CATCH AND RELEASE JURISDICTION

*Adam B. Sopko**

Review of Zachary D. Clopton, *Catch and Kill Jurisdiction*, 120 MICH. L. REV. 171 (2022).

INTRODUCTION

In *Catch and Kill Jurisdiction*, Professor Zachary Clopton sheds light on an increasingly common phenomenon in which federal courts are expanding the power of the federal judiciary in a way that frustrates the enforcement of substantive rights.[1] Federal courts expansively interpret their jurisdiction to reach cases that arguably belong in state court, then apply federal procedural doctrines to dismiss the cases on non-merits grounds.[2] First catch, then kill. Clopton argues we find catch and kills when the federal court system is not overly burdened and in areas where federal judges are "hostile" to a class of claims or litigants.[3] Catch and kills also incentivize more catch and kills. When a federal court endorses these tactics, it legitimizes the dubious readings of federal jurisdiction that support them. This encourages defendants to argue for more expansive readings of jurisdiction or make similar arguments in other courts.[4] As more cases flow into federal courts that are of a kind that federal judges oppose, these judges will expand or sharpen the catch and kill trap.

Though catch and kills appear in tension with several truisms of federal jurisdiction, Clopton contends the phenomenon is, to an extent, "baked in the cake of federal jurisdiction," and thus, some level of catching and killing is inevitable—and perhaps desirable.[5] But Clopton is no fan of catch and kills. He suggests the practice presents several concerns that warrant our attention. Catch and kills are the product of discretion by life-tenured judges who have created the constituent doctrines across numerous discrete cases, "diffus[ing]" accountability.[6] Additionally, the machinery—complete preemption, forum non conveniens, etc.—is too

* Staff Attorney, State Democracy Research Initiative, University of Wisconsin Law School. Thanks to Zachary Clopton for feedback on this Essay; I also benefited from an initial conversation with James Pfander. Thanks also to the editors of the *Michigan Law Review*, especially Zofia Peach, for helpful feedback and suggestions.

1. Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171 (2022).
2. *Id.* at 177–80.
3. *Id.* at 175, 202–03.
4. *Id.* at 192, 202–03.
5. *Id.* at 205.
6. *Id.* at 205–10.

abstract and complicated to attract and hold public attention.[7] Catch and kills also proceed in a dialect of neutrality, defeating climate change or opioid epidemic litigation purportedly based on vague notions of separation of powers or comity.[8] Thus, the tactics deviously evade culpability and public scrutiny. Catch and kills also create substantial federalism issues. As Clopton forcefully shows, federal judges are not rewriting state substantive law, yet federal procedural devices nevertheless change state substantive law by changing substantive outcomes.[9] That is, the outcome is different purely because a case is before a federal rather than state court judge.

As to solutions, Clopton is not optimistic. Devices like hypothetical jurisdiction and snap removal are too technical and legalistic to mobilize the public support necessary to trigger a legislative response.[10] Clopton sees the courts as a likely dead end as well. The U.S. Supreme Court has avoided reviewing cases that implicate catch and kill or deciding cases in ways that make it more effective, and the lower federal courts largely apply the Supreme Court's pro-catch and kill case law.[11] He also argues catch and kill mechanics are such that state court jurisdiction and procedure have "no bearing" on the issue and thus are unlikely to offer help.[12]

Instead, he argues reform is most likely found in individual cases. Circuit courts may differ in how broadly they construe federal jurisdiction, a core lever for catch and kill.[13] Additionally, individual lower court judges may be more solicitous to arguments concerning "democracy, federalism, and the judicial role" or persuaded by statements from the executive branch that there is no federal interest implicated in the case.[14] Clopton notes that even these "retail" strategies, though, are limited in their reach, as unsophisticated, non-repeat litigants will likely be unable to exploit them.[15] He concludes that we should be concerned about catch and kill, not in any one case but rather as a result of its repeated use.[16]

Clopton persuasively shows how deeply problematic catch and kill is, especially because the options to combat the phenomenon are so limited. I agree with his diagnosis, but I am not entirely convinced litigants are so limited to retail responses. In this brief Essay, I identify and develop three potential responses that may limit catch and kill beyond individual cases. My proposal focuses on one category of catch and kills that is increasingly

7. *Id.* at 207.
8. *Id.* at 207–08.
9. *Id.* at 209–10.
10. *Id.* at 206–07.
11. *Id.* at 216.
12. *Id.* at 216–17.
13. *Id.* at 217–18.
14. *Id.* at 218.
15. *Id.* at 219.
16. *Id.*

serving as a foil to important public law litigation: expansive readings of jurisdictional statutes and doctrines. I examine three common tactics within this category: snap removal, complete preemption, and federal officer removal. I suggest that, in some situations, federalism principles and state law can release cases that have been caught and return them to state court before they are killed.

As Clopton shows, in most of the cases that are caught and killed, state interests outweigh whatever federal interests may be implicated. By emphasizing federal court doctrines that highlight this disparity and counsel deference in the name of federalism, states and litigants may be able to limit catch and kill's bite.

For example, snap removal turns largely on timing. The exact moment a suit is initiated is a question of state, not federal, law, even when it is removed. So even with a federal judge's expansive reading of the general removal statute, state law can release those state court cases that have been caught. In this way, state-level policymakers are incentivized to scrutinize tactics like snap removal that empower a federal institution to frustrate the enforcement of state substantive law. This includes both state legislators and judges, both of whom have a role to play in the development and enforcement of state substantive law and procedure.[17]

Pennsylvania recently responded along these lines. A 2018 decision by the U.S. Court of Appeals for the Third Circuit, affirming snap removal, made suits filed in the state ripe for catch and kill.[18] Defendants were able to capitalize on the decision because the state's service of process rule required service by a sheriff, creating sufficient delay to incentivize snap removals. In response to abuse of the tactic, the state modified the rule to exempt cases that qualify for snap removal.[19]

This is just one example of potential responses available to states and litigants that can potentially minimize abuse of catch and kills. Indeed, as Clopton suggests, some form of catch and kill may be inevitable, but it is its exploitation that is deeply problematic. It's problematic because it centralizes too much decisional power in a single institution—the federal judiciary. And according to Clopton, catch and kill is on the rise, and thus presents cause for concern. In this Essay, I identify and develop some of the responses available to litigants and state actors that can minimize

---

17. *See generally* Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2019) (describing how state courts and legislatures exercise their authority to effectuate procedural changes).

18. *See* Encompass Ins. Co. v. Stone Mansion Rest., Inc., 902 F.3d 147 (3d Cir. 2018).

19. *See* In re Order Amending Rule 400 of the Pennsylvania Rules of Civil Procedure, No. 727 (Pa. Jan. 18, 2022) (per curiam). Pennsylvania's modification was intended to eliminate the delay Rule 400 ordinarily imposed on plaintiffs. However, there are reasons to suspect that snap removal is still viable in Pennsylvania, as defendants can monitor dockets and notice removal before a process server arrives. As I discuss below, modifying state commencement rules to require service for a qualifying suit to be "brought" would go further towards eliminating snap removal in the state.

catch and kill's bite and help ensure the state's interest in the enforcement of its substantive law is given effect.

