

# PREEMPTION AND REMOVAL: WATSON SHUTS THE FEDERAL OFFICER BACKDOOR TO THE FEDERAL COURTHOUSE, CONCEALS FAMILIAR MOTIVE

## I. INTRODUCTION

A group of plaintiffs sues a large national corporation in state court for violating state law. The corporate defendant responds that even if it did violate state law, it is not liable because federal law or a relevant federal regulatory agency authorized or directed the allegedly illegal conduct. But before arguing that the supremacy of federal law and regulation preempts the state claim, the corporate defendant invariably removes the case to federal court.<sup>1</sup> If the corporate defendant cannot establish diversity jurisdiction, however, the Supreme Court's narrow interpretation of the federal question jurisdiction statute and its strict application of the well-pleaded complaint rule make the task of keeping the case in federal court nearly impossible. Following remand, a state judge ultimately decides whether federal law or regulation preempts the state claim against the corporate defendant.

Given this jurisdictional milieu, corporate defendants eager to escape the state courts vigilantly try to sneak into the federal courthouse through a backdoor after finding the front door closed. Recently, cigarette maker Philip Morris found one such backdoor in the federal officer removal statute, 28 U.S.C. § 1442(a)(1).<sup>2</sup> Indeed, Philip Morris succeeded not only at the district court level,<sup>3</sup> but also convinced a panel of the Eighth Circuit

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1. See, e.g., Fred J. Meier et al., *Federal Officer Removal: Watson Would Fly With FAA Designees*, 72 J. AIR L. & COM. 485 (2007).

Aviation manufacturers are confronted with a fifty-state patchwork quilt of tort laws and procedural rules when litigation involves their products. The national and international scope of the aviation industry, the extreme mobility of their products, and jurisdictional rules generally subject aviation manufacturers to being haled into the local courts of any of the fifty states to answer lawsuits, regardless of whether the manufacturer has a physical presence in a given state. The alternative to being a stranger in a state court forum is to seek transfer to the presumably more neutral playing field of the United States District Court.

*Id.* at 486.

2. 28 U.S.C. § 1442(a)(1) (2000).

3. *Watson v. Philip Morris Cos.*, No. 4:03-CV-519 GTE, 2003 WL 23272484 (E.D. Ark. Dec. 12, 2003).

to unanimously affirm the district court's denial of plaintiffs' remand motion.<sup>4</sup>

On its face, the federal officer removal statute permits removal of state claims against officers or agencies of the United States as well as persons "acting under" those officers or agencies. Historically, individuals and corporations unaffiliated with the government scarcely used this narrow jurisdictional statute. When they did, the defendants were federal contractors facing suits for activities performed under the direction of the United States pursuant to a contract.<sup>5</sup> Philip Morris was the first corporate defendant to successfully argue that because the Federal Trade Commission (FTC) regulated and authorized its actions that allegedly violated state law, Philip Morris was a person "acting under" an agency of the United States entitled to federal jurisdiction under § 1442(a)(1). This backdoor did not stay open for long, however, as a unanimous Supreme Court reversed the Eighth Circuit and held that a corporation simply complying with federal regulation, no matter how detailed or specific, could not defend state law claims in federal court under the federal officer removal statute.<sup>6</sup>

This Note has two primary goals. The first goal is to highlight the underlying jurisdictional issues that were not apparent on the face of any of the three *Watson v. Philip Morris Cos.*<sup>7</sup> opinions. Specifically, the lower courts' acceptance of Philip Morris's argument for federal officer jurisdiction created a rule that could potentially result in removal under § 1442(a)(1) of any case where a defendant asserted a conflict preemption defense based on extensive federal regulation. This decision circumvented established Supreme Court doctrine and carved a new exception into the well-pleaded complaint rule. In addition, if left untouched, the decision

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4. *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005).

5. *See, e.g.*, *Crackau v. Lucent Techs.*, No. Civ. 03-1376 (DRD), 2003 WL 21665135 (D.N.J. June 25, 2003). Radar technicians sued the manufacturer of radar devices for exposure to radiation. *Id.* at \*1. Because the radar system was developed for the U.S. Army, and because the Army controlled the training given to technicians and the wording in the radar safety manuals, the *Crackau* court concluded that the government controlled the defendant's activities and federal officer jurisdiction existed. *Id.* at \*5; *see also* *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) (holding that workers injured in the construction of turbines built according to detailed government specifications and subject to government testing amounted to "direct and detailed control" sufficient to create federal officer jurisdiction). *But see* *Good v. Armstrong World Indus.*, 914 F. Supp. 1125, 1128 (E.D. Pa. 1996) (finding that defendant was ineligible to remove under § 1442(a)(1) because it had not produced turbine generators "according to the direct and detailed control of an officer of the United States, rather than at the general direction of an agency or other governmental department").

6. *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2310 (2007).

7. 2003 WL 23272484; 420 F.3d 852; 127 S. Ct. 2301.

had the potential to seriously alter the balance toward federal regulatory preemption of private enforcement of state law.

The second goal is to analyze the Supreme Court's reasons for reversing the lower courts. This Note explains why the three principal rationales the Court used to support reversal—history, plain language, and statutory purpose—undermine rather than bolster the Court's decision. Ultimately, the Note concludes that just as with the Court's development of the well-pleaded complaint rule in the context of interpreting the federal question jurisdiction statute, practical concern over the expansion of the federal docket drove the Court's narrow reading of the federal officer removal statute.

## II. THE FRONT DOOR TO THE FEDERAL COURTHOUSE: STATUTORY FEDERAL QUESTION JURISDICTION AND REMOVAL

### A. *Divergence Between the Constitutional and Statutory Interpretations of Federal Question Jurisdiction*

Before delving into the history and judicial treatment of the federal officer removal statute prior to and during *Watson*'s ascent to the Supreme Court, it is important to briefly address some fundamental principles of federal jurisdiction. That federal courts are courts of limited jurisdiction is an oft-heard truism for both students and practitioners of the law.<sup>8</sup> Article III of the United States Constitution created the Supreme Court, authorized Congress to create inferior federal courts, and defined the extent of judicial power that those courts could exercise.<sup>9</sup> Among the bases of subject matter jurisdiction<sup>10</sup> enumerated in Article III, the most prominent in contemporary civil litigation are the ubiquitous diversity jurisdiction<sup>11</sup> and federal question jurisdiction.<sup>12</sup> The development and application of

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8. See, e.g., ERWIN CHERMERINSKY, FEDERAL JURISDICTION 41 (5th ed. 2007). In perhaps the leading treatise in the field of federal jurisdiction, Professor Chemerinsky begins Part I of his work by noting that “[i]t is frequently stated and widely accepted that federal courts are courts of limited jurisdiction.” *Id.* By contrast, state courts are courts of general jurisdiction; they can hear any judicially cognizable dispute without explicit authorization of jurisdiction. *Id.* at 265. Growing from this maxim of limited federal jurisdiction is the presumption that federal jurisdiction does not exist unless proven by the person seeking jurisdiction. *Id.* at 267.

9. See U.S. CONST. art. III, § 12.

10. “Subject matter jurisdiction is the legal authority of a court to hear and decide a particular type of case. . . . [F]ederal courts have limited subject matter jurisdiction; that is, they are restricted in what cases they may adjudicate and may exercise jurisdiction only if it is specifically authorized.” CHERMERINSKY, *supra* note 8, at 265.

11. See 28 U.S.C. § 1332 (2000).

12. See *id.* § 1331.

diversity jurisdiction is comparatively straightforward (and also less relevant for the upcoming analysis in light of the introductory hypothetical),<sup>13</sup> so the focus of the rest of this section and this Note will be federal question jurisdiction.<sup>14</sup>

Article III, Section 2 is the source of federal question jurisdiction and provides that the federal judicial power “shall extend to all Cases . . . arising under . . . the Laws of the United States.”<sup>15</sup> While Congress exercised its Article III, Section 1 power and created inferior federal courts by enacting the Judiciary Act of 1789, it did not confer statutory federal question jurisdiction upon those inferior courts until 1875.<sup>16</sup> By that time, the Supreme Court already had occasion to interpret the “arising under . . . the Laws of the United States” language in the Constitution.<sup>17</sup> In *Osborn v. Bank of the United States*,<sup>18</sup> the Court adopted an extremely broad reading of the “arising under” language when it held that the mere possibility that a question of federal law would be an important ingredient in litigation satisfied Article III requirements.<sup>19</sup>

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13. The operative word in this sentence is *comparatively*. Diversity jurisdiction has its own panoply of complications. For example, while Article III, Section 2 authorizes federal diversity jurisdiction over “Controversies . . . between Citizens of different States,” the statutory grant of diversity jurisdiction has been construed to require complete diversity: that no plaintiff and no defendant can be from the same state. *See* *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

14. In my discussion throughout the rest of this Note, I will assume the unavailability of removal by way of diversity of citizenship. At any rate, plaintiffs that bring state court claims against corporate defendants are typically sophisticated enough to join a nondiverse party so as to defeat diversity removal.

15. U.S. CONST. art. III, § 2.

16. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (current version at 28 U.S.C. §§ 1331–1332 (2000)).

17. In *Osborn v. Bank of the United States*, a federally chartered bank sued to recover tax money seized by a state treasury for taxes, claiming that the bank was exempt under federal law. 22 U.S. (9 Wheat.) 738, 739–44 (1824). While the suit was based on state law, the bank sued in federal court because a federal statute authorized the bank to sue and be sued in federal court. *Id.* at 805, 807. The state defendant challenged whether this statutory grant of jurisdiction arose under federal law for purposes of Article III. *Id.* at 744–45.

18. 22 U.S. (9 Wheat.) 738.

19. The Court reasoned that though in most cases involving the bank the only disputed issues would depend on state law, the fact that the bank’s legitimacy and capacity to act depended on federal law, and could thus conceivably be challenged in any case, was enough to confer federal question jurisdiction under Article III. *Id.* at 805. “The breadth of Chief Justice Marshall’s interpretation of federal question jurisdiction in *Osborn* cannot be overstated. According to his opinion for the Court, the Constitution permits Congress to create federal court jurisdiction whenever federal law is a potential ingredient of a case.” CHEMERINSKY, *supra* note 8, at 277–78. Despite widespread criticism, *Osborn* continues to be good law. *See* *Verlinden B. V. v. Cent. Bank of Nig.*, 461 U.S. 480, 492 (1983) (explaining that “[t]he controlling decision on the scope of Art. III ‘arising under’ jurisdiction is Chief Justice Marshall’s opinion for the Court in *Osborn v. Bank of the United States*”).

While the language of the modern federal question jurisdiction statute, 28 U.S.C. § 1331,<sup>20</sup> is nearly identical to the constitutional “arising under” language, the Court interprets the statutory grant of jurisdiction much more narrowly. In fact, a question “arises under” federal law for purposes of § 1331 only when: (1) federal law creates the plaintiff’s cause of action;<sup>21</sup> or (2) state law creates the plaintiff’s cause of action but federal law is an essential component of the case, and the outcome depends on the construction or application of that federal law.<sup>22</sup> Together, these limitations define the boundaries of what has become widely known as the well-pleaded complaint rule—the requirement that the federal question must appear on the face of a well-pleaded complaint to trigger § 1331 jurisdiction.<sup>23</sup>

A corollary of the well-pleaded complaint rule is that a federal defense cannot give rise to § 1331 jurisdiction, regardless of whether a defendant first raises the defense, or the plaintiff anticipates the defense and addresses it in the complaint.<sup>24</sup> An increasingly common federal

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20. That section reads: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2000).

