NOTES

UNDERSTANDING PREEMPTION REMOVAL UNDER ERISA § 502

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INTRODUCTION

The well-pleaded complaint rule generally prevents a defendant in state court from removing a case to federal court unless a substantial federal issue arising under federal law appears on the face of the plaintiff's complaint. Even if the defendant asserts a federal defense that both parties agree will be the central issue of the action, removal still turns solely on the plaintiff's pleading. This system of jurisdiction, in which claims can only be removed to federal court if they arise under federal law, has operated for almost one hundred years.[1] At the same time, the growth of federal regulation has allowed an increasing number of defendants to argue that state law has been preempted by federal law, and the well-pleaded complaint rule has forced many of these defendants to argue their federal defenses in state court.[2]

Federal jurisdiction under the Employee Retirement Income Security Act of 1974[3] (ERISA) can be considered an exception to this basic rule. Defendants in state court who raise a specific ERISA preemption defense *are* able to remove their cases to federal court. Because a federal court will decide whether federal law preempts state law, the process is known as "preemption removal." The Supreme Court authorized preemption removal under ERISA in 1987, claiming

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1 See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 7 (1983) ("The jurisdictional structure at issue in this case has remained basically unchanged for the past century."). This Note does not address diversity jurisdiction, which allows parties to remove claims to federal court when the parties are residents of different states and the damages sought are greater than a minimum dollar amount. See 28 U.S.C. § 1332 (1994).

2 See Richard E. Levy, Comment, Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule, 51 U. Chi. L. Rev. 634, 646 (1984) (noting effect of federal regulation on preemption removal).

3 29 U.S.C. §§ 1001-1461 (1994).

that it was following congressional intent.[4] There are, however, significant reasons to believe that Congress did not intend to allow such preemption removal when it enacted ERISA in 1974.[5]

This Note argues that although congressional authorization is questionable, preemption removal under ERISA is justified by the particular issues surrounding the regulation of employee benefit plans. In the absence of congressional intent, these policies stand as the sole justification for this striking exception to the well-pleaded complaint rule. Because these policies and issues do not necessarily apply to other areas of federal legislation, this Note argues that when courts are confronted with the question of whether preemption removal should be extended to other federal statutes, they must look for either clear congressional intent or strong policy reasons, such as those implicated by ERISA, to allow such removal.

An understanding of the justification for ERISA preemption removal becomes more pressing as circuit courts begin to expand the preemption removal doctrine to other areas of federal regulation. The well-pleaded complaint rule is an important part of federal jurisdiction, representing difficult choices involving the relationship between state and federal courts and the desire to provide an adequate forum for parties with rights granted by federal law. If new exceptions to the rule are going to be added, it is important that those exceptions be necessary. Absent clear congressional intent, to expand preemption removal to an area unsupported by policy justifications similar to those of ERISA is to chip away needlessly at a rule that has helped to shape modern federal jurisdiction. While no rule should be perpetuated merely because it is old, neither should it be slowly eviscerated without adequate justification.

Part I of this Note discusses the questions of federal jurisdiction raised by preemption removal. First, the well-pleaded complaint rule and its underlying rationale are explained. The Note then explains preemption removal, also known as "complete preemption," and explores the situations where the traditional treatment of preemption defenses under the well-pleaded complaint rule should be abandoned in favor of preemption removal. It argues that preemption removal is only justified when the consequences of wrongly allowing a plaintiff to obtain a remedy under state law would be extraordinarily dire.

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[4] See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987) (concluding, after review of legislative history, that "Congress has clearly manifested an intent" to make ERISA's civil enforcement provisions removable to federal court); see also infra notes 122-38 and accompanying text.

[5] See infra Part II.C.

Part II discusses the creation of preemption removal under ERISA. After a brief primer on the background and jurisdictional structure of the statute, the Note explores the Supreme Court cases that created preemption removal under ERISA. The Note closely examines the Court's opinions and argues that the Court's conclusion that Congress intended to make preemption removal available under ERISA was most likely incorrect.

If this Note is correct in arguing that it is not evident that Congress wanted preemption removal under ERISA, then preemption removal must be justified by separate policy reasons not considered by the Court. Part III of the Note conducts this analysis and concludes that despite the questionable congressional intent, there are two important reasons why there should be preemption removal under ERISA. The Note also discusses how these policy justifications have been strengthened by the developments in ERISA, and the fields of law it regulates, since ERISA's enactment twenty-three years ago.

The Note concludes with a suggested framework for the potential application of preemption removal under other federal statutes. It argues that a court considering whether there should be preemption removal under a new area of federal law should expand preemption removal only in response to clear congressional intent or policy grounds analogous to the two that explain preemption removal under ERISA. Finally, the Note concludes by contrasting two methods of analysis recently used by a circuit court in addressing the preemption removal issue, endorsing that which resembles the analysis argued for in the Note.

I
AN EXPLANATION OF REMOVAL JURISDICTION

A. The Well-Pleaded Complaint Rule

In 1908 the Supreme Court held that a federal court has no subject matter jurisdiction over a case unless the plaintiff's statement of her own cause of action—the face of her well-pleaded complaint—shows that her claim is based on federal law.[6] The Court held further that a plaintiff cannot create federal jurisdiction by alleging in her complaint an anticipated federal defense by the defendant.[7] The *Mot-*

[6] See Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("[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.").

[7] See id. The rule currently operates through the federal removal statute, 28 U.S.C. § 1441 (1994), which generally requires that a removable case be one in which the federal district courts have original jurisdiction. For there to be original jurisdiction, the action

tley rule restricts the ability of defendants asserting federal defenses to remove their cases to federal court by making federal jurisdiction depend solely on the plaintiff's cause of action.

Since *Mottley*, courts and commentators have tried to justify a rule that many view as being too arbitrary, developing a number of policy considerations that support adherence to the well-pleaded complaint rule. First, the rule effectively limits the scope of federal question jurisdiction.[8] By distinguishing between those cases in which a federal issue is raised by the plaintiff and those cases in which a federal issue is raised by the defendant, the rule seeks to exclude those cases in which the federal issue is less likely to be a significant part of the case. Although a federal claim may be "lurking" in the background[9] if a defendant plans to assert a federal defense, the assumption that underlies the rule is that more often than not, if federal issues are central to the controversy, they will be raised by plaintiffs.[10] Federal question jurisdiction is thereby limited by allowing removal only when federal issues are more likely to dominate and screening out those cases in which issues of state law will likely be the focus of the litigation.[11]

Second, the well-pleaded complaint rule promotes comity concerns. If a case is going to revolve around a dispute over state law, it is best to let state courts make the final decisions.[12] If such cases are kept outside the jurisdiction of the federal courts, comity interests will be served because state courts will resolve more of those disputes in which state law predominates.

Finally, commentators note that the rule saves judges from wasting time and resources in making guesses about which issues in an

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must arise under federal law. See 28 U.S.C. § 1331 (1994). Thus, for a defendant to be able to remove a case to federal court, the case must arise under federal law.

8 See Levy, supra note 2, at 638-40 (placing federal removal jurisdiction over preemption cases within framework of well-pleaded complaint rule).

9 Justice Cardozo's use of the word "lurks" to characterize the potential federal issue in Gully v. First Nat'l Bank, 299 U.S. 109, 117 (1936), has been oft-repeated by judges, professors, and commentators. See, e.g., Levy, supra note 2, at 645-46 (noting that well-pleaded complaint rule "screen[s] out" cases that are primarily state law matters "even though a federal issue lurks in the background").

10 See Levy, supra note 2, at 640 (noting "intuitively appealing presumption" that when plaintiff raises federal claims, "federal issues are more likely to dominate").

11 See id. at 645-46.

12 See Herbert Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216, 218 (1948) (noting that allowing claims with federal ingredients to proceed first in state courts allows state agencies to determine issues of state law, and concluding that the more important the state issue, the more important it is to have them addressed first by state courts).

evolving lawsuit will eventually dominate the court's time.[13] Although the rule is underinclusive,[14] it does allow judges to make quick decisions after reading the plaintiff's complaint at the initial stages of the case.[15] The rule is particularly helpful in this regard because, as the Supreme Court suggested in *Gully v. First National Bank*,[16] with enough searching a federal issue could be found in most cases.[17]

While the well-pleaded complaint rule has strong policy underpinnings, there are nonetheless important criticisms of the rule.[18] One criticism focuses on the assumption that plaintiff-raised federal issues are either more important or more often central to the case than federal issues raised by the defendant.[19] Perhaps the importance of the federal issues averages out equally between occasions when they are raised by plaintiffs and when they are raised by defendants. If that is true, then the well-pleaded complaint rule is vastly underinclusive, preventing federal courts from hearing many cases that depend upon an important resolution of federal law but whose federal issues are raised by the defendant.[20]

A second criticism involves concerns about state court bias against the defendant. State courts might be hostile to defendants' federal defenses when they negate a plaintiff's right grounded in state

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[13] See Michael G. Collins, The Unhappy History of Federal Question Removal, 71 Iowa L. Rev. 717, 752-57 (1986) (suggesting that although courts originally interpreted Congress's intent wrongly, other reasons for supporting well-pleaded complaint rule exist); David P. Currie, The Federal Courts and the American Law Institute—Part II, 36 U. Chi. L. Rev. 268, 270-71 (1969) (discussing various proposals to reform federal court system).

[14] The rule excludes, for example, those cases in which the sole issue is the existence of a federal defense, thereby leaving them in state court. See Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (noting suits involving federal defenses do not necessarily receive federal jurisdiction).

[15] See Collins, supra note 13, at 757.

[16] 299 U.S. 109 (1936).

[17] See id. at 117 ("One could carry the search for causes backward, almost without end."). At times, however, the emphasis on saving judicial resources is relaxed to avoid claim manipulation that takes advantage of the rule. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 14-20 (1983) (directing judges to unravel declaratory judgment suits to uncover underlying issues in case).

[18] See William Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 890, 915 (1967) (arguing that rule's sole justification is to provide quick "rule of thumb"); Currie, supra note 13, at 269 (claiming that rule operates capriciously).

[19] See Collins, supra note 13, at 766 (stating that decision to follow well-pleaded complaint rule in removal context was not based on any overt judicial balancing of costs and benefits of rule, but was instead based solely on formal reading of statute's plain language).

[20] See Collins, supra note 13, at 757 (asserting that rule is "of course" underinclusive); Levy, supra note 2, at 639 (arguing that rule excludes large number of cases that eventually turn on validity of federal defense).

law.[21] Contributing to this bias concern are doubts about the Supreme Court's ability to monitor adequately state courts' decisions regarding federal defenses.[22]

Herbert Wechsler has argued that if bias is a major concern, then the rule has been fashioned exactly backwards.[23] In Wechsler's view, there is little bias concern if the plaintiff chooses to assert her federal claim in state court: We should be willing to trust the plaintiff's judgment that the court will adjudicate her claim fairly—after all, it is the plaintiff who has the most to lose from a court biased against her federal claim. On the other hand, Wechsler argues, we should be concerned about the defendant who did not choose to go to state court: He may indeed face a state court bias, particularly if he mounts a federal defense to a state law claim.[24]

The usefulness of the rule depends partly upon a judgment of timing. A plaintiff usually must prove the elements of her state law claim before the defendant has to prove any federal defense. Some number of plaintiffs will fail to prove the requisite state law elements, leaving the federal issues in the defense unexplored. If this occurs with some regularity, then the well-pleaded complaint rule stops federal courts from exerting jurisdiction over cases in which important federal issues will never be reached.[25]

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21 See, e.g., Mary P. Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 Geo. Wash. L. Rev. 812, 819 (1986) (noting concern that states may tend to err in favor of state law). But see Wechsler, supra note 12, at 227 (arguing that tension created by states' self-interest has reduced over time); see also Eric James Moss, Note, The Breadth of Complete Preemption: Limiting the Doctrine to Its Roots, 76 Va. L. Rev. 1601, 1626-34 (1990) (discussing potential state court bias against federal preemption issues but concluding that federal forum is needed less for preemption issues than for other federal issues). See generally Henry J. Friendly, Federal Jurisdiction: A General View 124-25 (1973) (questioning need for broad federal removal jurisdiction and doubting possibility that state judges cannot be trusted to enforce federal rights that are defenses).

22 See Collins, supra note 13, at 757-58 (describing reliance on Supreme Court review as costly use of resources, and noting Court now hears far fewer state court appeals); Wechsler, supra note 12, at 218 (arguing that interest in saving resources of Supreme Court for only most important cases must be balanced carefully against disadvantages of having original jurisdiction with federal courts).

23 See Wechsler, supra note 12, at 233-34; see also Collins, supra note 13, at 717 & n.4, 758 (citing Wechsler and questioning why defendants are allowed to remove federal questions brought by plaintiffs content to litigate in state court).

24 For a general discussion of state judges deciding preemption issues, see Stanley Blumenfeld, Jr., Comment, Artful Pleading and Removal Jurisdiction: Ferreting Out the True Nature of a Claim, 35 UCLA L. Rev. 315, 356-63 (1987).

25 Justice Brennan pointed out that this argument is problematic when all parties agree that the federal issue is the only item before the court that is in dispute. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 11-12 (1983).

Justice Brennan has said that the well-pleaded complaint rule is based on "reasons involving perhaps more history than logic."[26] Nevertheless, the rule has consistently been used by the courts to determine when there is sufficient federal jurisdiction for a case to be removed from state to federal court. A prominent exception to that rule, preemption removal, is explored next.

