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Rejecting the Touchstone: Complete Preemption and Congressional Intent after Beneficial National Bank v. Anderson

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REJECTING THE TOUCHSTONE: COMPLETE PREEMPTION AND CONGRESSIONAL INTENT AFTER *BENEFICIAL NATIONAL BANK V. ANDERSON*

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I. INTRODUCTION

The central question in the field of federal courts is the appropriate allocation of judicial power between the states and the federal government. Cases involving a federal preemption defense to state law claims raise concerns at the heart of this inquiry. Notably, where a case turns on substantive preemption of state law claims by federal law, both the states, whose laws are displaced by the preemption, and the federal government, which enacted the preempting federal legislation, have vested interests in asserting jurisdiction, furthering their own policies, and interpreting their respective laws.

Although 28 U.S.C. § 1331 provides federal courts with jurisdiction over cases arising under the federal Constitution or federal law,[1] such statutory "arising under," or "federal question," jurisdiction is restricted by the well-pleaded complaint rule. Under the well-pleaded complaint rule, the federal question must appear as part of the plaintiff's case as set forth in the complaint and cannot be based on a federal defense, either anticipated by the plaintiff or actually asserted by the defendant.[2] Consequently, the well-pleaded complaint rule allocates to the state courts, subject to Supreme Court certiorari review, the determination of a federal preemption defense to a complaint raising only state law claims.[3] Nevertheless, the Supreme Court has recognized a corollary, or exception, to the well-pleaded complaint rule for certain federal preemption defenses. The doctrine of complete preemption—a rather confusing term of art[4]—is a jurisdictional doctrine that allows

1. 28 U.S.C. § 1331 (2000).

2. *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.").

3. *See id.* at 393 ("[A] case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption . . . .").

4. Complete preemption is distinct from substantive preemption. Substantive federal preemption occurs when federal law preempts, and thus nullifies, some aspect of state law. Federal law can substantively preempt state law "by express language in a congressional enactment, by implication from

for removal based on a federal preemption defense, even though the plaintiff's complaint asserts only state law claims.[5]

Prior to 2003, the Supreme Court recognized complete preemption for only two federal preemption defenses and appeared to construe the doctrine very narrowly.[6] In *Metropolitan Life Insurance Co. v. Taylor*,[7] the Supreme Court explained that the "touchstone" for finding complete preemption is "the intent of Congress," thereby placing the allocation of jurisdiction over preemption questions in the hands of the legislature.[8] In the years following *Taylor*, the federal circuits created various complete preemption tests, but "all [the tests] focus[ed] on a similar goal: to determine whether Congress . . . *intended to grant a defendant the ability to remove* the adjudication of the cause of action to a federal court."[9]

In 2003, the Supreme Court in *Beneficial National Bank v. Anderson*[10] undermined its reliance on Congress by changing the test for complete preemption from examining congressional *intent of removability* to requiring congressional *intent that a federal cause of action be exclusive*.[11] By making the litmus test for complete preemption depend on whether a federal cause of action nullifies a state cause of action (and thus is "exclusive"),[12] the *Anderson* decision effected a change in the allocation of state and federal jurisdiction over federal preemption defenses.

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the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) (citations omitted). Thus, a defendant who raises a substantive preemption defense is asserting that a plaintiff's state law claim is preempted by federal substantive law and should be dismissed. Under the well-pleaded complaint rule, such a substantive federal preemption defense would have no effect on jurisdiction because the federal question appears by way of defense—even though the defense is that the state law claim is preempted by federal law. However, where the doctrine of complete preemption applies, a substantive federal preemption defense gives rise to a *jurisdictional* result by allowing removal of the case to federal court. *Id.*; *see also* Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272 n.5 (2d Cir. 2005) ("Because complete preemption operates to create federal subject-matter jurisdiction, some commentators have argued that the doctrine would be better labeled 'jurisdictional' preemption."); Lister v. Stark, 890 F.2d 941, 943 n.1 (7th Cir. 1989) ("The use of the term 'complete preemption' is unfortunate, since the complete preemption doctrine is not a preemption doctrine but rather a federal jurisdiction doctrine.").

5. *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987) ("One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.").

6. *See, e.g.*, *id.* at 67 (finding complete preemption for state law claims alleged to be preempted under section 502(a) of ERISA); Avco Corp. V. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968) (finding complete preemption and allowing removal for preemption defenses arising under section 301 of the Labor Management Relations Act).

7. 481 U.S. 58.

8. *Id.* at 66.

9. Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1797–98 (1998) (emphasis added).

10. 539 U.S. 1 (2003).

11. *See id.* at 9 & n.5.

12. *See id.*

One scholar has claimed that *Anderson* is justified as a rule of judicial economy and efficiency.[13] But *Anderson* creates far more problems than it alleviates as a rule for allocating jurisdiction between federal and state courts. Indeed, *Anderson*'s "exclusive cause of action" test gives rise to separation of powers and federalism concerns. The test creates separation of powers problems because it is Congress that has the power to determine the jurisdiction of the lower federal courts, and the *Anderson* rule results in an allocation of jurisdiction at odds with congressional intent. The test raises federalism concerns because, in cases raising solely state law claims, the *Anderson* test divests state courts of jurisdiction to legitimately construe the reach of state law in the face of federal preemption, even where Congress has made no indications that state courts should be deprived of such jurisdiction.

This Article first explores the separation of powers, federalism, and efficiency problems created by *Anderson*, and then offers a new framework for determining complete preemption that would ameliorate these problems and ground complete preemption in congressional intent. Part II of this Article examines the history of the well-pleaded complaint rule, which was created as a judicial interpretation of the 1875 judicial code and amendments thereto. The history of the rule, combined with repeated congressional rejections of proposals to repeal the rule, illustrate that the rule can fairly be seen as a congressional limitation on federal question jurisdiction. Part III reviews the Supreme Court cases that created the complete preemption exception to the well-pleaded complaint rule and allowed removal on the basis of certain federal preemption defenses. Both *Taylor* and *Anderson* are examined in Part III, as are changes in the caselaw of the lower federal courts following *Anderson*.

Part IV of this Article provides a brief overview of other proposed analyses for complete preemption, including a framework recently proposed as an alternative to *Anderson* that would allow complete preemption based upon the breadth of substantive federal preemption.[14] Part V examines the *Anderson* test and other proposed analyses for complete preemption, and explores separation of powers, federalism, and efficiency problems raised by such frameworks. Using cases regarding complete preemption under the Carmack Amendment[15] as a case in point, Part V reviews pre- and post-*Anderson* cases. These cases demonstrate that the *Anderson* test does not accurately determine congressional desire to transfer jurisdiction from state to federal courts. These cases also highlight the deficiencies of *Anderson* and other proposed complete preemption tests.

Finally, Part VI offers a new framework for complete preemption that is anchored in congressional intent to create removal jurisdiction. Modeled on

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13. *See* Garrick B. Pursley, *Rationalizing Complete Preemption After* Beneficial National Bank v. Anderson*: A New Rule, a New Justification*, 54 DRAKE L. REV. 371, 376, 432–33 (2006) ("[T]he *Anderson* rule is primarily justified as an efficiency generating tool of judicial administration[, and] [a]pplication of the *Anderson* rule allows the parties to skip several intermediate procedural steps, . . . reducing the length of litigation and conserving judicial and litigant resources.").

14. *See* Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 572–78 (2007).

15. Act of June 29, 1906, ch. 3591, 34 Stat. 584 (codified as amended at 49 U.S.C. § 14706 (2000)).

concurrent jurisdiction caselaw, this framework generally requires a manifestation from Congress that it intends to create removal jurisdiction for a specific federal preemption defense. The framework improves upon the *Taylor* analysis by clearly setting out the requirements for complete preemption and by allowing federal defense removal without congressional manifestations in a narrowly defined area where removal would be necessary to effectuate congressional purposes. Through this framework, complete preemption could once again be tied to the touchstone of congressional intent.

II. ORIGINS OF THE WELL-PLEADED COMPLAINT RULE

The Supreme Court has upheld the well-pleaded complaint rule as a restriction on *statutory* federal question jurisdiction under 28 U.S.C. § 1331 and not as a restriction created or required by Article III of the Constitution.[16] To the extent that the well-pleaded complaint rule is entirely a creation of the judiciary, it would seem the judiciary could reverse or abrogate the rule through judicially-created exceptions, like complete preemption. On the other hand, to the extent the rule is imposed by Congress, the judiciary is obligated to adhere to it. The Supreme Court has repeatedly recognized congressional power to determine the extent of jurisdiction to be exercised by the lower federal courts, including withholding jurisdiction "in the exact degrees and character which to Congress may seem proper for the public good."[17]

The Supreme Court has characterized the well-pleaded complaint rule as a requirement imposed by Congress rather than a creation of the judiciary.[18] A review of the history of the well-pleaded complaint rule reveals that it arose as a judicial interpretation of the 1875 grant of arising under jurisdiction and congressional amendments made thereto in 1887 and 1888.[19]

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16. *See* Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 258 (1992) (explaining that it is erroneous to "invoke [the well-pleaded complaint rule] outside the realm of statutory 'arising under' jurisdiction, *i.e.*, jurisdiction based on 28 U.S.C. § 1331," because the "'well-pleaded complaint' rule *applies only* to statutory 'arising under' cases" (emphasis added)); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 496–97 (1983) (holding that the Foreign Sovereign Immunities Act fell within constitutional arising under power and explaining that the lower court erred in relying heavily on the well-pleaded complaint rule to find a lack of constitutional power).

17. Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)) (internal quotation marks omitted); *see also infra* Part V.A.1 (discussing the foundations and extent of congressional power to determine lower federal court jurisdiction).

18. *See, e.g.*, Rivet v. Regions Bank of La., 522 U.S. 470, 472 (1998) ("*Congress* has provided for removal of cases from state court to federal court *when the plaintiff's complaint* alleges a claim arising under federal law. *Congress* has not authorized removal based on a defense or anticipated defense federal in character." (emphasis added)); Caterpillar Inc. v. Williams, 482 U.S. 386, 399 (1987) ("Congress has long since decided that federal defenses do not provide a basis for removal.").

19. In *Caterpillar*, the Court alluded to the role that both Congress and the Court played in the creation of the well-pleaded complaint rule when it stated,

> Before 1887, a federal defense such as pre-emption could provide a basis for removal, but, in that year, *Congress amended the removal statute. We interpret that amendment* to authorize removal only where original federal jurisdiction

A. Removal Under the 1875 Act and the Well-Pleaded Pleading Rule

In 1875, Congress bestowed federal question jurisdiction on the federal courts.[20] It has been recognized that the language used in the statutory grant of federal question jurisdiction, currently found at 28 U.S.C. § 1331, tracks the language of Article III, and that, therefore, the 1875 Congress may have intended to bestow jurisdiction on the lower federal courts to the full extent of the Constitution's arising under power.[21] While the precise scope of the arising under power of Article III continues to be debated and has not been satisfactorily determined by the Supreme Court, the leading case on the matter defines it exceptionally broadly and indicates that Article III power exists as long as there is even the *possibility* that a federal issue could arise in the case.[22] In addition to using the language of Article III, the 1875 jurisdictional grant allowed for removal by either a plaintiff or a defendant.[23] The Supreme Court construed these provisions of the 1875 Act as allowing removal on the basis of a federal defense.[24]

However, in construing the 1875 statutory grant of power, the Supreme Court required that the federal question be asserted by the party relying on it and could not be anticipated by the opposing party.[25] This requirement may be seen as

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> exists. Thus, it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense . . . .

482 U.S. at 392–93 (citations omitted) (first emphasis added).

20. *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. Federal question jurisdiction was briefly enacted in 1801 and repealed in 1802. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2, at 266 n.5 (4th ed. 2003).

21. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 n.8 (1983) ("[The] limited legislative history [of the 1875 Act] suggests that the 44th Congress may have meant to 'confer the whole power which the Constitution conferred . . . .'") (quoting 2 Cong. Rec. 4986 (1894) (statement of Sen. Carpenter))); Ray Forrester, *Federal Question Jurisdiction and Section 5*, 18 TUL. L. REV. 263, 265 (1943) ("[B]y repeating the words of the Constitution the Congress intended that the statutory words should have the same . . . meaning as the words in the Constitution.").

22. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822 (1824) (explaining that arising under power exists where "the title or right set up by the party[] *may* be defeated by one construction of the [C]onstitution or law of the United States, and sustained by the opposite construction" (emphasis added)); *see also* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 492 (1983) ("*Osborn* thus reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law." (emphasis added)). *But see* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 811 (2004) (arguing from a historical perspective that *Osborn* is not as broad as it has generally been construed and that "[t]he fact that it was *possible* that a federal question would arise in a case was *not* what made the case one arising under federal law" (emphasis added)).

23. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71.

24. *See, e.g.*, R.R. Co. v. Mississippi, 102 U.S. 135, 141 (1880) (holding that the case should have been removed to federal court under the 1875 Act "whether we look to the Federal question raised by the State in its original petition, or to *the Federal question raised by the company in its answer*" (emphasis added)).

25. *See, e.g.*, Cent. R.R. Co. of N.J. v. Mills, 113 U.S. 249, 257 (1885) ("The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party.").

directed by Congress itself,[26] which required in section 5 of the 1875 Act that if it appeared that a case "does not really and substantially involve a dispute or controversy properly within the [federal court's] jurisdiction," the court "shall proceed no further therein, but shall dismiss the suit or remand it" to state court.[27]

Indeed, in 1877, the Supreme Court in *Gold-Washing & Water Co. v. Keyes*[28] construed Section 5, whether correctly or incorrectly,[29] as requiring for federal question jurisdiction that it must "*appear upon the record*, . . . in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which *depends upon the construction or effect of the Constitution, or some law* or treaty *of the United States*."[30] Subsequently, in *Central Railroad Co. of New Jersey v. Mills*,[31] the Court, relying on *Keyes* and paraphrasing Section 5,

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26. While scholars have disagreed as to Congress's intended purpose in section 5 of the 1875 Act, they have not contended, as I do here, that contemporary Supreme Court caselaw denotes that section 5 provided a statutory basis for the creation of the well-pleaded complaint rule. *See infra* notes 29, 33.

27. Act of March 3, 1875, § 5, 18 Stat. at 472.

28. 96 U.S. 199 (1877).

29. Scholars have disagreed as to whether Congress intended Section 5 to affect the scope of statutory arising under jurisdiction. Professor Forrester argued that Section 5, which was still part of the judicial code at the time of his article, was not intended "to limit federal question jurisdiction" or the scope of the statutory arising under clause but was merely intended to require "the courts to investigate, *sua sponte*, . . . to be certain federal jurisdiction does exist in fact." Forrester, *supra* note 21, at 269. Professors Chadbourn and Levin argued that section 1 of the 1875 Act adopted the arising under language of the Constitution and was intended to confer the entire constitutional power as interpreted in *Osborn* but that Section 5 was then intended to limit the exercise of that jurisdiction to cases where the court was satisfied "at every stage of the proceedings, that there actually was a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved." James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 650 (1942).

Congress appears to have adopted Professor Forrester's position with its enactment of the 1948 Judicial Code, which repealed the descendant of Section 5, replaced it with 28 U.S.C. § 1359, and only prohibited fraudulent joinder of parties in diversity cases. *See* Act of June 25, 1948, ch. 646, § 1359, 62 Stat. 869 (codified at 28 U.S.C. § 1359 (2000)). The historical and revision notes to 28 U.S.C. § 1359 explain the change to the judicial code:

> Provisions of section 80 of title 28, U.S.C., 1940 ed., for dismissal of an action not really and substantially involving a dispute or controversy within the jurisdiction of a district court, were omitted as unnecessary. Any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion.

28 U.S.C. § 1359 note (2000). Despite winning the battle, Professor Forrester did not win the war—Congress has not partaken of his vision of statutory federal question jurisdiction to the full extent of constitutional power.

Finally, Donald Doernberg posits that Section 5 "may represent Congress' rejection, *for statutory purposes*, of Chief Justice Marshall's argument in *Osborn v. Bank of the United States* that an underlying federal issue, even if not disputed by the parties, was sufficient to confer jurisdiction under the constitutional provision." Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 602–03 (1987) (first emphasis added) (citing Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823–24 (1824)).

30. *Keyes*, 96 U.S. at 203–04 (internal quotation marks and citation omitted) (emphasis added).

31. 113 U.S. 249 (1885).

held that a party could not base federal jurisdiction on the anticipated allegations of the other side and indicated that the existence of the federal question had to appear on the record at the time the federal court asserted jurisdiction over a controversy.[32] Thus, for original jurisdiction, a plaintiff was not allowed to obtain federal jurisdiction by anticipating a federal defense that the defendant might raise.[33] Indeed, the Supreme Court so held in *Metcalf v. Watertown*.[34] Although not citing *Keyes*, *Mills*, or Section 5, the Supreme Court in *Metcalf* refused to allow original jurisdiction, as opposed to removal jurisdiction, when the plaintiff had not raised the federal question at issue.[35] The Court explained that for a federal court to exercise original jurisdiction, "it must appear, at the outset, from the declaration or the bill of the party suing, that the suit" arises under federal law.[36] The Court went on to explain that even if the defendant subsequently raised a federal defense, "the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind."[37]

The *Metcalf* and *Mills* holdings, which may have been understood as a condition imposed by Congress through section 5 of the 1875 Act, combine to make what could be called the well-pleaded *pleading* rule. While the 1875 Act was construed to allow removal on the basis of a federal defense or reply, a federal court could not obtain federal question jurisdiction over an original or removed case

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32. *Id.* at 257.

33. Professor Collins argues that "the Court first articulated its well-pleaded complaint rule in the unheralded and little-noted opinion of *Metcalf v. Watertown*." Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 730–31 (1986) (citing Metcalf v. Watertown, 128 U.S. 586 (1888)). However, as shown above, *see supra* text accompanying notes 31–32, the Court had already laid the foundations for *Metcalf* in *Mills* by holding that a party could not obtain federal jurisdiction through anticipation of the other side's pleadings and indicating that jurisdiction had to be clear from the pleadings at the time federal jurisdiction was invoked. *See Mills*, 113 U.S. at 257. Further, the *Mills* Court relied on the requirements found in *Keyes*, which interpreted section 5 of the 1875 Act. *See id.* (citing Smith v. Greenhow, 109 U.S. 669 (1884); *Keyes*, 96 U.S. 199). Professor Collins states that the *Metcalf* Court "neglected to indicate whether its newly articulated rule for plaintiffs was based on [A]rticle III, the terms of the 1875 Act, or general common-law pleading requirements somehow thought to apply in the absence of a more explicit constitutional or statutory command." Collins, *supra*, at 732. Professor Collins then argues that the rule forbidding anticipation of defenses was a common law principle of pleading. *See id.* at 732 n.79 (citations omitted). Professor Collins's discussion of contemporary pleading rules is instructive and reveals a likely foundation underlying the Court's decisions. Nevertheless, the Court could also construe section 5 of the 1875 Act as requiring that a federal question appear in the record and be asserted by a party, rather than anticipated, before a federal court can assume jurisdiction. In fact, this is what the Court expressly did in *Keyes*, 96 U.S. at 203–04, which is the same case Professor Collins uses to demonstrate reliance on common law pleading requirements. *See* Collins, *supra*, at 732 n.79 (citations omitted).

34. *See* 128 U.S. at 589.

35. *See id.* at 588–90.

36. *Id.* at 589.

37. *Id.*

unless and until a federal question existed on the face of a pleading or petition of the party actually asserting the federal question.[38]

B. *The 1887 and 1888 Amendments and the Prohibition of Federal Defense Removal*

Through amendments made in 1887 and 1888, Congress changed the removal section of the 1875 statute to eliminate removal by a plaintiff and to add a provision stating that the lower federal courts had removal jurisdiction only over cases "of which the [lower] courts of the United States *are given original jurisdiction* by the preceding section."[39] In *Tennessee v. Union & Planters' Bank*,[40] the Supreme Court construed these changes to prohibit removal on the basis of a federal defense.[41]

The *Union & Planters' Bank* Court explained that by allowing removal *only* "of suits of which the Circuit Courts of the United States are given original jurisdiction," the amendments limited removal jurisdiction "to such suits as might have been brought in that court *by the plaintiff*."[42] Further, as the Court had previously established in *Metcalf*,[43] it was essential to the federal court's *original* jurisdiction "that the *plaintiff's* declaration or bill should show that he asserts a right

38. This well-pleaded pleading rule could have constitutional implications. Since *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Supreme Court has failed to clarify whether it accepts *Osborn*'s construction that "a mere speculative possibility [of] a federal question" could fall within the bounds of Article III arising under power. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 493 (1983); *see also id.* at 492–93 (citing *Osborn*, 22 U.S. (9 Wheat.) 738) (explaining the broad nature of the *Osborn* holding and noting that "[t]he breadth of that conclusion has been questioned," but that the Court "need not now resolve that issue"). However, the Court has since clarified that arising under power at least exists whenever a case actually presents a question of federal law. *See* Powell v. McCormack, 395 U.S. 486, 514 (1969) ("It has long been held that a suit arises under the Constitution if a petitioner's claim will be sustained if the Constitution . . . [is] given one construction and will be defeated if [it is] given another." (omission and alterations in original) (quoting Bell v. Hood, 327 U.S. 678, 685 (1946)) (internal quotation marks omitted)). Thus, in any case where a defendant actually asserts a genuine federal defense to a state law cause of action, a federal question—and not the mere possibility of one—has been raised in the proceedings; therefore, it would fall within the power of Congress to confer such jurisdiction on the federal courts. Notably, however, if the Court rejects *Osborn*, and if the Constitution requires that there be more than the mere possibility of a federal question, then it could be argued that the anticipation of a federal defense or reply by the opposing side would be insufficient to confer federal jurisdiction, because anticipation merely raises the possibility of such a question.

39. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553, *amended by* Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 433, 434 (emphasis added). The amendments also raised the jurisdictional amount. *See* Act of Mar. 3, 1887, § 1, 24 Stat. at 552, *amended by* Act of Aug. 13, 1888, § 1, 25 Stat. at 434.

40. 152 U.S. 454 (1894).

41. *Id.* at 461–62.

42. *Id.* (emphasis added) (quoting Act of Aug. 13, 1888, § 2, 25 Stat. at 434; Act of Mar. 3, 1887, § 2, 24 Stat. at 553) (internal quotation marks omitted).

43. *See supra* text accompanying notes 35–36.

under the Constitution or laws of the United States."[44] Consequently, a defendant could only remove if the plaintiff asserted a right under federal law in the complaint—removal could not be achieved on the basis of a federal defense. In support of this construction of the amendments, the Court noted that the change was "in accordance with the general policy of these acts, manifest upon their face, . . . to contract the jurisdiction of the Circuit Courts of the United States."[45] Thus, the modern rule prohibiting removal on the basis of a federal defense was grounded by the Court not on policy or efficiency considerations but instead, as Professor Collins summarizes, purportedly "on a formal choice about the plain meaning of the statute" as amended in 1887 and 1888.[46]

Justice Harlan, the author of the *Metcalf* decision, dissented in *Union & Planters' Bank*, arguing that the grant of jurisdiction extended to federal rights asserted by either party.[47] Justice Harlan additionally provided what is probably the most plausible interpretation of the 1887 and 1888 amendments: namely, Congress included the language restricting removal to cases within the original jurisdiction of the federal courts to make it clear that the jurisdictional amount and other restrictions for original jurisdiction applied equally for removal jurisdiction.[48] Indeed, the 1887 and 1888 amendments struck the portion of the statute that

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44. *Union & Planters' Bank*, 152 U.S. at 461 (emphasis added). Professor Collins persuasively argues that Congress could not have relied on *Metcalf* in fashioning the 1887 and 1888 amendments because *Metcalf* was not decided until after the 1887 amendments were signed into law. *See* Collins, *supra* note 33, at 754–55 & n.185. However, *Metcalf* was not the first case to establish the well-pleaded pleading rule relied upon in *Union & Planters' Bank*. *See supra* text accompanying notes 28–33.

45. *Union & Planters' Bank*, 152 U.S. at 462. The legislative histories of the amendments, though never indicating that Congress intended to prohibit removal on the basis of a federal defense, do show that Congress intended to restrict the federal question removal that it had granted in 1875. Representative Culberson, the member of the House Committee on the Judiciary who introduced the bill, explained that "[t]he object of the bill is to diminish the jurisdiction of the [lower federal] courts." 18 CONG. REC. 613 (1887); *see also, e.g.*, 18 CONG. REC. 2727 (1887) ("The amendments of the Senate . . . promote the object[] of the bill, which is to reduce the jurisdiction of the courts of the United States and to regulate the removal of causes from State to Federal courts.") (statement of the House conferees).

Nevertheless, the primary way in which the House intended to limit federal jurisdiction, outside of prohibiting removal by a plaintiff, was through restrictions on diversity jurisdiction for corporations. *See, e.g.*, 10 CONG. REC. 701–02 (1880) (statement of Rep. Culberson proposing an amendment to limit the diversity jurisdiction of federal courts over corporations). However, the Senate rejected that proposal and it was never enacted. *See* 18 CONG. REC. 2543 (1887) (noting that the Senate struck the proposed amendment).

46. Collins, *supra* note 33, at 766. Professor Collins posits other motives that may have pushed the Court to adopt the rule, including special federalism concerns surrounding the validity of "enforcement actions by Tennessee to collect taxes alleged to be due to the State." *Id.* at 760.

47. 152 U.S. at 468 (Harlan, J., dissenting).

