Under such a reading, every remand motion which is not based on a lack of subject matter jurisdiction is subject to the thirty-day limit.[176] There is support for this interpretation in the legislative history to the 1996 amendment. For example, the House Report states that Congress's intent in passing the 1988 amendment "was to impose a thirty-day limit on all motions to remand except in those cases where the court lacks subject matter jurisdiction."[177] That intent was not entirely clear, the Report continues, and so the 1996 amendment was necessary to clarify matters.[178] Congresswoman Schroeder stated that the amendment "clarifies that 'defect' encompasses any defect other than subject matter jurisdiction."[179] This statement, while not a precise definition of what is meant by use of the term "defect," suggests the creation of a residuary clause akin to that described by Professor Siegel.

If Professor Siegel's interpretation of the new language is correct, the restructuring of the statute brings within the scope of the thirty-day limit several types of remand motions which previously did not fall within its scope.[180] The problem is that it may be "conceptually impossible" to apply the time limit to many of these newly-affected motions.[181]

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173. *See* David D. Siegel, *Commentary on 1996 Revision of Section 1447(c)*, 28 U.S.C.A. §1447 (1998).

174. *Id.*

175. *See id.*

176. *See id.*

177. *See* H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. at 3418. This statement was repeated by the CBO in its letter discussing the financial implications of the proposed amendment. *See id.* at 3419; *see also supra* note 170.

178. *See* 142 CONG. REC. H10459-02 (Sep. 17, 1996).

179. *Id.*

180. *See* David D. Siegel, *Commentary on the 1996 Revision of Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998). One should note that, while Professor Siegel posits this interpretation as plausible and literal, it is not an interpretation he advocates. *See id.*

181. *See id.*

Consider, for example, a remand motion based on one of the "abstention" doctrines. Such a motion asks the court to exercise its discretionary power to remand a state law case based on the presence of certain "exceptional circumstances," circumstances which implicate abstract considerations of "proper constitutional adjudication," "regard for federal-state relations," or "wise judicial administration."[182] As Professor Siegel notes, "[t]he occasion for deciding whether to abstain can arise well into the litigation, far beyond the thirty-day time period that applies to remand motions under § 1447(c)."[183] Consider as well remand motions based on a federal court's discretionary power to refrain from exercising its pendent or supplemental jurisdiction, previously referred to as *Gibbs* remands.[184] Such motions often follow—or are considered *sua sponte* with—a decision dismissing the main federal claim providing the basis for federal jurisdiction.[185] These dismissals often come late in a case, and in any event well after expiration of the thirty-day time period.[186] In circumstances such as these, Professor Siegel concludes that "[i]t would be impossible to apply the thirty-day period, and unreasonable to think that Congress intended to."[187] Yet, "[u]nder the literal language of the 1996 amendment, . . . the section 1447(c) thirty-day time period applies."[188] Professor Siegel thus likens the new language to "the tuna net that incidentally kills the porpoise."[189]

Professor Siegel's literal interpretation of the 1996 revision creates an additional problem which his Commentary does not discuss: It nearly swallows the *Thermtron* exception whole. Ever since the Supreme Court's decision in *Things Remembered*, the bar against appellate

182. *See id.*; *see also* Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 716 (1996). For example, the Supreme Court recognizes the power of lower federal courts to abstain from exercising their jurisdiction whenever (1) doing so would interfere with a pending state criminal proceeding or certain types of state civil proceedings, (2) the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law, (3) the case raises issues the proper adjudication of which might be impaired by unsettled questions of state law, or (4) the case is duplicative of pending state proceedings. *See id.* at 716-17 (citations omitted).

183. David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

184. *See* 28 U.S.C. § 1367(c).

185. *See* 28 U.S.C. § 1367(c)(3); *see also* David D. Siegel, *Commentary on the 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

186. *See* David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

187. *Id.*

188. *Id.*

189. *Id.*

review has applied only to remand orders issued pursuant to a removal statute, which includes remand orders issued pursuant to § 1447(c). At the time of the decision, § 1447(c) still bore the language of the 1988 revision. It authorized remand on the grounds of a procedural or jurisdictional defect only, and when read in conjunction with § 1447(d), similarly limited the appellate bar to such remand orders. Now, as amended by Congress and interpreted by Professor Siegel, § 1447(c) encompasses the entire universe of remand motions. Any remand motion—and, more importantly, any resulting remand order—is referable to § 1447(c) and falls within its scope. If § 1447(c) encompasses all remand orders in removed cases, then § 1447(d) precludes appellate review of all remand orders in removed cases. Such an interpretation brings the law full circle, restoring the interpretation of the appellate bar which existed for ninety years prior to the Supreme Court's decision in *Thermtron*. The *Thermtron* exception is thus another porpoise snagged in the tuna net of the 1996 revision to § 1447(c).[190]

