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III. Federal Question Jurisdiction

Brianna J. Fuller

III. FEDERAL QUESTION JURISDICTION*

A. Introduction to Federal Question Jurisdiction

As explained in the introduction to this issue, controlling the choice of forum can provide significant advantages for litigants. In most lawsuits, for either procedural or substantive reasons, the parties involved have some motivation to control whether the litigation ends up in federal or state court. "More and more, people and interest groups are becoming acutely aware of the practical significance of federal jurisdiction," particularly of the way in which technical jurisdictional issues influence and reflect substantive interests.[1]

One of the ways that litigants bring their cases in federal court is under the federal question theory. While diversity jurisdiction focuses on the people involved in bringing the claim, federal question jurisdiction focuses on the subject matter of the suit. Generally, federal question jurisdiction exists when either Congress or the federal courts decide that there is some federal interest implicated by a suit that is worthy of scarce federal judicial resources. Understanding the rules surrounding federal question jurisdiction is essential, given that a vast number of the cases heard in federal court are heard either under statutes that expressly confer federal question jurisdiction or under the general federal question jurisdiction statute.[2] At the same time, the test for federal question jurisdiction can be extremely malleable, permitting the parties to

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* Brianna J. Fuller: J.D. Candidate, May 2005 Loyola Law School; B.A. Messiah College, May 2001. I would like to thank my parents, Ken and Marilyn Fuller, for their constant love and support, my brother Bradley, for his sense of perspective and humor, and Dr. Linda Parkyn, whose guidance has shaped the course of my life. Special thanks also to Tamar Buchakjian and the staff of the *Loyola of Los Angeles Law Review* for their hard work.

1. Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Limitations: Some Observations from the History of the Federal Courts*, 46 N.Y.L. SCH. L. REV. 7, 19, 25 (2002/2003).

2. 28 U.S.C. § 1331 (2000).

characterize the issues in state or federal law terms as suits their interests.

This Section discusses three categories of federal questions which civil litigants can use to their advantage. Part B discusses Congress's power to expressly confer federal question jurisdiction in a statute. When Congress does so, a plaintiff suing under that statute may bring the suit in federal court, or if the plaintiff does not, the defendant may remove to federal court. This Section also explains the rather loose constitutional limitations placed on Congress's ability to pass such statutes and the effect of Congress's increasingly frequent attempts to "federalize" areas of substantive law.

Part C discusses a second type of federal questions, those falling under § 1331. Claims "arising under" federal law may be deemed federal questions by the court even though Congress did not write any explicit jurisdictional provision to that effect. This section discusses the current "arising under" test and the way litigants have used the test to their advantage by appealing to various federal or state interests.

Finally, Part D discusses the third way a claim can be deemed a federal question, that is, complete preemption. Federal law can so completely displace state law that there is essentially no state law left under which to plead. Any claim brought under that state law then becomes a federal question. This is the most rapidly changing area of federal question jurisdiction, as plaintiffs attempt to plead under state laws to avoid the harsh pro-defendant effects of certain federal laws.

There is no strict line between the three categories of federal questions, and in fact, defendants often remove citing various bases as grounds for removal.[3] The theme running through all three is that the plaintiff, as "master of the complaint," has the first chance to frame the issues in terms favorable to the suit. The plaintiff must do the initial calculus, looking at all the possible state and federal claims and the advantages of being in state or federal court. The plaintiff must then design a suit with the best possibility of remaining in the chosen forum. The purpose of this Section is to inform that calculus.

3. *See, e.g.*, Chille v. United Airlines, No. 00-CV-6571L, 03-CV-6177L, 2004 U.S. Dist. LEXIS 1022, at *5–*6 (W.D.N.Y. Jan. 14, 2004).

B. Statutes Expressly Conferring Federal Question Jurisdiction

The text of many federal statutes expressly confer federal question jurisdiction on the federal courts. For example, the Securities Litigation Unified Standards Act ("SLUSA") states that a certain type of litigation related to securities may be brought in federal court and is always removable to federal court.[4] Any case brought under the cause of action contained in such a statute is removable as a federal question.

Congress might want cases to be heard in federal court for a variety of reasons. For instance, Congress's nominal goal in passing SLUSA was to protect national interests in finance and banking.[5] But it is well recognized that the primary goal was to cut off plaintiff flight to state court in securities cases, caused by favorable state laws.[6] In other cases, the goal might be uniformity of outcome or protection of federal policy.[7]

Congress's power to confer federal question jurisdiction is limited by the constitutional provision outlining the power of the federal courts. Article III of the Constitution provides federal courts with the power to hear "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties."[8] Congress may not confer jurisdiction where the court does not have the power to hear the case.

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4. 15 U.S.C. § 78bb(f)(2) (2000).

5. *Id.* § 78b (stating that the legislation written in SLUSA was necessary because of the "national public interest" in regulating transactions that affect interstate commerce, national credit, banking, and taxes).

6. *See* Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 123 (2d Cir. 2003); *see also* Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1606–07 (2000) (noting Congress's decision to use jurisdiction rather than to preempt substantive law).

7. A good example of both of these purposes is the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 (2000), which permits federal jurisdiction in cases against a foreign state. The statute reflects a deliberate attempt to channel cases towards federal court. *See id*; *see also* Dole Food Co. v. Patrickson, 123 S. Ct. 1655, 1665 (2003) (Breyer, J., dissenting on other grounds). Justice Breyer, commenting on this choice, stated that federal jurisdiction is appropriate, because uniformity is necessary when sensitive foreign relations are involved. *Id.* at 1665–66.

8. U.S. CONST. art. III, § 2, cl. 1.

The Supreme Court has interpreted the scope of the term "arising under" very broadly. In *Osborn v. Bank of the United States*,[9] the Court considered an Ohio statute that levied a fee against all banks operating contrary to state law.[10] This included, according to the terms of the statute, the federal bank in Ohio.[11] The bank removed the case because the legislation incorporating the federal bank authorized the bank to sue and be sued in federal courts.[12] The preliminary question, then, was whether Congress had overstepped constitutional boundaries by automatically creating federal jurisdiction over all cases where the federal bank was a party.[13] The Court, under Chief Justice Marshall, upheld the constitutionality of the statute, saying that where there was a federal "ingredient" in a cause of action, Congress could constitutionally confer jurisdiction over that cause of action on federal courts.[14] The Court made it clear that the federal ingredient need not even be in contention in every case that could be brought under the jurisdictional provision; the mere potentiality of a federal ingredient is sufficient.[15]

The Court held that in every "well constructed government," the powers of the legislative, executive, and judicial branches are "potentially co-extensive," that is, the Legislature can delegate jurisdiction to the federal courts over any matter that it can constitutionally legislate.[16] The Court said that this was particularly

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9. 22 U.S. 738 (1824).

10. *Id.* at 740.

11. *See id.*

12. *Id.* at 817.

13. *Id.* at 818.

14. *Id.* at 823; *see also* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting) (criticizing the ingredient test as permitting federal question jurisdiction "on the remote possibility of presentation of a federal question").

15. *Osborn*, 22 U.S. at 824.

16. *Id.* at 818. This formulation provides a basis for the academic theory of protective jurisdiction. LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION §4.02(5), at 162 (1998). Protective jurisdiction is a theory that attempts to explain why Congress should have the power to confer jurisdiction over any area of the law it can constitutionally regulate. *Id.* There are two basic strands of the theory. *Id.* The first one, the "greater includes the lesser" theory, says that where Congress has the power to legislate a particular area, it also has the lesser power of conferring jurisdiction over that area to the federal court. *Id.* This is true even if it decides not to substantively regulate the question. *Id.* at 163. The second theory, the "partial occupation"

true in the bank case.[17] Because the bank was a creation of federal law, and because it had no rights or responsibilities but for federal law, any possible case against it would have to arise under the laws of the United States.[18] Therefore, because it was within the power of the legislature to create such a bank, it was within the power of Congress to confer jurisdiction over matters related to the bank to the federal courts.[19]

Congress has used this sweeping power to "federalize" state law claims where there is essentially no federal law being interpreted.[20] For example, shortly after September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act.[21] The act confers jurisdiction on the federal courts for tort claims arising out of the September 11 attacks. Although it requires that the federal courts apply the substantive law of the state where the attacks occurred, Congress nonetheless deemed federal court jurisdiction necessary to ensure uniformity of decision and fair compensation for all victims.[22] It is unlikely that any individual tort claim will require interpretation of federal law, as torts are almost exclusively state law issues. The

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theory, is that Congress has the power to confer jurisdiction on the federal courts when there is an "articulated and active federal policy regulating [the] field." *Id.* at 164.

The Court has often indicated its discomfort with the label "protective jurisdiction," even though it appears to support the general idea. *See* Mesa v. California, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' . . . and we do not see any need for doing so here."); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 491 n.17 (1983) ("[W]e need not consider petitioner's alternative argument that the Act is constitutional as an aspect of so-called 'protective jurisdiction.'"); *Textile Workers Union*, 353 U.S. at 474–75 (1957) (Frankfurter, J., dissenting) ("'Protective jurisdiction' . . . cannot be justified under any view of the allowable scope to be given to Article III . . . [and] cannot generate an independent source for adjudication outside of the Article III sanctions and what Congress has defined."). The Court has not mentioned the term "protective jurisdiction" in any decision since 1995.

17. *Osborn*, 22 U.S. at 823.

18. *Id.*

19. *See id.* at 823–25.

20. *See generally* Vairo, *supra* note 6, at 1561 (raising federalism concerns inherent in Congress's decision to federalize the forum).

21. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, § 408(b)(3), 115 Stat 230, 241 (2001).

22. *See* 147 CONG. REC. S9,595 (daily ed. Sept. 21, 2001) (statement of Sen. Hatch).

only federal interest then is the concern for seeing victims compensated and protecting the airline industry from bankruptcy.[23]

The federal courts are generally deferential to such congressional decisions, and no court has expressly dealt with the constitutionality of the jurisdictional provision in the Air Transportation Safety Act.[24] However, the Second Circuit recently heard a case in which the defendant asked the court to extend jurisdiction to a breach of contract claim against retrocessionaires (those who insure re-insurers) based on insurance claims arising out of the September 11 attacks.[25] The court declined to extend jurisdiction, saying that statutes should be construed to avoid raising constitutional problems, and that construing the Airline Safety Act so broadly "raises such doubts."[26]

The court did not make clear why this claim raised greater constitutional problems any more than the claims arising directly out of the attacks.[27] The only facts distinguishing the two is that Congress specifically provided for jurisdiction over claims made by direct tort victims, but not over reinsurers, and that the victims in this case were one step further removed from the tragedy. This is a good example of the fact that the court, while giving deference to Congress to define jurisdiction, will likely read such jurisdictional provisions narrowly to avoid constitutional problems and to limit their jurisdiction.[28]

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23. Can. Life Assurance Co. v. Converium Ruckversicherung, 335 F.3d 52, 55 (2d Cir. 2003).

24. *See* Air Transportation Safety and System Stabilization Act § 408(b)(3).

25. *Can. Life Assurance,* 335 F.3d at 52–53.

26. *Id.* at 59.

27. *See id.* at 58–59.

28. For a deeper analysis of federalism concerns related to the Air Transportation Safety Act, see Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265, 1286–94 (2002). There are many other examples where Congress has federalized state law claims. The Y2K Act, 15 U.S.C. §§ 6601–6617 (2000), confers federal question jurisdiction over any class action in which the plaintiff's harm arose out of an "actual or potential Y2K failure." *Id.* §§ 6602(1), 6614(c)(1). A district court in New York exerted jurisdiction over one such case without questioning the constitutionality of the act. *See* Lewis Tree Serv., Inc. v. Lucent Techs., Inc., 239 F. Supp. 2d 322, 326 (S.D.N.Y. 2002) (stating that Congress found "significant federal interests were vindicated by having Y2K class action[s] . . . proceed in federal courts"); *see also* Vairo, *supra* note 6, at 1561, 1608 n.257.

It is important to understand that the ingredient test limits Congress's authority to confer jurisdiction on the federal courts to hear certain types of claims.[29] Because the test is so broad, and because the courts have accepted virtually every federal ingredient that has been presented to them, it appears that Congress has the power to put a jurisdiction-conferring statute in virtually any legislation that it can pass under its Article I powers.[30]

Given the breadth with which Congress and the courts have read the ingredient test (a test which was very broad to begin with), a litigant has virtually no chance of successfully challenging federal jurisdiction on the basis that it is unconstitutional. In order to challenge Congress's decision to confer federal question jurisdiction in a particular statute, the litigant would have to argue that cases arising under the statute had absolutely no potential federal ingredient. It is very difficult to imagine that Congress could constitutionally pass a law within its Article I powers that has no possible federal ingredient. As such, once Congress has provided federal jurisdiction over the interpretation of certain statutes, it is very difficult for the litigants to challenge that grant as unconstitutional.[31]

For an argument that Congress should have the power to pass such jurisdictional statutes merely to protect federal interests, see Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 365–66 (2002). In the article, Segall argues that permitting Congress to confer jurisdiction in such cases actually protects state interests as well as federal interests. *See id.* at 387–89. He argues that this strategy is less disruptive of state law than preempting state law or creating new federal causes of action. *Id.* By transferring interpretation of the law to the federal courts, Congress can ensure that federal interests are protected without usurping areas of state law. *Id.* at 387.

29. *See* Vairo, *supra* note 6, at 1617–18.

30. *See* MULLENIX ET AL., *supra* note 16, § 4.02(2) at 155 n.15; Segall, *supra* note 28, at 369; John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1018 (2002). *See generally* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 21–22 (1990) (discussing the tension between Congress and the Courts in delineating federal court jurisdiction).

31. There may be another practical reason why there is very little litigation on the scope of the constitutionality of the "arising under" provision. Such cases would only arise when Congress has transferred a certain issue into federal court by creating a federal cause of action or explicitly conferred jurisdiction over a certain statute. Defendants, who tend to "start" the

A plaintiff who has a claim under a federal statute that expressly confers federal jurisdiction, but prefers a state court forum has essentially two options. The first is to show that the claim does not fit into a narrow reading of the jurisdictional provision, as in the Air Safety Act case above. The second is to ignore the federal claim. A plaintiff may refuse to plead an available federal cause of action and plead only pure state claims in order to avoid federal court.[32] All courts permit this because the plaintiff is not being deceptive—rather, the plaintiff has done the calculation and decided that a state court forum will raise its chances of success more than adding the federal claim would.[33]

For example, in *Lippitt v. Raymond James Financial Services, Inc.*,[34] the plaintiff chose to sue under the California Unfair Competition Law rather than the federal Securities and Exchange Act.[35] Although the action he complained of may have constituted a violation of the Securities and Exchange Act as well, this is a perfectly permissible choice.[36] The plaintiff most likely calculated that he had a better chance of winning under the state law in state court then under the federal law in federal court. The plaintiff, as "master of the complaint," may decide which combination of claims will lead to the best chance of success, even if this decision involves weighing the likely effect of federal or state jurisdiction.[37] Forum selection in this sense is no more than good legal strategy.

