

RATIONALIZING COMPLETE PREEMPTION AFTER *BENEFICIAL NATIONAL BANK V. ANDERSON*: A NEW RULE, A NEW JUSTIFICATION

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I. INTRODUCTION

The Supreme Court changed the oft-maligned complete preemption doctrine in *Beneficial National Bank v. Anderson*.¹ This Article attempts to show that *Anderson* is a useful revision to what has been considered a settled, but fundamentally flawed, federal jurisdictional rule. This Article argues that, far from being well-settled, a close examination of the Supreme Court's complete preemption jurisprudence reveals that there was no rule of complete preemption at all before *Anderson* was decided. *Anderson*, then, represents the first real, complete preemption case. This Article explains the contours of the new complete preemption doctrine, offers an argument justifying the rule announced in *Anderson*, and defends that rule against several objections.

Traditionally, complete preemption is thought to allow removal of state law causes of action to federal court where federal law "so completely pre-empt[s] a particular area that any [state law] civil complaint raising this select group of claims is necessarily federal in character."² What is striking about this statement is the ambiguity of its terms. What does it mean to say that a federal statute not only completely preempts an area of state law, but so completely preempts the area that additional effects ensue? Indeed, what is the difference between preempting an area of state law and "completely" preempting the same area? If preemption means that federal law invalidates the state law, what work is left to be done by the modifier "complete"? How can a state law claim be "necessarily federal" in character—is it not true as a matter of logic that a state law claim necessarily has a state law character? Addressing these ambiguities will be more than an idle exercise in semantics; complete preemption may be the most misunderstood of all federal jurisdictional rules. Now that the Supreme Court has uttered its first words on the subject in more than a decade, the need for clarification of this complicated area of law is more desperate than ever.

Leaving aside all this ambiguity for a moment, the general rule is that

1. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003).
 2. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987).

state law claims that are completely preempted are treated as federal claims and are thus removable to federal court.³ Complete preemption, then, is basically a kind of federal question removal.⁴ The notion of removing a case from state court to federal court on the basis of federal question jurisdiction has “for such a simple concept . . . provoke[d] heated debate and near-endless confusion,”⁵ and perhaps no permutation of federal question removal has provoked more confusion among courts and commentators than the doctrine of complete preemption.⁶

Among its other features, complete preemption is odd in that it seems to run counter to the “well-pleaded complaint” rule⁷—the doctrine requiring that a federal issue appear on the face of the plaintiff’s well-pleaded complaint for federal question jurisdiction to exist—by facilitating removal of wholly state law cases.⁸ Because traditional complete preemption issues almost always arise in cases where the defendant alleges, as a defense on the merits, that the plaintiff’s state law claims are substantively preempted by federal law,⁹ and because issues related to a federal preemption defense (such as anticipatory rebuttal arguments) would not appear on the face of a well-pleaded complaint,¹⁰ complete preemption removal seems to constitute an exception to the well-pleaded complaint rule.¹¹ Complete preemption removal is thus closely related, and perhaps identical, to federal defense removal, which is discussed

3. *See id.*

4. *Id.* at 63; *see also* Tristin K. Green, Comment, *Complete Preemption—Removing the Mystery from Removal*, 86 CAL. L. REV. 363, 363–64 (1998) (“[A] defendant may remove a cause of action that otherwise appears to lack federal question jurisdiction by asserting that federal law ‘completely preempts’ the state law claim.”).

5. Green, *supra* note 4, at 363.

6. *See, e.g., id.*; Sharon Reece, *The Circuitous Journey to the Patients’ Bill of Rights: Winners and Losers*, 65 ALB. L. REV. 17, 43 & n.187 (2001) (noting that, in the ERISA context where cases often address both substantive and complete preemption, “the area becomes complex and confusing”).

7. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152–54 (1908) (establishing the well-pleaded complaint rule).

8. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987).

9. *See, e.g., id.* at 392 (noting that the defendant raised federal preemption as a defense).

10. *See Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 113 (1936) (noting that “the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff’s cause of action and anticipates or replies to a probable defense” (citations omitted)).

11. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

below.¹²

There are other types of cases where removal based on the defendant's assertion of a federal defense is permitted,¹³ and historically there was at least one other recognized exception to the well-pleaded complaint rule.¹⁴ This exception was based on the "artful pleading doctrine," a corollary to the well-pleaded complaint rule designed to ensure that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint,"¹⁵ and allowed for federal question removal of certain state law claims subject to a federal claim preclusion defense. Complete preemption removal also has been characterized as a doctrinal response to such artful pleading because one effect of complete preemption is to prevent plaintiffs from defeating federal jurisdiction by intentionally omitting necessary federal claims from their complaints.¹⁶ One thus might be tempted to think that complete

12. See discussion *infra* Part II.C.

13. See *infra* notes 39–42 and accompanying text.

14. See *infra* note 15. Historically, some cases, the resolution of which "implicates a federal claim preclusion defense," were removable despite the lack of a federal issue on the face of the plaintiff's well-pleaded complaint. See Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1785 (1998) (discussing the "Moitie Doctrine," which is when "courts seek to enforce the res judicata effect of a federal adjudication by allowing—in certain circumstances—the removal of a state court action that implicates a federal claim preclusion defense"). The rationale for removal in these cases was that resolution of the relevant res judicata issues required analysis of exactly what was and was not decided in previous cases involving federal claims. *Id.* at 1809–10. This exception to the well-pleaded complaint rule seems to have been eliminated. See *Rivet v. Regions Bank of Los Angeles*, 522 U.S. 470, 478 (1998) ("*Moitie* did not create a preclusion exception to the rule . . . that a defendant cannot remove on the basis of a federal defense.>").

15. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). See generally *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (originally adopting the term "artful pleading" to describe a plaintiff's inclusion of an anticipated federal defense in the complaint in an attempt to create federal subject matter jurisdiction).

16. *Miller, supra* note 14, at 1784–85. Aside from the complete preemption case, there is at least one other situation in which a plaintiff might engage in artful pleading—the case in which the plaintiff's right to relief on a state law cause of action "depends on the resolution of a substantial, disputed federal question." *ARCO Envtl. Remediation L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (citations omitted). Applying this exception involves more than the conclusion that Congress intended certain state law claims be adjudicated in federal court, which seems, at first glance, to be the primary focus of the complete preemption exception. See discussion *infra* Part II.B. The "substantial federal issue" exception exists so federal courts will be able to exercise jurisdiction in cases where there is a strong federal interest in the creation of a single, uniform body of federal decisional law or

preemption is merely an uninteresting, rarely invoked technical feature of federal jurisdictional doctrine, but complete preemption continues to evolve and the implications of that evolution remain unclear and subject to criticism.

Justice Scalia's characterization of applications of complete preemption doctrine as acts of "jurisdictional alchemy"¹⁷ is typical of critical views of the doctrine. That criticism would be telling, however, only if the doctrine departs substantially from established jurisdictional principles.¹⁸ If Justice Scalia's argument is merely that "complete preemption" describes nothing more than an illegitimate or undesirable application of accepted jurisdictional principles to a certain set of cases, then it is substantially less troubling. The term "complete preemption" could be done away with altogether in favor of more familiar terms such as "removal jurisdiction" or "federal question jurisdiction," allowing for defense of the doctrine from a deep reservoir of jurisprudence and scholarly argument. But, the controversy surrounding complete preemption is provoked by more than erroneous nomenclature. It is precisely because the complete preemption doctrine is a judge-made jurisdictional rule, distinct from familiar jurisdictional principles, that critics find the doctrine so puzzling.

This Article has two goals. First, this Article examines the Supreme Court cases in which complete preemption doctrine has been applied to determine if complete preemption is distinguishable from other more familiar jurisdictional doctrines. Second, when an application of the doctrine departs from established jurisdictional principles, this Article examines the defensibility of the departure. Finally, Part IV concludes that *Anderson* constitutes the only such departure and that the "*Anderson* rule" of complete preemption is justified despite several potential objections.

Part II discusses federal question jurisdiction and removal to situate complete preemption in its proper doctrinal context. It distinguishes substantive preemption from complete preemption because the two must

statutory interpretation. See Miller, *supra* note 14, at 1786–87 ("It seems quite natural that federal courts would wish to recognize federal question jurisdiction for those seemingly pure state causes of action that implicate an important question of federal law.").

17. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 14 (2003) (Scalia, J., dissenting).

18. As Justice Scalia makes clear, complete preemption is only "alchemy" insofar as it constitutes a "radical departure" from settled jurisdictional principles such as the well-pleaded complaint rule. *Id.* at 14–15.

not be conflated. Complete preemption, a jurisdictional concept,¹⁹ is analytically and practically distinct from substantive preemption,²⁰ which concerns the invalidation or displacement by federal law of conflicting state substantive law.²¹ Despite the seeming ease of distinguishing these uses of the term “preemption” at the conceptual level, the fact that most cases involving complete preemption questions also involve questions of substantive preemption continue to produce inconsistent pronouncements from the courts.²²

Part II continues with a detailed examination of the Supreme Court’s core complete preemption cases. It argues that the Supreme Court cases commonly cited as the source of the controlling rule of complete preemption actually establish no rule at all. That is, no Supreme Court case before *Anderson* establishes a rule of removal analytically distinct from both substantive preemption and familiar jurisdictional concepts. Finally, Part II will discuss the Supreme Court’s recent treatment of complete preemption in the *Anderson* case and conclude that, unlike its predecessor cases, *Anderson* does in fact set out a distinct rule of complete preemption, making it the first complete preemption case.

In defense of the *Anderson* rule, Part III attempts to determine whether *Anderson*’s departure from the current state of things is beneficial. First, I discuss and discard several possible justificatory arguments and conclude—rather surprisingly, in light of previous judicial and scholarly defenses of complete preemption—that the *Anderson* rule is primarily justified as an efficiency generating tool of judicial administration. Second, Part III addresses two categories of objections to the *Anderson* decision. The first asks whether *Anderson* is consistent with established jurisdictional principles. The second concerns the *Anderson* rule’s effect of relocating a specific category of substantive preemption questions from state to federal court and whether that effect is problematic for federalism principles. Finally, Part III demonstrates that the negative effects of the rule in this

19. See Miller, *supra* note 14, at 1793–1800 (describing the complete preemption doctrine generally).

20. See generally Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770–73 (1994) (detailing substantive preemption doctrines).

21. See *infra* Part II (discussing differences between complete preemption and substantive preemption).

22. See Green, *supra* note 4, at 392 (arguing that “the Supreme Court’s guidance on [complete preemption] has been misleading and confused”). The current test for complete preemption requires a showing by the defendant seeking removal that the state law cause of action at issue is preempted and that Congress intended that the federal cause of action be exclusive. See *Anderson*, 539 U.S. at 9 n.5.

regard are nonexistent or negligible in light of the benefits to be captured by widespread application of *Anderson*.

II. THE HISTORY AND EVOLUTION OF COMPLETE PREEMPTION

A. Federal Question Jurisdiction and Removal

Complete preemption allows federal question removal of some wholly state law cases even though federal question jurisdiction only permits federal courts to hear cases “arising under” the Constitution, federal law, and treaties.²³ Far from being subject to the exclusive jurisdiction of the federal courts, the Supreme Court in *Tafflin v. Levitt*²⁴ held that these federal questions are generally presumed to be matters of concurrent jurisdiction among federal and state courts.²⁵ The concurrent jurisdiction of the state courts over federal questions can be restricted by Congress,²⁶ which may make federal court jurisdiction over cases involving federal questions exclusive,²⁷ or, leaving concurrent state court jurisdiction intact, may provide a defendant the right to remove a case to federal court if the plaintiff’s complaint asserts a claim based on federal law.²⁸ In the

23. U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331 (2000).

24. *Tafflin v. Levitt*, 493 U.S. 455 (1990).

25. *See id.* at 458–59 (“Under this system of dual sovereignty, 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.” (citations omitted)).

26. *Id.* at 459 (“This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.” (citations omitted)).

27. *See, e.g., id.* at 470–72 (Scalia, J., dissenting) (citing express statutory grants of exclusive federal court jurisdiction over particular federal statutory claims, express grants of exclusive federal court jurisdiction over certain subject matter areas, and examples of congressional grants of exclusive federal court jurisdiction implied by statute).

28. *See* 28 U.S.C. § 1441; *see also* *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252–54 (1868) (affirming the power of Congress to provide for pre-judgment removal from state to federal court on federal question grounds). Congress’s power to define the scope of federal court jurisdiction is constitutional in origin. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 451 (4th ed. 1996). The Constitution makes clear that the appellate jurisdiction of the Supreme Court is subject to “such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. As to the lower federal courts, it is accepted that the language of Article III’s vesting clause resulted from a compromise between a faction of the constitutional framers “who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there

context of removal, the *Tafflin* presumption is left intact, as removal is not automatic, but rather a discretionary right of the defendant.²⁹ Where a defendant chooses not to remove, the state court is presumed to have authority to adjudicate the federal claims at issue in the case.³⁰ Clearly, Congress ought to have the power to curtail state court jurisdiction to hear federal law claims when it chooses to do so—federal statutory claims are created by Congress, and Congress need not create federal statutory claims at all. Therefore, it follows that control over the forum for adjudicating such claims is an instance of the greater power including the lesser. Less intuitive is the idea that federal courts have the capacity to interpret federal statutes in a manner that curtails state court jurisdiction to hear state law claims, but this is precisely what many think occurs in cases where federal question removal is permitted under the complete preemption doctrine.³¹

should be no federal courts at all except for a Supreme Court with . . . appellate jurisdiction to review state court judgments.” FALLON ET AL., *supra*, at 348.

Because Congress also has the power to make federal court jurisdiction exclusive in cases of adjudication of federal law, it follows that Congress may provide for removal of cases involving issues of federal law as a lesser included power within the power to strip state courts of jurisdiction to hear issues of federal law altogether. *See City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966) (“We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared.”).

There are other ways in which Congress can restrict or alter the jurisdiction of the state courts to hear federal law claims. *See, e.g., Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 360–61 (1816) (upholding section 25 of the Judiciary Act of 1789, which granted the Supreme Court appellate jurisdiction over state court decisions that in some way pose a federal question of law). Congress can also provide for exclusive state court jurisdiction subject to appellate review by the Supreme Court by simply stripping lower federal courts of jurisdiction over certain causes of action. FALLON ET AL., *supra*, at 451. While congressional power to create removal jurisdiction is uncontroversial, it is a separate question whether federal courts ought to be able to create removal jurisdiction in the absence of clear congressional action to that end. *See infra* Part III.

29. It appears that there is no such thing as automatic removal. There may be cases in which removal to a federal court is required because the state court lacks subject matter jurisdiction over the federal claim, but such a case would be an exception to the general rule established in *Tafflin*. *See Tafflin*, 493 U.S. at 466–67 (“Although congressional specification of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a ‘clear incompatibility’ with federal interests.”).

30. This is the foundational premise of the *Tafflin* presumption—there is parity among state and federal courts regarding the capacity to adjudicate federal claims. *Id.* at 458.

31. *See generally Green, supra* note 4.

Generally, a suit “arises under” federal law for the purposes of federal question jurisdiction “when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or [the federal] Constitution.”³² This is what it means to say federal question jurisdiction only exists if a federal claim appears “on the face of the plaintiff’s properly pleaded complaint.”³³ The well-pleaded complaint rule, thus stated, is controlling as to whether federal question jurisdiction exists.³⁴ The plaintiff has been labeled the “master of the complaint”³⁵ and has the right to avoid federal question jurisdiction by pleading only state law claims.³⁶ The “master of the complaint” principle, a remnant of old common law, is predicated on the view that a lawsuit is the plaintiff’s property to dispense with as she plaintiff pleases.³⁷

Where a defendant seeks to remove a case from state to federal court in the absence of diversity,³⁸ the general rule is that she may only do so if the case could have been filed in federal court initially³⁹—meaning removal is only possible if the case satisfies the well-pleaded complaint rule.⁴⁰ The well-pleaded complaint rule does not allow for assertion of federal question jurisdiction or removal on the basis of the plaintiff’s anticipatory

32. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (quoting *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908)).

33. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (describing the well-pleaded complaint rule).

34. *Id.* at 392–93.

35. *See Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (“[T]he party who brings a suit is master to decide what law he will rely upon.”); *see also Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) (“Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.”).

36. *See Caterpillar*, 482 U.S. at 392.

37. *See* Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 203 (2000) (noting how the master of the complaint or “plaintiff’s choice” doctrine “is fundamentally a private-law view of civil litigation—one with deep roots in our common-law tradition”).

38. Where there is diversity of citizenship among the parties, a defendant may remove regardless of whether there is a federal law claim in the case. *See* 28 U.S.C. § 1332 (2000) (providing that federal district courts have original jurisdiction over diversity cases); *id.* § 1441 (allowing removal by a defendant only in cases in which federal court would have had original jurisdiction initially).

39. *See id.* § 1441(a) (permitting removal of “any civil action brought in a State court of which the [federal] district courts . . . have original jurisdiction”); *Caterpillar*, 482 U.S. at 392 (“Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant.”).

40. *See Merrell Dow*, 478 U.S. at 808 (“[T]he question for removal jurisdiction must also be determined by reference to the ‘well-pleaded complaint.’”).

response to a federal defense,⁴¹ even if “the defendant concedes the plaintiff’s state claims and the only real controversy relates to the federal defenses.”⁴² It is even less controversial that a defendant may not remove on the basis of a federal defense that the plaintiff’s complaint does *not* mention.⁴³ Congress expressly may provide for removal jurisdiction in cases where federal subject matter jurisdiction would not otherwise exist under § 1441, but does so only rarely.⁴⁴ Because removal on the basis of a federal defense is generally not allowed absent express congressional authorization, complete preemption doctrine, in order to justify removal, must be based on more than the assertion of a federal preemption

41. See *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 464 (1894) (“[A] suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.”).

In 1903, the Court explained the rationale for the exclusion of responses to anticipated federal defenses from the definition of a well-pleaded complaint:

It would be wholly unnecessary and improper, in order to prove complainant’s cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper.

Boston & Mont. Consol. Copper & Silver Mining Co. v. Mont. Ore Purchasing Co., 188 U.S. 632, 638–39 (1903). The well-pleaded complaint rule also prevents removal on the basis of federal questions arising out of counterclaims. See *Takeda v. N. Nat’l Life Ins. Co.*, 765 F.2d 815, 821–22 (9th Cir. 1985). By prohibiting removal based on federal defenses or counterclaims, the well-pleaded complaint rule “serves the essential administrative function of establishing the existence of a federal question at the onset of litigation.” *Miller*, *supra* note 14, at 1783.

42. Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 275 (1993) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9–12 (1983); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 151–52 (1908)).

43. See FALLON ET AL., *supra* note 28, at 453 (“[T]he right to remove depends on the contents of the plaintiff’s well-pleaded complaint; with a few exceptions, removal is not allowed based on a federal defense or a federal reply to a defense.”).

44. See The Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a) (providing that federal courts “shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim . . . with respect to which the foreign state is not entitled to immunity”); see also *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 497 (1983) (upholding the constitutionality of this grant of jurisdiction).

defense.⁴⁵

Additionally, complete preemption is not distinguishable unless it turns on more than some explicit or implicit provision of removal jurisdiction over a certain class of cases by statute. There are three generally accepted ways Congress may create removal jurisdiction. First, Congress may include a federal cause of action in a statute that provides relief where only state law remedies were previously available.⁴⁶ In this case, removal is possible under the general federal question removal statute if the plaintiff elects to plead the new federal cause of action in state court.⁴⁷ Second, Congress may provide for exclusive federal court jurisdiction over some types of claims.⁴⁸ Third, Congress may expressly provide that a certain set of state common law claims will be removable, trumping the well-pleaded complaint rule.⁴⁹ For example, Congress might

45. See FALLON ET AL., *supra* note 28, at 949 (noting substantive preemption issues usually arise as defenses to state law claims). *But see Franchise Tax Bd.*, 463 U.S. at 12 n.12, 20 n.20 (noting that federal substantive preemption may not always arise as a defense, as in cases where a “person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations”).

46. *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990). In this common type of case, removal is at the election of the defendant, but the presumption of state court concurrent jurisdiction remains intact; where removal is not elected, there is no worry about adjudication of the federal claim in state court. See *supra* notes 23–27 and accompanying text. This situation is distinguishable from situations where Congress has, either expressly or by implication, expressed doubts about the capacity or willingness of state courts to adjudicate the relevant federal issue or claim correctly. See *infra* notes 54–55 and accompanying text.

47. 28 U.S.C. § 1441(a).

48. See *supra* note 26 and accompanying text. In *The Moses Taylor*, Justice Field commented on the constitutional basis of Congress’s authority in this context, noting “[t]he constitutionality of these provisions [for exclusive federal court jurisdiction under the Judiciary Act of 1789] cannot be seriously questioned, and is of frequent recognition by both State and Federal courts.” *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 430 (1866). Examples of statutory grants of exclusive federal jurisdiction include 28 U.S.C. § 1333 (admiralty and maritime jurisdiction), § 1338 (patent and copyright cases), § 1346(b) (tort cases against the United States), and 15 U.S.C. § 78aa (2000) (securities litigation).

49. Section 2210(n)(2) of the Price Anderson Act provides that “any public liability action arising out of or resulting from a nuclear incident [pending in state court], . . . [u]pon motion of the defendant, . . . shall be removed . . . to the United States district court having venue under this subsection.” Price Anderson Act, 42 U.S.C. § 2210(n)(2) (2000). The removability of state law claims under § 2210 is made clear elsewhere in the statute. See *id.* § 2014(hh) (defining “public liability action” as “any suit asserting public liability”). This kind of express congressional provision for removal must not be confused with complete preemption.

provide that defendants who have a certain legal status,⁵⁰ plead a certain type of defense,⁵¹ or are charged with liability on the basis of a specific kind of event⁵² may remove a case despite the presence of only state law claims on the face of the well-pleaded complaint.⁵³

Most agree that Congress has the power to create removal jurisdiction as part of its broad constitutional authority to define the subject matter jurisdiction of federal courts.⁵⁴ Congress may choose to provide for removal of suits alleging only state law claims for various reasons, including the possibility that state courts might be unable or unwilling to competently and fairly adjudicate certain types of cases.⁵⁵ Such concerns for state court capacity or objectivity may rebut the *Tafflin* presumption discussed previously,⁵⁶ even in the absence of a clear statement from Congress to that effect.⁵⁷ These sorts of “parity”

50. See *supra* note 44 (discussing the Foreign Sovereign Immunities Act, which allows removal regardless of the nature of the plaintiff's claims if the defendant has the relevant legal status).

51. See, e.g., *Mesa v. California*, 489 U.S. 121, 139 (1989) (interpreting a federal officer removal statute to require the assertion of a federal defense to permit removal).

52. One such example would be a nuclear accident. See *supra* note 49 and accompanying text.

53. See, e.g., *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 482–88 (1999) (permitting removal based on the Price Anderson Act even though only state law claims were asserted in the complaint).

54. The power to provide for removal to federal court is seen as incident to Congress's power to provide for a uniform system of federal courts and federal law. See 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, 816 (1984) (“[S]hould Congress choose to create inferior federal courts, the only way to assure that the state courts were not left with ‘exclusive jurisdiction’ over the judicial power of the United States was to provide either for appellate review of state cases in the Supreme Court or for appeals or removal of such cases to inferior federal courts.” (emphasis omitted)).

55. Cf. Green, *supra* note 4, at 389–90 (noting that, until Supreme Court appellate jurisdiction was made entirely discretionary, a similar rationale supported “mandatory appellate review by the Supreme Court included cases in which a state [court] had decided against the validity of a treaty or Act of Congress or in favor of the validity of a state statute attacked upon federal grounds”).

56. See *supra* notes 29–30 and accompanying text.

57. See *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 478 (1981) (noting the presumption in favor of concurrent state-court jurisdiction over a federal claim may be rebutted “by a clear incompatibility between state-court jurisdiction and federal interests”).

considerations⁵⁸ are relevant to the discussion of complete preemption doctrine to come. For the moment, the pertinent observation is that complete preemption must be distinct from both substantive preemption and congressionally created exceptions to the well-pleaded complaint rule if critics are correct that the latter is a departure from familiar jurisdictional principles.

The well-pleaded complaint rule recognizes federal question jurisdiction where the plaintiff's complaint alleges a federal law claim under the "Holmes rule"⁵⁹ or where it is apparent from the face of the complaint that "the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law."⁶⁰ This latter permutation was set out in *Smith v. Kansas City Title & Trust Co.*⁶¹ In *Smith*, the Court upheld federal question jurisdiction over a bank shareholder suit to enjoin the bank from purchasing federal bonds issued pursuant to statute.⁶² The plaintiffs argued that the statute was unconstitutional, and state law prohibited bank investments in bonds not issued pursuant to a valid statute.⁶³ Although both the cause of action and the remedy sought were state law creations, the Court found federal jurisdiction because the case necessarily involved determining the constitutional validity of a federal statute.⁶⁴

Counterbalancing the well-pleaded complaint rule is the "artful pleading" doctrine,⁶⁵ crafted as a result of courts' recognition that the formalism of the well-pleaded complaint rule is too inflexible to meaningfully mark off the category of state law cases implicating important federal interests.⁶⁶ Rigidly applied, the well-pleaded complaint rule would

58. See generally Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06 (1977).

59. See *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (holding that "[t]he State is master of the whole matter").

60. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983). But see *supra* note 14 (discussing *Moitie* and *Rivet* and noting possible exceptions to the well-pleaded complaint rule).

61. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

62. *Id.* at 201.

63. *Id.* at 192-95.

64. See *id.* at 201.

65. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (discussing "artful pleading").

66. See *Miller*, *supra* note 14, at 1784 ("[C]ourts also have come to recognize the short comings of the well-pleaded complaint rule as a sorting device for the exercise of federal question jurisdiction . . .").

force courts to consistently “acquiesc[e] in the plaintiff’s characterization of his or her complaint as advancing only a state cause of action to negate removal jurisdiction.”⁶⁷ The artful pleading doctrine allows courts to penetrate the formalities of the complaint and look to the substantive nature of the issues when adjudicating federal question jurisdiction issues in certain types of cases.⁶⁸ Complete preemption ought to be one of the federal courts’ tools for correcting this artful pleading problem.⁶⁹

It may turn out that the complete preemption cases are no more than findings of congressional intent to create removal jurisdiction in a discrete class of cases. If that is true, complete preemption doctrine should not trouble anyone because: (1) it is merely a reiteration of the generally accepted principle that Congress has the power to create removal jurisdiction by statute; and (2) no holding of complete preemption would generally be applicable outside the context of the federal statute and particular state law claims at issue in the case. However, there is more to complete preemption than congressional grants of additional removal jurisdiction.

A principle thesis of this Article is that complete preemption doctrine must be more than a congressional grant of removal jurisdiction if it is to be distinct. This thesis follows quite clearly from the main premise of Justice Scalia’s argument that removal on the basis of complete preemption is some sort of “jurisdictional alchemy.”⁷⁰ By “alchemy,” Scalia must mean that complete preemption is not a direct application of established jurisdictional principles. However: (1) the cases traditionally thought to be examples of complete preemption are actually applications of familiar jurisdictional principles; (2) the *Anderson* case represents the first and only rule of complete preemption different from other jurisdictional rules; and (3) the *Anderson* rule of complete preemption is defensible. The next two Parts set out the context necessary to examine complete preemption.

B. Complete Preemption: Doctrinal Background

As noted, the Supreme Court’s complete preemption doctrine remains unclear.⁷¹ This Part attempts to resolve the confusion by reviewing

67. *Id.*

68. *Id.*

69. *Id.* at 1785.

70. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 14 (2003) (Scalia, J., dissenting).

