ARTICLE

COLLATERAL REVIEW OF REMAND ORDERS: REASSERTING THE SUPERVISORY ROLE OF THE SUPREME COURT

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INTRODUCTION

A quiet crisis has developed in the Supreme Court’s management of the appellate review of remand orders, one that nicely illuminates the challenges of crafting workable appellate jurisdictional law. The

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1 For an illustration of the Court’s current devotion to text-centered appellate jurisdictional law, see Bowles v. Russell, 551 U.S. 205, 206-07 (2007), which treats as jurisdictional the statutory thirty-day deadline for filing a notice of appeal and forbids equitable tolling. Cf. Holland v. Florida, 130 S. Ct. 2549 (2010) (allowing equitable tolling of the one-year limitation period for filing a federal habeas petition). For useful evaluations of the application of textualism to jurisdictional matters, see Peter J. Smith, Textualism and Jurisdiction, 108 COLUM. L. REV. 1883, 1937 (2008), which suggests that textualist judges interpret jurisdictional statutes differently depending on
trouble begins with the text of the relevant statute. On its face, § 1447(d) of the judicial code flatly prohibits review of remand orders, by “appeal or otherwise.” It thus appears to give district court judges the final word when they grant a motion to remand to state court. But the Court has not been able to live with a flat prohibition. In a line of
cases stretching back to 1976, the Court has held that the restriction on appellate review applies only to remands ordered to address a defect in removal procedure or an absence of subject matter jurisdiction.\(^5\) Having narrowed the statutory restriction, the Court has authorized appellate review of a range of remand orders. Thus, the Court has approved review when the remand in question represents an exercise of discretion\(^6\) and when another federal statute imposes a particularly emphatic restriction on the district court’s remand authority.\(^7\)

Apart from having crafted an exception to the statutory restriction on appellate review, the Court has expanded the availability of as-of-right review through the collateral order doctrine. Early decisions allowed review of remand orders by writ of mandamus, a tool of appellate oversight that applies only in extraordinary circumstances and only in the absence of other remedies.\(^8\) Mandamus requires a petition for review addressed to the appellate court and does not afford as-of-right access to appellate dockets.\(^9\) But later cases held that remand decisions qualify for as-of-right review as collateral orders that conclusively resolve important issues separate from the merits of the case.\(^10\) As a consequence of the Court’s switch to reliance on the collateral order doctrine, parties may now seek review of remand orders as a matter of


\(^6\) After Thermtron, the Court concluded that a federal district court could remand a state law claim to state court after declining to exercise supplemental jurisdiction over that claim in Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357 (1988). The lower courts’ division on such Cohill remands led to the decision in Carlsbad, 129 S. Ct. at 1867, allowing interlocutory review of a discretionary remand decision. Cf. Quackenbush, 517 U.S. at 715 (authorizing review of discretionary decision to remand on Burford abstention grounds (citing Burford v. Sun Oil Co., 319 U.S. 315 (1945))).

\(^7\) See Osborn, 549 U.S. at 240-42 (concluding that the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679, clearly prohibited the remand of an officer suit and thereby triggered an implied exception to § 1447(d)).

\(^8\) See, e.g., Thermtron, 423 U.S. at 353 (upholding use of mandamus to review remand orders that rest on grounds “having no warrant in the law”).


\(^10\) See Quackenbush, 517 U.S. at 714-15 (concluding that the remand at issue functioned much like the denial of a stay pending arbitration and thus deserved immediate review as a collateral order). The Quackenbush Court specifically rejected Thermtron’s suggestion that remand orders were not final. \(\text{id.}\)
right, without making the showing required to secure mandamus. 11 Any new expansion of remand review thus opens the docket of the intermediate appellate courts to a variety of new appeals. Defendants who wish to delay litigation on the merits by contesting remand and other collateral orders have shown a marked propensity to exploit opportunities for as-of-right appellate review. 12

One can see signs of growing discomfort in the Court’s most recent decisions. In Carlsbad Technology, Inc. v. HIF Bio, Inc., the Court unanimously concluded that the bar to appellate review did not apply to a district court’s discretionary decision to remand certain supplemental state law claims to state court. 13 Yet despite the Court’s unanimity, the remand order in Carlsbad does not appear to be a very compelling candidate for immediate appellate review. It was a garden-variety decision, involving state law claims that were removed to federal court alongside a federal question claim as part of the district court’s supplemental jurisdiction. 14 Once the federal question claim dropped out of the case, the district court exercised its discretion to send the supplemental state law claims back to state court. 15 The error rate in making such discretionary calls must be rather low, and the need for interlocutory appellate review correspondingly slight. As a consequence, one might ask whether a sensible jurisdictional regime would authorize immediate review of such orders.

Justice Breyer posed exactly that question. In his concurring opinion, Justice Breyer pointed out the anomaly of the Court’s current approach. 16 Carlsbad extended immediate review to routine matters but

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11 As noted below, the intermediate appellate courts have almost uniformly concluded that remand orders generally satisfy the collateral order doctrine and warrant as-of-right review. See infra note 55 (collecting cases reaching that conclusion); see also Osborn, 549 U.S. at 238-39 (confirming the availability of collateral order review, albeit in the context of official liability issues that the Court has regarded as entitled to such review in the past).

12 For a rough attempt to quantify the docket impact, see infra notes 55-57 and accompanying text.


15 Carlsbad, 129 S. Ct. at 1865.

16 See id. at 1869-70 (Breyer, J., concurring) (indicating possible need for statutory revision of § 1447).
not to a variety of issues that Justice Breyer and others regarded as much more pressing. Pointing to one of the Court’s recent decisions, Justice Breyer argued that issues of foreign sovereign immunity made a stronger demand on federal appellate dockets. Yet under the current regime, the jurisdictional characterization of the remand order foreclosed review of the immunity decision. Apparently believing that the Court itself could not easily address this anomaly, Justice Breyer issued a remarkable call. He suggested that a group of “experts” review the law to determine if “statutory revision is appropriate.” In addition to Congress, Justice Breyer may have meant to stimulate the Judicial Conference’s rules advisory process and the creative juices of legal scholars.

Whatever its impact on others, Justice Breyer’s call certainly stimulated his colleagues. In his own concurring opinion, Justice Scalia acknowledged that the appellate review of remand decisions departs from the text of the relevant statute and defies “common sense.” But he rejected the call for expert engagement. According to Justice Scalia, the Court should return to the text of the statute and flatly prohibit all appellate review of remand orders, thus fixing a mess of its own making. To be sure, that solution would require the Court to overrule a long line of cases. But Justice Scalia would presumably argue that litigants have few if any reliance interests in the continued application of an exception that departs from the plain language of the statute and operates with something of a hit-or-miss quality. In addition, Justice

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17 Id. at 1869 (citing Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 238-39 (2007)).
18 Id. at 1869-70.
20 Carlsbad, 129 S. Ct. at 1868 (Scalia, J., concurring).
21 Id. at 1869.
Scalia might observe that the continued multiplication of exceptions carries federal jurisdictional policy further and further away from Congress’s sensible decision to limit routine review.

Justice Stevens also answered Justice Breyer’s call. In a brief re-statement of his own views of statutory interpretation, Justice Stevens acknowledged that he would apply the literal meaning of § 1447(d) if he were writing on a clean slate. But earlier decisions had departed from the text. Feeling some obligation to honor these existing precedents, Justice Stevens viewed the textual argument as one whose day had passed. He thus announced a position similar to that in other cases where he has viewed the text of jurisdictional statutes as a relevant, but not necessarily dispositive, element in the interpretive enterprise.

By picking up this theme in Carlsbad, Justice Stevens apparently meant to highlight the fact that two Justices normally inclined toward textualism (Justices Thomas and Scalia), were cast in the awkward role of applying a judge-made rule that departs from the statute’s language.

Freed from the need to speak for a majority, as he had done in Carlsbad, Justice Thomas has also addressed the issue, albeit in a slightly different context. In Mohawk Industries, Inc. v. Carpenter, the Court refused to extend the collateral order doctrine to allow an appeal from a district court disclosure order adverse to a claim of attorney-client privilege. Justice Thomas wrote a separate opinion, concurring

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22 Id. at 1867-68 (Stevens, J., concurring).
23 See id. (citing cases such as Powerex and Quackenbush, which strayed from the statute’s text in the wake of Thermtron).
24 See id. (“If we were writing on a clean slate, I would adhere to the statute’s text . . . [but] stare decisis compels the conclusion that the District Court’s remand order is reviewable notwithstanding § 1447(d)’s unambiguous contrary command.”).
25 For example, Justice Stevens took issue with the Court’s conclusion that § 1367 had the effect of overruling a series of prior decisions on the application of the amount-in-controversy rules in the supplemental jurisdiction case Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 566-67, 572 (2005) (Stevens, J., dissenting). In his view, the Court had given too much weight to the perceived clarity of the text and too little to trying to discern what Congress had set out to accomplish in adopting the statute. Id. at 572. Justice Stevens argued in a separate opinion, as he has elsewhere, for the relevance of legislative history to the interpretive enterprise. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 579-80 & n.10 (2006) (using the legislative history of the Detainee Treatment Act of 2005 to find that “Congress’s rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government’s interpretation”).
26 See Carlsbad, 129 S. Ct. at 1868 (describing the case as a “welcome departure” from the Court’s “sometimes single-minded focus on literal text”).
in the denial of review and casting doubt on the legitimacy of judge-made exceptions to the final judgment rule.\textsuperscript{28} Justice Thomas emphasized that Congress had authorized the federal courts to fashion rules of interlocutory review through the rulemaking process. Viewing rule-makers drawn from “bench and bar” as the institution Congress deemed best suited to fashion legitimate exceptions to the finality requirement, Justice Thomas would eschew all future judge-made expansions in the collateral order doctrine.\textsuperscript{29}

In this Article, I suggest a solution to the problem of appellate review of remand orders that draws on the insights of all of these Justices. Justice Breyer correctly argues that the current system fails to deploy appellate resources efficiently. Justice Scalia may well be correct in his view that as-of-right review of remand orders makes little sense in light of the jurisdictional policy expressed in § 1447(d). Both the Court and Justice Thomas may be right to doubt the wisdom of further judicial expansions in the collateral order doctrine. But Justice Stevens sensibly recognizes that certain kinds of mistakes at the district court level call out so insistently for appellate oversight that a flat ban on review makes little sense. The puzzle lies in blending these insights into a workable package that fits tolerably well with the existing jurisdictional landscape and preserves the Court’s ability to identify egregious errors that require intervention.

The answer proposed here focuses not on new legislation or rule-making (although these possibilities deserve ongoing consideration), but on two changes that lie well within the Court’s own authority. First, the Court should reinvigorate its established powers of supervision. The Court’s own precedents recognize that it can directly intervene at the district court level, exercising powers of supervisory oversight conferred in the All Writs Act.\textsuperscript{30} To be sure, the Court decided many of the leading cases in the last century. Thus, in \textit{Ex parte Republic}


\textsuperscript{28} \textit{Mohawk}, 130 S. Ct. at 609-12 (Thomas, J., concurring).

\textsuperscript{29} Id. at 612.

\textsuperscript{30} See 28 U.S.C. § 1651(a) (2006) (authorizing the Supreme Court and all courts established by an act of Congress to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”). For an account of the history of the All Writs Act, tracing its origins to the grant of mandamus and habeas authority in the Judiciary Act of 1789, see James E. Pfander, \textit{Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals}, 78 TEX. L. REV. 1433 (2000).
of Peru, the Court granted an “original” writ of prohibition to bar the district court from hearing an admiralty claim in apparent violation of foreign sovereign immunity. As an “original” writ begins with a petition for leave to file in the Supreme Court, but it invokes the Court’s appellate jurisdiction under Article III of the Constitution. As recently as January 2010, the Court confirmed that these supervisory powers were no mere relic of the twentieth century but continued to provide an important source of oversight. In Hollingsworth v. Perry, the Court intervened directly to countermand a district court order that called for the Internet broadcast of a trial challenging the constitutionality of California’s Proposition 8.

By reinvigorating these powers of supervision in the context of remand orders, the Court could correct serious errors without giving up control of its carefully managed appellate docket. The tools of supervisory oversight, whether by mandamus or prohibition, come into play only when the petitioner makes a strong showing of need and only when the Court agrees, in its discretion, to hear the matter. With an opportunity to intervene through appellate supervision, the Court would no longer need to fashion exceptions to the statutory ban on review by the intermediate appellate courts.

The Court could thus adopt a second change, one that Justice Scalia has championed. By returning to a literal reading of § 1447(d), the Court could close off the disruptive as-of-right review that it has
made available in a number of situations. Through the combination of these two changes in appellate practice, the Court would preserve its ability to correct serious errors at the district court level without entitling parties to seek review in the intermediate appellate courts in similar cases. Such an approach would allow the Court to exercise its own judgment in evaluating the seriousness of the error and the need for appellate oversight without obliging Congress or the rulemakers to attempt to specify in advance an exhaustive catalog of the various kinds of remand (and other) errors that might warrant appellate review. Moreover, by foreclosing judge-made exceptions to § 1447(d), the Court could confirm the message of *Mohawk*: the task of crafting exceptions at the intermediate appellate level should be one for the legislative or rulemaking process.

