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2013

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Recommended Citation
Seinfeld, Gil. "The S&P Litigation and Access to Federal Court: A Case Study in the Limits of Our Removal Model." Colum. L. Rev. Sidebar 113 (2013): 123-35.

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COLUMBIA LAW REVIEW
SIDEBAR

VOL. 113 **SEPTMEMBER 23, 2013** **PAGES 123-135**

THE S&P LITIGATION AND ACCESS TO FEDERAL COURT: A CASE STUDY IN THE LIMITS OF OUR REMOVAL MODEL

*Gil Seinfeld**

INTRODUCTION

On June 6, 2013, the United States Judicial Panel on Multidistrict Litigation (the MDL panel) ordered the consolidation of fifteen actions filed by state attorneys general (AGs) against the Standard & Poor's rating agency (S&P) for its role in the collapse of the market for structured finance securities.[1] The cases are important: The underlying events shook markets worldwide and contributed to a global recession, the legal actions themselves take aim at foundational aspects of the way rating agencies go about their business, and the suits threaten the imposition of significant fines and penalties against S&P. So it is unsurprising that the order of the MDL panel—typically the sort of thing that would fly well under the radar—garnered an extraordinary measure of media attention.

Many observers marked the consolidation order as a significant victory for S&P. The *Wall Street Journal*, for example, characterized the decision as an "incremental but important legal victory" for the defendants and emphasized that consolidation will permit S&P "to streamline costs and avoid a piecemeal legal battle in state courts across the country."[2] Another observer deemed the decision a "big win" for S&P and highlighted the fact that it enabled S&P to move the suits away from the AGs' home courts and onto

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1. Transfer Order, In re Standard & Poor's Rating Agency Litig., MDL No. 2446, 2013 WL 2445043 (J.P.M.L. June 6, 2013). In all, seventeen suits were consolidated. Two are declaratory judgment actions filed in federal court by S&P against the states of South Carolina and Tennessee. The rest are the sovereign enforcement actions mentioned above. There are, in fact, two named defendants in all of the enforcement actions and two plaintiffs in the declaratory judgment suits. The McGraw-Hill Companies, S&P's corporate parent, is named alongside S&P.

2. Jeannette Neumann, S&P Scores a Legal Win, Wall St. J. (June 6, 2013), http://online.wsj.com/article/SB10001424127887324798904578529400470610398.html (on file with the *Columbia Law Review*).

(arguably) more neutral terrain.[3] But the reality is that S&P has won no more than a lottery ticket. It will enjoy the efficiencies associated with consolidation and keep the state AGs off of their home turf only if the judge to whom the cases have been assigned seriously misapplies federal jurisdictional law.

This Essay has two principal goals. The first is to show that our jurisdictional law does not permit removal in these cases. S&P has argued that these lawsuits are eligible for federal court jurisdiction on a federal question theory—i.e., on the ground that they "arise under" federal law within the meaning of 28 U.S.C. § 1331. I will show in Part I that these arguments are strained and ultimately unavailing.

My second goal (pursued in Part II) is to show that the relevant jurisdictional law is seriously unsatisfying. The S&P litigation raises challenging questions of jurisdictional policy, but the law as it stands simply fails to engage them. It relies instead on a pair of mechanical rules for sorting cases between the state and federal courts that have only an attenuated relationship to considerations of sound jurisdictional policy.

I. THE S&P LITIGATION AND THE LAW OF FEDERAL QUESTION JURISDICTION

A. *Background*

Before we jump into the jurisdictional weeds, a brief word is in order about the factual background and procedural posture of these cases. The lawsuits seek to hold S&P accountable for its role in the financial crisis that accompanied the collapse of the subprime mortgage market in the United States in 2008. The gravamen of the claims is that S&P deceived investors by purporting to provide objective, arm's length analysis of the riskiness of certain structured finance securities when, in fact, its analysis was tainted by a desire to please its clients (the very issuers whose securities S&P was rating) and thereby increase its share of the market for the relevant analytic services.[4]

All the suits were filed in state court, and, in all of them, the plaintiff-states pressed state law causes of action only.[5] The defendant responded by

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3. Andrew Harris, S&P Ratings Lawsuits Moved to N.Y. over State Objections, Bloomberg (June 6, 2013), http://www.bloomberg.com/news/2013-06-06/s-p-ratings-lawsuits-transferred-to-federal-court-in-n-y-.html (on file with the *Columbia Law Review*). For a discussion of the benefits of litigating in your own backyard (with particular attention to the benefits of litigating in either state or federal court), see Gil Seinfeld, The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction, 97 Calif. L. Rev. 95, 132–46 (2009) [hereinafter Seinfeld, Federal Courts].