B. Preemption Removal/Complete Preemption

The Supremacy Clause of the United States Constitution[27] requires that when a specific federal law conflicts with a specific state law, that state law is preempted. There are times, however, when Congress wants to regulate entire fields of law and install a single set of federal remedies. When that is the case, the congressional enactment is deemed to preempt the entire field of state law in that area, even absent a conflict with a specific state law. This sort of field preemption may be necessary because state law activity in the field could unduly interfere with federal regulation. Even if a defendant claims such field preemption as a defense to a state law claim, however, she still cannot remove the case to federal court. While it may have been preempted by federal law, the plaintiff's claim does not arise under federal law. Although preemption determines which set of regulations governs the dispute, it does not change the structure of the jurisdiction over the issue—the state law claim and the federal preemption defense are heard in state court.[28] There are many examples of preemptive federal legislation, and state judges are often required to make decisions that involve an examination of the scope of a federal preemption clause.[29]

In addition to preempting individual statutes or whole fields of law, Congress may go one step further: Rather than merely preempt an entire field of law, as above, Congress may also declare that *all* claims brought within a preempted field arise under federal law. In such instances, state law claims are not merely preempted because they fall within the broad field of preempted state law, but are in fact transformed into *federal* claims. This is where preemption removal, the subject of this Note, comes into play.

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[26] Id. at 4.

[27] U.S. Const. art. VI, § 2.

[28] See Blumenfeld, supra note 24, at 330 (noting that preemption, while "dictat[ing] the applicable law to govern the claim," does not alter jurisdiction).

[29] See, e.g., Adsit v. Quantum Chem. Corp., 605 N.Y.S.2d 788, 789-80 (N.Y. App. Div. 1993) (reversing trial court's denial of defendant's summary judgment motion that argued claim was preempted by ERISA § 514); see also Bill Alden, ERISA Preemption Rejected in State Suit, N.Y.L.J., Aug. 23, 1996, at 1 (discussing preemption decision in Tufino v. New York Hotel & Motel Assocs., 646 N.Y.S.2d 799 (N.Y. App. Div. 1996)).

Recall that under normal circumstances, if a defendant makes a preemption argument, the case stays in state court because the plaintiff's claim arises under state law and is therefore not removable; the state judge hears the claim and federal preemption defense, and determines whether the competing federal statute preempts the state law. In contrast, in the rare instances of preemption removal, a facially state law claim is considered to be a federal claim because it falls within the field that Congress has federalized. Because Congress has determined that all claims within the field arise under federal law, and because the plaintiff's claim falls within that field, it is deemed to arise under federal law. Removal to federal court is now allowed because the defendant is not just claiming federal preemption of the substantive state law; he is claiming that the plaintiff's state claim in fact arises under federal law. This is sometimes referred to as "complete preemption"[30] because Congress preempts the field of law to the extent that only federal law may exist, and any claim that is brought relating to this field is deemed to arise under federal law. In these instances, the plaintiff believes that she is bringing a state claim, but in reality there is no such thing as a state claim in that area of the law.[31]

The Supreme Court has explained complete preemption in this way: "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."[32] In effect, the plaintiff has lost her traditional power to decide which claims to plead and her choice of a state or federal forum.[33] It is the plaintiff's loss of her power to rely on state law that makes preemption removal unique. If she tries to bring a state claim, the court recharacterizes it as a federal claim.

While complete preemption is often called an exception to the well-pleaded complaint rule, they are technically consistent. The well-pleaded complaint rule requires a claim to arise under federal law for it to be removable. With complete preemption, Congress has said that

30 For use of the words "complete preemption," see Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987).

31 See Levy, supra note 2, at 650-51, 655-56 (stating that where there is federal preemption, complaint necessarily presents federal claim).

32 *Caterpillar*, 482 U.S. at 393 (citing Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 (1983)).

33 Normally, a plaintiff is the master of her complaint and is allowed to avoid federal court by choosing only to bring claims arising under state law. See Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (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 patent or other law of the United Statues by his declaration or bill.").

the putative state claim in fact arises under federal law. In allowing removal because the claim is "really" federal, the court is actually adhering to the well-pleaded complaint rule.

At this point a brief example of how complete preemption allows preemption removal is illustrative: Suppose that a plaintiff pleads a claim in an area of law which Congress has completely preempted with federal law. The defendant asserts that the plaintiff's claim arises under federal law because it falls within this specific set of federal remedies. The case is removed to federal court, where a federal judge decides the preemption/jurisdiction issue. If the plaintiff's claim falls within the federal law, the claims are necessarily federal; the state claims are dismissed; and the plaintiff is left with the set of federal remedies as her only relief. If not, the case is returned to state court. Back in state court, the defendant may still have a "normal" preemption defense because another part of the whole package of federal legislation may overlap the state law claim. Ordinary preemption defenses are decided by the state judge. The federal judge only decides whether the state claim is completely preempted because it falls within the remedies section of the federal law.[34]

The difference between a preemption defense and complete preemption removal is best seen in the plaintiff's resulting status when the defendant's claim succeeds. If the defendant asserts a normal preemption defense, that defense will be considered by a state judge and, if the judge finds for the defendant, the state court will dismiss the plaintiff's claim. She may then choose to bring a federal claim in federal court (or state court if there is concurrent jurisdiction over the federal claim). However, if the defendant successfully asserts a claim of complete preemption removal, the plaintiff's putative state law claim is turned into a federal law claim. She is then a litigant with a federal claim that the defendant has properly removed to federal court.

Because the practical effect of complete preemption is that the defendant gets a federal forum for what is essentially a preemption defense, we assume that there must be a reason why defendants with this specific preemption defense are given access to the federal courts. Normally, we take the risk that state courts will sometimes get the preemption question wrong and will allow a suit to continue under

[34] See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 60 (1987) ("The question presented by this litigation is whether these state common law claims are not only preempted by ERISA, but also displaced by ERISA's civil enforcement provision, to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b)." (citation and footnote omitted)).

state law. The justification for preemption removal must be that, in some areas of regulation, the consequences of wrongly allowing a party to obtain relief under state law are unusually severe. We therefore allow the defendant to make the preemption argument in federal court because we are less willing to take a chance that the state court will wrongly decide the preemption issue.[35]

Note that the need for a federal forum in these cases must be unusually strong. Under the standard operation of the well-pleaded complaint rule, countless defendants with important federal rights are not allowed to remove their cases to federal court, even though it seems inevitable that state courts will make some mistakes in deciding these issues.[36] It seems insufficient, therefore, merely to conclude that this is an extremely important federal right so Congress must have wanted a federal forum. For preemption removal to be warranted, the effects of an incorrect state court decision on a preemption question must go beyond the parties of the suit—the effect must be that a few isolated suits wrongly pursued under state law will have an effect on the entire area of federal regulation. To avoid the specter of these incorrect state court decisions, Congress federalizes the entire area of law, making all claims removable because they arise under federal law. This scheme starkly contrasts with the usual willingness of Congress to allow a few parties to "slip through the cracks" and obtain relief—perhaps incorrectly—under state law.

Given the drastic scope of this exception to the rule, it should not be routinely inferred by courts. Absent explicit congressional intent, a proper analysis must include an examination of the unique aspects of the area of regulation and the consequences of wrongly decided state court decisions. Part III shows that when ERISA is analyzed in this manner, it is evident that preemption removal is justified. First, however, Part II provides the relevant background to the development of preemption removal under ERISA.

II

THE DEVELOPMENT OF PREEMPTION REMOVAL UNDER ERISA

To determine whether there are sufficiently severe dangers associated with a small number of wrongly decided preemption questions, one must first have a basic understanding of the law at issue and what it regulates. Section A of this Part provides this simple background

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[35] See Moss, supra note 21, at 1626 (concluding that focus of complete preemption analysis is determination of which court should decide preemption issue).

[36] See id. at 1629 (noting justifiable concern that where federal and state laws conflict state judges might opt to enforce state laws at expense of federal ones).

for ERISA. Section B discusses the Supreme Court cases that established preemption removal under ERISA and explains why the Court believed that Congress intended preemption removal under ERISA. Section C concludes by questioning the soundness of the Court's conclusion.

A. What ERISA Regulates

ERISA was enacted in 1974 in response to a growing public perception that there was a significant problem of fraud in America's pension plans.[37] At the forefront of these concerns was a growing belief that workers who had dedicated most of their lives to a single employer were losing their pensions shortly before they reached retirement age.[38] Sometimes this would occur when a long-time employee was fired just before his pension rights were vested, leaving him with no retirement income.[39] Other times a large company would go out of business, leaving its older employees without pensions and without the time to invest another twenty years with a new company. For example, in one particularly well known case, when a large and previously successful car plant closed down, workers with both vested and non-vested pension benefits were left with claims to pensions that simply could not be met because the company had not adequately funded its pension plans.[40] In sum, the country was concerned with older workers who, in planning their retirements, had depended on receiving pensions from their long-time employer. When pension plans came up short, or when an employee was fired before his pension rights had vested, he was left without this source of income for his retirement years.

These concerns were balanced by an acknowledgment that pension plans were growing in popularity and were a needed component of most American industries. Senator Javits, a primary sponsor of ERISA, made the following comment shortly after the law was enacted:

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[37] See 29 U.S.C. § 1001(a) (1994) (enumerating findings of Congress regarding problems facing employee benefit plans); Michael S. Gordon, Overview: Why Was ERISA Enacted?, in Staff of Senate Special Comm. on Aging, 98th Cong., 2d Sess., The Employee Retirement Income Security Act of 1974: The First Decade 1, 15-16 (Comm. Print 1984), reprinted in part in John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 65 (2d ed. 1995) (discussing studies and anecdotes demonstrating that fraud in pension system led to passage of ERISA).

[38] See Michael Allen, The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement, in Langbein & Wolk, supra note 37, at 65; Gordon, supra note 37, at 16-17.

[39] See Gordon, supra note 37, at 16-17.

[40] See Allen, supra note 38, 62-63 (discussing closing of Studebaker plant).

> The problem, as perceived by those who were with me on this issue in the Congress, was how to maintain the voluntary growth of private plans while at the same time making needed structural reforms in such areas as vesting, funding, termination, etc., so as to safeguard workers against loss of their earned or anticipated benefits—which was their principal cause of complaint and which—over the years—had led to widespread frustration and bitterness * * * the new law represents an overall effort to strike a balance between the clearly-demonstrated needs of workers for greater protection and the desirability of avoiding the homogenization of pension plans into a federally-dictated structure that would discourage voluntary initiatives for further expansion and improvement.[41]

Thus, the central purpose of ERISA was to safeguard the benefit expectations of workers,[42] while encouraging the growth of pension plans.[43] Prior to ERISA, there was only an ineffective patchwork of state regulation covering this field; no federal remedy was available to workers who felt that they had been unfairly deprived of their pensions.[44]

There are two basic types of employee benefit plans subject to ERISA: pension plans and welfare plans. Pension plans are designed to provide retirement income to employees.[45] Pension plans may promise employees that they will receive a defined amount of money per month upon retirement. Alternatively, they may help each employee accumulate money for his retirement. In contrast, welfare plans provide numerous kinds of benefits to employees, but generally do not provide an income stream for retirement. Instead, they provide medical, health, accident, disability, death, unemployment, or vacation benefits. In addition, welfare plans might provide special training programs, day-care services, scholarship funds, or legal services.[46] Both pension and welfare plans are governed by ERISA, but pension plans are subjected to greater regulation.[47]

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41 Sen. Jacob K. Javits, Address Before the Conference on Pension & Employee Benefits, New York State School of Industrial & Labor Relations, Cornell University & Federal Bar Ass'n (Sept. 19, 1974), quoted in Gordon, supra note 37, at 25.

42 See Jay Conison, Suits For Benefits Under ERISA, 54 U. Pitt. L. Rev. 1, 3 (1992).

43 See Richard Rouco, Available Remedies Under ERISA Section 502(a), 45 Ala. L. Rev. 631, 632 (1994) (noting that ERISA reflects balance between encouraging further pension plan formation and protecting benefit interests of employees).

44 See Gordon, supra note 37, at 8 (noting that federal Welfare and Pension Plans Disclosure Act, passed in 1958, did not provide any federal remedies).

45 See 29 U.S.C. § 1002(2)(A) (1994); Michael J. Canan & William D. Mitchell, Employee Fringe and Welfare Benefit Plans, § 1.3, at 9 (1994).

46 See 29 U.S.C. § 1002(1); Canan & Mitchell, supra note 45, § 1.3, at 8.

47 See infra note 50.

ERISA was enacted with the following objectives, reflected in its mandates: to provide workers with adequate information about their benefit plans; to create standards of conduct for people who manage benefit plans; to make sure that enough funds are set aside for pension benefits; to make sure that workers who satisfy minimum requirements receive pension benefits; and to protect the rights of workers with pension benefits when their plans are terminated.[48] The primary means of regulation under ERISA is a system of disclosure, reporting, and standards of conduct and responsibility imposed on plan fiduciaries.[49] Instead of regulating the content of plans, ERISA regulation largely depends on the fiduciary responsibilities that the law imposes on the managers who administer the plans.[50]

1. Civil Enforcement Under ERISA § 502

Section 502,[51] ERISA's civil enforcement scheme, lists the different parties who may bring a civil suit under ERISA, the types of actions that they may bring, and the remedies that they may seek. Section 502(e) makes jurisdiction over claims exclusively federal, except for claims brought by a participant to recover benefits due, or to

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[48] See 29 U.S.C. § 1001(b)-(c) (1994) (enumerating purposes of ERISA's enactment); Barbara J. Coleman, Primer on ERISA 3 (3d ed. 1989) (same).

