

**THE FEDERAL COURTS AS FRANCHISE: RETHINKING THE TRIPARTITE MANTRA OF  
FEDERAL QUESTION JURISDICTION**

INTRODUCTION

Since 1875, the federal district courts have been vested with what is known as “general federal question jurisdiction”—original jurisdiction predicated on the presence in a suit of a question of federal law. The conferral of such jurisdiction on the federal courts is typically justified on three grounds. First, state court judges are thought more likely than their federal counterparts to exhibit bias against claims sounding in federal law; second, federal courts are thought better able than state courts to supply a uniform interpretation of federal law; and third, federal judges are thought to have greater expertise in the interpretation and application of federal law than state judges.<sup>1</sup> By channeling federal question cases into the federal courts, the argument goes, we increase the likelihood of evenhanded, uniform, expert adjudication of federal law. This bias-uniformity-expertise model lies at the core of judicial and scholarly discourse relating to federal question jurisdiction. It is incanted almost reflexively by courts when they craft doctrine governing the allocation of federal question cases between the state and federal judiciaries,<sup>2</sup> and it is frequently the starting point for scholarly analysis of these doctrines.<sup>3</sup>

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<sup>1</sup> I have, in prior work, highlighted only the first two of these claimed justifications for federal question jurisdiction, and treated the issue of federal judicial expertise in the interpretation of federal law as a component of the argument relating to interpretive uniformity. See Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 537 (2007). It is more appropriate to treat the expertise argument as entirely distinct from the uniformity claim, and I do so here.

<sup>2</sup> See, e.g., *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005); *Tafflin v. Levitt*, 493 U.S. 455, (1990); *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 483-84 (1981); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 826-27 & n.6 (1986) (Brennan, J., dissenting); *Hathorn v. Lovorn*, 457 U.S. 255, 271 (1982) (Rehnquist, J., dissenting). See also sources cited *infra* nn. \_\_, \_\_, \_\_. The Supreme Court’s repetition of the conventional wisdom relating to federal question jurisdiction in *Grable*—it stated that such jurisdiction allows for “resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues,” *Grable*, 545 U.S. at 312—

This article provides a critical analysis of this tripartite mantra of federal question jurisdiction. It demonstrates that the bias-uniformity-expertise model—despite its prominence in judicial and academic discussions of federal jurisdiction—is significantly flawed. I mean this in two senses. First, there are important ways in which the shape of our jurisdictional landscape cannot be squared with the standard account of the purposes federal question jurisdiction is designed to serve. It is not simply that pockets of the law of federal question jurisdiction are difficult to explain by reference to the narratives of bias, uniformity, or expertise (though that is surely the case); the dissonance is far sharper. Key fragments of the rules governing the federal courts’ authority to adjudicate federal questions have explicitly been premised on *rejection* of each component of the conventional model of federal question jurisdiction. Thus, the actual behavior of Congress and the courts in setting the terms of the federal judiciary’s interface with federal law raises serious doubts as to the explanatory power of the conventional

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has received considerable attention from the lower federal courts. Since the *Grable* decision was handed down in 2005, more than 30 lower federal courts have quoted this fragment of the decision verbatim, thereby simulatenously reflecting and propagating the conventional wisdom.

<sup>3</sup> See, e.g., Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L. J. 309, 331 (2007); Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. Kan. L. Rev. 1, 50 (2006); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court’s Theory that Self-Restraint Promotes Federalism*, 46 Wm. & Mary L. Rev. 1289, 1319-21, 1328 (2005); Christopher A. Cotropia, *Counterclaims, the Well-Pleaded Complaint Rule, and Federal Jurisdiction*, 33 Hofstra L. Rev. 1, 37-38 (2004); Michael Wells, “Available State Remedies” and the Fourteenth Amendment: Comments on *Florida Prepaid v. College Savings Bank*, 33 LOY. L. A. LAW. REV. 1665, 1683 (2000); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between the State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”* 78 VA. L. REV. 1769, 1787 & n.104 (1992); Patti Alleva, *Prerogative Lost: The Trouble With Statutory Federal Question Jurisdiction After Merrell Dow*, 52 OHIO ST. L. J. 1477, 1499-1500 (1984); Martha Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1083 (1974); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-68 (1969) [hereinafter ALI STUDY]; David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 268 (1969). See also sources cited *infra* nn. \_\_, \_\_, \_\_. Prominent commentators occasionally neglect the expertise argument for federal question jurisdiction in favor of the bias and uniformity themes, see, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 5.2.1 271-72 (5th ed. 2007); David Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 328 (1977); less prominent ones do too, see *supra* n.1.

account.<sup>4</sup> Second—and this, no doubt, explains some of the dissonance between the theory and practice of federal question jurisdiction—there is reason to doubt the accuracy of the empirical claims that lie at the core of the conventional wisdom. That is, there is cause to question whether (1) federal judges are in fact more likely than their state court counterparts to vindicate federal claims, (2) the lower federal courts meaningfully advance the cause of uniformity in the interpretation of federal law, and (3) federal judges have meaningful expertise in the myriad areas of federal law that come before them.<sup>5</sup>

My critique of the bias prong of the conventional wisdom covers ground that others have been over before, so it is relatively brief.<sup>6</sup> The federal judiciary is more ideologically conservative than it was thirty years ago; as a result, litigants pressing claims of individual constitutional right fare less well in federal court than they did

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<sup>4</sup> I do *not* have in mind here the well-pleaded complaint rule, even though it filters out of the federal courts many cases in which concern relating to the evenhanded, uniform, or expert interpretation of federal law might be justified. *See e.g.*, 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, 600 (1987) (“[T]he [well-pleaded complaint] rule is irrational because it is a mechanical rule that ignores important policy considerations underlying the existence of federal question jurisdiction.”); ALI STUDY, *supra* n. \_\_, at 188 (“The statutory construction that bars plaintiff from commencing in federal court, or defendant from removing thereto, a case in which there is a federal defense to a state-created claim . . . is inconsistent with the reasons that justify original federal question jurisdiction”) (citation omitted). I do not count this particular tension between theory and practice among the reasons to doubt the vitality of the bias-uniformity-expertise model because the exclusion of cases from the federal courts under the well-pleaded complaint rule is motivated not by skepticism as to the soundness of the bias-uniformity-expertise account, but by concern that the dockets of the federal courts would be overloaded if all cases involving questions of federal law—whether raised by plaintiff or defendant—fall within the federal courts’ original or removal jurisdiction. *See, e.g.*, Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1782 (1998) (explaining that the well-pleaded complaint rule reflects “concerns about the limited resources of the federal court system”); Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 162, 184-85 (1953) (similar).

<sup>5</sup> John Preis has recently challenged the empirical foundations of the conventional wisdom. *See* John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247 (2007). Though his method of attacking the question is substantially different from mine (Preis’s approach is largely empirical), our accounts of the deficiencies of the conventional model overlap, and we reach similar conclusions as to its overall (lack of) utility.

<sup>6</sup> The fact that scholars have, in recent years, expressed doubt about the bias hypothesis has not been sufficient to motivate its exclusion from standard accounts of the justifications for vesting federal question jurisdiction in the federal courts.

decades ago.<sup>7</sup> It therefore makes less sense to premise jurisdictional policy on the assumption that state courts are generally less willing than federal courts to vindicate federal claims.

My challenge to the uniformity and expertise prongs of the conventional wisdom—which have not come under anything like the scrutiny that attends the bias claim—requires rethinking our approach to the question of when it makes sense to channel a group of cases into the federal courts. Specifically, it calls into question the longstanding tendency of courts and commentators to think about matters of jurisdictional allocation in strictly relative terms. The conventional wisdom focuses on the question whether federal courts are likely to provide *more* uniformity and offer *greater* expertise than the state courts when it comes to the interpretation of federal law. In so doing, it neglects the analytically prior and programmatically more significant question whether the federal courts advance either of these interests in sufficient measure to justify shaping decisions of jurisdictional allocation around whatever relative advantages those courts may offer.

It should be obvious that even if the federal courts are better able than state courts to supply uniform, expert interpretation of federal laws, it hardly makes sense to premise decisions of jurisdictional allocation on this basis if the federal courts' contributions along these two dimensions are not meaningful in an absolute sense. Relying heavily on signals sent by both Congress and the courts in connection with the adjudicative authority of specialized courts and administrative agencies, this article argues that they are not.

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<sup>7</sup> Of course, the fact that the federal courts are populated by more ideologically conservative judges now than was the case in the 1960s and 70s does not mean that all claims of individual constitutional right are generally less likely to succeed in the federal courts. Much turns on the ideological valence of the substantive claim itself. *See infra* n. \_\_\_.

Our practice suggests, rather, that the lower federal courts no longer serve on the front lines of the battle to secure uniform, expert interpretation of federal law. This practice is driven by fundamental changes in the scope and character of federal law and the federal judiciary itself that render the federal courts unable to supply either uniformity or expertise in significant measure.

This is not to say that meaningful systematic differences between the state and federal courts do not exist. They do. But they are not the ones posited by the conventional account. This article endeavors to replace the conventional story about how the state and federal judiciaries differ from one another with an account that better captures the realities of modern legal practice. I do this by presenting a model of the federal courts as a kind of franchising arrangement—a chain of dispute resolution forums with a set of basic characteristics held in common across branches, regardless of the location in which any particular branch sits. I argue, in particular, that federal court practice—in sharp contrast to practice in scattered state courts—is characterized by a high measure of procedural homogeneity, a standardized culture marked by a strong ethic of professionalism, and a bench that exhibits generally high levels of competence in the stuff of judge-craft.

Discarding the conventional account of the differences between state and federal courts in favor of the Federal Franchise model has important consequences for how we think about the allocation of cases between the two systems. But these consequences are not embodied in clear directives to include specific sets of cases within the jurisdiction of the federal courts or to exclude others. Instead, taking heed of the franchise-like qualities of the federal judiciary reveals the inherently political character of these questions of

jurisdictional allocation. And it suggests, accordingly, that the federal courts have only a limited role to play in policing congressional judgments as to which cases ought to be adjudicated in which forum.

I proceed in three parts. Part I provides a brief account of the bias-uniformity-expertise model that is thought to serve as the foundation for federal question jurisdiction. Part II is an argument for uprooting this foundation (and, in part, an account of its having been uprooted already). It examines each component of the conventional account and demonstrates, first, that significant fragments of the law of federal jurisdiction are in deep tension with the bias-uniformity-expertise model and, second, that the factual premises underlying this model are open to question. Part III introduces the Federal Franchise model and explores the jurisdictional consequences that would follow from its adoption.

#### I. FEDERAL QUESTION JURISDICTION – THE CONVENTIONAL ACCOUNT

When we inquire into the reasons for establishing federal jurisdiction over a particular class of cases, we are asking, in essence, why state courts cannot do the job. Each of the states, of course, has an independent judicial system of its own; and state courts have, since the Founding, been presumed competent to adjudicate questions of federal law.<sup>8</sup> The decision to place some (but not all) suits within the jurisdiction of the federal courts therefore raises a pair of related questions: What is it about the cases that we channel into the federal courts that makes them appropriate subjects of federal jurisdiction? And, what is it about state courts that might make them suboptimal forums for the adjudication of these disputes?

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<sup>8</sup> The Judiciary Act of 1789 did not confer general federal question jurisdiction on the lower federal courts, thus leaving federal question cases to be adjudicated in the state courts. *See* Act of Sept. 24, 1789, 1 Stat. 73. *See also* *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876) (“rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class”).

With respect to federal question jurisdiction, in particular, there has long been debate as to *which* cases ought to fall within the jurisdiction of the lower federal courts.<sup>9</sup> But there is broad agreement as to *why* federal question cases, generally speaking, merit the attention of federal tribunals. Indeed, one scholar has gone so far as to claim that, since the Founding, “there has been virtually no disagreement” as to the basic justifications for federal question jurisdiction.<sup>10</sup> These justifications were rehearsed by the Supreme Court just two years ago, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, when the Justices invoked “the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”<sup>11</sup> As one commentator recently explained, this “three part conception of federal jurisdiction is dominant in the judiciary and the academy.”<sup>12</sup> In the sections that follow, I summarize each component of this account of federal question jurisdiction. I examine these components critically in Part II.

### A. Bias

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<sup>9</sup> This debate proceeds on numerous fronts. For example, the Supreme Court’s construction of the constitutional language authorizing the establishment of jurisdiction in federal question cases (offered in the seminal case of *Osborn v. United States*, 22 U.S. (9 Wheat.) 738 (1824)), has been criticized as unduly broad. *E.g.*, *Osborn*, 22 U.S. at 886 (Johnson, J., dissenting); *Textile Union Workers of Am. v. Lincoln Mills*, 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting). In addition, the Supreme Court’s interpretation of the federal statute that actually confers jurisdiction on the lower federal courts in cases involving federal questions, *see Louisville and Nashville Railroad v. Mottley*, 211 U.S. 149, 152 (1908), has been attacked for undermining the core purposes federal question jurisdiction is supposedly designed to serve. *See supra* n. \_\_.

<sup>10</sup> Doernberg, *supra* n. \_\_ at 648. *But see id.* at 647 n.220 (acknowledging that, according to some, at least one of the conventional justifications for the establishment of federal question jurisdiction—the possibility that state courts will exhibit bias against federal claims—“is no longer the concern that it once was”). I address this issue in Part II.A, *infra*.

<sup>11</sup> 545 U.S. 308, 312 (2005).

<sup>12</sup> Preis, *supra*, n. \_ at 250 n.6. *See also* sourced cited *supra* n. \_\_. As I detail in the paragraphs that follow, it is difficult to state with precision when this tripartite account of federal question jurisdiction rose to prominence. Certainly the most important step in bringing the bias-uniformity-expertise model as a whole to the foreground of judicial and scholarly discourse was the publication of the American Law Institute’s *Study of the Division of Jurisdiction Between State and Federal Courts* in 1969. The three-part account of the justifications for federal question jurisdiction features prominently in the Study, *see* ALI STUDY, *supra* note \_\_ at 165-68, and its discussion of the federal courts’ role in offering evenhanded, uniform, expert interpretation of federal law has been relied upon heavily by courts and scholars ever since.

Proponents of channeling federal question cases into the federal courts have long argued that state courts are likely to exhibit anti-federal bias when called upon to interpret and apply federal law. Perhaps most famously, Alexander Hamilton remarked in *Federalist 81* that “the 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.”<sup>13</sup> “State judges,” he argued, “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.”<sup>14</sup>

Arguments of this kind have, throughout U.S. history, shaped the debate relating to the proper scope of federal judicial power. During the ratification era, for example, proponents of a robust federal judiciary were motivated, in part, by skepticism of state courts’ willingness to enforce Article IV of the Treaty of Paris, which obligated each side to respect the lawfully contracted debts of the other, and thereby posed a significant threat to the economic interests of large debtor classes in the individual states.<sup>15</sup> During the Civil War era, state bias concerns resurfaced with vigor, as Congress enacted numerous measures allowing for the removal of cases from state to federal court in order to protect federal officers from unfair treatment at the hands of state judges.<sup>16</sup> The

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<sup>13</sup> The Federalist No. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Wythe Holt, “*To Establish Justice*”: *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1441-42, 158 (detailing widespread state refusal to vindicate claims of British creditors against U.S. debtors, the requirements of the Treaty of Paris notwithstanding, and explaining that “[a] solution to this problem was to establish federal courts, whose judges might not be so susceptible to local clamor raised by debtors”).

<sup>16</sup> STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 147-54 (1968) (describing removal provisions enacted by Congress during and soon after the Civil War and detailing the role played by state court hostility to federal law in motivating the passage of these measures). Concern about state hostility to federal law also led to the enactment of removal legislation in 1815 and 1833. See William M. Wiecek, *The Reconstruction of Federal Judicial Power*, 13 AM. J. LEG. HIS. 333, 337 (1969).



enactment of what is now 42 U.S.C. § 1983, along with its jurisdictional counterpart, 28 U.S.C. § 1343, have long been recognized as an expression of skepticism as to the ability or willingness of state courts (particularly in the South) to enforce federal law.<sup>17</sup> Likewise, the seismic shift in the law of federal jurisdiction embodied in the Jurisdiction and Removal Act of 1875<sup>18</sup>—which established original and removal jurisdiction in the federal courts over all suits arising under federal law—was driven by distrust of the state courts’ handling of federal questions.<sup>19</sup> And, finally, during the latter half of the 20<sup>th</sup>

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<sup>17</sup> See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 239-43 (1972) (surveying the legislative history of the Civil Rights Act of 1871 and concluding that “[Congress] was concerned that state instrumentalities could not protect [federal] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts”).

