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The Scent of Subject Matter Jurisdiction: Remand and Appellate Review Under the Supplemental Jurisdiction Statute

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THE SCENT OF SUBJECT MATTER JURISDICTION: REMAND AND APPELLATE REVIEW UNDER THE SUPPLEMENTAL JURISDICTION STATUTE

Deborah J. Challener* & John Howell*

Sometimes something has the scent of subject matter jurisdiction about it but is found not to fall under that category after all.¹

Abstract

Under 28 U.S.C. § 1447(c) and (d), as well as Supreme Court precedent, remand orders in removed cases are immune from appellate review when they are based on a lack of subject matter jurisdiction. Until recently, all appellate courts that had addressed the issue had concluded that the remand of supplemental claims under 28 U.S.C. § 1367(c), the supplemental jurisdiction statute, does not constitute a remand for lack of subject matter jurisdiction and therefore is reviewable on appeal.

In 2007, however, the Supreme Court held in Powerex Corp. v. Reliant Energy Services, Inc. that as long as a remand order can be “colorably characterized” as one that is based on a lack of subject matter jurisdiction, then it cannot be appealed. The case did not involve the remand of supplemental claims, but the Court stated in dicta: “It is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and (d).”

Then, in HIF Bio, Inc. v. Yung Shin Pharmaceuticals Indus. Co., the Federal Circuit followed the Powerex Court’s lead and became the first circuit to hold that § 1447(c) remands fall within § 1447(c) and (d) and therefore are unappealable. The HIF Bio court reasoned that “because every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction, a remand based on declining supplemental jurisdiction can be colorably characterized as a remand for lack of subject matter jurisdiction.”

The HIF Bio court reached the wrong conclusion, however, because it misunderstood the language of § 1367 and confused the existence of judicial power with the discretionary decision whether to exercise that power. Thus, while § 1367(c) remands may have the scent of subject matter jurisdiction about them, they do not fall into that category after all and, for better or worse, they are reviewable on appeal. Furthermore, even if the Supreme Court concludes that § 1367(c) remands can be colorably characterized as remands for lack of subject matter jurisdiction, that does not automatically mean that they will fall within § 1447(c) and be unreviewable on appeal.

Under the most plausible interpretation of § 1447(c), the statute is applicable only to

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¹ David D. Siegel, Commentary on 1996 Revision of Section 1447(c).
remands based on lack of subject matter jurisdiction over a whole case, not remands based on lack of jurisdiction over a claim. Finally, if the Court ultimately does conclude both that § 1367(c) remands are based on a lack of subject matter jurisdiction and that they are immune from appellate review under § 1447(c) and (d), then anomalous consequences will result.

The correct conclusion is that § 1367(c) remands are not based on a lack of subject matter jurisdiction. Nevertheless, they do have the scent of subject matter jurisdiction about them because, by definition, supplemental claims lack an independent basis of jurisdiction. It remains to be seen whether the mere scent of subject matter jurisdiction will be enough for the Supreme Court to conclude that § 1367(c) remands can be colorably characterized as remands based on a lack of subject matter jurisdiction.
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I. INTRODUCTION

Under 28 U.S.C. § 1447(c) and (d), as well as Supreme Court precedent, remand orders in removed cases are immune from appellate review when they are based on a lack of subject matter jurisdiction. Until recently, all appellate courts that had addressed the issue had concluded that the remand of supplemental claims under 28 U.S.C. § 1367(c), the supplemental jurisdiction statute, does not constitute a remand for lack of subject matter jurisdiction and therefore is reviewable on appeal.2

In 2007, however, the Supreme Court held in Powerex Corp. v. Reliant Energy Services, Inc.3 that as long as a remand order can be “colorably characterized” as one that is based on a lack of subject matter jurisdiction, then it cannot be appealed.4 The case did not involve the remand of supplemental claims, but the Court stated in dicta: “It is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and (d).”5

Then, in HIF Bio, Inc. v. Yung Shin Pharmaceuticals Indus. Co.,6 the Federal Circuit followed the Powerex Court’s lead and became the first circuit to hold that § 1447(c) remands fall within § 1447(c) and (d) and therefore are unappealable. The HIF Bio court reasoned that “because every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction, a

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2 See infra Part II.D.1.
4 Id. at 2418.
5 Id. at 2418-19.
6 508 F.3d 659 (Fed. Cir. 2007).
remand based on declining supplemental jurisdiction can be colorably characterized as a remand for lack of subject matter jurisdiction.”

This Article examines whether the *HIF Bio* court reached the correct conclusion and finds that it did not. Part II reviews the history of supplemental jurisdiction and § 1447(c) and (d). Part II also explains the relationship between § 1447(c) and (d) and explicates the pertinent Supreme Court and appellate court precedent. Part III begins by explaining how a post-removal event can lead to a remand for lack of subject matter jurisdiction despite the general rule that “postremoval events do not deprive federal courts of subject-matter jurisdiction.” Part III then argues that the *HIF Bio* court reached the wrong conclusion because it misunderstood the language of § 1367 and confused the existence of judicial power with the discretionary decision whether to exercise that power. Part III thus contends that while § 1367(c) remands may have the scent of subject matter jurisdiction about them, they do not fall into that category after all. Thus, for better or worse, they are reviewable on appeal.

Part III also argues that even if the Supreme Court concludes that § 1367(c) remands can be colorably characterized as remands for lack of subject matter jurisdiction, that does not automatically mean that they will fall within § 1447(c) and be unreviewable under § 1447(d). Part III ends by pointing out the anomalous consequences that will result if the Court ultimately does conclude both that § 1367(c) remands are based on a lack of subject matter jurisdiction and that they are immune from appellate review under § 1447(c) and (d).

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7 *Id.* at 667.
8 *Powerex Corp.*, __ U.S. __, 127 S. Ct. at 2417 n.1.
II. BACKGROUND OF SUPPLEMENTAL JURISDICTION AND § 1447(c) and (d).

A. SUPPLEMENTAL JURISDICTION

1. History

The history of supplemental jurisdiction is well documented\(^9\) and is recounted in relevant part only here. In 1990, Congress enacted 28 U.S.C. § 1367, which codifies the common law doctrines of pendent and ancillary jurisdiction under the label of supplemental jurisdiction.\(^10\) Pursuant to these doctrines, if a district court had an original basis of subject matter jurisdiction over at least one claim – federal question or diversity – then the jurisdictional statutes\(^11\) “implicitly” authorized supplemental jurisdiction over all other claims between the same parties arising out of the same Article III case or

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\(^10\) Chicago v. International College of Surgeons, 522 U.S. 156, 164-65 (1997). Pendent jurisdiction “applied only in federal-question cases and allowed plaintiffs to attach nonfederal claims to their jurisdiction-qualifying claims.” Exxon Mobil Corp., 545 U.S. at 590-91. In contrast, ancillary jurisdiction “applied primarily, although not exclusively, in diversity cases and typically involved claims by a defending party haled into court against his will.” Id. at 591 (internal quotation marks, citations and alterations omitted). Thus, prior to the enactment of the supplemental jurisdiction statute, courts regularly exercised ancillary jurisdiction “over compulsory counterclaims, impleader claims, cross-claims among defendants, and claims of parties who intervened of right.” Id. at 581 (internal quotation marks and citation omitted).

\(^11\) E.g., 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); 28 U.S.C. § 1332(a)(1) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – (1) citizens of different States[.]”)
controversy.” The “leading modern case for this principle” is United Mine Workers v. Gibbs.

In Gibbs, a pendent jurisdiction case, the plaintiff filed an action in federal court alleging violations of the Labor Management Relations Act (LMRA) and state law against the defendant. The district court had federal question jurisdiction over the LMRA claims, but it lacked diversity jurisdiction over the state claim. Nevertheless, because the district court had original jurisdiction over the federal claim and the state and federal claims were sufficiently related, the Supreme Court held that the district court had the “power” to hear the whole case. The Gibbs Court emphasized, however, that “pendent jurisdiction is a doctrine of discretion, not of plaintiff’s right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims.”

12 Exxon Mobil Corp., 545 U.S. at 556-57 (citing Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)) (emphasis added); see also id. at 554 (“In order for a federal court to invoke supplemental jurisdiction under Gibbs, it must first have original jurisdiction over at least one claim in the action.”).
14 Id. at 720.
15 See id. at 717, 728 (stating that the claims against the defendant under § 303 of the LMRA “generally were substantial”).
16 Id. at 720, 722 (stating that jurisdiction over the state law claim was based on the doctrine of pendent jurisdiction and that diversity jurisdiction over the state claim was absent).
17 See id. at 728 (“[T]he state and federal claims arose from the same nucleus of operative fact and reflected alternative remedies.”); see also id. at 725 (stating that if the federal claim has “substance sufficient to confer subject matter jurisdiction on the court” and the “state and federal claims . . . derive from a common nucleus of operative fact,” then “there is power in [the] federal courts to hear the whole.”).
18 Id. at 726. The Gibbs Court gave several examples of when a district court could decline to exercise pendent jurisdiction. Id. at 726. First, a district court should avoid “[n]eedless decisions of state law . . . both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” Id. Second, “if the federal claims [were] dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.” Id. Third, “if it appear[ed] that the state issues substantially predominate[d] . . . the state claims [could] be dismissed without prejudice.” Finally, a district court could decline to exercise pendent jurisdiction if there were “reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that . . . justif[ied] separating state and federal claims for trial.” Id.
Thus, although the district court may have the power to hear both the federal and state claims, “[t]hat power need not be exercised in every case in which it is found to exist.”

After the decision in *Gibbs*, the Court took issue with the common law nature of pendent and ancillary jurisdiction and the failure of the *Gibbs*’ Court to “mention, let alone come to grips with . . . the bedrock principle that federal courts have no jurisdiction without statutory authorization.” Although the Court reaffirmed *Gibbs* and the exercise of pendent and ancillary jurisdiction over claims between the same parties where at least one claim had an original basis of jurisdiction, the Court refused to extend *Gibbs* and interpret the jurisdictional statutes to “authorize supplemental jurisdiction over additional claims involving other parties.”

For example, in *Finley v. United States*, the Court refused to permit the exercise of supplemental jurisdiction where the plaintiff asserted a federal claim against one defendant and state law claims against the other defendants. The federal claim had its own basis of jurisdiction under 28 U.S.C. § 1346(b), but the state law claims did not fall within the district court’s diversity jurisdiction and no statute explicitly provided for the exercise of supplemental jurisdiction over them. Because there was no specific

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19 *Id.; see also id. at 727* (The question of power will ordinarily be resolved on the pleadings[,] . . . [b]ut the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation.”) (emphasis added); *Exxon Mobil Corp.*, 545 U.S. at 552-53 (“*Gibbs* confirmed that the District Court had the additional power (though not the obligation) to exercise supplemental jurisdiction over related state claims that arose from the same Article III case or controversy.”).

20 *See Exxon Mobil Corp.*, 545 U.S. at 553 (citing *Finley v. United States*, 490 U.S. 545 (1989)).

21 *See id.* at 553-57 (citing e.g., *Finley*, 490 U.S. at 549, 556; *Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939)).


23 *Id.*

24 *See id.*
statutory authorization for the district court to assert jurisdiction over the state law claims, the Finley Court held that the lower court did not have power to hear them.\(^{25}\)

In reaching its decision, the Finley Court noted that Congress could change the result in Finley by passing a statute that authorized the exercise of supplemental jurisdiction over claims by and against parties joined to an action that did not fall within a court’s original jurisdiction.\(^{26}\) Congress responded by enacting § 1367.\(^{27}\) The statute does “not acknowledge any distinction between pendent . . . and . . . ancillary jurisdiction.”\(^{28}\) Section 1367(a) provides that unless another federal statute or subsection

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) The supplemental jurisdiction statute provides:

§ 1367. Supplemental jurisdiction
(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

\(^{28}\) Exxon Mobil Corp., 545 U.S. at 559; see also id. (“Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are ‘two
(b) or (c) applies, when a federal court has original jurisdiction over at least one claim in an action, it “shall have” supplemental jurisdiction over additional claims that are part of the same Article III case or controversy but do not by themselves fall within the court’s original jurisdiction. \(^{29}\) Section 1367(a) also overrules the result in \textit{Finley} by providing that supplemental jurisdiction “include[s] claims that involve the joinder or intervention of additional parties.” \(^{30}\) Section 1367(b) “qualifies the broad rule of § 1367(a)” by creating specific exceptions to § 1367(a). \(^{31}\)

In addition, supplemental jurisdiction, like the doctrine of pendent jurisdiction, “is a doctrine of discretion, not of plaintiff’s right.” \(^{32}\) Section 1367 “confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise.” \(^{33}\) Specifically, § 1367(c) provides that “a district court may decline to exercise supplemental jurisdiction over a claim under subsection (a)” where

1. the claim raises a novel or complex issue of State law,
2. the claim substantially predominates over the claim or claims

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\(^{29}\) See id. at 558; see also \textit{Int’l College of Surgeons}, 522 U.S. at 168 (“The whole point of supplemental jurisdiction is to allow the district courts to exercise . . . jurisdiction over claims as to which original jurisdiction is lacking.”).

\(^{30}\) \textit{Exxon Mobil Corp.}, 545 U.S. at 558 (“All parties to this litigation and all courts to consider the question agree that § 1367 overturned the result in \textit{Finley}.”).

\(^{31}\) \textit{Id.} at 560. Section 1367(b) applies only to diversity cases and to those claims over which there is no independent basis of subject matter jurisdiction. It “withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under Federal Rule of Civil Procedure 19, or who seek to intervene pursuant to Rule 24,” and “explicitly excludes supplemental jurisdiction over claims by plaintiffs against defendants joined under” Rules 14, 19, 20 and 24. \textit{Id.; see also id.} at 593 (Ginsburg, J., dissenting) (stating that “§ 1367(b) stops plaintiffs from circumventing § 1332’s jurisdictional requirements by using another’s claim as a hook to add a claim that the plaintiff could not have brought in the first instance”).