21. This is often referred to as Justice Holmes’s cause of action test. *See* *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). While this was the predominant statement of the law on statutory federal question jurisdiction for a long time, it proved to be too narrow. *See* *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (noting that “Holmes’ test is more useful for describing the vast majority of cases that come within the district courts’ original jurisdiction than it is for describing which cases are beyond district court jurisdiction”).

22. *See* *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 180 (1921) (finding statutory federal question jurisdiction existed for a state law injunction that depended entirely on the validity of bonds issued under federal law); *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314–15 (2005) (finding that federal question jurisdiction existed for a state quiet title action where the only “disputed and substantial” issue was the sufficiency of a seizure notice issued by the IRS under federal law). *But see* *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) (finding no federal question jurisdiction over a state tort claim where the cause of action made the violation of a federal law into a presumption of negligence, even though violation of federal law was disputed and potentially critical to the outcome).

23. Nothing in part (2) in the preceding sentence requires that the essential and determinative federal question appear in the complaint, which raises the question of whether the well-pleaded complaint rule is properly named. Indeed, the Supreme Court has noted that while the well-pleaded complaint rule “makes sense as a quick rule of thumb,” it “may produce awkward results.” *Franchise Tax Bd.*, 463 U.S. at 11, 12. Still, the Court continues to use the rule and calls it a “powerful doctrine.” *Id.* at 9. Some mental gymnastics can resolve this minor dilemma if one accepts that a well-pleaded complaint would certainly mention an essential and determinative federal law.

24. *See* *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454 (1894) (holding that a federal defense asserted by the defendant does not create federal jurisdiction, even if the plaintiff anticipates the defense in his complaint, and even if the defendant asserts that defense thereafter); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that the federal claim must be asserted by the plaintiff as part of the affirmative theory of relief; rebutting a defense by raising a federal question does not create federal jurisdiction).

defense<sup>25</sup>—the one raised in the introductory hypothetical—is federal preemption of state law.<sup>26</sup> Broadly described, preemption is a doctrine grounded on the Supremacy Clause of the Constitution.<sup>27</sup> Article VI proclaims that federal law shall be the supreme law of the land, and that state judges shall be bound by federal law, anything to the contrary in state law notwithstanding.<sup>28</sup> An extension of this constitutional principle is that when Congress enacts a law with the explicit intent to change or supplant state law, a state judge must abide by that federal law even if doing so forecloses a plaintiff's relief for a defendant's violation of state law.<sup>29</sup> In addition to congressional ability to expressly preempt state law through statutory language, both federal law and federal regulation can preempt inconsistent or contrary state law by implication.<sup>30</sup> While it is the stated doctrine of both the state and federal judiciary to avoid finding conflict between federal and state law whenever possible,<sup>31</sup> when courts do find

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25. See, e.g., Joseph F. Zimmerman, *Congressional Preemption: Removal of State Regulatory Powers*, 38 POL. SCI. & POL. 375, 376–78 (2005). The author attributes the rise in preemption as a response to

(1) the failure of states by means of interstate cooperation to solve many multistate problems, including air and water pollution; (2) the ineffectiveness of conditional grants-in-aid in eliminating national problems; (3) the general failure of states to enact harmonious regulatory policies; (4) lobbying by industries, such as the motor vehicle industry, burdened with increasing nonharmonious state regulatory policies.

*Id.* at 376.

26. See generally JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW* (2006).

27. The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

28. *Id.*

29. This is called express preemption and occurs when Congress passes a statute that expressly spells out that it intends to preempt all or certain parts of state law and regulation on the subject. See O'REILLY, *supra* note 26, at 51–59.

30. See *id.* at 65–78. Implied preemption occurs in the absence of any express congressional provision. *Id.* at 65. There are several different types of implied preemption. The first, field preemption, occurs when a court determines that even absent an express provision, Congress intended to occupy the field and to exclude all state regulation on the subject matter. *Id.* at 69–72. The second type of implied preemption, conflict preemption, encompasses two situations. In instances of actual conflict between state and federal law, the federal law is said to preempt any conflicting state law. *Id.* at 72. Conflict preemption also covers situations where even absent a direct conflict, the "regulatory objectives" of the state and federal governments are incompatible. *Id.* In cases of conflict preemption, the Supremacy Clause "nullifies" the state law in favor of the federal law. *Id.* This Note is concerned primarily with the second type of implied preemption—conflict preemption.

31. See, e.g., *Altria Group, Inc. v. Good*, No. 07-562, slip op. at 6 (Dec. 15, 2008). "When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 543 (quoting *Rice v. Santa Fe Elevator Corp.*,

such conflicts, the conflict preemption doctrine requires displacement of state law in favor of federal law.<sup>32</sup>

*B. Practical Implications of the Divergent Interpretations for Litigants, and State and Federal Governments*

At the intersection of the well-pleaded complaint rule and the implied conflict preemption doctrine lies the question of true practical significance for our hypothetical corporate defendant—can the defendant remove the state law claim so that a federal court will rule on the validity of its federal preemption defense? The front door to the federal courthouse for our corporate defendant is the general removal statute, 28 U.S.C. § 1441.<sup>33</sup> Yet the general removal statute permits removal of a state case to federal court only if a district court could have exercised original jurisdiction over the case in the first place.<sup>34</sup> So, absent diversity jurisdiction, the corporate defendant cannot establish the requisite federal question jurisdiction based solely on its conflict preemption defense, and thus cannot remove under § 1441.<sup>35</sup> The result is that a district court will grant the plaintiff's motion for remand and a state judge, rather than the defendant's preferred federal judge, will ultimately determine whether a conflict exists between federal and state law, and whether that conflict will foreclose the plaintiff's remedy for the defendant's violation of state law.<sup>36</sup>

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331 U.S. 218, 230 (1947)). “That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States.” *Id.*

32. See O'REILLY, *supra* note 26, at 72–73.

33. The general removal statute, 28 U.S.C. § 1441(a) (2000), states that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”

34. *Id.*

35. See *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 19 (2003) (Scalia, J., dissenting). “Of critical importance here, the rejection of a federal defense as the basis for original federal-question jurisdiction applies with equal force when the defense is one of pre-emption. ‘By unimpeachable authority, 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.’” *Id.* at 12–13 (citing *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 116 (1936)). “‘A case *may not* be removed to federal court on the basis of . . . the defense of pre-emption. . . .’ To be sure, pre-emption requires a state court to *dismiss* a particular claim that is filed under state law, but it does not, as a general matter, provide grounds for *removal*.” *Id.* at 13 (citations omitted).

36. One exception to the well-pleaded complaint rule is the doctrine of complete preemption. Elucidated recently in *Beneficial Bank*, the doctrine provides that a state-law claim is completely preempted, and can therefore be *removed* to federal court, if federal law provides the exclusive cause of action for plaintiffs who wish to seek relief for the harm alleged. *Beneficial Bank*, 539 U.S. at 8. Originally, the doctrine was established by the Supreme Court in the 1968 case of *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). The *Avco* Court declared that Section 301 of the Labor Management Relations Act (LMRA) completely preempted state law claims related to labor relations.

Two inescapable questions follow. Does it matter? And if so, to whom? The simple answer belies its complex underpinnings. Yes, it matters a lot. And it matters not only to the individual litigants, but also to state and federal governments. For the litigants, the difference between a state and federal forum has immediate significance. Empirical evidence supports the conventional wisdom that the state court system tends to be more hospitable to plaintiffs, while the federal system is much friendlier terrain for the corporate defendant.<sup>37</sup> Even more poignant are the data showing that plaintiffs' win rates in cases removed to federal court are much lower than cases originally filed in federal court, even after a regression controlling for potential confounding variables.<sup>38</sup>

The question of who rules on conflict preemption defenses also matters for state and federal governments. A common justification for the grant of federal question jurisdiction to the federal courts is that states cannot be trusted to adequately safeguard federal rights.<sup>39</sup> Indeed, proponents of this

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*Id.* at 559–60. Subsequently, the doctrine of complete preemption has only been expanded to include two other statutory provisions. The first, section 502(a) of the Employee Retirement Income Security Act (ERISA) was held to completely preempt state law claims in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66–67 (1987). Finally, the *Beneficial Bank* Court held that state law claims of usury brought against national banks are completely preempted by the National Bank Act. *See Beneficial Bank*, 539 U.S. at 10–11.

37. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947. Professors Clermont and Eisenberg set out to evaluate whether there was any statistically significant difference between how losing defendants fare in the federal appellate courts compared to losing plaintiffs. *Id.* at 948–49. Running a regression analysis on data that included every federal trial and appellate decision between 1988 and 1997, Clermont and Eisenberg found that defendants that appeal their losses after trial obtain reversals at a 33% rate, while plaintiffs succeed at only a 12% rate. *Id.* at 952, tbl.1. The study attempted to control for variables that might affect the statistics. *Id.* at 950. The authors concluded that appellate judges' preference for ruling for defendants probably stems from the perception that juries and trial courts are friendly towards plaintiffs. *Id.* at 971.

38. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998). The authors' findings show that plaintiff's win rates in removed cases are much lower than in original federal cases. *Id.* at 593, 594 tbl.1. For example, the win rate in original diversity cases is 71%, while in removed diversity cases it is only 34%. *Id.* at 593. Here too the authors attempted to control for any confounding variables, but still found the decrease in plaintiffs win rates in removed cases to be statistically significant. Even in a regression controlling for many of these variables, the removal effect on plaintiff's win rates is significant. *Id.* at 597, 598 tbl.3. The authors conclude that not only does forum affect outcome, but also that the mere fact of removal further decreases a plaintiff's probability of success. *Id.* at 606–07.

39. *See, e.g.*, THE FEDERALIST NO. 81, at 316 (Alexander Hamilton) (Roy P. Fairfield ed., 1966). Alexander Hamilton explained that “[t]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes.” *Id.* Hamilton felt that “[s]tate judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.” *Id.*; *see also* AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 168 (1969) (arguing that federal question jurisdiction should exist “to protect litigants relying on



justification can point to a history of state court hostility to federal claims and resistance to federal assumption of the states' traditional police powers.<sup>40</sup> Common sense also suggests that federal judges, as creatures of federal political power, might be more inclined to construe potential inconsistencies between state and federal law as obstacles to federal supremacy, and hence more inclined to deny litigants relief under state law on preemption grounds. By contrast, state judges, many of whom are elected and thus directly accountable to the fellow citizens of their states, may think twice before denying one of those citizens relief under state law on the seemingly ethereal grounds of implied conflict preemption.<sup>41</sup> In light of this tension, the allocation of decision-making power over preemption defenses between state and federal judges may influence the balance of power between the state and federal systems.<sup>42</sup>

Two other justifications for the grant of federal question jurisdiction to the federal courts—expertise and uniformity—reveal similar federalism problems. If one accepts that the more frequent exposure of federal judges to issues of federal law creates expertise that eludes their state court colleagues, one might expect that federal judges would make fewer mistakes in the application of federal law.<sup>43</sup> Proper application of preemption principles, in turn, may better effectuate federal legislative intent and promote judicial efficiency that favors federal power. Similarly, the consistent allocation of issues raising state and federal conflicts to a unitary federal judicial system, rather than fifty separate state systems, may promote greater uniformity of outcome,<sup>44</sup> but again presumably in

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federal law from the danger that the state courts will not properly apply that law, either through misunderstanding or lack of sympathy”).

40. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1110–15 (1977).

41. See CHEMERINSKY, *supra* note 8, at 36 (“For example, the federal judicial system has greater insulation from political pressure because federal judges have life tenure and salaries that cannot be decreased, whereas in thirty-eight states there is some form of judicial election.”).

42. There, of course, remains the possibility that a state decision on federal preemption will eventually reach the Supreme Court through its appellate jurisdiction, but in light of the Court’s shrinking docket and the concomitant increase in potential state-federal conflicts, it is unlikely that a federal court could review state court decisions on the vast majority of preemption defenses.