This Article sets out its argument in three Parts. The first sketches the problems with the current system of appellate review of remand orders. The second argues that the Court should exercise its acknowledged supervisory powers to intervene directly at the district court level and considers predictable objections. Stepping back from the immediate debate over appellate review of remand orders, the third Part of the Article concludes with some thoughts on how Congress, the rulemakers, and the Court can best contribute to the enterprise of jurisdictional lawmaking.

I. APPELLATE REVIEW OF REMAND ORDERS

The current difficulties began in 1976, when the Court first read an exception into the ban on appellate review in § 1447(d). In *Thermtron Products, Inc. v. Hermansdorfer*, the district court had remanded a diversity proceeding (one that had otherwise been properly removed) on the basis that its docket was too full of other pressing matters. The intermediate appellate court viewed itself as lacking power to correct this error under § 1447(d), which forbade (as it does today) the review of remand orders by “appeal or otherwise.” The Supreme Court disagreed. It concluded that the ban on review in § 1447(d) applies only when the district court orders a remand for one of the reasons authorized in § 1447(c). By holding that the two sections should be “construed together,” the Court cleared the way for mandamus review to correct district court remand orders that enjoyed

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no statutory authority. As the Court explained, the congressional decision to foreclose review of authorized but possibly erroneous remand orders does not extend “carte blanche authority” to the district courts to “revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.” After finding that § 1447(d) posed no bar to review, the Court readily concluded that mandamus provides an appropriate remedy with which to “confine an inferior court to a lawful exercise of its prescribed jurisdiction.”

Having created an exception to the statutory restriction on intermediate appellate oversight, the Court made a second significant change in the rules twenty years later in Quackenbush v. Allstate Insurance Co. The case began in state court as a state common law action by the state insurance commissioner to recover damages from the reinsurer of an insolvent insurance company. The defendant removed on the basis of diversity and demanded arbitration. But the insurance commissioner persuaded the district court to abstain on Burford grounds and to remand the action to state court. Eventually the Court would hold that Burford abstention was unavailable in such an action for damages and that the district court should have sent the parties to arbitration rather than back to state court. But before getting there, the Court had to evaluate the propriety of the exercise of appellate jurisdiction over the Burford-based remand order. In doing so, the Court had little trouble in sidestepping the statutory ban in

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37 Thermtron, 423 U.S. at 345.
38 Id. at 351.
39 Id. at 352 (quoting Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26 (1943)).
40 Early cases confirm the Court’s power to review remand orders by way of mandamus. See, e.g., R.R. Co. v. Wiswall, 90 U.S. (23 Wall.) 507, 508 (1874) (concluding that the remand order was subject to review by way of mandamus, not by writ of error); Ins. Co. v. Comstock, 83 U.S. (16 Wall.) 258, 270-71 (1872) (same).
41 517 U.S. 706 (1996). After Thermtron, Congress changed the language of § 1447(c) to address remands due to “any defect other than lack of subject matter jurisdiction.” Pub. L. No. 104-219, 110 Stat. 3022 (1996) (codified at 28 U.S.C. § 1447(c)). The Court has never discussed the possible contention that this broadening of § 1447(c) expands the scope of the restriction on appellate review in § 1447(d).
42 Quackenbush, 517 U.S. at 709.
43 Id.
44 Id.
46 See Quackenbush, 517 U.S. at 728-31 (emphasizing the equitable origins of discretionary abstention doctrines in the course of refusing to permit Burford abstention, but declining to fashion a per se rule against abstention in actions for damages).
§ 1447(d); the basis for remand (Burford abstention) was not one specified in § 1447(c) of the statute. More challenging for the Court was the problem of selecting a proper vehicle for review once the statutory bar had been neutralized. Mandamus, the source of appellate authority on which the Court relied in Thermtron, would not obviously apply. After all, mandamus comes into play when the inferior court has exceeded its authority or has taken action in violation of settled law. Abstention-based remand orders, which entail an exercise of judicial discretion within the bounds of existing law, will often lack the element of clear error that triggers the availability of mandamus review. Accordingly, the Court turned away from mandamus and embraced the collateral order doctrine. An abstention-based remand decision, the Court reasoned, satisfies the collateral order doctrine as the determination of a question that is conclusive, separate from the merits, and will effectively evade review on appeal from a final judgment. The Court accordingly disavowed its assertion in Thermtron that a remand order is not “a final judgment reviewable by appeal.”

While the Court took pains to limit its decision to remands that operated as the functional equivalent of a stay pending arbitration, the decision has come to mean that virtually any remand decision qualifies as a final judgment for purposes of as-of-right review under § 1291, provided it was one to which the appellate review bar of § 1447(d) did not apply.

45 Id. at 712.
46 Under the traditional mandamus formulations, the writ of mandamus applies only to cases in which the inferior court has exceeded the boundaries of its jurisdiction, rather than cases where that court has exercised its acknowledged discretion within the bounds of law. See Pfander, supra note 30, at 1505-06 (discussing inferior court compliance with clearly established federal law).
47 Quackenbush, 517 U.S. at 713-15.
48 Id. at 714 (quoting Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352-53 (1976)).
49 The Court placed heavy reliance on an analogy to an earlier case that had upheld as-of-right review of a federal district court’s abstention-based stay order. Indeed, the Court described the remand in Quackenbush as “functionally indistinguishable” from the prior order. Id. at 715 (citing Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 n.11 (1983)). Accordingly, the Court’s disavowal of Thermtron’s mandamus regime could be viewed as limited to cases involving abstention-based stay orders.
the Second Circuit decision in *Shapiro*, the appellate courts have interpreted *Quackenbush* as effectively overruling *Thermtron* across a broad spectrum of matters. This switch has substantially altered the review of remand orders. Defendants no longer attempt to show extraordinary need or a clear error to secure the intervention of the appellate court. Indeed, defendants need not approach the appellate court at all to secure leave to appeal, as they would to secure mandamus and prohibition relief. Rather, defendants need only file a notice of appeal with the district court in accordance with the usual process that accompanies review of final judgments.

The shift from mandamus to appeal has left its mark on the frequency with which remands make their way to the appellate courts. A quick Internet search reveals that in the ten years following *Thermtron*, the intermediate appellate courts produced 55 opinions that dealt with

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52 See *Shapiro* v. Logistec USA, Inc., 412 F.3d 307, 308 (2d Cir. 2005) (allowing collateral review of a remand order).
53 See *Farmland Nat’l Beef Packing Co. v. Stone Container Corp.* (In re Stone Container Corp.), 360 F.3d 1216, 1219-20 (10th Cir. 2004) (holding that review of a remand order, when allowed, should be by appeal); *In re FMC Corp. Packaging Sys. Div.*, 208 F.3d 445, 449 (3d Cir. 2000) (“[T]he section 1447(d) bar does not apply to all remand orders and ... if review is appropriate it may be secured by appeal rather than mandamus ...”); *Long v. Bando Mfg. of Am.*, Inc., 201 F.3d 754, 758 n.3 (6th Cir. 2000) (noting that *Quackenbush* “abrogated *Thermtron*’s suggestion that remand orders were not final orders and ... could be reviewed only by ... mandamus”); *Benson v. SI Handling Sys.*, Inc., 188 F.3d 780, 782 (7th Cir. 1999) (“Although *Thermtron* stated that mandamus is essential and appeal impermissible, *Quackenbush* reversed that conclusion.”); *Ariail Drug Co. v. Recomm Int’l Display, Inc.*, 122 F.3d 950, 953 (11th Cir. 1997) (recognizing that *Quackenbush* held that review of remand orders can be obtained by appeal); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 542 (8th Cir. 1996) (dismissing a petition for writ of mandamus and, based on *Quackenbush*, reviewing the remand order on appeal); *Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 103-04 (5th Cir. 1996) (acknowledging the holding in *Quackenbush* that, under the collateral order doctrine, a remand order was reviewable on direct appeal). But see *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000) (holding that the court has the authority to review remand orders either as appealable decisions or on petition for writ of mandamus).
54 Rule 3 of the Federal Rules of Appellate Procedure declares that an appeal of right may be taken by filing a notice of appeal with the district clerk within the time specified by law. See Fed. R. App. P. 3(a)(1). The rule further specifies the content of the notice of appeal. See Fed. R. App. P. 3(c) (indicating that the notice of appeal must identify the parties, the subject of the appeal, and the court in which the appeal is brought). The Supreme Court recently clarified that the rules of timeliness establish a firm bar to the exercise of appellate jurisdiction. See *Bowles v. Russell*, 551 U.S. 205, 206-07 (2007) (“[P]etitioner’s untimely notice—even though filed in reliance upon a District Court’s order—deprived the Court of Appeals of jurisdiction.”).
the § 1447(d) ban on appellate review. By contrast, during the ten years following Quackenbush, some 293 opinions addressed the availability of review under § 1447(d).55 This increase in the number of remand appeals to the circuit courts of appeals has created more conflicts and necessitated greater oversight at the Supreme Court level. Since 2006, the Court has decided four cases that define the parameters of access to appellate review of remand orders.56 In each case, the defendant sought review of the remand order by way of appeal, apparently invoking Quackenbush’s extension of the collateral order doctrine. Meanwhile, mandamus review has all but disappeared.57

The switch from mandamus to appeal has fundamentally altered the standard of review as well. As the Ninth Circuit explained, a petitioner must make a showing of clear error or systemic error to secure intervention by way of mandamus, but simple legal error will suffice when review takes place by way of appeal.58 As a result, appellate courts now take a much more exacting look at remand orders. Consider, for example, the issue presented in Shapiro v. Logistec USA, Inc.59 There, the defendant corporation removed an action from state to federal court on the basis of diversity of citizenship, ignoring the home-state bar to removal in § 1441(b). Plaintiff did not move to remand until a few days after the specified thirty-day period, but the district court characterized the home-state bar as jurisdictional and granted the motion.60 On appeal, the Second Circuit disagreed about the rule’s juris-

55 Remand problems not only increased in absolute terms, from 55 to 293, but have accounted for a growing share of the appellate workload after Quackenbush. The scope of the statutory bar to remand figured in only approximately 16% (55 out of 339) of the removal cases on appeal during the ten-year period following Thermtron, but rose to approximately 38.5% (293 out of 760) of the removal cases on appeal during the ten-year period following the Quackenbush decision. The searches that yielded this data were run in October 2009 in the U.S. Courts of Appeals Cases (CTA) database of Westlaw with the following search terms: “remand /p 28 /4 1447(d) and da (aft 1977 and bef 1987)” [55 cases]; “remand /p 28 /4 1447(d) and da (aft 1997 and bef 2007)” [293 cases]. In addition, a search to identify decisions dealing with removal issues during those two periods returned 339 cases between 1977 and 1987, and 760 cases between 1997 and 2007, with the following search terms: “28 /3 1441 and da (aft 1977 and bef 1987)” [339 cases]; “28 /3 1441 and da (aft 1997 and bef 2007)” [760 cases].

56 See supra note 2 (citing cases).

57 Statistics from the federal judiciary indicate that mandamus petitions account for only a modest fraction of the workload of the intermediate appellate courts. See RICHARD H. FIELD ET AL., CIVIL PROCEDURE 1559 (9th ed. 2007) (noting that only 1.2% of all appeals in fiscal year 2000 were mandamus proceedings).

58 Cal. Dep’t of Water v. Powerex Corp., 533 F.3d 1087, 1092 (9th Cir. 2008).

59 412 F.3d 307 (2d Cir. 2005).

60 Id. at 308-09.
Adapting a rather fine distinction, the Second Circuit chose to treat the rules governing “removable” actions under § 1441(b) as different in kind from the rules that govern removal “jurisdiction” under § 1441(a). Yet in contrast to the Second Circuit’s view, the home-state bar to removal operates to block removal where the defendant faces no threat of bias and thus appears to be doing jurisdictional work.

One might better understand the Second Circuit’s approach by considering other implications, not related to appellate review, of its characterization of the home-state bar to removal. Hornbook law provides that federal courts must notice jurisdictional defects on their own motion and dismiss the action, even though the parties agreed to submit the case for decision and devoted substantial resources to its resolution. The Second Circuit’s approach in Shapiro undoubtedly expands appellate review of remand orders by eliminating the jurisdictionality of the home-state bar to removal. But in doing so, it wards off the threat to finality that the home-state rule would pose if treated as jurisdictional. Generalizing from such an insight, one might predict a tendency on the part of appellate courts to narrow the range of matters deemed jurisdictional in ambiguous cases, so as to avoid the risk of disruptive sua sponte dismissals. While this narrowing of jurisdictionality may widen the scope of appellate jurisdiction under § 1447(d) as currently interpreted, appellate courts may perceive greater systemic gains from a nonjurisdictional characterization than from a jurisdictional interpretation that would limit appellate review.

Whatever its ultimate justification, close parsing of jurisdictionality has led to a division at the Court on the question of how closely appellate courts should scrutinize the purported basis of remand orders. In Kircher v. Putnam Funds Trust, the Court ruled that the district court had correctly characterized its remand decision as jurisdictional and had

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61 See id. at 313 (“Section 1447(d) therefore does not apply and does not act to deprive us of the authority to review the district court’s order of remand.”).


63 Thanks to Eddie Hartnett for calling my attention to this possibility. The argument assumes that matters regarded as jurisdictional for purposes of § 1447(d) would also be so treated for purposes of applying the sua sponte jurisdictional dismissal rule.