[49] See Keith A. Rabenberg, Note, Punitive Damages and ERISA: An Anomalous Effect of ERISA's Preemption of Common Law Actions, 65 Wash. U. L.Q. 589, 589 n.1 (1987) (citing 29 U.S.C. § 1001).

[50] See Robert L. Aldisert, Note, Blind Faith Conquers Bad Faith: Only Congress Can Save Us After *Pilot Life Insurance Co. v. Dedeaux*, 21 Loy. L.A. L. Rev. 1343, 1350-51 (1988). Both welfare plans and pension plans are subject to reporting requirements, disclosure requirements, and ERISA-created fiduciary duties. See id. at 1351. Only pension plans, however, are required to comply with ERISA's funding, participation, and vesting requirements. See Canan & Mitchell, supra note 45, § 1.2, at 2; see also Daniel M. Fox & Daniel C. Schaffer, Semi-Preemption in ERISA: Legislative Process and Health Policy, 7 Am. J. Tax Policy 47, 48-52 (1988), reprinted in part in Langbein & Wolk, supra note 37, at 418. That ERISA does not regulate welfare plans to the extent it regulates pension plans has been the subject of much criticism. See Rouco, supra note 43, at 641 (arguing that ERISA's imposition of personal liability on plan fiduciaries is not good "fit" for effective regulation of welfare plans because welfare plans do not require same kinds of administration as pension plans); see also infra note 60. ERISA's legislative history suggests that pension reform and not welfare plan regulation was the primary consideration when ERISA was enacted. See 120 Cong. Rec. 29,192 (1974) (statement of Congressman Perkins, Chairman of the House Labor and Education Committee) ("Mr. Speaker, to summarize what is being done today let me state—after years of study and investigation, hearings and debate, after endless hours of work, *pension* reform legislation of an historic character is almost complete." (emphasis added)). For an explanation of why welfare plans were included in ERISA regulation, see Langbein & Wolk, supra note 37, at 509-10 (explaining that fraud and other forms of corruption were problems for both welfare and pension plans).

[51] 29 U.S.C. § 1132 (1994).

enforce or clarify rights under a plan.[52] For those cases, state courts have concurrent jurisdiction.[53] ERISA § 502 allows only certain parties to sue under ERISA and these parties are only allowed to sue for certain remedies. The parties allowed to bring claims under § 502 are plan participants and beneficiaries (the employees or people who are entitled to employee benefits, such as family members), fiduciaries (who are responsible for managing the plan), and the United States Secretary of Labor. A type of suit that frequently involves preemption removal is found at § 502(a)(1)(B), which generally allows employees to sue for benefits to which they are entitled.[54] For example, an employee might sue if his employee health insurer unfairly refused to pay for a needed medical operation. Additionally, under § 502(a)(2) and (3), the various parties are able to sue on behalf of the plan to get equitable relief. For example, an employee might sue because she feels that the plan administrators do not recognize her right to receive certain benefits in the future. Extracontractual damages and punitive damages are generally not available under these sections.[55]

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[52] See 29 U.S.C. § 1132(e)(1) (1994) (granting exclusive federal jurisdiction to ERISA claims, except claims brought under § 502(a)(1)(B)).

[53] See id. (granting concurrent jurisdiction for cases brought under § 502(a)(1)(B)).

[54] Section 502(a) states in part: "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the term of the plan . . . ." 29 U.S.C. § 1132(a) (1994).

These are the types of claims over which state courts have concurrent jurisdiction under § 502(e). For a good outline of the different cases that may be brought under § 502(a), see Térese M. Connerton, Suits by Beneficiaries Against Plans or Employers to Recover Benefits, in Employee Benefits Litigation 571, 571-96 (ALI-ABA Course of Study 1997).

[55] Section 502(a)(1)(B) limits recovery to the benefits that the beneficiary was entitled to under the plan. See Massachusetts Mut. Life v. Russell, 473 U.S. 134, 144 (1985) (ruling on remedies available under § 502(a)(2) and noting that § 502(a)(1)(B) "says nothing about the recovery of extracontractual damages"); see also Rouco, supra note 43, at 639 (noting that § 502(a)(1)(B) limits recovery to benefits to which participant is entitled under plan). *Russell* held that compensatory and punitive damages are not available under § 502(a)(2), which authorizes suits for breaches of fiduciary duty. See *Russell*, 473 U.S. at 146-48. While Justice Brennan's concurrence in *Russell* suggested that the Court's holding was limited to § 502(a)(2), see id. at 150 (Brennan, J., concurring), most courts have held that extracontractual damages are not available for suits under any part of § 502(a). See Connerton, supra note 54, at 635-36 (noting that Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), has prevented most lower courts from allowing compensatory damages as equitable relief under § 502(a)(3)); see also Fiduciary Responsibility, 1995 A.B.A. Sec. Lab. & Employment L. 295 (Supp. 1995) (noting damages limited to loss of benefits); Craig M. Stephens, Note, ERISA: The Inevitable But Unexpected Hurdles of the Plaintiff's Welfare Benefit Plan, 20 Am. J. Trial Advoc. 151, 171-80 (1996) (summarizing cases discussing extracontractual damages and influence of Justice Brennan's *Russell* concurrence).

Employees are sharply limited by ERISA in their ability to obtain relief. An employee can sue under § 502(a)(1)(B) to get the benefits that she deserves or to enforce or clarify her rights—but if the employee is successful, she only gets what she is entitled to receive under the plan, no more and no less. Even if she was denied benefits by a malicious act, she is only able to recover the benefits that she should have received, not punitive or other noncompensatory damages. Alternatively, the employee can sue under various subsections of § 502 to enforce ERISA regulations or to obtain damages on behalf of the plan, rather than themselves. Until very recently, this section was interpreted as forbidding plan participants from obtaining individual damages.[56] Keeping in mind the original purpose of ERISA, this civil enforcement scheme demonstrates ERISA's primary goal of fighting fraud. Fiduciaries are subject to private lawsuits if they breach their duties, and employees have a means of obtaining benefits due to them.

2. *ERISA § 514 Preemption*

Section 514 of ERISA states that with a few exceptions, "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan . . . ."[57] Courts have held that Congress deliberately intended § 514 to have an expansive preemptive effect,[58] specifically referring to the words "relate to" as an indication of this intended breadth.[59] The effect of the expansive preemption language is that the remedies which would normally be available to an injured worker, such as redress to state common law contract or fraud claims, or state employment regulations, are rendered unavailable. Because these laws generally "relate" to the benefit plans that are covered by ERISA, they are often preempted. As a result, workers who wish to bring a claim relating to a pension or welfare plan covered by ERISA have no choice but to use

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[56] See Varity Corp. v. Howe, 116 S.Ct. 1065, 1079 (1996) (holding that plan participants are authorized to seek individual relief under § 502(a)(3)).

[57] 29 U.S.C. §1141(a) (1994) (emphasis added). 29 U.S.C. §§ 1002 and 1003(a) (1994) describe the types of employee benefit plans that are covered by ERISA.

[58] See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (noting two exceptions to broad ERISA preemption); see also David Gregory, The Scope of ERISA Preemption of State Law: A Study in Effective Federalism, 48 U. Pitt. L. Rev. 427, 452 (1987) (noting ERISA's preemptive effect is broad but not absolute); H.R. Scheel, Recent Development: *Corcoran v. United Healthcare, Inc.*: ERISA Preemption of a Louisiana Tort Action, 67 Tul. L. Rev. 821, 830-32 (1993) (discussing limits of § 514).

[59] See Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1328-29 (5th Cir. 1992) (citing *McClendon*).

the enforcement schemes provided by ERISA. The broad preemption simply does not allow most alternative legal actions.[60]

The broad preemption is not unintended, but rather it is the result of a legislative trade off. In exchange for ERISA's provisions granting employees the nonforfeitable right to receive benefits, employees are provided with only a limited number of remedies.[61] Although some of the claims that an employee could bring under state common law can now be brought under ERISA, the scheme created by ERISA strips these traditional contract suits of many of the remedies that otherwise would be available under state law.[62] In exchange for this loss of state law claims and remedies, ERISA gives employees a reasonable guarantee that they will be able to recover all the benefits that they deserve under their plans.

Because of this delicate balancing, most courts have assumed that Congress wished to limit regulation of employee benefit plans to that provided by ERISA.[63] If employees had access to remedies other than those Congress chose to allow in ERISA, then the congressional

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[60] It has been suggested that this expansive preemption has turned out to be one of ERISA's greatest weaknesses. See Langbein & Wolk, supra note 37, at 509-10 (criticizing ERISA preemption for causing federal courts to displace state courts in areas in which state law is usually adequate); see also Catherine L. Fisk, The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism, 33 Harv. J. on Legis. 35, 36-39 (1996) (arguing that ERISA's broad preemption is both odd and ironic as law intended to provide significant federal protection instead leaves regulatory vacuum by invalidating numerous progressive state laws); Rouco, supra note 43, at 639-40 (expressing concern that combination of broad preemption and limited remedies limits plaintiffs' monetary relief). This concern stems largely from ERISA's different treatment of pension plans and welfare plans. See supra note 50. Recall that not only does ERISA preempt state laws that affect pension plans, it also preempts state laws that affect welfare plans. See, e.g., *Corcoran*, 965 F.2d at 1326-34 (finding variety of state medical malpractice claims preempted); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 60 (1987) (explaining Court's holding in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)). The scope of preemption is the same, despite the fact that ERISA does not regulate the content of welfare plans the way that it regulates pension plans. See supra note 50. As a result, a large amount of state welfare regulation is eliminated without being replaced by federal regulation. See Langbein & Wolk, supra note 37, at 509-10. This is particularly alarming to some commentators because although ERISA regulation was designed for pension plans more than for welfare plans, most preemption litigation involves welfare plans and preempted state regulations. See id. at 510. While commentators may question why welfare plans were even included in ERISA regulation, it has been suggested that welfare plans were plagued by the same type of fraud as pension plans prior to ERISA's enactment. See id. at 509.

[61] See Rouco, supra note 43, at 640-41.

[62] See Rabenberg, supra note 49, at 605-06 (describing limitation of remedies resulting from combination of exclusion of most punitive damages and broad preemption of common law claims).

[63] Note that ERISA not only preempts civil actions, but also preempts many state efforts at regulation beyond providing beneficiaries with a cause of action for benefits wrongly denied. ERISA has had an increasing impact on states trying to regulate the mar-

balance of interests between employee and benefit plan might fail. The Supreme Court expressed this attitude when it noted that "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."[64]

Put together, ERISA's civil enforcement scheme as provided in § 502 and its broad preemption provision under § 514 largely "federalize" the regulation of employee pension and welfare benefit plans. These two sections represent a clear statutory scheme to have only federal law govern this area of labor and employment law. Section 514, the preemption section, eliminates state law, and § 502, the civil enforcement provision, replaces it. "Federalizing" means more, however, than just increasing federal regulation. As one commentator has suggested, it means "a recasting of preexisting common law rights and relationships into the form of federal statutory rights and obligations such that only a federal tribunal has sufficient authority to issue binding decrees."[65]

Congress apparently believed that significant policy reasons justify federal uniformity in the law governing employee benefits. In *New York Conference of Blue Cross v. Travelers Insurance Co.*,[66] a case involving the state regulation of hospitals in New York, the Court discussed the reasons for this policy of uniformity. It extensively quoted its decision in *Ingersoll-Rand Co. v. McClendon*,[67] explaining that Congress intended:

> [T]o ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.[68]

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ket for health care services. For a discussion of ERISA's impact on state health care reforms, see generally Marilyn Werber Serafini, Up Against ERISA, 27 Nat'l J. 349 (1995).

64 Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

65 Rouco, supra note 43, at 645-46. Recall, however, that 28 U.S.C. § 1132(e) allows states to have concurrent jurisdiction for claims brought under ERISA § 502(a)(1)(B). See supra notes 51-54 and accompanying text.

66 115 S. Ct. 1671 (1995).

67 498 U.S. 133 (1990).

68 *Travelers*, 115 S. Ct. at 1677 (quoting *McClendon*) (alteration in original).

The Court then listed examples of similar statements found in the Congressional Record.[69] These statements are strong evidence that the goal of the broad preemption section was to make it easier to create a single body of law to regulate pension and employee welfare plans. This would seem consistent with pension and employee benefit regulations because absent federal "uniformity," some large employers may have to comply with the laws of many different states and jurisdictions.