43. See Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537 (2007). Professor Seinfeld posits that the federal courts’ capacity to provide greater uniformity in the interpretation of federal law stems from the facts that there are a lot fewer federal than state judges, and that they have greater expertise with federal law because they hear arguments on it more often. *Id.* at 542 n.12.

44. *But see* CHEMERINSKY, *supra* note 8, at 272. Professor Chemerinsky finds this rationale “problematic.” *Id.* “It is not clear that ninety-four federal judicial districts will produce more uniformity than fifty state judiciaries.” *Id.* While “[i]t might be argued that thirteen federal courts of appeals will produce more uniformity,” the fact that “[o]n a controversial issue, there are likely to be [just] two or three different positions” makes the uniformity argument less persuasive. *Id.*

favor of federal law. Ultimately, the question of who will rule on the corporate defendant's conflict preemption defense has immediate significance to the litigants, and lasting structural implications for the balance of power between the state and federal systems.

### C. Critiques of, and Reasons for, the Divergence in Interpretation

The Court's drastically different interpretations of nearly identical language in Article III and § 1331 greatly affect both individual litigants and the structural balance between state and federal governments. This raises an obvious question—why the divergence? What little legislative history exists for § 1331 suggests that Congress intended to confer the entirety of constitutional federal question jurisdiction to the federal courts.<sup>45</sup> The difficulty in reconciling the divergence as a matter of statutory interpretation has led many commentators to conclude that the Court either got it wrong, or at least that it failed to articulate a principled basis for distinguishing the § 1331 language.<sup>46</sup> After all, if the reason for granting federal jurisdiction to federal causes of action is the importance of vindicating federal rights, the federal interest is just as great when the federal right arises in a defense as when it arises in the complaint itself.<sup>47</sup> The potential for antifederal bias is equal whether a plaintiff asserts a federal right in state court or whether a defendant asserts a federal defense in state court.<sup>48</sup>

Other commentators, while acknowledging the Court's failure to convincingly support its multifarious federal question decisions with logic,

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45. See 2 CONG. REC. 4,986–87 (1874). Senator Carpenter, the author of the bill, stated that “[t]he Act of 1789 did not confer the whole power which the Constitution conferred. . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.” *Id.*

46. See generally James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987). The Supreme Court itself apparently agrees. In its recent *Franchise Tax Board* decision, the Court admitted that the rule is based more on “history than logic,” but refused to change it. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 4 (1983). The Court continues to defer to Congress to alter the well-pleaded complaint rule. See *id.* at 10 n.9 (mentioning congressional proposals to amend the rule, but noting that such proposals have not been adopted). So Congress has consistently reenacted the original Act granting federal jurisdiction without altering the language with full knowledge of the fact that the Supreme Court utilizes the well-pleaded complaint rule.

47. Doernberg, *supra* note 46, at 650–51 (explaining the desirability of having federal court decide dispositive federal questions regardless of whether plaintiffs or defendants raise those federal questions). Note, however, that the determination of whether a federal question is dispositive would often necessitate an inquiry into the merits in order to determine jurisdiction.

48. Seinfeld, *supra* note 43, at 545.

point instead to the practical implications of applying the Article III “arising under” interpretation to § 1331. Specifically, the explosion of potential federal questions that accompanied the massive accumulation of new federal legislation since the interpretation of the Article III language would turn most cases into federal question cases under *Osborn*.<sup>49</sup> Hence, it was primarily the Court’s concern with the control of the federal docket that drove the narrow interpretation of § 1331.<sup>50</sup> Indeed, the creation of the well-pleaded complaint rule coincided with a flood of litigation implicating federal land grants, which if allowed to proceed in federal court under *Osborn*, would have overwhelmed the still-limited federal court system.<sup>51</sup> Despite strong criticism of docket control as a tool of statutory construction in the realm of federal jurisdiction,<sup>52</sup> the fact remains that the well-pleaded complaint rule, along with the § 1441 prerequisite of original federal jurisdiction for removal, shuts the front door to the federal courthouse for the defendant asserting a preemption defense in a state case.

### III. HISTORY LEAVES A BACKDOOR CRACKED: THE FEDERAL OFFICER REMOVAL STATUTE

#### A. *Historical Versions of the Federal Officer Removal Statute*

Even when history closes the front door, it has a knack for leaving backdoors cracked open for the persistent and well-funded litigant. One such crack emerged in the history of the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Congress enacted the original federal officer removal

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49. See, e.g., Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 162–63 (1953). “To include within the jurisdiction of the lower federal courts all cases which might conceivably turn finally upon an issue of national law would create an impossible situation.” *Id.* at 163.

50. Seinfeld, *supra* note 43, at 546.

51. *Id.* Professor Seinfeld explains that around the same time that the Supreme Court decided the string of cases establishing the well-pleaded complaint rule, docket-control concerns were paramount because of the flood of litigation pertaining to western land grants. *Id.* Because the title to the western lands descended from a grant from the United States, this could have meant a caseload that was beyond the resources or capacity of the federal courts. *Id.*; see also Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1782 (1998).

52. See, e.g., Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the “Martian Chronicles”*, 78 VA. L. REV. 1769 (1992). “[T]he criteria for making . . . a reduction [in the federal docket] must be selected on the basis of a rational assessment of how particular groupings of cases would be served by the assertion of federal jurisdiction, not by the use of an approach that focuses on a convenient, but totally irrelevant, distinguishing factor.” *Id.* at 1795.

statute<sup>53</sup> at the end of the War of 1812 in order to permit removal of state claims against federal customs officials.<sup>54</sup> The main purpose of this early statute was to prevent interference by hostile state courts with the implementation of federal objectives by providing a federal forum more inclined to displace conflicting state law and to acknowledge valid federal defenses.<sup>55</sup>

Congress reincarnated the federal officer removal statute in the early 1830s in response to a South Carolina law that made the federal tax laws unconstitutional, and authorized the state prosecution of federal tax collectors.<sup>56</sup> Once again, the statute provided for removal of state claims to a federal forum that recognized the authority and supremacy of federal law.<sup>57</sup> The next iteration enlarged the pool of persons entitled to remove by including the phrase “any person acting under or by authority of any [revenue] officer” in the statute.<sup>58</sup>

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53. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195 (current version at 28 U.S.C. 1442 (a)(1) (2000)). The act reads:

[I]f any suit or prosecution be commenced in any state court, against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof, . . . the defendant shall, at the time of entering his appearance in such court, file a petition for the removal of the cause for trial at the next circuit court of the United States to be holden . . . where the suit is pending . . . [and] the cause shall there proceed in the same manner as if it had been brought there by original process . . . .

*Id.*

54. At that time, United States customs officials were trying to enforce a trade embargo against England. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). In response to having their goods seized by federal agents, American ship owners brought state-court claims against federal customs officials.

*Id.*

55. *Id. see also* Note, *Limitations on State Judicial Interference with Federal Activities*, 51 COLUM. L. REV. 84, 97 (1951) (explaining that the primary goal of the removal statutes is to attain decisions by federal tribunals so as to enforce national policy and achieve uniformity of result).

56. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632 (current version at 28 U.S.C. § 1442(a)(1) (2000)). The act reads:

[I]n any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, . . . it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States, in and for the district in which the defendant shall have been served with process, . . . the cause shall thereupon be entered on docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court . . . .

*Id.* at 633.

57. *See* 9 CONG. DEB. 461 (1833) (statement of Sen. Webster). Senator Daniel Webster explained at the time of the act’s enactment that to avoid state courts that might be hostile to federal law, the statute would “give a chance to the officer to defend himself where the authority of the law was recognised.” *Id.*

58. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171, 171 (current version at 28 U.S.C.

In 1948, Congress revised the federal officer removal statute and abandoned the limitation of the statute's application to the context of revenue collection.<sup>59</sup> The final modification that led to the version of the statute in existence today occurred in 1996, when Congress explicitly included agencies of the United States as parties protected by the statute.<sup>60</sup>

*B. Who Can Remove Under 28 U.S.C. § 1442(a)(1)?*

The federal officer removal statute makes clear that any officer or agency can remove state claims to federal court when the allegedly illegal actions were taken under color of federal law. But the statute also allows persons "acting under" those officers and agencies to remove.<sup>61</sup> The statute itself offers no clues on what "acting under" an officer or agency means, so § 1442(a)(1) raises the obvious question of when a private person can remove.<sup>62</sup>

Several early Supreme Court cases demonstrate the development of judicial interpretation of the "acting under" clause of the predecessors to

§ 1442(a)(1) (2000)).

59. Act of June 25, 1948, ch. 646, § 1442(a), 62 Stat. 938, 938; 28 U.S.C. § 1442(a) (2000).

60. See *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991). In this case, a group of animal advocates sued in Louisiana state court to enjoin the National Institutes of Health (NIH) from euthanizing monkeys on which the NIH had been conducting research. *Id.* at 74–76. The NIH removed the case to federal court based on § 1442(a)(1), but the district court granted the injunction. *Id.* at 75–76. After the Fifth Circuit reversed and vacated the injunction, the animal protection group challenged the federal courts' jurisdiction of the subject matter. *Id.* at 76. The Supreme Court engaged in an exercise of statutory construction, and concluded that because the statute used language permitting removal of action against "officer[s] of the United States or any agency thereof," agencies themselves were not officers entitled to removal. *Id.* at 82–84. The Court reasoned that unlike the more complicated federal officer immunity defense, which Congress thought better be decided by federal courts, federal agency immunity defenses were reasonably suited for resolution in state court. *Id.* at 85–86. In response, Congress amended the federal officer removal statute to specifically include agencies of the United States. See 28 U.S.C. § 1442(a)(1); Act of Oct. 19, 1996, Pub. L. No. 104-317, tit. II, § 206(a), 110 Stat. 3847, 3850.

61. Courts agree that a corporation is a person within the meaning of § 1442(a). See *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 947 (E.D.N.Y. 1992). But see *Krangel v. Crown*, 791 F. Supp. 1436 (S.D. Cal. 1992) (remanding because defendant corporation was not a person under § 1442(a)(1)). The *Krangel* decision was an anomaly and it is now universally accepted that corporations can be "persons" within the meaning of § 1442(a)(1). See *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 136 (2d Cir. 2008).

62. The full language of the statute reads:

A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office

28 U.S.C. § 1442(a)(1) (2000) (emphasis added).

§ 1442(a)(1). In *Davis v. South Carolina*,<sup>63</sup> for example, an army officer helped a federal revenue officer arrest a distiller for violating federal revenue laws.<sup>64</sup> During the arrest, the army officer shot and killed the distiller and was indicted for murder.<sup>65</sup> The Supreme Court upheld removal because the officer “acted under” the direction of the revenue officer when he joined in the attempted arrest, thereby bringing himself within the confines of the statute.<sup>66</sup> In *Maryland v. Soper*,<sup>67</sup> prohibition agents and the private citizen who drove them were charged with murder when a person was shot and killed during a distillery raid. Even though the Court eventually rejected removal,<sup>68</sup> it made the important pronouncement that even somebody acting as a chauffeur under the orders of federal agents enjoyed the same protection of the removal statute as did the agents themselves.<sup>69</sup>

After the 1948 enactment of § 1442(a)(1) removed the statute’s limitation to the revenue context, federal courts began to see an increase in attempts by other nongovernmental entities to use the “acting under” clause of the statute to remove state cases against them to federal court. In *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*,<sup>70</sup> for example, employers of migrant farm workers sued a legal assistance corporation and its lawyers for “conspiracy to induce the workers to breach their employment [contracts].”<sup>71</sup> The legal assistance corporation had received grants from the Office of Economic Opportunity (OEO) so that it would serve the needs of the migrant workers.<sup>72</sup> As a condition of the grants, the corporation had to comply with various OEO regulations, including submitting reports and permitting government audits.<sup>73</sup> A district court concluded that the OEO’s conditions constituted sufficient federal control of the attorneys and the legal assistance corporation so that the

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63. 107 U.S. 597 (1883).