4. See, e.g., Complaint for Injunctive and Other Relief at 1–3, Arizona ex rel. Horne v. McGraw-Hill Cos., No. CV2013-001188 (Ariz. Super. Ct. filed Feb. 5, 2013). When referring to arguments advanced by the states or by S&P, I will draw on the papers filed in the Arizona litigation, which I have selected more or less at random (I think alphabetical order counts as "random" for these purposes). I could just as easily have drawn from the papers filed by the state and by S&P in any of the cases in which S&P is the defendant.

5. The precise claims vary some from jurisdiction to jurisdiction. They are drawn principally from state consumer protection and unfair trade practices laws.

removing the actions to federal court and seeking consolidation.[6] As noted at the outset, the MDL panel granted S&P's motion to consolidate and transferred the cases to the United States District Court for the Southern District of New York. The first order of business for the judge to whom the cases have been assigned will be determining whether they should be remanded to state court.[7] Existing law indicates that they should.

B. *S&P's Jurisdictional Claims*

The fact that the AGs presented state law causes of action only suffices to bring these suits outside the realm of the jurisdictionally straightforward. Under the removal statute, 28 U.S.C. § 1441, an action may be removed from state to federal court only if the plaintiff could have filed in federal court as an original matter.[8] And under the federal question statute, 28 U.S.C. § 1331 (which S&P treats as the basis for jurisdiction in its removal petitions), a case falls within the original jurisdiction of the federal district courts only if it "aris[es] under" federal law.[9] The question of when a suit "arises under" federal law is governed by the venerable well-pleaded complaint rule.[10] And it is widely understood that, in the vast majority of cases at least, the rule directs that causes of action created by federal law are eligible for federal question jurisdiction, while causes of action created by state law are not.[11] By relying exclusively on state law, then, the attorneys general foreclosed the possibility of removal on the basis of a vanilla application of § 1331. If the cases are removable, it will have to be because a more exotic jurisdictional theory applies.

1. *The* Grable *Theory: Embedded Federal Questions.* — The most likely candidate, and the one S&P turned to explicitly in its removal papers, draws on the Supreme Court's decision in *Grable & Sons Metal Products, Inc. v. Darue*

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6. See, e.g., Defendants' Notice of Removal, *Horne*, No. CV2013-001188 [hereinafter AZ Notice of Removal].

7. I focus here on the arguments advanced by S&P prior to consolidation. In a move designed, no doubt, to frustrate the author of this Essay, S&P has recently filed a brief with the Southern District of New York (in opposition to the States' motion to remand the consolidated cases) in which it has shifted the emphasis of—and in some respects changed—its arguments as to why, exactly, federal question jurisdiction exists in these cases. I briefly address these new arguments infra note **Error! Bookmark not defined.**.

8. See 28 U.S.C. § 1441(a) (2006) (limiting removal to actions "of which the district courts of the United States have original jurisdiction").

9. See id. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

10. See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").

11. See Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (explaining that "a suit arises under the law that creates the cause of action"). But see T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) ("It has come to be realized that [*American Well Works*'s] formula is more useful for inclusion than for the exclusion for which it was intended.").

Engineering & Manufacturing[12] and the jurisdictional tradition of which it is a part.[13] *Grable* confirms the existence of § 1331 jurisdiction over a narrow class of suits in which state law supplies the plaintiff's cause(s) of action. Specifically, it provides that "arising under" jurisdiction will lie over a state law claim if the claim "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[14]