<sup>18</sup> Ch. 137, § 1, 18 Stat. 470.

<sup>19</sup> See, e.g., Erwin Chemerinsky, *The Values of Federalism*, 47 FLA L. REV. 499, 511 (1995) (“General federal question jurisdiction was created in 1875 because of fears about state court hostility to federal claims.”); G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 30 (1948) (“[T]he change, which the act of 1875 introduced, was brought about largely, if not entirely, in order to provide an impartial forum for those cases in which the federal question might be prejudiced in state courts.”); *id.* at 28, 29 (similar). It bears mention that the Jurisdiction and Removal Act, enacted on March 3, 1875, was something of a “Midnight Judges Act”—a statute passed by a lame duck Congress on the eve of power turning over to the other party. Through the landslide election of 1874, Democrats were poised to take over the House of Representatives on March 4, 1875, ending 14 years of Republican party rule.

Some have argued that the jurisdictional changes wrought by the 1875 Act were motivated not only by concern with State court hostility to Reconstruction Era protections for blacks, but also by a desire to protect certain economic interests (chiefly those of railroads) thought to be in jeopardy at the hands of hostile state courts. See Wiecek, *supra* note \_\_, at 341; Kutler, *supra* note \_\_, at 157-60. This economic rights understanding of the forces motivating the passage of the 1875 Act finds some support in the legislative history of the Act. See 2 Cong. Rec. 4986 (1874) (statement of Sen. Carpenter). Still, the economic rights angle lacks the resonance of claims linking the establishment of general federal question jurisdiction at that time to widespread southern hostility to the national government and to rights protected by federal law.

The economic rights account appears to have been advanced for the first time by Professors Frankfurter and Landis in their seminal work on federal jurisdiction, *The Business of the Supreme Court*. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 64-65 & n.31 (1928). But there is reason to view the Frankfurter/Landis claim with suspicion. As Professor Purcell has explained, the primary aim of the Frankfurter/Landis text was to increase dissatisfaction with diversity jurisdiction, which was at the time (working in tandem with the doctrine of *Swift v. Tyson* and the *Lochner*-era jurisprudence of substantive due process) deployed to serve corporate interests Frankfurter deplored. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 79-80 (2000). Recasting the 1875 Act as a sop to westward-expanding railroads served Frankfurter’s general purpose of depicting the rules governing the allocation of cases between the state and federal courts as the product of a corporate takeover of jurisdictional policy. At the very least, there is cause to wonder whether, by putting an economic rights gloss on the radical expansion of federal jurisdiction during the Reconstruction era, Frankfurter and Landis, writing in 1928—the heyday of *Lochner*-style protection of economic rights—are guilty of anachronistically reading contemporary political sensibilities into an era where they do not belong.

century, skeptics of state courts’ (particularly Southern state courts’) willingness to enforce the civil rights of disfavored minorities (particularly African-Americans) pressed for more expansive federal jurisdiction.<sup>20</sup>

As I explain in Part II.A, challenges to the state court bias argument have become increasingly common in modern times (including among Justices of the Supreme Court). Yet distrust of state courts unquestionably remains—along with claims relating to federal judicial expertise and capacity to secure uniformity—one of the pillars of current thinking as to the need for, and proper scope of, federal question jurisdiction. The state bias concern has repeatedly been invoked by the Supreme Court and lower federal courts in

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In any event, the Frankfurter/Landis account is fully consistent with the view that the expansion of federal jurisdiction in 1875 was driven by concern with state judicial bias in the adjudication of federal claims. It is simply the object of this bias that has shifted—from freed slaves to corporations.

<sup>20</sup> See, e.g., Anthony Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trials*, 113 U. PA. L. REV. 793 (1965) (advocating expanded federal habeas corpus and removal jurisdiction in light of pervasive failure of criminal justice systems in Southern states to protect the civil rights of black defendants).

modern times,<sup>21</sup> and continues to occupy a prominent place in academic commentary relating to federal question jurisdiction.<sup>22</sup>

### B. *Uniformity*

Though the interest in securing a uniform interpretation of federal law has been recognized as significant since the Founding,<sup>23</sup> the role of the lower federal courts in advancing this interest (through the device of general federal question jurisdiction or otherwise) appears not to have received sustained attention until considerably later. By some accounts, the passage of the 1875 Act marks congressional acknowledgement of the lower federal courts' capacity to contribute meaningfully to the maintenance of a uniform

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<sup>21</sup> See sources cited *supra* n. \_\_; see also *Perez v. Ledesma*, 401 U.S. 82, 110 n.7 (noting that “state court hostility to the federal claim is greatest” in suits challenging state legislative or administrative action); *Reed v. Clark*, 984 F.2d 209, 211 (7th Cir. 1993) (“State courts may be hostile to federal norms, and as a practical matter the Supreme Court of the United States can review only a tiny fraction of all state decisions. Constitutional rights, insulated from popular control, are most likely to engender hostility; a majority may very much wish to do things otherwise.”); *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984) (“[T]he principal purpose of giving federal courts original jurisdiction over federal claims is to afford parties relying on federal law a sympathetic, knowledgeable forum for the vindication of their federal rights”); *Wright v. Prudential Ins. Co. of America*, 285 F.Supp. 2d 515, 522 n.17 (D.N.J. 2003) (similar); *Conservation Law Foundation of New England v. Browner*, 840 F.Supp. 171, 177 n.11 (D. Mass. 1993) (similar); *Pena v. Downey Sav. & Loan Ass’n*, 929 F.Supp. 1308, 1317 & n.5 (C.D.Cal. 1996) (similar). The specter of anti-federal bias is frequently raised by federal courts in connection with the federal officer removal statute, 28 U.S.C. § 1442. *E.g.*, *Watson v. Philip Morris Companies, Inc.*, 127 S.Ct. 2301, 2306 (2007) (“State-court proceedings may reflect ‘local prejudice’ against unpopular federal laws or federal officials”); *Wyoming v. Livingston*, 443 F.3d 1211, 1222-23 (10th Cir. 2006) (removal “protects against the possibility of a hostile state forum, which might arise when the federal officer is enforcing a locally unpopular national law”); *Paldmic v. Altria Corp. Servs., Inc.*, 327 F.Supp. 2d 959, 963 (E.D. Wis. 2004) (“Section 1442(a)(1) is designed to prevent states from interfering with the implementation of federal law and seeks to accomplish this purpose by allowing those whose federal activity may be inhibited by state court actions to remove to the presumably less-biased forum of federal court.”).

<sup>22</sup> See sources cited *supra* n. \_\_; see also James S. Leibman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 847 (1998); Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L. J. 273, 321 (1993); Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 300-01 (1988). *But see infra* n. \_\_ and accompanying text (noting expressions of skepticism as to the bias hypothesis).

<sup>23</sup> Here too, Hamilton provides the canonical statement of the argument. “If there are such things as political axioms,” he wrote in *Federalist 80*, “the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.” *The Federalist No. 80*, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

body of federal law.<sup>24</sup> But support for this claim is thin<sup>25</sup> and is significantly outweighed by the material indicating that passage of the 1875 Act was driven by the bias concern.<sup>26</sup> It was only during the latter half of the twentieth century that the uniformity-based justification for vesting original federal question jurisdiction in the lower federal courts gained significant currency. The American Law Institute’s *Study of the Division of Jurisdiction Between State and Federal Courts*, published in 1969, asserted that “[t]here is reason . . . to believe that greater uniformity results from hearing [federal question] cases in a federal court.”<sup>27</sup> The authors of the Study supported this claim by arguing that “federal courts are more likely to apply federal law sympathetically and understandingly than are state courts.”<sup>28</sup>

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<sup>24</sup> See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting) (“The reasons Congress found it necessary to add [original federal question] jurisdiction to the district courts are well known. First, Congress recognized “the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution.”) (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816)). See also Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 83-84 (“The primary reason for adding this jurisdiction in 1875 is said to have been the desire for uniformity in the interpretation and application of federal law” (citing *Merrell Dow*)).

<sup>25</sup> Neither Justice Brennan’s opinion in *Merrell Dow* nor Deans Chemerinsky and Kramer provide direct support for the notion that the interest in uniformity contributed to the enactment of the federal question statute in 1875. Curiously, Justice Brennan relies principally on the Supreme Court’s 1816 decision in *Martin v. Hunter’s Lessee* to support his claim that the Congress that passed the 1875 Act was driven by concern with uniformity. (He makes the same move in his dissenting opinion in *Preiser v. Rodriguez*, 411 U.S. 475, 514 (1973) (Brennan, J., dissenting)). *Hunter’s Lessee*, of course, provides support for the notion that there is a strong interest in a uniform interpretation of federal law (hence the holding that the Constitution permits Supreme Court review of state court decisions on federal questions). But, having been decided sixty years *prior* to the establishment of general federal question jurisdiction, it tells us nothing about the motivations underlying Congress’s decision to do so. Professors Chemerinsky and Kramer buttress their claim that the passage of the 1875 Act was motivated by the uniformity concern only by reference to Justice Brennan’s anachronistic argument. Perhaps it is the flimsiness of the support mustered by Justice Brennan that led Deans Chemerinsky and Kramer to note only that the desire for uniformity is “said to have been” the primary reason for the enactment of the 1875 statute, instead of arguing that it actually *was* the primary reason for the jurisdictional expansion.

<sup>26</sup> See *supra* notes \_\_\_ - \_\_\_ and accompanying text.

<sup>27</sup> ALI STUDY, *supra*, note \_\_\_, at 165-66. This line of argument featured prominently, some fifteen years earlier, in the work of one of the lead Reporters for the ALI Study. See Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 158-59, 171-72 (1953).

<sup>28</sup> *Id.* at 166.

But the uniformity argument is not strictly derivative of the arguments rooted in bias and expertise. It is premised, also (perhaps primarily), on the fact that there are many more state courts and state judges than there are federal courts and federal judges. The judiciaries of fifty states (plus the District of Columbia and Puerto Rico) are, it is argued, likely to spawn greater interpretive variance than the thirteen U.S. Courts of Appeals.<sup>29</sup> This claim is based largely on the commonsense notion that as the quantity of decisionmakers addressing a debatable question increases, the likelihood that they will produce divergent answers increases along with it.<sup>30</sup> Hence, even if we reject the claims of state judicial bias and federal judicial expertise in connection with questions of federal law, there is still reason to believe that the interest in uniformity will be better served by opening the lower federal courts to federal question cases. It is a matter of simple mathematics.

Like the bias concern, the uniformity argument now lies at the heart of the conventional wisdom relating to federal question jurisdiction. It has repeatedly been identified by the Supreme Court and the lower federal courts as one of the principal

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<sup>29</sup> See, e.g., *id.* at 166-67 (invoking the small size of the federal judiciary as a reason to expect a high measure of interpretive uniformity to issue from the federal courts); Michael Wells, *The Impact of Substantive Interests on the law of Federal Courts*, 30 WM. & MARY L. REV. 499, 524 (1989) (“Uniformity would be served by rules that generally allocated federal law decision making to the federal rather than the state courts, because fewer differences are likely to exist between a dozen or so federal appellate courts than among fifty state supreme courts.”); Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 CONST. COMM. 347, 354 (1986) (discussing the possibility of vesting appellate jurisdiction over decisions from state courts in the regional federal appellate courts and stating that such a scheme would “increase[e] the federal judiciary’s capacity to maintain nationwide uniformity in the administration of federal law” for while “discrepancies might arise, as they do now, among the twelve courts of appeals, . . . the Supreme Court [would be] relieved of responsibility for reviewing fifty state courts (plus the District of Columbia and Puerto Rico)”).

<sup>30</sup> Of course, judges rely on prior decisions for guidance (even when those decisions come from other jurisdictions), so I do not mean to suggest that those who embrace this view of the relationship between the size of the federal and state judiciaries, on the one hand, and the likelihood of disuniformity in the interpretation of federal law, on the other, view the correlation as a strictly linear one.

justifications for channeling federal question cases into the federal courts.<sup>31</sup> And commentators, likewise, routinely argue that the lower federal courts offer significant advantages over the state courts where uniformity is concerned.<sup>32</sup>

### C. Expertise

The claim that federal question cases ought to be channeled into the lower federal courts due to their relative expertise in the interpretation and application of federal law is, like the uniformity-based argument, of relatively recent vintage.<sup>33</sup> Though it is likely that incarnations of this line of argument had been kicking around for some time already, the publication of the ALI Study helped this claim achieve prominence as well.<sup>34</sup> The Study straightforwardly asserts that “the federal courts have acquired a considerable expertness in the interpretation and application of federal law,”<sup>35</sup> and this claim has since become a central tenet of the federal courts orthodoxy. The Supreme Court and the lower federal courts have sounded this theme repeatedly,<sup>36</sup> and it is now a stock component of scholarly writing about federal question jurisdiction.<sup>37</sup>

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<sup>31</sup> See sources cited *supra* n. \_\_\_. See also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996) (explaining that the establishment of exclusive federal jurisdiction over an issue of federal law serves, among other things, “to achieve greater uniformity of construction”) (quoting *Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 256 (1985) (explaining that an “essential function of the federal courts [is] to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land”); *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir.1996) (similar); *Browne v. Nat’l Ass’n of Securities Dealers*, 2006 WL 3770505, at \*5 (N.D. Tex. 2006) (similar); *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*, 327 F.Supp. 2d 554, 567 (D.Md. 2004) (similar); *Acosta v. Master Maintenance and Const., Inc.*, 52 F.Supp. 2d 699, 708 (M.D. La. 1999) (similar).

<sup>32</sup> See sources cited *supra* n. \_\_; see also, e.g., Chemerinsky & Kramer, *supra* note \_ at 85 (“experience indicates that the availability of a federal forum significantly advances th[e] goal” of securing a uniform interpretation of federal law); Doernberg, *supra* note \_\_, at 647.

<sup>33</sup> See Preis, *supra* note \_\_ at 253 (2007) (characterizing the expertise-based justification for federal question jurisdiction as “newer”); Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Analysis of Students Rights Litigation*, 1984 WIS. L. REV. 1315, 1333-34 (noting that “[e]xpertise, of course, was not part of the original rationale for federal question jurisdiction”).

<sup>34</sup> ALI STUDY, *supra* note \_\_ at 164-65.

<sup>35</sup> *Id.*

<sup>36</sup> See sources cited *supra* n. \_\_; see also *Preiser v. Rodriguez*, 411 U.S. 475, 514 (1973); *Yong Wong Park v. Atty. Gen. of U.S.*, 472 F.3d 66, 71 (3d Cir. 2006); *Rogers v. Platt*, 814 F.2d 683, 695 (D.C. Cir.

There is nothing mysterious about the reason for the federal courts' perceived expertise in the adjudication of federal question cases. It is a function of experience.

Professor Redish explains:

One obvious difference [between state and federal courts] is the relative proportion of the caseloads which the two systems will handle. No matter how broadly we are willing to extend state court authority to adjudicate federal rights, it is difficult to imagine that such matters will—or should—consume a substantial proportion of a state court's docket. It is likely, then, that most of the state court's efforts will be devoted to state law, rather than federal law matters. The exact opposite is true for the federal courts. Therefore, federal courts will have a greater expertise in federal substantive law than will state courts.<sup>38</sup>

There are, of course, substantial benefits to be accrued—relating chiefly to the heightened probability of a correct result—from the practice of directing cases into tribunals with substantial experience (and, as a corollary, expertise) dealing with the relevant body of law. Hence the attractiveness of the expertise-based justification for allocating federal question cases to federal courts.