\(^{33}\) \textit{Id.} at 173.
over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.\textsuperscript{34}

According to the Supreme Court, § 1367(c) “reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, ‘a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.’”\textsuperscript{35}

Because the supplemental jurisdiction statute suggests that § 1367(c) is an exception to § 1367(a), the question that this Article ultimately addresses is whether a district court’s decision not to exercise supplemental jurisdiction in a removed case and to remand the state law claims constitutes a remand for “lack of subject matter jurisdiction” that is immune from appellate review under § 1447(c) and (d).

2. Supplemental Jurisdiction and Removal

The general removal statute, 28 U.S.C. § 1441(a), provides that defendants may remove “any civil action brought in a State court of which the district courts of the United States have original jurisdiction.” Accordingly, removal is proper only if the entire case “originally could have been filed in federal court.”\textsuperscript{36} Although the supplemental jurisdiction statute itself does not indicate whether it applies to removed cases, the Supreme Court has said that § 1367 “applies with equal force to cases removed to federal

\textsuperscript{34} 28 U.S.C. § 1367(c); see also \textit{Int’l College of Surgeons}, 522 U.S. at 173 (“Depending on a host of factors, then – including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims – district courts may decline to exercise jurisdiction over supplemental state law claims.”).

\textsuperscript{35} \textit{Int’l College of Surgeons} 522 U.S. at 173 (quoting \textit{Cohill}, 484 U.S. at 350).

court as to cases initially filed there.”\textsuperscript{37} Thus, taking § 1367 and § 1441(a) together, when a case is removed the court must have an independent basis of subject matter jurisdiction over at least one claim, and any claims that lack an independent basis of subject matter jurisdiction must fall within the court’s supplemental jurisdiction under § 1367(a). In addition, although neither § 1367 nor any other statute explicitly authorizes the remand of supplemental claims, there is no question that district courts may remand state law claims if they decline to exercise their supplemental jurisdiction under § 1367(c).\textsuperscript{38}

B. § 1447(c) and (d)

1. Statutory History

Like the history of supplemental jurisdiction, the history of § 1447(c) and (d) has been well documented\textsuperscript{39} and is recounted in pertinent part only here. Congress first created the right of removal in the Judiciary Act of 1789,\textsuperscript{40} and it has existed ever since.\textsuperscript{41} In contrast, although lower courts have always remanded cases when they lacked subject

\textsuperscript{37} Int’l College of Surgeons, 522 U.S. at 165; see also Exxon Mobil Corp., 545 U.S. at 591 n.11 (Ginsburg, J., dissenting) (“There was no disagreement in [College of Surgeons], and there is none now, that . . . § 1367(a) is properly read to authorize the exercise of supplemental jurisdiction in removed cases.”).

\textsuperscript{38} See Int’l College of Surgeons, 522 U.S. at 163-65.


\textsuperscript{40} Judiciary Act of 1789, ch 20, § 12, 1 Stat. at 79-80 (authorizing removal “if a suit were commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the . . . sum or value of five hundred dollars, exclusive of costs”).

\textsuperscript{41} Joan Steinman, Removal, Remand, and Review in Pendent Claim and Pendent Party Cases, 41 Vand. L. Rev. 923, 926 (1988) (citing 1A J. Moore & B. Ringle, Moore’s Federal Practice ¶ 0.156[1], at 13-14 (2d. 1987)); see also 28 U.S.C. § 1441(a) (“Except as otherwise expressly provided by . . . Congress, any civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed by the defendant or the defendants, to the district court . . . for the district and division embracing the place where such action is pending.”).
matter jurisdiction,\textsuperscript{42} it was not until 1875 that Congress expressly authorized remand for lack of subject matter jurisdiction.\textsuperscript{43} Moreover, Congress did not prohibit appellate review of remand orders until 1887.\textsuperscript{44}

\textsuperscript{42} Wasserman, \textit{supra} note 32, at 89-90 (stating that although the Judiciary Act of 1789 did not specifically authorize remands, the circuit courts of the time remanded cases “in which subject matter jurisdiction was lacking or in which the defendant had failed to comply with the statutory procedures for removal”).

\textsuperscript{43} \textit{Id.} at 90, 92; Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. at 472 (“[I]f, in any suit . . . removed . . . to a circuit court . . . , it shall appear to the satisfaction of said circuit court, at any time after such suit has been . . . removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court . . . , the said circuit court shall proceed no further therein, but shall . . . remand it to the court from which it was removed as justice may require . . . .”).

\textsuperscript{44} Wasserman, \textit{supra} note 32, at 100; Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 553 (“Whenever any cause shall be removed . . . and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded . . . , such remand shall be immediately carried into execution, and no appeal or writ of error from the decision . . . so remanding such cause shall be allowed.”). A few years after this provision was enacted, the Supreme Court held that it “precluded review of remand orders not only by writ of error and appeal, but also by writ of mandamus.” Wasserman, \textit{supra} note 32, at 103 (citing \textit{Missouri Pac. Ry. Co. v. Fitzgerald}, 160 U.S. 556, 582 (1896); \textit{In re Pennsylvania Co.}, 137 U.S. 451, 454 (1890)).

Interestingly, although the Judiciary Act of 1789 did not specifically authorize appellate review of remand orders, until 1875 “the Supreme Court reviewed remand orders entered by the circuit courts on writ of error or appeal” without statutory authorization. \textit{Id.} at 90. In 1875 when Congress authorized remand of actions for lack of jurisdiction, it also provided for appellate review of remand orders. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. at 472 (“[T]he order of [a] circuit court . . . remanding [a] cause to . . . State court shall be reviewable by the Supreme Court on writ of error or appeal . . . .”). According to Professor Wasserman, no legislative history for the appellate review provision has been found, and therefore the reasons for its enactment are unclear. Wasserman, \textit{supra} note 32, at 93.

Professor Wasserman has noted, however, that Congress expanded the removal jurisdiction of the circuit courts in 1875 by authorizing the removal of federal question cases. \textit{Id.} at 92 (discussing Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71). She has suggested that Congress added the appellate review provision to the removal statutes because “once Congress granted the federal courts removal jurisdiction of federal question cases, [it] wanted to ensure that any decisions that the circuit courts made interpreting the scope of federal question jurisdiction would be subject to review by the Supreme Court.” \textit{Id.} (emphasis in original). Professor Wasserman has also suggested that another, “less likely” possibility is that “Congress enacted [the appellate review] section to legislatively overrule” a recent Supreme Court case which “had held that a circuit court order remanding a removed action to state court was not a final order from which a writ of error would lie.” \textit{Id.} at 93 (discussing \textit{Chicago & Alton R.R. v. Wiswall}, 90 U.S. (23 Wall.) 507 (1875)).

In addition to expanding the removal jurisdiction of the circuit courts in 1875, Congress also significantly expanded the original jurisdiction of the circuit courts. \textit{See id.} at 91-92 (citing Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470). The enlargement of the circuit courts’ original and removal jurisdiction resulted in “docket congestion in both the circuit courts and the Supreme Court. \textit{Id.} at 94-96. Thus, in 1887, Congress reversed direction and restricted the scope of the circuit courts’ original and removal jurisdiction. \textit{Id.} at 99-100 (citing Act of Mar. 3, 1887, ch. 373, §§ 1, 6, 24 Stat. 552, 552-53, 555).

Congress also “repealed the provision authorizing appellate review of remand orders” and, for the first time, prohibited review of remand orders by appeal or writ of error. \textit{Id.} at 100 (citing Act of Mar. 3, 1887, ch. 373, §§ 1, 6, 24 Stat. 552, 553, 555).

The precise reasons for the inclusion of the ban on appellate review in the 1887 statute are uncertain. \textit{Id.} (stating that “[n]o legislative history exists to explain why the Senate included this provision” in the bill that Congress eventually passed). At the time, however, the Supreme Court – rather
Congress enacted the precursors to the current versions of § 1447(c) and (d) in 1948 and 1949 respectively. The 1948 version of § 1447(c) provided for remand where a case was “removed improvidently and without jurisdiction.” In 1988, Congress deleted “improvident” removal as a basis for remand under § 1447(c) and provided for remand “on the basis of any defect in removal procedure,” as well as for lack of subject matter jurisdiction. Congress last amended § 1447(c) in 1996 and the statute than an intermediate appellate court – heard appeals from remand orders. Id. at 101 (citing the Judiciary Act of 1789, ch. 20, § 13, 22, 1 Stat. 73, 81, 84 for the proposition that “[t]he Supreme Court had appellate jurisdiction to review ‘final judgments and decrees’ of the circuit courts”). Thus, the “most likely” explanation is that “Congress . . . wanted to relieve the Supreme Court’s overload directly, not merely indirectly, by reducing the circuit courts’ docket.” Id.

Professor Wasserman also has suggested two other possible explanations for the enactment of the ban on appellate review of remand orders. First, “Congress may have withdrawn appellate jurisdiction over remand orders to eliminate one of the most powerful weapons in the corporate arsenal: the ability of a corporation to exhaust a plaintiff’s resources or stamina by appealing a remand order to the Supreme Court in distant Washington, D.C.” Id. Second, the appellate bar was in the same paragraph of the statute that authorized remand “if some defendants would not face prejudice [in state court] or if the plaintiff’s affidavit alleging local prejudice [in state court] was not well-founded.” Id. Thus, Congress may have intended to help relieve the Supreme Court’s docket congestion by limiting appellate review only in this narrow class of cases where “if the circuit court erred in remanding . . ., the parties opposing remand would face little prejudice.” Id. at 101-02.

In 1948, Congress revised the Judicial Code and “consolidated and recodified” the removal statutes. Snapper, Inc. v. Redan, 171 F.2d 1249, 1254 (11th Cir. 1999) (citing Act of June 25, 1948, ch. 646, 62 Stat. 939 (1948)). The legislation, however, was replete with drafting errors. Wasserman, supra note 32, at 103 n.86. For example, Congress inadvertently omitted the provision barring appellate review of remand orders. Id. at 103 & n.86. In order to correct its many mistakes, including its omission of the prohibition on appellate review of remand orders, Congress again amended the removal provisions in 1949. Snapper, 171 F.3d at 1254; Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102 (codified at 28 U.S.C. § 1447(d)). The legislative history of the 1949 Act indicates that the new § 1447(d) was added to the legislation “to remove any doubt that the former law as to the finality of an order to remand to a State court is continued.” H.R. Rep. No. 352, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1268.

28 U.S.C. § 1447(c) (1946 ed. Supp. III) (current version at 28 U.S.C. § 1447(c)). Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, Title X, § 1016(c), 102 Stat. 4670 (1988) (codified at 28 U.S.C. § 1447(c)). The 1988 version of § 1447(c) provided in pertinent part: “A motion to remand on the basis of any defect in removal procedure must be made within 30 days after . . . removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . .” Id. While the 1948 version of § 1447(c) joined the bases for remand – improvident removal and lack of subject matter jurisdiction – with the conjunction “and,” the 1988 version explicitly provided for two separate bases of remand: defects in removal procedure and lack of subject matter jurisdiction. Snapper, 171 F.3d at 1254 n.7, 1256 n.12 (stating that the 1988 amendment to § 1447(c) ratified the lower courts’ understanding that Congress intended the phrase “improvidently and without jurisdiction” in the 1948 statute to be read in the disjunctive). The 1988 amendment also made explicit the lower courts’ understanding that Congress intended remand based on “improvident” removal to mean remand based on defects in removal procedure. Id. at 1254-56. Thus, the “primary change” affected by the 1988 amendment “was the imposition of the 30-day limitation on raising motions to remand based on procedural defects.” Snapper, 171 F.3d at 1256 n.13.
currently provides in pertinent part: “A motion to remand . . . on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after . . . removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”

The 1949 version of § 1447(d) stated: “An order remanding a case . . . is not reviewable on appeal or otherwise.” Congress amended § 1447(d) once in 1964 to permit appellate review of remand orders in civil rights cases, but otherwise has left § 1447(d) alone. The current version of the statute provides: “An order remanding a case . . . is not reviewable on appeal or otherwise, except that an order remanding a case . . . pursuant to § 1443 [the removal provision for civil rights cases] . . . shall be reviewable on appeal or otherwise.” According to the Supreme Court, the purpose of § 1447(d)’s

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49 United States District Court Removal Procedure, Pub. L. No. 104-219, 110 Stat. 3022 (1996). Congress apparently believed that the 1988 revision to § 1447(c) was ambiguous and had caused confusion in the lower courts. H.R. Rep. No. 104-799, reprinted in 1996 U.S.C.C.A.N. at 3417-18. Thus, according to the House Report that accompanied the 1996 amendment, § 1447(c) was amended to “clarify . . . the intent of Congress that the thirty-day limit applies to any ‘defect’ other than the lack of subject matter jurisdiction.” Id.


51 Civil Rights Act of 1964, Pub. L. No. 88-352, § 901, 78 Stat. 241, 266. The amendment apparently “was designed to ensure that defendants in civil rights cases would have access to a federal forum, even if the district court erroneously remanded the suit to state court, and to ensure the development of a uniform federal law regarding civil rights removal jurisdiction.” Wasserman, supra note 32, at 105 (citing Robert T. Markowski, Note, Remand Order Review After Thermtron Products, 1977 U. Ill. L. Forum 1086, 1097-98); see also id. at 105-06 (discussing the comments of members of Congress regarding the 1964 amendment to § 1447(d) and stating that the comments “focused on the importance of protecting civil rights defendants from hostile state courts and providing them with a federal forum”).

Congress has also expressly granted the United States the right to appeal remand orders in cases involving the property of Native Americans, e.g., 28 U.S.C. § 487(d), and has granted both the Federal Deposit Insurance Corporation and the Resolution Trust Corporation the right to appeal remand orders. 12 U.S.C. § 1819(b)(2)(C) (FDIC); 12 U.S.C. § 1441a(l)(3)(C) (RTC). Most recently, Congress has granted appellate courts authority to review district court orders granting (or denying) remand motions in cases removed under the Class Action Fairness Act as long as the notice of appeal is filed within the proper timeframe. 28 U.S.C. § 1453(c)(1); see also, e.g., Morgan v. Gay, 466 F.3d 276 (3d Cir. 2006 (stating that the purpose of § 1453(c)(1) “is to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions”).

ban on appellate review of remand orders is to prevent the delay caused by “protracted litigation of jurisdictional issues.”