In seeking removal, S&P insisted that the state enforcement actions "'necessarily require resolution'" of two substantial questions of federal law.[15] First, it argued that adjudicating these cases "calls for courts to make judicial determinations concerning the scope of CRARA [the Credit Rating Agency Reform Act of 2006]."[16] S&P emphasized that CRARA "include[s] a variety of requirements related to the independence of the ratings process,"[17] and it insisted that this litigation will require courts to determine the meaning and preemptive sweep of that statute, as well as the question of how these state law claims fit into the mosaic of federal securities law and policy more generally.[18] Second, S&P contended that its ratings constitute speech protected by the First Amendment, and so "in each case, the court will need to decide whether the absence of a heightened 'fault' requirement in [the applicable state laws] renders them unconstitutional as applied to [S&P's] speech."[19]

These claims about the application of CRARA and the First Amendment may or may not enable S&P to escape liability in these enforcement actions, but they have nothing at all to do with federal jurisdiction. For while it may be "necessary" for the courts to provide answers to these questions of federal law in the course of adjudicating these cases, "necessity," under the *Grable* doctrine, refers to something different. It refers to scenarios in which the plaintiff cannot make out her affirmative case without some showing as to the meaning or application of federal law, and the preemption and First Amendment claims at issue here do not "necessarily" arise in this particular sense.

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12. 545 U.S. 308 (2005).

13. The canonical cases include Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986), Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), and *American Well Works*, 241 U.S. 257.

14. *Grable*, 545 U.S. at 314.

15. AZ Notice of Removal, supra note 6, at 5 (alteration omitted) (quoting Hughes v. Chevron Phillips Chem. Co., 478 F. App'x 167, 170 (5th Cir. 2012)).

16. Id. (citing Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327).

17. Id. at 4.

18. See id. at 5 ("[A]djudicating the claims . . . calls for courts to make judicial determinations concerning the scope of CRARA [and] the federal interests served by that regulatory scheme in the context of broader federal regulatory oversight of national securities markets . . . .").

19. Id. at 6–7.

In *Grable* itself, the plaintiff sought to quiet title to real property located in the state of Michigan.[20] State pleading rules directed Grable to "specify 'the facts establishing the superiority of [its] claim.'"[21] Grable's claim of title was premised on the contention that the IRS failed to comply with federal laws governing the provision of notice to property holders before effecting a seizure to satisfy a tax delinquency.[22] Thus, "specify[ing] the facts establishing the superiority of [Grable's] claim"[23] meant proving something about the content and application of federal law. It was not necessary to consult the defendant's pleadings to locate a federal issue pertinent to the litigation. This aspect of the *Grable* rule—that a state law claim "necessarily" raises a federal question only if the federal issue is somehow embedded in the plaintiff's affirmative claim—has been a feature of the doctrine since its inception.[24]

The S&P litigation is not structured this way. It is almost certainly true, as S&P contends, that adjudicating these cases will require a determination as to whether the enforcement actions are preempted by CRARA or forbidden by the First Amendment. But these questions will come into play only at the defendant's behest, and so they cannot support federal court jurisdiction under the *Grable* theory.

2. *Uniformity, Interstate Coordination, and Complete Preemption.* — S&P deployed two additional lines of argument in an effort to prop up its jurisdictional claims. First, the notices of removal emphasize the possibility that piecemeal adjudication of the overlapping issues raised by these state enforcement actions could yield conflicting outcomes and nonuniform applications of federal law. "[I]t simply cannot be," S&P insists, "that different states across the country could have different powers in relation to the federal regulatory scheme [at issue]."[25] Perhaps not, but this sort of hand-waving about the interest in national uniformity fails to distinguish the S&P litigation from hordes of cases (none of them removable) in which a defendant insists

20. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 310–11 (2005).

21. Id. at 314 (alteration in original) (quoting Mich. Ct. R. 3.411(B)(2)(c)).

22. Id. at 310, 314–15.

23. Id. at 314 (internal quotation marks omitted).

24. Compare Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 199 (1921) (authorizing exercise of federal jurisdiction where plaintiff could not make out the elements of his affirmative claim without some showing as to the content of federal law), with Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (prohibiting exercise of federal jurisdiction over state law cause of action—despite the fact that the suit was almost certain to turn on a question of federal law—where plaintiff's affirmative case did not require resolution of any federal questions). See also, e.g., Ne. Rural Electric Membership Corp. v. Wabash Valley Power Ass'n, 707 F.3d 883, 890 (7th Cir. 2013) ("Federal defenses to a well-pleaded complaint, such as preemption or preclusion, do not provide a basis for removal."); R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Envtl. Mgmt., 585 F.3d 42, 48 (1st Cir. 2009) ("To satisfy the [*Grable*] rule, the plaintiff's well-pleaded complaint must exhibit . . . an embedded question of federal law . . . . The existence of a federal defense to a state-law cause of action will not suffice." (citation omitted)).