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jurisdictional battles by removing, normally prefer federal jurisdiction. Therefore, they have no motivation to challenge the constitutionality of a congressional grant of federal question jurisdiction, because the case is being heard in federal court, as they prefer. While plaintiffs have a motivation to challenge jurisdiction, they *tend* to have less resources to fight jurisdiction questions and might be especially hesitant to expend resources on such an uphill battle. This *may* be part of the reason that the Air Transportation Safety Act and the Y2K Act have gone largely unchallenged.

32. Caterpillar, Inc. v. Williams, 482 U.S. 386, 390 (1987). This statement, of course, leaves to the side pleading in an area of complete preemption. *See infra* Part III.D.

33. Of course, not every omitted federal claim is the product of such a calculus; sometimes plaintiffs have simply not discovered claims available to them, or for other reasons have decided not to sue in federal court.

34. 340 F.3d 1033 (9th Cir. 2003).

35. *Id.* at 1036.

36. *Id.* at 1043.

37. *Id.* at 1041–43.

C. Federal Questions Originating Under § 1331

Not every federal question has such an explicit congressional sanction. There is a broader category of federal questions, derived from the general federal question statute, the breadth of which is left largely up to the discretion of courts as they attempt to divine the intent of Congress.

1. Background on the federal question statute

For the first hundred years of this nation's existence, there was little statutory "federal question jurisdiction" to debate.[38] Cases brought under federal statutes that contained a specific grant of jurisdiction were federal questions, and only those statutes produced federal questions, because the constitutional provision was not self-executing.[39] As a result, a great deal of federal law interpretation occurred in state court.[40] Then, in 1875, Congress passed a general federal question statute, § 1331, conferring jurisdiction to the federal courts over "all civil actions arising under the Constitution, laws, or treaties of the United States."[41]

It is important to understand the difference between the constitutional provision and the statutory one. Article III is a limit on Congress's power to pass legislation conferring federal jurisdiction on the federal courts.[42] Section 1331, on the other hand, governs situations in which litigants can file in federal court or remove to federal court *in the absence of* a separate statute that explicitly confers federal jurisdiction.[43] There is some evidence that Congress expressed its intent to make the powers coextensive with the Constitution by using the same phrasing for the statutory limits as the constitutional provision.[44] However, the courts have interpreted

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38. William H. Rehnquist, Keynote Address at the Future of the Federal Courts Symposium (Apr. 9, 1996), *in* 46 AM. U. L. REV. 267, 267 (1996).

39. *See also id.; cf.* Smith v. Adsit, 83 U.S. (16 Wall.) 185, 188 (1872) (stating that for a federal question to exist in a case, the plaintiff must claim some right or privilege under an act of Congress).

40. *Id.*

41. 28 U.S.C. § 1331 (2000); *see* Friedman, *supra* note 30, at 21.

42. U.S. CONST. art. III, § 2, cl. 1.

43. 28 U.S.C. § 1331.

44. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 n.8 (1983); *see also* Friedman, *supra* note 30, at 21. There is little evidence as to what Congress's intent was in passing § 1331. *See id.* However, the

§ 1331 as a much narrower provision.[45] Although the courts sometimes confuse and cross-pollinate the tests,[46] litigants must understand the differences.

The scope of the statute has been a source of contention since it was passed in 1875. The first significant portion of the test as it exists today was laid down in *American Well Works Co. v. Laynes & Bowler Co.*[47] There the Supreme Court said that a "suit arises under the law that creates the cause of action."[48] This created a useful bright line rule whereby jurisdiction could be determined early in the suit. The *American Well Works* test is also the purest reflection of Congress's plenary power to define the scope of federal jurisdiction. Under the test, federal question jurisdiction existed only when Congress chose to create a cause of action.[49]

However, the courts soon came to regard the narrow test as, in the words of Judge Friendly, "more useful for inclusion than for the exclusion for which it was intended."[50] In *Smith v. Kansas City Title & Trust Co.*,[51] the Court recognized a much broader range of cases that could be heard in federal courts as federal questions.[52] The plaintiff in this case challenged the constitutionality of a farm bond

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evidence that exists points toward a broad reading of federal question jurisdiction that is roughly coextensive with the constitutional provision. *Id.* This has caused some scholars to question what "congressional intent" today's courts should really be looking at—the intent to create a cause of action in a particular statute (as was given precedence in Merrell Dow Pharms., Inc., v. Thompson, 478 U.S. 804, 807 (1986)), or the intent of § 1331 to allow a broad range of cases into federal court. *See* Friedman, *supra* note 30, at 22–23.

45. *See, e.g.*, *Merrell Dow*, 478 U.S. at 807.

46. *See infra* note 98 (discussing the use of the language from *Osborn* constitutionality test to interpret the *Smith* substantiality test).

47. 241 U.S. 257 (1916).

48. *Id.* at 260.

49. *See* Friedman, *supra* note 30, at 4. The premise of congressional control over the jurisdiction of lower federal courts is based on the fact that the Constitution vests Congress with the power to create lower courts in Article III, section 1, and that the power to create lower courts brings with it the power to control the jurisdiction of those courts—"greater includes the lesser." *Id.* There is an argument that Congress's control over federal jurisdiction is not and should not be as absolute as most assume. *See id.* at 5–6. This is based on the mandatory language of Article III, section 1, stating that judicial power "*shall* be vested" in the federal courts. *See id.* at 6 (emphasis added).

50. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964).

51. 255 U.S. 180 (1921).

52. *See id.* at 199–202.

act.[53] Even though state law created the cause of action, the Court said that jurisdiction was proper where "the right to relief depends upon the construction or application" of federal law.[54] Because the outcome of the case depended on the constitutionality of the federal act, the Court found that the district court properly took jurisdiction over the case.[55] However, the case did not lay out clear guidelines for the lower courts as to where this holding would be controlling.

Then, in 1986, the Supreme Court made an attempt to clarify its decision in *Smith*. The defendants in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*[56] manufactured a drug called Bendectin that allegedly caused the plaintiffs' children to be born with deformities. The plaintiffs brought several state causes of action, including negligence and breach of warranty, but they also claimed that the drugs were "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA").[57] The defendant removed the case, claiming that this last cause of action created federal question jurisdiction because it required interpretation of a substantial federal question.[58]

The Court first found, and the parties conceded, that the FDCA did not create a federal private cause of action.[59] This turned out to be almost determinative to the Court, because if there was no federal cause of action, it would "flout congressional intent" to find federal jurisdiction.[60] The Court held that the absence of such a cause of action is "tantamount to a congressional conclusion that the presence of a claimed violation . . . is insufficiently 'substantial' to confer federal-question jurisdiction" on the federal court.[61]

This statement would appear to bring an end to the *Smith* rule, and return federal question jurisdiction to the *American Well-Works* test. However, the footnotes in *Merrell Dow* muddied the question. In a footnote written for the majority,[62] Justice Stevens tried to

53. *Id.* at 182.
54. *Id.* at 199.
55. *Id.* at 201–02.
56. 478 U.S. 804 (1986).
57. *Id.* at 805–06.
58. *Id.* at 806.
59. *Id.* at 809.
60. *Id.* at 812.
61. *Id.* at 814.
62. *Id.* at 814 n.12.

reconcile two prior cases that appeared to be in direct conflict, *Smith* and *Moore v. Chesapeake & Ohio Railway Co.*[63] Both cases contained a federal question that appeared to be determinative in the lawsuit, but the Court only found jurisdiction in *Smith*. The majority said that the two could be reconciled by looking at the nature of the interest involved.[64] *Smith* was concerned with the constitutionality of an "important" act of Congress, while *Moore* and *Merrell Dow* both required the courts to interpret a federal statute as the standard for negligence in a state tort claim.[65]

The dissent in *Merrell Dow* wrote that *Smith* and *Moore* were patently irreconcilable.[66] The test laid out by the majority, it argued, would require a "case-by-case appraisal" balancing the importance of the preeminence of the state law and the nature of the federal interest.[67] Brennan, who authored the dissent, called for *Moore* to be overturned, stating that commentators and the lower courts preferred the *Smith* rule that there is jurisdiction where the right to relief depends on the interpretation of federal law.[68]

The dissent also questioned the majority's conclusion that it would flout congressional intent to confer federal jurisdiction where Congress created no right of action.[69] The dissent argued that even

63. 291 U.S. 205 (1934). The Supreme Court in *Moore* essentially held that a state's decision to incorporate a federal standard into a state cause of action did not constitute a federal question. *Id.* at 214–15. The holding is along the same lines as *Merrell Dow*, but instead of relying on the lack of a cause of action, the Court relied on the fact that the suit was essentially state-based in nature. *Id.*

64. *Merrell Dow*, 478 U.S. at 814 n.12.

65. *Id.*

66. *Id.* at 821 n.1 (Brennan, J., dissenting).

67. *Id.* (Brennan, J., dissenting).

68. *Id.*(Brennan, J., dissenting).

69. *See id.* at 831–32 (Brennan, J., dissenting); MULLENIX ET AL., *supra* note 16, § 4.03(2)(c), at 175 (stating that even if Congress does not provide a private remedy, federal interest may still exist). *See generally* Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272, 2289–90 (2002) [hereinafter *Mr. Smith Goes to Federal Court*] (asserting that the lack of a private cause of action may reflect more on the existing state remedies rather than on the importance of the federal issue). This goes back to the question mentioned above, *supra* note 44, regarding what congressional intent the courts should really be looking at. Although *Merrell Dow* restricts the question of congressional intent to whether or not Congress created a private right of action, the existing legislative history points to Congress's intent for broad

where Congress did not create a remedy in a particular statute, it may still want federal courts to adjudicate the issue.[70]

Merrell Dow added one more important wrinkle by cutting off the argument that Congress had implied a cause of action in certain suits, thus conferring jurisdiction on the federal court. Finding implied causes of action was once common fare of the federal courts.[71] However, in *Merrell Dow*, the Court stated that it violates "congressional intent to provide a private federal remedy for the violation of the federal statute."[72] Since that time, courts have more or less uniformly rejected implied causes of action. For example, in *Alexander v. Sandoval*,[73] the Supreme Court held that it was the judiciary's task only to enforce federal rights of action created by Congress, saying that "courts may not create [a cause of action] no matter how desirable that might be as a policy matter, or how compatible with the statute."[74]

2. Modern interpretation after *Merrell Dow*

The lower courts were justifiably confused after the Supreme Court's attempts at clarification. All circuits agreed that the federal courts would continue to have jurisdiction where federal law created the plaintiff's cause of action.[75] However, with regard to the *Smith* category of federal question cases, courts have acted with little consistency as to what may constitute a substantial federal question. There were many possible positions that could be supported with

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reading of federal question jurisdiction under § 1331. The *Merrell Dow* holding would seem to go against the congressional intent of the federal question statute.

70. *Merrell Dow*, 478 U.S. at 825–27 (Brennan, J., dissenting).

71. *See* Cort v. Ash, 422 U.S. 66 (1975) (laying out a test for when there is an implied private cause of action, focusing on congressional intent).

72. *Merrell Dow*, 478 U.S. at 812.

73. 532 U.S. 275 (2001).

74. *Id.* at 286–87. There may be cause to question this conclusion, however, given that both implied private causes of action and substantial federal questions rely on congressional intent to divine when Congress wanted to entrust certain things deemed especially important to the federal courts. The jurisdictional result is the same, although the nuances are not. Substantial federal questions leave a lot more state law intact than an implied cause of action.

75. Indeed, the majority of substantial federal questions continue to be those where a federal statute creates the cause of action. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 821 (1988).

some amount of legitimacy by the contradictory language of the *Merrell Dow* decision. One thing is strikingly clear about the federal courts' treatment of substantial federal questions post-*Merrell Dow*. Many decisions choose to cite the exact same language from the *Smith* and *Merrell Dow* decisions, but they come to very different conclusions.

a. reincarnation of American-Well Works

Some courts have said that while a *Smith* test exists in theory, only Congress can decide when something is substantial enough to confer jurisdiction. This approach derives directly from language in *Merrell Dow* that Congress's decision not to expressly create a federal cause of action is tantamount to Congress saying that the federal interest involved is not substantial.[76] While masking itself in *Smith*-like substantiality language, this approach essentially erases seventy years of federal question precedent and reinstates the *American Well Works* test that a case arises under the law that creates the cause of action.[77]

The Eleventh Circuit took this approach in *Jairath v. Dyer*.[78] After a lengthy discourse about the availability of federal jurisdiction for substantial federal questions, the court quoted large portions of *Merrell Dow* for the proposition that without a federal cause of action, there essentially was no federal question.[79] *Jairath* is especially interesting considering that the court was interpreting a portion of the Americans with Disabilities Act that did in fact

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76. *Merrell Dow*, 478 U.S. at 814.

77. Some courts have not tried to mask the fact that they read *Merrell Dow* to eviscerate the *Smith* test. *See, e.g.*, Zubi v. AT&T Corp., 219 F.3d 220, 223 n.5 (3d Cir. 2000) (stating in dicta that § 1331 does not include jurisdiction "where Congress has determined that there should be no private cause of action for violation of the federal law"); PCS 2000 LP v. Romulus Telecomms., Inc., 148 F.3d 32, 35 (1st Cir. 1998) (stating that there must be a federally cognizable cause of action because "'the presence of [a] federal issue as an element of [a] state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system'" (alteration in original) (quoting *Merrell Dow*, 478 U.S. at 814)); Guckin v. Nagle, 259 F. Supp. 2d 406, 412 (E.D. Pa. 2003) (holding that a private cause of action is a prerequisite for finding federal question jurisdiction).

78. 154 F.3d 1280 (11th Cir. 1998).

79. *Id.* at 1283–84.

provide certain federal causes of action.[80] Had the plaintiff been seeking an injunction, instead of damages, there would have been no question that federal question jurisdiction existed because the statute created a federal cause of action for an injunction.[81]

Similarly, the Tenth Circuit, in *Nicodemus v. Union Pacific Corp.*,[82] refused to exert jurisdiction over a case dealing with a federally created railroad right of way.[83] The court first acknowledged the existence of federal question jurisdiction for a "substantial[ly] disputed question of federal law."[84] However, the court then said that, despite the federal interest in what became of the right of way, the absence of congressional intent to provide a federal forum is "fatal" under *Merrell Dow*.[85]

The problem with any test that finds federal jurisdiction only where there is a federally-created cause of action is that it necessarily

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80. *Id.* at 1283.