## II. THE CONVENTIONAL ACCOUNT RECONSIDERED

There is reason to be skeptical of each of the conventional justifications for vesting federal question jurisdiction in the lower federal courts. Despite the fact that courts and commentators continue to incant the tripartite mantra of federal question jurisdiction, it does not present an accurate picture of the modern jurisdictional landscape.

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1987); *Simpson v. Union Pacific R. Co.*, 282 F.Supp. 2d 1151, 1156 (N.D.Cal. 2003); *Dardeau v West Orange-Grove Consolidated Independent Sch. Dist.*, 43 F.Supp. 2d 722, 730 (E.D. Tex. 1999); *Berry v. Blue Cross of Washington and Alaska*, 815 F.Supp. 359, 362 (W.D.Wash 1993); *W.R. Grace & Co. v. Vikase Corp.*, 1991 WL 211647, at \*1 (N.D. Ill. 1991).

<sup>37</sup> See sources cited *supra* n. \_\_; see also Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005); Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960).

<sup>38</sup> Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory*, 36 UCLA L. REV. 329, 333 (1988). See also ALI Study, *supra* note \_\_ at 165 (“Whatever the proportion may be, it is apparent that federal question cases must form a very small part of the business of [state] courts, while they are a highly concentrated part of the business of the federal courts.”)

As I noted at the outset, it is not simply that fragments of the law of federal question jurisdiction cannot be explained by reference to the narratives of bias, uniformity, or expertise; rather important pieces of our jurisdictional architecture are founded on an explicit *rejection* of each component of the conventional wisdom relating to what federal question jurisdiction is for. Moreover, the empirical claims that lie at the heart of the bias-uniformity-expertise model are highly dubious. That is, it is far from clear that federal judges are in fact generally more sympathetic to claims grounded in federal law than are state court judges, and there is cause to question whether the federal courts contribute meaningfully to the uniform, expert interpretation of federal law.

A. *Rethinking Bias: The Historical Contingency of the Disparity Hypothesis*

Because the state court bias argument has received substantial critical attention from scholars—in sharp contrast, as we will see, to the uniformity and expertise arguments—I will dwell on it only briefly here. I wish to make two points. First, despite the fact that the Supreme Court, the lower federal courts, and scholars regularly invoke the state court bias concern as one of the justifications for the establishment of federal question jurisdiction, the actual content of our jurisdictional law is, in many respects, difficult to reconcile with the judicial bias narrative. In a variety of doctrinal contexts, the Supreme Court has explicitly rejected the notion that state courts cannot be trusted fairly to adjudicate federal claims, and it has shaped jurisdictional doctrine around the presumption of state court competence in this regard. Most prominently, the Court’s narrowing of federal habeas corpus review of state criminal convictions,<sup>39</sup> and its expansion of doctrines requiring federal courts to abstain from adjudicating questions of

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<sup>39</sup> See, e.g. *Stone v. Powell*, 428 U.S. 465 (1976); *Wainwright v. Sykes*, 433 U.S. 72 (1977) [AEDPA].



federal law,<sup>40</sup> mark an emphatic rejection by the Supreme Court of the state bias narrative.<sup>41</sup>

It is tempting to write off these doctrinal changes as the work product of an increasingly conservative Supreme Court unwilling to acknowledge very real differences in the outlook and behavior of state and federal judges in the adjudication of constitutional claims.<sup>42</sup> But the fact is that skepticism as to the claim of a bias-based disparity in state and federal courts' adjudication of federal questions comes from other corners as well.<sup>43</sup> Numerous authorities—among them strong believers in expansive federal jurisdiction in federal question cases—have raised serious doubts as to whether

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<sup>40</sup> *E.g.*, *Younger v. Harris*, 401 U.S. 37 (1971); *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

<sup>41</sup> Writing for a bare majority in *Stone*, Justice Powell reasoned:

The policy arguments that respondents marshal . . . stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule . . . . The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

*Stone*, 428 U.S. at 493 n.35. *See also* *Allen v. McCurry*, 449 U.S. 90, (1980) (“The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that *Stone v. Powell* provided the occasion for the expression of such an attitude in the present litigation, in view of this Court’s emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so.”). *Cf. Yellow Freight Systems, Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) (“We have no reason to question the presumption that state courts are just as able as federal courts to adjudicate Title VII claims.”).

<sup>42</sup> *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06 (1977) (“[T]he assumption of parity is, at best, a dangerous myth, fostering forum allocation decisions which channel constitutional adjudication under the illusion that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts. At worst, it provides a pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to the vigorous enforcement of federal constitutional doctrine.”).

<sup>43</sup> Resistance to the contention that state court judges cannot be trusted fairly to adjudicate federal claims is as old as the contention itself. Thus, while James Madison insisted at the Constitutional Convention that “[c]onfidence can [not] be put in the State Tribunals as guardians of the National authority and interests,” 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, 27-28 (Max Farrand, ed. 1911), Roger Sherman countered that “the Courts of the States would not consider as valid any law contravening the Authority of the Union,” 2 *id.* at 27.

the presumption of state court bias in the adjudication of federal claims remains defensible and whether the federal courts are in fact a more attractive forum for parties pressing constitutional claims.

The principal cause of this shift in attitudes is the appointment of large numbers of conservatives judges to the lower federal courts by President Reagan and the two Presidents Bush. Thus, Professor Neuborne, the leading proponent of the disparity view in the 1970s (and author of the article that framed the debate on this subject for a generation), wrote as follows in 1995:

I agree that state/federal qualitative differences no longer play the role they played in the 60's and 70's in constitutional cases. . . . Unmistakable signals sent by the Supreme Court (and the people), coupled with the remaking of the federal judiciary during the Reagan/Bush years, have made conscientious judges—both state and federal—skeptical about efforts to push individual rights law beyond settled doctrine. Nowadays, it doesn't much matter where you make a novel individual rights argument; it isn't likely to win.<sup>44</sup>

Similar claims abound in the literature.<sup>45</sup> This brings me to my second point (one I am hardly the first to make): claims of a disparity in state and federal courts' treatment of

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<sup>44</sup> Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEP. L. REV. 797, 798-99 (1995).

<sup>45</sup> See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between State and Federal Courts*, 104 COLUM. L. REV. 1211, 1222-23 (2004) (“Faced with an increasingly conservative federal bench and a spate of social issues being addressed in liberal ways by state governments, liberals may come again to disfavor federal courts.”); Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 712 & n. 87 (noting that the presumption that federal courts will offer “a special sensitivity toward the enforcement of federal law” requires “qualification in light of some of the ideologically ‘conservative’ appointments made by Presidents Ronald Reagan and George Bush”); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 598-99 (1991) (“[T]he domination of federal courts by judges appointed by Republican presidents undermines any basis for confidence in the federal bench as a source of systematic protection of individual liberties. . . . If the assumption of federal courts superiority stemmed, in part, from years of Democratic appointees, then this sustained period of Republican domination diminishes any basis for greater trust in federal courts.”).

In fact, there is evidence that at least some individual rights claims tend to fare *better* in the state courts than the federal courts. See, e.g., DANIEL R. PINIELLO, *GAY RIGHTS AND AMERICAN LAW* 111, 275 (2003). William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMM. 599, 599 (1999) (“Put simply, gay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts.”).

federal claims are historically contingent.<sup>46</sup> And given the current makeup of the federal judiciary, previously held assumptions about systematic differences in the federal and state courts' likely treatment of such claims are of dubious validity.

Hence, despite the fact that judicial and scholarly discourse continues to pay lip service to the state bias concern in cases calling into question the proper allocation of cases between state and federal courts, the fact is that as things stand in 2008, the state judicial bias narrative is hanging by a thread. It fails to capture the state of the law, and it rests on a dated conception of the ideological character of the federal judiciary. It is therefore of limited utility to students of federal jurisdiction.<sup>47</sup>

### B. *The Myth of Uniformity*

The claim that federal courts are better able than state courts to supply a uniform interpretation of federal law has not come under anything like the scrutiny currently attending the claim of state bias in the adjudication of federal claims. The case law and the literature pertaining to federal jurisdiction overwhelmingly presume the federal courts' superiority to state courts along this dimension,<sup>48</sup> and this presumption has received only limited critical attention. It is not my goal, in this article, to demonstrate that this presumption is wrong. My goal, rather, is to demonstrate that the presumption is irrelevant.

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<sup>46</sup> Friedman, *supra* n. \_\_\_, at 1222 (“[P]arity inevitably is a dynamic rather than a static concept.”). Of course, some claims—perhaps takings claims, Second Amendment claims, Equal Protection challenges to affirmative action plans—might be vindicated more readily by today’s federal judiciary than that of 20 or 30 years ago. *See, e.g.*, Parker v. District of Columbia, 478 F.3d 370 (D.C.Cir. 2007) (holding that the Second Amendment protects an individual right to keep and bear arms); Hopwood v. Texas, 78 F.3d 932 (5<sup>th</sup> Cir. 1996) (invalidating the University of Texas Law School’s affirmative action program under the Equal Protection Clause), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

<sup>47</sup> Of course, the bias argument retains explanatory power when it comes to changes in the scope of federal jurisdiction over the course of U.S. history

<sup>48</sup> *See supra* nn. \_\_ - \_\_.

In determining the proper scope of original federal question jurisdiction, the question of the lower federal courts' capacity to advance the interest in a uniform interpretation of federal law *in absolute terms* is analytically prior to the question of their ability to do so *relative* to the state courts. For even if it is true that federal courts are apt to supply a more uniform interpretation of federal law than state courts, this ought not to affect the allocation of cases between state and federal courts if the measure of uniformity the federal courts produce does not reach some minimum threshold of decisional conformity beneath which the benefits of uniformity are illusory. Yet discussion of the uniformity interest (in both the case law and the scholarly literature) tends to focus intently on state and federal courts' relative capacities in this regard, while the issue of absolute capacity has been addressed only obliquely or in cursory fashion.

There are, in fact, myriad reasons to question the notion that the lower federal courts meaningfully advance the interest in a uniform interpretation of federal law.<sup>49</sup> This notion appears to be premised, in part, on assumptions about the overall size of the federal judiciary that are no longer valid; and it rests on questionable assumptions about the relationship between the number of judges adjudicating a particular question and the measure of disuniformity we can expect those judges to produce. Moreover, as I demonstrate below, despite courts' and commentators' repeated invocation of the uniformity argument for lower federal court jurisdiction in federal question cases, there is compelling evidence that both the Supreme Court and Congress are deeply skeptical of

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<sup>49</sup> It bears emphasis that I am speaking here about the lower federal courts only, not the federal judicial system as a whole (*i.e.*, including the Supreme Court of the United States). There can be little doubt that the existence of Supreme Court jurisdiction contributes meaningfully to the uniform construction of federal law.

the notion that the lower federal courts have a place on the front lines of the battle to assure that federal law is interpreted uniformly.

### 1. *The Size of the Federal Judiciary*

More than two centuries ago, in making the case for establishing Supreme Court review of judgments rendered by state courts, Alexander Hamilton insisted that “[t]he mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.”<sup>50</sup> Hamilton’s point, quite simply, is that as more and more courts are given jurisdiction to decide a particular question, the probability of their producing a uniform answer diminishes.<sup>51</sup> And if uniformity is to be achieved within a system that permits many courts to hear a given question, review must be concentrated in a smaller number of courts (preferably one).

There are, of course, many more federal courts today (staffed by many more judges) than once there were. As initially established, the federal judiciary comprised

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<sup>50</sup> The Federalist No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>51</sup> Hamilton’s assessment that the thirteen state court systems could not be counted on to interpret federal law uniformly might have rested on assumptions about the competence and professionalism of state courts in the 1780s that were not applicable to the system of federal courts he envisioned. See DANIEL J. HULSEBOCH, *CONSTITUTING EMPIRE* 249 (noting Hamilton’s view that one of the principal contributions of the federal judiciary was to lie in the professionalism of the judges, a trait he found to be in short supply among state judges). And it might also have rested on assumptions about how state courts, given their lack of independence and possible hostility to the central government, might treat federal question cases; and these assumptions, too, might not extend to federal courts. This is all by way of saying that it does not follow ineluctably from Hamilton’s contention that thirteen state courts could not be relied upon to provide a uniform interpretation of federal law that thirteen federal courts could not do so either. Still, it seems fair to assume that the argument in *Federalist 80* rests, at least in part, on the sheer number of courts that were to be authorized to interpret federal law. Numerous others have connected the federal courts’ capacity to provide a uniform interpretation of federal law to the relatively small number of federal courts of appeals. See, e.g., Chemerinsky & Kramer, *supra* note \_\_ at 73 (noting that “as long as the number of circuits was . . . relatively small, the Supreme Court could handle conflicts among the courts of appeals” and explaining that every decision to increase the number of courts of appeals “increases the likelihood of splits among the circuits and simply shifts the pressure of maintaining uniformity back to the Supreme Court”); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 39-40 (1973).

thirteen districts and three circuits, staffed by a total of 19 judges.<sup>52</sup> By 1891—at which time the Circuit Courts of Appeals were created—there were 67 judicial districts and nine Circuit Courts of Appeals, staffed by a total of 83 judges.<sup>53</sup> And by 2006, the lower federal courts comprised 94 judicial districts and thirteen Courts of Appeals, staffed by more than 1,100 judges (active and senior).<sup>54</sup> Hence, even if we assume that there was a time in our history during which the lower federal courts had the capacity of to contribute meaningfully to the establishment of a uniform construction of federal law, changes in the size of the federal judiciary provide reason to reconsider this view.

It is an incomplete response to this point to note that the quantity of states, state courts (including those of final jurisdiction), and state judges has risen dramatically over the course of this period as well. For even if this means (and it may not)<sup>55</sup> that the federal courts remain better equipped than the state courts to interpret federal law uniformly, that alone is an inadequate foundation upon which to allocate cases between the two systems. The relevant question is whether the significant expansion of the federal judiciary has sapped the lower federal courts of whatever capacity they may once have had to make *genuine* contributions to the uniformity of federal law.<sup>56</sup> An assessment of the relative

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<sup>52</sup> Act of Sept. 24, 1789, 1 Stat. 73. Federal law did not provide, at that time, for circuit judges. Instead, the circuit courts (which exercised some original and some appellate jurisdiction), were to be staffed by two Supreme Court justices and a district judge.

<sup>53</sup> Russell R. Wheeler & Cynthia Harrison (Federal Judicial Center), *Creating the Federal Judicial System* 20 (3<sup>rd</sup> ed. 2005).

<sup>54</sup> Administrative Office of the U.S. Courts, *2006 Judicial Business*, Table 11. I cannot resist the temptation to point out that if we are to credit Hamilton’s account—which posits that to confer adjudicative authority on thirteen different tribunals is to create an unwieldy, confusion-producing hydra—then the federal Courts of Appeals, which currently number thirteen, constitute such a hydra.

<sup>55</sup> See *infra* text accompanying notes \_\_ - \_\_.

<sup>56</sup> See, e.g., Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L. J. 89, 151, (1998) (“One may maintain that the uniformity of federal law is better served by federal court adjudication of constitutional issues. A problem with this argument is that the degree of uniformity achieved by channeling cases to twelve circuits rather than fifty state courts may be minimal.”); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 407 (1991) (“[E]ven under a regime of exclusive federal jurisdiction, there will be frequent conflicts in the

capacities of state and federal courts in this regard simply does not speak to the question. And, indeed, as I explain in the section that follows, though very little direct empirical evidence relating to this issue is available,<sup>57</sup> there are significant indications that both Congress and the Supreme Court have come to doubt whether the lower federal courts are in a position to contribute meaningfully to the uniformity of federal law.

Before moving on to an examination of this material, it is worth noting that when it comes to securing a uniform interpretation of federal law, even the relative superiority of the federal courts is open to question. As to most components of federal law—even those that are ambiguous and controversial—it is reasonable to expect two or perhaps three competing constructions to emerge, and for this to be true whether nine or thirteen or fifty-two different sets of courts (state or federal) are called upon to do the interpreting.<sup>58</sup> If this is true, there may be no difference at all in the measure of interpretive disuniformity likely to issue from the state and federal courts, and this may have been true long before the federal judiciary reached its current size.

