ARTICLES

THE PUZZLE OF COMPLETE PREEMPTION

GIL SEINFELD†

INTRODUCTION

It is a commonplace, at least for those of us who like to spend lots of time thinking about federal jurisdiction, that the conferral of jurisdiction on the federal courts over cases involving questions of federal law is designed principally to serve two goals. First, the establishment of such jurisdiction secures a hospitable forum for parties advancing claims that are grounded in federal law. State courts, it is argued, are

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† Assistant Professor of Law, University of Michigan Law School. I am grateful to Eve Brensike, Ariela Dubler, Daniel Halberstam, Don Herzog, Dan Meltzer, Trevor Morrison, Richard Primus, Rich Schragger, Cathy Sharkey, and Chris Whitman for commenting on earlier drafts and to Debra Chopp, Sarah Levine, and Annie Small for repeated conversations about the subjects explored here. I also thank Michael Farbiarz, Jesse Furman, Risa Goluboff, Ben Gruenstein, Megan Lewis, and Dave O’Neil for helpful comments and suggestions. Research for this Article was funded in part by the Cook Endowment at the University of Michigan Law School.
apt to exhibit bias against federal claims; the establishment of federal jurisdiction permits parties who are concerned about such bias to avoid litigating in the state courts. Second, the jurisdictional grant is thought to yield greater uniformity in the interpretation of federal law because federal judges have more expertise in the interpretation of such law and are less numerous than their counterparts at the state level.

As one might expect, entire bodies of Supreme Court doctrine involving the scope of federal jurisdiction explicitly take heed of concerns relating to state court bias and, indeed, are largely driven by judges’ attitudes with respect to this issue. For example, cases relating to the proper scope of federal habeas review, and whether federal courts should abstain from deciding questions of federal law (so that state court proceedings can run their course), focus intently on the issue of state-court bias against federally protected rights.1

Case law at the intersection of federal jurisdiction and the uniformity concern, however, is markedly different in character. One must strain to identify cases in which the Court carefully tinkers with the rules of federal jurisdiction so as to calibrate them in a manner that will best serve the interest in securing a uniform interpretation of federal law. While Supreme Court opinions occasionally mention this interest, the Justices typically fail to offer it sustained attention.

Nowhere is this more evident than in connection with the doctrine of complete preemption. Through this doctrine, the Court has singled out a set of preemptive federal statutes for special jurisdictional treatment. Specifically, notwithstanding the venerable well-pleaded complaint rule, which permits litigants to invoke federal question jurisdiction only when the plaintiff’s cause of action is grounded in federal law, the complete preemption cases allow the

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1 See, e.g., Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (taking note of the argument that “state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule,” and concluding that “we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States”); id. at 520 (Brennan, J., dissenting) (premising his argument, in part, on “the concern that state judges may be unsympathetic to federally created rights” (quoting Kaufman v. United States, 394 U.S. 217, 225 (1969))); Mitchum v. Foster, 407 U.S. 225, 242 (1972) (noting that the Congress that enacted the predecessor to 42 U.S.C. § 1983 “was concerned that state instrumentalities could not protect [federally created] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts”).
federal courts to exercise jurisdiction over causes of action that are pleaded in state law terms.

One can imagine a jurisdictional doctrine that treats preemption cases specially on the ground that the interest in uniformity features prominently when such statutes are at issue. When Congress preempts state law, one effect of its doing so is to homogenize the rule with which regulated entities are expected to comply. And we might want to make it particularly easy for cases calling for the interpretation of such statutes to get into the federal system, where they will be decided by courts that are thought most likely to interpret the law uniformly, thereby helping to secure the homogeneity Congress means to provide. ²

But the Court has declined to connect the doctrine of complete preemption to the basic policies relevant to the existence and scope of federal question jurisdiction, including the interest in a uniform interpretation of federal law. Indeed, the complete preemption cases offer nothing in the way of systematic thinking about the uniformity interest and how it relates to federal jurisdiction. Complete preemption doctrine thus presents a puzzle: how and why has the Court come to afford the covered cases special jurisdictional treatment, and why is a doctrine that appears to call for justification by reference to foundational jurisdictional policies—the uniformity interest in particular—seemingly disconnected from them? This Article offers a close analysis of this unusual rule of federal jurisdiction in an effort to answer these questions. It makes the case that, due to its neglect of the core values underlying the vesting of federal question jurisdiction in the federal courts, the Court has established a doctrine that is unstable and unsound. This Article argues, further, that the doctrine might be satisfyingly remodeled by shaping it around the interest in a uniform interpretation of federal law.

Part I introduces the central themes in the law of federal question jurisdiction. It describes the prevailing interpretations of the constitutional and statutory texts governing the federal courts’ jurisdiction to adjudicate disputes involving questions of federal law, and it explores

² There is cause to wonder, given the proliferation of federal judges and federal courts, as well as the proliferation and complexity of modern federal law, whether the lower federal courts truly offer a meaningful advantage over state courts when it comes to uniformity of interpretation. But I leave such wondering to another day. For purposes of this Article, I take this vital piece of the conventional wisdom relating to federal courts as a given. Indeed, I rely heavily on this facet of the conventional wisdom in shaping a new approach to complete preemption in Part III, infra.
the reasons for the establishment of such jurisdiction. This Part also introduces the well-pleaded complaint rule and examines the reasons for its adoption by the Supreme Court.

Part II provides a detailed account of complete preemption doctrine, under which parties are permitted to usher state-law claims into the federal courts despite the apparent absence of any federal question on the face of the plaintiff’s well-pleaded complaint. Under the complete preemption rule, a state-law claim will fall within the federal question jurisdiction of the federal courts if it is preempted by a federal statutory scheme that provides the exclusive cause of action for the harm alleged. Part II emphasizes the apparent disconnect between this special jurisdictional rule and the reasons underlying the creation of federal question jurisdiction in the first place—in particular, the need for uniformity in the interpretation of federal law.

Part III answers the question of what complete preemption jurisprudence might look like were it reshaped in light of the relationship between preemption and the uniformity interest. I develop this answer by focusing on a feature of this interest that has been overlooked by courts and commentators alike. Specifically, the interest in uniformity comes in two distinct forms: “equal-application uniformity,” which denotes the interest in assuring that all parties subject to a particular regulatory rule are treated alike, and “regulatory uniformity,” which refers to the interest in subjecting regulated entities to a single rule of law when regulation by a multitude of sovereigns would be intolerable. I argue that the intensity of the interest in regulatory uniformity varies significantly among federal statutory schemes and that where this interest is implicated with unusual force, the argument for federal jurisdiction is strongest. I explain, finally, that we can discern when the interest in regulatory uniformity is in play through careful attention to how broadly preemptive a federal statutory scheme is. Accordingly, Part III makes the case that the doctrine of complete preemption would operate more sensibly if it were remodeled with an eye to the breadth of federal preemption.

I. FEDERAL QUESTION JURISDICTION

A. The Basics

Article III, Section 2 of the Constitution authorizes Congress to confer jurisdiction on the federal courts over “all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties
made, or which shall be made, under their Authority." The canonical interpretation of this Clause is provided by the Supreme Court’s decision in Osborn v. Bank of the United States, which holds that a suit “arises under” federal law so long as a question of federal law “forms an ingredient of the original cause.” Under this construction, Congress may channel cases into the federal courts in which no federal question is actually raised by either party; all that is required is that a federal question lurk in the background of the litigation.

The federal statute governing the scope of federal question jurisdiction, 28 U.S.C. § 1331, largely mirrors the constitutional text. It provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Notwithstanding the textual similarity, statutory “arising under” jurisdiction is considerably narrower than its constitutional counterpart. In a series of cases decided in the decades immediately following the passage of the Judiciary Act of 1875 (which conferred general federal question jurisdiction on the federal courts for the first time), the Court took the position that jurisdiction under the federal question statute exists only when a federal question is presented on the face of the plaintiff’s well-pleaded complaint. That is, jurisdiction will exist under § 1331 only if a claim grounded in federal law is pre-
sent in the complaint, and is asserted by the plaintiff as part of her affirmative theory of relief.

B. The Reasoning Behind the Jurisdictional Scheme

1. Why Federal Question Jurisdiction?

The vesting of federal question jurisdiction in the federal courts has long been understood to serve two principal goals: it helps prevent state court hostility to claims grounded in federal law from undermining the purposes these laws are intended to serve, and it helps to secure uniformity in the interpretation and application of federal law. Concern relating to state judicial bias in the application of fed-

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9 See Metcalf v. Watertown, 128 U.S. 586, 589 (1888) (“[I]t must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of [a federal] character . . . .”). Note that this passage need not be read as prohibiting the exercise of federal jurisdiction on the basis of a federal defense. It suggests only that the federal character of the suit must be evident from the declaration of the party suing; and this might be accomplished through the plaintiff’s anticipation of a federal defense. See James H. Chadbourn & A. Leo Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 661-62 (1942); Donald L. Doernberg, There’s No Reason for It; It’s Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 Hastings L.J. 597, 613-14 (1987). This possibility was foreclosed, however, by the Supreme Court’s decision in Tennessee v. Union & Planters’ Bank, 152 U.S. 454 (1894). See infra note 10.

10 See Union & Planters’ Bank, 152 U.S. at 461 (holding that even if the plaintiff’s complaint anticipates the presentation of a federal defense, and the defendant, in fact, presents this very defense, federal jurisdiction will not lie). In reaching this conclusion, the Court relied on a passage from Osborn which states: “[T]he right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought.” Id. at 459 (quoting Osborn, 22 U.S. at 824). As has been noted by numerous scholars, this passage from Osborn was wrenched out of context by the Court in Union & Planters’ Bank and deployed to support a proposition diametrically opposite the one it was designed to establish. See, e.g., Doernberg, supra note 9, at 615-16.

11 Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (“It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States.”).

12 The federal courts’ capacity to provide greater uniformity in the interpretation of federal law is typically grounded in the fact that (1) there are considerably fewer federal judges than state judges, and (2) federal judges are presumed to have greater expertise in the interpretation of federal law. See, e.g., ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 164-65 (1968) [hereinafter ALI STUDY].
eral law is as old as the Union itself. Thus, in *Federalist 81*, Alexander Hamilton insisted that

the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . . . State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.

Numerous landmark decisions of the Supreme Court relating to the scope of federal jurisdiction advance claims similar to those raised in *Federalist 81*. The capacity of the lower federal courts to produce greater uniformity in the interpretation of federal law likewise lies at the heart of the conventional wisdom relating to why the federal courts ought to be given jurisdiction over cases involving federal law. It is hardly surprising, then, that the piecemeal expansion of federal jurisdiction during the mid-nineteenth century, as well as the conferral of general federal question jurisdiction on the federal courts by way of the Act of 1875, were driven largely by Congress’s desire to secure an impartial forum for the protection of rights conferred under federal law.