81. *Id.* There is some support for the argument that there should be subject matter jurisdiction over statutes that create a cause of action, even if the litigant does not rely particularly on that portion of the cause of action. Fermin v. Moriarty, No. 96 Civ. 3022 (MBM), 2003 U.S. Dist. LEXIS 13,367 (S.D.N.Y. Aug. 4, 2003); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2.3 (4th ed. 2003); *cf.* Ayres v. Gen. Motors Corp., 234 F.3d 514 (11th Cir. 2000) (finding subject matter jurisdiction, because, among other things, federal RICO laws do create a cause of action, even though the plaintiff relied on Georgia RICO law that does not create the cause of action).

However, *Jairath* stands as direct authority against such a proposition. *See* 154 F.3d at 1283–84 (finding that even though the Americans with Disabilities Act creates a cause of action for an injunction, the fact that it does not create a cause of action for damages is fatal to the claim of federal jurisdiction). This seems like the stronger argument, given that Congress's intent is subverted just as much, if not more, where it has made the intentional choice not to create a federal cause of action for certain portions of a statute —expressio unius est exclusio alterius.

It is completely rational to distinguish between the two cases on the basis of congressional intent. However, it is difficult to argue that the goals of federal question jurisdiction are served by distinguishing between the two cases. For example, if there are federal interests in adjudicating an injunction under the Americans with Disabilities Act, it is not clear why there is less of a federal interest where damages were at stake.

82. 318 F.3d 1231 (10th Cir. 2003).

83. *Id.* at 1233.

84. *Id.* at 1236.

85. *Id.* at 1238. It should be noted however that the court did go on to discuss one additional factor in its decision factoring in favor towards state court jurisdiction, that is, that the cause of action was essentially a property and tort question, issues it considered "traditionally relegated to state law." *Id.*

ignores the fact that *Merrell Dow* does not explicitly overrule *Smith*. Further, the footnote in the majority opinion at least implicitly sanctions *Smith* jurisdiction by stating that there are some issues important enough to merit jurisdiction even without a federal cause of action.[86]

This position is especially untenable in light of the Supreme Court's post-*Merrell Dow* decisions in *Christianson v. Colt Industrial Operating Corp.*[87] and *City of Chicago v. International College of Surgeons*,[88] which both referred to a test for substantial federal questions that went far beyond *American Well Works*.[89] However, it appears that some courts are still commonly applying this test.

While it is intriguing that some courts still use the *American Well Works* language, it is more important to realize that courts are hesitant to find substantial federal questions where there is no indication that Congress felt the issue was deserving of federal resources. As a result, a good number of the cases that "arise under" the laws of the United States do so only because Congress expressly decreed it.[90]

b. ad-hoc substantiality test

Despite such concerns, most courts read federal question jurisdiction to go beyond federal causes of action, even after *Merrell Dow*. Such a flexible test is implicitly encouraged by *Merrell Dow*;[91] indeed, this is the case by case determination of the nature of the federal issue that Justice Brennan predicted would result from the majority's formulation of the rule in *Merrell Dow*.[92]

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86. Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 814–15 n.12 (1986).

87. 486 U.S. 800 (1988).

88. 522 U.S. 156 (1997).

89. Both cases state that there is federal question jurisdiction where "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *See Christianson*, 486 U.S. at 808; *City of Chicago*, 522 U.S. at 163–64.

90. *See Merrell Dow*, 478 U.S. at 808.

91. *Id.* at 814 (recognizing the need for "careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction").

92. *Id.* at 821 n.1 (Brennan, J., dissenting). Some courts explicitly recognize that they are doing a sort of balancing of the relevant factors. The Ninth Circuit stated that its test was a weighing of a "complex group of

On the other hand, *Merrell Dow* also counsels that such cases must be limited.[93] The First Circuit recognized this when it said:

> The Supreme Court has periodically affirmed [substantiality as a basis for federal question jurisdiction] in the abstract, occasionally cast doubt upon it, rarely applied it in practice, and left the very scope of the concept unclear. Perhaps the best one can say is that this basis endures in principle but should be applied with caution and various qualifications.[94]

It is this tension with which the lower courts have struggled. Most courts have come to accept that the federal courts have jurisdiction over substantial federal questions, but the courts are far from uniform regarding what they consider substantial.

When a court finds a substantial federal question, it has generally found two factors to be present in the case: the federal question both plays a significant role in the litigation *and* implicates some larger federal interest. If both are not present to some degree, it is not likely that the court will find a substantial federal question.[95] Because of the flexibility of the test, it is up to litigants to suggest that a particular combination of these factors and rationales for extending jurisdiction either cuts in favor of or against federal question jurisdiction.

i. dominance of the federal question in the present litigation

The first factor examines the importance of the interpretation of federal law to the litigation before the court. This approach derives support from the Court's statement in *Merrell Dow* that the federal

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factors." *See* Lippitt v. Raymond James Fin. Servs. Inc., 340 F.3d 1033, 1042–43 (9th Cir. 2003). However, most courts do this more subconsciously.

93. *Merrell Dow*, 478 U.S. at 813–14 ("What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936))).

94. Almond v. Capital Props., Inc., 212 F.3d 20, 23 (1st Cir. 2000) (citations omitted).

95. *See, e.g.*, D'Alessio v. N.Y. Stock Exch., 258 F.3d 93, 103–04 (2d Cir. 2001) (finding federal question jurisdiction because (a) the case could not be resolved without interpretation of the scope of defendant's duties under federal law and (b) the case concerned the securities industry, a matter of "intense federal concern").

issue "must be in the forefront of the case and not collateral, peripheral, or remote."[96]

Of course, the federal question cannot be merely frivolous; there must be some federal question for the court to litigate.[97] However, courts will often weigh how determinative the federal issue is going to be. Therefore, federal question jurisdiction would be appropriate where the case turns on the federal question, or where the person's right to recover will succeed on one interpretation of the federal issue and fail under another.[98]

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96. *Merrell Dow*, 478 U.S. at 813 n.11 (quoting Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 470 (1957) (Frankfurtur, J., dissenting)). Note that this is different from the constitutional power of Congress to add jurisdictional provisions in a federal statute; for example, as shown above, the federal question in most cases brought under the Air Transportation Safety Act would be quite peripheral. *See supra* note 22 and accompanying text.

97. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (finding no federal jurisdiction where the federal question raised is frivolous or foreclosed by a prior decision).

98. *See, e.g.*, Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033 (9th Cir. 2003) (dismissing for lack of jurisdiction because the plaintiff's claim under California's Unfair Competition Law did not require that he prove a violation of any federal law); Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552 (4th Cir. 1999) (holding that subject matter jurisdiction was lacking because the reasonableness of an easement could be determined without regard to the federal standard). *But see, e.g.*, Battle v. Seibels Bruce Ins. Co., 288 F.3d 596 (4th Cir. 2002) (finding federal jurisdiction where the resolution of the state contract dispute would turn on whether a federal insurance statute in question had an implied good faith requirement); U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 391 n.3 (3d Cir. 2002) (noting that the federal question jurisdiction was appropriate because had they decided the federal issue the other way, the case would have been dismissed); D'Alessio v. N.Y. Stock Exch., 258 F.3d 93, 101–02 (2d Cir. 2001) (finding federal question jurisdiction because the case could only be resolved by interpreting federal securities law).

The notion of using this "construction" test is somewhat disturbing. Cases that weigh either the "outcome determinative" or the "essentially foreclosed" nature of the question often cite or refer to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824), which said that federal question jurisdiction is constitutional if the "right . . . may be defeated by one construction of the . . . law of the United States, and sustained by the opposite construction." *Id.* at 822. This is troubling given that this test originally described the broader constitutional test for federal question jurisdiction, not the statutory test. While the two tests have similar goals, the constitutional test is substantially broader, suggesting that this might not be an adequate ground for § 1331 jurisdiction. But no court has shirked away from this factor on that basis.

The Supreme Court has indicated some support for this interpretation. The Court, in *Christianson v. Colt Industries Operating Corp.*,[99] said that where a plaintiff's right to relief is supported by alternate theories, each one of those theories must involve a substantial federal question.[100] The Court essentially held that if each theory does not have a substantial federal question, then the outcome may very well not turn on federal law at all.[101]

Where this is the main factor in finding jurisdiction, litigants are appealing to the efficient use of judicial resources rather than to the protectionist purposes of federal question jurisdiction. As seen above, litigants are arguing that because the federal courts cannot take every case, they should take cases where their decisions will affect the outcomes, whether the cases will further any given federal policy or not. A plaintiff who wants to avoid federal court jurisdiction therefore will phrase the claim in ways that make federal law seem peripheral.

ii. nature of federal policy implicated in federal question

While this first factor examines the importance of the federal question to the parties in the lawsuit, the second examines the importance of the federal question, not to the litigants themselves, but to any federal interests involved. This is taken explicitly from the *Merrell Dow* majority's footnote, which promotes use of the nature of the federal interest to determine whether a federal question

99. 486 U.S. 800 (1988).

100. *Id.* at 810. *But see* Bellsouth Telecomms., Inc. v. MCImetro Access Transmission Servs. Inc., 317 F.3d 1270, 1278 (11th Cir. 2003) ("The resolution of each issue need not depend completely upon an interpretation of federal law.").

101. One court has fashioned a three-pronged balancing test for determining whether the federal question is prominent enough in the case to confer jurisdiction; the test makes the prominence of the federal issue the only real consideration. *See* Howery v. Allstate Ins. Co., 243 F.3d 912, 917 (5th Cir. 2001). The three prongs articulated by the Fifth Circuit are as follows: (1) the federal right must be "an essential element of the state claim;" (2) "interpretation of the federal right is necessary to resolve the case" and the interpretation will affect the outcome of the case; and (3) "the question of federal law is substantial." *Id.* Although this third prong would appear to throw the court into an endless spiral, it appears from the opinion that by substantial, the court meant how predominant the federal issue was within the case. *Id.* at 919.

is substantial.[102] Courts recognize that limited federal judicial resources should be spent on cases that have larger federal ramifications—either that they protect interests that the federal government has deemed substantial or that they further the purposes of federal question jurisdiction.

Of course, determining the nature of a federal question itself creates problems akin to substantiality. In *Merrell Dow*, the majority distinguished *Smith* and *Moore* by drawing a distinction between deciding the constitutionality of a state law and interpreting a federal statute as the standard in a state negligence claim.[103] The first was deemed to be substantial, while the second was not. However, subsequent decisions have not strictly followed the distinction between constitutional and statutory questions.

There are several federal interests that could be implicated in any case. The first is a general interest in a "correct" interpretation of federal law. This presumes that the federal courts are uniquely situated, by virtue of their special expertise in federal law, to protect federal interests that Congress has deemed significant.[104] The presumption is that federal courts will deal with so many complicated cases in the area of, for example, ERISA, that they will naturally interpret ERISA better than a state judge who may see ERISA rarely.[105] There is also a presumption that an elected state judge will be unlikely to eschew state policies and further the federal goal Congress intended.[106] Finally, there is a federal interest in

102. Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 814 n.12 (1986).

103. *Id.* For criticism of drawing the line at constitutionality, see Note, *supra* note 69, at 2288. The author points out that the interpretation of statutes may have far-reaching effects, while striking down a state law as unconstitutional may affect only a small proportion of people. *Id.* However, it seems relatively safe to say that there is a stronger federal interest in *most* constitutional issues than there is in *most* questions of statutory interpretation.

104. *See* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1774 (1992). However, this notion has been criticized; from the very beginning, our federal court system has invited state courts to play a role in interpreting federal law. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

105. *See Merrell Dow*, 478 U.S. at 826–27.

106. State court judges are bound by federal law just as federal court judges are, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987), and several Supreme Court cases have expressed confidence in the ability of state court judges to responsibly protect federal policies. *See, e.g.*, Miller v. Fenton, 474 U.S. 104,

having a uniform system of federal law, as opposed to fifty different state court interpretations.[107] If any of these issues are of special concern in a case, the court may be more likely to take jurisdiction.

In addition, the federal government at times has an interest in litigation, even in the absence of a specific interest in the interpretation of the law itself. For example, courts have found substantial issues of federal law where there is a case implicating foreign relations.[108] There are also cases finding a substantial federal question where the United States or its agencies are a party to the litigation,[109] or where some other federal program or interest is

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117 (1985). However, there is a historical concern that state court judges will not sufficiently protect federal policies. *See* Bradley W. Joondeph, *Exploring the "Myth of Parity" in State Taxation: State Court Decisions Interpreting Public Law 86-272*, 13 WASH. U. J.L. & POL'Y 205, 214–16 (2003).

107. *See, e.g.*, U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 391 (3d Cir. 2002). *But see Merrell Dow*, 478 U.S. at 816 (finding that the availability of United States Supreme Court review cut against this particular justification for finding jurisdiction). Several courts have used this as a justification for narrowing the range of federal question jurisdiction; they presume that if the state court's interpretation of federal law turns out to be unpalatable, the Supreme Court can always review the case and reverse the state court's interpretation. *See id.* at 816 n.14. While this argument is theoretically true, the limited number of cases the Supreme Court hears, and the even more minimal number of those cases that originate in state court, make it unlikely that the Supreme Court will fix any given state court interpretation of federal law, even if it disagrees with it. *See* Note, *supra* note 69, at 2286.

108. *Compare* Pacheco de Perez v. AT&T Co., 139 F.3d 1368 (11th Cir. 1998) (finding a substantial federal question because the case implicated the federal common law of foreign relations), *with* Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001) (finding that a state tort claim did not raise a substantial federal question merely because foreign relations might be implicated). *See generally* Erin Elizabeth Terrell, *Foreign Relations and Federal Questions: Resolving the Judicial Split on Federal Court Jurisdiction*, 35 VAND. J. TRANSNAT'L L. 1637 (2002) (describing the current split in the circuits regarding whether cases implicating foreign relations necessarily raise a federal question).

109. *See* Almond v. Capital Props., Inc., 212 F.3d 20 (1st Cir. 2000) (finding that, on a spectrum between *Smith* and *Moore*, *see supra* note 63, this case was substantial because the case turns on a contractual obligation to the United States); Montana v. Abbot Labs., 266 F. Supp. 2d 250 (D. Mass. 2003) (holding that subject matter jurisdiction existed because the case required interpretation of a contract to which the United States was a party). There is a separate statute, 28 U.S.C § 1442(a)(1) (2000), providing automatic jurisdiction in cases where a federal official or agency is a party to the suit. However, in situations where the federal government may not be a direct party

implicated.[110] Other courts have found a substantial federal question where two conflicting federal interests or rights must be weighed.[111] While none of these fall under a technical definition of arising under a federal law, there is little doubt that a federal court is more likely to find substantiality where there is some federal interest, even where there is essentially no federal law involved.

iii. substantiality of a state's interests

The most important factor that will cut against federal question jurisdiction is a state's interest in the case. The federal courts realize that decisions regarding jurisdiction require an eye towards comity, because if the federal question is deemed to be substantial, several state court issues might also come under the court's jurisdiction.[112] The reasons why a state may have a particular interest in litigation

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to the suit, litigants can still argue that there is still a substantial federal question under this line of cases.