64. *Id.* at 597–98. The federal officer removal statute in this case was limited to removal by revenue officers and persons acting under them.

65. *Id.* at 598.

66. *Id.* at 600.

67. 270 U.S. 9 (1926).

68. In *Soper*, the Court held that the officers seeking removal did not allege in sufficient detail that the actions giving rise to their state murder prosecution were undertaken strictly in an official capacity while enforcing the revenue laws of the United States. *Id.* at 35. As a result, the Supreme Court issued a writ of mandamus forcing the district court to remand the case to Maryland state court. *Id.* at 35–36.

69. *Id.* at 30.

70. 358 F. Supp. 841 (S.D.N.Y. 1973).

71. *Id.* at 842.

72. *Id.* at 845.

73. *Id.*

attorneys were “acting under” a federal agency when they interacted with the migrant workers.<sup>74</sup> The case stayed in federal court.

In *Winters v. Diamond Shamrock Chemical Co.*,<sup>75</sup> the Fifth Circuit evaluated a state claim by a nurse who had been exposed to Agent Orange manufactured by the defendant in Vietnam.<sup>76</sup> The defendant claimed that it was “acting under” the direction of the United States military when it manufactured the Agent Orange because the government specified the precise formula, as well as the packaging, labeling, and shipping requirements.<sup>77</sup> In addition, the government compelled the defendant to deliver the Agent Orange under threat of criminal sanction.<sup>78</sup> The Fifth Circuit found that such detailed specification, supervision, and control was sufficient to find that defendant was “acting under” a federal officer when it manufactured the product.<sup>79</sup>

A California district court reached a similar conclusion in *Fung v. Abex Corp.*<sup>80</sup> In *Fung*, workers exposed to asbestos during the construction of submarines sued the manufacturer.<sup>81</sup> The submarines were built pursuant to a federal contract where the government monitored the defendant’s performance and required that it keep strict contract specifications.<sup>82</sup> In addition, the government had a contractual right to inspect and approve all supplies to ensure compliance with the contract.<sup>83</sup> The *Fung* court found

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74. *Id.* at 847. Note that after the Supreme Court’s *Watson* decision, the outcome of this case would depend not on the level of control exercised by the OEO over the legal assistance corporation, but on whether the services that the corporation was providing were traditional governmental services such that the corporation was assisting the federal government in carrying out its official duties. *See infra* Part V.A.

75. 149 F.3d 387 (5th Cir. 1998).

76. *Id.* at 390.

77. *Id.* at 399.

78. *Id.* at 398.

79. *Id.* at 399–400. After the Supreme Court’s decision in *Watson*, the level and detail of supervision and control is no longer a relevant factor in analyzing whether a federal contractor warrants the protection of § 1442(a)(1). *See infra* Part V. What is relevant is the type of activity that the contractor was performing for the federal government. If the activity is one that is traditionally a governmental activity, then the contractor deserves removal. *See Watson v. Philip Morris Cos., Inc.*, 127 S. Ct. 2301, 2308 (2007). Conducting a war or providing for the national defense qualifies as such an activity. *Id.*

80. 816 F. Supp. 569, 572 (N.D. Cal. 1992).

81. *Id.* at 570–71.

82. *Id.* at 572–73.

83. *Id.* at 573. The *Fung* court also noted that the “control requirement can be satisfied by strong government intervention and the threat that a defendant will be sued in state court ‘based upon actions taken pursuant to federal direction.’” *Id.* at 572 (quoting *Gulati v. Zuckerman*, 723 F. Supp. 353, 358 (E.D. Pa. 1989)). Note again that after *Watson*, the control requirement is no longer relevant.

this level of direction and control sufficient to satisfy the “acting under” clause of § 1442(a)(1), and the case stayed in federal court.<sup>84</sup>

Noticing the trend that federal courts’ analysis of § 1442(a)(1) largely turned on the level and detail of government control rather than the existence of a contractual relationship, defendants in highly regulated industries noticed that the backdoor to the federal courthouse was cracked open and began to remove under § 1442(a)(1). In *Tremblay v. Philip Morris, Inc.*,<sup>85</sup> Philip Morris removed a light cigarette class action from state court in New Hampshire.<sup>86</sup> Philip Morris argued that removal was proper because it was “merely attempting to comply with the FTC’s policies regarding the testing and labeling of light cigarettes when it engaged in the conduct for which it [was] sued.”<sup>87</sup> The *Tremblay* court was unconvinced by Philip Morris’s argument and noted that mere compliance with regulation did not transform it into a federal actor.<sup>88</sup> Undeterred, Philip Morris and other tobacco companies began to remove cases to federal court under § 1442(a)(1) as a matter of course, though they did not have much success keeping them there.<sup>89</sup>

Defendants in other highly regulated industries soon tried to sneak through the same backdoor. In *Jamison v. Purdue Pharma Co.*,<sup>90</sup> the manufacturer of the drug OxyContin removed state claims of failure to warn from a Mississippi court.<sup>91</sup> The manufacturer based its § 1442(a)(1)

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84. *Id.* at 573. Another case involving a military contractor, however, reached a different result. See *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). In *Ryan*, the manufacturer had removed a case filed in Texas state court that sought damages for injuries suffered from exposure to Agent Orange in Vietnam. *Id.* at 937. While the manufacturer in *Ryan* was under similar direction and supervision from the government as was the *Winters* defendant, the *Ryan* court ultimately decided to remand the case. *Id.* at 953. The court distinguished the design and formulation of the Agent Orange from its delivery to the military. *Id.* at 950. Because the government did not control the herbicide’s development, the defendant did not “act under” a federal officer when it created the dangerous chemical. *Id.*

85. 231 F. Supp. 2d 411 (D.N.H. 2002).

86. *Id.* at 413–14. The plaintiffs’ theory in *Tremblay* was identical to the one put forward by the *Watson* class, and the argument for federal officer removal made by Philip Morris was also identical. *Id.* at 413–14. There have been a large number of light cigarette fraud cases around the country, and Philip Morris has attempted to remove using the federal officer statute in all of them. See generally EDWARD L. SWEDA, JR., MARK GOTTLIEB & CHRISTOPHER N. BANTHIN, LIGHT CIGARETTE LAWSUITS IN THE UNITED STATES: 2007 (2007). The *Watson* decision was the first successful removal. *Id.* at 9.

87. *Tremblay*, 231 F. Supp. 2d at 417.

88. *Id.* at 419.

89. See generally *Pearson v. Philip Morris*, No. 03-CV-178-HA, 2003 U.S. Dist. LEXIS 24508 (D. Or. Aug. 8, 2003); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832 (N.D. W.Va. 2004); *Paldemic v. Altria Corporate Servs.*, 327 F. Supp. 2d 959 (E.D. Wis. 2004). Altria is the parent company of Philip Morris.

90. 251 F. Supp. 2d 1315 (S.D. Miss. 2003).

91. *Id.* at 1318.



argument on the fact that the Food and Drug Administration (FDA) regulates in detail the approval, labeling, and marketing of prescription drugs.<sup>92</sup> Hence, the acts giving rise to plaintiffs' suits were taken "under" the FDA, a federal agent. The district court remanded, explaining that "[defendants] are not government contractors, delivering either a product or service to the United States, or to beneficiaries designated by the government."<sup>93</sup> Furthermore, the FDA did not explicitly direct the defendant to avoid warning consumers; it merely found the warnings the FDA approved sufficient for purposes of federal law.<sup>94</sup> While the court acknowledged that the defendant was highly regulated by the FDA, it found that being subject to such regulation was insufficient to support federal officer removal.<sup>95</sup>

Next to follow was the telecommunications industry. In *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*,<sup>96</sup> cellular telephone manufacturers removed state claims alleging that radio

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92. *Id.* at 1325; see also *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014 (D. Minn. 2006). The *Guidant* plaintiffs were survivors and estates of patients who had died as a result of malfunction of automatic implantable cardioverter defibrillators manufactured by the defendant. *Id.* at 1016. Their theories for relief included product liability, negligence, and fraudulent concealment. *Id.* The manufacturer removed cases based on the federal officer removal statute, arguing that in designing, manufacturing, and marketing the defibrillators at issue, it acted under the direct control and supervision of the FDA. *Id.* The court concluded that the defendant failed to show that it acted under the direction of the FDA, as necessary for removal, and that there was no causal connection between the alleged defects and deception, and the FDA's regulatory authority. *Id.* at 1017–18. This decision was issued after the *Watson* Eighth Circuit decision, yet the court distinguished *Watson* on the basis that the participation and level of control by the FDA over defendant was significantly less than that of the FTC over the tobacco industry. *Id.*

93. *Jamison*, 251 F. Supp. 2d at 1326. When the *Jamison* court mentioned the fact that defendant was not delivering a service to beneficiaries designated by the government, it was referring to a line of cases that applied § 1442(a)(1) to private companies acting as intermediaries in the Medicare program, which were acting under the direction of the Secretary of Health and Human Services. See, e.g., *Peterson v. Blue Cross/Blue Shield of Tex.*, 508 F.2d 55 (5th Cir. 1975); *Neurological Assocs. v. Blue Cross/Blue Shield of Fla., Inc.*, 632 F. Supp. 1078 (S.D. Fla. 1986); *Holton v. Blue Cross & Blue Shield of S.C.*, 56 F. Supp. 2d 1347 (M.D. Ala. 1999).

94. *Jamison*, 251 F. Supp. 2d at 1326–27. This reasoning by the *Jamison* court suggests that if the FDA had in fact explicitly directed defendant to avoid warning, that would have brought defendant within the confines of § 1442(a)(1). Note that this is in essence a statement that in a case of conflict preemption based on an explicit federal directive, the federal officer removal statute becomes a vehicle for removal. This is exactly the logic behind the decisions of the lower courts in *Watson*. See *infra* Part VI. Taking the *Jamison* court at its word, it appears that given the right facts, that court also was willing to make the same decision as the lower courts in *Watson*. The Supreme Court's decision in *Watson*, of course, completely foreclosed the possibility of § 1442(a)(1) being used as a method of removal even in the case of a conflict preemption defense based on an explicit federal directive. See *infra* Part V. It is still interesting to note that even courts that were denying highly regulated companies the use of § 1442(a)(1) continued to leave openings for such an invocation given the right circumstances—namely an explicit federal directive.

95. *Jamison*, 251 F. Supp. 2d at 1326.

96. 216 F. Supp. 2d 474 (D. Md. 2002).

frequencies increased the chance of the plaintiffs contracting brain cancer.<sup>97</sup> The manufacturers argued that they deserved § 1442(a)(1) removal because the Federal Communications Commission (FCC) specifically directed defendants to manufacture, test, and sell phones that emit only approved radio frequency radiation.<sup>98</sup> A Maryland district court was also unconvinced by this argument, finding that defendants were simply regulated by the FCC, and that the FCC did not specifically instruct them to avoid warning consumers or adding safety devices to their products.<sup>99</sup> In that sense, they were not “acting under” the FCC when they allegedly violated the plaintiffs’ state law rights.<sup>100</sup>

In *In re Methyl Tertiary Butyl Ether (“MTBE”) Product Liability Litigation*,<sup>101</sup> the defendants were more successful, albeit for only a short while. In this case, plaintiffs sued gasoline refiners, distributors, and retailers, claiming that the gasoline additive MTBE leaked from storage tanks and contaminated their groundwater supplies.<sup>102</sup> Defendants removed to federal court on the theory that Congress, when it enacted the Clean Air Act, authorized the Environmental Protection Agency (EPA) to approve various additives to gasoline that oxygenated it and reduced air pollution.<sup>103</sup> MTBE was one of the EPA’s approved additives.<sup>104</sup> Additionally, the defendants argued that the EPA knew that MTBE would be used and also could foresee that some MTBE would leak from storage tanks and contaminate groundwater.<sup>105</sup> After reviewing federal contractor cases requiring a high degree of federal control over defendants, a district court agreed that the EPA had approved the use of MTBE, and found that

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97. *Id.* at 479.

