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I. Introduction

When state and federal courts share concurrent jurisdiction, the general rule is that the plaintiff, as "the master of the claim,"[1] may choose the forum in which the case proceeds. The principal exception to this doctrine is provided by the rules of removal, which in certain circumstances allow the defendant to "remove" a case from state to federal court. Although the United States Constitution makes no mention of removal, defendants have been permitted to remove in limited circumstances since the Judiciary Act of 1789,[2] and the removal doctrine has existed in something very much like its present form for over a century.[3]

Given this history, it is not surprising that the rules governing removal have become familiar and that, with a few notable exceptions, those rules are applied by the courts without much difficulty. Nevertheless, several significant anomalies exist in the removal doctrine that merit consideration. This article will give a brief review of the current law of removal, and then turn to the issues raised by that law's anomalies.

II. Existing Law

A. *Requirements for Removal*

Under the first prong of the basic removal provision, 28 U.S.C. section 1441(a), a defendant may remove a civil action

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1. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

2. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80.

3. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552-54, corrected by Act of Aug. 13, 1888, 25 Stat. 433-37. *See generally* Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 7-8 (1983); Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L. Rev. 717 (1985-86).

from state to federal court if the case is one in which "the district courts of the United States have original jurisdiction." This formulation makes the availability of removal turn on whether the case could have been brought in federal court as an original matter, so that the usual rules governing federal question and diversity cases generally apply with full force in the removal setting. As a result (with one exception noted below), a defendant may remove a diversity case only if diversity is complete. Similarly, removability of a federal question case turns on satisfaction of the well-pleaded complaint rule,[4] which means "that a case may *not* be removed to a federal court on the basis of a federal defense . . . even if both parties concede that the federal defense is the only question truly at issue."[5] This approach to removal permits the plaintiff to "avoid federal jurisdiction by exclusive reliance on state law,"[6] or by joinder of nondiverse parties.[7]

Under the second prong of the basic removal provision, 28 U.S.C. section 1441(b), federal question cases are "removable

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4. That rule hinges jurisdiction on "what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." Oklahoma Tax Comm'n v. Graham, 109 S. Ct. 1519, 1521 (1989), quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914). *See generally Caterpillar*, 482 U.S. at 391-93; Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 807-09 (1986); *Franchise Tax Board*, 463 U.S. at 9-12; Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

5. *Caterpillar*, 482 U.S. at 393 (emphasis in original). *See Graham*, 109 S. Ct. at 1521.

6. *Caterpillar*, 482 U.S. at 392 (footnote omitted).

7. The plaintiff's control of the claim, however, is subject to some exceptions: a court may realign the parties in response to a request for removal, *see* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3721, at 207-212 (2d ed. 1985) [hereinafter WRIGHT & MILLER], and the Supreme Court has held that a plaintiff may not defeat removal by refusing to plead what the Court regards as a necessary federal question. *See Franchise Tax Bd.*, 463 U.S. at 22-23; Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981). This latter exception has its primary application in the cases where Congress has "so completely pre-empt[ed] a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). *See Caterpillar*, 482 U.S. at 393-94. The Court thus far has limited this category of necessarily federal claims to those involving section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982) (*see* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557 (1968)), and those arising under section 502(a) of ERISA, 29 U.S.C. § 1144(a). *See Metropolitan Life*, 481 U.S. at 65-66. Conversely, a declaratory judgment action is not removable if, but for the availability of the declaratory procedure, the federal claim would have been only a defense. *Franchise Tax Bd.*, 463 U.S. at 14. *Cf.* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

without regard to the citizenship or residence of the parties." The availability of removal for defendants asserting diversity is more limited: section 1441(b) provides that diversity cases are removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought." Removal therefore is permissible only in cases of complete diversity where none of the defendants is a citizen of the forum state. Once removal is effected in either a federal question or a diversity case, pendent state claims, as well as the federal claims that prompted removal, are brought into federal court.[8]

The third provision of the general removal statute, section 1441(c), provides that when a nonremovable claim is joined with a "separate and independent claim or cause of action, which would be removable if sued upon alone," the *entire* case may be removed. The district court, however, is given discretion to remand to state court the portion of the case that does not fall within its original jurisdiction. In its lone encounter with section 1441(c), the Supreme Court held that a "separate and independent claim or cause of action" does not exist within the meaning of the statute when "there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions."[9] This reading of section 1441(c) has severely limited the number of cases to which the statute is applicable.[10]

In addition to the basic removal statute, there are several provisions authorizing removal in specialized circumstances. Twenty-eight U.S.C. sections 1442 and 1442(a) permit federal officers and members of the armed forces (or persons acting under them) to remove civil actions or criminal prosecutions that challenge acts taken under color of office, even in cases that do not fall within the original federal jurisdiction; it is enough that "federal officers can raise a colorable defense arising out of their duty to enforce federal law."[11]

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8. *See generally* Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247.

9. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14 (1951).

10. *See* WRIGHT & MILLER, *supra* note 7, § 3724, at 367; Cohen, *Problems in Remand of a "Separate and Independent Claim or Cause of Action"*, 46 MINN. L. REV. 1, 13-17 (1961-62); Note, *Third-Party Removal Under Section 1441(c)*, 52 FORDHAM L. REV. 133, 156-58 (1983).

11. Willingham v. Morgan, 395 U.S. 402, 406-07 (1969). *See* Maryland v. Soper (No. 1), 270 U.S. 9 (1926). In addition, under 28 U.S.C. § 2679(d), a federal employee sued under the Federal Tort Claims Act for a traffic accident may remove the case "[u]pon a

Section 1443 works similarly in civil rights cases, allowing removal of a civil action or criminal prosecution "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof."[12] The Supreme Court has given this provision a very narrow reading, however, holding that

> [u]nder § 1443, the vindication of the defendant's federal rights is left to the state courts except in the rare situations in which it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights inevitably will be denied by the very act of bringing the defendant to trial in the state court.[13]

Finally, a handful of provisions scattered throughout the United States Code permit removal of specified categories of cases,[14] including quiet title or foreclosure actions brought against the United States,[15] suits relating to foreign arbitration agreements[16] or to the regulation of international banking,[17] and cases involving foreign sovereigns,[18] the FDIC,[19] the International Monetary Fund or International Bank,[20] or the United States Postal Service.[21] Conversely, 28 U.S.C. section 1445 provides that certain categories of claims are *not* removable, including actions under the Federal Employers' Liability Act

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certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose." 28 U.S.C. § 2679(d) (1982). But a federal employee may not remove a criminal prosecution for a traffic violation when the employee does not advance a federal defense. Mesa v. California, 109 S. Ct. 959 (1989).