Nevertheless, despite the policy justifications, this statutory design has been criticized as being too drastic. Section 514 is generally interpreted broadly and preempts a good deal of state law, whereas § 502 is usually interpreted narrowly in that only certain plaintiffs are able to seek limited awards, usually confined to the value of the benefits that the plaintiff lost. The combination of these two interpretations has the effect of substantially limiting the available remedies for an employee injured by her pension or welfare plan.[70] This limitation has had a particularly strong effect with the advent of managed care: An ERISA-regulated HMO that makes a mistake with a claim for benefits could cause a beneficiary serious physical harm, or even death.[71]

Although it is doubtful that Congress intended this effect with welfare plans,[72] the Court has left the statutory scheme intact because of what it perceived to be the deliberate intent of ERISA's drafters. In its decision in *Massachusetts Mutual Life Insurance Co. v. Russell*,[73] the Court explained its belief that Congress carefully designed this scheme and deliberately allowed few remedies. The Court noted that the detailed drafting of the civil enforcement provisions under § 502 "provide[s] strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."[74] In deciding a case that concerned the availability of remedies under § 502, the Court stated that "[w]e are reluctant to tamper with an en-

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[69] Id. at 1677-78 (noting comments of Representative Dent, a sponsor of ERISA, found at 120 Cong. Rec. 29,197 (1974), and of Senator Williams, found at 120 Cong. Rec. 29,933 (1974)). Senator Javits even suggested that to regulate employee benefit plans effectively, ERISA needed a complete field preemption section. See 120 Cong. Rec. 29,942 (1974); see also Rabenberg, supra note 49, at 608 & n.114 (discussing preemption of punitive damages remedies and citing legislative history showing intent to create uniform law).

[70] See Rouco, supra note 43, at 639 (arguing that ERISA preemption has created regulatory void).

[71] See generally Scheel, supra note 58, at 836-38 (discussing decreased deterrence of negligent medical decisionmaking, especially with increased use of utilization review in decisionmaking process).

[72] See supra note 50.

[73] 473 U.S. 134 (1985).

[74] Id. at 146.

forcement scheme crafted with such evident care as the one in ERISA."[75]

More recently, the Court has rejected the argument that § 502 and § 514 should not preempt state law to the extent that employees have less protection than they did before ERISA was enacted.[76] The Court disposed of the argument by reference to ERISA's careful and deliberate construction, noting that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs."[77]

* * * *

Before examining the history of the Court's preemption removal decisions, a brief review of how preemption removal plays out in a typical ERISA action should be helpful. Assume that there are two worlds, one with preemption removal and one without it. Now imagine a worker who receives health insurance through her employer's welfare benefit plan and goes to her HMO because she believes that she needs a certain operation. The HMO concludes that the operation is not necessary, and denies the employee coverage. The employee does not undergo the operation, and her condition worsens significantly. She then sues the HMO and her employer's benefit plan, alleging a number of state law tort and contract claims.

Picture the plan administrator, who is now a defendant sitting in state court facing claims under state law. The defendant knows that his plan is regulated by ERISA because it provides welfare benefits to the employees of the company. As a result, he suspects that this state tort claim arising from the HMO's alleged negligence is preempted by ERISA.

First consider the world where there is no preemption removal. The plan administrator makes a motion to dismiss the suit because it is preempted by ERISA. He argues that because the suit is about a mistake that was allegedly made in denying coverage under the HMO, it "relates to" an ERISA-covered welfare plan under § 514 and is therefore preempted. He also makes a motion to remove the case to federal court, based on this federal issue.

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[75] Id. at 147. For a contrasting view, see Justice Brennan's concurrence, in which he asserts that the role of federal courts in interpreting ERISA should be much broader, considering Congress's intent to have the courts develop a new federal common law under ERISA. See id. at 156 (Brennan, J., concurring).

[76] See Mertens v. Hewitt Assocs., 508 U.S. 248, 261-63 (1993) (stating that statute was carefully drafted and is not nonsensical, and that vague notions of statute's purpose cannot overcome its text).

[77] Id. at 262; see also id. at 254 (referring to the language cited from *Russell*, see supra text accompanying note 74).

The motion to remove the case to federal court is denied. Referring to the well-pleaded complaint rule, the federal judge explains that a case cannot be removed to federal court based solely on a federal defense. Since the federal issue in this case is the defendant's claim of ERISA preemption, the case stays in state court. Back in state court, the judge considers the preemption issue. If the court finds that the suit does fall within § 514, then it is dismissed, presumably with leave to amend so that the plaintiff may bring a federal ERISA suit. If the court finds that the suit is not preempted by ERISA according to § 514, then the case continues.

Now consider the preemption removal world. The plan administrator facing the same suit in the same state court makes a slightly different motion. Again, he claims that the suit "relates to" an ERISA-covered plan within the meaning of § 514 and is therefore preempted. This time, however, he also argues that this plaintiff is one of the parties listed in § 502 and is bringing the type of claim that is governed by § 502. The plan administrator also makes the motion to remove the case to federal court.

This time, the motion for removal is granted and a federal judge decides whether the case involves a § 502 party. If it does, it is preempted and the suit is dismissed. Again, leave to amend is presumably granted by the court so that the plaintiff can bring a proper claim under § 502. If the claim is not preempted by § 502, then the case is remanded to state court where the § 514 preemption issue is still alive. The state judge then decides the ordinary "relating to" preemption issue.[78]

This latter scenario involving preemption removal represents the typical treatment of ERISA claims brought today. The jurisprudential progression that led to the current state of the law is explored in the next section.

B. The Supreme Court's Decisions Creating Preemption Removal Under ERISA

The first commandment of preemption removal under ERISA is "first came the LMRA." The Labor-Management Relations Act[79] is the other significant area of federal legislation where the Supreme Court has authorized preemption removal.[80] It was largely the belief

[78] On the importance of distinguishing complete preemption under § 502 and ordinary preemption under § 514, see Warner v. Ford Motor Co., 46 F.3d 531, 535 (6th Cir. 1995) (overruling case that mistakenly allowed preemption removal based on § 514).

[79] 29 U.S.C. §§ 141-88 (1994).

[80] A footnote in Caterpillar Inc. v. Williams, 482 U.S. 386, 393 n.8 (1987), has led some lower federal courts to conclude that the Court's decision in Oneida Indian Nation v.

that the drafters of ERISA were copying the LMRA that led the Supreme Court to authorize preemption removal under ERISA.

Avco Corp. v. Aero Lodge No. 735[81] concerned LMRA § 301, a law that regulated collective bargaining agreements between labor unions and employers. Section 301 grants federal jurisdiction over cases involving enforcement of a collective bargaining agreement in an industry that affects interstate commerce.[82] In *Avco*, an employer sued a union in state court to prevent the union from striking and breaching the no-strike clause in the collective bargaining agreement.[83] The claim was removed from state to federal court and the district court denied a motion to remand.[84] The Sixth Circuit affirmed the decision of the district court.[85]

The issue, as framed by the circuit court, was whether the plaintiff's claim arose under federal law such that its removal was proper under § 1441.[86] The plaintiff claimed that the suit was based on a state right and therefore did not arise under federal law.[87] The court disagreed.[88]

The circuit court cited the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills,*[89] which held that federal substantive law fashioned by courts must apply to all suits brought under § 301.[90] Thus, the circuit court was faced with a statute that regulated collective bargaining agreements, created federal jurisdiction over suits relating to these agreements, and authorized federal courts to create

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County of Oneida, 414 U.S. 661 (1974), involved complete preemption. See, e.g., Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 585 (6th Cir. 1990) (citing *Oneida* for proposition that scope of complete preemption exists where state law complaint alleges present right to possession of Indian tribal lands). The *Caterpillar* footnote cited *Oneida* and summarized the case in a parenthetical as holding that a "state-law complaint that alleges a present right to possession of Indian tribal lands necessarily 'asserts a present right to possession under federal law,' and is thus completely pre-empted and arises under federal law." *Caterpillar*, 482 U.S. at 393 n.8 (quoting *Oneida*, 414 U.S. at 675). However, the Court's decision in *Metropolitan Life*, which authorized preemption removal under ERISA, not only failed to discuss *Oneida* but did not even cite it. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). Because the Supreme Court did not rely on *Oneida* when it authorized preemption removal under ERISA, this Note does not discuss *Oneida* in this context.

81 390 U.S. 557 (1968).

82 See Avco Corp. v. Aero Lodge No. 735, 376 F.2d 337, 339-40 (6th Cir. 1967), aff'd, 390 U.S. 557 (1968).

83 See id. at 338-39.

84 See id. at 339.

85 See id.

86 See id.

87 See id.

88 See id.

89 353 U.S. 448 (1957).

90 See *Avco*, 376 F.2d at 340.

common law over those suits. Noting that the intent was to have federal law govern these disputes, the Tennessee Court of Appeals came to the conclusion that all claims based on disputes involving agreements covered by LMRA § 301 must arise under federal law.[91] Because the suit arose under federal law, removal was appropriate.

In a brief opinion, the Supreme Court affirmed the Sixth Circuit's decision, authorizing preemption removal for the first time.[92] The Court first repeated the rule that the law to be applied to any case brought under § 301 must be federal law created by the courts,[93] even if the case is brought in state court.[94] The Court then concluded that because federal law controls all cases brought under § 301, "[i]t is thus clear that the claim under this collective bargaining agreement is one arising under the 'laws of the United States' within the meaning of the removal statute."[95] The statute invoked the district court's original jurisdiction granted by 28 U.S.C. § 1337,[96] and the claim therefore could be removed properly to federal court. Absent from the opinion is any explanation of why a claim that on its face has nothing to do with the LMRA must be transformed into one arising under the law. The Court did not discuss the traditional method of adjudication, which would involve the defendant raising a preemption defense and having the state court decide the merits of the preemption issue.

The briefs submitted to the Court also do not clarify why the Court moved away from the traditional rule that would allow a plaintiff who chooses to rely only on state law to remain in state court.[97] The Respondents argued that § 301(a) was the sole source of a right that could be a basis for the suit and that the claim therefore could only have been based on federal law.[98] They likewise noted the concern that the claim might be decided by possibly biased or uninformed state courts.[99] However, the Petitioner's argument that Tennessee law had created the cause of action[100] was seemingly unanswered by either

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91 See id.

92 See Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968).

93 See id. at 559-60 (quoting Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957)).

94 See id. at 560 (citing Humphrey v. Moore, 375 U.S. 335 (1964); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)).

95 *Avco*, 390 U.S. at 560 (quoting 28 U.S.C. § 1441(b)).

96 See id. at 561-62.

97 See supra note 33 and accompanying text.

98 See Brief for Respondents at 19, Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) (No. 67-445) (citing *Lincoln Mills*, 353 U.S. at 456-57, and arguing that application of federal law "is settled law").

99 See id. at 10.

100 See Reply Brief for the Petitioner at 9, *Avco*, 390 U.S. 557 (No. 67-445).

the Respondents or the Court. The Petitioner insisted that it clearly chose to rely on state law only and that Supreme Court case law therefore allowed it to remain in state court.[101] That Respondents persisted in calling the claim a "§ 301 action"[102] would not seem to have been an adequate response to the Petitioner's argument that this was a simple state claim arising under the law that created it.[103] Nonetheless, the Supreme Court obviously accepted Respondents' argument.

To summarize the new law established in *Avco*, the Court affirmed the conclusion that any case brought, whether in state or federal court, that fell within the scope of § 301 must be governed by federal law. If a suit must be governed solely by federal law, then it must arise under federal law and thus may be removed from state to federal court. Years later, the Supreme Court summarized *Avco* as meaning that any suit that falls within the scope of § 301 "'is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.'"[104] *Avco* does not use the term "preemption removal" or even "complete preemption." Nevertheless, it holds that when Congress decides that certain claims can only be governed by federal law, any such suits are deemed to arise under federal law.

In the early 1980s the Court introduced this issue to the world of ERISA in *Franchise Tax Board v. Construction Laborers Vacation Trust*.[105] The issue before the Court was whether ERISA's preemption section[106] prevented a state agency from collecting unpaid taxes from a trust fund within the scope of ERISA's regulation.[107] The state agency had filed a suit for a declaratory judgment in California state court, asking the court to find that ERISA did not preempt its authority to collect unpaid taxes from an ERISA-covered welfare plan.[108] The defendant (the welfare trust fund) removed the case to federal court. After denying the motion to remand, the district court found

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101 See id. at 11 (citing Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)); see also supra note 33 and accompanying text.

102 See, e.g., Brief for Respondents at 39, 71, *Avco*, 390 U.S. 557 (No. 67-445).

103 See Reply Brief for the Petitioner at 12, *Avco*, 390 U.S. 557 (No. 67-445) (citing American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)). But see Karen A. Jordan, The Complete Preemption Dilemma: A Legal Process Perspective, 31 Wake Forest L. Rev. 927, 952 (1996) (arguing that despite lack of elaboration, *Avco* was principled act of judicial creativity protecting federal interests in competency and uniformity without intruding on rights of state courts).

104 Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987) (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983)).

105 463 U.S. 1 (1983).