48. *Id.* at 471 (Harlan, J., dissenting); *see also* Collins, *supra* note 33, at 753 ("Under the 1875 Act, the Court had construed the absence of such a cross reference in [the removal section] to mean that the limits on original jurisdiction . . . did not apply on removal.").

expressly required a jurisdictional amount for removal.[49] Thus, the only indication that the jurisdictional amount applied for removal was the language, "of which the circuit courts of the United States are given original jurisdiction."[50]

In four House Reports and nearly one hundred pages of discussion in the Congressional Record from 1880 through 1887 regarding the 1887 and 1888 amendments, there is no mention of the meaning of or the reason for the original jurisdiction language relied on by the *Union & Planters' Bank* Court. It seems unlikely that in debating a bill for over seven years Congress would never mention that the bill would prohibit removal on the basis of a defense or that the inclusion of the original jurisdiction language was intended to effect that end. Notably, the House added an amendment that expressly allowed defendants to remove on the basis of a federal defense,[51] but the Senate struck that portion of the bill, and the bill was passed without that language.[52] Importantly, and perhaps the strongest

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49. *Compare* Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71 (allowing removal of any suit "brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States"), *with* Act of Mar. 3, 1887, ch. 373, §§ 1–2, 24 Stat. 552, 552–53, *amended by* Act of Aug. 13, 1888, ch. 866, §§1–2, 25 Stat. 433, 434 (allowing removal of any suit "arising under the Constitution or laws of the United States . . . of which the circuit courts of the United States are given original jurisdiction by the preceding section"—the preceding section requiring that "the matter in dispute exceeds . . . the sum or value of two thousand dollars").

50. Act of Mar. 3, 1887, § 2, 24 Stat. at 553, *amended by* Act of Aug. 13, 1888, § 2, 25 Stat. at 434. Professor Collins notes that "various members of the House emphasized that the new limitation on jurisdictional amount was to apply to removal as well as to original jurisdiction." Collins, *supra* note 33, at 753–54. Of course, having eliminated the express jurisdictional amount requirement in the removal provision, *see supra* note 49 and accompanying text, the only way that the requirement could apply to removal is if the original jurisdiction language incorporated the jurisdictional amount into removal jurisdiction.

51. *See* 10 CONG. REC. 701 (1880); see also *infra* note 53 for the text of the proposed amendment.

52. *See* 18 CONG. REC. 2542 (1887). Professor Collins argues the House actually included the amendment allowing removal on the basis of a federal defense in order to limit removal practice by federal corporations under the 1875 Act. *See* Collins, *supra* note 33, at 744–45. Correspondingly, Professor Collins argues the Senate struck the amendment in order to preserve the breadth of removal jurisdiction allowed by the Supreme Court in the *Pacific Railroad Removal Cases*. *See id.* at 747.

While it is plausible that this motivated the Senate, which did not examine the bill until 1887, the Senate is absolutely silent as to why it struck the removal clause. Perhaps it believed that the clause was superfluous; perhaps it did not want to allow federal defense removal; perhaps it believed, as Professor Collins argues, *see id.*, that the amendment was too restrictive of federal defense removal—but why not amend it rather than strike it? *See* 18 CONG. REC. 2542–43 (1887) (striking the proposed House amendment but failing to provide any reasoning).

As for the House, the bill remained the same from 1880 to 1887, including the added amendment expressly allowing removal on the basis of a federal defense. Thus, it is hard to imagine that the House wanted to alter the 1875 Act to "effectively reverse[] the Court's construction of that Act in the *Pacific Railroad Removal Cases*," which the Court decided in 1885—five years *after* the House added the amendment. Collins, *supra* note 33, at 750; *see also* 10 CONG. REC. 701–02 (1880) (statement of Rep. Culberson offering amendments).

Certainly, Professor Collins is correct that the House disagreed with the interpretation of federal jurisdiction promoted in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), which allowed federal question jurisdiction under the 1875 Act to be based on the mere fact that a corporation suing or being sued was incorporated by an act of Congress. *Id.* at 11; *see* Collins, *supra* note 33, at 747–48. Indeed,

indication that Congress did not intend the original jurisdiction language to restrict the ability to remove on the basis of a defense, is the fact that from 1880 until 1887 the bill included both the original jurisdiction language, construed by the *Union & Planters' Bank* Court as prohibiting removal on the basis of a defense, and the proposed language expressly allowing a defendant to remove on the basis of a defense.[53] Apparently, Congress did not see these two clauses as incongruous.

Eight years after *Union & Planters' Bank*, Congress considered amending the judicial code to allow for removal on the basis of a federal defense and to allow removal by either the plaintiff or defendant.[54] The House Report explains that "[t]o effect [removal on the basis of a defense] it is necessary to omit the words 'of which the circuit courts[] are given original jurisdiction by the preceding section,'

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while never mentioning the *Pacific Railroad Removal Cases*, part of the 1888 amendment, Act of Aug. 13, 1888, § 6, 25 Stat. at 436–37, repealed section 640 of the Revised Statutes, which allowed for removal in any suit commenced against "*any corporation* . . . [other] than a banking corporation, *organized under a law of the United States*," upon the petition of such defendant stating that "they have a defence arising under or by virtue of the Constitution" or federal law. Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226, 227 (emphasis added) (codified in Revised Statutes of 1873, § 640). In 1880, Representative Wellborn, who introduced the amendment repealing Section 640, explained that "it is claimed that in every suit against a Federal corporation it necessarily has a defense arising under, because chartered by, a law of the United States, and therefore that all suits against these corporations are removable under this [S]ection 640." 10 CONG. REC. 702 (1880); *see also id.* at 701–02 (statements of Reps. Culberson and Wellborn in support of repealing Section 640). Debates in the House running from 1880 until the passage of the 1887 amendment denote that the House did not think the mere fact that a corporation was created by Congress should be sufficient to create statutory federal question jurisdiction. *See, e.g.*, 18 CONG. REC. 614 (1887) (statement of Rep. Culberson in support of the amendment); 14 CONG. REC. 1248 (1883) (same); 10 CONG. REC. 701–02, 724 (1880) (statement of Reps. Culberson and Wellborn in support of the amendment).

Further, in passing the amendment to expressly allow federal defense removal, the House appears to have been motivated by an intent to give back a portion of what it was taking away with the repeal of Section 640. One Congressman explained that if the amendment passed, "no national corporation can complain at the repeal of [S]ection 640, because if such corporation has a meritorious defense" under federal law, then by virtue of the amendment it can remove the case. 10 CONG. REC. 702 (1880) (statement of Rep. Culberson in support of the amendment).

53. From 1880 until amended by the Senate in 1887, the bill provided

> [t]hat any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority *of which the circuit courts of the United States are given original jurisdiction by the preceding section*, . . . may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district whenever it is made to appear from the application of such defendant or defendants *that his or their defense depends in whole or in part upon a correct construction of some provision of the Constitution or law of the United States.*

10 CONG. REC. 701 (1880) (statement of Rep. Culberson proposing amendment) (emphasis added); *see* 18 CONG. REC. 613 (1887) (statement of Rep. Culberson quoting the same language in the bill); *see also* 18 CONG. REC. 2542 (1887) (record of Senate striking the language as proposed by the House).

54. *See* H.R. 14840, 57th Cong. (1902); S. 2660, 57th Cong. (1902). The House Report explains that H.R. 14840 was intended "to restore in a measure to the plaintiff the right and opportunity to remove his cause given him by the [A]ct of March 3, 1875." H.R. REP. NO. 57-2459, at 1 (1902).

found in the existing law."[55] Congress certainly understood in 1902—whether or not it initially intended so through the 1887 enactment—that the original jurisdiction language had been construed to prohibit removal on the basis of a defense. The 1902 bills were not passed in either the House or the Senate. In fact, the Senate reported adversely on the bill, explaining that it was "a very unwise change in the law."[56] To this day, the removal statute contains the restriction that removal is limited to cases "of which the district courts of the United States have original jurisdiction."[57] Since *Union & Planters' Bank*, multiple bills have been introduced in Congress to repeal the well-pleaded complaint rule, at least to the extent that the rule forbids removal on the basis of a federal defense, but Congress has yet to pass such an act.[58]

III. THE HISTORY OF THE COMPLETE PREEMPTION DOCTRINE

A. *Complete Preemption Prior to* Anderson

1. Avco *and Complete Preemption Under the LMRA*

Seventy-four years after *Union & Planters' Bank*, the Supreme Court created what it would later call a corollary to the well-pleaded complaint rule and eventually would be dubbed the complete preemption doctrine. In *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists*,[59] the Supreme Court allowed removal of a case asserting solely state law claims based on the federal

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55. H.R. REP. NO. 57-2459, at 1 (quoting Act of Mar. 3, 1887, § 2, 24 Stat. at 553, *amended by* Act of Aug. 13, 1888, § 2, 25 Stat. at 434); *see also id.* ("The relief sought by H.R. 14840 will be effected principally by omitting from [S]ection 2 of the statute as it now stands the words 'of which the circuit courts are given original jurisdiction by the preceding section' . . . , which were added . . . by the act of 1887–88." (quoting Act of Mar. 3, 1887, § 2, 24 Stat. at 553, *amended by* Act of Aug. 13, 1888, § 2, 25 Stat. at 434)).

56. S. REP. NO. 57-1077, at 2 (1902).

57. 28 U.S.C. § 1441(a) (2001).

58. In addition to the 1902 bills, *see supra* notes 54–56 and accompanying text, multiple bills allowing removal on the basis of a federal defense were introduced in 1905. *See* H.R. 18213, 58th Cong. (1905); S. 7131, 58th Cong. (1905); H.R. 8758, 59th Cong. (1905); H.R. 9744, 59th Cong. (1905). The Senate also introduced a similar bill in 1907. *See* S. 8290, 59th Cong. (1907). Further, a major effort was made in 1971, based on a study by the American Law Institute (ALI), A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) [hereinafter ALI STUDY], to change the judicial code to allow removal on the basis of a federal defense. *See* S. 1876, 92d Cong. (1971). Additionally, in 1948 Congress completely revamped the judicial code. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869 ("[An Act meant to] revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary.'"). Although at least one commentator recommended that Congress allow removal by the defendant on the basis of a federal defense, the well-pleaded complaint rule remained unchanged. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 233–34 (1948) (suggesting that the pending "statute ought to be reshaped in terms of a consistent theory that permits removal by the party who puts forth the federal right" or should drop federal question removal entirely).

59. 390 U.S. 557 (1968).

defense that section 301 of the Labor Management Relations Act (LMRA) preempted the state law claims.[60] The *Avco* Court provided no explanation for why it was allowing removal and, indeed, did not even mention the well-pleaded complaint rule.[61] The Court's only explanation for allowing removal was that "[a]n action arising under [Section] 301 *is controlled by federal substantive law* even though it is brought in a state court."[62]

In *Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*,[63] the Supreme Court in dicta attempted to provide a rationale for *Avco*.[64] The Court stated that, "*Avco* stands for the proposition that if a federal cause of action *completely pre-empts* a state cause of action any complaint that comes *within the scope of the federal cause of action* necessarily 'arises under' federal law."[65] The Supreme Court's explanation that removal was allowed when a federal statute "completely pre-empts" a state law claim did not explain why or when substantive

60. *Id.* at 560–62 (construing the Labor Management Relations Act (LMRA), ch. 120, § 301, 61 Stat. 136, 156–57 (1947) (codified as amended at 29 U.S.C. §§ 141–197 (2000))). The plaintiff in *Avco* filed a suit in Tennessee state court to enjoin the defendant union from striking at the plaintiff's plant. *Id.* at 558. The state court issued the requested injunction, and the defendants removed the case to federal court. *Id.* The federal court denied the motion to remand and dissolved the injunction. *Id.* at 558–59. The Supreme Court upheld removal of the case. *Id.* at 560–62.

61. *See id.* at 558–62.

62. *Id.* at 560 (emphasis added). Another aspect of *Avco* is notable. Under the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), which prohibited federal courts from issuing injunctions in labor disputes, *see id.* § 1, 47 Stat. at 70, the *Avco* plaintiffs could not obtain their requested injunction in federal court—although such an injunction was available in state court. Thus, removal deprived the plaintiffs of their requested relief. Noting that the plaintiffs still had remedies available under section 301 of the LMRA—albeit different remedies from the injunction available in state court—the *Avco* court held that "the breadth or narrowness of the relief which may be granted under federal law in [Section] 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Avco*, 390 U.S. at 561.

In *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), the Court rejected the court of appeals' holding "that a case may not be removed to federal court on the ground that it is completely pre-empted unless the federal cause of action relied upon provides the plaintiff with a remedy." *Id.* at 391 n.4. The *Caterpillar* Court stated that the requirement of a "replacement" federal cause of action "is squarely contradicted by [the Court's] decision in *Avco*," because the *Avco* plaintiffs lost their remedy of an injunction. *Id.* (citing *Avco*, 390 U.S. 557). However, the *Avco* plaintiffs did have a remedy under federal law—just not the same remedy that they had under state law. Thus, the requirement of a replacement cause of action does not appear, as the *Caterpillar* Court claimed, to contradict *Avco*. Nevertheless, the *Caterpillar* discussion seems to allow the possibility of complete preemption even where there is not a replacement federal cause of action; however, the *Beneficial National Bank v. Anderson* decision, 539 U.S. 1 (2003), bases complete preemption on finding an exclusive federal cause of action that preempts the state cause of action and not just federal law that preempts the state claim. *Id.* at 9 & n.5. As discussed in this Article, reliance on congressional intent to determine complete preemption would leave to Congress the question of whether a replacement federal claim is required. *See infra* notes 314–18 and accompanying text.

63. 463 U.S. 1 (1983).

64. *See id.* at 23–26.

65. *Id.* at 23–24 (emphasis added).

preemption, which did not allow for removal, became complete preemption, which did allow for removal.[66]

2. Taylor *and Complete Preemption Under ERISA*

Nearly twenty years after its decision in *Avco*, the Supreme Court held that a statute other than section 301 of the LMRA invoked complete preemption, and hence, removal of state law claims. In *Metropolitan Life Insurance Co. v. Taylor*,[67] the Supreme Court held that state law claims falling within the preemptive scope of section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA)[68] were removable to federal court.[69] In finding complete preemption, the Court relied on the clear congressional intent that Section 502(a) claims be removable.[70] The Court noted that "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of [section] 301 of the LMRA," and that a presumption that similar language was intended to have similar meaning was "fully confirmed by the legislative history of ERISA."[71] In fact, the legislative history specifically stated: "*[A]ll such actions* in Federal or State courts are *to be regarded as arising under the laws of the United States* in similar fashion to those brought under section 301 of the [LMRA]."[72] The *Taylor* Court explained,

> No more specific reference to the *Avco* rule can be expected and the rest of the legislative history consistently sets out this clear intention to make [Section] 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in like manner as [section] 301 of the LMRA.[73]

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66. Professor Seinfeld posited a practical explanation for *Avco*, although it does not include any theoretical explanation for determining when exceptions to the well-pleaded complaint rule should be made. *See* Seinfeld, *supra* note 14, at 563 n.87. He explained,

> There is considerable evidence that the Congress that enacted the LMRA was deeply concerned about the capacity and willingness of state courts to enforce collective bargaining agreements against labor unions. . . . Hence, the most likely explanation for the Supreme Court's decision in *Avco* (though the Court does not bother to say so), is that the Justices were responding to these very concerns.

Id.

67. 481 U.S. 58 (1987).

68. Pub. L. No. 93-406, § 502(a), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1132 (2000 & Supp. IV 2004)).

69. 481 U.S. at 66–67.

70. *Id.* at 66.

71. *Id.* at 65.

72. *Id.* at 65–66 (emphasis altered) (quoting H.R. REP. NO. 93-1280, at 327 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5107) (internal quotation marks omitted).

73. *Id.* at 66.

The Court concluded that "the touchstone of the federal district court's removal jurisdiction is . . . the intent of Congress."[74] And, for ERISA, Congress had "*clearly manifested an intent to make causes of action* within the scope of the civil enforcement provisions of [Section] 502(a) *removable to federal court*"[75]—an intent the federal judiciary "must honor."[76]

The Court stopped short of making clear congressional intent of removability an absolute requirement for finding complete preemption. Indeed, the Court did not say that without clear congressional intent removal would be foreclosed—only that it "would be reluctant to [so] find,"[77] and that absent "explicit direction from Congress, this question would be a close one."[78]

The concurring opinion of Justice Brennan, joined by Justice Marshall, further stressed the importance of congressional intent of removability. Justice Brennan explained that he wrote "separately only to note that today's holding is a narrow one"[79] and that the Court "focuses on the 'intent of Congress,' *to make respondent's cause of action removable* to federal court."[80] Justice Brennan then explained, in a passage that lower federal courts have quoted often,

> [O]ur decision should not be interpreted as adopting a broad rule that *any* defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has *clearly* manifested an intent to make causes of action . . . *removable to federal court*." In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court.[81]

B. *The* Anderson *Foray*

1. *The* Anderson *Decision*

Another sixteen years passed before the Supreme Court added a third statute to its list of federal statutes that invoked complete preemption. In *Beneficial National Bank v. Anderson*,[82] the Supreme Court reversed the decision of the Eleventh Circuit and held that section 30 of the National Bank Act (NBA), which

74. *Id.*
75. *Id.* (emphasis added).
76. *Id.*
77. *Id.* at 65.
78. *Id.* at 64.
79. *Id.* at 67 (Brennan, J., concurring).
80. *Id.* (emphasis added) (citation omitted).
81. *Id.* at 67–68 (Brennan, J., concurring) (citations omitted) (quoting *id.* at 66 (majority opinion)).
82. 539 U.S. 1 (2003).

is codified at §§ 85 and 86 of Title 12,[83] brought about complete preemption of state law claims falling within its scope.[84] The Eleventh Circuit, relying on *Taylor*, had held that complete preemption did not apply, because the court could "find no clear congressional intent to permit removal under §§ 85 and 86."[85] Although the NBA had been enacted in 1864[86]—11 years before the passage of the 1875 Act,[87] which contained the initial provision generally allowing removal from state to federal court[88]—the Eleventh Circuit examined statutory provisions and legislative history that nonetheless indicated that Congress was not concerned with taking the preemption question away from state courts.[89] First, the venue provision for the NBA expressly allowed for suit in either federal or state court.[90] Second, even before 1875, Congress had provided for removal of cases under several specific statutes but did not do so in the NBA.[91] Third, and perhaps most telling, four years after enacting the NBA, Congress enacted a statute allowing any corporation organized under national law—*except national banks*—to remove a case to federal court on the basis of a federal defense.[92] Thus, soon after the enactment of the NBA, Congress expressly excluded national banks from being able to remove on the basis of a defense, while granting that right to all other nationally chartered corporations.[93] Consequently, the Eleventh Circuit "reject[ed] the defendants' suggestion that the early history of national banks offers clear congressional intent to make claims under the NBA removable."[94]

The Supreme Court reversed.[95] In reviewing its previous caselaw, the Court provided a new rationale for *Avco* and *Taylor*:

> In the two categories of cases where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive

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83. Act of June 3, 1864, ch. 106, § 30, 13 Stat. 99, 108 (codified as amended at 12 U.S.C. §§ 85–86 (2000)).

84. *See Anderson*, 539 U.S. at 11.

85. Anderson v. H&R Block, Inc., 287 F.3d 1038, 1048 (11th Cir. 2002), *reversed sub. nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

86. Act of June 3, 1864, 13 Stat. 99.

87. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

88. *See* discussion *supra* Part II.A.

89. *See H&R Block*, at 1045–46 (discussing Act of July 27, 1868, ch. 255, 15 Stat. 226).

90. *Id.* at 1045.

91. *Id.*

92. *See id.* at 1045–46 (citing Act of July 27, 1868, 15 Stat. at 226–27); *see also supra* note 52 (discussing the text of the 1868 Act).

93. *See also* Seinfeld, *supra* note 14, at 558 ("It is exceedingly difficult to reconcile the exclusion of national banks from this removal provision with the notion that Congress was seriously concerned that NBA claims be eligible for federal jurisdiction.").

94. *H&R Block*, 287 F.3d at 1046.

95. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003).

> cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.[96]

The Court relied on the statement from *Franchise Tax Board* that attempted to explain *Avco*—asserting that removal is proper when "a federal cause of action completely pre-empts a state cause of action."[97] Yet, as noted, the Court in *Franchise Tax Board* had never explained when federal law *completely preempted* state claims as compared to when federal law merely *preempted* state claims.[98] The *Anderson* Court concluded from this quote, and purportedly also from the Court's decisions in *Taylor* and *Avco*, that "the framework for answering the dispositive question [was]: Does the National Bank Act provide *the exclusive cause of action* for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable."[99]

But how could the Court construe the existence of an exclusive cause of action as the rule and acknowledge *Taylor*'s emphasis on clear congressional intent of removability? The Court fused the *Taylor* focus on clear congressional intent—although dropping the modifier "clear"—with its rule of an exclusive federal cause of action and stated that "the *proper inquiry* focuses on whether Congress intended *the federal cause of action to be exclusive* rather than on whether Congress intended that the cause of action be *removable*."[100] Indeed, the Court stated that arguments regarding the pertinent jurisdictional statutes affecting the NBA were "irrelevant."[101]

However, the *Anderson* Court's construction of *Taylor* as requiring congressional intent of *an exclusive federal cause of action* cannot find its root in *Taylor*—or, for that matter, in *Avco*, which says nothing on the topic.[102] Notably, in *Taylor*, the fact that section 502(a) of ERISA is an exclusive federal cause of action is mentioned exactly once in the Court's very brief Section II of the opinion, which discusses the substantive preemption of the asserted common law claims.[103] Indeed,

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96. *Id.* at 8 (footnote omitted).

97. *Id.* at 7 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust of S. Cal., 463 U.S. 1, 24 (1983)) (internal quotation marks omitted).

98. *See supra* text accompanying notes 63–66. Indeed, in his *Anderson* dissent, Justice Scalia says of the *Franchise Tax Board* quote, "Of course it is not an explanation at all. It provides nothing more than an account of what *Avco* accomplishes, rather than a justification (unless *ipse dixit* is to count as justification) for the radical departure from the well-pleaded-complaint rule." *Anderson*, 539 U.S. at 14–15 (Scalia, J., dissenting).

99. *Anderson*, 539 U.S. at 9 (emphasis added).

100. *Id.* at 9 n.5 (emphasis added).

101. *Id.*

102. Professor Seinfeld has posited that the *Anderson* Court's "shift in focus—from inquiring directly whether Congress intended to create removal jurisdiction to inquiring whether Congress intended to create an exclusive federal cause of action—is sensible only if the latter is a good proxy for the former." Seinfeld, *supra* note 14, at 556. This inquiry will be examined in the context of the Carmack Amendment *infra* Part V.A.1.

103. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 62–63 (1987) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987)).

Section 502(a)'s nature as an exclusive federal cause of action is mentioned *nowhere* in Section III of *Taylor* regarding the well-pleaded complaint rule, complete preemption, removal jurisdiction, or congressional intent.[104] Further, the fact that section 502(a) of ERISA was an exclusive cause of action was included in the already-recited facts upon which the Court said it would be reluctant to find complete preemption "in the absence of explicit direction from Congress."[105] Thus, the required explicit direction from Congress cannot regard the already identified fact that the cause of action was exclusive. Further, to ascertain such direction from Congress, the *Taylor* Court examined the jurisdictional statutes of ERISA and the LMRA, as well as the legislative history of the ERISA jurisdictional provisions.[106] The *Taylor* Court certainly did not indicate, as did the *Anderson* Court,[107] that arguments regarding the pertinent jurisdictional provisions and legislative history were irrelevant. Finally, it is untenable to read *Taylor*'s full statement that the touchstone of complete preemption is congressional intent and claim the Court was referring to congressional intent of an exclusive cause of action rather than intent of removability.[108]

After redefining congressional intent as used in *Taylor*, the *Anderson* Court proceeded to determine that §§ 85 and 86 provided the exclusive federal cause of action and held that removal was proper.[109] Yet the Court's method for discerning congressional intent is illuminating. The Court determined that *Congress* had intended to provide an exclusive federal cause of action by citing to its own prior caselaw regarding the preemptive scope of the NBA.[110] No mention was made of the statutory language or legislative history of the NBA. The *Anderson* method contrasts with the *Taylor* analysis. The *Taylor* Court examined the text of the ERISA jurisdictional provision as well as reliable pieces of legislative history from

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104. *See id.* at 63–67.

105. *See id.* at 63–64.

106. *See id.* at 65–66.

107. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 n.5 (2003).

108. In *Taylor*, the Court stated,

> But the *touchstone of the federal district court's removal jurisdiction is* not the "obviousness" of the pre-emption defense but *the intent of Congress*. Indeed, as we have noted, even an "obvious" pre-emption defense does not, in most cases, create removal jurisdiction. In this case, however, *Congress has clearly manifested an intent to make causes of action* within the scope of the civil enforcement provisions of [Section] 502(a) *removable to federal court*. Since we have found Taylor's cause of action to be within the scope of [Section] 502(a), we *must honor that intent* whether pre-emption was obvious or not at the time this suit was filed.
>
> Accordingly, this suit, though it purports to raise only state law claims, *is necessarily federal* in character *by virtue of* the clearly manifested intent of Congress.

481 U.S. at 66–67 (emphasis added).

109. *Anderson*, 539 U.S. at 11.