12. 28 U.S.C. § 1443(1) (1982). In addition, 28 U.S.C. § 1443(2) provides for removal of civil actions or prosecutions "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

13. City of Greenwood v. Peacock, 384 U.S. 808, 827-28 (1966). *See* Georgia v. Rachel, 384 U.S. 780 (1966); Kentucky v. Powers, 201 U.S. 1 (1906); Virginia v. Rives, 100 U.S. 313 (1879). *See generally* Dittman, *Removal in Civil Rights Cases Under 28 U.S.C. Section 1443(2)*, 31 LOY. L. REV. 855 (1986); Redish, *Revitalizing Civil Rights Removal Jurisdiction*, 64 MINN. L. REV. 523 (1979-80).

14. *See generally* 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.155[1] at 2 n.5 (2d ed. 1989) [hereinafter MOORE'S FEDERAL PRACTICE].

15. 28 U.S.C. § 1444 (1982).

16. 9 U.S.C. § 205 (1988).

17. 12 U.S.C. § 632 (1988).

18. 28 U.S.C. § 1441(d) (1982).

19. 12 U.S.C. § 1819(4) (1988).

20. 22 U.S.C. § 286(g) (1982).

21. 39 U.S.C. § 409 (1982).

(FELA),[22] suits against common carriers under the Interstate Commerce Act for damages of less than $10,000,[23] and suits brought under state workmen's compensation laws.[24]

B. Removal Procedure and Grounds for Remand

Removal procedure is fairly straightforward. Defendants who seek to remove must file a notice of removal with the district court within thirty days of receipt of the complaint; removal is effective once the plaintiff and the state court are notified, at which point proceedings in state court are stayed.[25] A case not removable at the outset may become so if a federal claim is added or a nondiverse party dropped,[26] although cases involving diversity must be removed within one year of the initiation of suit.[27]

Once a case has been removed, the statute permits a district court to remand the action to state court in only two circumstances: (1) when (as indicated above) a "separate and independent" nonfederal claim was removed along with a federal claim pursuant to section 1441(c), and (2) when removal was improper because of a "defect in removal procedure" or because the district court lacks jurisdiction over the case.[28] While the Supreme Court has emphasized these strict statutory limits, making clear that district judges lack the discretion to remand because, for example, their dockets are overcrowded,[29] the Court itself has recognized one additional circumstance in which remand may be appropriate: when, after removal has been effected, all federal

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22. 28 U.S.C. § 1445(a) (1982). The same limitation applies to suits brought under the Jones Act for injuries to seamen. *See* 46 U.S.C. § 688 (1982).

23. 28 U.S.C. § 1445(b) (1982).

24. *Id.* § 1445(c).

25. *Id.* § 1446(a), (e). An ongoing criminal trial may continue in state court until the removal petition is acted upon, but a conviction may not be entered unless the petition is denied. *Id.* § 1446(c)(3). *See* Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action* 1990 B.Y.U. L. REV. 321.

26. 28 U.S.C. § 1446(b) (1982).

27. Pub. L. No. 100-702, § 1016, 102 Stat. 4669 (1988), amending 28 U.S.C. § 1446(a) & (b) (1982). Once removed, however, the plaintiff cannot force a remand to state court by adding a nondiverse party or dropping a federal claim. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938); WRIGHT & MILLER, *supra* note 7, § 3721, at 212-213.

28. 28 U.S.C. § 1447(c) (1982). A motion to remand based on defects in the removal procedure must be made within 30 days of the filing of the notice of removal; a motion to remand asserting lack of jurisdiction may be made at any time prior to final judgment. *Id.*

29. Thermtron Prod., Inc. v. Hermansdorfer, 423 U.S. 336, 344-45 (1976).

claims are dismissed and only pendent state law claims remain in the case.[30]

Orders remanding cases to state court are expressly made unreviewable by 28 U.S.C. section 1447(d), which provides that—with the exception of remands in civil rights cases removed pursuant to section 1443—"[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In *Thermtron Products, Inc. v. Hermansdorfer*,[31] the Supreme Court concluded that "only remand orders issued under § 1447(c) and involving the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)."[32] The Court then held review by mandamus to be appropriate when the district court ordered a remand because its docket was too crowded, a ground not specified in section 1447(c).[33] Yet, because virtually all the permissible grounds for removal are spelled out in section 1447(c),[34] the *Thermtron* exception is quite limited. Some courts nevertheless will permit appeal of a substantive decision by the district court that preceded entry of a remand order,[35] or of a district court's discretionary refusal to exercise pendent jurisdiction over a state law claim.[36]

III. Recommendations for Reform

Removal jurisdiction, like federal jurisdiction generally, assures the availability of a sympathetic and competent forum both for the resolution of federal claims and to prevent bias against out-of-state litigants. This being so, however, existing removal doctrine has some curious features. Assuming the value of

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30. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 619-20 (1988). In exercising this discretion, a court "can consider whether the plaintiff engaged in any manipulative tactics when it decides whether to remand a case." *Id.* at 622.

31. 423 U.S. 336 (1976).

32. *Id.* at 346.

33. *Id.* at 351-53.

34. It appears that remand orders entered under 28 U.S.C. § 1441(c), which permits district courts to remand state claims while retaining jurisdiction of "separate and independent" federal (or diverse) claims, are reviewable under the rationale of *Thermtron*. As explained below, however, cases properly removed under section 1441(c) are exceptionally rare. *See infra* text accompanying note 67.

35. *See* Clorox Co. v. U.S. Dist. Ct., 779 F.2d 517 (9th Cir. 1985). *See generally* Herrmann, Thermtron *Revisited: When and How Federal Trial Court Remand Orders Are Reviewable*, 19 Ariz. St. L.J. 395, 410-11, 416 (1987-88).

36. Scott v. Machinists Automotive Trades Dist. Lodge No. 190, 827 F.2d 589, 592 (9th Cir. 1987).

original diversity jurisdiction, the basic rule governing diversity removal is sensible enough; only nonresident defendants—the category of defendants arguably likely to suffer from in-state bias—may remove on diversity grounds. Federal question removal, on the other hand, is more problematic. Why, if the plaintiff is master of the claim, should the defendant be permitted to remove when the plaintiff is content to have its federal claim resolved by a state court? And why should the plaintiff have guaranteed access to a federal forum for the resolution of its federal claim, while the defendant has no right to air its federal defense in a federal court? Equally counter-intuitive is the rule, in both diversity and federal question cases, permitting the defendant to remove the entire case (under section 1441(c)) only in those circumstances when the federal and nonfederal claims are entirely *unrelated.* This article next addresses these issues, and several narrower removal controversies, in turn.

