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

Margaret C. Tarkington, Brigham Young University

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

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

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2 See, e.g., Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (“The presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.”).
art— is a jurisdictional doctrine that allows for removal based on a federal preemption defense, even though the plaintiff’s complaint asserts only state law claims.

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

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

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3 Complete preemption is distinct from substantive preemption. Substantive federal preemption occurs when federal law preempts (or nullifies) some aspect of state law. Consequently, a defendant who raises a substantive preemption defense is asserting that a plaintiff’s state law claim is preempted by federal substantive law and should be dismissed. Under the well-pleaded complaint rule, such a defense would have no effect on jurisdiction. However, where the doctrine of “complete preemption” applies, a substantive federal preemption defense additionally gives rise to a jurisdictional result by allowing removal of the case to federal court.


6 *Id.* at 66.


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

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

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9 Garrick B. Pursley, *Rationalizing Complete Preemption After Beneficial National Bank v. Anderson: A New Rule, A New Justification*, 54 DRAKE L. REV. 371, 376, 418-435 (2006); see, e.g., id. at 376, 432 (stating that “the *Anderson* rule is primarily justified as an efficiency generating tool of judicial administration” and that the *Anderson* rule “makes things simpler, faster or more efficient”).
Part III provides a brief overview of other proposed analyses for complete preemption, including a framework recently proposed as an alternative to *Anderson* that would allow complete preemption based upon the breadth of substantive federal preemption. Part IV examines the *Anderson* test and other proposed analyses for complete preemption and explores separation of powers, federalism, and efficiency problems raised by such frameworks. Using cases regarding complete preemption under the Carmack Amendment as a case in point, Part IV reviews pre- and post-*Anderson* cases, which demonstrate that the *Anderson* test does not accurately determine congressional desire to transfer jurisdiction from state to federal courts and highlight the deficiencies of *Anderson* and other proposed complete preemption tests.

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

I. Origins of the Well-Pleased Complaint Rule

The Supreme Court has upheld the well-pleaded complaint rule as a restriction on statutory federal question jurisdiction under 28 U.S.C. § 1331 and not as a restriction created or required by Article III of the Constitution. To the extent that the well-pleaded complaint rule is

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11 See *American Nat’l Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992) (explaining that it is “erroneous” to “invoke the well-pleaded complaint rule outside the realm of statutory ‘arising under’ jurisdiction, i.e., jurisdiction based on 28 U.S.C. § 1331” because the “well-pleaded complaint rule” applies only to statutory ‘arising under’
entirely a creation of the judiciary, it would seem the judiciary could reverse or abrogate the rule through judicially-created exceptions, like complete preemption. On the other hand, to the extent the rule is imposed by Congress, the judiciary is obligated to adhere to it. The Supreme Court has repeatedly recognized congressional power to determine the extent of jurisdiction to be exercised by the lower federal courts, including withholding jurisdiction in “the exact degrees and character which to Congress may seem proper for the public good.”

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

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

In 1875, Congress bestowed federal question jurisdiction on the federal courts. It has been recognized that the language used in the statutory grant of federal question jurisdiction, currently found at 28 U.S.C. § 1331, tracks the language of Article III, and that therefore, the 1875 Congress may have intended to bestow on the lower federal courts jurisdiction to the full

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13 See, e.g., Rivet v. Regions Bank of La., 522 U.S. 470, 472 (1998) (“Congress has provided for removal of cases from state court to federal court when the plaintiff’s complaint alleges a claim arising under federal law. Congress has not authorized removal based on a defense or anticipated defense federal in character.” (Emphasis added)); Caterpillar Inc. v. Williams, 482 U.S. 386, 399 (1987) (“Congress has long since decided that federal defenses do not provide a basis for removal.”).
14 In Caterpillar, 482 U.S. at 392-93, the Court alluded to the role that both Congress and the Court played in the creation of the well-pleaded complaint rule, when it stated that “[b]efore 1887, a federal defense such as pre-emption could provide a basis for removal, but in that year, Congress amended the removal statute. We interpret that amendment to authorize removal only where original federal jurisdiction exists. Thus it is now settled law that a case may not be removed to federal court on the basis of a federal defense . . . .” (Emphasis added.).
extent of the Constitution’s “arising under” power. While the precise scope of the “arising under” power of Article III continues to be debated and has not been satisfactorily determined by the Supreme Court, the leading case on the matter defines it exceptionally broadly and indicates that Article III power exists as long as there is even the possibility that a federal issue could arise in the case. In addition to using the language of Article III, the 1875 jurisdictional grant allowed for removal by either a plaintiff or a defendant. The Supreme Court construed these provisions of the 1875 Act as allowing removal on the basis of a federal defense.

However, in construing the 1875 statutory grant of power, the Supreme Court required that the federal question be asserted by the party relying on it and could not be anticipated by the opposing party. This requirement may be seen as directed by Congress itself, which in Section 5 of the 1875 act required that if it appeared that a case “does not really and substantially involve a dispute or controversy properly within the [federal court’s] jurisdiction,” the court “shall proceed no further therein, but shall dismiss the suit or remand it” to state court.

Indeed, in 1877, the Supreme Court in *Gold-Washing & Water Co. v. Keyes* construed §

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16 See *e.g.*, Franchise Tax Board of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 n.8 (1983) (noting the “limited legislative history” from 1875 “suggests that the 44th Congress may have meant to ‘confer the whole power which the Constitution conferred’”); Ray Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263, 265, 268 (1943) (“[B]y repeating the words of the Constitution the Congress intended that the statutory words should have the same . . . meaning as the words in the Constitution”).

17 See *Osborn v. President, Directors, and Co. of the United States*, 22 U.S. 738, 822 (1824) (explaining arising under power exists where “the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction” (emphasis added)); see also *Verlinden*, 461 U.S. at 492 (“Osborn thus reflects a broad conception of ‘arising under’ jurisdiction according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law.” (Emphasis added.)).

18 See Railroad Co. v. Mississippi, 102 U.S. 135, 140 (1880) (holding that the case should have been removed to federal court under the 1875 Act “whether we look to the Federal question raised by the State in its original petition, or to the Federal question raised by the company in its answer” (emphasis added)).

19 While scholars have disagreed as to Congress’s intended purpose in § 5 of the 1875 Act, they have not contended, as I do here, that contemporary Supreme Court case law denotes that § 5 provided a statutory basis for the creation of the well-pleaded complaint rule. *See infra* notes 22 & 25.

20 See Act of March 3, 1875, ch. 137 § 5, 18 Stat. at 472.

21 96 U.S. 199, 203-04 (1877).
5, whether correctly or incorrectly,\(^{22}\) as requiring for federal question jurisdiction that it must “appear upon the record” (“in good pleading”) “that the suit is one which ‘really and substantially involves a dispute or controversy’ as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States.”\(^{23}\)

Subsequently, in *Central Railroad Co. of New Jersey v. Mills*, the Court, relying on *Keyes* and paraphrasing § 5, held that a party could not base federal jurisdiction on the anticipated allegations of the other side and indicated the existence of the federal question had to appear on the record at the time that the federal court asserted jurisdiction over a controversy.\(^{24}\) Thus, for original jurisdiction, a plaintiff was not allowed to obtain federal jurisdiction by anticipating a federal defense that would be raised by the defendant.\(^{25}\) Indeed, the Supreme Court so held in

\(^{22}\) Scholars have disagreed as to whether Congress intended Section 5 to affect the scope of statutory “arising under” jurisdiction. Ray Forrester argued that Section 5 (which was still part of the judicial code at the time of his article) was not intended “to limit federal question jurisdiction” or the scope of the statutory “arising under” clause, but was merely intended to require “the courts to investigate, *sua sponte* . . . [that] federal jurisdiction does exist in fact.” Forrester, *supra* note 16, at 269. Chadbourn and Levin argued that section 1 of the 1875 act adopted the arising under language of the Constitution and was intended to confer the entire constitutional power as interpreted in *Osborn*, but that Section 5 was then intended to limit the exercise of that jurisdiction to cases where the court was satisfied “at every stage of the proceedings, that there actually was a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.” *See* James H. Chadbourn and A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649-50, 671-72 (1942).

Congress appears to have adopted Forrester’s position with it’s enactment of the 1948 judicial code, which repealed the descendant of Section 5, replaced it with 28 U.S.C. § 1359, and only prohibited fraudulent joinder of parties in diversity cases. The note to § 1359 explains that “[p]rovisions . . . for dismissal of an action not really and substantially involving a dispute or controversy within the jurisdiction of a district court, were omitted as unnecessary [because] a court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion.” 28 U.S.C. § 1359 historical and revision notes. Despite winning the battle, Forrester did not win the war, and has not partaken of his vision of federal question statutory jurisdiction to the full extent of constitutional power.

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

\(^{23}\) *Keyes*, 96 U.S. at 203-04 (emphasis added).

\(^{24}\) *See* Central R.R. Co. of New Jersey v. Mills, 113 U.S. 249, 257 (1885).

\(^{25}\) Michael Collins argues that the Court “first articulated its well-pleaded complaint rule in the unheralded and little noted opinion of *Metcalf v. Watertown*.” Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 730-31 (1986). However, as shown above, the Court had already laid the foundations for *Metcalf in Mills* by holding that a party could not obtain federal jurisdiction through anticipation of the other side’s pleadings and indicating that jurisdiction had to be clear from the pleadings at the time federal jurisdiction was invoked. *See Mills*, 113 U.S. at 257. Further, the *Mills* Court relied on the requirements found in
Metcalf v. City of Watertown. Although not citing Keyes, Mills, or § 5, the Supreme Court in Metcalf refused to allow original (as opposed to removal) jurisdiction when the plaintiff had not itself raised the federal question at issue. The Court explained that for original jurisdiction “it must appear, at the outset, from the declaration or the bill of the party suing, that the suit” arises under federal law. The court went on to explain that even if the defendant subsequently raised a federal defense “the want of jurisdiction, at the commencement of the suit, is not cured by [a federal] answer or plea.”

The Metcalf and Mills holdings, which may have been understood as a condition imposed by Congress through § 5 of the 1875 Act, combine to make what could be called the well-pleaded pleading rule. While the 1875 statute allowed removal on the basis of a federal defense or reply, nevertheless, a federal court could not obtain federal question jurisdiction over an original or removed case unless and until a federal question existed on the face of a pleading or petition of the party actually asserting the federal question.

Keyes, which interpreted Section 5 of the 1875 Act. See id. Collins states that the Metcalf Court “neglected to indicate whether its newly articulated rule for plaintiffs was based on Article III, the terms of the 1875 Act, or general common-law pleading requirements somehow thought to apply in the absence of a more explicit constitutional or statutory command.” See Collins, at 732. Collins then argues that the rule forbidding anticipation of defenses was a common-law principle of pleading. See id. at 732 n. 79. Collins’s discussion of contemporary pleading rules is instructive and reveals a likely foundation behind the Court’s decisions. Nevertheless, the Court could also, and it expressly did in Keyes, construe Section 5 of the 1875 Act as requiring that federal courts determine that a federal question appear of record and be actually asserted by a party (rather than anticipated) when it assumed jurisdiction.

26 128 U.S. 586 (1888).
27 See id. at 589.
28 See id.
29 This well-pleaded pleading rule could have constitutional implications. Since Osborn, discussed supra note 17 and accompanying text, the Supreme Court has failed to clarify whether it accepts Osborn’s construction that “a mere speculative possibility [of] a federal question” could fall within the bounds of Article III arising under power. See Verlinden, 461 U.S. at 492-94 (explaining the Osborn holding and noting that “[t]he breadth of that conclusion has been questioned” but that the Court “need not now resolve that issue”). However, the Court has clarified that arising under power at least exists whenever a case actually presents a question of federal law. Powell v. McCormack, 395 U.S. 486 (1969). Thus in any case where a defendant actually asserts a federal defense to a state law cause of action, a federal question (and not the mere possibility of one) has been raised in the proceedings, and so it would fall within the power of Congress to confer such jurisdiction on the federal courts. Notably, however, if Osborn is rejected and if the Constitution requires that there be more than the mere possibility of a federal question,
2. The 1887 Amendments and the Prohibition of Federal Defense Removal

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

The *Tennessee* Court explained that by allowing removal only “of suits ‘of which the circuit courts of the United States are given original jurisdiction’” the amendments limited removal jurisdiction “to such suits as might have been brought in that court *by the plaintiff.*” Further, as had been established in *Metcalf*, it was essential to the federal court’s original jurisdiction “that the plaintiff’s declaration or bill should show that he asserts a right under the constitution or laws of the United States.” Consequently, a defendant could only remove if the plaintiff asserted a right under federal law in the complaint—removal could not be achieved on the basis of a federal defense. In support of this construction of the amendments, the Court noted that the change was “in accordance with the general policy of these acts, manifest upon their face . . . to contract the jurisdiction of the circuit courts of the United States.”

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30 Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, 553, as corrected by the Act of August 13, 1888, ch. 866, § 2 25 Stat. 433, 434 (emphasis added). The amendments also raised the jurisdictional amount. See id., § 1.
31 152 U.S. 454 (1894).
32 Id. at 461-62 (emphasis added).
33 Id. at 460-61 (explaining and quoting *Metcalf* at length). Michael Collins persuasively argues that Congress could not have relied on *Metcalf* in fashioning the 1887 and 1888 amendments because *Metcalf* was not decided until after the 1887 amendments were signed into law. See Collins, *supra* note 25, at 754-55 & n.185. Nevertheless, *Metcalf* was not the first case to establish the well-pleaded pleading rule relied upon in *Tennessee*. See *supra* notes 19, 23-25 and accompanying text.
34 *Tennessee*, 152 U.S. at 462. The legislative history—though never indicating that Congress intended to prohibit removal on the basis of a federal defense—does show that Congress intended to restrict the federal question removal that it had granted in 1875. Mr. Culberson, the member of the House Committee on the Judiciary who
prohibiting removal on the basis of a federal defense was grounded by the Court not on policy or efficiency considerations but, as Michael Collins summarizes, purportedly, “on a formal choice about the plain meaning of the statute” as amended in 1887 and 1888.35

Justice Harlan, the author of the Metcalf decision, dissented, arguing that the grant of jurisdiction extended to federal rights “asserted by either party.”36 Justice Harlan additionally provided what is probably the most plausible interpretation of the 1887/88 amendments. Namely, Congress included the language restricting removal to cases within the original jurisdiction of the federal courts to make it clear that the jurisdictional amount and other restrictions for original jurisdiction applied equally for removal jurisdiction.37 Indeed, the 1887/88 amendments struck the portion of the statute that expressly required a jurisdictional amount for removal.38 Thus, the only indication that the jurisdictional amount applied for removal was the language, “of which the circuit courts of the United States are given original jurisdiction.”39

In four House Reports and nearly 100 pages of discussion in the Congressional Record introduced the bill, explained that “[t]he object of the bill is to diminish the jurisdiction of the [lower federal] courts.” 18 CONG. REC. 613 (1887); see also, e.g., 18 CONG. REC. 2727 (1887) (Letter from the House to the Senate, stating the Senate amendments “promote the objects of the bill, which is to reduce the jurisdiction of the courts of the United States and to regulate the removal of causes from State to Federal courts”).

Nevertheless, the primary way in which the House intended to limit federal jurisdiction (outside of prohibiting removal by a plaintiff) was through restrictions on diversity jurisdiction for corporations—a change rejected by the Senate and never enacted. See, e.g., 10 CONG. REC. 701 (1880); 18 CONG. REC. 2543 (1887).

35 See Collins, supra note 25, at 766. Collins posits other motives that may have pushed the Court to adopt the rule, including special federalism concerns surrounding the validity of “enforcement actions by Tennessee to collect taxes alleged to be due to the State.” See id. at 760.

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

37 Id. at 471 (Harlan, J., dissenting); see also Collins, supra note 25, at 753-54 (explaining that “[u]nder the 1875 Act, the Court had construed the absence of such a cross reference in [the removal section] to mean that limits on original jurisdiction . . . did not apply on removal”).

38 Compare Act of March 3, 1875, ch. 137 § 1, 18 Stat. 470 (allowing removal of any suit “brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States . . . .”) with Act of August 13, 1888, ch. 866, §§1-2, 25 Stat. 433, 434 (allowing removal of any suit “arising under the Constitution or laws of the United States . . . of which the circuit courts of the United States are given original jurisdiction by the preceding section”—the preceding section requiring that “the matter in dispute exceeds . . . the sum or value of two thousand dollars”).

39 Act of August 13, 1888, ch. 866, §2, 25 Stat. at 434. Collins notes that “various members of the house emphasized that the new limitation on jurisdictional amount was to apply to removal as well as to original jurisdiction.” See Collins, supra note 25, at 753-54. Of course, having eliminated the express jurisdictional amount requirement in the removal provision, see supra note 38, the only way that the requirement could apply on removal is if the “original jurisdiction” language incorporated the jurisdictional amount onto removal jurisdiction.
from 1880 through 1887 regarding the 1887/88 amendments, there is never any mention of the meaning of or the reason for the “original jurisdiction” language relied on by the Tennessee Court. It seems unlikely that Congress—in debating a bill over 7 years—would never mention that the bill would prohibit removal on the basis of a defense or that the inclusion of the “original jurisdiction” language was intended to effect that end. Notably, the House added an amendment that expressly allowed defendants to remove on the basis of a federal defense,40 but the Senate struck that portion of the bill and the bill was passed without that language.41 Importantly, and perhaps the strongest indication that Congress did not intend the “original jurisdiction” language to restrict the ability to remove on the basis of a defense is the fact that from 1880 until 1887, the

40 See infra note 42 for text of amendment.
41 Michael Collins argues the House actually included the amendment allowing removal on the basis of a federal defense in order to limit removal practice by federal corporations under the 1875 Act. Correspondingly, Collins argues the Senate struck the amendment in order to preserve the breadth of removal jurisdiction allowed by the Supreme Court in the Pacific Railroad Removal Cases. See Collins, supra note 25, at 747.

While plausible that this motivated the Senate, which did not examine the bill until 1887, the Senate is absolutely silent as to why it struck the removal clause—perhaps it believed that it was superfluous, perhaps it did not want to allow federal defense removal, perhaps it believed, as Collins argues, that the amendment was too restrictive of federal defense removal (but why not amend it rather than strike it?). See 18 CONG. REC. 2542 (1887).

As to the House, the bill remained the same, including with the added amendment expressly allowing removal on the basis of a federal defense, from 1880 to 1887. Thus it is hard to imagine that the House wanted to alter the 1875 Act to “effectively reverse[] the Court’s construction of that Act in the Pacific Railroad Removal Cases,” which was decided in 1885—five years after the House added the amendment. See Collins, supra note 25, at 750; see also 10 CONG. REC. 701-02 (1880) (statement of Mr. Culberson offering amendments).

Certainly Collins is correct that the House disagreed with the interpretation of federal jurisdiction promoted in the Pacific Railroad Removal Cases, 115 U.S. 1 (1885), which allowed federal question jurisdiction under the 1875 Act to be based on the mere fact that a corporation suing or being sued was incorporated by an act of Congress. Indeed, while never mentioning the Pacific Railroad Removal Cases, part of the 1887 and 1888 amendments included repealing Section 640 of the Revised Statutes, which allowed for removal in “any suit commenced . . . against any corporation other than a banking corporation, organized under a law of the United States . . . upon the petition of such defendant . . . stating that such defendant has a defense arising under or by virtue of the Constitution” or federal law. See Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226-27 (1868). Beginning in 1880, Mr. Wellborn, who introduced the amendment to repeal § 640, explained that “it is claimed that in every suit against a Federal corporation it necessarily has a defense arising under, because chartered by, a law of the United States, and therefore that all suits against these corporations are removable under this section 640.” See 10 CONG. REC. 702 (1880); see also id. at 701-02. Debates in the House running from 1880 until the passage of the 1887 amendments denote that the House did not think the mere fact that a corporation was created by Congress should be sufficient to create statutory federal question jurisdiction. See, e.g., 10 CONG. REC. 701-02, 724 (1880); 14 CONG. REC. 1248 (1883) (statement of Mr. Culberson); 18 CONG. REC. 613 (1887) (statement of Mr. Culberson).