64 Some developments at the Supreme Court tend to support the argument for a self-conscious narrowing of matters deemed jurisdictional. See Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006) (holding that the size-of-workforce rule that triggers application of an employment discrimination statute is not jurisdictional); Eberhart v. United States, 546 U.S. 12, 13 (2005) (noting that a time limit to file a motion for a new trial is not jurisdictional).
thus reached a conclusion that foreclosed appellate review.\textsuperscript{65} Such an approach suggests that an appellate court may at least consider the plausibility of a district court order remanding on jurisdictional grounds and may review the remand order if it concludes that the district court wrongly characterized the order’s disposition as jurisdictional.\textsuperscript{66} Justice Scalia wrote separately to argue against allowing any scrutiny of the remanding court’s jurisdictional characterization.\textsuperscript{67} Such a regime would, he feared, invite appellate litigation as to the proper characterization of district court remand orders and further delay litigation on the merits.\textsuperscript{68} The issue of how to characterize a remand order arose again in \textit{Powerex Corp. v. Reliant Energy Services, Inc.},\textsuperscript{69} in which one of the defendants invoked foreign sovereign immunity as a justification for removal. The district court ultimately concluded that immunity did not attach and attributed its remand decision to a lack of jurisdiction.\textsuperscript{70} Some members of the Court—including the author of the majority opinion, Justice Scalia—viewed the purported basis of the remand order as dispositive of its jurisdictional character for purposes of review.\textsuperscript{71} But other members apparently declined to endorse that view, leaving the issue open for further development in the lower courts.

One final complication grows out of the Court’s suggestion that some exceptionally clear prohibitions against remand override the ban on appellate review in § 1447(d). In \textit{Osborn v. Haley}, the plaintiff brought suit in state court against a federal official under a state law theory of liability.\textsuperscript{72} The Department of Justice certified, within the meaning of the Westfall Act, that the officer had been acting within the bounds of his official authority.\textsuperscript{73} If sustained, such a certification transforms the action into one against the federal government under

\textsuperscript{65} 547 U.S. 633, 642 (2006).
\textsuperscript{66} See id. at 642-44 (focusing on whether “the District Court was correct in understanding its remand order to be dictated by its finding that it lacked removal jurisdiction”); see also id. at 641 n.9 (declining to decide whether the purported basis of the order should control).
\textsuperscript{67} See id. at 650 (Scalia, J., concurring) (noting that litigation over the proper characterization had taken two years).
\textsuperscript{68} Id.
\textsuperscript{69} 551 U.S. 224 (2007).
\textsuperscript{70} Id. at 227.
\textsuperscript{71} See id. at 233 (acknowledging a division on the Court as to whether the appellate court may look behind a jurisdictional characterization).
\textsuperscript{73} Id. at 233 n.2.
the Federal Tort Claims Act (FTCA). Whether sustained or not, the certification also triggers the government’s right to remove the action to federal court. The district court, however, rejected the government certification and remanded the action to state court for a lack of jurisdiction. Nothing in the Westfall Act specifically allows the appellate court to review such remands, nor does the Westfall Act create an explicit exception to § 1447(d). The district court’s jurisdictional characterization of its remand might thus appear to have triggered the bar to appellate review. But the Court rejected that view. Pointing to the provision of the Westfall Act that makes the government’s certification “conclusive” for purposes of removal, the Court recognized an implicit exception to § 1447(d).

No one seems particularly pleased with the resulting state of affairs. Justice Scalia described the Osborn Court’s recognition of judge-made exceptions as defying common sense and good jurisdictional policy. He and Justice Thomas would return to the pre-Thermtron world of a flat ban on intermediate appellate review. Others have made their peace with Thermtron and judge-made exceptions; they would extend the exceptions more broadly. Thus, Justices Breyer and Stevens dissented from the Court’s refusal in Powerex to authorize appellate review of remand orders that rested on the district court’s rejection of a foreign sovereign immunity defense. Even the more reticent Justices Kennedy and Alito expressed something of the same concern in their

75 See 28 U.S.C. 2679(d)(2) (2006) (“Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed . . . at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending.”).
76 Osborn, 549 U.S. at 231.
77 See id. at 264-65 (Scalia, J., dissenting) (describing the absence of any explicit exception to § 1447(d) as fatal to the exercise of appellate jurisdiction and characterizing the majority’s contrary conclusion as “amazing”).
78 See 28 U.S.C. § 2679(d)(2) (stating that certification “conclusively” establishes the scope of employment for purposes of removal).
79 See Osborn, 549 U.S. at 243-44 (majority opinion) (acknowledging some tension with § 1447(d) and attempting to limit the breadth of the exception).
80 See id. at 264 (Scalia, J., dissenting) (arguing for a literal interpretation of § 1447(d)).
81 See Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 239 (2007) (Breyer, J., dissenting) (contending that the remand order should have been reviewable by appeal).
separate opinion in *Powerex*. While they acknowledged that the *Thermtron* approach foreclosed review, they described that result as “troubling” in light of its potential to “frustrate a [foreign sovereign immunity] policy of importance to our own Government.”

**II. SUPERVISORY OVERSIGHT OF REMAND ORDERS**

The discordant signals in the Court’s recent decisions suggest that a solution to the problem should take account of at least three concerns. First, some members of the Court wish to expand the range of remand orders to which appellate oversight extends. The decision in *Osborn*, creating a new exception to § 1447(d), reflects this impulse, as do the separate opinions in *Powerex*. *Thermtron* itself doubtless reflected dissatisfaction with a ban on review that would foreclose the Court from correcting what it viewed as the district court’s clearly unlawful remand of state law claims. Yet the Justices recognized a second concern with the preservation of Congress’s policy of limiting the routine review of remand orders. Justice Scalia believes that the *Thermtron* regime departs from the congressional policy expressed in § 1447(d) and fosters unnecessary delay as the parties jockey over forum choice. Justice Breyer’s *Carlsbad* concurrence identified a third concern with the judicious use of appellate resources and the perception that the *Thermtron* approach coupled with *Quackenbush*’s switch to the collateral order doctrine allows defendants to appeal from relatively routine remand orders.

The solution seems elusive while working within the Court’s current understanding of its appellate role. It is not obvious at first glance how the Court might claim a role for itself that does not also expand the powers of review of the intermediate appellate courts. Section 1254 empowers the Court to review “cases in the court of appeals” by writ of certiorari “before or after rendition of judgment.”

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82 *Id.* (Kennedy, J., concurring).

83 Of course, the *Thermtron* Court could have simply accepted the ban on appellate review and the occasional egregiously wrong district court remand order that such a rule would leave unremedied. One might predict few lawless remand orders from district court judges acting in good faith. Yet appellate reversal serves an important role in assuring the legality of lower court dispositions. A decision that foreclosed all review might invite ever more adventuresome remand orders (and perhaps eventually lead to a legislative or rulemaking response).

84 28 U.S.C. § 1254(1) (2006). For an account of the requirement that the case be “in” the court of appeals, see EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 79, 83-84 (9th ed. 2007), which notes that “a case is considered ‘in’ the court of appeals at and from the moment it is docketed in that court.” *Id.* at 84. Review may be granted
The statute confers no power on the Court to review cases in the district courts. As a result, the Court’s appellate jurisdiction has a derivative quality; the Court can hear only those matters that have been “in” the appellate courts under § 1254. If the appellate courts lack jurisdiction over the district court order, in short, the Court cannot reach the merits on its own but must dismiss the appeal for a lack of jurisdiction. In *Thermtron*, for example, the Court viewed its power to correct the Pennsylvania district court’s unauthorized remand of a diversity proceeding as necessarily entailing review of the Third Circuit’s role in overseeing the district court. The Court could reach the issue only by concluding that the Third Circuit was authorized to reach it as well.

Despite this perception of its appellate jurisdiction as derivative under the relevant statutes, the Court has ample constitutional and statutory authority to oversee district court remand orders directly, using common law writs of mandamus and prohibition. The Supreme Court’s power to issue these supervisory writs dates from the Judiciary Act of 1789 and now rests on the All Writs Act. As codified in 1948 and as currently phrased, the All Writs Act declares that the “Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

The Court’s cases make clear that this grant of all-writs authority encompasses the power to issue writs of mandamus and prohibition in appropriate cases. As before or after judgment in the court of appeals but not before the case arrives there through docketing. *Id.* at 79.

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85 *See United States v. Nixon*, 418 U.S. 683, 690-92 (1974) (concluding that the Court did have jurisdiction over a district court order because it was appealable and “therefore properly ‘in’ the Court of Appeals”); *see also GRESSMAN ET AL., supra* note 84, at 84 (explaining that a docketed case may be in the court of appeals for purposes of expedited review in the Supreme Court, but the order of the district court must be an “appealable order or otherwise fall[] within the jurisdiction of the courts of appeals”). The Supreme Court would, of course, have jurisdiction to determine jurisdiction (both its own and that of the lower federal courts) in the course of reviewing circuit court decisions, but its power to reach the merits would depend on a finding that the circuit court could have done so.


87 The All Writs Act authorizes the Supreme Court and other federal courts to issue “all writs” necessary in aid of their jurisdiction and agreeable to law. *See Pfander, supra* note 30, at 1466-67 (identifying the All Writs Act as the “lineal successor” to the powers conferred in sections 13 and 14 of the Judiciary Act of 1789).

the Court observed, a long line of cases upholds the power of a superior court to "confine an inferior court to a lawful exercise of its prescribed jurisdiction [through the writ of prohibition] or to compel it to exercise its authority when it is its duty to do so [through the writ of mandamus]."89 This Part explains how the Court might reassert its supervisory power to review district court remand orders through its all-writs authority.

A. The Freestanding Supervisory Power

The Court’s freestanding power to supervise all levels of the lower federal courts was nicely illustrated in Ex parte Republic of Peru, an admiralty proceeding brought against a vessel owned by the Republic of Peru.90 Despite Peru’s invocation of foreign sovereign immunity, and despite the federal government’s expression of support for the immunity defense, the district court refused to dismiss the proceeding. Peru sought relief by requesting a writ of prohibition not from the intermediate appellate court, but from the Supreme Court itself.91 The Court agreed to hear the case and, after concluding that it had jurisdiction, directed the district court to dismiss the proceeding.92 In dissent on the jurisdictional issue, Justice Frankfurter vigorously argued that the Court had no power to entertain Peru’s petition for a writ of prohibition.93 In his derivative account, the Court’s supervisory power applied only in situations where the Court could claim another statutory source of appellate jurisdiction. Noting that Congress had vested as-of-right review of the district courts in the intermediate appellate courts, he argued that the Court had been divested of its authority to supervise the district courts through writs of mandamus and prohibition. For Justice Frankfurter, the Court’s jurisdiction in certiorari applied only to cases “in” the appellate courts, and the all-writs power should be interpreted as operating only in aid of that grant of jurisdiction.94

Despite Justice Frankfurter’s concern with a loss of control of its appellate docket, the Court concluded that its all-writs power authorizes direct oversight of the district courts through writs of prohibi-

89 See Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26 (1943) (collecting Supreme Court authority); see also Thermtron, 423 U.S. at 352 (same).
90 Ex parte Republic of Peru, 318 U.S. 578, 580 (1943).
91 Id. at 581-82.
92 Id. at 589-90.
93 Id. at 590-92 (Frankfurter, J., dissenting).
94 See id. at 592 (arguing that, without appellate jurisdiction, the Court lacked power to issue writs of mandamus to district courts).
tion. The Court acknowledged that it no longer had jurisdiction over as-of-right appeals from the district courts.\(^\text{95}\) But its power to issue the common law writs had not been legislatively altered and did not depend on the continued existence of other sources of appellate oversight.\(^\text{96}\) Rather, the all-writs power attaches any time the petition seeks relief that satisfies the constitutional test for the exercise of appellate jurisdiction set forth in *Marbury v. Madison*.\(^\text{97}\) To the extent that the petition seeks relief that meets the *Marbury* standard for the “revision and correction” of lower court proceedings, the Court has power under Article III of the Constitution to entertain the petition.\(^\text{98}\) With broad constitutional power and an independent statutory source of authority, the Court articulated a remarkably expansive definition of its supervisory authority.\(^\text{99}\)

What then of the statutory requirement that writs issue in aid of the Court’s jurisdiction? The Court appears to have taken the view that virtually any case in the district court was within the potential scope of its appellate jurisdiction and therefore was an appropriate target of supervisory oversight.\(^\text{100}\) In reaching this expansive conclusion, the Court relied on its earlier decisions. In *Ex parte United States*, the Court considered an application for mandamus in which the government sought to compel the district court to issue a bench warrant for the arrest of an indicted criminal defendant.\(^\text{101}\) Although there was little prospect that such a question would reach the Court on re-

\(^\text{95}\) See id. at 584-85 & n.4 (majority opinion) (explaining that the purpose of the Judiciary Act of 1925 was to “curtail the Court’s obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases”).

\(^\text{96}\) See id. at 585 n.4 (finding, in the relevant legislative history, “not a single suggestion that the [Judiciary] Act [of 1925] would withdraw or limit the Court’s existing jurisdiction to direct the common-law writs to district courts when, in the exercise of its discretion, it deemed such a remedy appropriate”).

\(^\text{97}\) See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (articulating a functional test for the exercise of appellate jurisdiction that applies anytime the Court acts to “revise[] and correct[]” the proceedings of a lower court).

\(^\text{98}\) Id.; see also Pfander, supra note 30, at 1490-93 (discussing the evolution of mandamus into an alternative to direct appellate review after *Marbury*).