A. Federal Defense Removal

1. Removal policies

By far the most important question about the scope of existing removal doctrine, as a matter both of practice and theory, is that posed by the unavailability of removal on the basis of a federal defense—that is, the curious rule that allows the defendant to remove when the plaintiff's claim rests on federal law, but not when his own defense is federal in nature. This limit is a consequence of the test that makes the availability of removal turn on the existence of original jurisdiction, and the concomitant applicability of the well-pleaded complaint rule in the removal setting. Even in the context of original jurisdiction, the well-pleaded complaint rule "may produce awkward results," as when "both parties admit that the only question for decision is raised by a federal pre-emption defense."[37] But in that setting the rule at least has the virtue of efficiency, allowing the jurisdictional question to be settled at the outset of the suit by reference to a single document, while avoiding the possibility that a case might have to be dismissed at some later date if an anticipated federal defense fails to appear.[38]

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37. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983).

38. *See* Currie, *The Federal Courts and the American Law Institute—Part II*, 36 U. CHI. L. REV. 268, 270 (1969) [hereinafter Currie II].

That efficiency rationale, however, simply is not applicable in the removal context, where the district court determines its jurisdiction only after the filing of a notice of removal. In such circumstances, allowing the court to consider the defendant's answer, as well as the complaint and notice of removal, adds very little cost to the jurisdictional inquiry.[39] The irrelevance of the efficiency rationale in the removal setting is made especially clear by section 1446(b), which permits the defendant to seek removal within thirty days of any development in the *plaintiff's* case that makes the suit removable. The Supreme Court thus has acknowledged, somewhat delicately, that "[i]t is possible to conceive of a rational jurisdictional system . . . in which original and removal jurisdiction were not coextensive."[40] Moreover, the Court, gratuitously explaining that federal defense removal was permitted between 1875 and 1887,[41] has noted that "[c]ommentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive."[42]

Indeed, it is difficult to imagine a ground of principle on which a system that allows defendants to remove a plaintiff's federal claims would not also permit defendants to remove cases in which they have federal defenses. The superior expertise of federal judges in the interpretation of federal law, which in part justifies the availability of a federal forum for affirmative federal claims, is equally valuable in the analysis of federal defenses. And the value of federal courts as protectors of federal rights is no less pronounced when those rights are advanced in the form of defenses; to the contrary, it surely is more likely that state courts will offer unduly cramped constructions of a defendant's

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39. After all, the answer, which must be filed within 20 days of service of the complaint (see FED. R. CIV. P. 12(a)), typically will be filed before (or along with) the request to remove, which may be lodged up to 30 days after receipt of the complaint. *See generally* Collins, *supra* note 3, at 757. As Professor Currie has noted, "the expenditure of state-court effort between complaint and answer does not justify depriving the defendant of a federal court to protect against misunderstanding of the plaintiff's federal right; a fortiori, the same wasted effort does not justify depriving the defendant of federal protection for his own federal right." Currie II, *supra* note 38, at 270 (footnote omitted).

40. *Franchise Tax Bd.*, 463 U.S. at 10 n.9.

41. *Id. See* Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470; Collins, *supra* note 3, at 724-26. Indeed, there is some reason to believe that Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894), the decision generally cited as first requiring application of the well-pleaded complaint rule to the current removal statute's predecessor, may have been incorrectly decided. See *Collins*, *supra* note 3, at 734-56.

42. *Franchise Tax Bd.*, 463 U.S. at 10 n.9.

federal defenses to currently unremovable state causes of action than that those courts will engage in improperly expansive applications of a plaintiff's currently removable federal claims.[43] The perversity of this exclusive focus on the identity of the party raising the federal issue is especially noticeable in cases, such as those involving counterclaims or declaratory judgment actions, where the alignment of the parties may be wholly fortuitous.[44]

More than forty years ago Professor Wechsler, noting that a defendant may remove only the plaintiff's federal claim, observed that it would

> be far more logical to shape the rule precisely in reverse, granting removal to defendants when they claim a federal defense against the plaintiff's state-created claim and to the plaintiff when, as the issues have developed, he relies by way of replication on assertion of a federal right. The need is to remember that the reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously. That reason is quite plainly absent in the only situation where, apart from federal officers, removal now obtains: the case where the *defendant* may remove because the *plaintiff's* case is federal.[45]

There is an element of hyperbole in Professor Wechsler's observation. It is possible to imagine circumstances in which a plaintiff hopes to benefit from a state court's misapplication of federal law; at the same time, one might argue that the plaintiff's interest in choosing the forum does not justify denying the defendant access to the superior expertise that a federal judge

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43. In an example offered by the American Law Institute, while recommending creation of a limited federal defense removal, "[t]he labor union, wrongfully enjoined from picketing or striking because a state court has erroneously rejected its contention that the field in question is pre-empted by federal labor policies . . . is hurt at least as much as is the labor union wrongfully denied damages under § 301 of the Taft-Hartley Act." American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 6 at 95 (1968) [hereinafter ALI Draft No. 6]. Indeed, this example overstates the equivalence between federal claims and defenses, since the union, as plaintiff, could have submitted its Taft-Hartley claim to a federal court in the first instance.

44. *See* American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft 189 (1969) [hereinafter ALI Official Draft].

45. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 233-34 (1948) (emphasis in original) (footnote omitted). In fact, Professor Wechsler would have eliminated removal altogether, with the exception of federal officer removal. *See id.* at 234.

would bring to the resolution of a federal claim. But accepting the utility of existing federal claim removal in no way detracts from the conclusion that federal defense removal would serve purposes that are at least as valuable—a conclusion that accounts for the "long line of uncharitable commentary" on the existing system.[46]

2. *Federal caseload concerns*

These considerations make clear that, in an ideal system, federal defense removal would be generally available. Having said this, however, practical considerations strongly suggest that the existing statute should not be modified to permit removal of federal defenses. This conclusion is based principally on concern for the federal caseload, a concern that is compounded by the relative ease with which federal defenses may be concocted.

When recommending creation of federal defense removal some twenty years ago, the American Law Institute was willing to dismiss caseload concerns in large part because only 165 federal question cases were removed from state to federal court during the years 1959 and 1960.[47] Even apart from their age, however, these figures offer little comfort on the likely caseload effects of federal defense removal. Because federal courts presumptively are more generous than state courts in their application of federal law, the fact that defendants infrequently remove plaintiffs' federal claims says little about whether defendants would choose to remove when they have federal defenses. Indeed, even at the time of its report, there was strong sentiment in the ALI for the exclusion of constitutional defenses from its recommendation in favor of federal defense removal.[48] While the impossibility of drawing a principled line between constitutional and other federal defenses ultimately led the ALI to reject that

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46. Collins, *supra* note 3, at 717. *See e.g.*, Fraser, *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73, 84, 88-89 (1950); Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563, 608-09 (1981); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 72-73 (1980-81).