Although the plain language of § 1447(d) appears to immunize all remand orders (except those in civil rights cases) from appellate review, the Supreme Court has rejected that interpretation of the statute. In *Thermtron Products, Inc. v. Hermansdorfer,* the district court remanded a case because its own docket was congested, the case could not be tried in the near future, and the plaintiffs’ had a “right to a forum of their choice and . . . to a speedy decision on the merits.” The defendants petitioned the Sixth Circuit for a writ of mandamus or prohibition, but the court denied the petition because it concluded that, under § 1447(d), it “had no jurisdiction to review [the remand] order or to issue mandamus.”

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53 *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976) (citing *United States v. Rice*, 327 U.S. 742, 751 (1946)), overruled in part by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712-15 (1996); see also *Powerex Corp.*, ___ U.S. __, 127 S. Ct. at 2420 (stating that the policy behind § 1447(d) is “avoiding prolonged litigation on threshold nonmerits questions”). *C.f. Wasserman, supra* note 32, at 130-40 (arguing that § 1447(d) does not serve the purposes that historically were or currently are attributed to it); see also *id.* at 139-40, 150 (arguing that although § 1447(d) “may serve to reduce the docket overload suffered by the courts of appeals and to limit interference with state court judicial proceedings, these potential benefits do not justify retention of an absolute bar on review of remand orders”).

54 *Thermtron Prods., Inc.*, 423 U.S. at 337-53. In a case decided before *Thermtron*, the Supreme Court held that where a district court dismisses a third-party claim and then remands the case for lack of jurisdiction, the order of dismissal is reviewable on appeal because it precedes the remand order “in logic and in fact.” *Waco v. U.S Fidelity & Guar. Co.*, 293 U.S. 140, 142-44 (1934); see also *Wasserman, supra* note 32, at 112 (“Although the *Waco* Court acknowledged no exception to the statutory bar on appellate review of remand orders, it nevertheless recognized that district court decisions on the merits that logically preceded the remand order could be reviewed by the court of appeals, notwithstanding the remand [order].”).


56 See *id.* at 339-41.

57 *Id.* at 341-42.
The Supreme Court reversed. The Court held that § 1447(c) and (d) “must be construed together.” This meant “that only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . [were] immune from review under [§] 1447(d).” Because the district court had not remanded the case on a § 1447(c) ground but instead had remanded “a properly removed case on grounds that [it] had no authority to consider,” § 1447(d) did not apply and the remand order was reviewable on appeal. In reaching its conclusion, the Court not only interpreted § 1447(d) to bar appellate review of § 1447(c) remands, it also indicated that district courts have the power to issue remand orders only on the grounds specified in § 1447(c) and that remands on any other ground are impermissible.

Although the Court decided Thermtron under the 1948 version of § 1447(c) and the statute has been amended twice since the decision, the Court has never indicated that the amendments affected Thermtron’s holding that § 1447(c) and (d) must be read

58 Id. at 345.
59 Id. at 346. The Court further held that a § 1447(c) remand order is immune from appellate review regardless of “whether or not that order might be deemed erroneous by an appellate court.” Id. at 351; see also Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723, 723-24 (1979) (per curiam).
60 Because Thermtron is a 1976 decision, it was decided under the 1948 version of § 1447(c). Thus, the Thermtron Court’s conclusion that the case was not remanded under § 1447(c) meant that the case had not been “removed improvidently and without jurisdiction.”
61 Thermtron Prods., Inc., 423 U.S. at 351-52; see also id. at 344 (stating that the district court’s basis for remand was “plainly irrelevant to whether [it] would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under [§] 1441, and hence to the question whether [the] cause was [improperly] removed [under § 1447(c)].
62 Id. at 352 (“[T]his Court has not yet construed § 1447(d) 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 § 1447(c) and not touching the propriety of the removal.”); see also id. at 351 (“[W]e are 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 § 1447(c).”).

The Thermtron Court also held that because “an order remanding a removed action does not represent a final judgment” that is appealable under 28 U.S.C. § 1291, “the writ of mandamus is an appropriate remedy to require the District Court to entertain [a] remanded action.” Id. at 352-53. The Court later disavowed this holding in Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712-15 (1996). See infra note 76.
together. Indeed, since Thermtron the Court has stated repeatedly, most recently in 2007, that only § 1447(c) remands are immune from appellate review under § 1447(d). In contrast, however, the Court’s suggestion in Thermtron that district courts have authority to remand only on the grounds set forth in § 1447(c) has not withstood the test of time.

C. THE SUPREME COURT AND REMAND OF SUPPLEMENTAL CLAIMS


The Supreme Court held in Carnegie-Mellon University v. Cohill that district courts can exercise their discretion to remand pendent state law claims once the anchor claim on which federal question jurisdiction was based has been eliminated if they could have dismissed the claims under the same circumstances. This conclusion appeared to be irreconcilable with Thermtron because nothing in the language of § 1447(c) indicated

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In Powerex Corp., the Court addressed the question of how the 1988 and 1996 amendments to § 1447(c) affected Thermtron’s gloss on the statute. 127 S. Ct. at 2415-16. The Court recognized that under Thermtron, the application of § 1447(d) was limited to remands where a case had been removed “improvidently and without jurisdiction.” Id. at 2415. The Court also recognized that when the 1988 version of § 1447(c) was in effect, it had “interpreted § 1447(d) to preclude review only of remands for lack of subject-matter jurisdiction and for defects in removal procedure.” Id. (citing Quackenbush, 517 U.S. at 711-12; Things Remembered, Inc., 516 U.S. at 127-28). The Court then stated: “Although § 1447(c) was amended . . . again in 1996, we will assume . . . that the amendment was immaterial to Thermtron’s gloss on § 1447(d), so that the prohibition on appellate review remains limited to remands [for lack of subject-matter jurisdiction and for defects in removal procedure]” under § 1447(c). Id. at 2416.

The Thermtron decision, of course, has not been without its critics. Then-Justice Rehnquist dissented in Thermtron primarily on the ground that the plain language of § 1447(d) bars appellate review of all remand orders, including the one at issue in Thermtron, except those issued in cases removed under § 1443. He argued that “characterizing the bar to review [in § 1447(d)] as limited to only those remand orders entered pursuant to . . . § 1447(c)” ignored the purpose behind § 1447(d), id. at 355-56, which is “to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand,” id. at 354. Scholars have also criticized Thermtron. See, e.g., Wasserman, supra note 32, at 115-19 (suggesting that the Thermtron Court manipulated precedent to reach its conclusion that § 1447(d) applies only to remands under § 1447(c), arguing that the Thermtron Court created a “test for reviewability of remand orders” that is problematic for lower courts to apply, and contending that Thermtron is difficult to square with the Supreme Court’s later decision in Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988)).

64 484 U.S. 343 (1988).
65 Id. at 354
that district courts had the power to remand supplemental claims instead of dismissing them.\textsuperscript{66}

The Court, however, distinguished \textit{Thermtron} on the ground that it involved “a clearly impermissible remand” since the district court had jurisdiction over the case and had no authority to refuse to exercise its jurisdiction due to a crowded docket.\textsuperscript{67} In contrast, the \textit{Cohill} case involved pendent state law claims and the district court had “undoubted discretion” to decline to hear them under the doctrine of pendent jurisdiction set forth in \textit{Gibbs}.\textsuperscript{68} The only question was whether the district court could decline to exercise its pendent jurisdiction by remanding the state-law claims instead of dismissing them, and the \textit{Cohill} Court concluded that it could.\textsuperscript{69} The Court reasoned that “[t]he discretion to remand enables district courts to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine.”\textsuperscript{70}

Of particular importance here, the Court emphasized in a footnote that the remand power it had recognized did not derive from § 1447(c), but instead “derive[d] from the doctrine of pendent jurisdiction and applie[d] only to cases involving pendent claims.”\textsuperscript{71}

\textsuperscript{66} As one court cleverly explained: “\textit{Thermtron} h[eld] that § 1447(d) does not mean what it says . . . Then . . . \textit{Cohill} held that \textit{Thermtron} does not mean what \textit{it} says . . . .” \textit{In re Amoco Petroleum Additives Co.}, 964 F.2d 706, 708 (7th Cir. 1992).
\textsuperscript{67} \textit{Id.} at 355-56.
\textsuperscript{68} \textit{Id.} at 356; \textit{see also id.} (“[A]n entirely different situation is presented when the district court has clear power to decline to exercise jurisdiction. \textit{Thermtron} therefore does not control the decision in this case.”).
\textsuperscript{69} \textit{Id.} at 356-57.
\textsuperscript{70} \textit{Id.} at 357.
\textsuperscript{71} \textit{Id.} at 355 n.11.
Thus, according to the Court, “the remand authority conferred by [§ 1447(c)] and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all.”


In *Things Remembered, Inc. v. Petrarca,* the petitioner filed a notice of removal pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a), and the general removal statute, § 1441(a). Although the bankruptcy court found that removal was proper, on appeal the district court found that removal was untimely under both statutes and ultimately remanded the case to state court. The Sixth Circuit held that both § 1447(d) and § 1452(b) insulated the remand order from appellate review and dismissed the appeal. The question before the Court was whether § 1447(d) barred appellate review of “a district court order remanding a bankruptcy case to state court on grounds of untimely removal.”

In a unanimous opinion, the Court held 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.’” Thus, under *Things Remembered* § 1447(d) must be read in *pari materia* with all removal statutes.

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72 *Id.*
74 *Id.* at 126.
75 *Id.* at 126-27 & n.2.
76 *Id.* at 127.
77 *Id.* at 125.
78 *Id.* at 128 (quoting *United States v. Rice*, 327 U.S. 742, 752 (1946)) (emphasis added). The Court stated that “[a]bsent a clear statutory command to the contrary, [it] assume[s] that Congress is ‘aware of the universality of the[e] practice’ of denying appellate review of remand orders when Congress creates a new ground for removal.” *Id.* (quoting *Rice*, 327 U.S. at 752). Because Congress did not expressly indicate in § 1452 that it “intended the statute to be the exclusive provision governing removals and remands in bankruptcy” and there was no “reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage,” § 1447(d) applied and the remand order at issue was not subject to appellate review. *Id.* at 129.
Justice Kennedy wrote separately, however, to express his understanding that the Court’s holding in *Things Remembered* was “not intended to bear upon the reviewability of *Cohill* orders.”

He apparently was concerned that appellate courts would understand *Things Remembered* to mean that remand orders based on statutory authority are immune from review under § 1447(d), but remand orders that lack statutory authorization – such as those permitted in *Cohill* – are not. Thus, Justice Kennedy emphasized that the *Cohill* Court “did not find it necessary to decide” whether § 1447(d) would bar review of *Cohill* remand orders.

It decided only that district courts could remand pendent claims rather than dismissing them. Although he recognized that appellate courts had “relied on *Thermtron* to hold that § 1447(d) bars appellate review of § 1447(c) remands but not remands ordered under *Cohill*,

he ended his concurrence by stating: “The issues raised by those decisions are not before us.”


Despite Justice Kennedy’s concurrence in *Things Remembered*, however, later in the same Term the Court held in *Quackenbush v. Allstate Ins. Co.* that § 1447(d) is

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79 Id. at 129-30 (Kennedy, J., concurring).
80 Id. at 130 (Kennedy, J., concurring).
81 Id. (Kennedy, J., concurring).
82 Id. (Kennedy, J., concurring).

In *Quackenbush*, the California insurance commissioner sued Allstate Insurance Company in state court “seeking contract and tort damages for Allstate’s alleged breach of certain reinsurance agreements, as well as a general declaration of Allstate’s obligations under those agreements.” *Id.* at 709. Invoking diversity jurisdiction, Allstate removed the case and filed a motion to compel arbitration under the Federal Arbitration Act. *Id.* The commissioner then moved for remand, arguing that the district court should abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), because its resolution of the case might interfere with California’s regulation of the insurance industry. *Id.* Specifically, the commissioner indicated that there was “a hotly disputed question of state law” involved in the case, and that this question was already pending before the state courts.” *Id.*

The district court remanded the case primarily because it was concerned that the state and federal courts might rule differently on the disputed issue of state law and thereby produce inconsistent decisions. *Id.* at 709-10. The Ninth Circuit reversed, *id.* at 710, and the Supreme Court affirmed, *id.* at 711. The
inapplicable to abstention-based remands and therefore they are reviewable on appeal.\textsuperscript{84} Significantly, abstention-based remands, like Cohill remands, are not expressly provided for in § 1447(c) or any other statute. Instead, the power to abstain derives from “the historic discretion exercised by federal courts ‘sitting in equity’” to decline to exercise their jurisdiction.\textsuperscript{85} Citing both Thermtron and Things Remembered, the Quackenbush Court reiterated that § 1447(c) and § 1447(d) must be read together “so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).”\textsuperscript{86} Without additional explanation, the Court concluded that because abstention-based remands are not remands for lack of subject matter jurisdiction or a defect in removal procedure, § 1447(d) is inapplicable to them.\textsuperscript{87}

\textsuperscript{84} Id. at 711-12. The Quackenbush Court also held that remand orders which do not fall within § 1447(c) and (d) are appealable as final judgments under 28 U.S.C. § 1291. Id. at 712-15. Thus, Quackenbush disavowed the Thermtron Court’s statement that “an order remanding a removed action does not represent a final judgment reviewable by appeal” and therefore can be reviewed only through a writ of mandamus.” Id. at 714-15 (quoting Thermtron Prods., Inc., 423 U.S. at 352-53).

\textsuperscript{85} Id. at 718; see also id. at 717 (stating that “it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it is asked to employ its historic powers as a court of equity” and concluding that “[t]his tradition . . . explains the development of our abstention doctrines”) (internal quotation marks and citation omitted). Federal courts abstain only in exceptional circumstances. Id. at 716. They do so “out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism.” Id. at 723. For a more extensive discussion of abstention, see, e.g., Deborah J. Challener, Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction, 38 Rutgers L.J. 847, 849-65 (2007).

\textsuperscript{86} Id. (quoting Things Remembered, Inc., 516 U.S. at 127; Thermtron Products, Inc., 423 U.S. at 345-46).

\textsuperscript{87} Id. at 712. At the time Quackenbush was decided, the 1988 version of § 1447(c) was in effect. Thus, the Quackenbush Court concluded that abstention-based remands are not based on lack of subject matter jurisdiction or a defect in removal procedure.
In 2007, the Court decided Powerex Corp. v. Reliant Energy Services, Inc.,\(^8\) 127 S. Ct. 2411 (2007).