98. *Id.* at 499–500.

99. *Id.* at 500. Again, this court, like the *Jamison* court, suggests that if the FCC had directed the defendants in this case to take the specific actions complained of, then federal officer removal would have been available. *See id.* This amounts to a statement that where a conflict preemption defense is based on an explicit federal directive, the actor’s conduct becomes conduct “under” a federal officer and becomes qualified for removal under § 1442(a)(1). This suggestion by the court is particularly interesting in light of its statement earlier in the opinion that “[u]nder ordinary conflict preemption, state laws that conflict with federal laws are preempted, and preemption is asserted as ‘a federal defense to the plaintiff’s suit. As a defense it does not appear on the face of a well-pleaded-complaint, and, therefore, does not authorize removal to federal court.’” *In re Wireless*, 216 F. Supp. 2d at 493 (quoting *Darcangelo v. Verizon Commc’ns*, 292 F.3d 181, 186–87 (4th Cir. 2002)) (discussing it as part of its complete preemption analysis but failing to raise issue in its § 1442(a)(1) analysis).

100. *In re Wireless*, 216 F. Supp. 2d at 500.

101. 342 F. Supp. 2d 147 (S.D.N.Y. 2004) [hereinafter *In re MTBE*].

102. *Id.* at 149–50.

103. *Id.* at 150–51.

104. *Id.*

105. *Id.* at 151.

defendants had “acted under” a federal agency and could remove their cases to federal court.<sup>106</sup>

On interlocutory appeal of the district court’s order, the Second Circuit reversed.<sup>107</sup> The Second Circuit pointed to the fact that the district judge’s conclusion was “not based on any explicit directive in either the Clean Air Act or its implementing regulations.”<sup>108</sup> Even accepting the defendants’ allegations that Congress and the EPA approved of and knew that MTBE would be used as a gasoline additive, there was no evidence that any government agency directed the defendants to use MTBE.<sup>109</sup> The EPA only created regulations for the control of pollution and gave the defendants options on how to reach those regulatory goals.<sup>110</sup> Fearing that an alternative decision would federalize many state tort claims, the Second Circuit held that the MTBE cases were improperly removed to federal court under § 1442(a)(1).<sup>111</sup>

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106. *Id.* at 154–59. It is important to understand that this decision essentially accomplished the same result and created the same rule as did the lower courts in *Watson*. Namely, this court concluded that since the EPA approved the use of MTBE, and because plaintiffs alleged that the use of MTBE violated state law, compliance with both the federal regulation and state law being impossible was a colorable defense. *See In re MTBE*, 342 F. Supp. 2d at 158. This is the quintessential basis for the conflict preemption doctrine. *See supra* note 30. Note that this court, unlike the courts in *Jamison* and *In re Wireless*, did not even require an explicit directive in order to turn a conflict preemption defense that would normally be used at the summary judgment stage, into an argument for federal officer removal at the jurisdictional stage.

107. *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 488 F.3d 112, 136 (2d Cir. 2007).

108. *Id.* at 126.

109. *Id.* at 126–27. Even though the Second Circuit reversed the district court’s decision, it read § 1442(a)(1) to permit removal where there is an explicit federal directive. *Id.* In so doing, it adopted a reading similar to that in the *Jamison* and *In re Wireless* courts. In essence, the only difference between the district court’s interpretation of the statute and that of the Second Circuit, is that the Second Circuit would create the additional requirement that a conflict preemption defense needs to be based on an explicit federal directive rather than the mere conflict of the laws or regulations. While this interpretation is narrower than that of the lower courts in *Watson*, it still creates an exception to the well-pleaded complaint rule based on conflict preemption.

110. *Id.* at 127–30. A portion of the case explored the Eighth Circuit *Watson* decision in some detail. *Id.* at 130–31. First, the Second Circuit questioned whether the case was decided correctly. *Id.* Then the court concluded that even if the *Watson* court was correct, the regulation by the FTC over tobacco companies was much more direct than the regulation by the EPA there. *Id.* at 131. Finally, the court pointed to the *Watson* concurrence which made a special point to emphasize that the *Watson* decision should not be construed to give a federally regulated entity a ticket into federal court. *Id.* at 131.

111. *Id.* at 132. This last statement, although cursory, appears to be concerned with the impact on the federal docket should the court reach an alternative decision. In that sense, it is similar to what this Note suggests is the real rationale behind the Supreme Court’s decision in *Watson*.

IV. SNEAKING THROUGH THE BACKDOOR BUT LEAVING IT WIDE OPEN:  
THE *WATSON* LOWER COURT DECISIONS

A. *Grounds for the Lower Courts' Decisions*

In April 2003 a class of light cigarette smokers sued Philip Morris in Arkansas state court for violating the Arkansas Deceptive Trade Practices Act<sup>112</sup> by deceptively marketing light cigarettes as lower in tar and nicotine than regular cigarettes.<sup>113</sup> After Philip Morris removed the case to the Eastern District of Arkansas, plaintiffs moved to remand.<sup>114</sup> Philip Morris argued that the federal court had jurisdiction under § 1442(a)(1) because Philip Morris “acted under” the FTC when it tested its cigarettes and later based its advertising on those test results.<sup>115</sup> Specifically, Philip Morris alleged that the FTC required tobacco companies to test cigarettes using the FTC-mandated test and to disclose those test results in all advertising for cigarettes in the United States.<sup>116</sup> In addition, the FTC allegedly permitted tobacco companies to label cigarettes “light” if they fell within specified ranges on their test results.<sup>117</sup>

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112.

(a) Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, but are not limited to the following:

(1) Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services, or as to whether goods are original or new, or of a particular standard, quality, grade, style, or model . . . .

ARK. CODE ANN. § 4-88-107 (2001).

113. *Watson v. Philip Morris Cos.*, No. 403-CV-519 GTE, 2003 WL 23272484, at \*1 (E.D. Ark. Dec. 12, 2003). The essence of the complaint was that Philip Morris intentionally manipulated the design of its light cigarettes in order to receive lower tar and nicotine readings on the government mandated cigarette testing machine, and then knowingly used those misleading results to market their cigarettes as being healthier or less dangerous than normal cigarettes. *Id.* at \*1–2. In reality, plaintiffs claimed, light cigarettes delivered as much tar and nicotine as regular cigarettes, but were in fact more dangerous than regular cigarettes when smoked by persons switching from regular to light. *Id.*

114. *Id.* at \*2.

115. *Id.* One commentator referred to Philip Morris’s theory for removal as “almost laughable.” Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1252 (2008). “Perhaps, had the argument not been made by such serious-looking men and in such an august setting, the argument would have been given the unceremonious boot back to state court right away.” *Id.* As discussed below in Part V, I do not find the argument to be as laughable as Mr. Hoffman.

116. *Id.* at \*4.

117. *Id.* at \*6. There has been a dispute between the FTC and the tobacco companies as to whether the FTC ever actually defined these terms. See 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997). Again, no formal rules were adopted with respect to the use of these terms. *Watson*, 2003 WL 23272484, at \*6.

After reviewing the arguments of both sides, the district court boiled the § 1442(a)(1) question down to a single issue: “whether the actions that form the basis of the state suit were performed pursuant to comprehensive and detailed federal government regulation.”<sup>118</sup> The court’s task, therefore, was to “decide whether the FTC’s regulation of cigarette testing and advertising constitutes the direct and detailed control required to invoke § 1442(a)(1) jurisdiction and whether the manner in which Philip Morris tested and advertised Marlboro Lights and Cambridge Lights was directed by the FTC.”<sup>119</sup>

The district court surveyed the government contractor cases that evaluated the level of government control sufficient to invoke federal officer jurisdiction. It concluded that in order for a corporation to fall within the “acting under” language of the federal officer removal statute, it had to be subject to more direct control by a federal agency than is the case in a typical regulatory scenario.<sup>120</sup> Emphasizing the level and detail of control that the FTC exercised over Philip Morris with regard to its testing and advertising of cigarettes, the district court found that Philip Morris was indeed a person “acting under” the FTC for purposes of § 1442(a)(1) and denied plaintiffs’ motion to remand.<sup>121</sup> The court then certified its decision for immediate interlocutory appeal.<sup>122</sup>

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118. *Watson*, 2003 WL 23272484, at \*10. This language frames the question of federal officer jurisdiction in terms most often used in arguments for complete preemption. By framing the question as it does, the district court almost necessarily brings into the picture the implications of its decision in terms of removal based on a conflict preemption defense.

119. *Id.* at \*10.

120. *Id.* at \*13. The court approved of another court’s description of such a situation as “regulation plus.” *See Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 144–45 (E.D.N.Y. 1991). The *Bakalis* court was faced with a decision of whether to remand a case removed by a federally chartered savings bank from state court. *Id.* at 141. The bank was subject to extensive regulation by the Office of the Thrift Supervisor, a federal agency. *Id.* at 144. Despite the extensive regulation, the court concluded that mere regulation was not sufficient to turn the bank into a person “acting under” a federal officer, and that something akin to “regulation plus” was the standard for permitting removal. *Id.* at 144–45. Despite what it acknowledged was a “somewhat amorphous standard” because of the number and complexity of federal institutions and programs, the *Watson* court was resigned to the fact that a precise formulation of the “acting under” standard for regulated companies was impossible. *Watson*, 2003 WL 23272484, at \*13.

121. *Watson*, 2003 WL 23272484, at \*14. The court recognized that Philip Morris was not required to advertise its cigarettes as light or low tar. *Id.* at \*15. But because the FTC required the testing, and permitted the use of the descriptors light and low tar if the test results were within specified parameters, plaintiffs’ claim that such advertising was deceptive “squarely confront[ed]” the FTC’s regulation. *Id.* When presented with the fact that two other district courts had considered the exact same question with the same defendant and held that Philip Morris could not remove light class actions under § 1442(a)(1), the district court was content to find itself in disagreement with those courts. *Id.* at \*20.

122. *Id.* at \*23.

Reviewing the district court's decision de novo,<sup>123</sup> the Eighth Circuit reiterated that whether Philip Morris "acted under" the FTC within the meaning of § 1442(a)(1) depended "on the role the FTC play[ed] in regulating the tobacco industry."<sup>124</sup> The court focused on the detail and specificity of the direction of Philip Morris's advertising activities and whether the FTC exercised control over Philip Morris.<sup>125</sup> After looking at the level of detail found sufficient in government contractor cases, the Eighth Circuit concluded that the FTC exercised a similar level of detailed and comprehensive regulation.<sup>126</sup> Given this high level of control and the Supreme Court's instructions to interpret this statute broadly, the Eighth Circuit found that Philip Morris was in fact "acting under" the FTC when it advertised its cigarettes, and affirmed the district court's ruling without dissent.<sup>127</sup>

*B. Philip Morris's § 1442(a)(1) Argument Was a Thinly Disguised Conflict Preemption Argument*

Both the district court and the Eighth Circuit opinions reveal only a cursory mention of an essential prerequisite to federal officer removal—the existence of a colorable federal defense.<sup>128</sup> All that a reader can glean

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123. *Watson v. Philip Morris Cos.*, 420 F.3d 852, 855 (8th Cir. 2005).

124. *Id.* at 854–55.

125. *Id.* at 856–57.