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13 *The Federalist No. 81*, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton was not alone among prominent members of the founding generation in advancing this reason for vesting jurisdiction over questions of federal law in the federal courts. During the Constitutional Convention, for example, James Madison argued in favor of creating “inferior [federal] tribunals . . . throughout the Republic” in order to assuage concerns related to “improper Verdicts in State tribunals obtained under the biased [sic] directions of a dependent Judge, or the local prejudices of an undirected jury . . . .” *The Records of the Federal Convention of 1787*, at 124 (Max Farrand ed., 1911).


15 See, e.g., *Ali Study, supra* note 12, at 165-67 (discussing the federal courts’ capacity to provide a uniform interpretation of federal law).


17 See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499, 508 (1928) (characterizing jurisdictional legislation enacted during the first half of the nineteenth century as “directed towards demonstrated inadequacy of state agencies”); see also G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 Mich. L. Rev. 17, 28 (1947) (“There seems little doubt that . . . fear of local prejudice motivated the proponents of the change in 1875. The late war had fanned the flames of sectional distrust so that considerations of this nature were greater than at any other time in the nation’s history. It is not surprising,
and to provide for greater uniformity in the interpretation and application of federal law.

These themes—combating state court bias and securing uniformity—have not lost their resonance with the passage of time. To the contrary, twentieth-century commentary on the purposes served by the establishment of federal question jurisdiction is much the same.

2. Why the Well-Pleased Complaint Rule?

The Court’s expansive construction (in Osborn) of the jurisdiction-conferring language from Article III seems well adapted to serve the general goals described above. By authorizing Congress to confer jurisdiction upon the federal courts so long as a federal question might conceivably arise during litigation, the Court gave the legislature extraordinary latitude to deploy the federal courts in order to safeguard the interests underlying the constitutional grant of power. As nu-

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therefore, that legislation was introduced to meet the threat of local bias.); id. at 30 ("[T]he change, which the act of 1875 introduced, was brought about largely, if not entirely, in order to provide an impartial forum for those cases in which the federal question might be prejudiced in state courts.").

18 See Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 BYU L. REV. 67, 83-84 ("The primary reason for adding this jurisdiction in 1875 is said to have been the desire for uniformity in the interpretation and application of federal law." (citing Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting))).

19 Doernberg, supra note 9, at 648 ("In the years since The Federalist, there has been virtually no disagreement with Hamilton’s initial assessment.").


21 See, e.g., Ernest J. London, “Federal Question” Jurisdiction—A Snare and a Delusion, 57 MICH. L. REV. 835, 838 n.13 (1959) (noting that Osborn’s reading of Article III, § 2 was “sufficiently plastic . . . to fit almost any future contingency”). Osborn’s expansive interpretation of Article III is consistent with the Marshall Court’s general program of cementing (and broadening) the power of the federal government. The decision ultimately punts the question of just how broad federal question jurisdiction would be to Congress, but ensures that Congress has as much latitude as it could possibly want to meet the needs of the federal government as they changed over time. See Chadbourn & Levin, supra note 9, at 649 (“[I]n the Osborn case Marshall was construing for the future, and characteristically he construed broadly in order to allow future change and
merous scholars have argued, however, the well-pleaded complaint rule is hardly conducive to advancing the core purposes of federal question jurisdiction. The interest in a correct and uniform interpretation of federal law is no less potent when the party pressing a federal claim is the defendant rather than the plaintiff. And there is little reason to believe that plaintiffs who press federal claims are more likely to be the subjects of anti-federal bias on the part of state courts than are defendants who rely on federal law to support their claims. Yet the well-pleaded complaint rule, we have seen, forbids the exercise of federal question jurisdiction where the issue of federal law is introduced by the defendant rather than the plaintiff.

Why did the Supreme Court adopt a jurisdictional rule that is at war with the core purposes of the constitutional and statutory grants of jurisdictional power? The answer lies in considerations of docket growth.

22 See, e.g., ALI STUDY, supra note 12, at 188 (“The statutory construction that bars plaintiff from commencing in federal court, or defendant from removing thereto, a case in which there is a federal defense to a state-created claim . . . is inconsistent with the reasons that justify original federal question jurisdiction.” (citation omitted)); Doernberg, supra note 9, at 600 (“[T]he Mottley rule is irrational because it is a mechanical rule that ignores important policy considerations underlying the existence of federal question jurisdiction.”); see also, e.g., Cohen, supra note 20, at 894 (offering similar criticism of the Mottley rule); George B. Fraser, Jr., Some Problems in Federal Question Jurisdiction, 49 Mich. L. Rev. 73, 76 (1950) (same); Hornstein, supra note 20, at 608 (same). But see RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 190 (1985) (taking the position that the well-pleaded complaint rule “is not quite so arbitrary as it sounds,” because it is more likely that defendants will fashion frivolous defenses in order to secure federal jurisdiction than it is that plaintiffs will fashion frivolous federal causes of action for the same purpose).

23 See id. at 189 (“The alignment of parties to a lawsuit is often quite fortuitous . . . [and] seems irrelevant to any functional, or even rational, explanation of federal jurisdiction. The dangers against which the jurisdiction guards are as likely to be met when federal law is relied on defensively as when it is relied on offensively.”); Chadbourn & Levin, supra note 9, at 600 (“Obviously, the presence in a particular case of the reasons of policy underlying federal jurisdiction are independent of which party introduces the federal question.”).

24 Neither the text nor the legislative history of the Judiciary Act of 1875 supports the Court’s narrow reading of its jurisdictional grant. See, e.g., Doernberg, supra note 9, at 605 (“There is almost no legislative history concerning the intended scope of ‘aris-
control. The restriction of federal question jurisdiction to those cases in which the well-pleaded complaint rule is satisfied reduces the likelihood that the federal courts will be faced with a caseload that is beyond their capacity to process expeditiously. This is no post-hoc rationalization; docket-control concerns were highly salient during the quarter-century following the passage of the 1875 Act (during which time the Court decided the string of cases establishing the well-pleaded complaint rule). In particular, the well-pleaded complaint rule helped to hold back the flood of litigation pertaining to western land grants, which was inundating the federal courts toward the end of the nineteenth century.

26 See, e.g., Arthur R. Miller, Artful Pleading: A Doctrine in Search of Definition, 76 Tex. L. Rev. 1781, 1782 (1998) (explaining that the well-pleaded complaint rule reflects “concerns about the limited resources of the federal court system”); Mishkin, supra note 20, at 160 (noting that the “arising under” language of the statute “suggest[s] an intention to confer upon the national courts the full range of constitutional power over such cases” and that “[w]hat legislative history there is tends to confirm the inference”); see also Forrester, supra note 20, at 374-77 (similar); Fraser, supra note 22, at 74-75 (similar).

27 See Cohen, supra note 20, at 903; Forrester, supra note 20, at 379 n.61.

28 See ALL STUDY, supra note 12, app. c, at 482 (“If the Osborn construction had been applied to the statute, it would mean, for example, that virtually every case involving the title to land in the western states, where title descends from a grant from the United States, could be litigated in federal court.”); see also Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900) (noting that if federal question jurisdiction were extended to its constitutional limit, “every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws”). Indeed, the Shoshone Mining case provides a
Thus, the well-pleaded complaint rule is simultaneously an interpretation of the federal question statute and a rather broad species of exception to the principles underlying it. The doctrine provides a mechanism for testing when jurisdiction will exist under § 1331, but the mechanism does not operate as one would expect, given the concerns that motivated the enactment of the relevant language in Article III and § 1331 itself.

C. Exceptions to the Exception

The well-pleaded complaint rule is not without exceptions of its own; the federal courts sometimes exercise jurisdiction under the federal question statute notwithstanding the fact that the cause of action stated by the plaintiff does not appear to be rooted in federal law. The remainder of this Article focuses on one such exception: the doctrine of complete preemption—a jurisdictional rule that permits the exercise of federal question jurisdiction on the basis of the defendant’s presentation of a question of federal law.29

One might expect such tinkering at the margins of federal question jurisdiction to be reserved for those cases in which, though no federal question appears on the face of the plaintiff’s complaint, the interest in securing a uniform interpretation of federal law or safe-
guarding against state court bias is most pressing. But it is difficult to explain the jurisprudence of complete preemption along these lines. Indeed, if one consults the text of the Court’s complete preemption cases, one finds almost nothing in the way of reference to these foundational jurisdictional policies; indeed, the doctrine does not appear to be predicated on any theory of federal jurisdiction. As a result, rather than bringing the rules of federal question jurisdiction in line with the principles underlying its establishment, the doctrine serves only to muddle the jurisdictional picture.

II. COMPLETE PREEMPTION

In a series of cases stretching back nearly forty years, the Court has established and elaborated upon a rule that authorizes the exercise of federal jurisdiction based upon the defendant’s invocation of federal law. Specifically, the doctrine permits removal of a case to federal court if the defendant can demonstrate that the plaintiff’s claim is “completely preempted.” For nearly all of the doctrine’s history, it was exceedingly difficult to tell what, exactly, it meant for a state-law claim to be completely preempted by federal law. It was not until 2003, through the decision in Beneficial National Bank v. Anderson, that the Supreme Court cleared up much of this confusion. That case indicates that a state-law claim is completely preempted and, hence, may be removed to federal court, when federal law provides the exclusive cause of action for plaintiffs who wish to seek relief for the harm alleged.

Though this decision has brought clarity to the doctrine, the jurisprudence of complete preemption remains, as it has always been, significantly undertheorized. Indeed, if one consults the text of the relevant Supreme Court opinions, it is fair to say that it is entirely untheorized. Complete preemption doctrine has developed haphaz-

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30 See Merrell Dow Pharm. v. Thompson, 478 U.S. 804, 818-19 (1986) (Brennan, J., dissenting) (“[L]imitations on federal-question jurisdiction under § 1331 must be justified by careful consideration of the reasons underlying the grant of jurisdiction and the need for federal review.”); cf. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 2 (1927) (“[P]rocess is instrumental; it is the means of effectuating policy.”).

31 539 U.S. 1 (2003). The author served as a law clerk to Justice Scalia for the October 2002 Term, during which time Beneficial National Bank was decided. The opinions expressed in this Article are premised exclusively on publicly available information.

32 Id. at 8.
ardly, with scant attention paid to the basic principles underlying the establishment of federal question jurisdiction. Most notably, the complete preemption cases largely ignore the relationship between preemption, federal jurisdiction, and the interest in a uniform interpretation of federal law.

A. Complete Preemption: An Overview

The general removal statute, 28 U.S.C. § 1441(a), permits a defendant to remove to federal court only if the plaintiff could have filed in the federal system as an initial matter. When pieced together with the well-pleaded complaint rule, this means that a defendant may remove to federal court on the basis of federal question jurisdiction only if the plaintiff has presented a cause of action that is created by federal law. If a plaintiff files a state-law claim in state court, § 1441 provides no basis for removal (at least not on the basis of federal question jurisdiction).

The complete preemption doctrine is an exception to this rule. It permits removal from state to federal court on the basis of federal question jurisdiction in cases in which the plaintiff’s statement of her own cause of action does not rest on federal law.