110. *See, e.g.*, BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1278 (11th Cir. 2003) (considering the fact that the case implicated the decision of the Public Service Commission, a federal agency, in granting jurisdiction); D'Alessio v. N.Y. Stock Exch., 258 F.3d 93 (2d Cir. 2001) (holding that subject matter jurisdiction existed because regulation of the sale of securities on the New York Stock Exchange was important to our nation's economy); Olguin Arroyo v. State Election Bd., 30 F. Supp. 2d 183 (D.P.R. 1998) (finding that the relationship between Puerto Rico and the United States is a substantial federal issue).

111. *See, e.g.*, Dixon v. Coburg Dairy, Inc., 330 F.3d 250 (4th Cir. 2003) (asserting federal question jurisdiction where a person was fired for putting a Confederate flag on his tool box after an African-American employee complained about the flag, because it involved a decision between one person's First Amendment right to "free speech" and another person's statutory right to a harassment-free workplace); *Higgins*, 281 F.3d at 391 (stating that the clash between the Federal Rules of Civil Procedure and a decision of the Court of Appeals in the area of admiralty is substantial, both because of the importance of the Federal Rules, as well as the need for a uniform system of admiralty).

112. *See Merrell Dow*, 478 U.S. at 809 n.5. See *infra* Part IV.B for a discussion of the rules regarding supplemental jurisdiction over state claims that accompany federal question claims. It is sufficient here to mention that supplemental jurisdiction rules allow a vast majority of related state claims to be heard by the federal court.

The other place where this rule is apparent is in the context of preemption, which pays significantly more attention to the state interests involved than does the pure substantiality test. *See infra* Part III.D.

are similar to those of the federal government. The state has an interest in interpreting its own law, because the state wants to protect the interest its legislature desired to advance by passing the law.[113] This is especially true where there are novel or complex issues of state law.[114] Furthermore, a case may implicate state interests, i.e., the State or its agencies may be a party in interest.[115]

Where these interests are present and there is no strong federal interest, the case should be remanded.[116] Courts have said that it is a greater evil for a federal court to assume jurisdiction over a case it should not have, than for a state court to hear a case that could have been heard in federal court.[117] This reflects a general preference for state courts in close cases.[118] One reason for this is that when a state court hears an issue of federal law, it is subject to the review of the U.S. Supreme Court. On the other hand, if a federal court speaks out on a state law issue, the state court cannot review the federal court's decision in *that* case; the only recourse is to refuse to follow that precedent in future cases.

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113. *See generally* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381 (explaining the sensitivity to state interests necessary where the federal courts interpret state legislation).

114. In recognition of this, a federal court may decline to exert jurisdiction over supplemental state law claims where they raise complex or novel areas of state law. *See infra* Part IV.D.1.

115. This gets into the question of sovereign immunities in federal court. If a state is a party to the suit, Eleventh Amendment problems will be more of a barrier to suit in federal court than federal question jurisdiction will be.

116. *See, e.g.* Quintal v. New Eng. Reg'l Council of Carpenters, No. 03-10544-RWZ, 2003 U.S. Dist. LEXIS 16,386, at *4 (D. Mass. Sept. 18, 2003) (remanding because of lack of jurisdiction; while the plaintiff claimed that the case turned on a constitutional question related to federal income tax, the court said that "there is simply no federal interest" in adjudicating the argument between an employer and employee).

Litigants need to keep this doctrine separate from abstention doctrines. Abstention is not jurisdictional, but does appeal to a state's interest in a case to argue that a court should not hear a case. Under abstention, the litigant argues that a state's interests are so great that the court should abstain from hearing the case, *even though there is jurisdiction*. *See generally* MULLENIX ET AL., *supra* note 16, §13.02 (discussing abstention).

117. *See* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 323 (1993).

118. *See id.* at 322–24.

3. Well-pleaded complaint rule

This is really only half of the § 1331 rule, because all cases that pass the substantial federal question test above will not necessarily be afforded federal jurisdiction. There is a judicially-created requirement that there will be no federal question jurisdiction under § 1331 unless the federal question arises in the plaintiff's "well-pleaded complaint."[119] The case cited for this proposition is *Louisville & Nashville Railroad Co. v. Mottley*.[120] In *Mottley*, the plaintiffs claimed that the defendant had violated a contract by refusing to provide the plaintiffs with lifetime passes to ride the railroad.[121] They believed that the defendant would claim that they cancelled the Mottleys' passes to comply with a federal law prohibiting such passes. Therefore, the Mottleys argued in their complaint that this defense was not valid.[122]

The Court said that there was no federal question jurisdiction. The plaintiff's "well-pleaded" complaint would contain only allegations that went to the contract dispute, and therefore the federal question did not really "arise" until the defendant explained in its answer why it had failed to honor the lifetime passes.[123] The Court said that this was not enough. A federal court will only have federal question jurisdiction when a substantial federal question appears on the face of the *plaintiff's* claim.[124]

There are several rationales cited in favor of this rule. The first rationale commonly asserted is that jurisdiction can be determined from the outset; the court does not need to wait until the defendants have filed their answers to determine jurisdiction.[125] Second, the rule

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119. 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, 662 (1987).

120. 211 U.S. 149 (1908).

121. *Id.* at 150.

122. *Id.* at 153.

123. *Id.* at 152–53.

124. *Id.*

125. Technically, the court may not even be able to compel an answer unless it has jurisdiction to do so. *See* Ragazzo, *supra* note 117, at 318.

Some may question the sincerity of this argument given the fact that the current test puts the decision about jurisdiction in so much doubt. If the goal was truly to determine jurisdiction from the beginning of the litigation, the rule would be much simpler and more clear-cut. On the other hand, there is no reason to exacerbate the uncertainty problem by waiting for defendants to

supposedly allows the plaintiff to remain the master of the complaint, making jurisdiction a product only of what the plaintiff decides to put in the complaint.[126] Finally, in a pragmatic sense, the rule limits the number of cases that can be brought in federal court. While this is not necessarily a "good" rationale the Supreme Court has said that the well-pleaded complaint rule does limit the number of cases removable to federal court, which expresses a "'[d]ue regard for the rightful independence of state governments'" in interpreting their own law.[127]

However, most of the rationales for the rule are rather weak. In fact, when considered in light of the purposes of federal question jurisdiction—that is federal court expertise, comity, and protective interest in federal law—there is no reason why these purposes would not be served just as well by federal defenses as by federal claims.[128] That said, no court has expressed any doubt about the future of the well-pleaded complaint rule.

The rule, then, is rather simple: a court can find a substantial federal question only in the plaintiff's well-pleaded statement of her own claim.[129] Anything that the defendant may add in the answer is not relevant to jurisdiction.[130] Even where the plaintiff anticipates in the complaint any defense that the defendant may raise or where the parties agree that the only issue of contention is the validity of a federal defense, this still does not satisfy the requirements of the well-pleaded complaint rule.

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choose their defense. For a good discussion of the pros and cons of the well-pleaded complaint rule, see CHEMERINSKY, *supra* note 81, § 5.2, and Redish, *supra* note 104, at 1794–97.

126. Of course, the plaintiff is only the master of the complaint to a certain extent. For example, if the plaintiff wants to include the federal defense, the court will still not consider this for purposes of finding jurisdiction.

127. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 832 (2002) (alteration in original) (quoting Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109 (1941)).

128. Doernberg, *supra* note 119, at 663. One possible justification that is not often mentioned is that the plaintiff has an automatic check on jurisdiction in that non-meritorious claims will likely be dismissed. On the other hand, there is no similar mechanism to check the action of the defendant; the plaintiff ordinarily does not move to dismiss a particular defense, but merely disproves it at trial. *See* Tristin K. Green, *Complete Preemption—Removing the Mystery from Removal*, 86 CAL. L. REV. 363, 369 (1998).

129. *See Mottley*, 211 U.S. at 152–153.

130. *See id.*

There are a few permutations of the rule that should be mentioned. The first is that a plaintiff may not avoid the effect of the rule by filing a declaratory judgment.[131] For example, in the *Mottley* case above, the defendants could not have filed a lawsuit asking the federal court to declare that their actions were warranted under the federal statute.[132] This would only serve to circumvent the well-pleaded complaint rule, because the Mottleys could not have brought that suit.[133]

The rule is not always clear-cut because either party can ask for a declaratory judgment as to its rights or responsibilities, for example, under a contract.[134] Therefore, not all litigants requesting declaratory relief are immediately prohibited from federal question jurisdiction. The question for courts, then, is not *who* is bringing the suit, but rather, *what form* it would take as a coercive lawsuit, and whether the federal question is really brought as a claim for relief or as a defense to liability.[135] For example, in *Household Bank, F.S.B. v. JFS Group*,[136] the plaintiffs brought a declaratory suit against certain people who had opted out of a class action suit against the plaintiffs.[137] The class action suit was brought under the Truth in Lending Act.[138] The court found that there was jurisdiction, based on the fact that the plaintiffs in the declaratory suit *could have been* plaintiffs in a coercive suit against those who had brought the declaratory suit.[139]

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

132. *Id.*

133. The Declaratory Judgment Act, 28 U.S.C. § 2201 (2000), the statute that permits litigants to request that a court declare the rights of the parties, cannot serve as a federal question either. The statute is merely procedural and does not confer any substantive rights. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

134. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 19 n.19, 20 n.20 (1983).

135. Another way this is often phrased is whether the suit could have been brought if there was no declaratory judgment remedy. *Skelley Oil Co.*, 339 U.S. at 671; *see also* Robin E. Dieckmann, *Federal Jurisdiction Over Declaratory Judgment Suits—Federal Preemption of State Law*, 1986 U. ILL. L. REV. 127.

136. 320 F.3d 1249 (11th Cir. 2003).

137. *Id.* at 1251–52.

138. *Id.*

139. *Id.* at 1257–58.

In addition, when looking to a plaintiff's complaint, a court may only look at the *original* plaintiff, not at all parties in an offensive position in the suit, i.e., counterclaimants or cross claimants. In 2002, in *Holmes Group, Inc., v. Vornado Air Circulation Systems, Inc.*,[140] the plaintiff filed a complaint with the U.S. International Trade Commission (ITC) alleging that Holmes' product infringed on its patent.[141] Holmes then filed a claim seeking a declaratory judgment stating that it had not infringed on Vornado's patent, and sought an injunction to stop Vornado from accusing it of trade-dress infringement in any public materials.[142] Vornado then filed a counterclaim, essentially duplicating the complaint it had filed with the ITC.[143]

The Court held that even when the defendant takes the offensive position by filing a counterclaim, a federal claim stated therein is not sufficient to confer federal question jurisdiction on the court.[144] The Supreme Court was concerned that this would take control over jurisdiction out of the hands of plaintiffs.[145] The Court was also concerned that this would undermine the well-pleaded complaint rule as a "'quick rule of thumb'" for determining (and limiting) jurisdiction.[146]

Although there are very specific laws related to patent jurisdiction, later cases confirmed that a counterclaim can never

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140. 535 U.S. 826 (2002).

141. *Id.* at 827–28.

142. *Id.* at 828. It should be mentioned that even though this arose under the jurisdictional statute providing exclusive federal jurisdiction for patent claims, the standards are the same as under § 1331. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988) (stating that "[l]inguistic consistency" requires that the same test apply to jurisdiction arising under the patent law as jurisdiction arising under any other law of the United States).

143. *Holmes*, 535 U.S. at 828. This was a compulsory counterclaim under Rule 13(a) because the claim "ar[ose] out of the transaction or occurrence" as the original claim. *See* FED. R. CIV. P. 13(a).

144. *Holmes*, 535 U.S. at 831.

145. *Id.* at 826, 831–32.

146. *Id.* at 832 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 11 (1983). Again, this seems somewhat odd. Normally courts do not choose a rule only because it is easy to apply, and certainly, in the area of federal question jurisdiction, courts have foregone other quick rules of thumb, i.e., "a claim arises under the law that creates the right of action." *See supra* Part III.C.1.

serve as the basis of jurisdiction, even in non-patent litigation.[147] Therefore, the federal courts only have federal question jurisdiction where the plaintiff's "well-pleaded complaint" raises substantial federal questions.[148]

4. The effect of § 1331 and the well-pleaded complaint rule on litigants

The rule, then, is that there is federal jurisdiction where a well-pleaded complaint reveals a claim brought under a federal statute that either creates a cause of action or raises a substantial federal question. The movement of the courts towards this more flexible reading of federal question jurisdiction impacts litigants greatly. First, with such a great variety of factors, it is very difficult for the parties to predict whether a particular court will find any particular federal issue "substantial."[149] This means that fighting jurisdiction is

147. *See, e.g.*, Integra Bank, N.A. v. Greer, No. IP 4:02-CV-244 B/H, 2003 U.S. Dist. LEXIS 11,580 (S.D. Ind. June 26, 2003) (applying the rule to mortgage foreclosure); United Mut. Houses, L.P. v. Andujar, 230 F. Supp. 2d 349 (S.D.N.Y. 2002) (applying the rule in a landlord-tenant dispute). The rule in *Holmes* has also been expanded by at least one court to cover third party claims. *See* Adkins v. Ill. Cent. R.R. Co., 326 F.3d 828, 836 (7th Cir. 2003).

148. One possible impact of this case is that both the patent infringer and the patent owner will have strong motivation to try to file their patent claim before the other one can. This problem arises because of the unique appeal process of appeals in patent infringement cases and the advantages of litigation in the federal circuit court versus the federal district court. For more information on forum shopping and patent infringement after *Holmes*, see Christian A. Fox, *On Your Mark, Get Set, Go! A New Race to the Courthouse Sponsored by Holmes Group, Inc. v. Vornado Air Circulation System, Inc.*, 2003 BYU L. REV. 331.

149. Some have expressed concern with such an ad-hoc process for determining jurisdiction. *See* Note, supra note 69, at 2280. This is especially true because *Smith* cases are overturned on appeal with greater frequency then the general rate of reversal on appeal. *See id.* If an appeals court reverses a decision based on lack of jurisdiction, anything else that the lower court may have decided becomes moot. *See id.* This can lead to significant time and effort spent on issues that the parties will have to re-litigate in state court. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818–19 (1988) (discussing the waste to litigants of having such an unpredictable rule of federal question jurisdiction).