110. *See id.* at 10 (discussing a series of Supreme Court opinions that broadly construe substantive preemption under the NBA).

the House Report and a sponsor of the ERISA bill.[111] Indeed, *Taylor* looked to Congress in order to determine congressional intent.[112]

Importantly, the *Anderson* Court admitted that its holding was influenced by "the special nature of federally chartered banks."[113] Quoting *M'Culloch v. Maryland*,[114] the *Anderson* Court explained,

> The same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the "power to destroy," supports the established interpretation of §§ 85 and 86 [as the exclusive cause of action for usury against national banks] that gives those provisions the requisite pre-emptive force to provide removal jurisdiction.[115]

Indeed, the Court's desire to protect the historic independence of national banks from state encroachments was likely the catalyst for changing and broadening complete preemption—as the NBA did not satisfy *Taylor*'s test of clear congressional intent of removability.[116]

Justice Scalia, joined by Justice Thomas, dissented,[117] explaining that the new exclusive federal cause of action test "implicitly contradict[ed]" *Taylor* and the *Taylor* Court's examination of jurisdictional provisions and legislative history to determine the propriety of removal.[118] Further, Justice Scalia contended that the creation of a federal cause of action failed to demonstrate congressional intent to effect jurisdictional changes or "to wrest from state courts the authority to decide questions of pre-emption."[119] Justice Scalia also explained that fear of state court error, which had been advocated as a reason to allow removal, was "inadequate for judicial authority, because it is up to Congress, not the federal courts, to decide when the risk of state-court error with respect to a matter of federal law becomes

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111. *See Taylor*, 481 U.S. at 65–66.

112. *See id.*

113. *Anderson*, 539 U.S. at 10.

114. 17 U.S. (4 Wheat.) 316 (1819).

115. *Id.* at 11 (citation omitted) (quoting *M'Culloch*, 17 U.S. (4 Wheat.) at 431).

116. *See supra* text accompanying notes 73–81. The same interest of protecting national banks probably played a role in the *Osborn* Court's extremely broad construction of constitutional arising under power. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822 (1824) (explaining that the arising under power exists where "the title or right set up by the party[] *may* be defeated by one construction of the [C]onstitution or law of the United States, and sustained by the opposite construction" (emphasis added)).

117. Notably, in *Taylor*, it was the liberal Justices Brennan and Marshall that pushed for an extremely narrow interpretation of complete preemption, while in *Anderson*, it was Justices Scalia and Thomas. *Compare Taylor*, 481 U.S. at 67–68 (Brennan, J., joined by Marshall, J., concurring) (emphasizing the limited nature of the majority's holding regarding federal defense removal), *with Anderson*, 539 U.S. at 20–22 (Scalia, J., joined by Thomas, J., dissenting) (advocating a narrow interpretation of complete preemption).

118. *Anderson*, 539 U.S. at 16 (Scalia, J., dissenting). Justice Scalia indicated the Court could not contradict *Avco* because it "has no discussion to be contradicted." *Id.*

119. *Id.* at 19.

so unbearable as to justify divesting the state courts of authority to decide the federal matter."[120] Finally, expressing concern about the potentially broad reach of the *Anderson* decision, Justice Scalia concluded that "as between an inexplicable narrow holding and an inexplicable broad one, the former is the lesser evil."[121]

2. *The Effect of* Anderson *in the Lower Courts*

In 1998, Professor Miller explained that, while various multi-factored tests for complete preemption existed among the federal circuits,

> [A]ll [the tests] focus on a similar goal: to determine whether *Congress* not only intended a given federal statute to provide a federal defense to a state cause of action that could be asserted either in a state or a federal court, but *also intended to grant a defendant the ability to remove the adjudication of the cause of action to a federal court* by transforming the state cause of action into a federal [one].[122]

Following *Anderson*, federal courts are ceasing to ask if Congress "intended to grant a defendant the ability to remove the adjudication . . . to a federal court,"[123] examining instead whether the federal statute creates the exclusive cause of action for the alleged state law claims.

For example, the Second Circuit noted, "Until the Supreme Court's recent decision in . . . *Anderson*, . . . [w]e had understood the doctrine [of complete preemption] to be restricted to the very narrow range of cases where Congress has clearly manifested an intent to make specific action within a particular area removable."[124] The Second Circuit had held that "there is no complete preemption without a clear statement to that effect from Congress."[125] Similarly, prior to *Anderson*, the Fifth Circuit had articulated a three-prong test for complete preemption, the third prong of which was whether "there is a clear Congressional intent that claims brought under the federal law be removable."[126] And the Ninth

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120. *Id.* at 21.

121. *Id.*

122. Miller, *supra* note 9, at 1797–98.

123. *Id.*

124. Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 304 (2d Cir. 2004) (quoting Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 486 (2d Cir. 1998)) (internal quotation marks omitted).

125. Marcus v. AT&T Corp., 138 F.3d 46, 55 (2d Cir. 1998).

126. Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000) (quoting Heimann v. Nat'l Elevator Indus. Pension Fund, 187 F.3d 493, 500 (5th Cir. 1999)) (internal quotation marks omitted); *see also* Willy v. Coastal Corp., 855 F.2d 1160, 1166 (5th Cir. 1988) (finding no complete preemption because the allegedly preemptive federal laws "and the legislative history of those statutes indicate no intent, manifest or otherwise, that *Avco* should apply in this character of case"); Beers v. N. Am. Van Lines, Inc., 836 F.2d 910, 913 n.3 (5th Cir. 1988) (finding no complete preemption for Carmack Amendment claims because the court could "find no manifest congressional intent, of the type

Circuit had explained that "complete preemption occurs only when Congress . . . intends to transfer jurisdiction of the subject matter from state to federal court."[127]

In 2004, the Second Circuit explained that *Anderson* changed the "analytical framework"[128] and "*extend[ed]* the complete preemption doctrine to any federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action."[129] Notably, under the Second Circuit's formulation of the *Anderson* test, a federal court must determine the substantive preemption question to determine its own removal jurisdiction.[130] In like manner, post-*Anderson*, the Fifth Circuit abandoned its three-pronged test and held that "the proper focus of complete preemption analysis is on whether Congress intended that the federal action be exclusive."[131] The Fifth Circuit, prior to *Anderson*, had "considered complete preemption to be a narrow exception,"[132] but construed *Anderson* to "make[] finding complete preemption easier than existed under *Taylor*."[133] The Ninth Circuit likewise explained that *Anderson* clarified when complete preemption applied: namely, when "the federal statutes at issue provide[] the exclusive cause of action for the claim asserted."[134]

The Fourth Circuit's caselaw has also changed acutely post-*Anderson*. Prior to *Anderson*, the Fourth Circuit's seminal case regarding complete preemption was *Rosciszewski v. Arete Associates, Inc.*[135] In *Rosciszewski*, the Fourth Circuit held that complete preemption applied to state law claims coming within the preemptive scope of § 301(a) of the Copyright Act.[136] The court explained that the focus of its

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contemplated in *Taylor*, to make this state claim removable to federal court").

127. Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1183 (9th Cir. 2002); *see also* Ansley v. Ameriquest Mortgage Co., 340 F.3d 858, 862 (9th Cir. 2003) (quoting *Wayne*'s language as the test for complete preemption: a party must show that Congress intended "to transfer jurisdiction of the subject matter from state to federal court" (quoting *Wayne*, 294 F.3d at 1183) (internal quotation marks omitted)); *Wayne*, 294 F.3d at 1184 (holding no complete preemption by the Airline Deregulation Act).

128. *Briarpatch*, 373 F.3d at 304 (citing *Anderson*, 539 U.S. at 8–11).

129. *Id.* at 305 (emphasis added).

130. *See* City of Rome v. Verizon Commc'ns, Inc., 362 F.3d 168, 177 (2d Cir. 2004) (citing *Anderson*, 539 U.S. at 9–10) (explaining that to determine complete preemption the court "must undertake a two-step inquiry to determine first whether [s]ection 253 [of the Telecommunications Act] preempts any common-law or state statutory rule and then whether Congress intended Section 253 to provide an exclusive cause of action").

131. PCI Transp., Inc. v. Fort Worth & W. R.R. Co., 418 F.3d 535, 544 (5th Cir. 2005) (citing Hoskins v. Bekins Van Lines, 343 F.3d 769, 776 (5th Cir. 2003)) (finding complete preemption by the Interstate Commerce Commission Termination Act).

132. *Id.* at 543.

133. *Id.* at 544 n.32 (citing *Anderson*, 539 U.S. at 16–19 (Scalia, J., dissenting)).

134. Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042 (9th Cir. 2003); *see also* Miles v. Okun, 430 F.3d 1083, 1088 (9th Cir. 2005) (citing *Anderson*, 539 U.S. at 8–9) (stating that the *Anderson* Court "clarified that removal is proper under the complete preemption doctrine only when Congress intended the federal cause of action to be exclusive" and finding complete preemption by the Bankruptcy Code "for damages resulting from the filing of an involuntary bankruptcy petition").

135. 1 F.3d 225 (4th Cir. 1993).

136. *Id.* at 227 (construing the Copyright Act of 1976, Pub. L. No. 94-553, § 301(a), 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. § 301(a) (2000)).

inquiry was congressional intent, and it examined both the scope of the intended preemption by Congress and, as revealed by the statutory jurisdictional provisions and legislative history, the intent of Congress to place adjudication of the federal claims in federal court.[137] Although not paralleling the jurisdictional language used in the LMRA—as the *Taylor* Court had found with ERISA—the Fourth Circuit held that the provision for exclusive federal jurisdiction over copyright claims was "strong evidence that Congress intended copyright litigation to take place in federal courts."[138] The court concluded,

> The grant of exclusive jurisdiction to the federal district courts over civil actions arising under the Copyright Act, combined with the preemptive force of § 301(a), compels the conclusion that Congress intended that state-law actions preempted by § 301(a) of the Copyright Act arise under federal law.[139]

In stark contrast with its *Rosciszewski* decision,[140] the Fourth Circuit recently took complete preemption to a new level in *Discover Bank v. Vaden*.[141] In *Vaden*, Discover Financial Services, Inc. (DFS), allegedly on behalf of Discover Bank, sued Vaden in Maryland state court for nonpayment of a credit card debt.[142] Discover Bank is a Delaware-chartered bank—not a national bank as in

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137. *See id.* at 232.

138. *Id.* Notably, and as the *Rosciszewski* court itself recognized, when the Copyright Act was enacted, the so-called "derivative jurisdiction rule" prohibited removal of a claim within the exclusive jurisdiction of the federal courts. *See id.* at 232 n.6. The idea was that because the state courts did not have jurisdiction, the case could not be moved from state to federal court—rather, it had to be dismissed. *See, e.g.*, Lambert Run Coal Co. v. Balt. & Ohio R.R. Co., 258 U.S. 377, 382 (1922) ("If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.") *superseded by statute*, Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986) (codified as amended at 28 U.S.C. § 1441(f) (2000 & Supp. IV 2004)). The derivative jurisdiction rule was statutorily overturned in 1986 by what is currently 28 U.S.C. § 1441(f). Thus, while it is sound for the *Rosciszewski* court to state that Congress's grant of exclusive jurisdiction showed an intent by Congress that copyright claims be adjudicated in federal court and not by state courts, it is hard to argue that Congress intended that state law claims in state court be removed to federal court on the basis of a federal copyright preemption defense, because at the time of the statute's enactment the derivative jurisdiction rule prevented removal of even express copyright claims. *See Rosciszewski*, 1 F.3d at 232–33.

139. *Rosciszewski*, 1 F.3d at 232.

140. In *Lontz v. Tharp*, 413 F.3d 435 (4th Cir. 2005), the Fourth Circuit stated that the *Anderson* "view of the complete preemption doctrine is consistent with our approach in *Rosciszewski*." *Id.* at 441 (citing *Rosciszewski*, 1 F.3d 225). As will be demonstrated, the Fourth Circuit's current approach, as employed in *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), is quite divergent from the approach taken in *Rosciszewski*. However, the Fourth Circuit's view of the *Anderson* test in *Lontz* is arguably different from its view of *Anderson* indicated by *Vaden*. *See infra* note 162 and accompanying text.

141. 489 F.3d 594.

142. *Id.* at 597.

Anderson—but is federally insured.[143] Vaden filed counterclaims against DFS alleging that the fees and interest rates DFS charged violated Maryland law.[144] Discover Bank then filed a petition in federal court seeking to compel arbitration under the Federal Arbitration Act (FAA).[145] According to the Fourth Circuit, it had jurisdiction under the FAA only if it would have had jurisdiction over the underlying action—which, again, involved an affiliate of a state-charted bank suing a debtor under state law in state court, where the debtor counterclaimed that the bank's fees and interest rates violated state law.[146]

The Fourth Circuit held that the complete preemption doctrine gave it federal question jurisdiction over the underlying case.[147] According to the court, Vaden's state *counterclaims* against DFS, which the court construed to be against the bank itself, were completely preempted by the Federal Deposit Insurance Act (FDIA).[148] Leaving aside the Fourth Circuit's questionable determination that federal question jurisdiction existed on the basis of preemption of state law counterclaims,[149] the court's analysis underscores the change wrought by *Anderson*; the *Vaden* court focused entirely on congressional intent to preempt state law rather than on anything regarding jurisdiction.[150] Indeed, the court summarized in conclusion,

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143. *Id.*

144. *Id.*

145. *Id.* at 598.

146. *See id.* at 599 (construing the Federal Arbitration Act, ch. 213, § 4, 43 Stat. 883, 883–84 (1925) (codified as amended at 9 U.S.C. § 4 (2000)) (citations omitted).

147. *Id.* at 600.

148. *Id.* at 606–07 (construing the Federal Deposit Insurance Act, ch. 967, 64 Stat. 873 (1950) (codified as amended at 12 U.S.C. §§ 1811–1835a (2000 & Supp. IV 2004)).

149. The dissent in *Vaden* rightly pointed out that "a counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for arising under jurisdiction." *Id.* at 610 (Goodwin, J., dissenting) (quoting Holmes Group, Inc. v. Vorando Air Circulation Sys., Inc., 535 U.S. 826, 830 (2002)) (internal quotation marks omitted). The *Vaden* majority contended that *Holmes Group* was not controlling because it "did not . . . involve complete preemption." *Id.* at 600 n.4. According to the majority, complete preemption is an exception to, and overcomes all aspects of, the well-pleaded complaint rule to the extent that federal question jurisdiction may be based on a state law counterclaim that is completely preempted by federal law. *See id.*.

The theory of complete preemption has been that the *plaintiff's complaint* in fact raises a federal question because the state law claims are preempted by federal law. *See id.* at 611 (Goodwin, J., dissenting). The same cannot be said of counterclaims. Even assuming counterclaims are completely preempted by federal law, that only means the defendant raised invalid state law claims that are preempted by federal law. Certainly the idea of "recharacterization" by complete preemption of the plaintiff's state claims as being controlled by federal law does not have force with counterclaims.

Moreover, to allow complete preemption on the basis of a state law counterclaim that the *plaintiff* asserts in reply is preempted by federal law and, further, to allow the plaintiff to use that assertion to invoke a federal forum is essentially returning to the jurisdictional scheme of 1875–1887, during which either a plaintiff or a defendant could remove a case to federal court. *See supra* text accompanying notes 20–24. However, Congress determined in 1887 that plaintiffs should not be able to remove cases to federal court and that once they selected their forum they could not move to a different one. *See supra* notes 39–46 and accompanying text. Whether or not the rule is justifiable as a matter of principle, the decisive point is that Congress has expressly so limited federal removal jurisdiction, and without a change from Congress, the federal judiciary simply has no authority to declare it otherwise.

150. *See Vaden*, 489 F.3d at 606.

> Given the *express preemption language* of the FDIA, the statute's legislative history *affirming Congress' intent to provide competitive equality* between national and state-chartered banks, the virtual *identity of the preemption language* in the NBA and that of the FDIA, and the Supreme Court's finding of complete preemption under the NBA, we are hard-pressed to conclude other than that Congress intended complete preemption of state-court usury claims under the FDIA.[151]

Notably, each aspect of the FDIA that led the court to find complete preemption dealt with the scope of *substantive preemption* by the FDIA.[152] Noticeably missing from the analysis was anything akin to the analysis in *Taylor* or *Rosciszewski.* In *Taylor*, the Court compared the *jurisdictional provisions* for ERISA and the LMRA to see if ERISA was intended to have the same *jurisdictional effect* as the LMRA was construed to have.[153] Similarly, in *Rosciszewski*, the Fourth Circuit focused on the jurisdictional provision providing exclusive federal jurisdiction for copyright claims and held that the provision indicated a congressional desire that copyright claims be adjudicated in federal court, to the exclusion of state courts.[154]

While the *Vaden* court compared statutory provisions of the NBA to those of the FDIA, it based its finding of complete preemption on the comparison of the substantive preemption provisions,[155] basically ignoring any jurisdictional provisions of either statute. The court acknowledged in a footnote "one difference" between the NBA and the FDIA: namely, that § 86 of the NBA did not mention the type of courts in which the action was to be brought, while the FDIA stated that the action was to be commenced "*in a court of appropriate jurisdiction.*"[156] The court summarily dismissed this difference because "both statutes speak to the creation of a federal cause of action."[157] Arguably, under *Anderson*, the Fourth Circuit was correct in placing its focus on the fact that both statutes created a federal cause of action with a similar preemptive scope rather than examining any jurisdictional provisions.

Finally, the *Vaden* decision is illuminating because of its emphasis on following *Anderson* and its assumption that Congress has the same interest in protecting state banks from state court encroachments as it has in protecting federal banks. The *Anderson* Court emphasized "the special nature of federally chartered

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151. *Id.*

152. *See id.* 604–05.

153. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987).

154. *See* Rosciszewski v. Arete Assocs., 1 F.3d 225, 232 (4th Cir. 1993).

155. *See Vaden*, 489 F.3d at 606–07. In finding complete preemption, the *Vaden* Court compared § 85 of the NBA—the substantive preemption provision—to the FDIA but made no comparison of the FDIA to § 86 of the NBA, which created the NBA claim. *See id.* The Supreme Court in *Anderson* had found that the *combination* of §§ 85 and 86 brought about complete preemption. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9–11 (2003).

156. *Vaden*, 489 F.3d at 605 n.14 (citing 12 U.S.C. § 86 (2000); 12 U.S.C. § 1831d(b) (2000)).

157. *Id.*

banks" that "needed protection from 'possible unfriendly State legislation.'"[158] Indeed, the Court noted that *M'Culloch*'s "power to destroy" language supported complete preemption of state law claims against national banks.[159] The Fourth Circuit in *Vaden* interpreted the *Anderson* decision as "elucidat[ing]" the broad proposition that "federal banking laws preempt state law."[160] The *Vaden* court then took that proposition a step further and held that such substantive preemption triggered removal under the doctrine of complete preemption—even in cases involving state banks rather than national banks.[161] While the *Anderson* Court's bottom line concern may have been to preserve the historic independence of national banks from state encroachment, it did not limit its decision to such problems; rather, the Court phrased the dispositive inquiry in terms of a broad new test that would expand complete preemption removal to statutes of every sort.[162]

IV. ALTERNATIVE PROPOSALS FOR DETERMINING COMPLETE PREEMPTION

Commentators have expressed various views on the proper scope of both the well-pleaded complaint rule and the complete preemption doctrine. The entire gamut—everything from allowing removal on the basis of any federal defense[163] to

158. *Anderson*, 539 U.S. at 10 (quoting Tiffany v. Nat'l Bank of Mo., 85 U.S. (18 Wall.) 409, 412 (1874)).

159. *Id.* at 11 (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819)).

160. *Vaden*, 489 F.3d at 604 n.11 (citing *Anderson*, 539 U.S. at 11).

161. *Id.* at 606–07. The Fourth Circuit's theory was that Congress intended to create parity between state and federal banks, and if the court "found no complete preemption here, we would be treating state banks differently under the FDIA than national banks are treated under the NBA." *See id.* at 607 n.18.

162. Again, the *Anderson* Court framed the dispositive question for complete preemption as whether the "National Bank Act provide[s] the exclusive cause of action for usury claims against national banks?" *Anderson*, 539 U.S. at 9; *see also id.* at 9 n.5 (stating that the proper inquiry is "whether Congress intended the federal cause of action to be exclusive"). In none of its articulations of the test does the Supreme Court hint that the historical independence of the national banks played a role in determining complete preemption.

In *Lontz v. Tharp*, the Fourth Circuit recognized the *Anderson* Court's emphasis on the unique federal interests implicated by potential state encroachment on national banks as part of the complete preemption analysis. *See* 413 F.3d 435, 441 (4th Cir. 2005) (citing *Anderson*, 539 U.S. at 10–11). Specifically, the *Lontz* court indicated that the test for complete preemption from *Anderson* was whether "Congress intended [the preemptive statute] to 'provide the exclusive cause of action' *for claims of overwhelming national interest*." *Id.* (emphasis altered) (quoting *Anderson*, 539 U.S. at 9). The Fourth Circuit in *Lontz* noted that the *Anderson* Court "stressed that *national banks* were the subject of *unique national concern*." *Id.* (emphasis added). However, in *Vaden*, the Fourth Circuit—in similar fashion to the other federal courts of appeal and *Anderson*'s own articulation of its test—made no recognition that complete preemption in *Anderson* was found to be appropriate because of a special or unique federal interest involving national banks.

163. Several scholars, while not specifically discussing complete preemption, have argued that removal should be allowed on the basis of a federal defense and that the "well-pleaded complaint rule must . . . be abandoned." Doernberg, *supra* note 29, at 658. Similarly, A. Mark Segreti contends that because the Supreme Court is unlikely to change the well-pleaded complaint rule, Congress should "replace the phrase 'arising under' with some kind of 'federal ingredient' language" to eliminate the well-pleaded complaint rule and bestow on the federal courts the full-extent of arising under power as

abolishing the complete preemption exception and fully enforcing the well-pleaded complaint rule[164]—has been recommended. Pertinent for the purposes of this Article is scholarly commentary regarding what the proper test or framework for complete preemption should be.

One recommendation is to allow removal whenever any federal preemption defense is raised. For example, Professor Jordan argued that complete preemption should be allowed whenever there is a federal defense that has the potential to nullify a state cause of action—whether or not a federal cause of action is available.[165] Professor Jordan argues that her framework would create greater efficiency because the state claim, if properly removed, will either be dismissed in federal court or adjudicated as a federal claim.[166] If the case is remanded, "there will be no need to relitigate the merits of the preemption issue [in state court] since the law of the case doctrine applies to issues over which the federal court had jurisdiction to decide."[167]Professor Jordan also posits that "the shift in authority to decide the preemption issue will not deprive the state court of the opportunity to construe state law, but only of the opportunity to interpret federal law."[168]

Commentators have also favored an approach similar to *Anderson* that allows removal when there is a preemptive federal cause of action.[169] Professor Twitchell argues for such an approach but, cognizant of federalism issues, structures her

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interpreted in *Osborn*. *See* A. Mark Segreti, Jr., *Vesting the Whole "Arising Under" Power of the District Courts in Federal Preemption Cases*, 37 OKLA. L. REV. 539, 545 (1984) (citing Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824)). Doernberg notes that others have recommended allowing removal on the basis of a federal defense and specifically cites to Chadbourn & Levin, *supra* note 29, at 665; Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 164 (1953); and Herman L. Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 460–62 (1954). Doernberg, *supra* note 29, at 659 & n.268.

164. *See, e.g.*, A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH & LEE L. REV. 233, 288 (2007) ("To place the scope of federal jurisdiction back within its proper confines, the Supreme Court will have to take two radical steps: (1) adopt Justice Holmes's 'Creation Test' for determining the presence of federal question jurisdiction and (2) abolish the complete preemption doctrine.").

165. *See* Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927, 984 (1996); *see also* Segreti, *supra* note 163, at 545, 551–54 (arguing for allowing removal of federal preemption defenses as an alternative to abandoning the well-pleaded complaint rule).

166. *See* Jordan, *supra* note 165, at 989.

167. *Id.* Professor Jordan's conclusion that the state court would not need to revisit the preemption issue is subject to question. *See infra* note 407.

168. Jordan, *supra* note 165, at 990. The validity of this contention will be examined *infra* Part V.B.1.

169. *See* Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 865, 869 (1986) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust of S. Cal., 463 U.S. 1 (1983)); *see also* Tristin K. Green, Comment, *Complete Preemption—Removing the Mystery from Removal*, 86 CAL. L. REV. 363, 391 (1998) ("[W]hen Congress provides a replacement cause of action and creates preempting federal law, it may be logical to presume that there is reason to fear state court determination in that particular area of law, either due to bias [of the state courts] or complexity [of federal law]. In these situations, Congress has gotten involved by creating preempting law as well as a replacement cause of action, and the courts may infer a certain congressional concern for fair and accurate adjudication.").

"jurisdictional analysis to avoid unnecessary preemption decisions" by the federal court while determining whether or not it has removal jurisdiction.[170] Under her three-step analysis, a court must first determine "whether Congress has given [the] plaintiff an express cause of action," and if not, the suit is remanded because the state law claims cannot be recharacterized as federal claims.[171] Second, if there is a federal cause of action, the court examines "whether [the] defendant could reasonably argue that Congress intended" to preempt the state law claim, and if not, remand the suit to state court.[172] Third, if the first two requirements are met, the court will perform a full substantive preemption analysis and determine whether the plaintiff's claim is preempted.[173] In her analysis, Professor Twitchell sees the federal judiciary—particularly the Supreme Court—as the proper authority to determine what is "a meaningful way to divide power in our federal system," even though Congress has chosen not to change (whether unable or unwilling) the current jurisdictional allocation between federal and state courts created by the well-pleaded complaint rule.[174]

Post-*Anderson*, Professor Seinfeld[175] advocates a new test for determining complete preemption.[176] Noting that a primary justification for federal jurisdiction is the uniform interpretation of federal law, Professor Seinfeld argues that complete preemption should be based on the breadth of the substantive preemption of a federal statute and would generally exist when there is field preemption.[177] Professor Seinfeld recognizes that the delineation between field preemption and other forms of substantive preemption is "notoriously blurry,"[178] and so "[t]he hallmark of a preemptive regulatory regime that should suffice to underwrite federal defense removal is that supplementary state legislation is prohibited"—regardless

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170. Twitchell, *supra* note 169, at 865.

171. *Id.*

172. *Id.*

173. *Id.*

174. *See id.* at 870.