\(^\text{99}\) See Richard F. Wolfson, *Extraordinary Writs in the Supreme Court Since Ex parte Peru*, 51 COLUM. L. REV. 977, 991 (1951) (concluding that the Court had found that its power to issue supervisory writs was “practically limitless” as long as the strictures of *Marbury* were observed).

\(^\text{100}\) See GREASON ET AL., supra note 84, at 651 (noting that the “in aid of” language has been construed to include “even in aid of its potential jurisdiction over a case pending before a court over which it lacks direct appellate power but may ultimately be able to review after a decision by an intermediate court”).

\(^\text{101}\) 287 U.S. 241, 244-45 (1932).
view of a final judgment, the Court nonetheless concluded that it had power to entertain the mandamus application. 102 Similarly, in McClellan v. Carland, the Court upheld its authority to issue the common law writ of certiorari under the All Writs Act, even though the circumstances rendered inapplicable its statutory grant of certiorari authority. 103 As the McClellan Court explained, invoking its supervisory power, it would be reluctant to “reach a conclusion which would deprive the court of the power to issue the writ in proper cases to review the action of the Federal courts inferior in jurisdiction to this court.” 104

With their emphasis on the importance of preserving a supervisory role, cases such as Ex parte United States, McClellan v. Carland, and Ex parte Republic of Peru articulate an extremely broad vision of the Court’s authority under the All Writs Act. Indeed, close students of the Court’s use of the extraordinary writs have concluded that these cases empower the Court to issue a supervisory writ in connection with any proceeding in the lower federal courts. I have argued elsewhere that one can best account for the breadth of the Court’s supervisory power by viewing the All Writs Act as a direct codification of the Court’s grant of appellate jurisdiction in Article III. 105 On that view, the requirement that writs issue “in aid” of the Court’s jurisdiction does not require the Court to identify another statutory source of appellate jurisdiction; the writs operate in aid of jurisdiction conferred in Article III. The only limit on the all-writs power derives from the requirement stated in Marbury v. Madison that the writ issue to revise and correct proceedings in a lower court. 106

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102 Id. at 248-49.
103 217 U.S. 268, 279 (1910).
104 Id. It is worth noting that the Court upheld its own jurisdiction on the basis of its evaluation of the All Writs Act and did not base its jurisdiction either on the presence of some alternative statutory source of appellate jurisdiction or on the presence of jurisdiction in the court below. Indeed, arguably to underscore the independence of its own authority, the Court evaluated the appellate jurisdiction of the circuit court of appeals after it had upheld its own jurisdiction. Id.
105 See Pfander, supra note 30, at 1495-98.
106 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803). The Court derives its original and appellate jurisdiction directly from Article III of the Constitution; the Ex parte Republic of Peru Court viewed its all-writs power as a statutory grant of supervisory authority that directly implements the Court’s constitutional jurisdiction. Ex parte Republic of Peru, 318 U.S. 578, 582-83 (1943). The Court’s view of its supervisory power as a direct codification of its constitutional role and as resistant to other statutory restrictions was no mere spur-of-the-moment invention. Indeed, the Court had long held that its supervisory authority survived congressional restrictions on its other statutory sources of appellate jurisdiction. Thus, in Ex parte Yerger, 75 U.S. (8 Wall.) 85, 98, 103 (1868), the Court concluded that a statute that curtailed one statutory source of
B. Supervision of District Court Remand Orders

The decisions in *Ex parte Republic of Peru* and *Hollingsworth v. Perry* suggest that the Court has power under the All Writs Act to hear “original” petitions for mandamus to correct errors at the district court level.\(^{107}\) This conclusion provides the basis for a new approach to the review of remand orders. Instead of working through the appellate courts, the Court can directly intervene at the district court level to correct remand (and other) errors. This all-writs power, moreover, suggests that the Court can intervene whenever the “usages and principles of law” would support the entry of mandamus relief. By tying the Court’s original mandamus authority to the broad terms of the All Writs Act, the suggested approach frees the Court from the limits of appellate mandamus outlined in *Thermtron*. While § 1447(d) limits the power of the intermediate appellate courts to review remand decisions, the Court could sensibly conclude (as discussed at greater length below) that these limits do not apply to its mandamus power under the All Writs Act.\(^{108}\)

Such a revitalized supervisory approach to the review of remand orders offers a number of advantages. For starters, the Court could correct clear remand errors without being forced to recognize further exceptions to § 1447(d). The decision in *Osborn* provides an excellent illustration of the advantages of doing so. As the Court noted, the lower courts had divided as to whether a certification decision operated as a conclusive determination of the removability of claims against federal officers under the Westfall Act, or whether the district court could order a remand to the state courts after rejecting the government’s certification.\(^{109}\) When the district court in *Osborn* ordered a remand, the government could have sought review directly in the Supreme Court, invoking the Court’s discretionary mandamus authority (just as it did in *Ex parte United States*). The Court could have intervened, upholding the government’s view of the conclusiveness of the

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annalist review of habeas decisions had no impact on its authority to entertain “original” petitions for habeas relief under the precursor to the All Writs Act. Similarly, in *Ex parte Siebold*, 100 U.S. 371, 374-75 (1879), the Court had confirmed that all-writs authority was independent of other statutory sources of appellate jurisdiction and came into play any time the *Marbury* standard was satisfied. The decision in *Ex parte Republic of Peru* simply confirmed these conclusions and extended them to other forms of supervisory authority under the All Writs Act.

\(^{107}\) *Hollingsworth v. Perry*, 130 S. Ct. 705, 710 (2010) (per curiam); *Ex parte Republic of Peru*, 381 U.S. at 582.

\(^{108}\) See discussion infra Section II.C.

certification, without fashioning a new exception that would undermine the clarity of § 1447(d) or burden the intermediate appellate courts with a new collection of obligatory appeals.

Apart from obviating any need to fashion new exceptions to § 1447(d), reliance on the All Writs Act would enable the Court to correct important errors even where they implicate matters of procedure and jurisdiction that now lie beyond the authority of the appellate courts under Thermtron. Consider the Court’s decision in Powerex. At least four Justices expressed concern with the lower court’s remand order, which rejected a substantial foreign sovereign immunity defense. But the majority felt constrained by the Thermtron rule; foreign sovereign immunity issues were said to implicate subject matter jurisdiction and thus to fall within the bar to appellate review. By switching to the All Writs Act, the Court could use its mandamus authority to decide the immunity issue, if necessary, and to provide appropriate relief. Indeed, the immunity issue in Powerex bears more than a passing resemblance to the issue of foreign sovereign immunity that persuaded the Court to intervene by way of prohibition in Ex parte Republic of Peru.

Use of original mandamus would also have the advantage of enabling the Court to evaluate the significance of the error and the importance of its correction in light of other pressing concerns. The Court already routinely performs this sort of balancing in the discretionary management of its appellate docket. The proposed reinvigoration of its all-writs authority to encompass review of remand orders would, to be sure, bring a new stream of potential cases to the Court for consideration. But it would not alter the Court’s role and need not swamp the Court’s docket. After all, the Court has long held that

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110 While Thermtron allows review of certain remand decisions, § 1447(d) continues to foreclose review when the remand results either from a “defect” in removal procedure or from want of jurisdiction.

111 See Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 239 (2007) (Kennedy, J., concurring) (finding it “troubling to be required to issue a decision that might well frustrate a policy of importance to our own Government”); id. at 239-40, 245 (Breyer, J., dissenting) (arguing for review of the remand order and for the validity of the foreign sovereign immunity defense). Perhaps heeding these concerns, the Ninth Circuit eventually concluded that it had the power to reach and resolve the immunity issue and did so in favor of the foreign sovereign. See Cal. Dep’t of Water Res. v. Powerex Corp., 533 F.3d 1087, 1102 (9th Cir. 2008) (upholding the foreign sovereign immunity defense).

112 Powerex, 551 U.S. at 229-30.

113 See id. at 242 (Breyer, J., dissenting) (citing Ex parte Republic of Peru, 318 U.S. 578, 587 (1943)). Neither the parties nor Justice Breyer discussed the possibility that Ex parte Republic of Peru recognizes the existence of an alternative source of authority to conduct review.
parties must petition for leave to file original petitions for mandamus and prohibition under the All Writs Act. In passing on such petitions for leave, the Court exercises the same sort of discretion that now informs its evaluations of petitions for certiorari review. Indeed, the Court might draw on the same sort of factors in deciding whether to docket a mandamus petition that now inform its decisions to grant certiorari. Thus, the Court might evaluate the need for mandamus in part by reference to any conflict that had developed among the district or circuit courts and in part by reference to the severity and disruptive quality of the error at issue.

In the end, by reclaiming its “original” mandamus authority, the Court could address serious mistakes in the exercise of remand authority without the need to expand the scope of the circuit courts’ power to hear such matters on direct review. Such an approach

115 See Gressman et al., supra note 84, at 650 (describing the practice on extraordinary writs as “similar to that prescribed for the ordinary statutory petitions for certiorari”); cf. id. at 324 (noting that it takes five votes to docket an original petition for habeas corpus or any extraordinary writ rather than the four needed to grant certiorari).
116 Relatively few remand orders would present issues grave enough to warrant intervention by way of mandamus. By emphasizing the extraordinary nature of mandamus relief by original petition, the Court could signal to practitioners its own reluctance to entertain applications except in the clearest cases. Notably, the Court in both Ex parte Republic of Peru, 318 U.S. at 586, and Ex parte United States, 287 U.S. 241, 248-49 (1932), was careful to restate the limited nature of its all-writs authority. To be sure, one can argue that a remand decision operates as a final judicial determination of the claimed right of access to a federal forum and deserves to be regarded as a final judgment. Thus, in Thermtron, the district court’s remand would have essentially divested the federal courts of jurisdiction of the cause and deprived the removing party of an asserted right to a federal forum. See Thermtron Prod., Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976) (emphasizing the removing party’s right to a federal docket by way of diversity jurisdiction), abrogated in part on other grounds by Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996). Moreover, the removing party could not preserve the issue of access to a federal forum for review on appeal from a final state court disposition. The finality of the remand decision may thus warrant review, without regard to the availability of a collateral order or discretionary interlocutory review.

Yet the argument from finality confronts two hurdles. First, the remand order does not satisfy the traditional definition of finality: the case remains pending in state court after the remand. See Catlin v. United States, 324 U.S. 229, 233 (1945) (defining technical finality as an order that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment), superseded by statute in part on other grounds by 9 U.S.C. § 15 (2006); see also Thermtron, 423 U.S. at 352-53 (concluding that remands do not satisfy the final judgment rule). This lack of technical finality explains why early decisions treated mandamus as the proper vehicle for appellate oversight. See infra note 129. Second, the statutory bar to review in § 1447(d) suggests that Congress does not regard the removing party’s interest in a federal forum as sufficiently
would enable the Court to reconsider its decisions in *Thermtron* and *Quackenbush*. With the power to reach and resolve serious errors itself, the Court would no longer feel obliged to preserve circuit court review to secure its ultimate role in correcting clearly mistaken remand decisions. The Court’s own supervisory power would thus take some of the sting out of a decision to overturn or narrow *Thermtron*. Justice Scalia could insist on a return to the simple textual message of § 1447(d) without raising the hackles of the Justices who believe that some escape valve may be necessary to correct serious errors.

Two side benefits would flow from the Court’s acceptance of a reinvigorated supervisory role. First, the Court would no longer be obliged to preside over the increasingly byzantine rules that now govern access to appellate review under the *Thermtron* exceptions. Instead of an entitlement to review as of right, the parties would understand that review would be granted only in exceptional cases upon a strong showing of need. Second, by freeing itself from the obligation to police lower court disagreements about the scope of appellate jurisdiction, the Court could make a more significant contribution to the rules that govern the remand decisions of the district courts. The Court has taken four cases involving appellate review of remand orders in the past four years. In three of the four cases, the Court focused entirely on appellate jurisdictional issues and was unable to clarify the underlying rules that govern the district courts’ exercise of remand authority. Instead of an entitlement to review as of right, the parties would understand that review would be granted only in exceptional cases upon a strong showing of need. Second, by freeing itself from the obligation to police lower court disagreements about the scope of appellate jurisdiction, the Court could make a more significant contribution to the rules that govern the remand decisions of the district courts. The Court has taken four cases involving appellate review of remand orders in the past four years. In three of the four cases, the Court focused entirely on appellate jurisdictional issues and was unable to clarify the underlying rules that govern the district courts’ exercise of remand authority. One final point deserves mention. By reasserting its supervisory role, the Court would return the review of interlocutory matters to its roots as a discretionary doctrine. From its earliest days, the Court regarded remand orders as interlocutory decrees, reviewable through

weighty to warrant appellate review of a contrary district court decision. Congress could reasonably conclude that the availability of an alternative state forum with jurisdiction and the need for a relatively quick resolution of the remand issue override the removing party’s interest in securing review of a claimed right to a federal forum.