On the other hand, the fact that *Smith* cases make up such a small portion of the federal docket, and that such loose tests are constantly applied in other areas of the law (e.g., the "reasonable" test for negligence), cut against any such problem. *See* Note, *supra* note 69, at 2280.

a much more costly and lengthy process, and the party who wants to be in state court (often the plaintiff) must take this into account. Normally, if the defendant removed a case to federal court, the plaintiff would need to weigh the costs of fighting for a remand against two things—the probability of success on the jurisdiction question and the advantage gained by staying in state court. By raising the length and cost of litigation, and by throwing the probability of success into question, the current test means that the advantage of litigating in federal court must be significant before it will be worthwhile for the plaintiff to challenge jurisdiction.

The second result is that a plaintiff cannot avoid litigation merely by omitting federal causes of action, as the plaintiff could under the *American Well Works* test. This puts more control in the hands of the defendant to argue that federal questions exist.

This leads to a significant advantage for defendants. A defendant may gain some advantage because the test takes longer and is more costly to litigate. Defendants can also have an advantage because it becomes less likely that plaintiffs will challenge jurisdiction at all. Finally, there is an advantage to defendants because the test will land many more cases in federal court, which defendants tend to prefer.

In light of this, what can litigants do? This question requires examination of the doctrine of "artful pleading." The term artful pleading is used by courts in several contexts without any precise definition, but it generally refers to any attempt by a plaintiff to take advantage of its initial control over the pleading to characterize its claim in state law terms, with the goal of avoiding federal jurisdiction. For the purposes of this section, that means taking one's claim and phrasing it so as not to raise any substantial federal questions.[150]

Where a plaintiff has chosen to articulate its claims in state law terms, but it is clear that resolution of the case will involve federal law to some extent, the court will have to sort out whether the issue deserves federal resources. Courts have often repeated that "a plaintiff may not defeat removal by omitting to plead necessary

150. It oversimplifies things greatly to say that plaintiff will always want to be in state court. Because most of the cases in this area arise in that context, the focus is on that strategy here. However, most of these strategies could be used in reverse by the plaintiff who wanted to artfully plead *into* federal court.

federal questions in a complaint."[151] One court called the artful pleading doctrine "a useful procedural sieve to detect traces of federal subject matter jurisdiction in a particular case."[152]

The problem is determining how much power the court has to "alchemize a state claim into a federal claim" when the plaintiff has chosen not to do so.[153] The Supreme Court has said that jurisdiction cannot be sustained on a theory that the plaintiff has not advanced.[154] However, in reality most courts use the plaintiff's complaint as a starting place. From there, the courts (at the defendant's urging) go on to look for the presence of any of the factors that apply that can make a federal question "substantial" — whether federal law is going to be important to the plaintiff's claim or whether other federal interests are implicated. This system gives very little deference to the plaintiff's own characterization of the case, other than perhaps for the fact that the plaintiff gets the first chance to characterize the case. "Although a court should give some deference to a plaintiff's chosen forum, 'it should not allow a plaintiff to deny a defendant a federal forum simply by labeling his federal issues as state causes of action.'"[155]

There is a limit however. If the plaintiff can possibly state its cause of action without reference to federal law, the court should not force it to rephrase its cases just to strengthen its claim. Where the difference is marginal, and the plaintiff believes that it has a better chance in state court than in federal court with federal claims, the plaintiff should not have to plead federal causes of action. Only where the plaintiff cannot possibly state a claim without federal law should the federal courts step in and take jurisdiction.[156]

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151. *Franchise Tax Bd.*, 463 U.S. at 22.

152. Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1041 (9th Cir. 2003).

153. *Id.* at 1042.

154. *See* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 809 (1986).

155. Olguin Arroyo v. State Election Bd., 30 F. Supp. 2d 183, 186 (D.P.R. 1998).

156. For example, in *Lippitt*, 340 F.3d at 1033, the Court rejected defendant's accusation of artful pleading. The plaintiff did not have to rely on federal law to make a claim, even though it may have made his claim stronger. The court distinguished *Lippitt* from a case where the court did find artful pleading. In *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998), the court said that jurisdiction was proper where plaintiff sued NASDAQ for breach of contract after they de-listed her

How do plaintiffs artfully plead? A plaintiff trying to avoid federal court must both avoid federal causes of action and avoid raising substantial federal questions. The above section laid out the various claims a court is likely to consider substantial, and in light of these categories, the plaintiff must avoid claims that center around such substantial questions. The plaintiff must also take care to highlight any interest the state may have in adjudicating the suit.

Given all the uncertainty regarding the various factors and tests that are currently applied, plaintiffs trying to artfully plead have to walk a fine line; they must take care not to plead federal questions too pervasively, but still take advantage of any provisions in the federal law that may be advantageous to their cases. The question of how much substantive federal law a plaintiff can take advantage of while still staying in state court is very difficult.

However, it is important to see that even if the plaintiff is "caught" omitting a necessary federal question, it may still be to its advantage to plead federal questions sparingly. When a plaintiff articulates a claim in state law terms, and the defendant realizes that there may be a substantial federal question involved, the defendant is in a difficult place. In order to remove the case, the defendant will have to argue that without the federal law, the plaintiff's claim is rather weak, or in a way, that the plaintiff's claim will be much stronger under the federal law. The defendant is forced to make the plaintiff's argument. This is a somewhat uncomfortable position to have taken once the jurisdictional battle is over.

On the other hand, the plaintiff is still in a difficult position. By articulating the claim purely in state law terms, it risks several things. The plaintiff risks that the judge will believe it to be deceitful, and that the judge will more carefully scrutinize anything else it does. More importantly, it risks winning the battle but losing the war, i.e., remaining in state court with a case that is fatally weakened without resort to federal law.

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stock. Although the plaintiff had "carefully articulated" the breach of contract claim to avoid potential federal questions, the question of delisting of stocks is essentially controlled by federal law. *Id.* at 1212. Because proving a violation by NASDAQ would require proof that NASDAQ had violated federal securities law, the case would "turn on" federal law, and therefore, jurisdiction was proper. *Id.* In *Lippitt*, however, the plaintiff could be made whole without reference to federal law, therefore, there was no artful pleading.

In summary, the artful pleading of substantial federal question entails a strategic choice. The plaintiff must balance the advantages of federal law against the liabilities, and decide how much federal law is too much. In many cases, there will be nothing that the plaintiff can do to avoid federal jurisdiction, but in close cases, the plaintiff's choice of characterization may make a difference. All of these factors play into the plaintiff's original calculus. A plaintiff can take the original advantage in the federal question battle by carefully choosing the phrasing of the arguments.

5. The intersection of "substantial federal questions" and success on the merits

One important tactical point deserves a detour, that is, the tension between the substantiality of a federal question, and the success of the claim. Academically, these are two separate questions. But litigants and courts sometimes have trouble applying the distinction.[157] If done by the book, the court should look at the allegations in the complaint to see if they would raise a substantial federal question as alleged.[158] This should be made *independently* of "whether the claim ultimately [would] be held good or bad."[159] If the federal court finds jurisdiction, then it may consider whatever other motions may determine the *validity* of a claim. For example, it can then grant a summary judgment motion dismissing the claim. But if the federal court does not have jurisdiction, it must remand the case to state court for further consideration, and cannot make any statement on the merits of the case.

Part of the problem is that the issues of jurisdiction and of success on the merits are more interrelated than they may seem at first glance. Because a plaintiff cannot state a federal claim that is absolutely frivolous merely for the purpose of obtaining jurisdiction, the court does have to weigh the validity of the federal law claim even at the jurisdictional level. The purpose at that stage is to determine whether the federal claim is absolutely frivolous, and to

157. *See* Carlson v. Principal Fin. Group, 320 F.3d 301, 305–06 (2d Cir. 2003) ("Whether a federal court possesses federal-question subject matter jurisdiction and whether a plaintiff can state a claim for relief under a federal statute are two questions that are easily, and often, confused.").

158. Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913).

159. *Id.* at 25.

remand the case if it is found to be absolutely meritless.[160] However, the courts have held that the opposite is not true.[161] If plaintiffs want to plead so as to omit all potential federal issues and claims, they are permitted to, even if it is for the sole purpose of avoiding federal jurisdiction. This is true even if, without the federal claim, the claim is meritless and will be immediately dismissed.[162] The problem is that litigants sometimes get confused between the two, especially where plaintiffs are forced to plead so close to the lines so as to try to avoid federal court in areas of substantial federal control.

In some cases, confusion of the issue could lead to a substantial advantage to one of the two parties. If there is a potentially viable state claim, the defendant has a motivation to try to get the court to dismiss the case on summary judgment on the merits. It would end the litigation and make the issue *res judicata* in state court. On the other side, the plaintiff would prefer that the court dismiss based on lack of jurisdiction or remand, because this would not have the same preclusionary effects. Thus it is the responsibility of the party fighting the dual motion to remand/motion to dismiss battle to ensure that the court deals with the matters in the correct order. The burden for the motion to remand is merely to show that the case is not frivolous.[163]

D. Artfully Pleading in Areas of Potential Preemption

Another choice plaintiffs have is how to plead in areas of complete preemption. Preemption is probably the area of federal question jurisdiction that has most changed in recent years, and is potentially the area of greatest uncertainty. The general idea is that in some areas of the law, Congress has so completely taken over the regulation that state law claims and remedies no longer exist and no amount of artful pleading will allow the plaintiff to stay in state court.

The first important point is that there are various types of preemption. The first type of preemption is "conflict preemption."

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160. Bell v. Hood, 327 U.S. 678, 681–82 (1946).

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

162. *See supra* Part III.B (discussing artful pleading of only state law claims).

163. *See* Carlson v. Principal Fin. Group, 320 F.3d 301, 306–07 (2d Cir. 2003).

The basic premise of preemption follows from the Supremacy Clause of the Constitution.[164] When a federal court makes a law that is constitutionally within its power to make, any state law in conflict with that law is automatically void.[165] This is a conflict of substantive laws, meaning that it is not actually possible to comply with both federal and state law at the same time.[166] Conflict preemption is generally a defense.[167] A defendant who raises a statute that preempts state law, but only to the level of conflict preemption, will not be able to remove because of the well-pleaded complaint rule.[168]

The second type of preemption, called complete preemption, goes beyond the areas that actually conflict with state law.[169] Under the doctrine of complete preemption, a state's law may be void even though Congress has not taken any action that directly conflicts with state law in that area.[170] Complete preemption exists where Congress has taken some other step to preclude state regulation of a particular area.

The rationale for this is that Congress's intentions may be thwarted just as much where the states provide a remedy that Congress has chosen specifically not to provide, as where the state law is in direct conflict with federal law. Take for example the situation where Congress passes a statute permitting recovery of compensatory damages, but not punitive damages. This may reflect

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164. U.S. CONST. art. VI, cl. 2; *see also*, 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722.1 (3d ed. 1998 & Supp. 2004).

165. *Id.*

166. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

167. WRIGHT ET AL., *supra* note 164, § 3722.1.

168. Caterpillar, Inc. v. Williams, 482 U.S. 386, 398–99 (1987); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13, 26 (1983).

It is interesting to note that the current Court has generally read conflict and "field" preemption statutes very narrowly in an effort to avoid a federal take-over of state law. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227–28 (2000). On the other hand, as is noted below, the test for jurisdictional preemption sweeps more and more cases into a federal venue. *See infra* Part III.D.2.

169. Courts sometimes call this "super-preemption" or "jurisdictional preemption," and all three terms are used interchangeably in this Section.

170. 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 107.14[4][b][iii] (Daniel R. Coquillette et al. eds., 3d ed. 2003).

a deliberate choice that federal policies are best served if plaintiffs are not permitted to recover punitive damages in a certain suit. Therefore, if the state has a statute that permits punitive damages in this type of suit, federal policies are still hindered even though the state law does not technically conflict with any federal law.[171]

Where the courts find that the plaintiff's claims are completely preempted by federal law, the defendant will be permitted to remove the case to federal court.[172] The plaintiff's state law claim will be transformed into a federal law claim, and the plaintiff may be given the chance to amend the complaint to try to fit within the federal statute.[173] This is a corollary of the artful pleading doctrine; no matter how well the plaintiff couches the claims in state law terms, the defendant will be able to remove on the basis of complete preemption.[174]

Because of the danger of stepping on the states' toes, the courts have interpreted the reach of complete preemption rather narrowly.[175] The federal courts recognize that states should be permitted to supplement federal laws to conform to their own values and policies. As such, courts are hesitant to find that federal law completely preempts state law unless Congress has expressed some

171. *See, e.g.*, Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1354 n.11 (11th Cir. 1998) (finding that the fact that plaintiff could not obtain punitive damages under ERISA did not mean that his claim for punitive damages was not preempted; "[i]f it did, any plaintiff could thwart Congress's intent to completely preempt claims arising out of the denial of ERISA benefits by artful pleading.").

172. There are two possible explanations why removal under complete preemption is not limited by the well-pleaded complaint rule. The first is that complete preemption is actually the purest form of artful pleading; there is simply no more state law under which to artfully plead. In that case, preemption looks less like a defense to a state claim and more like artful pleading. The second is that all preemption is a defense, and complete preemption is merely a judicially-created exception to the well-pleaded complaint rule.

173. *See, e.g.*, Krispin v. May Dep't Stores Co., 218 F.3d 919, 924 (8th Cir. 2000).

174. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 2058, 2064 (2003) ("[T]here is, in short, no such thing as a state-law claim of usury against a national bank.").

175. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–65 (1987).

intention that federal law control the area and that the cases be heard solely in federal court.[176]

From the outset, one of the confusing parts of this law is that the term "preemption" has varied uses and often the courts are not specific about exactly which meaning of preemption they are using.[177] Often there may be questions of conflict and complete preemption within the same statute. Because the two statutes have similar goals, there is some overlap, and the amount to which certain tests will crossover is also unclear.[178]

1. Development of the complete preemption doctrine

Avco Corp. v. Aero Lodge No. 735[179] was the first case where the Supreme Court found federal question jurisdiction based on complete preemption. The plaintiffs sued the defendant union to enjoin the union members from striking.[180] Plaintiffs based their suit on a "no-strike" provision in the contract.[181] The defendant removed the case to federal court.[182] The Supreme Court held that § 301 of

176. Darcangelo v. Verizon Communications, Inc., 292 F.3d 181, 194 (4th Cir. 2002) ("[F]ederalism concerns strongly counsel against imputing to Congress an intent to preempt large swaths of state law absent some clearly expressed direction." (internal quotation marks omitted)).

177. *See* Sonoco Prods. Co v. Physicians Health Plan, Inc., 338 F.3d 366, 371 (4th Cir. 2003).

178. A good example of this is the Railway Labor Act, 45 U.S.C. §§ 151–188 (2000). Several federal courts accepted that the Railway Labor Act completely preempted the area of labor management for railroad employees and based their argument on a Supreme Court case, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994). *See, e.g.*, Gore v. Trans World Airlines, 210 F.3d 944, 949 (8th Cir. 2000) (finding complete preemption based on the holding in *Hawaiian Airlines*). However, one circuit recently held that the Railway Labor Act did not completely preempt. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1355–57 (11th Cir. 2003). The court noted that *Hawaiian Airlines* was a case heard by the Supreme Court on appeal from the Hawaii Supreme Court through § 1291, and was not a federal question case at all. *Id.* at 1355. Thus, the preemption analysis in *Hawaiian Airlines* was purely a conflict preemption discussion, and yet, this case formed the basis of an almost unanimous consensus that the Railway Labor Act did completely preempt state law. *Id.* at 1355–56.