175. Professor Seinfeld was a law clerk for Justice Scalia at the time the *Anderson* decision was rendered. Seinfeld, *supra* note 14, at 548 n.31.

176. *See id.* at 573–77. Professor Seinfeld notes that the Supreme Court has never "attempted to justify its development of this unusual jurisdictional rule without explicit (or even implicit) congressional authorization," but the Court "shows no signs of abandoning complete preemption" or leaving its crafting to Congress. *Id.* at 571. Thus, Professor Seinfeld proposes his own test for complete preemption that could be adopted by the judiciary. *See id.* at 573–77.

177. *See id.* at 574–75. Professor Seinfeld explains,

> [T]he more broadly preemptive federal law is, the more likely it is that the interest in regulatory uniformity is in play. And it would therefore make sense to *tether a rule of federal defense removal to the scope of federal preemption*—that is, to the extent to which federal law prohibits state intervention in a given field. Such a rule would channel into the courts thought most likely to provide a uniform interpretation of federal law those cases in which the need for such an interpretation is most pressing.

Id. at 574 (emphasis added).

178. *Id.* at 576.

of the label attached to the preemption involved.[179] Finally, Professor Seinfeld notes that under his proposed test, "*some reshaping* of the basic structure of federal question jurisdiction" would be required, including abandoning "the pretense that removal on the basis of a defense is prohibited" and allowing removal by the plaintiff where the defendant raises a federal defense.[180] The combination of these two features of "reshaping" constitute a repeal of the post-*Union & Planters' Bank* well-pleaded complaint rule.[181]

Scholars have also argued that complete preemption should be abandoned altogether. Arguing that the well-pleaded complaint rule serves federalism purposes, Professor Ragazzo contends that artful pleading exceptions to the well-pleaded complaint rule, including complete preemption, should be abandoned.[182]

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179. *Id.* at 576–77; *see also id.* at 577 (explaining that "[i]f federal law is construed to prevent states from heaping on regulated entities obligations above and beyond those animated by federal law, then it is reasonable to conclude that Congress has endeavored to assure" uniformity, and federal removal jurisdiction would be proper).

180. *Id.* at 577 (emphasis added).

181. Professor Seinfeld emphasizes throughout his article that there are separation of powers concerns with the judiciary creating and expanding the complete preemption doctrine without any congressional authorization. *See id.* at 550, 569–71. Professor Seinfeld nevertheless proposes his own jurisprudential theory for complete preemption, because "the Supreme Court shows no signs of abandoning complete preemption doctrine and leaving the task of crafting exceptions to the well-pleaded complaint rule to Congress alone." *Id.* at 571.

Surprisingly, then, Professor Seinfeld includes in his proposed judicial approach to complete preemption both abandoning the idea that removal cannot be based on a federal defense, *see id.* at 577, and allowing the plaintiff to remove, *see id.* at 578. The second of these cannot be accomplished by the judiciary no matter how "sound" the policy of allowing plaintiffs the right to remove. *See id.* From 1887 to the present, Congress has limited the right of removal to defendants. *See* 28 U.S.C. § 1441(a) (2000) (restricting removal to "the defendant or the defendants"). Professor Seinfeld probably recognized that this change would have to be made by Congress because he cites to the current statute, *see* Seinfeld, *supra* note 14, at 577 n.123 (citing 28 U.S.C. § 1441), but he fails to so state and adds confusion as to which parts of his framework could be accomplished by judicial interpretation and which require congressional action.

Similarly, Professor Seinfeld posits in a footnote that there are compelling reasons to treat the well-pleaded complaint rule "in effect, as if it were a creature of statute, rather than one of judicial construction," in light of the strong history of acquiescence by Congress. *See id.* at 570 n.107. Nevertheless, Professor Seinfeld proposes as part of his judicial complete preemption doctrine abandoning the idea that removal cannot be based on a federal defense, *see id.* at 577, which is the heart of the post-*Union & Planters' Bank* well-pleaded complaint rule. Again, while criticizing the Supreme Court for not addressing separation of powers problems with complete preemption, *see id.* at 550, 569–71, Professor Seinfeld's own proposal arguably raises even greater separation of powers concerns than the Supreme Court's current, and far more narrow, complete preemption doctrine.

182. *See* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 327–34 (1993). Professor Ragazzo alternatively argues that the Court, at the very least, "should restrict the artful pleading doctrine to those cases in which federal law both preempts state law and provides replacement federal claims." *Id.* at 335.

In his article, Professor Ragazzo discusses not only the complete preemption doctrine but also another "artful pleading" exception to the well-pleaded complaint rule founded on *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). *See* Ragazzo, *supra*, at 303–16. In *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), the Supreme Court did exactly what Professor Ragazzo suggested and abandoned the alleged "*Moitie* doctrine." *See id.* at 478 (citing *Moitie*, 452 U.S.

Professor Ragazzo also argues that judicial efficiency is strained by complete preemption, both because a case is passed between state and federal systems[183] and because such exceptions are "exceedingly difficult to apply."[184] Finally, Professor Ragazzo appears to put the abolishment of complete preemption in the hands of the Supreme Court, but "[f]ailing action by the Court, Congress would do well to eliminate a doctrine that is contrary to sound jurisdictional theory, exceedingly difficult to apply, and the bane of judges and litigants alike."[185] More recently, Professor Spencer advocated abolishing complete preemption "to the extent that the Court *infers* its existence in any given case."[186] Although sounding fairly absolute, Professor Spencer supports complete preemption "where Congress adopted the [jurisdictional] language" used in the LMRA that the Supreme Court interpreted "as indicative of an intent to permit" removal.[187]

Finally, in a short response to Professor Seinfeld's article discussed above,[188] Professor Morrison argued that "any attempt to fashion a rule of complete preemption entails decisions better made by Congress, not the Courts."[189] Noting some problems with Professor Seinfeld's theory, Professor Morrison argues briefly that "complete preemption should depend on congressional intent, not judicial invention," because "Congress is simply better than the courts at making the kinds of decisions necessary to craft sensible and coherent doctrine in this area."[190] Similarly, Arthur Miller has contended that the "Supreme Court probably should find an opportunity to offer some guidance as to what terms should appear in the statute or, at least, be set out in reliable legislative history to create complete preemption."[191] Placing "the burden on Congress," rather than allowing the "lower

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394). However, as demonstrated by *Anderson* itself, the Supreme Court has not shown any indication of similarly abandoning the complete preemption doctrine.

183. Ragazzo, *supra* note 182, at 329–31.

184. *Id.* at 331.

185. *Id.* at 335.

186. Spencer, *supra* note 164, at 290 (emphasis added). Indeed, Professor Spencer notes that "Congress of course retains the authority to provide expressly for the removability of preempted state law claims, as it has done in the past." *Id.*

187. *Id.* Professor Spencer argues that removal would be allowed not because of complete preemption, but "rather to honor the clear expression of congressional intent that such be the case" as, he contends, occurred in *Taylor*. *Id.* (citing Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)).

Notably, in *Taylor*, it was not just Congress's adoption of the jurisdictional language used in the LMRA that influenced the Court, but additionally it was the legislative history with a clear statement from Congress indicating that certain ERISA preemption defenses were intended to provide a basis for removal similar to section 301 of the LMRA. *See Taylor*, 481 U.S. at 65–66. Thus, it is a stretch to say that the Supreme Court in *Taylor* declared that whenever the jurisdictional language used in the LMRA is used in another statute that such use demonstrates Congress's intent to allow removal.

188. *See supra* notes 175–81 and accompanying text.

189. Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. PENNUMBRA 186, 186 (2007), http://www.pennumbra.com/issues/articles/155-3/Morrison.pdf.

190. *See id.* at 187, 194.

191. Miller, *supra* note 9, at 1800. The primary focus of Miller's article was the *Moitie* doctrine, *see supra* note 182, which was overturned in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), although Miller does examine complete preemption as well.

federal courts to construct their own potentially divergent multi-factored tests[,] would achieve greater uniformity and would avoid much litigation in the long run."[192]

V. SEPARATION OF POWERS, FEDERALISM, AND EFFICIENCY PROBLEMS WITH THE *ANDERSON* RULE

The Eleventh Circuit stated in the intermediate *Anderson* decision, "When a federal court acts outside its jurisdiction, it violates principles of separation of powers and federalism, interfering with Congress's authority to demarcate the jurisdiction of lower federal courts, and with the states' authority to resolve disputes in their own courts."[193] The Eleventh Circuit could not have known that its statement would be prophetic about the direction that complete preemption would take on the direct appeal of that very decision.

A. Separation of Powers Problems

1. Congressional Power to Determine Lower Federal Court Jurisdiction

The *Anderson* test raises separation of powers concerns because it is Congress that generally has the power to define the jurisdiction of the lower federal courts. The history of federal court jurisdiction[194] and pronouncements from the Supreme Court[195] verify—at least to the extent relevant to complete preemption and removal jurisdiction—that Congress controls the jurisdiction of the lower federal courts and may "withhold[] jurisdiction from them in the exact degrees and character which

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192. Miller, *supra* note 9, at 1800.

193. Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041 (11th Cir. 2002), *rev'd sub nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

194. The most obvious example of congressional ability to define and limit federal jurisdiction is that federal courts were not even given federal question jurisdiction until 1875. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. And even then federal question jurisdiction was limited by a jurisdictional amount until 1980. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (2000)). Further, the lower federal courts were not given general removal jurisdiction from a state to federal court until 1875. *See* Act of Mar. 3, 1875, § 2, 18 Stat. at 470–71. And, as noted above, although Congress initially gave both plaintiffs and defendants the right to remove to federal court, it restricted that grant of jurisdiction in 1887, limiting removal to defendants. *See supra* text accompanying notes 20–24, 39–41.

195. For example, in *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), the Supreme Court explained that "Congress, having the power to establish the courts, must define their respective jurisdictions," *id.* at 448–49, and "may withhold from any court of its creation jurisdiction of any of the enumerated controversies," *id.* at 449,—for "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *id. See also* Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (explaining that only the Supreme Court is created by the Constitution itself, but "[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it" and Congress "may give, withhold or restrict such jurisdiction at its discretion" (citations omitted)).

to Congress may seem proper for the public good."[196] Even the extensive realm of academic dialogue regarding the extent of congressional control over federal jurisdiction is restricted to a rather narrow area[197] and does not generally refute congressional control over granting and denying removal jurisdiction.[198]

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196. Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)) (internal quotation marks omitted).

197. One major theory is that Article III requires that there be some federal court adjudication—either original or appellate—over cases enumerated in Article III. However, because state court adjudication of the federal preemption defense is subject to Supreme Court review, this theory does not implicate removal jurisdiction by means of complete preemption. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 240–41, 255–57 (1985) (arguing that enumerated powers containing the term "all" require mandatory jurisdiction, including federal question cases); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 753 (1984) ("[T]he overriding objective of [Article III is] to ensure that some federal court would have at least a discretionary opportunity to review each class of case enumerated in [S]ection 2 of [A]rticle III.").

Theodore Eisenberg has contended that "Congress cannot withdraw federal jurisdiction to hear cases in which constitutional rights are at stake." Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 532 (1974). But with complete preemption, the federal defense at issue is one of statutory federal preemption and not constitutional right.

Other commentators argue that the Due Process Clause and other constitutional provisions curtail Congress's ability to limit jurisdiction. Under such theories, Congress cannot eliminate all judicial review—both state and federal—for federal rights. *See, e.g.*, David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2489–90 (1998) (identifying three constitutional problems associated with removing all judicial review for federal rights); Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts,"* 78 TEX. L. REV. 1405, 1425 (2000) ("It is right and good to continue to suppose that the Supremacy Clause and/or the Due Process Clause must pry open the doors of some court in this country to a constitutional claim, if we are to remain a nation of laws."). Also, Congress cannot strip federal courts of "jurisdiction to achieve unconstitutional substantive ends." Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42 (1981); *see also* Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839, 840 (1976) (stating that, while free to abolish the jurisdiction of the lower federal courts, Congress cannot "restrict substantive rights that it could not directly affect" through "the guise of a jurisdictional limitation"); Lawrence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 136 (1981) ("[C]ongress cannot blind an [A]rticle III court to a relevant constitutional issue or provision—or, indeed, to any relevant proposition of federal law—nor can Congress replace what the court sees in the legal landscape before it with a picture more to Congress' liking.").

Finally, some scholars contend Congress has broad authority to control the jurisdiction of the lower federal courts, excepting only facially discriminatory or arbitrary devices. *See, e.g.*, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 913 (1984) ("A broad congressional power over the jurisdiction of the lower federal courts is supported . . . by a long line of decisions and by repeated practice.").

198. *But see* CHEMERINSKY, *supra* note 20, § 3.3, at 191 (explaining that one approach, "and the only one that seems clearly untenable," requires the lower federal courts to be vested with "the full judicial power," and "[b]y this view, all attempts to restrict jurisdiction would be unconstitutional"). Under such an approach, the well-pleaded complaint rule would be unconstitutional along with all jurisdictional amount requirements.

Notwithstanding scholarly criticism of the well-pleaded complaint rule, the prohibition against removal on the basis of a federal defense was created as a judicial construction of the 1887 and 1888 amendments to the judicial code, and Congress has refused to repeal or revise the rule—which may not be wise anyway[199]—though given the opportunity on multiple occasions.[200] Despite congressional authority over removal jurisdiction, under *Anderson* removal jurisdiction becomes disassociated with congressional intent and congressional allocations of jurisdiction. Indeed, post-*Anderson*, federal courts have allowed removal jurisdiction where Congress has made no indications that such jurisdiction is authorized and where congressional manifestations indicate an intent to restrict federal jurisdiction.[201] Moreover, the general rule for the last 120 years has provided state courts with exclusive jurisdiction to determine federal preemption defenses when only state law claims are pled, and most federal courts have recognized the complete preemption doctrine to be exceptionally narrow and limited to a handful of statutes. Consequently, Congress could not have implicitly understood in passing legislation over the past century that by creating a preemptive federal cause of action, it was authorizing removal on the basis of a federal defense.

As a case in point, the 1906 Carmack Amendment to the Interstate Commerce Act[202] demonstrates how *Anderson* and other proposed tests for complete preemption fail to distribute cases in a manner consistent with congressional allocations of federal and state judicial power.

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199. The well-pleaded complaint rule does not necessarily provide the perfect delineation, but Congress is unlikely to greatly enlarge the jurisdiction of the federal courts by permitting wholesale removal on the basis of a federal defense. *See, e.g.*, Amar, *supra* note 197, at 270 ("Absolutely comprehensive federal question jurisdiction by federal trial courts . . . appears to be impracticable, unwieldy, and politically infeasible."); Eisenberg, *supra* note 197, at 517 (noting that if required to hear cases now limited under § 1331, the federal "courts would be swamped or the judiciary would have to be expanded to a dangerous extent"); Ragazzo, *supra* note 182, at 319–20 (contending that the ALI proposal "that every federal issue deserves a federal forum—would be a practical disaster" because it "portends an explosion of cases subject to federal jurisdiction at a time when the federal courts are in danger of being overwhelmed by the volume of federal litigation" and, additionally, because it is "unsound as a matter of theory"); Seinfeld, *supra* note 14, at 546 ("The restriction of federal question jurisdiction to those cases in which the well-pleaded complaint rule is satisfied reduces the likelihood that the federal courts will be faced with a caseload that is beyond their capacity to process expeditiously.").

200. *See supra* note 58 and accompanying text. Professor Twitchell states in passing that there have been countless attempts to get Congress to change the well-pleaded complaint rule. *See* Twitchell, *supra* note 169, at 862.

201. In a related context, the Supreme Court has recently allowed federal question jurisdiction "only if federal jurisdiction is consistent with *congressional judgment* about the sound division of labor between state and federal courts governing the application of § 1331." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005) (emphasis added); *see also* Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 344 (2007) (discussing the *Grable* standard and its "sensitive balancing approach reflecting the delicate task at hand—that of allocating judicial power between separate sovereigns").

202. Act of June 29, 1906, ch. 3591, 34 Stat. 584 (codified as amended at 49 U.S.C. § 14706 (2000)).

a. The Carmack Amendment and Congressional Intent of Removability

The Carmack Amendment provides a federal cause of action under which a shipper may recover from the initial carrier for loss, delay, or damage to goods shipped in interstate commerce.[203] Despite containing a savings clause declaring that "nothing in this section shall deprive [a shipper of goods] of any remedy or right of action which he has under existing law,"[204] the Supreme Court has construed preemption by the Carmack Amendment very broadly and interpreted the savings clause as a virtual nullity.[205] Beginning in 1913 with *Adams Express Co. v. Croninger*,[206] the Court held that the Carmack Amendment "embraces the subject" of carrier liability and "supersedes all the regulations and policies [of the states] upon the same subject."[207] The Court subsequently held that "state laws have no

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203. *Id.* sec. 7, § 20, 34 Stat. at 595.

204. *Id.*

205. *See* Adams Express Co. v. Croninger, 226 U.S. 491, 507–08 (1913). According to the *Croninger* Court, the purpose of the Carmack Amendment was to create a uniform body of law as to carrier liability. *See id.* To allow applicability of diverse state laws and remedies would "cause the [savings] proviso to destroy the act itself." *Id.* Thus, the Court held that Congress intended only to save existing *federal* law—of which there was none, other than pre-*Erie* general federal common law—while superseding all state law, both common law and statutory. *See id.*

Contemporary commentators note that prior to *Croninger*, not a single court or commentator had so construed the savings clause; rather, all assumed Congress meant to preserve state substantive laws and remedies in favor of the shipper. *See, e.g.*, Wayland H. Sanford, *The Carmack Amendment in the State Courts*, 15 MICH. L. REV. 314, 314–15 (1917) ("It had been thought, both by state and by federal courts, that the proviso above quoted was intended to save to the shipper whatever rights he had under existing *state* law. . . . The decision in the *Croninger* case . . . came as a distinct surprise, and was subjected to not a little adverse criticism. . . ."); E.C.G., Note, *The Effect of the Carmack Amendment to the Hepburn Act upon State Laws as to Limitation by Contract of the Amount of the Liability of a Common Carrier*, 11 MICH. L. REV. 460, 461 (1913) ("[The Carmack savings clause] has frequently been considered by the courts, and heretofore the conclusion has *always* been reached that the very purpose of the proviso was to save to shippers in certain of the states . . . their more extensive rights against the carrier." (emphasis added)).

Further, contemporary accounts, including the only piece of legislative history from the initial enactment, *see* 40 CONG. REC. 9579, 9580 (1906) (statement of Rep. Richardson), indicate that the Carmack Amendment was not intended to occupy the field of carrier liability, but to address a particular problem by making the initial carrier liable for damages to a shipment and to avoid requiring the shipper to prove which particular carrier, among many in an interstate shipment, was at fault. *See* Atl. Coast Line R.R. Co. v. Riverside Mills, 219 U.S. 186, 200–01 (1911) (noting the problems of proof for a shipper and explaining that "[t]his *burdensome situation of the shipping public* in reference to interstate shipments over routes including separate lines of carriers *was the matter* which *Congress undertook to regulate*" in the Carmack Amendment and referencing the existing piece of legislative history in support of this assertion (emphasis added)); 3 DEWITT C. MOORE, A TREATISE ON THE LAW OF CARRIERS 1922 (2d ed. 1914) ("This *burdensome situation of the shippers* demanded regulation by Congress in the public interest." (emphasis added)); F.E. Riddle, *The Carmack Amendment to the Hepburn Law*, 14 OKLA. L.J. 9, 9 (1916) (arguing same).

206. 226 U.S. 491.

207. *Id.* at 505; *see also* Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597, 603 (1915) ("[T]he special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect

application [and] cannot be applied in coincidence with, as complementary to or as in opposition to" the Carmack Amendment.[208]

Prior to *Anderson*, United States Courts of Appeals that examined the Carmack Amendment under the *Taylor* test requiring clear congressional intent of removability determined that the Carmack Amendment did not give rise to complete preemption, because there was "no manifest congressional intent, of the type contemplated in *Taylor*, to make [allegedly preempted] state claim[s] removable to federal court."[209] District courts that examined whether congressional intent of removability existed similarly held that preemption by the Carmack Amendment did not give rise to removal by complete preemption.[210] Indeed, these cases are correct in so holding. For while it is often stated that the 1906 Carmack

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thereto, have been superseded." (quoting Mo., Kan. & Tex. Ry. Co. of Tex. v. Harris, 234 U.S. 412, 420 (1914)) (internal quotation marks omitted)).

208. Mo. Pac. R.R. Co. v. Porter, 273 U.S. 341, 346 (1927).

209. Beers v. N. Am. Van Lines, Inc., 836 F.2d 910, 913 n.3 (5th Cir. 1988); *see also* Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1183–85 (9th Cir. 2002) (forbidding removal where defendants had argued complete preemption of state law claims by the Airline Deregulation Act and the Carmack Amendment, and explaining that complete preemption required congressional intent not only to preempt state law "but also [intent] to *transfer jurisdiction* of the subject matter *from state to federal court*" (emphasis added)); Hunter v. United Van Lines, 746 F.2d 635, 639 (9th Cir. 1984) ("Until Congress changes [the well-pleaded complaint] rule, it will remain true that . . . defendants relying on federal law are not entitled to a federal forum unless the plaintiff also relies on federal law.").

Prior to *Taylor*, the Second Circuit impliedly found complete preemption under the Carmack Amendment in *North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 234 (2d Cir. 1978) (finding federal jurisdiction because plaintiff's state law claims were preempted by the Carmack Amendment). However, post-*Taylor*, the Second Circuit held that "there is no complete preemption without a clear statement to that effect from Congress." Marcus v. AT&T Corp., 138 F.3d 46, 55 (2d Cir. 1998). After *Marcus*, lower courts in the Second Circuit were split as to whether the Carmack Amendment gave rise to complete preemption. *Compare* Sorrentino v. Allied Van Lines, No. 3:01CV1449(AHN), 2002 WL 32107610, at *2 (D. Conn. Mar. 22, 2002) (following *North American* and finding complete preemption), *with* Ben & Jerry's Homemade, Inc. v. KLLM, Inc., 58 F. Supp. 2d 315, 318 (D. Vt. 1999) (applying *Taylor* and *Marcus* and finding no complete preemption because "Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court").

210. *See, e.g.*, Lamm v. Bekins Van Lines Co., 139 F. Supp. 2d 1300, 1308 (M.D. Ala. 2001) ("[N]othing in the amendment's language, legislative history, or surrounding legislative context manifests a specific congressional intent . . . to provide a federal defense to a state cause of action . . . [or] to grant a defendant the ability to remove the adjudication of the cause of action to a federal court . . . ." (quoting BLAB T.V. of Mobile, Inc. v. Comcast Cable Commc'ns, Inc., 182 F.3d 851, 857 (11th Cir. 1999)) (internal quotation marks omitted)); *id.* at 1309 ("[The Carmack] jurisdictional provisions . . . do not just fail to echo [section] 301 of the LMRA, they seem almost diametrically opposed to the jurisdictional language of the latter . . . ."); *see also Ben & Jerry's Homemade*, 58 F. Supp. 2d at 318 (finding no complete preemption because "Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court"); Circle Redmont, Inc. v. Mercer Transp. Co., 78 F. Supp. 2d 1316, 1319 (M.D. Fla. 1999) (holding that "the Carmack Amendment's language and history do not manifest an intent to make state law claims removable as Carmack claims" and finding no complete preemption); Simmer v. N.A. Van Lines, Inc., No. CIV.A. 98-T-665-N, 1998 WL 1754006, at *3 (M.D. Ala., July 31, 1998) (noting that federal courts lack even original jurisdiction over all Carmack claims, and the lack of such jurisdiction "undermines greatly" a finding of complete preemption).

Amendment has almost no legislative history,[211] which is fairly accurate, legislative history exists for other enactments of Congress that specifically limit federal court jurisdiction over Carmack Amendment claims. These provisions, as well as their legislative history, show a desire to limit removal of and federal jurisdiction over Carmack cases.

For example, 28 U.S.C. § 1445(b) prohibits removal of Carmack Amendment claims "unless the matter in controversy exceeds $10,000, exclusive of interest and costs."[212] The predecessor of this provision was enacted in 1914 as a result of small Carmack claims being removed to federal court.[213] At the time the Carmack Amendment was adopted in 1906, a jurisdictional amount existed for federal question jurisdiction.[214] Congress subsequently amended the judicial code to except cases "arising under any law regulating commerce" from the jurisdictional amount requirement.[215] In 1913, the Supreme Court in *Croninger* interpreted the Carmack Amendment as an "act[] of Congress regulating interstate commerce,"[216] which brought about removal of Carmack claims regardless of the amount in controversy.[217]

Congress reacted in 1914 by passing what became 28 U.S.C. § 1445(b), which prohibited removal of Carmack claims not reaching a jurisdictional amount.[218] The legislative history reveals that Congress approved of Carmack claims being "tried in the State where [the case] is brought, and tried to a final conclusion" in state

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211. *See, e.g.*, Hoskins v. Bekins Van Lines, 343 F.3d 769, 776 (5th Cir. 2003) ("The Carmack Amendment was adopted without discussion or debate." (quoting Rini v. United Van Lines, Inc., 104 F.3d 502, 504 (1st Cir. 1997)) (internal quotation marks omitted)); Gordon v. United Van Lines, Inc., 130 F.3d 282, 286 (7th Cir. 1997) ("There is virtually no legislative history for the statute . . . ."); Bear MGC Cutlery Co. v. Estes Express Lines, Inc., 132 F. Supp. 2d 937, 946 (N.D. Ala. 2001) ("[T]here is a dearth of legislative history surrounding the Carmack Amendment . . . .").

212. 28 U.S.C. § 1445(b) (2000). Section 1445(b) states in full that

> [a] civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under [§] 11706 or [§] 14706 of [T]itle 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

Id.