25. AZ Notice of Removal, supra note 6, at 6.

that a state law claim is preempted by federal law.[26] If the widely held assumption that federal courts are better able than state courts to supply uniform interpretations of federal law[27] is correct, then *any time* state courts are permitted to interpret federal law, there is a heightened risk of divergent interpretations. And where the federal claim is one of preemption, the risk is precisely that "different states" will have "different powers" in relation to some federal regulatory scheme. Federal jurisdictional law addresses this concern not by allowing for removal to federal court any time a preemption defense is raised, but by authorizing the Supreme Court to review the final judgments of state courts with respect to federal questions.[28] Hence S&P's claims about the interest in national uniformity are ultimately a distraction. They identify a policy consideration that is surely pertinent to sound thinking about jurisdictional allocation in a federal system, but has no bearing on the permissibility of removal under the prevailing law.

Second, S&P's removal papers repeatedly draw attention to the fact that the state enforcement actions represent a "cohesive, coordinated effort" on the part of the state attorneys general.[29] They emphasize, in this vein, that a majority of the state enforcement actions were filed on the same day, that there is a great deal of overlap across the various complaints (in terms of both the factual allegations and the nature of the causes of action relied upon), and that (at least some of) the AGs consulted one another in the course of developing their litigation strategies.[30] S&P acknowledges that "[t]his level of cooperation [is] not inappropriate," but insists that it "bears directly on the impact of the cases on well-established federal interests."[31] Of course, no one doubts that national interests are at stake here. The question is whether and how this bears on the jurisdictional calculus, and S&P does not really explain.

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26. See Gully v. First Nat'l Bank, 299 U.S. 109, 116 (1936) ("[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.").

27. See, e.g., Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting) ("[W]hile perfect uniformity may not have been achieved, experience indicates that the availability of a federal forum in federal-question cases has done much to advance that goal.").

28. See 28 U.S.C. § 1257(a) (2006) ("Final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question . . . ."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) ("A motive of another kind . . . might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States . . . ."). The rare exception to the prohibition on grounding removal in the fact that the defendant has presented a federal defense is embodied in the doctrine of complete preemption. I address the complete preemption doctrine immediately below. See infra text accompanying notes 32–36.

29. AZ Notice of Removal, supra note 6, at 8.

30. Id.

31. Id. S&P does not specify how or why the cooperation in question "bears directly on the impact of the cases on . . . federal interests." Presumably, its point is that the interstate coordination reflects the national scope of the underlying issues. And national problems with the operation of credit rating agencies, the argument goes, are addressed by federal law.

One possible reading of S&P's argument is that it is a sotto voce allusion to the doctrine of complete preemption, which (on rare occasions) allows for the exercise of federal question jurisdiction over state law claims. Complete preemption takes hold when a plaintiff files a state law cause of action that is preempted by federal law, and that federal law supplies the exclusive cause of action for the harm alleged.[32] In other words, it covers scenarios in which federal law not only preempts the plaintiff's state law claim, but also supplies a replacement cause of action on which the plaintiff might have relied. Under these conditions, the Court has explained, the plaintiff's filing constitutes an exercise in artful pleading—an attempt to pass off what is necessarily a federal cause of action as a state law claim.[33] The complete preemption rule prevents plaintiffs from avoiding removal through this sleight of hand. Perhaps S&P means to intimate that something similar is afoot here—that the fifteen state law actions are, in fact, a single, consolidated, nationwide enforcement action masquerading as discrete lawsuits; and the plaintiffs, the argument goes, ought not to be permitted to escape federal court jurisdiction by obscuring the true nature of their filings.

If this is what S&P is up to in its removal papers,[34] the argument goes nowhere. To begin with, the cases do not come close to satisfying the formal requirements of the complete preemption rule. (No doubt this explains the defendant's failure to rely on it explicitly.) For not only does CRARA fail to state that federal law supplies the exclusive cause of action for conduct falling within its ambit, the statute appears to shield enforcement actions like those at issue here from the preemptive reach of the law.[35] More generally, it is difficult to see why the fact of close coordination among state attorneys general means that the underlying claims are "really" federal in nature and therefore proper candidates for removal.[36] Surely state attorneys general can

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32. See Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003) ("When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable . . . .").