47. ALI Draft No. 6, *supra* note 43, at 99. No such figures have been published since 1964. *Id.*

48. *See* American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 5, at 100-104 (1967) [hereinafter ALI Draft No. 5]. Proponents of this view expressed concern that it is relatively easy to devise nonfrivolous constitutional defenses.

approach,[49] the Institute's final recommendation did address caseload concerns (albeit in a somewhat hit-or-miss manner) by precluding removal when the federal defense was not dispositive of the entire case or was grounded on res judicata, choice of law, or a challenge to personal jurisdiction—defenses that generally were viewed either as collateral to the merits or likely to be insubstantial.[50]

In fact, the caseload impact of federal defense removal would surely be significant. Removal cases presently make up a substantial portion of the actions filed in federal court,[51] which suggests that defendants are not reluctant to remove when doing so offers a tactical advantage. Although there are no empirical data available on the number of state court suits in which substantial federal defenses are advanced, there is little doubt that the number is large; there are categories of cases in which federal defenses may be offered as a matter of course.[52] While there is, of course, no way of predicting the percentage of these cases in which defendants would seek to remove, the sense that federal courts are more sympathetic than are state courts to arguments premised on preemption or on the United States Constitution surely would make removal an attractive option.[53]

The structure of incentives also makes defendants more likely than plaintiffs to offer marginal arguments based on federal law. After all, a plaintiff who hinges federal jurisdiction on a questionable federal claim risks dismissal of the action on jurisdictional grounds and the associated delay of having to refile in state court—or perhaps the prospect of having an irritated federal judge retain jurisdiction over the remaining state law issue. The defendant, in contrast, loses nothing by listing any defense

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49. *See* ALI Draft No. 6, *supra* note 43, at 105-08.

50. ALI Official Draft, *supra* note 44, § 1312(b). *See* Currie II, *supra* note 38, at 272-74.

51. The most recent figures available from the Administrative Office of U.S. Courts indicate that 21,221 cases were removed to federal district court in 1988.

52. Such cases include privacy and defamation actions, evictions from public housing, actions to terminate public benefits, civil commitments and, perhaps, actions for punitive damages. *See generally* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 125 (1973); Collins, *supra* note 3, at 772.

53. *Cf.* Marvell, *The Rationales for Federal Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1350-51, 1371-72; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 726 (1980-81); Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1324.

that is credible.[54] This observation may help account for the general impression that it generally is easier to devise a nonfrivolous constitutional defense than a substantial federal claim.[55]

In these circumstances, the prospect of significantly increasing federal court caseloads counsels against creation of federal defense removal absent a practical showing for its need—a showing that is absent from the commentary that demonstrates (persuasively) the theoretical value of such a doctrine. This was the view of Judge Friendly, who opposed creation of a general federal defense removal because "[w]e thus cannot predict what the added burden from removal on the basis of a federal constitutional defense would be, and we cannot now afford to take risks that some might have regarded as not unreasonable in 1968."[56]

3. *Removal of federal counterclaims*

A compelling case may nevertheless be made for removal in one related situation—when the defendant has a federal counterclaim that is closely related to the plaintiff's original state law claim. When the counterclaim is compulsory—typically the case when the claim and counterclaim arise from the same transaction[57]—it is unfair to allow the plaintiff's choice of forum to force the defendant to litigate its related federal claim in state court. Even if the counterclaim is not technically compulsory as a matter of state law, it would be sensible to permit removal whenever the two claims arise from a single transaction. Such a rule would spare the federal court an inquiry into state procedural law.[58] It also would avoid putting the defendant to the unpleasant choice of litigating its federal claim in state court or pursuing factually related cases in two different courts, which

54. This consideration led Judge Posner to conclude that "[i]t would be a serious mistake to make all cases in which a federal defense was asserted removable as a matter of right." R. POSNER, THE FEDERAL COURTS—CRISIS AND REFORM 190 (1985).

55. *Cf.* ALI Draft No. 5, *supra* note 48, at 102-04.

56. H. FRIENDLY, *supra* note 52, at 125. Judge Friendly was more receptive to the possibility of removal grounded on federal statutory defenses, which he suggested might be limited to three categories: those that, had they been claims, would have been in the exclusive jurisdiction of the federal courts; those involving claims of federal preemption; and those resting on treaties. *Id.* at 125-26.

57. FED. R. CIV. P. 13(a) provides that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." This rule is similar to most state counterclaim provisions.

58. *See* Currie II, *supra* note 38, at 275.

would both waste resources and raise the risk that the defendant's counterclaim would become barred by collateral estoppel if the plaintiff's claim moved to judgment first.

When the claim and counterclaim arise from a single transaction, efficiency and collateral estoppel concerns suggest that the two claims be resolved in a single forum. Since such a case by definition has a significant federal component, that forum should be federal court. Both the plaintiff and the defendant should have the right to remove so that each party may bring its own federal claim in, and remove the other party's federal claim to, federal court.

There is still some risk that defendants will concoct counterclaims in an attempt to manufacture federal jurisdiction; defendants in cases brought by state officials might, for example, try to turn the cases around by seeking damages for the asserted denial of constitutional rights. But that sort of manipulation will be impossible in the typical case where federal law is asserted as a defense. And as suggested above, the statement of a substantial affirmative claim generally is perceived to be more difficult than the assertion of a nonfrivolous defense. The small risk of defendants making manipulative use of counterclaims thus does not outweigh the manifest injustice of forcing the trial of legitimate federal counterclaims in state court.

This principle should not, however, permit the removal of the entire case whenever a *third-party* action has a federal component. When the plaintiff's dispute with the defendant is entirely a matter of state law, it is unfair to force the plaintiff to submit the controversy to a federal court because of the fortuity that the defendant has a related federal dispute with a third-party. In addition, third-party claims typically are brought at the defendant's option;[59] the defendant therefore will be able to choose between the resolution of all claims in a single state forum and the separate resolution of its federal claim in a federal forum. While this solution is not ideal from the standpoint of judicial economy, particularly in cases where the plaintiff's claim and the third-party claim are transactionally related, it seems preferable to depriving the plaintiff of its choice of forum. In any event, such cases are likely to arise with great infrequency: rarely will the defendant's obligations to the plaintiff rest on

59. *See e.g.*, FED. R. CIV. P. 14.

state law while the third-party defendant's obligation to the third-party plaintiff rests on federal law.[60]

B. Separate Claim Removal

Other than the federal defense question, the remaining significant area of controversy involves 28 U.S.C. section 1441(c), the provision authorizing removal of an entire case whenever a "separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise removable claims or causes of action." While this provision has relatively little practical importance, it has proven so extraordinarily confusing to courts and annoying to commentators that it has been singled out by a leading scholar as "one of the most unfortunate provisions in the entire Judicial Code."[61]

1. The curious application of section 1441(c)

The original purpose of the predecessor to section 1441(c) is clear and (perhaps) salutary: it was designed to prevent plaintiffs from destroying diversity jurisdiction, and thus defendants' removal rights, by joining nondiverse parties to otherwise removable claims.[62] But the current statutory language, enacted as part of a 1948 revision, barely serves that purpose. As interpreted in *American Fire & Casualty Co. v. Finn*,[63] claims are not "separate and independent" within the meaning of section 1441(c) when they grow out of "a single wrong to plaintiff . . . arising from an interlocked series of transactions."[64] *Finn* itself involved a suit for proceeds of an insurance policy brought by a Texas plaintiff against three defendants—the insurance agent, also a resident of Texas, and two out-of-state insurance compa-

60. When the third-party defendant has a federal counterclaim against the defendant arising out of the same transaction as the third-party claim, the third party should be permitted to remove its dispute with the defendant to federal court.