I. SNAP REMOVAL

The general removal right is codified at 28 U.S.C. § 1441(a). Another section of the statute, § 1441(b)(2), commonly referred to as the "forum defendant rule," places a limitation on the right. This subsection provides (in relevant part) that "[a] civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[20] The provision is generally read to prohibit defendants who are citizens of the forum from removing diversity cases under § 1441(a).[21]

Snap removal exploits ambiguity in the phrase "properly joined and served." Defendants read it literally, meaning the forum defendant rule applies only when proper service on the forum defendant has been affected. If a forum defendant removes a diversity suit *before* service, the forum defendant rule does not apply. Electronic docket monitoring and pre-drafted removal notices have helped snap removal become more common and much more efficient.[22] The tactic incentivizes absurd behavior. For example, plaintiffs e-file complaints from parking lots and print summonses via wireless printers so they can race in the front door and serve the defendant before the defendant removes the case.[23] Defendants have stalled process servers[24] or surreptitiously changed registered

---

20. 28 U.S.C. 1441(b)(2).

21. *See, e.g.*, 13E CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3602, at 5 (3d ed. Supp. 2022), Westlaw (database updated Apr. 2022) ("In order for a defendant to remove a case to federal court on the basis of diversity, the defendant must not be local to the forum state. This is known as the forum-defendant rule . . . .").

22. *See* Adam B. Sopko, Swift *Removal*, 13 FED. CTS. L. REV. 1, 14–16 (2021); Dutton v. Ethicon, Inc., 423 F. Supp. 3d 81, 85 (D.N.J. 2019) (defendant filed for removal approximately sixty seconds before plaintiff effected service); Brittany Wakim, *5th Circ. Attys Should Be Ready to File for Removal in a Snap*, LAW360 (Apr. 14, 2020, 5:35 PM), https://www.law360.com/articles/1263519/5th-circ-atts-should-be-ready-to-file-for-removal-in-a-snap [perma.cc/37CG-DLTP] (suggesting as a best practice that defendants "have removal papers, or at least advanced shell removal papers, prepared for anticipated jurisdictions that are ready to be filed" because it "will help to avoid delay in a scenario where a few hours could make the difference in whether the removal is considered timely").

23. *Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2019) 15–19 (statement of Ellen Relkin, Defective Drugs and Devices Practice Group Co-Chair, Weitz & Luxenberg P.C.) [hereinafter Relkin Testimony].

24. *E.g.*, Jackson v. Howmedica Osteonics Corp., No. 19-18667, 2020 WL 6049400, at *2 (D.N.J. June 15, 2020), *report and recommendation adopted*, No. 19-18667, 2020 WL 4188165 (D.N.J. Jul. 20, 2020).

agents when they hear a lawsuit is imminent,[25] among other evasive tactics.[26]

But before a federal court determines whether the forum defendant rule applies, it must determine whether the suit is removable. In addition to the right to remove, § 1441(a) includes several limitations—i.e., its who, what, where, and when limits—on removal.[27] One such limitation is particularly relevant to snap removal. The tactic turns on timing—defendants must remove a suit before the plaintiff can serve them.[28] Section 1441(a) specifies that a case cannot be removed unless it has been "brought," a term the federal courts have consistently interpreted as synonymous with the word "commence."[29] The statute also requires that the action be "pending."[30] An individual would be unable to remove a lawsuit that has not yet been initiated, as something cannot be pending unless it has already been commenced.[31]

For the purposes of removal, whether and when a plaintiff has brought an action is determined by the law of the forum state. Take the Class Action Fairness Act of 2005 (CAFA).[32] CAFA is a federal statute that expanded diversity jurisdiction for most class and mass actions. Among

---

25. *E.g.*, Delaughder v. Colonial Pipeline Co., 360 F. Supp. 3d 1372, 1374–75 (N.D. Ga. 2018).

26. *See* Relkin Testimony, *supra* note 23 (providing additional examples of unusual behavior prompted by snap removal).

27. For example, only "defendants" can remove. 28 U.S.C. § 1441(a). The Supreme Court has construed this "who" requirement as limited to the adversarial party named in the plaintiff's original complaint. Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1750 (2019) (holding third-party counterclaim defendants are not a "defendant" within the meaning of § 1441(a)). Additionally, the "where" limitation requires defendants remove suits to the U.S. district court "embracing the place where such action is pending." 28 U.S.C. § 1441(a).

28. *See* Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 BAYLOR L. REV. 423, 446–49 (2020).

29. *See, e.g.*, Martin v. Franklin Capital Corp., 546 U.S. 132, 134 (2005) ("A civil case *commenced* in state court may, as a general matter, be removed by the defendant to federal district court, if the case could have been brought there originally." (emphasis added)); Cohn v. Charles, 857 F. Supp. 2d 544, 547–48 (D. Md. 2012) (holding "brought" means "commenced" in § 1441(a)); Marciniszyn v. Cigna Corp., 59 F. Supp. 3d 459, 460 (D. Conn. 2014) (same); Chase v. People, No. C 97-3696, 1998 WL 241551, at *3 (N.D. Cal. May 6, 1998) (remanding the underlying action because it was not yet properly initiated in state court, thus "there [was] no removable civil action as required by section 1441").

30. 28 U.S.C. § 1441(a).

31. Until and unless the action is brought, there are no plaintiffs or defendants, so the removing party would lack standing to remove a civil action that does not yet exist. *See, e.g.*, Juliano v. Citigroup, 626 F. Supp. 2d 317, 319 (E.D.N.Y. 2009) ("[A] non-party lacks standing to invoke a district court's removal jurisdiction under 28 U.S.C. §§ 1441 and 1446."); Adams v. Adminastar Def. Servs., Inc., 901 F. Supp. 78, 79 (D. Conn. 1995) ("It is axiomatic that in the usual case removal can be achieved only by a defendant, who is by implication a party to the state-court action.").

32. Pub. L. No. 109-2, 119 Stat. 4.

other things, CAFA made it easier to remove class actions by providing exceptions to the complete diversity requirement and one-year time limit for removal.[33] CAFA went into effect on February 18, 2005. The statute provided that it would "apply to any civil action *commenced* on or after the date of enactment of [the] Act."[34]

CAFA's commencement provision was vigorously litigated immediately following its enactment. The question was what law determined when lawsuits were "commenced" within the meaning of the federal statute. Defendants generally claimed federal law governed, which in most cases meant the class action was properly removed to federal court.[35] Plaintiffs typically argued state law governed, meaning remand was usually warranted.[36] The distinction mattered. In most cases, removal would dictate whether the underlying class would be certified.[37]

Like § 1441, Congress did not define "commenced" in CAFA, so courts were left to interpret it themselves. The Ninth Circuit was one of the first appellate courts to do so in *Bush v. Cheaptickets, Inc*.[38] In *Bush*, defendants unsuccessfully removed a putative class action that was filed in state court the day before Congress enacted CAFA.[39] On appeal they argued that Congress intended "commenced" to mean the date of removal rather than when the suit was initiated in the state court.[40]

The Ninth Circuit rejected the defendants' arguments. It started from the premise that defendants "may not remove a dispute before it has commenced in state court," which is determined by state law.[41] So the court turned to California law to construe CAFA and found that an action is "commenced" once a plaintiff files her complaint,[42] thus requiring the court to affirm the remand decision below.[43] *Bush*'s reasoning is typical

33. *Id.* sec. 4(a), § 1332(d), 119 Stat. at 9–12; *id.* sec. 5(a), § 1453(b), 119 Stat. at 12.

34. *Id.* § 9, 119 Stat. at 14 (emphasis added).

35. *See, e.g.*, Pfizer, Inc. v. Lott, 417 F.3d 725, 726 (7th Cir. 2005).

36. *See, e.g.*, Pritchett v. Off. Depot, Inc., 420 F.3d 1090, 1094 (10th Cir. 2005).

37. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 432–34 (2018) (discussing the distinction between certification rules in state versus federal courts).

38. 425 F.3d 683 (9th Cir. 2005).

39. *Id.* at 684–85.

40. *Id.* at 686.

41. *Id.*

42. *Id.* at 686–87.

43. *Id.* at 689. There was another question presented in the case related to appellate review that the court necessarily decided at the outset of the opinion. It did not implicate CAFA's commencement requirement and so is not relevant to the discussion here.

of the cases that followed in sibling circuits.[44] It also illustrates the general rule that, in most cases, state law determines when a state court's jurisdiction is properly invoked over a dispute, commencing an action.[45]

Courts similarly rely on state law to determine when an action is initiated for the purposes of the one-year limitation on removal.[46] Section 1446 says defendants have thirty days to remove the suit beginning upon receipt of the document that reveals the basis of removal.[47] And some cases might not become removable for days, weeks, or even months after the complaint was filed. Section 1446(c)(1) says those cases cannot be removed if more than one year passes from the "commencement of the action."[48] Here, too, courts look at state law to determine whether and when the action was commenced.[49]

---

44. *See, e.g.*, Farina v. Nokia Inc., 625 F.3d 97, 110 (3d Cir. 2010); Tmesys, Inc. v. Eufaula Drugs, Inc., 462 F.3d 1317, 1319 (11th Cir. 2006); *see also* Lonny Sheinkopf Hoffman, *The "Commencement" Problem: Lessons from a Statute's First Year*, 40 U.C. DAVIS L. REV. 469, 475–76 (2006) (noting that the federal courts often recognize that state law "governs the determination of when a dispute is commenced in state court"). In its opinion, the *Bush* court observed that all of the district courts that had grappled with the question at that point had similarly construed CAFA's commencement requirement according to relevant state law. 425 F.3d at 688.

45. *See* 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1057, at 302 (4th ed. 2015), Westlaw (database updated Apr. 2022) ("[A] federal district court sitting in diversity of citizenship jurisdiction is bound to apply the forum state's law regarding the time limits set by state statutes of repose as well as the procedures required to commence an action for the purpose of the statutes."); *see also, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 120 (1945) (holding that "[w]hether any case is pending in [state] courts is a question to be determined by [state] law"); Walker v. Armco Steel Corp., 446 U.S. 740, 750–52 (1980) (noting state law determines when diversity action commences for purposes of tolling state statute of limitations rather than Rule 3 of the Federal Rules of Civil Procedure); Cannon v. Kroger Co., 837 F.2d 660, 664 (4th Cir. 1988) (Murnaghan, J., dissenting) ("It is clear that a federal court must honor state court rules governing commencement of civil actions when an action is first brought in state court and then removed to federal court . . . .").

46. Section 1446(c)(1) provides, in whole, that "[a] case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1).

47. *Id.* § 1446(b).

48. *Id.* § 1446(c)(1); *see also, e.g.*, Title Pro Closings, L.L.C. v. Tudor Ins. Co., 840 F. Supp. 2d 1299, 1302 (M.D. Ala. 2012).

49. *See, e.g.*, Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801, 803 (5th Cir. 2006) ("[W]hen an action is commenced in state court is determined based on the state's own rules of procedure."); *Farina*, 625 F.3d at 110 (similar). As the Court noted in *Pitcairn*, construing a removal statute's timing requirement based on relevant state law is grounded in notions of federalism, as it respects the sovereignty of the state to independently organize and administer its legal system. *See* 324 U.S. at 120–26; *see also* Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938) (holding federal courts must apply state law in diversity cases in order to "preserve[] the autonomy and independence of the States").

Further, Congress itself intended the timing requirement in § 1446 be construed according to state law. In 2011, Congress amended several removal statutes through the Federal Courts Jurisdiction and Venue Clarification Act of 2011.[50] The statute stated that, for diversity cases subject to § 1446, "an action or prosecution commenced in State court and removed to Federal court shall be deemed to commence on the date the action or prosecution was commenced, *within the meaning of State law*, in State court."[51]

A. *Catch and Release*

With this background in mind, consider again snap removal's mechanics. When a defendant removes an action, they must make out the basis for removal in their notice, based on the facts alleged in the state court complaint. So, for example, a defendant that snap removes a case must show that there is complete diversity among the parties.[52] So too must the action have been "brought," which we know turns on the forum state's relevant law.[53] If the underlying state court action has not been commenced consistent with state law, then it is not removable under § 1441(a).

There is some variation among the states as to how a plaintiff initiates an action. In approximately half of the states, an action is commenced when the plaintiff files her complaint with the state court.[54] In the other half, states require filing *and* service of process.[55] Snap removal requires the plaintiff file her complaint so the defendant can notice removal before being served, so in some jurisdictions, state law may foreclose snap removals.

For example, in California, an action "is commenced when the complaint is filed."[56] So too in Florida[57] and Idaho.[58] But in Minnesota,[59] South

50. Pub. L. No. 112-63, 125 Stat. 758.

51. *Id.* § 105, 125 Stat. at 762 (emphasis added).

52. *See* Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84 (2005).

53. 28 U.S.C. § 1441(a).

54. *See, e.g.*, *infra* notes 56–58 and accompanying text; *cf.* FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

55. *See, e.g.*, MINN. R. CIV. P. 3.01(a); N.D.R. CIV. P. 3; *see also infra* notes 59–62.

56. *See, e.g.*, Fireman's Fund Ins. Co. v. Sparks Constr., Inc., 8 Cal. Rptr. 3d 446, 453 (Ct. App. 2004).

57. FLA. R. CIV. P. 1.050.

58. Rudd v. Merritt, 66 P.3d 230, 235 (Idaho 2003) ("[A] civil action is commenced by filing a complaint with the court.").

59. *E.g.*, Cox v. Mid-Minn. Mut. Ins. Co., 909 N.W.2d 540, 547 (Minn. 2018).

Carolina,[60] and Texas,[61] service is required to commence a civil action. Under Texas law, where a federal Court of Appeals decision says the forum defendant rule must be read to support snap removal, courts distinguish between "bringing" a suit and "commencing" one. A party commences a lawsuit by filing a complaint, but the action is not considered "brought" until service is affected.[62] One can imagine a plaintiff, whose suit was snap removed, arguing for remand on the basis that a lawsuit filed in Texas is not removable under § 1441(a) until the complaint is filed and the defendant is served with process. In this sense, state law could undermine the expansive reading of federal jurisdiction that supports snap removal.

To qualify for removal under § 1441(a), a suit must also be "pending." While most states observe that an action becomes pending once it is commenced, some draw a material distinction between the two. In Georgia, for example, a plaintiff can commence a suit by filing the complaint, but the "action is not a 'pending' suit until after service of process is perfected."[63] So too in Maryland.[64] If a defendant snap removes a suit before service in a state that recognizes the distinction, the plaintiff could argue that the action is not "pending," and thus remand is compelled by the removal statute's plain text.[65] Where the case has been caught by a federal court's expansive reading of its jurisdiction, state law and the federalism principles that animate *Erie* doctrine can serve as a response to "release" the case back to state court, where it likely belongs.

Defendants might argue that this interpretation of the removal statute could incentivize gamesmanship from plaintiffs. Specifically, it could encourage plaintiffs to join a forum defendant it does not intend to serve for the purpose of defeating removal.[66] Reading § 1441(a) this way, the

60. Kiriakides v. Sch. Dist., 675 S.E.2d 439, 446 (S.C. 2009) (observing that under state law, "both filing and service are required to institute an action").