## 2. *The Uniformity Argument in Decline*

While it is impossible to say with certainty that the size of the federal judiciary has seriously impeded the lower federal courts in their efforts to advance the interest in a

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interpretation of federal law between the twelve circuit courts of appeals. It seems doubtful that depriving state courts of concurrent jurisdiction will have much more than an incremental effect on the creation of these conflicts.”); *Tafflin v. Levitt*, 493 U.S. at 455, 465 (1990) (taking note of the “inconsistency . . . which a multimembered, multi-tiered federal judicial system already creates”).

<sup>57</sup> The exception is *Preis*, *supra* note \_\_.

<sup>58</sup> *See Preis*, *supra* note \_\_, at 256-57, 260-62 (challenging “the supposition that, as the number of decisionmakers increases, the variability of final decisions will increase as well,” and suggesting that “there is likely an ‘upper limit’ on the variety of interpretations of federal law”); Erwin Chemerinsky, *FEDERAL JURISDICTION* § 5.2.1 at 266 (4<sup>th</sup> ed. 2003) (“On a controversial issue, there are likely to be two or three different positions adopted among the thirteen federal courts of appeals. Even if all fifty state judiciaries consider the issue, there still are likely to be just two or three different positions taken on a given legal question. In other words, it is not clear that a greater number of courts will produce more variance in the law.”).

uniform interpretation of federal law, there is significant evidence that both Congress and the federal courts have embraced precisely this view. Congress has repeatedly sent the signal that when the interest in uniformity is surpassingly important, the ordinary Article III courts are not the bodies in which primary interpretive authority should be vested. Instead, under these conditions, the legislature increasingly looks to administrative agencies and specialized courts. The Supreme Court, meanwhile, has also exhibited skepticism as to the linkage between adjudication in the lower federal courts and the uniformity interest by narrowing the scope of judicial review of agency action. Thus, numerous statutory and doctrinal developments suggest that neither Congress nor the Court takes seriously the notion that the lower federal courts contribute meaningfully to the uniform interpretation of federal law.<sup>59</sup>

a. *Signals From Congress*

With increasing frequency since the early 20<sup>th</sup> century, Congress has determined that the lower federal courts are inadequate to supply the measure of interpretive uniformity necessary for federal law to function fairly and effectively. It has responded by calling, again and again, for the resolution of certain disputes (at least in the first instance) by administrative agencies and specialized courts. For example, the establishment, in 1910, of the short-lived Commerce Court (which enjoyed exclusive jurisdiction to review decisions of the Interstate Commerce Commission) is said to have

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<sup>59</sup> The Supreme Court's somewhat schizophrenic approach toward the lower federal courts' capacity to advance the interest in a uniform interpretation of federal law is mirrored by a striking disconnect in the scholarly literature between, on the one hand, discussions of the allocation of cases between state and federal court—which presume that the lower federal courts are equipped to advance the interest in interpretive uniformity, *see supra* n. \_\_—and, on the other hand, discussions of the proper role of specialized courts and administrative agencies in the interpretation of federal law—which proceed from the premise that adjudication in the lower federal courts will tend to undermine, rather than advance, the interest in uniformity, *e.g.* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111, 1155-57 (1990); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 65 (1975).



been driven by concern with “conflicts in court decisions begetting territorial diversity where unified treatment of a problem is demanded;”<sup>60</sup> Congress’s establishment of the U.S. Court of Appeals for the Federal Circuit, which enjoys exclusive jurisdiction over, among other cases, appeals arising under the patent laws, was motivated by the need for uniformity and coherence in that area of law—traits that were found lacking under the existing system of appeals in the regional circuits;<sup>61</sup> the conferral of exclusive jurisdiction on the D.C. Circuit to review regulations promulgated by the EPA under the Clean Air Act was driven by the need for “even and consistent national application,”<sup>62</sup> which, apparently, Congress thought would not be forthcoming were appellate jurisdiction vested in the regional circuit courts; and the establishment of jurisdiction in the National Labor Relations Board (as opposed to the state and lower federal courts) over labor relations disputes, was driven by a sense that “centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules

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<sup>60</sup> FRANKFURTER & LANDIS, *supra* note \_\_ at 154.

<sup>61</sup> *See generally* S. Rep. No. 97-275 (1981). *Id.* at 3 (“There are certain areas of the federal law in which the appellate system is malfunctioning. A decision in any one of the twelve regional circuits is not binding on any of the others. As a result, our federal judicial system lacks the capacity, short of the Supreme Court, to provide reasonably quick and definitive answers to legal questions of nationwide significance. . . . There are areas of the law in which the appellate courts reach inconsistent decisions on the same issue, or in which—although the rule of law may be fairly clear—courts apply the law unevenly when faced with the facts of individual cases.”); *see also* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 820 (1988) (Stevens, J., concurring) (“When Congress passed the Federal Courts Improvement Act in 1982 and vested exclusive jurisdiction in the Court of Appeals for the Federal Circuit to resolve appeals of claims that had arisen under the patent laws in the federal district courts, it was responding to concerns about both the lack of uniformity in federal appellate construction of the patent laws and the forum-shopping that such divergent appellate views had generated.”).

<sup>62</sup> S. Rep. No. 91-1196, 91<sup>st</sup> Cong. 2d Sess. 41 (1970). The D.C. Circuit has exclusive jurisdiction over a wide range of administrative law matters including appeals from decisions of the FCC, 47 U.S.C. § 402(b), challenges to regulations promulgated under CERCLA, 42 U.S.C. 9613(a), and actions pertaining to the establishment of national primary drinking water regulations, 42 U.S.C. § 300j-7(a)(1). The establishment of such jurisdiction, of course, fosters the development of a uniform body of law in the relevant areas. *E.g.*, Hon. S. Jay Plager, *Rethinking Patent Law’s Uniformity Principle: A Response to Nard and Duffy*, 101 Nw. U. L. Rev. 1735, 1736 (2007) (“The effect of assigning specified subject matter areas to a single court of appeals is to provide nationwide uniformity in those areas”).

and to avoid the[] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.”<sup>63</sup>

To be sure, it may be that when ICC orders, questions of patent law, clean air regulations, or the law of labor relations are at stake, the interest in uniformity is unusually important. And, the decision to remove these categories of cases from the lower federal courts does not necessarily mean that those tribunals are utterly useless when it comes to producing uniformity—only that they are insufficiently useful under the particular conditions at issue. But that is precisely the point. It appears that when the uniformity interest features prominently in congressional decisionmaking relating to the allocation of adjudicative authority, Congress typically does not turn to the lower federal courts. Instead, again and again, when Congress signals that there is a heightened interest in securing a uniform interpretation of a particular federal law or regulatory scheme, it channels cases implicating that scheme *out* of the federal district and regional circuit courts, not into them; and it sends the cases to administrative agencies or specialized courts.<sup>64</sup>

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<sup>63</sup> *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485, 490 (1953). *See also New York Telephone Co. v. New York Dep’t of Labor*, 440 U.S. 519, 527-28 (1979) (noting that “the overriding interest in a uniform, nationwide interpretation of the [National Labor Relations Act]” would be jeopardized “if state and federal courts were free, without limitation, to exercise jurisdiction over activities that are subject to regulation by the National Labor Relations Board.”).

<sup>64</sup> Concentrating review of a class of questions in a single body promises to sharply reduce the incidence of disuniformity. *See, e.g., Revesz, supra* note \_\_, at 1155 (noting that “a specialized court not subject to review in the generalist courts of appeals . . . would guarantee immediate uniformity of federal law”). Of course, a preference for adjudication by administrative agencies or specialized courts need not follow from recognition of the fact that such bodies offer significant advantages over the lower federal courts when it comes to uniformity. This is because the interest in uniformity is not the only one at stake when it comes to the adjudication of questions of federal law, and other considerations might militate against channeling cases into agencies and specialized courts, the loss of uniformity benefits notwithstanding. *E.g., id.*, at 1147-53 (taking note of the risk that interest group capture of the nomination process for judges on specialized courts will spawn biased decisionmaking); *id.* at 1156-61 (detailing advantages of allowing review of the decisions of specialized courts by generalist courts of appeals notwithstanding uniformity costs); Friendly, *supra* note \_\_, at 188 (noting that “there may be value in the expression of different points of view on legal issues that are subject to fair differences of opinion” and

The increasing frequency with which Congress has channeled cases into agencies and specialized courts has been accompanied by a decline in congressional establishment of exclusive jurisdiction in the lower federal courts. This is significant because the conferral on the lower federal courts of exclusive jurisdiction over a class of claims is perhaps the most striking means through which Congress can express a preference for adjudication in the lower federal courts over the state courts—a preference we might reasonably attribute to Congress’s commitment to at least some component of the bias-uniformity-expertise account. And this tactic has all but disappeared from the arsenal of modern jurisdictional lawmaking.

Thus, the Judiciary Act of 1789 rendered federal jurisdiction exclusive in connection with the prosecution of federal crimes, admiralty and maritime cases, and suits against consuls and vice-consuls of foreign states.<sup>65</sup> And Congress enacted a handful of statutes during the first half of the 20<sup>th</sup> century providing for exclusive jurisdiction in the federal district courts over certain causes of action contemplated by the relevant regulatory schemes.<sup>66</sup> Since that time, however, enactments calling for exclusive jurisdiction in the federal district courts have been few and far between.<sup>67</sup>

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advocating a wait-and-see approach before establishing a Court of Administrative Appeals, notwithstanding his contention that the establishment of such a court would produce “a noticeable increase in uniformity”).

<sup>65</sup> Act of Sept. 24, 1789, 1 Stat. 73. The jurisdiction of the lower federal courts in these areas remains exclusive. *See* 18 U.S.C. § 3231 (federal crimes), 28 U.S.C. §§ 1333 (admiralty, maritime, and prize cases), 1351 (consuls and vice-consuls).

<sup>66</sup> *E.g.*, 7 U.S.C. § 13a-2(2) (actions brought by state agents under the Grain Futures Act of 1922, which would later morph into the Commodities Exchange Act); 15 U.S.C. § 78aa (violations of the Securities Exchange Act of 1934); 15 USC § 80a-35(b)(5) (breach of fiduciary duty claims against investment advisers under the Investment Company Act of 1940); 15 USC §717u (violations of the Natural Gas Act of 1938); 40 U.S.C. § 3133(b) (actions on payment bond by party furnishing labor or materials in connection with the performance of federal contracts).

<sup>67</sup> *See* 29 U.S.C. § 1132(e)(1) (1974) (civil enforcement under ERISA); 15 U.S.C. § 77p (1998) (securities fraud class actions). Indeed, the latter provision—the Securities Litigation Uniform Standards Act of 1998—appears to have stripped the state courts of jurisdiction over securities class actions not because of the federal courts’ supposed superior capacity to interpret federal law uniformly, but because

b. *Signals from the Court*

As noted earlier, in decisions relating to the proper scope of federal question jurisdiction, the Supreme Court routinely invokes the federal courts' superiority over state courts in connection with the interest in a uniform interpretation of federal law. As far as outcomes are concerned, however, it typically does no more than pay lip service to this notion. For strictly doctrinal purposes, the narrative of federal superiority along this dimension is largely inert, which suggests that the Supreme Court likewise recognizes the inability of the lower federal courts to secure uniformity in the interpretation of federal law when it matters most.

The Supreme Court's decision in *Chevron v. Natural Resources Defense Council*,<sup>68</sup> mandating judicial deference to reasonable agency interpretations of federal statutes, is an indicator of the Court's attitude toward judicial intervention in legal regimes calling loudly for uniform interpretation. As Professor Peter Strauss has explained:

When national uniformity in the administration of national statutes is called for, the national agencies responsible for that administration can be expected to reach single readings of the statutes for which they are responsible and to enforce those readings within their own framework. . . . Any reviewing panel of judges from one of the twelve circuits, if made responsible for precise renditions of statutory meaning, could vary in its judgment from the agency's, and from the judgments of other panels in other circuits . . . . The Supreme Court's practical inability in most cases to give its own precise renditions of statutory meaning virtually assures that circuit readings will be diverse. *By removing the responsibility for precision from the courts of appeals, the Chevron rule*

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such suits were being filed in state court, *under state law*, and the procedural constraints of the Private Securities Litigation Reform Act of 1995 were thereby circumvented. See Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 Bus. Lawyer 1, 7-12 (1998).

<sup>68</sup> 467 U.S. 837 (1984).

*subdues this diversity, and thus enhances the probability of uniform national administration of the laws.*<sup>69</sup>

Indeed, to the extent the *Chevron* doctrine manifests a preference for agency decisionmaking where the interest in uniformity features prominently, it speaks to a concern that has long disciplined the exercise of federal court jurisdiction in matters of administrative law. Thus, the milder form of deference to agency interpretation mandated under the Supreme Court’s decision in *Skidmore v. Swift & Co.*,<sup>70</sup> has been justified, in part, on the ground that “an agency’s interpretation may merit some deference whatever its form, . . . given the value of uniformity in its administrative and judicial understandings of what a national law requires.”<sup>71</sup> Likewise, the doctrine of “primary jurisdiction”—which directs a court, under certain conditions, to channel part or even all of a dispute otherwise within its jurisdiction into an administrative agency—is driven, in part,<sup>72</sup> by the interest in securing a more uniform interpretation than can be expected from the lower federal courts.<sup>73</sup> These judicially created doctrines in the area of

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<sup>69</sup> Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (emphasis added). It bears emphasis that Professor Strauss expresses doubt about not only the lower federal courts’ capacity to bring uniformity to federal law, but the Supreme Court’s ability to serve this function. And he harbored such doubts at a time when (as the title of his article suggests), the Supreme Court tended to hear roughly 150 cases each year. His concerns would hold *a fortiori* under the conditions that obtain today—with the Court hearing roughly half as many cases per year.

<sup>70</sup> 323 U.S. 134 (1944).

<sup>71</sup> *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

<sup>72</sup> I say “in part” because, as we will see, *see infra* TAN \_\_ - \_\_, the *Chevron*, *Skidmore*, and primary jurisdiction doctrines mandate deference to administrative agencies not only in order to secure a more uniform interpretation of federal law but also so as to reap the benefits of agency expertise.

<sup>73</sup> *A Black Letter Statement of Administrative Law*, 54 Admin. L. Rev. 1, 49 (2002) (“In determining whether to invoke the doctrine of primary jurisdiction, courts consider (1) whether the issues in a case implicate an agency’s expertise or discretion, (2) whether the issues need a uniform resolution that the agency is best situated to provide, and (3) whether the referral to the administrative agency will impose undue delays or costs on the litigants.”). *See also* *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439-441 (1907) (establishing the doctrine of primary jurisdiction and discussing the capacity of the Interstate Commerce Commission to supply regulatory uniformity and the lower federal courts’ incapacity to do so).

administrative law indicate that the Supreme Court has long recognized the lower federal courts' limited capacity to advance the interest in a uniform interpretation of federal law.

Let me be clear, none of the judgments rendered by Congress or the Supreme Court in this regard suggests that state courts are preferable (or even appropriate) fora for the adjudication of cases that call specially for a uniform construction of the law. Nor do they contain explicit statements as to the relative capacities of state and federal courts when it comes to construing and applying federal law uniformly. On the whole, however, they suggest that state and federal courts may be fungible in this regard, and neither particularly useful.<sup>74</sup>

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<sup>74</sup> There are also subtle signals, implicit in doctrines that speak directly to the allocation of cases between the state and federal courts, that the justices harbor doubts as to the lower federal courts' capacity to supply interpretive uniformity. For example, the complete preemption line of cases authorizes the exercise of federal question jurisdiction over state law claims (which is ordinarily prohibited, of course, under the well-pleaded complaint rule) when federal law not only preempts the plaintiff's state law cause of action, but also supplies a private cause of action for the harm alleged. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8-9 (2003). As I have explained elsewhere, the decision to preempt state law sometimes signals a particularly potent interest in subjecting regulated entities to a uniform rule. *See Seinfeld, supra* note \_\_, at 572-77. Yet save for a pair of fleeting references, *see Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004); *Beneficial Nat'l Bank*, 539 U.S. at 10, the entire body of complete preemption jurisprudence simply ignores the issue of uniformity. It engages neither the question of how significant uniformity is to the efficacy of the preemptive regulatory regimes flagged for special jurisdictional treatment nor the matter of the federal courts' supposed superiority in safeguarding the interest in a uniform interpretation of federal law. It is tempting to speculate, especially given the signals from Congress and the Court relating to the use of specialized courts and administrative agencies, that the Court's failure to shape the law in this area around the federal courts' capacity to serve the interest in a uniform interpretation of federal law reflects generalized doubt on the Justices' part as to the role of the lower federal courts in advancing that interest.