71. *See supra* note 23 and accompanying text.

the history of complete preemption on the way to analyzing the *Anderson* test and the current state of the doctrine. First, however, it is important to reemphasize the necessity of distinguishing complete preemption from substantive preemption. There ought to be a difference between: (1) the case in which a federal defense renders a plaintiff's state law claim nonexistent, which is substantive preemption; and (2) the case in which a state law claim can be said to actually be a federal claim removable under § 1441. This Part and the next lay out the various doctrines of substantive preemption and complete preemption to emphasize the distinct nature of the latter. It is necessary to understand the policies substantive preemption is thought to promote to understand how complete preemption, which is mainly a jurisdictional precursor to a substantive preemption inquiry, may be defended. Complete preemption must be a jurisdictional doctrine distinct from both substantive preemption and other accepted jurisdictional principles. In this connection, this Article reviews the Supreme Court cases thought to be applications of the complete preemption doctrine and argues that none of these, until the *Anderson* decision, meets the criteria for a true rule of complete preemption.

1. *Substantive Preemption*

The similarity of the terms “substantive preemption” and “complete preemption” may cause confusion.⁷² Regardless, the doctrines are conceptually distinct. Substantive preemption concerns the invalidation or displacement of state law by conflicting federal law while complete preemption is a ground for removing state law claims to federal court on an assertion of federal question jurisdiction.⁷³ Put differently, substantive preemption concerns which substantive law—state or federal—governs a subject-matter area,⁷⁴ while complete preemption concerns the effect of federal legislation on the existence of, or appropriate forum for, certain causes of action.⁷⁵ When recharacterized this way by the complete

72. See, e.g., *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001) (“[U]se of the term ‘preemption’ . . . has caused ‘a substantial amount of confusion between the complete preemption doctrine and the broader and more familiar doctrine of ordinary preemption.’” (quoting *BLAB T.V. of Mobile, Inc. v. Comcast Cable Commc’ns, Inc.*, 182 F.3d 851, 854 (11th Cir. 1999))).

73. See generally, *Reece*, *supra* note 6, at 43–44 (explaining the difference between complete preemption and substantive preemption).

74. Though state procedural law may also be preempted, this discussion will focus only on the preemption of state substantive law.

75. See *Reece*, *supra* note 6, at 44 (stating that “[c]omplete preemption is actually a jurisdictional concept”).

preemption doctrine, state law claims become federal claims removable on standard removal jurisdiction principles.⁷⁶

State laws are substantively preempted when they conflict with federal law and are for that reason invalidated under the Supremacy Clause of Article VI.⁷⁷ The principle that federal law is the “supreme Law of the Land” such that when federal and state laws conflict, the state law is superseded and rendered invalid,⁷⁸ remains a canon of modern Supreme Court jurisprudence.⁷⁹ It is important to note that preemption of state law is not limited to state legislative and administrative enactments, but extends to state common law causes of action.⁸⁰ Applications of the

76. *See id.* (“When a court is faced with a complete preemption question, its analysis is standard federal removal analysis . . .”).

77. *But see* Gardbaum, *supra* note 20, at 785–807 (arguing that if one understands the history of preemption doctrine properly, it is apparent that Congress’s power to preempt is not connected to the Supremacy Clause at all).

78. U.S. CONST. art. VI, § 1, cl. 2; *see* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (“It is of the very essence of supremacy [of the federal government], . . . to modify every power vested in subordinate governments, as to exempt its own operations from their influence.”).

79. *See* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (“When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect.”); *Pac. Gas & Elec. Co. v. State Energy Comm’n*, 461 U.S. 190, 203 (1983) (noting that Congress’s power to preempt state law in a given area is “well established” (citations omitted)); *see also* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1378 (2001) (“*Geier* overrode a state law savings clause in the federal statute at issue and deferred to the preemptive judgment of a federal administrative agency—both actions in considerable tension with the traditional presumption against preemption.”).

80. *See* *Geier*, 529 U.S. at 867–70 (finding that regulations promulgated by the Department of Transportation pursuant to the National Traffic and Motor Vehicle Safety Act of 1996 preempted state tort claims); *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 508–09 (1992) (holding that the Federal Cigarette Labeling and Advertising Act preempted various state common law tort claims that would impose liability on cigarette manufacturers for inadequate warnings); M. Stuart Madden, *Federal Preemption of Inconsistent State Safety Obligations*, 21 PACE L. REV. 103, 106 n.4 (2000) (“Where applicable, federal preemption precludes coequally state statutes, regulations, or common law enforcement claims.”).

Additionally, in some subject matter areas, even federal common law may preempt conflicting state law of every type. *See, e.g.,* *S. Pac. Co. v. Jensen*, 244 U.S. 205, 217–18 (1917) (holding that admiralty and maritime common law rules preempt contrary state law). *See generally* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999) (discussing the constitutionality of federal preemption in admiralty cases); Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349, 1349–51 (1999) [hereinafter Young, *Brooding Omnipresence*]

supremacy principle in cases where state and federal law conflict is what is meant by “cases involving substantive preemption.” But despite the variety of types of cases involving substantive preemption analysis, two general principles are consistently applied. First, the preemption inquiry begins with the presumption that state laws are not to be displaced unless it is clear that Congress intended the federal law to have preemptive effect.⁸¹ Second, because substantive preemption analysis usually involves interpretation of federal statutes,⁸² such inquiries almost always focus on congressional intent.⁸³ Congressional intent may be stated explicitly in a statutory provision, or may be ascertained by examining the “structure and purpose” of the statute in question.⁸⁴

Substantive preemption cases can be divided into several categories. First, state law may be *expressly* preempted by a federal statutory provision mandating that state law is invalid to the extent it purports to regulate in an area encompassed by the statute.⁸⁵ Express preemption analysis involves interpretation of such statutory provisions to determine the scope of preemption Congress intended to affect.⁸⁶ Courts view the plain language of preemption provisions as the best indicator of congressional intent.⁸⁷ Where Congress includes express preemption language in legislation, it is

(same). In some areas, state law may even be preempted by the silence of Congress. See *infra* notes 103–10 and accompanying text.

81. *Cipollone*, 505 U.S. at 516.

82. See Young, *Brooding Omnipresence*, *supra* note 80, at 1383 (explaining that substantive preemption cases are primarily about the interpretation of federal statutes).

83. See *Cipollone*, 505 U.S. at 516 (stating that “‘historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

84. *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

85. See *Jones*, 430 U.S. at 525 (Congress’s intent to preempt state law may be “explicitly stated in the statute’s language”); Madden, *supra* note 80, at 105–08 (discussing the Supreme Court’s approach to express preemption).

86. See *Cipollone*, 505 U.S. at 517 (discussing express preemption analysis).

87. See *id.*

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a “reliable indicium of congressional intent with respect to state authority” . . . “there is no need to infer congressional intent to pre-empt state laws from the substantive provisions” of the legislation.

Id. (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 282 (1987)).

unnecessary that the state law at issue be found to conflict with the federal statute for the state law to be preempted—the state law need only fall within the ambit of the relevant preemption provision.⁸⁸

Absent an explicit Congressional statement of preemptive intent, substantive preemption may still be found where a state law and federal statute actually conflict.⁸⁹ Where it is logically impossible for a person to comply with both the federal and state laws—the most obvious example being where state law forbids something required by federal law—there is an actual conflict and the state law is invalidated.⁹⁰ The Supreme Court has also found actual conflicts resulting in preemption where “under the circumstances of [a] particular case [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁹¹ Such implied substantive preemption issues require courts to engage in more complex statutory interpretation,⁹² as Congress’s intent to preempt conflicting state law must be discerned through analysis of the “structure and purpose” of the relevant federal statute and its legislative history.⁹³ Courts must discern whether “the context of the federal regulatory interest, and the wishes of the congressional authors, read together, require the conclusion that inconsistent or additional state law claims or requirements” ought to be preempted.⁹⁴ While in some cases implied preemption holdings are thought to merely reflect congressional

88. *Cf. id.* (“[W]e need only identify the domain expressly pre-empted by [the relevant federal statutory provision].”).

89. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (“Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law.”).

90. *See, e.g., Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (“We will find preemption where it is impossible for a private party to comply with both state and federal law . . .” (citations omitted)).

91. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Crosby*, 530 U.S. at 373; *Fid. Fed. Sav. & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

92. *See Madden, supra* note 80, at 106–07. Implied preemption analysis ordinarily requires “an evaluation of not only the language of the statute, . . . but also . . . the overall statutory objectives. As to the latter, a full understanding of statutory objectives will frequently be informed by pertinent legislative history and the interpretation of the statute given it by the regulatory agency charged with its effectuation.” *Id.*

93. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516–17 (1992) (citation omitted).

94. *Madden, supra* note 80, at 108.

intent to preempt not made plain in an express preemption provision,⁹⁵ in other cases the court might justify its preemptive holding as preserving against state interference a carefully balanced federal regulatory scheme⁹⁶ or some other important federal interest.⁹⁷

The desire to promote uniformity in federal regulation underlies a good deal of preemption doctrine in cases involving statutes lacking express preemption language.⁹⁸ For example, where it appears Congress intends federal law to regulate an entire field of subject matter, all state laws that touch on that field will be preempted.⁹⁹ This third preemption category, called “field preemption,”¹⁰⁰ occurs when federal statute and, as the case may be, an accompanying federal administrative regime so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.”¹⁰¹ A finding of field preemption, like implied preemption analysis, requires careful attention to the structure of the relevant statute and Congress’s goals in enacting it, as well as the scope of regulation enabled by the statute relative to the scope of the field of regulatory subject matter at issue.¹⁰²

Finally, in some areas of federal interest, substantive preemption can occur even where Congress is “silent”—that is, where Congress has the authority to act, but no federal regulation yet exists. This “dormant

95. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (explaining the structure of a statute may contain “Congress’ command” to preempt state law (citations omitted)).

96. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867–74 (2000) (discussing Congress’s desire to preempt state law that would result in inconsistent levels of regulation).

97. See *infra* notes 103–09 and accompanying text.

98. See Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927, 949–50 (1996) (discussing the uniformity rationale).

99. See, e.g., *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (analyzing whether the Sherman Act preempts state anti-trust laws); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212–13 (1983) (analyzing whether Congress intended the entire field of nuclear regulation to be preempted).

100. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 547 (1992).

101. *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

102. See *Madden*, *supra* note 80, at 109 (noting that field preemption may be warranted when “examination of the federal statute and allied regulations permit the conclusion that . . . Congress intended that federal law and regulation effectively and functionally occupy the . . . field that the state law or regulation would purport to enter”).

preemption” has been at work for years in areas of commercial regulation,¹⁰³ maritime commerce,¹⁰⁴ and foreign affairs.¹⁰⁵ In these areas the uniformity argument takes on special significance, as state interference with, for example, federal regulations embodying the result of a careful balancing of interests, threaten not just the efficient administration of the regulations themselves, but also, for example, the federal interest in maintaining the viability of streams of interstate¹⁰⁶ and maritime commerce,¹⁰⁷ or the federal interest in uniformity of policy in foreign affairs.¹⁰⁸ In these contexts, disparate state regulations may be viewed not only as inefficiency-generating annoyances,¹⁰⁹ but also as real threats to the continuing viability of the country.¹¹⁰ State legislatures are considered too

103. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (explaining that the “dormant” commerce clause—the negative implication of the Constitution’s exclusive grant to Congress of regulatory authority over interstate commerce—“limits the power of the [state] to adopt regulations that discriminate against interstate commerce”).

104. See, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 214–18 (1917) (explaining that Congress alone may regulate matters pertaining to maritime commerce).

105. See, e.g., *Zschemig v. Miller*, 389 U.S. 429, 442–443 (1968) (Stewart, J., concurring) (finding that the federal government’s “monopoly” over foreign affairs means any state law touching on foreign affairs is preempted even without a conflicting federal statute).

106. See *S. Pac. Co.*, 244 U.S. at 215–16 (concluding that a state maritime law is invalid if it “contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations”). But see Young, *Brooding Omnipresence*, *supra* note 80, at 1362–66 (discussing and criticizing the uniformity rationale for dormant admiralty preemption).

107. See *S. Pac. Co.*, 244 U.S. at 217–18 (holding that Congress alone may regulate maritime commerce).

108. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381–84 (2000) (explaining that the “one voice” argument for foreign affairs preemption); see, e.g., *Zschemig*, 389 U.S. at 440–41 (noting that state lawmaking in areas of traditional state authority, such as probate law, may be preempted “if they impair the effective exercise of the Nation’s foreign policy” by creating a lack of uniformity).

109. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199–202 (1994) (prohibiting a state pricing order that burdened interstate commerce).

110. The *Zschemig* Court observed the following:

Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government. Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. If there are to be such restraints, they must be provided by the Federal Government.

localized in their knowledge and experience to conduct the kind of investigations and deliberations necessary to craft regulations that properly serve national interests.

To generalize, substantive preemption is generally defended on the basis of either: (1) Congress's power to affirmatively displace state law in an area it is constitutionally authorized to regulate exclusively;¹¹¹ or (2) some strong federal interest in the absence of state regulation of a specific subject matter, such as food and drugs, that Congress is constitutionally authorized to regulate.¹¹² Because preemption cases usually concern conflicts between state and federal law,¹¹³ substantive preemption analysis usually boils down to a question of congressional intent.¹¹⁴

Both these categories of justification for substantive preemption will be relevant, in an indirect way, to the complete preemption discussion. Application of the complete preemption doctrine is almost always the opening act for substantive preemption analysis in whichever court, state or federal, is found to have subject matter jurisdiction over the case. Whether some version of complete preemption can be justified and defended against federalism objections will turn in part on whether and to what extent federal courts can be said to be better suited to conduct substantive preemption analyses, either as a general matter or in certain types of cases.¹¹⁵ A discussion of the complete preemption doctrine in detail is helpful before revisiting such considerations.

2. Complete Preemption

This section argues that the line of cases traditionally thought to elaborate and apply the rule of complete preemption actually does no such thing. The historical incidents of application of a rule of complete preemption are best viewed as wrongly decided or as applications of

Zschernig, 389 U.S. at 441 (internal quotations omitted) (citations omitted).

111. See *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (stating that “[t]he purpose of Congress is the ultimate touchstone” of preemption analysis (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

112. See *Zschernig*, 389 U.S. at 441 (holding that the federal government has an interest in making sure each state does not establish its own foreign policy).

113. See *Young, Brooding Omnipresence*, *supra* note 80, at 1383 (“[Substantive preemption cases] are fundamentally about statutory interpretation. They are . . . not about what Congress has power to do, but about what Congress has in fact done.”).

114. *Id.*

115. See *id.* at 1380–84 (considering the federalism implications of preemption).

familiar jurisdictional principles.¹¹⁶

The discussion is divided into three sections. The first two sections consider cases of complete preemption under the federal Labor Management Relations Act (LMRA)¹¹⁷ and the federal Employee Retirement Income Security Act (ERISA).¹¹⁸ For the LMRA cases, the holding in the principal complete preemption case in fact involves a finding of field preemption, and thus does not provide any rule of *complete preemption* even if the case was correctly decided.¹¹⁹ Regarding the ERISA cases, the complete preemption holding of the principal case is best viewed as involving a finding of a congressional grant of removal jurisdiction rather than complete preemption.¹²⁰ The third section discusses the implications of this reading of the cases that supposedly establish the “rule” of complete preemption, and concludes that, prior to the *Anderson* decision, there really was no such rule.¹²¹

a. *The LMRA Cases.* The complete preemption doctrine was first announced as an exception to the well-pleaded complaint rule in *Avco Corp. v. Aero Lodge No. 735*.¹²² In *Avco*, an employer filed suit in Tennessee state court seeking injunctive relief under state law against a labor union to enforce an arbitration clause in the collective bargaining agreement, which would preclude union members from striking.¹²³ The union removed the case to federal court on the theory that section 301 of the LMRA controlled the disposition of the plaintiff’s claims.¹²⁴

Against the employer’s arguments in favor of remand, the *Avco* Court concluded that any “action arising under § 301 is controlled by federal substantive law even though it is brought in state court.”¹²⁵ The Court found that because section 301 had been interpreted to supplant all state law governing suits for enforcement of collective bargaining

116. See, e.g., *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 561 (1968).

117. Labor Management Relations Act of 1947, 29 U.S.C. § 141 (2000).

118. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 (2000).

119. See discussion *infra* Part II.B.2.a.

120. See discussion *infra* Part II.B.2.b.

121. See discussion *infra* Part II.B.2.c.

122. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560–62 (1968); see also Ragazzo, *supra* note 42, at 276 (citing *Avco* as the first application of complete preemption doctrine).

123. *Avco*, 390 U.S. at 558.

124. *Id.* at 558–60.

125. *Id.* at 560.

agreements,¹²⁶ “it is . . . clear that the claim under this collective bargaining agreement is one arising under the ‘laws of the United States’ within the meaning of the removal statute, 28 U.S.C. § 1441(b).”¹²⁷ Thus, removal was held appropriate under section 301.¹²⁸

The *Avco* Court relied on its earlier decision construing section 301 in *Textile Workers Union v. Lincoln Mills*.¹²⁹ The *Lincoln Mills* Court made clear that the two subsections of section 301 “supplement one another.”¹³⁰ Section 301(b), the Court explained, establishes that labor organizations have standing to sue and be sued as entities on behalf of the employees they represent—“the procedural remedy lacking at common law.”¹³¹ Section 301(a), then, “supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of [section] 301(b).”¹³² But section 301(a) was intended to do more than merely confer jurisdiction, the Court reasoned, in light of clear evidence that Congress intended section 301 to make collective bargaining contracts “equally binding and enforceable on both parties,”¹³³ a matter of substantive law.

Other congressional record evidence showed that this intent to make collective bargaining agreements enforceable carried with it Congress’s recognition that an “agreement to arbitrate grievance disputes is [plainly] the quid pro quo for an agreement not to strike.”¹³⁴ In recognizing this fact about labor agreements, and by making those agreements enforceable as a matter of federal law, the Court concluded that Congress implicitly rejected the previously endorsed common law rule that compulsory agreements to arbitrate are unenforceable.¹³⁵ The Court reasoned that if it read section 301 as merely granting jurisdiction over claims involving collective bargaining agreements, then the common law rule (or worse, a collection of differing state common law rules) would continue to govern disputes over the enforceability of compulsory arbitration clauses, and

126. *See id.* at 559 (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456–57 (1957)).

127. *Id.* at 560.

128. *Id.* at 558–62.

129. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *see Avco*, 390 U.S. at 559–62 (citing *Lincoln Mills*, 353 U.S. 448).

130. *Lincoln Mills*, 353 U.S. at 451.

131. *Id.*

132. *Id.* at 451–52.

133. *Id.* at 454 (quoting S. REP. NO. 80-105, at 15 (1947)).

134. *Id.* at 455–56 (citing *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109 (1924), for the rejected common law rule).

135. *Id.*

“[w]e would undercut the [LMRA] and defeat its policy”¹³⁶ With the common law rule displaced, the Court rightly asked, “what is the substantive law to be applied in suits under [section] 301(a)?”¹³⁷

In answering this question, the Court made the statement on which the *Avco* Court relied:

[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws Federal interpretation of the federal law will govern, not state law But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.¹³⁸

The federal policy in question was Congress’s intent “that federal courts should enforce [collective bargaining agreements and their compulsory arbitration clauses] on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.”¹³⁹ Therefore, broad preemption of state law was necessary to ensure that disputes over collective bargaining agreements were adjudicated in a manner consistent with this policy.¹⁴⁰ “The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain,”¹⁴¹ the Court explained in defending the extension of Article III “arising under” jurisdiction.¹⁴² Recall that field preemption occurs when Congress expresses the intent that a federal regulatory system should occupy an entire subject-matter area, completely displacing state law touching on that area.¹⁴³ This seems to be the conclusion reached by the *Lincoln Mills* Court.

What is less clear is how field preemption, a form of *substantive* preemption, can lead to finding removal jurisdiction in light of the general

136. *Id.* at 456.

137. *Id.*

138. *Id.* at 456–57, *quoted in* *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 559–60 (1968).

139. *Id.* at 455.

140. *See id.* at 456–57 (explaining that state law may be resorted to in order to find a rule that will effectuate federal policy; however, the state law will be absorbed as federal law and “will not be an independent source of private rights”).

141. *Id.* at 457 (citations omitted).

142. *Id.*

143. *Madden, supra* note 80, at 109.

rule that a defendant may not remove on the basis of a federal defense.¹⁴⁴ Justice Scalia later pointed out that “the opinion in *Avco* failed to . . . explain *why* state-law claims that are pre-empted by § 301 of the LMRA are exempt from the strictures of the well-pleaded-complaint rule, nor did it explain *how* such a state-law claim can plausibly be said to ‘arise under’ federal law.”¹⁴⁵ The *Lincoln Mills* Court did not indicate that section 301 created a federal cause of action for anyone.¹⁴⁶ The Court read the section merely to grant labor organizations standing to sue in federal court in common law contract actions and to ensure that such suits would be governed by federal law.¹⁴⁷ If there was to be any private right of action related to section 301, it would have to be created by federal courts after the fact,¹⁴⁸ as all state law causes of action had been conclusively preempted.

With no specific federal cause of action to replace the plaintiff’s state law claim, it seems the effect of section 301 does not meet the first criterion for complete preemption—that complete preemption be more than substantive preemption.¹⁴⁹ If anything, a successful defense of substantive preemption should lead to dismissal, not removal, of the plaintiff’s preempted state law claims.¹⁵⁰

Despite the analytical vagueness of the *Avco* holding, the Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*¹⁵¹ later said that *Avco* stands for the proposition that a statute granting federal question jurisdiction over a subject matter area, even if it does not provide substantive law to govern cases that might arise in that area, can make a case in which the plaintiff asserts only state law claims removable if those claims fall within the scope of the statute.¹⁵² The *Franchise Tax Board*

144. See *supra* notes 41–44 and accompanying text.

145. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 14 (2003) (Scalia, J., dissenting).

146. *Lincoln Mills*, 353 U.S. at 456–57.

147. *Id.*

148. See *Complete AutoTransit v. Reis*, 451 U.S. 401, 407–08 (1981) (noting that, while Congress authorized suits with section 301, the substantive law governing the suits was to be crafted by the federal courts); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 248–49 (1962) (explaining “the duty Congress imposed on [the federal courts] to formulate the federal law to govern § 301(a) suits”).

149. See *supra* notes 39–43 and accompanying text.

150. *Anderson*, 539 U.S. at 18.

151. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983).

152. *Id.* at 23–24. The *Franchise Tax Board* Court further attempted to justify the holding in *Avco*:

Court seems to have reasoned that because the *Lincoln Mills* Court established that section 301 preempts the entire field of state law claims concerning collective bargaining agreements while granting subject matter to the federal courts to hear actions concerning collective bargaining agreements, the *Avco* Court must have implicitly held that any state law claim touching on that subject matter area was in reality a federal claim removable regardless of whether the federal courts could provide the requested relief.¹⁵³

The Court in *Franchise Tax Board* superimposed this reading on the ambiguous *Avco* opinion. No argument is given in *Avco* for the conclusion that substantive preemption of a state law cause of action by federal law somehow recasts that state law claim as a federal claim removable under § 1441.¹⁵⁴ Had there been evidence that Congress intended state law claims preempted by section 301 to be removable, *Avco* would be nothing more than an application of the established principle that Congress may expand removal jurisdiction when it so chooses. But the *Avco* Court cited no such evidence. So, if *Avco* is rationally intelligible at all, it must stand for the proposition that for some reason state law claims substantively preempted by section 301 should not be dismissed, but rather transformed into federal claims subject to removal by the defendant despite any statements in the plaintiff's complaint.

To summarize, *Avco* should not be viewed as a complete preemption decision. Substantive preemption without more cannot sufficiently justify removal,¹⁵⁵ and *Lincoln Mills* holds that only section 301 substantively preempts the entire field of state laws relating to collective bargaining

The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.

Id. (footnote omitted). I argued previously that section 301 did not create a federal cause of action at all. If I am correct, then the proposition that the *Franchise Tax Board* Court claims *Avco* stands for makes no sense, as there is no federal cause of action to completely preempt state causes of action. *See supra* notes 146–47 and accompanying text.

153. *Franchise Tax Bd.*, 463 U.S. at 24–25.

154. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 n.2 (1968).

155. *See, e.g., Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987) ("ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law." (citation omitted)).

agreements.¹⁵⁶ It follows that section 301, without more, cannot support removal of state law claims to federal court.¹⁵⁷ The substantive preemption effect of section 301 renders the plaintiff's state law claims nonexistent, which means the claims should be dismissed rather than removed. It follows that *Avco*, relying as it did solely on the *Lincoln Mills* Court's reading of section 301, should not have ratified removal of the plaintiff's state law claim.¹⁵⁸ Understanding that *Avco* was wrongly decided, or at

156. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

157. *See Green*, *supra* note 4, at 390–91 (arguing that *Avco*'s ratification of removal under section 301 might be justified on grounds other than those in the opinion).

158. The creation of removal jurisdiction does not implicate the concurrent jurisdiction presumption because removal, as a discretionary right of the defendant, does not strip state courts of their subject matter jurisdiction over federal claims. *See* discussion *infra* Part III.B. This view of the import of the *Lincoln Mills* holding finds support in Supreme Court case law. In *Charles Dowd Box Co. v. Courtney*, the Court affirmed a holding of the Massachusetts Supreme Judicial Court that section 301 of the LMRA did not create exclusive federal court jurisdiction, and thus state courts continued to have concurrent subject matter jurisdiction over federal claims brought under section 301. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 504–06 (1962). Clearly, the Court noted, Congress had not expressly provided for exclusive federal jurisdiction in the text of section 301, which only specifies that federal courts “may” exercise subject matter jurisdiction over federal law claims brought under section 301. *Id.* at 506. The *Charles Dowd* Court further explained:

It has not been argued, nor could it be, that § 301(a) speaks in terms of exclusivity of federal court jurisdiction over controversies within the statute's purview. On its face § 301(a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts. The statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described “may” be brought in the federal district courts, not that they must be.

Id. In evaluating whether the statute impliedly created exclusive federal jurisdiction, the Court addressed the same types of state court bias and capacity arguments that might have been, *but were not*, cited in favor of removal in *Avco*. *See id.* at 506–09. Citing evidence from the legislative history, the Court explained that “the basic purpose of § 301 (a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. . . . [T]here is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.” *Id.* at 508–09. *Lincoln Mills*, the Court concluded, had done nothing more than establish that federal common law, rather than state substantive law, would govern suits for violation of collective bargaining agreements. *Id.* at 506–07. State courts were held presumptively competent to “enforc[e] rights created by federal law,” despite arguments that their doing so would upset the uniformity of labor law. *Id.* at 507–08. The Court concluded that “diversities and conflicts” of law that might occur could not provide a rationale for exclusive federal jurisdiction because they are simply the natural result of a system of concurrent federal and state court jurisdiction over

least ambiguously worded, helps explain why courts and commentators have had difficulty reconciling its holding with the principles of substantive preemption and federal question jurisdiction.¹⁵⁹ If my arguments are correct, *Avco* is not a complete preemption case at all.

Avco's failure to establish an intelligible rule of complete preemption was apparent in the Court's next major application of *Avco*'s holding in the LMRA context, *Caterpillar, Inc. v. Williams*.¹⁶⁰ In *Caterpillar*, a group of employees brought suit against their former employer, alleging breach of their employment contracts.¹⁶¹ The employer removed the case to federal court, citing *Avco* and arguing that the plaintiffs' claims were preempted by section 301 of the LMRA.¹⁶² The federal district court upheld removal,¹⁶³ but the Ninth Circuit reversed, holding that the plaintiff's claims were not predicated on any collective bargaining agreement and complete preemption could not be found where the federal statute did not provide a remedy to replace the preempted state law remedy.¹⁶⁴

The Supreme Court affirmed the Ninth Circuit on its holding that the individual employment contracts were unrelated to collective bargaining agreements,¹⁶⁵ and that the preemptive scope of section 301 extends only to "rights created by collective-bargaining agreements, and claims 'substantially dependent on analysis of a collective-bargaining agreement.'"¹⁶⁶ However, the Court rejected the Ninth Circuit's holding that the preempting federal statute must supply a replacement remedy for complete preemption removal to be appropriate.¹⁶⁷ Such a requirement, the Court explained, "is squarely contradicted by our decision in *Avco* . . . we there held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained

issues of federal law, which is the background norm in the American system. *Id.* at 514. Additionally, any serious conflicts could always be resolved by appeal to the Supreme Court. *Id.*

159. See, e.g., Ragazzo, *supra* note 42, at 282–87 (attempting, but admittedly failing, to harmonize *Avco* with existing jurisdictional law).