Further, in passing the amendment to expressly allow federal defense removal, the House appears to have been motivated by an intent to give back in part what it was taking away with the repeal of Section 640. The Congressman offering the amendment explained that if the amendment passed, “no national corporation can complain at the repeal of section 640, because if such corporation has a meritorious defense” under federal law, then by virtue of the amendment it can remove the case. See 10 CONG. REC. 701-02 (1880) (statement of Mr. Culberson).
bill included both the original jurisdiction language construed by the *Tennessee* Court as prohibiting removal on the basis of a defense and the proposed language expressly allowing a defendant to remove on the basis of a defense.\(^{42}\) Apparently, Congress did not see these two clauses as incongruous.

Eight years after *Tennessee*, Congress considered amending the judicial code to allow for removal of a federal defense and to allow removal by either the plaintiff or defendant.\(^{43}\) The House Report explains that “[t]o effect this [i.e., removal on the basis of a defense], it is necessary to omit the words ‘of which the circuit courts are given original jurisdiction by the preceding section,’ found in the existing law . . . .”\(^{44}\) Congress certainly understood in 1902 (whether or not it initially intended through the 1887 enactment) that the “original jurisdiction” language had been construed to prohibit removal on the basis of a defense. The 1902 bills were not passed in either the House or Senate (indeed the Senate reported adversely on such a bill explaining it was “a very unwise change in the law”\(^ {45}\)), and to this day the removal statute contains the restriction that removal is limited to cases “of which the district courts of the United States have original jurisdiction.”\(^{46}\) Since *Tennessee*, multiple bills have been introduced in Congress to repeal the well-pleaded complaint rule (at least to the extent that the rule forbids

\(^{42}\) From 1880 until amended by the Senate in 1887, the bill provided removal for any suit “arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority of which the circuit courts of the United States are given original jurisdiction by the preceding section . . . . may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district whenever it is made to appear from the application of such defendant or defendants that his or their defense depends in whole or in part upon a correct construction of some provision of the Constitution or law of the United States . . . .” See 10 *Cong. Rec.* 701 (1880) (statement of Mr. Culberson adding amendment) (emphasis added); 18 *Cong. Rec.* 613 (1887) (same language in bill); 18 *Cong. Rec.* 2542 (1887) (Senate striking amendment).

\(^{43}\) The House Report explains that the bill is intended “to restore in a measure to the plaintiff the right and opportunity to remove his cause given him by the act of March 3, 1875.” *H.R. Rep.* No. 57-2459, at 1 (1902).

\(^{44}\) *H.R. Rep.* No. 57-2459, at 1 (1902); *see also id.* (explaining that “relief sought by” the bill “will be effected principally by omitting from Section 2 of the statute as it now stands the words ‘of which the circuit courts are given original jurisdiction by the preceding section’”, which were added . . . by the act of 1887-88.”)


\(^{46}\) *See 28 U.S.C.* 1441.
II. The History of the Complete Preemption Doctrine

A. Complete Preemption Prior to Anderson

1. Avco and complete preemption under the LMRA

Seventy-four years after *Tennessee*, the Supreme Court created what it would later call a “corollary” to the well-pleaded complaint rule that eventually would be dubbed the complete preemption doctrine. In *Avco Corp. v. Aero Lodge No. 735*, the Supreme Court allowed removal of a case asserting solely state law claims based on the federal defense that the state law claims were preempted by § 301 of the Labor Management Relations Act (“LMRA”). The *Avco* Court provided no explanation for why it was allowing removal and, indeed, did not even mention the well-pleaded complaint rule. The Court’s only explanation for allowing removal was that “[a]n action arising under § 301 *is controlled by federal substantive law even though it is brought in state court.*”

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47 In addition to the 1902 bills, see supra notes 43-45, multiple bills allowing removal on the basis of a defense were introduced in 1905 in Congress and one was introduced into the Senate in 1907. See H.R. 18213, 58th Cong. (1905); S. 7131, 58th Cong. (1905); H.R. 8758, 58th Cong. (1905); H.R. 9744, 58th Cong. (1905); S. 8290, 58th Cong. (1907). Further, a major effort was made in 1971 based on the American Law Institute’s (ALI), STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969), to change the judicial code to allow removal on the basis of a federal defense. See S. 1876, 92d Cong. (1971). Additionally, in 1948 Congress revamped the judicial code. Although at least one commentator recommended that Congress allow removal by the defendant on the basis of a federal defense, the well-pleaded complaint rule remained unchanged. See, e.g., Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 233-34 (1948) (suggesting that the pending “statute ought to be reshaped in terms of a consistent theory that permits removal by the party who puts forth the federal right” or should drop federal question removal entirely).

48 *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). The plaintiff in *Avco* filed a suit in Tennessee state court to enjoin the defendant union from striking at the plaintiff’s plant. The state court issued the requested injunction, and the defendants removed the case to federal court. The federal court denied the motion to remand and dissolved the injunction. The Supreme Court upheld removal of the case.

49 *Id.* at 560 (emphasis added). Another aspect of *Avco* is notable. Under the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), which prohibited federal courts from issuing injunctions in labor disputes, the *Avco* plaintiffs could not obtain their requested injunction in federal court (although such an injunction was available in state court). Thus removal deprived the plaintiffs of their requested relief. Noting the plaintiffs still had available remedies under § 301 of the LMRA—albeit different remedies from the injunction available in state court—the *Avco* court held that “the breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter.” *Avco*, 390 U.S. at 561.
In *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*\(^{50}\) the Supreme Court attempted in dicta to provide a rationale for *Avco*. The Court stated that under *Avco*, “if a federal cause of action *completely preempts* a state cause of action any complaint *that comes within the scope of the federal cause of action* necessarily ‘arises under’ federal law.”\(^{51}\) The Supreme Court’s explanation that removal was allowed when a federal statute “completely preempts” a state law claim did not explain why or when substantive preemption (which did not allow for removal) became “complete preemption” (which did).\(^{52}\)

### 2. Taylor and complete preemption under ERISA

Over twenty years after its decision in *Avco*, the Supreme Court held that a statute other than § 301 of the LMRA invoked complete preemption, and hence, removal of state law claims. In *Metropolitan Life Insurance Co. v. Taylor*,\(^{53}\) the Supreme Court held that state law claims falling within the preemptive scope of §502(a) of the Employee Retirement Income Security Act of 1974 (“ERISA”) were removable to federal court. In finding complete preemption, the Court relied on congressional intent that § 502(a) claims be removable. The Court noted that “the

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\(^{50}\) 463 U.S. 1 (1983).

\(^{51}\) Id. at 23-24 (emphasis added).

\(^{52}\) Professor Gil Seinfeld posited a practical explanation for *Avco*, although it does not include any theoretical explanation for determining when exceptions to the well-pleaded complaint rule should be made. He explained: “There is considerable evidence that the Congress that enacted the LMRA was deeply concerned about the capacity and willingness of state courts to enforce collective bargaining agreements against labor unions. . . . Hence, the most likely explanation for the Supreme Court’s decision in *Avco* (though the Court does not bother to say so), is that the Justices were responding to these very concerns.” See Seinfeld, *supra* note 10, at 563.

language of the jurisdictional subsection of ERISA’s civil enforcement provisions closely parallels that of § 301 of the LMRA” and that a presumption that similar language was intended to have similar meaning was “fully confirmed by the legislative history of ERISA.” In fact, the legislative history specifically stated that “[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the [LMRA].”54 The Taylor Court explained:

No more specific reference to the *Avco* rule can be expected and the rest of the legislative history consistently sets out this clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA.55

The Court concluded that the “touchstone of the federal district court’s removal jurisdiction” is “the intent of Congress.”56 And, for ERISA, Congress had “clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court”—an intent the federal judiciary “must honor.”57

The Court stopped short of making clear congressional intent of removability an absolute requirement for finding complete preemption. Indeed, the Court did not say that without clear congressional intent removal would be foreclosed—only that it would be “reluctant” to so find, and that absent “explicit direction from Congress this question would be a close one.”58

The concurring opinion of Justice Brennan, joined by Justice Marshall, further stressed the importance of congressional intent of removability. Justice Brennan explained that he wrote “separately only to note that today’s holding is a narrow one” and that the Court “focuses on the

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54 *Id.* at 65-66 (emphasis changed).
55 *Id.* at 66.
56 *Id.* at 66.
57 *Id.*
58 *Id.* at 65, 64.
‘intent of Congress,’ *to make respondent’s cause of action removable* to federal court.”59 Justice Brennan then explained, in a passage that has often been quoted by lower federal courts:

> [O]ur decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, “Congress has *clearly* manifested an intent to make causes of action . . . removable to federal court.” In future cases involving other statutes, the prudent course for a federal court that does not find a clear congressional intent to create removal jurisdiction will be to remand the case to state court.60

### C. The *Anderson Foray*

#### 1. The *Anderson Decision*

Another sixteen years passed before the Supreme Court added a third statute to its list of federal statutes that invoked complete preemption. In *Beneficial National Bank v. Anderson*,61 the Supreme Court, reversing the Eleventh Circuit, held that §§ 85 and 86 of the National Bank Act (“NBA”) brought about complete preemption of state law claims falling within their scope. The Eleventh Circuit, relying on *Taylor*, had held that complete preemption did not apply because the court could “find no clear congressional intent to permit removal under §§ 85 and 86.”62 Although the NBA had been enacted in 1864—11 years before the passage of the 1875 Act that first generally allowed removal from state to federal court—the Eleventh Circuit examined statutory provisions and legislative history that nonetheless indicated that Congress was not concerned with taking the preemption question away from state courts.63 First, the venue provision for the NBA expressly allowed for suit in either federal or state court. Second, even before 1875, Congress had provided for removal of cases under specific statutes, but not the NBA. Third, and perhaps most telling, four years after enacting the NBA, Congress enacted a

59 *Id.* at 67 (Brennan, J., concurring) (emphasis added).
60 *Id.* at 67-68 (Brennan, J., concurring) (quoting majority opinion, *id.* at 66) (citations omitted).
62 See *Anderson v. H & R Block, Inc.*, 287 F.3d 1038, 1048 (11th Cir. 2002).
63 See *id.* at 1045-46.
statute allowing any corporation organized under national law—except national banks—to remove a case to federal court on the basis of a federal defense. 64 Thus, soon after the enactment of the NBA, Congress expressly excluded national banks from being able to remove on the basis of a defense, while granting that right to all other nationally chartered corporations. 65 Consequently, the Eleventh Circuit rejected the defendants’ suggestion that the early history of national banks offers clear congressional intent to make claims under the NBA removable.” 66

The Supreme Court reversed. In reviewing its previous case law, the Court provided a new rationale for *Avco* and *Taylor*:

In the two categories of cases where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action. 67 The Court relied on the statement from *Franchise Tax Board* that attempted to explain *Avco*, by asserting that removal is proper when “a federal cause of action completely preempt[s] a state law cause of action.” Yet, as noted, the Court had never explained when federal law completely preempted state claims as compared to when federal law merely preempted state claims. 68 The *Anderson* Court concluded from this quote, and purportedly also *Taylor* and *Avco*, that “the framework for answering the dispositive question” was: “Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of

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64 See Anderson v. H & R Block, Inc., 287 F.3d 1038, 1045-46 (11th Cir. 2002); see also supra note 41.
65 See also Seinfeld, supra note 10, at 558 (explaining that “[i]t is exceedingly difficult to reconcile the exclusion of national banks from this removal provision with the notion that Congress was seriously concerned that NBA claims be eligible for federal jurisdiction”).
66 See Anderson v. H & R Block, Inc., 287 F.3d 1038, 1046 (11th Cir. 2002).
68 See supra notes 50-52 and accompanying text. Indeed, in his *Anderson* dissent, Justice Scalia says of this quote that “it is not an explanation at all” for *Avco* because “[i]t provides nothing more than an account of what *Avco* accomplishes, rather than a justification (unless ipse dixit is to count as justification) for the radical departure from the well-pleaded-complaint rule.” See Anderson, 539 U.S. at 15 (Scalia, J., dissenting).
action necessarily arises under federal law and the case is removable.”

But how could the Court construe the existence of an exclusive cause of action as the rule and acknowledge Taylor’s emphasis on clear congressional intent of removability? The Court morphed the Taylor focus on clear congressional intent (although dropping the modifier, “clear”) with its rule of an exclusive federal cause of action, stating that “the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable.” Indeed, the Court stated that arguments regarding the pertinent jurisdictional statutes affecting the NBA were “irrelevant.”

However, the Anderson Court’s construction of Taylor as requiring congressional intent of an exclusive federal cause of action cannot find its root in Taylor (or Avco, which says nothing on the topic). Notably, in Taylor, the fact that § 502(a) of ERISA is an exclusive federal cause of action is mentioned exactly once in the Court’s very brief Section II of the opinion, which discusses the substantive preemption of the asserted common law claims. Indeed, § 502(a)’s nature as an exclusive federal cause of action is nowhere mentioned in Section III regarding the well-pleaded complaint rule, complete preemption, removal jurisdiction, and congressional intent. Further, the fact that ERISA § 502(a) was an exclusive cause of action was included in the already-recited facts upon which the court said it would be “reluctant” to find complete preemption absent “explicit direction from Congress.” Thus the needed “explicit direction from Congress” cannot regard the already-identified fact that the cause of action was

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69 Anderson, 539 U.S. at 9 (emphasis added).
70 Id. at 9 n.5.
71 Id.
72 Id. Professor Gil Seinfeld has posited that the Anderson Court’s “shift in focus—from inquiring directly whether Congress intended to create removal jurisdiction to inquiring whether Congress intended to create an exclusive federal cause of action—is sensible only if the latter is a good proxy for the former.” See Seinfeld, supra note 10, at 556. This inquiry will be examined in the context of the Carmack Amendment infra Part IV.
74 See id. at 63-67.
75 See id. at 64-65.
exclusive. Further, to ascertain such “direction from Congress,” the Taylor Court examined the jurisdictional statutes of ERISA and the LMRA, as well as the legislative history of the ERISA jurisdictional provisions.76 The Taylor Court certainly did not indicate, as did the Anderson Court, that arguments regarding the pertinent jurisdictional provisions and legislative history were “irrelevant.”77 Finally, it is untenable to read Taylor’s full statement that the “touchstone” of complete preemption is congressional intent and claim the Court was referring to congressional intent of an exclusive cause of action rather than intent of removability.78

After redefining “congressional intent” as used in Taylor, the Anderson Court proceeded to determine that § 86 provided the exclusive federal cause of action and held that removal was proper. Yet the Court’s method for discerning congressional intent is illuminating. The Court determined that Congress had intended to provide an exclusive federal cause of action by citing to its own prior case law regarding the preemptive scope of the NBA.79 No mention was made of the statutory language or legislative history of the NBA. The Anderson method contrasts with the Taylor analysis. The Taylor Court examined the text of the ERISA jurisdictional provision as well as reliable pieces of legislative history from the House Report and a sponsor of the ERISA bill. Indeed, Taylor looked to Congress in order to determine congressional intent.

Importantly, the Anderson Court admitted that its holding was influenced by “the special

76 See id. at 65.
77 See Anderson, 539 U.S. at 9 n.5.
78 The Taylor Court, 481 U.S. at 66 (emphasis added), stated:
[T]he touchstone of the federal district court’s removal jurisdiction is not the ‘obviousness’ of the pre-emption defense but the intent of Congress. Indeed, as we have noted, even an ‘obvious’ pre-emption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court. Since we have found Taylor’s cause of action to be within the scope of § 502(a), we must honor that intent whether pre-emption was obvious or not at the time this suit was filed. Accordingly, this suit, though it purports to raise only state law claims is necessarily federal in character by virtue of the clearly manifested intent of Congress.
79 Anderson, 539 U.S. at 10.
nature of federally chartered banks.”\textsuperscript{80} Citing \textit{McCulloch v. Maryland}, the Court explained:

The same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the ‘power to destroy,’ supports the established interpretation of §§ 85 and 86 [as the exclusive cause of action for usury against national banks] that gives those provisions the requisite preemptive force to provide removal jurisdiction.\textsuperscript{81}

Indeed, the Court’s desire to protect the historic independence of national banks from state encroachments was likely the catalyst for changing and broadening complete preemption—as the NBA did not satisfy Taylor’s test of clear congressional intent of removability.\textsuperscript{82}

Justice Scalia, joined by Justice Thomas,\textsuperscript{83} dissented, explaining that the new exclusive federal cause of action test “implicitly contradict[ed]” Taylor and the Taylor Court’s examination of jurisdictional provisions and legislative history to determine the propriety of removal.\textsuperscript{84}

Further, Justice Scalia contended that the creation of a federal cause of action failed to demonstrate congressional intent to effect jurisdictional changes or “to wrest from state courts the authority to decide questions of pre-emption.”\textsuperscript{85} Justice Scalia also explained that fear of state court error (which had been advocated as a reason to allow removal) was “inadequate for judicial authority,” because “[i]t is up to Congress, not the federal courts, to decide when the risk of state-court error with respect to a matter of federal law becomes so unbearable as to justify divesting the state courts of authority to decide the matter.”\textsuperscript{86} Finally, expressing concern about the potentially broad reach of the \textit{Anderson} decision, Justice Scalia concluded that “as between

\textsuperscript{80} Id.
\textsuperscript{81} Id. at 11 (citations omitted).
\textsuperscript{82} See supra notes 62-66 and accompanying text. The same interest of protecting national banks probably played a role in the \textit{Osborn} Court’s extremely broad construction of Constitutional arising under power. See supra note 17 regarding \textit{Osborn}’s holding.
\textsuperscript{83} Notably, in Taylor, it was the liberal Justices Brennan and Marshall that pushed for an extremely narrow interpretation of complete preemption, while in Anderson, it was Justices Scalia and Thomas.
\textsuperscript{84} Anderson, 539 U.S. at 16 (Scalia, J., dissenting). Justice Scalia indicates the Court could not contradict \textit{Avco} because “\textit{Avco} . . . has no discussion to be contradicted.” See id.
\textsuperscript{85} Id. at 19 (Scalia, J., dissenting).
\textsuperscript{86} Id. at 21 (Scalia, J., dissenting).
an inexplicable narrow holding and an inexplicable broad one, the former is the lesser evil.”87

2. The effect of Anderson in the lower courts

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

all [the tests] focus on a similar goal: to determine whether Congress not only intended a given federal statute to provide a federal defense to a state cause of action that could be asserted either in a state or federal courts, but also intended to grant a defendant the ability to remove the adjudication of the cause of action to a federal court by transforming the state cause of action into a federal [one].88

Following Anderson, federal courts are ceasing to ask if Congress “intended to grant a defendant the ability to remove the adjudication . . . to a federal court,” but rather examine whether the federal statute creates the exclusive cause of action for the alleged state law claims.

For example, the Second Circuit pre-Anderson “understood the doctrine [of complete preemption] to be restricted to ‘the very narrow range of cases where Congress had clearly manifested an intent to make a specific action within a particular area removable’”89 and had held that “there is no complete preemption without a clear statement to that effect from Congress.”90 Similarly, prior to Anderson, the Fifth Circuit had articulated a three-prong test for complete preemption, the third prong of which was: “there is a clear congressional intent that claims brought under the federal law be removable.”91 And the Ninth Circuit had explained that “complete preemption occurs only when Congress . . . intends to transfer jurisdiction of the

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87 Id. (Scalia, J., dissenting).
88 Miller, supra note 7, at 1797-98.
90 Marcus, 138 F.3d at 55.
91 Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000). See also Willy v. Coastal Corp., 855 F.2d 1160, 1166 (5th Cir. 1988) (finding no complete preemption because the allegedly preemptive federal laws “and the legislative history of those statutes indicate no intent, manifest or otherwise that Avco should apply in this character of case.”); Beers v. North Am. Van Lines Inc., 836 F.2d 910, 913 (5th Cir. 1988) (finding no complete preemption for Carmack Amendment claims because the court could “find no manifest congressional intent of the type contemplated in Taylor, to make this state claim removable to a federal court”).
subject matter from state to federal court.”