213. *See* Act of Jan. 20, 1914, ch. 11, 38 Stat. 278 (codified as amended at 28 U.S.C. § 1445(b)); 51 CONG. REC. 1544, 1545 (1914) (statement of Rep. Towner) ("All that is attempted to accomplish by these bills is to place the law in the condition it was intended and supposed to be—to prevent the right of transfer unless the amount in controversy exceeds $3,000 in all such cases.").

214. *See* Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 (setting the jurisdictional amount at $2,000).

215. *See* Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091–92.

216. Adams Express Co. v. Croninger, 226 U.S. 491, 500 (1913).

217. *See, e.g.*, McGoon v. N. Pac. Ry. Co., 204 F. 998, 1005 (D.N.D. 1913) ("The conclusion seems to me irresistible that the present suits arise under section 20 of the Interstate Commerce Act, and are, therefore, suits of which the federal courts would have had original jurisdiction, and were for the same reason properly removed under section 28 of the Judicial Code.").

218. *See* Act of Jan. 20, 1914, 38 Stat. at 278 (setting the jurisdictional amount at $3,000). The jurisdictional amount was initially set at $3,000 and later increased to $10,000 as jurisdictional amounts for diversity and federal question jurisdiction were increased. *See* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 9(b), 92 Stat. 1629, 1634 (codified as amended at 28 U.S.C. § 1445(b) (2000)).

court—even where the defendant wanted a federal forum and the complaint expressly relied on the Carmack Amendment.[219]

Congress provided several reasons for keeping smaller Carmack Amendment cases in state court, including avoiding a large docket shift from state to federal court and sparing the federal judiciary from the heavy caseload it would acquire—and had already started to acquire—by the potential removal of all Carmack cases to federal court.[220] Further, the legislative history demonstrates repeatedly that Congress never intended to bring about the removal of these smaller Carmack cases but intended the contemporary jurisdictional amount to keep such claims in state court.[221]

This legislative history is insightful because, under the then-existing judicial code, all claims under the Carmack Amendment would have been—and in fact briefly were—removable to federal court.[222] But Congress did not want all Carmack Amendment claims removable to federal court.[223] Rather, Congress adopted a jurisdictional amount specific to the Carmack Amendment to keep a sizable number of Carmack claims in state court and out of federal court.[224] While Congress did not address complete preemption—a doctrine that had not yet been formulated—Congress's strong assertion rings out: it did not want all Carmack Amendment claims removable to federal court but was perfectly happy to have state courts adjudicate—and thus determine the substantive preemption of—a large portion of claims arising under the Carmack Amendment.[225]

Another interesting point revealed by the legislative history is that Congress did not seem at the time to have any issue with the broad substantive preemption

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219. 51 CONG. REC. 1547 (1914) (statement of Rep. Borland); *see also* 51 CONG. REC. 1327 (1913) (statement of Sen. Shields) ("The object of this amendment is to prevent removals of these cases from the State courts where the amount involved is under $3,000[; rather, such cases] shall remain in the State courts, to be there finally determined.").

220. *See* H.R. REP. NO. 63-120, at 3 (1913) ("[H]undreds of cases, many of them involving small amounts, have been removed."); *id.* (noting that a railroad lawyer stated that more than 250 cases have been removed in the state of Iowa alone); *see also* 51 CONG. REC. 1547 (1914) (statement of Rep. Borland) ("[I]t is utterly impossible for the Federal courts, with the business they have, to try these little damage cases. These cases for damages in shipment have been accumulating rapidly in the Southwest and West . . . ."); *id.* (statement of Rep. Garner) ("[T]he Federal judges throughout the country are asking that this legislation be passed in order to relieve them of the litigation [that is removed to them.]"); *id.* (statement of Rep. Garner) ("Federal judges . . . have . . . stated that the law as it now stands was cluttering up their dockets . . . ."); 51 CONG. REC. 1544, 1545 (1914) (statement of Rep. Towner) ("Since [*McGoon* and *Croninger*,] hundreds of cases have been transferred where the amount in controversy was less than $3,000.").

221. *See, e.g.*, 51 CONG. REC. 1544, 1545 (1914) (statement of Rep. Towner) ("I think I am justified in saying that there was no intention or expectation of thus changing the law. No one thought at the time of its enactment that such an interpretation would be placed upon it. But nevertheless the condition exists and ought to be remedied."); *see also* H.R. REP. NO. 63-120, at 2 ("It is not likely the effect was intended which a literal application of this latest utterance of the legislative power gives.").

222. *See* Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091–92 (providing the district courts with original jurisdiction for "all suits and proceedings arising under any law regulating commerce").

223. *See supra* notes 218–21 and accompanying text.

224. *See* Act of Jan. 20, 1914, ch. 11, 38 Stat. 278.

225. *See supra* notes 218–21 and accompanying text.

announced by the Supreme Court in *Croninger*.[226] Congress referred to this construction in passing and seemed content with this aspect[227] of the Supreme Court's interpretation of the statute.[228] Nevertheless, the legislative history reveals that post-*Croninger*, Congress concerned itself with—and saw an urgent need to "remedy"—the *jurisdictional* consequences of the *Croninger* decision resulting in all Carmack Amendment claims being removable to federal court.[229] Again, this demonstrates that Congress can intend (or at least recognize) a very broad preemptive purpose eliminating nearly all state causes of action and replacing them with a federal cause of action, and yet at the same time Congress may determine that it does not want such cases to be removable to federal court and that it trusts the state courts to handle the preemption determination.

The question of jurisdiction over Carmack claims arose again in 1977, when Congress passed what is now 28 U.S.C. § 1337 (2000).[230] While § 1445(b) prohibits removal jurisdiction over Carmack claims for less than $10,000,[231] § 1337 prohibits original jurisdiction over Carmack claims unless the amount in controversy is over $10,000.[232] Notably, Congress enacted § 1337 with a jurisdictional amount stricter than other amount restrictions.[233] Section 1337 prohibits aggregation of claims against a carrier—even by the same plaintiff against the same defendant; rather, the amount for each bill of lading has to encompass $10,000 or more.[234] The legislative history shows that § 1337 was enacted in response to original federal filings of small Carmack claims, resulting in an inundation of a particular federal district with Carmack claims,[235] which Congress feared could happen "in almost any

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226. *See, e.g.*, H.R. REP. NO. 63-120, at 2–3 (noting that the *Croninger* interpretation of the Carmack Amendment "abrogates all State and common law liabilities on interstate shipments of property," and expressing concern with the jurisdictional consequences of *Croninger* but indicating no concern with the Supreme Court's interpretation of the breadth of Carmack preemption); 51 CONG. REC. 1544, 1545 (1914) (statement of Rep. Towner) (explaining the *Croninger* interpretation of the Carmack Amendment but emphasizing only that it resulted in cases being construed as arising "under the law regulating commerce," which in turn made Carmack claims removable).

227. Congress demonstrated its disapproval of another aspect of the *Croninger* interpretation by passing the Cummins Act the following year to overturn the Supreme Court's ruling regarding a carrier's ability to limit its liability. *See* Cummins Act of 1915, chap. 176, § 1, 38 Stat. 1196, 1197.

228. *See supra* note 226 and accompanying text.

229. *See, e.g.*, 51 CONG. REC. 1544, 1545 (1914) (statement of Rep. Towner) ("I think I am justified in saying that there was no intention or expectation of thus changing the law. No one thought at the time of its enactment that such an interpretation would be placed upon it. But nevertheless the condition exists and ought to be remedied."); H.R. REP. NO. 63-120, at 4 (determining that automatic removal of Carmack claims to federal court created hardship on both plaintiffs and carriers, which created an urgent need for a jurisdictional amount limitation).

230. *See* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 9(a), 92 Stat. 1629, 1633–34.

231. 28 U.S.C. § 1445(b) (2000).

232. *Id.* § 1337(a).

233. *See id.* ("The district courts shall have original jurisdiction . . . only if the matter in controversy *for each receipt or bill of lading* exceeds $10,000 . . . ." (emphasis added)).

234. *See id.*

235. By 1977 the District of Massachusetts had "the highest per judgeship pending civil caseload among the 94 district courts, 1,737 [as] compared to 278, for the 93 other district courts," because of original Carmack claims filed in federal court. *See* S. REP. NO. 95-117, at 50 (1977), *as reprinted in*

metropolitan area."[236] Further, testimony in congressional hearings indicated that federal judicial expertise was not needed for these claims.[237]

As demonstrated by the express provisions of §§ 1337 and 1445 and their legislative histories, Congress has shown no desire to move Carmack Amendment cases from state to federal court or to take the preemption question away from state courts.[238] Indeed, Congress has expressly denied federal courts both original and removal jurisdiction over a substantial number of Carmack claims, leaving such claims within the exclusive jurisdiction of state courts.[239]

It could be argued that these provisions and their legislative histories merely show that Congress is content with allowing state courts to adjudicate Carmack claims actually asserted as such by plaintiffs, yet Congress is not comfortable with allowing state courts to adjudicate Carmack *preemption defenses* to state law claims. Nevertheless, there certainly have been no congressional manifestations that a Carmack preemption defense should be removable as required by *Taylor*[240]—even assuming that §§ 1337 and 1445 fail to indicate a contrary manifestation. Further, the major cases regarding Carmack substantive preemption typically include actually-asserted Carmack claims as well as state law claims, because plaintiffs with a valid Carmack claim usually assert multiple federal and state claims.[241] Particularly where a plaintiff is attempting to recover mental, emotional, or punitive damages, which are not recoverable under the Carmack Amendment, the plaintiff is likely to assert state law claims that would allow such damages in addition to an express Carmack claim.[242] Thus, limits on removal and original jurisdiction as to expressly-asserted Carmack claims also leave to state courts the adjudication of federal preemption defenses to the state claims that are joined with a federal Carmack claim. Indeed, such a scenario may be more likely with small Carmack

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1978 U.S.C.C.A.N. 3569, 3613. Indeed, "Carmack [A]mendment cases represented 64 percent of the pending cases in Massachusetts." *Id.*

236. *Limitation of Federal Jurisdiction of Freight Damage Claims: Hearing on S. 346 Before the S. Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 94th Cong. 1 (1975) [hereinafter *1975 Hearing*] (introductory statement of Sen. Burdick).

237. *See id.* at 33 (testimony of C.J. Andrew A. Caffrey). Chief Judge Caffrey of the United States District Court for the District of Massachusetts stated, "These cases do not involve sophisticated or difficult legal ruling by any judge of our court [and] do not need Federal judge expertise." *Id.* Judge Caffrey further contended that "these cases are perfectly adequate for State courts and they are in State courts in all the other 49 States, which puts to rest any question that this type [of] litigation cannot be handled by State courts." *Id.*

238. *See supra* text accompanying notes 218–29.

239. In the legislative histories for §§ 1337 and 1445, Congress noted the large number of cases adjudicated in federal court that would be restricted to state courts after the amendments. *See supra* notes 220, 235 and accompanying text.

240. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987).

241. *See, e.g.*, Gordon v. United Van Lines, Inc., 130 F.3d 282, 285 (7th Cir. 1997) (listing the plaintiff's claims, which included claims arising under the Carmack Amendment as well as multiple state law claims); Rini v. United Van Lines, Inc., 104 F.3d 502, 503 (1st Cir. 1997) (same); Hunter v. United Van Lines, 746 F.2d 635, 638 (9th Cir. 1984) (same).

242. *See, e.g.*, *Gordon*, 130 F.3d at 285 (alleging intentional infliction of emotional distress in addition to claims under the Carmack Amendment); *Rini*, 104 F.3d at 503 (same).

claims because plaintiffs will want to increase damages by asserting other state law claims that might provide a greater recovery, and defendants will not be able to remove because of the jurisdictional amount for the federal Carmack claim.[243] For small Carmack claims, the state courts are thus left with exclusive jurisdiction in making the substantive preemption determination, and for all others, the state court is provided with express concurrent jurisdiction to make such a determination.

Additionally, the jurisdictional provisions of both the LMRA and ERISA expressly exempted the statutes from the then-existing federal question jurisdictional amount that otherwise would have applied.[244] In *Taylor*, the similarities of these jurisdictional provisions—both of which provide federal jurisdiction "without respect to the amount in controversy or the citizenship of the parties"[245]—led the Court to find clear congressional intent of removability.[246] In stark contrast, the jurisdictional provisions surrounding the Carmack Amendment contain an amount in controversy requirement where none would otherwise exist.[247] Further, Congress retained the specific jurisdictional amount limitations over Carmack Amendment claims even after eliminating the jurisdictional amount requirement for general federal question jurisdiction.[248] Under a *Taylor* analysis, then, there is no congressional intent—clear or otherwise—of removability of Carmack preemption defenses; instead, there is the opposite.[249]

Moreover, the fact that Congress exempted the LMRA and ERISA from the then-existing amount in controversy restrictions on federal question jurisdiction may indeed indicate a specific desire as to those statutes to avoid state court hostility, to promote uniformity, or to employ the federal law expertise of a federal judiciary. However, when Congress imposes extra restrictions on federal court

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243. *See, e.g.*, *Hunter*, 746 F.2d at 648–52 (finding no removal jurisdiction where plaintiffs brought a low-dollar Carmack claim and high-dollar state law claims for fraud, bad faith, and intentional infliction of emotional distress, because the state claims could not be aggregated with the Carmack claim, and remanding the preemption defense of the high-dollar state claims by the low-dollar Carmack claim for adjudication in state court).

244. *See* 29 U.S.C. § 185(a) (2000); 29 U.S.C. § 1132(f) (2000). When the LMRA and ERISA were enacted, a jurisdictional amount existed for general federal question jurisdiction, which was later eliminated. *See infra* note 247.

245. *Taylor*, 481 U.S. at 65 (quoting 29 U.S.C. § 1132(f)).

246. *See id.* at 65–66.

247. *Compare* 28 U.S.C. § 1337(a) (2000) (limiting federal question jurisdiction in Carmack cases to only those cases where "the matter in controversy for each receipt or bill of lading exceeds $10,000"), *and* 28 U.S.C. § 1445(b) (2000) (forbidding removal of Carmack claims "unless the matter in controversy exceeds $10,000"), *with* 29 U.S.C. § 185(a) (2000) (exempting claims brought under the LMRA from any jurisdictional amount requirement), *and* 29 U.S.C. § 1132(f) (2000) (exempting claims brought under ERISA from any jurisdictional amount requirement).

248. In 1980, Congress amended § 1331 to eliminate the jurisdictional amount for federal question jurisdiction. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, sec. 2, § 1331, 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331) (striking the jurisdictional amount for general federal question jurisdiction). However, Congress chose not to change § 1337 or § 1445, retaining a jurisdictional amount on original and removal jurisdiction over Carmack Amendment claims. *See* 28 U.S.C. § 1337(a); 28 U.S.C. § 1445(b).

249. *See supra* note 247 and accompanying text.

jurisdiction for a specific federal statute—as it imposed for Carmack claims—resulting in exclusive state court jurisdiction for many claims arising under that statute, it is difficult to conceive that Congress is seriously concerned with problems of judicial uniformity or state court hostility and error, or that it recognizes a need for federal-court expertise for that statute. Thus, tying complete preemption to congressional intent of removability may have the added benefit of supplying the uniform, sympathetic, and expert adjudication offered by the federal judiciary when it is most needed, and correspondingly, as with Carmack claims, denying or limiting access to that resource when Congress determines that it is not needed.

b. Complete Preemption by the Carmack Amendment Under Anderson

After *Anderson*, both the Fifth and Ninth Circuits have overturned their prior decisions and found complete preemption for state law claims preempted by the Carmack Amendment. In *Hoskins v. Bekins Van Lines*,[250] the Fifth Circuit held that *Anderson* "overruled the analysis used in *Beers* to reject the complete pre-emptive effect of the Carmack Amendment."[251] The *Hoskins* court held the dispositive inquiry to be "whether Congress intended the Carmack Amendment to provide the *exclusive* cause of action for claims arising out of the interstate transportation of goods by a common carrier."[252] Failing entirely to analyze the language of the statute itself (and stating that there was no legislative history[253]), the court examined early-twentieth century decisions of the Supreme Court, including *Croninger*,[254] and cases from the Fifth Circuit[255] that discussed the broad preemptive scope of the Carmack Amendment. The court then concluded that "*Congress intended* for the Carmack [A]mendment to provide *the exclusive cause of action for loss or damages to goods*"; therefore, "the complete preemption doctrine applies."[256]

Interestingly, the *Hoskins* court recognized that § 1445 prohibited the removal of Carmack claims unless a jurisdictional amount was reached and that 49 U.S.C. § 14706(d)(3) expressly provided for concurrent jurisdiction for larger Carmack

250. 343 F.3d 769 (5th Cir. 2003).

251. *Id.* at 775.

252. *Id.* at 776.

253. *See id.* ("[T]he Carmack Amendment was adopted without discussion or debate." (quoting Rini v. United Van Lines, 104 F.3d 502, 504 (1st Cir. 1997)) (alteration in original) (internal quotation marks omitted)).

254. *See id.* at 776–77 (discussing Supreme Court cases decided between 1913 and 1953). The Supreme Court decided all of the Carmack cases relied on by the *Hoskins* court well before *Avco* created the complete preemption doctrine in 1968. *See* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968).

255. *See Hoskins*, 343 F.3d at 777 (citing Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 379 (5th Cir. 2003); Moffit v. Bekins Van Lines Co., 6 F.3d 305, 307 (5th Cir. 1993); Air Prods. & Chems., Inc. v. Ill. Cent. Gulf R.R. Co., 721 F.3d 483, 487 (5th Cir. 1983)) (discussing the Fifth Circuit's broad construction of Carmack preemption).

256. *Id.* at 778 (first emphasis added).

claims.[257] Yet the court viewed these congressional enactments as immaterial to the complete preemption inquiry:

> Although both of these facts may have been *relevant to an analysis of whether Congress intended* for Carmack claims *to be removable*, they have *no bearing on the salient issue* today, *i.e.* whether Congress intended the Carmack Amendment to provide the exclusive cause of action for claims for loss or damage to goods arising from the interstate transportation of those goods by a common carrier.[258]

Similarly, the Ninth Circuit, in *Hall v. North American Van Lines, Inc.*,[259] held that a plaintiff's state law claims were completely preempted by the Carmack Amendment.[260] Quoting *Anderson*'s test for complete preemption,[261] the *Hall* court reviewed judicial precedent and concluded that it was "well settled that the Carmack Amendment is the exclusive cause of action for interstate-shipping contract claims alleging loss or damage to property."[262] The *Hall* court then examined Hall's state law claims and concluded that her breach of contract claim fell within Carmack complete preemption.[263] Having found one completely preempted claim, the Ninth Circuit asserted supplemental jurisdiction over the remaining state claims and similarly held that Hall's claims for fraud and conversion were preempted by the Carmack Amendment.[264] Further, because the plaintiff had refused to amend her complaint after removal to federal court to expressly add a Carmack claim (which would have been barred under a contractual

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257. *Id.* at 778 n.7 ("A civil action under this section may be brought in a United States district court or in a State court." (quoting 49 U.S.C. § 14706(d)(3) (2000)) (internal quotation marks omitted)).

258. *Id.* (emphasis added).

259. 476 F.3d 683 (9th Cir. 2007).

260. *Id.* at 689–90. Hall contracted with the defendants to ship her household goods from San Francisco, California, to Montana for the price of $6,144, which was to be paid when the goods arrived. *Id.* at 685. Hall moved to Montana, but her household goods failed to arrive. *Id.* She contacted the defendants, who told her that they had put her goods into storage and would not release them until she paid them $9,000. *Id.* She paid the $9,000. *Id.* After another fourteen months passed, defendants demanded that Hall pay an additional $18,000. *Id.* Hall refused to pay the $18,000, returned to San Francisco where her goods were being held and was able to get the defendants to release the goods for an additional $4,612. *Id.* at 685–86. In total, Hall paid nearly $14,000 (although she had contracted to pay approximately $6,000), she was without her household goods for well over a year, and the defendants never shipped the goods to her, forcing her to return to California and move the goods herself. *Id.* at 686.

261. *See id.* at 687 ("The Carriers argue that the Carmack Amendment is among the few statutes that completely preempt well-pleaded state claims by provid[ing] the exclusive cause of action for the claim asserted and also set[ting] forth procedures and remedies governing that cause of action." (citation and footnote omitted) (quoting Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003)) (internal quotation marks omitted)).

262. *Id.* at 688.

263. *Id.*

264. *Id.* at 689.

limitations period of nine months[265]), the Ninth Circuit upheld the district court's dismissal of the case with prejudice.[266]

Taking the *Anderson* test at face value, where Carmack preemption is defined broadly to preempt any state law claims arising out of a shipper-carrier relationship, courts will inevitably find complete preemption, as did the Fifth and Ninth Circuits, because the Carmack Amendment will always provide the exclusive cause of action. Even for courts that do not construe Carmack preemption as broadly, removal will still be likely and the determination of the propriety of removal will require a full substantive preemption analysis. Indeed, courts need only find one claim completely preempted in order to assume jurisdiction over the plaintiff's other state law claims under supplemental jurisdiction.[267]

Other proposed tests for complete preemption would similarly result in removal of Carmack preemption defenses. Obviously, if removal is allowed for any federal preemption defense, then there would be removal of Carmack defenses.[268] Scholars recommending complete preemption whenever a federal cause of action preempts a state cause of action essentially adopt the *Anderson* approach.[269] Although *Anderson* uses the phrase "exclusive cause of action,"[270] a federal cause of action is exclusive whenever it nullifies the alleged state law cause of action. Professor Twitchell's detailed framework for determining preemption is preferable to the *Anderson* rule because her approach delays a federal court's undertaking of a full substantive preemption analysis until other questions indicate that preemption is likely.[271] Nevertheless, because the Carmack Amendment provides a federal cause of action and preemption is generally arguable, a full substantive preemption analysis is inevitably required to determine the propriety of removal in a given Carmack preemption case—even under Professor Twitchell's approach.[272]

Professor Seinfeld's proposed test—basing complete preemption on the breadth of substantive preemption[273]—would result in a similar fate for state law claims allegedly preempted by the Carmack Amendment. As noted above, the preemptive

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265. The Carmack Amendment allows a carrier to limit its liability by requiring the plaintiff to file a claim within nine months of the incident. *See* 49 U.S.C. § 14706(e)(1) (2000). Hall failed to make her claim within the nine month contractual limitations period and declined to amend her complaint even after the district court granted her leave to do so. *Hall*, 476 F.3d at 686. Thus, the district court held, as an alternative basis for dismissing Hall's case, that even if Hall had asserted a claim under the Carmack Amendment, it would be barred by the contractual limitations period. *See id.* at 686, 690 n.9.

266. *See id.* at 690 & n.9.

267. *See Hall*, 476 F.3d at 689.

268. *See supra* Part IV.

269. However, as with *Anderson*, this test may require a federal court to perform a substantive preemption analysis to determine its jurisdiction. For example, under Professor Jordan's proposal, removal would be proper only if the state law claim is preempted. *See* Jordan, *supra* note 165, at 984 (describing a proposed two-pronged analysis).

270. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

271. *See supra* text accompanying notes 169–74.

272. *See* Twitchell, *supra* note 169, at 864–65 (describing a three-prong analysis to determine complete preemption); *see supra* text accompanying notes 169–74 (providing a detailed description of Professor Twitchell's approach).

273. *See supra* notes 175–81 and accompanying text.

scope of the Carmack Amendment has been construed to be exceptionally broad and to "supersede[] all the regulations and policies of [the states] upon the same subject."[274] Even among circuits that recognize exceptions to Carmack preemption, the exceptions are generally narrowly drawn and narrowly applied.[275] Professor Seinfeld would allow federal defense removal whenever "supplementary state legislation is prohibited."[276] Thus, the Carmack Amendment would clearly fall within the complete preemption rule advocated by Professor Seinfeld.

As exemplified by the Carmack Amendment, the complete preemption rule of *Anderson*, as well as other tests proposed by scholars, results in jurisdiction at odds with congressional allocation of judicial power. Congress has made no indication that it desires to remove Carmack preemption determinations from state courts (indeed, both statutory provisions and legislative history reveal congressional designs to *limit* federal jurisdiction over Carmack cases),[277] and yet the *Anderson* test produces removal jurisdiction for Carmack preemption defenses. This result is not peculiar to the Carmack Amendment, but occurred in *Anderson* itself,[278] and will surely arise in other contexts. Allowing removal in such circumstances is contrary to separation of the legislative and judicial powers and to the role of Congress in delineating the jurisdiction of the lower federal courts.

2. *Judicial Interpretation as the Basis for Determining Judicial Power*

As explained in *Cary v. Curtis*,[279] to deny the congressional role in defining lower federal court jurisdiction "would be to elevate the judicial over the legislative branch of the government, and to give to the former *powers limited by its own discretion* merely."[280] Thus, the "jurisdiction of the federal courts is carefully *guarded against expansion by judicial interpretation*."[281] As noted above, "expansion [of federal jurisdiction] by judicial interpretation"[282] is precisely the result of the *Anderson* rule as well as Professor Seinfeld's proposal to allow removal based on the breadth of preemption. The *Anderson* test, as well as Professor Seinfeld's proposal, gives the federal judiciary the ability to expand its own jurisdiction by construing federal preemption more broadly.

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274. Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1913).

275. *See infra* notes 294–97 (discussing the application of tests used to determine complete preemption in the First, Seventh, and Eleventh Circuits).

276. *See* Seinfeld, *supra* note 14, at 576–77.

277. *See* discussion *supra* Part V.A.1.a.

278. As noted, *see supra* text accompanying notes 92–93, soon after enacting the NBA, Congress expressly provided for removal on the basis of a federal defense for all nationally chartered corporations *except national banks*. *See* Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226, 227. The *Anderson* Court, like the court in *Hoskins*, stated that arguments regarding such jurisdictional enactments were "irrelevant" to determining removal jurisdiction and allowed removal because the NBA claim was exclusive. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 n.5 (2003).