33. Id.

34. To be clear, S&P does not make explicit reference to the doctrine of complete preemption in its removal papers. Still, its arguments were sufficiently close to invoking the doctrine to cause most of the plaintiff-states to address complete preemption in their motions to remand and to explain why the doctrine does not apply. See, e.g., Plaintiff's Motion to Remand with Incorporated Memorandum of Law at 4, Maine v. McGraw-Hill Cos., No. 1:13 cv-00067-JAW (D. Me. Mar. 15, 2013) ("CRARA clearly does not involve a case of complete preemption. Indeed, provisions of CRARA make clear that the Act contemplates an active role for state law enforcement authorities in addressing deceptive conduct.").

35. See 15 U.S.C. § 78o-7(o)(2) (2012) ("Nothing in this subsection prohibits the securities commission (or any agency or office performing like functions) of any State from investigating and bringing an enforcement action with respect to fraud or deceit against any nationally recognized statistical rating organization or person associated with a nationally recognized statistical rating organization.").

36. A parallel criticism applies to the complete preemption rule itself. See *Beneficial Nat'l Bank*, 539 U.S. at 18 (Scalia, J., dissenting) ("[T]he . . . fact that a state-law claim is invalid no more deprives it of its character as a state-law claim which does not raise a federal question, than

coordinate their filing of distinct state law claims without those claims somehow morphing into federal claims.[37] Once again, S&P's arguments suffice to demonstrate that the state enforcement actions are fraught with national implications, but these arguments have little to do with the contours of federal jurisdictional law.[38]

II. THE S&P LITIGATION AND JURISDICTIONAL POLICY

Our jurisdictional law forecloses consideration of two features of the S&P litigation that seem essential to sound thinking about whether the federal courts ought to be permitted to hear the cases. First (as we have seen already), S&P

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does the fact that a federal claim is invalid deprive it of its character as a federal claim which does raise a federal question.").

37. Cf. id. at 18–19 (inquiring why and how a state law claim that is preempted by a federal law that supplies the exclusive cause of action for the harm alleged "is transmogrified into the claim of a federal right"); Gil Seinfeld, The Puzzle of Complete Preemption, 155 U. Pa. L. Rev. 537, 554 n.59 (2007) [hereinafter Seinfeld, Puzzle] ("Parties advance nonviable claims all the time; and when they do, such claims are typically dismissed. [The Court does not explain] why state-law claims that are not viable because they are 'completely preempted' are transformed into federal claims.").

38. As noted earlier, see supra note 7, S&P's filing before the Southern District of New York includes an overhaul of some of its arguments in support of federal question jurisdiction. The hand-waving about important federal interests persists, see, e.g., Memorandum of Law in Opposition to Plaintiffs' Motions to Remand at 1–2, 4, 10, In re Standard & Poor's Rating Agency Litig., No. 13-MD-2446 (JMF) (S.D.N.Y. filed Aug. 23, 2013), but the recent filing shows greater sensitivity to the *Grable* doctrine's requirement that federal law be brought directly into question by the plaintiff's cause of action. Id. at 15 ("The States' own formulation of their claims will necessarily and inevitably require the Court to evaluate S&P's compliance with federal law.").

S&P emphasizes, in particular, that (1) credit rating agencies using the "issuer pays" model are required by federal law to establish and enforce policies to manage conflicts of interest, and (2) the States have alleged that S&P misled the public by claiming to have neutralized conflicts rooted in the issuer pays model. Id. at 14. S&P then insists that a court cannot determine whether these claims were misleading without also determining whether S&P was in compliance with federal law. Id. at 15. S&P also notes that some of the state antifraud provisions on which the plaintiffs rely include exemptions for conduct that is compliant with a federal regulatory scheme. Id. at 23–24. Under these laws, S&P insists, a finding of liability is contingent on whether the challenged conduct is consistent with federal law, and so the crucial *Grable* requirement is satisfied. Id. at 24.