61. *See* Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam) (observing that, despite the text of relevant rules, a plaintiff has not "br[ought] suit" until and unless the complaint is timely filed, and the defendant is served with process); Rigo Mfg. Co. v. Thomas, 458 S.W.2d 180, 182 (Tex. 1970).

62. *See, e.g.*, Boyattia v. Hinojosa, 18 S.W.3d 729, 733 (Tex. Ct. App. 2000) ("To 'bring suit,' a plaintiff must both file her action *and* have the defendant served with process."); Tarrant Cnty. v. Vandigriff, 71 S.W.3d 921, 924 (Tex. Ct. App. 2002) ("The mere filing of a lawsuit is not sufficient to meet the requirements of 'bringing suit' within the limitations period; rather, a plaintiff must *both* file her action *and* have the defendant served with process.").

63. Steve A. Martin Agency, Inc. v. PlantersFIRST Corp., 678 S.E.2d 186, 188 (Ga. Ct. App. 2009); *accord* Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1371–73 (N.D. Ga. 2011).

64. *See* Haupt v. State, 667 A.2d 179, 185 (Md. 1995).

65. *Cf.* Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147, 152 (3d Cir. 2018) (holding § 1441(b)(2)'s "plain meaning" precludes removal).

66. *See, e.g.*, Rogers v. Boeing Aerospace Operations, Inc., 13 F. Supp. 3d 972, 976 (E.D. Mo. 2014).

argument goes, would make the case effectively unremovable and sidestep Congress's intent behind the forum defendant rule.[67] To the extent that's true, courts are well-equipped to evaluate such claims. A removing defendant can show a forum defendant was improperly joined, and thus should be disregarded for the purposes of removal, by marshaling evidence, like the plaintiff serving the non-forum defendant but not the forum defendant. Several courts have already adopted this inquiry in response to snap removals, reasoning it best captures Congress's intent to limit gamesmanship from both parties.[68]

II. COMPLETE PREEMPTION

In some instances where state and federal law overlap, federal law is said to supersede state law.[69] The doctrine that governs this overlap is generally referred to as preemption. Defendants often raise preemption as a defense to knock out a plaintiff's state law claim.[70] But complete preemption is different. This doctrine says that federal law not only controls the claim, as with defensive preemption, but it also creates an independent basis of subject matter jurisdiction, permitting the defendant to remove it to federal court.[71]

Both forms of preemption—defensive and complete—are said to come from the Supremacy Clause. But under complete preemption, the state law claim is converted to a federal question on the theory that Congress intended to preempt the area so completely that any claim falling within its ambit is "necessarily federal in character."[72] The doctrine has obvious federalism implications because it permits a federal judge to override both a plaintiff's choice in the claims they plead and court in

---

67. *See, e.g.*, Stan Winston Creatures, Inc. v. Toys "R" Us, Inc., 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) ("The purpose of the 'joined and served' requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."). *But see, e.g.*, *Hawkins*, 785 F. Supp. 2d at 1377 (observing that the "legislative history on the purpose behind the joined and served requirement is conspicuously lacking").

68. *See, e.g.*, Walborn v. Szu, No. 08-6178, 2009 WL 983854, at *4–5 (D.N.J. Apr. 7, 2009); Prather v. Kindred Hosp., No. 14-0828-CV-W, 2014 WL 7238089, at *4 (W.D. Mo. Dec. 17, 2014); Burnett v. Tufguy Prods., Inc., No. 2:08-cv-01335, 2010 WL 11578884, at *3 (D. Nev. Feb. 10, 2010); *see also* Sopko, *supra* note 22, at 74–75 (suggesting courts engage in a similar analysis).

69. *See* U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . ."); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000).

70. *See* 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3722.2 (Rev. 4th ed. 2018 & Supp. 2022), Westlaw (database updated Aug. 2022).

71. *E.g.*, St. Pierre v. Ward, 542 F. Supp. 3d 549, 553 (W.D. Tex. 2021).

72. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987); Giles v. NYLCare Health Plans, Inc., 172 F.3d 332, 336–37 (5th Cir. 1999) (observing that complete preemption "transmogrify[ies]" a state cause of action into a federal one).

which they file.[73] Federal courts have generally limited complete preemption to a specific set of statutes.[74] However, defendants continue to try and expand the list.

As Clopton shows, complete preemption is another form of catch and kill.[75] Here, I suggest that, as with snap removal, federalism principles and state interests can, in some instances, minimize its effects. Complete preemption has served as a foil in many important areas of public law litigation, like climate change. Many of these cases arise in areas where Congress has failed to act, thus leaving space for states to experiment with various policy measures to fill the void. And states often do just that. This makes the use of complete preemption as a catch and kill mechanism all the more dubious, as the judge-made doctrine is premised on the existence of an exclusive, federal cause of action. This Section suggests the tension in these cases can present opportunities to limit the efficacy of catch and kills that turn on complete preemption. Many of the novel public law cases that complete preemption has caught for federal courts to kill could perhaps avoid the dead end in federal court by proceeding under state constitutions.

A. *State Constitutions*

State constitutions have traditionally supplied protections in areas ranging from the environment to education to public health. Recently, states have sought to amend their state constitutions to provide additional rights or greater protections in these areas. The redundancy of two sets of constitutions is based on a flexible conception of power distribution between the state and federal governments.[76] As Professor James Gardner has argued, "when the people prefer to put their confidence in the national and not the state government, federalism suggests that the principal role of states is to wait patiently in reserve for that moment . . . when the people's confidence tilts back their way," thus "federalism requires state power to be permanently available as a potential corrective to federal abuses."[77]

---

73. *See* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from* California v. BP, 117 MICH. L. REV. ONLINE 25, 37 (2018) (making this point and referring to complete preemption as "pretty potent stuff").

74. *See* WRIGHT ET AL., *supra* note 70 (listing statutes).

75. Clopton, *supra* note 1, at 199–200.

76. James A. Gardner, Reply, *What Is A State Constitution?*, 24 RUTGERS L.J. 1025, 1050 (1993); *see generally* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005) (arguing state constitutions serve an essential role in the allocation of power between states and the federal system).

77. Gardner, *supra* note 76 (internal quotation marks omitted).

Each state has its own constitution that guarantees certain rights and liberties.[78] Some provisions are textually similar to the federal Constitution,[79] whereas others have no federal analogue.[80] Just as the U.S. Supreme Court has the final say on questions of federal constitutional law, state supreme courts have the final say on the meaning of their state constitution.[81] Relevant to my discussion here, state constitutions are amended much more often than their federal counterpart.[82] The relative ease of amending state constitutions "provides a method for the voices of the citizens and the legislators to be heard."[83] The interests codified in state constitutions can reflect a particular form of governance and important values that result from a state's political process.[84] In this way, the interests and policy choices of the people in a given state inhere in their state constitution.[85]

---

78. Reader, I encourage you to (momentarily) stop reading this Essay, find the constitution of the state in which you're currently sitting, and spend a few minutes reading it. *See* Jill Rosen, *Americans Don't Know Much About State Government, Survey Finds*, JOHNS HOPKINS UNIV.: HUB (Dec. 14, 2018), https://hub.jhu.edu/2018/12/14/americans-dont-understand-state-government [perma.cc/LS35-JPBM] (announcing findings of a nationwide survey that "[m]ore than half" of respondents "didn't know if their state had a constitution").