279. 44 U.S. 236 (1845).

280. *Id.* at 245 (emphasis added).

281. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951) (emphasis added).

282. *Id.*

Also noticeable in *Anderson*—and in the Carmack Amendment cases that followed—is the fact that the Court did not examine the statute or any legislative history to determine if Congress intended to create an exclusive cause of action.[283] Notably, none of the recent cases finding complete preemption for the Carmack Amendment have examined the savings clause to the statute or other statutory provisions.[284] Rather, the determination of congressional intent has been based entirely on judicial decisions regarding the breadth of federal Carmack preemption.[285]

Of course, there is nothing illegitimate with federal courts interpreting the scope of federal preemption in general and as applied to specific state law claims; indeed, it is a judicial function to undertake such statutory interpretation,[286] especially where the statute's preemptive scope as enacted by Congress is unclear.[287] The quandary is that federal courts will be looking at the scope of substantive preemption to determine *jurisdiction* as opposed to determining substantive preemption, which is problematic for several reasons. First, by looking to the scope of substantive preemption—as required by *Anderson*—to determine federal jurisdiction, courts will be relying on a factor that does not accurately demonstrate congressional intent to confer or deny removal jurisdiction on the basis of a preemption defense. Second, by looking to the scope of substantive preemption, courts will need to rely more on judicial pronouncements and less on statements from Congress itself. For example, courts that have applied *Taylor*—looking for clear congressional intent of removability—generally have examined congressional enactments regarding jurisdiction and the history thereof, and have not needed to examine judicial pronouncements.[288] Indeed, the focus on jurisdictional enactments and congressional history under a *Taylor* analysis is

283. *See supra* text accompanying notes 109–16.

284. *See supra* text accompanying notes 250–67.

285. *See id.*

286. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

287. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) (noting that state action may be preempted "by implication from the depth and breadth of a congressional scheme that occupies the legislative field, . . . or by implication because of a conflict with a congressional enactment"); Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) ("Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred.").

288. *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (examining the jurisdictional provisions of ERISA and its legislative history to find clear congressional intent of removability); Rosciszewski v. Arete Assocs., Inc., 1 F.3d 225, 232 (4th Cir. 1993) (examining the provisions and legislative history of the Copyright Act and concluding that "[t]he grant of exclusive jurisdiction to the federal district courts over civil actions arising under the Copyright Act, combined with the preemptive force of § 301(a), compels the conclusion that Congress intended that state law actions preempted by § 301(a) of the Copyright Act arise under federal law"); Anderson v. H&R Block, Inc., 287 F.3d 1038, 1045–46 (11th Cir. 2002) (examining the legislative history and jurisdictional provisions surrounding the enactment of the NBA and finding a lack of "clear congressional intent to make claims under the NBA removable"), *rev'd sub nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

exemplified in *Taylor* itself,[289] as well as in the Fourth Circuit's *Rosciszewski* decision examining the Copyright Act,[290] and in the Eleventh Circuit's reversed *Anderson* opinion.[291] In contrast, by determining jurisdiction by the scope of substantive preemption and the analysis of a particular state law cause of action, courts often will be required to rely on judicial pronouncements as to the scope of preemption. Moreover, judicial pronouncements as to the scope of substantive federal preemption over specific state law claims will vary from circuit to circuit, in contrast to congressional jurisdictional enactments and history, which remain the same; consequently, such judicial pronouncements will broaden or narrow federal jurisdiction depending on the federal court's construction as to the reach of federal substantive law.

Returning to the Carmack Amendment as a case in point, there is significant variation among the federal courts as to the scope of Carmack preemption over state law.[292] Some of the federal circuits, usually quoting and relying heavily on *Croninger*, have found that the Carmack Amendment preempts all state common law and statutory claims that relate in any way to the carrier-shipper relationship.[293] Other federal courts have held that state law claims based on a separate and independent injury[294]—or, alternatively, based on separate conduct[295]—from any damage to, loss of, or delay of the shipped goods escape preemption by the Carmack Amendment. Consequently, federal courts that define Carmack substantive preemption more broadly will, under *Anderson*, find federal jurisdiction under the complete preemption doctrine more often. Even assuming a uniform rule

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289. *See Taylor*, 481 U.S. at 65–67.

290. *Rosciszewski*, 1 F.3d at 232–33.

291. *Anderson*, 287 F.3d at 1045–47.

292. *See* Lamm v. Bekins Van Lines Co., 139 F. Supp. 2d 1300, 1312 (M.D. Ala. 2001) ("[T]here is a wide range of opinion among the appellate and trial courts about the scope of the Carmack Amendment's ordinary preemption of state common law-claims.").

293. *See, e.g.*, Hall v. N. Am. Van Lines, Inc., 476 F.3d 683, 689 (9th Cir. 2007) ("It is well settled that the Carmack Amendment constitutes a complete defense to common law claims alleging all manner of harms."); Hoskins v. Bekins Van Lines, 343 F.3d 769, 776–8 (5th Cir. 2003) (examining the breadth of Carmack Amendment preemption over common law claims and remedies and concluding that the Carmack Amendment "provide[s] the exclusive cause of action for loss or damage to goods arising from the interstate transportation of those goods by a common carrier" (emphasis omitted)); Hopper Furs, Inc. v. Emery Air Freight Corp., 749 F.2d 1261, 1264 (8th Cir. 1984) (citing Se. Express Co. v. Pastime Amusement Co., 299 U.S. 28, 30 (1936)) ("All actions against a common carrier, whether designated as tort or contract actions, are governed by the federal statute . . . ."); Duerrmeyer v. Alamo Moving & Storage One, Corp., 49 F. Supp. 2d 934, 936–37 (W.D. Tex. 1999) (finding substantive preemption of "state court causes of action, whether based in contract or tort, seek[ing] damages *flowing from* the shipping contract" (emphasis added)).

294. *See, e.g.*, Gordon v. United Van Lines, Inc., 130 F.3d 282, 284 (7th Cir. 1997) ("[C]laims involving a separate and independently actionable harm to the shipper distinct from [loss or damage to goods] are not preempted."); Rini v. United Van Lines, Inc. 104 F.3d 502, 506 (1st Cir. 1997) (stating that if the plaintiff had prevailed on her intentional infliction of emotional distress claim, "it would not have been preempted").

295. *See, e.g.*, Smith v. United Parcel Serv., 296 F.3d 1244, 1249 (11th Cir. 2002) ("[S]eparate and distinct conduct rather than injury must exist for a claim to fall outside the preemptive scope of the Carmack Amendment.").

or interpretation by the Supreme Court, the broader the Court construes federal substantive preemption in an area, the larger it will define federal court jurisdiction over state law claims brought in state court.

Further, the variation among the federal courts as to the scope of Carmack preemption will lead to a variation in whether federal jurisdiction will exist over the same claims. In certain circuits (such as the Fifth or Ninth), state law claims for fraud and intentional infliction of emotional distress will be completely preempted by the Carmack Amendment and will be removable to federal court—even if the shipper alleges no loss or damage to property.[296] In other circuits (such as the First, Seventh, or Eleventh), the law will be unclear and will require a case-specific substantive preemption analysis by the federal court to determine whether the alleged claim is preempted by the Carmack Amendment and thus within federal removal jurisdiction.[297] Notably, the varying results among these circuits will not correlate to a legitimate difference between the scope of the state law claims being preempted. The same state laws, aimed at the same conduct and policies, would be preempted in the Fifth Circuit while perhaps escaping preemption in the Eleventh Circuit.[298] Thus, there would be federal jurisdiction in the Fifth Circuit but not in the Eleventh. In theory, the Supreme Court could eventually resolve jurisdictional variations. But such a resolution would have to be done on a federal-statute-by-federal-statute (as in, is there complete preemption by the Carmack Amendment as opposed to other federal statutes?), state-claim-by-state-claim (assuming there is complete preemption under the Carmack Amendment, does it apply to preempt these specific state law claims?), case-by-case (under the facts of this case, is there

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296. *See* discussion *supra* Part V.A.1.b.

297. For example, in *Rini*, 104 F.3d 502, a case dealing solely with substantive Carmack preemption, the First Circuit held that state law claims are preempted when they "impose liability on carriers *based on the loss or damage of shipped goods*" but are not preempted if increased liability is based on "an injury separate and apart from the loss or damage of goods." *Id.* at 506. The Seventh Circuit has adopted a similar test. *See, e.g.*, *Gordon*, 130 F.3d at 284 ("[C]laims involving a separate and independently actionable harm to the shipper distinct from such damage are not preempted [by the Carmack Amendment]."). While sounding straightforward, the application of these tests requires a fact-specific inquiry into the harms alleged and the recovery sought. Indeed, in *Rini* itself, it would appear that the plaintiff's claims for misrepresentation and deceptive trade practices, which the district court and a jury had found valid, would certainly entail injuries "separate and apart from the loss or damage of goods." 104 F.3d at 506. Yet the First Circuit held that "the state law claims at issue *all stem from* the loss of goods"; "involve no injury save the loss of property"; and were thus preempted by the Carmack Amendment—which lowered the plaintiff's damages from $350,000 to $50,000. *Id.* (emphasis added).

The Eleventh Circuit's test for substantive preemption under the Carmack Amendment is distinct from that employed by the First and Seventh Circuits. In *Smith*, 296 F.3d 1244, the Eleventh Circuit held that state law claims may avoid Carmack preemption only if the claim is "based on *conduct* separate and distinct from the delivery, loss of, or damage to goods . . . . In other words, separate and distinct *conduct* rather than *injury* must exist for a claim to fall outside the preemptive scope of the Carmack Amendment." *Id.* at 1249 (emphasis added). Again, under this test, a fact-intensive inquiry into the alleged conduct is required.

298. Such a result is distinct from the one discussed below where courts of two different states define facially similar state laws differently, and one state determines there is preemption by a federal law while another does not. *See* discussion *infra* Part V.B.1.

Carmack preemption?) basis—and that is hardly a desirable method for determining federal court jurisdiction.

Reliance on congressional intent of removability avoids these problems. A federal court can determine its own jurisdiction by looking to statements of Congress, in the statute itself, or in reliable legislative history. Consequently, a federal court's jurisdiction is not based on the court's own interpretation of the breadth of federal preemption but is based on whether Congress deems the state courts inadequate to deal with preemption determinations or sees a special need for the independence and expertise of the federal judiciary.

3. *Superiority of Congress to Make Jurisdictional Allocations*

The generally recognized purposes of federal court jurisdiction over questions of federal law are to promote uniformity of federal law, to secure decisions sympathetic to federal law and not subject to state court hostility, and to utilize the expertise of the federal judiciary in areas of federal law.[299] Notably, Congress may determine that the purposes of federal jurisdiction are particularly important for certain legislation and less important—perhaps not requisite—for others.

In fact, Congress has determined that certain federal defenses should give rise to removal jurisdiction. For the Price-Anderson Act and the Securities Litigation Uniform Standards Act (SLUSA), Congress has expressly allowed removal on the basis of a federal defense.[300] Further, through legislative history and adoption of jurisdictional language parallel to the LMRA, Congress has similarly provided for removal of claims preempted by section 502(a) of ERISA.[301] These are all examples where Congress has determined that the defendant should be able to adjudicate his federal defenses in federal court. For other federal statutes, Congress has provided exclusive federal jurisdiction,[302] and for the majority of statutes, it provides

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299. *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 514 (Brennan, J., dissenting) (stating that the grant of federal question jurisdiction "was designed to preserve and enhance the expertise of federal courts in applying federal law; to achieve greater uniformity of results" and provide a forum "likely to apply federal law sympathetically" (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816))).

300. Under the Price-Anderson Act, "any public liability action," 42 U.S.C. § 2210(n)(2) (2000), (which, in turn is defined as "any suit," *id.* § 2014(hh), asserting "any legal liability [based on state or federal law] arising out of or resulting from a nuclear incident or precautionary evacuation," *id.* § 2014(w)), filed in state court, "[u]pon motion of the defendant . . . , shall be removed or transferred to the United States district court," *id.* § 2210(n)(2); *see also id.* § 2014(hh) ("A public liability action shall be deemed to be an action arising under [§] 2210 of this title . . . .").

SLUSA likewise provides as follows: "Any covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c) (2000). As explained by the Supreme Court, SLUSA does not involve typical preemption because it "does not itself displace state law with federal law but makes some state-law claims nonactionable through the class action device in federal as well as state court." Kircher v. Putnam Funds Trust, 126 S. Ct. 2145, 2150 n.1 (2006).

301. *See* discussion *supra* Part III.A.2.

302. *See, e.g.*, 28 U.S.C. § 1338 (2000) (providing federal jurisdiction that is "exclusive of the courts of the states in patent, plant variety protection and copyright cases").

concurrent jurisdiction without defensive removal.[303] Apparently, Congress does not see the need for federal adjudication as being equal for all federal statutes or preemption defenses.

While not dealing with complete preemption, *Mitchum v. Foster*[304] provides an example of a situation where Congress intended to vest the federal courts with power to take jurisdiction from the state courts.[305] In *Mitchum*, the Supreme Court held that the Anti-Injunction Act did not prohibit a federal court from enjoining a state court proceeding under 42 U.S.C. § 1983.[306] The Court examined the language and legislative history of § 1983 and determined that Congress intended § 1983 "to enforce . . . the Fourteenth Amendment" against executive, legislative, or judicial state action.[307] Indeed, the legislative history revealed that "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights"[308] and that Congress "was concerned that state instrumentalities [including courts] could not protect those rights."[309]

In circumstances such as those involved in *Mitchum*, where state courts have demonstrated hostility to enforcing federally protected rights, Congress can appropriately determine any heightened need for federal adjudication. Importantly, unlike Congress, the judiciary has no ability to hold hearings or make determinations as to whether there is a problem with state court adjudication of particular federal laws on a national level. Courts are limited to the facts before them, which may or may not reflect an overall problem with state court adjudication of a particular area of federal law. Indeed, as to the Carmack Amendment, the congressional hearings and legislative history indicate that there has not been a problem with state court adjudication of federal law, that state courts are competent to determine the cases, and that limited—rather than expanded—federal jurisdiction over such cases is requisite.[310]

Nevertheless, a major justification for expanding complete preemption is the fear that state courts will prefer state law over federal law or will err in making a preemption determination.[311] But complete preemption under *Anderson* provides a

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303. *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990) (concluding that "Congress did not divest the state courts of their concurrent authority to adjudicate federal claims" under title VII of the Civil Rights Act of 1964); *see also* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) ("In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction.").

304. 407 U.S. 225 (1972).

305. *See id.* at 240–43.

306. *See id.*

307. *Id.* at 240 (citing *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

308. *Id.* at 240.

309. *Id.* at 242.

310. *See* discussion *supra* Part V.A.1.a.

311. *See* Twitchell, *supra* note 169, at 819 ("The concern is that if states make the preemption decision, they may err on the side of state law and find preemption *less frequently than Congress intended.*" (emphasis added)).

bankrupt method for allocating cases between state and federal court.[312] It results in the removal of cases to federal court, such as Carmack Amendment cases, when Congress has indicated there is a lesser need for employing the federal judicial resource. The litmus test under *Anderson* is whether Congress created a federal cause of action that excludes state law claims.[313] But, as Professor Seinfeld asserts, the reasons that may motivate Congress to create a private cause of action do not equate with a desire to divest state courts of jurisdiction to determine federal preemption.[314]

Indeed, there may be situations where Congress deems federal court adjudication over preemption defenses to be desirable even absent the creation of a federal cause of action.[315] Under an approach relying on Congress to determine appropriate federal preemption defense removal, the question of whether complete preemption should apply in situations where no replacement federal cause of action is provided does not need to be resolved. Congress could provide—as it did with ERISA—that all claims preempted by a specific section affording a federal cause

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312. Professor Seinfeld explained as follows:

> [T]he Court has made no effort to anchor the doctrine of complete preemption in some broader vision of judicial federalism. The cases say next to nothing about the federal courts' relative expertise in the application of national law, the interest in securing a uniform interpretation of such law, or the need to sidestep state courts due to fear that localist bias might affect their decision making.

Seinfeld, *supra* note 14, at 554; *see also id.* at 570 n.107 (examining Justice Scalia's dissent in *Anderson*).

313. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

314. *See* Seinfeld, *supra* note 14, at 556–66. Professor Seinfeld explains thoroughly why the provision of a preemptive federal cause of action might be indicative of a desire to create federal jurisdiction. *See id.* Namely, by requiring the plaintiff to bring a claim under federal law and excluding state law, federal jurisdiction can be invoked either by the plaintiff originally or by the defendant through removal. *See id.* at 557. Nevertheless, Professor Seinfeld recognizes that such reasoning is problematic both because there are situations where Congress has provided an exclusive federal cause of action—such as the NBA and, as shown above, the Carmack Amendment—while lacking "a strong desire to channel cases into the federal courts," *see id.* at 558–59, and because the provision of a cause of action may be driven by determinations about whether public or private enforcement will be more effective—regardless of jurisdiction, *see id.* at 559.

See also Morrison, *supra* note 190, at 189 (explaining that "[a] variety of considerations may go into Congress's decision whether to" create a cause of action and thus rely (in whole or in part) on private enforcement, "but there is no reason to conclude that the choice of private enforcement invariably reflects a heightened concern for the polices underlying federal jurisdiction," particularly because the Court has suggested "that *public* enforcement may be [used] for effectuating the federal government's most important policy aims").

315. Additionally, for proponents of a complete preemption rule based on a replacement federal cause of action, such as the *Anderson* rule, the primary justification of state court hostility or error does not comport with the scope of their proposed rule. As Justice Scalia contended, the rule is irrational "because there is no more reason to fear state-court error with respect to federal pre-emption accompanied by creation of a federal cause of action than there is with respect to federal pre-emption unaccompanied by creation of a federal cause of action." *Anderson*, 539 U.S. at 20–21 (Scalia, J., dissenting). Similarly, complete preemption applies only to federal preemption defenses and does not allow for removal based on other, arguably more important, federal defenses such as constitutional defenses—leaving those in the hands of state courts.

of action are subject to removal.[316] With such language, complete preemption would require that the state claim falls within the specific replacement federal cause of action, as is required for ERISA—claims preempted by ERISA but not falling within Section 502(a)(1)(B) are not subject to removal to federal court.[317] Similarly, if Congress wants all preemption defenses arising under a certain statute to effect removal to federal court, regardless of whether a federal cause of action is provided, Congress could so direct. For example, SLUSA expressly allows for removal of state class actions falling within its scope,[318] but does not provide a federal remedy to replace it; rather, it provides an absolute bar on certain state securities class actions.[319] Thus, SLUSA represents an area where Congress wanted to eliminate certain state law remedies involving nationally traded securities without providing a replacement remedy. Congress enacted SLUSA in order to effectuate its prior legislation in the Private Securities Litigation Reform Act (PSLRA), which placed limits on federal securities class actions because of "perceived abuses of the class-action vehicle in litigation involving nationally traded securities."[320] Yet after the PSLRA was enacted, plaintiffs avoided its limitations by "bringing class actions under state law, often in state court."[321] SLUSA was thus enacted by Congress to

316. The jurisdictional provision and legislative history demonstrate that Congress wanted to allow removal solely for claims falling within section 502(a)(1)(B) of ERISA. *See* 29 U.S.C. § 1132(a), (e), (f) (2000). Congress explained in the legislative history regarding Section 502(a)(1)(B) that "suits to enforce benefit rights under the plan or to recover benefits under the plan," whether brought under state or federal law, "are to be regarded as arising under the laws of the United States in similar fashion to those brought under [s]ection 301 of the [LMRA]." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (quoting H.R. REP. NO. 93-1280, at 327 (1974) (Conf. Rep.)) (internal quotation marks omitted). However, ERISA substantively preempts more than just "suits to enforce benefit rights;" indeed, ERISA preempts "any and all State laws [that] relate to any employee benefit plan." *See* 29 U.S.C. § 1144(a) (2000). Thus, not all suits related to an ERISA plan and falling within ERISA's broad preemptive scope qualify for removal under the complete preemption doctrine. Instead, only state law claims to enforce benefit rights, to recover benefits, or to clarify rights to future benefits fall within the scope of Section 502(a)(1)(B) and thus qualify for removal. *See id.* §1132(a)(1)(B).

317. *See supra* note 316 and accompanying text; *see also Taylor*, 481 U.S. at 64 (explaining that "ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law" and holding that complete preemption existed when a state action was "not only pre-empted by ERISA, but also came 'within the scope of [section] 502(a) of ERISA'" (quoting Franchise Tax Bd. v. Const. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 24 (1983))).

318. *See* 15 U.S.C. § 78bb(f)(2) (2000) ("Any covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court . . . ."). See *infra* note 319 for definitions of covered class actions and covered securities.

319. *See* 15 U.S.C. § 78bb(f)(1) ("No covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security . . . ."); *see also* Kircher v. Putnam Funds Trust, 126 S. Ct. 2145, 2151 (2006) ("A covered class action is a lawsuit in which damages are sought on behalf of more than 50 people. A covered security is one traded nationally and listed on a regulated national exchange." (internal quotation marks and footnote omitted) (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 83 (2006))).

320. *Kircher*, 126 S. Ct. at 2150 (quoting *Dabit*, 547 U.S. at 81) (internal quotation marks omitted).

321. *Id.* (quoting *Dabit*, 547 U.S. at 82) (internal quotation marks omitted).

"block this bypass" of the PSLRA.[322] SLUSA thus exemplifies an area where Congress saw a special need for federal court jurisdiction (and thus expressly allowed for defensive removal), because the point of SLUSA was to keep litigants from avoiding the limitations under the PSLRA through state court adjudication.

If, as feared, state courts really are finding preemption under the current jurisdictional regime less often than intended by Congress, Congress is not powerless to ameliorate the problem. First, if Congress thought the problem existed across the board for federal preemption, it could statutorily repeal the well-pleaded complaint rule altogether or for federal preemption defenses—a step that Congress considered in 1902, 1905, 1907, 1948, and 1971, but did not take.[323] Second, Congress could make it clear in a particular statute or regulatory scheme (or amendments thereto) that it desires to allow removal when a party raises a preemption defense on the grounds of that particular statute, as Congress has done in the Price-Anderson Act and SLUSA. Third, as it did with ERISA, Congress could evidence through statutory jurisdictional language and express legislative history that it desires to allow removal on the basis of a federal defense under the statute. All of these alternatives would leave the allocation of power between the state and federal courts in the hands of Congress.

In 1971, the ALI proposed legislation that generally allowed removal on the basis of a federal defense.[324] An examination of the ALI proposal denotes why it is better to eliminate or make exceptions to the well-pleaded complaint rule on the basis of legislation or other clear indications from Congress. With legislation, Congress can determine the extent to which it abrogates the well-pleaded complaint rule both generally and for specific statutory schemes. For example, the ALI proposal generally allowed for removal on the basis of a federal defense, yet added limitations, including a jurisdictional amount and a requirement that the defense be dispositive of the action.[325] The ALI also retained the well-pleaded *pleading* rule prohibiting jurisdiction based on anticipated claims or defenses.[326] Further, the proposed legislation enumerated specific federal defenses where removal would not be allowed based on previously expressed "congressional policy" to limit removal or keep certain cases out of federal court.[327] Indeed, one of those enumerated exceptions was for defenses raised by the Carmack Amendment—which the proposal rendered unremovable regardless of the amount in controversy.[328] Thus,

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322. *Id.*

323. *See supra* note 58 and accompanying text.

324. *See* ALI STUDY, *supra* note 58, § 1312(a), at 25–26; *see also* S. 1876, 92d Cong. § 1312(a) (1971) (incorporating the ALI proposal). The proposed legislation was the result of an eight-year study by the ALI. *See* ALI Study, *supra* note 58, at 1.

325. *See* S. 1876 § 1312(a); ALI STUDY *supra* note 58, § 1312(a), at 25.

326. ALI STUDY, *supra* note 58, § 1311 cmt. at 169, § 1312 cmt. at 188–91.

327. *See* S. 1876 § 1312(b); ALI STUDY, *supra* note 58, § 1312(b), at 26–27.

328. *See* S. 1876 § 1312(b)(4) ("The following civil actions shall not be removed . . . from a State court to any district court of the United States: . . . (4) actions against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, under [§] 20 of title 49 . . . ."); ALI STUDY, *supra* note 58, § 1312(b)(4), at 26.

The ALI explained that Carmack Amendment claims "are typically for a very small sum and

while abrogating the well-pleaded complaint rule, the ALI determined that congressional policy directed that certain federal defenses should not be subject to removal.[329] Although Congress did not enact the ALI proposal, it represents eight years of work by the ALI as to the appropriate allocation of judicial power between the state and federal courts.[330] Once again, this work highlights the flaws with the *Anderson* test, which allows removal on the basis of a defense—not necessarily an indefensible policy in the abstract—but does so on a basis that is not tied to any cogent policy; this results in the removal of preemption defenses, such as the Carmack Amendment, when congressional pronouncements in statutes and legislative history, as well as the eight-year study by the ALI, indicate that federal jurisdiction over such defenses is not warranted.[331]

In contrast to congressionally determined exceptions to the well-pleaded complaint rule, a broadly-stated, judicially interpreted test, such as that in *Anderson*[332] (and also the Seinfeld test based on the breadth of preemption[333]), creates jurisdiction, the contours of which are entirely unknown and must be determined on a case-by-case basis. For example, the *Anderson* Court—which may have been motivated in large part by its desire to protect national bank independence from state encroachment—certainly did not consider the propriety of removal for individual statutes that would be wrought by its new test,[334] such as whether its test would allow complete preemption by a Carmack preemption defense and whether removal of Carmack defenses would be an appropriate or desirable allocation of judicial power.