The line of cases exploring the federal courts' jurisdiction over state law causes of action that require resolution of "substantial" questions of federal law engages the interest in uniformity to a somewhat greater degree, but ultimately does little to suggest that either the Supreme Court or the lower federal courts are seriously committed to the notion of federal superiority when it comes to interpretive uniformity. In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), for example, the Court explicitly rejected the notion that jurisdiction in the lower federal courts is essential to safeguarding the interest in a uniform interpretation of federal law. More recently, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, the Court did invoke "the hope of uniformity that a federal forum offers" as a reason to favor more expansive jurisdiction in the lower federal courts. Nevertheless, the Court has since taken pains to emphasize that *Grable* exemplifies but a "slim category" of cases. *Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S.Ct. 2121, 2137 (2006). Furthermore, the lower federal courts' treatment of the uniformity interest in post-*Grable* cases suggests that this interest remains more or less dormant as a doctrinal construct. Thus, many courts apply the *Grable* rule with no discussion of the uniformity interest whatever, *e.g., Evans v. Courtesy Chevrolet II*, 423 F. Supp. 2d 669, 671-72 (S.D. Tex. 2006), *Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d 815, 823-24 (W.D. Wis. 2005), *Buis v. Wells Fargo Bank*, 401 F. Supp. 2d

C. *The Limits of Federal Court Expertise*

At first blush, it seems awfully hard to argue with the expertise-based argument for federal question jurisdiction. There is significant appeal to an account that rests on (1) the indisputably true statement that federal judges spend a significantly greater fraction of their time dealing with federal law than do state judges, and (2) the commonsense notion that, all other things being equal, a judge who gets lots of practice applying a particular body of law is apt to be more skilled in doing so than a judge with little exposure to the relevant area. Practice makes perfect (or, at least, better); or so one would think.

But the corpus of federal law is far larger and more complex than it was 100 or even 50 years ago. The advent of the modern regulatory state has been among the forces underwriting a massive expansion in the quantity of cases falling within the federal courts' federal question jurisdiction and generally ratcheting up the level of complexity associated with the adjudication of federal law.<sup>75</sup> The U.S. Code currently includes some 50 Titles, while the code of federal regulations has ballooned to more than one hundred

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612, 617-18 (N.D. Tex. 2005); some downplay the role of federal jurisdiction in safeguarding the interest in uniformity, e.g., *Mikulski v. Centerior Engergy Corp.*, No. 03-4486, 2007 WL 2372301, at \*4 (6th Cir. Aug. 21, 2007) (en banc) (characterizing “fear that allowing state courts to decide federal law issues might lead to some disastrous consequence, such as 50 irreconcilable interpretations of the tax code” as “histrionic”), *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 911 (7th Cir. 2007) (“[O]ne must be wary of uniformity-based arguments articulated at a high level of generality.”); and only a small number afford the issue of uniformity careful attention, e.g., *West Virginia ex rel McGraw v. Eli Lilly & Co.*, 476 F. Supp. 2d 230, 233-34 (E.D.N.Y. 2007); *In re Pharm. Indus. Average Wholesale Price Litig.*, 457 F. Supp. 2d 65, 75-76 (D. Mass. 2006). Taken together, the complete preemption and “substantial federal question” lines of cases reflect reluctance on the part of the federal courts to shape jurisdictional doctrine around their supposed superiority in providing a uniform interpretation of federal law.

<sup>75</sup> RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 87-89 (1985); FRIENDLY, *supra* note \_\_, at 23, 34-35. The explosion in federal court caseloads that took place during the latter half of the 20<sup>th</sup> century is also attributable, in significant part, to an increase in criminal cases, to Congress’s enactment of new civil rights protections, and to Supreme Court decisions expanding the scope of federal constitutional protections and the remedies available for their violation. See generally POSNER, *supra*, 59-93 (1985); FRIENDLY, *supra*, 18-27.

thousand pages. At some (largely misleading, but helpfully absurd) level, when we say that federal judges are experts in “federal law,” we are suggesting that they have expertise in this entire body of material.

More to the point, federal judges clearly do not get enough exposure to certain areas of law for the maxim “practice makes perfect” to have any bite. In a reprise of the structure of my argument relating to uniformity, I argue that those who invoke the expertise of the lower federal courts as a justification for channeling federal question cases away from state tribunals are unduly focused on the *relative* exposure of state and federal judges to questions of federal law. When addressing the question of expertise, courts and commentators wear the blinders of comparative thinking and tend to neglect the question of whether federal judges have sufficient exposure to a given body of federal law, *in absolute terms*, for the benefits of genuine expertise to accrue.

This section rests on three premises. First, experience-based-expertise in grappling with a particular body of law is a product of *sustained* exposure to that body of law.<sup>76</sup> Second, when exposure falls below some level it becomes senseless for decisions of jurisdictional allocation to be predicated on the fact of such exposure because such sporadic immersion is not likely to spawn meaningful interpretive expertise. Third, there is no grand sense in which all federal law is interconnected or sufficiently similar, such that expertise developed in one area carries over to all, or even many, others. To be sure, some substantively unrelated bodies of law borrow from one another in important ways; and in these circumstances, familiarity with one might contribute to better

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<sup>76</sup> See Currie & Goodman, *supra*, note \_\_, at 81 (1975) (explaining that “*concentrated* experience in handling a particular category of cases facilitates understanding” and that if judges sitting on a court “with broad jurisdiction . . . [are] expected to acquire their knowledge simply through frequent and continuing on-the-bench exposure to the several areas of litigation, [then] . . . [b]ecause of the diversity of cases coming before them, the judges could not truly be expert in any”) (emphasis added).



decisionmaking in the other.<sup>77</sup> But this is the exception rather than the rule. No amount of reflection on the nuances of Title VII jurisprudence or exposure to § 1983 suits is going to prepare a judge for an ERISA preemption case or a CERCLA action.

Of course, the precise point at which a judge's exposure to a particular question or area of law drops below the threshold necessary for one to speak reasonably of that judge having expertise is impossible to pin down. This cannot be accomplished in gross because the measure of exposure necessary for the benefits of expertise to kick in varies from judge to judge and, for each judge, from area to area. It is likewise impossible to pin down even for a particular judge within a particular field because expertise is not a binary concept such that for Judge Smith exposure to  $x$  cases in a given area is insufficient to render her an expert, but exposure to  $x+1$  cases suffices to do so. Expertise operates along a continuum. Nevertheless, it remains sensible to consider carefully just how much exposure to a given area of law the average federal judge can expect to get over the course of time. For, as it turns out, federal judges are exposed to certain questions of federal law so infrequently that the notion of such judges gaining experience-based-expertise in these areas is exceedingly difficult to swallow.

#### 1. *Some Highly Casual Empiricism*

Even the most casual engagement with the empirical evidence relating to the frequency with which federal judges confront different areas of federal law suffices to show that generalized claims of experience-based-expertise are significantly over-inclusive. According to the Federal Judicial Center's *Federal Court Cases* database, each of the U.S Courts of Appeals hears, for example, hundreds of civil rights claims, and

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<sup>77</sup> See, e.g., *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-66 (1987) (construing the scope of federal jurisdiction in ERISA cases in light of prior decisions elaborating on the scope of a similarly worded provision of the LMRA).

dozens of ERISA cases, each year.<sup>78</sup> As to these, at least, the notion of experience-based-expertise would appear to have some purchase.<sup>79</sup>

As to many other areas of federal law, however, federal judges enjoy nothing like this kind of sustained exposure. Between 2001 and 2006, for example, the U.S. Court of Appeals for the Fourth Circuit disposed of a total of 49 cases falling under the heading of “environmental law.” With fifteen authorized judgeships,<sup>80</sup> and judges sitting in panels of three, we can roughly estimate that, during this period, each Fourth Circuit judge heard, on average, only one or two cases per year from the entire universe of environmental law.<sup>81</sup> Similar exercises could be performed in connection with, say, copyright (fewer than 5 cases per year, on average, in fully half of the Circuit Courts) and antitrust (fewer than 5 cases per year, on average, in 10 of the 12 Courts of Appeals) cases.

There is, of course, regional variation in the Courts of Appeals’ exposure to different legal questions. For example, between 2001 and 2006, the Second Circuit was

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<sup>78</sup> See Federal Judicial Center, *Federal Court Cases: Integrated Data Base*, 2006, ICPSR Study No. 4685 (2007); Federal Judicial Center, *Federal Court Cases: Integrated Data Base*, 2005, ICPSR Study No. 4382 (2006); Federal Judicial Center, *Federal Court Cases: Integrated Data Base*, 2004, ICPSR Study No. 4348 (2006); Federal Judicial Center, *Federal Court Cases: Integrated Data Base*, 2003, ICPSR Study No. 4026 (2005); Federal Judicial Center, *Federal Court Cases: Integrated Data Base*, 2002, ICPSR Study No. 4059 (2005) [collectively, “FJC Dataset”].

<sup>79</sup> The FJC database subdivides the universe of “civil rights cases” into cases involving voting, jobs, accommodations, welfare, and “other.” The overwhelming majority of civil rights suits involve employment or fit into the “other” category; suits classified as “Civil Rights Voting” and “Civil Rights Welfare” amount, for the most part, to fewer than 10 cases per year in each Court of Appeals. Hence, within the universe of “civil rights cases,” federal court exposure to different categories of cases is uneven.

<sup>80</sup> In keeping with the casual nature of this empirical inquiry, I make no effort to account for vacancies, on the one hand, or the workload borne by Senior Judges, on the other. These factors, of course, cut in opposite directions for purposes of calculating the average number of exposures per judge on a given court.

<sup>81</sup> It bears emphasis that these figures encompass environmental law generally. So, when we note that Fourth Circuit judges heard, on average, one or two environmental law cases each year over a five-year period, it is not as if they heard one or two cases each year under CERCLA, the Clean Air Act, or the Clean Water Act. Rather, the figures aggregate all cases falling under the general heading of “environmental law.” Many other Courts of Appeals likewise encountered questions of environmental law only infrequently. First Circuit: 6 authorized judgeships/33 cases; Fifth Circuit: 17 authorized judgeships/46 cases; Seventh Circuit: 11 authorized judgeships/44 cases. See FJC Dataset, *supra* note \_\_\_\_.

responsible for more than one-fifth of the securities cases decided in the U.S. and, together with the Ninth Circuit, disposed of approximately 45% of the copyright appeals nationwide. And when one considers the raw number of cases heard by those two courts in each of these categories, the notion of experience-based expertise would appear to have some bite. But sustained exposure of this sort is the exception and not the rule. Whether the area is banking, civil RICO, food & drug law, claims under the Fair Labor Standards Act, trademark, or tax law (to name just a few), large swaths of the federal appellate judiciary can expect anywhere from zero to three exposures per year to each body of law.

Again, it must be acknowledged that expertise in the adjudication of federal law exists along a spectrum. And even if it is the case that federal judges encounter certain questions of federal law only infrequently, if state court judges' interface with these questions is rarer still, it might make sense to speak of the former as having greater expertise than the latter in the interpretation and application of the relevant law. Arguably, then, while it would be preferable to channel cases into courts with sustained experience in the relevant areas, where that is not possible, it remains sensible to prefer adjudication in the courts with more experience over those with less, even if "more" isn't very much at all.

But this is precisely the trap of thinking about jurisdictional allocation in strictly relative terms. In some circumstances, the incrementally greater experience of federal courts over state courts in the adjudication of a question of federal law will produce an expertise-benefit that is, at best, *de minimis*; and where this benefit is sufficiently limited, expertise ceases to be a sound basis on which to premise jurisdictional rules. The

conventional wisdom relating to federal jurisdiction simply misses this point and wields the argument for experience-based-expertise at the wholesale level. It ignores the fact of significant variation in the lower federal courts' immersion in different questions of federal law, and neglects the lessons to be learned from assessing expertise in absolute terms.<sup>82</sup>

## 2. *The Expertise Argument in Decline*

Much of the material indicating that Congress and the Supreme Court harbor doubts as to the lower federal courts' capacity to contribute meaningfully to the project of securing a uniform interpretation of federal law signals the same with respect to the interest in securing expert adjudication. That is, congressional enactments requiring the adjudication of certain cases involving questions of federal law in administrative agencies and specialized courts, as well as judicially created doctrines calling for deference to the judgments of these bodies, have been justified, again and again, by reference to the inability of the lower federal courts to supply the desired measure of expertise in interpreting and applying the relevant body of law. As is true with respect to the interest in uniformity, where the need for expert adjudication is acute, Congress tends to turn away from the lower federal courts.

For example, as the legislative history of the Federal Courts Improvement Act makes clear, the centralization of appellate review over patent claims in the Federal

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<sup>82</sup> It is likely that those who advance the bias-uniformity-expertise model do not mean to suggest that the expertise argument (or, really, any of the three arguments) is sufficient, on its own, to justify the full sweep of federal question jurisdiction. A more sensible deployment of the model would note that it is sometimes appropriate to channel federal question cases into the federal courts because states cannot be trusted to deal with them evenhandedly, and it is sometimes appropriate to do so because the federal courts have genuine expertise in the relevant area. (I doubt that, under modern conditions, the uniformity argument for lower federal court jurisdiction in federal question cases ever has significant purchase.) But courts and scholars typically fail to advance the conventional account with such precision. And, if we are skeptical of the bias and uniformity arguments for all of the reasons offered in Parts II.A and II.B, then the expertise argument is left to do far more work than it can reasonably bear.

Circuit was designed, in significant part, to help secure the benefit of expert adjudication in patent cases.<sup>83</sup> Similarly, it is widely acknowledged that the establishment of the Tax Court was motivated, in part, by Congress’s desire to channel tax disputes into bodies with genuine expertise in the subject matter.<sup>84</sup> Along these same lines, the D.C. Circuit’s accumulation of expertise in administrative law cases is widely cited as one of the principal benefits of centralizing review of agency action in that body.<sup>85</sup> Finally, the judicially created obligations of deference established under *Chevron*, *Skidmore*, and the doctrine of primary jurisdiction, all proceed from the explicit premise that administrative agencies—not the federal courts—are the bodies from which expert decisionmaking can be expected to flow.<sup>86</sup>

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<sup>83</sup> S. Rep. No. 97-275 at 6 (Nov. 18, 1981) (characterizing the establishment of the Federal Circuit as a “sensible accommodation of the usual preference for generalist judges and the selective benefit of expertise in highly specialized and technical areas”) (quoting 96<sup>th</sup> Cong. Hearings of March 20, 1979 (statement of Judge Jon O. Newman)). See also *United States v. Fausto*, 484 U.S. 439, 464 n.11 (1988) (explaining that “[b]ecause its jurisdiction is confined to a defined range of subjects, the Federal Circuit brings to the cases before it an unusual expertise that should not lightly be disregarded”).

<sup>84</sup> See, e.g., Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 *Tax Lawyer* 361, 371 (2005) (“[T]he Tax Court was created as a device by Congress to increase impartiality, reliance on expert decision making, and uniformity . . . .”); David F. Shores, *Rethinking Deferential Review of Tax Court Decisions*, 53 *Tax Lawyer*, 35, 74 (1999) (“Expert decision-making, as well as uniformity, was an important reason for creation of the Tax Court.”).

