Complete Preemption—Removing the Mystery from Removal

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The American Law Institute has begun a project to address the principles of our jurisdictional system, the implications of which are powerful and far-reaching. Our dual system of federal and state courts inevitably leads to forum questions that can radically alter, or even determine, the outcome of a dispute. Because jurisdiction serves as the initial door to legal relief, it must rest on a coherent framework of principles and rules if justice is to prevail. Not unlike its efforts in 1969, the ALI will propose a set of jurisdictional principles through amendments to our current statutes. In doing so, it will come across the convoluted doctrine of federal question removal based on complete preemption. This Comment addresses the confusion surrounding the doctrine and proposes that preemption should serve as the basis for removal only for those claims for which Congress has created federal law that both preempts state law and provides a parallel cause of action.

INTRODUCTION

Federal question removal seems like a simple concept. In federal question cases of concurrent jurisdiction, the plaintiff enjoys the initial choice of forum, but the defendant may remove to federal court if she so desires. But, for such a simple concept, it provokes heated debate and near-endless confusion. It is unlikely that a single federal or state judge is completely satisfied with removal as it stands today, if for no other reason than that it is so confused. One doctrine within removal has caused particular difficulties—the doctrine of complete preemption. Under this doctrine, a defendant may remove a cause of action that

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otherwise appears to lack federal question jurisdiction by asserting that federal law "completely preempts" the state law claim.

This Comment seeks to clarify the doctrine of complete preemption. In doing so, it necessarily must address the oft-criticized well-pleaded complaint rule and the misleading notion of artful pleading. By way of introduction, Part I lays out a brief background of removal jurisdiction and its connection to federal question jurisdiction. From there, Part II addresses the well-pleaded complaint rule. It notes criticisms of the rule and argues that the rule serves a legitimate purpose in the removal context. Part III provides an examination of the Supreme Court's use of complete preemption and its inclusion of the term "artful pleading" in the complete preemption context. This Part reveals the Court's own confusion about the doctrine and lays out the case law with which the lower courts are left to grapple. Part IV then addresses the lower court interpretations of the Supreme Court cases, looking at how the courts have interpreted the concept of artful pleading and the doctrine of complete preemption. Part V examines the use of artful pleading and shows that the term not only lacks consistent meaning, but is dangerous in application. Accordingly, this Part argues that artful pleading by any definition has no place in the complete preemption analysis. Finally, in Part VI, the Comment argues that while removal based on complete preemption may be justified in certain circumstances, it should be limited to those cases where Congress has created federal law that both preempts state law and provides a parallel federal cause of action.

I
BACKGROUND

Complete preemption, as a method of removal that permits a state court cause of action based on state law to be removed to federal court, necessarily involves issues of federal question jurisdiction and has been limited by established boundaries to that jurisdiction. It is wise, therefore, to begin an analysis of the doctrine of complete preemption with a brief background of removal and its tie to federal question jurisdiction.

A. History of Removal

Removal jurisdiction is not mentioned in the Constitution; rather, it is an invention of Congress. Although wholly statutory, it has been a part of American jurisprudence for over 200 years. The Judiciary Act of 1789 established a provision permitting removal jurisdiction.[1] In that

1. *See* Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 73.

Act, however, removal was limited to actions in diversity.[2] With the exceptiou of a brief interlude in 1801, Congress did not enact a general removal statute that extended removal beyond diversity until 1875.[3] The 1875 statute provided for removal to lower federal courts of "any suit [brought in a state court] arising under the Constitution or laws."[4] This grant of removal jurisdiction permitted either party to remove the case to federal court.[5] An 1887 revision of the statute, however, limited removal to defendants only.[6] In addition, the revision inextricably tied removal to origiual jurisdiction by allowing removal only where the federal court would have had "original jurisdictiou."[7]

The current removal statute, 28 U.S.C. § 1441, is based on that 1887 legislation.[8] Uuder § 1441(a), removal is permitted by the defendant in any civil action brought in a state court of which the district courts of the United States have original jurisdiction.[9]

B. Federal Question Jurisdiction and Boundaries of Removal

While § 1441 permits removal only in those cases in which the district court would have had original jurisdiction, such a limitation has failed to provide clear boundaries. Article III of the United States

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2. *See id.*

3. In 1801, for a brief period, Congress conferred broad federal question jurisdiction and removal, but the act was repealed just over one year later. *See* Act of Feb. 13, 1801, ch. 4, § 13, 2 Stat. 89 (repealed 1802). There is evidence that the 1801 Act was an effort on the part of the Federalist Party to increase the power of the judiciary, and therefore the power of its own party, by increasing the scope of federal jurisdiction. Any such plan was subsequently foiled by the next Congress's repeal of the Act. *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 879 (4th ed. 1996).

4. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71. The 1875 removal provision read:

> That any suit of a civil nature, at law or in equity, now pending or hereafter 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, or treaties . . . or in which there shall be a controversy between citizens of different States, . . . either party may remove said suit into the circuit court of the United States for the proper district. *Id.*

5. *See id.*

6. The 1887 Act revised section 2 of the 1875 Act to read in pertinent part: "[A]ny suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district." Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 553 (amended 1888).

7. *Id.*

8. Section 1441(a) provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C.A. § 1441(a) (West 1992).

9. *Id.*

Constitution confers upon Congress the authority to establish lower courts and to grant those courts the power to hear cases "arising under" the Constitution and federal laws.[10] Congress exercised this authority in the Judiciary Act of 1875.[11] The current statute conferring federal question jurisdiction is substantially the same as that of the 1875 Act. Under 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[12] Although § 1331, like the Constitution, uses the term "arising under," the statute has been interpreted more narrowly than Article III. This narrow construction of § 1331's "arising under" language is important to removal jurisdiction, for removal is permitted only if the action falls within the statutory grant.[13] Unfortunately, no clear test has been adopted to determine when a cause of action "arises under" the Constitution or federal law.

Two doctrines, however, have long served to gauge the limits of federal question jurisdiction—the well-pleaded complaint rule and the master-of-the-complaint doctrine. Under the well-pleaded complaint rule, federal question jurisdiction is only established when a federal question appears on the face of the complaint, not when it is asserted or anticipated as a defense. The rule was initially applied to the statutory grant of original federal question jurisdiction, though some judges and commentators thought the rule might also extend to the constitutional provision.[14] In 1894, the rule was extended to the removal context upon the Supreme Court's interpretation of the 1887 statutory revision of the Judiciary Act of 1875.[15]

The case most associated with the well-pleaded complaint rule is *Louisville & Nashville Railroad v. Mottley*.[16] In *Mottley,* the plaintiff alleged in her complaint that a federal statute on which the railroad was

10. U.S. CONST. art. III, §§ 1, 2. Section 2 also grants federal courts the power to hear cases affecting ambassadors, cases of admiralty, and cases between diverse parties. *See id.* § 2.

11. *See* Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. As noted above, however, this was not the first time Congress exercised its authority. *See supra* note 3.

12. 28 U.S.C.A. § 1331 (West 1992).

13. *See id.* § 1441(a) (permitting removal only where the district court has original jurisdiction).

14. *See* Richard E. Levy, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 637 n.14 and accompanying text (1984) (discussing implication of constitutional well-pleaded complaint rule in *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738 (1824) and resolution of the issue in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494 (1983), in which the Supreme Court located the source of the well-pleaded complaint rule in the statutory grant of jurisdiction).

15. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461-62 (1894) (interpreting the 1887 revision to require application of the well-pleaded complaint rule). For an argument that the well-pleaded complaint rule was erroneously applied to the 1887 statutory removal requirements, see Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986).

16. 211 U.S. 149 (1908).

expected to rely in defense was unconstitutional.[17] In anticipation of this defense, she sought federal jurisdiction in the trial court.[18] The Supreme Court did not reach the merits of the case, instead raising the jurisdictional issue *sua sponte* and dismissing for lack of jurisdiction.[19] In so doing, the Court stated the "settled iuterpretation" that "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."[20]

The master-of-the-complaint doctrine was established long after the well-pleaded complaint rule, but in some ways it rests on the same principles. Under this doctrine, the plaintiff is the master of his own complaint and is permitted to remain in state court if he chooses to forego his federal claims. The master-of-the-complaint doctrine was first announced by Justice Holmes in 1913: "Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the . . . law of the United States."[21] The doctrine was reaffirmed in 1918, when the Court declared that "the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case."[22] In this way, the plaintiff controls the extent to which his claim is removable.[23]

The well-pleaded complaint rule and the master-of-the-complaint doctrine work together to provide boundaries to removal jurisdiction. By granting the plaintiff control over the complaint and denying removal based on a federal defense, these rules limit the circumstances under which removal is possible. Accordingly, therefore, preemption ordinarily cannot serve as a basis for removal because it is raised as a defense and does not satisfy the well-pleaded complaint rule. If a plaintiff's state law claim is deemed preempted by federal law, the state law claim is simply dismissed. "Complete preemption," on the other hand, is a term used to define those situations in which preemption *does* provide a basis for removal. As Section IV.B of this Comment illustrates, courts have been unclear about when preemption simpliciter, raised as a defense, becomes complete preemption and therefore a basis for removal. One way to settle this confusion would be simply to do away with the well-pleaded complaint rule. If preemption, as a defense, were

17. *See id.* at 150-51.