61. Currie, *The Federal Courts and the American Law Institute—Part I*, 36 U. CHI. L. REV. 1, 22 (1968) [hereinafter Currie I]. *See* Harper v. Sonnabend, 182 F. Supp. 594, 595 (S.D.N.Y. 1960) ("it is not an exaggeration to say that at least on the surface the field luxuriates in a riotous uncertainty").

62. *See* Pullman Co. v. Jenkins, 305 U.S. 534 (1939). *See generally* Cohen, *supra* note 10, at 25-26; Currie I, *supra* note 61, at 8; Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 426 (1952-53). The predecessor to section 1441(c) made no provision for separate claim removal in federal question cases. *See* Cohen, *supra* note 10, at 3.

63. 341 U.S. 6 (1951).

64. *Id.* at 14.

nies. The Court observed that "[t]he allegations in which [the agent] is a defendant involve substantially the same facts and transactions as do the allegations in the first portion of the complaint against the foreign insurance companies."[65] In such circumstances, the Court concluded, "[i]t cannot be said that there are separate and independent claims for relief as § 1441(c) requires."[66]

Given *Finn*'s reading of the provision, "[m]ost commentators agree that few, if any, diversity cases can be properly removed under Section 1441(c)."[67] Virtually all state joinder rules, after all, provide that multiple parties may be joined in a single proceeding only if the claims against them involve common questions of law and fact;[68] Federal Rule of Civil Procedure 20(a), which is typical, permits joinder only if the right to relief asserted against each defendant arises "out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Thus, the factor making aggregation of parties in a single proceeding permissible—the commonality of claims—is the very factor that makes removal under section 1441(c) inappropriate.

The unsurprising result is that this provision hardly ever comes into play in diversity cases. One early study, for example, found that only twenty-seven reported diversity cases were removed pursuant to section 1441(c) between 1951 and 1961.[69] While there have been occasional decisions permitting removal under the statute in the intervening years, these decisions have been quite rare and often seemingly inconsistent with the weight of decisions rejecting removal in similar circumstances.[70] Under

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65. *Id.* at 16.

66. *Id.*

67. WRIGHT & MILLER, *supra* note 7, § 3724, at 367.

68. *See id.* at 367-68.

69. Cohen, *supra* note 10, at 13-15 nn.54-59.

70. The largest single category of decisions permitting section 1441(c) removal appears to be that involving third-party claims for indemnification, where the party obligated to indemnify has no responsibility for the injury to the plaintiff. *See e.g.*, Carl Heck Eng'rs v. Larouche Parish Police Jury, 622 F.2d 133, 135-36 (5th Cir. 1980); Connecticut Sav. Bank v. Savers Fed. Sav. & Loan Ass'n, 670 F. Supp. 1549, 1551 (S.D. Fla. 1987); Marsh Inv. Corp. v. Langford, 494 F. Supp. 344, 349-50 (E.D. La. 1980), *aff'd*, 652 F.2d 583 (5th Cir.), *cert. denied*, 454 U.S. 1163 (1982). Other courts, however, have held that third-party claims do not give rise to a right to remove under section 1441(c). *See infra* note 90. *See generally* WRIGHT & MILLER, *supra* note 7, § 3724, at 370-78 & nn.37-42 ("the lower federal courts repeatedly have denied removal in scores of cases involving

existing law, section 1441(c) diversity removal therefore seems appropriate, if at all,[71] only in highly unusual circumstances, such as the celebrated "Cleopatra" case[72]—circumstances peculiar enough as to call into question whether they warrant special statutory treatment.

Perhaps because the drafters of section 1441(c) did not anticipate its application in federal question cases,[73] the provision

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torts, contracts, combinations of these two theories of recovery, securities matters, insurance policies, and a variety of other matters" (citing cases)); Gibson, *Removal of Claims Related to Bankruptcy Cases: What Is a "Claim or Cause of Action"?* 34 UCLA L. REV. 1, 37 (1986-87) ("section 1441(c) has been virtually eliminated as a significant basis for removal of cases to district court").

71. Wright, Miller and Cooper suggest that section 1441(c) may come into play in a diversity case only when a resident plaintiff sues one resident and one nonresident defendant, and then adds an unrelated claim against the nonresident defendant. WRIGHT & MILLER, *supra* note 7, § 3724, at 369.

72. Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965). The case involved, among other things, claims that Elizabeth Taylor and Richard Burton breached their separate employment contracts with Twentieth Century-Fox relating to the production of the film *Cleopatra*. Burton, as an alien, could have removed had he been sued alone; Taylor, as an American domiciled abroad, could not have. Judge Weinfeld concluded that the contracts were "separate and distinct," *id.* at 917, that Burton accordingly was entitled to remove the breach of contract claim under section 1441(c), and that the breach of contract claim against Taylor (as well as related claims of tortious interference with business relations and inducement to breach of contract) should be adjudicated in federal court along with the claims against Burton. The judge remanded an unrelated claim against Taylor to state court. *Id.* at 922.

There is some doubt as to the vitality of *Taylor*. In Gardner & Florence Call Cowles Foundation v. Empire Inc., 754 F.2d 478 (2d Cir. 1985), decided many years after *Taylor*, the Second Circuit held that "claims of breach of contract and inducing breach of contract . . . state but a single claim, thus defeating § 1441(c) jurisdiction." *Id.* at 482. The court of appeals then read *Taylor* as holding "a claim of breach of contract and one of inducing that breach . . . 'separate and independent,'" and accordingly disapproved *Taylor* and its progeny "to the extent that they are inconsistent with our holding [in *Empire*]." *Id.* at 482 n.5. This appears to have been a misreading of *Taylor*, however. Judge Weinfeld had not held claims of breach and inducing breach to be "separate and independent" within the meaning of section 1441(c). Instead, he found that two distinct claims of breach of contract were "separate and independent;" he then permitted the claims of inducement to come into federal court along with the breach of contract suit against Burton. This seems permissible under *Empire*, which indicated that "independent breaches by contractors of separate contracts . . . may be removed under § 1441(c)." *Empire*, 754 F.2d at 482.