<sup>85</sup> See e.g., S.Rep. No. 99-56, 99th Cong., 2nd Sess. 24 (May 15, 1985). (“The justification for centralized judicial review of environmental regulations is that it eliminates the possibility of conflicting interpretations of the law in different circuits and allows a single court to develop expertise in this complex area of the law.”). Cf. *Telecommunications Research & Action Center v. F.C.C.*, 750 F.2d 70, 78 (D.C.Cir.1984) (“Appellate courts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise.”). Of course, to say that adjudication by an expert body is one of the key benefits of centralizing review in the D.C. Circuit is not to say that the prospect of securing that benefit is always sufficient to justify rigging the scheme of judicial review in this fashion. See S.Rep. No. 99-56, *supra*, (“Centralizing review in a single court may also deprive the law of diverse views on complex legal issues, and as a result may make the task of the Supreme Court more difficult.”).

<sup>86</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (noting, in the course of holding that reasonable agency interpretations of federal statutes are entitled to deference, that (1) the regulatory scheme at issue “is technical and complex,” (2) Congress might have called upon the EPA to reach the relevant policy judgment (rather than rendering that judgment itself) because EPA’s “great expertise” left it “in a better position to do so,” and (3) “[j]udges are not experts in the field.”); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651-62 (1990) (“[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (noting that “the Administrator’s policies are made in pursuance of official duty, based upon

There is, likewise, a striking disconnect between the academic literature relating to federal jurisdiction and scholarly commentary relating to administrative law and the establishment of specialized courts. While the former depicts federal judges as experts in the adjudication of federal questions, the latter takes as a given the impossibility of generalist federal judges developing legitimate expertise across the myriad and often complicated bodies of law that come before them. As one prominent commentator explained:

Judges have heavy caseloads. On average, a federal circuit judge must decide 372 cases per year. Judges have to research, analyze, and address an extraordinarily wide range of issues. . . . Each judge must be able to resolve a civil rights dispute on Monday, a major environmental law dispute on Tuesday, and a major commercial law dispute on Wednesday. Judges have little time or opportunity for reflection, detailed analysis of an area of law, or development of special expertise in any field of law.<sup>87</sup>

Numerous others have made similarly sweeping statements as to the unlikelihood of federal judges developing expertise in the application of federal law generally;<sup>88</sup> and

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more specialized experience and broader investigations and information than is likely to come to a judge in a particular case”); *Alaska Dep’t of Environmental Conservation v. E.P.A.*, 540 U.S. 461, 487 (2004) (explaining that “well-reasoned views of an expert administrator rest on a body of experience and informed judgment to which courts and litigants may properly resort for guidance” (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore*, 323 U.S. at 139-140)) (internal quotation marks omitted); *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 646 (2003) (explaining that “a court may ‘refer’ a question to [an agency] under the legal doctrine of ‘primary jurisdiction,’ which seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency’s specialized knowledge, expertise, and central position within a regulatory regime”); *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1344 (D.C.Cir.1989), *vacated on other grounds*, 498 U.S. 1117 (1991) (“[T]he doctrine of primary jurisdiction was originally rooted in the notion that agencies have greater expertise, experience, and flexibility than courts in dealing with regulatory matters”) (citations omitted).

<sup>87</sup> Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics*, 67 *G.W. L. Rev.* 797, 798 (1999).

<sup>88</sup> *See, e.g.*, Office of Technology Assessment, U.S. CONGRESS, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* at 279 (1986):

[J]udges are not experts, they are generalists par excellence. They are, by and large, ‘lawyer-generalists’ before their appointment and must remain so to serve fundamental goals of equality and neutrality within the legal system. . . . Sitting alone in courts of general jurisdiction district judges must be prepared for any subject matter. While appellate courts operate as collegial bodies, the continuous reassignment to different panels provides little opportunity for a lasting division of labor or the development of expertise.

expressions of skepticism as to the expertise of generalist Article III judges in connection with specific areas of the law cover significant and sizeable portions of the universe of federal legislative action.<sup>89</sup>

To be sure, expressions of doubt as to federal judges' expertise in certain areas of law sometimes focus on the difficulties of navigating challenging technical or scientific material, as opposed to strictly legal matters. To that extent, one could argue that such expressions of doubt do not speak directly to federal judges' expertise when it comes to raw legal analysis or interpretation and therefore do not undermine the general expertise-based argument for federal question jurisdiction. But it is hard to see the value in a hypothesized general expertise in the adjudication of federal law if judges' limited understanding of the real-world systems regulated by that law is independently disabling. To put the point another way, it is hard to imagine allocating a group of cases to a particular court on the basis of that court's supposed expertise in the relevant area of law if the factual scenarios and regulatory settings governed by that law are, in important

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*See also* Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 Va. L. Rev. 1267, 1277 (2005) (“Because generalist judges must handle all areas of the law, they generally are unable to develop expertise in any one area.”); Jon C. Blue, *A Well Tuned Cymbal? Extrajudicial Political Activity*, 18 Geo. J. Leg. Ethics 1, 16, n.95 (2004) (“Many academic specialists feel that because judges are required by the very nature of their positions to be generalists, they simply cannot acquire the necessary expertise . . . to master the intricacies of particular legal disciplines.”); Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Agency Action*, 129 U. Pa. L. Rev. 302, 366 (1980) (“[T]he whole concept of ‘judicial expertise’ lacks any practical meaning in a system in which courts are composed of many generalist judges, any three of whom may hear a given case on a given day.”).

<sup>89</sup> *E.g.*, Stephen A. LaGuarde, *DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity: Why and How the Supreme Court Should Resolve the Circuit Split Over Pre-ERISA Breaks in Service*, 59 TAX LAWYER, 589, 601 (2006) (ERISA); Michael J. Hayes, *After “Hiding the Ball” Is Over: How the NLRB Must Change Its Approach to Decision-making*, 33 RUTGERS L. J. 523, 561-62 (2002) (labor law); Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. J. 185, 199 (1996) (administrative law); Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Ohio St. L. J. 1037, 1077-82 (1995) (tax law); FRIENDLY, *supra* note \_\_, at 156-57 (patent law); Scott C. Whitney, *The Case for Creating a Special Environmental Court System-A Further Comment*, 15 Wm. & Mary L. Rev. 33, 48 (1973) (environmental law). *Cf.* Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L. J. 1263, 1268 (2007) (scientific evidence); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 329 (1989) (science and economics).

ways, beyond the ken of the judges who are to hear the cases. Where jurisdiction is to be assigned on the basis of expertise, it is exceedingly difficult (and perhaps silly) to disaggregate the different types of know-how—legal, technical, factual, scientific—that are prerequisites to producing sound decisions.

One could argue that the hyper-technical nature of many of the federal-question cases that are currently channeled into agencies and specialized courts countenances hesitation before inferring from Congress’s and the Court’s jurisdictional maneuvering in these particular circumstances that they have altogether given up on the lower federal courts as experts in the adjudication of federal law. Where cases are especially complex or require technical know-how, the argument goes, even sustained exposure for generalist judges might be insufficient to spawn genuine expertise, and a specialized tribunal is necessary. Where such complexities are absent, however, the possibility of experience-based-expertise is more plausible, and the lower federal courts may be up to the task. Hence, Congress’s increasingly frequent deployment of specialized courts does not require abandonment of the notion that the lower federal courts offer the benefit of expertise in connection with some questions of federal law.

Though this argument has some appeal, it is limited in important ways. First and foremost, it concedes the existence of significant limits on the role of experience-based-expertise in the adjudication of federal law. Within the universe of cases that receive special jurisdictional treatment, it would seem, Congress has concluded that whatever experience the lower federal courts might gain through the ordinary processes of district and circuit court litigation is insufficient to spawn genuine (or, at least, the necessary measure of) expertise. In the era of the modern administrative state, this universe is



expanding, and the experience-based-expertise model of federal court adjudication might be inching (if not marching) toward obsolescence.<sup>90</sup>

Furthermore, as to the body of federal question cases that Congress has been content to keep in the lower federal courts, one must strain to find the sort of full-throated appeal to the value of expert adjudication that we see in connection with the cases that are directed to administrative agencies and specialized courts. While mechanical invocation of the bias-uniformity-expertise mantra is endemic to the case law on federal jurisdiction, sustained discussion of the federal courts' experience with and concomitant expertise in the adjudication of federal law is far less common in this context.<sup>91</sup> Thus, if jurisdictional doctrine outside the world of specialized tribunals has, in fact, been framed with a keen eye toward securing the benefits of expert adjudication, the courts have had surprisingly little to say about it. A more plausible account of Congress's jurisdictional choices is that where expertise in the adjudication of federal law is highly valued and, therefore, the subject of sustained attention, the legislature typically does not look to the lower federal courts. Adjudication pursuant to the default rules of federal question jurisdiction is far

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<sup>90</sup> Here too, my point is not that state courts *are* up to the task of supplying expert adjudication in these contexts, only that the lower federal courts are not.

<sup>91</sup> The Supreme Court's decision in *Grable* offers a telling example of the ways in which the interest in securing the benefit of federal court expertise can affect decisions of jurisdictional allocation. In the course of justifying the exercise of federal jurisdiction over plaintiff's state-law quiet title action, the Court emphasized that adjudication of the state law claim would require determination of questions of federal law relating to the notice the IRS must provide prior to seizing property to satisfy a tax delinquency. The Court explained that interested parties "may find it valuable to come before judges used to federal tax matters." *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 315 (2005). There can be little doubt that the lower federal courts hear far more cases involving the federal tax laws than the state courts. Nevertheless, as noted above, tax scholars have challenged the suggestion that federal judges have meaningful expertise in the interpretation and application of the tax laws. *See supra* n.\_\_; *see also* Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947) ("In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception-couched in abstract terms that offer no handle to seize hold of-leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most ordinate expenditure of time."). And the data relating to the frequency with which the federal courts of appeals confront questions of tax law provide further reason to doubt that, by virtue of their experience, federal judges are expert in the interpretation of tax law.

more likely when the matter of expertise operates largely on the periphery of legislative concern.

### III. THE CONVENTIONAL ACCOUNT REPLACED: THE FEDERAL COURTS AS FRANCHISE

Each of the conventional justifications for the conferral of federal question jurisdiction on the lower federal courts is unsatisfying in important ways. As demonstrated above, numerous decisions by both Congress and the courts, implicating a wide variety of statutes, regulations, and legal doctrines, signal skepticism as to the bias-uniformity-expertise model and significantly limit the explanatory power of this account of our federal system's jurisdictional design. Given the sweeping changes in the scope and character of federal law that have occurred since the early 20<sup>th</sup> century, as well as the significant expansion and changing character of the federal judiciary, this shift in attitudes toward, and rules governing, the lower federal courts is hardly surprising. Many of the assumptions underlying the bias-uniformity-expertise model simply do not hold true today.

Acknowledging these limits on the utility of the conventional model invites two questions: First, do the federal courts of 2008 play a unique role in the federal system, and if so, what is it? Second, if there are, in fact, significant systemic differences between the state and federal courts, what do these differences suggest about the proper allocation of cases between the two systems? I tackle these questions below.

#### A. *The Federal Franchise*

One way of thinking about our federal courts is as a franchise—a chain of forums for the resolution of disputes with a set of basic characteristics held in common across branches, regardless of the location in which any particular branch sits. Just as many

people value the ability to walk into a Starbucks anywhere in the country and have at least a general sense of what to expect in terms of the menu and service, as well as the conventions and vocabulary pertinent to getting what one wants, so too do many litigants (and, more to the point, their attorneys) value the ability to walk into any federal court and have a sense of what to expect in terms of the services provided as well as the conventions and vocabulary pertinent to litigating effectively. To be sure, there is significant variation, along a variety of different dimensions, within the federal court system (more on this below);<sup>92</sup> but to a far greater extent than is true of state court practice, when one walks into a federal court, one knows what to expect. In particular, the Federal Franchise offers a significant measure of homogeneity in connection with the applicable procedural rules and cultural dynamics, and is characterized by a high measure of professionalism and competence.<sup>93</sup> For those called upon to litigate in jurisdictions spread across the country, the federal courts are the forum of predictability and stability,<sup>94</sup> and, for litigants generally, they represent our legal system’s “forum of excellence.”<sup>95</sup>

### 1. *Procedural Conformity*

One key feature of federal court litigation that distinguishes it from litigation in the various state courts is the applicability of common rules of procedure. Quite

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<sup>92</sup> See *infra* TAN \_\_ - \_\_.

<sup>93</sup> I am not forgetting my earlier admonitions as to the hazards of relative thinking when considering the proper allocation of cases between the state and federal courts. Though I occasionally refer, in this section, to the relative capacities of the state and federal courts along these dimensions—procedural homogeneity, cultural dynamics, and technical competence—I am inclined to believe, as to each, that the federal courts offer benefits in sufficient measure to count as meaningful.

<sup>94</sup> I develop this point in detail below, but it is worth flagging, at the outset, that the “predictability and stability” I emphasize here are different from the “uniformity” highlighted under the conventional model. My focus is on commonalities in the process and culture of federal court litigation, while the uniformity angle developed under the conventional model trains directly on the interpretation of federal law. It is conceivable that the phenomena I give attention to here could yield marginally greater conformity in terms of interpretive outcomes, but, for the reasons outlined in Part II.B, I doubt if they do so to an extent that would support the conclusion that federal courts contribute meaningfully to the uniform interpretation of federal law.

<sup>95</sup> I borrow this term from Professor Neuborne. See Neuborne, *supra* note \_\_.

obviously, the Federal Rules of Civil Procedure and Appellate Procedure apply throughout the federal judicial system and do not control in state court.<sup>96</sup> In contrast, each state has its own unique codes of procedure governing litigation in its own courts. When it comes to the fundamental rules of practice, then, the Federal Franchise offers litigators a measure of predictability and (for repeat players) familiarity that is largely unavailable through episodic practice in scattered and diverse state court systems. To be sure, a practitioner could become conversant in the rules of practice and procedure applicable in many state courts and thereby experience litigation in different forums as familiar and predictable. However, as the quantity of states in which a lawyer practices rises, the costs of cultivating such a comfort level rise along with it. And attorneys with national practices, if left to the state courts, would be forced to expend considerable resources in order successfully to navigate the complexities of local practice. The conformity of such rules within the Federal Franchise is thus a significant attraction for these attorneys and, by extension, their clients.

Of course, the adoption of local rules of procedure by some federal district and appellate courts creates variance in the rules of procedure applicable within the federal

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<sup>96</sup> See Fed. R. Civ. P. 1 (“These rules govern the procedure in the United States district courts”); Fed. R. App. P 1(a)(1). (“These rules govern procedure in the United States courts of appeals.”). The Federal Rules of Evidence likewise apply across (and, at least of their own force, *only* to) the federal judicial system. See Fed. R. Evid. 101 (“These rules govern proceedings in the courts of the United States . . .”). States are, of course, free to enact their own rules of evidence and to the extent they do, the variation in rules from state to state renders the possibility of resort to a national forum with common rules of evidence more attractive to parties called upon to litigate in courts scattered across the country. That said, the rules of evidence in the various states have a significant amount in common; forty-two states and Puerto Rico have adopted the Federal Rules of Evidence in one form or another, see Weinstein, et al., EVIDENCE, i (Supp. 2007). Still, some of our most populous states, including California, New York, and Illinois, are among those not to have adopted the Federal Rules. And, even the states that have adopted the Federal Rules do so to varying degrees. So it seems fair to say that at least some benefit in terms of homogeneity of the rules of evidence comes with litigating in the federal courts.

judiciary.<sup>97</sup> But the measure of procedural heterogeneity tolerated within the federal system is constrained in important ways. To begin with, though Federal Rule of Civil Procedure 83 authorizes individual district courts to establish their own requirements of practice and procedure, it also explicitly requires that such rules “be consistent with” the Federal Rules.<sup>98</sup> Hence, large swaths of the law of procedure applicable in the federal courts—matters addressed directly by the Federal Rules themselves—are simply not up for grabs. Moreover, the evolution of Rule 83 is marked by increasing efforts to limit the proliferation of local rules precisely because of their capacity to undermine the uniformity of federal procedural law.<sup>99</sup> And while the success of these efforts has been uneven—significant divergence in rules of practice persist within the federal system<sup>100</sup>—the mere fact that such divergence is widely conceptualized as a problem is telling. This attitude toward local rulemaking shapes the agenda for regulators (*i.e.*, Congress and the Advisory Committee on Civil Rules) that are empowered to limit the discretion granted

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<sup>97</sup> See generally CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3153-54 (discussing the large quantity and diversity of local rules in the U.S. District Courts and efforts to control the disuniformity caused by the promulgation of such rules). In some cases, the rules of procedure applicable in a federal district court are not even common across the entire district but, instead, are promulgated as “standing orders” by individual judges. WRIGHT, ET AL., *supra*.