The doctrine was established by the Supreme Court in 1968, in Avco Corp. v. Aero Lodge No. 735, International Ass’n of Machinists. In that case, the plaintiff (Avco) had filed suit in state court to enjoin members and associates of the defendant union from striking at an Avco facility. The employer’s claim sounded in state contract law—it alleged that the union had violated the “no-strike” clause in the parties’ collective bargaining agreement, which provided that grievances were to be settled amicably or through arbitration. The union sought to remove to federal court. Given the constraints of the well-pleaded complaint rule (which had been around for at least sixty years by the time Avco was decided), this effort ought to have failed. And,

33 See Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (explaining that, for purposes of the jurisdictional statutes, “[a] suit arises under the law that creates the cause of action”).

34 There are others. See infra text accompanying note 77 (noting the Supreme Court’s authorization of federal question jurisdiction when a plaintiff’s state law cause of action requires resolution of a “substantial question of federal law”).


36 Id. at 558.

37 Id.

38 Id.
indeed, Avco insisted that, because its complaint was based squarely and exclusively on state contract law, the case could not have been filed initially in federal court and, hence, could not be removed. 39

The Supreme Court disagreed. In a unanimous decision, the Court determined that Avco’s suit was “within the ‘original jurisdiction’ of the District Court” and that, as a corollary, removal was appropriate. 40 The basis for the Court’s holding is elusive. It is clear that section 301 of the Labor Management Relations Act (LMRA) provided the jurisdictional basis for the suit, 41 but the Court’s analysis confirms only that section 301 preempts certain state-law claims pertaining to labor relations. 42 Under the well-pleaded complaint rule, of course, the availability of a preemption defense ought not to have sufficed to support federal question jurisdiction. Indeed, thirty years prior, the Court had stated unequivocally that “a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby” 43—seemingly foreclosing the holding in Avco.

The decision in Avco left many questions unanswered. First, it failed to clarify when, exactly, the availability of a preemption defense would suffice to underwrite removal jurisdiction. Second, and more fundamentally, it failed to explain why the relevant class of cases (whatever its contours) merits an exception to the well-pleaded complaint rule. 44 Indeed, the Court did not so much as mention the well-pleaded complaint rule or give reasons for its abrogation. Finally, even if there were good cause to afford the relevant class of cases special jurisdictional treatment, the Court failed to explain why it is for the judiciary, and not Congress, to make this judgment and craft the appropriate jurisdictional rule.

The Court revisited complete preemption doctrine periodically during the decades following its decision in Avco. It held in Franchise

39 See Avco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinists, 376 F.2d 337, 339 (6th Cir. 1967).
40 Avco, 390 U.S. at 560.
41 Id. at 559-60.
42 Id.
44 As I explain in Part II.B.2, see infra note 87 and accompanying text, the decision in Avco is probably best understood as an expression of judicial concern with state courts’ treatment of claims against labor unions. But nothing on the face of the Avco opinion states as much, and subsequent Supreme Court cases applying the rule established in Avco do not treat this factor as doctrinally relevant. It is hardly surprising, then, that the decision has provoked more questions than it answered.
Tax Board v. Construction Laborers Vacation Trust that certain state-law claims brought by California taxing authorities were not completely preempted by section 502(a) of Employee Retirement Income Security Act (ERISA) (and, hence, could not be removed to federal court); and it held in Metropolitan Life Insurance Co. v. Taylor that state-law claims brought against an employer by a group of former employees were completely preempted by that statute (and were therefore proper subjects of federal jurisdiction). In 1987, in Caterpillar, Inc. v. Williams, the Court returned to the statute at issue in Avco and held that state-law claims alleging breach of individual employment contracts were not completely preempted by section 301 of the LMRA.

Even with the accretion of precedents during this period, the precise scope of complete preemption doctrine was impossible to pin down.\footnote{45} In some instances, the Court appeared to take the position that preemption-based removal is permitted when federal law not only preempts state law, but also supplies a cause of action under which the plaintiff might have proceeded.\footnote{46} At other times, however, application of the doctrine appeared to turn on the breadth of the preemptive federal law at issue.\footnote{47} Neither of these approaches was explicitly en-
endorsed or rejected by the Justices, and a division of authority emerged among the lower federal courts as to the proper understanding of the complete preemption rule.\footnote{51}

The Court’s decision in \textit{Beneficial National Bank v. Anderson} finally brought clarity to the doctrine. In that case, the Court determined that state-law claims of usury brought against national banks are completely preempted by the National Bank Act (NBA) and, hence, are removable from state court.\footnote{52} In the course of reaching this conclusion, the Court explained that the complete preemption rule will take hold only if the defendant can show not only that the plaintiff’s claim is preempted by federal law, but that federal statutes “provide[,] the exclusive cause of action for the claim asserted.”\footnote{53} Where that is the case, the Court explained, “any complaint that comes within the scope of the federal cause of action,” even if it relies exclusively on state law, “necessarily ‘arises under’ federal law.”\footnote{54} Because the NBA did, in fact, provide the exclusive cause of action for claims of usury against national banks, the Court concluded that “[e]ven though the complaint ma[de] no mention of federal law,” plaintiffs’ cause of action “only arises under federal law and could, therefore, be removed.”\footnote{55}

In the wake of the decision in \textit{Beneficial National Bank}, the confusion that previously accompanied application of the complete preemption rule has subsided considerably. Numerous courts of appeals have now acknowledged that a preemptive federal regulatory regime

\footnote{51} Compare, e.g., \textit{Ry. Labor Executives Ass’n v. Pittsburgh & Lake Erie R.R. Co.}, 858 F.2d 936, 942 (3d Cir. 1988) (holding that complete preemption takes hold only where Congress not only preempts state law, but also supplies a replacement cause of action through which plaintiffs might seek redress for the alleged injury), \textit{and Willy v. Coastal Corp.}, 855 F.2d 1160, 1165 (5th Cir. 1988) (same), \textit{with, e.g., Deford v. Soo Line R.R. Co.}, 867 F.2d 1080, 1084-85 (8th Cir. 1989) (taking the position that the complete preemption rule turns on the breadth of the preemptive provision), \textit{and Graf v. Elgin, Joliet & E. Ry. Co.}, 790 F.2d 1341, 1344-45 (7th Cir. 1986) (same).\footnote{52} \textit{Beneficial Nat’l Bank v. Anderson}, 539 U.S. 1, 10-11 (2003).\footnote{53} Id. at 8.\footnote{54} Id. at 7 (quoting \textit{Franchise Tax}, 465 U.S. at 24).\footnote{55} Id. at 11.
must provide the exclusive cause of action for a particular harm in order for the rule to take hold.\(^{56}\)

But even as the Court has made these strides toward doctrinal clarity, the theoretical questions that have plagued the complete preemption rule since its creation remain unanswered. In particular, the Court has made only the most unsatisfying efforts to explain why it carved out this exception to the well-pleaded complaint rule in the first place. The best the Court has come up with by way of doctrinal justification is this passage from *Franchise Tax*:

> 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. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action[,] any complaint that comes within the scope of the federal cause of action necessarily “arises under” federal law.\(^{57}\)

This explanation is entirely conclusory. “It provides nothing more than an account of what *Avco* accomplishes, rather than a justification . . . for [its] radical departure from the well-pleaded-complaint rule . . . .”\(^{58}\) Nevertheless, the Court has relied on this passage repeatedly in its complete preemption cases,\(^ {59}\) and the doctrine has evolved

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\(^{56}\) See, e.g., Miles v. Okun, 430 F.3d 1083, 1088 (9th Cir. 2005); City of Rome v. Verizon Commc’ns, Inc., 362 F.3d 168, 177-78 (2d Cir. 2004); King v. Marriot Int’l, Inc., 337 F.3d 421, 425 (4th Cir. 2003); Hoskins v. Bekins Van Lines, 343 F.3d 769, 773-76 (5th Cir. 2003).

\(^{57}\) *Franchise Tax*, 463 U.S. at 23-24 (footnote omitted).

\(^{58}\) *Beneficial Nat’l Bank*, 539 U.S. at 15 (Scalia, J., dissenting).

\(^{59}\) See id. at 7; Caterpillar, Inc. v. Williams, 482 U.S. 386, 394 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987). Scholars have offered similar—and therefore similarly unsatisfying—accounts of why removal is permitted in the complete preemption cases. For example, Professor Oakley has argued that “complete preemption is better understood as an integral part of the general principles governing the existence of ordinary [arising under] jurisdiction over a claim that, in the final analysis, exists only as a creature of federal law.” John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law?*, 76 TEX. L. REV. 1829, 1845 (1998). To say that a given claim “exists only as a creature of federal law” is to say that a plaintiff cannot prevail on such a claim if it is pleaded in state-law terms. It does not follow from this that a plaintiff who stupidly (or strategically) attempts to rely on state law to advance such a claim has actually pleaded a federal cause of action. See *Beneficial Nat’l Bank*, 539 U.S. at 20 (Scalia, J., dissenting) (noting that even if “the only visible claim against a national bank for usury is a federal one,” this does not mean that all claims of usury against a national bank—including those explicitly pleaded in state-law terms—are federal in character).
in a common-law-like fashion without meaningful clarification of its conceptual underpinnings.

In particular, the Court has made no effort to anchor the doctrine of complete preemption in some broader vision of judicial federalism. The cases say next to nothing about the federal courts’ relative expertise in the application of national law, the interest in securing a uniform interpretation of such law, or the need to sidestep state courts due to fear that localist bias might affect their decision making. Hence, even if we assume that the federal courts have authority to establish exceptions to the well-pleaded complaint rule, there is reason to doubt whether this authority has been exercised wisely.

The Court’s failure to ground complete preemption jurisprudence in some broader jurisdictional policy is particularly baffling given the obvious relationship between congressional preemption of state law, on the one hand, and the interest in uniformity, on the other. One important effect of federal preemption is the production of a measure of uniformity in connection with a particular regulatory rule through the disabling of state law that does not conform to the federal design. As Professors Issacharoff and Sharkey recently explained, the power to preempt is deployed particularly aggressively “[w]hen what is at stake is a national, integrated scheme.” Thus, one of the core values that the federal courts are designed to serve—

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Parties advance nonviable claims all the time; and when they do, such claims are typically dismissed. Neither the Court nor Professor Oakley explains why state-law claims that are not viable because they are “completely preempted” are transformed into federal claims. See id. at 18-19 (“The proper response to the presentation of a nonexistent claim to a state court is dismissal, not the ‘federalize-and-remove’ dance authorized by today’s opinion. For even if the Court is correct that the National Bank Act obliterates entirely any state-created right to relief for usury against a national bank, that does not explain how or why the claim of such a right is transmogrified into the claim of a federal right.”). It is no answer to say that the federal courts’ authority to “transform” a plaintiff’s complaint in this fashion is a component part of their power to construe judicial pleadings. Whatever the precise contours of that power, it has long been disciplined by the maxim that “the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.” Caterpillar, 482 U.S. at 392 (citation omitted).