79. *Compare, e.g.*, N.J. CONST. art. I, ¶ 7 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

80. *See, e.g.*, ME. CONST. art. I, § 25 ("All individuals have a natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.").

81. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100 (2000) ("Regardless . . . of the U.S. Supreme Court's pronouncements concerning the breadth and scope of the federal constitution, the highest court of each state remains the final arbiter of the meaning of . . . the state constitution.").

82. John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U.L. REV. 27, 30–31, 31 n.24 (2016) (comparing amendment rates between state and federal constitutions and among the fifty states).

83. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L.R. 389, 434 (1998).

84. *See id.* at 452–53.

85. *See, e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 22–32 (2013) (arguing that state constitutional provisions, even seemingly narrow guarantees, reflect important popular concerns and principles on both a local and national level); Schapiro, *supra* note 83, at 440–

For example, many states have codified some form of an environmental guarantee.[86] Rhode Island's constitution provides that the people "shall be secure in their rights to the use and enjoyment of the natural resources of the state" and that the legislature must "adopt all means necessary and proper" to conserve the state's resources.[87] Florida's constitution imposes a duty on its legislature to provide "for the abatement of air and water pollution and . . . protection of natural resources."[88] Recent attention to state-level solutions has seen these provisions serve as the basis of new environmental protections.[89]

Three states have enacted affirmative rights to a clean environment in their constitutions. In November 2021, New York joined Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Rhode Island in providing that each person in the state is entitled to a clean and healthy environment.[90] These amendments reflect important choices by the states' electorates. Voters have responded to an increasingly industrialized society where the existing constitutional regime, as well as Congress and the state legislature, cannot readily offer the protections necessary for their health and happiness.[91]

State constitutions can offer advantages for litigants bringing cases that would otherwise be caught and killed. First, they are superior to other sources of state law in important respects. State constitutions often place obligations on political branches or entitle individuals to certain guarantees, but unlike statutes and common law, they secure these policies by removing them from the political process. Similarly, state constitutions can remove courts from consideration by amending around judicial decisions the electorate has rejected or shifting more decisional

---

56 (suggesting state constitutions speak to the values and identities of the state rather than state political or moral identity).

86. *See, e.g.*, COLO. CONST. art. XVIII, § 6 (preservation of forests); HAW. CONST. art. XI, § 9 (environmental rights); ILL. CONST. art. XI, § 2 (right to a healthful environment).

87. R.I. CONST. art. I, § 17.

88. FLA. CONST. art. II, § 7(a).

89. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 92.001 (West, Westlaw through 2021 Legis. Sess.) ("It is the further finding of this legislature that it is necessary to exercise the authority of the legislature pursuant to Article XVI, Section 59, of the Constitution of the State of Texas to assure proper and orderly development of both the mineral and land resources of this state and that the enactment of this chapter will protect the rights and welfare of the citizens of this state."); *see also* Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013) (granting standing to communities to challenge state actions that could degrade environmental quality).

90. N.Y. CONST. art. I, § 19; *accord* PA. CONST. art. I, § 27 (providing "a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment"); MONT. CONST. art. IX, § 1, cl. 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

91. *See* ZACKIN, *supra* note 85, at 163.

power to the executive or legislative branches. They also serve as a rallying point for citizens to organize and achieve change otherwise impossible through the legislature. In other words, state constitutions often represent certain priorities, structural choices, and values of a state that are placed in a durable medium that is superior to statutes and common law.[92] In contrast to these significant interests, catch and kills are "supported by weak federal interests."[93] As I show in this Section and the next, this disparity in sovereign interests could help counteract the power of federal jurisdiction that often undermines public law litigation through catch and kills.

State constitutions offer additional features that could be advantageous in novel litigation that often meets a dead end in the federal system. For example, state constitutions generally have more relaxed state action doctrines compared to the federal constitution.[94] Thus, constitutional deprivations at the hands of a private actor—like firearms manufacturers or oil companies—that are non-cognizable under the federal constitution may trigger liability under state constitutions.[95] Similarly, states' standing doctrines are generally more relaxed compared to the limitations on federal courts imposed by Article III.[96]

Another example is the more innovative vision of liberty that generally animates state constitutions compared to the federal constitution. For instance, some states "stack" provisions of their constitution.[97] The

---

92. *See id.* at 61–62; *see also* Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 751–52 (1992).

93. Clopton, *supra* note 1, at 211.

94. *See* Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 20-21 (1993) (discussing the state action doctrine under state constitutions); David J. Fine, Elias N. Matsakis & Phillip L. Spector, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 297–301 (1973) (suggesting a structural explanation for state courts' willingness to hold private actors liable for state constitutional violations).

95. *Compare, e.g.*, Watkins v. Mercy Med. Ctr., 520 F.2d 894 (9th Cir. 1975) (dismissing for lack of state action a challenge to private hospital's decision to deny renewal of doctor's privileges for performing a legal abortion), *with, e.g.*, Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641 (N.J. 1976) (granting a suit to enjoin a private hospital to require it to offer legal abortions following its refusal to do so).

96. *See, e.g.*, Firearm Owners Against Crime v. Papenfuse, 261 A.3d 467, 472 (Pa. 2021) (holding plaintiffs who were dismissed from federal court for lack of standing could proceed under Pennsylvania's standing doctrine); Nike, Inc. v. Kasky, 539 U.S. 654, 661–63, 661 n.2 (2003) (Stevens, J., concurring) (per curiam) (noting that the plaintiff suing under a California statute could not satisfy Article III's standing requirement but could bring suit in California state court); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1852–58 (2001) (comparing more liberal standing doctrines crafted by state courts to Article III's limitations).

97. *See generally* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001 (examining the use of stacking). Stacking should not be mistaken for constitutional borrowing. Borrowing is where

Connecticut Supreme Court, for example, has read the equal protection and right-to-education clauses of its state constitution "conjointly" to hold the "extreme racial and ethnic" segregation of its public school system unconstitutional.[98] Montana's high court found that the use of then-novel thermal imaging equipment by the police constituted an unreasonable search, as the state constitution's privacy provision was meant to supplement its search-and-seizure provision.[99] Amendments tailored to emerging social issues like climate change or gun violence, read in tandem with provisions guaranteeing dignity, equal protection, or public health and safety, could entitle people to new or enhanced constitutional guarantees far above what the federal constitution is read to offer.[100] As important public law litigation is increasingly caught and killed in federal courts, state courts and constitutions could potentially help avoid the phenomenon and minimize the effects of federal retrenchment.[101]

To realize these benefits, plaintiffs would rely on notions of comity and the substantial interests states have in construing state constitutional provisions to properly enforce their protections and guarantees.[102] Indeed, "[p]rinciples of federalism implicit in the United States Constitution dictate that, whenever possible," questions concerning a state's constitution should be answered by that state's court system.[103] In this way,

---

"[one] person draws on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain." Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010). Nor is it the same as intratextualism. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) ("In deploying this technique, the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."). Rather, stacking is a method of constitutional interpretation used in "situations in which more than one state constitutional clause applies to the same claim." Williams, *supra* at 1008.

98. Sheff v. O'Neill, 678 A.2d 1267, 1281 (Conn. 1996).

99. State v. Siegal, 934 P.2d 176, 183–185, 192 (Mont. 1997); *see also* Walker v. State, 68 P.3d 872, 883–85 (Mont. 2003) (finding prison conditions violated an incarcerated person's right to dignity by reading two provisions "together").