In Kircher, the district court remanded several cases to state court on the ground that it lacked jurisdiction over them under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). 547 U.S. at 637-38. On appeal, the Seventh Circuit concluded that the district court’s decision to remand was substantive, not jurisdictional, and therefore § 1447(d) did not prohibit it from reviewing the remand order. See id. at 638-39.

The Supreme Court reversed. Id. at 648. It noted that it has “repeatedly held that ‘any remand order issued on the grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court.’” Id. at 640 (quoting Thermtron Products, Inc., 423 U.S. at 351). Citing Things Remembered, the Court further stated that “[t]he bar of § 1447(d) applies equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions, and the force of the bar is not subject to any statutory exception that might cover this case.” Id. at 341 (citing Things Remembered, Inc., 516 U.S. at 128). The district court “said that it was remanding for lack of jurisdiction, an unreviewable ground,” and “look[ing] beyond the court’s own label,” the remand orders were “umistakably premised” on the district court’s view that it lacked subject matter jurisdiction.” Id. at 641. Thus, the Court concluded that the remand orders were issued pursuant to § 1447(c) and therefore were immune from appellate review under § 1447(d). Id.

In Osborn, the Court addressed the interaction of § 1447(c) and (d) with the Westfall Act. The Westfall Act “accords federal employees absolute immunity from common-law tort claims arising out of . . . their official duties.” 127 S. Ct. at 887 (citing 28 U.S.C. § 2679(b)(1)). “When a federal employee is sued for wrongful or negligent conduct, the [Westfall] Act empowers the Attorney General to certify that the employee ‘was acting within the scope of his office or employment at the time of the incident out of which the claim arose.’” Id. at 887-88 (quoting § 2679(d)(1), (2)). Once the certification occurs, “the United States is substituted as a defendant in place of the employee,” and “[t]he litigation is thereafter governed by the Federal Tort Claims Act.” Id. at 888. If the action is filed in state court, the Westfall Act provides that it is to be removed to federal court and renders the Attorney General’s certification “conclusiv[e] . . . for purposes of removal.” Id. (quoting § 2679(d)(2)).

In Osborn, the U.S. Attorney, serving as the Attorney General’s delegate, certified that the defendant was acting within the scope of his employment at the time of the conduct alleged in the plaintiff’s complaint and removed the case to a federal district court. Id. The district court rejected the Westfall Act certification, “denied the Government’s motion to substitute the United States as a defendant,” and remanded the case for lack of subject matter jurisdiction. Id. at 888, 896.

One question on appeal was whether the district court had authority under the Westfall Act to remand the case. See id. The Supreme Court held that “once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to the state court.” Id. at 888-89.

A second question on appeal was whether § 1447(d) barred appellate review of the remand order in the case at bar even though it was improper. See id. at 888 The Court concluded that § 1447(d) was inapplicable and that the remand order was reviewable. See id. at 889. The Court reasoned that in this case, “§ 1447(c) and (d) must be read together with the later enacted § 2679(d)(2). Both § 1447(d) and § 2679(d)(2) are antishuttling provisions. Each aims to prevent ‘prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.’” Id. at 894 (quoting United States v. Rice, 327 U.S. 742, 751 (1946)). According to the Court, only one “of the two antishuttling commands” could prevail, and it held that “§ 2679(d)(2) controls.” Id. at 896. The Court insisted that its decision “scarcely mean[t] that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order.” Id. at 895. The Court acknowledged that “[s]uch an exception would . . . collide head on with § 1447(d), and with [its] precedent.” Id. at 895-96 (citing e.g., Things Remembered, Inc. v. Petrarca, 516 U.S. at 127-28). Thus, the Court emphasized that “[o]nly in the extraordinary case in which
another § 1447(d) case. In *Powerex*, four cross-defendants removed the case.\(^{89}\) Powerex and a corporation owned by British Columbia removed pursuant to 28 U.S.C. § 1441(d), which permits a “foreign state,” as defined by the Foreign Sovereign Immunities Act (FSIA), to remove.\(^{90}\) The other two cross-defendants were United States agencies.\(^{91}\) They removed pursuant to 28 U.S.C. § 1442(a), which authorizes removal by federal agencies.\(^{92}\)

The district court determined that §§ 1441(d) and 1442(a) permit a defendant to remove the entire case and therefore concluded that the removal was proper.\(^{93}\) Ultimately, however, the district court remanded all of the claims because it found that (1) Powerex did not qualify as a “foreign state” under the FSIA; (2) the British Columbian corporation was immune from suit in federal court under the FSIA; and (3) the federal agencies were immune from suit in state court, and therefore a federal court could not acquire jurisdiction over them upon removal.\(^{94}\) After concluding that § 1447(d) did not prohibit appellate review of the remand order, the Ninth Circuit affirmed the district court but concluded that it should have dismissed the claims against the federal agencies instead of remanding them.\(^{95}\)

Only Powerex appealed to the Supreme Court,\(^{96}\) and the Court concluded that it did not have appellate jurisdiction to review the remand order. The Court first rejected

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\(^{89}\) *Id.* at 2414.

\(^{90}\) *Id.*

\(^{91}\) *Id.*

\(^{92}\) *Id.*

\(^{93}\) *Id.*

\(^{94}\) See *id.* at 2414-15.

\(^{95}\) *Id.* at 2415.

\(^{96}\) See *id.*
the argument that § 1447(d) bars appellate review of remand orders based on a lack of subject matter jurisdiction only if jurisdiction was absent at the time of removal.\textsuperscript{97} Relying on the language of § 1447(c) and its history, the Court held that when a case is properly removed but the district court subsequently determines that it lacks jurisdiction, “the remand is covered by § 1447(c) and thus shielded from review by § 1447(d).”\textsuperscript{98} The Court reasoned that “[n]othing in the text of § 1447(c) supports the proposition that a remand for lack of subject-matter jurisdiction is not covered so long as the case was properly removed in the first instance.”\textsuperscript{99} Indeed, while the language of the 1948 version of the statute provided for remand if the case “was removed improvidently and without jurisdiction,” the 1988 version and the current version require remand “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction.”\textsuperscript{100}

Furthermore, the Court pointed out, the “same section of the public law that amended § 1447(c) to include the phrase ‘subject matter jurisdiction,’ also created” the current version of 28 U.S.C. § 1447(e).\textsuperscript{101} Section 1447(e) provides: “If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to State court.” According to the Court, § 1447(e) “unambiguously demonstrates that a case can be properly removed and yet suffer from a failing in subject matter jurisdiction that requires remand.”\textsuperscript{102} Because the phrase “subject matter jurisdiction” was inserted into § 1447(c) and (e) at the same time, under principles of statutory construction it should be

\textsuperscript{97} Id. at 2416.
\textsuperscript{98} Id. at 2416-17.
\textsuperscript{99} Id. at 2416.
\textsuperscript{100} See id. .
\textsuperscript{101} Id. at 2417 (citing § 1016(c), 102 Stat. 4670).
\textsuperscript{102} Id.
construed to have the same meaning in both subsections of the statute.\textsuperscript{103} Thus, if removal is proper but the district court later remands for lack of subject matter jurisdiction, appellate review of the remand order is prohibited under § 1447(d).

The Court next addressed the question of whether the district court had remanded the case at bar for lack of subject matter jurisdiction.\textsuperscript{104} In answering this question, the Court held that “review of the District Court’s characterization of its remand as resting upon lack of subject-matter jurisdiction . . . should be limited to confirming that that characterization was colorable.”\textsuperscript{105} The Court reasoned that “[l]engthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d).”\textsuperscript{106}

The Court assumed that the district court’s conclusion that §§ 1441(d) and 1442(a) permit a defendant to remove the entire case was correct and therefore that removal was proper. The Court concluded, however, that the only “plausible” explanation for the district court’s remand order was that the lower court believed it lacked subject matter jurisdiction to adjudicate the claims against Powerex once it decided that Powerex was not a “foreign state” capable of independently removing the case and that the other defendants were immune from suit.\textsuperscript{107} The Court acknowledged that it had never decided whether subject matter jurisdiction exists over a removed claim when sovereign immunity bars the claims against the only parties capable of removing and that the point was “debatable.” Nevertheless, because the remand could be colorably

\textsuperscript{103} Id.
\textsuperscript{104} Id. at 2417.
\textsuperscript{105} Id. at 2418.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
characterized as one that was based on a lack of subject matter jurisdiction, the remand order was immune from appellate review under § 1447(d).\(^{108}\)

The Court also rejected the defendant’s argument that the remand order was based on the district court’s discretionary decision not to exercise supplemental jurisdiction and therefore the order was reviewable on appeal.\(^{109}\) Because the district court “never mentioned the possibility of supplemental jurisdiction” and it did not appear that the defendant had made any argument regarding supplemental jurisdiction, there was “no reason to believe that an unmentioned nonexercise of Cohill discretion was the basis for remand.”\(^{110}\)

In reaching this conclusion, the Court assumed that supplemental jurisdiction was available in the circumstances of the cases and that Cohill remands are reviewable on appeal.\(^{111}\) Of crucial importance here, however, the Court stated: “It is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d).”\(^{112}\) Echoing Justice Kennedy’s concurrence in Things Remembered, the Court further emphasized that

\(^{108}\) Id.  
\(^{109}\) Id. at 2418-19. Before concluding its opinion, the Court rejected two additional arguments made by the defendant as to why the remand order was reviewable. First, the defendant contended that “§ 1447(d) does not preclude review of a district court’s merits determinations that precede . . . remand.” Id. at 2419. The Court recognized that it held in Waco v. United States Fidelity & Guaranty Co., 293 U.S. 140 (1934), that orders which precede remand are reviewable on appeal. See id. In the case at bar, however, there was no district court order “separate from the remand” and therefore Waco did not permit appellate review. Id. Second, the defendant argued that § 1447(d) was inapplicable because the case was removed under the Foreign Sovereign Immunities Act (FSIA) and “Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications.” Id. at 2419-20. The Court rejected this argument because Congress has not authorized appellate review of FSIA remands, and the Court would not “ignore [§ 1447(d)] in reliance upon supposition of what Congress really wanted.” Id. at 2419-20. Moreover, the defendant’s “divination of congressional intent [was] flatly refuted by longstanding precedent.” Id. at 2420 (citing Things Remembered, 516 U.S. at 128; United States v. Rice, 327 U.S. 742, 752 (1946)).  
\(^{110}\) Id. at 2419.  
\(^{111}\) See id. at 2418-19.  
\(^{112}\) Id.
it has “never passed on whether Cohill remains are subject-matter jurisdictional for purposes of post-1988 versions of 1447(c) and 1447(d).”\(^\text{113}\)

D. Appellate Courts and Cohill/§ 1367(c) Remands

1. Pre-Powerex Decisions

Relying primarily on Thermtron, Cohill and each other, appellate courts uniformly concluded prior to Powerex that Cohill/§ 1367(c) remands are not made pursuant to § 1447(c) and therefore § 1447(d) is inapplicable to them.\(^\text{114}\) More specifically, these courts concluded that where a federal claim is eliminated from a

\(^{113}\) Id. at 2419 n.4 (citing Things Remembered, Inc., 516 U.S. at 129-30 (Kennedy, J., concurring); Cohill, 484 U.S. at 355 n.11).

\(^{114}\) See, e.g., Connolly v. H.D. Goodall Hosp., 427 F.3d 127, 128 (1st Cir. 2005); Hudson United Bank v. LitTenda Mortg. Corp., 142 F.3d 151, 155, 157-58 (3d Cir. 1998); Penn. Nurses Ass’n v. Penn. State Educ. Ass’n, 90 F.3d 797, 801 (3d Cir. 1996); Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 221-25 (3d Cir. 1995); Bryan v. Bellsouth Comms., Inc., 377 F.3d 424, 428 (4th Cir. 2004); Hinson v. Norwest Fin. South Carolina, Inc., 239 F.3d 611, 614-15 (4th Cir. 2001); Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1450-53 (4th Cir. 1996); Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1106 n.4 (4th Cir. 1989); Regan v. Starcraft Marine, LLC, ___ F.3d ___, 2008 WL 963406, *2 (5th Cir. 2008); Certain Underwriters at Lloyd’s v. Warrantech Corp., 461 F.3d 568, 571-72 (5th Cir. 2006); Giles v. NYLCare Health Plans, Inc., 172 F.3d 332, 336 (5th Cir. 1999); Thomas v. LTV Corp., 39 F.3d 611, 615-16 (5th Cir. 1994); Hook v. Morrison Milling Co., 38 F.3d 776, 780 (5th Cir. 1994); Bogle v. Phillips Petroleum Co., 24 F.3d 758, 761-62 (5th Cir. 1994); Burks v. Amerada Hess Corp., 8 F.3d 301, 303-04 (5th Cir. 1993); DaWalt v. Purdue Pharma, L.P., 397 F.3d 392, 396-402 (6th Cir. 2005); First Nat’l Bank v. Curry, 301 F.3d 456, 460 (6th Cir. 2002); Long v. Bando Mfg., Inc., 201 F.3d 754, 758 (5th Cir. 2000); In re Glass, Moulders, Pottery, Plastics & Allied Workers Int’l Union, 983 F.2d 725, 727 (6th Cir. 1993); In re Romulus Comm. Schs., 729 F.2d 431, 434-35 (6th Cir. 1984); Baker v. Kingsley, 387 F.3d 649, 653-57 (7th Cir. 2004); Adkins v. Ill. Central. R.R., 326 F.3d 828, 830-34 (7th Cir. 2003); J.O. v. Alton Comm. Unit Sch. Dist. 11, 909 F.2d 267, 269-70 (7th Cir. 1990); In re Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992); Ali v. Rasmussen, 423 F.3d 810, 812-13 (8th Cir. 2005); Lindsey v. Dillard’s, Inc., 306 F.3d 596, 598-99 (8th Cir. 2002); Green v. Ameritrade, Inc., 279 F.3d 590, 594-95 (8th Cir. 2002); St. John v. Int’l Ass’n of Machinists & Aerospace Workers, 139 F.3d 1214, 1216-17 (8th Cir. 1998); Gaming Corp. v. Dorsey & Whitney, 88 F.3d 536, 541-42 (8th Cir. 1996); In re Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir. 1994); In re Life Ins. Co., 857 F.2d 1190, 1193 n.1 (8th Cir. 1988); Executive Software N. Am., Inc. v. U.S. Dist. Ct., 24 F.3d 1545, 1549 (9th Cir. 1994); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1538-39 (9th Cir. 1992); Hansen v. Blue Cross of Cal., 891 F.2d 1384, 1390 (9th Cir. 1989); Price v. PSA, Inc., 829 F.2d 871, 874 (9th Cir. 1987); Scott v. Machinists Automotive Trades Dist. Lodge No. 190, 827 F.2d 589, 592 (9th Cir. 1987); Albertson’s, Inc. v. Carrigan, 982 F.2d 1478, 1479-80 (10th Cir. 1993); Westinghouse Credit Corp. v. Thompson, 987 F.2d 682, 684 (10th Cir. 1993); Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1350-51 (11th Cir. 1998); First Union Nat’l Bank, 123 F.3d 1374, 1377-78 (11th Cir. 1997); In re Surinam Airways Holding Co., 974 F.2d 1255, 1257 (11th Cir. 1992).
removed case and a district court remands any remaining state-law claims, the remand order is reviewable on appeal.\textsuperscript{115}