IV. JUDICIAL TREATMENT OF THE 1996 AMENDMENT

Despite the apparent logic of Professor Siegel's interpretation of the 1996 revision and the implications of that interpretation for the reach of the appellate bar, it is too soon to mourn (or toast) the death of *Thermtron* and its progeny. If one assents to the proposition that the *Thermtron* exception, at its core, reflects a naked policy choice by the Supreme Court and the lower circuit courts of appeals in favor of extending appellate review to any and all decisions emanating from federal district courts, then one should not be easily convinced that these same courts are likely to abandon the *Thermtron* exception. History shows that the Supreme Court is unlikely to accord a literal interpretation to statutory language, or even its own precedent, if doing so will result in or encourage an absolute bar against appellate review.[191] The Court has shown itself able and willing to finesse the clearest language—the language of §

190. Even under the above interpretation, however, the *Thermtron* exception would not disappear entirely. At least one such exception would remain. As noted *supra* note 157, some courts hold that a remand order based on a motion subject to the thirty-day limit and which failed to comply with that limit is reviewable on appeal. Because the underlying motion was filed untimely, the subsequent remand order is not authorized by a removal statute and is therefore reviewable. This application of *Thermtron* is not affected by Professor Siegel's interpretation of the 1996 revision.

191. *Things Remembered* may actually signal a shift in favor of a broader appellate bar, at least at the Supreme Court level, because it extends the reach of the appellate bar to remand order issued under any removal statute. At this juncture, however, it remains to be seen how far the Court is willing to go.

1447(d) in *Thermtron*, the language of *Thermtron* in *Carnegie-Mellon*—in order to craft an appellate bar to its liking. There is little reason to think that either the Supreme Court or the lower appellate courts will reverse course now.

Still, the statute says what it says. Courts will have to interpret the new language. Those that are careful will recognize the implications of the 1996 revision for both the thirty-day limit and the appellate bar. They will have to employ some means of ignoring or avoiding the textual problems created by the revision on both fronts. A review of post-amendment case law, and careful consideration of the language itself, reveals several possible approaches.

One "approach" is not really an approach at all. Several recent decisions from federal circuit courts of appeals have an "ignorance is bliss" quality to their analysis. For example, the Ninth Circuit recently applied the *Thermtron* exception to review a discretionary remand order issued pursuant to the Declaratory Judgment Act, codified at 28 U.S.C. § 2201.[192] The Eighth Circuit applied the *Thermtron* exception to review a discretionary remand order based on the existence of concurrent jurisdiction.[193] Twice, the Eleventh Circuit applied the *Thermtron* exception to review a discretionary *Gibbs* remand pursuant to the supplemental jurisdiction statute, codified at 28 U.S.C. § 1367.[194] All of these decisions are incorrect under Professor Siegel's literal interpretation of § 1447(c) as a "residuary clause," yet none of the decisions acknowledge the problem or give any indication that the issuing courts were aware that § 1447(c) was revised in late-1996.[195] In fact, three of the decisions refer-

192. *See* Snodgrass v. Provident Life and Accident Ins. Co., 147 F.3d 1163, 1165 (9th Cir. 1998). Subsequent to this decision, the District Court of Hawai'i similarly applied the *Thermtron* exception to reconsider its earlier decision to remand a case under the Declaratory Judgment Act. *See* Maui Land & Pineapple Co. v. Occidental Chemical Corp., 24 F. Supp. 2d 1083, 1085 (D. Haw. 1998).

193. *See* Williams v. Ragnone, 147 F.3d 700, 702 (8th Cir. 1998).

194. *See* Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1350-51 n.3 (11th Cir. 1998); First Union National Bank of Florida v. Hall, 123 F.3d 1374, 1377-78 (11th Cir. 1997).