118 See *Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 129 S. Ct. 1862, 1867 (2009) (remanding to the circuit court without considering the merits of the district court’s remand decision); *Powerex*, 551 U.S. at 238-39 (declaring that the circuit court lacked appellate jurisdiction and thus refusing to reach the merits of the remand order); *Kircher v. Putnam Funds Trust*, 547 U.S. 635, 642-48 (2006) (scrutinizing the remand order, deciding that it was based on a lack of jurisdiction and immune from appellate review under § 1447(d), and recognizing that the remand decision itself and preclusion issues would remain open); *cf.* *Osborn v. Haley*, 549 U.S. 225, 239-44 (2007) (concluding that the remand order was subject to appellate review and further concluding that the district court erred in remanding).
mandamus but not by way of appeal or writ of error.\textsuperscript{119} Indeed, one can discern an element of appellate discretion in early statements of the collateral order doctrine. In the leading case, \textit{Cohen v. Beneficial Industrial Loan Corp.}, the Court’s concluding comment emphasized the importance of judgment:

\begin{quote}
We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question.\textsuperscript{120}
\end{quote}

Interestingly, then, the \textit{Cohen} Court did not regard its decision as establishing as-of-right review for all security orders.\textsuperscript{121} To the contrary, it suggested that routine security matters or those assigned to the district court’s discretion would not warrant appellate review. That cautionary note finds its echo in Justice Breyer’s stated reluctance in \textit{Carlsbad} to authorize routine review of discretionary \textit{Cohill} remands.\textsuperscript{122} As we have seen, the Court could restore the exercise of appellate judgment by reasserting its supervisory authority.

\textbf{C. Predictable Concerns with the Use of Supervisory Power}

\textit{1. Docket Control}

The suggested reliance on the Court’s power to oversee remand orders through its supervisory writs of mandamus and prohibition brings two predictable concerns to mind. First, the Court might worry about the docket implications associated with accepting responsibility for direct review of remand orders. After all, the removal of cases from state to federal court occurs with numbing regularity today, predictably triggering motions to remand. There are a good many more

\textsuperscript{119} See R.R. Co. v. Wiswall, 90 U.S. (23 Wall) 507, 508 (1874) (treating the remand order as a “refusal to hear and decide,” not a final, appealable judgment).


\textsuperscript{121} Thanks to David Shapiro for suggesting that \textit{Cohen} may have meant to narrow the category of appealable collateral security orders to those that present serious or unsettled questions. Orders within the category would still enjoy as-of-right review and appellate jurisdiction would turn on whether the issues of security were of the unsettled and serious or mundane variety.

\textsuperscript{122} See \textit{Carlsbad}, 129 S. Ct. at 1869 (Breyer, J., concurring) (arguing that discretionary \textit{Cohill} remands do not require interlocutory review).
Collateral Review of Remand Orders

The Court firmly established its direct supervisory role in *Ex parte Republic of Peru* and *Ex parte United States*. The Court might prefer to avoid this supervisory responsibility and preserve its scarce appellate resources for other work that it deems more important.

While the Court’s understandable desire to maintain control of its docket deserves serious attention, I do not believe it provides a strong basis for argument against the revival of the Court’s supervisory role. As noted above, parties seeking a supervisory writ of mandamus from the Supreme Court must first apply for leave to file, thereby triggering the same discretionary calculus that the Court currently performs in deciding whether to grant a petition for certiorari. The Court would thus retain control, docketing only those cases, if any, that satisfy the stringent test for supervisory intervention. The Court could tailor its review function as it sees fit and would have no obligation to hear every petition that presents an arguable case for supervisory intervention. By establishing a demanding standard for intervention, the Court could avoid any untoward run on its docket. The Court could thus honor the spirit of Congress’s declared desire to restrict routine review of remand orders while retaining its authority to correct systemic and egregious errors.

Equally important, many interventions by way of supervisory writ are one-off events that—unlike *Quackenbush* and *Carlsbad*—will not bring a stream of new cases to the appellate courts. In *Thermtron*, for example, the Court clarified that district courts have no power to remand diversity cases solely on the ground that their dockets are full of

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123 See supra notes 90-104 and accompanying text.
124 In the past twenty-five years or so, the Court has considered an average of fewer than 100 petitions per year for extraordinary writs and has denied them all without oral argument. See GRESSMAN ET AL., supra note 84, at 651 n.9. That record makes the recent decision in *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (per curiam), all the more significant.
125 The Court distinguishes in the administration of its extraordinary writs between systemic errors and egregious errors that fail to present systemic concerns. See GRESSMAN ET AL., supra note 84, at 653-67 (listing and explaining systematic errors that the Court has found to warrant the issuance of an extraordinary writ). Consider *Felker v. Turpin*, 518 U.S. 651 (1996). There, the justification for review was to clarify the scope of the Court’s own oversight authority (a systemic issue) rather than to correct an egregious error below. See id. at 658. The Court then articulated a very demanding standard for review, thereby limiting its supervisory role to situations that presented genuine systemic issues, rather than claims of simple error below. See Pfander, supra note 30, at 1503-05 (noting that the *Felker* Court both reaffirmed its “freestanding power of supervision” and indicated that it would not exercise this power frequently).
more pressing matters. One might suppose that relatively few such remand orders have been rendered in the succeeding years. Similarly, the Court’s conclusion in Osborn should prevent district courts in the future from relinquishing control of actions against federal officers that have been certified for transformation into suits against the government under the Westfall Act. So long as the Court confines itself to making these sorts of gatekeeping decisions by extraordinary writ and emphasizes the narrowness of its supervisory authority, docket issues should not become overly pressing. Supervisory review enables the Court to apply this corrective measure without getting bogged down in the details of intermediate appellate review.

2. Section 1447(d)

A second and more serious concern flows from the language of the statute. Perhaps § 1447(d), with its prohibition against review “on appeal or otherwise,” curtails not only the circuit courts’ appellate jurisdiction but the Court’s supervisory authority as well. In evaluating this argument, one must begin by recognizing that the Court has applied a strong presumption against implied repeals of its supervisory authority. In Ex parte Yerger, the Court found that it retained supervisory power to issue original writs of habeas corpus under the All Writs Act, notwithstanding a statute that expressly repealed its power to review lower court habeas decisions on appeal. As the Court explained, the supervisory power in habeas was a longstanding feature of the Court’s appellate jurisdiction and should not be viewed as some-


\[127\] See Osborn v. Haley, 549 U.S. 225, 243-44 (2007) (holding that the district court lacks authority to remand actions to state court once they have been certified for removal under the Westfall Act).


\[129\] See Ex parte Yerger, 75 U.S. (8 Wall.) 85, 103-06 (1868) (construing the Act of March 27, 1868, ch. 34, 15 Stat. 44, as limited in effect to appeals taken under that Act). The Act of March 27, 1868, had repealed the Court’s power to review lower court habeas decisions on appeal. It was that statutory repeal to which the Court had given effect in Ex parte McCordale, 74 U.S. (7 Wall.) 506, 514-15 (1868), which was dismissed for want of jurisdiction in light of the Act. For an account of the latter case, see Daniel J. Meltzer, The Story of Ex parte McCordale: The Power of Congress to Limit the Supreme Court’s Appellate Jurisdiction, in FEDERAL COURTS STORIES 57, 69-74 (Judith Resnik & Vicki C. Jackson eds., 2010) (discussing the historical circumstances surrounding the Act’s repeal and the McCordale decision).
thing Congress inadvertently or indirectly repealed.\footnote{See Ex parte Yerger, 75 U.S. at 106 (rejecting the proposition that the acts of 1867 and 1868 repealed the Court’s “original” jurisdiction in habeas cases by implication). The Court described its “whole appellate jurisdiction,” in cases of habeas corpus as “conferred by the Constitution, recognized by law, and exercised from the foundation of the government” under the Judiciary Act of 1789. Id. On this account, the Constitution confers jurisdiction, and the law simply recognizes its existence. The Court accordingly resisted the notion that its habeas jurisdiction was taken away “by mere implication.” Id.} Similarly, in \textit{Felker v. Turpin}, the Court found that its power to issue a supervisory writ survived a restriction on its authority to review circuit court gatekeeping decisions by appeal or certiorari.\footnote{Felker v. Turpin, 518 U.S. 651, 657-61 (1996) (concluding that the terms of the statutory restriction on the Court’s appellate jurisdiction did not repeal its original habeas power under the successor to the All Writs Act).} The \textit{Felker} Court indicated that its conclusion was informed in part by its desire to avoid the constitutional question that might arise if the statute were construed as a broad restriction on the Court’s appellate jurisdiction.\footnote{Id. at 661-62. For a discussion, in the context of \textit{Felker}, of the use of avoidance canons to dodge jurisdiction-stripping questions, see Ernest A. Young, \textit{Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review}, 78 Tex. L. Rev. 1549, 1556-62 (2000).}

Applying the lessons of \textit{Yerger} and \textit{Felker} and the presumption against implied repeals of supervisory authority, the Court’s mandamus authority should survive the congressional restriction in § 1447(d). For starters, the provision curtails review by “appeal or otherwise”\footnote{28 U.S.C. § 1447(d).} but says nothing that would expressly restrict the Court’s power to issue the writs of mandamus or prohibition. The Court, in both \textit{Yerger} and \textit{Felker}, relied on a similar failure to enact an express repeal to conclude that its supervisory powers remained intact. Indeed, the case against finding an implied repeal seems even stronger in the remand context, where the provision (as reenacted in 1949) was aimed at the authority of the circuit courts of appeals, not the Supreme Court.\footnote{Ch. 139, sec. 84(b), § 1447, 63 Stat. 89, 102 (1949) (codified as amended at 28 U.S.C. § 1447 (2006)).} After all, only the circuit courts have authority to review district court decisions by way of “appeal”; the reference to review by appeal “or otherwise” can be most naturally read as restricting other modes of review at the intermediate appellate court level.\footnote{Id.} In con-
trust, the restrictions at issue in *Yerger* and *Felker* were both clearly aimed at Supreme Court review.\(^{136}\)

The history of remand review before the enactment of the judicial code in 1948 and 1949 confirms that the restriction in § 1447(d) was aimed at review conducted by the intermediate courts of appeals and did not affect the Supreme Court’s all-writs authority. To be sure, nineteenth-century statutes cutting back on the review of remand orders were interpreted as curtailing review in the Supreme Court.\(^{137}\) But these restrictions were adopted and interpreted at a time when the language of the relevant statute, the structure of the federal judiciary, and the procedure for the removal of actions to federal court differed sharply from those later adopted in 1948 and 1949. So although the Court treated pre-1948 restrictions on the review of remand orders as applicable to its own supervisory authority, it has never ruled that those restrictions were carried forward in 1949 when

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\(^{136}\) The avoidance canon arguably applies with somewhat reduced force to the repeal of the Court’s power to supervise remand decisions. Remand decisions simply result in state court resolution of a dispute within the state court’s acknowledged jurisdiction (except in the rare case where the district court mistakenly remands a matter exclusively within federal jurisdiction). Congress could leave such matters in the hands of the state courts, presumably, and thus may not tread too heavily on the judiciary’s toes in limiting the Court’s power to review decisions that return them there. On that view, perhaps the avoidance canon does not come into play, and a statute repealing the Court’s appellate jurisdiction need not speak with special clarity. Thanks to David Shapiro for making this point.

In my view, however, Congress’s power to fashion exceptions and regulations to the Court’s appellate jurisdiction does not encompass a power to curtail its discretionary authority to supervise lower courts through the writs of mandamus and prohibition. While Congress has ample power to curtail as-of-right review in the Supreme Court, it has much reduced authority to curtail its discretionary powers of review. For an elaboration of this thesis, see Pfander, *supra* note 30, at 1501-03, 1508-11. See also *James E. Pfander, One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* 59-80 (2009); *James E. Pfander, Essay, Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction Stripping Legislation*, 101 NW. U. L. REV. 191, 234-36 (2007). On this view, the proposed interpretation of § 1447(d) as curtailing the Court’s discretionary powers of supervision triggers the avoidance canon without regard to the nature of the underlying district court decision under review.

\(^{137}\) In 1887, with concern growing about the state of the Court’s appellate backlog, Congress provided by statute that remand orders “shall be immediately carried into execution, and no appeal or writ of error . . . shall be allowed.” Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 552, 553. As noted below, early decisions interpreted this provision as foreclosing all review of remand orders, including by way of mandamus. *See In re Pa. Co.*, 137 U.S. 451, 454 (1890) (construing the provision as “taking away the remedy by mandamus as well as that of appeal and writ of error”); *see also Henry Campbell Black, Dillon on Removal of Causes § 223 (6th ed. 1898)* (noting that the provision was understood to preclude Supreme Court review of remand orders). For a summary of subsequent developments, see *Gay v. Ruff*, 292 U.S. 25, 29-33 (1934).
Congress enacted the very different language of § 1447(d). If the Court were to reach that open question today, it should conclude that the statutory bar does not restrict its supervisory authority.

The story begins with the Court’s nineteenth-century determination that mandamus was the preferred mode with which to review remand orders (which operated, in effect, as a refusal by an inferior court to exercise the jurisdiction conferred).\(^\text{138}\) Congress responded in 1875 by authorizing review by appeal or writ of error, thus switching from the discretionary use of mandamus to as-of-right review for cases in law (writ of error) and equity (appeal).\(^\text{139}\) Then, concerned about the backlog of cases on the Court’s docket at a time when it was the nation’s only federal appellate tribunal, Congress switched course again. The Judiciary Act of 1887 declared that that the remand orders of the federal trial courts “shall be immediately carried into execution, and no appeal or writ of error from the [remand decision] shall be allowed.”\(^\text{140}\) Read against the backdrop of existing law, the provision might well have been interpreted as ending the nation’s experiment with as-of-right review and returning to review by mandamus.\(^\text{141}\) But in a significant 1890 decision, In re Pennsylvania Co., the Court concluded that its mandamus authority was foreclosed as well.\(^\text{142}\)

\(^{138}\) The Court initially took the position that remands were nonfinal orders, subject to review by mandamus but not by appeal or writ of error. See R.R. Co. v. Wiswall, 90 U.S. (23 Wall.) 507, 508 (1874) (declining to issue writ of error to the circuit (trial) court); see also Ins. Co. v. Comstock, 83 U.S. (16 Wall.) 258, 270-71 (1874) (declaring that writ of error will not lie to correct a refusal of the lower court to exercise jurisdiction and suggesting instead that mandamus provides the proper remedy).