106 See supra Part II.A.2.

107 See *Franchise Tax*, 463 U.S. at 3-4.

108 See id. at 5-7.

for the plaintiff on the merits of the case. The California Court of Appeals reversed on the merits. The Supreme Court, without reaching the issue of whether ERISA preempted the tax claim, held that there was no federal removal jurisdiction under 28 U.S.C. § 1441.[109]

The Court examined § 502, explaining that it gave certain parties the right to sue under ERISA.[110] In this case, the defendant trust company was one of the parties listed in § 502. When one of these parties brings a suit about the rights and duties under ERISA, explained the Court, it must do so under ERISA and the suit must be governed by federal law.[111] Because of *Avco*, any such suit would presumably arise under federal law. However, in the case facing the Court, the trust company was the defendant. The Court decided that although the defendant could have brought a suit under ERISA, it had chosen not to and therefore the state's declaratory judgment suit did not arise under federal law (ERISA) because the plaintiff state agency was not a § 502 party.[112]

The Court found that ERISA only established federal jurisdiction over suits brought by the parties listed in § 502.[113] The Court assumed that Congress did this because these parties needed a right to have a federal forum in order to further the purposes of the statute.[114] But, the Court noted, ERISA does not provide federal jurisdiction over *all* suits that involve these parties, such as when a § 502 party is a defendant sued by a party not listed in § 502. For example, the Court noted that a "[s]tate's suit for a declaration of the validity of a state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction" such that the suit is not within the federal court's original jurisdiction.[115] Therefore, when such a suit is brought in state court, it is not removable to federal court.[116]

The Court did refer back to *Avco* in explaining that any suit brought under § 301 must be federal in nature because § 301 displaces all related state causes of action.[117] Therefore, any claim that falls within the scope of § 301 must arise under federal law.[118] Finally, the Court suggested that the same might hold true for ERISA § 502, but found that neither of the plaintiff's claims was within the scope of that

109 See id. at 7.
110 See id. at 19-20.
111 See id.
112 See id. at 21.
113 See id.
114 See id.
115 See id. at 21-22.
116 See id. at 22.
117 See id. at 23.
118 See id. at 23-24.

section.[119] While § 301 may apply to all suits involving violations of labor-management contracts, § 502 does not apply to all suits involving ERISA plans.[120] Therefore, because this suit by state tax authorities fell outside the scope of § 502, the Court would not decide whether § 502 had the same effect as § 301.[121]

In *Metropolitan Life Insurance Co. v. Taylor*,[122] the Supreme Court took the next step and held that all claims falling within the scope of § 502(a)(1)(B) arise under federal law and therefore are removable under the complete preemption doctrine.[123] *Metropolitan Life* involved a disability welfare plan established by General Motors and insured by Metropolitan Life.[124] Taylor was a GM employee who had received payments from the plan while unable to work for various periods due to a back injury and emotional problems.[125] He was fired because he refused to return to work after a GM physician concluded that he was fit to work.[126] Taylor later sued GM and Metropolitan Life in state court.[127] Metropolitan Life removed the case to federal court, where the district court judge granted summary judgment for

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119 See id. at 24-25.

120 See id. at 25 & n.28.

121 See id. at 24-27.

122 481 U.S. 58 (1987).

123 See id. at 66. It is not clear whether *Metropolitan Life* is limited to cases under § 502(a)(1)(B). See Kramer v. Smith Barney, 80 F.3d 1080, 1082-84 (5th Cir. 1996) (extending complete preemption to § 502(a)(2)); Warner v. Ford Motor Co., 46 F.3d 531, 534 (6th Cir. 1995) (limiting *Metropolitan Life* to cases arising under § 502(a)(1)(B)); Smith v. Dunham-Bush, Inc., 959 F.2d 6, 8 (2d Cir. 1992) (stating that claim need only fall within § 502(a)); see also Langbein & Wolk, supra note 37, at 689 (arguing *Metropolitan Life* implies that it covers all claims brought under § 502(a)). Note, however, that some commentators have suggested that Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995), and Rice v. Panchal, 65 F.3d 637 (7th Cir. 1995), also have limited *Metropolitan Life* to § 502(a)(1)(B) cases. See Roger C. Siske et al., What's New in Employee Benefits, in Pension, Profit-Sharing, Welfare, and Other Compensation Plans 1, 118-20 (ALI-ABA Course of Study 1996) (summarizing recent removal cases); Roger C. Siske et al., What's New in Employee Benefits: A Summary of Current Case and Other Developments, in Pension, Profit-Sharing, Welfare, and Other Compensation Plans 1, 99-104 (ALI-ABA Course of Study 1995) (same). For a summary of cases that argue that preemption removal is not limited to § 502(a)(1)(B), see Paul J. Ondrasik Jr. and Sara E. Hauptfuehrer, Removal Jurisdiction in ERISA Cases—The Doctrine of "Complete" Preemption, 4 No. 5 ERISA Litig. Rep. 4, 6-8 (1995) (arguing that *Metropolitan Life* involved § 502(a)(1)(B) but that principle established in the case applies to other cases under § 502(a)); see also Jordan, supra note 103, at 967-69 (finding that most jurisdictions have interpreted *Metropolitan Life* to apply to other parts of § 502(a)); Janice M. Radlick, Removing ERISA Cases After *Warner v. Ford Motor Company*, 74 Mich. B.J. 1044, 1045-46 (1995) (criticizing *Warner*).

124 See *Metropolitan Life*, 481 U.S. at 60.

125 See id. at 60-61.

126 See id. at 61.

127 See id.

the defendants.[128] The Sixth Circuit reversed, holding that the case should not have been removed to federal court because the plaintiff's complaint only contained state causes of action that were subject to a federal defense of ERISA preemption.[129]

On review, the Supreme Court first recited the well-pleaded complaint rule, then gave its summary of the rule developed by *Avco*. Calling it a "corollary of the well-pleaded complaint rule," the Court explained that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character."[130] The Court did not cite any detailed policy rationale for this rule, saying only that the "pre-emptive force of § 301 is so powerful."[131] Regarding ERISA, the Court noted that it had found in *Franchise Tax* that ERISA's preemption section does not turn an ordinary state claim into one arising under federal law. Then, after noting *Franchise Tax*'s suggestion regarding § 502,[132] the Court found that the claim by this plaintiff fell within the scope of the civil enforcement scheme found in ERISA's § 502.[133]

Next, the Court had to decide whether a state claim that falls within the scope of the civil remedies allowed by § 502 should be recharacterized as one arising under federal law. The Court remarked that it would hesitate to find complete preemption under § 502 without clear congressional intent,[134] as the preemptive power at issue—the conversion of a state common law claim into a claim that arises under federal law—was unusually strong.[135]

Nonetheless, the Court found itself unable to ignore what it perceived to be clear congressional intent. It noted that the language of § 502(f), which gives federal courts jurisdiction in ERISA cases, parallels the language of LMRA § 301.[136] On this issue, the Court specifically referred to and quoted from ERISA's conference report:

> [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under*

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128 See id. at 61-62.

129 See id. at 62.

130 Id. at 63-64.

131 Id. at 64 (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983)).

132 See supra text accompanying notes 119-21.

133 See *Metropolitan Life*, 481 U.S. at 64.

134 See id. at 64-65.

135 See id. at 65.

136 See id.

> *the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*[137]

The Court believed that Congress's clear intent in passing § 502 was to establish the same jurisdictional structure that had developed under § 301. The Court took this legislative history as a clear reference to the rule of LMRA jurisdiction created in *Avco*, and held that Congress intended to make claims brought under § 502(a)(1)(B) federal questions for the purpose of deciding jurisdiction.[138] Given the finding of clear congressional intent, the Court's decision lacked a significant discussion of why benefit regulation under ERISA merited such an unusual rule of jurisdiction.

In sum, *Avco* held that in writing § 301 of the Labor-Management Relations Act, Congress took certain types of labor-management lawsuits and decided that only federal law would govern these suits. Because only federal law could govern, the Court reasoned, these suits must arise under federal law. Because these suits arise under federal law, a defendant can properly remove them to federal court. In *Franchise Tax*, the Court suggested that the same could be true of ERISA § 502, but refused to decide the issue because it faced claims that did not fall within the scope of § 502. Finally, in *Metropolitan Life,* the Court took the final step and found that the *Avco* analysis was applicable to ERISA § 502. Although the Court seemed hesitant to find such an unusual rule of jurisdiction, it decided that the congressional intent to copy the jurisdictional system of LMRA § 301 while drafting ERISA was clear. Thus, any claim, state or federal, brought under § 502 is viewed as one arising under federal law. Indeed, a purported state claim is in fact transformed into a federal claim. A critique of the Court's reasoning in coming to this conclusion follows.[139]

C. *A Critical Examination of the Supreme Court's ERISA Preemption Removal Decisions*

The Supreme Court largely based its finding that Congress wanted preemption removal on a single line in ERISA's voluminous legislative history. The Court concluded that because § 502 of ERISA was modeled after § 301 of the LMRA, Congress must have wanted to

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137 Id. at 65-66 (quoting H.R. Conf. Rep. No. 93-1280, at 327 (1974)).

138 See id. at 66 (noting that "no more specific reference to the *Avco* rule can be expected").

139 In addition, Justice Scalia has suggested that the Court's entire history of preemption analysis under ERISA has failed and that the Court's new approach is an application of traditional field preemption principles. See California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 117 S. Ct. 832, 842-43 & n.1 (1997) (Scalia, J., concurring).

duplicate § 301's jurisdictional system as part of this modeling. However, there may be reasons to believe that preemption removal was not what Congress had in mind when it looked to § 301. The words "arising under" may simply have been the traditional, rather than legally significant, way legislators explained that there was to be federal jurisdiction over the claims created by the new statute. While the Court found that similar sections of labor laws should be read to have similar meanings,[140] in other contexts the Court has noted that the mere fact that Congress borrows language from another statute does not mean that it was copying all of the implications of that language.[141]

Preemption removal was far from the most prominent feature of LMRA § 301 at the time of ERISA's enactment, and it seems more likely that Congress copied § 301's system of jurisdiction for a limited reason that did not include preemption removal. Because the line in the conference report relied on so heavily by the *Metropolitan Life* Court does not mention preemption removal or *Avco*, it seems plausible that Congress had something else in mind.

The LMRA, like ERISA, was an exercise in federalizing an area of law that had been previously regulated by state law. With LMRA, the area of the law "federalized" was that covering disputes arising from collective bargaining agreements. With ERISA, it is the regulation of employee benefit plans. In both cases, Congress replaced multiple remedies in a large area of state law with fewer remedies and a narrow federal enforcement mechanism. Because such a complex area of the law was replaced by a narrow enforcement clause, Con-

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140 See *Metropolitan Life*, 481 U.S. at 65 (comparing ERISA § 502 with LMRA § 301).

141 See Tafflin v. Levitt, 493 U.S. 455, 462 (1990). In *Tafflin*, Justice O'Connor, the author of *Metropolitan Life*, found that although Congress had modeled a section of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1994), after § 4 of the Clayton Act, 15 U.S.C. § 15(a) (1994), the presumption of concurrent state court jurisdiction was not shifted because "the 'mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language.'" *Tafflin*, 493 U.S. at 462 (quoting Lou v. Belzberg, 834 F.2d 730, 737 (9th Cir. 1987)). The Court added that if it is reasonable to assume that Congress knew of the Court's prior decisions, it would be just as logical to assume that Congress would have made express reference to the precedents. See id. at 462-63. But see Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992) (Souter, J.) ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4."). In the *Holmes* case, however, the Court was deciding which elements must be proved to bring a successful claim. The *Tafflin* case is more on point for the issue addressed in this Note. Just as there is a presumption in favor of concurrent jurisdiction when a statute's language is silent on the issue, this Note argues that courts should be reluctant to find that preemption removal has been authorized when there is no clear indication of congressional intent. See infra Part IV.

gress probably assumed that there would be large gaps in enforcement under the new regulations. Many unusual twists and turns that had been ironed out over time by state common law would be reopened by ERISA.

In *Lincoln Mills*, the Supreme Court demonstrated how Congress had solved this problem in the LMRA. The Court explained that the purpose of LMRA was to provide legal remedies for certain labor disputes.[142] While Congress created some of the substantive law to govern these disputes in the Act itself, the Court found that Congress intended the gaps in enforcement to be "filled in" by the courts.[143] As a result, the Court in *Lincoln Mills* found that § 301, in providing for federal jurisdiction, granted federal courts the power to create federal, substantive common law that it would apply to suits falling under § 301.[144]

Congress apparently addressed this issue under ERISA in the same way as it had in the LMRA—it had to find a way to fill in the

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142 See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

143 See id. at 457.

144 See id. at 456. An interesting issue is whether the Court's holding in *Lincoln Mills* was correct. Justice Frankfurter strongly disagreed with the holding and wrote a dissent that numbered over twenty pages, see id. at 460-84, and was accompanied by a 61-page appendix of the statute's legislative history, see id. at 485-546. Justice Frankfurter thought that there was no clear mandate from Congress directing the courts to create a body of federal common law. See id. at 464. He believed that the Court took a procedural section and, using a few isolated statements in the legislative history, turned it into a mandate to create new law in an extremely complicated area of labor disputes. See id. at 461-62. Justice Frankfurter attached the statute's legislative history as evidence that the majority was not being loyal to the overall meaning of the documents. Justice Frankfurter dissented because he believed the Court should exercise restraint before finding such an expansive grant of power. See id. at 464.

There was, and is, strong support from legal commentary that Frankfurter was right. See Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The *Lincoln Mills* Case, 71 Harv. L. Rev. 1, 27 (1957) (stating that no support exists in the legislative history and that task is too complex for courts in this area of law); Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 82-83 (1980) (concluding that it is more reasonable that section concerns only jurisdiction and not power to create common law); Note, The Federal Common Law, 82 Harv. L. Rev. 1512, 1532-35 (1969) (arguing that Court's conclusion was justified by neither statutory language nor legislative history, but adding that majority's decision is justified by other policy interests).