126. *Id.* at 857–60.

127. *Id.* at 860–61. Note that a concurring judge on the Eighth Circuit wrote separately to emphasize that the decision "should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like Philip Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations." *Id.* at 863 (Gruender, J., concurring). This, presumably, is an attempt by the court to limit its holding to what it considered the unique relationship of regulation between the FTC and the tobacco companies. However, the court never analyzed the level and detail of control that companies in other industries, such as pharmaceuticals, experience from their regulators, like the FDA. Suffice it to say that the court did not fully consider or appreciate the consequences and implications that its decision might have in other federally regulated industries, notwithstanding the concurrence's words of caution.

128. In general, in order for a federal defense to be considered colorable, it only needs to be plausible. *United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001). A court does not need to find that a federal defense will be "successful before removal is appropriate." *Id.*; see also *Pennsylvania v. Newcomer*, 618 F.2d 246 (3d Cir. 1980). In *Newcomer*, the Third Circuit applied a broad reading of § 1442(a)(1) by holding that federal officials did not need to assert a colorable federal defense such as immunity in order to be entitled to remove state criminal prosecutions against them. *Id.* at 250. The Third Circuit apparently based its decision on a reading of the Supreme Court's decision in *Willingham v. Morgan*, 395 U.S. 402 (1969), which upheld removal of an action against federal prison guards. The *Newcomer* court read the *Willingham* decision to permit the removal of civil cases when the acts complained of were performed while the federal officer was on duty. *Newcomer*, 618 F.2d at 249–50. But, as the Court pointed out in *Mesa v. California*, such a reading of the federal officer removal statute presents serious constitutional problems. 489 U.S. 121, 136–37 (1989). Because

from the faces of the opinions is that Philip Morris claimed that federal law and regulation preempted plaintiffs' state law claims.<sup>129</sup> The development of Philip Morris's preemption defense in an identical case recently decided by the Supreme Court,<sup>130</sup> however, reveals the full extent of that defense. Specifically, Philip Morris argued both that the Federal Cigarette Labeling Act expressly preempted state law claims based on health messages in advertising, and that FTC regulation impliedly preempted state deceptive advertising claims because they stood as an obstacle to the FTC's effective regulation of the tobacco industry.<sup>131</sup>

Close examination reveals that Philip Morris's implied conflict preemption argument and its § 1442(a)(1) argument are practically identical. Philip Morris alleged that the FTC mandated that all cigarette companies test their cigarettes according to the specified FTC method, and that they place the testing results on all advertising for cigarettes.<sup>132</sup> In addition, Philip Morris alleged that the FTC authorized the use of the term "light" for cigarettes falling within certain ranges on the FTC test.<sup>133</sup> Then Philip Morris argued that when it sold the light cigarettes to the plaintiffs—the act that plaintiffs claimed violated Arkansas law—it was merely "acting under" the FTC for purposes of § 1442(a)(1) and so deserved removal.<sup>134</sup>

The only difference in Philip Morris's preemption argument is that instead of using those facts to support removal, it argued that the same facts supported summary judgment on conflict preemption grounds. More

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§ 1442(a)(1) is a pure jurisdictional statute, that simply gives the federal courts jurisdiction over federal officers; it does not independently satisfy the Article III "arising under" federal law requirement. *Id.* To remedy this problem, the Court insisted that the assertion of a colorable federal defense was necessary to create the question of federal law that would satisfy the constitutional level of jurisdiction. *Id.* at 129.

129. See *Watson v. Philip Morris Cos.*, No. 4:03-CV-519 GTE, 2003 WL 23272484, at \*10 (E.D. Ark. Dec. 12, 2003); *Watson v. Philip Morris Cos.*, 420 F.3d 852, 862–63 (8th Cir. 2005).

Preemption, just like the federal officer removal statute, is concerned with the supremacy of federal law. See *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 74 (1st Cir. 2006) ("A fundamental tenet of our federalist system is that constitutionally enacted federal law is supreme to state law. As a result, federal law sometimes preempts state law either expressly or by implication.") (citation omitted).

130. *Altria Group, Inc. v. Good*, No. 07-562, slip op. (Dec. 15, 2008).

131. See *id.* The Court eventually rejected Philip Morris's express preemption defense. *Id.* at 16. Philip Morris's implied preemption argument asked the Court to find that allowing plaintiffs to proceed with their state law fraud claim would present an obstacle to the FTC's effective regulation of the tobacco industry's advertising activities. *Id.* The Court ultimately rejected this implied preemption argument as well. *Id.* at 19–20.

132. *Watson*, 2003 WL 23272484, at \*4.

133. *Id.* at \*6.

134. *Id.* at \*2.

precisely, if doing what the FTC told Philip Morris to do violated Arkansas law, and complying with Arkansas law would be inconsistent with the FTC's authorization, then simultaneous compliance with both authorities would be impossible. This inconsistency between Philip Morris's duties under the FTC's regulation and under state law, combined with the supremacy of federal regulation over state law, required a finding of implied preemption and a judgment for Philip Morris.

*C. Implication: A Conflict Preemption Defense Based on Detailed Federal Regulation Is Sufficient for § 1442(a)(1) Removal*

The district court's and the Eighth Circuit's failure to recognize that Philip Morris's removal and preemption arguments were one and the same turned the open crack in the backdoor to the federal courthouse into a gaping hole. Specifically, both courts held that when a defendant has a conflict preemption defense based on compliance with federal directives, the defendant can use that defense as a vehicle for removal to federal court under § 1442(a)(1). The crucial omission by both courts, of course, is that almost any federally regulated, national corporation can assert a colorable conflict preemption defense based on regulatory monitoring, control, and direction.<sup>135</sup> Particularly in the case of a regulatory directive that conflicts with an entity's state law duties, it is difficult to imagine how such a conflict would not qualify for removal under the lower courts' analysis.<sup>136</sup>

Despite the Eighth Circuit's attempt to characterize the regulatory relationship between the FTC and the tobacco industry as unique,<sup>137</sup> its

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135. This is because conflict preemption is raised as a defense where compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the achievement of the objectives of Congress. *See California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989). A common basis of a conflict preemption defense is based on the duty to comply with some federal regulation. *See Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

136. If the action which is being sued upon under state law was an action taken pursuant to explicit federal directive, there is no question that there is an apparent conflict preemption defense available to the defendant. In fact, many courts struggled to reconcile their attempts to read the federal officer removal statute narrowly with the understandable inclination to permit federal jurisdiction on the basis of a conflict with an express directive. *See supra* Part III.B. The problem, of course, is that the courts conflated the necessity of using such a conflict as a grounds for summary judgment with the provision of federal jurisdiction. Although no court has explicitly mentioned it, it seems at least plausible that by creating this explicit directive exception, federal courts are showing their distrust that state courts will make the appropriate decisions at summary judgment, thereby necessitating the paternalistic grant of federal jurisdiction.

137. *See, e.g., Watson v. Philip Morris Cos.*, 420 F.3d 852, 863 (8th Cir. 2005) (Gruender, J., concurring).

I write separately to emphasize that our decision today should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like Philip



decision would nevertheless have allowed removal in almost every state case where a defendant had a colorable conflict preemption defense based on compliance with either an express federal regulatory directive, or even a highly detailed, conflicting federal regulation. A pharmaceutical manufacturer sued in state court on a deceptive marketing or failure to warn theory, for example, would be able to remove under § 1442(a)(1) on the basis that in creating its product insert and marketing literature, it was “acting under” the FDA.<sup>138</sup> Similarly, an automobile manufacturer sued in state court under a defective design theory could remove based on compliance with regulatory directives promulgated under the National Traffic and Motor Safety Act.<sup>139</sup> While these would normally be arguments reserved for summary judgment based on conflict preemption, the rationale of the lower courts in *Watson* would transform the argument into one for removal at the jurisdictional phase of the case.

#### *D. Practical Implications of the Lower Courts’ Decisions*

Three main practical implications emerge from the lower courts’ *Watson* decisions. First, the opinions flew in the face of the well-pleaded complaint rule and the Supreme Court’s long history of refusing to grant federal question jurisdiction based on a federal defense.<sup>140</sup> Defendants

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Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations. . . . In this case, as the court’s opinion makes clear, the FTC’s direction and control of the testing and marketing practices at issue is extraordinary.

*Id.* at 863–64.

138. *See, e.g.*, *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 344–46 (2001) (outlining the thorough review process that pharmaceuticals and medical devices must go through at the hands of the FDA before they are permitted to enter the marketplace); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 477 (1996) (explaining that the federally mandated premarket approval process for medical products is very rigorous). Given the high level of control by the FDA over its regulated agencies, it is no surprise that pharmaceutical manufacturers as well as medical device manufacturers have repeatedly attempted to remove based on § 1442(a)(1). *See Jamison v. Purdue Pharma Co.*, 251 F. Supp. 2d 1315 (S.D. Miss. 2003); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 428 F. Supp. 2d 1014 (D. Minn. 2006).

139. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). In *Geier*, an injured motorist sued an automobile manufacturer under state tort law for negligently failing to equip the car with airbags. *Id.* at 865. The action conflicted with Department of Transportation standards requiring manufacturers to furnish some, but not all 1987 cars with airbags. *Id.* at 881. The *Geier* Court held that the state common law action was preempted by the federal regulation under the doctrine of conflict preemption. *Id.* at 886. Notwithstanding the fact that *Geier* is now mandatory authority for state courts, under the lower courts’ *Watson* decisions, the mere appearance of conflict between the state tort law and the federal transportation regulations would have led to the removal of the case to federal court at the jurisdictional stage.

140. *See supra* text accompanying note 24; *Tenn. v. Union & Planter’s Bank*, 152 U.S. 454 (1894); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

asserting a colorable conflict preemption defense would be able to remove and keep cases in federal court under § 1442(a)(1), even where all of plaintiffs' claims were based on state law. As a result, the federal courts would have been flooded with litigation that the Supreme Court has fought to keep in state court since the inception of its narrow reading of the federal question jurisdiction statute.<sup>141</sup>

Of more direct importance to parties seeking relief under state law, plaintiffs would now be forced to pursue many state law claims in the federal courts. As mentioned above, empirical evidence suggests that federal courts offer a more favorable forum for defendants, particularly in cases removed from state court.<sup>142</sup> In addition to more stringent rules of procedure and larger jury pools, defendants would also have the availability of review by federal appellate courts. Not only could this deter plaintiffs from bringing suit and seeking relief in the first place, it could also undermine the tort system of compensation, and encourage potential defendants to take greater risks in light of reduced deterrence incentives.

Finally, important decisions on the balance between federal regulatory authority and private enforcement of state law would be in the hands of the federal courts.<sup>143</sup> Because the lower courts' *Watson* decisions would funnel cases to federal court where an apparent conflict between state and federal law was already present, federal judges would be left to decide whether the asserted federal regulation in fact preempted the state law that formed the basis of plaintiffs' complaint. Given the higher likelihood of the federal judiciary asserting the primacy of federal law in the face of conflict,<sup>144</sup> such a jurisdictional reshuffling may, in the long term, be expected to tilt the scales in favor of federal regulation at the expense of private litigation in state court.

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141. *Id.*

142. *See supra* notes 37–38.

143. The uncalled-for shift of power to the federal government and the erosion of the police powers of the state have been cited as the primary reasons for a narrow reading of the federal officer removal statute in different contexts. *See, e.g.,* Kristina L. Garcia, Comment, *The Boyle Festers: How Lax Causal Nexus Requirements and the "Federal Contractor Defense" Are Leading to a Disruption of Comity Under the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1)*, 46 EMORY L.J. 1629 (1997) (suggesting a narrow reading in the federal contractor context); Elizabeth M. Johnson, Note, *Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 COLUM. L. REV. 1098 (1988) (suggesting a narrow reading in the criminal context).

