CLIMATE CHANGE LITIGATION IN THE FEDERAL COURTS: JURISDICTIONAL LESSONS FROM *CALIFORNIA V. BP*

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On March 21 of this year, something unusual took place at a U.S. courthouse in San Francisco: a group of scientists and attorneys provided Federal District Judge William H. Alsup with a crash course in climate science. The five-hour tutorial was ordered by Judge Alsup in connection with a lawsuit that had been filed by the cities of Oakland and San Francisco ("the Cities") against the world's five largest producers of fossil fuels.[1] The central issue in the case is whether the energy companies can be held liable for continuing to market fossil fuels long after they learned that such fuels contribute to climate change.[2] As you might expect, the lawsuit has attracted a great deal of attention.[3] There are billions of dollars at stake in this case alone, and if the Cities secure a favorable verdict, hordes of public and private plaintiffs will surely follow suit.[4] The case thus carries the potential to reallocate some of the massive social costs associated with climate change.

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1. Initially, the Cities filed separate actions against the energy companies in state court. Shortly after the Defendants removed to federal court, the parties agreed to have the cases related to one another under Local Rule 3-12.

2. California v. BP, P.L.C., Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 1064293, at *1 (N.D. Cal. Feb. 27, 2018), *appeal docketed sub nom.* City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018).

3. *See, e.g.*, Kurtis Alexander, *San Francisco, Oakland Sue Major Oil Companies Over Rising Seas*, SFGATE (Sept. 20, 2017, 9:15 PM), https://www.sfgate.com/bayarea/article/San-Francisco-Oakland-sue-major-oil-companies-12215044.php (on file with the *Michigan Law Review*); Anna Maria Barry-Jester, *Who Should Pay for Climate Change?*, FIVETHIRTYEIGHT (Mar. 22, 2018, 12:28 PM), https://fivethirtyeight.com/features/who-should-pay-for-climate-change/ [https://perma.cc/MM9P-QD4M]; Warren Cornwall, *In a San Francisco Courtroom, Climate Science Gets Its Day on the Docket*, SCIENCE (Mar. 22, 2018, 4:00 PM), http://www.sciencemag.org/news/2018/03/san-francisco-court-room-climate-science-gets-its-day-docket [https://perma.cc/J66S-QUJY]; Chris Megerian, *Bay Area Cities Sue Major Oil Companies Over Climate Change*, L.A. TIMES (Sept. 20, 2017, 12:06 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-climate-1505933864-htmlstory.html [https://perma.cc/A9CQ-7H6W].

4. Pun intended. In fact, there are already a number of similar cases pending in state and federal courts across the country. *E.g.*, County of San Mateo v. Chevron Corp., 294 F.

Before joining issue over the legal and scientific questions at heart of the case, however, the two sides clashed over the choice of forum. Specifically, the Plaintiffs filed their actions in California Superior Court, the Defendants removed to the U.S. District Court for the Northern District of California, and the Plaintiffs sought remand, arguing that the suits fall outside the subject matter jurisdiction of the lower federal courts.[5] The Cities insisted, in particular, that because their public nuisance actions are creatures of California law, they do not "arise under" federal law within the meaning of the federal question statute[6] and therefore cannot be removed.[7] Judge Alsup, however, was unpersuaded. He determined that, even though the Cities styled their claims as state law public nuisance actions,[8] the suits are "necessarily governed by federal common law" and, as such, are eligible for federal court jurisdiction on a federal question theory.[9]

There is no consensus as to whether the availability of federal court jurisdiction in actions like this one is likely to favor plaintiffs or defendants. Some have argued that the federal courts have generally been inhospitable to

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Supp. 3d 934 (N.D. Cal. 2018), *appeal docketed sub nom.*, County of Marin v. Chevron Corp., No. 18-15503 (9th Cir. Mar. 16, 2018); City of New York v. BP, P.L.C., No. 1:18-cv-00182-JFK, 2018 WL 3475470 (S.D.N.Y. July 19, 2018), *appeal docketed*, No. 18-2188 (2d. Cir. July 26, 2018); Notice of Removal, King County v. BP, P.L.C., No. 2:18-cv-00758-RSL (W.D. Wash. May 9, 2018), 2018 WL 2440729; Complaint & Jury Demand, Bd. of Cty. Commr's v. Suncor Energy, Inc., 2018cv030349 (Colo. D. Ct. Apr. 17, 2018); Notice of Removal by Defendant Shell Oil Products Co., Rhode Island v. Chevron Corp., No. 1:18-cv-00395-WES-LDA (D.R.I. July 2, 2018), 2018 WL 3579926.

5. Plaintiff's Motion to Remand to State Court at 2–4, California v. BP, P.L.C., No. 3:17-cv-06012-WHA (N.D. Cal. Nov. 20, 2017).

6. 28 U.S.C. § 1331.