179. 390 U.S. 557 (1968).

180. *Id.* at 558.

181. *Id.*

182. *Id.*

the Labor Management Relations Act provided federal jurisdiction for putative violations of a collective bargaining agreement.[183]

Although this is often cited as the first example of preemption in federal question jurisdiction, the word "preemption" is not mentioned anywhere in the case. The Court based its decision on the fact that § 301 suits are controlled by federal law, and that any claim arising under § 301 therefore would arise under the laws of the United States.[184] The Court concluded that "removal is but one aspect of the 'primacy of the federal judiciary in deciding questions of federal law.'"[185] The decision is only five pages long and subsequently sat largely untouched. It was only fifteen years later, when the Supreme Court used *Avco* to explain preemption in another context, that the Court finally gave an explanation of its holding.[186]

In *Franchise Tax Board v. Construction Laborers Vacation Trust*,[187] the defendants represented a vacation trust fund for construction workers.[188] The plaintiff tax board tried to collect back taxes by levying taxes against the fund.[189] The defendants removed the case to federal court on the basis that the Employee Retirement Income Security Act of 1964 (ERISA)[190] preempted state law on the question of interpreting employee benefits.[191]

The Supreme Court ordered the case remanded to state court.[192] The Court recognized that certain provisions of ERISA might be removable to federal court.[193] However, it held that the plaintiff's claim was not removable because ERISA did not create a cause of action for certain classes of litigants such as the tax board.[194] ERISA does create express causes of action for participants of the plan, beneficiaries, fiduciaries, and the Secretary of Labor,[195] but because ERISA did not cover the plaintiff's action, the Court found that

183. *Id.* at 560.
184. *Id.* at 559–60.
185. *Id.* at 560.
186. *See infra* note 200 and accompanying text.
187. 463 U.S. 1 (1983).
188. *Id.* at 4–5.
189. *Id.* at 5–6.
190. 29 U.S.C. §§ 1001–1461 (2000).
191. *Franchise Tax Bd.*, 463 U.S. at 7.
192. *Id.* at 28.
193. *Id.* at 24.
194. *Id.* at 27.
195. 29 U.S.C. § 1132(a); *see Franchise Tax Bd.*, 463 U.S. at 24–25.

Congress had not intended to preempt that kind of suit.[196] Therefore, the Court ordered that the case be remanded to state court for lack of jurisdiction.[197]

The Court also noted that ERISA law would affect the outcome to the extent that the state law conflicted with federal law.[198] However, the Court held that conflict preemption is merely a defense, which cannot give rise to federal question jurisdiction under the well-pleaded complaint rule.[199]

Franchise Tax Board is especially informative because the Court explained its holding in *Avco*. The Supreme Court said that "*Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."[200] The Court explained that complete preemption existed in *Avco* because the "pre-emptive force of § 301 [of the Labor Management Relations Act was] . . . so powerful as to displace entirely any state cause of action" in the area of collective bargaining.[201] As such, any state law claim that came within the scope of the area covered by § 301 was completely preempted. In addition, the Court found the distinguishing factor between *Avco* and *Franchise Tax Board* was the fact that under the LMRA, the plaintiff's state cause of action was replaced with a federal cause of action.[202] In contrast, in *Franchise Tax Board*, if the plaintiff's claim had been completely preempted, the plaintiff would have had no replacement cause of action because ERISA did not provide standing for the state tax board to sue.[203]

The next case that defined the limits of complete preemption was *Metropolitan Life Insurance Co. v. Taylor*.[204] Whereas *Franchise Tax Board* had merely hinted that any cause of action that arose out of ERISA's enforcement provision would be completely

196. *Franchise Tax Bd.*, 463 U.S. at 26–28.
197. *Id.* at 28.
198. *Id.* at 26.
199. *Id.* at 13, 26.
200. *Id.* at 23–24.
201. *Id.* at 23–26.
202. *Id.* at 25 n.28.
203. *Id.* at 26.
204. 481 U.S. 58 (1987).

preempted,[205] *Taylor* explicitly says so.[206] The Supreme Court said that Congress "had clearly manifested [its] intent to make [all] causes of action" in ERISA's § 502(a) enforcement provision "removable to federal court."[207] When Congress expresses an intention to make certain types of cases removable, the state claim is necessarily federal and preemption is no longer a defense. As such, there is no longer a well-pleaded complaint problem.

Obviously, this was useful for litigants' cases under ERISA's civil enforcement section. However, because of the conflicting rationales in *Franchise Tax Board* and *Taylor*, the lower federal courts were not always clear about when to find complete preemption outside of the two areas on which the Supreme Court had already spoken. *Taylor* seemed to say that an exception was made for ERISA based on the fact that Congress had designed it to act just like the LMRA.[208] But the Court did not completely explain why the LMRA had the preemptional force necessary for removal. It was not entirely clear what level of congressional intent the courts were supposed to be looking for: congressional intent to make something look like LMRA, or congressional intent to create a nebulous preemptive force.

The Supreme Court did not find complete preemption in another case until June 2003. In the meantime, the lower federal courts had extended complete preemption to many other statutes. Most used some form of a two or three-pronged test to determine where Congress had created the preemptive force necessary to bring the federal statute within the limits of *Taylor*.[209] Some focused on, as

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205. *Franchise Tax Bd.*, 463 U.S. at 24.

206. *Taylor*, 481 U.S. at 66.

207. *Id.* Congress did not exactly hide its intent. The Court in *Taylor* noted that when ERISA was passed, the preemption section was largely copied from the preemption section in LMRA. *Id. Compare* 29 U.S.C. § 185(a) (2000) (preemption provision of the LMRA), *with* 29 U.S.C. 1132(f) (2000) (preemption provision of ERISA). Furthermore, the sponsor of the ERISA bill explicitly stated that "'[i]t is intended that such actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under . . . the Labor Management Relations Act.'" *Taylor*, 481 U.S. at 66 (omission in original) (quoting 120 CONG. REC. 29,933 (1974)).

208. *Taylor*, 481 U.S. at 66.

209. For a good summary of the different tests being utilized by the circuits pre-*Beneficial*, see BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851, 856–57 (11th Cir. 1999).

Taylor had counseled, whether Congress had expressed the intention that cases falling under the statute be removed.[210] Others had focused more on a broader congressional intent to create exclusive remedies.[211] Still others looked for evidence of a more explicit link between the statute in question and either the LMRA or ERISA.[212]

In 2003, in *Beneficial National Bank v. Anderson*,[213] the Supreme Court clarified and significantly altered the rules on complete preemption. Twenty-six plaintiffs promised their tax refund checks to defendants in order to obtain a short-term loan.[214] They then sued the defendant on several state law claims, asserting that the interest rates charged on the loans were usurious.[215] Defendants removed the case, saying that claims regarding unfair interest rates were completely preempted by the National Bank Act.[216] The Court found federal jurisdiction, holding that state usury statutes were completely preempted by the National Bank Act.[217]

The case adds three things to the understanding of preemption. First, it adds the National Bank Act to the list of statutes that the Supreme Court has affirmatively held completely preempts all state law. Second, it shuts down the line of cases that had said that a statute must look like LMRA or ERISA in order to merit complete preemption. Third, it provides greater insight into a general rule of complete preemption. It is this third purpose that is more important for this Part.

To understand how *Beneficial* changed the preemption question, it is necessary to understand why the Supreme Court found that the

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210. *See, e.g.*, *id.* at 859 n.3. In fact, several cases had explicitly said that the intention to create an exclusive remedy was not sufficient to confer jurisdiction. Anderson v. H&R Block, Inc., 287 F.3d 1038, 1046–47 (11th Cir. 2002), *rev'd sub nom.* Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 2058 (2003).

211. *See, e.g.*, Smith v. United Parcel Serv., 296 F.3d 1244, 1246–47 (11th Cir. 2002).

212. *See, e.g.*, Aaron v. Nat'l Union Fire Ins. Co., 876 F.2d 1157, 1164 (5th Cir. 1989) (finding that the plaintiff's claim was not completely preempted by a federal statute where that statute did not have jurisdictional provisions paralleling the LMRA).

213. 123 S. Ct. 2058 (2003).

214. *Id.* at 2060–61.

215. *Id.* at 2061.

216. *Id.*

217. 12 U.S.C. §§ 85–86 (2000).

National Bank Act had the preemptive force necessary for complete preemption. The Court said that there are two situations where complete preemption exists: (1) where Congress has explicitly provided that it should; and (2) where "a federal statute wholly displaces the state-law cause of action through complete preemption."[218]

The first category covers federal statutes that expressly provide for removal to federal court, even for claims brought under state law. The example the Court gives is the Price-Anderson Act, which provides federal jurisdiction for state-law tort claims arising out of nuclear accidents.[219]

The second is much broader, including what is typically thought of as "complete preemption" cases. The Court explicitly shuts down the *Taylor* line of reasoning that required that Congress express some intent to remove certain cases.[220] The Court said that instead of focusing on whether Congress intended the cause of action to be removable, the correct inquiry is whether Congress intended the federal cause of action to be the *exclusive* cause of action for this type of claim.[221] The Court then examined the structure of the

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218. *Beneficial*, 123 S. Ct. at 2063.

219. *Id.* at 2062.

220. *Id.* at 2064 n.5. The Supreme Court gives one very practical reason for not requiring indication of Congress's intent to remove. Many congressional acts, including the National Bank Act, were passed before the general removal statute or the well-pleaded complaint rule was in existence. To expect that Congress would have included some statement about removal to get around the well-pleaded complaint rule would be to expect the impossible. *Id.*

221. *Id.* at 2064. When the Eleventh Circuit decided that more than just an exclusive federal remedy was necessary, it relied on *Taylor*. Anderson v. H&R Block Inc., 287 F.3d 1038, 1046–47 (11th Cir. 2002), *rev'd sub nom. Beneficial*, 123 S. Ct. at 2058. The Supreme Court in *Taylor* recognized that ERISA provided the exclusive remedy for certain employee benefit cases, but then said that it would be reluctant to find complete preemption solely on that basis. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Rather, the Court found that Congress had expressed a clear desire to make ERISA cases heard in federal court based on the "close parallels" between the language of the LMRA and ERISA. *Beneficial*, 123 S. Ct. at 2067 (Scalia, J., dissenting).

The Eleventh Circuit and several other courts had relied on this language to hold that an exclusive remedy was not sufficient to find complete preemption. *Anderson*, 287 F.3d at 1047. Thus, there is a conflict in reasoning between the Supreme Court's decision in *Taylor* and *Beneficial* that will have to be dealt with by the lower federal courts as they review circuit precedent

National Bank Act.[222] The first clause, 12 U.S.C. § 85, provides a substantive law of interest rates, describing how much any bank can charge in interest.[223] The Court said that this section would provide only conflict preemption; any state that told banks that they could charge more, or indeed less, than this would be preempted by federal law.[224] However, the Court found that § 85 by itself would not be a basis for removal.[225]

On the other hand, § 86 of the National Bank Act sets out exactly what remedies are available to the person who has been charged more interest than is permitted under § 85.[226] The Court then cited several cases that had held that usury was a question to be determined by reference to federal law only and not state law; they found this to be necessary to retain uniformity.[227] As such, the Court decided that the plaintiff's claim was preempted because Congress expressed sufficient intent that the National Bank, and in particular, § 86, was to be the sole remedy for usury claims.

2. General rule

There are basically two parts, then, of the rule, although they are largely related. First, Congress must have intended the federal statute to be the exclusive remedy for the type of claim that the plaintiff has brought. Second, the plaintiff's claim must fit within the preemptive scope of that statute. This next part examines each inquiry in turn.

a. finding Congress's intent to preempt certain state laws

The first question involves Congress's intent to preempt a particular area of the law. The Court has repeatedly said that Congress's intent is the "touchstone" of the preemption inquiry.[228] However, as in all areas of the law, Congress's intent is a somewhat nebulous concept. The best way to determine what is acceptable

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under the *Beneficial* standard. *See Beneficial*, 123 S. Ct. at 2067 (Scalia, J., dissenting).

222. *Beneficial*, 123 S. Ct. at 2063–64.
223. *Id.* at 2063.
224. *Id.*
225. *Id.*
226. *Id.* at 2063–64.
227. *Id.*
228. Metro. Life Ins. Co. v. Taylor, 481 U.S. 59, 66 (1987).

evidence of intent is to look at the various statutes where the federal courts have found the "preemptive force" necessary to confer jurisdictional preemption.

i. using the language to determine Congress's intent

The starting place for the analysis is always the language in the statute itself. The analysis is easiest where Congress has said that certain actions are removable. For example, the Securities Litigation Uniform Standards Act (SLUSA) states that certain "covered" class actions based on state law claims are removable.[229] Though limited in scope, this provision makes it clear that Congress intended those cases that fall under the provision to be removable.[230] The Court made it clear in *Beneficial* that where such a statement exists, removal is permitted. It talked about the Price-Anderson Act, which like SLUSA, expressly permits removal of any state law claim arising out of a nuclear accident.[231] The question of Congress's intent to permit removal is not difficult when Congress writes into the statute that cases are removable.

But complete preemption is not limited to statutes with this clear statement of intent. For example, the federal courts generally agree that § 301(a) of the Copyright Act completely preempts state laws on copyright, although it has no jurisdictional removal language. This holding is based on two statutes that evidence Congress's intent to completely preempt copyright law. First, § 301(a) of the Copyright Act contains a broad "conflict" preemption clause, stating that all rights granted by states that are "within the general scope of [the subject of] copyright" and are equivalent to rights granted under the Copyright Act are governed exclusively by the federal copyright statute.[232] Second, there is a specific jurisdictional statute conferring exclusive federal jurisdiction on the question of copyrights.[233]

229. 15 U.S.C. § 78bb(f)(2) (2000). The removal provision acts only on covered class actions, and only on claims of misrepresentation made in connection with the purchase or sale of a covered security. *Id.*

230. *See, e.g.*, Patenaude v. Equitable Life Assurance Soc'y of the United States, 290 F.3d 1020 (9th Cir. 2002).

231. *Beneficial*, 123 S. Ct. at 2062.

232. 17 U.S.C. § 301(a) (2000). Under the lower *Beneficial* test, this statement stripping plaintiff of state claims would probably be sufficient to find congressional intent of an exclusive cause of action.

233. 29 U.S.C. § 1132(f) (2000).