195. To be fair, it is unclear from reading these cases whether the remand orders involved were issued prior to or after the effective date of the 1996 revision, which was October 1, 1996. *Snodgrass* was submitted for decision in November, 1997 and decided in July, 1998, but the underlying state court action seems to have been filed in late-1995 and was removed to federal court soon thereafter. *See Snodgrass*, 147 F.3d at 1163, 1164. After removal, the district court raised the question of remand *sua sponte*, and there is no indication when the remand order issued. *See id.* at 1165. *Williams* was submitted for decision in March, 1998 and decided in June, 1998. *See Williams*, 147 F.3d at 700. No other dates may be inferred from the text of the decision. *See id.* at 701-03. *Engelhardt* was decided in April, 1998. *See Engelhardt*, 139 F.3d at 1346. A motion to dismiss the appeal was denied by a separate panel in June, 1997, *see id.* at n.2, and it appears the underlying state court suit was filed in late-1995

ence the old statutory language and standards.[196] This trend exists at the trial court level as well. Several federal district courts, when considering a motion to remand or making a general reference to § 1447(c), similarly failed to notice or acknowledge the 1996 revision.[197] One district court not only missed the 1996 revision to § 1447(c), but missed the 1988 revision as well, citing and quoting the version of the statute in effect when *Thermtron* was decided in 1976.[198]

A variant of the foregoing "approach" acknowledges the amended language, but interprets or applies the same utilizing the old "procedural versus jurisdictional" dichotomy embodied in the prior statute. For example, the Fifth Circuit recently issued a decision which, after repeating the revised version of the thirty-day limit, stated that whether the time limit applied to a remand motion based on § 1445(c) turned "on whether the removal of [a state worker's compensation claim] causes a procedural or jurisdictional defect."[199] The District Court for the Eastern District of Pennsylvania recently issued a decision which, after quoting the

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and removed shortly thereafter. *See id.* at 1348-49. However, remand was not considered until after discovery and the filing of dispositive motions, and thus could have occurred either before or after the critical date of October 1, 1996. *See id.* at 1349-50. *First Union* was decided in September, 1997. *See First Union*, 123 F.3d at 1374. No other dates may be inferred from the text of the decision. *See id.* at 1376-81. It is possible that all four decisions involved remand orders issued before the effective date of the 1996 revision. Even so, it is unclear whether that affects the circuit court's power to hear the respective appeals. It seems it should have no effect so long as the appellate court's jurisdiction was triggered post-amendment, which almost certainly was the case in each of these appeals.

196. *See Snodgrass*, 147 F.3d at 1165; *Williams*, 147 F.3d at 702; *First Union*, 123 F.3d at 1377-78.

197. *See* Miller v. Riddle Memorial Hospital, 1998 WL 272167, *2, 7-8 (E.D. Pa. 1998); Champagne v. Revco D.S., Inc., 997 F. Supp. 220, 221 n.1 (D. R.I. 1998); Codapro Corp. Wilson, 997 F. Supp. 322, 324 (E.D.N.Y. 1998); Mitchell v. Racer Components, Inc., 1997 WL 781862 *1 (W.D.N.Y. 1997); McShares, Inc. v. Barry, 979 F. Supp. 1338, 1341 (D. Kan. 1997); Stein v. Sprint Comm. Co., 968 F. Supp. 371, 375 (N.D. Ill. 1997); Alexander v. Certified Master Builder Corp., 1997 WL 298448 *2 (D. Kan. 1997);Davis v. Ciba-Geigy Corp., 958 F. Supp. 264, 266 (M.D. La. 1997); Teajman v. Frigoletti, 1997 WL 1067639 *2 n.5 (D. N.J. 1997); Ren-Den Farms, Inc. v. Monsanto Co., 952 F. Supp. 370, 373 (W.D. La. 1997); Yanez v. Humana Med. Plan, Inc., 969 F. Supp. 1314, 1316 (S.D. Fla. 1997); Allstate Ins. Co. v. Ford Motor Co., 955 F. Supp. 667, 669 (W.D. La. 1996); Glaze v. Ahmad, 954 F. Supp. 137 (W.D. La. 1996). Some of these omissions, particularly those issued in late-1996 or early-1997, may simply be a function of the lag time between passage of the amendment and notice of the amendment via the 1997 supplements to the U.S. Code or U.S. Code Annotated. While there are more reliable ways to update the status of a statute, it is plausible that many lower courts rely principally upon the paper supplements to bound volumes of the federal statutes.

198. *See* Tyree v. The Burlington N. & Santa Fe Ry. Co., 973 F. Supp. 786, 793 n.5 (W.D. Tenn. 1997) (quoting older version of statute which authorized remand if "the case was removed improvidently and without jurisdiction").

