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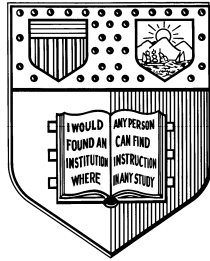
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Complete Preemption and the  
Separation of Powers

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## Complete Preemption and the Separation of Powers

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## COMPLETE PREEMPTION AND THE SEPARATION OF POWERS

TREVOR W. MORRISON<sup>†</sup>

In response to Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537 (2007).

Identifying muddles, messes, and even incoherencies in the Supreme Court's decisions on federal jurisdiction is regrettably easy. Rescuing even part of the doctrine from the mire is not. For that reason and others, Gil Seinfeld's *The Puzzle of Complete Preemption*<sup>1</sup> merits considerable praise. Professor Seinfeld does an admirable job not only of diagnosing the Court's rather odd and undertheorized doctrine of "complete preemption,"<sup>2</sup> but also of proposing a way to place the doctrine on firmer conceptual footing by shaping it around the fundamental goal of uniformity in the interpretation of federal law. The result is certainly a better justified account of complete preemption than can be found in the Court's cases.

Sometimes, however, doctrinal reconceptualization exposes even more fundamental flaws. Such is the case with complete preemption. Professor Seinfeld certainly does place the doctrine on surer footing than where it currently stands, but in so doing he also illuminates an ineluctable problem: any attempt to fashion a rule of complete preemption entails decisions better made by Congress, not the courts.

In this short response, I first sound some notes of agreement with Professor Seinfeld's critique of complete preemption doctrine. I then turn to his proposed reshaping of the doctrine around an interest in what he calls the "regulatory uniformity" of federal law. Although certainly more satisfying than the Court's shallow account, Professor Seinfeld's refashioning seems to raise a number of new difficulties, or at least puzzles. In particular, it appears to invite the federal courts to

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<sup>1</sup> 155 U. PA. L. REV. 537 (2006).

<sup>2</sup> As Professor Seinfeld points out, "undertheorized" doesn't go far enough. "[I]n deed, the [complete preemption] doctrine does not appear to be predicated on any theory of federal jurisdiction." *Id.* at 548.

engage in a range of line-drawing exercises to which they may not be especially well suited. Finally, I conclude by suggesting that the difficulties raised by Professor Seinfeld's version of complete preemption point not so much to problems with his particular refashioning of the doctrine as to the broader notion that complete preemption should depend on congressional intent, not judicial invention.

## I

As Professor Seinfeld shows,<sup>3</sup> both the scope and the theory of complete preemption have been largely obscure since its inception in 1968.<sup>4</sup> To be sure, the basic operation of complete preemption has always been clear enough: in cases where it applies, it permits federal question-based removal of state-law claims filed in state court. In effect, complete preemption operates as an exception to the well-pleaded complaint rule. Under that longstanding rule, which the Court has inferred from the federal question statute, a claim "arises under" the Constitution or laws of the United States (and thus satisfies the requirements of federal question jurisdiction)

only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated [federal] defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution.<sup>5</sup>

Congress has created certain exceptions to this rule,<sup>6</sup> and, in effect, complete preemption functions as a judicially created exception.

Yet the Court has refused to cast complete preemption as an exception to the well-pleaded complaint rule, reflecting, perhaps, a reluctance to admit to the judicial creation of such exceptions in the absence of any expressed legislative intent to do so. The result is an entirely conclusory rationale for the doctrine: "When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law."<sup>7</sup>

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<sup>3</sup> See Seinfeld, *supra* note 1, at 549-55 (detailing the confusing Supreme Court case history on complete preemption).

<sup>4</sup> The first case decided on the basis of complete preemption was *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

<sup>5</sup> *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

<sup>6</sup> See, e.g., *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 484-85 (1999) (discussing the exception created by the Price-Anderson Act).

<sup>7</sup> *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

I agree with Professor Seinfeld that there are many problems with this account. First, it is sheer fiction to say that complete preemption does not entail a departure from the well-pleaded complaint rule. The cases covered by complete preemption are all filed in state court. The complaint seeks relief under state law and typically says nothing about federal law. The basis for removal is the defendant's assertion that the state claim is preempted by federal law. In an ordinary preemption case, such a defense would not support federal jurisdiction precisely because it would not satisfy the well-pleaded complaint rule. Instead, the preemption defense would be litigated in state court. Thus, if complete preemption cases are removable, it is because the well-pleaded complaint rule does not apply in those cases. In short, the Court's protestations notwithstanding, complete preemption is indeed "a jurisdictional rule that permits the exercise of federal-question jurisdiction on the basis of the *defendant's* presentation of a question of federal law."<sup>8</sup> If the doctrine operates as an exception to the well-pleaded complaint rule, it ought to be recognized as such.