18. *See id.*

19. *See id.* at 152.

20. *Id.* The *Mottley* Court cited to sixteen previous Supreme Court cases where the *Tennessee v. Union & Planters' Bank* rule had been applied. *See id.* at 154.

21. Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

22. Great N. Ry. Co. v. Alexander, 246 U.S. 276, 282 (1918).

23. *See* Billy Jack for Her, Inc. v. New York Coat Workers' Union, 511 F. Supp. 1180, 1184 (S.D.N.Y. 1981) ("[T]he plaintiff, by the allegations of its complaint, really determines whether the case is removable as one arising under the laws of the United States.").

always a basis for removal, then the complete preemption doctrine would be superfluous. Any coherent resolution of the complete preemption confusion, therefore, must begin with the well-pleaded complaint rule.

II

ANALYZING THE WELL-PLEADED COMPLAINT RULE

Although the well-pleaded complaint rule has been a part of federal question and removal jurisdiction for over a century, it has been severely criticized.[24] Even the Supreme Court has questioned the rule. Justice Brennan stated in a footnote in *Franchise Tax Board v. Construction Laborers Vacation Trust,*[25] "It is possible to conceive of a rational jurisdictional system in which the answer as well as the complaint would be consulted before a determination was made whether the case 'arose under' federal law."[26] But, thus far, the Court has deferred to Congress for any such change.[27]

The American Law Institute (ALI) has also criticized the rule. In its 1969 report, the ALI proposed that removal be permitted on the basis of a federal defense.[28] According to the ALI,

> If it is accepted that a defense based on federal law should be enough for federal question jurisdiction, it is possible to abandon the rule that the federal question must appear from the plaintiff's statement of his claim. With this rule abandoned, it would be possible, as it is not now, to confine federal question jurisdiction to those cases that actually present a real and substantial controversy about federal law.[29]

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24. *See, e.g.,* William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" under Federal Law,* 115 U. PA. L. REV. 890, 895 (1967); David P. Currie, *The Federal Courts and the American Law Institute (Part II),* 36 U. CHI. L. REV. 268, 269-276 (1969); Donald L. Doerenberg, *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 (1987); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROBS. 216, 233-34 (1948).

25. 463 U.S. 1 (1983).

26. *Id.* at 10 n.9.

27. *See id.* at 11 n.9 (citing to proposals to change the rule, but noting that "those proposals have not been adopted"). Note, however, that the fact that Congress has continucd to reenact the language of the 1875 Act unchanged, knowing the Court's interpretation of the statute to require the well-pleaded complaint rule, suggests that Congress acquiesces to such an interpretation. *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); Heald v. District of Columbia, 254 U.S. 20, 23 (1920) ("[W]here provisions of a statute had previous to their re-enactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary.").

28. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 188-191 (1969) [hereinafter ALI STUDY].

29. *Id.* at 189.

There are, however, several reasons why the well-pleaded complaint rule should be retained. To begin with, if we were to follow today a suggestion such as the ALI proposed in 1969, we would have an extraordinary number of cases headed to the federal system. With expansion of statutory federal law comes a vast increase in the potential for a federal defense.[30] In addition, it is important to note that the ALI proposal also provided for a reduction in the number of diversity cases going to federal court.[31] Under the ALI plan, therefore, while federal question jurisdiction would increase, diversity jurisdiction would decrease. Without a similar significant decrease in some other area of the federal caseload, allowing removal based on a federal defense invites a deluge of cases to the federal courts.

Further, there is greater danger of unacceptable forum manipulation based on a frivolous defense than on a frivolous claim. A plaintiff has a built-in check on his claims because any frivolous claims will be dismissed.[32] A defendant, on the other hand, has no similar built-in check on his defenses and so has an incentive to plead a federal defense in his answer solely to achieve federal jurisdiction. Then, if the defense is deemed frivolous or is not raised at trial and the case is remanded, the defendant has lost nothing but time, something of generally greater concern to the plaintiff.

The well-pleaded complaint rule also provides a practical way to limit federal court jurisdiction to those cases where federal law is likely to predominate. The ALI sought this goal through its 1969 proposal—"to confine federal question jurisdiction to those cases that actually present a real and substantial controversy about federal law."[33] By requiring that the federal question be raised in the complaint, the court increases the odds of a federal question being at issue in the suit, if only because of the built-in incentives the plaintiff has to bring legitimate claims.[34]

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30. In 1994 alone there were 465 federal public laws passed. *See* 108 Stat. (1994). In contrast, there were 190 federal public laws passed in 1969. *See* 83 Stat. (1969).

31. *See* ALI STUDY, *supra* note 28, at 123-25 (proposing limitation barring an in-state plaintiff from instituting a diversity action in federal court against an out-of-state defendant).

32. Under Federal Rule of Civil Procedure 12(b)(6), the plaintiff's claim may be dismissed "for failure to state a claim upon which relief can be granted" upon motion by the defendant. FED. R. CIV. P. 12(b)(6). Of course, the plaintiff may have incentive to raise a frivolous federal claim in order to bring a state claim into federal court under supplemental jurisdiction, but this problem is dealt with independently by 32 U.S.C. § 1367. *See* 32 U.S.C.A. § 1367 (West 1992) (providing for supplemental jurisdiction but giving power to district court to decline to allow jurisdiction over the state law claim in certain circumstances).

33. ALI STUDY, *supra* note 28, at 189.

34. Judge Posner espouses a similar argument: "In many [cases] the federal defense would have little merit—would, indeed, have been concocted purely to confer federal jurisdiction—yet this fact might be impossible to determine, with any confidence, without having a trial before the trial." RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 190 (1985).

Standing alone, such an argument is open to the suggestion that we should allow the federal court to examine the law governing the claim, whether that law appears in the initial complaint or in the answer. By allowing removal to federal court based on both the defense and the claim, the argument goes, those cases where the dominant federal law arises in the defense will not be kept from federal court. However, the well-pleaded complaint rule does more than weed out those cases where federal law is not likely to predominate; it provides, in most cases, a bright-line rule upon which litigants aud courts alike can rely. While some cases are certain to get past the rule, the rule's clarity will outweigh an occasional "awkward result."[35] As the Supreme Court itself has noted, "[T]he well-pleaded complaint rule makes sense as a quick rule of thumb."[36]

In addition to practical concerns of judicial efficiency, the well-pleaded complaint rule also serves the interests of federalism. The Constitution does not *require* Congress to create federal courts inferior to the Supreme Court.[37] Further, state courts are courts of concurrent jurisdiction.[38] The plausible assumption—and the reality from 1789 to the present—is that state courts will hear most cases.[39] As one commentator put it, "[I]t is a more serious error for the federal courts to hear a case they ought not to have heard than to decline to hear a case they might have heard."[40] Moreover, by placing those cases where the federal defense is the basis for alleged federal question jurisdiction in state courts, we are not uecessarily taking away all opportunities for federal review.[41] By placing a predominately state law claim in federal court, on the other hand, we are denying the state courts any opportunity to comment on the state law issues.

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35. *See* Franchise Tax Bd. v. Const. Laborers Vac. Trust, 463 U.S. 1, 12 (noting that the rule "may produce awkward results").

36. *Id.* at 11.

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

38. *See* 28 U.S.C. §§ 1331-1332 (West 1992) (granting "original" but not "exclusive" jursidiction on federal courts).

39. This assumption is reflected in the fact that the removal statute is to be strictly construed. *See, e.g.*, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106-07 (1941); Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365-66 (5th Cir. 1995).

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

41. The issues of federal law that do not appear in the well-pleaded complaint will be reviewable under § 1257 by the United States Supreme Court. *See* 28 U.S.C.A. § 1257 (West 1992). Of course, while in theory Supreme Court review is available from state court, as a practical matter, because of the Court's ability to deny certiorari, there will be little opportunity for review. Nonetheless, the opportunity does exist. If a predominantly state law claim is taken to federal court, on the other hand, there will be no opportunity for a state court to review the state law issues.

Finally, the well-pleaded complaint rule is consistent with the master-of-the-complaint doctrine in that it allows the plaintiff to forego his federal claims to remain in state court. To abolish the well-pleaded complaint rule and allow removal based on a federal defense would severely restrict the master-of-the-complaint doctrine. Without the well-pleaded complaint rule, the plaintiff with both a state and federal claim might forego his federal claim to stay in state court, but the defendant would still be allowed to remove to federal court based on a federal defense to the state law claim. Under such a system, the master-of-the-complaint doctrine would only retain its force where the defendant's sole federal defense is a defense to the plaintiff's federal claim rather than his state claim.

For these reasons, although the well-pleaded complaint rule may appear unnecessarily limiting in cases in which the federal defense turns out to be the focus of the suit, it serves a practical purpose by providing a fairly clear rule that works to funnel cases in which federal questions are likely to predominate into federal court. Accordingly, it should be retained as a principle of our jurisdictional system.

As a general rule, therefore, preemption simpliciter, because it is raised as a defense, cannot and should not be a basis for removal. The doctrine of complete preemption, discussed below, carves out an exception to this general rule and defines those circumstances in which removal based on preemption is proper.