Several courts have found that these two factors combine to create complete preemption for any claim that falls under the limits of the provision.[234]

Even this indicium of congressional intent is not necessary; the Court's two earliest statements on complete preemption dealt with LMRA and ERISA, which both contain much less forceful language. LMRA simply states that cases relating to collective bargaining agreements "may be brought in . . . [federal] court."[235] Similarly, ERISA contains language of conflict preemption, i.e., that state laws in the area of employee benefits are "superseded," and that the federal courts shall have exclusive jurisdiction over certain claims.[236] These were both found to be sufficient.

The Court's most recent statement on the matter extended complete preemption to the National Bank Act, a statute that has no jurisdictional language at all. The Court in *Beneficial* expressly orders federal courts not to require language regarding intent to remove.[237] This makes it clear that SLUSA-type language is not required, but does little to explain what indicia of congressional intent will be required.

ii. determining Congress's intent post-*Beneficial*

If language is now sufficient but not required for complete preemption, the question is how *Beneficial* will affect the way that the lower federal courts look at congressional intent. It appears, on

234. *See* Rosciszewski v. Arete Assocs. Inc. 1 F.3d 225 (4th Cir. 1993); Firoozye v. Earthlink Network, 153 F. Supp. 2d 1115, 1121–23 (N.D. Cal. 2001). Again, there are courts that have not settled the question. The Pennsylvania District Court said that because it had other grounds to deny jurisdiction, it refused to rule on the question of whether the Copyright Act had the power of complete preemption. *See* County of Del. v. Gov't Sys., Inc., 230 F. Supp. 2d 592, 599 n.9 (E.D. Pa. 2002).

235. 29 U.S.C. § 185(a).

236. 29 U.S.C. §§ 1001–1461. Part of Justice Scalia's complaint about the path that the majority took in *Beneficial* is the "flimsiness of its precedential roots." *Beneficial*, 123 S. Ct. at 2068 (Scalia, J., dissenting). Scalia notes that the *Avco* decision gave no justification for why the LMRA indicated congressional intent to completely pre-empt, and that the only grounds for finding ERISA preemption is to draw the connection between Congress's intent in passing ERISA to look like the LMRA. *Id.* at 2066 (Scalia, J., dissenting).

237. *See Beneficial*, 123 S. Ct. at 2064 n.5.

its face, that the standard was lowered and that the key inquiry is shifted away from the importance of the particular language of the statute. Indeed some courts have already found that to be the case. For example, the Fifth Circuit recently reconsidered its precedent in light of the new standard.[238] Prior to *Beneficial*, the court had examined the Carmack Amendment for any evidence of an intent that the claims be removable.[239] Because it found none, the court held that the Carmack Amendment did not completely preempt state law claims in that area.[240] However, the court recently stated that after *Beneficial*, it was forced to reexamine its prior holding to see if the Carmack Amendment was designed to be the exclusive remedy for interstate shipping of goods by a common carrier.[241] The court held that under the new test, the Carmack Amendment did completely preempt.[242] This was not because of any language in the statute, but rather because courts had consistently interpreted the Carmack Amendment to supersede state remedies for breaches of contract by interstate carriers.[243]

A survey of claims brought under the Federal Communications Act (FCA) provides another example of how federal courts have had to adjust their analysis post-*Beneficial*. All of the circuits, save one, have come down on the side of finding that the FCA does not completely preempt state law regulating the communications

238. Hoskins v. Bekins Van Lines, 343 F.3d 769, 775–76 (5th Cir. 2003).

239. *Id.* at 775 (citing Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000) as requiring that a statute evidence a clear congressional intent that claims brought under the federal law be removable).

240. *Id.* (citing Beers v. N. Am. Van Lines, Inc., 836 F.2d 910, 912 (5th Cir. 1988)).

241. *Id.* at 775–76.

242. *Id.* at 778.

243. *Id.* at 776–78. It is interesting to note that the cases cited in this section appear to be discussing only conflict preemption. This is only one example of where the *Beneficial* rule may serve to blur the line between the two types of preemption.

Some circuits had already decided that the Carmack Amendment did completely preempt; the shift is less dramatic in the various circuits that were already using the essence of the *Beneficial* test for the Carmack Amendment. *See, e.g.*, Smith v. United Parcel Serv., 296 F.3d 1244, 1246–49 (11th Cir. 2002) (finding that Congress's intent to eliminate state law claims related to shipping and delivery of goods was sufficient for complete preemption).

industry.[244] The FCA contains several provisions forbidding the states from regulating certain areas of communication law. For example, 47 U.S.C. § 332(c)(3)(A) prohibits the states from regulating rates charged by commercial mobile phone services.[245] However, the courts have found that this is not clear enough intent to find complete preemption.

Prior to *Beneficial*, a court could rest this holding on two grounds. First, some courts found that there was nothing on the face of the statute that evidenced a congressional intent to make FCA cases removable.[246] The second rationale is related to the first; the FCA contained a savings clause stating that the state may continue to regulate those areas not covered by the preemption provision.[247] Several post-*Beneficial* cases at the district level have made it clear that this second rationale is sufficient to hold up the weight of the finding of no complete preemption.[248]

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244. The one dissenting circuit is the Seventh Circuit, which has consistently held to its decision in *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000), that the FCA completely preempts claims related to the regulation of rates and market entry. *See also* Franczyk v. Cingular Wireless, L.L.C., No. 03 C 6473, 2004 U.S. Dist. LEXIS 643, at *9 n.1 (N.D. Ill. Jan. 21, 2004).

245. 47 U.S.C. § 332(c)(3)(A) (2000).

246. *See, e.g.*, Shaw v. AT&T Wireless Servs., Inc., No. 3:00-CV-1614-L, 2001 U.S. Dist. LEXIS 6,589, at *12 (N.D. Tex. May 18, 2001).

247. *See* 47 U.S.C. § 414; Smith v. GTE Corp., 236 F.3d 1292, 1313 (11th Cir. 2001). A similar rationale could be given for refusing to find complete preemption under the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of U.S.C. titles 18, 26, 29, and 42), although the case law is much more sparse on that issue. *See* O'Donnell v. Blue Cross Blue Shield of Wyo., 173 F. Supp. 2d 1176, 1183–84 (D. Wyo. 2001).

Of course, the existence of a savings clause alone is not sufficient to disqualify a federal statute from complete preemption. ERISA has a savings clause. *See infra* note 262 and accompanying text. However, one difference is that, as blurry as the line may be, ERISA divides the area of health benefits into two areas, with the state government and the federal government each having control over one. On the other hand, FCA merely permits the states to regulate as long as they are not in conflict with the federal law. One possible explanation for the existence of a dissenting circuit on this issue is this elusive distinction between separate sphere of control and the concurrent power to regulate. *See Bastien*, 205 F.3d at 987–90 (finding complete preemption despite the existence of a savings clause, in that the federal law creates an area of exclusive federal control in which only the federal courts have jurisdiction).

248. *See, e.g.*, Moriconi v. AT&T Wireless PCS, L.L.C., 280 F. Supp. 2d 867, 872–74 (E.D. Ark. 2003) (stating that although *Beneficial* changed the

All of this leads to the conclusion that while the language Congress uses is still important, it is certainly not determinative. Other factors are considered in the purview of "congressional intent." One such factor that will surely continue to be integral is the similarity to already accepted preemptive law. For example, in *Taylor*, the Court stated that it would hesitate to find that ERISA had the force of complete preemption had it not been for the fact that those who wrote ERISA modeled it after the language in LMRA, and that the bill's sponsor had stated that the goal was to enact preemption similar to that in LMRA.[249] Similarly, in analyzing whether the Railway Labor Act (RLA) completely preempted state laws regulating collective bargaining agreements for railway and airline employees, several courts have noted that the RLA has the same function as the LMRA, and as such, is deserving of preemptive force.[250]

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semantics of the rule, preemption would still be an exceptional circumstance and that the savings clause still is convincing evidence that Congress intended the states to maintain some authority to regulate in this area); Gregory v. Sprint Spectrum L.P., No. 03-CV-0676 W (POR), 2003 U.S. Dist. LEXIS 10,943, at *6–*8 (S.D. Cal. Jan. 16, 2003) (stating that FCA's savings clause was evidence that the FCA does not have an "extraordinary" preemptive force that would transform a state claim into a federal one); *see also* Lewis v. Nextel Communications, Inc., 281 F. Supp. 2d 1302, 1305 (N.D. Ala. 2003) (noting that *Beneficial* makes the Seventh Circuit's dissenting position on the FCA much shakier). However, the Seventh Circuit recently rejected the opportunity to conform to the rest of the circuits, even though it cited to *Beneficial* in other portions of the decision. *See* Fedor v. Cingular Wireless Corp., 355 F.3d 1069 (7th Cir. 2004).

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

250. *See, e.g.*, Gore v. Trans World Airlines, 210 F.3d 944, 949 (8th Cir. 2000). As with many of these statutes, there are dissenters. The Eleventh Circuit recently held that the RLA did not have the preemptive force necessary for complete preemption. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1357 (11th Cir. 2003). The court did a good job knocking out some of the foundational bases that the other circuits had relied on, as well as focusing on the differences in language between the LMRA and the RLA. *Id.* at 1354–56. The RLA requires mandatory arbitration, while the LMRA does not, and as such, the court said that the two are fundamentally different. *Id.* at 1356. The court asserted that, under the RLA, the goals of preemption could be protected just as well under conflict preemption because the mandatory arbitration compels a certain amount of uniformity. *Id.* However, the truth is that part of the reason for denying complete preemption was the fact that the RLA evinced no congressional intent for removal. *Id.* Because *Beneficial* changed the

Also important is the way in which the statute has been interpreted in non-jurisdiction contexts. In *Beneficial*, the Supreme Court found that the National Bank Act contained the exclusive remedy for usury because, under the "longstanding and consistent construction" of the Act, the federal remedies for using substantive law were to be exclusive.[251] Similarly in *Hoskins v. Bekins Van Lines*, the court found it crucial that several courts had found state substantive laws to be superseded in favor of federal law.[252] In light of *Beneficial*, the key evidence of congressional intent may be whether the federal courts have treated the remedy as exclusive in the past in substantive questions.[253]

b. determining what Congress intended to preempt under certain statutes

Once the federal courts have decided that certain jurisdictional or preemptive language in a statute does confer this super-preemptive power, the only remaining question is whether the plaintiff's claim falls under the breadth of the preemptive power. This again can be tricky. Does the extent of the complete preemption match the breadth of the conflict preemption, or is it much narrower than that?

The courts take a number of things into account when interpreting the breadth of the preemption. The overarching theme is that where complete preemption is found, it must be read narrowly because of the questions of federalism that finding complete preemption raises. The courts have taken their cue from the Supreme Court's statement in *Taylor* that it would extend the reach of complete preemption very reluctantly.[254]

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standard on that question, it is possible that the Eleventh Circuit would not hold to its dissenting position in the future.

251. Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 2058, 2064 (2003).

252. Hoskins v. Bekins Van Lines, 343 F.3d 769, 777–78 (5th Cir. 2003).

253. Again, this shifts the inquiry away from interpreting the language Congress used and towards whether Congress meant to make something exclusive. Both tests attempt to divine Congress's intent, but the second test leaves much more room for the federal courts to find the intent necessary to preempt.

254. *Taylor*, 481 U.S. at 65.

i. interpreting the breadth of preemption using the statute's language

In most cases, the courts are doing little more than interpreting the jurisdictional provision. For example, with preemption under the LMRA, litigants are no longer arguing about whether the provisions of the LMRA are completely preempted, but rather, what falls within the preemptive power of § 301. The Supreme Court has said that § 301 preemption applies when a case "is substantially dependent upon analysis of the terms of [a collective bargaining agreement]."[255] Such a flexible test leaves much room for litigation on the scope of this clause.

Similarly, SLUSA preemption litigation today revolves around several questions derived from the jurisdictional provision itself—for example, what are "covered class actions,"[256] what transactions are considered "in connection" with the sale of those securities,[257] and what "misrepresentations" are covered.[258]

One incredibly complex question of statutory interpretation is the area of ERISA preemption. As Justice Scalia noted in 1997, the fact that ERISA cases were still coming to the Supreme Court meant that the prior fourteen Supreme Court decisions related to ERISA preemption had far from succeeded in defining the scope of the subject.[259]

Part of the confusion is that ERISA has a conflict preemption clause, § 514(a), and a complete preemption clause, § 502(a).[260] The conflict preemption clause states that all state law claims "relate[d] to

255. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985).

256. Patenaude v. Equitable Life Assurance Soc'y of the United States, 290 F.3d 1020 (9th Cir. 2002).

257. Falkowski v. Imation Corp., 309 F.3d 1123 (9th Cir. 2002) (interpreting the phrase "in connection with"); Green v. Ameritrade, Inc., 279 F.3d 590 (8th Cir. 2002) (holding that receiving the information necessary to make a sale did not fall within the scope of "in connection with" a sale).

258. Burns v. Prudential Secs., Inc., 218 F. Supp. 2d 911 (N.D. Ohio 2002) (interpreting the scope of misrepresentations covered under the SLUSA preemption).

259. Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 335 (1997) (Scalia, J., concurring). Since 1997, the Supreme Court has heard several more cases dealing with ERISA preemption. *See, e.g.*, Rush Prudential HMO v. Moran, 536 U.S. 355 (2002); Pegram v. Herdrich, 530 U.S. 211 (2000).

260. 29 U.S.C. §§ 1132(a), 1144 (2000).

any employee benefit plan" are superseded, but saves certain suits related to insurance from preemption.[261] However, the complete preemption clause is narrower. The federal courts have interpreted the scope of complete preemption to be coextensive with the § 502(a) civil enforcement provision, which states that "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary. . . to enforce any provisions of this subchapter or the terms of the plan."[262] The two questions are distinct and must be handled separately, and neither one is particularly clear.

The general rule, then, is that if the claim meets the requirements of § 514 but not the requirements of § 502(a), there is only conflict preemption, which is not sufficient for removal.[263] However, there appears to be a split in circuits as to whether or not conflict preemption is a prerequisite to complete preemption.[264] In some circuits, complete preemption under ERISA is a two-step process; a claim may be removed only if it meets the requirements of § 514 and § 502(a). However, several circuits, including the Fifth[265] and the Eleventh[266] Circuits abandoned that position in 2003, leaving only the Ninth[267] and the Second[268] circuits still clinging to that position.