Many of the courts that addressed the reviewability of Cohill/§ 1367(c) remands pre-Powerex reasoned that § 1447(c) authorizes the remand of only those cases that have been improperly removed (1) due to a defect in removal procedure or (2) because none of the claims provides a basis for original jurisdiction in federal court. According to these courts, Cohill/§ 1367(c) remands are not based on § 1447(c) because in those cases there is no question that jurisdiction exists at the time of removal: The federal claim provides the basis for original jurisdiction in federal court and either pendent jurisdiction or § 1367(a) – depending on when the case was decided – provides supplemental jurisdiction over the state-law claims. Thus, unless there is a defect in removal procedure,\textsuperscript{116} the

\textsuperscript{115} In researching the pre-Powerex cases where § 1447(d) was held inapplicable to remands under Cohill and § 1367(c), the authors found only one case where the remand order was not based on § 1367(c)(3). \textit{PAS v. Travelers Ins. Co.}, 7 F.3d 349, 351-52 (3d Cir. 1993) (finding that a remand under § 1367(c)(1) was immune from § 1447(d) and therefore reviewable on appeal); \textit{see also} § 1367(c)(1) (stating that a district court can decline to exercise its supplemental jurisdiction over a state law claim if that claim “raises a novel or complex issue of State law”). Thus, like Cohill itself, the cases cited in notes 107 and 110 involve the remand of state law claims after the district court had dismissed all of the claims over which it had original jurisdiction. \textit{See supra} note 107; \textit{infra} note 110; \textit{see also} § 1367(c)(3) (stating that a district court can decline to exercise its supplemental jurisdiction if “the district court has dismissed all claims over which it has original jurisdiction”).

\textsuperscript{116} There does not appear to be any question that Cohill/§ 1367(c) remands themselves are not remands based on a defect in removal procedure. Under the 1948 version of § 1447(c), courts generally interpreted the phrase “improvident removal” to mean that district courts could remand for “errors in the removal process.” \textit{Snapper}, 171 F.3d at 1254-55 (citing various cases); \textit{see also} Joan Steinman, \textit{supra} note 34, at 960-61 (citing various cases and noting that the Cohill Court did not “utilize the language of improvidence” but instead “found . . . that the case had been properly removed, and had remained properly removed”). Thus, in addition to holding that Cohill/§ 1367(c) remands were not based on lack of subject matter jurisdiction, lower courts consistently held that such remands were not based on improvident removal and therefore § 1447(d) was inapplicable to them. \textit{See Snapper}, 171 F.3d at 1255 & n.10 (citing multiple cases); \textit{see also} Steinman, \textit{supra} note 34, at 962 (stating that there was “no justification for concluding that [the 1948 version of] § 1447(c) authorize[ed] the remand of pendent claims on the theory that they were removed ‘without jurisdiction’”).

When § 1447(c) was amended in 1988, the legislative history specifically stated that the amendment was “written in terms of a defect in ‘removal procedure’ in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of pendent jurisdiction or that might instead be remanded.” H.R. Rep. No. 100-889, at 72 (1988), \textit{reprinted in} 1988 U.S.C.C.A.N. 5982, 6033; David D. Siegel, \textit{Commentary on 1988 Revision of
removal is proper and any remand of state-law claims is not pursuant to § 1447(c).

Instead, the district court’s power to remand derives from either the doctrine of pendent or supplemental jurisdiction and the Supreme Court’s decision in Cohill. Accordingly, these courts conclude that § 1447(d) is inapplicable to Cohill/§ 1367(c) remands.\(^{117}\)

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\(\text{Section 1447} \) (stating that the “dropping out” of the claim on which original jurisdiction is based is not a defect in removal procedure “that would trigger the 30-day rule”); see also Snapper, 171 F.3d at 1256 n.13 (stating that the change in language from “removed improvidently” to “any defect in removal procedure” is “best understood as a congressional ratification of . . . consistent judicial practice in order to preclude any misapplication of the new [thirty-day] time limit” on filing remand motions based on defect in removal procedure”). In keeping with the legislative history, after the 1988 amendment lower courts continued to conclude that Cohill/§ 1367(c) remands were not based on a defect in removal procedure and therefore § 1447(d) was inapplicable to them. Snapper, 171 F.3d at 1256-57 & n.17; see also id. at 1257 (stating that with regard to Cohill/§ 1367(c) remands, this result made sense because it is unlikely that a Cohill/§ 1367(c) remand order would be “ripe” within thirty days of removal).

When § 1447(c) was again amended in 1996, a question arose as to how expansively the phrase “any defect other than lack of subject matter jurisdiction” should be interpreted. Specifically, lower courts began to address whether “any defect” referred only to defects in removal procedure or if, instead, it meant that motions to remand on any ground other than lack of subject matter jurisdiction were now covered by § 1447(c)’s thirty-day time limit and therefore immune from appellate review under § 1447(d). E.g., Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc., 201 F.3d 15, 16-17 (1st Cir. 2000) (remand based on a forum selection clause); Snapper, 171 F.3d at 1252-60 (same); Hudson United Bank v. LITenda Mortgage Corp., 142 F.3d 151 (3d Cir. 1998) (§ 1367(c) remand); see also David D. Siegel, Commentary on 1996 Revision of Section 1447(c) (stating that the “other than lack of subject matter jurisdiction” language is “like a residuary clause” and could include § 1367(c) remands within its reach).

Ultimately, the lower courts have concluded that the 1996 amendment applies to defects in removal procedure only, and therefore it did not make remands on any ground – including Cohill/§ 1367(c) remands – subject to the thirty-day limit or expand the types of remands covered by § 1447(c) and (d). See, e.g., Autoridad de Energia Electrica de Puerto Rico, 201 F.3d at 16-17 (concluding that § 1447(d) does not bar review of a remand ordered based on a forum selection clause because the order was not issued pursuant to § 1447(c)); Snapper, 171 F.3d at 1252-60 (same); Hudson United Bank v. LITenda Mortgage Corp., 142 F.3d 151 (3d Cir. 1998) (concluding that § 1447(d) did not bar review of an order remanding supplemental state claims after the federal claims had been dismissed because the order was not issued pursuant to § 1447(c)); see also id at 156 n.8 (stating that rather than understanding the 1996 amendment “as a wholesale rejection of Thermtron and a dramatic expansion of § 1447(d),” the court would “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)”). Moreover, the Powerex Court stated that it would assume that the 1996 amendment “was immaterial to Thermtron’s gloss on § 1447(d), so that the prohibition on appellate review remains limited to remands based on [lack of subject matter jurisdiction and defects in removal procedure].” Powerex Corp., ___ U.S. at ___, 127 S. Ct. at 2416.\(^{117}\) See, e.g., Hudson, 142 F.3d at 157-58 (distinguishing § 1447(c) and § 1367(c) remands on the ground that “§ 1447(c) remands are warranted only when a federal court has no rightful authority to adjudicate a state case that has been removed from state court,” whereas § 1367(c) remands “may be entered only when federal subject matter jurisdiction [has] been affirmatively established, via . . . § 1367(a) and therefore imply that the case was properly filed in federal court”); see also Trans Penn Wax Corp., 50 F.3d at 223 (“[A] remand only falls under § 1447(c) if the removal itself was jurisdictionally improper, not if the defect arose after removal.”); Bogle, 24 F.3d at 761-62 (stating that the “critical distinction” between a nonreviewable § 1447(c) remand and a reviewable [Cohill/§ 1367(c)] remand is that “[j]n a Section 1447(c) remand, federal jurisdiction never existed, and in a non-Section 1447(c) remand federal jurisdiction did
Moreover, some courts further reason that the district court does not lose jurisdiction over the state-law claims post-removal. They note that it is undisputed that a federal court has the power to adjudicate the supplemental claims even after the federal claim has been eliminated or, alternatively, the district court can remand the state-law claims. Because the decision whether to hear or remand the state-law claims is discretionary, rather than mandatory, these courts conclude that the remand is not for lack of subject matter jurisdiction under § 1447(c) and § 1447(d) is inapplicable. 118

exist at some point in the litigation, but the federal claims were either settled or dismissed”); First Nat’l Bank, 301 F.3d at 460 (finding that the district court’s remand order was reviewable because the district could not have concluded that it had supplemental jurisdiction over the state-law claims and declined to exercise that jurisdiction “had it determined that it never had subject-matter jurisdiction over the removed case); Exec. Software N. Am., Inc., 24 F.3d at 1549 (stating that the discretionary remand of supplemental claims is not done pursuant to § 1447(c) because in supplemental claim cases the district court has asserted original jurisdiction over at least one claim); Sever, 978 F.2d at 1539 (finding that the remand of state claims was reviewable because the original removal was proper). Cf. DaWalt, 397 F.3d at 400-02 (recognizing that § 1447(c) “on its face prohibits appellate review of subject-matter-jurisdiction remands that the district judge makes ‘at any time,’” including those based on post-removal events, but concluding that discretionary remands of pendent state-law claims are an exception to § 1447(c) and (d)); Adkins, 326 F.3d at 832-34 (stating that “any remand based on a conclusion that jurisdiction was lacking at the time of removal is covered by § 1447(c) [and (d)], no matter when that fact becomes apparent,” but further stating that if a remand is based on the “discretionary exercise of the power to decline supplemental jurisdiction,” then the remand is reviewable on appeal).

118 See, e.g., Baker, Watts & Co., 876 F.2d at 1106 n.4 (stating that because “[t]he district court did not believe that plaintiff’s common law claims were improvidently removed and clearly recognized that it had jurisdictional power to resolve them on the merits even after the dismissal of the federal claims,” the discretionary decision to remand them was “not jurisdictional” and therefore was reviewable on appeal); Long, 201 F.3d at 758 (“Here, the district court did not remand because it lacked subject matter jurisdiction; on the contrary, the district court explicitly stated that it had subject matter jurisdiction when the case was removed and noted that it had not been divested of that jurisdiction by the dismissal of the plaintiff’s federal claims.”); In re Glass Moulders, Pottery, Plastics & Allied Workers Int’l Union, 983 F.2d at 727 (finding that an order remanding state-law claims after the federal claims had been dismissed was reviewable because the remand was “discretionary” and “did not stem from lack of subject matter jurisdiction over the remaining claims”); Lindsey, 306 F.3d at 599 (stating that a § 1367(c) remand is not a remand for lack of subject matter jurisdiction because a district court “is not required to remand state law claims when the only federal claim has been dismissed,” but instead “maintains discretion to either remand the state law claims or keep them in federal court”); Gaming Corp., 88 F.3d at 542 (“Because the district court never lacked subject matter jurisdiction and remanded under § 1367, neither § 1447(d) nor any other statutory bar exists to [appellate review of the remand order].”); Price, 829 F.2d at 874 (finding that the remand order was reviewable because the removal was proper and the district court’s decision to remand the remaining state claims was discretionary rather than mandatory); Scott, 827 F.2d at 592 (finding that a remand order was reviewable because the state law claims were within the district court’s supplemental jurisdiction, the district court retained the power to hear them after the federal claims were dismissed, and the district court remanded them in its discretion, not because the removal itself was improper); First Union Nat’l Bank, 123 F.3d at 1377-78 (finding that a remand order was reviewable because the district court never stated that it lacked subject matter jurisdiction, “believed that it had supplemental jurisdiction to hear

In *HIF Bio, Inc. v. Yung Shin Pharmaceuticals Industrial Co.*, the Federal Circuit became the first appellate court to hold that *Cohill* § 1367(c) remands fall within § 1447(c) and thus are immune from appellate review under § 1447(d). The plaintiffs in *HIF Bio* asserted federal question and state-law claims in state court. After the defendants removed the case, the district court dismissed the federal question claim. It then declined to exercise supplemental jurisdiction over the state law claims pursuant to § 1367(c) and remanded them to state court. On appeal, the Federal Circuit concluded that § 1447(d) prohibited it from exercising appellate jurisdiction over the remand order.

The *HIF Bio* court first recognized that many other appellate courts have held that *Cohill* § 1367(c) remands are reviewable on appeal. The court, however, interpreted *Powerex* “to reopen the question of whether § 1367(c) remands are barred from review under §§ 1447(c) and (d).” Relying on *Powerex*, the court held that because a § 1367(c) remand “can be colorably characterized as a remand based on lack of subject

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119 508 F.3d 659 (Fed. Cir. 2007).
120 Id. at 667.
121 See id. at 661-62, 664.
122 See id. at 662.
123 Id. at 662, 664.
124 Id. at 663.
125 Id. at 665.
126 Id. at 666.
matter jurisdiction” under § 1447(c), it is “barred from appellate review under §
1447(d).”

The court reasoned that supplemental state law claims by definition lack an
independent basis of jurisdiction, and therefore a court has power over them only if they
fall with § 1367(a). According to the Federal Circuit, however, “[t]he text of § 1367(a)
indicates [that] § 1367(c) constitutes an express statutory exception to the authorization
of jurisdiction granted by § 1367(a).” Thus, “when declining supplemental
jurisdiction over state claims [under § 1367(c)], a district court strips the claims of the
only basis on which they are within the jurisdiction of the court.” Absent the “cloak of
supplemental jurisdiction, [the] state claims must be remanded for lack of subject matter
jurisdiction.”