Both arguments appear to be red herrings. It may be that, in the course of determining whether S&P violated state law by misleading the public, a court will learn enough to answer the separate question whether S&P failed to meet its obligations under federal law. But that doesn't transform findings pertinent to the state law inquiry into determinations of questions of federal law. Meanwhile, the notion that the conduct of which the plaintiffs in these cases complain is authorized by, or is an exercise in compliance with, federal law seems highly dubious. If it is true that a court would need to address this issue prior to assigning liability under the relevant state laws, it is equally true that a court would first need to assess whether the conduct in question is compliant with federal environmental and antitrust laws. S&P's reading of these exemptions seems to stretch them well beyond their breaking point. See Consolidated Reply in Support of Plaintiff States' Motions to Remand at 5–8, In re Standard & Poor's Rating Agency Litig., No. 13-MD-2446 (JMF) (S.D.N.Y. filed Sept. 9, 2013) (explaining that plaintiffs' state law claims can succeed without the states making any showing as to the meaning or application of federal law).

will present defenses that sound in federal law; these defenses are almost certain to feature prominently in this litigation, and they might prove dispositive. Second, the lawsuits in question are enforcement actions brought by sovereign states, not private actions in which plaintiffs seek redress for individual losses. These two factors cut in opposite directions for purposes of jurisdictional analysis: The former militates in favor of federal court jurisdiction, while the latter counsels against it. For purposes of this Essay, however, I wish to focus not on the question of how best to reconcile these competing forces, but on the fact that our jurisdictional law ignores them entirely.

A. *Federal Question, Federal Court*

The irrelevance of S&P's federal defenses is attributable, as we have seen, to the well-pleaded complaint rule—which excludes pleadings other than the complaint from the jurisdictional calculus—and the removal statute—which doubles down on the well-pleaded complaint rule by tethering the permissibility of removal to the scope of original federal jurisdiction.[39] Scholars have long criticized these features of our jurisdictional law and lamented the myopic character of the jurisdictional regime they help constitute.[40] The grounds for objection are clear and compelling. If we proceed from the conventional premise that federal judges are more apt than their state court counterparts to provide uniform, expert interpretations of federal law,[41] then we have cause to wonder why eligibility for federal jurisdiction ought to turn on whether it is the plaintiff or the defendant who raises a federal question. As one prominent commentary explains, "The dangers against which [federal question] jurisdiction guards are as likely to be met when federal law is relied on defensively as when it is relied on offensively."[42]

The S&P litigation provides more grist for this mill. A cause of action established by our federal securities laws and filed against S&P or against the issuers of mortgage-backed securities would undoubtedly support jurisdiction

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39. See supra notes 8–9 and accompanying text.

40. See, e.g., Am. Law Inst., Study of the Division of Jurisdiction Between State and Federal Courts 187–91 (1969) [hereinafter ALI Study] (advocating federal defense removal); James H. Chadbourn & A. Leo Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 665 (1942) (arguing that federal courts ought to be permitted to exercise jurisdiction on the basis of anticipated federal defenses and that, if it becomes clear in the course of litigation that no such defense will materialize, dismissal or remand is appropriate); 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, 658–59 (1987) (advocating abandonment of well-pleaded complaint rule and authorization of removal on the basis of a federal defense).

41. See ALI Study, supra note 40, at 164–68 (arguing that federal courts are better equipped to interpret federal law than state courts). But see Seinfeld, Federal Courts, supra note 3, at 114–32 (advancing reasons to be skeptical of the view that federal courts are equipped to supply uniform, expert interpretation of federal law).

42. ALI Study, supra note 40, at 189.

under the federal question statute.[43] And yet a state law cause of action that triggers a defense predicated on the very same laws would not.

There are reasons the law of federal question jurisdiction is structured this way. If jurisdiction were to lie on the basis of a plaintiff's speculation that the defendant might raise a federal defense, it could lead to the federalization of cases in which no issue of federal law actually materializes.[44] And even if we extended federal jurisdiction only to those cases in which the defendant actually raises a federal defense, those tribunals would quickly face a caseload burden that they could not hope to manage.[45] But it is not as if these difficulties cannot be mitigated. One might avoid the former problem by continuing the practice of prohibiting the assertion of federal question jurisdiction on the basis of anticipated federal questions[46] and allowing for federal defense removal only once it is clear from the defendant's pleadings that a federal defense has been raised.[47] The docket-control problem, meanwhile, might be alleviated by restricting federal defense removal to scenarios in which federal law is potentially dispositive of the entire action or by including an amount in controversy requirement in the removal statute.[48] Of

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43. See, e.g., Boca Raton Firefighters & Police Pension Fund v. Bahash, 506 F. App'x 32, 39 (2d Cir. 2012) (affirming dismissal, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, of claims brought under securities laws by private parties against S&P's parent company and not questioning the existence of federal court jurisdiction).