III

THE SUPREME COURT—ARTFUL PLEADING AND PREEMPTION REMOVAL

The Supreme Court first used preemption as a basis for removal almost thirty years ago. Since then, the Court has jumbled the doctrine into confusion in at least five additional cases, allowing it, coupled with the misleading concept of artful pleading, to come dangerously close to nullifying the well-pleaded complaint rule and master-of-the-complaint doctrine altogether. On several occasions, the Court has addressed the complete preemption issue head-on; on others, it has relegated its discussion to footnotes. Whatever the nature of the guidance, however, the substance has been far from clear.

The Supreme Court case most often credited with promulgating the notion of artful pleading and complete preemption did not actually mention the terms "artful pleading" or "complete preemption" at all. In *Avco Corp. v. Aero Lodge 735*,[42] the plaintiff-employer originally brought his action to enjoin a striking labor union in state court as a state law contract claim based on violation of a collective bargaining

42. 390 U.S. 557 (1968).

agreement.[43] The state court issued an *ex parte* injunction.[44] The defendants then removed to federal court.[45] Motion to remand was denied, and the district court dissolved the injunction issued by the state court.[46] On review, the Supreme Court upheld removal to the federal court, relying on an earlier Supreme Court finding that claims based on collective bargaining agreements would be governed by section 301 of the Labor Management Relations Act (LMRA).[47] The Court stated in that earlier decision that "[a]ny state law applied . . . will be absorbed as federal law and will not be an independent source of private rights."[48] Because the *Avco* plaintiff's claim was based on a violation of a collective bargaining agreement, the Court found the claim covered by section 301 of the LMRA and thus qualified as "one arising under the 'laws of the United States.'"[49]

Additionally, the *Avco* Court's analysis distinguished between the issues of federal jurisdiction and available remedy. The plaintiff in *Avco* sought an injunction, yet the Court affirmed removal even though federal courts are precluded from issuing injunctions in labor disputes.[50] In support of this result, which essentially barred the plaintiff from attaining his desired remedy, the Court stated, "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy."[51]

Over a decade later, the Supreme Court revisited preemption removal in *Federated Department Stores, Inc. v. Moitie*.[52] Notably, *Moitie* contains the Court's first use of the term "artful pleading." In a footnote, the Court stated that "artful pleading" was a "settled principle."[53] The Court's support for this "settled principle" consisted of citation to a treatise stating that courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal formm . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of the plaintiff's characterization."[54]

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43. *See id.* at 558.

44. *See id.*

45. *See id.*

46. *See id.* at 558-59.

47. *See* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

48. *Avco*, 390 U.S. at 559 (quoting *Textile Workers*, 353 U.S. at 456-57).

49. *Id.* at 560 (quoting 28 U.S.C. § 1441(b)).

50. *See id*; *see also* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) (holding that the Norris-LaGuardia Act bars federal courts from issuing an injunction in a labor dispute), *overruled in part by* Bays Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

51. *Avco*, 390 U.S. at 561.

52. 452 U.S. 394 (1981).

53. *Id.* at 397 n.2.

54. *Id.* (alterations in original) (quoting 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722, 564-66 (1976)).

The plaintiffs in *Moitie*, along with several other plaintiffs, had filed an earlier action in federal court based on federal antitrust law.[55] After that action was dismissed on the merits, the two plaintiffs in *Moitie* filed a state court action making similar allegations based on state law.[56] Their co-plaintiffs from the earlier action, however, appealed the federal court judgment and won on appeal.[57]

The Supreme Court held the *Moitie* plaintiffs' subsequent state court action removable and affirmed the lower court dismissal of the claims as barred by *res judicata*.[58] Expressly deferring to the factual findings and analyses of the lower courts, the Court described the *Moitie* plaintiffs as having "attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims."[59]

By introducing the term artful pleading and endorsing such a broad definition of preemption removal, the Court expanded the doctrine's application to a point where it threatened to swallow the well-pleaded complaint rule. However, several factors indicate that the Court in *Moitie* did not intend such a far-reaching expansion of preemption removal. First, the facts of *Moitie* are distinct, in that the Court was looking at a case of refiling in state court subsequent to adjudication in federal court.[60] Second, the Court itself indicated discomfort with the issue of artful pleading and removal by deferring to the lower courts' analyses and concluding that it would not question "that factual finding."[61] Third, the Court's discussion of the issue was relegated to a footnote, suggesting a degree of indifference on the part of the Court rather than any desire to undo the established understanding of the well-pleaded complaint rule.

Although the *Avco* Court did not mention artful pleading, preemption, or even the well-pleaded complaint rule, *Avco* is known for promulgating these doctrines based on the Court's later characterization of the case in *Franchise Tax Board v. Construction Laborers Vacation Trust*.[62] There, the Court decided whether federal courts had jurisdiction over an action filed by a state tax agency in state court against the administrator of a trust fund regulated by the Employee Retirement Income Security Act (ERISA).[63] In doing so, the Court looked at

55. *See id.* at 395-96.
56. *See id.* at 396.
57. *See id.* at 396-97.
58. *See id.* at 397 n.2.
59. *Id.* (alteration in original).
60. *See id.* at 395-97.
61. *Id.* at 397 n.2.
62. 463 U.S. 1 (1983).
63. *See id.* at 3-4.

whether removal was proper under *Avco*. It started its inquiry into preemption removal by stating that "it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint,"[64] thus establishing the notion of artful pleading as it is often stated today and connecting it to removal based on preemption. To further complicate matters, the Court failed to define "necessary," opening the door to a reading of artful pleading that goes beyond the context of preemption removal.

The *Franchise Tax Board* Court then characterized *Avco*:

> The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.[65]

In finding that removal was not justified under *Avco*, the *Franchise Tax Board* Court stated that

> on the face of a well-pleaded complaint there are many reasons completely unrelated to the provisions and purposes of ERISA why the State may or may not be entitled to the relief it seeks. Furthermore, ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its pre-empted state contract claim.[66]

With this analysis, the Court seemed to state a two-part test, requiring both that the state law be preempted on the face of the complaint and that the federal statute provide a replacement cause of action.

Four years later, in *Metropolitan Life Insurance Co. v. Taylor*,[67] the Court again looked at ERISA, this time extending the statute's ability to provide removal jurisdiction under a preemption theory. In *Metropolitan Life*, the question was whether a plaintiff's state common law claims were sufficiently preempted by ERISA's civil enforcement provision, section 502(a)(1)(B), to permit removal to federal court.[68] The Court explained that preemption is a "corollary of the well-pleaded

64. *Id.* at 22.
65. *Id.* at 23-24 (footnotes omitted).
66. *Id.* at 26 (footnotes omitted).
67. 481 U.S. 58 (1987).
68. *See id.* at 60.

complaint rule" through which "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character."[69] Noting that this principle had thus far been limited to section 301 of the LMRA, the Court extended it to those cases within the scope of section 502(a) of ERISA, in part because of the similarity between the jurisdictional sections of each of the statutes, and in part because of clear congressional intent that section 502(a) of ERISA be given the same jurisdictional significance as section 301 of the LMRA.[70] In allowing removal, the Court summarized its application of the *Avco* doctrine, stating that "the touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress."[71] Justice Brennan, in a concurring opinion to *Metropolitan Life*, wrote separately "only to note that today's holding is a narrow one," reaffirming that removal jurisdiction exists only when "Congress has *clearly* manifested an intent to make causes of action . . . *removable to federal court.*"[72]

Just two months after *Metropolitan Life*, the Court again discussed preemption as a basis for removal, with Justice Brennan writing for a unanimous Court in *Caterpillar Inc. v. Williams.*[73] *Caterpillar* involved the question of whether a state-law contract claim was preempted by section 301 of the LMRA so as to support removal to federal court.[74] While the Court's holding in the case was not particularly noteworthy, its use of language seemed to broaden the availability of removal based on preemption. For the first time, the Court referred to the doctrine of "complete pre-emption."[75] Further, it reiterated an earlier statement in *Metropolitan Life* that under the "complete preemption" doctrine, "[o]nce an *area* of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[76]

Beyond that, in a footnote, the Court questioned the Ninth Circuit Court of Appeals' understanding of the complete preemption doctrine. The Court took issue with the Court of Appeals' statement:

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69. *Id.* at 63-64.

70. *See id.* at 64-67. As the Supreme Court notes, the Conference Report on ERISA describing the civil enforcement provisions of section 502(a) says in part: "All 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 Labor-Management Relations Act of 1947." H. R. Conf. Rep. No. 93-1280, at 327 (1974).

71. *Metropolitan Life*, 481 U.S. at 66.

72. *Id.* at 67-68 (alteration in original) (Brennan, J., concurring).

73. 482 U.S. 386 (1986).

74. *See id.* at 388.

75. *Id.* at 393.

76. *Id.* (emphasis added).

> A state law cause of action has been 'completely pre-empted' when federal law both displaces *and* supplements the state law—that is, when federal law provides both a superseding cause of action replacing the state cause of action *and* preempts that state law remedy. These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court.[77]

According to the Supreme Court, this analysis was "squarely contradicted by our decision in *Avco*."[78] The Court then went on to cite to *Avco*'s reasoning that the nature of the relief is a distinct question from jurisdiction.[79] As Part VI of this Comment will later show, this misinterpretation of the Ninth Circuit's analysis, together with the Court's failure to clearly and consistently lay out the requirements of complete preemption, ultimately generated needless uncertainty in the doctrine.