The Court also has made no effort to justify its assumption of authority to fashion an exception to the baseline jurisdictional rule. Justice Scalia’s dissenting opinion in Beneficial National Bank focuses a great deal of attention on this issue. See infra note 107.

Samuel Issacharoff & Catherine M. Sharkey, Backdoor Federalization, 53 UCLA L. Rev. 1353, 1370 (2006). The authors also emphasize the capacity of preemption “to prevent states from imposing externalities on each other or to overcome the inability to rationalize coordinated national standards for goods and services.” Id.
securing uniformity—might be implicated with special force when issues of federal-state preemption are at stake. It would have made good sense, then, for the Court to link the special jurisdictional rule it created to the nature and intensity of the federal interest in assuring uniform regulation within a given sphere. But the Court has done nothing of the sort, and the reason the doctrine has assumed its current form remains opaque.

B. Complete Preemption and Jurisdictional Policy

1. Congressional Intent?

The Court’s apparent neglect in the complete preemption cases of core jurisdictional values might be excusable if the doctrine were somehow rooted in congressional intent. For while it is true that good reasons to broaden the scope of federal question jurisdiction must be grounded in the interests in uniformity and in channeling federal claims away from potentially hostile state courts, Congress may expand such jurisdiction for good reasons or bad, so long as it stays within Osborn’s expansive boundaries. Thus, where it is clear that Congress intends to allow removal on the basis of a defendant’s presentation of a preemption defense (or, for that matter, any other federal defense), removal must be permitted. This is true regardless of whether a judge believes (or traditional jurisdictional policies suggest) that it is important that the federal courts be available to decide the matter.

It is difficult, however, to understand the doctrine of complete preemption as the product of a rigorous or sound judicial inquiry into congressional intent. Many of the cases in this line—Avco, Franchise Tax, and Caterpillar—do not discuss congressional intent at all. As to

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62 Indeed, the entire body of complete preemption jurisprudence contains but two passing references to the interest in uniformity. See Aetna Health, Inc. v. Davila, 542 U.S. 200, 208 (2004) (“The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.”); Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 10 (2003) (“Uniform 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.’” (quoting Tiffany v. Nat’l Bank of Mo., 85 U.S. (18 Wall.) 409, 412 (1873))). Neither of these cases connects the dots between preemption, uniformity, and federal jurisdiction.

these, the Court’s failure to frame its thinking around the core purposes of federal question jurisdiction does not appear to be a product of deference to legislative will.

Other complete preemption cases do confront the question of congressional intent. Thus, the Taylor Court stated that “the touchstone of the federal district court’s removal jurisdiction is . . . the intent of Congress” and noted, in this vein, that “Congress ha[d] clearly manifested an intent to make [the relevant] causes of action . . . removable to federal court.”\(^64\) In Beneficial National Bank, however, (and again in Aetna Health, Inc. v. Davila\(^65\)) the Court insisted that “the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable.”\(^66\) This shift in focus—from inquiring directly whether Congress intended to create removal jurisdiction to inquiring whether Congress intended to create an exclusive federal cause of action—is sensible only if the latter is a good proxy for the former.\(^67\) For if Congress’s decision to create an exclusive cause of action for a particular injury is not motivated, at least in

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\(^64\) Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987); see also id. at 68 (Brennan, J., concurring) (stating that “a clear congressional intent to create removal jurisdiction” is necessary to justify application of the complete preemption rule).


\(^66\) Beneficial Nat’l Bank, 539 U.S. at 9 n.5.

\(^67\) One could attempt to justify the shift in the Court’s understanding of what sort of congressional intent is relevant on the ground that the National Bank Act was passed prior to Congress’s establishment of general federal question jurisdiction and general removal jurisdiction. For such a statute, it could be argued, an expression of specific intent to create removal jurisdiction could not reasonably be expected, and so it would make sense for the courts to seek some other sign of legislative intent to provide expansive federal jurisdiction. See Spellman v. Meridian Bank, Nos. 94-3203, 94-3209, 94-3215 to 94-3218, 1995 WL 764548, at *21 (3d Cir. Feb. 16, 1995) (Scirica, J., dissenting in part) (“We could not expect the Congress which enacted the National Bank Act to have discussed the federal question jurisdiction or removal implications of 12 U.S.C. §§ 85 & 86, since neither general federal question jurisdiction nor general removal power existed in 1864.”). But it was, of course, entirely possible for Congress specifically to authorize removal of claims falling within the preemptive scope of the National Bank Act. It declined to do so. Given that specific removal statutes were hardly unfamiliar in the early- and mid-nineteenth century, see supra notes 16-17, infra note 75 and accompanying text, it seems fair to draw a negative inference from Congress’s failure to provide for removal here. Moreover, the Court gave no indication in Beneficial National Bank that the method it announced for identifying the requisite congressional intent was limited to preemptive federal laws that predate passage of the removal statute. To the contrary, Beneficial National Bank purports to provide a post hoc justification for prior applications of the complete preemption rule, 539 U.S. at 8, each of which involved statutes passed long after Congress had provided for general removal jurisdiction.
part, by jurisdictional concerns, then there is little reason for this decision to serve as the touchstone of an intent-based inquiry into removal jurisdiction.\footnote{68}

The relationship between Congress’s creation of an exclusive cause of action and the intended scope of federal question jurisdiction proves to be a complex one. Perhaps the most salient effect of Congress’s establishment of a private cause of action is the opening of the federal courts to individuals who wish to vindicate their rights under federal law.\footnote{69} Where Congress declines to create a cause of action through which plaintiffs might secure relief for the violation of federal law, the basic rules of statutory federal question jurisdiction afford no access to the federal courts.\footnote{70} It therefore cannot be disputed that Congress’s establishment of a private cause of action for the violation of a particular federal law has at least some jurisdictional ramifications.

Where Congress takes the added step of rendering a cause of action exclusive—that is, where it simultaneously provides a cause of action for the vindication of federal rights\footnote{68} and preempts state-law causes of action for the injury in question—the instinct to presume a jurisdiction-based motivation is stronger still. By preempting all state-law causes of action that would otherwise be available alongside the federal one, Congress effectively decrees that all viable claims for redress of a particular harm are eligible for federal jurisdiction. This is the case because a plaintiff who wishes to secure relief for the harm at issue can do so only by filing under federal law. And such a filing may be ushered into the federal courts either by the plaintiff in the first instance or by the defendant through a petition to remove.\footnote{71} Accord-

\footnote{68} Justice Scalia, for one, has taken the position that “Congress’s mere act of creating a federal right and eliminating all state-created rights in no way suggests an expansion of federal jurisdiction so as to wrest from state courts the authority to decide questions of pre-emption under the [relevant federal statute].” \textit{Beneficial Nat’l Bank}, 539 U.S. at 19 (Scalia, J., dissenting).

\footnote{69} A straightforward application of the well-pleaded complaint rule allows a plaintiff who presents a cause of action grounded in a federal statute to file in federal court. See supra notes 9-11, 32 and accompanying text.

\footnote{70} I refer to the “basic” rules of jurisdiction because there are subrules of federal question jurisdiction (other than the complete preemption rule) that occasionally permit its exercise even when no federal cause of action is available. See infra text accompanying note 77.

\footnote{71} This is not something that Congress could accomplish either by preempting state-law causes of action without providing a replacement right of action under federal law, or, conversely, by creating a private right of action under federal law without preempting state-law claims. In the former scenario, the absence of a cause of action
ingly, when Congress takes the trouble simultaneously to create a private right of action and eliminate otherwise available state-law causes of action, it would appear to be sending a strong jurisdictional message: we mean for parties litigating over the relevant class of injuries to have access to the federal courts. If this is right, then the Court’s placement of dispositive jurisdictional weight on the exclusive-cause-of-action construct is entirely sensible.

But this line of reasoning suffers from at least two flaws. First, the “jurisdictional” account of why Congress might create an exclusive cause of action in connection with a preemptive regulatory scheme simply does not hold together in certain contexts. For example, it is difficult to sustain the notion that the Congress that enacted the NBA saw a pressing need to assure federal court availability in cases involving that statute. It is true that the NBA explicitly allowed plaintiffs to file suit for NBA violations in federal court, but it permitted filings in state court as well.\(^72\) With no general removal statute in place at the time (and no specific statute authorizing removal of claims arising under the NBA), there was nothing to prevent plaintiffs from filing such claims in state court and keeping them there. And, of course, if we proceed from the premise that state courts were more likely to be hostile to national banks than federal courts, we would expect plaintiffs to do exactly that, and the presumed purpose of Congress’s establishment of an exclusive cause of action would thereby be thoroughly undermined.

Moreover, a mere four years after the passage of the NBA, Congress enacted a statute authorizing corporations organized under federal law to remove cases to federal court if they raised a defense grounded in federal law.\(^73\) Yet national banks were expressly excepted from this statute.\(^74\) It is exceedingly difficult to reconcile the exclusion of national banks from this removal provision with the notion that Congress was seriously concerned that NBA claims be eligible for federal jurisdiction. Congress’s establishment of an exclusive federal cause of action in the NBA still left a sizeable hole through which cases might slip into the state courts; given the opportunity to patch this hole up, Congress took a pass. At least in this context, then, the


\(^74\) Id. § 2, 15 Stat. at 227.

under federal law eliminates any conventional basis for the assertion of federal jurisdiction. And in the latter scenario, a plaintiff may assure that litigation occurs in the state courts by filing state-law claims only.
creation of an exclusive federal cause of action and a strong desire to channel cases into the federal courts appear not to go hand in hand. 75

Second, and more broadly, the analysis above runs together two congressional decisions—the decision to preempt state-law causes of action and the decision to create a federal one—that are sometimes best understood independently of one another. It thereby ignores the possibility that the jurisdictional consequences of establishing an exclusive federal cause of action might be nothing more than a byproduct of Congress’s desire to serve other goals of a nonprocedural nature.

Specifically, the decision to preempt state-law causes of action is frequently motivated, above all else, by an interest in securing a particular regulatory outcome. Preemption of state-law claims forecloses the possibility that conduct will be actionable under terms other than those spelled out under federal law (assuming federal law deems the covered conduct actionable at all). And this, in turn, encourages regulated entities to behave in light of the incentives established by federal statutes and regulations alone.

The decision to establish a private right of action, meanwhile, may be driven by a sense that public enforcement will prove inadequate to assure compliance with the relevant federal rules or by a sense that individual victims of violations of these rules ought to have access to judicial redress. Conversely, the decision not to provide such a cause of action may reflect a congressional judgment that public enforcement is sufficient to trigger the desired response from regulated entities or that public enforcement will prove more efficient. From this perspective, attribution of significant jurisdictional weight to the presence or absence of a cause of action within a preemptive federal regulatory scheme seems misguided. 76

75 The establishment of an exclusive federal cause of action in the National Bank Act likewise had only a limited effect on the availability of Supreme Court review. Under then-prevailing jurisdictional rules, that Court would be available to hear cases involving claims of usury against national banks—even those arising under state law—whenever a state court ruled against the federal claimant. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-87. If a state court upheld a claim of federal preemption, Supreme Court jurisdiction was lacking under the rules applicable at the time the National Bank Act was enacted. See id.