Second, until 2003, the Court's cases provided very little guidance as to precisely when a federal statute will be deemed to preempt state law so thoroughly that it yields complete preemption. When, exactly, is a state-law claim "in reality based on federal law"?<sup>9</sup> As Professor Seinfeld describes, it wasn't until *Beneficial National Bank v. Anderson* that the Court provided a reasonably clear answer: A state-law claim is completely preempted, and thus removable to federal court as arising under federal law, when federal law provides the exclusive cause of action for plaintiffs who seek relief for the harm alleged.<sup>10</sup> The complete preemption inquiry "focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable."<sup>11</sup> Thus in *Beneficial National Bank* itself, the Court held that because the National Bank Act provides the exclusive cause of action for usury claims against national banks, "there is . . . no such thing as a state-law claim of usury against a national bank."<sup>12</sup> Any complaint purporting to as-

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<sup>8</sup> Seinfeld, *supra* note 1, at 547.

<sup>9</sup> *Beneficial Nat'l Bank*, 539 U.S. at 8.

<sup>10</sup> *Id.* Following Professor Seinfeld's lead, *see* Seinfeld, *supra* note 1, at 548 n.31, I note that I served as a law clerk to Justice Ginsburg during the October 2002 Term, the Term during which *Beneficial National Bank* was decided. Everything I write here is based on publicly available information.

<sup>11</sup> *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5.

<sup>12</sup> *Id.* at 11.

sert such a claim “in reality” asserts a federal claim and thus is removable as arising under federal law.

*Beneficial National Bank* may have clarified that an exclusive federal cause of action is the trigger for complete preemption, but it did not explain why. To say that federal law provides the only cause of action in a particular area is to say that state-law claims in that area are preempted. Yet, as Justice Scalia put it in his dissenting opinion, “[t]he proper response to the presentation of a nonexistent claim to a state court is *dismissal*, not the ‘federalize-and-remove’ dance authorized by today’s opinion.”<sup>13</sup> Complete preemption marks a departure from that typical response. But why? Why should complete preemption’s jurisdictional consequences turn on whether Congress has created an exclusive cause of action?

The Court’s cases do not even attempt to connect this focus on exclusive causes of action to either of the fundamental policies of federal jurisdiction—namely, protecting against potential state court hostility to federal law, and helping to secure uniformity in the interpretation and application of federal law. Professor Seinfeld, however, does examine the potential connection to those interests. He concludes that the presence or absence of an exclusive federal cause of action does not reliably tell us anything about whether either policy is implicated with any special force.<sup>14</sup> This is a sound conclusion. In particular, the inaptness of *Beneficial National Bank*’s exclusive cause of action test becomes clear when one recognizes that the test privileges federal statutes that provide for *private* enforcement over those that rely on direct public enforcement. A variety of considerations may go into Congress’s decision whether to rely on private or public actors (or both) to enforce a particular law,<sup>15</sup> but there is no reason to conclude that the choice of private enforcement invariably reflects a heightened concern for the policies underlying federal jurisdiction. For the Court to suggest otherwise is particularly puzzling, given its suggestion in other contexts that *public* enforcement may be the principal mechanism for effectuating the federal government’s most important policy aims.<sup>16</sup>

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<sup>13</sup> *Id.* at 18 (Scalia, J., dissenting).

<sup>14</sup> Seinfeld, *supra* note 1, at 561-66 (concluding that concerns of uniformity and state-court bias do not explain *all* preemption).

<sup>15</sup> For a general discussion of some of the tradeoffs between public and certain kinds of private enforcement, see Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 607-18 (2005).

<sup>16</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 759 (1999) (suggesting that the case did

In sum, the clarity that *Beneficial National Bank* brought to complete preemption also exposed its theoretical impoverishment. The Court's emphasis on the presence or absence of an exclusive federal private right of action goes entirely unexplained in its opinions and bears no meaningful connection to the underlying policies of federal jurisdiction. Complete preemption needs rethinking.

## II

Professor Seinfeld's proposed reshaping of the doctrine contains four main contentions. First, the interest in the uniform interpretation and application of federal law (which Seinfeld subdivides into "equal-application uniformity" and "regulatory uniformity") is more germane to this inquiry than is the interest in protecting against state courts' anti-federal law biases.<sup>17</sup> Second, the presence of a particularly strong interest in regulatory uniformity may be inferred from the extent to which the relevant federal statute preempts state law: "the more broadly preemptive federal law is, the more likely it is that the interest in regulatory uniformity is in play."<sup>18</sup> Third, federal courts are likely to interpret the law both correctly and in a way that will advance the goals of regulatory uniformity.<sup>19</sup> Therefore, fourth, the more broadly preemptive a federal statute is, the more inclined we should be to assign a jurisdictional consequence to that preemption by allowing defendants invoking the law to remove to federal court.<sup>20</sup> Distilled to its essence, the argument is that the jurisdictional consequences of complete preemption should be a function of the preemptive breadth of the federal law in question.