\(^{139}\) Congress broadly declared that an order dismissing or remanding an action to state court “shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.” Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472.


\(^{141}\) The Court arguably overread the statutory restriction, which failed to say anything about mandamus. As David Shapiro observed to me, mandamus belongs in a category separate from appeal and writ of error review (both of which may be invoked as a matter of right). One might argue that, in reclaiming authority to review remand orders by mandamus, the Court would simply be reinterpreting the current restriction on review to bring it into line with the initial statutory prohibition against as-of-right review.

\(^{142}\) 137 U.S. 451, 454 (1890). The Court’s analysis deserves close attention. The opinion acknowledged that the statute “abolishes appeals and writs of error” and does not “mention writs of mandamus.” Id. The Court further acknowledged that its supervisory authority by way of mandamus was of “great moment” and not lightly to be deemed to have been taken away. Id. Despite these considerations, the Court found that the lan-
In one of those twists of path-dependent fate, the decision came down only one year before Congress was to provide a more effective, structural solution to the Court’s appellate backlog. Up to that point, the federal system had two sets of trial courts—district courts and circuit courts.\footnote{143} Much of the removal litigation stemmed from the removal of diverse-party proceedings from state to federal circuit courts. Direct appellate review of circuit court decisions was conducted by the Supreme Court.\footnote{144} In the Judiciary Act of 1891, Congress created a three-tiered court system, with the district courts serving as all-purpose trial courts and the circuit courts reconfigured as courts of appeal with responsibility for direct oversight of the decisions of the district courts.\footnote{145} The old circuit courts were retained for a transition period and later phased out.\footnote{146} Instead of reviewing trial court decisions directly as it had in 1890, the Court was expected to review the decisions of the intermediate appellate courts. While the statute preserved the Court’s as-of-right review of some matters deemed of great importance (including issues of jurisdiction), it provided that

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many decisions of the intermediate appellate courts were to be final and subject to review only by way of the now-familiar writ of certiorari.\footnote{See id. § 5, 26 Stat. at 827-28 (empowering the Supreme Court to review district court judgments by appeal or writ of error in cases involving jurisdictional issues, constitutional issues, and an assortment of other federal questions); see also id. § 6, 26 Stat. at 828 (declaring the finality of circuit court appellate decisions, subject to the possibility of Supreme Court review by certified question and by writ of certiorari).}

The creation of a three-tiered system changed the role of the Supreme Court. Instead of directly reviewing trial court decisions, the Court was to review cases in the intermediate appellate courts. The intermediate courts, in turn, would take responsibility for oversight of the trial courts.\footnote{Id. § 6, 26 Stat. at 828.} This change in the structure of the federal judiciary was reflected in the removal statutes, which were amended to provide for removal from state courts to “district” courts.\footnote{See Judiciary Act of 1911, ch. 231, § 28, 36 Stat. 1087, 1094 (“Any suit of a civil nature, at law or in equity, arising under the Constitution or the laws of the United States, . . . may be removed by the defendant or defendants therein to the district court of the United States for the proper district.”).} In addition, the removal statutes carried forward the prohibition against review of district court remand decisions. Like the previous provision, the new version proclaimed that remand orders “shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court . . . shall be allowed.”\footnote{Id. at 1095.} The Court held that the statute foreclosed review of district court remand orders by the intermediate appellate courts.\footnote{Ex parte Matthew Addy S.S. & Commerce Corp., 256 U.S. 417, 420 (1921).} Moreover, pointing to its earlier opinion in In re Pennsylvania Co., which it quoted at length, the Court concluded that the statute reenacted and “continued unchanged” the language of immediacy that had been previously interpreted to bar discretionary review by way of an original petition for mandamus in the Supreme Court.\footnote{Id. at 418-20.}

Despite the bar on mandamus (and other) review of district court remand orders, a variety of alternative modes of review combined to reduce the impact of this restriction on the Court’s ability to stay in touch with the contours of removal jurisdiction. In the pre-1948 world, defendants seeking to remove an action began by filing a removal petition with the state court.\footnote{See § 29, 36 Stat. at 1095 (providing for the submission of removal petition to the state court and imposing a duty on the state court to accept the petition and proceed no further in the action if it concludes that the party is “entitled to remove” the action).} If the state court rejected the removal peti-
tion, the defendant had two options in attempting to secure removal rights: (1) stay in state court, object to the state court’s denial of removal, litigate the case to a final judgment, and if unsuccessful, seek further review of the denial of removal; or (2) remove the case to federal court and invite the plaintiff to contest removal jurisdiction through a motion to remand the action. If the defendant chose option one and stayed in state court, the Court would review as a matter of right the state court’s denial of the defendant’s removal petition.\textsuperscript{154}

If the defendant chose option two and filed a set of removal papers in federal court, the options for further review multiplied, as did the prospects for overlapping litigation. Notably, the submission of removal papers to federal court did not put the state court litigation on hold as it does today. The old removal statute required the state court to stay its hand only if \textit{it} found that the defendant was “entitled” to remove.\textsuperscript{155} So long as the state court maintained its view of the action as nonremovable, it could proceed to judgment.\textsuperscript{156} Similarly, if the federal court concluded that removal was proper, it had no obligation to defer to the state court’s contrary conclusion. Often, in cases of disagreement, simultaneous actions would proceed in both the state and federal courts, and the parties would face the burden of duplicative litigation.\textsuperscript{157} Eventually, the jurisdictional issue would sort itself out; either the state court (or Supreme Court on direct review) would conclude that removal was proper and invalidate any state judgment in favor of the plaintiff, or the federal courts would conclude that removal

\textsuperscript{154} See Metro. Cas. Ins. Co. v. Stevens, 312 U.S. 563, 567 (1941) (sketching the available options and confirming the availability of appellate review of state court decisions denying a petition to remove).


\textsuperscript{156} See Mo. Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556, 581-82 (1896) (reviewing the Court’s prior precedent on the removal jurisdiction of the circuit courts). The Court confirmed that the same basic structure for removal litigation remained in place as late as 1941, just prior to the enactment of the 1948 judicial code. \textit{Metro. Cas. Ins. Co.}, 312 U.S. at 567-68.

\textsuperscript{157} See \textit{Metro Cas. Ins. Co.}, 312 U.S. at 568 (confirming the prospect of overlapping state and federal litigation and indicating that both courts may “render final judgments” subject to further review). \textit{But see Kern v. Huidekoper}, 103 U.S. 485, 490 (1880) (holding that “when the defendants in error filed . . . in the Circuit Court of the United States a transcript of the record of the State court, the former acquired and the latter lost jurisdiction of the case”).
was improper and set aside any federal judgment on jurisdictional
grounds, thus leaving the state court’s resolution of the merits intact. 158

When the state court refused to grant removal, and the defendant
removed nonetheless, both parties could take steps in federal court to
secure review of the jurisdictional issue. Suppose the district court
found that it lacked jurisdiction: it could either remand the action or
dismiss on jurisdictional grounds.159 While the remand order was im-
mune from review, the dismissal on jurisdictional grounds would oper-
ate as a final judgment and trigger the availability of appellate review.160

The district court thus enjoyed some control over how to structure the
order if it sought to facilitate review of its rejection of a defendant’s
claimed right to a federal docket.161 Notably, a jurisdictional dismissal
was subject to review both in the intermediate appellate courts and by
writ of error in the Supreme Court. The Judiciary Act of 1891 pro-
vided for as-of-right review of district court jurisdictional dismissals.162
Appellate review of jurisdictional dismissals, including as-of-right re-
view in the Supreme Court, took some of the sting out of the non-
reviewability of remand orders.

If the district court agreed with the removing defendant and
upheld its jurisdiction, the action would proceed in federal court. As a
nonfinal order, the denial of a motion to remand was not subject to
review by writ of error or appeal. But such orders were occasionally re-
viewed by way of supervisory writ. Indeed, the Supreme Court itself
granted original petitions for mandamus (or prohibition) on a number

158 For review of the state court decision, see McLaughlin Bros. v. Hallowell, 228 U.S.
278, 286-87 (1913). For review of the federal court denial of a motion to remand, see

159 According to the statute, whenever “it shall appear to the satisfaction of
the . . . district court” that an action removed from state court does not involve a dis-
pute “properly within [its] jurisdiction,” the district court “shall proceed no further
therein, but shall dismiss the suit or remand it to the court from which it was re-

160 See, e.g., Powers, 169 U.S. at 101-02 (reviewing a jurisdictional issue on direct re-
view of a district court decision that had upheld removal and then entered default
judgment against the plaintiff).

161 Today, a jurisdictional dismissal by a federal court after removal might cause
prejudice to the plaintiff and the district court would simply remand. Under the old
rules, however, a jurisdictional dismissal of the federal proceeding would not affect the
viability of state court proceedings that remained pending. See Metro. Cas. Ins. Co., 312
U.S. at 567-68 (implicitly deriving this principle from the three options available when
a petition for removal to a federal court is denied by a state court).

162 Judiciary Act of 1891, ch. 517, § 5, 26 Stat. 826, 827 (allowing appeals or writs of
error to the Supreme Court “[i]n any case in which the jurisdiction of the [lower]
court is in issue”.

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of occasions, directing the lower court to refrain from exercising jurisdiction over a cause. On other occasions, however, the Court took the position that supervisory oversight was improper due to the availability of appellate review after a final judgment. To secure relatively expeditious review of the jurisdictional issue, the plaintiff opposing removal could simply decline to prosecute the action in federal court and suffer the entry of a default judgment. The Court found that (final) judgment was subject to review on appeal to the intermediate appellate court and subject to reversal if the district court lacked jurisdiction. In such a case, the appellate court would vacate the (merits-based) dismissal and order the district court to remand the action to state court. Such remand orders were subject to further review in the Supreme Court by way of certiorari. If the federal courts lacked jurisdiction, then the state court’s disposition of the merits would control.

The 1948 amendments dramatically restructured the system of removal litigation. Rather than having the state court pass on the removal petition in the first instance, the 1948 codification provided for the defendant to initiate the removal by filing a petition and bond in federal court. This model essentially transferred the task of resolving the existence of removal jurisdiction to the federal courts, eliminating state court consideration of the petition to remove in the first instance. Without any state court decision as to removal, the 1948 statute also effectively eliminated the Supreme Court’s role in conduct-

163 See In re Winn, 213 U.S. 458, 467 (1909) (confirming the availability of mandamus to review a denial of a remand order), abrogated by Ex parte Harding, 219 U.S. 363 (1911); In re Moore, 209 U.S. 490, 506-08 (1908) (assuming the availability of mandamus review but concluding that the lower court properly denied the remand motion), abrogated by Ex parte Harding, 219 U.S. 363; Ex parte Wisner, 203 U.S. 449, 461 (1906) (issuing writ of mandamus to overturn a lower court’s denial of a motion to remand), overruled by Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653 (1923).
164 See Ex parte Roe, 234 U.S. 70, 73 (1914) (concluding that a writ of error following an entry of judgment provided adequate remedy for an erroneous assertion of removal jurisdiction); Ex parte Harding, 219 U.S. at 380 (same); cf. Maryland v. Soper, 270 U.S. 9, 35-36 (1926) (concluding that remedy by appeal was inadequate and that mandamus was available to correct erroneous denial of remand order).
165 See Powers, 169 U.S. at 95, 102 (reaching the jurisdictional issue on direct review of the district court entry of a default judgment following plaintiff’s refusal to prosecute the case in federal court). Needless to say, the plaintiff’s willingness to accept a federal default judgment expresses either a great confidence that jurisdiction was improper or a financial inability to proceed in both courts at once.
166 Id. at 99-100.
167 Id. at 101.
168 Id.
169 Ch. 646, § 1446(d), 62 Stat. 869, 939 (1948).
ing direct review of state court denials of removal petitions. Finally, the new removal law foreclosed the exercise of overlapping state and federal jurisdiction; it declared that, after removal papers had been filed in federal court, the state court “shall proceed no further therein unless the case is remanded.” Under this model, the federal district court’s resolution of the motion to remand represented the first judicial determination of removability—not the second determination, as had been the case under the previous law.

The 1948 law did not specifically address the availability of appellate review of remand orders. There was no provision authorizing or restricting such review: the precursor provision that had long been read as a barrier to as-of-right and supervisory (mandamus) review of remand orders did not appear in the 1948 law. To be sure, in other provisions, the intermediate appellate courts were empowered to hear appeals from the final judgments of the district courts and to issue all writs, including the writ of mandamus, that could be viewed as operating in aid of their jurisdiction and in accordance with the “usages and principles” of law. The Supreme Court, as we have seen, was empowered to oversee the intermediate appellate courts through the writ of certiorari. While its all-writs power extended to both the circuit courts and the district courts, the Court had no jurisdiction to hear as-of-right “appeals,” from either the circuit or the district courts.