7. Plaintiff's Motion to Remand to State Court, *supra* note 5, at 2.

8. Complaint for Public Nuisance at 37, California v. BP, P.L.C., No. 17-561370 (Cal. Super. Ct. Sept. 19, 2017) [hereinafter "SF Complaint"]; Complaint for Public Nuisance at 32, California v. BP, P.L.C., No. 17-1785889 (Cal. Super. Ct. Sept. 19, 2017) [hereinafter "Oakland Complaint"].

9. *See* California v. BP, P.L.C., 2018 WL 1064293, Nos. C 17-06011 WHA, C 17-06012 WHA, at *2, (N.D. Cal. Feb. 27, 2018), *appeal docketed sub nom* City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018). Judge Alsup later dismissed the suit for failure to state a claim, reasoning that (1) the federal courts are required to "defer to the legislative and executive branches when it comes to . . . international problems," and so (2) the court could not provide relief under the common law. City of Oakland v. BP, P.L.C., Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 3109726, at *6, (N.D. Cal. June 25, 2018), *appeal docketed*, City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018). Just a few weeks after Judge Alsup issued his order on the jurisdictional question in *California v. BP, P.L.C.*, Judge Chhabria (who also sits on the U.S. District Court for the Northern District of California) remanded a similar case that had been filed in California court by a different group of local governments against a group of energy companies. *See* County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), *appeal docketed sub nom.* County of Marin v. Chevron Corp., No. 18-15503 (9th Cir. Mar. 27, 2018). Judge Chhabria rejected the defendants' contentions that the plaintiffs' claims (1) necessarily sound in federal common law, and (2) are completely preempted by federal law. *See id.* It won't be long before the Ninth Circuit has to resolve the jurisdictional question, most likely in connection with an appeal in *California v. BP*.

climate change actions like this one, and so the decision constitutes a "significant setback" for the Cities.[10] Others, however, speculate that Judge Alsup's decision could "open the floodgates for climate-change litigation in federal courts around the country . . . [t]he size and scale of [which] could mirror the tobacco litigation that began in the 1990s."[11]

But even as observers have opined about the potential consequences of Judge Alsup's holding, they have afforded little attention to the particular procedural device on which his opinion rests: the obscure doctrine of complete preemption.[12] Complete preemption enables federal courts to take claims that have been framed by plaintiffs as state law causes of action, treat them as if they were in fact creatures of federal law, and then exercise jurisdiction under the federal question statute.[13] The doctrine is unusual and controversial.[14] It transgresses the venerable rule that the plaintiff is the master of her complaint—free to choose whether to bring claims of this sort or that, including whether to eschew federal claims in favor of ones grounded in state law alone. Moreover, Judge Alsup's application of the doctrine is unusual in its own right. It authorizes removal on the ground that *federal common law* necessarily governs the Plaintiffs' claims. This move is difficult to reconcile with a fifteen-year trend in complete preemption jurisprudence that places congressional intent at the center of the doctrine.

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10. *Federal Court Asserts Jurisdiction Over Cities' Climate Nuisance Suit*, INSIDEEPA.COM: DAILY BRIEFING, Mar. 2, 2018, 2018 WLNR 6563745; *see also* Bina R. Reddy et al., *Industry Wins First Round in California Climate Change Litigation*, BEVERIDGE & DIAMOND, PC (Feb. 28, 2018), http://www.bdlaw.com/news-2201.html [https://perma.cc/KCQ7-KTCM] (asserting that Judge Alsup's ruling is a "serious blow" to the Plaintiffs and that if the decision holds up on appeal, "plaintiffs' novel climate change challenge will face a steep uphill battle"). The National Association of Manufacturers issued a statement shortly after Judge Alsup issued his opinion in which it claimed that "[p]recedent shows that similar cases heard in federal court have been unsuccessful for plaintiffs looking to pin the global challenge of climate change on manufacturers"). *MAP Statement on Federal District Court Decision to Hear San Francisco Climate Case*, MANUFACTURERS' ACCOUNTABILITY PROJECT (Feb. 28, 2018), http://mfgaccountabilityproject.org/2018/02/28/map-statement-san-francisco-federal-district-court-decision-hear-climate-case/ [https://perma.cc/RWP3-FLFR].

11. Brian H. Potts, *A California Court Might Have Just Opened the Floodgates for Climate Litigation*, FORBES (Mar. 1, 2018, 4:42 PM), www.forbes.com/sites/brianpotts/2018/03/01/a-california- court-might-have-just-opened-the-floodgates-for-climate-litigation/#9970d7f18518 [https://perma.cc/4LFK-5Y9M]; *see also* Seth Jaffe, *Federal Common Law Controls California Climate Actions: Never a Dull Moment*, FOLEY HOAG LLP (Mar. 2, 2018), https://www.lawandenvironment.com/2018/03/02/federal-common-law-controls-california-climate-actions-never-a-dull-moment/ [https://perma.cc/2C86-8EGH] (suggesting that "[t]his might be . . . a 'be careful what you wish for' scenario" for the energy companies).