160. *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

161. *Id.* at 388–89.

162. *Id.* at 390.

163. *Id.*

164. *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 932 n.2, 935–36 (9th Cir. 1986).

165. *Caterpillar*, 482 U.S. at 394–96.

166. *Id.* at 394 (quoting *Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)).

167. *Id.* at 391 n.4.

only in state court.”¹⁶⁸ This reasoning seems anomalous. Two cases discussed below, which were decided between *Avco* and *Caterpillar*, contain reasoning in favor of complete preemption under ERISA that seem to directly contradict this version of the rule of complete preemption.¹⁶⁹

For now, however, it will suffice to note the difficulty the *Caterpillar* Court had in specifying what rule *Avco* created. The Court first cited the lower court in *Avco*, which held that, due to the preemptive force of section 301, state law “does not exist” in the context of the enforcement of collective bargaining agreements.¹⁷⁰ This, the *Caterpillar* Court reasoned, grounded the *Avco* Court’s holding that any state law claim brought to enforce a collective bargaining agreement was in reality a federal claim.¹⁷¹ However, while it may be true that state law that would otherwise govern enforcement of collective bargaining agreements is rendered nonexistent by the preemptive force of section 301, it does not follow that such nonexistent state law claims must be, by virtue of the reason for their nonexistence, federal claims. The natural conclusion would be that such state law claims, if found to be nonexistent, could not constitute “claim[s] upon which relief can be granted.”¹⁷² As such, the claims should subject the plaintiff to dismissal rather than removal to federal court.¹⁷³ What is missing from the analysis is the *intermediate step*—the argument that justifies replacing the nonexistent state law claim with a federal claim.

The *Caterpillar* Court’s other attempts to explain the *Avco* holding fare little better. The Court cites the characterization of *Avco* presented in *Franchise Tax Board* discussed previously.¹⁷⁴ Recall that, in *Franchise Tax Board*, the Court explained that the preemptive force of section 301 is “so powerful” that state law claims related to enforcement of rights created by collective bargaining agreements are federal in character regardless of what is alleged in the plaintiff’s complaint.¹⁷⁵ This formulation of the *Avco* “rule” falls prey to the same criticism leveled in the preceding paragraph—while the premises might be true, the conclusion does not follow. Later,

168. *Id.*

169. *See infra* Part II.B.2.b.

170. *Caterpillar*, 482 U.S. at 394 (citing *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337 (6th Cir. 1967)).

171. *Id.*

172. FED. R. CIV. P. 12(b)(6).

173. *Id.*

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

175. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

however, the *Caterpillar* Court proffers a third formulation of the *Avco* “rule,” arguing that “[w]hen a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant’s option.”¹⁷⁶ While this formulation might have partially rationalized a finding that removal was appropriate in *Caterpillar*—on the argument that the plaintiff could be assumed to be on notice that her claims, though premised solely on state law, would be subject to removal under *Avco*—this third version of the rule in no way explains *Avco* itself.

First, and most obviously, no plaintiff prior to *Avco* could have had notice that pleading state law claims for enforcement of a collective bargaining agreement was tantamount to pleading federal claims that would subject the plaintiff to removal as a matter of law. More importantly, the notice argument has the same problem as the other versions of the *Avco* rule. It is not obvious how a plaintiff’s *choice* to plead state law claims known to be preempted by federal claims changes the fact that only state law claims appear on the face of the complaint. The more natural conclusion would be that the plaintiff has chosen to plead nonexistent claims, and so has chosen to face dismissal. And, even if one concedes the *Caterpillar* Court’s position that such state law claims when pled are not nonexistent but are rather essentially federal claims under *Avco*, the *Avco* “rule” itself is not suddenly made intelligible. There remains a conceptual disconnect—a missing premise—in the *Avco* reasoning.

One might object that the *Franchise Tax Board* and *Caterpillar* reading of *Avco* simply is the “rule” of complete preemption. On this view, the rule would be that complete preemption removal is appropriate whenever the relevant federal statute has similar preemptive power to section 301 of the LMRA. Such a rule would ground the *Avco* decision. The problem is that the rule is not judicially administrable. Recall that a federal defense of substantive preemption generally does not provide a basis for removal.¹⁷⁷ So if removal is to be allowed in some subset of substantive preemption cases, there must be a principled manner of drawing the line. The assertion that some statutes have such “preemptive force” that removal is somehow obviously available provides no intelligible rule of decision. Additionally, there is no subset of substantive preemption findings from which it simply *follows* that removal is appropriate,¹⁷⁸ further

176. *Caterpillar*, 482 U.S. at 399.

177. *See supra* notes 39–42 and accompanying text.

178. Again, this is because substantive preemption, without more, cannot

underscoring the need for an administrable measure of “preemptive force.”

In response, one could argue that the special features of the preemption provision of section 301, as construed in *Lincoln Mills*,¹⁷⁹ provide the necessary indicia of special preemptive power. One might think federal statutes that both preempt state law and provide federal courts with authority to make federal common law are an identifiable subset of federal statutes having preemptive force that might be conceived by virtue of their specific distinguishing characteristics to give rise to removal. Again, however, the line turns out to be unmanageable. A number of statutes provide federal courts with common lawmaking authority, or have been interpreted to do so,¹⁸⁰ yet complete preemption removal has only been found appropriate under three federal statutes—the LMRA,¹⁸¹ ERISA,¹⁸² and the National Bank Act.¹⁸³ The Supreme Court has yet to explain how to identify federal statutes of sufficient preemptive force to justify removal.¹⁸⁴ Without a method for identifying such statutes, no generally applicable “rule” of complete preemption can be distilled from the reformulation of *Avco* common to *Franchise Tax Board* and *Caterpillar*.

b. *The ERISA Cases.* The *Avco* Court did not call the rationale for its holding “complete preemption”; that term was coined in *Franchise Tax Board*.¹⁸⁵ In that case, the California Franchise Tax Board, a state government agency, tried to collect unpaid state income taxes “by levying on funds held in trust for the taxpayers under an ERISA-covered vacation benefit plan” and subsequently sued the Construction Laborers Vacation

support removal. See *Franchise Tax Bd.*, 463 U.S. at 26.

179. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

180. See generally Joseph M. Manko, *Emerging Environmental Federal Common Law*, 70 TEMP. L. REV. 1227 (1997) (discussing federal common law making authority granted by the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response Compensation and Liability Act); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) (discussing gaps in the Telecom Act that invite federal common law making).

181. See *Caterpillar*, 482 U.S. at 394.

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

183. See *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 11 (2003).

184. See *id.* at 13–15 (Scalia, J., dissenting) (arguing that, since *Avco*, no court has explained why section 301 of the LMRA has sufficient preemptive force to justify removal).

185. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23–24 (1983).

Trust (CLVT) for refusing to pay.¹⁸⁶ The Board pursued two state law causes of action: a claim for damages for the amount of the unpaid levies, and a request for declaratory judgment that the Board's levies were not preempted by ERISA.¹⁸⁷ CLVT argued that "section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State."¹⁸⁸ CLVT removed the case to federal district court, where the Board's motion for remand was denied.¹⁸⁹ The district court rejected CLVT's substantive preemption argument but was reversed by the Second Circuit.¹⁹⁰

The Supreme Court did not reach the substantive preemption issue because it concluded that the case was not properly removed due to lack of federal question jurisdiction over the Board's claims.¹⁹¹ CLVT, citing *Avco*, argued the Board's causes of action were, "in substance, federal claims."¹⁹² Specifically, CLVT insisted that "ERISA, like § 301 [of the LMRA], was meant to create a body of federal common law, and that any state court action which would require the interpretation or application of ERISA . . . 'arises under' the laws of the United States."¹⁹³

The Court explained, somewhat ambiguously, that "*Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."¹⁹⁴ This statement followed on the heels of the Court's analysis of the facts in *Avco*, including the unavailability of the type of relief the plaintiff sought under federal law.¹⁹⁵ Removal was nonetheless justifiable in *Avco*, the Court explained, because "the preemptive force of § 301 is so powerful as to displace

186. *Id.* at 4. ERISA refers to the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2000).

187. *Franchise Tax Bd.*, 463 U.S. at 5–6.

188. *Id.* at 6 (quotation omitted).

189. *Id.* at 7.

190. *Franchise Tax Bd. v. Cal. Laborers Vacation Trust*, 679 F.2d 1307, 1308–09 (9th Cir. 1982).

191. *Franchise Tax Bd.*, 463 U.S. at 7.

192. *Id.* at 22.

193. *Id.* at 24 (quotation omitted).

194. *Id.* at 23–24.

195. *See id.* at 22–23 (noting that "the petitioner's action . . . could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law").

entirely any state cause of action.”¹⁹⁶ Later, however, the Court seems to have held that CLVT could *not* remove the Board’s claims on the basis of ERISA because the federal statute contained no “replacement” causes of action under which the Board would have had standing to sue.¹⁹⁷

Evaluating CLVT’s *Avco*-based argument in favor of removal, the Court reasoned as follows:

ERISA contains provisions creating a series of express causes of action in favor of participants, beneficiaries, and fiduciaries of ERISA-covered plans It may be that, as with § 301 as interpreted in *Avco*, any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law. It does not follow, however, that either of [the Board’s] claims in this case comes within the scope of one of ERISA’s causes of action.¹⁹⁸

Because none of ERISA’s causes of action expressly gave standing to state governmental entities to pursue claims related to ERISA-governed benefit plans,¹⁹⁹ the Court found that section 502(a) of ERISA did not automatically recharacterize the Board’s state law claims as federal claims.²⁰⁰ There were no parallel federal causes of action encompassing suits by state tax authorities in section 502(a), so “ERISA does not provide an alternative cause of action in favor of the State to enforce its rights”²⁰¹ such that complete preemption was inappropriate.²⁰²

Although the rational basis for the *Franchise Tax Board* holding is fairly clear, it remains unclear whether the Court managed to harmonize *Avco* with existing doctrine.²⁰³ The requirement that a precisely parallel federal cause of action replace the state law cause of action to justify complete preemption removal does not obviously follow from the Court’s reformulation of *Avco*’s holding.²⁰⁴ Furthermore, the parallel federal cause

196. *Id.* at 23.

197. *Id.* at 26.

198. *Id.* at 24–25 (citing ERISA § 502(a), 29 U.S.C. § 1132(a) (2000)).

199. *See id.* at 25.

200. *See id.* at 25–26.

201. *Id.* at 26.

202. *See id.* at 27 (arguing that if the plaintiff could not take advantage of ERISA’s private remedial provisions due to lack of standing, a suit for relief by such a party does not “arise under” those provisions).

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

204. *See Franchise Tax Bd.*, 463 U.S. at 23–24 (summarizing the *Avco* holding).

of action requirement alluded to in *Franchise Tax Board* is in tension with the *Caterpillar* Court's argument that *Avco* allowed for complete preemption removal even where federal law provided no remedy at all.²⁰⁵

Even if the reformulation of *Avco* did entail the parallel cause of action requirement, it still is not obvious that the *Franchise Tax Board* Court's characterization of the rationale for the *Avco* decision is accurate.²⁰⁶ The best reading of *Avco* and *Franchise Tax Board*, in light of the above arguments against the view that *Avco* created a coherent "rule" of complete preemption, is that the requirement of a parallel federal cause of action originated in *Franchise Tax Board*. This reading avoids the confusion that inheres in trying to trace the requirement back to *Avco*. Perhaps it is most useful to observe that the *Franchise Tax Board* Court did not actually uphold complete preemption, and therefore the status of the parallel federal cause of action requirement as part of the test for complete preemption remained uncertain after that decision.²⁰⁷

Metropolitan Life Insurance Co. v. Taylor,²⁰⁸ however, concretized the "replacement cause of action" requirement.²⁰⁹ In *Taylor*, an insured sued his employer and insurance company on several state law tort and contract theories for failure to pay benefits on a disability policy held by the insured through his employee benefit plan.²¹⁰ The defendants removed the case to federal district court, where they won summary judgment on the merits.²¹¹ They argued that federal question jurisdiction existed "over the disability benefits claim by virtue of ERISA"²¹² and that removal of the entire case was proper as an exercise of pendent jurisdiction over the remaining state law claims.²¹³ The Supreme Court upheld the propriety of removal on

205. See *supra* notes 166–67 and accompanying text.

206. See *supra* notes 144–58 and accompanying text.

207. See Ragazzo, *supra* note 42, at 277, 287–88 (noting this lack of clarity in the test for complete preemption in *Franchise Tax Board*).

208. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

209. See *id.* at 64–66 (discussing the similarities between the federal statute involved in *Franchise Tax Board*, section 301 of the LMRA, and the civil enforcement provision in section 502 of ERISA and finding that Congress intended the federal cause of action under ERISA to replace the state law claims). The "replacement cause of action" requirement means, of course, that there must be a precisely parallel federal cause of action that replaces the state law cause of action to justify removal to federal court based on complete preemption.

210. *Id.* at 60–61.

211. *Id.* at 61–62.

212. *Id.*

213. *Id.* at 61.

appeal.²¹⁴

The *Taylor* Court explained that the relevant question in adjudicating the legitimacy of removal was “whether [the plaintiff’s] state common law claims are not only pre-empted by ERISA, but also displaced by ERISA’s civil enforcement provision, § 502(a)(1)(B).”²¹⁵ The displacement finding was necessary, the Court explained, because the *Franchise Tax Board* Court had made clear that “ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law.”²¹⁶ The only distinction between the facts of *Franchise Tax Board* and those of *Taylor* is that the plaintiff in *Taylor* alleged a state law claim that was both preempted by ERISA’s preemption provision and replaced by ERISA’s civil enforcement provision.²¹⁷ If ERISA preemption is not enough to make removal of state law claims appropriate, then the propriety of removal in *Taylor* must have something to do with this federal replacement cause of action. This formulation of the rule of complete preemption is, again, in tension with the *Caterpillar* Court’s suggestion that the jurisdictional inquiry and questions about the availability of a federal remedy are distinct.²¹⁸

Apart from this tension, the requirement of a parallel federal cause of action does aid the *Taylor* Court in concluding that a plaintiff’s state law claims, when encompassed by ERISA’s remedial provisions, are actually federal law claims removable under § 1441. In cases like these, there is a clear federal cause of action that replaces the plaintiff’s state law claim. Nevertheless, *Avco*’s analytical gap remains. While it may be that the plaintiff’s claims are preempted by federal statute and there may be federal claims available that the plaintiff might have alleged to avoid the finding of substantive preemption, it remains to be explained why the plaintiff’s preempted state law claims are transformed into those replacement federal claims rather than being dismissed.

214. See *id.* at 62 (reversing the Second Circuit’s reversal, for lack of removal jurisdiction, of the district court’s grant of summary judgment).

215. *Id.* at 60.

216. *Id.* at 64.

217. Compare *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13–14, 26–28 (1983) (holding that a suit by state tax officials to enforce levies against trust funds held under an ERISA covered plan to declare their validity is not encompassed by ERISA), with *Taylor*, 481 U.S. at 62–64 (discussing whether the respective plaintiffs’ claims are encompassed by ERISA’s civil enforcement provisions).

218. See *supra* notes 163–66 and accompanying text.

But, the *Taylor* holding is susceptible to an alternative reading that makes the result obvious and uncontroversial. In addressing whether the plaintiff's claims, though preempted by ERISA, were nevertheless removable because they were somehow transformed into federal claims, the *Taylor* Court explained that "[i]n the absence of explicit direction from Congress, this question would be a close one."²¹⁹ Recognizing that it was operating without any clear rule of complete preemption,²²⁰ the Court argued the "extraordinary preemptive power" the *Avco* Court had ascribed to section 301 of the LMRA was not obviously present even in a statute with as sweeping a preemption provision as ERISA.²²¹ Indeed, there was no principled way to find such preemptive power, as no court had made clear exactly what distinguishes the preemptive force of LMRA section 301 from that of other statutes.²²² Presumably, the difficulty in determining the exact degree of ERISA's preemptive force was the reason the Court considered the question a close one. However, no measurement of preemptive power turned out to be necessary in light of clear evidence of congressional intent to allow removal of state law claims encompassed by ERISA's remedial provisions.²²³

Noting that the jurisdictional subsection of ERISA's remedial provision, section 502(f), contained language almost identical to section 301 of the LMRA, the Court examined the legislative history to determine the reason for the similarity.²²⁴ The Court found, apparently in light of *Avco*, that both the House and Senate had agreed to the nearly identical language so all state law claims encompassed by ERISA's remedial provisions would be regarded as "arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."²²⁵ The Court took this as evidence of congressional

219. *Taylor*, 481 U.S. at 64.

220. *Id.*

221. *Id.* at 65.

222. *See supra* notes 176–77 and accompanying text.

223. *Taylor*, 481 U.S. at 65–66.

224. *Id.* Compare ERISA § 502(f), 29 U.S.C. § 1132(f) (2000) ("The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action."), with LMRA § 301, 29 U.S.C. § 185(a) ("Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties." (emphasis added)).

225. *Taylor*, 481 U.S. at 65–66 (citing H.R. REP. NO. 93-1280, at 327 (1974))

recognition of the *Avco* rule and incorporation of that rule, by reference, into the *text* of section 502(f) of ERISA.²²⁶ Based on this observation, the *Taylor* Court concluded that “Congress has *clearly* manifested an intent to make [state law] causes of action within the scope of the civil enforcement provisions of [ERISA] *removable* to federal court.”²²⁷ It seems the best understanding of the basis of the *Taylor* holding is that the Court found an express congressional grant of removal jurisdiction.

Taylor, therefore, is not a complete preemption decision after all. Justice Brennan’s concurrence makes clear that this is the best reading of *Taylor*, arguing the Court’s decision was “a narrow one” that depended entirely on “the intent of Congress . . . to make respondent’s cause of action removable to federal court.”²²⁸ This reading of *Taylor* dispenses with the difficulties attendant to any attempt to apply whatever “rule” *Avco* can be said to stand for; instead, it casts the case as a straightforward finding of *clear* congressional intent to create removal jurisdiction.²²⁹ While this reading renders the *Taylor* holding intelligible and defensible, it also dispels the illusion that *Taylor* is an application of a complete preemption rule.

One might challenge my conclusion that *Taylor* can be read as a finding of express congressional creation of removal jurisdiction and argue that *Taylor* really stands for the proposition that courts can permit removal on the basis of implied congressional intent to allow removal. After all, the relevant section of ERISA does not specifically provide that state law actions will be removable as do the statutes in other cases where removal of state law claims is upheld on the basis of congressional authorization.²³⁰ One might, on this argument, challenge my conclusion that *Taylor* merely reiterates the established jurisdictional principle that Congress can create removal jurisdiction and instead argue that a new jurisdictional rule was

(Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 5038, 5162 (emphasis omitted)). Similar statements were found in the Senate debates. See *id.* at 66 (citing 120 CONG. REC. 29933, 29942 (1974) (statements of Sens. Williams and Javits)).

226. *Id.*

227. *Id.* (emphasis added).

228. *Id.* at 67 (Brennan, J., concurring). Not only does Justice Brennan emphasize that the majority’s holding was entirely predicated on a finding of clear congressional intent to create removal jurisdiction, but he also wants the *Taylor* rule to be confined to ERISA. As argued above, this kind of holding cannot constitute a generally applicable rule of complete preemption distinct from established jurisdictional principles.

229. *Id.*

230. See *supra* note 48 and accompanying text.

created in *Taylor*. It is not obvious that the Court has specifically allowed for implied congressional creation of removal; it follows that such a holding creates a new jurisdictional rule analytically distinct from accepted jurisdictional principles.

This argument, however, fails to appreciate the nature of what the *Taylor* Court seems to have believed it was doing in ratifying removal under ERISA's remedial provisions. It may be that judicial recognition of implied removal authorizations would be a new jurisdictional rule. It is not obvious, however, that such an implied authorization is what the *Taylor* Court found. In fact, the Court made clear that the use of nearly identical statutory language to that of section 301 of the LMRA was as clear a reference to the *Avco* rule as could be expected,²³¹ which supports the conclusion that Congress intended by the use of that language to expressly authorize removal.²³²

Additionally, the *Taylor* Court did not engage in substantive analysis of Congress's intent regarding the purposes of ERISA generally, or the jurisdictional or remedial provisions in particular, aside from whether the relevant section was intended to provide for removal.²³³ But some broader measure of analysis of congressional motives would be necessary to find an implied grant of removal jurisdiction in the "structure and purpose"²³⁴ of the statute.²³⁵ The *Taylor* Court did not announce that a congressional grant of removal jurisdiction could be implied in a federal statute. If anything, the Court seems to have viewed its holding not as a departure from established jurisdictional principles, but rather as a straightforward application of the general rule that Congress may create additional removal jurisdiction by statute.²³⁶ Thus, Justice Scalia characterized the *Taylor* decision as "rest[ing] upon a sort of statutory incorporation of *Avco*."²³⁷

231. See *Taylor*, 481 U.S. at 66.

232. See *id.* at 65–66.

233. See *id.* at 66–67 (addressing only the removal provision of ERISA, found at § 502(a)(1)(B), § 514(a), and § 514(b)(2)(A)).

234. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

235. Cf. *supra* notes 88–96 and accompanying text (discussing the analysis involved in finding implied substantive preemption).

236. See *Taylor*, 481 U.S. at 67–68 (Brennan, J., concurring) (emphasizing the clarity of congressional intent to allow removal in the specific context of ERISA section 502(f)).

237. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 13, 16 n.1 (2003) (Scalia, J., dissenting).

c. *The Absence of a “Rule” of Complete Preemption.* The *Taylor* holding is best understood as based on a finding of clear congressional intent to create removal jurisdiction, and this ground of decision makes it impossible that the Court applied a distinct rule of complete preemption. Thus, if there is to be a rule of complete preemption in this line of cases that has actually been applied to justify removal, the only potential source for such a rule is *Avco*.²³⁸

The Court in *Avco* easily could have provided a third premise to justify its conclusion that state law claims ought to be removable. It simply needed to provide an argument for preferring removal and replacement of the state law cause of action with a parallel federal claim over outright dismissal. Recall, for example, the Court’s discussion of the purposes of section 301 of the LMRA in *Charles Dowd Box Co. v. Courtney*.²³⁹ There, the Court indicated that Congress, far from intending to strip state courts of jurisdiction over claims involving enforcement of collective bargaining agreements, actually wanted to expand the number of forums in which such agreements could be enforced by plaintiffs.²⁴⁰ Recall, also, the *Lincoln Mills* Court’s finding that Congress enacted section 301 to allow labor organizations to enforce collective bargaining agreements on behalf of their members where previously such organizations had no standing to sue, again expanding in number the available remedies.²⁴¹ From these two statements of congressional purpose underlying section 301 of the LMRA, one might infer that Congress intended to provide for as much enforcement of collective bargaining agreements as possible by as many parties as possible. It follows that, to further this goal, courts should allow suits to enforce collective bargaining agreements to go forward over procedural hurdles whenever possible. A rule of complete preemption would further the purposes of the underlying statute by allowing state law claims that would otherwise be dismissed on substantive preemption grounds to instead go forward, recast as federal claims.

This type of argument would support a jurisdictional rule that selected removal and replacement of preempted state law claims over their outright dismissal, and could possibly have provided the missing premise in the *Avco* reasoning. Such an augmented rule of complete preemption could be made generally applicable—by saying, for example, that complete

238. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 557 (1968).

239. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *see supra* note 155.

240. *Charles Dowd*, 368 U.S. at 511.

241. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 452–54 (1957).

preemption removal will be appropriate wherever a federal statute: (1) preempts state law claims; (2) provides parallel federal claims; and (3) has a purpose that would be served by recharacterizing preempted state law claims as federal claims so that they might go forward. Unfortunately, no such argument appears in the line of cases traditionally thought to establish the rule of complete preemption. The LMRA line of cases stands for a rule that is both unintelligible and unworkable, and the ERISA branch amounts to no rule of complete preemption at all.

C. Beneficial National Bank v. Anderson

This Part analyzes the *Anderson* case which, in light of the previous Part's conclusions, represents the first complete preemption case. It will first describe the facts and reasoning in *Anderson* and then address and rebut Justice Scalia's objections that the *Anderson* rule is illegitimate in terms of precedent, jurisdictional principle, and federalism considerations.

In *Anderson*, twenty-six individuals who took out "tax-refund anticipation loans" from Beneficial National Bank (Beneficial) brought state law usury claims against the bank in Alabama state court.²⁴² The plaintiffs alleged that Beneficial's interest rates were excessive in violation of "the common law usury doctrine" and an Alabama statute providing a private remedy for usury.²⁴³ Beneficial removed the case to federal district court, arguing "the National Bank Act . . . is the exclusive provision governing the rate of interest that a national bank may lawfully charge, . . . that Rev. Stat. § 5198, 12 U.S.C. § 86, provides the exclusive remedies available against a national bank charging excessive interest, and that the [general] removal statute . . . therefore applied."²⁴⁴ The district court denied plaintiffs' motion to remand but certified the jurisdictional question to the Eleventh Circuit.²⁴⁵

The Eleventh Circuit reversed, holding that removal was inappropriate where there was no "clear congressional intent to permit removal under §§ 85 and 86 [of the National Bank Act]."²⁴⁶ The Supreme Court framed the question as whether "the National Bank Act provide[s] the exclusive cause of action for usury claims against national banks[.] If

242. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 4 (2003).

243. *Id.* at 3.

244. *Id.* at 4–5.

245. Anderson v. H & R Block, Inc., 132 F. Supp. 2d 948, 952 (M.D. Ala. 2000).

246. See Anderson v. H & R Block, Inc., 287 F.3d 1038, 1048 (11th Cir. 2002) (discussing the National Bank Act, 12 U.S.C. §§ 85–86 (2000)).

so, then the cause of action arises under federal law and the case is removable.”²⁴⁷ Reversing the Eleventh Circuit, the Court held that it was a matter of “longstanding and consistent construction of the National Bank Act” (NBA) that the NBA does, in fact, create the exclusive cause of action for usury against a national bank.²⁴⁸ In view of the historical treatment of the NBA, the Court held that, despite the purported state law basis for the plaintiffs’ usury claims, usury claims against national banks *can only* arise under federal law, and thus that the claims were removable under § 1441.²⁴⁹

At first glance, it is not obvious that the rule announced by the Court in *Anderson* is any more a rule of complete preemption than the so-called rules of *Avco* and *Taylor*. However, closer analysis of the Court’s reasoning provides some illumination. As the *Anderson* Court makes clear, § 85 “is the exclusive provision governing the rate of interest that a national bank may lawfully charge”²⁵⁰ and provides the only “substantive limits” on national bank interest rates.²⁵¹ So § 85 constitutes a uniform system of federal regulations governing the interest rates charged by national banks.²⁵² Section 86 of the NBA provides a cause of action against national banks for charging usurious interest rates. That section reads, in full:

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within

247. *Anderson*, 539 U.S. at 9.

248. *See id.* at 10–11 (arguing that the relevant NBA provisions “supersede both the substantive and remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive”).

249. *See id.* (“Because §§ 85 and 86 [of the NBA] provide the exclusive cause of action for [usury against a national bank], there is, in short, *no such thing as a state law claim of usury against a national bank.*” (emphasis added)).

250. *Id.* at 4–5.

251. *Id.* at 9.