44. Justice William Johnson raised this concern in the course of rejecting the expansive conception of federal jurisdiction endorsed by the Court in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). "It is true," he wrote, "that a question might be made, upon the effect of [federal law], on the rights claimed [in some case]; but until that question does arise . . . what end has the United States to subserve in claiming jurisdiction of the cause?" Id. at 885 (Johnson, J., dissenting). Justice Johnson explained further:

> The object [of the constitutional and statutory provision governing federal court jurisdiction] was, to secure a uniform construction and a steady execution of the laws of the Union. Except as far as this purpose might require, the general government had no interest in stripping the State Courts of their jurisdiction . . . . Why then should [they] be vested with jurisdiction in a thousand causes, on a mere possibility of a question arising, which question, at last, does not occur in one of them?

Id. at 886.

45. See, e.g., Seinfeld, Puzzle, supra note 37, at 545–46.

46. See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) ("It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution . . . . [S]uch allegations . . . do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.").

47. This approach carries the downside, relative to established practice, of delaying a conclusive determination with respect to jurisdiction. It is desirable to settle jurisdictional issues at an early stage, since it is wasteful for a court to invest significant time and energy into a case only to determine that jurisdiction is ultimately lacking. See, e.g., Arthur R. Miller, Artful Pleading: A Doctrine in Search of Definition, 76 Tex. L. Rev. 1781, 1782–83 (1998) (noting that the well-pleaded complaint rule requires plaintiffs to establish the existence of federal question in the complaint, and that this helps conserve federal judiciary's limited resources). This difficulty might be addressed by accelerating the timeline for defendants to announce whether they intend to rely on federal law as part of their defense.

48. The American Law Institute suggested both of these things in its 1969 report on the allocation of cases between state and federal court. See ALI Study, supra note 40, at 25

course, these limitations carve out of the jurisdiction of the federal courts cases in which questions of federal law might feature prominently. And in this way, the carve-outs mirror the well-pleaded complaint rule insofar as they are disconnected from first principles of federal question jurisdiction. But this approach would still qualify as a significant improvement over the jurisdictional status quo, which (complete preemption to one side) treats federal defenses as categorically irrelevant.[49]

B. *State Enforcement Action, State Court*

The fact that the S&P litigation comprises a series of enforcement actions brought by the states to redress public harms adds an additional wrinkle to the jurisdictional analysis. For even if it is the case that federal defense removal ought sometimes to be permitted, and even if the S&P litigation is, in some respects, a particularly strong candidate for removal on the basis of a federal defense, the fact that these suits are sovereign enforcement actions militates against allowing them to proceed in federal court.

Although the removal of a state-initiated action to enforce state law is not unheard of,[50] it is very much the exception and not the rule. Our jurisdictional traditions suggest, instead, that proper respect for the sovereign authority of the states requires that they be permitted to enforce their law in their own courts.[51]

(suggesting permitting removal "[i]f the amount in controversy exceeds the sum or value of $10,000" and if, "subsequent to the initial pleading, a substantial [federal] defense is properly asserted that . . . would be dispositive of the action or of all counterclaims therein"). It is likely that such a rule would encourage defendants eager to remove to federal court to cast about for some federal defense that might suffice to support removal, even if that defense is exceedingly unlikely to succeed. At least one commentator has defended the well-pleaded complaint rule on the ground that it is considerably easier for defendants to conjure flimsy federal defenses than it is for plaintiffs to find plausibly applicable affirmative causes of action that sound in federal law. See Richard A. Posner, The Federal Courts: Crisis and Reform 190 (1985). One way to attack this problem would be to have judges make discretionary judgments as to whether a federal defense is sufficiently serious to support removal, though it must be acknowledged that this would render jurisdictional practice considerably more uncertain.