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

The Fourth Circuit’s case law has also acutely changed post-Anderson. Prior to Anderson, the Fourth Circuit’s seminal case regarding complete preemption was Rosciszewski v. Arete

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92 Wayne v. Worldwide Express, 294 F.3d 1179, 1184 (9th Cir 2002) (holding no complete preemption by the Airline Deregulation Act); Ansley v. Ameriquest Mortgage Co., 340 F.3d 858, 862 (9th Cir. 2003) (early post-Anderson, but citing Wayne’s language as test for complete preemption—must show that Congress intended “to transfer jurisdiction of the subject matter from state to federal court”).
93 Briarpatch, 373 F.3d at 304.
94 Id. at 304-05 (emphasis added).
95 See also City of Rome, N.Y. v. Verizon Commc’ns, Inc., 362 F.3d 168, 177 (2d Cir. 2004) (explaining that to determine complete preemption the court “must undertake a two-step inquiry to determine first whether Section 253 [of the Telecommunications Act] preempts any common law or statutory rule and then whether Congress intended section 253 to provide an exclusive cause of action”).
96 PCI Transp., Inc. v. Fort Worth & W. R.R. Co., 418 F.3d 535, 544 (5th Cir. 2005) (finding complete preemption by the Interstate Commerce Commission Termination Act (ICCTA)).
97 PCI, 418 F.3d at 543-44 & n.32.
98 Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042 (9th Cir. 2003). See also Miles v. Okun, 430 F.3d 1083, 1088 (9th Cir. 2003) (stating that the Anderson Court “clarified that removal is proper under the complete preemption doctrine only when Congress intended the federal cause of action to be exclusive” and finding complete preemption by the bankruptcy code (11 U.S.C. § 303(1)) “for damages resulting from the filing of an involuntary bankruptcy petition”).
In *Rosciszewski*, the Fourth Circuit held that complete preemption applied to state law claims coming within the preemptive scope of § 301(a) of the Copyright Act. The court explained that the focus of its inquiry was “congressional intent” and examined both the scope of the intended preemption by Congress and the intent of Congress to place adjudication of the federal claims in federal court, as revealed by the statutory jurisdictional provisions and legislative history. Although not paralleling the jurisdictional language used in the LMRA (as the *Taylor* Court had found with ERISA), the Fourth Circuit held that the provision for exclusive federal jurisdiction over copyright claims was “strong evidence that Congress intended copyright litigation to take place in federal courts.” The Court concluded:

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

In stark contrast with its *Rosciszewski* decision, the Fourth Circuit recently took complete preemption to a new level in *Discover Bank v. Vaden*. In *Vaden*, Discover Financial Services, Inc. (“DSF”), allegedly on behalf of Discover Bank, sued Vaden in Maryland state court for non-payment of a credit card debt. Discover Bank is a Delaware chartered bank (not a

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99 *Rosciszewski*, 1 F.3d at 232.
100 Id. at 232. Notably, and as the *Rosciszewski* court itself recognized, *see id.* at 232 n.6, at the time the Copyright Act was enacted the so-called “derivative jurisdiction rule” prohibited removal of a claim within the exclusive jurisdiction of the federal courts. The idea was that because the state courts did not have jurisdiction, the case could not be “moved” from state to federal court—rather, it had to be dismissed. *See e.g.*, Lambert Run Coal Co. v. Baltimore & Ohio R.R., 258 U.S. 377, 382 (1922). The derivative jurisdiction rule was statutorily overturned in 1986 by what is currently 28 U.S.C. § 1441(f). Thus, while it is sound for the *Rosciszewski* court to state that Congress’s grant of exclusive jurisdiction showed an intent by Congress that copyright claims be adjudicated in federal court and not by state courts, it is hard to argue that Congress intended that state law claims in state court be removed to federal court on the basis of a federal copyright preemption defense because at the time of the statute’s enactment the derivative jurisdiction rule prevented removal of even express copyright claims.

102 Id. at 232.
103 In *Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005), the Fourth Circuit stated that the *Anderson* “view of [complete preemption]” “is consistent with our approach in *Rosciszewski.*” As will be demonstrated, the Fourth Circuit’s current approach as employed in *Vaden* is quite divergent from the approach taken in *Rosciszewski*. However, the Fourth Circuit’s view of the *Anderson* test in *Lontz* is arguably different from its view of *Anderson* indicated by *Vaden*. *See infra* note 116 and accompanying text.

national bank as in *Anderson*), but is federally insured. Vaden filed counterclaims against DSF alleging that fees and interest rates charged violated state law.\(^\text{105}\) Discover Bank then filed a petition in federal court seeking to compel arbitration under the Federal Arbitration Act ("FAA"). According to the Fourth Circuit, it had jurisdiction under the FAA only if it would have had jurisdiction over the underlying action (which, again, involved an affiliate of a state-chartered bank suing a debtor under state law in state court where the debtor counterclaimed that bank’s fees and interest rates violated state law).\(^\text{106}\)

The Fourth Circuit held that it would have federal question jurisdiction over the underlying case by virtue of complete preemption. According to the court, Vaden’s state *counterclaims* against DFS, which the Court construed to be against the bank itself, were completely preempted by the Federal Deposit Insurance Act ("FDIA").\(^\text{107}\) Leaving aside the Fourth Circuit’s questionable determination that federal question jurisdiction existed on the basis of preemption of state law counterclaims,\(^\text{108}\) the court’s analysis underscores the change wrought by *Anderson*. The *Vaden* court focused entirely on congressional intent to preempt state law

\(^{105}\) Id. at *1.

\(^{106}\) See id. at *3.

\(^{107}\) 12 U.S.C. § 1811 et seq.

\(^{108}\) The dissent rightly pointed out that under *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 830 (2002), “a counterclaim—which appears as part of the defendant’s answer, not as part of the plaintiff’s complaint—cannot serve as the basis for ‘arising under’ jurisdiction.” *See Vaden*, 2007 WL 1695758, at *12 (Goodwin, J., dissenting). The *Vaden* majority contends that *Holmes Group* is not controlling because it “did not . . . involve complete preemption.” *See Vaden*, 2007 WL 1695758, at *15 n.4. According to the majority, complete preemption is an exception to and overrides all aspects of the well-pleaded complaint rule to the extent that federal question jurisdiction may be based on a state law counterclaim that is completely preempted by federal law. *See id.*

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

Moreover, to allow complete preemption on the basis of a state law counterclaim that the *plaintiff* asserts in reply is preempted by federal law and, further, to allow the plaintiff to use that to invoke a federal forum is essentially returning to the jurisdictional scheme of 1875 to 1887 during which either a plaintiff or a defendant could remove a case to federal court. However, Congress determined in 1887 that plaintiffs should not be able to remove and once they selected their forum they could not move to a different one. Whether or not the rule is justifiable as a matter of principle, the decisive point is that Congress has expressly so limited federal removal jurisdiction and without a change from Congress, the federal judiciary simply has no authority to declare it otherwise.
(rather than on anything regarding jurisdiction). Indeed, the court summarized in conclusion:

Given the express preemption language of the FDIA, the statute’s legislative history affirming Congress’ intent to provide competitive equality between national and state-charted banks, the virtual identity of the preemption language in the NBA and that of the FDIA, and the Supreme Court’s finding of complete preemption under the NBA, we are hard-pressed to conclude other than that Congress intended complete preemption of state-court usury claims under the FDIA.\(^{109}\)

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

While the Vaden court compared statutory provisions of the NBA to those of the FDIA, it based its finding of complete preemption on the comparison of the substantive preemption provisions,\(^{110}\) basically ignoring any jurisdictional provisions of either statute. The court acknowledged in a footnote “one difference” between the NBA and the FDIA: namely, that § 86 of the NBA did not mention the type of courts in which the action was to be brought, while the FDIA stated that the action was to be commenced “in a court of appropriate jurisdiction.”\(^{111}\) The court summarily dismissed this difference because “both statutes speak to the creation of a

\(^{109}\) Id. at *9.

\(^{110}\) In finding complete preemption, the Vaden Court compared § 85, the substantive preemption provision, of the NBA to FDIA, but made no comparison of FDIA to § 86 of the NBA, which created the NBA claim. The Supreme Court in Anderson had found that the combination of §§ 85 and 86 brought about complete preemption. Compare Vaden, 2007 WL 1695758, at *8 with Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 2 (2003).

federal cause of action. Arguably, under *Anderson*, the Fourth Circuit was correct in placing its focus on the fact that both statutes created a federal cause of action with a similar preemptive scope rather than examining anyjurisdictional provisions.

Finally, the *Vaden* decision is illuminating because of its emphasis on following *Anderson* and its assumption that Congress has the same interest in protecting state banks from state court encroachments as it has in protecting federal banks. The *Anderson* Court emphasized “the special nature of federally chartered banks” that “needed protection from ‘possible unfriendly State legislation.’” Indeed the Court noted that *McCulloch’s* “power to destroy” language supported complete preemption of state law claims against national banks. The Fourth Circuit in *Vaden* interpreted the *Anderson* decision as “elucidat[ing]” the broad proposition that “federal banking laws preempt state law.” It then took that proposition a step further and held that such substantive preemption triggered removal under the doctrine of complete preemption—even in cases involving state banks rather than national banks. While the *Anderson* Court’s bottom line concern may have been to preserve the historic federal independence of national banks from state encroachment, it did not limit its decision to such problems; rather, the Court phrased the dispositive inquiry in terms of a new broad test that would expand complete preemption removal to statutes of every sort.

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112 *Anderson*, 539 U.S. at 10.
113 *Id.* at 11.
114 *Vaden*, 2007 WL 1695758, at *7 n.11.
115 The Fourth Circuit’s theory was that Congress intended to create parity between state and federal banks if the court “found no complete preemption here, we would be treating state banks differently under the FDIA than national banks are treated under the NBA.” *See Vaden*, 2007 WL 1695758, at *9 n.18.
116 Again, the *Anderson* Court framed the dispositive question for complete preemption as “Does the National Bank Act provide the exclusive cause of action for usury claims against national banks?” *Anderson*, 539 U.S. at 9; *see also id.* at 9 and n.5; *id.* at 8. In none of its articulations of the test does the Supreme Court hint that the historical federal independence of the national banks played a role in determining complete preemption.

In *Lontz*, the Fourth Circuit recognized the *Anderson* Court’s emphasis on the unique federal interests implicated by potential state encroachment on national banks as part of the complete preemption analysis. *Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005). Specifically, the *Lontz* court indicated that the test for complete preemption from *Anderson* was that “Congress intended [the preemptive statute] to ‘provide the exclusive cause of
III. Alternative Proposals for Determining Complete Preemption

Commentators have expressed various views on the proper scope of both the well-pleaded complaint rule and the complete preemption doctrine. The entire gamut—everything from allowing removal on the basis of any federal defense\(^{117}\) to abolishing the complete preemption exception and fully enforcing the well-pleaded complaint rule has been recommended. Pertinent for the purposes of this paper are scholarly commentary regarding what the proper test or framework for complete preemption should be.

One recommendation is to allow removal whenever any federal preemption defense is raised. For example, Karen Jordan argued that complete preemption should be allowed whenever there is a federal defense that has the potential to nullify a state cause of action—whether or not a federal cause of action is available.\(^{118}\) Jordan argues that her framework would create greater efficiency because the state claim, if properly removed, will either be dismissed in federal court or adjudicated as a federal claim, and if remanded, “there will be no need to relitigate the merits of the preemption issue [in state court] since the law of the case doctrine applies to issues over

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action’ for claims of overwhelming national interest.” See id. (emphasis added). The Fourth Circuit in Lontz noted that the Anderson Court “stressed that national banks were the subject of unique national concern.” See id. (emphasis added). However, in Vaden, the Fourth Circuit (in similar fashion to the other federal courts of appeal and Anderson’s own articulation of its test) made no recognition that complete preemption in Anderson was perhaps found to be appropriate because of a special or unique interest involving national banks.

\(^{117}\) Several scholars, while not specifically discussing complete preemption, have argued that removal should be allowed on the basis of a federal defense and that the “well-pleaded complaint rule must be abandoned.” Doernberg, supra note 22, at 658. Similarly, A. Mark Segreti contends that, because the Supreme Court is unlikely to change the well-pleaded complaint rule, Congress should “replace the phrase ‘arising under’ with some kind of ‘federal ingredient’ language” to eliminate the well-pleaded complaint rule and bestow on the federal courts the full-extent of arising under power as that power was interpreted in Osborn. See A. Mark Segreti, Jr., Vesting the Whole ‘Arising Under’ Power of the District Courts in Federal Preemption Cases, 37 OKLA. L. REV. 539, 545 (1984). Doernberg notes that others have recommended allowing removal on the basis of a federal defense, and specifically cites to Chadbourn and Levin, supra note 22; Paul J. Mishkin, The Federal “Question” in the District Courts, 53 COLUM. L. REV. 157 (1953); and Harmon L. Trautman, Federal Right Jurisdiction and the Declaratory Remedy, 7 VAND. L. REV. 445, 461 (1954). See Doernberg, supra note 22, at 659 & nn.267-68.

\(^{118}\) Karen A. Jordan, The Complete Preemption Dilemma: A Legal Process Perspective, 31 WAKE FOREST L. REV. 927, 984 (Winter 1996); see also Segreti, supra note 116, at 545, 551-54 (arguing as an alternative to abandoning the well-pleaded complaint rule, allowing removal of federal preemption defenses).
which the federal court had jurisdiction to decide.”119 Jordan also posits that “the shift in authority to decide the preemption issue will not deprive the state court of the opportunity to construe state law, but only of the opportunity to interpret federal law.”120

Commentators have also favored an approach similar to Anderson, which allows removal when there is a preemptive federal cause of action.121 Mary Twitchell argues for such an approach, but cognizant of federalism issues, structures her “jurisdictional analysis to avoid unnecessary preemption decisions” by the federal court while determining whether or not it has removal jurisdiction.122 Under her “three-step analysis,” a court must first determine “whether Congress has given plaintiff an express cause of action” and, if not, the suit is remanded because the state law claims cannot be “recharacterized” as a federal claim.123 Second, if there is a federal cause of action, the court examines “whether defendant could reasonably argue that Congress intended” to preempt the state law claim, and if not, remand the suit to state court.124 Third, if the first two requirements are met, the court will perform a full substantive preemption analysis and determine whether plaintiff’s claim is preempted.125 In her analysis, Twitchell sees the federal judiciary, and particularly, the Supreme Court as the proper authority to determine what is “a meaningful way to divide power in our federal system” even though Congress has chosen not to change (whether “unable or unwilling”) the current jurisdictional allocation between federal and

119 Id. at 989. Jordan’s conclusion that the state court would not need to revisit the preemption issue is subject to question. See infra note 286.
120 Id. at 990. The validity of this contention will be examined infra Part IV.B.1.
121 See Mary P. Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 GEO. WASH. L. REV. 812, 869, 865 (1986); see also Tristan K. Green, Complete Preemption—Removing the Mystery from Removal, 86 CAL. L. REV. 363, 389, 391 (1998) (explaining that “when Congress provides a replacement cause of action and creates preempting federal law, it may be logical to presume that there is reason to fear state court determination in that particular area of law either due to bias [of the state courts] or complexity [of federal law]” and in such situations, “Congress has gotten involved by creating preempting law as well as a replacement cause of action, and the courts may infer a certain congressional concern for fair and accurate adjudication”).
122 Twitchell, supra note 121, at 865.
123 Id.
124 Id.
125 Id.
state courts created by the well-pleaded complaint rule.\textsuperscript{126}

Post-\textit{Anderson}, Gil Seinfeld\textsuperscript{127} advocates a new test for determining complete preemption.\textsuperscript{128} Noting that a primary justification for federal jurisdiction is the uniform interpretation of federal law, Seinfeld argues that complete preemption should be based on the breadth of the substantive preemption of a federal statute, and would generally exist when there was field preemption.\textsuperscript{129} Seinfeld recognizes the delineation between field preemption and other forms of preemption is “notoriously blurry” and so “[t]he hallmark of a preemptive regulatory regime that should suffice to underwrite federal defense removal is that supplementary state legislation is prohibited”—regardless of the label attached to the preemption involved.\textsuperscript{130} Finally, Seinfeld notes that under his proposed test, “\textit{some reshaping} of the basic structure of federal question jurisdiction” would be required, including abandoning “the pretense that removal on the basis of a defense is prohibited” and allowing removal by the plaintiff where the defendant raises a federal defense.\textsuperscript{131} The combination of these two features of “reshaping” constitute a repeal of the post-\textit{Tennessee} well-pleaded complaint rule.\textsuperscript{132}

\textsuperscript{126} Id.
\textsuperscript{127} Seinfeld was a law clerk for Justice Scalia at the time the \textit{Anderson} decision was rendered. \textit{See} Seinfeld, supra note 10, at 548 n.31.
\textsuperscript{128} Seinfeld notes that the Supreme Court has never “attempted to justify its development of this unusual jurisdictional rule without explicit (or even implicit) congressional authorization,” but the Court “shows no signs of abandoning complete preemption” or leaving its crafting to Congress. Thus, Seinfeld proposes his own test for complete preemption that could be adopted by the judiciary. \textit{See} id.
\textsuperscript{129} \textit{See id.} at 578, 574-475; \textit{see also id.} at 574 (“[T]he more broadly preemptive federal law is, the more likely it is that the interest in regulatory uniformity is in play. And it would therefore make sense to \textit{tether a rule of federal defense removal to the scope of federal preemption}—that is, to the extent to which federal law prohibits state intervention in a given field. Such a rule would channel into the courts thought most likely to provide a uniform interpretation of federal law those cases in which the need for such an interpretation is most pressing.” (Emphasis added.)).
\textsuperscript{130} \textit{Id.} at 576-77; \textit{see also id.} at 577 (explaining that “[i]f federal law is construed to prevent states from heaping on regulated entities obligations above and beyond those animated by federal law, then it is reasonable to conclude that Congress has endeavored to assure” uniformity and federal removal jurisdiction would be proper).
\textsuperscript{131} \textit{Id.} at 577-78.
\textsuperscript{132} Seinfeld emphasizes throughout his article separation of powers concerns with the judiciary creating and expanding the complete preemption doctrine without any congressional authorization. \textit{See, e.g., id.} at 550, 571. Seinfeld nevertheless proposes his own jurisprudential theory for complete preemption because “the Supreme Court
Scholars have also argued that complete preemption should be abandoned altogether. Arguing that the well-pleaded complaint rule serves federalism purposes, Robert Ragazzo contends that artful pleading exceptions to the well-pleaded complaint rule, including complete preemption, should be abandoned.¹³³ Ragazzo also argues that judicial efficiency is strained by complete preemption both because a case is passed between state and federal systems and also because such exceptions are “exceedingly difficult to apply.”¹³⁴ Finally, Ragazzo appears to put the abolishment of complete preemption in the hands of the Supreme Court, but “[f]ailing action by the Court, Congress would do well to eliminate a doctrine that is contrary to sound jurisdictional theory, exceedingly difficult to apply, and the bane of judges and litigants alike.”¹³⁵

More recently, Benjamin Spencer advocated abolishing complete preemption “to the extent that shows no signs of abandoning complete preemption doctrine and leaving the task of crafting exceptions to the well-pleaded complaint rule to Congress alone.” See id. at 571.