In reaching its conclusion, the court rejected the argument that Cohill/§ 1367(c)
remands are similar to abstention-based remands and therefore, like abstention-based
remands, are subject to appellate review. The Federal Circuit recognized that courts
abstain and decline supplemental jurisdiction for similar reasons and that both abstention
and supplemental jurisdiction “are discretionary doctrines that allow a district court to
decline jurisdiction.”

The court believed, however, that there is a “fundamental difference” between
abstention-based remands and Cohill/§ 1367(c) remands which “compels a different

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127 Id. at 667.
128 See id.
129 Id. (quoting Voda v. Cordis Corp., 476 F.3d 887, 898 (Fed. Cir. 2007)).
130 Id.
131 Id.
132 Id. at 666-67.
133 Id. at 666.
result when applying the jurisdictional bar of § 1447(d).”134 It explained that when a court abstains, it declines to hear “claims over which it has an independent basis of subject matter jurisdiction, whether it be federal question . . . or diversity jurisdiction.”135 Thus, “a remand premised on abstention cannot be colorably characterized as a remand based on lack of subject matter jurisdiction.”136 According to the Federal Circuit, Cohill/§ 1367(c) remands are distinguishable because the only basis for jurisdiction over supplemental claims is § 1367(a).137 Since § 1367(c) is an exception to § 1367(a), once a court declines to exercise its supplemental jurisdiction the state law claims no longer fall within § 1367(a) and therefore are without any jurisdictional basis.138 At that point, the district court must remand them for lack of subject matter jurisdiction, and § 1447(c) and (d) bar appellate review of the remand order.139

III. SECTION 1367(C) REMANDS AND SUBJECT MATTER JURISDICTION

This Part examines whether the HIF Bio court correctly held that remand orders pursuant to § 1367(c) are remands based on a lack of subject matter jurisdiction under § 1447(c) – or at least can be colorably characterized as such – and therefore are immune from appellate review under § 1447(d). This Part first analyzes whether, under Powerex, the post-removal decision not to exercise supplemental jurisdiction can even result in a remand for lack of subject matter jurisdiction when the removal itself is proper. Second, this Part contends that the HIF Bio court incorrectly concluded that § 1367(c) remands fall within § 1447(c) and (d) because it confused the existence of judicial power with the

134 Id. at 666-67.
135 Id. at 667 (citing Burford v. Sun Oil Co., 319 U.S. 315, 317-18 (1943)).
136 Id.
137 Id.
138 See id.
139 Id.
discretionary decision whether to exercise that power. Third, this Part argues that even if the Supreme Court ultimately determines that § 1367(c) remands are based on a lack of subject matter jurisdiction, they do not fall within § 1447(c) because § 1447(c) is applicable only where a court determines that is lacks subject matter jurisdiction over the “case” and remands the entire case. Finally, this Part notes the anomalous consequences of any conclusion that § 1367(c) remands are covered by § 1447(c) and (d).

A. POST-REMOVAL EVENTS

Prior to Powerex, some appellate courts reasoned that Cohill § 1367(c) remands were not subject to the review bar of § 1447(d) as long as jurisdiction existed over the entire case at the time of removal. \(^{140}\) In effect, these courts concluded that § 1447(c) and (d) are concerned only with cases that are defective at the time they are removed. Thus, as long as jurisdiction existed at the time of removal, post-removal events that deprived the court of jurisdiction did not bring the case within § 1447(c) and (d). \(^{141}\) The HIF-Bio court, in contrast, implicitly assumed that even where removal is proper, post-removal events can result in a remand for lack of subject matter jurisdiction under § 1367(c).

After Powerex, this assumption appears to be correct.

Although the “general rule” is “that postremoval events do not deprive federal courts of subject-matter jurisdiction,” \(^{142}\) the Powerex Court nevertheless held that when a case is “properly removed” but the district court “lacks subject-matter jurisdiction to hear

\(^{140}\) See supra Part II.D.1.

\(^{141}\) Given the language of the 1948 version of § 1447(c), which provided for remand where a case was “removed improvidently and without jurisdiction,” this reasoning made eminent sense.

\(^{142}\) Powerex Corp., __ U.S. __, 127 S. Ct. at 2417 n.1 (citing Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 391 (1998)); St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 292-93 (1938); see also Steinman, supra note 32, at 886 (stating that one of the “basic tenet[s] of our system is that federal jurisdiction, once acquired, cannot be divested”).
a claim . . . , the consequent remand is authorized by § 1447(c) and appellate review is barred by § 1447(d).” As the Powerex Court explained, both the language of § 1447(c) and its history support this reasoning. In particular, the statute explicitly provides for remand “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction.” Thus, under Powerex, appellate courts can no longer simply determine that a case was properly removed and conclude on that basis that the remand of supplemental claims is not a remand pursuant to § 1447(c).

B. POWER VERSUS DISCRETION

Before Powerex, appellate courts also found that § 1367(c) remands are not based on a lack of subject matter jurisdiction because they are discretionary, not mandatory. Although scholars have taken the same position, the HIF-Bio court effectively rejected this reasoning by concluding that the declination of supplemental jurisdiction constitutes a loss of judicial power and therefore requires remand for lack of subject matter jurisdiction. In reaching its conclusion, the court emphasized the fact that “every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of jurisdiction.” In addition, the Federal Circuit distinguished

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143 Powerex Corp., ___ U.S. ___, 127 S. Ct. at 2417 n.1.
144 See supra Part II.C.3.
145 See supra Part II.D.1.
146 See, e.g., Joan Steinman, Supplemental Jurisdiction in §1447 Removed Cases: An Unsurveyed Frontier of Congress’ Handiwork, 35 Ariz. L. Rev. 305, 318 (1993) (“When the court merely has concluded that, as a matter of discretion, it will not exercise its jurisdiction, § 1447(c) is inapplicable because there has been no determination that the court lacks jurisdiction, even over the rejected claim.”); Steinman, supra note 34, at 962 (“[A] remand ordered as a matter of discretion not to exercise conceded judicial power is not a remand predicated on a lack of jurisdiction.”); David D. Siegel, Commentary on 1988 Revision of Section 1447 (“[T]he dropping out of the claim on which the other claims depended does not bring about a defect of subject matter jurisdiction – because the court has discretion to retain and try the remaining claims and a defect in subject matter jurisdiction can never allow that.”).  
147 See supra Part II.D.2.  
148 HIF Bio, Inc., 508 F.3d at 667.
abstention from the declination of supplemental jurisdiction on the ground that a court abstains from hearing claims over which it has an independent basis of jurisdiction, while a court by definition does not have an independent basis of jurisdiction over the claims it declines to adjudicate under § 1367(c). Accord ing to the HIF Bio court, this difference in the two doctrines compels disparate treatment under § 1447(c) and (d).

The HIF Bio court, of course, is correct that supplemental claims by definition do not have an independent basis of jurisdiction – i.e., federal question or diversity – and therefore do not fall within the original jurisdiction of a federal court. Furthermore, assuming that the Federal Circuit is correct that courts abstain only from deciding claims with an independent basis of subject matter jurisdiction, the court has undoubtedly

149 See supra Part II.D.2.
150 Id.
151 The exact nature of the relationship between abstention and § 1367(c) is unclear at best. Robert A. Schapiro, Polyphonic Federalism: State Constitutions in the Federal Courts, 87 Calif. L. Rev. 1409, 1421 & n.52 (1999) (noting that “[t]he relationship between § 1367(c) and abstention remains somewhat unclear” and cataloging various positions taken by courts and scholars). If anything, comments by scholars, lower federal courts and the Supreme Court have suggested that courts can abstain under § 1367(c). If this is true, then the HIF Bio court is incorrect that federal courts abstain only from deciding claims over which they have an independent basis of subject matter jurisdiction.

For example, in his commentary on the 1990 adoption of the supplemental jurisdiction statute, Professor David D. Siegel stated that § 1367(c)(1) and (2) are “analogous” to Pullman and Burford abstention “if not overlapping or duplicative” bases for declining jurisdiction. David D. Siegel, Commentary on 1988 Revision; see also David D. Siegel, Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act, 133 F.R.D. 61 (1991). Other scholars and some courts have taken a similar position. See John B. Oakley, Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990, 24 U.C. Davis L. Rev. 735, 767-68 (1991) (“Importing abstention considerations into the standards governing district courts' discretion to decline to exercise supplemental jurisdiction would appear substantially to curtail . . . the discretion . . . accorded district courts [prior to the enactment of § 1367].”); see also id. at 766 n.118 (stating that § 1367(c)(1) “introduces, in the articulation of the very first statutory factor . . . “the language of abstention’”); Joan Steinman, Section 1367 – Another Party Heard From, 41 Emory L.J. 85, 92 (1992) (stating that § 1367(c)(1) “is redolent of language used in abstention cases”); Patrick D. Murphy, A Federal Practitioner’s Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367, 78 Marq. L. Rev. 973, 1024-25 & n.288 (1995) (stating that § 1367(c)(1) is analogous to Pullman abstention, that declining supplemental jurisdiction under § 1367(c)(2) “is loosely analogous to invoking the Burford abstention doctrine, and that “[a]n imperfect analogy can be made between [s]ubsection (c)(4) and federal abstention under Colorado River”); Robert A. Schapiro, Dual Enforcement of Constitutional Norms: Interjurisdictional Enforcement of Rights in a Post-Erie World, 46 Wm. & Mary L. Rev. 1399 (2005) (stating that § 1367(a)(1) “appears to overlap with the bases for Pullman abstention”); White v. County of Newberry, 985 F.2d 168 (4th Cir 1993); Brown v. Woodland Joint Unified School, 1992 WL 361696, *5 (E.D. Cal. 1992) (“If it is not
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identified a real distinction between the two doctrines. This distinction, however, is immaterial. Instead, the crucial distinction here is the difference between the existence of judicial power – i.e., subject matter jurisdiction – and the exercise of that power. The existence of judicial power is a yes or no question. The decision whether to exercise that power, on the other hand, is discretionary.  

appropriate to abstain it is likewise not appropriate to decline the court’s supplemental jurisdiction over the state law claims.”).

In 1997, the Supreme Court suggested in Chicago v. International College of Surgeons, 522 U.S. 156 (1997), that some relationship does indeed exist between abstention and § 1367(c). Id. at 173-74. Specifically, the Court stated: “In addition to their discretion under § 1367(c), district courts may be obligated not to decide state law claims (or to stay their adjudication) where one of the abstention doctrines articulated by this Court applies. Those doctrines embody the general notion that ‘federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest . . . .’ Id. at 174 (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996)).

After the Court’s decision in College of Surgeons, scholars began to argue that § 1367(c)(4) codifies abstention principles. For example, in interpreting the Court’s statement in College of Surgeons, Professor Oakley focused on the Court’s quotation of the “exceptional circumstance”/“important countervailing interest” test for abstention and the similarity between this test and a court’s discretion to decline jurisdiction under § 1367(c)(4) where “in exceptional circumstances, there are . . . compelling reasons for declining jurisdiction.” The American Law Institute, Federal Judicial Code Revision Project: Tentative Draft No. 2, at 93 (April 14, 1998). According to Professor Oakley, it appears that the “exceptional circumstances/compelling reasons” standard of “present[] § 1367(c)(4) . . . would permit supplemental jurisdiction to be declined at to any claim that absent such statutory discretion would be eligible for abstention under the virtually indistinguishable “exceptional circumstances/important countervailing interest” test for when abstention is proper.” Id. Other scholars have made arguments similar to Professor Oakley’s. See, e.g., Georgene M. Vairo, Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction; Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act, ALI-ABA Course of Study, at 770 (2006) (stating that § 1367(c)(4) “would seem to include the following abstention formulas: cases where state law claims may be unclear – Pullman; cases involving state criminal proceedings – Younger; and, cases where the same parties are litigating the same issues in state court – Colorado River”); see also id. (discussing Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), cert. denied, 113 S. Ct. 1067 (1993)); Joseph N. Akrotirianakis, Comment: Learning to Follow Directions: When District Courts Should Decline to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c), 31 Loy. L.A. L. Rev. 995, 1026-27, 1029 (1998) (acknowledging that legal scholars have argued that § 1367(c)(4) codifies Pullman, Burford, and Younger abstention and contending that “[i]f the three traditional abstention doctrines present “exceptional circumstances” where “other compelling reasons for declining jurisdiction” exist under § 1367(c)(4), certainly so do the even narrower circumstances where a dismissal is warranted for “reasons of wise judicial administration” under Colorado River); see id. (discussing Hays); see also SST Global Tech. v. Chapman, 270 F. Supp.2d 444 (S.D.N.Y. 2003). But see U.S. Financial Corp. v. Warfield, 839 F. Supp. 684 (D. Ariz. 1993) (“The plaintiff provides no support for its position that section 1367(4) should not be invoked unless circumstances exist that would require a court to abstain anyway pursuant to one of the abstention doctrines. Certainly such an interpretation of section 1367(c)(4) would render the statutory provision almost nugatory.”).

152 See Rosado v. Wyman, 397 U.S. 397, 403-05 (1970), cited in, Steinman, supra note 34, at 962. In Rosado, the Supreme Court found that it had jurisdiction over the plaintiff’s state law claims even after the
“Subject matter jurisdiction” is the “power to adjudicate . . . claims.”\(^\text{153}\) It is axiomatic that a federal court has subject matter jurisdiction over a claim only when both the U.S. Constitution and a federal statute provide the court with power to adjudicate the claim. For example, a claim falls within the original jurisdiction of a federal court only when both Article III of the Constitution and a federal statute, typically §§ 1331 or 1332, authorize the court to adjudicate the claim. Similarly, a claim falls within the supplemental jurisdiction of a federal court only when both Article III and § 1367(a) of the supplemental jurisdiction statute authorize adjudication. Thus, the constitutional and statutory requirements for subject matter jurisdiction either are satisfied or they are not, and judicial power either exists or it does not.