IV

THE LOWER COURTS—INTERPRETING THE SUPREME COURT DECISIONS

From these Supreme Court decisions, the lower courts were left with a confused doctrine with which to decide questions of jurisdiction. An examination of circuit court attempts to grapple with the doctrine of complete preemption and its connection with the concept of artful pleading reveals an array of interpretations.

A. Artful Pleading

Since its inception thirty years ago in *Avco*, the notion of "artful pleading" has been used frequently, though inconsistently, in the circuit courts. Courts most often interpret artful pleading as an exception to the well-pleaded complaint rule.[80] Used this way, artful pleading allows the court to "recharacterize" the complaint as arising under federal rather than state law and thus conclude that removal is proper. Although courts

77. *Id.* at 391 n.4.

78. *Id.*

79. *See id.*

80. *See* Peters v. Union Pac. R.R. Co., 80 F.3d 257, 260-61 (8th Cir. 1996) (interpreting earlier case to hold that complete preemption "prohibits a plaintiff from defeating removal by failing to plead necessary federal questions in a complaint"); Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 366-67 & 367 n.3 (5th Cir. 1995) (describing artful pleading as exception to be used in "extraordinary circumstances"); Goepel v. Nat'l Postal Mail Handlers Union, 36 F.3d 306, 310 & 310 n.5 (3d Cir. 1994) (citing to language in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983), and noting that the language is referred to as "artful pleading"); Burda v. M. Ecker Co., 954 F.2d 434, 438 (7th Cir. 1992) ("An independent corollary to the 'well-pleaded complaint rule' is the 'artful pleading doctrine.'"); M. Nahas & Co. v. First Nat'l Bank, 930 F.2d 608, 612 (8th Cir. 1991) (noting exception to well-pleaded complaint rule that "a plaintiff cannot thwart the removal of a case by inadvertently, mistakenly or fraudulently concealing the federal question that would necessarily have appeared if the complaint had been well pleaded," but not mentioning the term artful pleading); Aaron v. Nat'l Union Fire Ins. Co., 876 F.2d 1157, 1161 (5th Cir. 1989) (seeing artful pleading as an exception to the well-pleaded complaint rule).

might agree that artful pleading is an easy way around the well-pleaded complaint rule, they offer little consensus on what "artful pleading" really is. In fact, the concept is so slippery that a definition is nearly impossible to pin down.

Several courts interpret artful pleading as synonymous with complete preemption.[81] Other courts have attempted to analyze preemption as a basis for removal without referring to artful pleading at all,[82] but only in those cases involving ERISA and the LMRA, statutes the Supreme Court had previously determined to preempt state law completely.[83] As a result, in these certain cases, lower courts are able to forego justifications for their decisions, and consequently avoid mentioning artful pleading, by relying on Supreme Court precedent.[84]

The Ninth Circuit, rather than simply reciting or avoiding the notion of artful pleading, has been of the few circuits to wrestle with the term's meaning and application. The Ninth Circuit's struggle to understand artful pleading, however, does little more than reveal the doctrine's endlessly confusing, and potentially dangerous, nature. For example, in one early case, the court distinguished between two types of cases, each removable to federal court, but only one through what it called artful pleading.[85] Under this understanding, artful pleading is synonymous with complete preemption, in that a complaint is only artfully pleaded when, on the face of the complaint, the state law claim has been completely preempted by federal law. In contrast, a state law claim is not artfully pleaded, but is still removable, when it expressly

81. *See Carpenter*, 44 F.3d at 367 (using complete preemption as explanation of artful pleading doctrine); *Goepel*, 36 F.3d at 310 n.5 ("This same principle has been referred to elsewhere as the 'artful pleading' doctrine."); Bartholet v. Reishauer A.G., 953 F.2d 1073, 1075 (7th Cir. 1992) (equating right to remove case that has been subject to "crafty drafting" with complete preemption).

82. *See* Stroug v. Telectronics Pacing Sys., Inc., 78 F.3d 256 (6th Cir. 1996); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 354 (3d Cir. 1995); Franklin H. Williams Ins. Trust v. Travelers Ins., 50 F.3d 144, 147 (2d Cir. 1995); Shannon v. Shannon, 965 F.2d 542, 546 (7th Cir. 1992); Matter of Amoco Petroleum Additives Co., 964 F.2d 706, 709-10 (7th Cir. 1992); Smith v. Dunham-Bush, Inc., 959 F.2d 6, 8 (2d Cir. 1992).

83. The Supreme Court has held that section 502(a) of ERISA and section 301 of the LMRA completely preempt state law. *See* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); *Avco Corp.*, 390 U.S. at 557.

84. *See Dukes*, 57 F.3d at 354 (stating that the Supreme Court "has determined that Congress intended the complete-preemption doctrine to apply to state law causes of action which fit within the scope of ERISA's civil-enforcement provisions"); *Franklin H. Williams Ins. Trust*, 50 F.3d at 147 (addressing question whether plaintiff's claim is preempted by and falls within civil enforcement provision of ERISA); *Shannon*, 965 F.2d at 546 (noting an exception to the well-pleaded complaint rule when the cause of action falls within section 502(a) of ERISA); *Matter of Amoco*, 964 F.2d at 709-10 (looking at whether claim is completely preempted by section 301 of LMRA); *Smith*, 959 F.2d at 10-11 (finding plaintiff's claim to fall within ERISA's civil enforcement provision and, therefore, removable). *But see Strong*, 78 F.3d at 256 (analyzing non-ERISA or- LMRA claim and declining to extend the complete prcemption doctrine).

85. *See* Utley v. Varian Assocs., Inc., 811 F.2d 1279, 1287 (9th Cir. 1987).

incorporates federal law that is substantial enough to support federal jurisdiction.[86]

In a recent case, however, the Ninth Circuit not only contradicted its earlier understanding of artful pleading, but dramatically enlarged the doctrine's scope. In *Rains v. Criterion Systems, Inc.*,[87] the plaintiff brought an action in state court for wrongful discharge and interference with contractual relations in violation of public policy.[88] The defendant removed, asserting that the stated claim was really a federal Title VII claim.[89] The court in *Rains* defined artful pleading as a doctrine under which a plaintiff may not avoid federal jurisdiction by "omitting from the complaint federal law essential to his claim, *or* by casting in state law terms a claim that can be made only under federal law."[90] The court went on to find that Rains had not engaged in artful pleading because "no essential federal law was omitted."[91] Then, further adding to the confusion, the court noted that, while Rains may not have artfully pleaded his complaint, an "independent corollary" to the well-pleaded complaint rule known as complete preemption may allow removal.[92] According to the *Rains* court, therefore, artful pleading, despite a definition that seems to include complete preemption, is distinct from complete preemption.

Amid this confusion, the *Rains* court also impliedly embraced a drastically expanded interpretation of artful pleading that permits the court to look beyond the face of the complaint for *facts* not pleaded. While the court did not explicitly rely on such an understanding, it indicated its approval by adopting the definition of artful pleading laid out in a 1984 case, *Olguin v. Inspiration Consolidated Copper Co.*[93] In *Olguin,* the court used artful pleading to look beyond the face of the complaint for facts not pleaded to support removal based on complete preemption. The plaintiff there alleged four causes of action under state

86. *See id.* This type of removal is distinct from complete preemption removal, whether or not it is placed within some overarching notion of artful pleading. Under this type of removal, the basis for removal lies not in preemption of federal law over state law, but in express incorporation of federal law within a state law claim. Even where such express incorporation exists, however, the federal law must be sufficiently substantial to support plaintiff's state law claim. *See* Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 814 (1986) (holding that because there is no federal cause of action for Federal Food, Drug and Cosmetic Act violations, a state law claim resting on theories of negligence, breach of warranty, strict liability, fraud, and gross negligence did not present a federal issue in a state-created cause of action for purposes of subject matter jurisdiction).

87. 80 F.3d 339 (9th Cir. 1996).

88. *See id.* at 343-44.

89. *See id.*

90. *Id.* at 344 (emphasis added) (quoting Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1472 (9th Cir. 1984)).

91. *Id.*

92. *See id.* (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)).

93. 740 F.2d 1468, 1472 (9th Cir. 1984).

law against his employer.[94] The plaintiff made no mention of a collective bargaining agreement in his complaint, but the court looked to the defendant's removal petition to find facts indicating the existence of a collective bargaining agreement.[95] Because section 301 of the LMRA completely preempts all causes of action arising under collective bargaining agreements, the court found removal proper.[96]

The Ninth Circuit is not alone in supporting an expanded view of artful pleading that allows the court to look beyond the face of the complaint for facts not pleaded. The Seventh Circuit also seems to adopt such a view.[97] In a recent decision, *Jass v. Prudential Health Care Plan, Inc.*,[98] the Seventh Circuit permitted removal of the plaintiff's state law negligence claim based on complete preemption by section 502(a) of ERISA. In doing so, the court stated that "a plaintiff cannot avoid complete preemption . . . by artfully pleading a complaint so as to omit facts that indicate federal jurisdiction."[99]

B. Complete Preemption

While some circuits have salvaged a coherent doctrine of complete preemption from the Supreme Court's opinions, others have settled upon an overly-simplified understanding of preemption as a basis for removal. There are several possible readings of the Supreme Court's decisions. Under a very narrow reading, Congress must expressly show its intent to allow removal. Under a more moderate reading, complete preemption may exist beyond ERISA and the LMRA, but Congress must indicate its intent to allow removal either expressly or by implication by providing a parallel federal cause of action. Finally, under a broad reading, complete preemption exists whenever federal law is "so powerful" that it completely preempts an "area" of state law, regardless of whether Congress has provided a federal cause of action. Very few, if any, courts follow a very narrow interpretation, at least expressly, for to do so would be to deny the existence of the complete preemption doctrine except in those cases where the Supreme Court has already ruled, namely section 502(a) of ERISA and section 301 of the LMRA. Several courts do, however, limit the doctrine to cases where a federal

94. *See id.* at 1471.