The questions related to interpretation of § 502(a) are far too numerous and complicated to lay out here, but provide one of the hottest sources of jurisdictional litigation in the federal courts right now.[269] It is also interesting to note, in this discussion of forum

261. *Id.* § 1144(a)–(b).
262. *Id.* § 1132(a)(3)(ii).
263. *See* Marks v. Watters, 322 F.3d 316, 322–23 (4th Cir. 2003).
264. Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1013 n.7 (11th Cir. 2003).
265. Arana v. Ochsner Health Plan, 338 F.3d 433, 440 (5th Cir. 2003).
266. *Ervast*, 346 F.3d at 1012–14.
267. *See, e.g.*, Funkhouser v. Wells Fargo Bank, N.A., 289 F.3d 1137, 1141–42 (9th Cir. 2002).
268. Franklin H. Williams Ins. Trust v. Travelers Ins. Co., 50 F.3d 144 (2d Cir. 1995).
269. There are many excellent sources to help litigants untangle the maze of ERISA questions that are beyond the scope of this Section. A good general source is Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105 (2001). One dealing specifically with the HMO preemption cases is PHYLLIS C. BORZI & MARC I. MACHIZ, *ERISA and Managed Care Plans: Key Preemption and Fiduciary Issues*, *in* ALI-ABA COURSE OF STUDY MATERIALS: HEALTH CARE LAW AND LITIGATION; ACCESS

selection, that while Congress designed ERISA to protect employees and their benefits,[270] ERISA has evolved into a shield against generous state laws protecting employees and has moved a significant number of cases into federal court.

ii. interpreting the breadth of preemption using the statute's purpose

In determining the breadth of complete preemption, the federal courts have also examined Congress's purpose for passing the statute, a factor that will certainly become more important as the inquiry under *Beneficial* shifts away from the explicit jurisdictional language previously required. A common theme where the federal courts have found complete preemption is that the statute was passed, at least in part, to close off state remedies that undermined federal policy. This not only counsels towards complete preemption; it also provides guidance to the court as to how it should read the preemption provision. For example, SLUSA was enacted in part to close a federal flight loophole that existed in its predecessor, the Private Securities Litigation Reform Act (PSLRA).[271] Essentially, because of heightened requirements for plaintiffs under PSLRA, many plaintiffs were finding it much more advantageous to go around the federal law and file claims in state court.[272] Because this undermined the broader goal of the statute, the courts have held that SLUSA preemption must be construed so as to prevent this federal flight problem.[273] Therefore, any case that follows this rationale or where it looks like the plaintiff is trying to get around the core of the statute to take advantage of greener pastures is more likely to be found to fall under the preemption provisions of SLUSA.

TO CARE AND TECHNOLOGY 71 (2002), WL SH027 ALI-ABA 71. One caution is that almost every secondary source on ERISA is out of date by the time it comes out because of the vast number of cases being decided on a constant basis.

270. *See* Bogan, *supra* note 269, at 105–06.

271. Green v. Ameritrade, Inc., 279 F.3d 590, 595–96 (8th Cir. 2002).

272. *Id.*

273. *Id.*; *see also* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990); Bogan, *supra* note 269, at 117–18 (asserting that the goal of ERISA was to provide employers with a uniform set of regulations and liabilities, and that state remedies that fall outside those particular remedies thwart the goal of the federal statute).

In its most recent decision, *Beneficial*, the Supreme Court explicitly mentioned this fact. The Court stated that the National Bank Act was passed in part to enact "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges [as] an integral part of a banking system that needed protection from 'possible unfriendly [s]tate legislation.'"[274] Because the plaintiffs pleaded so as to get around the effect of federal law, their claim obviously fit within the scope of claims that Congress would want governed by federal law. Similarly, plaintiffs have a much easier case when they can show that their cause of action does not fit the rationale for which Congress passed the law.

In the same way, courts will examine the issue of standing, i.e., what type of plaintiffs the complete preemption should cover. There is general consensus that the mere fact that preemption will leave the plaintiff before the court without a remedy is not sufficient to stop a finding of complete preemption.[275] One court put it this way: "[D]efendant[s] tow[] the case into the federal harbor only to try to

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274. Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 2058, 2064 (2003) (quoting Tiffany v. Nat'l Bank of Mo., 85 U.S. (18 Wall) 409, 412 (1873)). All of these opinions stress that uniform *rules* are important, while none make it clear exactly why a federal *forum* is necessary. Justice Scalia in *Beneficial* makes this point by citing the amicus brief written by the United States. The brief argued that removal was necessary because if the case were not removed, the state might choose to ignore the federal law and allow the state claim to proceed. *Id.* at 2069 (citing Brief for the United States as Amicus Curiae at, 17–18, *Beneficial* (No. 02-306)). However, this rationale is somewhat dubious. Why should the danger be more prevalent here than anywhere else?

The answer comes from the basis of the artful pleading doctrine itself. The artful pleading doctrine says that however the claim is pleaded, the court can reshape it according to existing law. *See infra* Part III.C.2. If the plaintiff pleads a state claim that is completely preempted, the court must re-characterize it as a purely federal law claim because there is no state law left. *See infra* Part III.C.2. Obviously, if the plaintiff had pleaded under federal law, she would do so at the risk of being removed to federal court. Thus, the plaintiff's choice to label her claims as state claims should not result in a state forum when there really was no state law on the matter.

275. This is reflected in the number of times that defendants are filing a motion to remove at the same time as a motion to dismiss. This is one of the prime payouts of preemption for defendants; often the plaintiff's claim is one that is not covered under the federal statute, meaning that complete preemption will equal dismissal. This may also be why the complete preemption debate centers around only a few limited statutes. ERISA and SLUSA preemption provide broad incentives for corporate defendants in that they cut off state statutes favorable to plaintiffs.

sink it once it is in port."[276] The rationale for this goes back to something said earlier—Congress may say as much when it eliminates certain relief or certain causes of action for a particular plaintiff as when it creates them. Congress's choice to create certain causes of action for a particular group of plaintiffs makes the omission of other causes of action for that plaintiff significant.

However, a plaintiff has a better argument that the claim should not be preempted if it falls outside of the enforcement provisions of the statute altogether, i.e., that the statute does not provide a remedy for this class of plaintiff at all. The generally accepted complete preemption statutes have been interpreted this way. One of the first Supreme Court preemption cases, *Franchise Tax Board*, demonstrated that the cases of persons who do not come within the civil enforcement provision of ERISA are not preempted.[277]

The same is true of other federal statutes. The Copyright Act only preempts those causes of action where the right protected under the federal law is equivalent to the rights under state law.[278] Where the state law adds an "extra element" to the Copyright Act, a plaintiff's case brought under that state law will no longer be removable.[279] The case is even stronger under the new *Beneficial* standard; as one court recently stated, "Congress cannot be said to have provided an *exclusive* federal remedy where, as here, they have provided no remedy whatsoever [for this plaintiff]."[280] As such, one of the best ways for plaintiffs to get around complete preemption is

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276. La Buhn v. Bulkmatic Transp. Co., 644 F. Supp. 942, 948 (N.D. Ill. 1986).

277. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983) (finding that the tax board's claim was not preempted under ERISA because ERISA created no counterpart to appellant's state claim).

> "Section 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies . . . . [This] makes [it] clear that Congress did not intend to pre-empt entirely every state cause of action relating to such plans."

Id. at 25.

278. *See* Rosciszewski v. Arete Assocs., Inc., 1 F.3d 225, 229 (4th Cir. 1993).

279. *See id.* at 229–30.

280. JK&E P'ship v. Chase Manhattan Bank, No. 03-CV-2543 (DGT), 2004 U.S. Dist. LEXIS 587, at *8 (E.D.N.Y. Jan. 16, 2004).

to show that Congress's regulation targeted a narrower group that did not include them.

In summary, the general rule under *Beneficial* is that complete preemption only applies in certain areas of the law where Congress intended federal law to be the exclusive remedy for certain claims.[281] This means that only some statutes have the preemptive effect necessary to preempt not only state substantive law, but also to remove jurisdiction from state forums. It also means that even claims brought under those statutes may not be preempted if they are not the kind of claim that Congress intended to preempt.

The most obvious effect of the change from looking at "intent to remove" to "intent to be an exclusive remedy" is that many more cases can be removed to federal court. Justice Scalia said that the Court's *Beneficial* decision "effectuate[d] a significant shift in decisional authority from state to federal courts."[282] The test is significantly broader than the prior test; while the prior test emphasized Congress's selective intent to shift the venue from state to federal court, the current test emphasizes Congress's intent to shift from state to federal law, something that Congress presumably does more routinely.

One final thing to remember is that orders remanding a case to state court are not reviewable by a federal appellate court.[283] The rule is not absolute; there are several judge made exceptions.[284] However, the general rule is that the appellate court will not be able to review, even where the decision is wrong.[285] The practical effect of this is that the plaintiff only has to win once, while the defendant has to continue winning up the appellate ladder.

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281. Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 2058, 2064 (2003).

282. *Id.* at 2068 (Scalia, J., dissenting).

283. See *infra* Part V.G.5 for a more in-depth discussion of the appealability of remand orders.

284. *See* Dorothy F. Easley, *Remand Orders in ERISA Cases: When Are They Reviewable in the 11th Circuit?*, FLA. B.J., Oct. 2003, at 88 (describing the various exceptions to the § 1447(c) prohibition of appellate review on ERISA remand orders).

285. *See* Dahl v. Rosenfeld, 316 F.3d 1074, 1079 (9th Cir. 2003) (finding that there was no avenue to overturn the district court's remand order, even though it was wrongly decided in light of Ninth Circuit precedent).

3 Impact on litigants

As stated above, the plaintiff has several modes of attacking a claim that potentially falls within the realm of a completely peremptory statute. The first is to try to bring a successful claim under the federal statute. There may be times when it is not worth challenging removal because the federal law is clearly peremptory or because the federal law is not that harmful to the plaintiff's case.

The second is to argue that the statute does not have the preemptive force necessary for complete preemption. Again, under *Beneficial*, this means arguing that Congress did not intend the federal law to be the exclusive remedy for this type of claim. To show this, the plaintiff will need to show that allowing the state remedy to exist alongside of the federal remedy will not thwart Congress's intention in passing the law, and that the federal courts have not traditionally interpreted the federal law to be exclusive. With *Beneficial*, no statute is "safe" from reconsideration, and plaintiffs may find, as in *Hoskins*, that certain enclaves of state law are no longer protected from jurisdictional preemption.

The third is to argue that the preemptive force of the statute does not cover the plaintiff's claim. As laid out above, the preemptive scope of a statute is interpreted narrowly, and so the plaintiff may be able to argue that the purpose of the exclusive remedy does not include her particular claim at all.

The final strategy is to forego the strongest state claim and adapt other state law claims that are outside preemptive reach. As with substantial federal questions, the plaintiff is the master of the complaint; the plaintiff can forego certain claims altogether if she determines that there is a better chance of recovery without the claim in state court than there is with the claim in federal court. The broader reach of the *Beneficial* test means that the calculus is shifted somewhat: if Congress intended a federal statute to be the exclusive remedy for a certain wrong, then no matter which state claim is brought, it is likely to be preempted.

Of course, the defendant may have little to lose by removing under preemption in close cases, especially where the payoff is an automatic dismissal. Especially given the broad test that the Supreme Court used in *Beneficial*, defendants have a strong incentive to argue for complete preemption in many cases. Furthermore, as above, the wealthy defendant can win not only by getting the case

removed to federal court, but also by extending the time and cost of litigation to the point where it is not worth the plaintiff's effort to fight the forum selection battle.

4 Relationship between preemption and substantial federal question

There is one circuit that has said that the complete preemption exception entirely swallows up the artful pleading doctrine.[286] The Fifth Circuit has said that there should be no substantial federal interest unless Congress has gone so far as to preempt state law in an area.[287] Its basis for holding so lies with a strict reading of the Supreme Court's holding in *Rivet v. Regions Bank of Louisiana*,[288] where the Court said that artful pleading "allows removal where federal law completely preempts a plaintiff's state-law claim," but says nothing about any other type of artful pleading.[289] A few other courts have expressed this assertion.[290] The idea has a certain appeal; the question is certainly not substantial enough that Congress felt the need to have exclusive control over the area, so the state court should not be shut out of interpreting the law. In some ways, this comes closer to effectuating Congress's intent.

However, while most courts have indeed recognized that most situations of artful pleading will be complete preemption cases,[291] the Fifth Circuit stands alone in saying that complete preemption swallows up the doctrine of artful pleading. Furthermore, because it seems like the scope of federal question jurisdiction is generally broadening, rather than constricting, it seems unlikely that the majority of courts will move in this direction.

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286. *See* Terrebonne Homecare, Inc., v. SMA Health Plan, Inc., 271 F.3d 186, 188–89 (5th Cir. 2001); Waste Control Specialists v. Envirocare of Tex., Inc., 199 F.3d 781, 783–84 (5th Cir. 2000).

287. *Terrebonne Homecare*, 271 F.3d at 188–89; *Waste Control Specialists*, 199 F. 3d at 783–84.

288. 522 U.S. 470 (1998).

289. *Id.* at 475.

290. *See* State *ex rel.* Nixon v. Nextel W. Corp., 248 F. Supp. 2d 885, 889 (E.D. Mo. 2003).

291. *See* New York v. Justin, 237 F. Supp. 2d 368, 372 n.5 (W.D.N.Y. 2002) (stating that the "'classic application of the artful pleading doctrine occurs in the context of federal preemption of state law'" (quoting Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 758 (2d Cir. 1986))).

E. Conclusion

In conclusion, there are three points that should be emphasized. First, plaintiffs and defendants both have a vested interest in influencing the forum decision for their benefit. Whether the advantage is favorable federal law or more advantageous procedure, parties will often try to push a suit towards either federal or state court. The concept of parity between federal and state courts is dead.[292]

Second, two broad trends describe the shift that federal courts have effected in the federal question debate, and affect the shape of that debate. The first is a general shifting of cases from state courts to federal courts. This can be seen in Congress's decision to federalize certain statutes that typically would have been heard in state court, and also in the liberalization of "substantiality." This trend is also apparent from the *Beneficial* decision, under which a larger class of cases is preempted and therefore heard in federal court. The effect of this "federalization" is that plaintiffs will have to work harder to keep their cases out of federal court. The subtler trend is from congressional control over jurisdiction to the courts taking a more active role. Changes in complete preemption shift the courts' role away from interpreting the language of the statutes to devising what Congress "meant." This also means that litigants will play a more active role in arguing that certain claims should be heard in federal court.

The final point to emphasize here is that plaintiffs can and are using their initial control over pleading to affect the choice of forum. Federal question jurisdiction requires a plaintiff to quantify the advantages and disadvantages of a federal forum, as well as the chances of success with and without federal law. This means appealing to the federal and state interests in the suit, the concerns regarding federalism, and the purposes of federal question jurisdiction. It also means choosing what claims to bring and how to phrase them. By understanding the rules and trends in federal

292. *See generally* Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991) (discussing the emergence and assumptions behind the parity debate and offering an alternative approach for defining federal court jurisdiction).

question jurisdiction, the plaintiff has the best opportunity to design and phrase its claim to obtain the chosen forum.