Surprisingly, then, Seinfeld includes in his proposed judicial approach to complete preemption both abandoning the idea that removal cannot be made on the basis of a federal defense and allowing the plaintiff to remove. The second of these cannot be accomplished by the judiciary no matter how “sound” the policy of allowing plaintiffs the right to remove. See id. at 578. From 1887 to the present, Congress has limited the right of removal to defendants. See 28 U.S.C. § 1441(a) (restricting removal to “the defendant or the defendants”). Seinfeld probably recognized that this change would have to be made by Congress as he cites to the current statute, see Seinfeld, supra note 10, at 577-78 nn.123-24, but he fails to so state and adds confusion as to which parts of his framework could be accomplished by judicial interpretation and which require congressional action.

Similarly, Seinfeld posits in a footnote that there are compelling reasons to treat the well-pleaded complaint rule “in effect, as if it were a creature of statute, rather than one of judicial construction” in light of the strong history of acquiescence by Congress. See id. at 570 n.107. Nevertheless, Seinfeld proposes as part of his judicial complete preemption doctrine abandoning the idea that removal cannot be based on a federal defense—the heart of the post-Tennessee well-pleaded complaint rule. Again, while criticizing the Supreme Court for not addressing separation of powers problems with complete preemption, Seinfeld’s own proposal arguably raises even greater separation of powers concerns than the Supreme Court’s current (and far more narrow) complete preemption doctrine.


¹³⁴ Ragazzo, supra note 133, at 329-31.

¹³⁵ Id. at 335.
the Court inferences its existence in any given case.”  Although sounding fairly absolute, Spencer supports complete preemption “where Congress adopted the [jurisdictional] language” used in the LMRA that the Supreme Court interpreted “as indicative of an intent to permit” removal.

Finally, in a short response to Seinfeld’s article discussed above, Trevor Morrison argued that “any attempt to fashion a rule of complete preemption entails decisions better made by Congress, not the Courts.” Noting some problems with Seinfeld’s theory, Morrison briefly argues that “complete preemption should depend on congressional intent, not judicial invention” because “Congress is simply better than the courts at making the kinds of decisions necessary to craft sensible and coherent doctrine in this area.” Similarly, Arthur Miller has contended that the “Supreme Court probably should find an opportunity to offer some guidance as to what terms should appear in the statute, or, at least, be set out in reliable legislative history, to create complete preemption,” which would place “the burden on Congress” rather than allowing the “lower federal courts to construct their own potentially divergent multi-factored tests, would achieve greater uniformity and would avoid much litigation in the long run.”

IV. Separation of Powers, Federalism, and Efficiency Problems with the Anderson Rule

The Eleventh Circuit stated in the lower Anderson decision: “When a federal court acts

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136 Benjamin Spencer, Anti-Federalist Procedure, 64 WASH. & LEE L. REV. 233, 290 (2007) (emphasis added). Indeed, Spencer notes that “Congress of course retains the authority to provide expressly for the removability of preempted state law claims, as it has done in the past.” See id.

137 Id. Spencer argues removal would be allowed not because of complete preemption but “rather to honor the clear expression of congressional intent that such be the case” as, he contends, occurred in Taylor. See id.

Notably, in Taylor, it was not just Congress’ adoption of the jurisdictional language used in the LMRA, but additionally the legislative history with a clear statement from Congress indicating that ERISA preemption was intended to be removable similar to § 301 of the LMRA. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987). Thus it is a stretch to say that the Supreme Court in Taylor declared that whenever the jurisdictional language used in the LMRA is used in another statute that such demonstrates Congress’s intent to allow removal.

138 See supra notes 127-32 and accompanying text.


140 Miller, supra note 7, at 1800 (1998). The primary focus of Miller’s article was the Moitie doctrine, see supra note 133, which, again was overturned in Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998), although Miller does examine complete preemption as well.
outside its jurisdiction, it violates principles of separation of powers and federalism, interfering with Congress’s authority to demarcate the jurisdiction of lower federal courts, and with the states’ authority to resolve disputes in their own courts.”\textsuperscript{142} The Eleventh Circuit could not have known that its statement would be prophetic about the direction that complete preemption would take on the direct appeal of that very decision.

A. Separation of Powers Problems

1. Congressional Power to Determine Lower Federal Court Jurisdiction

The \textit{Anderson} test raises separation of powers concerns because it is Congress that generally has the power to define the jurisdiction of the lower federal courts. The history of federal court jurisdiction\textsuperscript{143} and pronouncements from the Supreme Court\textsuperscript{144} verify—at least to the extent relevant to complete preemption and removal jurisdiction—that Congress controls the jurisdiction of the lower federal courts, and may “withhold[] jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.”\textsuperscript{145} Even the extensive realm of academic dialogue regarding the extent of congressional control over federal jurisdiction is restricted to a rather narrow area\textsuperscript{146} and does not generally refute congressional

\begin{itemize}
\item \textsuperscript{142} Anderson v. H&R Block, Inc., 287 F.3d 1038, 1042 (2002).
\item \textsuperscript{143} The most obvious example of congressional ability to define and limit federal jurisdiction is that federal courts were not even given federal question jurisdiction until 1875—and even then federal question jurisdiction was limited by a jurisdictional amount until 1980. Further, the lower federal courts were not given general removal jurisdiction from a state to federal court until 1875. And, as noted, \textit{supra} notes 15-18 & 30-31 and accompanying text, although Congress initially gave both plaintiffs and defendants the right to remove to federal court, it restricted that grant of jurisdiction in 1887, limiting removal to defendants.
\item \textsuperscript{144} For example, in \textit{Sheldon v. Sill}, 49 U.S. 441, 448-49 (1850), the Supreme Court explained that “Congress having the power to establish the courts, must define their respective jurisdictions” and “may withhold from any court of its creation jurisdiction of any of the enumerated controversies”—for “[c]ourts created by statute can have no jurisdiction but such as the statute confers.” \textit{See also} Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922) (explaining that only the Supreme Court is created by the Constitution itself, but “[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it” and Congress “may give, withhold or restrict such jurisdiction at its discretion”).
\item \textsuperscript{145} \textit{Ankenbrandt}, 504 U.S. at 698 (quoting Cary v. Curtis, 44 U.S. 236, 245 (1845)).
\item \textsuperscript{146} One major theory is that Article III requires that there be some federal court adjudication—either original or appellate over cases enumerated in Article III. However, because state court adjudication of the federal preemption defense is subject to Supreme Court review, this theory does not implicate removal jurisdiction by means of complete preemption. \textit{See, e.g.}, Robert N. Clinton, \textit{A Mandatory View of Federal Court Jurisdiction: A}
control over granting and denying removal jurisdiction.\footnote{147}

Notwithstanding scholarly criticism of the well-pleaded complaint rule, the prohibition against removal on the basis of a federal defense was created as a judicial construction of 1887 amendments to the judicial code, and Congress has refused to repeal or revise the rule (which may not be wise anyway\footnote{148}) though given the opportunity on multiple occasions.\footnote{149} Despite congressional authority over removal jurisdiction, under\footnote{Anderson}, removal jurisdiction becomes

\footnote{Guided Quest for the Original Understanding of Article III, 132 U. PA. L. REV. 741, 753 (1984) (arguing Article III was intended “to ensure that some federal court would have at least a discretionary opportunity to review each class of case enumerated in section 2 of article III”); Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the two Tiers of Federal Jurisdiction, 65 BOSTON UNIV. L. REV. 205, 240-41, 255-57, 272 (1985) (arguing that enumerated powers containing the term “all” require mandatory jurisdiction, including federal question cases).

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

Other commentators argue that the Due Process clause and other constitutional provisions curtail Congressional ability to limit jurisdiction. Under such theories Congress cannot eliminate all judicial review (both state and federal) for federal rights, see, e.g., David Cole, Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction, 86 GEORGETOWN. L. J. 2481 (1998); Louise Weinberg, The Article III Box: The Power of “Congress” to Attack the “Jurisdiction” of “Federal Courts,” 78 TEX. L. REV. 1405 (2000), and Congress cannot strip federal courts of jurisdiction in order to “achieve unconstitutional substantive ends,” see Lawrence Gene Sager, The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 42 (1981); see also Ronald Rotunda, Congressional Power to Restict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 GEORGETOWN. L. J. 839, 840 (1976); Lawrence H. Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts, 16 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 133 (1981);

Finally, some scholars contend Congress has broad authority to control the jurisdiction of the lower federal courts, excepting only facially discriminatory or arbitrary devices. See, e.g., Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895 (1984).

\footnote{147 But see CHEMERINSKY, FEDERAL JURISDICTION § 3.3, at 191 (explaining that one approach, “and the only one that seems clearly untenable” requires the lower federal courts to be vested “with the full judicial power” and “[b]y this view, all attempts to restrict jurisdiction would be unconstitutional”). Under such an approach, the well-pleaded complaint rule would be unconstitutional along with all jurisdictional amount requirements.}

\footnote{148 The well-pleaded complaint rule does not necessarily provide the perfect delineation, but Congress is unlikely to greatly enlarge the jurisdiction of the federal courts by permitting wholesale removal on the basis of a federal defense. See, e.g., Amar, supra note 146, at 269-70 (stating that “comprehensive federal question jurisdiction by federal trial courts . . . appears to be impracticable, unwieldy, and politically infeasible”); Eisenburg, supra note 146, at 516-17 (noting that if Congress were required to hear cases now limited under § 1331 the federal “courts would be swamped or the judiciary would have to be expanded to a dangerous extent.”); Ragazzo, supra note 133, at 320 (contending that the ALI proposal “that every federal issue deserves a federal forum—would be a practical disaster” because it “portends an explosion of cases subject to federal jurisdiction at a time when the federal courts are in danger of being overwhelmed by the volume of federal litigation” and additionally, is “unsound as a matter of theory”); Seinfeld, supra note 10, at 546-47 (arguing that “[t]he restriction of federal question jurisdiction to those cases in which the well-pleaded complaint rule is satisfied reduces the likelihood that the federal courts will be faced with a caseload that is beyond their capacity to process expeditiously”).}

\footnote{149 See supra note 47 and accompanying text. Mary Twitchell states in passing that there have been “countless attempts” to get Congress to change the well-pleaded complaint rule. Twitchell, supra note 121, at 862.}
disassociated with congressional intent and congressional allocations of jurisdiction. Indeed, post-
Anderson, federal courts have allowed removal jurisdiction where Congress has made no
indications that such is authorized and indeed, where congressional manifestations indicate an
intent to restrict federal jurisdiction. Moreover, the general rule for the last 120 years provided
state courts with exclusive jurisdiction to determine federal preemption defenses when only state
law claims are pled, and most federal courts recognized the complete preemption doctrine to be
exceptionally narrow and limited to a handful of statutes. Consequently, Congress could not
have implicitly understood in passing legislation over the past century that by creating a
preemptive federal cause of action it was authorizing removal on the basis of a federal defense.

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

a. The Carmack Amendment and Congressional intent of removability

The Carmack Amendment provides a federal cause of action to a shipper to recover from
the initial carrier for loss, delay, or damage to goods shipped in interstate commerce. Despite
containing a savings clause declaring that “nothing in this section shall deprive” a shipper of
goods “of any remedy or right of action which he has under existing law,” the Supreme Court
has construed preemption by the Carmack Amendment very broadly and interpreted the savings
clause as a virtual nullity. Beginning in 1913 with Adams Express Co. v. Croninger, the

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150 In a related context, the Supreme Court has recently allowed federal question jurisdiction “only if
federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and
federal courts governing the application of § 1331.” See Grable & Sons Metal Prods., Inc. v. Darue Engineering &
152 34 Stat. at 595.
153 According to the Court, the purpose of the Carmack Amendment was to create a uniform body of law as
to carrier liability. See Adams Express Co. v. Croninger, 226 U.S. 491, 507-08 (1913). To allow applicability of
diverse state laws and remedies would “cause the [savings] proviso to destroy the act itself.” Thus the Court held
Court held that the Carmack Amendment “embraces the subject” of carrier liability and “supersedes all the regulations and policies” of the states “upon the same subject.” The Court subsequently held that “state laws have no application” and “cannot be applied in coincidence with, as complementary to or as in opposition to” the Carmack Amendment.

Prior to Anderson, United States Courts of Appeals that examined the Carmack Amendment under the Taylor test requiring clear congressional intent of removability determined that the Carmack Amendment did not give rise to complete preemption as there was “no manifest congressional intent of the type contemplated in Taylor, to make [allegedly preempted] state claim[s] removable to a federal court.” District courts that examined whether that Congress intended only to save existing federal law (of which there was none, other than pre-Erie general federal common law) while superseding all state law, both common law and statutory. See id. at 507-08.

Contemporary commentators noted that prior to Croninger, not a single court or commentator had so construed the savings clause; rather, all assumed Congress meant to preserve state substantive laws and remedies in favor of the shipper. See, e.g., E.C.G., Note, The Effect of the Carmack Amendment to the Hepburn Act upon State Laws as to Limitation by Contract of the Amount of the Liability of a Common Carrier, 11 Mich. L. Rev. 460, 461 (1913) (explaining that the Carmack savings clause had “frequently been considered by the courts, and heretofore the conclusion has always been reached that the very purpose of the proviso was to save to shippers in certain of the states . . . their more extensive rights against the carrier”); Wayland H. Sanford, The Carmack Amendment in the State Courts, 15 Mich. L. Rev. 314, 314-15 (1916-17) (explaining that “[i]t had been thought, both by state and federal courts, that the proviso quoted was intended to save the shipper whatever rights he had under existing state law” and thus Croninger “came as a distinct surprise, and was subjected to not a little adverse criticism”).

Further, contemporary accounts (including the only piece of legislative history from the initial enactment, see 40 Cong. Rec. 9580 (1906)), indicate that the Carmack Amendment was not intended to occupy the field of carrier liability, but to address a particular problem by making the initial carrier liable for damages to a shipment and avoid requiring the railroad carrier to prove which particular carrier, among many in an interstate shipment, was at fault. See Atlantic Coast Line Railroad Co. v. Riverside Mills, 219 U.S. 186, 200-201 (1911) (noting the problems of proof for a shipper and explaining that “[t]his burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate” in the Carmack Amendment and quoting the existing piece of legislative history in support of this assertion); Dewitt C. Moore, 3 A Treatise on the Law of Carriers (2d ed.), 1922 (1914) (explaining that the “burdensome situation of the shippers demanded regulation by Congress in the public interest”); Judge F. E. Riddle, The Carmack Amendment to the Hepburn Law, 14 Okla. L. J. 9, 9 (1915-16) (explaining same).

\(^{154}\) 226 U.S. 491 (1913).

\(^{155}\) Id. at 505; see also Charleston & W. Carolina Ry. Co., 237 U.S. 597, 603 (1915) (explaining that “regulations and policies of particular states upon the subject of the carrier’s liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto have been superseded” (internal citations omitted)).


\(^{157}\) Beers v. North Am. Van Lines Inc., 836 F.2d 910, 913 n.3 (5th Cir. 1988); see also Hunter v. United Van Lines, 746 F.2d 635, 639 (9th Cir. 1985) (although plaintiffs claims were under the jurisdictional amount, the court emphasized that “[u]ntil Congress changes [the well-pleaded complaint] rule it will remain true that . . . defendants relying on federal law are not entitled to a federal forum unless the plaintiff also relies on federal law”); Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1183-85 (9th Cir. 2002) (forbidding removal where defendants had argued
Congressional intent of removability existed similarly held that preemption by the Carmack Amendment did not give rise to removal by complete preemption. Indeed, these cases are correct in so holding. For while it is often stated that the 1906 Carmack Amendment has almost no legislative history, which is fairly accurate, yet legislative history exists for other enactments of Congress that specifically limit federal court jurisdiction over Carmack Amendment claims. These provisions, as well as their legislative history, show a desire to limit removal of and federal jurisdiction over Carmack cases.

For example, 28 U.S.C. § 1445(b) prohibits removal of Carmack Amendment claims “unless the matter in controversy exceeds $10,000, exclusive of interest and costs.” The predecessor of this provision was enacted in 1914 as a result of small Carmack claims being complete preemption of state law claims by the Airline Deregulation Act and the Carmack Amendment and explaining that complete preemption required congressional intent not only to preempt state law, “but also [intent] to transfer jurisdiction of the subject matter from state to federal court”.

Prior to Taylor, the Second Circuit impliedly found complete preemption under the Carmack Amendment in North American Phillips Corp v. Emery Air Freight Corp., 57 F.2d 229, 234 (2d Cir. 1978) (finding federal jurisdiction because plaintiff’s state law claims were preempted by the Carmack Amendment). However, post-Taylor, the Second Circuit held that “there is no complete preemption without a clear statement to that effect from Congress.” See Marcus v. AT&T Corp., 138 F.3d 46 (2d Cir 1998). After Marcus, lower courts in the Second Circuit were split as to whether the Carmack Amendment gave rise to complete preemption. Compare Sorrentino v. Allied Van Lines, No. 3:01CV1449(AHN), 2002 WL 32107610 (D. Conn. March 2, 2002) (following North American and finding complete preemption) with Ben & Jerry’s Homemade, Inc. v. KLLM, Inc., 58 F. Supp. 2d 315 (D. Vt. 1999) (applying Taylor and Marcus and finding no complete preemption because “Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court”).

See e.g., Lamm v. Bekens Van Lines Co., 139 F. Supp. 2d 1300, 1308-09 (M.D. Ala. 2001) (concluding that “nothing in the amendment’s language, legislative history or surrounding legislative context manifests” a congressional intent of removability and stating that in fact the Carmack jurisdictional provisions did “not just fail to echo § 301 of the LMRA, they seem almost diametrically opposed to the jurisdictional language of the latter”); See also Simmer v. North American Van Lines, Inc., No. Civ. A. 98-T-665-N, 1998 WL 1754006, at *3 (M.D. Ala., July 31, 1998) (noting that federal courts lack even original jurisdiction over all Carmack claims which “undermines greatly” a finding of complete preemption); Circle Redmont, Inc. v. Mercer Transportation Co., 78 F. Supp. 2d 1316 (M.D. Fla. 1999) (holding that “the Carmack Amendment’s language and history do not manifest an intent to make state law claims removable as Carmack claims” and finding no complete preemption); Ben and Jerry’s Homemade, Inc. v. KLLM, Inc., 58 F. Supp. 2d 315 (D. Vt. 1999) (finding no complete preemption because “Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court”).


28 U.S.C. § 1445(b), which states in full: “A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss or injury of shipments, arising under section 11796 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.”
removed to federal court. At the time the Carmack Amendment was adopted in 1906, a jurisdictional amount existed for federal question jurisdiction. Congress subsequently amended the judicial code to except cases “arising under any law regulating commerce” from the jurisdictional amount requirement. In 1913, the Supreme Court in *Croninger* interpreted the Carmack Amendment as an “act[] of Congress regulating interstate commerce,” which brought about removal of Carmack claims regardless of the amount in controversy.

Congress reacted in 1914 by passing what became 28 U.S.C. § 1445(b), which prohibited removal of Carmack claims not reaching a jurisdictional amount. The legislative history reveals that Congress approved of Carmack claims being “tried in the State where [the case] is brought, and tried to a final conclusion” in state court—even where the defendant wanted a federal forum and the complaint expressly relied on the Carmack Amendment.