76 It would be possible, I suppose, for Congress to supply a private federal cause of action for a violation of federal law and preempt state-law actions only to the extent that they deviate from the measure and form of relief made available under federal law. Under this scheme, state-law causes of action that duplicate the cause of action created by the federal government would be viable. Cf., e.g., Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 447 (2005) (noting that the preemption provision in the Federal
Indeed, in a distinct but related pocket of the law of federal jurisdiction—one that also involves judicial tinkering with the well-pleaded complaint rule—the Court recently rejected the suggestion that the availability of the federal courts to hear claims under a federal statute ought to turn entirely on whether Congress has included a private right of action in the relevant regulatory scheme. Since the early twentieth century, the Supreme Court has authorized the assertion of federal question jurisdiction over state-law causes of action so long as the plaintiff’s right to relief under that cause of action depends on the resolution of a “substantial question of federal law.” In *Merrell Dow Pharmaceuticals v. Thompson*, however, the Court held that there was no federal question jurisdiction over a state-law claim that would require interpretation of the Federal Food, Drug, and Cosmetic Act (FDCA). The Court’s conclusion rested in large part on the fact that

Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) (2000), permits tort actions to enforce state-law labeling requirements, so long as these requirements are “equivalent to, and fully consistent with, FIFRA’s misbranding provisions”). Moreover, the substantive goals I have posited for Congress—regulatory precision and assuring the possibility of judicial redress for victims—could be secured without rendering the federal cause of action exclusive. This, in turn, raises the question of what purpose is served by the exclusivity of a federal cause of action, and it revives the possibility that the answer might relate to jurisdictional concerns.

But this all seems rather tortured. Creation of an exclusive cause of action is the most straightforward way to assure that judicial remedies are available to private litigants—but only on the precise terms provided by federal law. Congress might think it redundant to permit state-law causes of action to proceed only if they duplicate federal law. Moreover, if duplicative state-law actions are permitted, this would likely provoke litigation over whether such actions are, in fact, identical to the relevant provisions of federal law. So while it is possible to spin out an account under which Congress’s establishment of an exclusive federal cause of action is left wanting for substantive explanation (thus inviting the jurisdiction-based justification), it is doubtful that this account accurately reflects the motives underlying Congress’s establishment of this sort of preemptive/remedial scheme. I am aware of no direct evidence in the text or legislative history of these statutes to support the jurisdictional account of why Congress creates an exclusive cause of action.

77 See, e.g., Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 28 (1983). In the seminal case in this line, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the Court permitted the exercise of federal question jurisdiction over a state cause of action to enjoin the purchase of certain bonds. The plaintiff argued that (1) state law forbade the defendant corporation from investing in bonds that had not been issued under a valid law, and (2) the bonds in question were issued pursuant to a federal statute that violated the U.S. Constitution. *Id.* at 198. Notwithstanding the fact that the plaintiff’s cause of action was created by state law, the Supreme Court determined that the case fell within the federal question jurisdiction of the federal courts because “the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question.” *Id.* at 201.

78 478 U.S. 804, 817 (1986).
the FDCA did not include a private cause of action for violations of the federal regulations at issue.\(^79\)

But in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,\(^80\) a unanimous Court recently rejected the proposition that the existence of federal question jurisdiction under this doctrine turned exclusively on whether the federal scheme at issue includes a private right of action.\(^81\) The Court explicitly disclaimed language from *Merrell Dow* suggesting as much and explained that “questions of jurisdiction over state-law claims require ‘careful judgments’ . . . about the ‘nature of the federal interest at stake,’” rather than a narrow inquiry into whether the federal scheme includes a private right of action.\(^82\) In making the necessary “careful judgments,” the Court explained, “the absence of a federal private right of action [is] relevant . . . but not dispositive.”\(^83\) The Court’s reasoning here echoes that of Justice Brennan’s dissenting opinion in *Merrell Dow*. “Why,” Justice Brennan asked, “should the fact that Congress chose not to create a private federal remedy mean that Congress would not want there to be federal jurisdiction to adjudicate a state claim that imposes liability for violating the federal law?”\(^84\)

For all of these reasons, it is unwise to assume that Congress’s creation of an exclusive private cause of action must be charged with jurisdictional meaning. Yet complete preemption doctrine appears to rest on precisely this assumption.

2. Is the Court onto Something?

It is possible that, notwithstanding the Court’s failure explicitly to ground its decisions in some account of the relationship between pre-

\(^79\) *Id.* at 814 (“[T]he congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.”).

\(^80\) 545 U.S. 308 (2005).

\(^81\) *Id.* at 311-12.

\(^82\) *Id.* at 317 (quoting *Merrell Dow*, 478 U.S. at 814, 814-15 n.12) (citation omitted).

\(^83\) *Id.* at 318.

\(^84\) *Merrell Dow*, 478 U.S. at 825 (Brennan, J., dissenting). The decision not to provide a private right of action and, instead, to allow for public enforcement “reflects congressional concern with obtaining more accurate implementation and more coordinated enforcement of a regulatory scheme.” *Id.* at 832. And, of course, these concerns need not entail congressional hostility to the exercise of federal jurisdiction where interpretation of the relevant federal regulations is necessary to the disposition of a plaintiff’s state-law claim. *See id.* at 829-32.
emption and the purposes underlying the grant of federal question jurisdiction, the Court has crafted a doctrine that can be justified in such terms. Were this true, the Court’s failure expressly to connect the analytic dots would remain lamentable, but it would not signal that the doctrine is altogether wrongheaded.

Inquiry along these lines turns out to mirror the analysis of congressional intent undertaken in the previous section. This is because the question of legislative intent, in this context, is necessarily one of constructive intent. This is so because the statutes at issue in the complete preemption cases do not explicitly command creation of the jurisdictional rule crafted by the Court; nor do the legislative histories of the provisions that fall within the ambit of the complete preemption rule contain relevant signals of the intended jurisdictional consequences of the preemptive and remedial schemes crafted by Congress. Hence, when we ask whether the doctrine of complete preemption can be justified by reference to congressional intent, we are unavoidably asking whether a sensible Congress would have wanted the jurisdictional consequences of this doctrine to issue in the covered cases. To answer this question, one must assess whether an unusually strong interest in uniformity or potent fear of state-court bias is implicated in such cases. And it should come as no surprise, given the analysis above, that the exclusive cause of action construct proves too

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85 Section 502(a) of ERISA (the provision deemed completely preemptive in Taylor) is an exception of sorts. As the Supreme Court emphasized in Taylor, “the language of the jurisdictional subsection of ERISA’s civil enforcement provisions closely parallels that of § 301 of the LMRA,” and this triggers a strong presumption that Congress intended the jurisdictional rules governing the relevant provisions of ERISA to mirror those applicable under LMRA section 301. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987); see also id. (quoting portions of the legislative history of ERISA to illustrate that the enacting Congress intended the jurisdictional rules governing ERISA’s civil enforcement provision to parallel those applicable under section 301 of the LMRA). Of course, if it followed ineluctably from Congress’s creation of an exclusive federal cause of action that the legislature intended to establish a jurisdictional regime like that concocted in Avco, there would be no need to point to legislative history referencing the Avco rule to illustrate that Congress in fact intended to allow for preemption-based removal. Yet the Taylor Court indicated that, but for the “specific reference to the Avco rule,” id. at 66, in the legislative history of ERISA, it would have been reluctant to deem the relevant provision of ERISA completely preemptive, id. at 65. So, the legislative history of ERISA may well send the signal that Congress intended the complete preemption rule to apply to causes of action falling within the scope of ERISA section 502(a)(1)(B)—but it does not suggest that any time Congress establishes an exclusive federal cause of action, it intends these same jurisdictional consequences.

86 See supra text accompanying notes 77-84.
blunt an instrument to perform the task of singling out those cases in which these fundamental jurisdictional policies are at issue.

To be sure, a narrative of state court bias has considerable purchase in connection with the LMRA (the statute deemed completely preemptive in *Avco*). But this hardly proves that whenever Congress creates an exclusive private right of action under federal law, it does so out of concern that state courts cannot be trusted to vindicate the relevant federal rights. Indeed, there is little basis upon which to construct a state judicial bias narrative in connection with section 502(a) of ERISA (the statute at issue in *Taylor*); and while a bias-based account of the NBA has surface appeal, this approach founders upon careful examination. By the same token, there can be no doubt that

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*87* There is considerable evidence that the Congress that enacted the LMRA was deeply concerned about the capacity and willingness of state courts to enforce collective bargaining agreements against labor unions. See, e.g., Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 510 (1962) (“A principal motive behind the creation of federal jurisdiction in this field was the belief that the courts of many States could provide only imperfect relief because of rules of local law which made suits against labor organizations difficult or impossible, by reason of their status as unincorporated associations.”); see also S. REP. No. 80-105, at 421 (1947) (“The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union.”). Justice Frankfurter’s opinions in *Ass’n of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 459-61 (1955) (plurality opinion), and *Textile Union Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 460-546 (1957) (dissenting opinion), contain extensive discussion of the legislative history of the LMRA and provide robust support for this claim as well. See also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. Rev. 1, 43 (1985) (noting that “the primary motivation for conferring federal jurisdiction [in LMRA section 301] was to avoid parochialism or bias on the part of state courts”). Hence, the most likely explanation for the Supreme Court’s decision in *Avco* (though the Court does not bother to say so), is that the Justices were responding to these very concerns.

*88* Evidence of congressional concern with state court bias in connection with the sorts of claims at issue in section 502(a)(1)(B) of ERISA is lacking. While there can be little doubt that ERISA was designed to crowd state legislatures out of the field of pension plan regulation, see generally Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46-47 (1987), and that that statute was designed to assure “ready access to the Federal courts,” 29 U.S.C. § 1001(b) (2000), I am aware of no evidence that Congress was specifically concerned that state courts might be uncharitable to parties raising claims under that statute. Indeed, while federal jurisdiction over the lion’s share of ERISA’s civil enforcement provisions is exclusive, jurisdiction over claims arising under section 502(a)(1)(B) is concurrent with the state courts, see 29 U.S.C. § 1132(e) (2000) (codifying § 502 of ERISA); this suggests that, relative to other claims arising under ERISA, Congress was actually *more* trusting of state courts’ capacity to adjudicate claims under section 502(a)(1)(B) fairly.

*89* The Bank Act was passed in 1864. Although decades had passed since the pitched battles over the legitimacy of federal banking operations that spawned the momentous decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), widespread hostility among the states to national banks loomed large in the minds of those
who drafted that statute. As the Supreme Court explained in Tiffany v. National Bank of Missouri:

It was expected [that national banks] would come into competition with State banks, and [the Act] was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible.

85 U.S. (18 Wall.) 409, 412-13 (1873). Indeed, Justice Stevens relied on this passage to support the Court’s conclusion that the National Bank Act is, in fact, completely preemptive of state law usury claims against national banks. See Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 10 (2003) (quoting Tiffany, 85 U.S. at 409).