73. As noted above, the predecessor to section 1441(c) did not allow for separate claim removal in federal question cases. The avowed purpose of the 1948 revision that produced section 1441(c) was to *narrow* the scope of separate claim removal, a purpose that the statute plainly achieved in the diversity area. *See* American Fire & Casualty Co. v. Finn, 341 U.S. 6, 9-11 & n.2 (1951). There is no evidence that Congress recognized that the changes in statutory language would make separate claim removal available in federal question cases. *See* Thomas v. Shelton, 740 F.2d 478, 483 (7th Cir. 1984); Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1, 9-10 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983).

has a different but equally curious effect in that setting. When state and federal claims are combined in a single action, the entire case is removable under section 1441(a) and (b) so long as the state law claims fall within the federal court's pendent jurisdiction under the doctrine of *United Mine Workers v. Gibbs*[74]—if, that is, the state and federal claims "derive from a common nucleus of operative fact."[75] In such a case, the state and federal claims are part of the same "civil action" within the meaning of 28 U.S.C. section 1331, and therefore are part of the discrete "civil action" made removable by section 1441(a) and (b).[76] But if the claims do not share a common nucleus of fact they will be "separate and independent" under the analysis of *Finn*,[77] and once again the entire case will be removable. The combination of *Gibbs* and *Finn* therefore seemingly makes both the federal and the state law portion of *every* federal question case removable, although section 1441(c) does permit the district judge to remand the state-law portion of the case to state court.

There is yet a further anomaly here. Commentators have noted that section 1441(c) arguably leaves a hiatus: the entire case is removable if the state and federal issues are so closely related that the former is pendent to the latter, and the entire case is removable if the claims are so unrelated as to be "separate and independent"—but the case (or at least the state-law portion of it) is not removable if the state claim falls somewhere in the middle and is neither pendent nor entirely unrelated to the federal claim.[78] Until quite recently this concern was largely hypothetical because *Finn* and *Gibbs* were understood to be flip sides of a single test turning on whether the federal and state claims were derived from a single transaction.[79] But that may have changed last term with the Supreme Court's decision in *Finley v. United States*.[80] *Finley* rejected the *Gibbs* test in the setting of pendent party (and possibly ancillary) jurisdiction, holding that state and federal claims against separate defend-

74. 383 U.S. 715 (1966).

75. *Id.* at 725.

76. *See* Mengler, *supra* note 8, at 251-55.

77. In contrast to the restrictions on joinder of parties, state rules typically permit the joinder of unrelated claims. *See* WRIGHT & MILLER, *supra* note 7, § 3724, at 399. Again, the federal rule is typical. *See* FED. R. CIV. P. 18(a).

78. *See* WRIGHT & MILLER, *supra* note 7, § 3724, at 399; Lewin, *supra* note 62, at 430-31, 437-42.

79. *See e.g.*, WRIGHT & MILLER, *supra* note 7, § 3724, at 400-01.

80. 109 S. Ct. 2003 (1989).

ants are not part of the same "civil action" even if the claims are transactionally related.[81] The state claim in such a case therefore does not fall within the federal court's original jurisdiction and accordingly is not removable under section 1441(a) and (b). Because the claims are not "separate and independent," the case is also not removable under section 1441(c). Yet the case would be removable under section 1441(c) if the claims were entirely unrelated.[82]

This is hardly a sensible allocation of jurisdiction. It means that section 1441(c), as its only effect in federal question cases, allows the defendant to bring state law claims that are wholly unrelated to the federal action into federal court. At the same time, it excludes state claims, such as those against pendent parties, that are related to the federal action and that might appropriately be tried along with the federal claim as a matter of judicial economy. It is difficult to believe that Congress actually intended such a result.[83]

There is also reason to question the constitutionality of section 1441(c). The *Gibbs* test, which permits assertion of federal jurisdiction over a state law claim arising from the same transaction as a federal claim, extends the authority of the federal courts "to the full extent permitted by the Constitution."[84] It therefore is doubtful that federal courts may take jurisdiction over nonfederal claims that do not satisfy the *Gibbs* test—the very "separate and independent" claims that section 1441(c) authorizes the federal courts to resolve.[85] This concern is less

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81. *Finley* itself involved an attempt to find federal jurisdiction under 28 U.S.C. § 1346(b), but the Court's analysis is not confined to that statute. *See* 109 S.Ct. at 2010. *See also* Mengler, *supra* note 8, at 255-58.

82. This problem was anticipated by Judge Breyer, writing for the First Circuit in Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983). That case involved federal and state claims against a union, as well as state tort claims against individual union members growing out of the same series of transactions. The court held that the labor statute creating subject matter jurisdiction over the union, 29 U.S.C. § 187, did not allow it to take pendent party jurisdiction over the claims against the individuals. But the court also held jurisdiction unavailable under section 1441(c) because the claims against the individuals were "too closely related to [the federal claims] to satisfy *Finn*'s requirements." 708 F.2d at 9.

83. "What sense does it make, after all, to have a *tertium quid* of certain state claims—those too distant to be pendent, too close to be 'separate and independent'—that alone, in an 'arising under' case, the federal court would have no statutory power to hear?" *Charles D. Bonanno*, 708 F.2d at 9.

84. *Finley*, 109 S. Ct. at 2006. *See Gibbs*, 383 U.S. at 725.

85. *See* Lewin, *supra* note 62, at 431-37. *But see*, Moore & VanDercreek, *Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under*

pressing in diversity than in the federal question cases, given the Court's holding that complete diversity is not required by the Constitution;[86] but even in that setting there may be some point at which claims involving different parties become so unrelated that they no longer constitute a single constitutional case.[87] Fortunately for casebook authors, these problems have not yet materialized, presumably because restrictive state joinder rules prevent consolidation of unrelated claims against different parties, while district courts retain the option under section 1441(c) to remand state law claims to state court.[88]

2. *Repeal of section 1441(c)*

Section 1441(c) in its current form has serious flaws. It is virtually never available in the diversity setting, where it is invoked most frequently. Indeed, it has been held inapplicable in cases where the out-of-state defendant is most likely to suffer prejudice—those, like *Finn* itself, involving alternative liability between in-state and out-of-state defendants. Yet while the provision has minimal value, it has been the subject of a large volume of litigation[89] and has spawned considerable uncertainty about a host of subsidiary issues.[90] If separate claim removal serves useful purposes, the statute should be made effective, as the ALI suggested twenty years ago when it proposed making the entire case removable, whenever a single defendant could have removed if sued alone;[91] if separate claim removal is not desirable, the existing statute should be eliminated.[92]

Section 1441(c), 46 IOWA L. REV. 489, 506 n.81 (1960-61).

86. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).

87. *See* Cohen, *supra* note 10, at 24-25; Currie I, *supra* note 61, at 24 n.117.

88. *See generally* Ireland, *Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts*, 11 IND. L. REV. 555, 567-71 (1977-78).

89. The latest editions of the leading federal courts treatises respectively devote 56 and 75 pages to section 1441(c) litigation. WRIGHT & MILLER, *supra* note 7, § 3724, at 358-414; MOORE'S FEDERAL PRACTICE, *supra* note 14, at 298-373.

90. It remains unsettled, for example, whether claims by several plaintiffs against a single defendant are removable under section 1441(c), and whether third-party claims, cross-claims and counterclaims are removable. *See* Thomas v. Shelton, 740 F.2d 478, 487 (7th Cir. 1984); Carl Heck Eng'rs v. Larouche Parish Police Jury, 622 F.2d 133, 135-36 (5th Cir. 1980); Ford Motor Credit Co., v. Aaron Lincoln Mercury, Inc., 563 F. Supp. 1108, 1110-17 (N.D. Ill. 1983); WRIGHT & MILLER, *supra* note 7, § 3724, at 386-92; Note, *supra* note 10, at 134-36.

91. ALI Official Draft, *supra* note 44, § 1304, at 83.

92. As Professor Currie stated, with characteristic brevity:

> [T]he present statute manages to create difficult interpretive problems, fails

On balance, those commentators who have advocated outright repeal of section 1441(c) have the better of the argument:[93] a special rule is not warranted by the prospect that plaintiffs will join nondiverse or nonfederal claims to a federal action in an effort to preclude removal. Litigants, after all, have operated without apparent difficulty for forty years under a section 1441(c) that virtually never allows separate claim removal. Indeed, the danger at which *existing* section 1441(c) explicitly is aimed (that "separate and independent" claims will be joined to otherwise removable actions) is made wholly illusory in diversity cases by state joinder rules. As for the more realistic concern that *related* diverse and nondiverse claims will be joined (as in the joint tortfeasor setting)—a concern that, under *Finn*, existing section 1441(c) does nothing to ameliorate—the complete diversity rule of *Strawbridge v. Curtiss*[94] is grounded on the assumption that out-of-state defendants will be protected against local bias by the presence in the case of a resident defendant. If one accepts that assumption, there is, as Professor Currie has noted, no need for separate claim removal.[95]

There may, of course, be reason to doubt the validity of the *Strawbridge* rationale. Even so, it seems an overreaction to destroy the law's symmetry by permitting nonresident defendants to avoid the complete diversity rule through removal under an expanded section 1441(c), while a similar option is not open to plaintiffs. This conclusion is buttressed by the general skepticism that diversity jurisdiction in fact is a necessary safeguard against bias.[96] Certainly, it would be preferable to dispense altogether with section 1441(c) (and its associated litigation) than to expand the federal caseload substantially by allowing elimination of the complete diversity rule at the defendant's option.[97]

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to accomplish its policy of protecting against abuses of *Strawbridge* [v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)], invites the federal courts to take pendent jurisdiction when judicial administration does not call for it, and grants the defendant an unjustified advantage over the plaintiff in bringing cases less than wholly diverse into federal court.

Currie I, *supra* note 61, at 24.

93. *See* Cohen, *supra* note 10, at 41; Currie I, *supra* note 61, at 25-26 n.120. *Cf.* Lewin, *supra* note 63, at 442.

94. 7 U.S. (3 Cranch) 267 (1806).

95. *See* Currie I, *supra* note 61, at 22.

96. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990) [hereinafter FSCS REPORT]; Chemerinsky & Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67.

97. In recommending the latter course, the ALI acknowledged that its proposal

There also is no need for a provision like section 1441(c) to deal with federal question cases. State procedural rules do make it possible for plaintiffs to join unrelated federal and state claims. But it is doubtful such a joinder makes the federal claim unremovable; under the *Finley* rationale, the federal claim itself appears to be the removable "civil action" specified in section 1441(a) and (b).[98] In any event, the section 1441(c) issue arises with remarkable infrequency in federal question cases. It does not appear that any federal question claims were denied removal to federal court because joined with unrelated state claims prior to the 1948 revision that produced section 1441(c).[99] Similarly, Professor Cohen's study found only two federal question cases removed under section 1441(c) during the thirteen-year period preceding 1961.[100] More frequently, as in *Finley* itself, the plaintiff is the one attempting to bring state and federal claims into federal court over the defendant's objection. A special rule designed to deal with the those rare cases that present removal problems surely would create more trouble than it is worth.[101] This is doubly true of a constitutionally-suspect rule like section 1441(c) that serves only to allow the joint trial of unrelated claims.[102]

C. *Miscellaneous Removal Problems*

Although less significant than those discussed above, there

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would likely lead to a significant expansion of the federal caseload. ALI Official Draft, *supra* note 44, at 144.

98. That was the holding in Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1, 11 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983). *See also*, Thomas v. Shelton 740 F.2d 478, 483 (7th Cir. 1984). *But see* Lewin, *supra* note 63, at 426. When a federal claim is removed in such circumstances, the unrelated state law claim remains in state court. *See Charles D. Bonanno*, 708 F.2d at 11.

99. *See* Thomas v. Shelton, 740 F.2d 478, 483 (7th Cir. 1984).

100. Cohen, *supra* note 10, at 30-32. While the provision has been cited occasionally in federal question cases in the intervening years, *see, e.g.*, Butler v. Rye, 544 F.Supp. 143, 145 (W.D. Mo. 1982), it is not apparent that the courts would have excluded the federal claims had the provision been unavailable.

101. As an alternative to repeal, a statute could be drawn that would permit removal of a diverse (or federal) claim that arises out of a different transaction than the rest of the suit. *See* Currie I, *supra* note 61, at 25-26 n.120. But it is far from clear that there is any need for such a statute at present.

102. Of course, it makes sense as a matter of judicial economy to permit the joint trial of claims that arise from a single transaction, such as pendent party claims of the sort at issue in *Finley*. But this problem should not be addressed through the removal mechanism, where it would benefit only defendants; instead, it should be remedied by changing the district courts' original jurisdiction. *See* Mengler, *supra* note 8, at 273-87.

are several additional removal issues that deserve brief consideration.