252. *See Farmers’ & Mechs.’ Nat’l Bank v. Dearing*, 91 U.S. 29, 32–33 (1875) (interpreting the provisions of the NBA).

two years from the time the usurious transaction occurred.²⁵³

This section “provides the exclusive remedies available against a national bank charging excessive interest.”²⁵⁴ It “sets forth the elements of a usury claim against a national bank, provides for a 2-year statute of limitations for such a claim, and prescribes the remedies available to borrowers . . . and the procedures governing such a claim.”²⁵⁵

The *Anderson* Court compared the effect of the relevant sections of the NBA to that of the LMRA and ERISA provisions analyzed in *Avco* and *Taylor*.²⁵⁶ The majority read those earlier cases to hold that the relevant statutory sections “provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing [the relevant] cause of action.”²⁵⁷ From this construction of the case law, the *Anderson* majority announced that the complete preemption inquiry requires a finding that a federal statute creates the exclusive cause of action for the specific harm the plaintiff’s state law complaint alleges.²⁵⁸ Where there is an exclusive federal cause of action, on this rule, the plaintiff’s state law claims are removable.²⁵⁹ As the exclusivity of the usury cause of action under the NBA was already firmly established, the *Anderson* Court had no difficulty upholding removal.

The finding that Congress intended the NBA to provide the exclusive cause of action for usury against national banks was supported, the Court reasoned, by the “same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the ‘power to destroy.’”²⁶⁰ Recall that in *McCulloch v. Maryland*,²⁶¹ the Court concluded that Congress had the power to create national banks²⁶² and that allowing states to tax those banks, potentially to “death,” would violate the constitutional system of dual sovereignty.²⁶³ Put another way, because the sovereign power of Congress to charter national banks is derived from all

253. 12 U.S.C. § 86 (2000).

254. *Anderson*, 539 U.S. at 5.

255. *Id.* at 9.

256. *Id.* at 8.

257. *Id.*

258. *Id.* at 9 & n.5.

259. *Id.* at 9.

260. *Id.* at 11 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)).

261. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

262. *Id.* at 427.

263. *Id.* at 429–30.

“the people of the United States,”²⁶⁴ a single state government’s sovereign power to tax, derived from only the citizens of that state, could not be used to undo acts enabled by the national polity as a whole.²⁶⁵ Thus, state taxes on national banks were held substantively preempted.²⁶⁶

With respect to the NBA itself, the *Anderson* Court explained that “[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from ‘possible unfriendly State legislation.’”²⁶⁷ This rationale—that state governments might be hostile to national banks—is an argument for creating an exclusively federal cause of action so that state legislatures’ attempts at predatory regulation of national banks through private suit would be preempted. The substantive preemption effect of §§ 85 and 86 of the NBA thus both provides for more hospitable substantive law and opens the door to a more hospitable judicial forum by bringing claims against national banks within federal question jurisdiction.

However, there is no argument that the NBA attempts to provide for exclusive federal court jurisdiction over claims brought under §§ 85 and 86, and thus, state courts retain concurrent jurisdiction to adjudicate NBA usury claims according to the usual presumption discussed in *Tafflin*.²⁶⁸ There is no mandate that a national bank defendant is entitled to a federal forum. This observation, coupled with the *Anderson* majority’s stipulation to the absence of congressional intent that NBA usury claims be removable, indicates that further discussion is needed to understand the justification for what Scalia calls the *Anderson* majority’s “‘federalize-and-remove’ dance.”²⁶⁹ What is the argument for the proposition that state law causes of action should be removable where they are substantively preempted by Congress’s creation of an exclusive federal cause of action for the same injury? This is the same essential premise that was missing from the *Avco* rule of “complete preemption,” making that rule unintelligible and not generally applicable.²⁷⁰ But *Anderson*’s fate is more

264. *Id.* at 430.

265. *Id.* at 430–31.

266. *Id.* at 436.

267. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 10–11 (2003) (quoting *Tiffany v. Nat’l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874)).

268. *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (reaffirming state courts’ “inherent authority . . . to adjudicate claims arising under the laws of the United States”).

269. *Anderson*, 539 U.S. at 18 (Scalia, J., dissenting).

270. *See supra* notes 144–50 and accompanying text.

promising. Unlike *Avco*, the procedural context in which the *Anderson* rule operates implicates particularized interests justifying a rule of removal.

Preliminarily, it should be noted that there is an important conceptual difference between any general reasons (not necessarily congressional), for making a cause of action removable to federal court on the one hand, and the reason or reasons that motivate congressional grants of exclusive federal jurisdiction—which reason or reasons give rise to a desire that state courts be entirely foreclosed from adjudicating the relevant claim—on the other. The operation of the *Anderson* rule requires only some reason to allow for removal. Indeed, as removal is an option of the defendant, and one that may or may not be subject to judicial override in the form of a remand in any given case, a rule that results in removal forecloses to state courts only the question of the propriety of removal. In cases involving the *Anderson* rule, the question of the propriety of removal is a substantive preemption question.

But the specific desire to foreclose state courts from deciding the substantive preemption question need not be the reason justifying the rule of removal. Other reasons supporting removal of claims that fall within the ambit of the *Anderson* rule may support removal independently, and thus foreclosure of state court consideration of the substantive preemption issue may be a necessary result of the operation of an otherwise justified rule. This distinction will be fleshed out in the discussion to come, and is germane to the rejoinder of the federalism objection taken up in the last section of this Article.

III. DEFENDING COMPLETE PREEMPTION

Anderson's rule of complete preemption is not a rule whose operation depends on a determination that a federal statute meets some threshold degree of preemptive force and just happens to contain a private right of action. Nor does its applicability depend on any specific expression of congressional intent that certain state law causes of action be removable to federal court. The *Anderson* rule, distinctly, is a judge-made rule that depends only on the nature of the federal cause of action at issue.

Contrary to Justice Scalia's assertion, "[d]isplacement [of a state law claim by an exclusive federal cause of action] alone"²⁷¹ is not all that grounds the *Anderson* rule of "federalize-and-remove."²⁷² That would be

271. See *Anderson*, 539 U.S. at 17.

272. *Id.* at 18.

no more than a specialized reiteration of the discredited *Avco* “preemption equals removal” rule. The generalized form of the *Anderson* rule may be stated as follows: A state law claim is removable where federal law provides the exclusive cause of action for the injury on which the state law claim is predicated. This statement depends on the premise that there is some justification for making the state law claim removable when it is substantively preempted in this specific manner. Thus, to justify application of the *Anderson* rule in each case where an exclusively federal cause of action preempts a state law claim, requires that there be a reason to allow removal that is applicable to this entire category of state law claims.

This kind of categorical applicability is exactly what the broad language of the *Anderson* majority contemplates. The *Anderson* Court’s discussion is not limited to an analysis of the NBA, but rather explains that removal under the NBA is appropriate on application of a general jurisdictional rule—any state claim that is preempted by an exclusive federal cause of action will be removable.²⁷³ It is the generality of this jurisdictional rule that requires justification. Justice Scalia’s objection is simply that no such justification is in the offing in light of precedent, established jurisdictional principles, and considerations of federalism. Before turning to these objections, however, the most compelling arguments justifying the creation, generalization, and continued application of the *Anderson* rule will be discussed.

A. Justifications for the *Anderson* Rule

A proper understanding of the *Anderson* rule depends on a realistic view of the particular procedural circumstances in which it operates. Consider the procedural posture of the *Anderson* plaintiffs’ state law usury claim. In their complaint, the plaintiffs alleged one count of usury in violation of both the “common law usury doctrine” and “Alabama Code § 8-1-1, et seq.[.]”²⁷⁴ as well as other counts for intentional misrepresentation, suppression of material facts, breach of fiduciary duty, and “violations of the Alabama Code by charging ‘excessive interest.’”²⁷⁵ The complaint was filed in Alabama state court,²⁷⁶ and a month later, the defendants filed a notice of removal in the United States District Court for the Middle

273. *Id.* at 8–9 (majority opinion).

274. *See* Brief for Petitioners at 3, *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1 (2003) (No. 02-306) (quoting Count VI of the plaintiffs’ complaint).

275. *Id.* at 4.

276. *Id.* at 2.

District of Alabama. The district court considered the defendants' argument for removal in its disposition of the plaintiffs' motion to remand the case to state court.²⁷⁷ The district court held that the NBA completely preempted the plaintiffs' "state law usurious interest claims" and denied the plaintiffs' motion to remand.²⁷⁸ It is unclear what the district court intended to do with the other claims in the plaintiffs' complaint—either it considered them to be predicated on the same operative facts (the charging of "excessive interest")²⁷⁹ such that all the claims would be consolidated with the federal NBA usury claim, or it intended to exercise supplemental jurisdiction over the other state law claims.²⁸⁰

Because the *Anderson* rule applies only to state law claims that are substantively preempted by an exclusive federal cause of action, the cases in which the rule operates likely will share a very similar procedural scenario; the plaintiff files a complaint alleging only state law claims in state court, and the defendant removes the case to federal district court where the applicability of the *Anderson* rule is determined during adjudication of the plaintiff's motion to remand. Consider the different results possible under these circumstances. The district court may find, as it did in *Anderson*, that the plaintiff's state law claim is substantively preempted by an exclusive federal cause of action and deny the remand motion, thus allowing the plaintiff's case to proceed in federal court either immediately,²⁸¹ or after the plaintiff files an amended complaint explicitly stating the federal claim.²⁸² Alternatively, if the federal court finds that the federal cause of action does not substantively preempt the plaintiff's state

277. *Anderson v. H & R Block, Inc.*, 132 F. Supp. 2d 948, 949–50 (M.D. Ala. 2000).

278. *Id.* at 952.

279. See Brief for Petitioners, *supra* note 274, at 4 (citing various sections of the plaintiffs' complaint alleging the charging of "excessive interest").

280. See 28 U.S.C. § 1367 (2004) (federal supplemental jurisdiction statute). See generally Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 864–65 (1992).

281. See, e.g., *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 771 (5th Cir. 2003) (finding that the plaintiff's state law claims were properly removed under *Anderson* because they were substantively preempted by the remedial provisions of the Carmack Amendment to the Interstate Commerce Act; explaining that the "district court [below] . . . ordered that [the plaintiff] may not amend her complaint to add the Carmack Amendment expressly because the facts that she has pleaded suffice" (internal quotation marks omitted)).

282. See 28 U.S.C. § 1653 (2000) (allowing parties to amend defective jurisdictional allegations in either trial or appellate court with leave from the court); *Hoskins*, 343 F.3d at 771 (noting the possibility of allowing the plaintiff to amend the complaint to specify the federal cause of action).

law claims, the plaintiff's motion to remand will be granted and the plaintiff's case will proceed in state court.²⁸³

In the absence of the *Anderson* rule, the disposition of the substantive preemption argument and the effect of that disposition on the plaintiff's ability to proceed would be substantially different.²⁸⁴ The defendant may attempt to remove on the basis of complete preemption. Assuming the federal district court finds that there is an exclusively federal cause of action that substantively preempts the plaintiff's state law claim, but there is neither evidence of the extreme preemptive force discussed in *Avco* nor of any express congressional intent to permit removal of state law claims as required by *Taylor*, the federal court will find it lacks jurisdiction and remand the case to state court.²⁸⁵ Back in state court, the defendant will move to dismiss the plaintiff's state law claims on substantive preemption grounds.²⁸⁶ If the state court rejects the preemption argument, the state law

283. See, e.g., *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 937–38 (9th Cir. 1986) (holding that where federal law did not completely preempt the plaintiffs' breach of contract claims, the federal district court should have remanded those claims to the state court); *Anderson*, 132 F. Supp. 2d at 950 ("Because federal court jurisdiction is limited, the Eleventh Circuit favors remand of removed causes where federal jurisdiction is not absolutely clear.").

284. The discussion of the "pre-*Anderson*" circumstances will assume parties with the same motivations. It assumes that the defendant wants to remove the case and the plaintiff wants to remain in state court. See Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 185 (2002) ("Most plaintiffs prefer to litigate in state court and most defendants prefer to litigate in federal court.").

285. The Eleventh Circuit analyzed the history of the relevant NBA provisions and found that "clear congressional intent to permit removal is lacking." *Anderson v. H & R Block, Inc.*, 287 F.3d 1038, 1047 (11th Cir. 2002). Thus, the court of appeals found that the district court lacked subject matter jurisdiction to consider the substantive preemption question, reversed the district court's denial of the plaintiff's remand motion, and remanded the case to the district court where, presumably, remand to the state was the proper action. *Id.* at 1041, 1048. Generally, any decision by the federal district court on the substantive preemption question during its disposition of the remand motion will not be preclusive on the state court, making relitigation of the preemption issue in state court likely.

286. A decision remanding a case to state court is almost always unreviewable on appeal. See 28 U.S.C. § 1447(d) (2000) (proscribing appellate review of remand decisions except in select civil rights cases). "As a matter of federal law, unappealable decisions generally do not have preclusive weight." *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 100 n.5 (1st Cir. 2001); see also RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982) (stating that preclusion doctrines generally do not apply in cases where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action").

claim will go forward in state court.²⁸⁷

But, if the state court determines that the plaintiff's state law claim is substantively preempted by an exclusive federal cause of action and dismisses the claim on that basis, the plaintiff is presented with three options: file a new complaint alleging the exclusive federal claim in federal district court, file a new complaint or amend the existing complaint to allege the exclusive federal claim in state court, or give up the litigation altogether. If the plaintiff chooses to refile in federal court, the result is the same as it would have been after application of the *Anderson* rule—the plaintiff will have to prosecute the exclusive federal cause of action in federal district court. If the plaintiff files the federal claim in state court in a new or an amended complaint, the defendant will have the option to remove the federal claim to federal court under the general removal statute.²⁸⁸ The result is the same as in the post-*Anderson* world—the choice between a state and federal forum is placed beyond the plaintiff's control.²⁸⁹ Assuming that the defendant will exercise the removal option, the plaintiff again lands in federal court, as she would if the *Anderson* rule had been applied in the first instance.

So, it seems all the *Anderson* rule has really enabled is the assertion of removal jurisdiction somewhat ahead of schedule. By authorizing removal on the basis of the resolution of this specific type of substantive preemption question, the *Anderson* rule allows the parties to skip over several time and resource-consuming procedural steps. The result, however, remains the same: in cases where the plaintiff's state law claim is substantively preempted by an exclusive federal cause of action, the

287. See discussion *infra* Part III.B. If the state court dismisses the plaintiff's state law claims on preemption grounds but grants the plaintiff leave to amend the complaint, which would be slightly less time consuming and costly than filing a new complaint in a new case, then the defendant would have the option to remove the amended complaint, now containing a federal law claim. 28 U.S.C. § 1446(b) (permitting removal of complaints which, while not originally removable, become removable because of events later in the litigation).

288. See 28 U.S.C. § 1446(b); see also Heather R. Barber, Comment, *Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1582–84 (2004) (explaining the court-created requirement that any alteration in the case that renders it later removable must result from a voluntary choice by the plaintiff).

289. Here, just as after application of the *Anderson* rule, the plaintiff's former state law claim has become, by the parties' actions, a removable federal claim, and it is this effect of the *Anderson* rule that this Article attempts to justify. Whether the defendant actually chooses to remove the case is irrelevant, because the plaintiff's ability to choose to proceed in state court is effectively destroyed by the fact of removability, not actual removal.

plaintiff's claim becomes a federal claim subject to removal by the defendant.²⁹⁰ The only difference between the *Anderson* and non-*Anderson* circumstances is the time and resources that are expended by the parties to reach this result. This is the effect referred to above when I said that the *Anderson* rule is a rule of judicial administration; the "procedural leap" *Anderson* authorizes is what is meant by saying that a plaintiff's state law claim is "recharacterized" into a removable federal claim by the

290. The distinction made here between the specific category of substantive preemption questions that *Anderson*-rule cases involve—namely questions concerning whether some state law cause of action is preempted by a federal cause of action found to be exclusive, and other kinds of substantive preemption issues is important. State law causes of action may be preempted for a number of reasons. See *supra* notes 79–80 and accompanying text. In cases where the state law claim is preempted and there is no federal analogue cause of action, the plaintiff is just out of luck. In state or federal court, the plaintiff's claim will be dismissed, leaving the plaintiff with no private right of recovery at all. Professor Redish describes something like this distinction in his discussion of "positive" and "negative" preemption of state law claims:

In "positive" preemption, both the state and federal causes of action are designed to aid the same class of plaintiffs, but because Congress, by adoption of its legislation, has totally occupied the field, the state cause of action is preempted, lest it aid those protected by the federal law in ways not contemplated by Congress. In "negative" preemption, the state cause of action is superseded because it directly clashes with—and therefore undermines—federal law. For example, a state tort suit against one protected by federal immunity is preempted because it "negatively" undermines the goal of the federal immunity.

MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 115 (2d ed. 1990) (footnote omitted). After *Anderson*, the relevant distinction is between state law claims preempted by a federal statute containing a cause of action, because a court finds that Congress intended the federal cause of action to provide the exclusive private right of action for the injuries of which the plaintiff complains, and state law claims preempted by a federal statute, whether or not it provides a cause of action, because the state law claim "negatively" conflicts with the federal statute. In every case to which *Anderson* applies, by definition, there must exist such a federal analogue. It follows that some evidence of congressional intent that the provisions of the federal statute be enforceable by private right of action will be present in each case. If the federal statute does not provide a private right of action, but nevertheless provides for detailed regulation of some subject area, preemption of state private rights of action that also constitute regulation of that subject area will seem consistent with congressional intent. Alternatively, where a federal statute provides a private right of action, state law rights of action that conflict or interfere with the federal claim may still be preempted, even though the statute will evidence Congress's intent that the subject area be regulated in part by private suit. In such cases, there will be reasons for a court to take the view that while state law claims are preempted, private suits touching on the subject-area should be preserved to best effectuate congressional intent.

Anderson rule.

Thus, the two obvious effects of the *Anderson* rule are transfer of the substantive preemption issues in certain cases from state to federal court and the “procedural leap” just described. The *Anderson* rule itself could be justified if either effect provides benefits that would be unavailable under non-*Anderson* circumstances. If there is a compelling reason to prefer either: (1) the adjudication of this type of substantive preemption inquiry by federal courts rather than state courts; or (2) the availability of *Anderson*’s “procedural leap” over the non-*Anderson* process described above, then the creation and continued application of the *Anderson* rule may be justified. These potential grounds of justification will be considered in turn.

First, however, note one caveat. Any justification for the *Anderson* rule, to be effective, must be independent of the bare fact that there exists a substantive preemption question in any given case. Recall that the so-called rule of complete preemption in *Avco* is flawed because its applicability depends only on the possibility of substantive preemption of the plaintiff’s state law claim. Leaving aside the hopeless task of differentiating federal statutes according to their relative degrees of preemptive force, which the *Avco* “rule” also required,²⁹¹ there is a fundamental problem with basing the decision to remove the case on the mere fact that the case involves a substantive preemption question. Because a state law cause of action may be preempted by a federal statute or regulation that does not provide any private right of action, and because there is no conceptual difference between such preemption and preemption of a state law claim by an exclusively federal cause of action, a rule that allows removal in the latter case but not the former cannot be justified solely on the claim that the state law claim is allegedly preempted by federal statute, lest the rule be unprincipled and arbitrary.

Thus, this Article’s proposed justification for the *Anderson* rule will not derive principally from the inevitable presence of substantive preemption questions in the category of cases to which *Anderson* will apply. For this reason, the *Anderson* rule will be distinguishable from federal defense removal. It is the specific effect of finding that a state law cause of action is substantively preempted by an exclusive federal cause of action that will justify removal under *Anderson*. Put simply, where this specific category of federal preemption defense succeeds, it will affect the case in a way that justifies removal.

291. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 559–60 (1967).

B. *Benefits of Shifting the Substantive Preemption Inquiry from State Court to Federal Court*

To argue that there is some benefit in transferring certain substantive preemption questions from state to federal courts, one might take the position that state courts are either unwilling or unable to decide such questions as correctly, fairly, or efficiently as the federal courts.²⁹² The question “whether, overall, state courts are equal to federal courts in their ability and willingness to protect federal rights,”²⁹³ often referred to as a question of parity,²⁹⁴ has sounded in numerous debates concerning federal jurisdiction over the years. Indeed, the parity issue played a role in the original structuring of the federal judiciary.²⁹⁵ While delegates to the Constitutional Convention agreed on the need for a federal judiciary, they differed on whether, in Madison’s words, “[c]onfidence [might] . . . be put in the State Tribunals as guardians of the National authority and interests.”²⁹⁶ Some delegates felt there was no need for lower federal courts;²⁹⁷ others thought the federal judiciary needed lower courts with

292. One criticism of attempts to empirically prove or disprove federal-state court parity takes issue with the assumption that there is ever one correct answer to the kinds of legal questions about which the parity debate is concerned. See Brett C. Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL’Y 233, 237 (1999) (noting that the question “whether state courts are doing a good job of interpreting the Federal Constitution . . . inevitably lead[s] to a conclusion influenced by the normative preconceptions of the person who poses the query”); cf. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 633 (1981) (“[I]t is misleading to suppose that the rejection of a particular constitutional claim imports less fidelity to constitutional values than its vindication.”).

293. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 34 (2d ed. 1994).

294. The seminal article broadly addressing the question whether there is parity between state and federal courts is Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Professor Neuborne was primarily concerned with the relative ability and willingness of state and federal courts to uphold federal constitutional rights, and indeed the question of parity in constitutional adjudication is what preoccupies most commentators.

295. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239–40 (1988) (discussing the parity debate at the Constitutional Convention).

296. 2 M. FERRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 27–28 (1937).

297. Notably, one such delegate was John Rutledge, who argued “the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts [sic].” 1 M. FERRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 124 (1937).

broad jurisdiction so that enforcement of federal law would not depend upon “improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury.”²⁹⁸ Though this particular dispute was resolved by the “Madisonian compromise,”²⁹⁹ which left creation of lower federal courts to Congress’s discretion,³⁰⁰ the general parity question remained unanswered.

The Supreme Court has taken conflicting views on the relative competencies of state and federal courts depending on the issues being considered.³⁰¹ For example, in cases authorizing and expanding federal habeas corpus review of state court dispositions of criminal defendants’ federal constitutional claims, the Court has often based decisions at least partly on the view that expanded federal court review is needed because state courts might be inclined to under-enforce federal constitutional rights.³⁰² Distinctly, in cases addressing the authority of federal courts to intervene in ongoing state court proceedings to remedy or prevent violations of federal rights,³⁰³ the Court has often expressly rejected the notion that state courts might be inferior forums for adjudicating federal claims.³⁰⁴ In the majority of these cases, the Court is primarily concerned

298. *Id.*

299. *See supra* note 27 and accompanying text.

300. *See* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

301. For a substantially more detailed account of the history of Supreme Court treatment of the parity issue, *see* Chemerinsky, *supra* note 295, at 242–52.

302. *See, e.g.,* *Rose v. Mitchell*, 443 U.S. 545, 561–63 (1979) (holding that claims of discriminatory grand jury selection may be heard in federal court on habeas review even when previously litigated in state court); *Brown v. Allen*, 344 U.S. 443, 459 (1953) (holding that state prisoners could present claims of constitutional deprivation by the state in federal court on a habeas petition even if they fully litigated those claims in state court).

303. *See, e.g.,* *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987) (prohibiting federal court interference in state court civil suits between private parties); *Ohio Civil Rights Comm’n v. Dayton Christian Sch.*, 477 U.S. 619, 625 (1986) (proscribing federal court interference in state administrative proceedings); *Trainor v. Hernandez*, 431 U.S. 434, 439–40 (1977) (prohibition against federal court interference with state court civil attachment in which the state is a party); *Younger v. Harris*, 401 U.S. 37, 41 (1971) (prohibiting, in most cases, federal court injunctions that would interfere with state court criminal proceedings).

304. *See* *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 812 (1976) (finding that “[m]ere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in [federal] district court for their declaration” in denying preemption); *Younger*, 401 U.S. at 43–45 (finding doctrines of equity and federalism prohibit federal

with whether state courts are likely to robustly enforce federal constitutional rights rather than federal rights created by statutes that have no constitutional dimension.³⁰⁵ But even on the narrower question of state court willingness and capacity to properly enforce federal constitutional claims, the Supreme Court's guidance has been muddled at best.³⁰⁶

Perhaps legal scholarship provides more definitive resolution to the parity debate. Academic examination of the parity problem can be divided into two types: empirical³⁰⁷ and conceptual (or normative). Attempts at empirical verification or refutation of the notion of federal-state court parity, however, have been largely unsuccessful and unpersuasive in light of methodological problems stemming from the inherently subjective nature of the criteria for evaluating judicial decisions.³⁰⁸ Professor

court interference where the holder of the federal right has "an adequate remedy at law" in the state court).

305. The Supreme Court's consideration of parity questions has been limited, for the most part, to consideration of state court capacity and willingness to give full weight to federal constitutional rights, whether asserted negatively as defenses to state criminal prosecution or affirmatively in federal court through a statutory cause of action. Less often considered is the question of state court competence and willingness to enforce rights created by federal statute, such as the right to sue national banks for usury violations created by the NBA. This sort of constitutional tunnel vision in the parity debate is also found in the scholarly literature on the issue.

306. See Chemerinsky, *supra* note 295, at 253 (arguing that "parity has been a central concern of the Supreme Court's jurisdictional decisions and that the Court has been markedly inconsistent in dealing with the parity issue").

307. E.g., Gerry, *supra* note 292, at 271–93 (comparing state and federal court treatment of federal constitutional takings claims and finding broad parity); Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Evaluation of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1352–71 (surveying attorneys engaged in student rights litigation and finding a strong preference for federal court among those surveyed); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 232–46 (1983) (comparing state and federal court rulings in cases involving claims of First, Fourth, and Fourteenth Amendment rights and concluding that state courts are as likely to rule in favor of the constitutional claimant as federal courts); see also Kenneth N. Vines, *Southern State Supreme Courts and Race Relations*, 18 W. POL. Q. 5, 6 (1965) (examining U.S. Supreme Court reversals of state courts' decisions involving federal constitutional rights).

308. See Chemerinsky, *supra* note 295, at 256–72 ("Because there rarely is consensus as to what constitutes a 'correct' decision, [empirical] measurement [of parity] surely cannot take the form of counting the number of 'right' results produced by each court system."). Chemerinsky lodges a number of other criticisms against empirical parity work that attempts to evade the problem of the normative question inherent in asking whether state courts "get it right" as often as do federal courts, and his analysis of empirical efforts thus far is considered by many to be an irrefutable

Chemerinsky, after surveying the majority of the empirical work on parity, concluded that “parity is an empirical question, [but] no empirical answer seems possible.”³⁰⁹ Perhaps more importantly, there seems to be no empirical data available concerning relative court competencies in adjudicating complex issues of federal statutory interpretation, which would be required to attempt an empirical justification of the *Anderson* rule on the basis of a disparity between federal and state courts’ ability to properly adjudicate the substantive preemption issues raised in the relevant category of cases.³¹⁰

Inconclusive and unpersuasive as the empirical research may be, there remains a robust academic debate concerning the effect on parity of certain observable institutional differences between federal and state courts. Burt Neuborne, for example, argued that federal judges are more likely than state judges to uphold federal constitutional rights in any given case because of their superior “psychological set”³¹¹ and their greater technical competence and political independence guaranteed by the structural features of the federal judiciary.³¹² Along with indicting these anti-parity institutional arguments,³¹³ proponents of parity insist that other

indictment of the possibility of any empirical answer to the parity question. *Id.* at 261–73; see also Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 330 (1988) (agreeing with Chemerinsky’s conclusion that empirical study of parity is conceptually difficult or impossible).

309. Chemerinsky, *supra* note 295, at 273. At least one author has attempted an empirical analysis of the parity issue even after Chemerinsky declared such attempts futile. See Gerry, *supra* note 292, at 257–58 (“If the question is not whether state courts interpret the Federal Constitution as *well* as the lower federal courts, but instead whether they interpret the Federal Constitution *differently* than the federal courts, the parity inquiry becomes more susceptible to empirical analysis.”).