<sup>98</sup> See Fed. R. Civ. P. 83.

<sup>99</sup> WRIGHT, ET AL., *supra* note \_\_ § 3151 (“[C]oncerns about the variety and content of local rules, and about the proliferation of standing orders of individual judges, have led to amendments of both the statute and Rule 83.”); *id.* § 3152 (characterizing the establishment of the Federal Rules as an “effort to create a single national body of rules of practice for the federal courts”).

<sup>100</sup> The *Local Rules Project* compiled by the Judicial Conference of the United States in 1988 reports as follows:

The ninety-four district courts currently have an aggregate of approximately 5,000 local rules, not including many ‘subrules,’ standing orders and standard operating procedures. These rules are extraordinarily diverse and their numbers continue to grow rapidly. . . . These local rules literally cover the entire spectrum of federal practice, from attorney admission and discipline, through the various stages of trial, including pleading and filing requirements, pre-trial discovery procedures, and taxation of costs.

Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Local Rules Project*, Part I., at 1 (1988). See also, *e.g.*, Gregory Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 COL. L. REV. 1, 61 (1997) (“The pendulum has swung heavily from national uniformity and too far in the direction of local experimentation with little coordination among circuits.”).

individual districts along this dimension; and it likely disciplines the process of local rule creation for those districts that do choose to exercise their powers under Rule 83. Finally, the Federal Rules exert pressure on any jurisdiction that might choose to enact its own procedural rules simply by providing a broader framework into which such rules must fit. The Federal Rules are designed to operate as a coordinated system of regulation for practice in the federal courts; local adjustments to these rules must rest comfortably within the existing edifice of procedural law in order for the system as a whole to function reasonably efficiently.

The rather forgiving constraints of the Due Process Clause to one side, states are free to enact their own rules of practice and procedure. And, indeed, variation in such state rules is endemic and potentially bewildering. It is not simply that genuinely idiosyncratic rules of procedure might ensnare the untutored outsider (though this is surely the case). The point, rather, is that the basic mechanics of pleading and discovery (among other things), vary in important ways from jurisdiction to jurisdiction. Thus, while most states allow for notice pleading, some still require traditional code pleading;<sup>101</sup> and, relatedly, courts differ as to the level of detail required for allegations to qualify as sufficient to support a cause of action and as to the form in which allegations must be presented.<sup>102</sup> Some jurisdictions require automatic disclosure of basic information about witnesses and documents, while others eschew such mandatory discovery.<sup>103</sup> Whatever procedural diversity is injected into the federal judicial system by virtue of the establishment of jurisdiction specific rules, such diversity is different in kind from that which characterizes practice in the state courts. An attorney whose practice

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<sup>101</sup> FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE, § 5.1 at 253 & n.15 (4<sup>th</sup> ed. 2005).

<sup>102</sup> *Id.* at 293-94.

<sup>103</sup> *Id.* at 401-02.

calls for litigating in federal courts in different parts of the country can thereby attain basic procedural competence in gross, rather than doing so through separate iterations in each forum. And this, in turn, means the baseline measure of familiarity such an attorney can expect to have with respect to the rules of practice and procedure as she moves through the federal system is fairly high

2. *“Culture” in State and Federal Court*

A litigator’s comfort zone is fashioned not only through deep knowledge of the relevant substantive law and procedural rules, but through familiarity with the trappings and uncodified conventions of the setting in which she litigates. Access to the federal courts can benefit practitioners along this dimension by providing a measure of cultural homogeneity and by diminishing the costs of accruing cultural capital on a jurisdiction-by-jurisdiction basis. To return to the franchise metaphor, if individual federal courts are the jurisdictional equivalent of Starbucks, individual state courts might be thought of as the local coffeehouse. Each local coffeehouse looks different from the next; each caters to local tastes and traditions; each has its own unique jargon and rhythm; and each has its own set of expectations when it comes to the demeanor and behavior of employees and customers. The local coffeehouse, moreover, might be frequented by a relatively small band of regular customers—individuals who are familiar to, and perhaps especially trusted by, the proprietors (and clerks!) and are steeped in the unique culture of that particular store. An outsider who walks into such an environment is readily identifiable as such, and she must learn not only the established rules of dealing, but the more diffuse

cultural norms as well. This requires time, energy, and significant resources if it is to be done in shop after shop after shop.<sup>104</sup>

Individual outposts within a national franchise, in contrast, are intended to look and “feel” the same. They are designed to create a sense of familiarity and comfort for consumers even if they have never before entered the particular branch in which they happen to find themselves on a given occasion. The federal judiciary offers this sense of familiarity through its highly professionalized legal culture. Judges across the system are selected through the same process. For the most part, they select clerks through a single process and from the same applicant pool of recent law school graduates.<sup>105</sup> Funding for individual districts and courts is coordinated through a single bureaucracy, thus assuring a measure of equity in resource allocation across the system. Judges from across the federal judiciary meet and work together through the Judicial Conference of the United

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<sup>104</sup> I don’t mean to suggest that an outsider who walks into a local coffeehouse will be so bewildered by local culture that she cannot even order something to drink. Nor do I mean to suggest that a litigator practicing in unfamiliar surroundings will be so befuddled as to be unable to file a claim or argue a motion. My point is simply that, in addition to having their own rules of practice and procedure, state courts (particularly at the trial level) have their own unique culture and that, in some circumstances, it can be extremely challenging for an outsider to adapt.

Nor, of course, do I mean to suggest that cultural homogeneity is necessarily a good thing. (There is plenty to be said for the charm and character of the local coffeehouse.) My point here is simply that the standardization of legal culture within the federal judiciary produces a benefit for parties called to litigate in courts spread across the country by obviating the need for jurisdiction-by-jurisdiction accrual of cultural capital. Even assuming that attorneys with national practices appreciate some of the unique attributes of practice in particular jurisdictions, it is safe to assume that, on the whole, these attorneys prefer winning cases and serving their clients well—things they are better able to do within a familiar legal culture and under familiar rules of practice and procedure—to the prospect of stumbling upon a jurisdiction with a legal culture that somehow suits the attorney particularly well.

<sup>105</sup> Professor Neuborne highlighted some of these features of the federal judiciary to support his contention that federal judges are likely to exhibit greater “technical competence” than their state court counterparts. Neuborne, *supra* note \_\_ at 1122. I address the issue of technical competence below. *See infra* pp. \_\_ - \_\_. For present purposes, however, I mean to emphasize that a corps of judges who are selected through a single process (presidential nomination and senate confirmation, sometimes by more or less the same cast of characters) are likely to have more in common with one another—and thereby to foster the development of a relatively homogeneous culture—than judges who come to serve through divergent processes of election by non-overlapping bodies of varying size or appointment by different individuals.



States, which helps to instill a sense of shared enterprise and contributes to the establishment of a single federal judicial culture.

Part of what this means is that it is possible, to some extent, for attorneys to feel a general sense of comfort and familiarity as they practice across the federal system and to develop a kind of cultural competence at the wholesale level. Consider that an attorney with significant practice experience in the courts of New York, Indiana, and Arizona would be unlikely to note in her professional bio that she has extensive experience litigating “in the state courts;” that sort of generalization is barely meaningful in our legal culture. And you would be unlikely to hire an attorney to try a case for you in South Carolina on the basis of her extensive experience litigating in the courts of Oregon.<sup>106</sup> But we *can* speak intelligibly of an attorney as “a seasoned federal litigator,” and it is commonplace for an attorney to be touted as having extensive experience litigating “in the federal courts.”<sup>107</sup> And, it would be entirely reasonable, moreover, for you to count an attorney’s experience litigating in the federal courts generally (even in a district other than the one in which your case has been filed) as relevant to the question whether she would serve as good counsel.

Of course, we often classify lawyers on the basis of their substantive experience and expertise (*e.g.*, “labor lawyer,” “tort lawyer”), and these classifications might be most important to determining which attorney is best suited to provide representation in any

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<sup>106</sup> To be sure, you might hire such a lawyer if her experience in Oregon covered the same legal terrain as your South Carolina suit, but that decision would be driven by interest in her substantive experience, which happens to have been gained in the Oregon courts. It would not be because that experience was gained *in Oregon* or because it was gained in state court as opposed to federal court.

<sup>107</sup> In part, when attorneys tout their practice experience in the federal courts in these general terms they are playing to a widespread sensibility that the federal judiciary is an elite institution. Signaling that one has experience in the federal courts is a way of communicating that one has played in the big leagues. This is fully consistent, of course, with my claim that the federal judiciary is characterized by a high measure of cultural conformity.

given case. But attorneys can be valuable for knowing the lay of the land not only substantively, but procedurally and culturally as well. And, along these dimensions at least, an attorney's experience litigating in the courts of New York or Indiana is likely irrelevant to one seeking representation in the courts of the state of Arizona; but experience litigating in federal courts situated in New York or Indiana cannot readily be dismissed as irrelevant to one seeking representation in a U.S. District Court elsewhere in the country. This suggests that, to some extent, an attorney can get her ticket punched as a federal litigator in one court and take it with her to another federal tribunal. This is the case, in part, because of the high measure of procedural homogeneity we see in the federal system. But it is also attributable to the fact that the federal courts are characterized by a high measure of cultural conformity that permits the federal litigator to experience herself as an insider even as she moves within the federal system.<sup>108</sup>

To be sure, the kind of cultural competence I am concerned with is best secured by having people *on the ground* in the relevant jurisdiction who are, as I put it above, “steeped in the unique legal culture of that particular [place].” And, to the extent this is true, cultural competence is less portable, even within the federal system. Indeed, the phenomenon of law firms (even very large ones with thriving federal court practices) routinely retaining local counsel to aid with practice in individual U.S. District Courts and even Circuit Courts suggests that, in important ways, legal culture is constructed at the local, not the national level, even within the federal judiciary. And while the relatively small size of the federal judiciary makes the piecemeal accrual of cultural capital somewhat more manageable (at least for large, national law firms), it is surely the

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<sup>108</sup> There are, of course, important cultural differences among the federal courts, many of which likely mirror broader, regional, differences in culture.

case that the overwhelming majority of practitioners fall far short of attaining genuine cultural competence over the lion's share of lower federal courts.

But even if we assume that cultural comfort zones cannot truly be developed in gross, and that the federal judiciary is too large to permit lawyers to cultivate general insider status by proceeding on a court-by-court basis, federal courts might still be able to provide litigators with benefits along this dimension. This is so because there is an asymmetry in the *significance* of cultural capital in the federal and state judiciaries. That is, there is reason to believe that insider status takes you farther in state court than it does in the federal system and, hence, the availability of the federal courts helps to neutralize the disadvantages of outsider status. This is so largely because of the highly potent ethic of professionalism among federal judges. This ethic of professionalism tends both to standardize cultural norms across the federal system and to blunt the effect of any home-court advantage that might exist.<sup>109</sup>

Standards of professionalism among the state courts, in contrast, are lower, and the likelihood of local, personal relationships coming into play in the far smaller trial-level units of the state judiciaries is higher.<sup>110</sup> In the most egregious cases, we might worry that the local judge will treat her courtroom as a private fiefdom in which personal connections and insider status are transparently outcome determinative. As one journalist recently noted in the context of a *New York Times* exposé of New York State's shabby

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<sup>109</sup> Larson on professionalism and a word about the role of senate confirmation contributing to it in the fed courts

<sup>110</sup> *Cf.* THE SOCIOLOGY OF GEORG SIMMEL 96-97 (Kurt H. Wolff ed.) (1950) (examining the relationship between the size of a social unit and the sorts of relationships that develop within it and noting that “it is hard to reconcile personal relations, which are the very life principle of small groups, with the distance and coolness of objective and abstract norms without which the large group cannot exist”); *id.* at 99-104 (discussing the role of law and custom within social groups of different sizes and characterizing custom as “belonging to smaller groups”).

system of Town and Village Courts,<sup>111</sup> “[a] common argument in favor of New York’s justice courts is that local judges know the people and problems that come before them. But that can be a problem itself when the justices use those prejudices to favor friends and ride herd over others.”<sup>112</sup> The problem was unintentionally highlighted by one New York judge who explained to a state commission in the course of its investigation of the Town and Village Courts: “Maybe you are not familiar with what goes on in North Country, but we are all more or less friends up there.”<sup>113</sup> The *Times* account further noted:

Some of the courtrooms are not even courtrooms: tiny offices or basement rooms without a judge’s bench or jury box. Sometimes the public is not admitted, witnesses are not sworn to tell the truth, and there is no word-for-word record of the proceedings. Nearly three quarters of the judges are not lawyers, and many—truck drivers, sewer workers or laborers—have scant grasp of the most basic legal principles. Some never got through high school, and at least one went no further than grade school. . . .

For the nearly 75 percent of justices who are not lawyers, the only initial training is six days of state-administered classes, followed by a true-false test so rudimentary that the official who runs it said only one candidate since 1999 had failed.<sup>114</sup>

Of course, the egregious case is not the usual one, and I am not arguing that rule of law values stand at perpetual risk in the hands of provincial state jurists. My point, rather, is that on the whole, it is reasonable to expect the idiosyncrasies of local culture to carry

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<sup>111</sup> The jurisdiction of the Town and Village courts includes civil actions (state or federal) in which the amount-in-controversy is up to \$3,000. See <http://www.courts.state.ny.us/courts/townandvillage/introduction.shtml>. These courts are also authorized to “handle matters involving the prosecution of misdemeanors and violations that are committed within the town’s or village’s geographic boundaries,” and to conduct arraignments and preliminary hearings in felony cases. *Id.*

<sup>112</sup> William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, New York Times (Sept. 25, 2006).

<sup>113</sup> William Glaberson, *Delivering Small-Town Justice, With a Mix of Trial and Error*, New York Times (Sept. 26, 2006).

<sup>114</sup> Glaberson, *supra* n. \_\_, at \_\_. See also *id.* (“Again and again, the commission’s records show, justices have failed to remove themselves from cases involving their own families”).

greater weight in the comparatively small and often less formal world of state practice (particularly at the trial level) than in the more regimented professional culture of the Federal Franchise.

### 3. *The Competence Gap*

The final characteristic of the Federal Franchise that I wish to highlight draws upon Professor Neuborne’s account of the institutional differences between the state and federal judiciaries. Neuborne argues that “a competence gap exists between the state and federal courts, [which] stems in part from the relative capacities of the judges themselves and, in part, from institutional factors unrelated to personal ability.”<sup>115</sup> The core of his argument is that because the federal judiciary is far smaller than the state judiciaries (in the aggregate),<sup>116</sup> and because federal judgeships are generally better compensated and more prestigious than state judgeships,<sup>117</sup> Congress and the President are effectively able to skim their judicial appointees off the top of the pool of individuals interested in serving as judges, and to attract to the federal bench talented lawyers who might not be interested

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<sup>115</sup> Neuborne, *supra* note \_\_ at 1121. The concept of “expertise,” which plays a key role in the conventional model, is distinct from the “technical competence” to which Neuborne refers and on which I focus here. A judge can be technically competent—possessed of a certain set of skills and talents relevant to the act of legal interpretation—without being expert in any particular area. So too, a judge might be relatively expert in the application of a particular body of law even if he is not, generally speaking, an especially talented legal analyst.

<sup>116</sup> Neuborne noted that, at the time of his writing, there were “about twice as many judges in California as in the entire federal system.” *Id.* California currently employs nearly 1,500 judges and more than 2,000 “judicial officers,” see Judicial Council of California, Administrative Office of the Courts, *2007 Court Statistics Report*, xiii, 143, again nearly doubling the total number of judges in the Article III judiciary, see *supra* TAN \_.