12. Judge Alsup's opinion denying the Plaintiffs' motion to remand does not mention complete preemption by name. As I explain below, however, the case is best understood as an application of that doctrine. *See infra* Part I.B.

13. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 (2003) (holding that a claim styled by plaintiffs as a state common law action for the charging of usurious interest "necessarily ar[ose] under federal law" and was, therefore, removable to federal court).

14. *See id.* at 13–20 (Scalia, J., dissenting).

As a result, there's a high likelihood that this case will end up back in the California courts. Although Judge Alsup has now reached the merits (and dismissed the case),[15] the question of his jurisdiction to rule in the first place will surely be contested on appeal. If the Court of Appeals concludes that removal was improper (and other courts handling similar litigation agree), then state courts could emerge as the primary fora for climate change litigation. They might or might not determine that state law nuisance actions of this sort are preempted by federal law, but it will be *state courts*, not federal courts, that do the determining (at least until the Supreme Court gets involved).

The case also provides a good opportunity to reconsider the rules that govern federal question jurisdiction, especially the doctrine of complete preemption. It is worth asking, in particular, why Judge Alsup concluded that federal jurisdiction ought to lie in this case, what a jurisdictional regime that accommodates such a case would look like, and how these considerations bear on the shape of complete preemption doctrine.

This Essay has two Parts. Part I provides more detail about the case itself—*California v. BP*—and describes the central elements of Judge Alsup's holding. It attempts to show that, although Judge Alsup's opinion does not mention complete preemption by name, the doctrine—or something very much like it—provides the analytic foundation for his decision. Part II zooms out. It assesses how Judge Alsup's opinion fits within complete preemption jurisprudence more broadly and considers what we might learn from his unorthodox application of the complete preemption rule.

I. CALIFORNIA V. BP

A. Background and Holding

On September 19, 2017, the cities of Oakland and San Francisco filed separate complaints in California Superior Court against the world's largest producers of fossil fuels: BP, Chevron, ConocoPhillips, ExxonMobil, and Shell.[16] The Cities sought an order directing the Defendants to fund an abatement program that will build sea walls and other infrastructure to protect persons and property from harm caused by global warming–induced sea-level rise.[17]

The theory of the case is fairly simple. It is that fossil fuel use is the leading cause of climate change, that the Defendants continued to produce and (misleadingly) market fossil fuels even after learning of this causal

15. California v. BP, P.L.C., Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), *appeal docketed sub nom.* City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018).

16. SF Complaint, *supra* note 8, at 1; Oakland Complaint, *supra* note 8, at 1.

17. SF Complaint, *supra* note 8, at 5; Oakland Complaint, *supra* note 8, at 5.

relationship, and that the Defendants ought therefore to pay for some of the costs associated with adjusting to our changed climate.[18] The Plaintiffs' focus on the marketing and sale of fossil fuels (as opposed to their use) is important.[19] In fact, the Cities took special care to note in their complaints that they do not seek to hold the Defendants liable for the emission of greenhouse gases.[20] Earlier suits against energy companies had taken that tack, and both the Supreme Court and the Ninth Circuit turned such cases away on the ground that the claims advanced by the plaintiffs were displaced by the Clean Air Act.[21] Oakland and San Francisco were thus careful to identify the marketing and sale (not the burning) of fossil fuels as the relevant public nuisance.[22]

As noted above, the Defendants removed to federal court. Their Notice of Removal lays out a whopping seven different theories to support federal jurisdiction, most of them rooted in 28 U.S.C. § 1441.[23] That statute authorizes federal courts to exercise removal jurisdiction over "any civil action brought in a State court of which the district courts of the United States have original jurisdiction."[24] In other words, § 1441 authorizes the removal of cases that could've been filed in federal court as an initial matter. Here, the Defendants argued that the Cities' claims qualify for original federal jurisdiction because they "aris[e] under" federal law within the meaning of 28 U.S.C. § 1331. In particular, the Defendants insisted that the Plaintiffs' claims implicate "uniquely federal interests" and therefore arise under federal common law.[25] More generally, the Defendants argued that

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18. SF Complaint, *supra* note 8, at 1-5; Oakland Complaint, *supra* note 8, at 1–5.

19. *See* Plaintiff's Motion to Remand to State Court, *supra* note 5, at 8.

20. SF Complaint, *supra* note 8, at 5; Oakland Complaint, *supra* note 8, at 5.

21. *See* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 424 (2011) ("[T]he Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012), *cert. denied*, 569 U.S. 1000 (2013) ("[T]he Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief.").

22. The Plaintiffs alleged, in particular, that the Defendants "engaged in large-scale, sophisticated advertising and public relations campaigns to . . . portray fossil fuels as environmentally responsible" and "sponsored public relations campaigns . . . to deny and discredit the mainstream scientific consensus on global warming [and] downplay the risks of global warming." SF Complaint, *supra* note 8, at 3; Oakland Complaint, *supra* note 8, at 2. In developing this argument, the Plaintiffs made a point of analogizing the energy companies' marketing efforts to those at issue in the tobacco litigation of the 1990s. *See* SF Complaint, *supra* note 8, at 23-26; Oakland Complaint, *supra* note 8, at 21-24.