But it does not follow from the fact that national banks might be subject to unfriendly state legislation that state courts are likely to exhibit bias against such banks by giving short shrift to claims of preemption under the National Bank Act. See Anderson v. H&R Block, Inc., 287 F.3d 1038, 1045 (11th Cir. 2002), rev’d sub nom. Beneficial Nat’l Bank v. Anderson, 539 U.S. 1 (2003) (“While the congressional debates [relating to the enactment of the National Bank Act] amply demonstrate Congress’s desire to protect national banks from state legislation, they do not demonstrate that Congress desired to protect national banks from facing suit in state court.”). One might, I suppose, take the position that state legislative bias and state judicial bias go hand in hand, and that it therefore makes sense to attach jurisdictional consequences to Congress’s enactment of legislation that is driven by concern with the former. But the effects for our scheme of federal jurisdiction of lumping together state legislatures and courts in this fashion are potentially vast. (In the extreme, it could be argued that this calls for federal jurisdiction whenever Congress preempts state law.) Hence, one would expect an argument that rests on the supposition that state judicial bias is inferable from state legislative bias to offer something in the way of explanation. Justice Stevens’s opinion in Beneficial National Bank provides none.

Moreover, as noted already, see supra text accompanying notes 63-68, given Congress’s failure to provide for removal of claims raised under the National Bank Act and, more strikingly, its subsequent exclusion of national banks from the class of federally chartered corporations authorized to remove to federal court upon the presentation of a federal defense, it is hard to sustain the proposition that Congress’s establishment of an exclusive federal cause of action in the National Bank Act was motivated by concern with state judicial bias. See Jones v. Bankboston, 115 F. Supp. 2d 1350, 1360-61 (S.D. Ala. 2000) (“Congress necessarily recognized that claims against national banks for excessive interest—even if expressly based on the National Bank Act—took root in state court. Congress had the power to preclude state court jurisdiction of such claims, but elected not to exercise this prerogative.” (footnote omitted)). Note, in particular, that if we proceed from the premise that state courts are more likely to exhibit hostility to national banks than federal courts, then plaintiffs wishing to pursue usury claims against such banks would be more likely to file their claims in the state courts, notwithstanding the existence of original federal jurisdiction over such claims. Under the rules crafted by Congress, such claims would not be removable. One has to wonder, then, whether the National Bank Act is prop-
the broadly preemptive scheme enacted in ERISA was motivated by congressional interest in securing a uniform regulatory rule with respect to the covered activities. But this tells us nothing about whether the establishment of an exclusive cause of action in connection with the statutory scheme was itself driven by the uniformity concern; nor, of course, does it speak to whether uniformity is a prominent concern whenever federal preemption is accompanied by the creation of a private cause of action.

As to this last point, it bears repeating that if we disaggregate the decision to preempt state law from the decision to create a private right of action, it is easy to construct a narrative under which the existence of such a right of action within a preemptive federal regulatory regime is largely unrelated to the interest in a uniform interpretation of federal law. The interest in uniformity is served in overwhelming part by preemption—by the disabling of state and local rules that fail to conform to federal standards. The question of whether to allow enforcement of the federal scheme through a private right of action may run along an entirely different track.

Indeed, there are numerous contexts in which the interest in a uniform interpretation of federal law is indisputably strong, yet Congress has not created a private cause of action (exclusive or otherwise) through which private parties can seek relief for violations. In some cases, this is likely because Congress prefers public over private enforcement. In others, Congress might allow for private actions by

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90 See, e.g., Pilot Life, 481 U.S. at 46 (quoting Senator Williams’s statement that “the substantive and enforcement provisions of [ERISA] are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans”); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 99-100 n.20 (1983) (quoting Senator Javits’s statement that “the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs”).

91 See supra Part II.B.1.

92 For example, the Court has acknowledged the need for uniform federal regulation of oil-tanker safety under the Port and Waterways Safety Act, see Ray v. Atl. Richfield Co., 435 U.S. 151, 165-68 (1978) (preempting state law requirements that were more stringent than their federal counterparts), and it has emphasized the broadly preemptive scope of title II of that statute, see United States v. Locke, 529 U.S. 89, 111 (2000) (noting that “Congress has left no room for state regulation” of oil-tanker safety). Yet Congress has eschewed private enforcement in that context in favor of enforcement through civil and criminal penalties and fines. See 46 U.S.C. § 3718 (2000)
parties injured as a result of violations of a federal statute, but channel such disputes away from the federal courts (at least in the first instance) by providing for administrative remedies. In these circumstances, Congress’s failure to create a private cause of action, enforceable in federal court, does not remotely suggest a diminished interest in a uniform interpretation of the law.

Hence, while it is possible to make sense of the outcomes in some of the complete preemption cases by reference to the core policies underlying the creation of federal question jurisdiction (Avco appears to be a bias case; Taylor appears to be a uniformity case), the doctrinal test crafted by the Court remains wanting for justification. The fact that a federal statute establishes the exclusive cause of action for a particular kind of harm is both an unsure indicator that fundamental jurisdictional policies are implicated with unique force and significantly underinclusive as a means of singling out those preemptive federal statutes in connection with which the interest in uniformity is unusually potent. Yet current doctrine dictates that the question of whether a preemptive federal regulatory scheme is eligible for defense-based removal turns squarely on whether that scheme contains such a right of action.

3. Understanding Complete Preemption: Anxiety About Exceptions?

The Court has declined explicitly to link the jurisprudence of complete preemption to basic jurisdictional policies. And, as the pre-
vious section demonstrates, the construct that lies at the heart of the doctrine is not particularly useful as a means of detecting those cases in which these policies are specially implicated. So the question remains: how can we best explain the Court’s decision to treat the existence of an exclusive federal cause of action as the hinge on which the door to the federal courthouse swings?

The Court may have hinted at the answer to these questions through its repeated insistence that completely preempted state-law claims are “necessarily . . . federal.” As noted earlier, this fragment of the Court’s reasoning is entirely conclusory. It is one thing to treat claims that have been framed in state-law terms as if they are “necessarily federal” and quite another to explain why such claims are federal in character, the plaintiff’s characterization notwithstanding. Conclusory though it is, this aspect of the Court’s thinking may provide significant insight into why the doctrine has assumed its current form.

A crucial consequence of the decision to conceptualize completely preempted state-law claims as “necessarily federal” is that it allows the Court to claim that the doctrine does not mark an exception to the longstanding well-pleaded complaint rule. Indeed, the Court has scrupulously avoided characterizing complete preemption doctrine in this way, choosing instead to label the doctrine a “corollary” of that principle. In this vein, the Court has not stated that the defense of complete preemption allows the federal courts to exercise removal jurisdiction over the plaintiff’s state-law claims; rather, the Court has insisted that completely preemptive federal laws require courts to convert a plaintiff’s improperly pleaded state-law claim into a federal one, and to proceed as if the plaintiff’s complaint actually included a claim aris-

96 See supra note 57 and accompanying text.
97 See supra text accompanying notes 56-59.
98 As noted earlier, see supra note 59, the Court’s usual practice dictates that “the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.” Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).
ing under the cause of action provided by federal law. In fact, the Court has taken the position that a plaintiff who presents a completely preempted state-law claim has pleaded artfully—as one court of appeals put it, such a plaintiff has disguised “a federal case in state wrapping paper”—and thus a federal court’s exercise of jurisdiction over such a suit is true to the suit’s essence, if not its appearance.

The Court’s apparent discomfort with classifying the doctrine as an “exception” to the well-pleaded complaint rule is difficult to understand. The most significant functional effect of applying the complete preemption rule in any given case is that a federal court (rather than a state court) gets to decide whether state law is, in fact, preempted. But this would be the case whether complete preemption doctrine is characterized as a “corollary” to the well-pleaded complaint rule—through which “necessarily federal” claims that have been artfully pleaded under state law are recognized as federal—or as an “exception” to the well-pleaded complaint rule, under which federal jurisdiction is predicated squarely on the fact that a special kind of federal defense has been raised. To be sure, the latter formulation

100 See


102 See Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 8 (2003) (“[A] claim which comes within the scope of [a completely preemptive federal] cause of action, even if pleaded in terms of state law, is in reality based on federal law.” (emphasis added)); Cat-erpillar, 482 U.S. at 393 (“Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.” (emphasis added)).

103 The decision to conceptualize completely preempted cases as intrinsically federal has two additional practical consequences, though it seems doubtful that either is of significance to the Court’s thinking. First, the Court’s manner of conceptualizing these claims would seem to require a federal court to which a completely preempted state-law claim has been removed to assess not whether that state-law claim is preempted, but whether the newly fashioned federal-law claim states a claim on which relief can be granted. Of course, plaintiffs who rely on state law notwithstanding the existence of a powerfully preemptive federal law may choose to do so because state and federal law differ in some material way, and the facts of the plaintiff’s case make state law more appealing. While complete preemption doctrine permits federal courts to transform such state-law claims into federal ones, it does not allow them to modify the factual allegations or precise legal theories advanced by the plaintiff. Hence, assuming that the plaintiff has selected state law because federal law offers no relief on the facts
would require the Court to explain why, in derogation of the well-pleaded complaint rule, it was authorizing an assertion of federal jurisdiction on the basis of a federal defense; but this is no more of a burden than explaining why, in derogation of the “master of the complaint” rule, the courts are authorized to transform a claim explicitly pleaded in state-law terms into one that sounds in federal law.

That said, if we take as our premise that the Court is skittish about the idea of crafting a true “exception” to the well-pleaded complaint rule, then we can begin to understand its decision to frame complete preemption doctrine around whether Congress has not only preempted state-law causes of action, but also provided a replacement cause of action under federal law. Where no federal cause of action exists, it is considerably more difficult to sustain the fiction that a preempted state-law claim, from its inception, arises under federal law. This is true because, without the cause of action, the only federal law under which the claim could conceivably arise is the law that gives rise to the defense. Such a result is obviously intolerable to a Court unwilling to countenance the establishment of an “exception” to the well-pleaded complaint rule.

III. COMPLETE PREEMPTION RECONSIDERED

Some have argued that the doctrine of complete preemption ought to be abandoned. Most prominently, in a dissenting opinion in presented, then, immediately after removal, one would expect the defendant to move to dismiss on the grounds that the facts alleged by the plaintiff cannot support relief.

If, on the other hand, the underlying facts support a viable claim under federal law, then the Court’s approach—in contrast to one that simply treated the defense as a predicate for removal—would allow the plaintiff’s claim to survive. If the plaintiff’s claim is not “transformed” into a federal one, it must be dismissed on preemption grounds (given that federal law provides the exclusive cause of action for the harm alleged). But it is hard to see why the federal courts should have any interest in transforming nonviable state-law claims into viable federal ones for its own sake. Certainly the Court has not justified the doctrine on this basis. Second, if a plaintiff’s claim is, as the Court puts it, “from its inception,” Caterpillar, 482 U.S. at 393, “necessarily federal in character,” Taylor, 481 U.S. at 63-64, then it may be incumbent upon a state court faced with such a claim to treat it as such whether or not the defendant seeks to remove. That is, in theory, even if a defendant does not seek to remove a completely preempted state-law claim, the state court should still treat the plaintiff’s complaint as if it asserted the relevant federal cause of action and should assess whether the plaintiff has stated a claim under federal law, rather than dismissing the preempted state-law cause of action on preemption grounds.