An alternate purpose of § 301 was to open up a federal forum in order to circumvent problems in state courts, specifically the application of state common law rules. See Herbert G. Keene, Jr., The Supreme Court, Section 301 and No-Strike Clauses: From *Lincoln Mills* to *Avco* and Beyond, 15 Vill. L. Rev. 32, 34-35 (1969). Keene explained that it was difficult to get judgments against unions in state courts because they were unincorporated and difficult to sue as a single entity. Thus, he argued that Congress made federal court an additional forum without eliminating state court jurisdiction. Keene also suggested that legislative history supports Justice Frankfurter's position that the section was only procedural and wasn't intended to create new substantive law. See id. at 35.

anticipated gaps. Rather than trying to legislate in anticipation, it authorized the federal courts to furnish a body of substantive federal common law to be used under ERISA.[145] The Ninth Circuit explained in *Menhorn v. Firestone Tire & Rubber Co.*[146] that "Congress realized that the bare terms, however detailed, of these statutory provisions would not be sufficient to establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans."[147] To allow fulfillment of its legislative purposes, Congress directed the courts "to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies set out in ERISA."[148]

The most prominent feature of LMRA § 301, from the perspective of the 1974 Congress, would seem to be the authorization from Congress to the courts to create federal common law. Given that both were labor laws, that both were replacing large areas of state law, and that both were creating new enforcement mechanisms narrower than the prior law, it seems logical that Congress would want to copy § 301.[149] While it is likely that Congress wanted to copy this common law feature of § 301, it is far less clear that Congress knew that it was also copying the preemption removal features of § 301. This is especially plausible when one considers the unusually powerful effect of the Court's interpretation of the conference report language: The language displays Congress's intent to transform claims brought under state law into those arising under federal law. This is a forceful and unusual assertion of Congress's power, one that automatically raises questions of federalism. In comparison, granting federal courts the authority to fashion federal common law is a significant but far less unusual exercise of power. Because the language does not clearly

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145 See Rice v. Panchal, 65 F.3d 637, 645 (7th Cir. 1995) ("Congress intended a federal common law of rights and obligations under the ERISA plan to develop."); James S. Ray & Samuel W. Halpern, The Common Law of ERISA, Trial, June 1985, at 20, 20-24 (warning labor lawyers of broad law-creating powers ERISA grants to courts).

146 738 F.2d 1496 (9th Cir. 1984). *Menhorn* has been widely criticized, but not for its discussion of the motivations underlying the power to create federal common law. See Lee v. Garrett Corp. Retirement Plan, 803 F.2d 1082, 1084 (9th Cir. 1986) (discussing criticism but reaffirming *Menhorn*'s holding about date of effectiveness of § 502).

147 *Menhorn*, 738 F.2d at 1499.

148 Id. at 1500; see also *Rice*, 65 F.3d at 645 ("Indeed, it is probably the broad sweep of § 514(a) that explains why Congress intended a federal common law of rights and obligations under the ERISA plan to develop.").

149 For a theory that Congress did not intend to copy § 301, see Conison, supra note 42, at 16-20. Professor Conison, while not doubting that Congress did copy § 301, argues that the legislative goals of ERISA are different from those of LMRA, and that copying § 301 was inconsistent with providing workers with a means to obtain benefits through litigation. See id.

demonstrate either intent, the more reasonable interpretation is that Congress intended the more obvious, more common, less threatening authorization.[150]

Further supporting the theory that Congress did not intend to authorize preemption removal is the recognition that concurrent jurisdiction of § 502 is an imperfect means of providing a federal forum. Because the jurisdiction is concurrent,[151] the decision to remove a case filed in state court lies with the defendant. Significantly, however, a defendant with a complete preemption claim does not have to remove the case to federal court—if he wishes, he is free to argue the issue in state court.

Defendants may prefer a federal forum because of the decreased likelihood of bias as well as presumed expertise on federal question jurisdiction. However, it seems reasonable to assume that some defendants would not be willing to pay the extra costs associated with a change of venue, or for other reasons might prefer to stay in state court. Congress, by granting concurrent jurisdiction to the states, chose a jurisdiction scheme that risks having some cases slip through to state court. If Congress was truly worried about state courts making incorrect decisions on these preemption issues, it could have, and perhaps should have, made the jurisdiction exclusively federal.

If, in fact, congressional intent for preemption removal under ERISA is not as clear as the Court thought it to be, the question raised is whether policy justifications support expansive preemption removal. Part III of this Note explores that question, and demonstrates that such strong policy considerations do support preemption removal under ERISA despite the lack of clear congressional intent.

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[150] In addition, circuit courts have recently begun to narrow the scope of § 502, as a few cases have held that § 502(a)(1)(B) only covers suits to recover or clarify benefits, not suits about the quality of benefits received. See, e.g., Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 351-52 (3d Cir. 1995) (finding that negligence claims and vicarious liability claims brought against ERISA-covered HMO did not fall within scope of § 502(a)(1)(B) and therefore could not be removed to federal court); Rice v. Panchal, 65 F.3d 637, 638, 646 (7th Cir. 1995) (finding that malpractice claim against insurer does not fall within § 502 and therefore could not be removed to federal court). In doing so, these courts have raised the new possibility that Congress really didn't intend for § 502 to be the sole remedy for all claims by beneficiaries. Notwithstanding the following discussion about delicate balancing, see infra Part III.B.2, it is still possible that Congress did not intend to deprive employees of all of their traditional common law remedies under state law and did not intend to eliminate all state regulation of welfare plans. If this is true, having a state judge decide a preemption issue may not be so bad after all, as state law remedies could provide appropriate relief for the plaintiffs.

[151] See supra notes 52-54 and accompanying text.

III
WHY PREEMPTION REMOVAL IS JUSTIFIED UNDER ERISA

As discussed in Part II, the Supreme Court essentially has rested its decision that Congress wanted preemption removal under ERISA on its belief that Congress explicitly copied LMRA § 301, which was known to involve preemption removal. For this conclusion, the Court relied on ERISA's conference report.[152] Even if that conclusion were plausible, however, it still fails to explain why Congress would want such unusually expansive preemption removal in this area.

Logic dictates that there are times when a state judge facing a preemption issue will decide it incorrectly, allowing the action to proceed under state law when it really should have been preempted by federal law. For various reasons, reflected in the well-pleaded complaint rule,[153] our system tolerates these occasional mistakes. Preemption removal, however, is the exception to this system of tolerance, affording certain defendants the right to have a federal judge decide their preemption defense.

When Congress enacts preemption removal, therefore, there should be some reason why the potential mistakes that might occur if a case intended to be preempted went forward under state law are so bad that it is necessary to expand federal jurisdiction to prevent them from happening. With ERISA, the consequence of allowing a case to wrongly proceed under state law is that a plaintiff might obtain relief beyond what is allowed by the statute. This Part explains why this result is sufficiently dire to warrant departure from traditional doctrines.[154]

A. Uniform Treatment of Similarly Situated Participants

One reason why Congress may have wanted preemption removal under ERISA can be seen in the effect that a mistake in a state court would have on parties other than those involved in an individual case. ERISA's statutory language, scholarship, case law, and legislative history frequently discuss the importance of a uniform body of law governing benefit plans. Section 502 has been categorized in commentary as the result of the decision of Congress to create a uniform, federal

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152 See supra note 137 and accompanying text.

153 See supra Part I.A.

154 The following policy justifications could be used to support the argument that Congress did intend to authorize preemption removal under ERISA. There is no direct evidence that these policy justifications actually motivated Congress. See supra Part II.C. Instead, these explanations are best seen as important justifications in light of the lack of clear congressional intent.

body of employee benefit law,[155] a view also seen in the legislative history.[156] A major purpose of this preemption was that the only law regulating benefit plans would be the uniform regulation found in ERISA.

If it is true that Congress wanted a uniform law, perhaps it believed that it was necessary in the area of benefit regulation because the different parties—employees, unions, and employers—share a more complex interrelationship than parties in other areas of the law. If one person participating in an employee benefit plan is able to obtain certain remedies upon a contractual breach, it is likely that all of the plan's participants would expect such remedies.[157] If the benefit plan is very large, this expectation of available remedies could conceivably carry over to thousands of workers. In fact, if one company is running benefit plans for many different workers, a company could easily be concerned about setting a precedent regarding which remedies participants may receive if the company is at fault in a benefit claim.

A similar scenario is seen in a unionized workforce. Today, a number of large, national unions are comprised of smaller unions. If one smaller union has success in obtaining certain remedies, other member unions may expect the same remedies if their own benefit contracts are ever disputed.

Additionally, large multistate employers, who have workers in similar situations in different states, may be concerned that employees suing in state court have access to additional remedies because a state court inappropriately applies state law to a case that should be governed by § 502. The administrators of these benefit plans would then face the burden of sorting through the different state standards of benefits.

The concern addressed by preemption removal holds true even if we assume that the incorrect state court decisions would be isolated and would not be followed by other courts. Thus, while a few state courts could make a mistake in a § 502 preemption issue and wrongly allow a plaintiff to recover substantial state law remedies otherwise

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155 See Rouco, supra note 43, at 637.

156 See, e.g., Fox & Schaffer, supra note 50, at 49 (discussing comments of Representative Dent, one of ERISA's sponsors, who considered preemption section's elimination of such a large body of state law to be statute's "crowning achievement"). But see id. (noting that Senators Javits and Williams were not quite so enthusiastic about preemption section and that Senator Javits seemed to believe that there needed to be future regulation at both state and federal level).

157 See Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 757-58 (1982) (arguing for broad judicial review and noting that consistent treatment of like cases is "most basic principle of jurisprudence").

unavailable under ERISA, it is likely that other courts would ignore the decision and continue to correctly interpret the broad scope of ERISA preemption. Even given this assumption which eliminates the threat of establishing bad precedent, there is still a problem that can be addressed by preemption removal. Although most plaintiffs would correctly have their state claims preempted by ERISA and would have their disputes settled under § 502, a few workers might obtain the benefits of an incorrect state decision. Members of large unions may believe strongly in a principle of equal treatment among workers of equal standing. Under these circumstances, the worker who was denied extensive damages under § 502 would feel that he has been treated unjustly when he sees that a similar worker with a similar claim recovered far greater damages under state law. The "slighted" worker might believe that his union is not protecting his rights with as much vigor as it did for the other employee. This problem of unequal treatment among similarly situated workers is not resolved even if later courts correctly interpret ERISA preemption. The single incorrect decision may have an impact on all workers in that union, who work for the same employer, or who participate in the same benefit plan.

This perception of inequality may seem exaggerated until one remembers the nature of these controversies. The benefit that an employee suing under § 502 may be seeking might not be clarification of his pension plan, but rather having his HMO pay for a life-saving operation. Consider, for example, *Scalamandre v. Oxford Health Plans, Inc.*,[158] where a widower successfully sued under § 502 to recover the costs of an expensive chemotherapy treatment for his wife that his benefit plan had wrongly refused to cover. The plaintiff was able to pay for the treatment himself, and he and his wife later sued to recover the costs (three months before she passed away). The court found that Oxford had inappropriately denied coverage.[159] Under § 502, this widower was unable to recover punitive damages, no matter how negligent or malicious the defendant may have been.[160] One wonders how that worker would respond were he to find out that a similar worker participating in the same plan had the same thing happen to him and his wife, except that they were able to recover $1,000,000 in punitive damages under state common law.

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158 823 F. Supp. 1050 (E.D.N.Y. 1993).

159 See id. at 1060-61. The court held that in refusing to pay for the woman's treatment, Oxford had breached the regulations set forth in its own handbook. See id.

160 See supra note 55 and accompanying text.

Considering also that managed care was not as prevalent at the time that ERISA was enacted as it is today,[161] these may not have been the scenarios Congress had in mind in wanting a uniform body of law. It is possible, however, that Congress was concerned about the perceived injustice that would result from a few workers mistakenly having access to remedies that their brethren were denied. Such unusually harmful effects of having a state judge wrongly decide ERISA preemption could justify a choice of preemption removal. This could also help explain why Congress could have intended preemption removal for § 502 preemption cases, but not other preemption cases arising under § 514.

Note that this need for uniform treatment goes beyond the desire to have uniform interpretation of federal law. It would be too easy to conclude that preemption removal is justified because we want federal courts to interpret the law uniformly.[162] The decision to sacrifice uniformity of interpretation was made decades ago when the well-pleaded complaint rule was developed. We could have a system where all federal issues receive a federal forum. That option was never chosen. Uniformity under ERISA must be supported by reasons beyond a simple interest in having a uniform body of law. Uniformity is needed in this case because a single "wrong" decision will have an effect on parties beyond those who are before the court, an effect that could easily be felt by thousands of plan participants. This is one compelling reason why preemption removal is justified under ERISA.

B. Delicate Balancing

A second reason why preemption removal makes sense under ERISA is that the limitation of remedies available to workers under § 502 was part of the delicate process of legislative balancing. Congress understood very well that the system of employee benefits is largely a voluntary one; most employers are not required by law to provide health or welfare benefits to their employees.