23. Defendants' Notice of Removal at 3–5, California v. BP, P.L.C., No. 17-1785889 (Cal. Super. Ct. Sept. 19. 2017) [hereinafter "Defendants' Notice of Removal"].

24. 28 U.S.C. § 1441.

25. Defendants' Notice of Removal, *supra* note 23, at 3. Defendants also argued that federal jurisdiction is appropriate because the Plaintiffs' claims necessarily raise substantial federal questions sufficient to support federal jurisdiction under the Supreme Court's decision in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*., 545 U.S. 308 (2005).

these lawsuits implicate a wide range of important national policies (including ones relating to national security, energy regulation, environmental protection, and international affairs), and so they cannot and should not be left to the state courts.[26]

The trial court agreed. Judge Alsup reasoned that "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints."[27] "[T]he scope of the worldwide predicament," he explained, "demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law."[28] He concluded, accordingly, that "[f]ederal jurisdiction is . . . proper."[29]

B. Complete Preemption?

Judge Alsup's opinion doesn't mention complete preemption by name, but I think it's clear that the doctrine supplies the analytic framework for his decision. To understand how the doctrine functions (and why I think it's driving Judge Alsup's decision), it is helpful to begin with the basic mechanics of federal question jurisdiction. The federal question statute, 28 U.S.C. § 1331, authorizes federal courts to exercise original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." In the famous case of *Louisville & Nashville Railroad v. Mottley*, the Supreme Court explained that a suit "aris[es] under" federal law within the meaning of this statute "only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that

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Grable is part of a line of cases that establishes an exception to the general rule that only federal causes of action will support jurisdiction under the federal question statute. *Grable* specifies that § 1331 jurisdiction will lie over a state law cause of action if it "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. Plaintiffs further insisted that jurisdiction could be predicated on the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b), the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), the Bankruptcy Removal Statute, 28 U.S.C. § 1452(a), a series of cases recognizing federal court jurisdiction over certain actions arising on federal enclaves, and on the theory that Plaintiffs' claims are completely preempted by the Clean Air Act. Defendants' Notice of Removal, *supra* note 23, at 21–32.

26. Defendants' Notice of Removal, *supra* note 23, at 2-3.

27. California v. BP, P.L.C., Nos. 17-06011-WHA, 17-06012-WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *appeal docketed sub nom.* City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018).

28. *Id.*

29. *Id.* at *5. In reaching this conclusion, the court rejected the Plaintiffs' claim that their novel theory of liability (directed at marketing and sale, rather than use, of fossil fuels) brought the suit outside the ambit of the federal common law. *Id.* at *3–4. It also rejected the notion that any federal common law claims that might be in play are displaced by the Clean Air Act, and that state law is left to govern in its place. *Id.* at *4–5.

Constitution."[30] This means that § 1331 jurisdiction cannot be premised on the claims the defendant brings to the table or on the plaintiff's responses to them. Instead, as the saying goes, courts must look only to the "face of the plaintiff's well-pleaded complaint" to determine whether jurisdiction will lie.[31]

One consequence of this is that federal question jurisdiction typically does not extend to cases in which the plaintiff presents only state law causes of action (since examination of the well-pleaded complaint, under such conditions, will reveal no questions of federal law).[32] And when you piece this together with the longstanding "master of the complaint" rule—"the party who brings a suit is master to decide what law he will rely upon"[33]—it becomes clear that a plaintiff can prevent removal to federal court (at least on federal question grounds) by declining to press any federal claims.

Complete preemption is an exception to all of this. It enables defendants to remove to federal court on an "arising under" theory even when the plaintiff's complaint relies exclusively on state law. The doctrine is rooted in the notion that, in some instances, Congress enacts statutes that "so completely pre-empt a particular area that any civil complaint raising [a] select group of claims is *necessarily federal in character*."[34] A state law claim that falls within the ambit of a completely preemptive federal statute is, according to the doctrine, "purely a creature of federal law," the plaintiff's characterization of the claim notwithstanding.[35] Indeed, when a plaintiff files a state law claim that is completely preempted, courts will classify the filing as an exercise in artful pleading—an effort to escape the jurisdiction of the federal courts by disguising what is, inescapably, a federal cause of action as a claim grounded in state law.[36] Complete preemption is thus framed as an exercise in thwarting a ruse. The doctrine allows judges to transform a plaintiff's state law claim into a federal cause of action (or, as the cases would have it, it allows them strip away the state law façade that is being used to

30. 211 U.S. 149, 152 (1908).

31. *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.").

32. The key exception is the *Grable* doctrine. *See supra* note 25.

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

34. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987) (emphasis added).

35. *See id.* at 64 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 23 (1983)).