In contrast, the decision whether to exercise judicial power is, sometimes, discretionary. That is, when a court has subject matter jurisdiction over a claim, in certain circumstances it may decline to exercise its jurisdiction. For example, when the plaintiff’s federal claim became moot. 397 U.S. at 401-04. The Rosado Court “adhered to the position that when a federal court has power to adjudicate a state claim, the decision whether to exercise that jurisdiction is a matter of discretion.” Steinman, supra note 34, at 962 (discussing Rosado, 397 U.S. at 403-05). Thus, the Court “distinguished between the existence of judicial power and the exercise of that power. The first is a ‘yes or no’ question as to whether jurisdiction exists; the second is merely a matter of discretion. Where there is power, a decision not to hear the state claim is purely a discretionary decision not to exercise that power. Hence a remand ordered as a matter of discretion not to exercise conceded judicial power is not a remand predicated on a lack of jurisdiction.” Id at 961(discussing Rosado, 397 U.S. at 403-05); see also Mark Herrmann, Thertron Revisited: When and How Federal Trial Court Remand Orders are Reviewable, 19 Ariz. St. L.J. 395, 420-21 (1987) (“Pendent jurisdiction is obviously not truly discretionary. A federal court either has power to hear the case or it does not. Thus, the phrase ‘discretionary jurisdiction’ is misleading. It is more accurate to say that a federal court has jurisdiction over state law claims and, under Gibbs, also has the power to decline to hear those claims, i.e., not to exercise that jurisdiction.”); Kircher v. Putnam Funds Trust, 373 F.3d 847, 850 (7th Cir. 2004), overruled on other grounds, 547 U.S. 633 (2006) (stating that it is important to “distinguish between a decision that ‘[a] court lacks adjudicatory competence’ and a decision that ‘[a] court has been authorized to do X and having done so should bow out” because “[t]he former implies lack of subject-matter jurisdiction . . .; the latter implies the presence of jurisdiction’”); id. (stating that “a suit under federal law with a state-law claim supported by . . . supplemental jurisdiction” is a “good example” of the category in which a court has adjudicatory competence but is authorized to decline to exercise its power and having done so should bow out).

\(^{153}\) E.g., Powerex Corp., 127 S. Ct. at 2418.
jurisdiction of a federal court is properly invoked under §§ 1331 or 1332, the court has a
“strict duty” to adjudicate the controversy. 154 This “duty” derives from the “undisputed
constitutional principle that Congress, and not the Judiciary, defines the scope of federal
jurisdiction within the constitutionally permissible bounds.” 155 Nevertheless, the federal
courts’ obligation to decide cases is not “absolute.” 156 The Supreme Court has long held
that federal courts have the power to abstain. 157 Under the abstention doctrines, federal
courts “may decline to exercise their jurisdiction, in otherwise exceptional circumstances,
where denying a federal forum would clearly serve an important countervailing
interest.” 158 The Supreme Court has “located the power to abstain in the historic
discretion exercised by federal courts sitting in equity,” but it has also “recognized that
the authority of a federal court to abstain from exercising its jurisdiction extends to all
cases in which the court has discretion to grant or deny relief.” 159

Dist. v. United States, 424 U.S. 800, 817 (1976) (stating that federal courts have a “virtually unflagging
obligation . . . to exercise the jurisdiction given them”); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404
(1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that
which is not given.”).


156 Quackenbush, 517 U.S. at 716.

157 See, e.g., Colo. River, 424 U.S. at 814-17 (discussing the different categories of abstention and citing
many cases in which the Supreme Court has approved of abstention).

158 Quackenbush, 517 U.S. at 716 (internal quotation marks and citations omitted) (emphasis added). When
a federal court abstains, it either: (1) declines to exercise its jurisdiction altogether by remanding a removed
case to state court or dismissing the case outright, or (2) “postpones” the exercise of its jurisdiction by
staying the federal proceedings and remitting the parties to a state court. See, e.g., id. at 731 (“[F]ederal
courts have the power to dismiss or remand cases based on abstention principles only where the relief being
sought is equitable or otherwise discretionary.”); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (affirming a
district court’s dismissal of a complaint on abstention grounds); La. Power & Light Co. v. City of
Thibodaux, 360 U.S. 25, 30-31 (affirming a district court’s stay of proceedings on abstention grounds).

159 Id. at 716 (internal quotation marks and citations omitted) (emphasis added). In the past, it has been
unclear whether, for example, “Pullman abstention is mandatory or discretionary.” Erwin Chemerinsky,
Federal Jurisdiction 795 (5th ed. 2007). In other words, it has been uncertain whether a court is obligated
to abstain if the requirements for abstention are satisfied or whether a court can decide to exercise
jurisdiction even if the requirements for abstention are satisfied. According to Dean Chemerinsky, the
“preferable approach is to treat abstention as discretionary and allow federal courts to hear the case, even if
the Pullman criteria are met, provided substantial reasons for avoiding abstention are present.” Id. As
Similarly, § 1367(a) states: “Except as provided in subsections (b) and (c) or as otherwise expressly provided by Federal statute,” the district courts “shall have supplemental jurisdiction” when the statute is properly invoked. The mandatory language in § 1367(a) – “shall have supplemental jurisdiction” – indicates that the court has a duty to adjudicate the supplemental claims before it. Section 1367(a) makes it clear, however, that the court’s duty is not absolute. Subsection (b) provides that in diversity cases, the district courts “shall not have supplemental jurisdiction under subsection (a)” over particular claims. Thus, subsection (b) specifically withdraws the jurisdiction granted under subsection (a) in certain circumstances.

In contrast, under subsection (c), a district court “may decline to exercise supplemental jurisdiction over a claim under subsection (a)” if one of the criteria enumerated in subsection (c) is satisfied. Subsection (c), unlike subsection (b), does not provide for discretionary abstention. As noted above, the Court stated in Quackenbush, its most recent abstention decision, that abstention is “derived from ‘discretion historically enjoyed by courts of equity.’” 517 U.S. at 728; see also Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943) (describing the court’s choice of whether to abstain as a matter of discretion). Thus, the better conclusion is that the decision whether to abstain is a discretionary one. See John B. Oakley, Prospectus for the American Law Institute’s Federal Judicial Code Revision Project, 31 U.C. Davis L. Rev. 855, 938-39 (1988) (“Subsection 1367(a) begins with a sweeping grant of supplemental jurisdiction . . . . The drafters elected to phrase this grant in mandatory language, subject only to the exceptions expressly provided by other federal statutes or set out in subsections (b) and (c) of section 1367.”).

160 See Oakley, supra note 153, at 943.
161 Section 1367(c) specifically provides that a court may decline to exercise supplemental jurisdiction when “(1) the claim raises a novel or complex issues of State law,” (2) “the claim substantially predominate over the claim or claims” within the court’s original jurisdiction, (3) “the district court has dismissed all claims over which it has original jurisdiction,” or (4) “in exceptional circumstances.”

There is a circuit split regarding whether § 1367(c) codifies the broad discretionary approach under Gibb or is limited to only the criteria listed therein. Compare e.g., Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (finding that a district court can decline to exercise its supplemental jurisdiction under § 1367(c) for reasons of convenience, fairness, judicial economy and comity as set forth in Gibb) with Executive Software N. Am. V. Dist. Court, 24 F.3d 1545 (9th Cir. 1994) (finding that a district court can decline to exercise its supplemental jurisdiction under § 1367(c) only for the reasons listed in the statute). This circuit split, however, does not affect the reasoning or conclusions of this Article.
not withdraw the jurisdiction granted in subsection (a). Instead, subsection (c) authorizes a district court to decline to exercise its power under (a) if subsection (c) is satisfied and the court chooses not to exercise its power. The court may, but is not obligated to, decline to exercise its supplemental power. Thus, contrary to the *HIF Bio* court’s conclusion, the plain language of subsection (c) demonstrates that it is not an express statutory exception to subsection (a).

Furthermore, the Supreme Court has indicated that the decision whether to decline to exercise supplemental jurisdiction is discretionary. The Court has noted that “pendent jurisdiction ‘is a doctrine of discretion, not of plaintiff’s right,’” and that “district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons.” The Court has also recognized that § 1367(c) “confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise.” Thus, the Court has concluded that § 1367(c) “reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, ‘a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.’”

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163 Oakley, supra note 151, at 943 (stating that “subsection 1367(c) further qualifies the mandatory nature of . . . subsection (a),” but “[u]nlike subsection 1367(b) . . . does not withdraw the jurisdiction granted by subsection 1367(a). Subsection 1367(c) seeks instead to resurrect the element of judicial discretion in the exercise of supplemental jurisdiction that the mandatory phrasing of subsection 1367(a) needlessly extinguished.”).

164 See *Int’l College of Surgeons*, 522 U.S. at 172 (“Of course, to say that the terms of § 1367(a) authorize the district courts to exercise supplemental jurisdiction over state law claims . . . does not mean that the jurisdiction must be exercised in all cases.”).


166 *Id.* at 173.

167 *Id.* at 173 (quoting *Cohill*, 484 U.S. at 350).
In *HIF Bio* itself, the defendants properly removed the case to federal court. Therefore, judicial power existed for the federal court to adjudicate the claims before it. The district court then dismissed the federal claims on the merits. After the federal claims were dismissed, there was no question that the district court retained jurisdiction to decide the supplemental state law claims. The question the district court faced was whether it should decline to exercise its supplemental jurisdiction under § 1367(c)(3) because the claims within its original jurisdiction had been eliminated. The court decided, in its discretion, to remand the supplemental claims to state court, but it was not required to do so because it lacked subject matter jurisdiction – *i.e.*, judicial power – over the claims. It declined to exercise supplemental jurisdiction under § 1367(c)(3) – a discretionary decision – given the circumstances of the case.

Thus, when a court declines to exercise its supplemental jurisdiction under § 1367(c), as when it abstains, the court is making a discretionary decision not to exercise jurisdiction.

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168 *See supra* Part II.D.2.
169 *Id.*
170 *E.g.*, *Rosado*, 397 U.S. at 403-05; *see also* Steinman, *supra* note 34, at 963 (“[E]limination of the federal question claim does not destroy a federal court’s jurisdiction, its power to determine a [supplemental] state law claim.”).
171 The *HIF Bio* court repeatedly used the phrase “declining supplemental jurisdiction.” *E.g.*, 508 F.3d at 664 (“In this case, the district court’s remand order is based on declining supplemental jurisdiction.”); *id.* at 665 (“[W]e are faced with an issue of first impression for this court: whether a remand based on declining supplemental jurisdiction under § 1367(c) is within the class of remands described in § 1447(c).”); *id.* at 667 (“[A] remand based on declining supplemental jurisdiction can be colorably characterized as a remand based on lack of subject matter jurisdiction.”). The court’s use of this phrase, however, is incorrect. Section 1367(c) specifically states that a district court “may decline to exercise supplemental jurisdiction” in certain circumstances. Thus, under § 1367(c), a district court declines to exercise conceded supplemental jurisdiction. It cannot “decline supplemental jurisdiction” because the existence of jurisdiction – *i.e.*, judicial power – is a yes or no question. The decision whether to exercise judicial power, however, is discretionary. The remand order in *HIF Bio* was based on the district court’s discretionary decision to decline to exercise supplemental jurisdiction and not on the decision to “decline jurisdiction,” a decision that the district court was without power to make. Accordingly, the *HIF Bio* court inappropriately used the phrase “declining jurisdiction” throughout its opinion.
existing judicial power. The court has both constitutional and statutory authority to adjudicate the claim but chooses not to use its power. The conclusion that jurisdiction evaporates at the moment a court declines to exercise its supplemental power is tautological. Once a court has determined that § 1367(c) is applicable and that it will

172 See Doughty v. Underwriters At Lloyd’s, 6 F.3d 856, 860 (1st Cir. 1993), overruled on other grounds, Quackenbush, 517 U.S. at 712-15 (“Because abstention, by definition, assumes the existence of subject matter jurisdiction in the abstaining court – after all, one must have . . . subject matter jurisdiction in order to decline the exercise of it – section 1447(c) does not apply to an abstention-driven remand.”); David D. Siegel, Commentary on 1996 Revision of Section 1447(c) (stating that the decision whether to remand a supplemental claim after the main claim has been disposed of on the merits is “not a question of subject matter jurisdiction,” but “[l]ike . . . abstention, it’s one of discretion.”).

173 This argument is derived from Kircher v. Putnam Funds Trust, 373 F.3d 847, 849-50 overruled on other grounds, 547 U.S. 633 (2006). In Kircher, the plaintiffs sued an investment fund and its adviser in state court for misconduct under state law. Id. at 847. The defendants removed the suit under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). Id. at 848.

The district court remanded the case for lack of jurisdiction. See id. Nevertheless, the Seventh Circuit concluded that § 1447(c) and (d) did not insulate the remand order from appellate review because the removal itself was jurisdictionally proper and no post-removal events “undercut the propriety of removal.” Id. at 851. Instead, according to the Seventh Circuit, the “only pertinent development” post-removal was that the district court made a “substantive decision” under SLUSA that remand was appropriate for non-jurisdictional reasons. Id. at 849, 851. The appellate court reasoned that once the district court made its substantive decision, it “had nothing else to do: dismissal and remand [were] the only options.” Id. at 849-50.

The court recognized that it was possible to conclude “that jurisdiction evaporated at that juncture, but found that such a conclusion “would be tautological.” Id. at 850. The court emphasized the distinction between the decision that a “court lacks adjudicatory competence’ and a decision that '[a] court has been authorized to do X and having done so should bow out.”’ Id. In the latter situation, the court has “no adjudicatory competence to do more,” but it “is not the ‘lack of subject-matter jurisdiction’ that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed ‘for lack of jurisdiction’ because the court’s job was finished.” Id.

According to the court, remands under § 1367(c) are a “good example” of the second category: a court has adjudicatory competence under § 1367(a), but one it decides not to exercise its supplemental jurisdiction under subsection (c), it should bow out. See id. The remand, however, is not for lack of subject matter jurisdiction simply because the court’s job is finished. See id. Similarly, the Seventh Circuit concluded that once the district court in Kircher made the substantive decision that remand was appropriate, its only options were remand and dismissal. Id. at 849-50. That did not mean, however, that the remand was for lack of subject matter jurisdiction just because the court had finished its work. Id. at 850.