1. Reviewability of remand orders

One troublesome question concerns the reviewability of remand orders. Under section 1447(d), a district court's decision to remand a case to state court pursuant to section 1447(c) is entirely unreviewable. While *Thermtron Products, Inc. v. Hermansdorfer*[103] creates a very limited exception to the bar on review for remands not grounded on section 1447(c), it is clear that any citation to section 1447(c) in the remand order—or, for that matter, any indication that the district court remanded the case because it believed itself to be without jurisdiction—will insulate the remand decision from review.[104]

This bar on review is designed "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues."[105] But while that surely is a desirable goal, it is a curious rule that expedites state proceedings by refusing to correct the wrongful exclusion of defendants from a federal forum. In addition, this rule is not entirely in line with other aspects of removal doctrine. For one thing, removal reviewability rules are not symmetrical. A decision *not* to remand is subject to review; if such a decision is set aside on appeal and the case remanded, an entire federal court trial may be rendered nugatory.[106] Conversely, removal is permitted whenever developments that occur during the course of the case (such as dismissal of a nondiverse party or addition of a federal claim) create federal jurisdiction, even though proceedings may be well under way in state court.[107]

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103. 423 U.S. 336 (1976).

104. *See* Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723, 723-24 (1977) (per curiam); Volvo of America Corp. v. Schwarzer, 429 U.S. 1331, 1332-33 (1976) (Rehnquist, J., in chambers).

105. *Thermtron*, 423 U.S. at 351. *See also id.* at 354-56 (Rehnquist, J., dissenting).

106. This was the case, for example, in American Fire & Casualty Co. v. Finn, 341 U.S. 6, 7-8 (1951). *See generally* WRIGHT & MILLER, *supra* note 7, § 3740, at 596-599. In part an appellate remedy necessarily is available in this setting because federal courts may lack jurisdiction over improperly removed cases. But that is only a partial explanation for the appealability of decisions not to remand: a plaintiff may seek a remand under section 1447(c) on nonjurisdictional grounds by pointing to defects in remand procedures, so long as the request is made within 30 days of filing of the notice of removal. Nothing in the statute precludes an appellate challenge to the denial of such a request.

107. Diversity removals are permitted only if dismissal of the nondiverse party occurred within one year of initiation of the suit. 28 U.S.C. § 1446(b) (1982).

If the protection of federal interests is important enough to warrant a removal procedure in the first instance—and certainly if protection of those interests is so significant that removal is permitted even after substantial proceedings have occurred in state court—removal rights should not be frustrated by a district court's insupportable decision to remand.[108] This is particularly true given the ease with which remand orders may be insulated by a bald citation to section 1447(c) or an unsupported assertion that the district court, in its view, lacks jurisdiction. The competing concerns of efficiency on the one hand, and the protection of federal rights on the other, should be balanced by making remand decisions reviewable. But review should be limited to that available on writ of mandamus. This would allow for expeditious review and the setting aside of plainly unlawful remands, while avoiding the prospect of full-scale appeals that could delay the resolution of every case returned to state court.

2. *Civil rights removal*

The Court's decisions in *City of Greenwood v. Peacock*[109] and *Georgia v. Rachel*[110] made civil rights removal virtually unavailable by holding section 1443 applicable only in the rare case where a state statute would, on its face, deny defendants equal protection in state court. Not surprisingly, the subject of civil rights removal attracted considerable attention (and *City of Greenwood* and *Rachel* attracted considerable criticism) around the time that the decisions were rendered.[111] Improvements in the administration of justice in the state courts during the intervening years, however, have made the case for expanded civil rights removal less compelling. In these circumstances, the American Law Institute got it right when it concluded that, "if

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108. *See generally* Steinman, *Removal, Remand and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 1007-09 (1988); Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?*, 48 MISS. L.J. 741, 748-49 (1977).

109. 384 U.S. 808 (1966).

110. 384 U.S. 780 (1966).

111. *See, e.g.*, Johnson, *Removal of Civil Rights Cases From State to Federal Courts: The Matrix of Section 1443*, 26 FED. B.J. 99 (1966); Morse, *Civil Rights Removal: "The Letter Killeth, But the Spirit Giveth Life."* 11 HOW. L.J. 149 (1965); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965); Note, *Federal Removal and Injunction to Protect Political Expression and Racial Equality: A Proposed Change*, 57 CALIF. L. REV. 694 (1969); Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited*, 1967 DUKE L.J. 136; Comment, *A Reexamination of the Civil Rights Removal Statute*, 51 VA. L. REV. 950 (1965).

fundamental changes are to be made in that [federal-state] relationship in the area of civil rights, such changes would more appropriately come in a civil rights bill than in a jurisdictional study."[112]

3. *Additional nonremovable cases*

Finally, commentators occasionally suggest that particular categories of cases, typically those involving "a widows-and-orphans type of plaintiff,"[113] be added to the list of nonremovable cases now contained in section 1445. The American Law Institute, for example, proposed that actions for wages under the Fair Labor Standards Act[114] be made nonremovable; actions under ERISA, which often involve routine claims that have state law aspects, may be another candidate for this sort of treatment. On balance, however, it is not advisable to add to the nonremovable list. Without vastly expanding that list it would be difficult to draw principled distinctions between categories of routine cases, and it is not at all clear that any particular type of action has proven so burdensome to the federal courts as to single itself out for special treatment. In such circumstances, the prudent course is to do nothing.

IV. CONCLUSION

Any modification of the law of removal must be carried out within significant constraints. On one side are the constraints set by the policies that underlie original jurisdiction. At least presumptively, removal surely should be available in circumstances where, had the alignment of the parties been reversed, the suit could have been brought in federal court as an original matter; if diversity jurisdiction, for example, is thought to serve significant federal interests in original cases, the same interests militate in favor of making diversity removal available as well. On the other

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112. ALI Draft No.6, *supra* note 43, at 113. It is worth bearing in mind that problems relating to the denial of federal rights in state court may be better addressed by the injunction of defective state proceedings than through removal of entire state cases to federal court. The Federal Courts Study Committee's recommendations on the Anti-Injunction Act and *Younger* abstention may be read with this consideration in mind. FSCS REPORT, *supra* note 96, at 48.

113. Currie II, *supra* note 38, at 275.

114. 29 U.S.C. § 216 (1982). Indeed, some courts have suggested that the FLSA itself precludes removability. *See* WRIGHT & MILLER, *supra* note 7, § 3729, at 495-97 & nn.56-57 (citing cases).

hand, in those areas where a departure from the rules governing original jurisdiction are justified—in the setting of federal defense removal (or, perhaps, in the application of complete diversity requirements to separate claim removal)—the caseload considerations that prompted creation of the Federal Courts Study Committee impose practical constraints on the scope of any reforms.

Within these constraints, however, there is room for improvement in the law. Federal counterclaim removal would permit parties who have substantial federal claims to escape from state court, without threatening a dramatic increase in the federal caseload. The repeal of section 1441(c) would forestall a large volume of litigation that, at present, fails to serve any federal interest. And allowing limited appellate challenges to remand decisions, while not creating inordinate delays, would give an important safeguard to parties who are entitled to the protection of a federal forum. In combination, these modest steps would go a long way towards rationalizing the law of removal.