36. *See, e.g.*, Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998); King v. Marriott Int'l, Inc., 337 F.3d 421, 425 (4th Cir. 2003) ("[T]he plaintiff simply has brought a mislabeled federal claim"); Burda v. M. Ecker Co., 954 F.2d 434, 438 (7th Cir. 1992) ("[A] federal court may, in some situations, look beyond the face of the complaint to determine whether a plaintiff has artfully pleaded his suit so as to couch a federal claim in terms of state law. In these cases, we will conclude that a plaintiff's claim actually arose under federal law and is therefore removable.").

obscure the federal essence of the claim) and to exercise jurisdiction on federal question grounds.

With this background in place, it's easy to see complete preemption at work in *California v. BP*. "Federal jurisdiction," Judge Alsup wrote, "exists in this case if the claims *necessarily arise under* federal common law."[37] This formulation echoes the Supreme Court's oft-repeated claim that, when complete preemption takes hold, "any complaint that comes within the scope of the federal cause of action *necessarily arises under* federal law."[38] Moreover, in the course of explaining why the exercise of jurisdiction on the facts presented is consistent with the well-pleaded complaint rule, Judge Alsup explained that "Plaintiffs' claims for public nuisance, though pled as state law claims . . . are governed by federal common law."[39] This passage calls attention to Judge Alsup's exercise of the power that lies at the heart of (indeed, it essentially defines) complete preemption—the power to take a claim that has been framed by the plaintiff in state law terms and treat it as a federal cause of action. Despite Judge Alsup's failure to say so, then, *California v. BP* is best understood as a complete preemption case.

II. COMPLETE PREEMPTION AND FEDERAL COMMON LAW

A. A Poor Fit

Although it is clear, upon careful analysis, that *California v. BP* relies on a complete preemption approach, it is equally clear that the court's application of the doctrine is unorthodox. To see why and how this is so, we need to dive a bit deeper into the case law. Complete preemption was first deployed by the Supreme Court in 1968,[40] but it was not until 2003, in a case called *Beneficial National Bank v. Anderson*,[41] that the Justices clearly identified the essential features of a completely preemptive federal statute. There the Court explained that (1) application of the complete preemption rule is contingent on the "pre-emptive force" of federal law,[42] and (2) the requisite level of force is present when "the federal statutes at issue provide[] the exclusive cause of action for the claim asserted and also set forth

37. California v. BP, P.L.C., Nos. 17-06011-WHA, 17-06012-WHA, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018), *appeal docketed sub nom.* City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018) (emphasis added).

38. Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 24 (1983) (emphasis added) (internal quotation marks omitted).

39. *BP*, 2018 WL 1064293, at *5.

40. *See* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557 (1968) (deeming plaintiff's state law contract claim eligible for federal jurisdiction on a federal question theory).

41. 539 U.S. 1 (2003).

42. *Id.* at 7.

procedures and remedies governing that cause of action."[43] This means that aggressive federal preemption of state law is not enough, on its own, to support federal court jurisdiction on a complete preemption theory.[44] What is necessary, rather, is that federal law preempt the state law cause of action advanced by the plaintiff *and* supply a cause of action through which the plaintiff might seek relief for the harm alleged. Numerous cases from the lower federal courts confirm that this is the central lesson of *Beneficial National Bank*.[45]

In the years since *Beneficial National Bank* was decided, the lower federal courts have deemed a variety of federal statutes to be completely preemptive, including the Copyright Act,[46] the Carriage of Goods at Sea Act,[47] the Securities Litigation Uniform Standards Act,[48] and fragments of the Bankruptcy Code.[49] Moreover, and crucially for purposes of this Essay, the cases have repeatedly signaled that careful attention to congressional intent is an essential feature of complete preemption analysis. Thus, one Court of Appeals has noted that the "extraordinary preemptive force" necessary to a finding of complete preemption "must be manifest in the clearly expressed intent of Congress."[50] And another has explained that "the linchpin of an inquiry into the existence of complete preemption is Congress's intent about whether or not to create an exclusive federal cause of action."[51]

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43. *Id.* at 8.

44. It is a longstanding rule of federal court jurisdiction that "a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." Gully v. First Nat'l Bank, 299 U.S. 109, 116 (1936). *Beneficial National Bank* did not purport to disturb that rule. *See* 539 U.S. at 8.

45. *See, e.g.*, Johnson v. MFA Petroleum Co., 701 F.3d 243, 252 (8th Cir. 2012) ("Other circuits generally agree that the lack of a federal cause of action is fatal to a complete preemption argument."); Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1244–46 (9th Cir. 2009); Harris v. Pacificare Life & Health Ins. Co., 514 F. Supp. 2d 1280, 1294–96 (M.D. Ala. 2007).

46. *See, e.g.*, Ritchie v. Williams, 395 F.3d 283, 286–87 (6th Cir. 2005); Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 304-05 (2d Cir. 2004), *cert. denied*, 544 U.S. 949 (2005).

47. *See, e.g.*, Continental Ins. Co. v. Kawasaki Kisen Kasha, Ltd., 542 F. Supp. 2d 1031, 1033–35 (N.D. Cal. 2008).