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would invite the use of removal as a harassing tactic." ALI STUDY, *supra* note 58, § 1312(b) cmt. at 201. Noting that current jurisdictional limitations permit removal under 28 U.S.C. § 1445 of Carmack claims over $3,000, the ALI proposal "prohibits their removal *regardless of amount*." ALI STUDY, *supra* note 58 § 1312(b) cmt. at 201 (emphasis added).

329. Professor Wright, who was on the council for the ALI STUDY, explained as follows:

> Removal on the basis of a federal defense was the hardest fought issue within the Institute in the federal question area, if not indeed in the entire Study. There was agreement throughout that this kind of removal should be permissible in some cases, but there were serious differences about how broadly this should be allowed.

Charles Alan Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 200 (1969). Nevertheless, in Professor Wright's article, the congressional hearings, and an article by Professor Currie, there is no objection mentioned to excluding Carmack cases from those removable. Indeed, Professor Currie, who criticized the jurisdictional amount limitations on federal defense removal and advocated broader federal defense removal, saw "no reason to criticize" the limitation on removal for Carmack and other enumerated cases. *See* David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 275 (1969).

330. *See* ALI STUDY, *supra* note 58, at 1.

331. *See* discussion *supra* Part V.A.1.a.

332. *See* discussion *supra* Part III.B.1.

333. *See* Seinfeld, *supra* note 14, at 576–77.

334. *See* discussion *supra* Part III.B.1.

B. Federalism Problems

In 1998, Professor Miller stated, "Because of the obvious federalism implications of the complete-preemption doctrine and its inconsistency with the well-pleaded complaint rule, its application thus far has been extremely limited . . . ."[335] Miller did not elaborate on what "obvious federalism implications" were involved, but the expansion of the complete preemption doctrine under *Anderson*[336] illuminates encroachments on federalism.

1. Denying State Courts the Ability to Construe the Reach of State Law

Returning to our case in point, in the short time since federal courts have consistently recognized complete preemption for Carmack claims, federalism issues have arisen. In *Franyutti v. Hidden Valley Moving & Storage, Inc.*,[337] the plaintiff filed a complaint in state court alleging two state law claims: fraud and violation of the Texas Deceptive Trade Practices Act (DTPA).[338] The defendants removed, arguing that the Carmack Amendment preempted both claims.[339] The district court, relying on Fifth Circuit law, defined Carmack preemption exceptionally broadly.[340] The court then found both the fraud and DTPA claims preempted, refused to remand the case, and ordered the plaintiffs—on threat of dismissal with prejudice—to amend their pleadings to assert a Carmack claim.[341] Notably, the Texas Supreme Court had previously held that the Carmack Amendment did not preempt claims under the Texas DTPA.[342] The district court in *Franyutti* acknowledged this holding, but concluded that the Texas Supreme Court decision "occurred prior to many of the Supreme Court and Fifth Circuit opinions relied upon" and thus "its holding has limited value."[343] Notably, the only decisions cited in *Franyutti* that post-date that of the Texas Supreme Court are two Fifth Circuit cases regarding substantive Carmack preemption,[344] and *Anderson*[345] and *Rivet v. Regions Bank of Louisiana*,[346] both of which deal with federal jurisdiction rather

335. Miller, *supra* note 9, at 1797.

336. *See* discussion *supra* Part III.B.

337. 325 F. Supp. 2d 775 (W.D. Tex. 2004).

338. *Id.* at 776.

339. *Id.*

340. *See id.* at 777 (citing Hoskins v. Bekins Van Lines, 343 F.3d 769, 778 (5th Cir. 2003); Air Prods. & Chems., Inc. v. Ill. Cent. Gulf R.R. Co., 721 F.2d 483, 484–85 (5th Cir. 1983)).

341. *Id.* at 778.

342. *See* Brown v. Am. Transfer & Storage Co. (*Brown II*), 601 S.W.2d 931, 938 (Tex. 1980).

343. *See* 325 F. Supp. 2d at 777–78 n.1.

344. *See id.* at 777 (citing *Hoskins*, 343 F.3d at 778; *Air Prods.*, 721 F.2d at 484–85)

345. *Id.* (citing Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003)) ("When an area of state law however, is completely preempted, the plaintiff's suit may be removed.").

346. *Id.* ("Although federal preemption is ordinarily a defense, once an area of state law has been completely preempted, any claim purportedly based on that preempted state law claim is considered from its inception a federal claim, and therefore arises under federal law." (quoting Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998)) (internal quotation marks omitted)).

than substantive Carmack preemption.[347] Indeed, the *Franyutti* court's substantive preemption conclusion is based largely on *Croninger*,[348] a decision the Texas Supreme Court certainly had before it.

It seems unlikely that the Texas Supreme Court would agree that its 1980 decision in *Brown v. American Transfer & Storage Co.* (*Brown II*),[349] "has limited value," as the *Franyutti* court held.[350] In *Brown II*, the plaintiff relied solely on a claim under the Texas DTPA and was awarded treble damages.[351] The defendants argued that the DTPA was preempted by the Carmack Amendment and, correspondingly, that a limit of liability found in the bill of lading of thirty cents per pound shipped should apply.[352] The Texas Supreme Court held that "the DTPA was a general statute, which provided remedies for persons victimized by false, misleading and deceptive acts within the police power of the state."[353] In contrast, "the Carmack Amendment was [intended] to create a uniform rule of responsibility for interstate commerce and interstate commerce bills of lading, and . . . a DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations."[354] The Texas Supreme Court did not stop with its explanation of the different purposes and scopes of the statutes and thus lack of preemption. Rather, the Court emphasized, "We also conclude the DTPA's prohibitions against false, misleading and deceptive acts *protects a deeply rooted state interest* and is

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347. *See supra* notes 345–46.

348. *See Franyutti*, 325 F. Supp. 2d at 777 ("The legislation encompassing the Carmack Amendment embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract." (quoting Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1913)) (internal quotation marks omitted)).

349. 601 S.W.2d 931 (1980).

350. *See* 325 F. Supp. 2d at 777–78 n.1.

351. *See* 601 S.W.2d at 931, 939.

352. *See id.* at 934.

353. *Id.* at 938.

354. *Id.* The Texas Supreme Court made these statements in summation of the holding of the Texas Court of Civil Appeals and then explained, "We agree with this holding of the Court of Civil Appeals for the reasons stated in its opinion." *Id.* at 938 (citing Am. Transfer & Storage v. Brown (*Brown I*), 584 S.W.2d 284, 284–91 (Tex. Civ. App. 1979), *rev'd on other grounds*, 601 S.W.2d 931). The Texas appellate court's opinion explains more fully as follows:

> The uniformity sought by the Carmack Amendment . . . is uniformity in the requirements of a contract of carriage in interstate commerce and in the carrier's liability for breach of its duties under such a contract. The Deceptive Trade Practices Act . . . presents no obstacle to full accomplishment of uniformity in these respects. It applies to false, misleading, and deceptive acts or practices in general and makes no special provision for interstate shipments or other transactions in interstate commerce. We find nothing in the Carmack Amendment or in the decisions construing it suggesting that uniformity was sought with respect to legal liability for false, deceptive, or misleading acts or practices preliminary to the formation of the contract . . . . We conclude that protection of interstate shippers from such practices is left to the police powers of the several states.

Brown I, 584 S.W.2d at 288–89.

an exercise of the right of the State of Texas to protect its citizens from acts such as those committed by American Transfer."[355]

The Texas Supreme Court's decision upholding its state law against federal preemption was not illegitimate and in no way validates fears of state court hostility to federal law if state courts are allowed to determine preemption issues. Indeed, the United States Supreme Court in *Missouri, Kansas & Texas Railway Co. v. Harris*[356] held that a state statute was not preempted by the Carmack Amendment because the statute was a general statute that had "broad sweep [and] only incidentally include[d] claims arising out of interstate commerce."[357] The Court found no Carmack preemption because the state statute did not "either enlarge or limit the responsibility of the carrier for the loss of property."[358] Basing their opinions in part on *Harris*, the First, Seventh, and Eleventh Circuits have allowed for exceptions to Carmack preemption and articulated tests for doing so.[359] The Texas Supreme Court's *Brown II* decision harmonizes well with both *Harris*—because both *Harris* and *Brown II* involve general statutes not aimed specifically at regulating carrier conduct—and the cases from the First, Seventh, and Eleventh Circuits that examine whether separate and distinct conduct or harm is involved.[360] Additionally, the fact that the Fifth Circuit has adopted an extremely broad view of Carmack preemption in no way binds the Texas Supreme Court. A state court is not bound by federal law interpretations from the circuit encompassing that state. Rather, state courts are bound by United States Supreme Court decisions—the decisions of other federal courts are persuasive.[361] Thus, the Texas Supreme Court is not bound to follow the Fifth Circuit interpretation of Carmack preemption over that of the First, Seventh, or Eleventh Circuits.

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355. *Brown II*, 601 S.W.2d at 938 (emphasis added) (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)).

356. 234 U.S. 412 (1914).

357. *Id.* at 416.

358. *Id.* at 420.

359. In *Rini v. United Van Lines*, 104 F.3d 502 (1st Cir. 1997), the First Circuit relied heavily on *Harris* and contrasted it with *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915), a case finding Carmack preemption, to create a test for Carmack preemption. *See Rini*, 104 F.3d at 505–06 (citing *Harris*, 234 U.S. at 416, 420, 421–22; *Varnville*, 237 U.S. at 603).

The Seventh Circuit, in turn, relied heavily on *Rini* to determine its test for Carmack preemption. *See* Gordon v. United Van Lines, 130 F.3d 282, 289–90 (7th Cir. 1997). Finally, the Eleventh Circuit in *Smith v. United Parcel Service*, 296 F.3d 1244 (11th Cir. 2002), relied for its test in part on *Gooch v. Oregon Short Line R.R.*, 258 U.S. 22 (1922), where the Court explained that "the Carmack Amendment did not preempt an action involving a physical injury to a caretaker accompanying an interstate shipment." *See Smith*, 296 F.3d at 1249 (citing *Gooch*, 258 U.S. 22).

360. *See supra* notes 292–94, 297 and accompanying text.

361. *See* Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993). In *Penrod*, the Texas Supreme Court noted that the lower appellate court apparently "felt bound by the pronouncements of the Fifth Circuit on federal law issues." *Id.* The Texas Supreme Court explained, "This is not the case. While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court." *Id.*

If it were not for *Anderson*, the *Franyutti* plaintiff's state claims would not have been subject to complete preemption and would have remained in Texas court. Texas courts could have continued to recognize the state's "deeply rooted" interest[362] in protecting its citizens under the Texas DTPA as separate and distinct from Carmack preemption.[363] Moreover, as shown, Congress has not manifested a design to take Carmack preemption issues from state courts.[364]

In fact, the Seventh Circuit, when faced with the question of whether a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act was preempted by the Carmack Amendment, deferred to the holding of a state appellate court "regarding the reach of the Illinois Act."[365] Notably, the Illinois court had held that the Illinois statute fell within Carmack preemption.[366] The Seventh Circuit's statement underscores an important federalism interest: namely, state courts have the authority to determine "the reach" of their statutes and laws, including policies advocated and conduct prohibited thereby.[367] It is perfectly consistent to have a Texas court declare that its Deceptive Trade Practices Act is aimed at prohibiting conduct separate and distinct from liability created under a Carmack claim, and to have an Illinois court declare that its similar statute does not reach beyond conduct encompassed by the Carmack Amendment.

Thus, in the Carmack context, in light of the fact that a number of the federal circuits have determined Carmack preemption is not an absolute bar to all state law claims relating to a carrier-shipper relationship,[368] state court adjudication performs an important function. Specifically, state courts can legitimately and authoritatively determine if state law or policy is aimed at separate and independent injuries or conduct and thus preserve state law from Carmack preemption, or determine that state law falls within such preemption.

Importantly, these considerations are pertinent beyond the context of the Carmack Amendment, which is merely one illustration where state courts can authoritatively construe the reach of their own laws and policies in the legitimate contours of federal preemption. Because even field preemption requires the determination of where the field begins and where it ends, state courts can authoritatively declare where their state laws fall in the known spectrum of preemption—clearly inside the field, on the margins, or outside of it. Further, in

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362. *See supra* text accompanying note 355.

363. The Texas Supreme Court's decision would be subject to review by the United States Supreme Court. Though grants of certiorari are rare and may be inadequate to protect federal rights in many areas, where Congress has indicated, as it has in the Carmack area, that it is comfortable with state court adjudication and determination of federal preemption issues, Supreme Court review is arguably an adequate protection.

364. *See* discussion *supra* Part V.A.1.a.

365. *See* Gordon v. United Van Lines, Inc., 130 F.3d 282, 289 (7th Cir. 1997).

366. *Id.* (citing Nowakowski v. Am. Red Ball Transit Co., 680 N.E.2d 441, 444 (Ill. Ct. App. 1997)).

367. *See id.*; Coombes v. Getz, 285 U.S. 434, 436 (1932) ("The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon [the United States Supreme Court].").

368. *See supra* note 297 and accompanying text.

cases involving multiple state law claims, only one of which is preempted by federal law, moving the adjudication to federal court deprives the state court of adjudication of purely state law claims.[369] Again, the point is particularly poignant when, as with the Carmack Amendment, Congress has indicated no qualms with allowing state courts to determine the federal preemption defense.[370]

2. *Taking Jurisdiction from the States Without Congressional Authorization*

The Carmack Amendment illustrates another federalism problem with complete preemption under *Anderson*: For over a century, under the well-pleaded complaint rule, state courts have generally had exclusive jurisdiction over federal preemption defenses when only state law claims are pled in state court.[371] The *Anderson* decision divests state courts of that jurisdiction without any congressional authorization to do so. While appearing to be a separation of powers problem, it also raises federalism concerns regarding the ability of the federal judiciary to strip state courts of jurisdiction. As the Supreme Court has recognized, separation of powers and federalism problems often go hand in hand. When the federal judiciary does not confine its jurisdiction to that determined appropriately by Congress, it

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369. *See, e.g.*, Lamm v. Bekens Van Lines Co., 139 F. Supp. 2d 1300, 1313 (M.D. Ala. 2001) (explaining in a Carmack case on remand, that if the state court determined the outrage claim was not preempted, then the court would "need to turn to purely state-law issues, such as whether the plaintiffs' claim rises to the level of severity necessary to make out an Alabama outrage claim" and noting that the "plaintiffs' suit might well involve novel state-law issues over which a state court could have a claim to greater competence than a federal court").

370. Professor Twitchell notes that

> allowing state courts to identify the law controlling plaintiff's claim in uncertain preemption situations does not place a significant additional burden on federal interests. In fact, it could be argued that this division of labor would protect strong federalism interests. By placing such questions in the hands of the states at the outset, we may balance the power of the central government with a countervailing state-oriented weight. Assuming that state courts are more likely than federal courts to find against preemption, this distribution of power to make initial preemption determinations may provide an important safeguard for our constitutional structure. Structural decisions made to maintain an important balance between state and central power may account for [the well-pleaded complaint rule] itself and for congressional inertia . . . to change the . . . rule.

Twitchell, *supra* note 169, at 861–62. Professor Twitchell notes countervailing federal interests and explains that the "major factor" in favor of having federal courts perform the preemption analysis "appears to be the federal interest in avoiding state court error on preemption issues," as "[f]requent errors would undermine federal regulatory interests, create unnecessary judicial conflicts, and increase the Supreme Court's caseload with direct appeals from state court judgments." *Id.* at 861. Yet, as noted, Congress is not impotent to examine and ameliorate such problems.

371. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (explaining that federal preemption, as a defense not appearing on the face of a complaint, does not authorize removal to a federal court under the well-pleaded complaint rule).

correspondingly fails to maintain due regard for the independence and sovereignty of the states.[372]

Justice Scalia, in his *Anderson* dissent, alluded to concurrent jurisdiction caselaw as another area where the federal judiciary determines whether state courts should be deprived of jurisdiction over federal law.[373] In that context, the federal courts have presumed state court jurisdiction except in very narrow instances.[374] The analogy to concurrent jurisdiction caselaw is helpful. For both contexts, state courts are divested of deciding something over which they generally have jurisdiction. Given that federal question jurisdiction did not exist until 1875,[375] state courts were initially the primary vindicators of federal rights and interpreters of federal law. Further, Congress's conferral of federal question jurisdiction in 1875 expressly stated that such jurisdiction was granted "concurrent with the courts of the several States."[376]

The Supreme Court has explained in the concurrent jurisdiction context that under the "system of dual sovereignty" between the state and federal governments, "we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."[377] The Court described three possible scenarios where "the presumption of concurrent jurisdiction can be rebutted": namely, "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[378] This test, though more

372. For example, in *Healy v. Ratta*, 292 U.S. 263 (1934), the Supreme Court explained as follows: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 270.

373. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 18 n.2 (2003) (Scalia, J., dissenting) (citing Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473, 478 (1981)).

374. *Id.*

375. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

376. *Id.* Further, in *Claflin v. Houseman*, 93 U.S. 130 (1876), the Supreme Court reiterated that "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction." *Id.* at 136.

377. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

378. *Id.* at 459–60 (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (internal quotation marks omitted)). The concurrence in *Tafflin*, authored by Justice Scalia, contended that exclusive federal jurisdiction could not be founded on an unmistakable implication from legislative history, and perhaps not on an incompatibility between state court jurisdiction and federal interests either. *See id.* at 469–73 (Scalia, J., concurring). Justice Scalia argued that exclusive jurisdiction had never been found through legislative history, and additionally, "[w]hat is needed to oust the States of jurisdiction is congressional *action* (*i.e.*, a provision of law), not merely congressional discussion." *Id.* at 472 (Scalia, J., concurring). Later that year, in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), the Court held that jurisdiction under Title VII was concurrent despite "legislative history indicating that many participants in the complex process that finally produced the law fully expected that all Title VII cases would be tried in federal court." *See id.* at 824–25. The Court further explained that the expectation shown through legislative history, "even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction." *Id.*

exacting than that found in *Taylor* for complete preemption,[379] similarly relies on a congressional design to deprive state courts of their jurisdiction.

Indeed, in the complete preemption context, state courts have been given exclusive jurisdiction over nondiverse cases pleading only state law causes of action.[380] The divesting of state courts, as dual sovereigns, of such exclusive jurisdiction should be undertaken with hesitance, in a manner similar to divesting state courts of concurrent jurisdiction. As the concurrent jurisdiction cases require a manifestation from Congress of intent to divest the state courts of jurisdiction (or a clear incompatibility between state court jurisdiction and the federal regulation), so too should complete preemption be based on congressional manifestation. Certainly state courts should not be deprived of jurisdiction in situations like the Carmack Amendment, where Congress has manifested the opposite intent, namely, to relegate a large number of such cases to state courts.[381]

Nevertheless, the presence of congressional intent for complete preemption does not require that state court adjudication be ousted entirely or that there be exclusive federal jurisdiction. Indeed, for ERISA, Congress expressly gave concurrent jurisdiction over claims arising under Section 502(a)(1)(B),[382] but at the same time explained in reliable legislative history that while there was concurrent jurisdiction, "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the [LMRA]."[383] Thus, Congress designed that both state and federal courts could entertain an ERISA Section 502(a)(1)(B) claim but also that a defendant invoking a federal preemption defense by that section of ERISA should be able to remove the case to federal court—even if the plaintiff only alleges state law claims.[384]

It is thus up to Congress to examine the purpose and complexity of specific federal legislation, as well as any state court hostility or likelihood of error, and determine the slice of federal jurisdiction to be served up with its federal legislation.[385] For some statutes, it will be exclusive federal jurisdiction, for others

379. *See* discussion *supra* Part III.A.2.

380. *See supra* text accompanying note 371.

381. *See* discussion *supra* Part V.A.1.a.

382. *See* 29 U.S.C. § 1132(e)(1) (2000) (stating in part that "[s]tate courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under" Section 502(a)(1)(B)).

383. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (emphasis omitted) (quoting H.R. REP. NO. 93-1280, at 327 (1974) (internal quotation marks omitted)).

384. *See id.* at 66. Similarly, while the finding of complete preemption in *Avco* is not explained and does not appear to be based on congressional intent, *see supra* text accompanying notes 59–62, the Supreme Court had earlier held in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), that federal and state courts shared concurrent jurisdiction over claims under section 301 of the LMRA, *see id.* at 505–06. As with ERISA, both concurrent jurisdiction and complete preemption exist for the same statute.

385. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) (explaining that Congress makes decisions of investing lower courts "with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem

it will be concurrent jurisdiction while allowing federal defense removal, and for the majority of statutes it will be concurrent jurisdiction along with the normal strictures of the well-pleaded complaint rule. As noted above, Congress has the ability to determine when it would be appropriate to limit state adjudication and when limitations on state jurisdiction are not needed, thus retaining due regard for the sovereignty of state courts where the courts are competent to adjudicate issues of federal law, including federal preemption.

C. *Efficiency—An Alleged Benefit of the* Anderson *Rule*

Weighed against these separation of powers and federalism problems are alleged benefits of the *Anderson* rule that have been proffered by commentators. Garrick Pursley insists that *Anderson* is justified because it promotes judicial economy, efficiency, and administration.[386] Similarly, Professor Seinfeld states in passing that *Anderson* "has brought clarity to the doctrine" of complete preemption.[387] In terms of articulating an actual test for complete preemption (that is, if an exclusive federal cause of action, then complete preemption),[388] it may be true that *Anderson* has brought some clarity; but in terms of creating a test that is straightforward in its application and clear for litigants to determine when removal is proper, *Anderson* has done the opposite.

Professor Wright suggests four criteria "to test the appropriateness of an allocation of jurisdiction between state and federal courts"—two of which involve efficiency.[389] Namely, the division should be clear, adhering to a "[b]right [l]ine [p]olicy"—that is, "[a] lawyer of reasonable ability should be able to read the statute and tell with fair assurance whether a particular court has jurisdiction."[390] Additionally, the division must be "consistent with efficient judicial administration," which means that the "allocation should not aggravate . . . burdens by permitting extensive preliminary litigation to decide [jurisdiction], or by requiring wasteful duplication of proceedings . . . , or by shuttling the litigants . . . back and forth between the two systems."[391]

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proper for the public good." (quoting Cary v. Curtis, 44 U.S. 236, 245 (1845)) (internal quotation marks omitted)).

386. *See* Pursley, *supra* note 13, at 376, 418–45 (justifying the *Anderson* rule on the basis of judicial economy and efficiency).

387. Seinfeld, *supra* note 14, at 548.

388. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

389. *See* Wright, *supra* note 329, at 186–87. Notably, Professor Wright's other two criteria are that the division ought to be rational and that the division should be "designed to reduce friction between" the state and federal systems. *Id.* As noted previously, the *Anderson* test results in an irrational division because it allows for removal where Congress has determined that use of the federal judicial resource is unnecessary. *See* discussion *supra* Part V.A. Further, as discussed above, *Anderson* exacerbates federalism problems. *See* discussion *supra* Part V.B.

390. Wright, *supra* note 329, at 187.

391. *Id.* Professor Wright explains, "If we must choose between a reasoned division of jurisdiction and a workable division of jurisdiction, I would choose the latter every time." *Id.* at 207.

As to adhering to a bright line policy, *Anderson* notoriously fails. The *Anderson* test is horribly unpredictable. *Anderson* requires a case-by-case analysis that first examines whether the alleged preemptive statute falls within the complete preemption doctrine, and then examines whether a specific state claim asserted by the party falls within the preemptive scope of the statute, thus requiring the federal court to construe both state and federal law.[392] In essence, the federal court is required to determine the merits of the substantive federal preemption defense to determine if it has jurisdiction over the case.[393] A jurisdictional test that generally requires a full preemption analysis, often comprising the merits of the case, does not make jurisdiction clear for the lawyer of reasonable (or perhaps extraordinary) ability—particularly where preemption is unsettled or difficult to determine. As Professor Cohen noted, "It goes without saying that it is undesirable for jurisdictional rules to be uncertain."[394] This is not only because it is horribly inefficient to have uncertain jurisdictional rules (and an appellate court may later rule that the district court erred and that removal was granted improvidently, and thus remand the case to state court on the basis of a lack of jurisdiction[395]), but also because uncertain jurisdictional rules can be manipulated by plaintiffs and defendants.

In fact, *Anderson* arguably broadened the scope and application of the complete preemption doctrine to unknown areas that attorneys may be all too happy to explore or exploit.[396] As the scope of complete preemption broadens, the more likely it becomes that defense attorneys will file removal petitions, either in hope that the court will find complete preemption and remove the case or in order to delay the proceedings (but with a jurisdictional rule that is opaque enough to allow a defendant to persuasively argue that it had an "objectively reasonable basis" for

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392. *See* discussion *supra* Part III.B.1.

393. Though not on point, the problem is related to the issue in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), regarding whether a federal court should make an easy determination on the merits prior to determining its own jurisdiction. *See id.* at 88–89. The Supreme Court held that jurisdiction must be determined before a federal court can decide the merits. *See id.* at 94. In the complete preemption context, and particularly under the *Anderson* test, a federal court must determine the merits of the preemption defense as a prerequisite to determining its jurisdiction. *See* discussion *supra* Part III.B.2. And if, upon remand to state court, the federal court's substantive preemption determination is given law-of-the-case or other preclusive effect, *see infra* note 407, then the federal court, without jurisdiction, has determined the merits.

394. William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 908 (1967) ("[S]ince objections to jurisdiction of the district court cannot be waived, and since in many cases the lack of jurisdiction can even be asserted by the party who invoked federal jurisdiction, there should not be doubt about the threshold question of jurisdiction.") (footnotes omitted).

395. *See, e.g.*, Beers v. N. Am. Van Lines, Inc., 836 F.2d 910, 912–14 (5th Cir. 1988) (holding removal to have been improvident because there was no complete preemption, vacating a federal jury trial verdict, and remanding to state court).