95. *See id.* at 1473-76.

96. *See id.*

97. *See* Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1488-89 (7th Cir. 1996) (interpreting artful pleading as permitting the court to look beyond the face of the complaint for omitted facts); Burda v. M Ecker Co., 954 F.2d 434, 438 n.3 (7th Cir. 1992) (stating that a plaintiff "may not artfully omit facts that indicate federal jurisdiction"); Oglesby v. RCA Corp., 752 F.2d 272, 278 (7th Cir. 1985) (holding that it is proper to look to the removal petition to ascertain the facts on which to base a federal claim).

98. 88 F.3d 1482 (7th Cir. 1996).

99. *Id.* at 1488.

cause of action replaces the state cause of action. Other courts, in contrast, follow a broad interpretation, requiring something more than preemption simpliciter, but not requiring a parallel federal cause of action. Still others have taken the broad interpretation to its extreme by sidestepping the well-pleaded complaint rule altogether and allowing removal upon any showing of federal preemption.

1. Circuits Requiring a Parallel Federal Cause of Action

At least four circuits seem to have interpreted the complete preemption doctrine as requiring a replacement federal cause of action. In a recent case, *Schmeling v. NORDAM,*[100] the Tenth Circuit explained its understanding of the doctrine. In *Schmeling,* a former aviation employee brought suit against his employer in state court alleging that he was terminated in violation of state law because his termination was based in part on a single positive drug test.[101] The employer removed on grounds that the state court action was completely preempted by Federal Aviation Administration (FAA) regulations covering drug testing of aviation employees.[102] The court remanded the action to state court, holding that Schmeling's suit was not subject to removal under the complete preemption doctrine.[103] In doing so, it read complete preemption as a term of art,

> not as a crude measure of the breadth of the preemption . . . but rather as a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal.[104]

This understanding led to a two-part test in which the court determined (1) whether the FAA regulations preempted the relied-upon state laws, and (2) whether Congress intended to allow removal, as manifested by provision of a federal cause of action.[105] The court examined the second part of the test first so as to avoid looking at the merits without first establishing some potential for jurisdiction.[106] Following this analysis, the court found removal improper because Congress "neither expressly nor impliedly provided Schmeling with a federal cause of action to enforce the FAA drug testing laws."[107]

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100. 97 F.3d 1336 (10th Cir. 1996).
101. *See id.* at 1337.
102. *See id.* at 1338.
103. *See id.* at 1344-45.
104. *Id.* at 1342.
105. *See id.* at 1343.
106. *See id.*
107. *Id.* at 1344.

The Sixth Circuit has followed a similar line of reasoning by permitting removal based on preemption only when Congress has expressed an intent to allow removal by providing a parallel federal cause of action that would "convert" the state cause of action into a federal cause of action.[108] In *Strong v. Telectronics Pacing Systems, Inc.*,[109] the plaintiff filed suit in state court alleging negligence on the part of a heart pacemaker manufacturer.[110] The defendant removed on the ground that the state law was completely preempted by section 360k(a) of the Medical Device Amendments to the Food, Drug, and Cosmetics Act (MDA).[111] Acknowledging the confusion among the circuits, the court nonetheless found that because section 360k(a) of the MDA did not provide a parallel federal cause of action, federal question jurisdiction did not exist and removal was therefore improper.[112] In the course of its analysis, the court noted the distinction between preemption under section 1132 of ERISA and section 1144 of ERISA: The former creates a federal cause of action for participants and beneficiaries in ERISA plans, while the latter does not.[113] This distinction was crucial to the court's conclusion that "the congressional intent necessary to confer removal jurisdiction upon the federal district courts through complete preemption is expressed through the creation of a parallel federal cause of action."[114]

The Third Circuit has applied a somewhat more narrow, but substantially similar, test. Like the Tenth Circuit, the Third Circuit applies a two-part test.[115] But where the Tenth Circuit finds congressional intent in the existence of a replacement cause of action, the Third Circuit allows removal only when, in addition to ordinary preemption, (1) "the statute relied upon by the defendant as preemptive contains civil enforcement provisions within the scope of which the plaintiff's state claim falls,"[116] and (2) there is "a clear indication of a Congressional intention to permit removal despite the plaintiff's exclusive reliance on state law."[117]

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108. *See* Strong v. Telectronics Pacing Sys., Inc., 78 F.3d 256, 260 (6th Cir. 1996); *see also* Warner v. Ford Motor Co., 46 F.3d 531, 533-35 (6th Cir. 1995) (en banc) (overruling earlier case in which the Sixth Circuit allowed a plaintiff's state law discrimination claim to be removed under complete preemption doctrine and ERISA).

109. 78 F.3d 256 (6th Cir. 1996).

110. *See id.* at 258.

111. *See id.*

112. *See id.* at 259-60 n.1 and accompanying text.

113. *See id.* at 260.

114. *Id.*

115. *See* Goepel v. Nat'l Postal Mail Handlers Union, 36 F.3d 306, 313 (3d Cir. 1994) (finding removal improper despite defendant's assertion that the Federal Employees Health Benefits Act completely preempted plaintiff's state law claim).

116. *Id.* at 311.

117. *Id.*

The Ninth Circuit, despite its confusion with the concept of artful pleading, also might be read to require a parallel federal cause of action for preemption removal. According to the court in *Utley v. Varian Associates, Inc.*,[118] "[t]he superseding federal remedy must provide a right of action *in federal court.*"[119] The Ninth Circuit recently used similar language in *Rains v. Criterion Systems, Inc.*[120] There, although its decision rested on the finding that federal law did not preempt the plaintiff's state law claim, the court followed the reasoning in *Utley*, noting that "even though Title VII creates a private right of action, it does not preempt state law claims that are not in conflict with it."[121]

2. Circuits Not Requiring a Parallel Federal Cause of Action

Other circuits embrace a broader interpretation of the Supreme Court doctrine of complete preemption and do not require that the federal statute provide a parallel cause of action. Often these circuits will cite to the expansive wording of the Supreme Court. While the Supreme Court has only identified two areas of law that are completely preempted by federal statutes, section 301 of the LMRA and section 502(a) of ERISA, some lower courts have extended the doctrine to include other federal laws.[122]

In 1993, the Fourth Circuit held that section 301(a) of the Copyright Act completely preempted a state law claim alleging violation of the Virginia Computer Crimes Act.[123] In doing so, the court cited the general language of *Caterpillar*, finding that complete preemption occurs when "an area of state law has been [so] completely pre-empted, [that] any claim purportedly based on th[e] pre-empted state law is considered . . . a federal claim."[124] The Fourth Circuit's test for complete preemption ultimately rested with congressional intent.[125] It found that, because Congress afforded exclusive original jurisdiction over copyright claims to the federal courts, it also intended to allow removal.[126]

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118. 811 F.2d 1279 (9th Cir. 1987).

119. *Id.* at 1288.

120. 80 F.3d 339 (9th Cir. 1996).

121. *Id.* at 345.

122. *See* Rosciszewski v. Arete Assocs. Inc., 1 F.3d 225 (4th Cir. 1993) (extending complete preemption to section 301 of the Copyright Act); M. Nahas & Co. v. First Nat'l Bank of Hot Springs, 930 F.2d 608 (8th Cir. 1991) (extending complete preemption to section 86 of the National Bank Act); Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990) (extending complete preemption to section 105(a)(1) of the Airline Deregulation Act).

123. *See Rosciszewski,* I F.3d at 232.

124. *Id.* at 231 (alterations in original) (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1986)).

125. *See id.* at 231.

126. *See id.* at 232.