Congress addressed the situation one year later, enacting a provision that restricted appellate review of remand orders. The 1949 provision simply declared that an “order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.” As noted above, the 1949 amendment did not declare that

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170 See, e.g., Metro. Cas. Ins. Co. v. Stevens, 312 U.S. 563, 568 (1941) (stating that there is no review of state court decisions following remand from federal court).
171 § 1446(c), 62 Stat. at 929.
172 Id. § 1291, 62 Stat. at 929.
173 Id. § 1651, 62 Stat. at 944.
174 See id. § 1254, 62 Stat. at 928 (providing for Supreme Court appellate jurisdiction from the courts of appeals but making no mention of appeals from the lower federal courts). One can only speculate about how appellate oversight might have developed under these provisions. Conceivably, the Court could have viewed the remand order as a final judgment, ending federal judicial involvement and triggering as-of-right review in the appellate courts. Alternatively, the Court might have returned to the oversight scheme that preceded the adoption of the statutory restriction on review of remand orders; under that earlier view, remand orders were nonfinal dispositions subject to discretionary review via mandamus.
175 Ch. 139, sec. 84(b), § 1447(d), 65 Stat. 89, 102 (1949).
the remand was to be “immediately carried into execution.” It was that language in the earlier statute that had persuaded the Court in 1890 that its power to review remand orders by mandamus was foreclosed. Moreover, when it revisited its original mandamus authority after the creation of a three-tiered court system in 1921, the Court again emphasized the language of immediacy in concluding that its mandamus authority was restricted. In light of the interpretive history of the earlier statute, Congress’s decision to omit the language of immediacy suggests that it no longer meant to foreclose mandamus review, especially at the Supreme Court level.

One might argue that the “or otherwise” language of the 1949 amendment extends the prohibition against review to encompass mandamus and other supervisory writs at the Supreme Court level. But the canons of statutory interpretation undercut such a view. If we interpret the phrase “or otherwise” by reference to the company it keeps, as suggested by the canon *ejusdem generis*, it would encompass other forms of as-of-right review, like the “appeal” with which the phrase appears in the statute. The “or otherwise” reference would then also encompass forms of review that take place at the intermediate appellate court level. As we have seen, only those courts had jurisdiction to review district court orders “on appeal.” The Court no longer had appellate jurisdiction with respect to district courts and would have had no occasion under the 1948 law to review (by appeal or certiorari) state court decisions as to the removability of actions to federal court. State courts no longer passed on removal issues.

One additional piece of evidence tends to confirm the canon’s suggested reading of the “or otherwise” language to focus on the intermediate appellate courts and as-of-right review. In *Shotkin v. Perkins*, which came down just two months before the publication of the House Judiciary Committee Report on the 1949 amendment, the Tenth Cir-

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177 See *In re Pa. Co.*, 137 U.S. 451, 454 (1890) (“[T]he use of the words ‘such remand shall be immediately carried into execution,’ in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. . . . [T]he act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.”).
179 For a recent restatement of the canon, see *Hall St. Assos., L.L.C. v. Mattel, Inc.*, 552 U.S. 376, 386 (2008), which states that “when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.”
cuit confronted an appeal from a remand order. In the course of refusing to exercise appellate jurisdiction, the Shotkin court pointed out that the 1948 statute had failed to include language to prohibit appellate review. Citing cases that addressed review at the circuit court level (and paying no attention to the Court’s supervisory powers), the Tenth Circuit described it as “settled law” that the former statute “prohibits review of an order remanding a cause to a state court by appeal, writ of error, or otherwise.” Congress appears to have borrowed this language from the Shotkin opinion; its 1949 amendment tracks the decision’s language almost word for word, aside from the statute’s omission of any reference to then-outmoded review by “writ of error.”

By the time of the 1948 codification of the judicial code, the Court had taken an extremely broad view of its ability to supervise the district courts directly through writs of mandamus and prohibition. That conclusion was codified in the 1948 version of the All Writs Act in § 1651. The Court had also concluded that the statutory restriction on the review of remand orders applied to the circuit courts of appeals and, with its reference to immediacy, to mandamus review of remand orders by the Court itself. Yet the statutory restriction was dropped in 1948. When Congress adopted the language that now appears, as modified, in § 1447(d), foreclosing review by “appeal or otherwise,” it apparently focused on review at the intermediate appellate court level and failed to include the language of immediacy that had

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180 172 F.2d 377, 377 (10th Cir. 1949). Shotkin was decided on January 19, 1949, and the House Judiciary Committee published its report on the 1949 amendments on March 30, 1949. H.R. REP. NO. 81-352, at 1 (1949). The report described the addition of a new § 1447(d) as meant to “remove any doubt that the former law as to the finality of an order of remand to a State court is continued.” Id. at 15. While the Report does not refer to Shotkin directly, it was the only circuit court opinion on the books in March 1949 that addressed the impact of the 1948 enactment on the existence of appellate review of remand orders. The fact that the Report spoke of the need to “remove any doubt,” rather than to restore an omitted appellate restriction, tends to confirm that the House’s reading of Shotkin motivated the legislation.

181 172 F.2d at 378.

182 Id.

183 Deletion of the reference to writ of error doubtless reflects the fact that the judicial code no longer authorized that mode of review. See ch. 646, § 1291, 62 Stat. 869, 929 (1948) (providing for appellate review of district court decisions, but making no provision for review by writ of error).

184 § 1651, 62 Stat. at 944; see also Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 239 (2007) (Kennedy, J., concurring) (asserting that legislative action would be undertaken should Congress disagree with the Court’s interpretation of § 1447(d)).

been viewed as restricting mandamus authority.\(^{186}\) Certainly the *Thermtron* Court, after carefully reviewing the 1948 and 1949 legislation, understood § 1447(d) as a restriction on the appellate jurisdiction of the circuit courts of appeals; the Court said nothing to suggest that the statute may have limited its own supervisory authority.\(^{187}\) Indeed, by focusing on the circuit courts and ignoring the possibility of supervisory review, the Court missed an opportunity. Rather than broadening the appellate jurisdiction of the circuit courts of appeals, the Court should have exercised its own mandamus authority under the All Writs Act as the least disruptive way to perform the Court’s traditional gatekeeping duties.\(^{188}\)

III. THE FUTURE OF APPELLATE JURISDICTIONAL LAW

The varying opinions of the Justices in *Carlsbad* and *Mohawk* illustrate three different approaches to the development of appellate jurisdictional law. In proposing to overrule *Thermtron*, Justice Scalia would apparently foreclose all appellate review of remand orders by the circuit courts.\(^{189}\) Such a course of action would presumably highlight the text of § 1447(d), the importance of adhering to the congressional policy expressed there, and the confusion that has resulted from the Court’s departure from the text. While a decision to overturn *Thermtron* would radically uproot a well-established body of law, Justice Scalia might defend his stance as one that would return jurisdictional lawmaking to Congress. If the Court failed to identify an escape valve (such as the exercise of its own supervisory power), a decision to overturn *Thermtron* could pressure Congress to update its jurisdictional statutes. Indeed, Congress did precisely that in the wake of Justice Scalia’s text-centered


\(^{187}\) See *Thermtron*, 423 at 343 (summarizing the pre-1948 situation by observing that a district court’s remand order “is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise”).

\(^{188}\) In upholding the propriety of mandamus, the Court emphasized the need to oversee district court remand decisions that lacked any statutory justification. *Id.* at 352-53.

decision for the Court in *Finley v. United States*.\textsuperscript{190} *Finley* overturned decades of judge-made ancillary jurisdiction doctrine and forced Congress to adopt a supplemental jurisdiction statute.\textsuperscript{191}

Justices Stevens and Breyer would not necessarily embrace Justice Scalia’s text-centered approach. Both have supported judicial expansion of the *Thermtron* exception and both appear to take for granted that the Court has a role to play in fine-tuning jurisdictional law.\textsuperscript{192} Yet Justice Breyer, in calling for expert assistance, may have had in mind something different from both the Congress-centered approach of Justice Scalia and the court-centered approach of Justice Stevens. As the *Mohawk* Court observed, and as Justice Thomas highlighted in his separate opinion, the Supreme Court has the power, bestowed by Congress, to prescribe general rules of interlocutory appellate jurisdiction through the Judicial Conference rulemaking process.\textsuperscript{193} Indeed, that was the solution to the remand problem proposed by the American Law Institute in its Federal Judicial Code Revision Project.\textsuperscript{194} In asking for help, Justice Breyer may have imagined that the rules advisory process might develop rules to govern review of remands and other interlocutory orders for eventual approval by the Court and Congress.\textsuperscript{195}


\textsuperscript{191} 490 U.S. at 555-56. On the codification of supplemental jurisdiction, see Thomas M. Mengler et al., *Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991).


\textsuperscript{193} *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009); id. at 609-10 (Thomas, J., concurring); see also 28 U.S.C. § 1292(e) (granting the Supreme Court authority to provide appellate review of interlocutory decisions); 28 U.S.C. § 2072(c) (giving the Court authority to define when a district court ruling is final under § 1291). Cf. 28 U.S.C. § 1292(b) (authorizing an appellate court in its discretion to accept review of interlocutory decisions upon district court certification). The discretionary mode of securing interlocutory appeals has not been as successful as some had hoped, in part due to appellate court hostility to the device. See, e.g., Nystrom v. TREX Co., 339 F.3d 1347, 1351 (Fed. Cir. 2003) (describing the Federal Circuit’s practice of largely declining to accept certified matters for interlocutory review).

\textsuperscript{194} See AM. LAW INST., *supra* note 2, at 494-96 (explaining the power of the Supreme Court in exercising its rulemaking authority with regard to permitting appellate review of remand orders).

Justice Thomas apparently shares the view that any further expansions in interlocutory review must come through the rulemaking process.\(^{196}\)

In evaluating these approaches to jurisdictional law, we might begin by noting that the contributions of strict textualism to the legitimacy of the judicial enterprise come at some cost. The Court might simply demand, as Justice Scalia’s approach apparently would, that Congress bear the responsibility for the creation of exceptions to a reinvigorated rule that bans review of remand orders. One might contend that the resulting exceptions would gain legitimacy if they were fashioned by democratically accountable lawmakers.\(^{197}\) A similar argument might support Justice Scalia’s textualism in *Finley*; perhaps § 1367 now provides a firmer foundation for the exercise of supplemental jurisdiction. Yet textualism applied to jurisdictional statutes poses risks, as the post-*Finley* experience illustrates. Strict readings of Congress’s supplemental jurisdiction statute have produced a variety of jurisdictional twists and turns, including the revision (at odds with the drafters’ likely expectation) of much amount-in-controversy law.\(^{198}\) Textualism deprives the federal courts of the power to work out inconsistencies as the courts integrate specific jurisdictional enactments into the broader framework of jurisdictional law.\(^{199}\) If Congress, as an institutional matter, has difficulty anticipating all of these twists and turns, jurisdictional law may quickly fall into disrepair.

Apart from imperfect foresight, Congress suffers from another shortcoming as a jurisdiction-managing institution—lack of interest. However one might model their voting behavior, members of Congress respond to a complex mix of motivations. On any one issue, they balance the interests of their constituents, their main financial backers, the leading figures in their party, and the interest groups

\(^{196}\) See *Mohawk*, 130 S. Ct. at 609-10 (Thomas, J., concurring) (arguing that any redefinition of finality for purposes of interlocutory review must come through Congress).


\(^{198}\) See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 560 (2005) (concluding that the enactment of § 1367 altered the amount-in-controversy rules that govern Federal Rule of Civil Procedure 23(b)(3) class actions and claims by plaintiffs joined under Rule 20).

whose support they seek to cultivate for the next election. Whether anyone, including legislators themselves, can say which of these competing factors drives particular decisions, the goal of preserving a coherent body of rules to govern the appellate review of remand orders must rank relatively low on the typical legislator’s priority list. Interest groups may press for public expenditures, such as the repair of roads and bridges, but they are unlikely to press for jurisdictional repairs. The combined absence of interest group support and, dare I say it, intrinsic interest, can sometimes consign jurisdictional reform to legislative limbo. Justice Scalia’s suggested return to a strict reading of § 1447(d) might encourage Congress to fashion some sort of escape

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201 On May 12, 2010, Representative Hank Johnson introduced the Removal Clarification Act of 2010 to authorize the removal of state presuit discovery proceedings to federal court. Removal Clarification Act of 2010, H.R. 5281, 111th Cong. (2010). The impetus for H.R. 5281 was apparently self-protective; Representative Eddie Bernice Johnson was named in a Texas presuit discovery proceeding, and the federal courts had refused to assert removal jurisdiction over the matter. See Price v. Johnson, 600 F.3d 460, 463 (5th Cir. 2010). The bill includes a provision that allows appellate review of all orders remanding actions that were removed by federal officials under § 1442. H.R. 5281 § 2. The bill thus deals with a specific problem and makes no attempt to clarify comprehensively the rules of interlocutory review.

202 An important jurisdictional reform measure became law in 1990 in part because Representative Robert Kastenmeier and three other members of Congress had served as members of the Federal Courts Study Committee and had helped to develop its recommendations. See Arthur D. Wolf, Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal, 14 W. NEW ENG. L. REV. 1, 17-20 (1992) (describing the legislative backdrop to the 1990 statute). Kastenmeier’s bill to implement the Committee’s noncontroversial proposals became law, thereby codifying supplemental jurisdiction and making other changes. Id. at 17-18.