Congress provided several reasons for keeping smaller Carmack Amendment cases in state court, including avoiding a large docket shift from state to federal court and sparing the federal judiciary from the heavy caseload it would acquire (and had already started to acquire) by the potential removal of all Carmack cases into federal court. Further, it is repeatedly noted

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164 The jurisdictional amount was initially set at $3,000 and later increased to $10,000 as jurisdictional amounts for diversity and federal question jurisdiction were increased.
165 51 CONG. REC. 1547 (1914) (Statement of Representative Borland, a sponsor of one of the versions of the bill); see also 51 CONG. REC. 1327 (1913) (Statement of Senator Shields) (explaining that “object of this amendment is to prevent removals of these cases from the State courts where the amount involved is under $3,000”; rather, such cases “shall remain in the State courts, to be there finally determined”).
166 H.R. REP. No. 63-120, at 3 (1913) (stating that “hundreds of cases, many of them involving small amounts, have been removed”); see also id. (stating that 250 cases in Iowa alone have been removed); 51 CONG. REC. 1545 (1914) (statement of Mr. Clayton, explaining that since *Croninger*, “hundreds of cases have been transferred where the amount in controversy was less than $3,000); id. at 1547 (statements of Mr. Garner and Towner, claiming that “the Federal judges throughout the country are asking that this legislation be passed to relieve them of the litigation” that is removed to them); 51 CONG. REC. 1545 (1914) (statements of Mr. Garner) (explaining that federal judges in his state have informed him that “the law as it now stands was cluttering up their dockets”); see also id. (statement of Representative Boreland, who sponsored one of the versions of the bill) (explaining “it is utterly impossible for the Federal courts, with the business they have, to try these little damage cases” and that “[t]hese cases for damages in shipment have been accumulating rapidly in the Southwest and West”).
that Congress never intended to bring about the removal of these smaller Carmack cases, but intended the contemporary jurisdictional amount to keep such claims in state court.\textsuperscript{167}

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

Another interesting point revealed by this history is that Congress does not seem at this time to have any issues with the broad substantive preemption announced by the Supreme Court in \textit{Croninger}. Congress refers to this construction in passing and seems content with this aspect\textsuperscript{168} of the Supreme Court’s interpretation of its fairly recent statute.\textsuperscript{169} Nevertheless, the legislative history reveals that post-\textit{Croninger}, Congress is quite concerned about—and sees an urgent need to “remedy”—the \textit{jurisdictional} consequences of the \textit{Croninger} decision in leading

\textsuperscript{167} See, e.g., 51 CONG. REC. 1545 (1914) (statement of Mr. Clayton) (“I think I am justified in saying that there was no intention or expectation of thus changing the law. No one thought at the time of its enactment that such an interpretation would be placed upon it. But nevertheless the situation exists and ought to be remedied.”); \textit{see also} H.R. REP. NO. 63-120, at 2 (“It is not likely the effect was intended which a literal application of this latest utterance of the legislative power gives.”).

\textsuperscript{168} The fact that Congress was not pleased with another aspect of the \textit{Croninger} interpretation is demonstrated by the Cummins Act passed the following year to overturn the Supreme Court’s ruling in \textit{Croninger} regarding a carrier’s ability to limit its liability. \textit{See} Cummins Act of 1915, 38 Stat. 1196 (1915).

\textsuperscript{169} \textit{See, e.g.,} H.R. REP. NO. 63-120, at 2 (noting the \textit{Croninger} interpretation that the Carmack Amendment “abrogates all State and common law liabilities on interstate shipments of property,” expressing concern with the jurisdictional consequences of \textit{Croninger}, but indicating no concern with the Supreme Court’s interpretation of the breadth of the Carmack preemption); 51 CONG. REC. 1545 (1914) (statement of Mr. Clayton, a sponsor of the bill, explaining the \textit{Croninger} interpretation of the Carmack Amendment, but emphasizing only that it resulted in cases being construed as arising “under the law regulating commerce,” which in turn made Carmack claims removable).
to the unintended result of having all Carmack Amendment claims removable to federal court. Again, this demonstrates that Congress can intend (or at least recognize) a very broad preemptive purpose eliminating nearly all state causes of action and replacing them with a federal cause of action, and yet at the same time determine that it does not want such cases to be removable to federal court and it trusts the state courts to handle the preemption determination.

The question of jurisdiction over Carmack claims arose again in 1977, when Congress passed what is now 28 U.S.C. § 1337. While § 1445(b) prohibits removal jurisdiction over Carmack claims for less than $10,000, § 1337 prohibits original jurisdiction over Carmack claims unless the amount in controversy is over $10,000. Notably, § 1337’s jurisdictional amount was enacted to be stricter than other amount restrictions. No aggregation of claims against a carrier is allowed—even by the same plaintiff against the same defendant; rather, the amount for each bill of lading has to encompass $10,000 or more. The legislative history shows § 1337 was enacted in response to original federal filings of small Carmack claims, resulting in an inundation of a particular federal district with Carmack claims—which, it was feared, could happen “in almost any metropolitan area.” Further, testimony in congressional hearings indicated that federal judicial expertise was not needed for these claims.

As demonstrated by the express provisions of 28 U.S.C. §§ 1337 and 1445 and their

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170 See 28 U.S.C. § 1337(a) (allowing original jurisdiction over Carmack claims “only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs” (emphasis added)).

171 By 1977 the District of Massachusetts had “the highest per judgeship pending civil caseload among the 94 district courts, 1,737 [as] compared to 278 for the 93 other district courts” because of original Carmack claims filed in federal court. See S. REP. NO. 95-117, at 50 (1977). Indeed, “Carmack amendment cases represented 64 percent of the pending cases in Massachusetts.” See id.


173 See id. at 33 (testimony of the Honorable Andrew A. Caffrey). Chief Judge Caffrey of the United States District Court for the District of Massachusetts stated that “[t]hese cases do not involve sophisticated or difficult legal ruling by any judge of our court” and “do not need Federal judge expertise.” He further contended that “these cases are perfectly adequate for state courts and they are in State courts in all the other 49 States, which puts to rest any question that this type of [litigation] cannot be handled by State courts.” See id.
legislative history, Congress has shown no desire to move Carmack Amendment cases from state to federal court or to take the preemption question away from state courts. Indeed, Congress has expressly denied federal courts both original and removal jurisdiction over a substantial number of Carmack claims, leaving such claims within the exclusive jurisdiction of state courts.174

It could be argued that these provisions and legislative history merely show that Congress is content with allowing state courts jurisdiction to adjudicate Carmack claims actually asserted as such by plaintiffs, and that it does not demonstrate that Congress is comfortable with allowing state courts adjudication over Carmack preemption defenses to state law claims. Nevertheless, there certainly are no congressional manifestations that a Carmack preemption defense should be removable as required by *Taylor*—even assuming §§ 1445 and 1337 fail to indicate a contrary manifestation. Further, the major cases regarding Carmack substantive preemption include actually asserted Carmack claims as well as state law claims because plaintiffs with a valid Carmack claim usually assert multiple (federal and state) claims.175 Particularly where a plaintiff is attempting to recover mental, emotional, or punitive damages, which are not recoverable under the Carmack Amendment, the plaintiff is likely to assert state law claims that would allow such damages in addition to an express Carmack claim.176 Thus, limits on removal and original jurisdiction as to expressly asserted Carmack claims also leave to state courts adjudication of federal preemption defenses to the state claims joined with a federal Carmack claim. Indeed, such a scenario may be more likely with small Carmack claims because plaintiffs will want to raise damages by asserting other state law claims that might provide a greater recovery and defendants will not be able to remove because of the jurisdictional amount for the federal

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174 In the legislative histories for §§ 1337 and 1445, Congress noted the large number of cases adjudicated in federal court that would be restricted to state courts after the amendments. *See supra* notes 166 & 171.

175 *See, e.g.*, Rini v. United Van Lines, Inc., 104 F.3d 502 (1st Cir. 1997); Gordon v. United Van Lines, Inc., 130 F.3d 282 (7th Cir. 1997); Hunter v. United Van Lines, 746 F.2d 635 (9th Cir. 1985).

176 *See, e.g.*, Rini, 104 F.3d 502; Gordon, 130 F.3d 282.
Carmack claim.\textsuperscript{177} For small Carmack claims, the state court is thus left with exclusive jurisdiction in making the substantive preemption determination, and for all others, the state court is provided with express concurrent jurisdiction to make such a determination.

Additionally, with both the LMRA and ERISA, the jurisdictional provisions excluded the statutes from the federal question jurisdictional amount that otherwise would have applied.\textsuperscript{178} In \textit{Taylor}, it was the similarities of these very jurisdictional provisions—both of which provide federal jurisdiction “without respect to the amount in controversy or the citizenship of the parties”—that led the Court to find clear congressional intent of removability.\textsuperscript{179} In starkest contrast, the jurisdictional provisions surrounding the Carmack Amendment create an amount in controversy requirement where none would otherwise exist. Further, Congress has retained the specific jurisdictional amount limitations over Carmack Amendment claims even after eliminating the jurisdictional amount requirement for general federal question jurisdiction.\textsuperscript{180} Under a \textit{Taylor} analysis, then, there would be no congressional intent (clear or otherwise) of removability of Carmack preemption defenses—indeed there is the opposite.

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

\begin{itemize}
\item \textsuperscript{177} See, e.g., \textit{Hunter}, 746 F.2d at 638, 648-52 (finding no removal jurisdiction over case where plaintiffs brought low-dollar Carmack claim plus high-dollar state law claims for fraud, bad faith, and intentional infliction of emotional distress because the state claims could not be aggregated with the Carmack claim and remanding the preemption defense of the high-dollar state claims by the low-dollar Carmack claim for adjudication in state court).
\item \textsuperscript{178} See 29 U.S.C. § 185(a) and 29 U.S.C § 1132(f).
\item \textsuperscript{180} In 1980, Congress amended § 1331 to eliminate the jurisdictional amount for federal question jurisdiction. However, Congress chose not to change § 1337 or § 1445, retaining a jurisdictional amount on original and removal jurisdiction over Carmack Amendment claims.
\end{itemize}
in exclusive state court jurisdiction for many claims arising under that statute, it is difficult to
conceive that Congress was seriously concerned with problems of judicial uniformity or state
court hostility and error, or that it recognized a need for federal-court expertise for that statute.
Thus, tying complete preemption to Congressional intent of removability may have the added
benefit of supplying the uniform, sympathetic, and expert adjudication offered by the federal
judicial resource when it is most needed and correspondingly, as with Carmack claims, denying
or limiting access to that resource when Congress determines that it is not needed.

b. Complete preemption by the Carmack Amendment under Anderson

After Anderson, both the Fifth and Ninth Circuits have overturned their prior decisions
and found complete preemption for state law claims preempted by the Carmack Amendment. In
Hoskins v. Bekins Van Lines, the Fifth Circuit held that Anderson “overruled the analysis used
in Beers to reject the complete pre-emptive effect of the Carmack Amendment.” The Hoskins
court held the dispositive inquiry to be “whether Congress intended the Carmack Amendment to
provide the exclusive cause of action for claims arising out of the interstate transportation of
goods by a common carrier.” Failing entirely to analyze the language of the statute itself (and
stating that there was no legislative history), the court examined early 20th Century decisions
of the Supreme Court, including Croninger, and cases from the Fifth Circuit as to the broad
preemptive scope of the Carmack Amendment. The court then concluded that “Congress
intended for the Carmack amendment to provide the exclusive cause of action for loss or

181 343 F.3d 769 (5th Cir. 2003)
182 Id. at 775.
183 Id. at 776.
184 Id.
185 See id. All of the Supreme Court Carmack cases relied on by the Hoskins court were decided well before
the complete preemption doctrine had been created by Avco. See id.
186 See id. at 777 (relying on Air Prods. v. Ill. Cent. Gulf R.R. Co., 721 F.2d 483, 487 (5th Cir. 1983), Moffit
v. Bekins Van Lines Co., 6 F.3d 305 (5th Cir. 1993), and Morris v. Covan World Wide Moving, Inc., 144 F.3d 377
(5th Cir. 1998), each of which construed Carmack preemption very broadly).
damages to goods” and thus “the complete preemption doctrine applies.”

Interestingly, the Hoskins court recognized that 28 U.S.C. § 1445 prohibited the removal of Carmack claims unless a jurisdictional amount was reached and that 49 U.S.C. § 14706(d)(3) expressly provided for concurrent jurisdiction for larger Carmack claims. Yet the court viewed these Congressional enactments as immaterial to the complete preemption inquiry because:

Although both of these facts may have been relevant to an analysis of whether Congress intended for Carmack claims to be removable, they have no bearing on the salient issue today, i.e. whether Congress intended the Carmack Amendment to provide the exclusive cause of action for claims for loss or damage to goods arising from the interstate transportation of those goods by a common carrier. See Beneficial, 123 S.Ct. at 2064 n. 5.

Similarly, the Ninth Circuit, in Hall v. North American Van Lines, Inc., held that a plaintiff’s state law claims were completely preempted by the Carmack Amendment. Quoting Anderson’s test for complete preemption, the Hall court reviewed judicial precedent and concluded that it was “well settled that the Carmack Amendment is the exclusive cause of action for interstate shipping contract claims alleging loss or damage to property.” The Hall court then examined Hall’s state law claims and concluded that Hall’s breach of contract claim fell within Carmack complete preemption. Having found one completely preempted claim, the Ninth Circuit asserted supplemental jurisdiction over the other claims and similarly held that Hall’s claims for fraud and conversion were preempted by the Carmack Amendment. Further,

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187 Hoskins, 343 F.3d at 778 (emphasis added).
188 Id. at 778 n.7.
189 Id.
190 476 F.3d 683 (9th Cir. 2007). Hall contracted with the defendants to ship her household goods from San Francisco, California, to Montana for the price of $6,144 to be paid when the goods arrived. Hall moved to Montana, but her household goods failed to arrive. She contacted the defendants, who had put her goods into storage and told her they would not release them unless she paid them $9,000 first. She paid the $9,000. Fourteen months passed and defendants demanded she pay an additional $18,000. Hall refused to pay the $18,000, returned to San Francisco where her goods were being held, and was able to get the defendants to release the goods for an additional $4,612. In total, Hall paid nearly $14,000 (when she contracted to pay approximately $6,000), she was without her household goods for well over a year, and the defendants never shipped the goods to her, forcing her to return to California and move the goods herself. See id. at 685-86.
191 Id. at 688.
192 Id.
because the plaintiff had refused to amend her complaint after removal to federal court to expressly add a Carmack claim (which claim would have been barred under a contractual limitations period of nine months\textsuperscript{193}), the Ninth Circuit dismissed the case with prejudice.

Taking the \textit{Anderson} test at face value, where Carmack preemption is defined broadly to preempt any state law claims arising out of a shipper-carrier relationship, a court will inevitably find complete preemption, as did the Fifth and Ninth Circuits, because the Carmack Amendment will always provide the exclusive cause of action. Even for courts that do not construe Carmack preemption as broadly, removal will be likely and the determination of the propriety of removal will require a full substantive preemption analysis. Indeed, a court need only find one claim completely preempted in order to assume jurisdiction over the plaintiff’s other state law claims under supplemental jurisdiction.\textsuperscript{194}

Other proposed tests for complete preemption would similarly result in removal of Carmack preemption defenses. Obviously, if removal is allowed for any federal preemption defense,\textsuperscript{195} then there would be removal of Carmack defenses.\textsuperscript{196} Scholars recommending complete preemption whenever a federal cause of action preempts a state cause of action essentially adopt the \textit{Anderson} approach. Although \textit{Anderson} uses the phrase “exclusive cause of action,” a federal cause of action is exclusive whenever it nullifies the alleged state law cause of action. Twitchell’s detailed framework for determining preemption under this approach is preferable to \textit{Anderson} as it delays the federal court’s undertaking a full substantive preemption

\textsuperscript{193} The Carmack Amendment allows a carrier to limit its liability by requiring the plaintiff to file a claim within nine months of the incident. Hall failed to make her claim within the nine month contractual limitations period. Thus, the district court held that even if Hall had asserted a claim under the Carmack Amendment, it would be barred by the contractual limitations period. \textit{See id. at 690 n.9.}

\textsuperscript{194} \textit{See id. at 688-89.}

\textsuperscript{195} \textit{See supra Part III.}

\textsuperscript{196} However, as with \textit{Anderson}, this test may require a federal court to perform a substantive preemption analysis to determine its jurisdiction. For example, under Karen Jordan’s proposal, removal would be proper only if the state law claim is preempted. \textit{See Jordan, supra} note 118, at 984 (describing a proposed two pronged analysis).
analysis unless other questions indicate that preemption is likely. Nevertheless, because the Carmack Amendment provides a federal cause of action and preemption is generally arguable, even under Twitchell’s approach, a full substantive preemption analysis would inevitably be required to determine the propriety of removal in a given Carmack preemption case.

Seinfeld’s proposed test—basing complete preemption on the breadth of substantive preemption—would result in a similar fate for state law claims allegedly preempted by the Carmack Amendment. As noted above, the preemptive scope of the Carmack Amendment has been construed to be exceptionally broad and to “supersede[] all the regulations and policies” of the states. Even among circuits that recognize exceptions to Carmack preemption, the exceptions are generally narrowly drawn and narrowly applied. Seinfeld would allow federal defense removal whenever “supplementary state legislation is prohibited.” Thus, the Carmack Amendment would clearly fall within the complete preemption rule advocated by Seinfeld.

As exemplified by the Carmack Amendment, the complete preemption rule of Anderson, as well as other tests proposed by scholars, results in jurisdiction at odds with congressional allocations of judicial power. Congress has made no indications that it desires to remove Carmack preemption determinations from state court (indeed, both statutory provisions and legislative history reveal congressional designs to limit federal jurisdiction over Carmack cases), and yet the Anderson test produces removal jurisdiction for Carmack preemption defenses. This result is not peculiar to the Carmack Amendment, but occurred in Anderson itself and will

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197 See supra notes 121-26 and accompanying text.
198 See Twitchell, supra note 121, at 865; see also supra notes 121-26 and accompanying text.
199 See supra notes 127-32 and accompanying text.
201 See infra notes 210-212 (discussing application of tests in 1st, 7th, and 11th Circuits).
203 As noted, soon after enacting the NBA, Congress expressly provided for removal on the basis of a federal defense for all nationally-chartered corporations except national banks. See Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226-27 (1868); see also supra notes 62-66 and accompanying text. The Anderson Court, like the Hoskins
surely arise in other contexts. Allowing removal in such circumstances is contrary to separation of the legislative and judicial powers and the role of Congress in delineating the jurisdiction of the lower federal courts.

2. Judicial Interpretation as the Basis for Determining Judicial Power

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

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

Of course, there is nothing illegitimate with federal courts interpreting the scope of federal preemption in general and as applied to specific state law claims—indeed, it is a judicial function to undertake such statutory interpretation, especially where the statute’s preemptive

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204 Cary v. Curtis, 44 U.S. 236, 245 (1845).
scope as enacted by Congress is unclear. The quandary is that federal courts are looking at the scope of substantive preemption to determine jurisdiction as opposed to determining substantive preemption, which is problematic for a couple reasons. First, by looking to the scope of substantive preemption (as required by *Anderson*) to determine federal jurisdiction, the courts are relying on a factor, which, as discussed above, does not accurately demonstrate congressional intent to confer or deny removal jurisdiction on the basis of a preemption defense.\(^{206}\) Second, by looking to the scope of substantive preemption, courts will generally need to rely more heavily on judicial pronouncements and less on statements from Congress itself. For example, courts applying *Taylor* and looking for clear congressional intent of removability, generally examined congressional enactments regarding jurisdiction and the history thereof and did not need to examine judicial pronouncements. Indeed, the focus on jurisdictional enactments and congressional history under a *Taylor* analysis is exemplified in *Taylor* itself, as well as the Fourth Circuit’s *Rosciszewski* decision examining the Copyright Act, and the Eleventh Circuit’s reversed *Anderson* opinion.\(^{207}\) In contrast, by determining jurisdiction by the scope of substantive preemption and whether a particular state law cause of action asserted by the plaintiff is preempted by a federal cause of action, courts will often be required to rely on judicial pronouncements as to the scope of preemption. Moreover, judicial pronouncements as to scope of substantive federal preemption over specific state law claims asserting specific facts will frequently vary from circuit to circuit (in contrast to congressional jurisdictional enactments and history—which remain the same), and consequently will broaden or narrow federal jurisdiction.