49. To be clear, the docket-control consequences of such a shift would be dramatic. If this sort of move is to be endorsed without either seriously overtaxing the federal judiciary or significantly increasing the number of federal judges, it will be necessary to rethink other elements of the law of federal jurisdiction. The significant curtailment of diversity jurisdiction is the obvious move. See, e.g., Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (lamenting "the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction"). But see Diane P. Wood, The Changing Face of Diversity Jurisdiction, 82 Temp. L. Rev. 593, 605 (2009) (defending targeted use of diversity jurisdiction as a means of "assuring a national approach to national problems that happen to be governed by state law"). This Essay is not the place for sustained engagement with the question of whether diversity jurisdiction ought to be abolished.

50. See 28 U.S.C. § 1442(a)(1) (Supp. V 2012) (authorizing removal of criminal or civil actions commenced against federal officers for, or relating to, their official acts).

51. The ALI study, which endorses federal defense removal, carves out an exception for actions brought by the states. See ALI Study, supra note 40, at 26. It also explains that "[a]s a matter of policy, . . . proper respect for the states suggests that they should be allowed to use their own courts for routine matters of law enforcement." Id. at 201.

This is reflected most prominently (which is not to say uncontroversially) in the line of Supreme Court decisions directing federal courts to abstain from adjudicating federal claims properly within their jurisdiction so that ongoing state court proceedings (in which those claims might be ventilated) can run their course.[52] If the law prohibits private parties from using affirmative suits for injunctive relief to call a halt to state enforcement actions, it is difficult to see why (absent extraordinary circumstances)[53] it should permit parties to do so through the device of removal.

Here too, the law of federal question jurisdiction simply fails to engage. It turns out that the well-pleaded complaint rule is well adapted to keeping state enforcement actions out of the federal system, but this has nothing at all to do with the nuances of our federalism as applied to such cases. It is a byproduct of the docket-control (and related) considerations mentioned earlier. And since the law governing federal question jurisdiction fails to treat the presence of a federal defense as sufficient, on its own, to underwrite federal judicial authority, it has nothing to tell us about how best to strike the balance between the interests in federal court adjudication of federal questions and state court control over the enforcement of state law.

CONCLUSION

When the Judicial Panel on Multidistrict Litigation ordered the consolidation of fifteen sovereign enforcement actions against S&P, at least one observer speculated that this might portend success for S&P in its efforts to keep the cases in federal court. "If I was a state, with a motion for remand pending," opined this commentator, "I'd be concerned that the reasons given for consolidating these actions before one judge could have an influence on the remand decision of that judge."[54] S&P, of course, is hoping this proves correct, as it is now fighting remand motions that have been presented to the judge presiding over the consolidated actions. But this is almost certainly a losing battle, for under existing law, the arguments in favor of federal question jurisdiction are seriously flawed.

What is most noteworthy about the jurisdictional questions in these cases, however, is not that S&P's arguments are unavailing, but that the law directs our attention away from the features of this litigation that would seem most pertinent to sound thinking about whether the federal courts ought to intervene. Neither the fact that federal questions are certain to feature prominently, nor the fact that the suits in question are sovereign enforcement actions, will have bearing on the court's assessment of whether federal question jurisdiction will lie. In this way, the S&P litigation exemplifies some of the most unsatisfying features of our system for allocating cases between the state and federal courts.

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52. See Younger v. Harris, 401 U.S. 37, 49–54 (1971); see also Huffman v. Pursue, Ltd., 420 U.S. 592, 603–07 (1975) (applying *Younger* doctrine to civil enforcement action).

53. See supra note 50 (describing limited circumstances where removal is allowed).

54. See Harris, supra note 3 (quoting Kenneth A. Wexler, class action plaintiffs' lawyer unaffiliated with S&P litigation) (internal quotation marks omitted).

Reasonable people can disagree as to whether, all things considered, the S&P litigation belongs in one system or the other, but it is not too much to ask that our efforts to resolve this question be more sensitive to considerations of sound jurisdictional policy.

Preferred Citation: Gil Seinfeld, *S&P Litigation and Access to Federal Court: A Case Study in the Limits of Our Removal Model*, 113 COLUM. L. REV. SIDEBAR 123 (2013), http://www.columbialawreview.org/SP-Litigation_Seinfeld.