203 For example, ever since the Supreme Court identified the absence of statutory support for multidistrict litigation transfers, the Judicial Conference of the United States has been pressing for legislation authorizing multidistrict litigation courts to transfer a matter to themselves for trial. See Courtney E. Silver, Note, Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecom Result, 70 OHIO ST. L.J. 455, 475-79 (2009) (providing an account of efforts to amend 28 U.S.C. § 1407 to address Lexecom Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)). Yet the provision has never been regarded as a legislative priority. The Conference has been pushing a second bill, the Federal Courts Jurisdiction and Venue Clarification Act of 2009, that seeks to harmonize and regularize certain rules of removal and venue. Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. (2009). As of October 2010, the bill had passed the House and been referred to the Senate Committee on the Judiciary.
valve for cases deserving of appellate review. But it might not. To the extent that Justice Scalia’s textualism creates a new or dislocating jurisdictional framework, it poses a risk of dysfunctional results should Congress fail to intervene.

Justice Stevens was more willing than Justice Scalia to recognize a place for the federal courts in crafting jurisdictional law and was less willing to take the risk of dysfunctional results in the event of congressional inaction. The federal courts do have several important institutional advantages over Congress in crafting jurisdictional law. First, they have an immediate stake in the issues at hand, which can bear heavily on the conduct of judicial business, and they have a strong interest in producing workable solutions. In addition, litigants bring a constant stream of cases that the courts can use as vehicles for the development of jurisdictional law. The federal courts thus differ from Congress in having an interest and expertise in jurisdictional matters and an opportunity to contribute to the law on a regular basis.

But there are limits to how far the courts can go in making adjustments. When courts self-consciously depart from the best reading of a statutory text, they can undermine the integrity of the judicial process and the values of legal clarity and transparency. Such departures raise particularly troublesome questions when they involve decisions by courts to undertake appellate review of claims that Congress, at least on the face of things, meant to foreclose. The federal courts, needless to say, lack the lawmaking competence and democratic legitimacy of Congress; a decision to exercise jurisdiction that Congress has apparently withheld poses obvious separation of powers issues.

To the extent that Justices Breyer and Thomas imagine greater reliance on the rulemaking process, they have identified a lawmaking forum that provides a useful blend of democratic legitimacy, expertise, and interest. Congress has, after all, expressly authorized the Supreme Court to fashion rules governing interlocutory review, thus resolving

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204 One might argue that Congress’s speedy response to Finley demonstrates its capacity to manage jurisdictional issues. But Finley happened to come down at a time when the House Judiciary Committee was already in the middle of a set of jurisdictional reforms occasioned by the recommendations of the Federal Courts Study Committee. See Wolf, supra note 202, at 16-25 (providing an account of the legislative process behind the codification of supplemental jurisdiction). Section 1367’s speedy enactment owes much to that ongoing process. Furthermore, the interpretive difficulties that later arose suggest that one should not evaluate the quality of Congress’s jurisdictional lawmaking solely by reference to the speed with which it acts. For an account of the difficulties, see Pfander, supra note 1, at 112-13.
any problem of lawmaking authority.\footnote{See 28 U.S.C. § 2072 (allowing the Supreme Court to “define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title”). Well, almost any problem: The Court and the rulemakers might understandably hesitate before countermanding a statutory prohibition on interlocutory review. But, in light of the supersession provision of the Rules Enabling Act, the hesitancy would not rest on constitutional concerns. See id. § 2072(b) (“All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”).} As for expertise, committees of the Judicial Conference draw their members from the ranks of the state and federal judiciaries, as well as from the practicing bar. When the judges feel that they lack the expertise to construct an effective set of rules, they have turned to law professor consultants to assist with the work at hand. Despite these advantages, the power to regulate appellate jurisdiction through the rulemaking process has been used rather sparingly. In the only example to date of such a rule, the Court promulgated a provision for interlocutory review of class action certification decisions.\footnote{See FED. R. CIV. P. 23(f) (providing for interlocutory review of class action certification decisions).} But the provision emerged from the committee on civil rules rather than the committee on appellate rules.\footnote{See id. advisory committee’s note (describing the permissive interlocutory provision as adopted under the power conferred by 28 U.S.C. § 1292(e)).} So far at least, the appellate rules committee has not viewed its procedural mandate as encompassing work on questions of jurisdictional authority.

One might argue that in recognizing a judicial role in the promulgation of rules of appellate finality, the congressional delegation of jurisdictional lawmaking authority to the federal courts provides support for the approach of Justice Stevens. After all, the statute recognizes that the Court may aid in the development of rules of interlocutory appellate review. Granted, the provision apparently contemplates that the Court will work through the rules advisory process and the Judicial Conference, rather than simply promulgating rules on its own.\footnote{The Court appears to recognize this distinction with its emphasis on the role of “bench and bar” in the promulgation of rules through the advisory process. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609 (2009).} But one could argue that the rulemaking process fails to engage the Court’s special expertise in an institutionally effective way. The committees of the Judicial Conference, made up principally of lower court judges, develop the proposed rules without any direct input from the Justices and then present them to the Conference for approval. If the Conference approves them, the rules come to the
Court for a simple vote of approval or rejection. On occasion, the Justices have dissented from proposed rules, but they more often simply promulgate the rules in deference to the Judicial Conference and the rulemaking process.

One might find the Court’s frustration with the rulemaking process reflected to some extent in the much-discussed cases of *Twombly* and *Iqbal*. Those well-known cases rework the pleading rules from the top down; almost no one contends that *Twombly* and *Iqbal* draw their inspiration from the understood operation of the pleading rules in place when the Federal Rules of Civil Procedure took effect in 1938. Rather, the two decisions create a new regime of plausibility and somewhat heightened particularity, at least in complex cases. Along the way, the Court abandoned the no-set-of-facts language that had long served as a touchstone of the old notice-pleading regime. One might try to domesticate the radical impulse reflected in the cases by pointing to legislation that signaled some congressional dissatisfaction with notice pleading and the costs of discovery. But this dissatisfaction was relatively focused on a few areas of complex litigation. A more sensible account might simply highlight the Justices’ alienation from the rulemaking process and their institutional preference to make law

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209 For a description of the rulemaking process, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103-19 (2002), which illustrates the development of rules by the advisory committees, the review of proposed rules that occurs at the hands of the Judicial Conference standing committee and of the Judicial Conference itself, the review and promulgation of the rules by the Supreme Court, and, finally, the review by Congress.

210 See id. at 1127-29 (collecting examples of dissents from particular rules and quoting Chief Justice Rehnquist’s observation that approval of the rules at the Supreme Court level more so reflects a certification of their procedural regularity than an endorsement of their content).


213 See *Twombly*, 550 U.S. at 562-63 (retiring the no-set-of-facts language from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

through adjudication. If the Court wishes to participate in shaping the civil or appellate rules, perhaps adjudication provides a more effective way for it to do so.

Yet top-down intervention presents serious questions of institutional competence and legitimacy. Professor Stephen Burbank posed these questions in their sharpest form in his testimony to Congress on proposed legislation to restore the notice-pleading regime that Twombly and Iqbal overthrew. As Professor Burbank observed, much of what Congress did to broaden access to the federal courts over the last several decades was built upon the notice-pleading rules embedded in federal practice since 1938. By overturning these rules, the Court intervened on the basis of its own questionable assumptions about the likely plausibility of the claims at issue and the likely burden of discovery in complex cases. However well-informed the Justices’ views of these matters, the rulemaking process includes representatives of bench and bar who work with litigation at the district court level on a daily basis and thus may have stronger institutional support when evaluating such matters. The process of amending federal rules of procedure has also been democratized, such that the development and approval of proposed rule changes takes place in plain sight and undergoes the give and take of something akin to a political process. Certainly, rules that attract vigorous interest group opposition may run into trouble in Congress following their promulgation by the Supreme Court.

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215 See Has the Supreme Court Limited Americans’ Access to Courts? Hearing Before the S. Comm. on the Judiciary, 111th Cong. 1 (2009) (statement of Stephen B. Burbank, Professor, University of Pennsylvania) (arguing that the Supreme Court’s decisions in Twombly and Iqbal run counter to Congress’s goal of increasing access to courts).

216 See id. at 4-6 (providing a historical account of pleading standards).

217 See Struve, supra note 209, at 1103-19 (arguing persuasively that the rulemaking process provides a degree of openness, transparency, and democratic legitimacy that differentiates it from the process by which the Supreme Court decides cases). In addition, the rules advisory committee has increasingly requested specific empirical data from the Administrative Office of the United States Courts and from the Federal Judicial Center in the course of the rulemaking process. For an account, see Thomas E. Willging, Fast and Potential Uses of Empirical Research in Civil Rulemaking, 77 Notre Dame L. Rev. 1121, 1124, 1204 (2002).

218 See Struve, supra note 209, at 1119 (describing the evolution and increasing democratization of the rulemaking process).

219 See id. at 1111-12 (recounting a limited number of occasions on which interest groups mobilized to oppose particular rule amendments). Of course, the rules advisory committees understand that any rule must undergo congressional review and therefore take account of interest group signals in the course of developing proposed amendments.
The fundamental difference between the rulemaking process and the process of judicial decisionmaking suggests that the Court will not attempt to defend its own role in reshaping the rules of appellate finality by pointing to the legislative delegation of rulemaking authority. As the Court views matters, at least in its recent Mohawk decision, Congress delegated rulemaking authority on issues of appellate finality to the rulemaking process, as currently configured, and not to the Court itself.\(^{220}\) One can, to be sure, fashion an argument that the Court could choose to play a more active role in the rulemaking process. The relevant statute confers the rulemaking power on the Court itself\(^{221}\) and specifically provides that the failure to follow rulemaking’s notice-and-comment process does not affect the validity of the rule.\(^{222}\)

Even if the Court were not inclined to issue its own home-made rules, it might make important changes in the course of its own prepromulgation review of rules proposed by the Judicial Conference. But both of these models of more active involvement by the Court would still contemplate promulgation of rules subject to a congressional waiting period and possible disapproval. Neither model would provide authority for the judicial pronouncement of new rules in the context of a litigated dispute.

Yet my proposal to reinvigorate the Court’s supervisory role under the All Writs Act does not depend on the identification of a grant of lawmaking authority. The proposal does not call upon the Court to exercise top-down authority to specify rules of appellate jurisdiction for the intermediate appellate courts (and does not implicate the top-down concerns expressed in Mohawk). After all, the Court’s supervisory role rests on its own freestanding authority to issue writs of mandamus and prohibition, and it does not depend on the statutes that govern appellate review at the intermediate level. The Court’s supervisory power would allow it to defer to the rulemakers, as the Mohawk Court and Justice Thomas have suggested they would prefer, in fashioning rules of interlocutory review at the intermediate level.

\(^{220}\) Justice Sotomayor’s opinion for the Court in Mohawk disclaimed common law expansion of the collateral order doctrine in favor of a rulemaking process that invited the participation of bench and bar. See Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609 (2009) (recognizing a distinction in the role of different institutional actors in the rulemaking process).


\(^{222}\) See id. § 2073(e) (declaring that the failure to comply with the notice-and-comment procedures of rulemaking does not invalidate rules issued by the Court and approved by Congress).
In the meantime, even after any such rules took effect, the Court could still contribute to the development of the law at the district court level through the issuance of supervisory writs. Such contributions would help to ensure effective review without inundating the intermediate appellate courts—or the Supreme Court itself—with petitions. Such review could also provide a useful source of ongoing oversight while the rulemaking process gears up to tackle interlocutory appellate jurisdiction. Supervisory writs would allow the Court to stay in touch with developments at the district court level, and the resulting decisions might help to inform the rulemakers’ assessment of where additional appellate resources could best be deployed. In this way, the Court could work in tandem with the rulemaking process, rather than dictating terms in a manner that presents institutional concerns. Perhaps Justice Breyer would find that he and his colleagues on the Supreme Court are themselves the very “experts” to whom we should look for guidance, at least in part, about how to deploy appellate resources.

CONCLUSION

In the old days, common law courts made their rules of practice and procedure on something of an ad hoc basis by fashioning rules in the context of case-by-case adjudication. Lately, with the adoption and extension of the Rules Enabling Act and the rise of the rulemaking process, the practice of case-by-case lawmaking in the procedural arena has fallen into disrepute. Scholars have questioned the authority of the Supreme Court to fashion procedural common law and to make procedural rules for lower federal courts. Scholars have also been quite critical of the Court’s attempt in Twombly and Iqbal to rework pleading rules through top-down judicial decisions that depart from prevailing conceptions of the meaning of the civil rules. The general critique of federal judicial lawmaking, coupled with the insistent demands of textualism, have called into question a broad swath of judge-made jurisdictional law, including the Thermtron doctrine’s provision for interlocutory review of some, but not all, remand orders.

This Article does not call for a return to the old days of procedural common law. But it does suggest one arena in which a reinvigorated

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use of the common law writs of mandamus and prohibition might improve the ability of the Supreme Court to contribute in a meaningful way to the development of rules of interlocutory oversight. By reasserting its supervisory authority over remand issues, the Court could help to identify the kinds of errors at the district court level that require appellate correction, thus serving the rulemaking process (should it ever get underway). It could also provide stopgap review of the most egregious errors without triggering as-of-right review of all errors in the category. This reclaimed authority would enable the Court to police excesses without carving further exceptions to the congressional ban on appellate review of remand orders. By drawing on the insights of Justices with views as disparate as Breyer, Scalia, Stevens, and Thomas, the suggested reinvigoration of the Court’s supervisory authority might provide a workable answer to the appellate review puzzle.