48. *See, e.g.*, U.S. Mortgage, Inc. v. Saxton, 494 F.3d 833, 843–45 (9th Cir. 2007)

49. *See, e.g.*, *In re* Miles, 430 F.3d 1083 (9th Cir. 2005).

50. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1353 (11th Cir. 2003), *reh'g denied*, 67 F. App'x 590 (11th Cir. 2003), *cert. denied*, 540 U.S. 946 (2003) (internal quotation marks omitted).

51. López-Muñoz v. Triple-S Salud, Inc., 754 F.3d 1, 8 (1st Cir. 2014); *see also, e.g.*, Smart v. Local 702 Int'l Bhd. of Elec. Workers, 562 F.3d 798, 804 (7th Cir. 2009) (quoting Vorhees v. Naper Aero Club, Inc., 272 F.3d 398, 403 (7th Cir. 2001)) ("To determine whether a claim is subject to complete preemption, we ask whether 'Congress clearly intended completely to replace state law with federal law and create a federal forum.' "); Roddy v. Grand Trunk W. R.R., 395 F.3d 318, 326 (6th Cir. 2005), *cert. denied*, 546 U.S. 928 (2005) ("Complete preemption represents a substantial departure from the firmly established well-pleaded complaint rule. This Court is hesitant to find such a departure absent clear Congressional intent to that effect."); *see also* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND

The focus on congressional intent is easy to explain. Complete preemption is a judge-made doctrine that deviates from (or, at the very least, bends) a series of overlapping, deeply entrenched rules governing the jurisdiction of the federal courts: that the plaintiff is the master of her complaint; that state law causes of action will not support jurisdiction under § 1331;[52] and that federal defenses—including a defense of preemption—cannot serve as the predicate for § 1331 jurisdiction. Moreover, the doctrine wrests authority from the state courts over important questions pertaining to the viability of (what at least appear to be) state law claims. That's an awful lot to do based solely on a judge's intuition that it would make good sense for a set of claims to be heard in federal court. Far better, it would seem, if the move can be justified on the ground that it's what Congress wants.[53]

Judge Alsup, however, could offer no such justification, for he concluded that the public nuisance actions filed by Oakland and San Francisco are preempted by federal *common law*. Congressional intent, quite obviously, was out of the picture,[54] and in this way, the decision is out of step with prevailing doctrine.[55] One could try to defend Judge Alsup's opinion by insisting that it is in fact *not* an application of the complete preemption rule. One might read the opinion to hold, instead, that the Cities' claims are

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PROCEDURE § 3722.2 (4th ed. 2018) ("[F]ederal courts faced with removals purportedly based on complete preemption have often focused on Congressional intent."). Some cases go a step further and require that the relevant intent be made clear in the text of the federal statute. *See, e.g.*, Lontz v. Tharp, 413 F.3d 435, 440–41 (4th Cir. 2005).

This focus on congressional intent actually predates *Beneficial National Bank*. Thus, in *Metropolitan Life Insurance Co. v. Taylor*, in the course of deeming s 502(a) of ERISA to be completely preemptive, the Supreme Court emphasized that "the touchstone of the federal district court's removal jurisdiction is . . . the intent of Congress." 481 U.S. 58, 66–67 (1987) ("[T]his suit, though it purports to raise only state law claims, is necessarily federal in character by virtue of the clear manifested intent of Congress.").

52. *But see supra* note 25 (discussing the line of Supreme Court cases that allows for the exercise of federal question jurisdiction over state law causes of action that necessarily raise federal issues).

53. *See* Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. PENNUMBRA 186, 193–94 (2007) (noting separation of powers–based difficulties raised by complete preemption doctrine). *See id.* at 187 (concluding that "complete preemption should depend on congressional intent, not judicial invention").

54. This is not to say that complete preemption and federal common law can never travel together. Indeed, the Supreme Court's first complete preemption case, Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 57 (1968), held that state law claims pertaining to a collective bargaining agreement were completely preempted by federal common law. But the Court made clear in that case that the Labor Management Relations Act requires federal courts to create the relevant substantive law, *see id.* at 559; so, convoluted though the reasoning may be, the decision is consistent with the Court's subsequent teaching that congressional intent is essential to a finding of complete preemption.

55. *See, e.g.*, Signer v. DHL Worldwide Express, Inc., No. 06-61932-CIV, 2007 WL 1521497, at *5 (S.D. Fla. May 22, 2007) ("A problem with the argument that federal common law can convey federal question jurisdiction based on complete preemption of state law claims is . . . that the complete preemption inquiry turns on the question of Congressional intent.").

necessarily federal in character and that the existence of federal question jurisdiction follows straightforwardly from that fact (with no resort to the rather bizarre doctrine of complete preemption necessary). This approach has at least two virtues. First, it enables us to eschew the seemingly unfair tactic of simultaneously insisting that Judge Alsup (1) deployed a doctrine that his opinion does not even bother to mention, and (2) deployed that doctrine incorrectly. Second, it allows us to make at least some sense of the judge's failure to address congressional intent. If this isn't a complete preemption case, then there's no particular reason to expect the court to check the boxes associated with that doctrine.