104 See supra note 98.
Beneficial National Bank, Justice Scalia took the position that the doctrine is both conceptually bankrupt and violative of the separation of powers. The decision of the Eleventh Circuit in Anderson v. H&R

105 Out of respect for the doctrine of stare decisis, Justice Scalia did not advocate the full-scale abandonment of the complete preemption rule. But he did argue that it should not be extended beyond the provisions at issue in Avco and Taylor and statutes modeled after them. Beneficial Nat'l Bank, 539 U.S. at 21-22 (Scalia, J., dissenting).

106 Justice Scalia explained that "even if the Court is correct that the National Bank Act obliterates entirely any state-created right to relief for usury against a national bank, that does not explain how or why the claim of such a right is transmogrified into the claim of a federal right." Id. at 18-19. Justice Scalia dismissed the Court’s oft-repeated claim that completely preempted state-law claims "necessarily 'arise[ ] under' federal law," see cases cited supra note 59, as mere ipse dixit. Beneficial Nat'l Bank, 539 U.S. at 14-15 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 24 (1983)). And he insisted, further, that “[t]he proper response to the presentation of a nonexistent [state-law] claim to a state court is dismissal, not the 'federalize-and-remove' dance authorized by today’s opinion.” Id. at 18.

107 See Beneficial Nat'l Bank, 539 U.S. at 21 (Scalia, J., dissenting) ("[I]t is up to Congress, not the federal courts, to decide when . . . [to divest] the state courts of authority to decide the federal matter. Unless and until we receive instruction from Congress that claims pre-empted under the National Bank Act . . . 'arise under' federal law, we simply lack authority to . . . permit[] removal.").

It is tempting to respond to Justice Scalia’s separation of powers objection by noting that the well-pleaded complaint rule is itself a judicial construction, see supra text accompanying notes 7-11, 25-28, and arguing that, as such, there should be no objection to the Supreme Court’s tinkering with that construct. But things are not so simple. To begin with, the text of the federal question statute surely does not forbid the construction embodied in the well-pleaded complaint rule. It remains possible, therefore, to treat the establishment of that rule as an ordinary exercise in statutory interpretation, rather than judicial arrogation of control over the scope of federal question jurisdiction. And, if this is true, questions pertaining to the legitimacy of complete preemption cannot be answered simply by characterizing the doctrine as part of a larger, and largely uncontroversial, project of judicial policing of jurisdictional boundaries.

Indeed, if anything, situating complete preemption doctrine within the history of legislative-judicial interaction relating to the federal question statute provides a strong foundation for a claim of congressional acquiescence to the well-pleaded complaint rule. Congress has had ample opportunity since the establishment of the well-pleaded complaint rule to direct its abandonment, and it has done nothing of the sort. Moreover, Congress undertook a significant revision of the Judicial Code in 1948 and, although it was doubtlessly well aware of the well-pleaded complaint rule, it did nothing to dislodge it. Accordingly, even if one were inclined to treat the adoption of the well-pleaded complaint rule as a case of judicial overreaching, there exists a strong argument that, as a result of decades of legislative acquiescence, the rule should be treated, in effect, as if it were a creature of statute, rather than one of judicial construction. Cf., e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) ("Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings."); Flood v. Kuhn, 407 U.S. 258, 283-84 (1972) (treating Congress’s failure, over fifty years, to re-
Block, Inc. \(^{108}\) (which was overturned by the Supreme Court in Beneficial National Bank), effectively takes this position as well (though that Court did not deploy separation of powers rhetoric with the same vigor as Justice Scalia).\(^{109}\)

These concerns are well taken. The Beneficial National Bank majority made no effort to engage Justice Scalia’s objection and, indeed, the Court has never even attempted to justify its development of this unusual jurisdictional rule without explicit (or even implicit)\(^{110}\) congressional authorization. But the Supreme Court shows no signs of abandoning complete preemption doctrine and leaving the task of crafting exceptions to the well-pleaded complaint rule to Congress alone. During the last four years, the Court has twice authorized the removal of state-law claims to federal court on the ground that the claims are completely preempted by federal law. Accordingly, for those who (like the majority of Justices on the Supreme Court) would allow the judiciary more latitude in crafting exceptions to the well-pleaded complaint rule, the question remains: what might a sensible jurisprudence of preemption-based removal look like?

\(^{108}\) 287 F.3d 1038 (11th Cir. 2002).

\(^{109}\) The Eleventh Circuit held that the complete preemption rule should kick in only where Congress specifically “intended to grant a defendant the ability to remove the adjudication of the cause of action to a federal court.” \textit{Id}. at 1043 (quoting \textit{BLAB T.V. of Mobile, Inc. v. Comcast Cable Commc’ns, Inc.}, 182 F.3d 851, 857 (11th Cir. 1999) (emphasis omitted)); \textit{see also id}. at 1046 (“[W]e also must reject the line of cases which have found complete preemption without inquiring into Congress’s intent.”). By focusing its inquiry on congressional intent to allow removal, and not on intent to render a federal cause of action exclusive (or some other indication that an expansive approach toward federal jurisdiction might be in order), the Eleventh Circuit placed control of the scope of the complete preemption rule squarely in Congress’s hands.

\(^{110}\) But \textit{see supra} note 85 (discussing the legislative history of ERISA).
A. Preemption, Uniformity, and Federal Jurisdiction

The first step in crafting a viable doctrine of federal defense removal is (perhaps counterintuitively) to set aside one of our foundational jurisdictional concerns—state court bias against federal claims—and to focus intently on the interest in uniformity. This is necessary not because it is a bad idea to take an expansive view of federal jurisdiction even when there is legitimate reason to fear bias among the state courts; to the contrary, this is a perfectly good reason to make a federal forum available for the adjudication of federal claims. But concerns relating to state court bias are historically contingent, and a jurisdictional rule crafted around such contingencies would necessarily be ad hoc. It is easy enough to say that the federal courts ought to be available when there is special reason to believe that state courts cannot be trusted to offer an evenhanded interpretation of federal law. But during any given period, state courts might be particularly hostile to civil rights claims, the claims of criminal defendants, claims against labor unions, and so on. And without knowing what sorts of cases will fit into this category as time goes on, it is difficult to craft a jurisdictional rule that will accommodate this concern over the long term.

The interest in uniformity, however, is of a different character. This is true because one can generalize about the sorts of federal statutory schemes in connection with which this interest is likely to feature prominently. In particular, there is a close relationship between the manner in which Congress chooses to deploy its power to preempt state law and the intensity of its interest in assuring that federal law is interpreted and applied uniformly. By definition, federal

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111 One could argue that state courts are likely to exhibit bias against claims of federal preemption and that this tendency is unlikely to change over time, since it is rooted in an aversion to the trumping of state authority by the federal government that would appear not to be unique to any particular time period or regulatory context. Even assuming this is correct, it still affords no basis for selecting a subset of preemption cases for special jurisdictional treatment, and it is therefore a nonstarter for purposes of crafting a scheme of preemption-based removal unless one is willing to contemplate removal of any case in which state and federal law clash.

112 This is not to say that concerns of this sort ought never to motivate the establishment of special rules of jurisdiction. But judgments of this sort might be especially difficult for the judiciary, as opposed to the legislature, to make competently. Indeed, one wonders whether the Avco Court’s failure to invoke the bias concern as a justification for its decision—though the decision seems obviously motivated by it—reflects the Justices’ recognition of the fact that a judgment premised on this concern and lacking clear support in the statute under review pushes the limits of the Court’s authority.
preemption of state law produces some measure of uniformity in the
governing legal rule by crowding out state law that fails to conform to
the relevant federal guidelines.\textsuperscript{113} But the relationship between fed-
eral preemption and the interest in uniformity varies from statute to
statute, and the Court might place complete preemption doctrine on
more stable ground by offering sustained attention to the nuances of
this relationship.

1. Regulatory Uniformity and Federal Preemption

To see how the interest in uniformity varies across federal statutes,
it is helpful to distinguish between two species of this interest. There
is, first, what I call “equal-application uniformity.” This interest is
rooted in the notion that national law is meant to be, well, \textit{national}—
which is to say that it would be unfair for residents of State A to be
subject to rights and obligations different from those applicable to
residents of State B under a law that is meant to apply equally to all.
Put otherwise, the meaning and application of federal law ought not
to turn on the judicial district in which a case is brought. Crucially,
this type of uniformity does not vary from statute to statute; national
law, whatever its content, calls for equal-application uniformity.

Some statutory schemes, however, are infused with an additional
interest in what might be called “regulatory uniformity.” This is an in-
terest in subjecting regulated entities to a single set of legal standards,
so as to avoid the burdens that might accompany compliance with a
multitude of rules enacted by different sovereigns. In contrast to
equal-application uniformity, the importance of regulatory uniformity
\textit{does} vary from statute to statute. Not all legal rules depend for their
coherence and achievement of their desired goals on uniformity of
application.\textsuperscript{114} And while regulation by the federal government typi-

\textsuperscript{113} Though the Supreme Court’s cases in this area are radically undertheorized,
the fact that the Justices are drawn toward preemption cases for special jurisdictional
treatment suggests at least a tacit understanding of the close relationship between fed-
eral preemption and the interest in uniformity. \textit{See} Issacharoff & Sharkey, \textit{supra} note
61, at 1365-98 (exploring a variety of Supreme Court decisions governing the breadth
of preemptive federal statutes and identifying therein a “drive toward federalization”
animated in large part by the need for uniform national standards).

\textsuperscript{114} For example, if courts in some jurisdictions construed Title VII’s prohibition of
discrimination “because of sex” to cover discrimination on the basis of sexual orienta-
tion, while others did not, one might take the position that this is unfair or unwise.
(Why, you might ask, should federal law protect people in some parts of the country,
but not others, from discrimination on the basis of sexual orientation?) But this is dif-
cally homogenizes a rule of law nationwide, there are greater and lesser degrees of homogeneity. And, it is sometimes the case that the interest in homogeneity is itself a motivating factor underlying the decision to regulate, while sometimes it is not.

The presence of a special interest in regulatory uniformity, as opposed to run-of-the-mill equal-application uniformity, is often inferable from the manner in which Congress deploys its power to preempt state law. Specifically, the more broadly preemptive federal law is, the more likely it is that the interest in regulatory uniformity is in play. And it would therefore make sense to tether a rule of federal defense removal to the scope of federal preemption—that is, to the extent to which federal law prohibits state intervention in a given field. Such a rule would channel into the courts thought most likely to provide a uniform interpretation of federal law those cases in which the need for such an interpretation is most pressing.