The consequences of disrupting this delicate balancing can be seen in the legislative history of ERISA. Because employers *voluntarily* provide most employee benefits, Congress was concerned that imposing too many new costs or obligations on employers would provide employers with an incentive to stop providing these benefits. Because ERISA was intended to ensure that workers receive the benefits

161 See infra note 166 and accompanying text.

162 See Moss, supra note 21, at 1630 (arguing that complete preemption cases are not different from other cases where federal laws are used as defenses to state claims).

which were promised by the employers, the costs of providing these benefits could have significantly risen for employers. The House Committee on Education and Labor was worried about this:

> The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases has been minimized. Additionally, all of the provisions in the Act have been analyzed on the basis of their projected costs in relation to the anticipated benefit to the employee participant.[163]

Without preemption removal, a few state judges might incorrectly allow plaintiffs to recover benefits that Congress intentionally excluded from ERISA's scheme of benefit recovery. Normally, because of the concerns embodied by the well-pleaded complaint rule, Congress is willing to accept these types of mistakes. Increased costs to a few scattered employers, caused by a few cases slipping through to state law, at first seems to be just the type of acceptable risk that is part of American jurisprudence as embodied in the well-pleaded complaint rule. However, Congress evidently considered carefully which benefits it could ensure to workers without driving costs to employers so high as to encourage them to terminate or not adopt benefit plans. That Congress performed such a delicate "balancing act" could be used as evidence to support the argument that Congress may have wanted preemption removal because it was concerned that a few lucrative decisions under state law might sufficiently drive employers to scale back or eliminate benefits. The concern about these costs to employers was considered by Congress:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.[164]

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[163] H.R. Rep. No. 93-533, at 1-2 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 1639-40 (noted in Whitaker v. Texaco, Inc., 566 F. Supp. 745, 751 n.8 (N.D. Ga. 1933)).

[164] Subcommittee on Labor, Senate Comm. of Labor and Pub. Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at

Congress's decision to allow employees access to some remedies under § 502 but not others was based partly on the fear that too many guaranteed benefits would raise costs to the extent that employers would provide fewer benefits. Again, no clear statement was made during these congressional discussions that this is why Congress wanted preemption removal, but the Supreme Court has recognized the importance of this balancing in noting that "'[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.'"[165]

Any remedies that employees can obtain that are beyond what Congress allowed in § 502 could have the effect of convincing employers that the costs of their benefit plans are becoming too expensive. A few generous decisions for employee-plaintiffs under state law could have this effect. Preemption removal under ERISA prevents § 502 cases from slipping into state courts where extensive damages could be awarded.

The above two concerns, uniform treatment of parties and delicate legislative balancing, have grown stronger over the twenty-three years since ERISA's enactment. The number of Americans who receive health care services from a managed care organization is growing.[166] Because of the growth of managed care, an increasing number of Americans may have claims against their health care providers. Not only may an employee sue the person who directly provides her health care services, but the plaintiff also will likely have a claim against a nonmedical organization that is responsible for making an administrative decision about her health care.[167] A good example,

4800 (Comm. Print 1976) (remarks of Senator Nelson), noted in *Whitaker*, 566 F. Supp. at 751 n.8.

165 Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64-65 (1987) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)).

166 See Erik Eckholm, While Congress Remains Silent, Health Care Transforms Itself, N.Y. Times, Dec. 18, 1994, at A1. By 1993-94, a majority of privately insured Americans were enrolled in managed care plans that limited their choice of doctors and treatment. See id. By 1994, a fifth of the nation's population were members of HMOs. See id.

167 For discussions of managed care liability, see generally Richard A. Hinden & Douglas L. Elden, Liability Issues for Managed Care Entities, 14 Seton Hall Legis. J. 1 (1990); Jack K. Kilcullen, Groping for the Reins: ERISA, HMO Malpractice, and Enterprise Liability, 22 Am. J. L. & Med. 7 (1996); Linda V. Tiano, The Legal Implications of HMO Cost Containment Measures, 14 Seton Hall Legis. J. 79 (1990); Sharon M. Glenn, Comment, Tort Liability of Integrated Health Care Delivery Systems: Beyond Enterprise Liability, 29 Wake Forest L. Rev. 305 (1994); Randolph E. Sarnacki, Comment, Contractual Theories of Recovery in the HMO Provider-Subscriber Relationship: Prospective Litigation for Breach of Contract, 36 Buff. L. Rev. 119 (1987); Earlene P. Weiner, Note, Managed Health Care: HMO Corporate Liability, Independent Contractors, and the Os-

discussed above, is *Scalamandre v. Oxford Health Plans, Inc.*[168] As more Americans receive health care through organizations that add a level of decisionmaking to the health care process, it is more likely that suits will be brought against the party that administers the services in addition to the party that provides the services. As *Scalamandre* illustrates, these suits often involve, literally, issues of life and death, and strongly implicate issues of uniform treatment of similarly situated employees. Moreover, exposure to potential punitive damages from these suits is more likely to cause employers to drop benefit plans.

Some may argue that the growth of managed care is a reason why ERISA preemption should be scaled back.[169] Regardless of this policy issue, the growth of managed care increases the stakes when a defendant argues that ERISA preempts a state cause of action. Managed care places more decisionmaking power in the hands of people who are not physicians. Moreover, unlike traditional fee-for-service insurance plans, managed care gives health care providers an incentive to minimize the amount of care provided to plan beneficiaries.[170] Because of this change in how health care benefits are provided, more is at stake in an ERISA suit because more is involved than just a calculation of eligibility for pension or vacation benefits. ERISA suits today frequently involve claims that a plan administrator has wrongly denied vital services under a managed care plan.[171]

Even if the ERISA suit is filed after the beneficiary has received benefits elsewhere, as in *Scalamandre*, the implications of the typical

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tensible Agency Doctrine, 15 J. Corp. Law 535 (1990). For some examples of the types of suits involving managed care organizations, see Roger Parloff, The HMO Foes, The Am. Law., July/Aug. 1996, at 80.

168 823 F. Supp. 1050 (E.D.N.Y. 1993). See supra text accompanying note 159.

169 See Scheel, supra note 58, at 836-38 (arguing that ERISA has led to decreased deterrence of negligent medical decisionmaking, especially with advent and increase of utilization review decisions).

170 A basic managed care model does this by paying health care providers a flat rate per patient during a set time period, no matter how often the patient sees her provider. As a result, the provider maximizes her income by providing as few health care services as possible. Even if no services are rendered, the health care provider receives the same flat payment. See Eleanor D. Kinney, Procedural Protections for Patients in Capitated Health Plans, 22 Am. J. L. & Med. 301, 301, 305 (1996) (explaining capitation plans and how HMOs bear the cost of excess services and therefore have incentives to control costs); L. Frank Coan, Jr., Note, You Can't Get There From Here—Questioning the Erosion of ERISA Preemption in Medical Malpractice Against HMOs, 30 Ga. L. Rev. 1023, 1028-29 (1996) (discussing capitation rates and the difference between different types of HMO models); see also Julie Kosterlitz, Unmanaged Care? 26 Nat'l J. 2903, 2904-05 (1994). For an introduction to the structure of managed care, see Alain C. Enthoven, The History and Principles of Managed Competition, Health Affairs 24, 25-27 (1993 Supp.) (describing the economic consequences of a traditional fee-for-service health care system).

171 See supra note 167 regarding the liability of managed care organizations.

§ 502 suit could be more significant than they were in 1974. From the uniformity side, parties may be more likely to object to disparate treatment when it comes to claims related to physical injury that allegedly resulted from an administrative mistake of a managed care organization. From a delicate balancing point of view, it seems vitally important that we do not scare employers into dropping health care coverage for their employees. In short, the consequences of a 1997 suit against an HMO are more severe than a 1974 suit against a pension administrator. From the federal legislator's point of view, preemption removal is needed more than ever to avoid unequal treatment and incentives for employers to drop ERISA-regulated health care plans.

IV
EXPANDING PREEMPTION REMOVAL BEYOND ERISA: A METHOD OF ANALYSIS

This Note has explained the significance of preemption removal's role as an exception to the well-pleaded complaint rule. Because of the policies embodied in the well-pleaded complaint rule, preemption removal should only be allowed when there is a clear manifestation of Congress's intent to make an exception to the well-pleaded complaint rule or, alternatively, when there are strong policy justifications for preemption removal.[172] While the Court's conclusion that Congress wanted preemption removal under ERISA is problematic, Part III of this Note demonstrated that preemption removal under ERISA is justified by unique concerns about uniform treatment of plan beneficiaries and the delicate balancing of the welfare of employees with the concerns of employers, who might otherwise drop or scale back their employee benefit plans.

Although this approach is conservative in that it implies a presumption against preemption removal, it is not the most conservative approach possible. For example, grounds for a more conservative approach are found in Justice Brennan's concurring opinion in *Metropolitan Life*.[173] Justice Brennan suggested that preemption removal

[172] For an argument for a narrow theory of complete preemption based on federalism and judicial economy concerns, see Moss, supra note 21, at 1603-07, 1636-39 (arguing for requirement of federal cause of action to replace preempted state cause of action). An analysis focusing on a replacement cause of action finds support in Schmeling v. Nordam, 97 F.3d 1336, 1341-45 (10th Cir. 1996) (discussing different theories of preemption removal and ordering remand to state court because no replacement cause of action authorized by Federal Aviation Administration regulations).

[173] See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67-68 (1987) (Brennan, J., concurring).

should only be extended to other laws if congressional intent is clear, apparently leaving out the role of policy justification. This conservative approach can be lifted from Justice Brennan's advice for post-ERISA cases:

> [O]ur decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction.... In future cases involving other statutes, the prudent course for a federal court that does not find a clear congressional intent to create removal jurisdiction will be to remand the case to state court.[174]

The advantage of the analysis suggested by this Note is that it both justifies the survival of the *Metropolitan Life* holding, where congressional intent was weak, and also gives courts some flexibility in shaping the judicially created well-pleaded complaint rule.[175] A court should first look to congressional intent; but when legislative history is unclear this Note proposes a second step: an analysis of the regulation's policy implications and an investigation into the merits of preemption removal.

To date, the Supreme Court has not expanded preemption removal beyond ERISA, and the courts of appeals are divided in their willingness to expand preemption removal.[176] Rather than delving into each of these lower court decisions, and their varied approaches

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[174] Id.; see also Jordan, supra note 103, at 959-60, 983-84 (arguing that focus on congressional intent unduly narrows reach of complete preemption and is breakdown of principles underlying preemption removal, and concluding that preemption removal should be broadened).

[175] This analysis also finds support in *Metropolitan Life*. The Court stated that without explicit direction, the question would be a close one. See *Metropolitan Life*, 481 U.S. at 64. Nonetheless, that the Court stated that the question would have been close, and not closed, is support for this Note's analysis of policy justifications for preemption removal.

[176] For cases refusing to extend preemption removal, see Schmeling v. Nordam, 97 F.3d 1336, 1339-44 (10th Cir. 1996) (finding no preemption removal under employee drug-testing regulations promulgated by Federal Aviation Administration under 49 U.S.C. § 45102 (1994)); Strong v. Telectronics Pacing Sys., Inc., 78 F.3d 256, 259-61 (6th Cir. 1996) (finding no preemption removal under Medical Device Amendments to Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360 (1994)); Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 313 (3d Cir. 1994) (finding no preemption removal under Federal Employees Health Benefits Act, 5 U.S.C. § 8901-14 (1994)); Holman v. Laulo-Rowe Agency, 994 F.2d 666, 668-69 (9th Cir. 1993) (holding that Federal Crop Insurance Act, 7 U.S.C. § 1506(d) (1994), did not apply to suit, but noting that statute lacked requisite preemptive force to justify preemption removal in any event); Hurt v. Dow Chem. Co., 963 F.2d 1142, 1144-46 (8th Cir. 1992) (finding no preemption under Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) (1994)); Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 585-86 (6th Cir. 1990) (finding that 28 U.S.C. § 959(b) evidences no congressional intent for removal jurisdiction over claims against bankruptcy trustees); Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936, 942-43 (3d Cir. 1988) (applying two-part test for complete preemption requiring both civil enforcement provision and clear congressional intent, and finding preemption removal authorized by neither Inter-

to removal, this Note concludes by comparing two cases that have dealt with the issue of expanding preemption removal to other federal statutes.[177] While some courts have taken a conservative approach that resembles this Note's view toward preemption removal, others excessively expand preemption removal without finding clear congressional intent or unique policy justifications.

One of the cases extending preemption removal is *M. Nahas & Co. v. First National Bank of Hot Springs*.[178] In this case, the Eighth Circuit authorized preemption removal under § 86 of the National Bank Act.[179] The plaintiff claimed that First National, a national bank, had charged more than the maximum amount of interest allowed by Arkansas state law.[180] The district court found that the de-

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state Commerce Act, 49 U.S.C. §§ 10101-11917 (1994) nor Railway Labor Act, 45 U.S.C. §§ 151-88 (1994)).

For cases extending preemption removal, see Rosciszewski v. Arete Assocs., Inc., 1 F.3d 225, 232-33 (4th Cir. 1993) (finding preemption removal under Copyright Act, 17 U.S.C. § 301(a) (1994)); Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 787-88 (5th Cir. 1990) (finding preemption removal authorized by Civil Aeronautics Act, 49 U.S.C. § 1305(a)(1) (1994)); Deford v. Soo Line R.R. Co., 867 F.2d 1080, 1085-86 (8th Cir. 1989) (finding complete preemption under Railway Labor Act, 45 U.S.C. § 153 (1994)); see also Texas Employers' Ins. Ass'n v. Jackson, 820 F.2d 1406, 1419-20 (5th Cir. 1987) (finding preemption removal authorized by Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a) (1994)), rev'd en banc, 862 F.2d 491, 494 (5th Cir. 1988) (reversing and holding court had no authority to issue an injunction). Once the rehearing was granted in *Jackson*, the court's opinion had no precedential value. See Griffis v. Gulf Coast Pre-Stress Co., 850 F.2d 1090, 1092 (5th Cir. 1988) (explaining that *Jackson* is no longer precedential authority).