100. *See, e.g.*, N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law."); *id.* art. I, § 19 (providing "a right to clean air and water, and a healthful environment"); *id.* art. XIV, § 1 (guaranteeing that state forests must be kept "forever . . . wild"); *id.* art. XVII, § 3 (imposing a duty to protect the health of the state's inhabitants on the "state and . . . its subdivisions"); *see also* ZACKIN, *supra* note 85, at 28–32, 204–08 (discussing unique features of environmental rights provisions).

101. *See, e.g.*, Alicia Bannon, *The Supreme Court Is Retrenching. States Don't Have to.*, POLITICO (June 29, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928 [perma.cc/8DJF-CYHW] (suggesting that the U.S. Supreme Court's recent term "cements that we are in an era of retrenchment for many civil rights").

102. *See, e.g.*, La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) (rejecting the notion that abstention doctrines are merely "a technical rule" of procedure, but rather "[t]hey reflect a deeper policy derived from our federalism").

103. Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 963 F. Supp. 395, 408 (D.N.J. 1997), *aff'd*, 140 F.3d 478 (3d Cir. 1998).

the interests of comity inherent in state constitutions, and the ways state courts interpret them, could serve as a limit on the expansive conceptions of federal jurisdiction that complete preemption is premised on.

B. *Catch and Release*

With this discussion in mind, consider removal under a complete preemption theory. A plaintiff will file an action in state court and raise issues of state law, including a state constitutional claim. The defendant will remove on the basis that federal law completely preempts the state law claims thus entitling them to a federal forum. They will likely move to dismiss the suit based on federal defenses, like defensive preemption. Catch, then kill.

But we know that complete preemption is premised on a judicial determination that Congress intended a certain federal statute govern the interests within its ambit, supplanting all state laws that fall within the sphere. The case for remand—or catch and release—is especially strong where removal on a complete preemption theory is premised on federal common law. This is a basis that defendants often rely on for removal in climate litigation.[104] In those cases, the "linchpin" to complete preemption—congressional intent—is absent, and so courts typically find there isn't a sufficient federal interest to warrant complete preemption's extraordinary force.[105] Complete preemption also requires the federal law that allegedly preempts the state law claims provide a private cause of action. Indeed, the "sine qua non of complete preemption is a pre-existing *federal* cause of action that can be brought in the district courts."[106]

Even in cases where defendants rely on a federal statute, plaintiffs can distinguish their state law claims from the scope of the statute, and many state constitutions provide ample grounds to do so. Plaintiffs could rely on textual distinctions, unique state interests, and distinctive interpretive methodologies like stacking to show that the cause of action is

104. *See* Rachel Rothschild, Note, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L.J. 412, 419–20 (2019).

105. *See, e.g.*, López-Muñoz v. Triple-S Salud, Inc., 754 F.3d 1, 8 (1st Cir. 2014); Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 973 (D. Colo. 2019) (finding that "federal common law would not provide a ground for such preemption" because "[w]hen the defendant asserts that federal common law preempts the plaintiff's claim, there is no congressional intent which the court may examine—and therefore congressional intent to make the action removable to federal court cannot exist" (quoting Merkel v. Fed. Express Corp., 886 F. Supp. 561, 566 (N.D. Miss. 1995)), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2007), *vacated* 141 S. Ct. 2667 (2021) (mem.)).

106. Lontz v. Tharp, 413 F.3d 435, 442 (4th Cir. 2005); *accord* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 815 (6th ed. 2009) (noting that complete preemption requires the federal law provide a substitute federal remedy).

sufficiently different from the scope of the federal law defendants invoke.[107] In this way, the state interests that inhere in state constitutions, and the various ways state courts construe them, could provide a means to release cases caught by federal courts. This dynamic may also incentivize state-level lawmaking where Congress is unwilling or unable to act.[108]

III. FEDERAL OFFICER REMOVAL

Another tactic, federal officer removal, originated from a statute that was enacted after the War of 1812.[109] The provision granted federal customs officials a federal forum to defend suits brought by American ship owners in response to officials seizing their goods to enforce a trade embargo.[110] During Reconstruction, the federal government relied on a similar statute in response to a South Carolina law that nullified the federal tax code and authorized state prosecutions of federal tax collectors.[111] These provisions are predecessors of 28 U.S.C. § 1442, which enables federal officers, agencies, and those "acting under" federal officers (including private parties) to remove a suit to federal court and assert immunity defenses before a federal judge.[112]

Today, corporations often rely on the statute when they are sued in state court. For example, tobacco companies have argued their industry is so tightly regulated that by complying with relevant federal regulations, they are "acting under" the direction of federal officers.[113] Opioid

---

107. *See, e.g.*, Mersmann v. Cont'l Airlines, 335 F. Supp. 2d 544, 557 & n.15 (D.N.J. 2004) (remanding action presenting state constitutional claim because defendant could not establish the exact contours of plaintiff's claim and thus how the Railway Labor Act would completely preempt it); County of Nassau v. New York, 724 F. Supp. 2d 295, 304 (E.D.N.Y. 2010) (similar); *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 488 F.3d 112, 134–35 (2d Cir. 2007). *See generally* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U.L. REV. 189 (2002) (discussing various methods of state constitutional interpretation and contrasting them with federal constitutional methodologies).

108. *See generally* John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PA. STATE L. REV. 1007 (2011) (examining "the increasing reliance on state constitutional amendment processes for responding to federal action or inaction.").

109. *See* Willingham v. Morgan, 395 U.S. 402, 405 (1969).

110. *Id.*

111. WRIGHT ET AL., *supra* note 70, at § 3726.

112. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 60–61 (2007); Michael E. Klenov, *Preemption and Removal:* Watson *Shuts the Federal Officer Backdoor to the Federal Courthouse, Conceals Familiar Motive*, 86 WASH. U.L. REV. 1455, 1467 (2009); Maryland v. Soper (No. 1), 270 U.S. 9, 30 (1926).

113. Watson v. Philip Morris Cos., 551 U.S. 142, 154 (2007).

manufacturers have made similar arguments.[114] Oil companies have removed climate change suits to federal court on the theory that their drilling contracts with the federal government demonstrates the hand-in-hand relationship the statute generally requires.[115]

As the statute's historical pedigree suggests, defendants rely on the statute to invoke a federal defense. But federal defenses are generally not enough to establish federal question jurisdiction, as defendants must point to a federal issue on the face of the plaintiff's complaint.[116] In this way, § 1442, like complete preemption, is an exception to the general rule that federal defenses cannot serve as the basis for federal jurisdiction.

As in the prior Section, I suggest here that state constitutions could play a role in limiting the scope of catch and kill. Clopton shows that catch and kill creates an odd tension between the state and federal systems, as in most cases the balance of interests between the state and federal systems favors the states.[117] Specifically, when federal courts expand their jurisdiction with the application of a federal-only procedural rule to dismiss cases that arguably belong in state court, Clopton contends they "undermine state-created rights without any state actor weighing in."[118] In other words, catch and kill often creates friction between the two systems. Abstention doctrine could provide the means to mediate this tension. It could prevent federal courts from hitting the kill switch by forcing them to evaluate the substantial federalism interests that federal officer removals often implicate.

A. *Abstention*

The Court has recognized several overlapping abstention doctrines, but they all serve essentially the same purpose. The doctrine generally calls for a federal court to wait for a state court to decide a question in the case before proceeding (if necessary) or forecloses jurisdiction all together in favor of a state forum.[119] Federal courts defer in recognition of a state's sovereignty over matters of particular concern to the state and the ability to adjudicate those matters in an independent court system.[120]

---

114. *See, e.g.*, Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1325–26 (S.D. Miss. 2003); *In re* Nat'l Prescription Opiate Litig., 327 F. Supp. 3d 1064, 1070 (N.D. Ohio 2018).