310. The dearth of empirical scholarship on this issue may result from the relatively small data set. One early study of the kinds of federal law issues taken up by state courts indicated that the “vast bulk (over 90 percent) of the federal question cases [in the few state courts studied] . . . contained constitutional rather than federal statutory claims.” Gerry, *supra* note 292, at 243 (citing Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 CONST. COMMENT. 347, 358–59 (1986)).

311. Neuborne, *supra* note 58, at 1124.

312. *Id.* at 1121–28.

313. See, e.g., Bator, *supra* note 292, at 630–31 (observing that state supreme court judges are well paid and occupy positions of prestige equivalent to those of federal judges); Gerry, *supra* note 292, at 248 (arguing that “studies of judicial elections demonstrate that majoritarian control over judges is extraordinarily weak, notwithstanding the formal reality of judicial elections in several jurisdictions”); Solimine & Walker, *supra* note 307, at 230–31 (arguing that the political accountability of state judges does not necessarily influence the character of their federal law

structural features of the judicial system, such as the oath taken by both state and federal judges to uphold the federal Constitution, promote equivalent competence and willingness to uphold federal constitutional rights.³¹⁴ Whether one advocates or opposes the notion of parity, however, arguments based on institutional factors share an analytical flaw: there does not seem to be a convincing argument showing that any set of institutional features entails fairer or more correct adjudication of federal rights. What remains is what Professor Chemerinsky calls “an intuitive judgment about whether the institutional differences between federal and state courts matter in constitutional cases.”³¹⁵

Where does this review of the parity debate leave the possibility of a disparity-based justification for the *Anderson* rule? The answer seems to be “on the shelf.” Without any definitive answers regarding the possibility of parity generally or whether it exists for certain kinds of federal law issues implicated by *Anderson*, and more broadly regarding whether parity is issue-sensitive in this manner, there seems to be little benefit in constructing such an argument.

To be sure, there are premises available to support the argument that federal courts are generally better suited to decide substantive preemption questions than state courts. One might contend, for example, that state courts lack sufficient experience with interpreting the complicated federal statutes that will often be involved in *Anderson* rule cases, and that this lack of experience will inevitably result in inferior decision making. This premise might be coupled with the observation that, as Professor Young argues, federal preemption of state law cuts right to the heart of state regulatory authority, which is the primary wellspring of the continuing ability of the states to effectively advance their interests in the federal political process.³¹⁶ Accepting for a moment the hypothesis that state court judges, many of whom are connected to one degree or another with their

decisions).

314. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 511–12 (1963) (arguing that certain decision-making processes inhere in the judicial role, whether state or federal); Solimine & Walker, *supra* note 307, at 248 (noting that the submission of information to judges by attorneys is an important factor in decision-making shared by state and federal courts).

315. Chemerinsky, *supra* note 295, at 278–79.

316. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 80–88, 130–34 (2004) (arguing that substantive preemption cases undermine state regulatory authority, thereby implicating the important state interest in commanding the political allegiance of state citizens); Young, *supra* note 79, at 1377 (same).

state political processes, are likely to be more sympathetic to state governmental concerns,³¹⁷ it follows that there is some reason to fear that state court judges are more likely than federal court judges to skew the results of their substantive preemption decisions in favor of the challenged state law. Insofar as each case in which *Anderson* will be applied requires a substantive preemption determination, the *Anderson* rule's transferal of the preemption questions to federal courts would avoid the problems of state court inexperience and bias. If there were sufficient reason to credit the general argument against parity, one might think that because any federal right is in danger of underenforcement in state courts, *any* rule that takes a category of federal claims out of state courts is net-beneficial for the federal rights of individual litigants. *Anderson* could be justified, then, on either the specific or the general parity argument.

But this kind of argument is unattractive given the intractability of the parity dispute. Just as there are premises available to construct an argument that *Anderson* is justified for disparity reasons, so are there equally compelling arguments going the other way. Indeed, as with the other parity-related arguments criticized previously, one can only reach the conclusion that state courts are more likely to decide substantive preemption questions incorrectly or unfairly by inference from the observations about the institutional features of state courts.³¹⁸ Not only is the accuracy of those observations questionable, nothing in those observations entails that state courts are less willing or able to decide substantive preemption questions. Relative inexperience with complicated federal statutes does not necessarily translate to an inability to interpret such statutes; states have complex statutes, too, and statutory interpretation is statutory interpretation, regardless of the jurisdiction. As for the bias argument, state courts might just as easily view the preemption of state law as a boon for states whose scarce resources may be supplemented by federal resources for regulation of the preempted subject area, or still other reasons might prompt state court judges to welcome federal preemption.³¹⁹ It seems that any attempt to construct a disparity-based justification for a rule of removal like *Anderson* is a hopeless exercise in the absence of some sort of empirical evidence one way or the

317. See G. Alan Tarr, *State Supreme Courts and the U.S. Supreme Court: The Problem of Compliance*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 155, 155 (Mary C. Porter & G. Alan Tarr eds., 1982) (arguing that state courts are more likely to be sympathetic to "state concerns and state perspectives"); Gerry, *supra* note 292, at 247–48 (noting this argument).

318. See *supra* notes 269–72 and accompanying text.

319. See *infra* note 343.

other. Apparently, all that remains is indeterminacy occasioned by the existence of competing and equally legitimate conceptual arguments on both sides.³²⁰

There are two broader criticisms that should also be considered. First, any argument that the *Anderson* rule is justifiable on the basis of some disparity between state and federal courts in the adjudication of certain substantive preemption issues should address the tension between this rationale and the well-established federal jurisdictional rules that require state criminal defendants to assert their federal constitutional defenses in state courts. While the kinds of disparities potentially involved in adjudicating substantive preemption issues and constitutional defenses to criminal prosecution may be distinct in meaningful ways,³²¹ there remains an intuitive sense that substantive preemption ought not to be our top priority if we are really concerned about whether state courts adequately adjudicate claims of federal rights. Should we not be primarily concerned with state court treatment of federal constitutional rights, which lay persuasive claim to being more important than federal statutory rights? One might think that if state courts are believed to be inadequate or unwilling to handle matters of federal statutory interpretation properly,

320. See also Chemerinsky, *supra* note 295, at 253 (“[A]ll of the discussion about parity really might be a subterfuge; conservatives who believe that state courts are more likely to favor the government over the individual may simply be using the parity argument as a tool to advance their ideological agenda.”). If this is so, however, it does not do away with the dispute by showing the advocates of parity to be incorrect or not really advocating parity. More plausibly, it may be that the political motivations of the participants in the parity debate simply do not map well enough onto the federal/state court distinction to allow for this proposed use of parity or disparity arguments as ideological tools. This is because the compositions of the two judiciaries are fluid rather than static, and the general political alignment is subject to change over time. See Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1304–05 (2003) (stating that political differences between state and federal courts affect when and how federal issues are addressed); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1222–23 (2004) (“For some time, liberals have favored adjudication in federal courts, but owners of fugitive slaves in the mid-1800s and the opponents of progressive economic legislation in the early 1900s did as well.”); see also Young, *supra* note 316, at 134 (arguing political liberals “are beginning to recognize . . . that they will not always control the national government, and that many states may be receptive to their views”); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1301–02 (2004) (discussing growing liberal willingness to “embrace state autonomy as a means of opposing the War on Terror” as representing “something of a shift in the traditional political valence of federalism disputes”).

321. See *supra* note 304 and accompanying text.

then there is good reason to fear that they are also unlikely to properly dispose of federal constitutional claims, and we should prioritize rescuing the latter.

Prior to 1996, the answer to this objection was fairly simple. Removal of state criminal cases where the defendant asserts a federal constitutional defense under a rule like *Anderson* was unnecessary in light of broad provisions for post-conviction review of state court dispositions of federal constitutional defenses in habeas corpus proceedings.³²² With some exceptions,³²³ habeas allowed criminal defendants to relitigate their federal constitutional defenses in federal court without regard to the time their petitions were filed³²⁴ or the state courts' prior disposition of the federal claims,³²⁵ thereby ensuring the claimant a federal forum to offset any disparity in state court adjudication of such defenses.³²⁶ For state court civil defendants with a federal defense, however, there is no procedural analogue to habeas corpus,³²⁷ and principles of claim preclusion usually

322. See James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 415 (2001) (noting that, historically, there was no time bar to habeas petitions and no limit on the number of petitions).

323. The most notable exception is the total bar on habeas review of state court dispositions of Fourth Amendment exclusionary rule claims. See *Stone v. Powell*, 428 U.S. 465, 494 (1976); see also *McCleskey v. Zant*, 499 U.S. 467, 492–93 (1991) (introducing limitations on the introduction of new habeas claims after filing of the petition); *Wainwright v. Sykes*, 433 U.S. 72, 87–91 (1977) (limiting federal review of habeas petitions where procedural default under state law prevented state court review of the petitioner's claims).

324. See *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (stating that there is no statute of limitations on habeas petitions).

325. See, e.g., *Miller v. Fenton*, 474 U.S. 104, 110–11 (1985) (reiterating that federal courts are not bound by state court determinations regarding the voluntariness of confessions); *Mincey v. Arizona*, 437 U.S. 385, 398–402 (1978) (reviewing the record anew despite prior state court adjudication of a habeas petitioner's claim that his confession was involuntary); *Brown v. Allen*, 344 U.S. 443, 458 (1953) (noting that a state court disposition of a federal constitutional claim is "not *res judicata*" on habeas review in federal court).

326. See Chemerinsky, *supra* note 295, at 316–20 (arguing that except for exclusionary rule claims, relitigation of constitutional claims in federal court through habeas provides sufficient opportunity for litigant choice and "maximiz[ation of] the protection of rights" in state criminal prosecutions); Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1732–34 (2000) (arguing that habeas doctrine, prior to the passage of the Antiterrorism and Effective Death Penalty Act in 1996, advanced the principle that a state criminal defendant is entitled to a federal forum for his or her federal claim).

327. See Friedman, *supra* note 320, at 1264 ("If collateral review exists in criminal cases to afford a federal forum for federal interests, and a federal forum

make subsequent federal court litigation of the federal defense impossible.³²⁸

The 1996 enactment of the federal Antiterrorism and Effective Death Penalty Act (AEDPA)³²⁹ removed some of the teeth from the habeas corpus rejoinder.³³⁰ By placing additional limitations on the time for filing habeas petitions,³³¹ the number of petitions an individual claimant may file,³³² and the degree to which the federal reviewing court may disregard the state court's prior disposition of the federal claims,³³³ the AEDPA

largely is available for plaintiffs with federal claims, how do we explain the denial of federal review to state [civil] defendants [who assert federal defenses]?"

328. See, e.g., *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1243–44 (9th Cir. 2004) (holding that, where a successor attempted to relitigate a preemption claim previously brought in state court, “[i]t is well settled that claim and issue preclusion apply to state court rulings on federal preemption issues”). This result should be contrasted with the non-preclusive effect of the state court preemption decision if the case is subsequently removed to federal court. While the state court decision remains “in effect,” it may be reconsidered by the federal court if the issue of preemption is raised again. See 28 U.S.C. § 1450 (2000) (“All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.”).

329. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 22, 28, 42, 49, 50 U.S.C.).

330. See, e.g., Yackle, *supra* note 326, at 1734–56 (detailing new procedural hurdles the AEDPA and recent Supreme Court decisions have interposed into the habeas process and arguing habeas law has been severed from its original foundation in the principle that federal claims should be heard in federal forums); Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus*, LAW & CONTEMP. PROBS., Autumn 1998, at 190 (arguing that the provisions of the AEDPA effectively deprive death row inmates of federal review of their constitutional challenges to the state prosecution).

331. See 28 U.S.C. § 2244(d) (imposing a one-year statute of limitations for filing habeas petitions, subject to certain exceptions); see also Liebman, *supra* note 332, at 416 (noting that this “time bar was unprecedented in the history of habeas corpus” and detailing problems that may arise from imposition of this new hurdle).

332. See 28 U.S.C. § 2244(a)–(b); see also Yackle, *supra* note 326, at 1740–41 (explaining the differences in the law governing successive habeas petitions before and after the AEDPA).

333. See 28 U.S.C. § 2254(d)(1). Section 2254(d)(1) reads, in relevant part:

(d) An application . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

renders habeas, at best, an incomplete remedy for the (hypothetical) disparity problem.³³⁴

If there is a disparity between the ability or willingness of state and federal courts to uphold claims of federal rights in general and if federal habeas corpus review no longer provides a sufficient remedy, then one might ask why we should even bother with a rule like the *Anderson* rule—which provides for removal of only a few substantive federal preemption claims—if we are content to allow state courts to continue to adjudicate federal constitutional defenses in criminal cases. But if the justification for the *Anderson* rule depended only on a specific disparity between state and federal courts in deciding the particular kinds of federal law claims that *Anderson* implicates, this objection would lose some force. Arguments about specific areas of disparity need not be taken as general indictments of parity, and it is important to observe that the differences between categories of federal law issues bear directly on the question of relative state and federal court competence. The argument for disparity seems much stronger for cases involving complex issues of federal statutory interpretation than for criminal cases involving federal constitutional claims precisely because state courts deal with so few of the former and so many of the latter.³³⁵ Yet if it turns out that state courts generally are hostile to federal rights claims, then observations about the extent of state courts' experience handling federal claims in criminal cases cannot completely dispel the objection.

But aside from the observation that any such general claim of state court hostility to federal rights can probably never be proven, there are also reasons to distinguish state criminal cases that have nothing to do with parity but nevertheless justify leaving those cases in state court. Professor Friedman explains that

the Supreme Court of the United States

Id. There are different interpretations of this provision and its effect on federal treatment of prior state court adjudication of a habeas petitioner's constitutional claims. Compare Yackle, *supra* note 326, at 1748–56 (arguing that the AEDPA does not require federal courts to defer to state court determinations), with Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1713 (2000) (arguing that the AEDPA requires federal courts to defer to incorrect state court interpretations of federal law).

334. See Liebman, *supra* note 322, at 425–27 (arguing that the AEDPA “complicates review,” “add[s] litigation steps,” causes a “proliferation of litigation” concerning its vague provisions, and “greatly diminish[es] the reliability of the capital system’s review process and of the capital verdicts that the system produces”).

335. See *supra* note 309 (noting the types of federal claims that make up the federal law portion of state court dockets).

[t]he constitutionalization of criminal process means these [federal constitutional] issues are potentially present in virtually every criminal case. . . . For this reason, even those commentators most bullish on federal jurisdiction . . . conceded that employing any model other than collateral review to permit litigation of federal claims in state criminal cases would be infeasible.³³⁶

Professor Chemerinsky has specifically considered—and rejected—the suggestion of allowing removal of criminal cases involving constitutional defenses under a rule functionally similar to the *Anderson* rule, arguing that it would effect too massive and fundamental a change to be workable.³³⁷ Thus, even if there were persuasive arguments to show that state courts generally under-enforce federal rights, the existence of habeas corpus (even in its more limited post-AEDPA form) and considerations of history and feasibility militate against expanding any removal rule to include state criminal cases involving federal constitutional defenses.³³⁸

The other general objection to a disparity-based justification for *Anderson*'s removal rule is more difficult to knock down. If state courts actually suffer from relative inexperience or bias respecting federal statutory issues, then the proposal should be to remove all such issues from state court, not just substantive preemption claims involving an exclusive federal cause of action. But, one might respond, if the disparity argument is true, then it is on balance beneficial to remove from state courts any category of federal claims likely to receive adverse treatment. To be sure, the *Anderson* rule removes one category of such claims, but that category is relatively narrow, and simply citing one beneficial effect of a rule does not necessarily provide a justification for the rule. For the *Anderson* rule to be justified on disparity grounds, there would have to be some specific reason for taking questions concerning the preemption of state law claims by exclusive federal causes of action away from state courts. There would have to be some reason to think state courts are likely to be incapable or unwilling to fairly and correctly resolve these specific kinds of federal claims to justify removing them. Any satisfactory answer to such a specific parity question requires the kind of empirical support that may be impossible, as noted previously. At bottom, it just does not seem that a justification of *Anderson* relying on disparity arguments can be persuasive.

336. Friedman, *supra* note 320, at 1274 (footnote omitted).

337. Chemerinsky, *supra* note 295, at 318–19 (“After two hundred years of generally allowing each jurisdiction to try its own criminal cases, revising the rules to allow for removal seems quite improbable.”).

338. *See id.*

In order to avoid entanglement in the hopelessly stalemated parity debate, the justification for the *Anderson* rule should be indifferent to the relative capacities and predispositions of the state and federal courts. Such an argument would be more consistent with what Professor Rehnquist calls “the Constitution’s forum neutrality,”³³⁹ as well as with the *Anderson* rule, which does not require any showing of disparity. Of course, arguments about state court hostility were at work in *Anderson*, but those arguments went to the exclusivity of the federal cause of action and not to the rationale for removal.³⁴⁰ Although it is likely that other cases in which the *Anderson* rule is invoked will involve evaluations of evidence that congressional concern about state hostility motivated Congress to make exclusive the federal cause of action doing the preempting, the rule itself does not require such evidence as a condition of its applicability. The only requirement of the *Anderson* rule is that the state law claim be preempted by a federal cause of action found to be exclusive, for whatever reason. Thus, the *Anderson* rule operates from a position of neutrality with respect to parity or disparity by its own terms, and its justification will be similarly neutral. The following section demonstrates that such a justification is available.

C. Benefits of *Anderson*’s Procedural Effects

Disregarding the issue of parity between state and federal courts in the adjudication of federal law issues, one may nevertheless think that certain types of legal issues ought to be addressed by one court system or the other because it makes things simpler, faster, or more efficient. The *Anderson* rule promotes these sorts of interests and is justified on that basis. If we assume that the plaintiff’s state law claim is preempted by an exclusively federal cause of action, the result is the same with or without the *Anderson* rule—unless the plaintiff decides to give up on the litigation, the claim (eventually) becomes a removable federal claim.³⁴¹ Application of the *Anderson* rule allows the parties to skip several intermediate procedural steps, such as litigating a motion to dismiss and then amending or refiling a complaint in state court before litigating federal jurisdiction

339. James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1052 (1994). In designing jurisdiction-limiting doctrines like abstention, Rehnquist accuses, the Court has ignored the Constitution’s “neutrality as to whether issues are litigated in state or federal court,” a “theoretical defect” in judge-made jurisdictional rules that renders them “inconsistent with the judicial structure established by the Constitution.” *Id.*

340. See *supra* notes 260–66 and accompanying text.

341. See *supra* notes 280–89 and accompanying text.

when the defendant removes, reducing the length of litigation and conserving judicial and litigant resources.³⁴² Indeed, *Anderson* removal may save the plaintiff from disaster in cases where the plaintiff's federal law claim is subject to a short statute of limitations. It is the specific kind of preemption defense required by the rule—and the effect that the success of that defense has on the plaintiff—that creates the procedural loop that *Anderson* circumvents by allowing removal up front.

The need to minimize the length of litigation and the expenditure of judicial and litigant resources, especially in light of the ever increasing volume of cases in all courts,³⁴³ has been recognized by commentators,³⁴⁴ the Supreme Court,³⁴⁵ and Congress.³⁴⁶ The modern concern for efficiency

342. See *supra* notes 288–89 and accompanying text.

343. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59–94 (1985) (noting the “caseload explosion” in federal courts); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 609 (2004) (“The dramatic growth in the caseload of federal courts over the last century has been well documented and, in general, bemoaned.”).

344. See, e.g., Christopher R. McFadden, *Removal, Remand, and Reimbursement Under 28 U.S.C. § 1447(C)*, 87 MARQ. L. REV. 123, 124–25 (2003) (arguing that increased use of courts’ discretionary fee-shifting authority to deter frivolous removal would promote efficiency and conserve litigant resources); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000) (proposing a system by which federal courts confronting cases that may be the subject of duplicative state court litigation would be required to either abstain or enjoin the state court to avoid the inefficiencies generated by redundant adjudication). See generally Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989) (advocating court-ordered inclusive joinder of parties and claims to avoid the inefficiencies associated with serial litigation against multiple defendants and duplicative litigation of the same claim by multiple plaintiffs in different courts).

345. See, e.g., *Zafiro v. United States*, 506 U.S. 534, 537–38 (1993) (rejecting a bright-line rule against joinder of criminal defendants with conflicting defenses so that the joint-trial provisions of the Federal Rules of Criminal Procedure may continue to be applied flexibly and thereby maximize efficiency in criminal trials); *Christian v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988) (endorsing and applying the law of the case doctrine as a “rule of practice that promotes finality and efficiency of a judicial process by ‘protecting against the agitation of settled issues’” (citation omitted)); *Wainwright v. Sykes*, 433 U.S. 72, 86–91 (1977) (adopting the “cause-and-prejudice” exception to procedural default rules for habeas corpus petitions for efficiency reasons (internal quotation marks omitted)).

346. For example, the House Judiciary Committee lauded benefits to judicial efficiency when approving House Bill 1038, the Multidistrict Litigation Restoration Act of 2005, which would amend the federal Multidistrict Litigation Statute, 28 U.S.C. § 1407 (2000), to allow judges to whom cases are transferred by the Multidistrict

in litigation is typified by Rule 1 of the Federal Rules of Civil Procedure, which provides that federal procedural law should be “construed and administered to secure the just, speedy, and inexpensive determination of every action.”³⁴⁷ As Professor Freer observed, “society[] [has a] legitimate interest in judicial efficiency. Courts are a public resource, providing publicly financed resolution of private disputes. We pay for them, and we have a right to insist that their services not be squandered.”³⁴⁸

A number of judge-made procedural rules are justified, either completely or in large part, on the basis of their capacity to conserve court resources and promote efficiency in litigation.³⁴⁹ Rules that prevent duplication of effort by state and federal courts provide some examples. The various abstention doctrines prevent the waste of judicial resources that inheres in simultaneous litigation of the same or similar issues in state

Litigation Panel to “self-refer” (retain jurisdiction over) those cases for trial when the transferee judge finds it appropriate. See H.R. REP. NO. 109-24, at 2 (2005). The current bill requires that the transferee judge send the case back to the original transferor jurisdiction after pretrial proceedings for referral for trial, even if the transferee judge has reason to want to preside over the trial. See *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40–41 (1998) (construing 28 U.S.C. § 1407(a) to require remand to transferor court and prohibit “self-assignment” by transferee court). In proposing reforms to the rules governing class actions, the Senate Committee on the Judiciary noted that the general unavailability of federal diversity jurisdiction for national class actions, coupled with the lack of procedures for consolidating overlapping class actions filed in different states’ courts, gives rise to the filing of “copycat” class actions. See S. REP. NO. 108-123, at 7 (2003). These “copycat” cases result in “enormous waste—multiple judges of different courts must spend considerable time adjudicating the same claims asserted on behalf of the same people.” *Id.* By contrast, the Committee noted, “when overlapping cases are pending in different federal courts, they can be consolidated under one single judge to promote judicial efficiency and ensure consistent treatment of the legal issues involved.” *Id.* Accordingly, the Committee proposed modifying the diversity jurisdiction and removal jurisdiction rules to allow more interstate class actions to be litigated in federal courts. *Id.*

347. FED. R. CIV. P. 1.

348. Freer, *supra* note 344, at 832.

349. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 449–50 (2003) (noting that many courts adopt measures to promote efficiency, such as the originally judge-made rule of exhaustion and the judge-made abstention doctrines exercised in federal courts). Congress has also modified procedural rules to provide solutions to problems of inefficiency. See James M. Underwood, *Rationality, Multiplicity, and Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 418–39 (2004) (detailing historical and contemporary congressional modifications to procedural rules governing complex litigation and class actions undertaken to streamline these processes).

and federal court.³⁵⁰ Preclusion doctrines prevent inefficiencies that would result from successive relitigation of claims and issues previously resolved by a court.³⁵¹ In contrast to the abstention doctrines, federal courts may also prevent unnecessary expenditure of judicial resources by enjoining state court proceedings that duplicate the efforts of a federal court in a parallel case.³⁵² The District of Columbia Circuit enforces “non-jurisdictional” exhaustion requirements in cases where Congress has not expressly made exhaustion of administrative remedies a prerequisite for judicial review of a plaintiff’s claims.³⁵³ These non-jurisdictional exhaustion requirements allow federal courts to decline to exercise jurisdiction over unexhausted claims, though jurisdiction exists, where doing so would preserve judicial resources that might be needlessly expended deciding issues better suited to administrative disposition.³⁵⁴ The forum non conveniens doctrine permits dismissal of suits where litigation in another

350. See *Zwickler v. Koota*, 389 U.S. 241, 248 (1967) (describing the abstention doctrines as judge-made rules). The majority of the abstention doctrines were created for reasons of judicial economy and federalism. See, e.g., *Younger v. Harris*, 401 U.S. 37, 46 (1971) (prohibiting, in most cases, federal court injunctions that would interfere with state court criminal proceedings); *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496 (1941) (authorizing federal court abstention in cases raising federal constitutional claims where resolution of an unsettled issue of state law would potentially make deciding the constitutional issue unnecessary). One abstention doctrine, however, exists only to conserve judicial resources. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (finding that abstention may be justified in some circumstances on the basis of “considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation” (alteration in original) (internal quotation omitted) (citation omitted)); Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 100–01 (1986) (arguing that *Colorado River* abstention has been approved as a “palliative means of avoiding duplicative litigation and furthering the interests of judicial economy and sound judicial administration”).

351. See, e.g., *In re Schimmels*, 127 F.3d 875, 885 (9th Cir. 1997) (noting that claim preclusion doctrines compensate for “the burdens relitigation poses on the judicial system; and . . . the cost and harassment that relitigation poses to the parties”).

352. See 28 U.S.C. § 2283 (2000) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”).

353. See *Avocados Plus, Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (explaining the distinction between jurisdictional and non-jurisdictional exhaustion requirements and describing the latter as “judicially created doctrine[s]”).

354. See *Randolph-Shepard Vendors of Am. v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1985) (explaining that the enforcement of exhaustion requirements preserves judicial resources in cases where “decision by the agency may obviate the need for a judicial decision on the issue”).

forum would conserve both judicial and litigant resources.³⁵⁵

Thus, the *Anderson* rule, when properly understood as a judge-made procedural rule designed to streamline the litigation process, is in pedigreed company. Of course, the primary resource-benefits of the *Anderson* rule accrue to state courts and litigants, as the rule marginally increases the number of cases to be adjudicated by federal courts. *Anderson*'s procedural leap omits unnecessary state court action from the procedural picture, saves the litigants time and money, and potentially prevents the plaintiff from losing his or her claims upon expiration of a statute of limitations. These benefits should not be overlooked simply because they principally flow to state rather than federal courts. While much of the commentary concerning overcrowded dockets and the negative effects of increased litigation volume focuses on the federal courts,³⁵⁶ state courts also face overcrowded dockets and a constantly growing influx of new cases.³⁵⁷ In fact, the burdens on state courts may be more extreme than the litigation-volume problems facing the federal judiciary.³⁵⁸

In cases where the state law claim is preempted by an exclusive federal cause of action, the obstacle to removal is a purely formal matter—the plaintiff failed to plead the only available cause of action arising out of the facts he or she alleged. That said, it is difficult to conceive of state courts jealously guarding their right to perform the uncomplicated task of dismissing the state claim and instructing the plaintiff to refile and assert

355. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (explaining that *forum non conveniens* requires consideration of “private interest” factors as well as “public interest” factors, such as court “administrative difficulties” and the court’s familiarity with the applicable substantive law); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 556 (1985) (discussing the discretionary nature of the *forum non conveniens* doctrine).

356. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53–86 (1996) (describing increases in the amount of litigation in federal courts); POSNER, *supra* note 343, at 59–93; Haiber, *supra* note 343, at 609; William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 3 (noting that the federal courts “have become overburdened and the system has become clogged”).

357. See POSNER, *supra* note 356, at 219 (arguing that abolition of federal diversity jurisdiction would “swamp” already overloaded state courts).

358. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 332 n.283 (1996) (“The problem, of course, is that the state courts are even more overloaded than their federal counterparts. State courts handle 52 times the caseload with only 15 times the judges.”).

the appropriate federal claim. To be sure, there are arguments that state courts have an interest in taking the first shot at federal preemption questions, and those arguments are addressed later. Nevertheless, there may be something to the notion that state courts might actually approve of a pragmatic rule removing certain cases from their already overcrowded dockets when those cases are destined for federal court anyway.

The circumstances generally accompanying *Anderson* removal mentioned previously³⁵⁹ are further complicated if a defendant who is unsuccessful in the state trial court appeals an adverse decision on a preemption defense in the state appellate system.³⁶⁰ If a state appellate court reverses the state trial court decision, the plaintiff again will be stuck with a removable federal claim, only now a period of months—or more likely years—will have elapsed, intensifying the sting of the procedural loop that *Anderson* avoids. Alternatively, the defendant may anticipate state court hostility to the preemption defense and file a declaratory judgment action in federal court,³⁶¹ creating a duplicative litigation

359. See *supra* notes 280–89 and accompanying text. Imagine alternatively a wary plaintiff who, predicting a loss on the preemption issue in state court, files a complaint in federal district court asserting the allegedly preemptive federal cause of action on the same facts. The federal court in this situation may consider questions of abstention before considering the jurisdictional issue.

360. See *supra* note 349. Or, barring a decision to abstain, two different courts may end up considering parallel causes of action arising out of the same set of facts, perhaps even resulting in divergent decisions. At the least, the outcome is inefficient. See *infra* note 361 and accompanying text. Application of the *Anderson* rule to move the preemption question into federal court at the outset of litigation would avoid this problem.

361. The legitimacy of this option for the defendant is uncertain. In *Public Service Commission v. Wycoff Co.*, the Supreme Court considered an interstate shipper's claim for declaratory judgment that its activities constituted interstate commerce. *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 239 (1952). The *Wycoff* Court noted the declaratory plaintiff's only purpose for invoking the federal Declaratory Judgment Act, 28 U.S.C. § 2201, was to establish a defense if named a defendant in a future state law case. *Id.* at 248. Some circuits read *Wycoff* to establish the rule that seeking a declaratory judgment of federal preemption for such prospective defensive purposes does not raise a federal question sufficient to confer federal subject matter jurisdiction. See, e.g., *Illinois v. Gen. Elec. Co.*, 683 F.2d 206, 209 (7th Cir. 1982); *Mich. Sav. & Loan League v. Francis*, 683 F.2d 957, 960 (6th Cir. 1982); *Exxon Corp. v. Hunt*, 683 F.2d 69, 73 (3d Cir. 1982); *Lawrence County v. South Dakota*, 668 F.2d 27, 30–31 (8th Cir. 1982). These decisions, as well as the dicta in *Wycoff*, seem to be consistent with the Court's previous rule, established in *Skelly Oil Co. v. Phillips Petroleum Co.*, which provided that federal question jurisdiction would not exist for declaratory judgment actions presenting claims that, but for the availability of the declaratory judgment statute, would only arise as defenses to state

problem.³⁶² But even without these permutations, *Anderson* generates efficiency benefits by avoiding the problem of piecemeal litigation—litigating different portions of a single case in different forums³⁶³—in one category of cases by locating the preemption inquiry and the jurisdictional inquiry in a single court.³⁶⁴

law claims. *Wycoff*, 344 U.S. at 241; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 667–68 (1950). Other circuits, however, have found that the potentially defensive nature of the federal preemption claim advanced by a declaratory judgment plaintiff is not dispositive of the federal question jurisdiction issue. *See* *Springfield v. McCarren*, 549 F. Supp. 1134, 1137 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983); *Braniff Int'l, Inc. v. Fla. Pub. Serv. Comm'n*, 576 F.2d 1100, 1105–06 (5th Cir. 1978). Given the circuit split, a duplicative declaratory judgment action remains possible.

362. *See* *Redish*, *supra* note 344, at 1352–55 (detailing the negative effects and general judicial intolerance of duplicative litigation).

363. Piecemeal litigation is roundly criticized. *See, e.g.,* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999) (noting a “great advantage to class action treatment . . . is the opportunity to save the enormous transaction costs of piecemeal litigation”); Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 9 LEWIS & CLARK L. REV. 295, 308 (2005) (citing the desire to forestall piecemeal litigation as a primary justification for federal supplemental jurisdiction).

364. *See* *Ragazzo*, *supra* note 42, at 329–33 (arguing that some inefficiency may result from widespread application of a complete preemption rule of removal). *Ragazzo* contends that the outcome is inefficient if the federal district court determines the state law claim is not preempted and the case is remanded to state court because “[t]he district court’s ruling on the merits of the federal defense is not preclusive and the defense may be reasserted in state court.” *Id.* at 330. This hypothesized inefficiency, however, would unlikely be substantial enough to offset *Anderson*’s benefits. After all, if defendants are of the mind to reassert the federal defense after remand, they likely would do so regardless of whether the federal remand decision is preclusive, thereby requiring the state court to adjudicate the plaintiffs’ collateral estoppel arguments and expend some judicial resources in any case. Moreover, the fact that the federal court’s disposition of, say, a substantive preemption defense is not preclusive on the state court does not mean the state court will disregard the federal court’s reasoning. Indeed, the state court may hold the federal court’s decision binding as to the preemption issue under the law-of-the-case doctrine. *See generally* 18B CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* §§ 4478–4478.6 (2d ed. 2002). In any event, the remand decision will be the most persuasive nonbinding authority available, and the state court will have to take it into account in deciding the defense on remand.

Finally, it is worth remembering that by doing away with *Avco*’s preemptive force test for removal, *Anderson* reduces the chances of a federal court’s disposition of the removal inquiry being reversed because the governing standard is substantially clearer, and also reduces the number of federal statutes under which preemption-related removal is arguable by requiring that the federal statute contain a private right of action that covers the plaintiff’s injuries and is arguably exclusive. Thus, the post-*Anderson* world, compared to the *Avco-Taylor* world, runs an

Another benefit of the *Anderson* rule is that it clarifies an extremely muddled area of jurisdictional doctrine under *Avco*. As argued in Part I, *Avco*'s "preemptive force" requirement for removal was not amenable to principled application.³⁶⁵ No measure of "preemptive force" has ever been enunciated by the Supreme Court, and it is not apparent why the fact that a state law claim is preempted by a statute of "greater than average" preemptive force should make that claim removable rather than requiring dismissal.³⁶⁶ There is broad scholarly consensus that jurisdictional rules ought to be as clear as possible.³⁶⁷ As Professor Friedman notes, "[o]ne ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction."³⁶⁸ Professor Chafee explained that nebulous jurisdictional rules predictably cause "an enormous amount of expensive legal ability [to] be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of each case."³⁶⁹ Indeed, where jurisdictional rules seemingly expand federal jurisdiction at the expense of the states, even fierce proponents of state autonomy admit that clearer rules are preferable if getting rid of the rule altogether is not an option.³⁷⁰ *Anderson* adds clarity

appreciably smaller risk of generating substantial inefficiencies of the sort with which Ragazzo is concerned. *See supra* Part III.B.

365. *See supra* notes 144–60 and accompanying text.

366. *Cf. Ragazzo, supra* note 42, at 331 (arguing that the complete preemption doctrine and other rules designed to correct for artful pleading "waste[] federal judicial resources because [they] are exceedingly difficult to apply").

367. *See, e.g., Rehnquist, supra* note 339, at 1111–12 (arguing that one benefit of his "first filed rule" proposal for modifying the abstention doctrines is that "the rule is . . . cleaner and simpler than current doctrine" which "weighs especially heavily in [the first filed rule's] favor in view of abstention's jurisdictional nature"). While some degree of judicial discretion in jurisdictional decision making may be inevitable, such "discretion need not mean incoherence, indeterminacy, or caprice" but may "lead to the development of effective guidelines and, yes, even rules." Shapiro, *supra* note 355, at 545.

368. Friedman, *supra* note 320, at 1225.

369. ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 312 (1950).

370. *See Young, supra* note 316, at 127–29 (proposing a model for judicial enforcement of federalism-based limitations on national power that would, in part, rely on "categorical restrictions on government practices that undermine the 'political safeguards of federalism'" and citing the anticommandeering doctrine as an example of such a "bright-line" restraint). Professor Young does not argue that categorical formal rules are the right choice for every area having federalism implications. Much of his work advances what he calls "soft" limitations, such as clear statement rules, that force Congress to act affirmatively when it wants to test the outer limits of its constitutional authority in a manner that potentially conflicts with state interests. *See, e.g., id.* at 16–18 (discussing the distinction between hard and soft rules).

and predictability by dumping *Avco*'s "preemptive force" criterion and substituting a rule that provides for removal in a discernable set of cases for a clear reason: Where a state law claim is preempted by an exclusive federal cause of action, that state law claim may be removed to federal court because it is more efficient to allow removal than to require state-court adjudication of the preemption defense, dismissal of the state law claim, and the subsequent filing of a removable federal claim.³⁷¹

When I set out *Anderson*'s procedural effects earlier, I did not make clear whether the "non-*Anderson* world" that provided the basis for comparison was the world of complete preemption under *Avco* and *Taylor* or a world with no complete preemption doctrine. Given my earlier criticisms of the complete preemption rule in place before *Anderson*, it would be a small thing to show that *Anderson* represents a doctrinal improvement over the previous incarnations of the rule. Indeed, the most powerful criticisms in this area do not urge that the pre-*Anderson* line of cases somehow had it right—they argue that there should never have been any complete preemption doctrine at all.³⁷² A compelling justification for the *Anderson* rule must show not only that *Anderson* represents an improvement over the complete preemption rules established by *Avco* and *Taylor*, but also that *Anderson* is justified even if the notion of "complete preemption" had been introduced for the first time by the *Anderson* majority. Satisfying this burden requires defending *Anderson* as a departure from the well-pleaded complaint rule, as a judge-made alteration to federal removal jurisdiction, and as a doctrine with federalism implications. For the purposes of establishing *Anderson*'s efficiency benefits, however, the challenge from the general criticisms of complete preemption is to show that the *Anderson* rule increases efficiency compared to a hypothetical status quo containing no complete preemption rule.

If there is no other complete preemption doctrine at work, *Anderson*'s effect on the procedural picture is largely identical to that set out previously. The only difference is that a defendant cognizant of the potential preemption of the plaintiff's state law claim by an exclusive federal cause of action would have no reason to think removal is possible on that basis. Thus, the substantive preemption challenge would most

371. See discussion *supra* Part III.A.

372. See, e.g., *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11–22 (2003) (Scalia, J., dissenting) (arguing not only that the *Anderson* majority decision is unjustified, but that the line of cases representing the "complete preemption" doctrine generally runs counter to jurisdictional principles and state interests).

likely be presented in state court on a motion to dismiss or for summary judgment. If the state law claim is adjudged preempted, however, the plaintiff is again faced with the same choices—give up, file the federal claim in state court and be subject to removal by the defendant, or file the federal claim in federal court. Again then, the *Anderson* rule's provision for removal at the outset skips over state court adjudication of the substantive preemption defense, thereby conserving judicial and litigant resources. In a legal system that admits an interest in promoting efficient and cost-effective litigation, any new procedural rule that increases efficiency is justified *ceteris paribus*.

The next section will examine two kinds of objections to this justification. The first category, involving objections from precedent and jurisdictional principle, centers on the idea that *Anderson* is only justified by its efficiency benefits *ceteris paribus*. That is, the rule may be unjustifiable despite its benefits if it runs counter to established precedent or violates basic jurisdictional principles. The second category of objections, by contrast, involves potential negative policy effects of the *Anderson* rule that might weigh against its continued application even when the rule is concededly justified as a conceptual matter. This category will address claims that *Anderson* may adversely affect state interests or the proper allocation of authority between the state and federal courts.

D. Answers to Objections

1. *The Objection from Precedent*

The *Anderson* Court seems to have based its decision on a “rule” of complete preemption established in *Avco* and applied in *Taylor*³⁷³—that a case is removable where a federal statute provides the exclusive cause of action for the injury that the plaintiff's state law claims allege.³⁷⁴ But, as Justice Scalia explains after discussing *Avco* and *Taylor*, those cases contain no such rule.³⁷⁵ Scalia charges: “[t]he best that can be said, from a precedential perspective, for the rule of law announced by the Court today is that variations on it have twice appeared in our cases in the purest

373. See *id.* at 6–8 (majority opinion) (citing *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 557–60 (1968); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23–24 (1983); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65–66 (1987)).

374. *Id.* at 7.

375. See *id.* at 11–17 (Scalia, J., dissenting).

dicta.”³⁷⁶ While the *Anderson* Court repeats the *Franchise Tax Board* reformulation of *Avco*,³⁷⁷ it is clear the *Anderson* majority did not engage in a substantive inquiry into the “degree” of preemptive force unleashed by § 85 and § 86 of the NBA.³⁷⁸ The Court did not compare the preemptive effect of the relevant sections of the NBA to that of the LMRA and ERISA provisions under which complete preemption had previously been found nor did it consult the relevant legislative history to discern the degree to which Congress intended state law to be preempted by the NBA.³⁷⁹

Most likely, the Court recognized that the *Avco* “preemptive power” test was no test at all because the task of distinguishing how much “preemptive power” a given federal statute brings to bear is impossible.³⁸⁰ Additionally, it is unlikely that such an inquiry would have supported complete preemption under the relevant sections of the NBA. Unlike LMRA section 301, which the *Lincoln Mills* Court construed to displace state law entirely and grant federal common lawmaking authority to the federal courts,³⁸¹ § 85 of the NBA expressly provides that state law will, in part, determine what interest rates national banks may lawfully charge, and thus whether those banks are liable for usury in any given case.³⁸² If anything, the “preemptive power” of § 85 and § 86 is somewhat smaller than that of LMRA section 301. Thus, it is unlikely any rule elaborated in *Avco* gives rise to the rule established in *Anderson*.

Similarly, the *Anderson* rule of complete preemption cannot be distilled from the *Taylor* holding. The majority correctly noted that the

376. *Id.* at 17. Indeed, the two instances of dicta to which Justice Scalia points are not in *Avco* and *Taylor*, but *Rivet v. Regions Bank of Louisiana* and *Caterpillar, Inc. v. Williams*, two cases that came substantially later in the line. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998) (stating that state claims preempted by federal causes of action may arise under federal law); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (explaining that when the preemptive force of a statute is “extraordinary,” it can transfer a state claim into a federal claim).

377. *Anderson*, 539 U.S. at 7 (majority opinion) (quoting at length from *Franchise Tax Bd.*, 463 U.S. at 23–24).

378. *Id.* at 6–11.

379. *Id.*

380. See *supra* notes 176–77 and accompanying text.

381. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456–57 (1957); see also *supra* notes 137–47 and accompanying text.

382. See 12 U.S.C. § 85 (2000); *Farmers’ & Mechs.’ Nat’l Bank v. Dearing*, 91 U.S. 29, 32–33 (1875) (explaining that the continuing relevance of state law under the NBA is strictly limited to determining the lawful interest rates in adjudicating usury claims against national banks).

Taylor Court upheld removal due to clear evidence of congressional intent to allow removal.³⁸³ And, the Court seems to have acknowledged the failure of the *Taylor* Court to actually apply some intelligible “rule” from *Avco*, as Justice Stevens explained that the *Taylor* Court simply held that “the statutory text in § 502(a) [of ERISA] . . . used language similar to the statutory language construed in *Avco*, thereby indicating that the two statutes should be construed in the same way.”³⁸⁴ While this may seem to describe an application by analogy of the *Avco* rule, the *Taylor* decision was predicated on a finding that the similarity of the statutory language of the relevant ERISA provisions to those of the LMRA was tantamount to an express congressional grant of removal jurisdiction rather than an application of some formulation of the *Avco* holding.³⁸⁵ Even if the *Taylor* Court had applied some sort of rule from *Avco*, that rule certainly was not the “exclusive federal cause of action rule” announced by the *Anderson* Court.³⁸⁶

One might argue that language in the *Anderson* decision indicates that the Court was actually applying an *Avco* rule of some stripe. Specifically, after explaining the rationale for finding that the NBA usury action is exclusive—the fear that state governments might be inclined to be hostile to the interests of national banks that peaked around the time the NBA was enacted³⁸⁷—the *Anderson* majority explains that this observation “gives [§ 85 and § 86 of the NBA] the requisite pre-emptive force to provide removal jurisdiction.”³⁸⁸ No more explicit reference to the “preemptive force” language of *Franchise Tax Board*’s formulation of *Avco* could be expected. However, the *Avco* rule and its subsequent reformulations established no metric for determining the preemptive force of a federal statute.³⁸⁹ Nothing in the *Anderson* opinion explains why state hostility toward national banks translates into greater preemptive power for the NBA—a federal statute that contains no express preemption

383. See *Anderson*, 539 U.S. at 8 (explaining that removal was held appropriate in *Taylor* for two reasons, one of which was “the legislative history of ERISA [that] unambiguously described an intent to treat [state law claims encompassed by ERISA’s civil enforcement provisions] as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947” (internal quotation omitted)).

384. *Id.* at 7–8.

385. See *supra* notes 223–27 and accompanying text.

386. *Anderson*, 539 U.S. at 10–11.

387. See *supra* notes 259–66 and accompanying text.

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

389. See *supra* notes 176–78 and accompanying text.

language. The “state hostility” discussion in *Anderson* is best read as the majority’s reasoning for the conclusion that the federal usury cause of action was meant to be exclusive.³⁹⁰ It is the exclusivity of the cause of action that triggers removal under the *Anderson* rule.³⁹¹

But even if Justice Stevens’s state hostility thesis were taken to bridge the analytical gap between substantive preemption and removal by providing a reason that substantive preemption under the NBA is of sufficient “force” to allow removal,³⁹² this rationale cannot be found in *Avco* or its progeny. In fact, the *Charles Dowd* Court explicitly rejected this state hostility argument in analyzing the congressional intent behind the preemption provision of the LMRA, the same provision at work in *Avco*.³⁹³ Indeed, as noted above, this sort of broad federal/state court disparity argument has been fairly well debunked. The *Anderson* rule of complete preemption, then, is new in relation to those cases that have traditionally been regarded as generative of the complete preemption doctrine; it is a judge-made jurisdictional rule justifiable on grounds of sound judicial administration and efficiency that has little to do with substantive preemption.

Of course, it is not uncommon for the Supreme Court to make new rules and doctrines, or to apply existing rules and doctrines to new cases and subject areas in novel ways. Thus, it is no argument against the legitimacy of the *Anderson* rule that it has no basis in the “complete preemption” line of cases, at least without more.³⁹⁴ Justice Scalia, however, reaches just this conclusion in his *Anderson* dissent, explaining that the “rule announced in today’s opinion . . . is nowhere to be found in either *Avco* or *Taylor*.”³⁹⁵ Certainly if there was no basis at all in those cases for finding complete preemption removal appropriate, then it is neither surprising nor troubling that the *Anderson* rule cannot be traced to nonexistent or unintelligible doctrine.³⁹⁶

390. See *supra* notes 259–66 and accompanying text.

391. See *supra* notes 256–66 and accompanying text.

392. See *supra* notes 150–57 and accompanying text; see also discussion *infra* Part III.D.3.

393. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 504–05 (1962); see *supra* notes 158–59 and accompanying text.

394. The distinct question whether the *Anderson* rule is contrary to some existing precedent is taken up in the section on the well-pleaded complaint rule. See *infra* Part III.D.2.a.

395. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 16 (2003) (Scalia, J., dissenting).

396. See *supra* Part II.B.2.c. (establishing the absence of any “rule” of

Anderson's benefits to judicial economy and litigant resources show that the rule is a useful judicial creation. It is a principle of great vintage that judges may legitimately create rules of judicial administration;³⁹⁷ thus, the *Anderson* rule is justifiable even if it is new. Yet it is problematic if *Anderson* conflicts with other established jurisdictional doctrines such as the well-pleaded complaint rule. The next section examines this question.

2. *The Objections from Jurisdictional Principle*

Justice Scalia and others insist that any rule of complete preemption that expands the scope of federal "arising under" jurisdiction without express congressional authorization requires that "bedrock principles of removal jurisdiction must be ignored."³⁹⁸ The bedrock principles Scalia is concerned with are the well-pleaded complaint rule and the related principle that removal on the basis of a federal defense is not allowed absent express congressional authorization.³⁹⁹ The *Anderson* rule allows for assertions of federal question jurisdiction over complaints that display no federal law issues on their face and arguably allows removal on the basis of a federal defense of substantive preemption alone.⁴⁰⁰

Another basic jurisdictional principle that might be invoked in opposition to the *Anderson* rule is the more general prohibition on judicial expansion of federal jurisdiction without express congressional authorization.⁴⁰¹ If *Anderson* expands federal removal jurisdiction to

complete preemption in the supposedly relevant line of cases).

397. See *supra* notes 349–55.

398. *Anderson*, 539 U.S. at 17.

399. See *id.* at 17–18. Scalia insists that there is a second, distinct jurisdictional principle violated by the *Anderson* majority's holding—"the principle that merely setting forth in state court facts that would support a federal cause of action indeed, even facts that would support a federal cause of action and would not support the claimed state cause of action does not produce a federal question supporting removal." *Id.* at 17. But this second principle is no more than a restatement of the first, as the well-pleaded complaint rule and the prohibition on federal defense removal, when brought to bear on arguments in favor of removal based on the substantive preemption of state law claims, caution precisely that the plaintiffs, as masters of their complaints, ought not have their state law claims subjected to recharacterization by federal courts that defeat their initial forum selection.

400. See *id.* at 12–13 (discussing the application of federal question jurisdiction and preemption).

401. See *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own

encompass a greater number of cases, and if removal jurisdiction is limited only by the original jurisdiction of the lower federal courts—diversity and “arising under” jurisdiction⁴⁰²—it follows that *Anderson*’s expansion of removal jurisdiction constitutes an expansion of original jurisdiction, a matter committed by the Constitution to Congress’s control.

The most obvious answer to these criticisms is to say that they simply do not apply—the *Anderson* rule does not violate the well-pleaded complaint rule or expand federal jurisdiction because it recharacterizes, for example, the *Anderson* plaintiffs’ state law usury claims as claims “arising under” the NBA. Removal is justified under the general removal statute because, hypothetically, federal subject matter jurisdiction would have existed in the first place.⁴⁰³ This answer is unsatisfying, however, as it reinvigorates the fiction this article has been trying to dispel. There is, in fact, no alchemy involved in the operation of the *Anderson* rule; no magical recharacterization of the plaintiff’s claims. Indeed, what the *Anderson* rule really does is perhaps the direct opposite of wizardry, as it involves the basic nuts and bolts of civil procedure.⁴⁰⁴ This section shows that the effect of the *Anderson* rule should not be blocked by the well-pleaded complaint rule, because the *Anderson* rule actually serves the same central policy interests the well-pleaded complaint rule is thought to promote—the interests in preserving forum choice and streamlining federal court jurisdictional inquiries. However, it will not undertake a general theoretical indictment of the well-pleaded complaint rule because such general critiques have already been advanced—that ground is already well-covered.⁴⁰⁵

jurisdiction to the precise limits which the [federal] statute has defined.”).

402. 28 U.S.C. § 1441(a)–(b) (2000).

403. See *id.* § 1441. Cf. REDISH, *supra* note 290, at 116. Professor Redish explains that “when a state court defendant, attempting to remove the case to federal court, correctly cites federal preemption” for the proposition that the facts the plaintiff has alleged give rise only to a federal claim, “the federal issue is not a defense, but rather actually provides the basis of the plaintiff’s cause of action. As such, it meets the requirements of even the strict[est] . . . test of federal question jurisdiction.” *Id.* (footnote omitted). Redish’s argument is similar to the argument made in this section, but removal, rather than dismissal, is justified by such an argument. Again, as Justice Scalia points out in his *Anderson* dissent, there must be some reason why the plaintiff’s claim ought to be made removable rather than dismissed outright under Federal Rule of Civil Procedure 12(b)(6). *Anderson*, 539 U.S. at 18. The argument for why removal ought to be allowed in the class of cases *Anderson* affects was provided previously. See *supra* Part III.A. This Part attempts to demonstrate that various theoretical and policy based arguments do not provide other reasons not to apply *Anderson*.

404. See *supra* Part III.A.

405. See, e.g., REDISH, *supra* note 290, at 106–17 (arguing in favor of federal

As to the objection based on Congress's control over the jurisdiction of the lower federal courts, one need not accept the recharacterization fiction⁴⁰⁶ to understand that the *Anderson* rule does not expand federal removal jurisdiction or federal question jurisdiction. Rather, *Anderson* constitutes a judicial modification of a judge-made limitation on the exercise of removal jurisdiction over a category of cases that would, absent that limitation, fall within "arising under" jurisdiction in the first place. As such, the *Anderson* rule no more usurps Congress's control over federal court jurisdiction than would a decision by the Supreme Court to abandon *Younger* abstention.

a. *The Well-Pleaded Complaint Rule.* Again, federal question jurisdiction generally is held to exist only where a federal law cause of action appears on the face of the plaintiff's well-pleaded complaint.⁴⁰⁷ This well-pleaded complaint rule is a judge-made rule—it cannot be found in any constitutional provision⁴⁰⁸ or act of Congress⁴⁰⁹—that functions as a

defense removal and against continued adherence to the well-pleaded complaint rule); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1794–97 (1992) (complaining that the well-pleaded complaint rule "undermines the principles of systemic representativeness, logical consistency, litigant choice, and, arguably, institutionalism" that ground our jurisdictional allocation scheme).

406. It is, in a sense, correct to call the claim that the *Anderson* rule itself recharacterizes the plaintiff's claim a fiction, but because application of the *Anderson* rule may result in a federal law claim being substituted for the plaintiff's preempted state law claim without dismissal, the recharacterization claim may just as well be considered a shorthand representation of a series of procedural steps by which the plaintiff's case is allowed to go forward in federal court after removal. See *supra* Part III.C.

407. See *supra* notes 32–37 and accompanying text.

408. See Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1437 n.179 (1983) (noting that absurd results would ensue "if the well-pleaded complaint rule were viewed as constitutional . . . [because] [i]mportant federal questions raised as defenses could not be heard in federal courts under any circumstances").

409. See Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 587 (1989) ("Congress did not create the well-pleaded complaint rule, and it has never explicitly endorsed it."). The accuracy of this claim may be disputed. For example, in *Tennessee v. Union & Planters' Bank*, the Supreme Court seems to have read Congress's 1887 amendments to the 1875 Judiciary Act's grant of general federal question jurisdiction to require something like the well-pleaded complaint rule. *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 461–62 (1894). Because the 1887

jurisdictional “sorting device,” a tool of judicial convenience designed to allow courts to ascertain existence of federal subject matter jurisdiction in an expedient and predictable manner.⁴¹⁰ The well-pleaded complaint rule is also thought to operationalize the principle that the plaintiff ought to be master of the complaint⁴¹¹—that courts ought to respect the plaintiff’s right to choose a federal or state judicial forum⁴¹² by restricting the extent to which a defendant may override the plaintiff’s forum choice.

Because the well-pleaded complaint rule is judge made, there are only two sets of reasons why a court might apply the rule in any given case: the reasons that support adherence to previous court decisions, and the reasons that justify application of the well-pleaded complaint rule other than the reasons for adherence to precedent. These sets of reasons are not coequal, as a court may conclude that *stare decisis* compels application of a legal norm even where none of the norm-specific reasons that justify its application are implicated in a case. But this situation only obtains where prior court decisions establish that there are to be no exceptions made to the application of the rule, even if application would be otherwise unjustified on the facts of a case.