Where the Fourth Circuit maintained an element of inquiry into congressional intent and appeared to require something more than a showing of federal preemption for removal, the Eighth Circuit appears to have done away with complete preemption analysis altogether. In a recent case, the Eighth Circuit held that preemption by the Federal Railroad Safety Act (FRSA) of a state law conversion of property claim supported removal.[127] Like the Fourth Circuit, the Eighth Circuit cited to language in *Caterpillar* that "[o]nce an area of state law has been completely preempted, any claim based on that preempted state law claim is considered, from its inception, to raise a federal claim and therefore arises under federal law."[128] The court then went on to analyze the issue in terms of preemption simpliciter without any additional requirement to support removal.[129] The court concluded that because the plaintiff's state law claim was preempted by federal law, "[a]ny issue raised in this area is a federal issue justifying removal."[130]

Consistent with its willingness to expand artful pleading, the Seventh Circuit also seems to have expanded complete preemption to include all cases that have been preempted by federal law. While the court does not expressly indicate this willingness, its analysis reveals as much. In *Matter of Amoco Petroleum Additives Co.*,[131] the court found a state-law invasion of privacy claim completely preempted by section 301 of the LMRA and removable to federal court.[132] In its explanation of complete preemption, however, the court cited the test for preemption simpliciter without any additional requirement to support removal.[133] Immediately following its discussion of federal preemption, it stated that "[s]ubstantive federal principles permit removal under the federal-question jurisdiction."[134] The Seventh Circuit used similar reasoning in *Bartholet v. Reishauer A.G.*,[135] decided earlier the same year. There, in a convoluted analysis, the court extended ERISA preemption to section 1144(a), a provision of ERISA that does not provide for civil enforcement.[136]

127. *See* Peters v. Union Pac. R.R. Co., 80 F.3d 257 (8th Cir. 1996).
128. *Id.* at 260.
129. *See id.* at 261.
130. *Id.* at 262.
131. 964 F.2d 706 (7th Cir. 1992).
132. *See id.* at 709-10.
133. *See id.* at 709.
134. *Id.*
135. 953 F.2d 1073 (7th Cir. 1992).
136. *Compare id.* at 1076-78 (extending complete preemption to section 1144) *with* Strong v. Telectronics Pacing Sys., 78 F.3d 256, 260 (6th Cir. 1996) (declining to extend complete preemption beyond section 1132 to section 1144 because no parallel federal cause of action exists for section 1144).

V
ARTFUL PLEADING—NO PLACE IN COMPLETE PREEMPTION ANALYSIS

The notion of artful pleading should not enter into complete preemption analysis. As discussed above, artful pleading is a confused doctrine that evades clear definition and that has found little consistency among the courts. Although courts often employ the doctrine to look beyond the face of the complaint, there appears to be no clear understanding of what "artful pleading" is or, perhaps more important, when it should be applied.

Those courts that use artful pleading synonymously with complete preemption are using artful pleading as a shield from necessary analysis. By simply citing to the "exception" to the well-pleaded complaint rule, they fail to analyze their decision's effect on that rule. As a result, artful pleading becomes a way for courts to dodge the issue of complete preemption by looking to other factors such as the plaintiff's motive.[137]

Beyond the confusion that it creates, artful pleading should not be used in connection with complete preemption for two reasons. First, artful pleading is inconsistent with the well-pleaded complaint rule and unnecessary in the context of complete preemption. Second, it is a dangerous doctrine that has the potential to swallow the well-pleaded complaint and master-of-the-complaint doctrines that serve to set useful and necessary boundaries for removal.

A. Inconsistent with the Well-Pleaded Complaint Rule

The use of artful pleading as an exception to the well-pleaded complaint rule promotes misunderstanding and undermines principles of federalism. Under the well-pleaded complaint rule, the plaintiff is the master of his complaint and is free to forego his federal claims and rely solely on state law in order to stay in state court. Under the well-pleaded complaint rule, jurisdiction is decided on the face of the complaint and the motive behind the pleading remains completely irrelevant. The artful pleading doctrine, however, introduces the idea of looking beyond the face of the complaint to the underlying claim. By doing so, it shifts the focus from the nature of the claim to the motive of the plaintiff, a shift that contradicts established doctrine.

137. *See* Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 819-20 (1986) (discussing the use of artful pleading to avoid substantive analysis).

The Fifth Circuit's explanation of the doctrine illustrates this point. In *Aaron v. National Union Fire Insurance Co.*,[138] the Fifth Circuit described artful pleading as an exception to the well-pleaded complaint rule "in which the court seeks to evaluate a plaintiff's motive for her failure to plead a federal case of action."[139] It went on to note that "[i]f the court concludes that the plaintiff's failure to plead her federal claim was not in good faith, but rather was an attempt to conceal the fact that her claim was truly federal, the court will allow removal."[140]

This type of explanation reveals courts' concerns about forum manipulation. Use of artful pleading in the complete preemption context casts a pejorative characterization on the plaintiff's decision to proceed under state law. Forum choice, however, is not the evil that many judges think it to be.[141] To the contrary, it is the very basis of the master-of-the-complaint doctrine and is rooted in notions of federalism. Where state and federal courts have concurrent jurisdiction, the plaintiff has the option of choosing the state forum by relying solely on state law. As Justice Brennan in his dissent to *Moitie* stated, "It would do violence to state autonomy were defendants able to remove state claims to federal court merely because the plaintiff *could have* asserted a federal claim based on the same set of facts underlying his state claim."[142]

Not only is the notion of artful pleading inconsistent with the well-pleaded complaint rule and principles of federalism, it stands on questionable precedent. The Court in *Avco* did not use the term artful pleading when it first introduced the idea of federal law displacing state law so as to permit removal.[143] Further, it did not mention the well-pleaded complaint rule or address whether its holding required an exception to the long-standing rule.[144] The Court's silence on this matter suggests that it saw its holding as consistent with the well-pleaded complaint rule. In later cases, the Court tied artful pleading to preemption removal, promoting the notion that an exception to the well-pleaded complaint rule—namely the artful pleading exception—was necessary for complete preemption. However, as *Avco* illustrates, no such exception of the well-pleaded complaint rule was needed or intended by the

138. 876 F.2d 1157 (5th Cir. 1989). Although the court ultimately held removal improper in the case, *see id.* at 1166, the court's explanation of the doctrine of artful pleading illustrates its misperception that artful pleading focuses on the plaintiff's motive. *See id.* at 1161.

139. *Id.* at 1161.

140. *Id.*

141. *See generally*, Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990) (arguing that forum shopping is a legitimate part of the adversarial system).

142. Federated Dep't Stores v. Moitie, 452 U.S. 394, 407 (1981) (Brennan, J., dissenting).

143. *See* Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559-60 (1968).

144. *See id.*

Avco Court. Even the *Franchise Tax Board* Court's late characterization of *Avco* focused on preemption with no mention of artful pleading.[145]

The Court in *Moitie* tied the knot between artful pleading and preemption removal. It did so by explaining artful pleading as an exception to the well-pleaded complaint rule necessary to removal.[146] However, the Court had little to no support for its statement that artful pleading was a "settled principle," citing to a treatise rather than settled case law.[147]

Even if the *Moitie* Court did have some basis for terming artful pleading a settled principle, the facts of *Moitie* are distinct from those that usually form the basis for complete preemption. In *Moitie*, the plaintiff had refiled in state court after adjudication in federal court.[148] Unlike *Moitie*, however, *res judicata* is not generally an issue in complete preemption cases; rather, the question focuses on whether the plaintiff's claim exists under state law or has been replaced by federal law. Further, the Court's artful pleading comments were placed in a footnote, suggesting the Court was not altering its earlier understanding of the well-pleaded complaint rule. Thus, *Moitie* should be restricted to cases in which the plaintiff has filed consecutively in federal and state court as an attempt to escape *res judicata;* it should not be relied upon as support for a necessary connection between artful pleading and complete preemption.

Perhaps most important, artful pleading is unnecessary in the complete preemption context. Because the complete preemption doctrine in limited application does not violate the well-pleaded complaint rule, the doctrine of artful pleading is not needed as an exception to the settled rule. To begin with, the complete preemption doctrine does not require the court to look beyond the face of the plaintiff's complaint. The court must take the plaintiff's complaint as it is pled. Accordingly, complete preemption is not based on some notion of poor or sneaky pleading, but on congressional intent and federal law preemption of state law. The

145. *See* Franchise Tax Bd. v. Const. Laborers Vac. Trust, 463 U.S. 1, 23-24 (1983).

146. *See Moitie,* 452 U.S. at 397 n.2.

147. *Id.* It is interesting to note that the very treatise upon which the *Moitie* Court relied was critical of the decision in its subsequent supplement. *See* 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722 at 202 (2d ed. Supp. 1985) (finding aspects of the *Moitie* decision "difficult to understand" and questioning the Court's use of "artful pleading" and "complete preemption").

The artful pleading doctrine itself seems to invoke treatise citation. *See, e.g.,* M. Nahas & Co. v. First Nat'l Bank, 930 F.2d 608, 612 (8th Cir. 1991) (citing 1A MOORE'S FEDERAL PRACTICE ¶ 0.160[3.-3], at 234 (1990 ed.); Holcomb v. Bingham Toyota, 871 F.2d 109, 110 (9th Cir. 1989) (citing to 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722 at 266-75 (2d ed. 1985)); Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 758 (2d Cir. 1986) (quoting 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722 at 268-75 (2d ed. 1985)).

148. *See Moitie,* 452 U.S. at 395-96.

issue for the court is whether Congress intended for the plaintiff's claims to be removable. This requires analysis of existing federal and state law, not an examination of the way in which the complaint was pled.

B. Dangerous Expansion of Federal Jurisdiction

Not only is the use of artful pleading inaccurate and confusing, it is dangerous to federal-state principles of jurisdiction. Many lower federal courts have seized upon the notion of artful pleading as an exception to the well-pleaded complaint rule and cite to it whenever removal is an issue. This is dangerous for two reasons. First, by citing to incoherent doctrines, the courts undermine their own credibility. Second, by citing to the concept of artful pleading as a settled doctrine, they leave room for expansion of removal beyond the context of complete preemption.