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\(^{206}\) See supra notes 62-66 and accompanying text (regarding NBA legislative history showing no intent to allow removability); supra Part IV.A.1 (regarding Congressional intent for Carmack Amendment); and infra note 221 and accompanying text (pointing out that reasons leading Congress to provide a federal cause of action do not equate with reasons for providing federal defense removal).

depending on the federal court’s construction as to the reach of federal substantive law.

Returning to the Carmack Amendment as a case in point, there is significant variation among the federal courts as to the scope of Carmack preemption over state law. 208 Some of the federal circuits, usually quoting and relying heavily on Croninger, have found that the Carmack Amendment preempts all state common law and statutory claims that relate to the carrier-shipper relationship in any way. 209 Other federal courts have held that state law claims based on a separate and independent injury 210 (or, alternatively, based on separate conduct 211) from any damage to, loss of, or delay of the shipped goods escape preemption by the Carmack Amendment. Consequently, federal courts that define Carmack substantive preemption more broadly will, under Anderson, correspondingly find federal jurisdiction under the complete preemption doctrine more often. Even assuming a uniform rule or interpretation by the Supreme Court, the broader the Court construes federal substantive preemption in an area, the larger it is defining federal court jurisdiction over state law claims brought in state court.

Further, the variation among the federal courts as to the scope of Carmack preemption will lead to a variation in whether federal jurisdiction will exist over the same claims. In one circuit (such as the Fifth or Ninth), state law claims for fraud and intentional infliction of emotional distress will be completely preempted by the Carmack Amendment and will be

208 See e.g., Lamm v. Bekens Van Lines Co., 139 F. Supp. 2d 1300, 1311 (M.D. Ala 2001) (noting that “there is a wide range of opinion among the appellate and trial courts about the scope of the Carmack Amendment’s ordinary preemption of state common law claims” and citing cases).

209 See, e.g., Hopper Furs, Inc. v. Emery Air Freight Corp., 749 F.2d 1261, 1264 (8th Cir 1984) (“All actions against a common carrier, whether designated as tort or contract actions are governed by the federal statute . . . .”); Hall v. North Am. Van Lines, Inc., 476 F.3d 683, 689 (9th Cir. 2007) (“It is well settled that the Carmack Amendment constitutes a complete defense to common law claims alleging all manner of harms.”); Hoskins v. Bekins Van Lines, 343 F.3d 769, 776-78 (5th Cir. 2003); Duerrmeyer v. Alamo Moving and Storage One, Corp., 49 F. Supp. 2d 934, 936 (W.D. Tex. 1999) (finding substantive preemption of “state court causes of action, whether based in contract or tort seek[ing] damages flowing from the shipping contract”) (emphasis added)).

210 See Rini v. United Van Lines, 104 F.3d 502, 506 (1st Cir. 1997); Gordon v. United Van Lines, Inc., 130 F.3d 282, 284 (7th Cir. 1997) (explaining that “claims involving a separate and independently actionable harm to the shipper distinct from [loss or damage to goods] are not preempted”).

211 Smith v. United Parcel Service, 296 F.3d 1244,1248-49 (11th Cir. 2002) (explaining that “separate and distinct conduct rather than injury must exist for a claim to fall outside” Carmack preemption).
removable to federal court—even if the shipper alleges no loss or damage to property. In other circuits (such as the First, Seventh, or Eleventh), it will be unclear and will always require a case-specific substantive preemption analysis by the federal court to determine whether the alleged claim is preempted by the Carmack Amendment and thus within federal removal jurisdiction.\footnote{For example, in Rini, 104 F.3d at 506, a case dealing solely with substantive Carmack preemption, the First Circuit held that state law claims were preempted when they “impose liability on carriers based on the loss or damage of shipped goods,” but are not preempted if increased liability is based on “an injury separate and apart from the loss or damage of goods.” \textit{Id.} (emphasis added). The Seventh Circuit has adopted a similar test. See \textit{Gordon}, 130 F.3d at 284 (explaining that “claims involving a separate and independently actionable harm to the shipper distinct from such damage are not preempted” by the Carmack Amendment). While sounding straightforward, the application of this test requires a fact-specific inquiry into the harms alleged and the recovery sought. Indeed, in \textit{Rini} itself, it would appear that the plaintiff’s claims for misrepresentation and deceptive trade practices, which the district court and a jury had found valid, would certainly entail injuries “separate and apart from the loss or damage of goods.” \textit{Rini}, 104 F.3d at 506. Yet the First Circuit held that “the state law claims at issue all stem from the loss of goods,” “involve no injury save the loss of property,” and were thus preempted by the Carmack Amendment (which had the result of lowering the plaintiff’s damages from $350,000 to $50,000). \textit{See id.} (emphasis added) The Eleventh Circuit’s test for substantive preemption under Carmack is distinct from that employed by the First Circuit. In \textit{Smith v. United Parcel Service}, 296 F.3d 1244, 1248-49 (11th Cir. 2002), the Eleventh Circuit held that state law claims may avoid Carmack preemption, but only if the claim is “based on conduct separate and distinct from the delivery, loss of, or damage to goods.” (Emphasis added). That is, “separate and distinct conduct rather than injury must exist” to escape Carmack preemption. \textit{See id.} at 1249 (emphasis added). Again, under this test, a fact-intensive inquiry into the alleged conduct is required.} Notably, this difference in result does not correlate to a legitimate difference between the scope of the state law claims being preempted. The same state laws aimed at the same conduct and policies would be preempted in Fifth Circuit, but may not in the Eleventh.\footnote{Such a result is distinct from the one discussed below where courts of two different states define facially similar state laws differently and one state determines there is preemption by a federal law while another does not.}

Thus there would be federal jurisdiction in the Fifth Circuit but not in the Eleventh. In theory, the Supreme Court could eventually resolve jurisdictional variations. But it would have to be done on a federal-statute-by-federal-statute (e.g., is there complete preemption by the Carmack Amendment as opposed to other federal statutes?), state-claim-by-state-claim (assuming there is complete preemption under the Carmack Amendment, does it apply to preempt these specific state law claims?), case-by-case (under the facts of this case, is there Carmack preemption?) basis—and that is hardly a desirable method for determining federal court jurisdiction.

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

3. Superiority of Congress to Make Jurisdictional Allocations

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

In fact, Congress has determined that certain federal defenses should give rise to removal jurisdiction. For the Price-Anderson Act and the Securities Litigation Uniform Standards Act (“SLUSA”), Congress has expressly allowed removal on the basis of a federal defense.\(^\text{214}\) Further, as noted, (through legislative history and adoption of jurisdictional language parallel to the LMRA) Congress has similarly provided for removal of claims preempted by § 502(a) of ERISA. These all are examples where Congress has determined that the defendant should be able to invoke the federal courts to adjudicate federal defenses. For other federal statutes, Congress has provided exclusive federal jurisdiction, and for the majority of statutes it provides concurrent jurisdiction.

\(^{214}\) Under the Price-Anderson Act, “any public liability action,” (which, in turn is defined as “any suit” asserting “any legal liability [based on state or federal law] arising out of or resulting from a nuclear incident or precautionary evacuation,”) filed in state court “upon motion of the defendant . . . shall be removed or transferred to the United States district court.” See 42 U.S.C. §§ 2210(n)(2) & 2014(w) & (hh). See also 42 U.S.C. § 2014(hh) (stating that a “public liability action shall be deemed to be an action arising under section 2210 of this title”). SLUSA likewise provides: “Any covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending.” See 15 U.S.C. § 77p(c). As explained by the Supreme Court, SLUSA does not involve typical preemption because it “does not itself displace state law with federal law but makes some state-law claims nonactionable through the class action device in federal as well as state court.” Kircher v. Putnam Funds Trust, 126 S. Ct. 2145, 2150 n.1 (2006).
jurisdiction without defensive removal. Apparently Congress does not see the need for federal adjudication as being equal for all federal statutes or preemption defenses.

While not dealing with complete preemption, the case *Mitchum v. Foster*\(^{215}\) provides an example where Congress intended to vest the federal courts with power to take jurisdiction from the state courts. In *Mitchum*, the Supreme Court held the anti-injunction act did not prohibit a federal court from enjoining a state court proceeding under 42 U.S.C. § 1983. The Court examined the language and legislative history of § 1983 and determined § 1983 was intended “to enforce . . . the Fourteenth Amendment” against State executive, legislative, or judicial action.\(^{216}\) Indeed, the legislative history revealed that “state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights” and that Congress “was concerned that state instrumentalities [including courts] could not protect those rights.”\(^{217}\)

In circumstances such as those involved in *Mitchum* with § 1983, where state courts have demonstrated hostility to enforcing federally protected rights, Congress can appropriately determine any heightened need for federal adjudication. Importantly, unlike Congress, the judiciary has no ability to hold hearings and make determinations as to whether there is a problem with state court adjudication of particular federal laws on a national level. Courts are limited to the facts before them, which may or may not reflect an overall problem with state court adjudication of a particular area of federal law. Indeed, as to the Carmack Amendment, the congressional hearings and legislative history indicate that there has not been a problem with state court adjudication of federal law, that state courts are competent to determine the cases, and

\(^{216}\) See id. at 240.
\(^{217}\) See id., at 240, 242.
that limited (rather than expanded) federal jurisdiction over such cases is requisite.218

Nevertheless, a major justification for expanding complete preemption is the fear that
state courts will prefer state law over federal law or will err in making a preemption
determination.219 But complete preemption under *Anderson* provides a bankrupt method for
allocating cases between state and federal court.220 It results in cases, such as Carmack
Amendment cases, being moved to federal court when Congress has indicated there is a lesser
need for employing the federal judicial resource. The litmus test under *Anderson* is whether
Congress created a federal cause of action that excludes state law claims. But, as Seinfeld asserts,
the reasons that may motivate Congress to create a private cause of action do not equate with a
desire to divest state courts of jurisdiction to determine federal preemption.221

Indeed, there may be situations where Congress deems federal court adjudication over
preemption defenses to be desirable even absent the creation of a federal cause of action.222

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218 See supra Part IV.A.1.a.
219 See, e.g., Twitchell, supra note 121, at 819 (noting the “concern” that “if states make the preemption
decision, they may err on the side of state law and find preemption less frequently than Congress intended.”)
220 Seinfeld notes that the Supreme Court “has made no effort to anchor the doctrine of complete
preemption in some broader vision of judicial federalism. The cases say next to nothing about the federal courts’
relative expertise in the application of national law, the interest in securing a uniform interpretation of such law, or
the need to sidestep state courts due to fear that localist bias might affect their decision making.” Seinfeld, *supra*
note 10, at 554, 570, n.107.
221 See Seinfeld, *supra* note 10, at 556-66. Seinfeld thoroughly explains why the provision of a preemptive
federal cause of action might be indicative of a desire to create federal jurisdiction. Namely, by requiring the
plaintiff to bring a claim under federal law and excluding state law, federal jurisdiction can be invoked by either the
plaintiff originally or by the defendant through removal. See *id.* at 557-58. Nevertheless, Seinfeld recognizes that
such reasoning is problematic both because there are situations where Congress provided an exclusive federal cause
of action such as the NBA (and, as shown above, the Carmack Amendment) while lacking “a strong desire to
channel cases into the federal courts,” see *id.* at 558-59, and because the provision of a cause of action may be
driven by determinations about whether public or private enforcement will be more effective—regardless of
jurisdiction. See *id.* at 559.
222 See also Morrison, *supra* note 139, at 189 (explaining that “a variety of considerations may go into
Congress’s decision whether to” create a cause of action and thus rely (in whole or in part) on private enforcement,
“but there is no reason to conclude that the choice of private enforcement invariably reflects a heightened concern
for the polices underlying federal jurisdiction,” particularly because the Court has suggested “that public
enforcement” may be used for “the federal government’s most important policy aims”
222 Additionally, for proponents of a complete preemption rule based on a replacement federal cause of
action, as well as the *Anderson* rule, the primary justification of state court hostility or error does not comport with
the scope of their proposed rule. As Justice Scalia contended, the rule is irrational “because there is no more reason
to fear state-court error with respect to federal preemption accompanied by creation of a federal cause of action than
Under an approach relying on Congress to determine appropriate federal preemption defense removal, the oft-argued question of whether complete preemption should apply in situations where no replacement federal cause of action is provided does not need to be resolved. Congress could—as it did with ERISA—say that all claims preempted by a specific section providing a federal cause of action are subject to removal. With such language, it would be required for complete preemption that the state claim falls within the specific replacement federal cause of action (as is required for ERISA—claims preempted by ERISA, but not falling within § 502(a)(1)(B), are not subject to removal to federal court). Similarly, if Congress wants all preemption defenses arising under a certain statute, regardless of whether a federal cause of action is provided, to effect removal to federal court, Congress could so direct. For example, SLUSA expressly allows for removal of state class actions falling within its scope, but does not provide a federal remedy to replace it—rather it provides an absolute bar on certain state securities class actions. Thus SLUSA represents an area where Congress wanted to eliminate

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223 The jurisdictional provision and legislative history demonstrating that Congress wanted to allow removal regards solely claims falling with § 502(a)(1)(B). See 29 U.S.C. § 1132 (a), (e) & (f). As quoted in Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987), Congress explained in the legislative history regarding § 501(a)(1)(B) that “suits to enforce benefit rights under the plan or to recover benefits under the plan” “are to be regarded as arising under the laws of the United States” similar to § 301 of the LMRA. Thus not all suits related to an ERISA plan and thus falling within ERISA’s broad preemptive scope (see 29 U.S.C. § 1144— superseding “any and all State laws” that “relate to any employee benefit plan”) qualify for removal, but only claims to enforce benefit rights or recover benefits and thus falling with § 501(a)(1)(B).

224 See supra note 223 and accompanying text. See also Taylor, 481 U.S. at 64 (explaining “that ERISA preemption, without more, does not convert a state claim into an action arising under federal law” and holding that complete preemption existed when a state action is “not only pre-empted by ERISA, but also came within the scope of § 502(a) of ERISA”).


226 SLUSA provides: “No covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party” if alleging misrepresentation or manipulation in “the purchase or sale of a covered security.” 15 U.S.C. § 78bb(f)(1). See also Kircher v. Putnam Funds Trust,
certain state law remedies involving nationally traded securities without providing a replacement remedy. Congress enacted SLUSA in order to effectuate its prior legislation in the Private Securities Litigation Reform Act (PSLRA), which placed limits on federal securities class actions because of “perceived abuses of the class-action vehicle in litigation involving nationally traded securities.” Yet after PSLRA was enacted, plaintiffs avoided PSLRA’s limitations by filing state law class actions in state courts. SLUSA was thus enacted by Congress to “block this bypass” of PSLRA. SLUSA thus exemplifies an area where Congress saw a special need for federal court jurisdiction (and thus expressly allowed for defensive removal) because the point of SLUSA was to keep litigants from avoiding PSLRA limitations through state court adjudication.

If, as feared, state courts really are finding preemption under the current jurisdictional regime less often than intended by Congress, Congress is not powerless to ameliorate the problem. First, if Congress thought the problem existed across the board for federal preemption, it could statutorily repeal the well-pleaded complaint rule altogether or for federal preemption defenses—a step that has been proposed to and considered by Congress, including in 1902-07, 1948, and 1971, but has not been taken. Second, Congress could make it clear for a particular statute or regulatory scheme (or amendments thereto) that it desires to allow removal when a preemption defense is raised on the grounds of that particular statute, as it has done in the Price-Anderson Act and SLUSA. Third, Congress, as it did with ERISA, could evidence through statutory jurisdictional language and express legislative history that it desires to allow removal on the basis of a federal defense under the statute. All of these alternatives would leave the allocation of power between the state and federal courts in the hands of Congress.

126 S.Ct. 2145, 2150-51 & n.1 (2006) (explaining that a covered class action “is a lawsuit in which damages are sought on behalf of more than 50 people” and a covered security “is one traded on a regulated national exchange”).

Kircher, 126 S.Ct. at 2150 (citations omitted).

See id.

See supra note 47 and accompanying text.
In 1971, the American Law Institute (ALI) proposed legislation that would generally allow removal on the basis of a federal defense. The ALI proposal denotes why it is better to eliminate or make exceptions to the well-pleaded complaint rule on the basis of legislation or other clear indications from Congress. With legislation, Congress can determine the extent to which it abrogates the well-pleaded complaint rule both generally and for specific statutory schemes. For example, the ALI proposal generally allowed for removal on the basis of a federal defense, yet added limitations, including a jurisdictional amount and a requirement that the defense be dispositive of the action. The ALI also retained the well-pleaded pleading rule prohibiting jurisdiction based on anticipated claims or defenses. Further, the proposed legislation enumerated specific federal defenses where removal would not be allowed based on previously expressed “congressional policy” to limit removal or keep certain cases out of federal court. Indeed, one of those enumerated exceptions was defenses raised by the Carmack Amendment—which the proposal made not removable regardless of the amount in controversy. Thus, while abrogating the well-pleaded complaint rule, the ALI determined that congressional policy directed that certain federal defenses should not be subject to removal.

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230 See S. 1876, 92d Cong. (1971). The proposed legislation was the result of a ten year study by the ALI published as AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) [hereinafter ALI STUDY].
231 S. 1876, 92d Cong. § 1312; see also ALI STUDY § 1312.
232 ALI STUDY, § 1311 at 169; § 1312 at 188-91.
233 See ALI STUDY § 1312, at 201.
234 See S. 1876, 92d Cong. § 1312(b) (“The following civil actions shall not be removed . . . from a State court to any district court of the United States: . . . (4) actions against a common carrier on its receivers or trustees to recover damages for delay, loss, or injury of shipments, under section 20 of title 49 . . . .”)
   The ALI explained that Carmack amendment claims are often for a small sum “and would invite the use of removal as a harassing tactic.” Noting that current jurisdictional limitations prohibited removal of Carmack claims over $3,000 under 28 U.S.C. § 1445, the ALI proposal “prohibits their removal regardless of amount.” See ALI STUDY § 1312, at 201 (emphasis added).
235 Charles Alan Wright, who was on the council for the ALI STUDY, explained: “Removal on the basis of a federal defense was the hardest fought issue within the Institute in the federal question area, if not indeed in the entire Study. There was agreement throughout that this kind of removal should be permissible in some cases, but there was serious differences about how broadly this should be allowed.” Charles Alan Wright, Restructuring Federal Jurisdiction: The American Law Institute Proposals, 26 WASH. & LEE L. REV. 185 (1969). Nevertheless, in Wright’s article, the congressional hearings, and an article by David Currie, there is no objection mentioned to
Although the ALI legislation was not enacted, it represents ten years of work by the ALI as to the appropriate allocation of judicial power between the state and federal courts.236 Once again, this highlights the flaws with the Anderson test, which allows removal on the basis of a defense (not necessarily an indefensible policy in the abstract) but does so on a basis that is not tied to any cogent policy and results in removal of preemption defenses such as the Carmack Amendment when congressional pronouncements in statutes and legislative history as well as a ten year study by the ALI indicate that federal jurisdiction over such defenses is not warranted.

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

B. Federalism Problems

In 1998, Arthur Miller stated: “Because of the obvious federalism implications of the complete preemption doctrine and its inconsistency with the well-pleaded complaint rule, its application thus far has been extremely limited . . . .”237 Miller did not elaborate on what

236 ALI STUDY ix.
237 Miller, supra note 7, at 1797.
“obvious federalism implications” were involved, but certainly the expansion of the complete preemption doctrine under *Anderson* illuminates encroachments on federalism.