This list of cases is meant to be representative but not exhaustive. For a discussion of the reasoning behind some of the lower court cases, see Jordan, supra note 103, at 964-83.

177 A number of district courts have also faced the issue of whether to extend preemption removal to other federal laws. See Weinberg v. Sprint Corp., 165 F.R.D. 431, 437-40 (D.N.J. 1996) (finding preemption removal not authorized by Federal Communications Act, 47 U.S.C. § 414 (1994)); Castellanos v. U.S. Long Distance Corp., 928 F. Supp. 753, 755-56 (N.D. Ill. 1996) (same); Pena v. Downey Sav. & Loan Ass'n, 929 F. Supp. 1308, 1312-17 (C.D. Cal. 1996) (finding complete preemption not authorized by Home Owners' Loan Act, 12 U.S.C. §§ 1463, 1464(a), regulation 12 C.F.R. § 563.39); DeCastro v. AWACS, Inc., 935 F. Supp. 541, 550-55 (D.N.J. 1996) (finding preemption removal not authorized by Federal Communications Act of 1934, 47 U.S.C. § 207 (1994)); Kenney v. Farmers Nat'l Bank, 938 F. Supp. 789, 791-94 (M.D. Ala. 1996) (finding preemption removal not authorized by National Bank Act of 1864, 12 U.S.C. §§ 85-86 (1994)); Giddens v. Hometown Fin. Servs., 938 F. Supp. 801, 804-07 (M.D. Ala. 1996) (same); Hill v. Chemical Bank, 799 F. Supp. 948, 951-52 (D. Minn. 1992) (finding complete preemption under § 521 of Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1831(d) (1994)); Matlock v. First Fed. Sav. & Loan Ass'n, No. Civ.A.88-7172, 1990 WL 82102, at *2 (E.D. Pa. June 12, 1990) (finding preemption removal not authorized by regulations promulgated by Federal Home Loan Bank Board, found at 12 C.F.R. §§ 563.39(a), 545.2); see also Stephen C. Kenney, Recent Developments in Aviation Law, 61 J. Air L. & Com. 3, 27-34 (1995) (discussing preemption removal under Warsaw Convention).

178 930 F.2d 608 (8th Cir. 1991).

179 12 U.S.C. § 86 (1994).

180 See *Nahas*, 930 F.2d at 609.

fendant had properly removed the case to federal court, recharacterized the plaintiff's claim as arising under federal law, and dismissed the complaint because it was barred by the National Bank Act's two-year statute of limitations.[181]

On appeal, the circuit court traced the history of federal regulation of national banks. It explained that while Congress generally allows national banks to charge whatever rates are allowed in their host states, § 86 of the National Bank Act provides the sole remedy for parties suing national banks for usurious interest.[182] The court concluded that it is settled law that § 86 preempts all state usury remedies and disagreed with the plaintiff's argument that changes in the federal law and Arkansas's constitution allowed Arkansas to provide a separate remedy.[183]

The court explained that while states have concurrent jurisdiction under the National Bank Act, a state court would be forced to apply § 86's statute of limitations.[184] The court discussed the complete preemption doctrine and concluded that the doctrine was most appropriate where Congress has created an exclusive federal remedy that replaces overlapping or inconsistent state law.[185] With little further discussion, the court found the complete preemption doctrine applicable and held that the claim was properly removed.[186]

While it is not clear whether the court's conclusion is correct, it is clear that its analysis is inadequate. The court made no mention of congressional intent other than its discussion of the intent to preempt state law. As has been shown, mere preemption alone is not a basis for preemption removal.[187] Even where Congress has provided an exclusive federal remedy, the background assumption of the well-pleaded complaint rule is that a state court generally is able to decide whether the federal statute controls and that preemption alone does

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181 See id.

182 See id. at 610.

183 See id. at 610-11.

184 See id. at 611.

185 See id. at 612.

186 See id. The court only explained that:

> That is precisely the situation here. Section 86 is an exclusive federal remedy, created by Congress over 100 years ago to prevent the application of overly-punitive state law usury penalties against national banks. It is now settled that suits under § 86 may be brought in federal court. Thus, whether or not plaintiff artfully attempted to couch its complaint wholly in state law terms, it was necessarily federal in nature and properly removable.

Id. (citations omitted).

187 See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (repeating Court's holding in *Franchise Tax*, 463 U.S., that, in context of ERISA, "pre-emption, without more, does not convert a state claim into an action arising under federal law"); see also supra Part III.A.

not imply that the decision must be taken out of the hands of the state court. The *Nahas* court's first failure was extending preemption removal without looking for any indication that Congress intended a unique system of jurisdiction.

In addition, the court made little attempt to fit the National Bank Act into the LMRA-ERISA framework. The court did not review the reasons why the Supreme Court authorized preemption removal for these two statutes and, therefore, did not make any attempt to explain the justifications for preemption removal under the National Bank Act. It is possible that the unique issues surrounding the regulation of national banks require preemption removal—perhaps a single state court decision against a national bank would affect so many customers in several states that the risk of allowing a plaintiff to proceed under preempted state law is too great. Despite this plausible explanation, the Eighth Circuit showed no indication that Congress came to this conclusion and provided no rationale of its own.

In contrast to the *Nahas* court's abbreviated discussion, other courts extending preemption removal have used a far more exacting analysis similar to the one endorsed in this Note. In a more recent Eighth Circuit decision,[188] the court found that preemption removal was authorized by the Indian Gaming Regulatory Act (IGRA),[189] the federal law that controls state and federal regulation of Native American gaming. The case concerned a dispute over the licensing of a tribal casino,[190] the plaintiff alleging that the representative of a Native American tribe had violated both state and federal law.[191] The case was removed to federal district court, where the court dismissed the federal claims and remanded the case to state court because no federal questions remained.[192] The defendant then sought review, claiming that the state claims were completely preempted by IGRA.[193]

On appeal, the court briefly reviewed the development of the complete preemption doctrine.[194] Then the court specifically referred to the methodology used by the Supreme Court in deciding *Metropolitan Life*, noting the Supreme Court's review of ERISA's text, committee reports, and floor debates.[195] It then went on to conduct a similar review of IGRA's text, structure, legislative history, and jurisdictional

188 Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996).
189 25 U.S.C. §§ 2701-21 (1994).
190 See *Gaming Corp.*, 88 F.3d at 539.
191 See id.
192 See id.
193 See id.
194 See id. at 542-43.
195 See id. at 544.

framework.[196] The court examined IGRA's legislative history, pointing out the intended strong preemption effect and the consistent reference to federal jurisdiction when referring to court action.[197] It then discussed the statute's regulatory framework, explaining that Congress did not want courts to weigh the relative interests of each party in deciding whether to apply state or federal regulations to gaming activity. "The courts are not to interfere with this balancing of interests . . . ."[198]

The court concluded that the legislative history indicated that IGRA had the requisite extraordinary preemptive force to justify preemption removal.[199] But to support this conclusion, the court went beyond its examination of congressional intent and also looked for unique policy justifications for the extension. The court framed the issue in the context of Native American law, where issues of sovereignty and Congress's constitutional responsibility to protect that sovereignty provide a backdrop for court decisions.[200] It noted that states do not have jurisdiction over Native American lands unless Congress grants it.[201] Finally, the court noted that there are other unusual legal rules that result from these interests, including the rule that "a less stringent test is applied when preemption is asserted as a defense in cases involving Indian affairs."[202] In short, the court focused on the unique issues of Native American sovereignty in assessing a preemption removal claim.

Whether or not the court's conclusion was correct, its analysis is similar to that recommended by this Note. The court supported its conclusions about congressional intent with a discussion of the unique issues involved in this area of federal law, concluding that:

> This line of cases demonstrates a continuing federal concern for tribal economic development, self-sufficiency, and self-government which Congress reaffirmed in the text of IGRA. 25 U.S.C. § 2701(4). In this overall historical context, the intent of Congress that IGRA "expressly preempt the field" is particularly compelling, and the statute can be seen to have the "extraordinary" preemptive force required by *Metropolitan Life*.[203]

Similarly, the court explained why IGRA involved unusual issues that distinguished it from other federal laws that have a strong pre-

196 See id.
197 See id. at 544-45.
198 Id. at 547.
199 See id.
200 See id.
201 See id. at 547 n.12.
202 Id. at 548.
203 Id.

emptive effect on state law. Its discussion of Native American sovereignty suggests that unique problems could arise from an incorrect ruling on a preemption question that allows a suit to proceed under state law.

The court also discussed a balancing of interests similar to that discussed in this Note:[204] "If a state, through its civil laws, were able to regulate the tribal licensing process outside the parameters of its compact with the nation, it would bypass the balance struck by Congress."[205] The effect of an incorrect preemption ruling would threaten to upset this balance. The court's discussion shows that it not only considered Congress's reasons for preempting state law, but also contemplated the effect of upsetting Congress's balancing of the sovereignty of Native American tribes. The final conclusion, which admittedly the court was not explicit in declaring, is that IGRA is highly unusual in authorizing preemption removal because, unlike other laws, it involves issues of sovereignty that should not be left, even occasionally, to state courts and state law.

These two Eighth Circuit opinions demonstrate two very different types of analysis. Whereas one simply assumed Congress wanted complete preemption, justifying its conclusion with rationales applicable to any type of federal preemption, the other focused on congressional intent[206] and explored the unique policy issues underlying the regulation. Considering the significance of preemption removal, the latter approach emerges as a more sophisticated and likely superior analysis.

CONCLUSION

This Note has addressed the question of how to handle the creation of exceptions to an age-old rule of jurisdiction. As Part I explained, the well-pleaded complaint rule is an important part of our system of jurisdiction, representing a compromise among competing issues of federalism, judicial economy, and our concerns about protecting federal rights. Part I also demonstrated that preemption removal operates as an exception to the well-pleaded complaint rule, as

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[204] See supra Part III.B.

[205] *Gaming Corp.*, 88 F.3d at 549.

[206] For an additional opinion emphasizing the need for congressional intent, see Spellman v. Meridian Bank, No. 94-3203, 1995 WL 764548 (3d Cir. Dec. 29, 1995), vacated & reh'g granted, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996). Before vacating the opinion, the court had found that there was no congressional intent to have preemption removal under the National Bank Act, 12 U.S.C. §§ 214-16 (1994), or the Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. §§ 85-86 (1994). See *Spellman*, 1995 WL 764548, at *7.

it allows a defendant to remove a case to federal court based on what is essentially a federal preemption defense. Preemption removal is justified when we are unwilling to take the risk that a few state courts will wrongly allow cases to proceed under state law. It remains, however, a powerful doctrine, as it removes the plaintiff's control over her complaint, taking the unusual step of converting a claim raising only issues of state law into a claim arising under federal law.

Part II explored what is perhaps the most developed area of preemption removal: preemption removal under ERISA. Part II.A explained the nature and scope of ERISA, and most important, the issues about which the writers of the law were concerned in 1974. Part II.B then traced the judicial authorization of preemption removal under ERISA, highlighting the Supreme Court's reliance on a single sentence in ERISA's conference report in coming to the conclusion that preemption removal under ERISA was Congress's will. Part II.C challenged this conclusion, arguing that it is more likely that the 1974 Congress was trying to copy the LMRA's system of jurisdiction because it similarly wanted to empower the federal courts to fashion a body of federal common law.

Looking beyond congressional intent, Part III argued that preemption removal under ERISA is justified by two policy reasons involving unusually drastic consequences that may flow from a few incorrect state court decisions on preemption questions. First, wrongly allowing a plaintiff to obtain a remedy under state law would implicate all other potential plaintiffs who participate in the same benefit plan. This could affect thousands of people because many benefit plans cover the workers of large national employers and labor unions. Second, Congress was concerned that the protection it was providing in ERISA could give employers an incentive to discontinue or scale down benefit plans. Congress carefully balanced the issues and created a limited set of remedies. A few significant awards under state law could have the drastic result of causing employers to cut back radically on employee benefit plans. Preemption removal reduces the possibility that employers will become alarmed by generous, but erroneous, state court judgments.

This Note concludes that, ultimately, preemption removal is justified under ERISA. However, it also urges that preemption removal should be extended only when federal regulation requires a federal forum for a narrow preemption defense because the consequences of incorrect state court decisions would be unusually harmful. This decision is best left to Congress, and, therefore, clear congressional intent should be the primary concern of courts considering an extension of preemption removal. Some statutes, however, may involve policy is-

sues like ERISA's and warrant an extension of preemption removal. Therefore, when congressional intent is unclear, courts should closely examine the purposes and operation of the statutes at issue and should ask whether there are policy issues similar to those implicated by ERISA. The rationale that underlies traditional preemption, the need for a uniform body of law, is simply insufficient. The court must demonstrate why the usually acceptable number of incorrect state court decisions is uniquely unacceptable. Without such an analysis, the expansion of preemption removal is troublesome absent evidence that Congress intended to authorize preemption removal.

While some circuit courts have adopted an approach that resembles the analysis suggested here, others have not been as careful. Preemption removal has been extended by lower federal courts that have found neither clear congressional intent nor searched for truly unique policy justifications. The likely result of these decisions will be what legislators and courts alike have been trying to avoid for years: burgeoning new areas of federal litigation traditionally handled by state courts and a patchwork of unprincipled preemption removal jurisprudence.