Unfortunately, this line of reasoning raises at least as many questions as it answers, largely because Judge Alsup's opinion offers no explanation for its disregard of the master of the complaint rule. It does not explain, in other words, where the court comes off insisting that the Plaintiffs' state law public nuisance actions *just are* federal claims and that they can be treated, for jurisdictional purposes, as if they had been pleaded in federal terms.[56] Outside the context of the complete preemption doctrine, that's just not something federal courts do.[57] So we can shield Judge Alsup's opinion from criticism for its failure to consider congressional intent; but we can do so only by severing the opinion from the only doctrine that is both firmly grounded in precedent and (at least theoretically) capable of justifying the holding.

B. A Flawed Framework

Judge Alsup's holding with respect to the jurisdictional issue in *California v. BP* is of interest not only because of its consequences for that particular case (and, potentially, for climate change litigation more generally) but also because it calls attention to important ways in which complete preemption doctrine is unsatisfying. Consider Judge Alsup's claims that "[a] patchwork of fifty different answers to the [issues raised in this case] would be unworkable"[58] and that the problem of global warming "crie[s] out for a uniform and comprehensive solution."[59] If he's right about

56. To be sure, the complete preemption doctrine also makes a hash of the master of the complaint rule, *see* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 13–20 (2003) (Scalia, J., dissenting), but it is a doctrine with fifty-year-old precedential roots at the Supreme Court level and has been applied thousands of times over the years by the lower federal courts.

57. To be fair, two Courts of Appeals have determined that federal common law governs the liability of an air carrier for lost or damaged goods, that suits falling within the ambit of the relevant common law rules are eligible for federal question jurisdiction, and that this is true even when the plaintiff frames the action in state law terms. Treiber & Straub, Inc. v. United Parcel Serv., Inc., 474 F.3d 379, 384 (7th Cir. 2007); Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 926–29 (5th Cir. 1997). But neither court makes any effort to square its decision with the master of the complaint rule.

58. California v. BP, P.L.C., Nos. 17-06011-WHA, 17-06012-WHA, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018), *appeal docketed sub nom.* City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018).

59. *Id.*

this, then considerations of sound jurisdictional policy would seem to militate in favor of removal, since (as Judge Alsup correctly observes)[60] we tend to look to the federal courts when the interest in uniformity looms large.[61]

Indeed, in other contexts, the Court has proven willing to doctor the law of federal court jurisdiction (including by bending the well-pleaded complaint rule) in light of such considerations. Thus, the Court has explained that, despite the general rule limiting the exercise of federal question jurisdiction to federal causes of action, it is sometimes permissible for federal courts to rely on § 1331 to assert jurisdiction over state law claims. This is because of "the commonsense notion that a federal court ought to be able to hear claims recognized under state law that [implicate questions of federal law and therefore] justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[62] Similarly, the Justices have explained that federal court jurisdiction ought to be construed as exclusive, even absent an explicit congressional directive to that effect, where "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims" loom large.[63] Complete preemption, however, casts these considerations aside; it turns on a factor—the availability of a federal cause of action to replace the preempted state law claim—that does not track the interest in uniformity or any of the other policies underlying the establishment of federal question jurisdiction.[64] The reasons to single out the covered cases for special jurisdictional treatment remain elusive.

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60. *Id.*

61. Whether the federal courts are actually well equipped to supply uniform answers to questions of federal law is subject to debate. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 114–24 (2009). But there is no doubt that Judge Alsup's view is the dominant/conventional one. *See id.* at 106–08. *See also, e.g.*, AM. LAW. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 165–66 (1969) ("There is reason . . . to believe greater uniformity results from hearing [federal question] cases in federal courts.").

62. Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 312 (2005).

63. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483–84 (1981).

64. *See* Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 561–66 (2007). *See also id.* at 565 ("The interest in uniformity is served in overwhelming part by preemption—by the disabling of state and local rules that fail to conform to federal standards. The question of whether to allow enforcement of the federal scheme through a private right of action may run along an entirely different track."). In his dissenting opinion in *Beneficial National Bank,* Justice Scalia makes a similar point with respect to the interest in crafting jurisdictional rules with an eye to avoiding the erroneous interpretation of federal law by state courts. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 20–21 (2003) (Scalia, J., dissenting) ("[T]here is no more reason to fear state-court error with respect to federal pre-emption accompanied by creation of a federal cause of action than there is with respect to federal pre-emption unaccompanied by creation of a federal cause of action.").