It is important for our courts to attempt to create doctrines that are understandable to the public at large, or at least to the average lawyer and judge. When the court relies on an incoherent doctrine, any opportunity for the public to understand the law's rulings is significantly diminished. By using misleading language like artful pleading, the judiciary undermines its legitimacy and pushes itself deeper into the realm of unreasonable, and thus unjust, outcomes.

In addition, clarity in jurisdictional principles will increase the efficiency of our system as a whole. The more litigants understand why they are being taken to federal court or denied a federal forum, the less litigation will center around that question. Not only is this beneficial to the judicial system's resources, it also furthers a central purpose of the legal system—facilitating the provision of remedies[149]—by freeing up time to adjudicate the merits of disputes.

Further, in application, use of the artful pleading doctrine in the preemption removal context is dangerous because it allows the court to expand artful pleading to create an independent ground for federal jurisdiction. The Seventh Circuit's use of the doctrine of artful pleading in *Jass v. Prudential Health Care Plan, Inc.*[150] and the Ninth Circuit's use in *Olguin v. Inspiration Consolidated Copper Co.*[151] are clear examples of this danger. In both cases, the courts extended the notion of artful pleading to include a plaintiff's omission of facts that, if included in the complaint, would have indicated possible federal jurisdiction based

149. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress.").

150. 88 F.3d 1482 (7th Cir. 1996); *see also* Oglesby v. RCA Corp., 752 F.2d 272, 278 (7th Cir. 1985) (holding that the court properly looked to the removal petition and plaintiff's motion to remand to find facts essential to complete preemption under the LMRA).

151. 740 F.2d 1468 (9th Cir. 1984).

on complete preemption.[152] Such an extension of artful pleading threatens to swallow the master-of-the-complaint rule because, according to these courts, a plaintiff may not forego his federal claims in order to remain in state court by pleading only those facts relevant to his state law claim. Under the artful pleading doctrine as applied in *Jass* and *Olguin*, the plaintiff can plead a state law claim, but must also plead facts relevant to a federal claim.

The *Jass* and *Olguin* courts did not want to allow a plaintiff under a benefits plan covered by ERISA, or collective bargaining agreement covered by the LMRA, to avoid federal jurisdiction merely by omitting the particular term from her complaint.[153] This is an understandable concern, but it does not provide adequate basis for violating the well-pleaded complaint and master-of-the-complaint doctrines, nor is it consistent with a coherent complete preemption doctrine. The better solution to this situation would simply be to allow the state court to decide whether the plaintiff's claim is preempted by federal law when the issue is raised as a defense. At that time, the court will consider facts beyond the complaint. If the state court decides the plaintiff's claim is preempted, then the claim will be dismissed.[154]

The notion of artful pleading is tempting, partly because it has a certain ring to it, partly because—as an exception to the well-pleaded complaint rule—it gives courts an easy way to escape analysis of that rule, and partly because it gives judges hostile to forum shopping a way to look beyond the face of the plaintiff's complaint. There can be little doubt, however, that any use of the term "artful pleading" is not only unnecessary and contrary to the well-pleaded complaint and master-of-the-complaint rules, but fraught with significant dangers. Accordingly, it should be discarded.

VI
PREEMPTION REMOVAL

Beyond the question of whether artful pleading should be used in complete preemption analysis lies the question of whether complete preemption should be permitted as a basis for removal at all, and, if so,

152. *See Jass*, 88 F.3d at 1488-89; *Olguin*, 740 F.2d at 1473.

153. *See Jass*, 88 F.3d at 1488 (stating that "a plaintiff cannot avoid complete preemption . . . by artfully pleading a complaint so as to omit facts that indicate federal jurisdiction"); *Olguin*, 740 F.2d at 1473 (stating that "[t]he artful pleading doctrine would afford little protection if a plaintiff could avoid federal jurisdiction simply by leaving out material facts").

154. This solution will also arguably promote more accurate pleading on the part of the plaintiff when complete preemption is probable. Presumably, the plaintiff would prefer adjudication in federal court to dismissal. This built-in incentive for a plaintiff to plead facts necessary to a federal claim under completely preempted areas of law should render the concern raised by both the *Jass* and *Olguin* courts somewhat immaterial.

under what circumstances. Although some commentators have argued that complete preemption should never be grounds for removal, there are several reasons why removal based on preemption might be justified.[155] Those reasons, however, do not extend beyond a narrow construction of complete preemption. Accordingly, the complete preemption doctrine should be limited to those claims for which Congress has provided a federal law that not only preempts state law but also provides a parallel federal cause of action.

A. Preemption Removal Permitted

When Congress has clearly expressed its intent to allow removal, courts have little reason to provide otherwise, save a violation to the Constitution. In certain situations, Congress provides for exclusive jurisdiction of the federal courts;[156] in others, it prohibits removal to federal court altogether.[157] In each of these instances, Congress can be seen as attempting to solve a perceived problem through the drafting of its laws. If courts were to interfere with clear intent on the part of Congress, they would be exceeding their judicial role. The Supreme Court illustrated this understanding of its role in *Metropolitan Life Insurance* when the Court indicated that it "would be reluctant to find . . . extraordinary pre-emptive power, such as has been found with respect to section 301 of the LMRA."[158] Notwithstanding this reluctance, the Court went on to find complete preemption under section 502(a) of ERISA because "the language of the jurisdictional subsection of ERISA's civil enforcement provision closely parallels that of [section 301] of the LMRA."[159] In addition to the similar language in the sections, the Court found congressional intent in the Conference Report on ERISA which said 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 Labor-Management Relations Act of 1947."[160]

Even absent a finding of congressional intent in the language of the statute or its legislative history, complete preemption might be supported in some circumstances by practical considerations stemming

155. *See* Ragazzo, *supra* note 40, at 302 (stating that *Avco* is an unjustified departure from established law).

156. *See, e.g.*, 28 U.S.C.A. § 1334 (West 1992) (expressly providing for exclusive jurisdiction of federal courts for bankruptcy proceedings).

157. *See, e.g.*, Securities Act of 1933, ch. 2A, § 77v(a), 48 Stat. 86 (prohibiting removal); 28 U.S.C. § 1445(a) (making Violence Against Women Act of 1994, § 40302, 108 Stat. 1941 nonremovable).

158. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1986).

159. *Id.*

160. *Id.* at 65-66 (quoting H.R. Conf. Rep. No. 93-1280, at 327 (1974)) (emphasis omitted).

from the potential that a state court will decline to decide the preemption issue at all. When the state has concurrent jurisdiction over the latent federal claims, and the facts as alleged in the complaint necessarily entitle the plaintiff to relief under either federal or state law, the state court might not feel compelled to decide the preemption question. Under such a scenario, the state court may find it irrelevant which court grants the relief. Accordingly, any congressional intent to have federal law preempt state law will be confounded.[161] In addition, by relying on state law, the state court has necessarily decided the preemption question by implicitly holding that the state law survives any preemption challenge. This further undermines any congressional intent to have federal law preempt state law by placing the decision of preemption in the hands of the state court judge.

Similar reasoning has been seen elsewhere in federal court jurisprudence. Until 1988, mandatory appellate review by the Supreme Court included cases in which a state had decided against the validity of a treaty or Act of Congress or in favor of the validity of a state statute attacked upon federal grounds.[162] The purpose behind such a system clearly stems from the idea that a state court might be biased toward its own law when the law is asserted to be in conflict with federal law. Thus, Supreme Court review was mandatory only when the state court decided in favor of its own law over federal law.

Of course, the state court has a responsibility under the Supremacy Clause to decide the preemption issue and to apply federal law fairly. However, there may be reason in certain situations to doubt the state court's ability or willingness to do so. As a practical matter, in those situations in which federal law preempts state law and provides a parallel federal cause of action, there may be greater reason to fear state court bias or to question the state court's ability to decide the question fairly and accurately. In those situations, therefore, it may be preferable to allow removal based on the federal defense of complete preemption rather than to force the defendant to remain in state court.

The Court's decision in *Avco* can be read to reflect such a fear of bias. Historically, state courts were more friendly to organized labor than were federal courts. This may have resulted in concern that elected state court judges, being more susceptible to political pressures from

161. This reasoning is laid out in a footnote in *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758-59 n.6 (2d Cir. 1986). The Court in *Travelers*, however, notes that the reasoning is not entirely consistent with the doctrine as it now exists because complete preemption has been extended to claims which, once deemed federal, are within the exclusive jurisdiction of federal courts. *Id.* However, such an objection may not be as much an argument against complete preemption as an argument for limiting the doctrine when Congress has provided for exclusive federal jurisdiction.

162. *See* Act of February 13, 1925, ch. 229, § 237, 43 Stat. 936. Later, in 1988, all state court judgments were made reviewable only by writ of certiorari. *See* Act of June 27, 1988, 102 Stat. 662.

unions, would fail to apply the LMRA to collective bargaining cases. Prior to *Avco,* the Court had decided, in *Textile Workers Union v. Lincoln Mills,*[163] that the jurisdictional grant of section 301 reflected a congressional policy that peaceful labor relations would be best promoted through application of a uniform federal law to all collective bargaining questions.[164] Applying a similar rationale to *Avco,* the Court read Congress' intent to require removal based on an LMRA preemption defense.