115. *See, e.g.*, City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191, 206–09 (D.N.J. 2021), *aff'd sub nom.* City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022).

116. Franchise Tax Bd. v. Construction Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 10 (1983).

117. *See* Clopton, *supra* note 1, at 210–12.

118. *Id.* at 210.

119. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

120. *See Burford*, 319 U.S. at 318; Julie A. Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1, 9 (1986); Charles R. Wise & Robert K. Christensen, *Sorting Out Federal and State Judicial*

These background principles acknowledge the necessity of facilitating policy responses to issues of state or local concern as well as the importance of states serving as laboratories to help the nation as a whole identify optimal social policies.[121] The notions of comity and federalism at the center of abstention respect the differing rights-remedies gap in the state and federal systems.[122] This disjuncture is a core theme that animates the critique of catch and kill.

The Court has crafted several abstention categories, and they could each play a role in minimizing the effects of catch and kills.[123] But in this brief Essay, I focus on two formulations: *Pullman*- and *Burford*-type abstention. *Pullman* abstention postpones the exercise of federal jurisdiction to see if a state court can dispose of the case on state law grounds. In the event the state-law question does not resolve the case, the parties may return to federal court to litigate the remaining federal issues.[124] One of *Pullman* abstention's chief concerns is to avoid unnecessary resolution of federal constitutional issues.[125] But the doctrine is not simply a mechanism of constitutional avoidance. Rather, it is a way for federal courts to "assess judicial federalism implications on a case-by-case basis."[126] In this

---

Roles in State Institutional Reform: Abstention's Potential Role, 29 FORDHAM URB. L.J. 387, 410 (2001).

121. *See, e.g.*, Adkins v. VIM Recycling, Inc., 644 F.3d 483, 486 (7th Cir. 2011) (referring to abstention as "federalism doctrines"); Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134, 1141 (1980); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1180 (1977); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

122. *See* Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2334 (2018); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 123–24 (2009).

123. *See* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4241 (3d ed. 2007 & Supp. 2022), Westlaw (database updated Apr. 2022).

124. England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 421 (1964).

125. *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941); Reetz v. Bozanich, 397 U.S. 82, 86–87 (1970).

126. Keith Werhan, Pullman *Abstention After* Pennhurst*: A Comment on Judicial Federalism*, 27 WM. & MARY L. REV. 449, 473 (1986); *accord* Sebastian Waisman, Note, Pullman *Abstention in Preemption Cases*, 52 B.C. L. REV. 1515, 1533 (2011) ("*Pullman* is designed to delay federal court review of state laws when necessary to avoid needless interference with state programs, destabilizing conflict between state and federal courts, or superfluous adjudication."); 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4251, at 1–2 (3d ed. 2007), Westlaw (database updated Apr. 2022) (explaining that abstention's federalism principles "teach[]" that federal courts should avoid intruding "on the right of a state to enforce its laws in its own courts").

way, *Pullman* abstention can provide a distribution of public law litigation between state and federal courts that is sensitive to the sovereignty interests implicated in each case.[127]

Burford-type abstention calls for remand in cases that turn on "a difficult question of state law bearing on policy problems of substantial public importance" that go beyond the specific case at hand.[128] *Burford* abstention may be appropriate in instances where a state codified a right in its constitution that requires the legislative and executive branches to design a regulatory scheme to support said right. For example, Texas recently enacted a regulatory regime based on an environmental interest codified in its constitution.[129] Litigation arising out of this regime could be a good fit for federal courts to defer to state courts, as the Texas court system is likely best positioned to construe the relevant statutes, regulations, and state constitutional provisions. Abstention has an additional benefit for plaintiffs facing catch and kill because of its focus on the respect for state sovereignty and state court expertise. It enables litigants to speak in the same neutral, abstract dialect that federal courts use in catch and kills.[130] The dispute concerns comity rather than climate change or federalism versus firearms.

B. *Catch and Release*

Abstention would come into play after the suit was removed but before it's dismissed. There are a few ways abstention would favor remand. First, when federal courts consider abstaining from a state constitutional issue, remand is more likely when the particular state constitutional provision lacks a federal analogue.[131] This makes sense, as unique or state-

127. *See* Waisman, *supra* note 126, at 1533–34; Younger v. Harris, 401 U.S. 37, 44–45 (1971) (explaining the concept of "Our Federalism"); 17A WRIGHT ET AL., *supra* note 123, § 4241, at 320 (noting that abstention is about "the relationship between the federal governments and the states").

128. 17A WRIGHT ET AL., *supra* note 123, § 4244, at 392–93.

129. *See* Tex. Nat. Res. Code Ann. § 92.001 (West) ("It is the further finding of this legislature that it is necessary to exercise the authority of the legislature pursuant to Article XVI, Section 59, of the Constitution of the State of Texas to assure proper and orderly development of both the mineral and land resources of this state and that the enactment of this chapter will protect the rights and welfare of the citizens of this state."); *see also* TEX. CONST. art. XVI, § 59(a) ("[T]he preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.").

130. *See* Clopton, *supra* note 1, at 208 (observing that catch and kill decisions are "routinely cloaked in neutral or impersonal language" and often rest on "airy values such as 'comity' . . . or 'institutional competence' " rather than more normative concerns like "human rights or climate change").

131. *See, e.g.*, Harris Cnty. Comm'rs Ct. v. Moore, 420 U.S. 77, 84–85 (1975) (holding abstention was warranted to determine whether the case could be decided under a state-specific provision of the state constitution); Askew v. Hargrave, 401 U.S. 476, 478 (1971) (per curiam) (similar); Reetz v. Bozanich, 397 U.S. 82, 87 (1970) (similar); *see also* 17A

specific provisions often implicate questions of state and local policy, complex state regulatory schemes, or novel theories of liability.[132] Second, even if a state constitution does have a federal analogue, state courts sometimes construe the provision as offering greater protection than the federal constitution.[133] This matters because resolution—regardless of outcome—of a state law claim that offers greater protection than federal law would be dispositive for the purposes of abstention analysis.[134] Third, abstention is also appropriate where a cause of action implicates "an integrated scheme of related constitutional provisions . . . and where the scheme as a whole calls for clarifying interpretation by the state court[]."[135] One distinguishing feature of state constitutional interpretation is that state courts generally read the constitution as a whole, such that interpretation of a single provision gives effect to all other provisions in the constitution.[136] Thus, bringing suits under state constitutions concentrates the federalism principles that abstention was designed to help federal courts navigate.[137]

In these instances, *Pullman*-type considerations would warrant state court resolution before the federal court took its turn. This could be

---

WRIGHT ET AL., *supra* note 123, § 4242, at 343–44 ("The proper line appears to be that abstention is in order if the case may turn on the interpretation of some specialized state constitutional provision, but not if the state provision is substantially similar to the federal provision that is the basis of the federal challenge.").

132. *See, e.g.*, Philip Morris Inc. v. Harshbarger, 946 F. Supp. 1067, 1078–79 (D. Mass. 1996); Sherman v. Town of Chester, No. 01 CIV. 8884, 2001 WL 1448613, at *2–3 (S.D.N.Y. Nov. 15, 2001).

133. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (sketching a theory of judicial federalism where state courts provide greater rights protections under state constitutions than the federal constitution in response to retrenchment by the U.S. Supreme Court); Fine et al., *supra* note 94 (similar).