This is not to say that we'd be better off if the doctrine authorized the move Judge Alsup makes in *California v. BP*. Even in its conventional form, complete preemption is pretty potent stuff. It enhances federal judicial power at the expense of plaintiffs (when it comes to choosing claims) and state courts (when it comes to deciding them). If complete preemption can attach when state law is preempted by federal *common law*, it introduces another form of federal judicial empowerment to the mix—this time at the expense of Congress. And while there's nothing earthshaking about federal judges making law[65] (including law that can be wielded to defeat a state law cause of action[66]), the simultaneous arrogation of powers typically exercised by plaintiffs, state courts, and Congress ought to give us pause. It means trading off on the values of litigant choice, state autonomy, and the separation of powers all at once.[67]

A better approach would combine Judge Alsup's focus on the interest in uniformity with the current doctrine's insistence on congressional guidance. As I have argued elsewhere, the best way to do so would be to focus attention on the breadth of federal preemption of state law and, in particular, on the question of whether Congress has fully occupied a given field.[68] When Congress occupies a field, it disables states from creating the sort of

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65. This is true, *Erie* notwithstanding. *See* Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) ("*Erie* led to the emergence of a federal decisional law in areas of national concern . . . .").

66. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

67. There is some temptation to argue that if federal courts can create common law, and they are also permitted, under the right conditions, to transform a state law cause of action into a federal claim and then exercise jurisdiction over that claim, then there should be no constraint on their ability to do those things concurrently. But I don't think this conclusion follows. One might reasonably be willing to do the first two of those things (i.e., find complete preemption) only if there is a strong signal from Congress that it's appropriate. And one might generally be willing to do the last of these things (i.e., authorize judicial lawmaking), but not if it means casting aspersions on state courts' capacity to adjudicate federal claims and/or ignoring a plaintiff's choice to advance one claim and not another.

Note also that, given the grounds for Judge Alsup's subsequent dismissal of this lawsuit, *see supra* note 9, his jurisdictional holding rests on the notion that the Cities' state law nuisance claims are completely preempted by a federal common law cause of action that does not exist. Judge Alsup took note of this curiosity in his opinion. *See* City of Oakland v. BP, P.L.C., Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 3109726, at *9 (N.D. Cal. June 25, 2018), *appeal docketed sub nom.* City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. Sept. 4, 2018). To be sure, it is the possible that (1) a plaintiff will present (what she believes are) state law claims that (2) fall within the ambit of completely preemptive federal law and are therefore (3) subject to removal jurisdiction even though (4) the plaintiff cannot make out the theoretically available federal claim. But that sort of scenario is considerably easier to swallow when we can, say, look to a federal statute to identify the contours of the federal claim that the plaintiff turns out to be unable to advance successfully. It's not entirely clear what, if anything, Judge Alsup imagines that a viable federal common law claim in the climate change space might look like. And that, in turn, gives cause to wonder whether the species of complete preemption deployed in this case does nothing more than enable a federal court to adjudicate a federal defense to a state law cause of action.

68. *See* Seinfeld, *supra* note 64, at 574–77.

regulatory patchwork that Judge Alsup worried about in *California v. BP*.[69] Indeed, it is often the case that supplying a uniform rule is *the point* of Congress's decision to preempt an entire field. A court that finds field preemption can safely draw a strong inference about the importance of uniform regulation in the relevant context; and it can reasonably conclude, too, that there might be especially powerful reasons to allow for federal court jurisdiction.[70]

To be sure, there is reason to wonder whether courts ought to be in the business of tinkering with the rules of federal jurisdiction even under these circumstances. There is nothing to prevent Congress from specifying—whether in connection with statutes that preempt an entire field, create an exclusive federal cause of action, or otherwise—that the ordinary rules of federal question jurisdiction are to be set aside.[71] And if we're going to take issue with Judge Alsup's opinion in *California v. BP* for its failure to consider congressional intent, we ought also to ask whether complete preemption as a whole—which, however it is conceived, relies on a mix of inference from congressional action and judicial intuition about sound jurisdictional policy—allows for an excessive measure of judicial law-making. That question is beyond the scope of this brief Essay. For now, I am content to note that (1) the federal courts have long been in the habit of tinkering at the margins of federal question jurisdiction, even without explicit guidance from Congress,[72] (2) complete preemption itself has been around for fifty years, and (3) it has been deployed by the lower federal courts with increased frequency ever since *Beneficial National Bank* was decided. For all of these reasons, it seems worthwhile to consider ways to make the doctrine function better, even if there are reasons to doubt its soundness as a whole. *California v. BP* can help us to do that. It calls attention to the policy considerations that ought to guide application of the complete preemption rule and to the hazards of pulling the doctrine even further from the clearly expressed intent of Congress.

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69. *See id.* at 574–76.

70. *See supra* text accompanying notes 60–63.

71. *See* Morrison, *supra* note 53, at 194 ("Congress could surely enact such an exception to [the well-pleaded complaint rule], permitting removal on the basis of certain federal defenses . . . . But in the absence of any such congressional action, the wholly judge-made doctrine of complete preemption chafes with the rule that federal jurisdiction is 'not to be expanded by judicial decree.'" (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994))).

72. *See supra* text accompanying notes 62–63.