Were complete preemption doctrine reformulated along these lines, it would certainly enjoy a conceptual soundness that it currently lacks. But Professor Seinfeld's proposal also raises some puzzles of its own that are worth considering.

First, a strong premise in Professor Seinfeld's argument is that federal courts are consistently superior to state courts when it comes

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not implicate a strong federal interest because the federal government had not prosecuted the action directly); *see also* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 194 (noting, and criticizing, the Court's "equation of importance with centralized enforcement").

<sup>17</sup> Seinfeld, *supra* note 1, at 573.

<sup>18</sup> *Id.* at 574.

<sup>19</sup> *Id.* at 574 & n.115.

<sup>20</sup> *Id.* at 574.

to interpreting federal law uniformly and correctly.<sup>21</sup> He is not the first to embrace that premise, of course. Indeed, the academic literature contains numerous strong arguments against the “myth of parity” and in favor of the view that the federal courts are structurally superior to state courts in the interpretation and enforcement of federal law.<sup>22</sup> Yet the Constitution’s adoption of the Madisonian Compromise (which allows Congress to choose whether to create lower federal courts)<sup>23</sup> and the fact that Congress did not grant the lower federal courts general federal question jurisdiction until 1875<sup>24</sup> suggest that those courts have not always been deemed indispensable to the policies of federal law. The point here is not to deny any difference between the federal and state judiciaries when it comes to the correct and uniform interpretation of federal law; it is rather to suggest that the *extent* of the federal courts’ superiority may be historically contingent.

Moreover, the contingency may be substantive in addition to historical. Consider in this regard Professor Seinfeld’s own account of concerns relating to state-court bias: “[D]uring any given period, state courts might be particularly hostile to civil rights claims, the claims of criminal defendants, claims against labor unions, and so on. . . . [We cannot] know[] what sorts of cases will fit into this category as time goes on . . . .”<sup>25</sup> Professor Seinfeld contrasts this historical and substantive contingency with the interest in the uniform and correct interpretation of federal law, which he sees as more stable across time. But even if the uniformity interest is *relatively* stable, doesn’t the variability of state-court bias inevitably yield at least some variability in the extent to which access to federal courts is essential to federal uniformity? In times of heightened state-court bias against certain categories of litigants or types of federal laws, there would naturally be a heightened concern about state courts’ capacity and inclination to interpret federal law in a way that is both correct and conducive to federal uniformity. But at other times and in other areas, state courts may be more reliable on this score. The likelihood of state-court bias at any

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<sup>21</sup> *Id.* at 542 & n.12.

<sup>22</sup> See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). For a review of the literature in this area, see Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988).

<sup>23</sup> See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

<sup>24</sup> See Seinfeld, *supra* note 1, at 543 (discussing the 1875 statute).

<sup>25</sup> *Id.* at 572.

particular time and in any particular area, in other words, surely affects the extent to which the federal courts will be better at producing correct and uniform interpretations of federal law.

There may be other variations as well. Citing the American Law Institute's 1968 *Study of the Division of Jurisdiction Between State and Federal Courts*, Professor Seinfeld notes that one reason federal judges are generally thought to be better at producing federal uniformity is that they are presumed to have greater expertise in the interpretation of federal law.<sup>26</sup> But here too, it seems unlikely that the federal-state difference would be constant. Wouldn't the difference depend in part on the complexity of the particular federal statute in question? And wouldn't it also depend on whether many states have adopted laws essentially modeled on the federal one? If the federal law is not particularly complex, and if state-court judges in many states are likely to find the statute accessible given its similarities to certain state-law analogs, then presumably the expertise disparity would be smaller than if we were dealing with a unique and highly complicated federal statute.

To reiterate, I do not deny that federal courts are, on average, better situated than state courts to construe federal law in a uniform and correct fashion. Rather, my point is that the extent of the difference between state and federal courts may well be historically and substantively contingent. If so, then a crucial premise of Professor Seinfeld's argument is somewhat weakened. If the federal courts' superior capacity to produce federal uniformity is variable, then the removability of state-law claims that implicate federal statutes should perhaps not simply be a function of the federal statute's preemptive breadth. In some areas and at some times, state courts may be perfectly adequate to the task of dismissing state-law claims on the basis of federal preemption defenses. Indeed, that may be particularly so in Professor Seinfeld's paradigm case for complete preemption, where the federal statute that the defendant invokes is broadly field-preemptive of state law. If a federal statute's field-preemptive sweep is sufficiently broad, even relatively inexpert state courts may have little difficulty determining, correctly, that all state laws in the area are preempted and that claims under those state laws must be dismissed.