144. *See supra* Part II.B.

V. SHUTTING THE DOOR FOR GOOD: THE SUPREME COURT'S *WATSON*  
DECISION AND A FAMILIARLY ELUSIVE RATIONALE

A. *The Supreme Court Decision*

In light of the potentially serious ramifications of the Eighth Circuit's decision, it is no surprise that the Supreme Court granted the plaintiffs' petition for certiorari in *Watson*. Echoing both the Eighth Circuit and the Eastern District of Arkansas, the Court framed the question before it as "whether the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail brings that company within the scope of [§ 1442(a)(1)] and thereby permits removal."<sup>145</sup> The Court noted that although its past decisions have instructed that the statute should be liberally construed, "broad language is not limitless."<sup>146</sup> The Court ultimately found those limits in the history, language, and purpose of the federal officer removal statute.<sup>147</sup>

1. *The History Rationale*

First, the Court traced the history of the predecessors of the modern federal officer removal statute, as well as the Court's interpretations of those previous versions.<sup>148</sup> Noting that the earliest versions of the removal statute were enacted during times of particularly acute conflict between the federal government and the states, the Court suggested that the statutes were a vehicle for the vindication of the supremacy of federal law through the grant of federal jurisdiction to federal officers asserting immunity defenses.<sup>149</sup> The presence of clauses in these early statutes granting private persons the same federal jurisdiction when those persons were "acting under" the direction of federal officers revealed to the Court that the same considerations of supremacy and immunity could be present when a federal officer exercised control over a private person.<sup>150</sup> Looking at its earliest federal officer removal cases involving private persons' use of the removal statute, *Davis v. South Carolina*<sup>151</sup> and *Maryland v. Soper*,<sup>152</sup> the

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145. *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2304 (2007).

146. *Id.* at 2305.

147. *Id.* at 2305–08.

148. *Id.* at 2305–06.

149. *Id.* at 2306–07.

150. *Id.* at 2307.

151. 107 U.S. 597 (1883).

152. 270 U.S. 9 (1926).

Court concluded that, just as in those cases, in order for a private person to come within the scope of the “acting under” clause, that person must be assisting a federal officer in the performance of his official duties.<sup>153</sup>

## 2. *The Plain Language Rationale*

Aiming to bolster the conclusion it drew from the history and judicial interpretation of the predecessors to the modern federal officer removal statute, the Court turned to a plain language analysis of the word “under” as it pertains to the phrase “acting under an agency of the United States.”<sup>154</sup> Citing a dictionary definition, the Court suggested that the word “under” must refer to what has been described as a relationship that involves “‘acting in a certain capacity, considered in relation to one holding a superior position or office.’”<sup>155</sup> Adding this plain language interpretation to its analysis of precedent and statutory history, the Court concluded that “the private person’s ‘acting under’ must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior.”<sup>156</sup> Simply complying with the law, in the Court’s view, did not satisfy this definition.<sup>157</sup>

## 3. *The Statutory Purpose Rationale*

Finally, the Court cited the purpose of the federal officer removal statute to validate its reading of the “acting under” clause.<sup>158</sup> The Court suggested that the fundamental purpose of the statute throughout its history was the protection of the federal government from interference

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153. *Watson*, 127 S. Ct. at 2307. The Court also referred to a case that interpreted a related removal provision for the proposition that the statute only authorized removal by private parties if they were “authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law.” *Id.* (quoting *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)). This case involved an attempt by several defendants to remove criminal prosecutions instituted against them in federal court based on their assertion that in performing the acts giving rise to their prosecutions, the defendants were vindicating rights under the federal civil rights laws. *Id.* at 810–12. Despite the defendants’ contention that they would be unable to obtain a fair trial in state court, the Supreme Court affirmed the Fifth Circuit’s decision to remand the criminal cases for lack of subject-matter jurisdiction. *Id.* at 824.

154. *Watson*, 127 S. Ct. at 2307.

155. *Id.* (citing 18 OXFORD ENGLISH DICTIONARY 948 (2d ed. 1989))

156. *Id.*

157. *Id.* The Court cites some examples of people who simply comply with federal laws or regulations but do not thereby “help” or “assist” the federal government, such as “[t]axpayers who fill out complex federal tax forms, airline passengers who obey federal regulations prohibiting smoking, [and even] well-behaved federal prisoners.” *Id.*

158. *Id.* at 2307–08.

with its operations by hostile state courts.<sup>159</sup> As the Court noted, “[s]tate-court proceedings may reflect ‘local prejudice’ against unpopular federal laws or federal officials.”<sup>160</sup> In addition, “States may deprive federal officials of a federal forum in which to assert federal immunity defenses.”<sup>161</sup> In light of these purposes, the Court felt that when a corporation complies with even highly detailed regulations, such compliance does not create a risk of state-court prejudice.<sup>162</sup> In addition, keeping state lawsuits against such companies in state courts would likely not “deny a federal forum to an individual entitled to assert a federal claim of immunity.”<sup>163</sup>

Ultimately, the rule that emerged from the Court’s decision is that a highly regulated corporation cannot bring itself within the meaning of the statute simply by complying with highly detailed federal regulations, even when there is a high degree of federal supervision and monitoring.<sup>164</sup> The Court felt that a contrary determination would open the federal courthouse doors to any highly regulated corporation sued in state court.<sup>165</sup>

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159. *Id.* at 2306.

160. *Id.* (citing *Maryland v. Soper*, 270 U.S. 9, 32 (1926)).

161. *Id.*

162. *Id.* This statement by the Court raises the question of exactly what kind of prejudice would suffice to confer federal jurisdiction. The implication in the Court’s statement is that the only prejudice that matters is the prejudice against the federal government itself, personified through an officer or agency of the United States. The Court ignores the more relevant contemporary issue of potential prejudice of state courts against the excessive encroachment of federal law and regulation.

163. *Id.* at 2308.

164. *Id.* This Note argues that, in fact, this is the real reason behind the Court’s decision. Yet, like the Court’s previous jurisprudence surrounding federal question jurisdiction and the well-pleaded complaint rule, the *Watson* Court relies on unconvincing rationales while obscuring the practical considerations that drive its decisions.

165. *Id.* The Court points to companies regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as examples of companies subject to highly detailed and specific regulations for whom an alternative holding on their part would open the doors to federal courts. *Id.* The Court also suggests that the FTC’s regulation of Philip Morris is no different for federal officer removal purposes than the FDA’s regulation of a pharmaceutical manufacturer. *Id.* at 2310.

In reaching its conclusion, the Court dismissed Philip Morris’s reliance on federal contractor cases. Drawing an inherent distinction between the circumstances surrounding those cases and the ones in the case before it, the Court explained that when a private contractor is helping the government produce something that it needs, the contractor in essence helps the government fulfill its basic tasks. *Id.* at 2308. In the Agent Orange cases, for example, the defendant manufacturers was helping the government conduct an essential governmental task—conducting a war. *Id.* at 2308–09. Presumably, had there not been a private contractor, the government itself would have had to manufacture Agent Orange. The Court found this distinction sufficient for the present purposes, leaving open whether and when other government contractors could avail themselves of the benefits of the statute, and the corresponding protection of the federal courts. *Id.*

*B. The Supreme Court's Rationales Equally Support of the Opposite Conclusion*

*1. The History Rationale*

The Court's historical argument rests primarily on the previous incarnations of the federal officer removal statute and its early judicial opinions interpreting those respective versions. The first federal officer removal statutes were enacted shortly after the formation of the Republic.<sup>166</sup> At that time, the federal government was just starting to take shape and was therefore very limited in the scope of its operations. The states were largely recalcitrant to any assertion of federal authority that undermined traditional notions of state sovereignty. Not surprisingly, therefore, the two principal areas of federal control at the time, over international trade and over the collection of federal taxes, became the subjects of the earliest state-federal conflicts. Consequently, the original federal officer removal statutes were narrow, and applied at first only to federal customs officers, and later to federal revenue collectors.<sup>167</sup>

Seeking to trace the history of the "acting under" clauses of the early federal officer removal statutes, the Court looked to two early cases that involved private persons assisting federal revenue officials in arresting illegal distillers. In both of those cases, the rule emerged that where a private person assists a federal revenue officer in the performance of his official duties, he has "acted under" that officer and therefore deserves the protection of the federal courts in state lawsuits arising from that assistance.<sup>168</sup> The Court, in turn, took these early determinations of what conduct qualifies as "acting under" a federal officer, and suggested that these decisions limit a private actor's access to § 1442(a)(1) to similar circumstances.<sup>169</sup>

The Court's reliance on these early cases in its reading of the "acting under" clause in § 1442(a)(1) is misguided. First, neither *Davis* nor *Soper* purported to address what actions by a private person will not qualify for federal officer removal.<sup>170</sup> There are no bright lines drawn in those decisions and, in fact, there had been no Supreme Court case prior to

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166. See *supra* Part III.A.

167. See *supra* notes 54–55 and accompanying text; *Willingham v. Morgan*, 395 U.S. 402 (1969).

168. *Watson*, 127 S. Ct. at 2306–07 (citing *Davis v. South Carolina*, 107 U.S. 597 (1883) and *Maryland v. Soper*, 270 U.S. 9 (1926)).

169. *Id.* at 2307.

170. See *Davis*, 107 U.S. 597; *Soper*, 270 U.S. 9 (neither case addresses what conduct will not qualify to "act under" a federal officer).

*Watson* that held that any person was not “acting under” a federal officer for purposes of any version of the removal statute. Thus, while *Davis* and *Soper* are instructive on what conditions are *sufficient* to “act under” a federal officer, they are completely silent on what conditions are *necessary* for removal.<sup>171</sup> The Court’s suggestion that these cases make the assistance of a federal officer in the performance of his official duties a necessary condition for removal is not accurate.

Furthermore, the Court’s reliance on interpretations of the early versions of the federal officer removal statute promulgated in the nineteenth century and early twentieth century ignores the radically different conditions surrounding the enactment of those statutes. First, the size of the federal government and the scope of federal encroachment into the traditional police powers of the state were miniscule at the time of the earlier statutes’ enactments.<sup>172</sup> The size of the federal government and the pervasiveness of federal regulation during the second half of the twentieth century are overwhelming by comparison. Second, the early statutes specifically limited private persons entitled to removal to those “acting under” federal customs officials and federal revenue collectors.<sup>173</sup> This essentially restricted the scope of “acting under” to the exact situations that the early cases addressed. By contrast, § 1442(a)(1) provides for removal for persons “acting under” federal agencies. The scope of “acting under” that is possible with respect to a federal agency is not only greatly expanded compared to the early versions of the statute, but the kind of “acting under” that the Court suggests is necessary from its reading of *Davis* and *Soper* seems counterintuitive. Namely, it is difficult to imagine how a private person can assist a federal agency in the performance of its official duties. Ultimately, the Court’s conclusory statement that the early history of the federal officer removal statutes supports its narrow reading of § 1442(a)(1) is not persuasive.

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171. Chief Justice White made an analogous argument in his dissent in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The plurality held the Bankruptcy Act of 1978 unconstitutional under Article III in part because three categories of permissible Article I courts emerged through the Court’s prior cases, and the newly established bankruptcy courts did not fit into any of those three categories. *Id.* at 70–71 (plurality opinion). Justice White chastised the plurality for assuming those three categories defined the outer limits of constitutional authority because without articulating unifying principles, the decision rested on the simplistic rationale that bankruptcy courts were unconstitutional simply because they did not look enough like the three previously approved Article I categories. *Id.* at 105 (White, J., concurring).