2. Federal Preemption and Federal Jurisdiction

Measuring the breadth of federal preemption is not hard science. So, while a jurisdictional rule of the sort contemplated here would offer the benefit of drawing on the core policies underlying the establishment of federal question jurisdiction, it would create uncertainty as to when, exactly, a federal regulatory regime is so robustly preemptive as to establish a foundation for defense-based removal. But the inquiry need not be entirely rudderless; a good place to start is with the concept of field preemption, because when Congress goes so far different from believing that such variation in federal employment discrimination law is somehow structurally unworkable.

There is a difference in the way we use the word “uniformity” when we talk about the unique benefits that federal courts are presumed to provide, as opposed to the interest in subjecting regulated entities to a single legal standard. This is evident from the fact that the federal courts could provide uniformity of decision, but not uniformity of regulation, by unanimously deciding that a given federal statute does not preempt state law. But this distinction need not detain us. The notion that federal courts offer a significant benefit over state courts due to their capacity to produce uniform decisions would be difficult to sustain were it not joined with the notion that these decisions are also more likely to be correct. And it is widely accepted that federal courts are more expert in the interpretation of federal law than state courts. See ALI STUDY, supra note 12, at 165 (“The federal courts have acquired a considerable expertise in the interpretation and application of federal law which would be lost if federal question cases were given to the state courts.”). Hence, where Congress deploys its power to preempt in order to assure that regulated entities will be subject to a uniform rule, the conventional wisdom suggests that the federal courts, due in large part to their expertise, will be best suited to advancing the uniformity interest.
as to oust states entirely from a given field of regulation, there is a strong basis upon which to conclude that it wishes to hold regulated entities to a single, uniform standard.

When Congress occupies an entire field, federal law establishes both a regulatory floor and ceiling. All state law—even if it does not squarely conflict with federal standards, indeed, even if it is duplicative of federal standards—\(^{116}\) is disabled. In contrast, where federal law is preemptive, but does not occupy the entire field, state law is inoperative only to the extent that it conflicts with federal law. Absent field preemption, state legislatures are typically permitted to supplement the federal regime by, for example, imposing requirements on regulated entities above and beyond what federal law requires.\(^{117}\) The divergent effects of field versus partial preemption on the likelihood of regulatory uniformity are clear: when states are permitted to supplement a federal statutory scheme, the likelihood of efficiency-based uniformity decreases; when Congress decides, instead, to disable all state law within a given field, the likelihood of regulatory uniformity is significantly enhanced.

There is, unsurprisingly, plenty of case law confirming that field-preemptive federal statutes are specially designed to secure regulatory uniformity. When discussing federal statutes that have been construed to occupy entire fields, the Court has repeatedly emphasized Congress’s interest in holding regulated entities to a single standard and has focused its attention on the inefficiencies and other harms that might plague the field in question absent federal “occupation.” Field preemption, the Court has explained, relieves regulated entities of the “impossible task” of “follow[ing] closely the laws of the 48 different States, the regulations thereunder, and the administrative rul-

\(^{116}\) See, e.g., S. Ry. Co. v. R.R. Comm’n of Ind., 236 U.S. 439, 448 (1915) (deeming an Indiana law imposing penalties on railway companies for failure to equip railcars with hand-holds to be preempted by a federal law that imposed penalties for the same).

\(^{117}\) See, e.g., Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 285 (1987) (“Congress intended the [Pregnancy Discrimination Act] to be ‘a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.’” (quoting Cal. Fed. Sav. & Loan Ass’n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985))).

I say “typically” because states might be prohibited from supplementing a federal regulatory scheme, if doing so would “frustrate the purpose” of the federal scheme. And a court might conclude that this is so without holding that Congress has occupied an entire field. Of course, the more forms of state regulatory intervention are deemed to frustrate the purpose of a given federal law, the more reasonable it is to conclude that federal law occupies the entire field. As I explain below, the labels do not really matter; the breadth of federal preemption does.
ings thereunder.” It “establish[s] a system of uniform federal ... standards” and thereby “avoid[s] duplicative, and possibly counterproductive, regulation” by the states. These cases, and many others like them, make clear that when federal law preempts an entire field, we can say with confidence that the creation of a uniform regulatory standard is not simply the effect of federal regulation, but, rather, it is among the causes of Congress’s decision to regulate in the first place.

This is not to say that the interest in regulatory uniformity plays no role in preemptive federal statutory schemes that stop short of occupying an entire field. One could surely cobble together statements from Supreme Court decisions relating to ordinary preemptive statutes (i.e., preemptive statutes that do not occupy an entire field) and paint a roughly similar picture of the role played by regulatory uniformity in connection with these provisions. In addition, the line distinguishing field preemption from other forms of federal preemption is notoriously blurry, so even the label the courts choose to attach to the preemptive scope of a federal regulatory scheme is an imperfect indicator of just how aggressive Congress means to be in crowding states out of the relevant sphere.

For these reasons, if complete preemption jurisprudence is to be reshaped with an eye to the breadth of federal preemption, the inquiry ought not to begin and end with the field preemption construct. The hallmark of a preemptive regulatory regime that should suffice to underwrite federal defense removal is that supplementary state legisla-

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118 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 233 n.11 (1947) (quoting S. REP. NO. 71-1775, at 2); see also id. at 236 (noting that “by eliminating dual regulation and substituting regulation by one agency, Congress sought to achieve ‘fair and uniform business practices’ which ... was the purpose of the amended Act” (quoting Fed. Compress & Warehouse Co. v. McLean, 291 U.S. 17, 23 (1934))).

119 Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 102 (1992). While the Court couched its holding in this case as one of implied conflict preemption, it noted that the label “field preemption” was equally appropriate. Id. at 104 n.2.

120 Indeed, one way of distinguishing partial from field preemption is to say that the latter seeks to establish a uniform rule across a narrower sphere.

121 See 1 Laurence H. Tribe, American Constitutional Law § 6-28, at 1176-77 (3d ed. 2000) (noting that the categories of preemption are “anything but analytically air-tight” and, in particular, that field preemption “may fall into any of ... three categories”—namely, express, implied, or conflict preemption). The porosity of these categories has been acknowledged by the Supreme Court. See, e.g., English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990) (noting that the preemption categories are not “rigidly distinct” and explaining that “field pre-emption may be understood as a species of conflict pre-emption”).
tion is prohibited; the label attached to such a preemptive scheme is ultimately insignificant. If federal law is construed to prevent states from heaping on regulated entities obligations above and beyond those animated by federal law, then it is reasonable to conclude that Congress has endeavored to assure not just equal-application uniformity, but regulatory uniformity as well. Hammering out precisely which federal statutes will fall within the ambit of this rule (other than field preemptive statutes) will be no easy task; but the development over time of the necessary rules of federal defense removal, crafted in light of the values that are central to our scheme of federal jurisdiction, is preferable to continuing along the path the Court is currently on.122


This sort of shift in the jurisprudence of complete preemption would require some reshaping of the basic structure of federal question jurisdiction. Some of this is already part of existing doctrine as a functional (if not formal) matter. Specifically, the Court would have to abandon the pretense that removal on the basis of a defense is prohibited. Of course, if we value judicial candor over unflinching formal adherence to established rules, this is to be celebrated, rather than lamented.

In addition, this approach toward complete preemption would require rethinking the question of which parties are permitted to remove cases to federal court. The removal statute currently permits defendants to remove to federal court, but not plaintiffs.123 Where the existence of federal question jurisdiction turns exclusively on the content of the plaintiff’s pleading, this approach is defensible; it establishes a kind of symmetry with respect to the parties’ access to the federal courts. In a case that is eligible for both state and federal jurisdiction, the plaintiff makes the initial decision whether to file in state or federal court. If the plaintiff opts for the former, the defendant then chooses whether to remain in the state system or, instead,

122 And, of course, the current regime hardly relieves the courts of the obligation to decide difficult questions pertaining to the applicability of the complete preemption rule. For example, existing doctrine requires courts to determine whether Congress intended a particular cause of action to be exclusive and whether the cause of action presented by the plaintiff falls within the ambit of the federal right of action. Compare Brief of Petitioners at 11-15, Beneficial Nat’l Bank v. Anderson, 539 U.S. 1 (2003) (No. 02-306), with Brief of Respondents at 15 n.12, Beneficial Nat’l Bank v. Anderson, 539 U.S. 1 (2003) (No. 02-306).

remove to federal court. Each party is able to invoke the jurisdiction of the federal courts so long as the well-pleaded complaint rule is satisfied.

If, however, it becomes possible for federal question jurisdiction to be rooted in the content of the defendant’s pleading, the plaintiff must enjoy a right to remove in order to preserve this symmetry.124 There is no sound reason to permit defendants to remove to federal court because they have claimed rights under a broadly preemptive federal statute while forbidding plaintiffs from doing the same.125

CONCLUSION

The puzzle of complete preemption lies in the Court’s failure to connect the doctrine to basic policies that have been understood since the Founding to support the establishment of federal question jurisdiction. Since the initial decision in *Avco*, which failed even to acknowledge the oddity of the Court’s jurisdictional maneuver, much less attempt to justify it, the doctrine has evolved in a common-law-like fashion. And not once along the way has the Court made an effort to explicate the doctrine by reference to the foundational principles underlying our jurisdictional structure.

It is little wonder, then, that Justice Scalia recently called for the virtual abandonment of the complete preemption rule. To be sure, the core of his gripe lies in separation of powers concerns that would not be resolved even if the doctrine were reoriented so as to reflect sound jurisdictional policy. But the doctrinal disarray and conceptual impoverishment that currently characterize complete preemption make it an easy target.

I have suggested that the jurisprudence of complete preemption might stand on firmer ground if the availability of federal defense removal turned on the breadth of the preemptive statute relied upon by the defendant. Where federal law is broadly preemptive of state

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124 Removal by plaintiffs is hardly an unfamiliar concept. Under the Judiciary Act of 1875, both parties were permitted to remove. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71. The notion of plaintiff removal has attracted support from leading authorities on the subject of federal jurisdiction. See, e.g., ALI STUDY, supra note 12, at 192 (“[D]efendant should be permitted to remove to guard against the danger that the state court . . . will give an unduly expansive construction to the plaintiff’s claim. . . . By similar reasoning, plaintiff should be allowed to remove if the defendant has relied on a federal defense which the state court might read too broadly.”).

125 ALI STUDY, supra note 12, at 194 (“It is logically sound to permit removal to the party who opposes the federal right as well as to the party who asserts the right.”).
regulation, there is good reason to believe that one of the core func-
tions of the federal judiciary—preservation of uniformity (in particu-
lar, regulatory uniformity)—is specially implicated; it therefore makes
good sense to take an expansive view of federal jurisdiction where in-
terpretation of such statutes is called for. The devil is sure to be in the
details. Crafting a body of case law that distinguishes those federal
statutes that are so robustly preemptive as to merit special jurisdic-
tional treatment from those that are not will present significant line-
drawing challenges. But at least the details on which the courts’ atten-
tion will be focused under this approach relate to the core values un-
derlying the establishment of federal question jurisdiction and, hence,
to the mission of the federal courts.