Although the facts of *Metropolitan Life* do not raise the same issue of potential state court bias, the Supreme Court in *Metropolitan Life* was similarly receptive to the idea that ERISA cases should be removable to federal court. In addition to its understanding that Congress intended section 502(a) of ERISA to have the same jurisdictional effect as section 301 of the LMRA, the Court was aware of the complexity of ERISA. Once in federal court, the cases would be decided by federal judges with more experience in handling ERISA cases and who would arguably be less likely to make errors in applying the federal statute. While neither bias nor complexity standing alone entirely supports either of the Court's decisions, each taken together with indication of congressional intent through federal preemption provides some rationale for allowing preemption to support removal in limited situations.

Accordingly, 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 or complexity. In these situations, Congress has gotten involved by creating preempting law as well as a replacement cause of action, and the courts may infer a certain congressional concern for fair and accurate adjudication.

To some degree, this inference will be an artificial judicial construct of congressional intent. It is a construct, however, that serves the practical purpose of allowing preemption to serve as a basis for removal to federal court in those cases in which there is some reason to fear the state court determination of federal law. This is to be contrasted with preemption simpliciter raised as a defense when Congress has merely created a federal law that is supreme over state law, but there is arguably less reason to fear or question a state court's determination. Even if such a rule of judicial construction does not always result in an exactly correct interpretation of congressional intent, it results in a small group of cases that are removed. Further, if Congress is particularly concerned with this small group of cases, all it need do is provide that removal is not permitted under that particular statute.

163. 353 U.S. 448 (1957).
164. *See id.* at 456-57.

One commentator has argued that complete preemption cannot be justified in light of established precedent because it contradicts the well-pleaded complaint and master-of-the-complaint rules.[165] What this argument fails to recognize, however, is that in the limited circumstances in which Congress either expressly allows for removal or creates a parallel cause of action, the plaintiff in state court has *only* a federal claim. That is, when the state law claim has been preempted *and* supplanted by federal law, the plaintiff's claim is necessarily federal. This is to be distinguished from the case in which a defendant raises a federal defense of preemption simpliciter. In the latter case, if the court finds preemption, the plaintiff's claim will be defeated, while in the former case, the plaintiff still has a claim, but his claim is federal.

B. Preemption Removal Limited

While removal based on complete preemption may be justified in certain circumstances, it should be limited to those cases in which federal law both preempts and supplants state law by providing a parallel federal cause of action. Reasoning similar to that laid out above also supports limiting removal based on complete preemption to those cases in which federal law provides a parallel cause of action. A parallel federal cause of action may itself indicate congressional intent. When Congress is not concerned with providing the defendant the option of a federal forum, it can merely preempt state law with federal law. In those cases, the defendant can raise the preemption issue as a defense, but under the well-pleaded complaint rule, the case will not be removable to federal court. Then, if the state court decides that the plaintiff's state law claim has been preempted by federal law, his claim is dismissed. Under this rationale, without a parallel cause of action, the plaintiff does not have a federal cause of action to properly support removal.

Although the Supreme Court's guidance on this issue has been misleading and confused, it does support the requirement of a replacement cause of action in addition to preemption. Despite the Court's more recent use of broad language, the test laid out in *Franchise Tax Board* should still stand. Under that test, state law must be preempted on the face of the complaint and the federal statute must provide an alternative cause of action.[166] Since *Franchise Tax Board*, the Court has twice used broader language. In *Metropolitan Life*, it stated that complete preemption exists when Congress has "so completely pre-empt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character."[167] In *Caterpillar*, it reiterated the broad

165. *See* Ragazzo, *supra* note 40, at 281-286 (1993).
166. *See* Franchise Tax Bd. v. Const. Laborers Vac. Trust, 463 U.S. 1, 25-26 (1983).
167. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987).

language: "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[168] Each of these explanations of complete preemption might be read to expand the notion to include an "area" of state law that has been completely preempted but for which no replacing federal cause of action has been enacted. Although this may be a plausible reading of the Court's statements, it is not a probable one. The Court has never expressed concern with the narrowness of the *Franchise Tax Board* test, nor has it indicated a desire to expand the test. Further, the Court has consistently required a federal cause of action to replace state law.[169]

The Court's discussion in *Caterpillar* of the Ninth Circuit's analysis is also insufficient indication of a change in the Court's construction of the doctrine. An adequate understanding of the passage rests on the distinction between a provided parallel cause of action and an exact remedy. While a replacement cause of action must be provided for complete preemption to exist, the exact remedy sought need not be supplied. This has been the case from the very start. In *Avco*, the plaintiff sought injunctive relief that the federal court was forbidden to provide under the Norris-LaGuardia Act.[170] The Court nonetheless found removal proper because the plaintiff still had a cause of action under federal law, just no opportunity for injunctive relief.[171]

In the *Caterpillar* footnote, however, Justice Brennan characterized the Ninth Circuit's understanding of the rule as requiring the exact remedy sought by the plaintiff.[172] The Ninth Circuit had stated that "[a] state law cause of action has been 'completely pre-empted' when federal law both displaces *and* supplements the state law—that is, when federal law provides both a superseding remedy replacing the state cause of action *and* preempts that state law cause of action."[173] Quoting *Avco*, Brennan insisted that the Ninth Circuit was mistaken in requiring the exact remedy.[174] However, while Brennan was correct in his assertion that the exact remedy need not be provided, he misunderstood the Ninth Circuit's analysis. The Ninth Circuit merely asserted that the state cause of action must be replaced, not that the exact remedy sought must be provided. As a result, the Court injected unnecessary confusion into the doctrine, blurring the distinction between remedy and cause of action.

168. Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987).

169. The sole exception is *Moitie*, in which the distinct facts call into question the Court's desire to expand the doctrine of complete preemption. *See supra* Part III.

170. *See* Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560-61 (1968).

171. *See id.*

172. *See Caterpillar*, 482 U.S. at 391 n.4.

173. *Id.*

174. *See id.*

Even given the Court's confusion, it never stated that the complete preemption doctrine could exist without a replacement federal cause of action.

This limitation of complete preemption to only those cases in which the plaintiff's cause of action has been preempted and supplanted by federal law is consistent with the interpretation that most circuit courts have adopted. The Tenth Circuit in particular has adopted this view.[175] According to the Tenth Circuit, the federal court deciding the complete preemption issue should look first at whether Congress intended to replace the state law claim with a federal claim. If Congress has so intended through providing a parallel cause of action, then the court can look to the question of whether the state law claim is preempted by federal law. If there is no parallel federal cause of action, however, the claim of federal preemption is a defense that should be decided by the state court on remand. This system allows the federal court to remand without addressing the merits of the potential federal defense in those cases in which removal is not proper.

Moreover, on a practical level, the broader interpretation of complete preemption that does not require a replacement cause of action is unworkable because it provides no guidance for when an area of law has been "so completely preempted" as to support removal. The consequences of this amorphous understanding of complete preemption are illustrated by the Seventh and Eight Circuits' apparent failure to distinguish between complete preemption and preemption.[176] By allowing removal based on a showing that federal law preempts a state law claim without any further analysis, these Circuits eviscerate the well-pleaded complaint rule in all cases in which an issue of federal preemption is raised.

Finally, such a system is also consistent with notions of federalism and parity. The federal system assumes that most cases will be heard in state court. By allowing removal based on federal preemption only in those cases where federal law preempts and provides a replacement cause of action, the state courts will be left to decide the cases in which Congress has been ambiguous. This construction respects the state courts by leaving them to decide the federal defenses, but allows for removal in those cases where Congress has indicated, either expressly or by providing a parallel federal cause of action, that it is beneficial to provide a federal forum.

175. *See* Schmeling v. NORDAM, 97 F.3d 1336, 1342 (10th Cir. 1996); *see also supra* Section IV.B.1.

176. *See supra* Section IV.B.2.

CONCLUSION

The question remains: how to clarify the current confusion surrounding complete preemption so that courts and litigants alike can understand the doctrine of complete preemption? The ALI has before it an opportunity to clarify the removal statute and provide guidance to all courts. One possibility for clarification of the requirements of preemption as a basis for removal would involve the addition of a short sentence to § 1441(a). Such an amended statute might read:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. *Preemption may serve as a basis for removal only for those claims for which Congress has created federal law that both preempts state law and provides a parallel cause of action.*[177]

Whether or not the ALI proposes an amendment to the statute, however, it is crucial that the ALI address the issue, for failure to do so will undermine any sense of a rational jurisdictional system. As this Comment has shown, the well-pleaded complaint rule does serve a valid purpose. Any use of the artful pleading doctrine not only unnecessarily violates the well-pleaded complaint rule but threatens through expansion to destroy it as well as the master-of-the-complaint rule altogether. Further, in order to maintain a coherent system, removal based on complete preemption must be limited to those cases in which Congress has created a federal law that preempts and provides a parallel cause of action for the plaintiff's state law claim. Removal, so simple in concept, should not be permitted to continue to promote confusion through the complete preemption doctrine. Federal question jurisdiction and removal may never cease to be a subject of debate, but at least the governing rules ought to be as clear and free of misleading terms and needless confusion as possible.

177. 28 U.S.C. § 1441(a) (proposed amendment emphasized).