On certiorari, the Supreme Court held that the district court’s remand order was, in fact, based on a lack of jurisdiction and therefore it was immune from appellate review under § 1447(c) and (d). Kircher v. Putnam Funds Trust, 547 U.S. 633, 642-44 (2006). The Court noted that the only adjudicatory competence the district court had was the power to determine if it actually had jurisdiction to proceed with the case. See id. at 644. Because the Court concluded that judicial power never existed in Kircher, once the district court decided that it lacked subject matter jurisdiction, the remand order necessarily fell within § 1447(c) and (d). See id. Although the Supreme Court overruled the Seventh Circuit’s holding that the remand order was reviewable on appeal, the Court neither called into question nor even addressed the Seventh Circuit’s reasoning that there is a distinction between the existence of judicial power and the decision whether to exercise it. The Court simply did not reach this issue because it concluded that judicial power never existed.
exercise its discretion not to adjudicate a supplemental claim, there is nothing left for the court to do in a removed case except remand the claim. The remand does not result from a lack of jurisdiction but instead from the court’s decision not to exercise its conceded judicial authority. Accordingly, remands under § 1367(c), like abstention-based remands, cannot be colorably characterized as remands for lack of subject matter jurisdiction and therefore do not fall within § 1447(c) and (d).

C. THE REMAND OF CLAIMS AND CASES UNDER § 1447(C)

After concluding that § 1367(c) remands are based on a lack of subject matter jurisdiction, the HIF Bio automatically assumed that they therefore fall “within the class of remands described in § 1447(c) and thus barred from appellate review by § 1447(d).” Even if the Supreme Court ultimately concludes that § 1367(c) remands can

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174 Several circuits have concluded that because the decision whether to exercise supplemental jurisdiction is discretionary, (1) neither a district court nor an appellate court is obligated to raise the applicability of § 1367(c) sua sponte, and (2) if the parties fail to raise the issue in the district court then they cannot raise it on appeal. See e.g., Alternate Fuels, Inc. v. Cabanas, 435 F.3d 855, 857 n.2 (8th Cir. 2006) (stating that where neither party nor the magistrate judge raised the issue, the court “need not decide sua sponte whether the magistrate judge abused its discretion in exercising supplemental jurisdiction); Int’l College of Surgeons v. Chicago, 153 F.3d 356, 366 (1998) (on remand from the U.S. Supreme Court) (finding that where the litigants do not challenge a district court’s decision to exercise jurisdiction over supplemental claims under § 1367(c) in the district court, they cannot raise the argument on appeal); Lucero v. Trosch, 121 F.3d 591, 598 (11th Cir. 1997) (same); Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (holding that “when there is power to hear the case under § 1367(a),” the district court can exercise supplemental jurisdiction “without sua sponte addressing whether it should be declined under § 1367(c)” and the appellate court is “not required, sua sponte, to decide whether the district court abused its discretion under § 1367(c) when neither party raised the issue); Doe by Fein v. Dist. of Columbia, 93 F.3d 861, 871 (D.C. Cir. 1996) (finding that while Article III jurisdiction must be raised sua sponte because it “goes to the foundation of the court’s power to resolve a case,” a district court’s decision whether to exercise supplemental jurisdiction under § 1367(c) is discretionary and therefore, absent exceptional circumstances, any objection to a district court’s decision to exercise supplemental jurisdiction is waived if not raised in the district court).

These decisions bolster the conclusion that remands under § 1367(c) are not based on lack of subject matter jurisdiction. If they were, then presumably district courts and appellate courts would be required to raise sua sponte the issue of whether they should decline to exercise supplemental jurisdiction if the parties do not raise the issue. Cf. Chemerinsky, supra note 152, at 418 (stating that “the Supreme Court repeatedly and consistently has held that a state may waive its Eleventh Amendment immunity. . . . But waiver should not be possible if the Eleventh Amendment is a restriction on subject matter jurisdiction”).

175 HIF Bio, Inc., 508 F.3d at 667.
be colorably characterized as remands for lack of subject matter jurisdiction, however, they will not necessarily fall within § 1447(c). Section 1447(c) can be interpreted to encompass only those remands that are based on lack of subject matter over an entire case and not remands, like those under § 1367(c), that involve remand of only a claim or claims.

Section 1447(c) states in pertinent part: “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” Noticeably absent from § 1447(c) is the definition of over precisely what it must appear that the district court lacks subject matter jurisdiction before the case must be remanded. Two options logically present themselves. The first is that if the district court appears to lack jurisdiction over a “claim,” then the whole case must be remanded. The second is that if the district court appears to lack jurisdiction over the “case,” then the whole case must be remanded.

The Supreme Court has defined a claim as a “judicially cognizable cause of action.”176 There is no doubt that should a court determine that it does not have original jurisdiction over any claim in a complaint, the entire case must be remanded and the remand order would fall within § 1447(c).177 If § 1447(c) is interpreted to apply where a court has original jurisdiction over one claim but remands one or more other claims for lack of subject matter jurisdiction, however, then the plain language of § 1447(c) requires the court to remand the entire “case” in these circumstances, too.

176 *Int’l College of Surgeons*, 522 U.S. at 165.
In the context of § 1367(c) remands, this interpretation of § 1447(c) is quite problematic. First, the plain language of § 1367(c) itself permits a court to decline to exercise supplemental jurisdiction over supplemental claims, but it does not authorize a court to decline to exercise jurisdiction over claims within its original jurisdiction.\textsuperscript{178} Second, with regard to remands under § 1367(c)(1), (2), and (4), this interpretation of § 1447(c) would require a court to remand claims within its original jurisdiction. For example, if a district court declined to exercise its supplemental jurisdiction over a state-law claim under § 1367(c)(1) – because “the claim raises a novel or complex issue of State law” – then § 1447(c) would mandate that the whole case be remanded, including the claims over which the district court had original jurisdiction. The same analysis would apply if the district court declined to exercise its supplemental jurisdiction under § 1367(c)(2) or (c)(4). Such results would flout the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”\textsuperscript{179}

If a district court declined to exercise its supplemental jurisdiction over a state-law claim under § 1367(c)(3) because it had “dismissed all claims over which it ha[d] original jurisdiction,” then § 1447(c) would still mandate remand of the entire case. In this circumstance, however, all that would remain of the “case” would be the state-law claim, and the district court would not be required to remand claims within its original jurisdiction in order to remand the “case.” Thus, it is conceivable that a court could conclude that only remands pursuant to § 1367(c)(3) – and not remands under § 1367(c)(1), (2), and (4) – constitute remands for lack of subject matter jurisdiction that

\textsuperscript{178} Steinman, \textit{supra} note 139, at 318 (noting that “§ 1447(c) calls for remand of the entire case, but § 1367(c) authorizes the courts to decline jurisdiction over only the claims within supplemental jurisdiction, not to decline jurisdiction over claims over which there is an independent basis of jurisdiction”).

\textsuperscript{179} \textit{Colorado River Water Conservation Dist. v. United States}, 424 U.S. 800, 817 (1976); \textit{see supra} notes 146-151 & accompanying text.
fall within § 1447(c) and (d). However, such a conclusion would conflict with the *HIF Bio* court’s reasoning that a court loses jurisdiction over the supplemental claims when it declines to exercise supplemental jurisdiction because § 1367(c) is an express statutory exception to § 1367(a). Under *HIF Bio*, the reason for a district court’s decision not to exercise supplemental jurisdiction is irrelevant. Once the decision is made, the court loses jurisdiction over the claim.

The second, more plausible interpretation of § 1447(c) is that it requires a district court to remand a “case” only when it appears that it lacks subject matter jurisdiction over the whole case, and not just a claim. If a “case” is understood to comprise all of the claims in a lawsuit, then only if the court determines that it is without jurisdiction over all claims in the suit must the entire case be remanded. For example, if a court discovers before final judgment that it never had original jurisdiction over any claim, then removal was improper under § 1441(a) and § 1447(c) requires remand of the whole case for lack of subject matter jurisdiction.

This interpretation of § 1447(c) not only prevents a district court from having to remand claims within its original jurisdiction under § 1447(c), but it is also consistent with *Powerex*. The *Powerex* Court held that even if removal is proper, post-removal events can result in a remand for lack of subject matter jurisdiction. The Court did not define the type of post-removal events that can result in a § 1447(c) remand, but it did rely on 28 U.S.C. § 1447(e) in reaching its conclusion. Section 1447(e) states: “If after

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180 *See supra* Part II.D.2.
181 Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 Ind. L.J. 75, 87 (1998) (“First, claims and actions are not the same thing. While an action may consist of a single claim, a single civil action pending in federal court may consist of multiple claims, some or all of which are asserted by plaintiffs and some or all of which are asserted by parties.”).
removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.” Thus, under § 1447(e), if joinder would destroy complete diversity and thereby deprive the court of jurisdiction over the case, then the court must “remand the action.” As the Powerex Court said, § 1447(e) “unambiguously demonstrates that a case can be properly removed and yet suffer from a failing in subject-matter jurisdiction that requires remand.” Consequently, § 1447(e) demonstrates that it is possible to interpret § 1447(c) to require a court to lack jurisdiction of a case before the remand falls within § 1447(c) and reconcile that interpretation with Powerex.

Under this more plausible interpretation on § 1447(c), even if § 1367(c) remands can be colorably characterized as remands for lack of subject matter jurisdiction, they would not fall within § 1447(c) because the court would lack jurisdiction over only a claim or claims and not the whole case. Furthermore, because § 1447(c) and (d) must be read together under Thermtron and its progeny, if § 1447(c) does not cover § 1367(c) remands (even if they are for lack of subject matter jurisdiction), then § 1447(d) would be inapplicable and § 1367(c) remands would be reviewable on appeal.

D. ANOMALOUS CONSEQUENCES

The ban on appellate review of remand orders based on a lack of subject matter jurisdiction has created a “strange concatenation of results.” If § 1367(c) remands are found to be immune from appellate review, the anomalous results produced by § 1447(c) and (d) will multiply. Currently, if a claim is dismissed for lack of subject matter

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182 Powerex Corp., __ U.S. __, 125 S. Ct. at 2417 (emphasis added).
183 See supra Part II.B.2.
184 See Steinman, supra note 34, at 926.
jurisdiction, it is reviewable on appeal *de novo*. If a claim is remanded for lack of subject matter jurisdiction, however, it is unreviewable. Furthermore, at least until *HIF Bio* was decided, all circuits that had addressed the issue held that § 1367(c) remands are reviewable on appeal. This led to the odd circumstance that discretionary remands are subject to appellate review (except in the Federal Circuit) while remands for lack of subject matter jurisdiction are not. This is a “perverse” result “because discretionary decisions, by their very nature, are such that different judges may reasonably come to different conclusions.”

Appellate review of discretionary decisions therefore “would seem less essential than review of nondiscretionary conclusions as to jurisdiction, based upon holdings of law.”

If the Supreme Court decides that § 1367(c) remands are based on lack of subject matter jurisdiction and therefore are immune from appellate review, yet another anomaly will be created: § 1367(c) remands will no longer be subject to appellate review, but § 1367(c) dismissals will remain reviewable on appeal. Moreover, if § 1367(c) remands are based on a lack of subject matter jurisdiction, then courts presumably will consider § 1367(c) dismissals to be based on a lack of jurisdiction as well. As a result, § 1367(c)

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185 *Id.* at 1007.
186 *Id.; see also* Steinman, *supra* note 139, at 320 (“[A] set of rules that allows appellate courts to review remands based on technical defects in removal procedure or ordered in the exercise of discretion but denies them the ability to review remands based on the fundamental question of federal jurisdiction is most peculiar. It is hard to fathom that Congress would have intended such a scheme. The system is perverse, and ought to be fixed.”).
187 Steinman, *supra* note 34, at 1004 (noting the consequences of making “discretionary remands of pendent state law claims” unreviewable). According to Professor Steinman, the law would be in a “problematic state” if discretionary remands of supplemental claims were not reviewable on appeal but discretionary dismissals were. *Id.* She notes that district courts could “dismiss when they welcomed appellate review of a ‘hard’ decision,” but “remand when appellate review would accomplish little.” *Id.* at 1005. “In addition, such a system could work less benignly, allowing district judges to avoid reversal by remanding.” Furthermore, “the choice between remand and dismissal often will be driven by statute of limitations or other considerations that have no bearing on the value of appellate review in a particular case. To the extent that this is true, it is anomalous for remand and dismissal to have different appellate consequences.” *Id.* at 1005.
dismissals will become reviewable on appeal *de novo*, while § 1367(c) remands will receive no appellate scrutiny whatsoever. As Professor Steinman has observed previously, “[t]o the extent that the denial of appellate review is intended as a mechanism to limit the volume of federal litigation, it is a remarkably unprincipled tool.”

Although the system needs to be fixed, banning appellate review of § 1367(c) remand orders will not accomplish that goal.

IV. CONCLUSION

This Article has argued that although post-removal events can result in remands for lack of subject matter jurisdiction, a court’s decision not to exercise supplemental jurisdiction under § 1367(c) does not constitute such an event. Instead, when a court remands claims under § 1367(c), it makes a discretionary decision not to exercise the power that it has under both the Constitution and § 1367(a). Because constitutional and statutory power – *i.e.*, jurisdiction – exist, a remand under § 1367(c) is in no sense a remand based on a lack of subject matter jurisdiction. This Article has also argued that even if the Supreme Court concludes that § 1367(c) remands result from a lack of subject matter jurisdiction, they would not fall within § 1447(c) because that statute applies only to remands based on a lack of jurisdiction over the entire case. Finally, this Article pointed out the incongruent consequences of any decision that § 1367(c) remands not only are based on lack of subject matter jurisdiction but also fall within § 1447(c) and (d).

This Article concludes that § 1367(c) remands cannot be even “colorably characterized” as remands based on lack of subject matter jurisdiction. Nevertheless,

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they do have the scent of subject matter jurisdiction about them because, as the *HIF Bio*
court pointed out, supplemental claims by definition lack an independent basis of
jurisdiction. It remains to be seen whether just the scent of subject matter jurisdiction
will be enough for the Supreme Court to conclude that § 1367(c) remands can be
colorably characterized as remands based on a lack of subject matter jurisdiction.