199. Sherrod v. American Airlines, Inc. 132 F.3d 1112, 1117 (5th Cir. 1998).

revised version of the statute, stated that "[c]ase law confirms that the thirty day limit applies only to a motion based on a failure to follow the procedural requirements of § 1446, as opposed to a fundamental jurisdictional defect.[200] And the District Court for the Southern District of Florida recently issued a decision which quoted the revised version of the statute and even acknowledged that "one could interpret this amendment as altering the scope of § 1447(c)," but then rejected this possibility by noting that "the Eleventh Circuit twice concluded that a Defendant may not seek review of remand orders based on the lack of subject matter jurisdiction or the existence of a procedural defect."[201]

The foregoing will not continue indefinitely. Sooner or later, federal courts will realize the fact of the 1996 revision and its possible implications. When they do, many will seek an interpretation which avoids any radical alteration of either the thirty-day limit or the appellate bar. There is a textual approach which accomplishes this end. The approach focuses on the meaning of the word "defect." The 1996 revision to § 1447(c) drops the word "procedural" but retains the word "defect" within the designation of the thirty-day limit.[202] Said limit now applies to "any *defect* other than lack of subject matter jurisdiction."[203] Professor Siegel interprets the latter phrase as a residuary clause encompassing whatever does not fall within the rubric of subject matter jurisdiction.[204] Perhaps "defect" has a narrower meaning. On its face, the term reasonably implies either the lack of something necessary or the presence of something objectionable.[205] Errors such as an untimely notice of removal, failing to obtain the consent of all co-defendants, the presence of a resident defendant in a diversity case, conduct amounting to a waiver of the removal right—these are all matters fitting comfortably within the above definition of "defect." They involve either the absence of something necessary (timely notice, unanimous consent) or the presence of something objectionable (resident defendant, waiver). Moreover, they present mandatory grounds for remanding a case because the corre-

200. Feldman v. New York Life Ins. Co., 1998 WL 94800 at *3 (E.D. Pa. 1998).

201. Somoano v. Ryder Systems, Inc., 985 F. Supp. 1476, 1477 (S.D. Fla. 1998) (citing Ariail Drug Co., Inc. v. Recomm Int'l Display, Ltd., 122 F.3d 930, 933 (11th Cir. 1997) and New v. Sports & Recreation, Inc., 114 F.3d 1092, 1095 n.5 (11th Cir. 1997)).

202. *See* Act of October 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022.

203. 28 U.S.C.A. § 1447(c) (1998) (emphasis added).

204. *See* David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

205. One dictionary defines "defect" as follows: "1. The lack of something necessary or desirable; deficiency. 2. An imperfection; a failing; fault." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New Coll. Ed. 1980).

sponding law precludes removal in the first place. Discretionary remands are a different matter altogether. Discretionary remands—abstention-based remands, *Gibbs* remands, or remands under the Declaratory Judgment Act—involve prudential judgments based on abstract policy considerations that may or may not warrant the exercise of the court's remand power. Such remand motions are not based on concrete errors precluding removal outright and therefore fall outside the above definition of "defect." Under this approach, discretionary remand motions should not be subject to the thirty-day limit and remand orders resulting therefrom should not be subject to the bar against appellate review.

There is precedent for such an interpretation. As indicated in Part III of this Article,[206] an older version of § 1447(c)—the version in effect when *Thermtron* was decided—authorized remanding cases "removed improvidently and without jurisdiction."[207] Cases were "improvidently removed" of there were either procedural defects in the manner of removal or "legal" defects in the nature of the removal, *i.e.*, non-jurisdictional defects which were also not procedural.[208] The 1988 revision dropped this language and inserted in its place a time limit for remand motions asserting "any defect in removal procedure."[209] The revised language excluded remand motions based on so-called "legal" defects, and courts subsequently struggled with how to characterize such motions for purposes of the thirty-day limit.[210] In direct response to this confusion, Congress passed the 1996 revision, dropping the reference to "removal procedure" in favor of the current "any defect other than lack of subject matter jurisdiction."[211] Defining the term "defect" as discussed above returns the statute to this original interpretation, which may have been Congress's actual intention. More importantly, it reduces the confusion created by the 1988 revision without inflicting collateral damage. It manages to bring within the scope of the thirty-day limit—and therefore within the scope of the appellate bar—all of those

206. *See supra* notes 151-53 and accompanying text.