Justice Scalia’s accusation that the *Anderson* rule is illegitimate

amendments allowed for removal by the defendant only for cases “of which the Circuit Courts of the United States are given original jurisdiction by the preceding section[.]” the Court reasoned that looking to the plaintiff’s complaint to determine whether it could have properly invoked original federal question jurisdiction was an appropriate test for removal jurisdiction. *Id.* (internal quotation omitted). In this way, one might argue that the well-pleaded complaint rule was created by Congress. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) (“For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff’s* complaint establishes that the case ‘arises under’ federal law.”). The 1887 amendments to the 1875 Judiciary Act do not mandate the well-pleaded complaint rule in its familiar form—they only require a determination that the plaintiff’s case could have been brought originally in federal court based on “arising under” jurisdiction. The 1887 amendments do not require any particular method for making that determination, nor do they give an exhaustive list of the types of cases that arise under federal law. The well-pleaded complaint rule, then, does not seem to have been created by Congress; it is a tool that courts find convenient for policing the line drawn by the 1887 limitation on removal jurisdiction.

410. *See Miller, supra* note 14, at 1818.

411. *See supra* notes 34–36 and accompanying text.

412. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831–32 (2002) (“[S]ince the plaintiff is ‘the master of the complaint,’ the well-pleaded-complaint rule enables him, ‘by eschewing claims based on federal law, . . . to have the cause heard in state court.’” (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398–99 (1987))).

because it violates the well-pleaded complaint rule thus may be interpreted as either the strong claim that no jurisdictional rule that departs from the well-pleaded complaint rule can be legitimate, or the weaker claim that there are no good reasons to deviate from the well-pleaded complaint rule in cases where *Anderson* will provide for removal. While one may hypothesize policy reasons to support the categorical application of one legal rule or another, it is difficult to think of an example of a rule that is actually applied in that manner. Statutes of limitations, to give a procedural-rule example, are subject to equitable tolling in cases presenting reasons why we should set aside our desire to limit the time for filing lawsuits.⁴¹³ Similarly, substantive constitutional rules such as the Fifth Amendment's prohibition on deprivations of life, liberty, or property without due process of law may be set aside in cases where there is some significant governmental interest served by doing so.⁴¹⁴ Like these other rules, the well-pleaded complaint rule may be set aside, or perhaps applied in a modified fashion, under certain circumstances.

One modification of the well-pleaded complaint rule is the Supreme Court's prohibition on invoking federal jurisdiction by affirmatively asserting defensive or otherwise responsive federal law issues in a declaratory judgment action.⁴¹⁵ On an unflinching application of the well-pleaded complaint rule, a declaratory complaint seeking a declaration of federal law rights would establish federal question jurisdiction. If the court is required to determine jurisdiction from the face of the plaintiff's well-pleaded complaint alone, and the declaratory claim presents a question of federal law on the face of the well-pleaded declaratory complaint,⁴¹⁶ the

413. See, e.g., *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 551 n.5 (2002) ("Equitable tolling is a background rule that informs our construction of federal statutes of limitations . . ." (citations omitted)).

414. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529–35 (2004) (weighing an individual's "most elemental of liberty interests" guaranteed by the Due Process Clause against "sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," and finding that affording the individual the full panoply of due process rights was unwarranted in light of the resulting burdens on the military).

415. See *supra* note 360 (commenting on the *Skelly Oil* Court's treatment of the well-pleaded complaint rule in the declaratory judgment context).

416. See 28 U.S.C. § 2201 (2000) (requiring that a federal declaratory complaint, to establish federal jurisdiction, either raise a question of federal law or fall under diversity jurisdiction); Redish, *supra* note 405, at 1797 ("[I]n a declaratory judgment action, the [declaratory] plaintiff *does* guarantee that a federal issue will be discussed . . . simply by raising the issue in the complaint seeking the declaratory judgment.").

well-pleaded complaint rule seems to mandate that federal jurisdiction exists.⁴¹⁷

But in *Skelly Oil Co. v. Phillips Petroleum Co.*,⁴¹⁸ the Supreme Court determined that federal courts entertaining federal declaratory judgment actions should look beneath the complaint and hypothesize what the plaintiff's underlying coercive action would have been, apply the well-pleaded complaint rule to the hypothetical complaint in the hypothetical underlying coercive action, and decide the jurisdictional question on that basis.⁴¹⁹ This allows a court to determine whether the federal issue raised in the declaratory judgment cause of action is really a federal defense to an anticipated state law claim or a reply to an anticipated federal defense in disguise. If the declaratory complaint is well pleaded on its face and presents a substantial federal question,⁴²⁰ then looking to an imagined complaint in a hypothetical coercive action to decide whether federal question jurisdiction exists is not an application of the well-pleaded complaint rule as we know it.⁴²¹

417. This problem arises because the well-pleaded complaint rule does not require a more complex inquiry into whether a complaint bearing a federal question actually creates a case that arises under federal law. Rather than asking this question, which requires consideration of the actual scope of federal question jurisdiction, the well-pleaded complaint rule serves as a proxy that identifies those cases that will, in the majority of instances, arise under federal law. If the inquiry required by the well-pleaded complaint rule was coextensive with the inquiry required to determine whether each case arises under federal law under the statute, it would not work as a tool of convenience in determining whether federal subject-matter jurisdiction exists. See *supra* note 40 (characterizing the well-pleaded complaint rule as a jurisdictional "sorting device").

418. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

419. *Id.* at 671–72; Doernberg & Mushlin, *supra* note 409, at 543–44; see also *id.* at 535 (explaining that the Court's method of determining the existence of federal question jurisdiction in declaratory judgment cases often requires an "analysis of nonexistent documents" which "imports a certain air of unreality to the task").

420. See 28 U.S.C. § 2201 (granting federal district courts jurisdiction over declaratory judgment actions).

421. See *supra* Part III.A. As a related aside, it may be that Justice Scalia's criticism overstates the rigidity of the well-pleaded complaint rule as enunciated in *Louisville & Nashville Railroad Co. v. Mottley*. In that case, the plaintiffs sued a railroad that refused to renew an agreement guaranteeing them transportation for life for breach of contract. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 150 (1908). Along with their state law breach of contract claim, the plaintiffs' complaint contended that if a federal statute proscribing the issuance of free transportation passes was construed to allow the railroad to cancel the agreement, the statute would violate the Fifth Amendment's prohibition on deprivations of property without due process. *Id.* at 150–51. In determining that there was no federal question jurisdiction, the Court

The *Skelly Oil* Court's justification for this modification of the well-pleaded complaint rule depends on the Court's conclusion that Congress did not intend the federal Declaratory Judgment Act to expand federal question jurisdiction.⁴²² Because rigid application of the well-pleaded complaint rule would lead to the erroneous conclusion that the declaratory plaintiff had properly invoked federal question jurisdiction⁴²³ in a context where Congress has made clear that no such jurisdiction may exist,⁴²⁴ the

found the constitutional issue was a reply to a potential defense rather than a cause of action, and so was not properly included in the plaintiff's complaint and could not serve as a basis for jurisdiction. *Id.* at 153–54. This holding grounds the rule that a party may not remove on the basis of a federal defense to a state law claim.

However, the result also indicates that before applying the well-pleaded complaint rule to determine whether “arising under” jurisdiction exists in *any* case, a court may have to sort through the issues and claims in the plaintiff's complaint to determine their validity. Determining the validity of a claim or the necessity of the presence of an issue in a complaint may involve determining what substantive law will govern the case in order to verify that the plaintiff has raised a valid state or federal claim. Thus, the jurisdictional inquiry is not limited to the face of the plaintiff's complaint. See Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 823–24 (1986) (giving a similar reading of *Mottley*). It seems then that the *Anderson* rule's recharacterization of the plaintiff's state law usury claims as claims arising under the NBA is not per se in conflict with the well-pleaded complaint rule. Because the usury provisions provide the sole cause of action against a national bank for charging excessive interest, a plaintiff pleading a state law usury claim against a national bank has, in fact, plead nothing at all. A court could reasonably examine the facts to see what the plaintiff should have pleaded and whether there is any reason to allow the case to go forward despite the mispleading. See, e.g., *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 769 n.3 (9th Cir. 1986) (noting that despite the well-pleaded complaint rule, a federal court deciding a removal question may look to “the petition for removal to clarify the action presented in the complaint in determining whether it raises a federal question” (citations omitted)). This reading of *Mottley* allows for judicial inquiry into the nature of the plaintiff's cause of action under some circumstances, which is the proposition this Article is urging that *Skelly Oil*, and now *Anderson*, stand for.

422. *Skelly Oil*, 339 U.S. at 671–72 (noting that the federal Declaratory Judgment Act was intended to “enlarge[] the range of remedies available in the federal courts but . . . not [to] extend their jurisdiction”).

423. See *id.* at 673 (rejecting assertions of federal question jurisdiction based on “an anticipated defense derived from federal law”).

424. The validity of the *Skelly Oil* majority's premise is irrelevant to my argument—I focus only on the Court's reasoning from the observation that the well-pleaded complaint rule does not fulfill its principal function in federal declaratory judgment cases to the conclusion that the rule ought to be applied in a modified manner because of the observed deficiency. Assuming the Court's conclusion about congressional intent is true, the Court's justification for modifying the well-pleaded

standard version of the well-pleaded complaint rule does not function as an accurate jurisdictional proxy in federal declaratory judgment actions.⁴²⁵ The standard well-pleaded complaint rule produces too many jurisdictional “false positives” in such cases. The Court thus fashioned its modified version of the well-pleaded complaint rule to correct this error and ensure correct jurisdictional outcomes in cases involving federal declaratory judgment claims.⁴²⁶ Importantly, while the rules themselves differ, the justificatory arguments for the modified *Skelly Oil* version of the well-pleaded complaint rule are identical to those advanced for the standard *Mottley* version of the well-pleaded complaint rule.⁴²⁷

Several conclusions follow from these observations. First, Justice Scalia cannot have intended the strong proposition that the well-pleaded complaint rule simply does not admit of exception or modification under any circumstances—he does not even address *Skelly Oil*, much less attempt to either meaningfully distinguish or condemn *Skelly Oil*’s version of the well-pleaded complaint rule.⁴²⁸ Scalia thus seems to concede that the well-pleaded complaint rule may at least be modified under circumstances that such modification is necessary to effectuate the rule’s basic purposes, as

complaint rule is analytically sound and justifies a similar modification in *Anderson* rule cases.

425. See *supra* note 416. This conclusion is distinct from the observation that the well-pleaded complaint rule as a jurisdictional proxy will sometimes be over-inclusive and sometimes be under-inclusive. In federal Declaratory Judgment Act cases, it is the nature of the cause of action that will appear on the face of the declaratory plaintiff’s complaint that creates the trouble, rather than the inherent inaccuracy of the well-pleaded complaint rule at the margins. Where an identifiable category of cases ought to be treated differently than the well-pleaded complaint rule dictates because of some feature common to cases in that category, it makes sense to modify the rule to create the right results for that category of cases. This kind of categorical proxy error also occurs during attempts at a rigid application of the well-pleaded complaint rule to the category of cases to which *Anderson* will apply, necessitating a *Skelly Oil*-like modification to the rule.

426. See *Skelly Oil*, 339 U.S. at 673 (determining that federal question jurisdiction on a straight-forward application of the well-pleaded complaint rule to the declaratory plaintiff’s complaint would “turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created”).

427. Because Justice Scalia’s criticism of the *Anderson* rule (and indeed any criticism of *Anderson* based on the well-pleaded complaint rule) must proceed from the position that the well-pleaded complaint rule itself is justified, this Article proceeds from the same assumption in response.

428. Indeed, Justice Scalia recently delivered a majority opinion that discussed at length and approved the *Skelly Oil* rule. See *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. UAW*, 523 U.S. 653, 658–61 (1998).

Skelly Oil indicates is the case in federal declaratory judgment cases. What remains is the second, weaker form of the Scalian claim: While the well-pleaded complaint rule is subject to modification where necessary to maintain fidelity to that rule's underlying goals, as demonstrated in *Skelly Oil*, no modification of or exception to the well-pleaded complaint rule may be justified under the circumstances presented in the *Anderson* case. Another conclusion that can be drawn from *Skelly Oil* is that the Court is willing, where there is good reason, to base jurisdictional decisions on the underlying facts of a case. After all, *Skelly Oil*'s hypothetical complaint—on which the jurisdictional decision was based—really consists of nothing more than judicial conclusions concerning possible legal claims that may arise from the facts.

In the posture in which the jurisdictional question will arise in *Anderson* rule cases, namely during the adjudication of a motion to remand, the court will similarly have to look at the underlying facts of the case to determine whether the state law claim falls within an exclusively federal cause of action. The results of this factual examination, in cases where jurisdiction is properly asserted under the *Anderson* rule, will show that the facts alleged in the plaintiff's complaint can only give rise to a federal cause of action, as any possible state law claim will be found to be preempted. The court will conclude that the "real case" asserts a federal cause of action sufficient to ground an assertion of federal question jurisdiction. In this way, the inquiries in *Anderson* cases and *Skelly Oil* cases are directly parallel—the court in both inquiries must extrapolate the plaintiff's possible causes of action from the facts alleged and base its jurisdictional decision on those hypothesized claims.⁴²⁹

But what justifies looking beyond the face of the complaint in the first place? For the *Skelly Oil* Court, it was the observation that a standard application of the well-pleaded complaint rule would run counter to congressional intent by indicating the existence of federal question

429. The "deviation" of the *Skelly Oil* rule was the determination that the facts underlying a complaint containing a well-pleaded federal claim did not give rise to any cause of action that would properly invoke federal question jurisdiction. On the other hand, *Anderson*'s "deviation" will occur where the facts underlying a well-pleaded complaint lacking any federal element give rise to a cause of action that does warrant federal question jurisdiction. This difference, however, is of no concern. The *Skelly Oil* rule is not designed to solely deny jurisdiction—it merely relocates the jurisdictional inquiry from the complaint to the underlying facts. If the underlying facts would normally result in the presence of a federal claim on the face of the hypothetical well-pleaded complaint, federal question jurisdiction will be appropriate even applying the *Skelly Oil* rule.

jurisdiction for most cases containing a federal declaratory judgment claim.⁴³⁰ Because a central purpose of the well-pleaded complaint rule is to effectuate congressionally imposed limitations on federal question jurisdiction, the “beneath the complaint” inquiry in *Skelly Oil* cases is needed to avoid frustrating that purpose. In *Anderson* rule cases, it is the observation that a standard application of the well-pleaded complaint rule would be inefficient because it would indicate a lack of federal question jurisdiction over a class of cases that will eventually contain federal causes of action. Because another purpose of the well-pleaded complaint rule is to facilitate efficiency by allowing jurisdiction to be established at the outset of litigation,⁴³¹ the “beneath the complaint” inquiry in *Anderson* cases is needed to maintain fidelity to the well-pleaded complaint rule’s rationales. There is no obvious reason why the latter circumstance provides a less legitimate reason to look beyond the complaint than the former.

However, one might wonder whether federal question jurisdiction is properly asserted under the *Anderson* rule after this examination of the underlying facts of the case. After all it seems that the Supreme Court’s federal question jurisdiction decisions are best harmonized by reading them together for the proposition that the presence of a substantial federal element on the face of the plaintiff’s well-pleaded complaint is a necessary, but not sufficient, condition for the assertion of federal question jurisdiction.⁴³² On this view, the well-pleaded complaint rule would not be

430. *Skelly Oil*, 339 U.S. at 673–74.

431. *See* *Arkansas v. Kan. & Tex. Coal Co.*, 183 U.S. 185, 188 (1901); *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 459 (1894); *see also* Redish, *supra* note 405, at 1796–97 (arguing that the well-pleaded complaint rule is intended to quickly and efficiently identify cases that involve a substantial federal law issue).

432. In *American Well Works Co. v. Layne & Bowler Co.*, Justice Holmes announced the “Holmes Rule,” an early, restrictive version of the well-pleaded complaint rule; writing that a “suit arises under the law that creates the cause of action.” *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Holmes’s version of the well-pleaded complaint rule would look only at the legal source of the causes of action themselves when determining jurisdiction. *Id.* at 260. Five years after *American Well Works*, however, the Court explained that “where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has [federal question] jurisdiction.” *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

Taken together, the Holmes and *Smith* rules constitute a well-pleaded complaint rule that does not limit jurisdictional decisions to determining whether federal or state law creates the cause of action. Rather, the court may examine

a mere proxy for federal question jurisdiction; it would actually state one of the essential features of a case that arises under federal law.⁴³³ This would certainly harmonize *Skelly Oil* with the standard well-pleaded complaint rule—in *Skelly Oil* the necessary condition of pleading a federal element was satisfied, but congressional intention to expand federal question jurisdiction through the federal Declaratory Judgment Act was absent. It would also explain other cases in which the Court has denied federal question jurisdiction where the complaint contains a well-pleaded federal claim.⁴³⁴ On this view, an assertion of federal question jurisdiction under the *Anderson* rule is inappropriate, even in light of *Skelly Oil*, because the well-pleaded federal element present in *Skelly Oil* is absent at the point jurisdiction is decided in *Anderson* rule cases.

What the *Skelly Oil* Court actually decided, however, was that the declaratory judgment claim had no bearing on the jurisdictional question. Recall that under the *Skelly Oil* rule, the existence of federal question

whether the plaintiff's complaint reveals some question of federal law that needs to be decided to resolve the lawsuit. However, the federal "ingredient" on which federal question jurisdiction is predicated must still appear on the face of the well-pleaded complaint under both the Holmes and *Smith* rules, indicating that the Court thinks jurisdictional inquiry should begin and end with the plaintiff's complaint. The presence of a federal element in the complaint alone, however, is insufficient to confer federal question jurisdiction in some cases. In *Smith*, the Court explained that, at least for cases in which federal jurisdiction is predicated on a federal law element in a state law cause of action, the federal element must appear on the face of the well-pleaded complaint and be determinative of the plaintiff's "right to relief." See *Smith*, 255 U.S. at 199. Later in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Court ratcheted up this requirement, concluding that even outcome determinative federal law elements in state law causes of action must be sufficiently important before they will support federal question jurisdiction. See *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813–14 (1986). Neither case discussed the relation between the outcome determinative or importance requirements for federal element based jurisdiction and the Holmes rule that a federal law cause of action is per se sufficient to confer federal question jurisdiction, so it would seem that the Holmes rule lives on. See Doernberg & Mushlin, *supra* note 409, at 539–40. Thus, while a federal law issue on the face of the well-pleaded complaint may be necessary for the assertion of federal question jurisdiction in most cases, a federal law cause of action is a sufficient, but not necessary, condition, and a federal law element in a state law cause of action, without more, is neither a necessary nor sufficient condition.

433. Congress's control over the scope of federal court subject matter jurisdiction being well established, this position cannot be supported by the Supreme Court's determination that a well-pleaded federal element is required for a case to "arise under" federal law. See *supra* notes 407–08 and accompanying text.

434. See *Merrell Dow*, 478 U.S. at 814 n.12 ("[T]his Court has sometimes found that formally federal causes of action were not properly brought under federal-question jurisdiction because of the overwhelming predominance of state law issues.").

jurisdiction is determined from examination of a hypothetical complaint.⁴³⁵ The well-pleaded declaratory judgment claim is *irrelevant* to the jurisdictional question and thus cannot satisfy the requirement of a well-pleaded federal element.⁴³⁶ Any hypothetical complaint found to satisfy the test for federal question jurisdiction under *Skelly Oil* must satisfy the well-pleaded federal element requirement with a hypothetical federal element. *Skelly Oil* thus supports the conclusion that a court may base an assertion, and not just a denial, of federal question jurisdiction entirely on extrapolation from the underlying facts of a case, so long as there is some reason to examine the underlying facts.⁴³⁷ This is precisely what *Anderson* allows. *Skelly Oil* stands for the proposition that a beneath-the-pleadings inquiry is a valid modification of the well-pleaded complaint rule, and *Anderson* is an application of that proposition.⁴³⁸

435. See *supra* note 419 and accompanying text.

436. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950). (“To sanction suits for declaratory relief as within the jurisdiction of District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation.”).

437. The exact scope of “arising under” jurisdiction remains underdetermined. See CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 91 (4th ed. 1983) (“Though the meaning of this phrase [‘arising under’] has attracted the interest of . . . giants of the bench . . . , and has been the subject of voluminous scholarly writing, it cannot be said that any clear test has yet been developed to determine which cases ‘arise under’ the Constitution, laws, or treaties of the United States.”).

At its margins, the well-pleaded complaint rule will be an imperfect proxy for “arising under” jurisdiction. The presence of a federal issue on the face of the well-pleaded complaint merely indicates the case will *most likely* arise under federal law. The absence of a federal issue in the complaint can do no more than indicate the case will *most likely not* arise under federal law. Because courts are primarily concerned with getting jurisdictional decisions *right*, the *Skelly Oil* rule was formulated to address a class of cases in which the well-pleaded complaint rule fails by indicating the existence of federal question jurisdiction where, in fact, there is none. Similarly, if there is a discrete class of cases in which the well-pleaded complaint rule fails by indicating a lack of federal question jurisdiction where there are good reasons to think jurisdiction in fact exists, a *Skelly Oil*-like modification to the well-pleaded complaint rule is in order.

438. The reasoning employed by the *Skelly Oil* Court has not been subsequently restricted; to the contrary, in *Franchise Tax Board*, the Court extended the *Skelly Oil* reasoning by applying it to claims brought under state declaratory judgment statutes. See *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 18–19 (1983) “[W]hile *Skelly Oil* itself is limited to the federal Declaratory Judgment Act, fidelity to its spirit” led the Court to find that claims for declarations of federal law rights brought under state declaratory judgment statutes could not confer federal question jurisdiction unless, after a *Skelly Oil*-like analysis, the underlying coercive action could be shown, by hypothesis, to satisfy the well-pleaded complaint rule. *Id.* at

One objection to this view is that it violates the master of the complaint principle by depriving the plaintiff in *Anderson* rule cases of the state court option. It is notable that the *Skelly Oil* Court did not pay much homage to the master of the complaint principle, but rather made clear that to allow a plaintiff to invoke federal jurisdiction by artful pleading in anticipation of a federal defense would “disregard the effective functioning of the federal judicial system.”⁴³⁹ The master of the complaint principle does not go so far as to allow plaintiffs to manufacture forum choice where none exists by artfully pleading some illicit basis for federal jurisdiction.⁴⁴⁰ The flip side is that denying a plaintiff her chosen state or federal forum does not implicate the master of the complaint concept when she never really had a choice of forum to begin with.

In *Anderson* rule cases, the plaintiff’s option to recover for injuries through a state law suit in state court is illusory, as the plaintiff’s state law cause of action is preempted by an exclusively federal cause of action. Denying the plaintiff a nonexistent alternative forum choice cannot violate the master of the complaint principle.⁴⁴¹ Indeed, the only real choice the plaintiff has in this kind of case is whether to sue in the first place. By filing the lawsuit, the plaintiff demonstrates her choice to seek a judicial remedy. Without the *Anderson* rule, that choice would be frustrated by outright dismissal of the plaintiff’s preempted state law claim in state court and the additional legal and resource related hurdles such a dismissal would place between the plaintiff and her desired recovery.⁴⁴² By allowing the suit to continue in federal court after preemption is found, the *Anderson* rule respects the only real choice the plaintiff has in these cases—to vindicate her legal rights in some judicial forum rather than be denied a forum altogether.

But even if the *Anderson* rule does erode the master of the complaint

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439. *Skelly Oil*, 339 U.S. at 673–74.

440. *See id.*

441. This is also true in the absence of the *Anderson* rule, so the *Anderson* rule does not itself create the rebuttal of this objection. In a non-*Anderson* world, the plaintiff’s substantively preempted state law claim must be refiled as a federal claim if the plaintiff wants to recover. Thus, even if the plaintiff decides to refile the federal claim in state court, the plaintiff’s claim will invariably be subject to the defendant’s option to remove. I do not, however, indict the general rule of federal question removal for violating the master of the complaint principle. Indeed, this argument demonstrates the relatively low value courts accord to mastery of the complaint, as the defendant’s right to remove federal question cases regularly trumps the plaintiff’s initial forum choice.

442. *See supra* text accompanying notes 284–89.

principle, the assumption of general federal-state court parity means the impact on litigants will be negligible because their rights will be enforced equally well in either forum.⁴⁴³ Indeed, the desire to maintain the plaintiff's mastery of the complaint must often give way to weightier jurisdictional considerations. Whenever a plaintiff chooses to lodge a federal law claim in state court, he is subject to removal and the frustration of his forum choice by the defendant, despite the existence of valid subject matter jurisdiction in the state court. The plaintiff's mastery of the complaint is similarly trammled whenever a federal court abstains from adjudicating a case in which the plaintiff rightfully invokes federal subject-matter.⁴⁴⁴ Indeed, when courts decline to hear an otherwise validly lodged federal case under the doctrine of *Colorado River*⁴⁴⁵ abstention, they deny the plaintiff her chosen federal forum for exactly the same reason that the plaintiff will be denied her chosen state court forum in *Anderson* rule cases—to promote judicial economy and litigation efficiency.⁴⁴⁶ Insofar as these other deprivations of forum choice are justifiable, the *Anderson* rule's more limited impact on plaintiffs' forum choice is of no concern.⁴⁴⁷

443. See Redish, *supra* note 308, at 341 (arguing that if parity is assumed, efforts to preserve a litigant's forum choice are a fool's errand because "[c]hoice of forum is largely an esoteric strategic choice of which the litigant will likely be unaware").

444. See *supra* note 344 and accompanying text.

445. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

446. See *id.* at 817 (stating that "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'" may justify federal court abstention in some circumstances (alteration in original)).

447. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (noting that a tangential but beneficial effect of the well-pleaded complaint rule is to reduce the number of cases that land on federal court dockets). Of course, the *Anderson* rule does not really increase the federal caseload, it just gets cases that will inevitably end up in federal court (or at least in state court subject to removal) into federal court sooner. One would need a specific reason to think *Anderson* rule cases pose a comparatively greater danger to the federal workload if allowed to come into federal court in order to justify excluding them on that basis. Without a specific justification, one is left "engaging in the astrological sign approach to federal jurisdiction." Redish, *supra* note 405, at 1795. *Anderson* rule cases will be few in number and are already destined for federal court, and the adjudication of federal statutory claims is at the core of federal question jurisdiction. See *id.* at 1788 (explaining that under the Holmes rule a case arises under the law creating the cause of action). Thus, there is no compelling argument that these cases would overcrowd the federal courts.

b. *Congressional Control of Federal Question Jurisdiction: The Separation of Powers Objection.* Justice Scalia insists that federal courts must “scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”⁴⁴⁸ The *Anderson* rule flouts traditional jurisdictional limits, Scalia argues, by ignoring the “principle that a federal defense to a state cause of action does not support federal-question jurisdiction.”⁴⁴⁹ Phrased generally, if the *Anderson* rule expands removal jurisdiction, it must expand original jurisdiction, as removal depends on finding that federal subject matter jurisdiction would have existed in the first instance.⁴⁵⁰ Because control over the scope of federal subject matter jurisdiction is constitutionally committed to Congress,⁴⁵¹ judicial expansion of federal question jurisdiction beyond the limits set out in § 1331 amounts to an illicit usurpation of exclusive congressional authority.⁴⁵² It is generally held that jurisdiction under § 1331 must be based on the nature of the plaintiff’s affirmative claims for relief and not on the presence of a federal defense or a plaintiff’s anticipatory response to a federal defense.⁴⁵³ Thus, if *Anderson* in fact authorizes assertions of federal question jurisdiction on the basis of federal defenses, it arguably expands that jurisdiction beyond what Congress prescribed.

The abstract response is that the objection simply does not make sense. It is desirable in principle for federal courts to diligently guard the outer limits of statutory federal question jurisdiction, but, in practice, the exercise is useless because the scope of the congressional grant remains undefined.⁴⁵⁴ It is certain that federal statutory causes of action, for example, are within the scope of § 1331—the Holmes rule that a case “arises under the law that creates the cause of action” may be said to define the central cases of federal question jurisdiction.⁴⁵⁵ At the margins,

448. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 18 (2003) (Scalia, J., dissenting) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

449. *Id.* at 17–18 (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987)).