396. For a discussion of several contexts in which *Anderson* has already broadened the scope and application of the complete preemption doctrine, see *supra* Part III.B.2.

removal[397] and avoid being assessed attorneys' fees and costs under 28 U.S.C. § 1447(c)[398] even if the case is remanded). One surprising example of the uncertainty of complete preemption being manipulated—in this case by the plaintiffs—is *Hoover v. Allied Van Lines, Inc.*[399] In *Hoover*, the plaintiffs filed a complaint based entirely on state law, and the state court held that some of the state law claims were preempted by the Carmack Amendment.[400] The plaintiffs were then allowed to amend their complaint to add a Carmack claim.[401] Defendants then removed on the basis that the case had become removable by the assertion of a federal question by the plaintiffs.[402] Shockingly, the court remanded the action to state court, agreeing with the plaintiffs that by virtue of complete preemption the case had been removable at the time the case was filed, and thus had to be removed within thirty days of receiving the complaint.[403] Because the defendants allegedly "waived" the right to remove the case as initially pled, the federal district court refused to allow them to remove once the case became removable by subsequent events—namely, the amendment of the complaint adding a federal claim.[404]

Professor Wright's criterion of efficient judicial administration is also not satisfied by the *Anderson* test.[405] Pursley argues that *Anderson* allows "removal at

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397. *See* Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005) ("Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.").

398. Section 1447(c) provides, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (2000).

399. 205 F. Supp. 2d 1232 (D. Kan. 2002).

400. *Id.* at 1235.

401. *Id.*

402. *See id.* at 1235, 1241. Under 28 U.S.C. § 1446(b) (2000), a defendant is required to remove within thirty days of receiving the complaint. However, the statute also provides as follows:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading . . . from which it may first be ascertained that the case is one which is or has become removable . . . .

Id.

403. *Hoover*, 205 F. Supp. 2d at 1236, 1241.

404. *See id.* at 1234, 1241. Notably, this case was decided prior to *Anderson* and prior to the *Hoskins* and *Hall* decisions finding complete preemption by virtue of the Carmack Amendment. *See* discussion *supra* Part V.A.1.b. Indeed, the *Hoover* court noted that courts were divided on the question of complete preemption under the Carmack Amendment and included in its citations both circuit court cases on the matter, each of which had found no complete preemption. *Id.* at 1237 (citing Beers v. N. Am. Van Lines, 836 F.2d 910 (5th Cir. 1988); Hunter v. United Van Lines, 746 F.2d 635, 643–46 (9th Cir. 1984)). Thus, it is hard to justify the court's claim that the defendants should have recognized that the complaint was removable at the time of the filing of the initial complaint. *See id.* at 1241.

However, the Tenth Circuit had a more lenient test for complete preemption than did other circuits prior to *Anderson*. The Tenth Circuit's test required two determinations: first, that there was substantive preemption of the state law claim; and second, that Congress "intended to allow removal in such cases, as manifested by the provision of a federal cause of action." *See* Schmeling v. Nordam, 97 F.3d 1336, 1343 (10th Cir. 1996).

405. *See* Wright, *supra* note 329, at 186–87.

the outset" and "skips over state court adjudication of the substantive preemption defense, thereby conserving judicial and litigant resources."[406] *Anderson* does not "skip" litigation of the preemption defense—rather, it moves it to federal court to be litigated as a motion to remand. The remand motion becomes based on a potentially complex issue of substantive preemption at the very early stages of litigation—before facts are fleshed out at all. The federal court hears the remand motion, determines substantive preemption, and either sends the case back to state court or keeps it. If it remands to state court, the case was unnecessarily shuttled between federal and state court, and additional litigation may arise in state court as to whether or not the federal court's substantive preemption determination is either law of the case or otherwise preclusive.[407] Notably, if the federal court's substantive ruling is not somehow binding on the state court, the parties will be required to litigate the same substantive preemption question twice[408]—a decisively inefficient method for "conserving judicial and litigant resources."[409]

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406. Pursley, *supra* note 13, at 441.

407. In *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006), the Court held that the federal court's determination that SLUSA did not apply was not issue preclusive on the state court. *See id.* at 2156–57. The Court explained that while the state court could not revisit the decision to remand, "it [was] perfectly free to reject the remanding court's reasoning," *id* at 2157, and "[c]ollateral estoppel should be no bar to such a revisitation of the [substantive] issue," *id.* at 2156–57. Issue preclusion was not applicable because 28 U.S.C. § 1447(d) prevented appeal of the district court's substantive determination. *Kircher*, 126 S. Ct. at 2156–57. Further, the Court held, "Nor is there any reason to see things differently just because the remand's basis coincides entirely with the merits of the federal question; it is only the forum designation that is conclusive." *Id.* Thus, a state court could revisit the merits subject to Supreme Court review. *See id.*

Nevertheless, the *Kircher* Court failed to acknowledge or cite its prior contradictory statement in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999):

> *Issue preclusion* in subsequent state-court litigation, however, *may also attend a federal court's subject-matter determination*. . . . If[, for example,] the district court determines that state law does not allow punitive damages for breach of contract and therefore remands the removed action for failure to satisfy the amount in controversy, *the federal court's conclusion will travel back with the case*. Assuming a fair airing of the issue in federal court, [*the federal*] *court's ruling on permissible state-law damages may bind the parties in state court* . . . .

Id. at 585–86 (emphasis added) (citation omitted). *Kircher* seems to state the better policy for both federalism reasons and in light of the lack of appeal of the remand order. Nevertheless, it results in repetitive litigation in state and federal court.

Further, *Kircher* says nothing about law-of-the-case doctrine. However, "[a] number of federal courts have stated that law-of-the-case principles do not bind the state court after remand for want of federal subject-matter jurisdiction, even in cases in which the determination of subject-matter jurisdiction involves a ruling on the reach of federal law." 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.4, at 788 (2d ed. 2002).

408. On the other hand, if the federal court's determination is binding on the state court on remand, that raises rather grave federalism problems as the state court has exclusive jurisdiction over the merits and yet is bound by the determination of a federal court without jurisdiction to decide the merits. *See also supra* note 393 (noting that the actions required of a federal court under the *Anderson* test are in tension with those required under the rule that a federal court must determine whether jurisdiction is proper prior to deciding the merits of a case).

409. *See* Pursley, *supra* note 13, at 441.

On the other hand, if the federal court finds complete preemption and the case remains in federal court, the federal court will either (1) construe the plaintiff's complaint as asserting the preemptive federal claims and adjudicate it on its merits;[410] (2) request that the plaintiff amend the complaint to add the federal cause of action (and if the plaintiff fails to amend, dismiss the action);[411] or (3) dismiss the case for failure to state a cause of action—because the plaintiff asserted a "non-existent" state law claim that is preempted by an unasserted federal cause of action.[412] The second and third scenarios are precisely what would happen procedurally in state court without complete preemption—if the state court determines the substantive preemption question adversely to the plaintiff, the court would generally allow the plaintiff to amend the complaint to assert the federal claim or dismiss the preempted claims. Indeed, if the state court determines that the plaintiff must amend the complaint or else have it dismissed, and the plaintiff decides to amend the complaint to add the federal cause of action, then removal of the case to federal court falls squarely under statutory removal jurisdiction,[413] avoiding the jurisdictional battle over removal or remand.

Further, if a federal court determines that there is complete preemption over one or more of the plaintiff's state law claims, the question of exercising supplemental jurisdiction over other non-preempted state law claims arises—not an uncommon scenario.[414] Often the plaintiff has justifiably decided to forego a federal claim (for example, the limitations period has run on the federal claim but not on

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410. *See, e.g.*, Hoskins v. Bekins Van Lines, 343 F.3d 769, 771 (5th Cir. 2003) (explaining that the district court held that the plaintiffs did not need to amend the complaint to expressly allege a Carmack claim because the facts pleaded sufficed to raise such a claim).

411. *See, e.g.*, Hall v. N. Am. Van Lines, Inc., 476 F.3d 683, 690 n.9 (9th Cir. 2007) (holding that the plaintiff was required to amend the complaint to expressly add a claim under the Carmack Amendment once the district court found complete preemption and that the plaintiff's refusal to do so required dismissal of the action).

412. *See, e.g.*, Carr v. Olympian Moving & Storage, No. 1:06 CV 00679, 2006 WL 2294873, at *2 (N.D. Ohio June 6, 2006) (holding that the plaintiff's state law claims were completely preempted by the Carmack Amendment but were not thereby "translate[d] magically" into a Carmack claim and dismissing the case with prejudice for failure to state a claim).

413. *See* 28 U.S.C. § 1446(b) (2000).

414. Surprisingly, many commentators discuss complete preemption with the assumption that federal law preempts all of the asserted claims. *See* discussion *supra* Part IV. Thus, the questions surrounding complete preemption are analyzed as state adjudication of only state law claims (assuming no federal preemption of any claims) or federal adjudication of only federal claims (assuming federal preemption of all claims). But there are plenty of cases where some claims are potentially preempted by federal law and some are not. *See, e.g.*, Gordon v. United Van Lines, Inc., 130 F.3d 282, 289–90 (7th Cir. 1997) (holding that state law claims for breach of contract, fraud, willful and wanton conduct, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act were preempted by the Carmack Amendment but that a claim for intentional infliction of emotional distress was not); Hoover v. Allied Van Lines, Inc., 205 F. Supp. 2d 1232, 1235 (D. Kan. 2002) (noting that the state court found that the Carmack Amendment preempted negligence and breach of contract claims but not claims for fraud, misrepresentation, or violations of the Kansas Consumer Protection Act).

a state claim that may or may not be preempted by federal law[415]) but has other state causes of action that are not preempted by federal law. If the case remains in state court, the state court can determine whether the one claim is preempted by the federal claim. If it is, the court may give the plaintiff the opportunity to amend to assert the federal claim, but the plaintiff is unlikely to amend if for some justifiable reason the plaintiff cannot recover under the federal claim. The state court will then determine the merits of the other state law claims. If, on the other hand, the defendant uses complete preemption of the one claim as a basis for removal, the federal court will take jurisdiction and, even assuming it finds complete preemption, will also determine that the federal claim is barred and dismiss the federal claim. Thus, even though the federal court would initially have supplemental jurisdiction, the court would likely remand the remaining state law claims upon dismissing the federal claim. In such a scenario, complete preemption, even where found, simply adds the extra steps of removal and eventual remand.

Similarly, if the plaintiff's alleged federal claim was not barred, but recovery under it was tenuous, and the plaintiff had other state law claims, the plaintiff may choose—after a state court determines that the tenuous federal claim preempts any state law claim—to forego preempted state claims and remain in state court for adjudication of the remaining non-preempted state claims. If, however, one of the plaintiff's state law claims is preempted by the tenuous federal claim, and the defendant removes on the basis of complete preemption, the federal court could assert jurisdiction over the tenuous federal claim as well as the other state law claims under supplemental jurisdiction. The federal court would thus be determining primarily state law claims in addition to a federal claim on which the plaintiff only has a marginal chance of recovery and may have preferred to forego in order to retain a state forum.[416]

Of course a bright line rule that streamlined procedure and reduced costs to litigants would have little value if it failed to produce a correct result. Such error costs are an essential component in determining efficiency. Yet it is important to examine what a correct result would look like in the complete preemption context—and, correspondingly, what errors should be avoided. If a correct result means a correct substantive determination of federal preemption defenses and, also, if federal courts in fact provide a more correct substantive determination of federal preemption than do state courts, then the *Anderson* test would lower error costs in some cases by increasing federal jurisdiction and providing a federal forum for such

415. *See, e.g.*, *Hall*, 476 F.3d at 690 n.9 (noting that the plaintiff's unasserted Carmack claim would have been barred by the contractual limitations period); Ritchie v. Williams, 395 F.3d 283, 286–89 (6th Cir. 2005) (finding complete preemption of state law claims by § 301 of the Copyright Act, 17 U.S.C. § 301 (2000), and holding that the copyright claim was barred by the statute of limitations).

416. Professor Twitchell has recommended that where a "plaintiff has viable state law claims and never sought to rely on federal law," the "plaintiff should still be given the option of dismissing [the federally preempted] claims and returning to state court to assert any viable state claims." *See* Twitchell, *supra* note 169, at 868–69 & n.273.

determinations.[417] Yet complete preemption is a jurisdictional doctrine and thus the key question is not what the ultimate substantive determination should be, but which court, state or federal, should be given the authority to make that decision. The error to be avoided is an error in the allocation of judicial power between state and federal governments rather than any specific errors as to the ultimate substantive outcome. Under *Anderson*, as shown in the Carmack Amendment context and in *Anderson* itself,[418] the *Anderson* test results in jurisdiction at odds with congressional intent. Because the *Anderson* tests fails to properly allocate judicial power between state and federal governments in accordance with congressional intentions, *Anderson* not only provides a complex and unworkable framework for determining federal jurisdiction, it additionally increases error costs.

Overall, the *Anderson* framework is far from efficient and certainly cannot be justified on the basis of creating efficiency in judicial administration.

VI. RETURNING TO CONGRESSIONAL INTENT

Although *Taylor* rightly focuses on the need to tie complete preemption to congressional intent,[419] *Taylor* could be improved as a workable test for complete preemption. Notably, while the *Taylor* concurrence was straightforward in requiring clear congressional intent of removability,[420] the majority opinion merely said it would be hesitant to find complete preemption without such intent.[421] It is likely that the *Taylor* majority did not want to foreclose complete preemption to unknown future cases where a clear manifestation from Congress was absent but where allowing removal on the basis of the federal defense might nevertheless seem requisite to effectuate the purposes of a federal statute. However, the *Taylor* majority left the door open without explaining when complete preemption should be allowed absent such a manifestation.[422] Consequently, federal courts created divergent multifactored tests for complete preemption.[423]

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417. But if a correct substantive determination is the correct and desired result in fashioning a rule for removal jurisdiction, then federal courts should always be given removal jurisdiction for federal defenses rather than employing the complex case-by-case analysis required by the complete preemption doctrine post-*Anderson*. *Anderson* does not provide a federal forum for all federal preemption defenses, but only where the preemptive federal law provides the exclusive federal cause of action. *See* discussion *supra* Part III.B. Where no federal cause of action is provided or where the federal cause of action is not exclusive, *Anderson* does not create a federal forum through complete preemption.

418. *See* discussion *supra* Part V.A.1.b. Further, as noted, *see supra* text accompanying notes 92–93, soon after enacting the NBA, Congress expressly provided for removal on the basis of a federal defense for all nationally chartered corporations *except national banks*. *See* Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226, 227. The *Anderson* Court stated that arguments regarding such jurisdictional enactments were "irrelevant" to determining removal jurisdiction and allowed removal because the NBA claim was exclusive. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 n.5 (2003).

419. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66–67 (1987).

420. *See id.* at 67–68 (Brennan, J., concurring).

421. *See id.* at 64–65.

422. *See id.*

423. *See* Miller, *supra* note 9, at 1797–1800 (discussing pre-*Anderson* tests in federal circuits).

Thus, while *Taylor*'s premise—relying on congressional intent of removability—is appropriate, there are other methods of reaching the same goal that would be more predictable and reliable. Arguably, the most efficient option is through legislation clearly setting out which federal defenses are subject to removal and which are not, similar to the 1971 ALI proposal discussed previously.[424] Whether or not one agrees with each aspect of the ALI proposal, the proposal demonstrates that well-drafted legislation can create clear, efficient delineations of jurisdiction and effectuate congressional policy determinations on the appropriate allocation of authority in light of the purposes of federal jurisdiction.

Absent such congressional action, a judicial test could be crafted similar to the one articulated for concurrent jurisdiction in *Tafflin v. Levitt*.[425] Under this framework, removal on the basis of a federal defense would be authorized if the statute so directed—as with the Price-Anderson Act—or by Congress's manifestation of its intent, as found in the statutory provisions and reliable legislative history, that the jurisdictional provision should allow removal on the basis of a federal defense—as with ERISA.[426] At the very least, as in *Rosciszewski v. Arete Associates Inc.*,[427] to allow for removal on the basis of a federal defense, Congress should clearly manifest its intent that the adjudication of federal preemption should occur in federal courts to the exclusion of state courts.[428] In short, the complete preemption test would require some manifestation from Congress that it intends the jurisdictional provision to allow removal based on a preemption defense under that statute.[429]

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424. *See supra* text accompanying notes 324–30.

425. As noted, *supra* text accompanying notes 377–78, the Court described three scenarios where "the presumption of concurrent jurisdiction can be rebutted": namely, "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." 493 U.S. 455, 459–60 (1981) (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)) (internal quotation marks omitted).

426. *See Tafflin*, 493 U.S. at 459–60. Justice Scalia contended that legislative history should not be allowed to provide the basis for exclusive federal jurisdiction, *see id.* at 472 (Scalia, J., concurring), and the Supreme Court in *Yellow Freight v. Donnelly*, 494 U.S. 820 (1990), seemed to lean in that direction, *see id.* at 824–25.

Nevertheless, while Justice Scalia is correct in stating that exclusive federal jurisdiction has never been found on the basis of legislative history, *see Tafflin*, 493 U.S. at 472 (Scalia, J., concurring), the same cannot accurately be said of complete preemption. Indeed, the finding of complete preemption in *Taylor* for ERISA is based on legislative history that explained what Congress intended to effect by adopting the same jurisdictional provision for ERISA as that used for the LMRA. *See Taylor*, 481 U.S. at 65–66. The jurisdictional provision itself, however, does not expressly provide for federal defense removal, but only exempts ERISA and the LMRA from any jurisdictional amount and citizenship requirements. *See id.* Reliable legislative history, such as that found in *Taylor*, which directly explains what Congress intends to effect by the adoption of certain statutory language, certainly demonstrates clear congressional intent of removability and should suffice to effect complete preemption.

427. 1 F.3d 225 (4th Cir. 1993).

428. *See supra* text accompanying notes 135–39.

429. Despite not being tied to anything, the *Avco* decision, allowing removal for preemption defenses based on section 301 of the LMRA, *see supra* text accompanying notes 59–62, should be upheld for stare decisis purposes and because Congress, in stating in the ERISA legislative history that it wanted ERISA to work like section 301 of the LMRA actions as interpreted by *Avco*, *see supra* text

Again, following the concurrent jurisdiction model, complete preemption could additionally be allowed in the extreme and rare instance where there exists a "disabling incompatibility between the federal [statute] and state-court adjudication" of the federal preemption defense.[430] Like the *Taylor* majority, this would leave the door open for the possible, however unlikely, situation where there is no clear manifestation from Congress, but where removal on the basis of a federal defense is necessary to effectuate congressional purposes. Such an allowance should be construed very narrowly, as it appears to have been in the concurrent jurisdiction caselaw.[431] Indeed, in the concurrent jurisdiction context, the Supreme Court has rejected claims of incompatibility based on contentions that interpretive variation among state courts will lead to nonuniformity, explaining that state court misinterpretations are subject to Supreme Court review and would not "result in any more inconsistency than that which a multimembered, multitiered federal judicial system already creates."[432] Further, the incompatibility must be with a distinctive congressional design for the statute at issue and not from something that is a general federal interest applicable to all or many federal preemption defenses.[433] That is, allowing state court adjudication of the federal preemption defense must "plainly disrupt the [specific] statutory scheme" as authored and envisioned by Congress.[434] Otherwise, the "clear incompatibility" analysis could be just as malleable,

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accompanying notes 72–73, impliedly authorized such removal. However, the *Avco* decision remains an anomaly and would not come within the scope of a rule based on congressional intent of removability.

430. *See Gulf Offshore*, 453 U.S. at 477–78. A different articulation requires "a clear incompatibility between state-court jurisdiction [over the federal preemption defense] and federal interests." *Tafflin*, 493 U.S. at 459–60 (quoting *Gulf Offshore*, 453 U.S. at 478) (internal quotation marks omitted).

431. *See, e.g.*, *Tafflin*, 493 U.S. at 472–73 (Scalia, J., concurring) (explaining that exclusive jurisdiction had yet to be found by the Supreme Court on the basis of a clear incompatibility).

432. *See Tafflin*, 493 U.S. at 465; *see also* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 514 (1962) (noting that "diversities and conflicts" would occur "no less among the courts of the eleven federal circuits, than among the courts of the several States," which is the "usual consequence" of concurrent jurisdiction, and to resolve such conflicts "is one of the traditional functions of this Court").

433. *See Tafflin*, 493 U.S. at 472 (Scalia, J., concurring) (explaining that clear incompatibility might be established where "a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme").

Notably, in situations where Congress has not made any express manifestations that it desires to allow removal on the basis of a preemption defense and where it has expressly allowed concurrent jurisdiction, it will be difficult—if possible at all—to demonstrate a clear incompatibility with allowing state court adjudication of the preemption defense. This is so because by expressly conferring concurrent jurisdiction, Congress is allowing state courts to determine federal preemption where both express federal claims and state claims are brought in the same action and where the defendant does not seek removal. On the other hand, a court may be more likely to find a clear incompatibility where the federal preemptive statute provides for exclusive federal jurisdiction, or where Congress fails to enact a provision regarding whether there is exclusive or concurrent jurisdiction.

434. *See id.*

unpredictable, and entirely divorced from congressional intent of removability as the analysis under the *Anderson* test.[435]

VII. CONCLUSION

The *Anderson* test creates a policy-bankrupt allocation of state and federal jurisdiction. Complete preemption under *Anderson* completely fails to comport with separation of powers and federalism principles by allocating cases to federal court, contrary to congressional intent and despite congressional manifestations that state courts are competent to adjudicate the federal preemption defense. Further, the *Anderson* test is unpredictable, shuttles cases between state and federal court, and is generally inefficient. This is so not because removal on the basis of a defense is necessarily inefficient but because an unpredictable rule requiring a full substantive analysis to determine jurisdiction is inefficient.

In contrast, a test for complete preemption based on congressional intent of removability has a solid foundation in the structure of American government, giving weight to separation of powers and federalism concerns. First, it allows Congress, rather than federal courts, to expand the jurisdiction of the federal judiciary. Judicial allowance of federal jurisdiction is thus tied to the constitutional foundation for lower federal court jurisdiction—namely, authorization by Congress. This foundation is particularly important for removal jurisdiction, which is "entirely

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435. *See* discussion *supra* Part III.B. Other commentators, such as Professors Morrison, Miller, Ragazzo, and Spencer, have recommended that courts rely on Congress to determine complete preemption or abandon complete preemption as a judicial doctrine. *See discussion supra* Part IV. However, both Professor Morrison's and Professor Spencer's discussions are nearly cursory—they lack elaboration or explanation of how reliance on Congress would actually work. *See* Morrison, *supra* note 189, at 194; Spencer, *supra* note 164, at 290. Professor Ragazzo offers a full treatment of the issue, but the force of his argument is to abandon complete preemption and similar exceptions rather than offering a framework for relying on congressional intent. *See* Ragazzo, *supra* note 182, at 329–31, 335. Finally, Professor Miller briefly recommends that the Supreme Court "clarify the analytical standard," Miller, *supra* note 9, at 1822, and suggests the Court "[p]lac[e] the burden on Congress—at least prospectively" by offering "guidance as to what terms should appear in the statute, or, at least, be set out in reliable legislative history, to create complete preemption," *id.* at 1800. This would allow Congress to knowingly craft legislation providing for federal defense removal; however, the Price-Anderson Act, SLUSA, and ERISA indicate that where Congress particularly has wanted to allow federal defense removal, it has been able to manifest that desire.

This Article contributes to the work of these scholars by offering a new framework for the judiciary to apply, modeled on concurrent jurisdiction caselaw, that ensures reliance on congressional intent but still allows a narrowly defined area for the judiciary to provide federal defensive removal absent such manifestations where necessary to effectuate specific congressional purposes. Further, the Article explores efficiency, separation of powers, and federalism problems created by *Anderson* and examines a specific statutory scheme as a case in point, the Carmack Amendment, *see* discussion *supra* Part V.A., to demonstrate that reliance on a replacement federal cause of action does not accurately demonstrate congressional intent of removability and, indeed, may accompany congressional desires to limit federal jurisdiction.

a creature of statute."[436] Second, contrary to the *Anderson* and Seinfeld analyses, the breadth of federal jurisdiction would not be dependent on federal court interpretations of federal power. Third, federalism and comity are promoted where state court jurisdiction over federal preemption defenses is taken away only when Congress determines that such action is needed—whether it be for uniformity, state hostility, or federal law expertise reasons.

Reliance on Congress to create exceptions to the well-pleaded complaint rule would also be far more predictable, and thus more efficient, than the current regime: if there are no congressional manifestations that a federal preemption defense should be removable, then it is not removable—absent the rare clear incompatibility. This way courts and litigants could determine, with far more certainty than under *Anderson*, whether removal was proper and would not have to litigate the preemption defense in order to find out if the federal court has jurisdiction. Finally, complete preemption could become grounded in the purposes of federal jurisdiction because Congress can determine when the "interest in securing a uniform interpretation of federal law or safeguarding against state court bias is most pressing" and when it is not pressing or necessary.[437]

While the Supreme Court's decision in *Anderson* employs the *Taylor* rubric of looking to congressional intent as the touchstone of complete preemption, by changing the test from congressional intent of removability to congressional intent that a cause of action be exclusive, the Court has abandoned reliance on Congress as the proper and best authority to permit removal on the basis of a federal defense.

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436. *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) ("The right of removal is entirely a creature of statute and a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. [Removal statutes] are to be strictly construed." (citation omitted) (quoting Great N. R.R. Co. v. Alexander, 246 U.S. 276, 280 (1918)) (internal quotation marks omitted)).

437. *See* Seinfeld, *supra* note 14, at 547–48 (explaining the need to ground complete preemption analysis in the purposes of federal jurisdiction).

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