207. *See Thermtron*, 423 U.S. at 589.

208. *See supra* notes 151-53 and accompanying text.

209. *See* Act of November 19, 1988, Pub. L. No. 100-702, Title X, § 1016(c), 102 Stat. 4642, 4670.

210. *See* David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

211. *See* Act of October 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022; *see also* H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. 3417 at 3418; *see also* David D. Siegel, *Commentary on the 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

mandatory remand motions which do not fit within the labels "procedural" or "jurisdictional." At the same time, it spares those discretionary remand motions which may be "conceptually impossible" to file within the thirty-day limit.[212] Such a result is a reasonable interpretation of the statutory text and best reflects Congress's intentions in passing the 1996 amendment.[213]

Another approach focuses on the practical realities surrounding application of the thirty-day limit. As explained by Professor Siegel, interpreting the new language as a "residuary clause" purports to bring within the scope of the thirty-day limit several discretionary remand motions—*Gibbs* remands, abstention-based remands, etc.—which are "conceptually impossible" to bring within the limit.[214] Because one may presume that Congress did not intend to legislate in this fashion, Professor Siegel suggests that recognition of the problem speaks against a literal interpretation of the revised statute:

> With its very assertion of the time limit, including a starting time measured from the original notice of removal, § 1447(c) obviously aims at defects, whether of procedure or of subject matter jurisdiction, that are in the case when it first arrives in federal court. While in some instances it may indeed be appropriate to remand a case because of some later development . . . remands in the "supplemental jurisdiction" category should not be deemed

212. David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

213. The legislative history is not clear on this point, however. For example, the proffered interpretation is undercut by the statement in the House Report explaining that the 1996 revision "clarif[ies] that the thirty-day limit for remanding a case from federal court to state court *applies to all motions to remand, except in cases in which the federal court lacks subject matter jurisdiction.*" *See* H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. 3417 at 3418 (emphasis added). The highlighted language rejects a narrow interpretation of the term "defect" and is more consistent with Professor Siegel's interpretation of section 1447(c) as a residuary clause.

One should also note that even under the narrow interpretation of the term "defect" posited above, the 1996 revision expands the reach of § 1447(c) and the bar against appellate review. Prior to the revision, it could be argued that certain non-jurisdictional remand motions fell outside the scope of § 1447(c) because they were not based on a clear procedural defect, *e.g.*, remand motions based on a resident defendant or a waiver of the removal right. Consequently, any remand order resulting from such a motion arguably fell outside the scope of the appellate bar. Under the revised statute, these same motions fall within the scope of § 1447(c) simply by being non-jurisdictional. Once within the scope of the statute, they fall under the protection of the appellate bar.

214. *See* David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (1998).

to fall under the thirty-day time limit of § 1447(c) at all.[215]

The District Court for the Eastern District of Louisiana takes this approach to the amended statute. In *Rodriguez v. Valteau*, the court dismissed all of the federal claims giving rise to federal jurisdiction and was left to decide whether or not to remand the pendent state law claims to state court.[216] Dismissal of the federal claims came well beyond the thirty-day limit for seeking remand on "any defect other than subject matter jurisdiction."[217] The defendant seized upon the latter fact to argue that remand was no longer an option. Citing and quoting Professor Siegel, the court concluded that § 1447(c) does not apply to such remand motions:

> Defendants next argue that a remand of pendent claims under the newly amended 28 U.S.C. § 1447(c) is permitted only within a thirty-day time window that has since closed. The new amendment to the statute requires remand motions to be filed within 30 days if based on "any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c). Defendants assert that this Court has supplemental jurisdiction over the state law claims so that remand is not based on a lack of subject matter jurisdiction, and the thirty-day rule applies. This Court agrees with at least one commentator's statement that "with its very assertion of the time limit, including a starting time measured from the original notice of removal, § 1447(c) obviously aims at defects, whether of procedure or subject matter jurisdiction, that are in the case when it first arrives in federal court" and that "remands in the 'supplemental jurisdiction' category should not be deemed to fall under the thirty-day time limit of § 1447(c) at all." David D. Siegel, Commentary on 1996 Revision of § 1447(c), 28 U.S.C.A. § 1447, at 53 (West Supp. 1996) (emphasis added). This Court holds that Section 1447(c) is not a barrier to remand of the pendent state claims on the facts presented here because this would eviscerate 28 U.S.C. § 1367(c)(3).[218]