172. See generally William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333 (1969).

173. See *supra* Part III.A.

## 2. *The Plain Language Rationale*

Perhaps reluctant to base its conclusion solely on the history and early interpretations of the previous incarnations of the federal officer removal statute, the Court turned to alternative rationales to support its decision. One readily available was that of plain language. If the plain language of the term “acting under” could support the Court’s narrow reading based on an incomplete analysis of statutory history, maybe the Court’s decision would carry greater persuasive weight.

In fact, the Court found just such support by looking at the dictionary definition of the term “under.”<sup>174</sup> “Under,” the Court suggested, “must refer to what has been described as a relationship that involves ‘acting in a certain capacity, considered in relation to one holding a superior position or office.’”<sup>175</sup> The Oxford English Dictionary, in the Court’s eyes, settled the plain language issue, and coupled with the Court’s contention that the history of the statute necessitates that a private person be assisting or helping to carry out the official tasks of the federal superior, led the Court to conclude that simply complying with federal agency directives did not equal “acting under” that agency.<sup>176</sup>

Here too, the Court’s analysis fails to persuade. Specifically, the Court’s interpretation of the term “under” is both arbitrary and contrary to the plain language understanding of the term when applied to “acting under” a federal agency. Acting under an agency can equally mean acting “subject to the authority, direction, or supervision” of that agency.<sup>177</sup> The Court provides no arguments in support of what is clearly a case of forum shopping for the most favorable dictionary definition.<sup>178</sup> Its arbitrary selection of a particular definition lends no credibility to the conclusion that the definition is used to support.

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174. *Watson*, 127 S. Ct. at 2307.

175. *Id.* (quoting 18 OXFORD ENGLISH DICTIONARY 948 (2d ed. 1989)).

176. *Id.*

177. RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY, 2059 (2d ed. 1997). *See also* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2487 (2002) (acting under means to act “subject to the bidding or authority” that person); WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2765 (2d ed. 1958) (under indicates a position of “subjection, guidance, or control”).

178. *See generally* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998) (examining the use of dictionary definitions in recent Supreme Court decisions and arguing that such use is selective, inconsistent, and tries to create a false sense of objectivity in statutory interpretation). The most likely scenario is that the Court had to search to find a definition that supported its conclusion and the Oxford English Dictionary did just that.



Furthermore, the Court's requirement that "under" refer to a relationship akin to that of a subordinate employee to one holding a superior position or office seems to leave federal agency employees as the only potential private persons capable of "acting under" a federal agency. But because federal agency employees are already considered federal officers who are entitled to remove under the statute, the Court's reading would merely be a repetition of an earlier portion of the statute. The Court chose not to address this rather obvious problem in its interpretation. In fact, it strains reason to suggest that complying with a regulatory directive such as that of the FTC to Philip Morris to include tar and nicotine numbers on all packages of all cigarettes could not be considered "acting under" the FTC according to the ordinary meaning of the phrase. Even absent an explicit directive, it is more than plausible to suggest that merely acting within the scheme of the pervasive regulation of the FTC over the tobacco industry comports with the ordinary meaning of "acting under" the FTC. Thus, like its incomplete account of statutory history, the Court's attempt to reshape the language and meaning of the statutory text is unconvincing.

### 3. *The Statutory Purpose Rationale*

Finally, the Court suggests that the statutory purpose behind the federal officer removal statute—the protection of federal objectives from potentially hostile or prejudiced state courts—would not be advanced by permitting a corporation subject to detailed federal regulations to remove cases against it to federal court.<sup>179</sup> Compliance with a regulatory order, according to the Court, "does not create . . . a significant risk of state-court 'prejudice.'"<sup>180</sup> Once again, this pronouncement by the Court is not only conclusory, but also cannot withstand logical scrutiny.

First, if one accepts the premise that a state court is capable of bias against federal objectives, it is difficult to envision how the risk of that bias would not exist in a scenario comparable to that in *Watson*. Specifically, where a state court is faced with a federal defense such as preemption to an assertion of rights under state law, there is reason to believe that a state judge, as an instrument of the state's political structure, would look for ways to apply the state law rather than displace it in favor of federal law.<sup>181</sup> In this sense, the state court might be biased against not

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179. *Watson*, 127 S. Ct. at 2307–08 (2007).

180. *Id.* at 2307.

181. See, e.g., G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 28 (1947) (There seems little doubt that . . . fear of local prejudice motivated the proponents

only the specific federal regulation, but also against the federal assumption of the police powers generally reserved to the states.<sup>182</sup> The Court's attempt to limit potential bias that the federal officer removal statute guards against to bias against a particular type of defendant misses the point. Regardless of whether the defendant is a federal officer or a private person, the validity of the supremacy of federal law and regulation is an equally important federal interest. If state courts refuse to properly apply federal defenses, the entire system of federal regulation could be compromised as regulated entities would be subject to a patchwork of disparate state regulation in addition to that of the federal government.

Furthermore, the Court suggests that its decision would not "deny a federal forum to an individual entitled to assert a federal claim of immunity."<sup>183</sup> Again, this statement presupposes that the federal interests protected by the removal statute are limited to the physical protection of officers or agents of the federal government. This reading directly conflicts with previous pronouncements by the Court that the statute protects from state court bias not only federal officials, but also unpopular federal laws.<sup>184</sup> Moreover, the Court's limitation of the federal defenses that the statute was designed to protect solely to federal immunity defenses is misguided. The Court's previous jurisprudence required the averment of any colorable federal defense, not strictly the defense of official immunity. And in fact, the 1996 amendments to the statute recognized that § 1442(a)(1) would provide a federal forum for "important and complex federal issues such as preemption."<sup>185</sup>

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of the change in 1875. The late war had fanned the flames of sectional distrust so that considerations of this nature were greater than at any other time in the nation's history. It is not surprising, therefore, that legislation was introduced to meet the threat of local bias).

182. *Watson*, 127 S. Ct. at 2306–07.

183. *Id.* at 2308.

184. *See, e.g., Maryland v. Soper*, 270 U.S. 9, 32 (1926) (noting that the statute was designed to protect from potential local prejudice against unpopular federal laws and officials); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (noting that the statute prevents states from interference with federal government operations).

185. *See* H.R. REP. NO. 104–798, at 20 (1996) (Section 1442(a)(1) provides a federal forum for "important and complex federal issues such as preemption"); 142 CONG. REC. S6517, S6519 (daily ed. June 19, 1996) (statement of Sen. Grassley) (same). While it may not be wise to draw any firm conclusions about congressional intent from one terse statement in what was a very limited discussion of the amendment on the Senate floor, the statement at least makes more plausible the proposition that Congress intended § 1442(a)(1) to encompass conflict preemption scenarios.

*C. The Driving Force Behind the Watson Decision is Federal Docket Control*

As noted above, commentators have long complained that the Court's decisions interpreting § 1331 and its development of the well-pleaded complaint rule lacked principle and merely disguised an attempt to limit the burgeoning federal docket. Careful reflection on the Court's opinion in *Watson* reveals that its interpretation of § 1442(a)(1) suffers the same malady. In fact, the Court explicitly recognized it in the statement that "[a] contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries."<sup>186</sup>

In light of the growing prevalence of federal legislation and regulation,<sup>187</sup> the potential for conflict between federal and state statutes, regulations, and common law is virtually limitless. Both state and federal courts are continually faced with motions for summary judgment based on federal preemption defenses as this rapidly developing body of law continues to evolve. In this context, the Court's decision is certainly justifiable in practical terms. Had the Eighth Circuit's decision been left untouched, virtually any conflict preemption defense based on a regulatory directive asserted by a highly regulated corporation would have qualified for removal under § 1442(a)(1). Indeed, the Court's decision in *Watson* parallels its creation of and continued adherence to the well-pleaded complaint rule. Just as § 1331 could have been broadly interpreted in light of its similarity to Article III, so too could § 1442(a)(1) have been interpreted broadly in light of its language and the interests it was designed to protect. In both cases, however, the alternative resolution would simply have produced an unworkable result.<sup>188</sup>

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186. *Watson*, 127 S. Ct. at 2308.

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In the twentieth century Congress increasingly relied upon conditional grants-in-aid to encourage states to implement its policies until 1965 when heavy reliance began to be placed upon preemption statutes which were enacted at the following pace: 14 (1900–1909), 22 (1910–1919), 17 (1920–1929), 31 (1930–1939), 16 (1940–1949), 24 (1950–1959), 47 (1960–1969), 102 (1970–1979), 93 (1980–1989), 83 (1990–1999).

Zimmerman, *supra* note 25, at 375.

188. *See supra* note 49.

## VI. CONCLUSION

The judicial opinions in the *Watson* case, from the district court all the way to the Supreme Court, appear to focus narrowly on an often overlooked congressional grant of federal jurisdiction, 28 U.S.C. § 1442(a)(1). Indeed, a perfunctory reading of the Supreme Court decision might lead one to wonder whether the holding is really all that important in the grand scheme of the allocation of jurisdiction between the state and federal courts. After all, § 1442(a)(1) is called the federal officer removal statute, and the Supreme Court seemingly stated the obvious by holding that, aside from a few exceptional circumstances, the statute, and hence the federal courts, should only be available to officers or agencies of the United States government.

Such a reading, however, misses the reality that the *Watson* case was far from simple, and was in fact yet another classic battleground for the resolution of the difficult issues that have plagued the field of federal jurisdiction for the past two centuries. Specifically, the underlying concern of jurisdictional allocation—when a federal interest in a particular case is sufficient to warrant its resolution in a federal forum—was again called directly into question. While the Court had answered previously that a federal defense of conflict preemption is not a sufficient interest for federal jurisdiction with respect to 28 U.S.C. § 1331, the answer to the same question in the context of § 1442(a)(1) was by no means preordained. While the *Watson* Court did ultimately reach the same result with respect to § 1442(a)(1), it is important to recognize that the very rationales relied on by the Court to support its decision could just as easily be used to support the opposite conclusion.

Specifically, the history of the federal officer removal statutes reveals that they were designed to address precisely the kinds of state-federal conflicts that are present in conflict preemption cases. The aim of the removal statutes has always been to direct the resolution of such conflicts to a forum that respected the authority and supremacy of federal law. The inclusion of private persons “acting under” federal officers in both the historical and contemporary versions of the statutes is an affirmation that these same state-federal conflicts can exist even where the defendant himself is not a federal officer, but an entity subject to the supervision and control of that officer.

Similarly, the plain language and ordinary meaning of the term “acting under” certainly does not foreclose the possibility that a person acting under the supervision, control, and direction of a federal agency is “acting under” that agency. Indeed, if anything, the plain language of the statutory

provision supports an even more expansive reading of the grant of federal officer jurisdiction than that outlined by the lower courts in *Watson*. The term “acting under” could potentially encompass even a corporation that is simply acting subject to a regulatory scheme developed by a federal agency. Thus, a high level of detailed and direct control by a federal officer or agency over the specific action of the private person need not be a prerequisite under a plain language analysis.

Finally, the purpose of the federal officer removal statute, the prevention of interference by hostile state courts with unpopular federal laws and officials, appears to support the lower courts’ extension of the benefits of federal jurisdiction to private persons following the direction of federal officers, particularly when those directions carry the weight of federal law. Contrary to the Supreme Court’s assertion, allowing a federal court to rule on a conflict preemption defense when the very vitality of federal regulation is at stake would certainly promote the purposes of the statute.

Ultimately, the Court’s analysis, if not its actual decision, is regrettable. Left intact, the Eighth Circuit decision would not only have opened the federal courthouse doors to many highly regulated defendants, but also would have altered the balance of power both between plaintiffs and defendants, and state and federal governments. In lieu of these significant consequences, the Court’s holding cannot seriously be questioned in practical terms. What is ultimately unsatisfying, however, is the Court’s decision to once again engage in a game of hiding the ball.

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