450. *See* 28 U.S.C. § 1441(b) (2000).

451. *See supra* notes 23–28 and accompanying text.

452. *See Chemerinsky, supra* note 295, at 290 (presenting, but not advocating, the argument that “[t]o the extent that Congress has enacted statutes defining federal jurisdiction, it would violate separation of powers for the courts to disregard them unless they were unconstitutional”).

453. *See supra* notes 39–42 and accompanying text.

454. *See supra* note 434 and accompanying text.

455. *See Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (announcing the Holmes rule).

however, things are far less clear.⁴⁵⁶ When, for example, is a federal issue in a case involving only state law claims important enough to confer federal question jurisdiction under *Merrell Dow*?⁴⁵⁷ What are the criteria for making such a determination?⁴⁵⁸ Indeed the logic of *Skelly Oil* does away with the only potential hard limit on the scope of federal question jurisdiction—the requirement that the plaintiff’s complaint bear on its face some issue of federal law.⁴⁵⁹ In the absence of any readily ascertainable boundary line around the “arising under” jurisdiction, it is difficult to persuasively argue that asserting federal question jurisdiction over some set of cases would constitute an expansion.

The previous section addressed and rejected the possibility that a well-pleaded federal element on the face of the complaint is a necessary condition for the assertion of federal question jurisdiction.⁴⁶⁰ The mere absence of a well-pleaded federal element alone thus cannot be the jurisdictionally troubling characteristic of *Anderson* rule cases. Because federal question jurisdiction can exist even without a federal element in the actual complaint,⁴⁶¹ then, by hypothesis, asserting jurisdiction over a wholly state law complaint is not necessarily illicit.⁴⁶² Some feature of *Anderson* rule cases unrelated to the actual contents of the plaintiffs’ complaints must be the source of this concern about expanding federal question jurisdiction.

In the typical *Anderson* rule scenario, the federal court will decide the substantive preemption question in resolving the plaintiff’s remand motion.⁴⁶³ If the federal court determines the plaintiff’s claim is

456. See Redish, *supra* note 405, at 1793–94 (discussing ambiguities in the scope of “arising under” jurisdiction).

457. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 814 (1986).

458. See *id.* at 822 n.1 (Brennan, J., dissenting) (arguing that the majority’s “importance of the federal issue” test requires that “jurisdiction turn[] in every case on an appraisal of the federal issue, its importance and its relation to state law issues”); Redish, *supra* note 405, at 1794 (comparing application of *Merrell Dow*’s jurisdictional “rule” to “the free-standing, subjective, and individualized determinations of Judge Wapner”).

459. See *supra* notes 431–37 and accompanying text.

460. See *supra* notes 431–37 and accompanying text.

461. See *supra* notes 433–36 and accompanying text.

462. For example, under *Franchise Tax Board*’s extension of the *Skelly Oil* rule to claims under state declaratory judgment statutes, federal question jurisdiction arguably could be predicated on the hypothetical underlying complaint, if well-pleaded and bearing a substantial federal element or cause of action, despite the absence of any federal law issue on the face of the declaratory complaint. See *supra* note 427 (describing the *Franchise Tax Board* holding in more detail).

463. See *supra* notes 274–80 and accompanying text.

preempted, it will either conclude that the complaint alleges sufficient facts to make out the federal cause of action⁴⁶⁴ or require the plaintiff to amend the complaint to allege the federal claim specifically.⁴⁶⁵ In either case, federal question jurisdiction is asserted only *after* disposition of the substantive preemption question and only on the basis of the federal cause of action.

This kind of result is not unique to *Anderson* rule cases. Imagine, for example, that a plaintiff lodges a complaint in federal district court alleging a usury violation against a national bank. The complaint does not specify state or federal law as the source of the cause of action, and the plaintiff has failed to plead jurisdictional facts or even cite § 1331. Federal Rule of Civil Procedure 8(a)'s notice pleading regime requires that the court determine the nature of the plaintiff's claim and whether federal subject matter jurisdiction exists.⁴⁶⁶ The substantive preemption issue thus will arise when the court evaluates its jurisdiction, either *sua sponte* or on motion by the defendant. After the court determines that the plaintiff's allegations only give rise to a federal statutory usury claim because the NBA preempts state law usury claims, the court will conclude that federal question jurisdiction exists under § 1331 and the case will proceed.⁴⁶⁷ In this situation, as in *Anderson* rule cases, the substantive preemption issue is presented as a jurisdictional question; the only difference is the procedural posture in which the jurisdictional question arises.

So, it is incorrect for Scalia or other critics to characterize *Anderson* as authorizing removal on the basis of a federal defense.⁴⁶⁸ The substantive preemption issue is not a federal element that supports federal question jurisdiction in *Anderson* rule cases. Jurisdiction is predicated on the presence of a federal law cause of action in the case after disposition of the preemption issue and some subsequent action, by either the plaintiff or the court, to replace the preempted state law cause of action with the relevant

464. See *supra* notes 280–81 and accompanying text.

465. See 28 U.S.C. § 1653 (2000) (allowing for amendment of defective jurisdictional statements in pleading); see also *supra* notes 289–90 and accompanying text.

466. See FED. R. CIV. P. 8(a); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (noting the liberal pleading requirements under the Federal Rules of Civil Procedure).

467. Rule 8(a)(1) requires the complaint contain “a short and plain statement of the grounds upon which the court’s jurisdiction depends,” FED. R. CIV. P. 8(a)(1), so a federal court in this situation may require the plaintiff to amend the complaint to add a reference to § 1331. See 28 U.S.C. § 1364 (authorizing such amendments).

468. See *supra* notes 17–18 and accompanying text.

federal claim in the plaintiff's complaint.⁴⁶⁹ Federal subject matter jurisdiction is thus asserted, and the case removed, only on the basis of a federal statutory claim that falls squarely within the core of federal question jurisdiction.⁴⁷⁰ Numerically increasing assertions of core federal question jurisdiction certainly does not expand the scope of that jurisdiction in derogation of congressional control.

And what of the *Anderson* rule's effect of transferring some substantive preemption questions from state to federal court? Allowing the substantive preemption issue to be presented in federal court as a jurisdictional question on removal is, after all, one salient effect of the rule. Does this somehow illicitly expand federal question jurisdiction? Certainly not. Federal courts always have jurisdiction to determine whether they have subject matter jurisdiction over a case, regardless of what kind of jurisdictional question is raised.⁴⁷¹ To be sure, presenting the preemption issue as a jurisdictional question in federal court is an innovation. But hopefully this Article has shown that *Anderson*'s departure from the jurisdictional norm is a rationally coherent extension of existing jurisdictional principles justified by its significant efficiency benefits. What remains is to determine the nature of *Anderson*'s impact on the allocation of judicial authority among federal and state courts.

3. *The Objection from Federalism*

Application of the *Anderson* rule does no more than relocate a single category of substantive preemption decisions from state to federal court. It does not increase the variety of state law causes of action preempted by

469. In other words, jurisdiction is asserted in *Anderson* cases in the manner prescribed by the Holmes rule—by determination of the law creating the cause of action—rather than on the more complicated, and controversial, *Smith* and *Merrell Dow* jurisdictional theory. This avoids unnecessary entanglement in what Justice Frankfurter called the “litigation-provoking problem”—the difficult task of assigning relative weight to federal law issues on whose resolution the plaintiff's right to relief might depend. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting). *Anderson* thus increases the number of “central case” assertions of federal question jurisdiction rather than adding to the number of marginal, and thus questionable, jurisdictional decisions.

470. This explanation of the nuts and bolts of the *Anderson* rule dispels any illusions that the plaintiff's state law claim is somehow “magically” recharacterized by operation of the *Anderson* rule.

471. See Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22–27 (1981) (discussing this “pump-priming jurisdiction”).

federal statute,⁴⁷² it does not increase the frequency with which such preemption occurs, and it does not make federal court the primary forum for adjudicating some category of state law claims.⁴⁷³ According to Justice Scalia's characterization, the *Anderson* rule "wrest[s] from state courts the authority to decide questions of pre-emption under the National Bank Act."⁴⁷⁴ Concerns about the propriety of committing certain legal questions to federal courts to the exclusion of state courts are based on the idea that federal judicial rules should respect comity between the federal and state judicial systems.⁴⁷⁵

The "notion" of comity⁴⁷⁶ is often invoked to justify federal abstention doctrines⁴⁷⁷ and exhaustion requirements,⁴⁷⁸ but is rarely

472. This effect would be particularly troubling in light of Professor Young's contention that substantive preemption of state law cuts into the very foundation of the states' capacity to participate effectively in the political process. See Young, *supra* note 79, at 1377 (arguing that vital state interests in maintaining regulatory authority are at stake in substantive preemption cases).

473. This would violate the general dual sovereignty principle that state courts are to be the final arbiters of state law. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1874) ("The [s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise."); see, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 724 (1996) (noting that federal abstention doctrines are predicated on "principles of comity and federalism"); *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973) (explaining that, in the context of federal habeas corpus proceedings, the requirement of exhaustion of state law remedies is justified by "strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors").

474. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 19 (2003) (Scalia, J., dissenting).

475. See *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 576 (1999) ("[F]ederal and state courts are complementary systems for administering justice. Cooperation and comity, not competition and conflict, are essential to the federal design.").

476. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (dubbing the comity consideration a "notion"); *Rehnquist, supra* note 339, at 1066–67 (arguing that the Supreme Court's failure to elevate comity from the status of a "notion" to something more concrete makes comity "a toothless abstraction, not a rule, invoked in an infinite variety of contexts to justify one governmental body's deference to another").

477. See *Younger*, 401 U.S. at 44 (listing promotion of comity as among the "underlying reason[s] for restraining courts of equity from interfering in criminal prosecutions").

478. Comity is often invoked, for example, in the federal habeas context as a justification for requiring exhaustion of state law avenues to relief prior to proceeding in habeas. See, e.g., *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982) (holding that comity dictates that federal courts should deny habeas petitions that contain a mix of exhausted and unexhausted claims); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)

discussed as a separate concept.⁴⁷⁹ Most often comity is listed as a member of the nebulous tripartite principle of “equity, comity, and federalism.”⁴⁸⁰ Though “[c]omity has never had any precise meaning,”⁴⁸¹ there can be little doubt that the Supreme Court counts comity among the central values of judicial federalism.⁴⁸² Synthesizing the Court’s guidance on the matter, Professor Rehnquist suggests that comity may be “[u]nderstood as a general principle of respect . . . that . . . reflect[s] the view that federal and state courts serve as adjudicatory coequals within the zone where their jurisdictions overlap.”⁴⁸³ Professor Chemerinsky similarly explains that “comity . . . [is] the respect owed to the state’s courts as those of another sovereign,” which requires that “federal court jurisdiction must be exercised in a manner that does not insult the state courts or cause friction with them.”⁴⁸⁴

In practice, this principle of intersystemic respect usually translates to a general unwillingness by federal courts to take action that would interfere with ongoing or future state judicial or administrative proceedings,⁴⁸⁵ or to decide issues better addressed in a state judicial or administrative forum.⁴⁸⁶

(exhaustion requirements “minimize friction between our federal and state systems of justice by allowing the [s]tate an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights”); *Darr v. Buford*, 339 U.S. 200, 204 (1950) (explaining that “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation”).

479. See Rehnquist, *supra* note 339, at 1066 n.99 (observing that commentators “purport[] to take issue with comity” but fail to analyze it as an independent concept).

480. See *id.* (discussing how cases after *Younger* “drained comity of all content whatsoever, lumping it with ‘equity’ and ‘federalism’ to form an amorphous, three-headed impediment to federal jurisdiction”).

481. *Id.* at 1067.

482. *Younger*, 401 U.S. at 44 (discussing comity as a vital aspect of judicial federalism); see, e.g., *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (referencing the “notions of comity so central to *Younger*’s ‘Our Federalism’”); *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (“[C]omity between state and federal courts . . . has been recognized as a bulwark of the federal system.”).

483. Rehnquist, *supra* note 339, at 1066.

484. Chemerinsky, *supra* note 295, at 280.

485. See, e.g., *Allen*, 449 U.S. at 96, 105 (deciding that principles of comity require that state court decisions be given preclusive effect in federal § 1983 actions); *Rizzo v. Goode*, 423 U.S. 362, 379–80 (1976) (concluding that principles of equity, comity, and federalism also apply “where injunctive relief is sought . . . against those in charge of an executive branch of an agency or state or local governments”).

486. See, e.g., *Buford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943) (holding that federal court abstention is warranted when deciding a case would interfere with a state’s formulation of administrative policy); *R.R. Comm’n v. Pullman Co.*, 312 U.S.

But the comity idea weighs against applying jurisdictional rules in a way that “might implicitly insult state judges or cause friction with them.”⁴⁸⁷ Comity does not demand “blind deference to ‘States’ Rights,” but rather counsels federal courts to accommodate the “legitimate interests of both State and National governments.”⁴⁸⁸

A comity-based objection to the *Anderson* rule might proceed as follows: State governments have a distinct interest in the outcomes of substantive preemption questions, because federal preemption of state law usually diminishes state regulatory authority.⁴⁸⁹ Though substantive preemption inquiries often turn entirely on the interpretation of federal statutes,⁴⁹⁰ they remain, in essence, constitutional challenges to state laws.⁴⁹¹ To avoid friction between the federal and state judiciaries, perhaps state courts should be given the first opportunity to consider substantive preemption questions, as it is state law that such questions jeopardize.⁴⁹² If this is what comity requires, *Anderson*’s wresting of substantive preemption questions from state courts seems to run directly counter to comity’s dictates.

This argument proves too much. After all, federal courts decide substantive preemption questions regularly and in a variety of contexts⁴⁹³ without any noticeable effect on relations between federal and state courts. Indeed, if federal court disposition of preemption questions were a

496, 501 (1941) (advising federal courts to abstain from deciding cases involving a federal constitutional question and an unresolved antecedent state law issue).

487. Chemerinsky, *supra* note 295, at 281 (raising several objections to the use of comity as a general principle for defining federal jurisdiction).

488. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

489. *See Young*, *supra* note 316, at 130–34 (enumerating the impacts of preemption on state governments).

490. *See Young*, *supra* note 79, at 1383.

491. *See supra* note 74 and accompanying text.

492. *See Wisconsin v. Constantineau*, 400 U.S. 433, 440 (1971) (Burger, C.J., dissenting) (arguing that the Court should have abstained from striking down a Wisconsin statute on due process grounds to give state courts the opportunity to first address the issue).

493. *See generally* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999) (reporting the results of an empirical study of federal court preemption decisions). The Spence and Murray study indicates federal courts are statistically more likely to find preemption than to uphold state or local law, especially in the fields of health, safety, and environmental regulation. *Id.* at 1187. These results give no information, however, about whether federal courts are more likely than state courts to find preemption.

significant source of intersystemic friction, one might think that our currently federalism-focused Supreme Court⁴⁹⁴ would have fashioned an abstention doctrine to apply when such questions arise.⁴⁹⁵ Instead, the Court has focused on enforcing subtler “soft restraints” on Congress’s power to preempt state law,⁴⁹⁶ such as the strong presumption against preemption.⁴⁹⁷ These restraints on preemption, which are thought sufficient to protect state interests,⁴⁹⁸ remain firmly in place in *Anderson* rule cases, leaving states with little reason to fear the additional instances of federal court disposition of substantive preemption issues that will result.

Additionally, federal court adjudication of substantive preemption issues poses less risk of insulting state courts than is present in other contexts in which this “give states the first bite at the apple” argument is

494. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998) (stating that the Rehnquist Court has engaged in a “federalist revival”); see also Young, *supra* note 79, at 1376–77 (arguing that the Court’s expansions of state sovereign immunity are actually counterproductive to a viable federalism doctrine).

495. The applicability of *Pullman* abstention to cases involving preemption challenges remains an open question. Compare *Fireman’s Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 n.12 (9th Cir. 2002) (noting that “*Pullman* abstention is not appropriate when the federal question at stake is one of federal preemption”), with *Fleet Bank, Nat’l Ass’n v. Burke*, 160 F.3d 883, 890–91 (2d Cir. 1998) (finding *Pullman* applicable in preemption cases). If *Pullman* abstention is available in cases involving substantive preemption, comity concerns arising from the *Anderson* rule are further ameliorated because preemption issues of particular importance to states are likely to prompt the federal court to abstain.

496. See Young, *supra* note 316, at 131 (“[P]reemption doctrine has traditionally focused on interpretive rules that tend to moderate the impact of what Congress has enacted on state authority.”).

497. See *supra* note 80.

498. Professor Young explains as follows:

The presumption against preemption tends to enhance the political safeguards of federalism by requiring clear notice to legislators when state authority is at stake, thereby reducing the information costs associated with mobilizing against federal legislation. The presumption likewise reinforces the procedural safeguards of federalism by raising the costs of federal lawmaking, both in terms of drafting costs and, in some cases, by requiring a judicial remand to Congress in order to clarify the preemptive scope of federal statutes.

Young, *supra* note 316, at 132; see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (explaining that the presumption against preemption is intended to subject substantive preemption decisions to the political process).

advanced. Federal habeas review of state criminal proceedings, for example, charges federal courts with the unenviable task of reviewing state court actions for constitutional error.⁴⁹⁹ The more frequently federal courts undertake such review, the more state courts might be perceived as inferior tribunals prone to frequent mistakes. Thus, federal habeas jurisdiction has been conditioned on exhaustion of state court remedies to afford state courts “the first opportunity to correct [their] own errors.”⁵⁰⁰ A federal court deciding a preemption question in an *Anderson* rule case does not sit in this same “examiner/examinee” relation to the state court from which the action is removed, and a finding of preemption does not condemn as erroneous any previous state court action. *Anderson* seems unlikely, then, to cause the kind of federal-state friction the comity principle counteracts in other contexts.

The comity objection also assumes a disparity between state and federal courts in their capacity or willingness to correctly decide preemption questions. If there is parity, and if preemption questions have correct answers, then the results should be identical regardless of the forum, and states have no reason to be concerned with the effect of the *Anderson* rule. But even if there is a disparity, deference to state court consideration of preemption issues does not necessarily follow. Indeed, to the extent that disparity exists, federal courts likely would prove better at deciding preemption questions correctly,⁵⁰¹ which seems to justify an even broader transferal of preemption issues from state to federal court than is affected by *Anderson*.⁵⁰² The comity objection is incoherent insofar as it

499. See, e.g., *Bradshaw v. Richey*, 126 S. Ct. 602, 604 (2005) (reviewing a state court habeas determination by United States Supreme Court).

500. *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

501. See *supra* note 317 and accompanying text.

502. See *Jordan, supra* note 98, at 990–91 (advancing this justification for a broad form of complete preemption doctrine). *Jordan* argues various policy interests relevant to the allocation of federal and state jurisdiction would be served by shifting every inquiry concerning the possible preemption of a state law claim, whether or not by an exclusive federal cause of action, to federal court. *Id.* at 983–84. *Jordan* notes: “[W]here federal law is clear, state courts will properly apply federal law even if the consequence is that a state resident is left without a remedy.” *Id.* at 991. But “[b]ecause the preemption issue is in essence a matter of [federal] statutory interpretation, preemption questions have yielded notoriously inconsistent results.” *Id.* Thus, *Jordan* argues that transferal of substantive preemption questions to federal court by a rule of removal is justified, exclusive federal cause of action or not, because “[w]here the law is unclear, state courts have a greater ability even while engaging in accepted legal reasoning to reach an [undesirable] outcome oriented result.” *Id.* This argument provides an example of how likely unjustified assumptions of disparity between federal and state courts may prompt overly broad conclusions.

depends on an assumption about parity because answering the parity question conclusively may prove impossible.⁵⁰³

Ignoring for the moment the futility of the parity discussion, a disparity on preemption issues may actually work to federalism's advantage. The process theory of federalism depends on the idea that state governments will compete with the federal government for the political allegiance of citizens and interest groups to check federal encroachments on state governmental authority.⁵⁰⁴ Fostering vertical competition of this sort by maintaining areas of concurrent federal and state authority has the obvious structural benefit of reinforcing an important self-correcting mechanism in the federal system, as well as advancing other interests.⁵⁰⁵ For example, Professor Amar observes that federal-state competition in provision of remedies for injured citizens may maximize protection of individuals' constitutional rights by generally expanding the panoply of available remedies.⁵⁰⁶ Vertical competition in other regulatory fields may improve the environment, economic efficiency, and the business climate.⁵⁰⁷

Recall that while the majority of defendants in *Anderson* rule cases likely will choose to remove,⁵⁰⁸ the *Anderson* rule merely creates the option of a federal forum where there was none before.⁵⁰⁹ Insofar as the force of the comity objection depends on states placing some value on state court retention of authority to adjudicate substantive preemption issues; it follows that *Anderson*, by giving litigants the choice of a state or federal forum, motivates the states to compete for the opportunity to adjudicate this category of federal preemption defenses.⁵¹⁰ If states place more value on state court disposition of preemption questions than on the efficiency benefits of the *Anderson* rule, they will take steps to ameliorate whatever conditions motivate defendants to favor removal.

In order to compete effectively, states will have to remedy any

503. See *supra* notes 292–315 and accompanying text.

504. See generally Young, *supra* note 79.

505. See Young, *supra* note 316, at 80–88.

506. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428 (1987).

507. See John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 111 (2004) (discussing the benefits of vertical competition in the federal structure).

508. See *supra* notes 281–82 and accompanying text.

509. See *supra* notes 288–89 and accompanying text.

510. Professor Chemerinsky broadens this argument to support a general rule of federal defense removal. See Chemerinsky, *supra* note 295, at 309–10.

disparity that exists by increasing the quality of state court adjudication of federal preemption issues. This result would benefit both litigants and state courts. If the disparity exists only in the minds of litigants and commentators, then states will need to alter public perception of state court proclivities, also presumably to the benefit of state courts. If states' ameliorative efforts are successful, state courts will become the adjudicatory coequals of federal courts as envisioned by the comity principle. If states do not place sufficient importance on opportunities to decide federal preemption questions to justify the changes required to compete successfully, then the comity objection never really had much force to begin with. It may be that changing defendants' minds about litigating in state court would entail sacrificing other interests that state governments are keen to advance, such as providing a broad range of state law remedies for injured plaintiffs. Or, states might find that *Anderson's* efficiency benefits more than compensate for any small measure of adjudicative ground surrendered.

It is also possible that the comity principle is independent of concerns about the effects of jurisdictional rules on state authority or the relative capacities of federal and state courts. One might think, for example, that friction between the federal and state judiciaries would be so detrimental to the effective functioning of the overall judicial system that federal courts should defer to state courts whenever possible and, thus, avoid creating friction, even if state courts are doing an on-balance worse job adjudicating cases.⁵¹¹ But the *Anderson* rule promotes litigation efficiency and conserves litigant resources, and its benefits accrue principally state judicial systems.⁵¹² Thus the *Anderson* rule seems less likely than other possible jurisdictional rules to increase federal-state judicial friction—actually, there are reasons to think that it would be welcomed by state courts. *Anderson's* efficiency benefits also arguably outweigh any minor friction that results.

More generally, attempts to avoid insulting or causing friction with state courts may be too little, too late. Professor Chemerinsky observed that

the very existence of federal courts and federal jurisdiction is based on

511. Professor Bator argues we should enforce comity because insulting state courts exacerbates any existing disparity in judicial performance. See Bator, *supra* note 314, at 625–26. This is not really a comity argument, however, as Bator does not explain why, if this is our concern, it would not be better to simply confine adjudication of all federal law issues to federal courts or provide for across-the-board interlocutory appeal from state court disposition of federal law issues to avoid state court error.

512. See *supra* notes 363–64 and accompanying text.

a distrust of state courts. Diversity jurisdiction . . . exists because of a fear that state courts will be parochial and protect their own citizens at the expense of out-of-staters . . . [and g]eneral federal question jurisdiction was created . . . because of a fear about state court hostility to federal claims.⁵¹³

It seems superfluous to worry about *Anderson*'s potential to unsettle federal-state court relations when the very structure of federal subject matter jurisdiction is designed in perhaps the most friction-inducing manner possible. At the very least, this observation minimizes the *Anderson* rule's negative comity-related consequences to the point of easy palatability in light of its potential to make litigation more efficient.

American federalism is really about concurrent authority.⁵¹⁴ Professor Young observes the decline of the old dual federalism theory, which "contemplated 'two mutually exclusive, reciprocally limiting fields of power—that of national government and the States'"⁵¹⁵ as courts have recognized the "futility of trying to divide up the world into separate and exclusive spheres of governmental competence."⁵¹⁶ Professor Redish explains that the death of dual federalism brought the demise of the notion that "recognition of power in one sovereign inherently implies an absence of concurrent power in the other sovereign."⁵¹⁷ Modern, more realistic federalism theory is concerned with describing and refereeing the interactions of two sovereigns with coextensive authority to regulate in most areas.⁵¹⁸ *Anderson* recognizes federal court authority to assert jurisdiction over a category of cases normally restricted to state courts, but does not simultaneously strip state courts of jurisdiction to hear those cases—the defendant's choice, not the *Anderson* rule, determines the forum. Embracing concurrent jurisdiction in this way, the *Anderson* rule

513. Chemerinsky, *supra* note 295, at 283.

514. *Id.* at 308 ("A central notion of American federalism is concurrent governance." (footnote omitted)); see Martin H. Redish, *Supreme Court Review of State Court 'Federal' Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 889 (1985) ("Though certain commentators now challenge the point, there can be no serious doubt that the interactive model has dominated judicial federalism since the nation's beginnings." (footnote omitted)).

515. Young, *supra* note 316, at 104–05 (quoting Alpheus Thomas Mason, *The Role of the Court*, in *FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 8, 24 (Valerie A. Earle ed., 1968)).

516. *Id.* at 105 (footnote omitted).

517. Redish, *supra* note 514, at 877.

518. See Chemerinsky, *supra* note 295, at 308 (describing this "more neutral sense of federalism").

stands in alignment with, not in opposition to, established federalism principles.

IV. CONCLUSION

Anderson rehabilitates the hopelessly muddled complete preemption doctrine and represents the first instance of complete preemption as a distinct jurisdictional rule. Theoretically, the rule is consistent with judicial treatment of the well-pleaded complaint rule, the established scope of federal question jurisdiction, and principles of comity and federalism. Practically, the rule makes litigation more time and resource efficient. As one piece of the mosaic of federal jurisdictional rules, *Anderson* proves to be more a corrective for excessive, counter productive formalism than any sort of “aberration” or “alchemy.” When understood in this way, complete preemption may be accepted as a legitimate and useful feature of our jurisdictional structure.

The allocation of subject matter jurisdiction between the state and federal courts is a delicate matter influenced by a variety of policy considerations, not the least of which is the tendency of sweeping federal actions to encroach on areas of traditional state authority. The history of federal jurisdictional doctrine shows that these considerations have been balanced differently at different times, resulting in what Professor Redish calls “a crazyquilt combination of sometimes vague and cryptic statutory directives and judge-made doctrines that may or may not coincide with each other or the preexisting statutory framework.”⁵¹⁹ This is a particularly apt description of the Supreme Court’s complete preemption jurisprudence up to *Anderson*. Under the *Avco* and *Taylor* version of complete preemption, courts were left with two rather unsatisfactory options when they had reason to question the propriety of applying the well-pleaded complaint rule. They could either attempt the hopeless task of determining whether a federal statute had enough “preemptive force” to justify the extension of federal question jurisdiction, or they could search for the rare instance in which such an extension was expressly authorized by Congress. *Anderson* replaces these troubling inquiries with a simple, administrable rule of removal.

This new understanding of complete preemption may occasion a broader reexamination of other aspects of jurisdictional doctrine. Disregarding the irrelevant parity debate and embracing cooperative federalism can allow courts to engage in efficiency-minded innovation

519. Redish, *supra* note 405, at 1769.

when crafting new jurisdictional rules, reducing the transaction costs of litigation and improving the accessibility and functionality of the judicial system.