If, as *Rodriguez* and Professor Siegel suggest, such remand orders are not subject to § 1447(c) or any other removal statute, then they are not subject to the bar against appellate review and the *Thermtron* excep-

215. *Id.*
216. 1997 WL 602191 at *3-4 (E.D. La. 1997).
217. *See id.*; 28 U.S.C.A. § 1447(c) (1998).
218. *Rodriguez*, 1997 WL 602191 at *4.

tion survives.[219]

A third approach relies upon the legislative history of the 1996 amendment. As indicated earlier, that history suggests Congress did not intend a radical alteration of either the thirty-day limit or the appellate bar. For example, the fact that the House Judiciary Committee "viewed the bill as technical and noncontroversial" in nature and refrained from conducting formal hearings on the matter indicates strongly that Congress did not think it was making a notable change in existing law.[220] The same may be inferred from the Senate's decision not to issue a report on the proposed revision or conduct a floor debate.[221] Congresswoman Schroeder's comment that the revision is simply a "technical clarification" or "correction" undercuts any suggestion that the revision was intended to alter dramatically existing case law on the thirty-day limit or the scope of the appellate bar.[222] Finally, the CBO's judgment that the revision posed virtually no financial impact on either the federal or state court systems may also indicate that Congress did not understand the new language to negate the *Thermtron* exception and expand the appellate bar (creating a cost savings for the federal court system) or to result in significantly more cases being remanded to state court (creating a cost increase for the state court system).[223]

There are indications that the foregoing aspects of the legislative history might play a decisive role in taming the implications of the 1996 revision to § 1447(c). In *Hudson United Bank v. Litenda Mortgage Corp.*, the Third Circuit recently applied the *Thermtron* exception to a discretionary *Gibbs* remand.[224] In doing so, the Third Circuit rejected—citing legislative and judicial history—a literal interpretation of the revised statute that effectively overrules the *Thermtron* exception:

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219. Note that neither *Rodriguez* nor Professor Siegel address the situation where the basis for a discretionary remand is present "when [the case] first arrives in federal court." David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C. § 1447(c) (1998). For example, it would not seem uncommon for the grounds of an abstention-based remand to be present and obvious at the time a case is first removed to federal court. The same can be said for a remand based on the court's discretion to decline jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201. In such situations, it is not clear whether the thirty-day limit applies under Professor Siegel's approach. It seems that it would, because both Professor Siegel and *Rodriguez* focus upon when the grounds for remand became present, rather than the nature of the grounds for remand. If the thirty-day limit applies in such situations, then appellate review of any resulting remand order is barred by section 1447(d).

220. *See* H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. 3417 at 3418.

221. *See id.* at 3417; *see also*, 141 CONG. REC. S9580-02 (June 30, 1995).

222. 142 CONG. REC. H10459-02 (Sep. 17, 1996).

223. *See supra* note 170 and accompanying text.

224. 142 F.3d 151, 156 n.8 (3rd Cir. 1998).

Those attempting to divine the meaning of § 1447 from its text would do well to recall that sometimes "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L.Ed. 963 (1921) (Holmes, J.). In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976), the Supreme Court examined the century-old history of Congress's bar to review of remand orders and concluded that the bar to review contained in § 1447(d) covered only remands issued because a case was removed improperly or the district court was without subject matter jurisdiction. *See id.* at 346-50, 96 S. Ct. at 590-93. At the time of *Thermtron*, the text of § 1447(c) provided the textual hook for this interpretation. It then read: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs." *Thermtron*, 423 U.S. at 342, 96 S. Ct. at 589. Thus, the Court concluded that the bar to review contained in § 1447(d) applied only when the remand was based on the grounds specified in § 1447(c). *See id.* at 346, 96 S. Ct. at 590.

Congress has since amended § 1447(c) several times, most recently in 1996. The amendments have focused on creating and clarifying time limits concerning when a plaintiff can seek a remand following removal from state court. These amendments have slightly altered the grounds for remand "specified" in the text of § 1447(c): the statute now speaks of remands for lack of subject matter jurisdiction, and remands for "any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c) (West Supp. 1997). Rather than take this change in language as a wholesale rejection of *Thermtron* and a dramatic expansion of § 1447(d), we will assume that Congress did not mean to upset the *Thermtron* limits on § 1447(d), and that they remain in effect unchanged by the intervening textual modifications to § 1447(c). This conclusion is supported by the legislative history of the 1996 amendment. *See* H.R. Rep. No. 104-799 at 2-3 (1996), reprinted in 1996 U.S.C.C.A.N. 3417, 3418-19 (suggesting that the textual changes were designed only to clarify Congressional intent on the timing of remands made for reasons other than lack of subject matter jurisdiction).[225]