Finally, and separately, it is worth noting that if the Court were to adopt Professor Seinfeld's approach, the instances of complete preemption would almost surely increase. To be sure, as Professor Seinfeld sensibly acknowledges, it might be difficult under his approach to

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<sup>26</sup> *Id.* at 542 n.12.

“distinguish[] those federal statutes that are so robustly preemptive as to merit special jurisdictional treatment from those that are not.”<sup>27</sup> But at the very least, removal would be proper in every state case in which the defendant invokes a field-preemptive federal statute. The Court’s current doctrine, in contrast, permits removal only when the defendant relies on a preemptive federal statute that also provides an exclusive private right of action. The latter is surely a smaller set of cases than the former. As the Solicitor General noted during the *Beneficial National Bank* litigation, “[f]ield preemption is relatively rare. It occurs only when displacement of state law is ‘the clear and manifest purpose of Congress.’ And field preemption accomplished through the provision of a federal cause of action is rarer still.”<sup>28</sup>

In other words, even if Professor Seinfeld’s proposal were limited to field-preemptive statutes (and, as he explains, it is not<sup>29</sup>), it would still permit removal in more cases than current doctrine allows. Of course, this alone does not undermine Professor Seinfeld’s argument. But it does suggest caution, especially where, as here, federal jurisdiction is predicated entirely on judge-made doctrine. Indeed, in the next Part I will suggest that decisions of this sort would be much better made by Congress, not the courts.

### III

It is a commonplace that “[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.”<sup>30</sup> That separation of powers principle strains under the weight of complete preemption, which, as Ernest Young puts it, is “wholly [a] product[] of the judicial imagination.”<sup>31</sup> More specifically, complete preemption functions as a judicially created exception to the well-pleaded complaint rule, which has long been understood to be included in the

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<sup>27</sup> *Id.* at 579.

<sup>28</sup> Brief for the United States as Amicus Curiae Supporting Petitioners at 19, *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1 (2003) (No. 02-306), 2003 WL 1098993 (internal citation omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>29</sup> Seinfeld, *supra* note 1, at 576.

<sup>30</sup> *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citation omitted).

<sup>31</sup> Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption* 15 (Oct. 25, 2006) (unpublished manuscript, on file with the author).

language of the general federal question statute. Congress could surely enact such an exception to that rule, permitting removal on the basis of certain federal defenses. Congress could even abandon the well-pleaded complaint rule across the board. But in the absence of any such congressional action, the wholly judge-made doctrine of complete preemption chafes with the rule that federal jurisdiction is “not to be expanded by judicial decree.”<sup>32</sup>

Professor Seinfeld’s reconceptualization of complete preemption does not cure these separation of powers concerns, nor does it purport to do so. Instead, he reasons that since the Supreme Court has shown no inclination to abandon complete preemption doctrine, it is worth asking how the doctrine might be most sensibly maintained and reformed.<sup>33</sup> That is a perfectly worthy undertaking. And it has its rewards. As noted above, the doctrinal reformulation proposed by Professor Seinfeld is much more conceptually sound than the Court’s current doctrine.

Yet at the same time, Professor Seinfeld’s reformulation highlights some of the reasons why the existence and scope of preemption-based removal is best left to Congress. As discussed above, the need for this sort of removal to ensure regulatory uniformity seems both historically and substantively contingent. Assessing the need in any particular area requires factfinding and balancing. The question is not simply whether federal courts are typically better than state courts at interpreting federal law, but *how much* better they are in certain areas and during certain times, and *whether* the extent of their superiority justifies the costs associated with a heavier federal caseload. Courts are ill-suited to perform this sort of policy-based balancing. Congress, in contrast, is well suited to the task. Thus, in addition to the formal point that federal courts are not empowered to expand the boundaries of their own jurisdiction, there is a functional argument that Congress is simply better than the courts at making the kinds of decisions necessary to craft sensible and coherent doctrine in this area.<sup>34</sup>

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<sup>32</sup> *Kokkonen*, 511 U.S. at 377.

<sup>33</sup> Seinfeld, *supra* note 1, at 571.

<sup>34</sup> Justice Scalia may have been making this very point in his *Beneficial National Bank* dissent, in which he stressed that “it is up to Congress, not the federal courts, to decide when the risk of state-court error with respect to a matter of federal law becomes so unbearable as to justify divesting the state courts of authority to decide the federal matter.” *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 21 (2003) (Scalia, J., dissenting).

In sum, though there is considerable merit in Professor Seinfeld's reformulated doctrine of complete preemption, the hope should be that Congress will take his reformulation up as a legislative matter, not that the Court will impose it by decree.