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

   Returning to our case in point, in the short time since federal courts have consistently recognized complete preemption for Carmack claims, federalism issues have arisen. In *Franyutti v. Hidden Valley Moving & Storage*,238 the plaintiff filed a complaint in state court alleging two state law claims: fraud and violation of the Texas Deceptive Trade Practices Consumer Protection Act (“DTPA”). The defendants removed, arguing that both claims were completely preempted by the Carmack Amendment. The district court, relying on Fifth Circuit law, defined Carmack preemption exceptionally broadly, found both the fraud and DTPA claims preempted, refused to remand the case, and ordered the plaintiffs (on threat of dismissal with prejudice) to amend their pleadings to assert a Carmack claim. Notably, the Texas Supreme Court had previously held that claims under the Texas DPTA are not preempted by the Carmack Amendment.239 The district court in *Franyutti* acknowledged this holding, but concluded that the Texas Supreme Court decision “occurred prior to many of the Supreme Court and Fifth Circuit opinions relied upon” and thus “its holding has limited value.”240 Notably, the only decisions cited in *Franyutti* that post-date that of the Texas Supreme Court are one Fifth Circuit case regarding substantive Carmack preemption,241 as well as *Anderson*, *Rivet v. Regions Bank of Louisiana*,242 and *Hoskins*, all of which deal with federal jurisdiction rather than substantive Carmack preemption.243 Indeed, the *Franyutti* court’s substantive preemption conclusion is based

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240 *Id.* at 778 n.1.
242 522 U.S. 470 (1998) (overturning the so-called *Moitie* exception to the well-pleaded complaint rule).
243 *See generally Franyutti*, 325 F. Supp. 2d 775.
largely on *Croninger*—a decision the Texas Supreme Court certainly had before it.\textsuperscript{244}

It seems unlikely the Texas Supreme Court would agree that its 1980 decision in *Brown v. American Transfer and Storage Co.*,\textsuperscript{245} “has limited value,” as held in *Franyutti*. In *Brown*, the plaintiff relied solely on a claim under the Texas DPTA and was awarded trebled damages. The defendants argued the DPTA was preempted by the Carmack Amendment and, correspondingly, a limit of liability found in the bill of lading of 30 cents per pound shipped should apply.\textsuperscript{246} The Texas Supreme Court held that “the DPTA was a general statute, which provided remedies for persons victimized by false, misleading and deceptive acts within the police power of the state.”\textsuperscript{247} In contrast, “the Carmack Amendment was [intended] to create a uniform rule of responsibility for interstate commerce and interstate commerce bills of lading, and [] a DTPA suit for misrepresentation made prior to contract does not fall within the ambit of federal regulations.”\textsuperscript{248} The Texas Supreme Court did not stop with its explanation of the different purposes and scopes of the statutes and thus lack of preemption. Rather, the Court emphasized:

“We also conclude the DTPA’s prohibitions against false, misleading and deceptive acts protects a deeply rooted state interest and is an exercise of the right of the State of Texas to protect its

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\item \textsuperscript{244} See id. at 778.
\item \textsuperscript{245} 601 S.W.2d 931 (1980).
\item \textsuperscript{246} Id. at 934.
\item \textsuperscript{247} Id. at 938.
\item \textsuperscript{248} Id. at 938. The Texas Supreme Court made these statements in summation of the holding of the Texas Court of Civil Appeals and then explained that “[w]e agree with this holding of the Court of Civil Appeals for the reasons stated in its opinion [at] 584 S.W.2d 284-91.” The Texas appellate court’s opinion explains more fully: The uniformity sought by the Carmack Amendment, according to the authorities above mentioned, is uniformity in the requirements of a contract of carriage in interstate commerce and in the carrier’s liability for breach of its duties under such a contract. The Deceptive Trade Practices Act presents no obstacle to full accomplishment of uniformity in these respects. It applies to false, misleading, and deceptive acts or practices in general and makes no special provision for interstate shipments or other transactions in interstate commerce. We find nothing in the Carmack Amendment or in the decisions construing it suggesting that uniformity was sought with respect to legal liability for false, deceptive, or misleading acts or practices preliminary to the formation of the contract . . . . We conclude that protection of interstate shippers from such practices is left to the police powers of the several states.
\end{itemize}

citizens from acts such as those committed by American Transfer.”

The Texas Supreme Court’s decision upholding its state law against federal preemption was not illegitimate and in no way validates fears of state court hostility to federal law if allowed to determine preemption issues. Indeed, the United States Supreme Court in Missouri, Kansas & Texas Railway Co. of Texas v. Harris, held that a state statute was not preempted by the Carmack Amendment because the statute was a general statute “having a broad sweep” and “only incidentally includes claims arising out of interstate commerce.” The Court found no Carmack preemption because the state statute did not “either enlarge or limit the responsibility of the carrier for the loss of property.” It is based in part on Harris that the First and Seventh Circuits have allowed for exceptions to Carmack preemption and articulated tests for doing so. The Texas Supreme Court’s Brown decision harmonizes well with both Harris (because both cases involve general statutes not aimed specifically at regulating carrier conduct) and the cases from the Eleventh, First, and Seventh Circuits examining whether separate and distinct conduct (or alternatively, harm) is involved. Additionally, the fact that the Fifth Circuit has adopted an extremely broad view of Carmack preemption in no way binds the Texas Supreme Court. State courts are not bound by federal law interpretations from the circuit encompassing that State.

Rather, state courts are bound by United States Supreme Court decisions—the decisions of other

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249 Brown, 601 S.W.2d at 938 (emphasis added).
250 234 U.S. 412 (1914).
251 Id. at 416.
252 Id. at 420.
253 In Rini v. United Van Lines, 104 F.3d 502 (1st Cir. 1997), the First Circuit relied heavily on Harris, and contrasted it with Charleston & Western Carolina Railway Co. v. Varnville Furniture Co., 237 U.S. 597 (1915), a case finding Carmack preemption, to create a test for Carmack preemption. See Rini, 104 F.3d at 504-06.
The Seventh Circuit, in turn relied heavily on Rini to determine its test for Carmack preemption. See Gordon v. United Van Lines, 130 F.3d 282, 289-90 (7th Cir. 1997). Finally, the Eleventh Circuit in Smith v. United Parcel Service, 296 F.3d 1244 (11th Cir. 2002), relied for its test in part on Gooch v. Oregon Short Line R.R. Co., 258 U.S. 22 (1922), where the Court held “the Carmack Amendment did not preempt an action involving a physical injury to a caretaker accompanying an interstate shipment.” See Smith, 296 at 1249.
federal courts are persuasive.\textsuperscript{254} Thus the Texas Supreme Court is not bound to follow the Fifth Circuit interpretation of Carmack preemption over that of the First, Seventh or Eleventh Circuits.

If it were not for Anderson, the Franyutti plaintiff’s state claims would not have been subject to complete preemption and would have remained in Texas court. Texas courts could have continued to recognize the state’s “deeply rooted” interest in protecting its citizens under the Texas DTPA as separate and distinct from Carmack preemption.\textsuperscript{255} Moreover, as shown, Congress has not manifested a design to take Carmack preemption issues from state courts.

In fact, the Seventh Circuit, when faced with the question of whether a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act was preempted by the Carmack Amendment, deferred to the holding of a state appellate court “regarding the reach of the Illinois Act.”\textsuperscript{256} Notably, the Illinois court had held that the Illinois statute fell within Carmack preemption.\textsuperscript{257} The Seventh Circuit’s statement underscores an important federalism interest: namely, state courts have the authority to determine “the reach” of their statutes and laws, including policies advocated and conduct prohibited thereby. It is perfectly consistent to have a Texas court declare that its deceptive trade practices act is aimed at prohibiting conduct separate and distinct from liability created under a Carmack claim and for an Illinois court to declare that its similar statute does not reach beyond conduct encompassed by the Carmack Amendment.

Thus, in the Carmack context, in light of the fact that a number of the federal circuits

\textsuperscript{254} See, e.g., Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993). In Penrod, the Texas appellate court “felt bound by the pronouncements of the Fifth Circuit on federal law issues.” In response, the Texas Supreme Court explained: “This is not the case. While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court.”

\textsuperscript{255} The Texas Supreme Court’s decision would be subject to review by the United States Supreme Court. Though grants of certiorari are rare and may be inadequate to protect federal rights in many areas, where Congress has indicated, as it has in the Carmack area, that it is comfortable with state court adjudication and determination of federal preemption issues, Supreme Court review is arguably an adequate protection.

\textsuperscript{256} Gordon v. United Van Lines, Inc. 130 F.3d 282, 289 (7th Cir. 1997).

have determined Carmack preemption is not an absolute bar to all state law claims relating to a
carrier-shipper relationship, state court adjudication performs an important function. Specifically,
state courts can legitimately and authoritatively determine if state law or policy is aimed at a
separate and independent injury or conduct and thus preserve state law from Carmack
preemption or determine that state law falls within such preemption.

Importantly, these considerations are pertinent beyond the context of the Carmack
Amendment, which is merely one illustration where state courts can authoritatively construe the
reach of their own laws and policies in the legitimate contours of federal preemption. Since even
field preemption requires the determination of where the field begins and where it ends, the state
courts can authoritatively declare where their state laws fall in the known spectrum of
preemption—clearly inside the field, on the margins, or outside of it. Further, in cases involving
multiple state law claims, only one of which is preempted by federal law, moving the
adjudication to federal court deprives the state court of adjudication of purely state law claims.258
Again, the point is particularly poignant when, as with Carmack Amendment, Congress has
indicated no qualms with allowing state courts to determine the federal preemption defense.259

Carmack case being remanded that if the state court determined that the outrage claim was not preempted then the
state court would “need to turn to purely state-law issues, such as whether the plaintiff’s claim rises to the level of
severity necessary to make out an Alabama outrage claim” and noting that the “plaintiff’s suit might well involve
novel state-law issues over which a state court could have a claim to greater competence than a federal court.”)

259 Mary Twitchell notes that
allowing state courts to identify the law controlling plaintiff’s claim in uncertain preemption
situations does not place a significant additional burden on federal interests. In fact, it could be
argued that this division of labor would protect strong federalism interests. By placing such
questions in the hands of the states at the outset, we may balance the power of the central
government with a countervailing state-oriented weight. Assuming that state courts are more
likely than federal courts to find against preemption, this distribution of power to make initial
preemption determinations may provide an important safeguard for our constitutional structure.
Structural decisions made to maintain an important balance between state and central power may
account for Mottley itself and for congressional inertia . . . to change the Mottley rule.
Twitchell, supra note 121, at 861-62. Twitchell notes countervailing federal interests and explains that the “major
factor” in favor of having federal courts perform the preemption analysis “appears to be the federal interest in
avoiding state court error on preemption issues” as “[f]requent errors would undermine federal regulatory interests,
2. Taking Jurisdiction from States without Congressional Authorization

The Carmack Amendment illustrates another federalism problem with complete preemption under *Anderson*. For over a century, under the well-pleaded complaint rule, state courts have generally had exclusive jurisdiction over federal preemption defenses when only state law claims are pled in state court. The *Anderson* decision divests state courts of that jurisdiction without any congressional authorization to do so. While appearing to be a separation of powers problem, it also raises federalism concerns regarding the ability of the federal judiciary to strip state courts of jurisdiction. As the Supreme Court has recognized, separation of powers and federalism problems often go hand in hand. When the federal judiciary does not confine its jurisdiction to that appropriately determined by Congress, it correspondingly fails to maintain due regard for the independence and sovereignty of the states.²⁶⁰

Justice Scalia, in his *Anderson* dissent, alluded to concurrent jurisdiction case law as another area where the federal judiciary determines whether state courts should be deprived of jurisdiction over federal law. In that context, the federal courts have presumed state court jurisdiction except in very narrow instances.²⁶¹ The analogy to concurrent jurisdiction case law is helpful. For both contexts, the state courts are divested of deciding something over which they generally have jurisdiction. Given that federal question jurisdiction did not exist until 1875, state courts were initially the primary vindicators of federal rights and interpreters of federal law. Further, Congress’s conferral of federal question jurisdiction in 1875 expressly stated that such create unnecessary judicial conflicts, and increase the Supreme Court’s caseload with direct appeals from state court judgments.” *Id.* at 861. Yet, as noted, Congress is not impotent to examine and ameliorate such problems.²⁶⁰ For example, in *Healy v. Ratta*, 292 U.S. 263, 270 (1934), the Supreme Court explained: “Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”²⁶¹ *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 18, n.2 (2003) (Scalia, J., dissenting).
jurisdiction was granted “concurrent with the courts of the several states.”

The Supreme Court has explained in the concurrent jurisdiction context that under the “system of dual sovereignty” between the state and federal governments, “we have consistently held that state courts have inherent authority, and are thus presumptively competent to adjudicate claims arising under the laws of the United States.” The Court described three possible scenarios where “the presumption of concurrent jurisdiction can be rebutted,” namely: “by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.” This test, though more exacting than that found in Taylor for complete preemption, similarly relies on congressional design that state courts be deprived of their jurisdiction.

Indeed, in the complete preemption context, state courts have been given exclusive jurisdiction over non-diverse cases pleading only state law causes of action. To divest the state courts, as dual sovereigns, of such exclusive jurisdiction should be undertaken with hesitance, in similar manner to divesting state courts of concurrent jurisdiction. As the concurrent jurisdiction cases require a manifestation from Congress of intent to divest the state courts of jurisdiction (or a clear incompatibility between state court jurisdiction and the federal regulation), so too should complete preemption be based on congressional manifestation. Certainly state courts should not

262 See Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875). In Clafin v. Houseman, 93 U.S. 130, 136 (1876), the Supreme Court reiterated that “if exclusive jurisdiction be neither express not implied, the State courts have concurrent jurisdiction.”


264 Id. at 459 (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)). The concurrence in Tafflin, authored by Justice Scalia, contended that exclusive federal jurisdiction could not be founded from an unmistakable implication from legislative history, and perhaps not by an incompatibility between state-court jurisdiction and federal interests. See Tafflin, 493 U.S. at 473 (Scalia, J., concurring). Justice Scalia argued that exclusive jurisdiction had never been found through legislative history and additionally, “[w]hat is needed to oust the States of jurisdiction is congressional action (i.e., a provision of law), not merely congressional discussion.” Later that year, in Yellow Freight v. Donnelly, 494 U.S. 829 (1990), the Court held that jurisdiction under Title VII was concurrent despite “legislative history indicating that many participants in the complex process that finally produced the law fully expected that all Title VII cases would be tried in federal court.” See id. at 824. The Court further explained that the expectation shown through legislative history, “even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction.” Id. at 824-25.
be deprived of jurisdiction in situations like the Carmack Amendment, where Congress has manifested the opposite intent, namely, to relegate a large number of such cases to state courts.

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

It is thus up to Congress to examine the purposes and complexity of specific federal legislation as well as any state court hostility or likelihood of error and determine the slice of federal jurisdiction to be served up with its federal legislation. For some statutes, it will be exclusive federal jurisdiction, for others it will be concurrent jurisdiction while allowing federal defense removal, and for the majority of statutes it will be concurrent jurisdiction along with the normal strictures of the well-pleaded complaint rule. As noted above, Congress has the ability to determine when it would be appropriate to limit state adjudication and when limitations on state

265 See 29 U.S.C. § 1132(e)(1) (stating in part that “State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under” § 502(a)(1)(B)).


267 Similarly, while the finding of complete preemption in Aveco is not explained and does not appear to be based on congressional intent, the Supreme Court had earlier held in Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), that federal and state courts shared concurrent jurisdiction over claims under § 301 of the LMRA. As with ERISA, both concurrent jurisdiction and complete preemption exist for the same statute.

268 See also Ankenbrandt v. Richards, 504 U.S. 689 (1992) (explaining that Congress invests the lower courts “with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good”).
jurisdiction are not needed, thus retaining due regard for the sovereignty of the state courts where state courts are competent to adjudicate issues of federal law, including federal preemption.

C. Efficiency—An Alleged Benefit of the Anderson Rule

Weighed against these separation of powers and federalism problems are alleged benefits of the Anderson rule that have been proffered by commentators. Garrick Pursley insists that Anderson is justified because it promotes judicial economy, efficiency, and administration.269 Similarly, Gil Seinfeld states in passing that Anderson “has brought clarity to the doctrine” of complete preemption.270 In terms of articulating an actual test for complete preemption (e.g., if exclusive federal cause of action, then complete preemption), it may be true that Anderson has brought some clarity, but in terms of creating a test that is straight-forward in its application and clear for litigants to determine when removal is proper, Anderson has done the opposite.

Charles Alan Wright suggested four criteria “to test the appropriateness of an allocation of jurisdiction between state and federal courts”—two of which involve efficiency.271 Namely, the division should be clear, adhering to a “bright line policy”—that is, “[a] lawyer of reasonable ability should be able to read the statute and tell with fair assurance whether a particular court has jurisdiction.”272 Additionally, the division must be “consistent with efficient judicial administration,” which Wright explains means the allocation should not aggravate burdens “by permitting extensive preliminary litigation to decide” jurisdiction, by requiring duplication of

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269 Pursley, supra note 9, at 376, 418-45.
270 Seinfeld, supra note 10, at 548.
271 Wright, supra note 235, at 186-87. Notably, Wright’s other two criteria are that the division ought to be rational and that the division should be “designed to reduce friction between” the state and federal systems. As shown supra Part IV.A, the Anderson text results in an irrational division because it allows for removal where Congress has determined use of the federal judicial resource is unnecessary. Further, as discussed above, supra Part IV.B, Anderson exacerbates federalism problems.
272 See Wright, supra note 235, at 187.
proceedings, or by “shuttling the litigants . . . back and forth between the two systems.”

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

In fact, Anderson arguably (and, as shown above, in some contexts already has)
broadened the scope and application of the complete preemption doctrine to unknown areas that

273 Id. Indeed, Wright explains that “[i]f we must choose between a reasoned division of jurisdiction and a
workable division of jurisdiction, I would choose the latter every time.” See id. at 207.
274 Though not on point, the problem is related to the issue in Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998), regarding whether a federal court should make an easy merits determination prior to
determining its own jurisdiction. The Supreme Court held that jurisdiction must be determined before a federal court
can decide the merits. In the complete preemption context, and particularly under the Anderson test, a federal court
must determine the merits of the preemption defense as a prerequisite to determining its jurisdiction. And if, upon
remand to state court, the federal court’s substantive preemption determination is given law of the case or other
preclusive effect, see infra note 286, then the federal court, without jurisdiction, has determined the merits.
Law, 115 U. Pa. L. Rev. 890, 908 (1967) (explaining that because “objections to the jurisdiction of the district court
cannot be waived, and since in many cases the lack of jurisdiction can even be asserted by the party who invoked
federal jurisdiction, there should not be doubt about the threshold question of jurisdiction”).
complete preemption and improvident removal, vacating a federal jury trial verdict, and remanding to state court).
attorneys may be all too happy to explore or exploit. The broader the scope of complete
preemption becomes, the more likely that defense attorneys will file removal petitions either in
the hope that complete preemption will be found and the case will be removed to federal court or
in order to delay the proceedings (but with a jurisdictional rule that is opaque enough that the
defendant could persuasively argue that it had an “objectively reasonable basis” for removal and will avoid being assessed attorney fees and costs under 28 U.S.C. § 1447(c) even if the
case is remanded). One surprising example of the uncertainty of complete preemption being
unfairly manipulated (in this case by the plaintiffs) is Hoover v. Allied Van Lines Inc. In
Hoover, the plaintiffs filed a complaint based entirely on state law, and the state court held that
some of the state law claims were preempted by the Carmack Amendment. The plaintiffs were
then allowed to amend their complaint to add a Carmack claim. Defendants then removed on the
basis that the case had become removable by the assertion of a federal question by the
plaintiffs. Shockingly, the court remanded the action to state court, agreeing with the plaintiffs
that by virtue of complete preemption the case had been removable at the time the case was filed
and thus had to be removed within 30 days of the filing of the complaint. Because the
defendants allegedly “waived” the right to remove when the case was initially filed, the federal
district court refused to allow them to remove once the case became removable by subsequent

277 See Martin v. Franklin Capital Corp., 126 S.Ct. 704, 708, 711 (2005) (“Absent unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.”).
278 28 U.S.C. § 1447(c) provides “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.”
280 See id. at 1235.
281 See id. at 1241. Under 28 U.S.C. 1446(b), a defendant is required to remove within 30 days of the filing of the complaint. However, the statute also provides “[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading . . . from which it may first be ascertained that the case is one which is or has become removable . . . .”
282 See Hoover, 205 F. Supp. 2d at 1236; see also 28 U.S.C. § 1446(b).
events—namely, the amendment of the complaint adding a federal claim.\textsuperscript{283}

Wright’s criterion of efficient judicial administration is also not satisfied by the \textit{Anderson} test.\textsuperscript{284} Pursley argues that \textit{Anderson} allows “removal at the outset” and “skips over state court adjudication of the substantive preemption defense, thereby conserving judicial and litigant resources.”\textsuperscript{285} \textit{Anderson} does not “skip” litigation of the preemption defense—rather it moves it to federal court to be litigated as a motion to remand. The remand motion becomes based on a potentially complex issue of substantive preemption at the very early stages of litigation—before facts are fleshed out at all. The federal court hears the remand motion, determines substantive preemption, and either sends the case back to state court or keeps it. If it remands to state court, the case was unnecessarily shuttled between federal and state court and additional litigation may arise in state court as to whether or not the federal court’s substantive preemption determination is either law of the case or otherwise preclusive.\textsuperscript{286} Notably, if the federal court’s substantive

\begin{footnotes}
\item[283] See Hoover, 205 F. Supp. 2d at 1241. Notably, this case was decided prior to \textit{Anderson} and prior to the \textit{Hoskins} and \textit{Hall} decisions finding complete preemption by virtue of the Carmack Amendment. Indeed, the district court notes that district courts were divided on the question of complete preemption under the Carmack Amendment and includes in its citations both circuit court cases on the matter (\textit{Hunter} and \textit{Beers}), in which each court had found no complete preemption. Thus it is hard to justify the court’s claim that the defendants should have recognized that the complaint was removable at the time of the filing of the initial complaint.