225. *Id.*

It seems likely that other courts will follow the Third Circuit's lead and utilize the legislative history to reject any dramatic expansion of the bar against appellate review.[226]

Two final points are warranted. First, even if, for the reasons outlined above, the revised statute does not apply to discretionary remand motions, some of those same motions may be brought within the scope of the appellate bar via *Things Remembered. Things Remembered* stands for the proposition that a remand order falls within the scope of the appellate bar so long as it is issued pursuant to the language of a *removal* statute.[227] Some discretionary remands are now authorized by statutory provisions, such as *Gibbs* remands under 28 U.S.C. § 1367(c), Declaratory Judgment Act remands under 28 U.S.C. § 2201, and "separate and independent claim" remands under 28 U.S.C. § 1441(c). While these statutes, with the exception of § 1441(c), are not *removal* statutes, such a requirement implies the use of the *in pari materia* canon to limit the scope of § 1447(d), a dubious proposition in its own right.[228] If the purpose of the appellate bar is to prevent the delays associated with improper or imprudent removals, the appellate bar should apply regardless of whether a statutory remand order is mandatory or discretionary in nature.[229] Second, despite the sound and fury, no federal court has yet taken the plunge and interpreted the revised language of § 1447(c) as a residuary clause.[230] Until one does, the *Thermtron* exception is safe.

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226. Of course, any such expansion is "dramatic" only if one accepts the validity of *Thermtron*'s limitations on the facially broad scope of section 1447(d). Otherwise, a change is hardly "dramatic" if it simply has the effect of making a statute mean what it actually says.

227. *See supra* note 150 and accompanying text.

228. *See supra* notes 97-100 and accompanying text.

229. The validity of this point varies depending on how one views the underlying purpose of the appellate bar. If it is simply to prevent delays in removed cases generally, there is no principled reason for excusing discretionary remands from its reach. However, if it is to prevent bad faith delays occasioned by patently erroneous removals to federal court, then there is good reason to treat discretionary remands differently. That is, discretionary remand orders, because they involve cases that are properly in federal court to begin with, do not occasion delay for delay's sake. Mandatory remand orders, because they involve cases that should not have been brought to federal court, are more likely to reflect an attempt by the removing party to delay the case in bad faith. This point is well made in *Hudson*, 142 F.3d at 157-58.

230. One federal district court came close. The District Court for the Central District of California issued a decision declaring that the revised language "clearly imposes a 30 day limit on all motions to remand except in those cases where the court lacks subject matter jurisdiction," citing similar statements contained in the legislative history of the 1996 revision. Joe Boxer Corp. v. Fritz Transp. Int'l, 1998 WL 938581 *5 (C.D. Cal. 1998). However, the remand order in that case—based on the "saving to suitors" clause of 28 U.S.C. § 1333(1), which prohibits the removal of admiralty cases unless complete diversity exists—qualifies as a "defect other than lack of subject matter jurisdiction" under the narrow interpretation of the

V. CONCLUSION

As remarked by Judge Easterbrook of the Seventh Circuit, "'[s]traightforward' is about the last word judges attach to § 1447(d) these days. . . ."[231] With the 1996 revision to § 1447(c), the situation becomes worse. Federal courts are likely to ignore the problem, but by doing so they will lend credence to the view that the *Thermtron* exception survives only because it satisfies judicial notions of fairness. There is little basis for the exception in the plain language of § 1447(d). The logical foundations of the exception, dubious to begin with, have disappeared from view, and the principal analysis asserted in their place—the use of the *in pari materia* canon to limit the scope of the appellate bar—is itself subject to serious criticism. If the 1996 revision to § 1447(c) is given the literal interpretation suggested by Professor Siegel, then the evisceration of the *Thermtron* exception begun by *Carnegie-Mellon* will be complete. It is time for Congress to revisit the question of appellate review of remand orders in removed causes, and then to legislate—more clearly and forcefully—its decision on the matter. Then it is time for the federal courts to accept Congress's judgment.

statute discussed above. *See id.* Accordingly, any description of the revised language as containing a residuary clause is dicta at this point.

231. *In re* Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992).