134. *E.g.*, Hickerson v. City of New York, 932 F. Supp. 550, 555 (S.D.N.Y. 1996) (remanding on abstention grounds a challenge to a zoning ordinance under the First Amendment and more-protective state analogue so the "state constitutional claims [could] be determined before plaintiffs' claims under the federal constitution, because a ruling that the resolution violates the state constitution would obviate the need to decide the federal constitutional questions").

135. *Moore*, 420 U.S. at 84 n.8; *see also supra* notes 97–100 and accompanying text (discussing stacking).

136. *See, e.g.*, Dep't of Env't Prot. v. Millender, 666 So. 2d 882, 886 (Fla. 1996) ("[E]ach subsection, sentence, and clause must be read in light of the others to form a congruous whole so as not to render any language superfluous."); Shea v. State, 510 P.3d 148, 153 (Nev. 2022) (("[T]he Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision.") (quoting Nevadans for Nev. v. Beers, 142 P.3d 339, 348 (Nev. 2006))). For two scholars' view on why this is so, see generally Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 865–69 (2021).

137. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941); Werhan, *supra* note 126; Randall P. Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107 (1974).

meaningful in cases where a defendant has relied on the federal officer statute because in many instances, upon removal, they will move to dismiss the suit based on a federal defense, like preemption. Federalism principles "apply as much to a question of preemption as to any other question of constitutional law."[138] The Supremacy Clause is the reason a federal law can trump a state law.[139] When a court determines whether a state law is preempted, it is deciding whether the state law is unconstitutional.[140] Thus, preemption can serve as the constitutional issue federal courts abstain from deciding, in favor of an independent state ground.[141]

Remand may be necessary under *Burford*-type abstention as well. Issues pertaining to New Yorkers' guarantee to "clean air and water"[142] or New Jerseyans' right to a "thorough and efficient" education,[143] for instance, implicate the kinds of issues federal courts often abstain from.[144] They are specialized constitutional guarantees that often support statutory schemes for the purpose of establishing uniform policy around an issue of statewide importance.[145] The Supreme Court has said that in circumstances like these, state courts are generally the better forum.[146] And rightly so. These cases most often involve unsettled areas of state law,

---

138. Torres v. Precision Indus., Inc., 938 F.3d 752, 755 (6th Cir. 2019); *accord* Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (("[Determining whether a statute is preempted by federal law] 'is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.' ") (quoting Perez v. Campbell, 402 U.S. 637, 644, (1971))); N.J. Payphone Ass'n v. Town of West New York, 299 F.3d 235, 249 (3d Cir. 2002) ("It is clear . . . that preemption is a constitutional issue."); BellSouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1176 (11th Cir. 2001).

139. *See, e.g.*, *Kalo Brick & Tile Co.*, 450 U.S. at 317 (explaining that a federal law can invalidate a state law because of the Supremacy Clause); City of Philadelphia v. New Jersey, 430 U.S. 141, 142 (1977) (per curiam) (observing that preemption "is . . . ultimately a question under the Supremacy Clause"); Nelson, *supra* note 69, at 233–34.

140. *E.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000).

141. *See e.g.*, Waisman, *supra* note 126, at 1542–44; Bezanson, *supra* note 137, at 1112–13 (discussing the Court's use of *Pullman* abstention beyond a narrow focus on federal constitutional questions).

142. N.Y. CONST. art. I, § 19.

143. N.J. CONST. art. VIII, § 4, ¶ 1.

144. *See, e.g.*, Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (per curiam) (abstaining because whether a trespass relating to water rights could be a "public use" within the meaning of the New Mexico constitution was a "truly novel" issue of state law).

145. *See, e.g.*, N.J. CONST. art. VIII, § 4, ¶ 1; School Funding Reform Act of 2008, N.J. STAT. ANN. 18A:7F-43 to -63 (West 2021); *see also* Cap. Bonding Corp. v. N.J. Sup. Ct., 127 F. Supp. 2d 582, 596–97 (D.N.J. 2001).

146. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813–15 (1976); Harris Cnty. Comm'rs Ct. v. Moore, 420 U.S. 77, 84 n.8 (1975) (holding abstention appropriate where the challenged state law is "part of an integrated scheme of related constitutional provisions . . . and where the scheme as a whole calls for clarifying interpretation by the state court[]").

where the assertion of federal jurisdiction risks turning a federal district court into an ongoing supervisor of a core feature of the state's government.[147]

Abstention is generally warranted in cases where state interests are significant, relative to any federal interests implicated in the litigation. As Professor Barry Friedman has shown, abstention exists to help navigate sensitive state-federal relations, protect state court review of state interests, and retain federal review of federal interests.[148] Indeed, jurisdictional statutes notwithstanding, federal judges rely on abstention to allocate cases between state and federal courts in a way that is sensitive to these interests or lack thereof.[149] Cases premised on fundamental, substantive rights that go beyond statutes or common law arguably represent the highwater mark of a state's enforcement interest, not just because of a constitution's place on the hierarchy of sources of law, but also because of the unique democratic interests that inhere in them.[150] Of course, exercising federal jurisdiction to ensure federal rights are adequately protected is part and parcel of concurrent jurisdiction and federal supremacy.[151] But making every case a federal case inevitably creates the friction between state and federal systems that abstention was designed to avoid. Catch and kills effectively nullify particularized state interests without a countervailing federal interest in the federal forum or federal substantive right.[152] Abstention is one way to avoid that tension and asymmetry.

To be sure, these suggestions are not a universal cure. There are reasons to suspect that the same federal courts that expand their jurisdiction through strained interpretations of removal statutes would be disinclined to limit that jurisdiction by applying discretionary doctrines like abstention. Nevertheless, the Court has suggested that this discretion favors respecting states' interests in "sensitive area[s] of social policy."[153] And state constitutions are one area where states codify some of their

147. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1465 (1999) ("In the realm of state constitutional law, . . . federalism suggests a more advisory, rather than supervisory, role.").

148. *See* Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 594–95 (1989).

149. *See id.* at 549–50 ("[A]lthough congressional jurisdictional grants, and Supreme Court interpretation of those grants, sweep quite broadly, the Court uses the abstention doctrines to effect a sensitive allocation of cases between the federal and state courts, ensuring the exercise of federal jurisdiction only where necessary to vindicate federal rights.").

150. *See supra* notes 91–93 and accompanying text; Friedman, *supra* note 148, at 584–88; Bulman-Pozen & Seifter, *supra* note 136, at 907–09.

151. *See* Friedman, *supra* note 148, at 548–49.

152. Clopton, *supra* note 1, at 210–11.

153. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941).

most sensitive interests. So, to the extent the Court's respect for state sovereignty is serious, we have at least some reasons to be optimistic that not all cases that are caught will be killed.

CONCLUSION

Catch and Kill Jurisdiction is an important contribution. It identifies and synthesizes a troubling use of federal jurisdiction to undermine substantive rights and centralize more lawmaking power in the hands of federal judges. As Clopton shows, this phenomenon rests on a facially legitimate basis of neutral principles. But in fact, catch and kill is a devious way to change substantive law under the guise of applying procedural or jurisdictional rules. An important lesson from *Catch and Kill Jurisdiction* is how easily federal judges can close the courthouse door—in both federal and state courts. In this Essay, I show how some of the tensions inherent in federal jurisdiction can, in some cases, work to keep the doors open. I suggest that federalism interests and state law can play a larger role in limiting the expansion of the federal judiciary than perhaps we appreciate.