However, the Tenth Circuit had a more lenient test for complete preemption than did other circuits prior to \textit{Anderson}, which required a determination, first, that there was substantive preemption of the state law claim and, second, that Congress “intended to allow removal in such cases, as manifested by the provision of a federal cause of action.” \textit{See Schmeling v. Nordam}, 97 F.3d 1336 (10th Cir. 1996).

\item[284] Wright, supra note 235, at 186-87.
\item[285] Pursley, supra note 9, at 441.
\item[286] In \textit{Kircher v. Putnam Funds Trust}, 126 S. Ct. 2145, 2156-57 (2006), the Supreme Court held that the federal court’s determination that SLUSA did not apply was not issue preclusive on the state court. The Court explained that while the state court could not revisit the decision to remand, “it is perfectly free to reject the remanding court’s reasoning” and “[c]ollateral estoppel should be no bar to such a revisitation of the [substantive] issue.” \textit{See id.} Issue preclusion was not applicable because 28 U.S.C. § 1447(d) prevented appeal of the district court’s substantive determination. Further, the Court held: “Nor is there any reason to see things differently just because the remand’s basis coincides entirely with the merits of the federal question; it is only the forum designation that is conclusive” and a state court could revisit the merits subject to Supreme Court review. \textit{See id.} at 2157.

Nevertheless, the \textit{Kircher} Court failed to acknowledge or cite its prior contradictory statement in \textit{Ruhrgas AG v. Marathon Oil Co.}, 526 U.S. 574, 585-86 (1999):

\textit{Issue preclusion in subsequent state-court litigation, however, may also attend a federal court’s subject matter determination... If [for example] the district court determines that state law does not allow punitive damages for breach of contract and therefore remands the removed action for failure to satisfy the amount in controversy, ... the federal court’s conclusion will travel back

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ruling is not somehow binding on the state court, the parties will be required to litigate the same substantive preemption question twice—a decisively inefficient model of jurisdiction.287

On the other hand, if the federal court finds complete preemption and the case remains in federal court, the federal court (1) will construe the plaintiff’s complaint as asserting the preemptive federal claims and adjudicate it on its merits, or (2) will request that the plaintiff amend the complaint to add the federal cause of action (and if not amended, will dismiss the action), or (3) will dismiss the case for failure to state a cause of action (because the plaintiff asserted a “non-existent” state law claim that is preempted by an unasserted federal cause of action).288 The second and third scenarios are precisely what would happen in state court without complete preemption—if the state court determined the substantive preemption question adversely to the plaintiff, the court would generally allow the plaintiff to amend the complaint to assert the federal claim and/or dismiss the preempted claims. Indeed, if the state court’s determination is the plaintiff must amend or be dismissed, and the plaintiff decides to amend the complaint to add the federal cause of action, the case is then removed to federal court squarely with the case. Assuming a fair airing of the issue in federal court, [the federal] court’s ruling on permissible state-law damages may bind the parties in state court . . . .

Id. (emphasis added). Kircher seems to state the better policy for both federalism reasons and in light of the lack of appeal of the remand order. Nevertheless, it results in repetitive litigation in state and federal court. Further, Kircher says nothing about law of the case doctrine. However, a “number of federal courts have stated that low-of-the-case principles do not bind the state court after remand for want of federal subject matter jurisdiction, even in cases in which the determination of subject matter jurisdiction involves a ruling on the reach of federal law.” CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 18B FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4478.4.

287 On the other hand, if the federal court’s determination is binding on the state court on remand, that raises rather grave federalism problems as the state court has exclusive jurisdiction over the merits and yet is bound by the determination of a federal court without jurisdiction to decide the merits. See also supra note 274.

288 See, e.g., Hoskins v. Bekins Van Lines, 343 F.3d 769, 771 (5th Cir. 2003) (explaining that district court held plaintiffs did not need to amend the complaint to expressly allege a Carmack claim because the facts pled sufficed to raise such a claim); Hall v. North Am. Van Lines, 476 F.3d 683, 690 n.9 (9th Cir. 2007) (holding that plaintiff was required to amend the complaint to expressly add a claim under the Carmack Amendment once the district court found complete preemption and that plaintiff’s refusal to do so required dismissal of the action); Carr v. Olympian Moving & Storage, No. 1:06 CV 00679, 2007 WL 2294873, *2 (N.D. Ohio June 6, 2006) (holding that plaintiff’s state law claims were completely preempted by the Carmack Amendment but were not thereby “translate[d] magically” into a Carmack claim and because the plaintiff had failed to explicitly plead a Carmack claim, the court dismissed the case with prejudice for failure to state a claim).
under statutory removal jurisdiction, avoiding the jurisdictional battle over removal or remand.

Further, if a federal court determines that there is complete preemption over one or more of the plaintiff’s state law claims, the question of exercising supplemental jurisdiction over other non-preempted state law claims (a not uncommon scenario) arises. Often the plaintiff has decided to forego a federal claim justifiably (e.g., the statute of limitations has run on the federal claim, but not on a state claim that may or may not be preempted by federal law) but has other state causes of action that are not preempted by federal law. If the case remains in state court, the state court can determine whether the one claim is preempted by the federal claim. If it is, the court may give the plaintiff the opportunity to amend to assert the federal claim, but the plaintiff is unlikely to amend if for some justifiable reason the plaintiff cannot recover under the federal claim. The state court will then determine the merits of the other state law claims. If, on the other hand, complete preemption of the one claim is used as a basis for removal, the federal court will take jurisdiction and, even assuming that it finds complete preemption, will also determine that the federal claim is barred and dismiss the federal claim. Thus, even though the federal court would initially have supplemental jurisdiction, the court would likely remand the remaining state law claims upon dismissing the federal claim. In such a scenario, complete preemption, even where found, simply adds the extra steps of removal and eventual remand.

Similarly, if the plaintiff’s alleged federal claim was not barred, but recovery under it was

\footnote{Surprisingly, many commentators discuss complete preemption with the assumption that there is only one claim or with the assumption that all claims asserted are preempted by federal law. Thus the questions surrounding complete preemption are analyzed as state adjudication of only state law claims (assuming no federal preemption of any claims) or federal adjudication of only federal claims (assuming federal preemption of all claims). But there are plenty of cases where some claims are potentially preempted by federal law and some are not. See e.g., Gordon v. United Van Lines, Inc., 130 F.3d 282, 289 (7th Cir. 1997) (holding that some state law claims were preempted by the Carmack claim brought by plaintiff, but claim for intentional infliction of emotional distress was not preempted); Hoover v. Allied Van Lines Inc., 205 F. Supp. 2d 1232 (D. Kan. 2002) (noting that state court found preemption of some state claims, but not of claims for fraud, misrepresentation and consumer protection).

\footnote{See Hall, 476 F.3d at 690 n.9 (noting that plaintiff’s unasserted Carmack claim would have been barred by contractual limitations period); Ritchie v. Williams, 395 F.3d 283 (6th Cir. 2005) (finding complete preemption of state law claims by Copyright Act and holding that Copyright claim was barred by statute of limitations).}
tenuous, and the plaintiff had other state law claims, the plaintiff may choose (after a
determination by the state court of preemption of any state law claims by the tenuous federal
claim) to forego preempted state claims and remain in state court for adjudication of the
remaining non-preempted state claims. If, however, one of the plaintiff’s state law claims is
preempted by the tenuous federal claim and the defendant removes on the basis of complete
preemption, the federal court could assert jurisdiction of the tenuous federal claim as well as the
other state law claims under supplemental jurisdiction. The federal court would thus be
determining primarily state law claims plus a federal claim that the plaintiff only has a marginal
chance of recovery on and may have preferred to forego in order to retain a state forum.291

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

V. Returning to Congressional Intent

Although Taylor rightly focuses on the need to tie complete preemption to congressional
intent, Taylor could be improved as a workable test for complete preemption. Notably, while the
Taylor concurrence was straightforward that clear congressional intent of removability was
required,292 the majority opinion merely said it would be hesitant to find complete preemption
without it.293 It is likely that the Taylor majority did not want to foreclose complete preemption
to unknown future cases where a clear manifestation from Congress was absent, but where
allowing removal on the basis of the federal defense might nevertheless seem requisite to
effectuate the purposes of a federal statute. However, the Taylor majority left the door open
without explaining when complete preemption should be allowed without such a manifestation.

291 Mary Twitchell has recommended that where a “plaintiff has viable state law claims and never sought to
rely on federal law,” the “plaintiff should be given the option of dismissing [the federally preempted claims] and
returning to state court to assert any viable state claims.” See Twitchell, supra note 121, at 868-69 & n.278.
293 See id., 481 U.S. at 64-65.
Consequently, federal courts created divergent multi-factored tests for complete preemption.294

Thus, while the premise of Taylor—relying on congressional intent of removability—is the appropriate premise, there are other methods of reaching that same goal that would be more predictable and reliable. Arguably the most efficient option is through legislation by Congress clearly setting out what federal defenses are subject to removal and what are not, similar to the 1971 ALI proposal discussed previously.295 Whether or not one agrees with each aspect of the ALI proposal, the proposal demonstrates that well-drafted legislation can create clear, efficient delineations of jurisdiction and effectuate congressional policy determinations as to the appropriate allocation of jurisdiction in light of the purposes of federal jurisdiction.

Absent such congressional action, a judicial test could be crafted after the manner of that articulated for concurrent jurisdiction in Tafflin v. Levitt.296 Under this framework, removal on the basis of a federal defense would be authorized if the statute so directed (as with the Price-Anderson Act), or by manifestations from Congress that it intended the jurisdictional provision to allow removal on the basis of a federal defense as found in statutory provisions and reliable legislative history (as with ERISA).297 At the very least, as in Rosciszewski v. Arete Associates

294 See Miller, supra note 7, at 1797-1800 (discussing pre-Anderson tests in federal circuits).
295 See supra notes 230-36 and accompanying text.
296 493 U.S. 455, 459 (1990) (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)). As noted supra notes 263-64 and accompanying text, the Court described three scenarios where “the presumption of concurrent jurisdiction can be rebutted,” namely: “by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.” See id.
297 See id. It has been contended that legislative history should not be allowed to provide the basis for exclusive federal jurisdiction and the Supreme Court in Yellow Freight v. Donnelly, 494 U.S. 820 (1990), seemed to lean in that direction. See supra note 264.

Nevertheless, while Justice Scalia is correct in stating for exclusive federal jurisdiction that it has never been found on the basis of legislative history, see Tafflin, 493 U.S. at 472 (Scalia, J., concurring), the same cannot accurately be said of complete preemption. Indeed, the finding of complete preemption in Taylor for ERISA is based on legislative history that explained what Congress was intending to effect by adopting the same jurisdictional provision for ERISA as that used for the LMRA. See Taylor, 481 U.S. at 65-66. The jurisdictional provision itself, however, does not expressly provide for federal defense removal, but only exempts ERISA and the LMRA from jurisdictional amount and citizenship requirements. See id. Reliable legislative history such as that found in Taylor, which directly explains what Congress is intending to effect by adoption of certain statutory language certainly demonstrates clear congressional intent of removability and should suffice to effect complete preemption.
Inc., to allow for removal on the basis of federal defense, there should be clear congressional manifestations that Congress intended adjudication of federal preemption to occur in federal courts to the exclusion of state courts. In short, the complete preemption test would generally require some congressional manifestation that Congress intends the jurisdictional provision to allow for removal on the basis of a preemption defense under that statute.

Again, following the concurrent jurisdiction model, complete preemption could additionally be allowed in the extreme and exceptionally rare instance where there existed “a disabling incompatibility between the federal [statute] and the state court adjudication” of the federal preemption defense. Like the Taylor majority, this would leave the door open for the possible, however unlikely, situation where there was no clear manifestation from Congress, but where removal on the basis of a federal defense was necessary to effectuate congressional purposes. Such an allowance should be construed very narrowly, as it appears to have been in the concurrent jurisdiction case law. Indeed, in the concurrent jurisdiction context, the Supreme Court has rejected claims of incompatibility based on contentions that interpretive variation among state courts will lead to non-uniformity, explaining that state court misinterpretations are subject to Supreme Court review and would not “result in any more inconsistency than that which a multi-membered, multi-tiered federal judicial system already creates.”

298 1 F.3d 225 (4th Cir. 1993); see also supra notes 99-102 and accompanying text.
299 Despite not being tied to anything, the Avco decision allowing removal for preemption defenses based on § 301 of the LMRA should be upheld for stare decisis purposes and because Congress in stating in the ERISA legislative history that it wanted ERISA to work like §301 LMRA actions as interpreted by Avco impliedly authorized such removal. See supra notes 54-55 and accompanying text. But frankly, Avco remains an anomaly and technically should not come within the scope of a rule based on congressional intent of removability.
300 Gulf Offshore Co., 453 U.S. at 477. A different articulation requires “a clear incompatibility between state-court jurisdiction [over the federal preemption defense] and federal interests.” Tafflin, 493 U.S. at 459.
301 See, e.g., Tafflin, 493 U.S. at 472-73 (Scalia, J., concurring) (explaining that exclusive jurisdiction had yet to be found by the Supreme Court on the basis of a clear incompatibility).
302 Tafflin, 493 U.S. at 465; see also Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 514 (1962) (noting that “diversities and conflicts” would occur “no less among the courts of the eleven federal circuits, than among the courts of the several States” which is the “usual consequence” of concurrent jurisdiction and to resolve such conflicts “is one of the traditional functions of this Court.”)
incompatibility must be with a distinctive congressional design for the statute at issue and not from something that is a general federal interest applicable to all or many federal preemption defenses. That is, allowing state court adjudication of the federal preemption defense must “plainly disrupt the [specific] statutory scheme” as authored and envisioned by Congress.\(^{303}\) Otherwise, a “clear incompatibility” could be just as malleable, unpredictable, and entirely divorced from congressional intent of removability as exists under the Anderson test.\(^{304}\)

VI. Conclusion

The Anderson test creates a policy-bankrupt allocation of state and federal jurisdiction. Complete preemption under Anderson completely fails to comport with separation of powers and federalism principles by allocating cases to federal court contrary to congressional intent and

\(^{303}\) See Tafflin, 493 U.S. at 472 (Scalia, J. concurring) (explaining that clear incompatibility might be established where “a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme”).

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

\(^{304}\) Other commentators, such as Morrison, Miller, Ragazzo, and Spencer, have recommended reliance on Congress to determine complete preemption or abandonment of complete preemption as a judicial doctrine. See supra Part III. However, both Morrison’s and Spencer’s discussions are nearly cursory without elaboration or explanation on how reliance on Congress would actually work. See Morrison, supra note 139, at 194; Spencer, supra note 136, at 290. Ragazzo offers a full treatment, but the force of his argument is to abandon complete preemption and similar exceptions rather than offering a framework for relying on congressional intent. See Ragazzo, supra note 133, at 329-31, 335. Finally, Miller briefly recommends that the Supreme Court “clarify the analytical standard” and suggests the Court “place[e] the burden on Congress—at least prospectively” by offering “guidance as to what terms should appear in the statute, or, at least, be set out in reliable legislative history, to create complete preemption.” See Miller, supra note 7, at 1822, 1800. While this would allow Congress to knowingly craft legislation providing for federal defense removal, yet, the Price-Anderson Act, SLUSA, and ERISA indicate that where Congress particularly wants to allow federal defense removal, it has been able to manifest that desire.

This paper contributes to the work of these scholars by offering a new framework to be applied by the judiciary, modeled on concurrent jurisdiction case law, that ensures reliance on congressional intent but still allows a narrowly defined area for the judiciary to provide federal defensive removal absent such manifestations where necessary to effectuate specific congressional purposes. Further, the paper explores efficiency, separation of powers, and federalism problems created by Anderson, and examines a specific statutory scheme as a case in point, the Carmack Amendment, to demonstrate that reliance on a replacement federal cause of action does not accurately demonstrate congressional intent of removability and indeed, may accompany congressional desires to limit federal jurisdiction.
despite congressional manifestations, as with the Carmack Amendment, that state courts are
competent to adjudicate the federal preemption defense. Further, the Anderson test is
unpredictable, shuttles cases between state and federal court, and is generally inefficient. This is
so not because removal on the basis of a defense is necessarily inefficient, but because an
unpredictable rule requiring a full substantive analysis to determine jurisdiction is inefficient.

In contrast, a test for complete preemption based on congressional intent of removability
has a solid foundation in the structure of American government, giving weight to separation of
powers and federalism concerns. First, it allows Congress, rather than federal courts to expand
the jurisdiction of the federal judiciary. The allowance of federal jurisdiction is thus tied to the
Constitutional foundation for lower federal court jurisdiction—namely, authorization by
Congress. This foundation is particularly important as to removal jurisdiction, which is “entirely
a creature of statute.” Moreover, contrary to the Anderson and Seinfeld analyses, the breadth
of federal jurisdiction would not be dependent on federal court interpretations of federal power.
Further, federalism and comity are promoted where state court jurisdiction over federal
preemption defenses is taken away only when Congress determines that such action is needed—
whether it be for uniformity, state hostility, or federal law expertise reasons.

Reliance on Congress to create exceptions to the well-pleaded complaint rule would also
be far more predictable and thus efficient than the current regime—if there are no congressional
manifestations that a federal preemption defense should be removable then it is not removable
(absent the rare clear incompatibility). Courts and litigants could determine with far more
certainty than under Anderson whether or not removal was proper and would not have to litigate
the preemption defense in order to find out if the federal court has jurisdiction. Finally, complete

305 See, e.g., Sygenta Crop Protection Inc. v. Henson, 537 U.S. 28, 32 (2002) (explaining that the “right of
removal is entirely a creature of statute and a suit commenced in a state court must remain there until cause is shown
for its transfer under some act of Congress” and that removal statutes are to be strictly construed).
preemption could become based in the purposes of federal jurisdiction because Congress can determine when the “interest in securing a uniform interpretation of federal law or safeguarding against state court bias is most pressing” and when it is not pressing or necessary.306

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

\footnote{\textit{Seinfeld, supra} note 10, at 547-48 (explaining the need to ground complete preemption analysis in the purposes of federal jurisdiction).}