<sup>117</sup> Neuborne, *supra* note \_\_ at 1121. U.S. District Court judges currently earn an annual salary of \$165,200, while Court of Appeals judges earn \$175,100 per year. See <http://www.uscourts.gov/salarychart.pdf>. By comparison, trial judges in New York state earn annual salaries up to \$136,700 (for some trial-level judges, the figure is as low as \$108,800), while associate justices of the Appellate Division (intermediate courts of appeals) earn \$144,000 annually. See National Center for State Courts, *Judicial Compensation in New York: A National Perspective* 24 (2006). For both trial and appellate judges, then, members of the New York State judiciary earn approximately 82% as much as their federal counterparts.

in a state judgeship.<sup>118</sup> Neuborne further suggests that the selection process for federal judges, though flawed, tends to “focus substantially on the professional competence of the nominee,” while neither judicial elections nor the patronage-based appointments typical of state court systems “is calculated to make refined judgments on technical competence.”<sup>119</sup> Finally, Neuborne notes that significant disparities in the caliber of judicial clerks in the two systems,<sup>120</sup> as well as the heavier caseload faced by most state court judges,<sup>121</sup> would yield a higher level of performance by federal judges, even if members of the state and federal benches were, on average, equally talented.

There is, understandably, much tiptoeing around this point in the relevant literature.<sup>122</sup> It is unseemly to speak of a talent gap between one pool of judges and another (particularly where the pieties of federalism are in play). Moreover, it is surely the case that state courts, particularly at the top levels, are often staffed by lawyers of the very highest caliber, and that a non-trivial number of federal judges are disappointing from a competence standpoint. Nevertheless, I find it difficult to escape the conclusion that, on the whole—and particularly outside the highest echelons of the state court systems—federal judges are likely to be more skilled legal analysts and judicial

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<sup>118</sup> Neuborne, *supra* note \_\_ at 1121-22. *See also* Wells, *supra* note \_\_, at 1683 (“[F]ederal judges are, generally speaking, likely to be more talented than state judges.”); Wells, *supra* note \_\_, at 300-01 (arguing, for largely the reasons advanced by Professor Neuborne, that “[t]here are marked institutional differences between federal and state courts, and these differences are important to the outcome of litigation”).

<sup>119</sup> *Id.* at 1122.

<sup>120</sup> *Id.* (noting that federal court clerks tend to be “among the most promising recent law school graduates,” while state court clerks “when available at all, tend to be either career bureaucrats or patronage employees and may lack both the ability and dedication of their federal counterparts”).

<sup>121</sup> *Id.*

<sup>122</sup> *E.g.*, Redish, *supra* note \_\_, at 1781 (“I should emphasize that to question the fairness of state court adjudication in cases challenging the constitutionality of state action is in no way to question the competence or integrity of state judges”); ALI STUDY, *supra* note \_\_, at 100 (“Without disparagement of the quality of justice in many state courts throughout the country, it may be granted that often the federal courts do have better judges . . .”). *See also* Wells, *supra* note \_\_, at 297 (noting that “[o]ut of sensitivity or decorum,” critics of doctrines constraining federal court jurisdiction “generally refrain from direct attacks on state judges”).

craftspersons than their counterparts on the state courts. The first set of observations offered by Neuborne on this subject represent the most persuasive considerations. Federal judgeships are more prestigious and significantly better paying than the vast majority of state judgeships; all other things being equal, then, it would be surprising if the most talented lawyers *didn't* gravitate to the federal bench.

B. *The Federal Franchise and Jurisdictional Allocation*

In this section, I use the Federal Franchise model to examine some of the consequences of opening the federal courts to federal question cases. I explain, first, that the likely beneficiaries of the procedural and cultural homogeneity that characterizes federal court practice are attorneys who litigate in courts dispersed throughout the United States and, by extension, their clients—typically corporations engaged in commercial activity on a national scale. Second, I argue that it is exceedingly difficult to identify, *ex ante*, classes of litigants that are likely to benefit from having their cases adjudicated by a tribunal characterized by a high level of technical competence. Taken together, these factors draw attention to the fundamentally political character of decisions of jurisdictional allocation, and they suggest, as a corollary, that judicial tinkering with the rules of allocation ought to be limited.<sup>123</sup>

In this way, rather than providing direct guidance to those called upon to craft jurisdictional policy, the Federal Franchise model sheds light on what a theory of federal question jurisdiction should be. That is, when we focus on the distinctions between state

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<sup>123</sup> Professor Redish has repeatedly called for a limited judicial role in policing the bounds of federal court jurisdiction, particularly with respect to doctrines of abstention. *See, e.g., Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 342-67 (1988); *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L. J. 71, 74 (1984). He argues that separation of powers principles require virtually unwavering judicial adherence to congressional directives relating to federal jurisdiction.

and federal courts that lie at the heart of the Federal Franchise account, matters of jurisdictional allocation begin to appear less like questions of fundamental constitutional structure and more like questions of simple politics. This means that, from the perspective of the Federal Franchise model, the quality of a decision allocating cases between the state and federal courts is properly assessed not by measuring that decision against some abstract theory of federalism, but by determining whether that decision fairly and reasonably distributes the costs and benefits of access to the federal courts.

The fact that acknowledging the real differences between state and federal courts tends not to produce sharp jurisdictional lines or pointed directives for purposes of jurisdictional lawmaking does not call the soundness of the Federal Franchise model into question. It is certainly no excuse for pretending that the state-federal differences identified by the Federal Franchise account do not exist or, worse, that others do and ought to provide the foundation for our jurisdictional architecture.

1. *Procedural and Cultural Homogeneity: The Jurisdictional Upshot*

The benefits provided by the federal courts with respect to rules of procedure and cultural norms are concentrated on identifiable parties. Attorneys with national practices are able to conserve considerable resources and reduce the costs of their outsider status when they act as repeat players within the federal judicial system instead of litigating intermittently in various state courts. Without access to the federal courts, parties that find themselves litigating in different jurisdictions across the country would be in the unhappy position of either hiring local counsel for each distinct forum, paying more to a single law firm so that it might invest more in assuring procedural competence and accruing cultural capital across the country (in part, no doubt, through the device of



securing local counsel on its own), or simply foregoing the benefit of procedurally competent, insider counsel. It would seem, then, that (at least along this dimension) the principal beneficiaries of federal court access are elite lawyers practicing at elite law firms and their clients; as noted above, these are typically corporations engaged in commercial activity on a more or less nationwide basis.<sup>124</sup>

But the fact that we can identify the likely beneficiaries of the procedural and cultural realities of federal court practice does not lead inexorably to any particular conclusion as to the proper shape of our jurisdictional landscape. This is because acknowledging the fact that these benefits are concentrated on identifiable parties introduces a “baseline” problem to the task of jurisdictional allocation. Does the conferral of federal jurisdiction afford these attorneys and their clients an unfair advantage by forcing adversaries off of their home turf and neutralizing the cultural capital these adversaries have taken pains to cultivate? Or, does denying federal court access unfairly burden “national litigants” with the tasks of adapting to the procedural idiosyncrasies of state court practice and struggling against the near-monopoly on cultural capital enjoyed by locals?

Seen in this light, the considerations relevant to determining the proper scope of the federal courts’ jurisdiction in federal question cases dovetail with those underlying

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<sup>124</sup> The picture I paint here—of the corporation (typically a defendant) as the perpetual outsider in state court, and the individual (typically a plaintiff) as the likely insider—will not, of course, always accurately depict the operation of the insider-outsider dynamic in litigation. Attorneys other than those at elite national law firms (and, by extension, their clients) can enjoy the benefit of repeat-playing in the federal courts. And some of the most extreme cases of insider advantage accrue to corporations litigating in their own backyards. Nevertheless, the benefits of access to the Federal Franchise are unmistakably greatest for those lawyers and litigants who find themselves in federal court most often, and—due in no small part to the rather forgiving constitutional constraints on the exercise of long-arm jurisdiction—the corporate-outsider/individual-insider dynamic seems likely to be the most prevalent given that corporations active in national commerce are far more likely than individuals to become ensnared in litigation in many different jurisdictions.

the grant of jurisdiction to the federal courts in diversity cases. Both require a judgment as to how the dynamics of outsider status ought to play out in litigation.<sup>125</sup> At the very least, our practice relating to diversity jurisdiction makes clear that a desire to relieve a class of litigants of the burdens of outsider status is a legitimate consideration for Congress in defining the contours of federal jurisdiction.<sup>126</sup> To be sure, discussions of in-staters’ home-court advantage in the diversity context tend to conjure images of transparent bias against outsiders on the part of state court judges. But federal court access in diversity cases levels the playing field between insiders and outsiders not only by taking the possibility of blatant bias by the state judge out of the equation, but by stifling the more subtle advantages enjoyed by in-staters by virtue of their familiarity with local rules and norms.<sup>127</sup>

The key point I wish to make here is that when a federal statute or regulation invites litigation that will predictably pit individuals against parties (usually corporations) doing business in many states, the realities of insider-outsider status are likely to come

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<sup>125</sup> See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) (“Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.”); JONATHAN ELLIOT, 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 486 (1836) (quoting James Madison’s claim that diversity jurisdiction “will be rather salutary, than otherwise. It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims against them.”). Some scholars have noted that the establishment of diversity jurisdiction was driven not be a general fear of state judicial bias against out-of-staters, but by specific concern with state courts’ treatment of creditors. See, e.g., Larry Kramer, *Diversity Jurisdiction*, 1990 *BYU L. REV.* 97, 119 (1990); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *HARV. L. REV.* 483, 495-97 (1928).

<sup>126</sup> The intermingling of concerns relating to the proper scope of federal question and diversity jurisdiction goes back to the founding generation. Concerns relating to state judicial bias in enforcing the debt provisions of the Treaty of Paris, see *supra* notes \_\_ - \_\_ and accompanying text, were, in essence, concerns about state courts’ likely treatment of outsiders, aliens in particular. See *supra* note \_\_. This might help to explain why the Judiciary Act of 1789 did not provide for general federal question jurisdiction even though Federalists were deeply concerned about states’ willingness to enforce the Treaty with England. The paradigm case involving the debt provisions of the Treaty pitted an in-stater against an out-of-stater (or alien) and, hence, could be swept into federal court through the device of diversity or alienage jurisdiction which were, of course, provided for in the ’89 Act.

<sup>127</sup> The reality is, moreover, that the line distinguishing “blatant bias” from the more subtle advantages of insider status is a blurry one. (The concept of cultural capital, in particular, seems to straddle this line.)

into play. Under such conditions, a judgment as to whether federal jurisdiction is to exist, through the device of federal question jurisdiction or diversity, is unavoidably a judgment about how the dynamics of insiderism are to play out. This judgment is inherently a political one; it is a question of which among a set of competing (and overlapping) interest groups—plaintiffs, defendants, individuals, corporations—is to litigate under conditions it finds most favorable. Nothing about the essential character of our federal system requires one outcome or another. The important thing is that this judgment be made deliberately—which is to say, it should be made with eyes open to the fact that the establishment of federal jurisdiction carries the capacity to shift the balance of things in favor of one or another.

2. *Professionalism and Technical Competence: The Jurisdictional Upshot*

Acknowledging the existence of a competence gap between the state and federal courts invites consideration of a straightforward question: Which cases merit the attention of the best judges? While the question is straightforward, finding answers to it is far from easy. For it is hard to say (and there is certainly no consensus as to) which cases, at least within the universe of those presenting questions of federal law, are most in need of the attention of excellent, highly professional judges.

Numerous answers suggest themselves. One could take the position, for example, that criminal cases, in which questions of Due Process and other constitutional rights always lurk, and in which the threat of incarceration looms, are as deserving of the federal courts' attention as any.<sup>128</sup> (The existence of federal habeas corpus review for

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<sup>128</sup> See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 508 (1963) (taking note of, but not embracing, the argument that “constitutional rights in criminal cases have a particular sanctity and importance so as to deserve consideration as of right by a federal court”).

state court criminal convictions—though significantly constrained by federal statute and judicial doctrine—proceeds from precisely this premise.) Or, one could argue that cases involving any individual right protected by the U.S. Constitution—not just those arising in the context of criminal prosecutions—have a particularly strong claim for inclusion on the federal docket.<sup>129</sup> Alternatively, one might reason that cases involving complicated regulatory matters are strong candidates for steering toward the more technically competent forum (assuming, that is, that the subject has not been deemed so complex as to require the use of a specialized court or agency). Or, one could take the position that cases involving statutes and regulations that affect large numbers of people and/or carry especially significant consequences for the national economy are most appropriate for federal jurisdiction.

But is it more important to have technically superior judges adjudicate a Free Exercise claim or a claim arising under the Clean Air Act? Are the professionalism and high caliber of federal judges best deployed in the adjudication of, say, an ERISA case affecting 12,000 employees and the distribution of tens of millions of dollars, a prosecution for drug possession, or a case for the recovery of past-due child support? Reasonable people are certain to disagree about the answers to these questions, questions best thought of as essentially political in nature.

I do not deploy the term “political” here in precisely the same sense as in Part III.B.1, where I characterized as “inherently . . . political” the question whether federal

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<sup>129</sup> *E.g.*, Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 91 (expressing Professor Chemerinsky’s view that “Constitutional claims presented by individuals are among the nation’s most important litigation. . . . Effective judicial enforcement is imperative if these rights are to be protected. But federal and state courts vary in their ability and willingness to protect these rights”); FRIENDLY, *supra* note \_\_ at 90 (“It is hard to conceive of a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states.”).

court jurisdiction should be established in order to constrain the insider/outsider dynamic.<sup>130</sup> A crucial part of the political dimension of that question lies in the fact that identifiable interest groups stand to gain or lose from the establishment of federal jurisdiction;<sup>131</sup> and when Congress decides whether to allow for the exercise of federal jurisdiction in a particular set of cases, then, it is necessarily distributing a benefit to one group or another. But I don't think the question of which cases to channel into the federal courts in light of their role as a "forum of excellence" is political in this sense. That is, I don't think we can say, *ex ante*, what class of litigants stands to benefit most from having a set of cases heard by the most technically competent judges. (Are technically competent judges likely to produce outcomes that benefit plaintiffs or defendants? Corporations or individuals? The individual or the State?<sup>132</sup>) Accordingly,

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<sup>130</sup> See *supra* TAN \_\_ - \_\_.

<sup>131</sup> See *supra* TAN \_\_ - \_\_.

<sup>132</sup> Professor Neuborne argues that the competence gap between the state and federal courts renders the latter a more attractive forum for litigants pressing civil rights claims because "a technically less competent judge is not as likely to err on the side of the constitutional claimant as against him." Neuborne, *supra* note \_\_ at 1123. This is so, he argued, because constitutional claimants bear a special burden by virtue of their seeking to upset judgments that enjoy the imprimatur of democratic decisionmaking and, in some cases, long-established tradition. *Id.* at 1123-24. And judges with greater technical competence, he argued, are more likely to comprehend possibly complicated arguments as to why the law requires a break from the status quo. *Id.* at 1123. Professor Neuborne acknowledges, however, that the relationship he identifies between technical competence, constitutional/civil rights claims, and the legal status quo is a historically contingent one. After an era of expansion in the scope of individual constitutional rights (such as the Warren Court years), it would be parties seeking to contract the scope of those rights that would benefit most, by Neuborne's lights, from access to a bench of technically competent judges. *Id.* at 1124. Setting aside the issue of historical contingency, I am inclined to believe that the ideological outlook of the individual judge, far more than the measure of her technical competence, is likely to shape her attitude toward novel constitutional claims. Hence, while I am in general agreement with Professor Neuborne's claims as to the *existence* of a competence gap between the state and federal courts, I am skeptical of his observations as to how that gap might affect judicial decisionmaking. *Cf.* Chemerinsky, *supra* note \_\_, at 278 ("Even if federal judges are of a higher quality than state judges . . . that does not mean that there are differences in the way the judges handle constitutional cases. In fact, there is no reason that better judges are necessarily more disposed toward safeguarding individual liberties."). (Dean Chemerinsky correctly emphasizes, as well, the disputed character of the notion that decisions favoring individual rights claimants are definitionally a "better" species of constitutional adjudication. *Id.* at 258-59.)

Neuborne also suggests that the intrinsic importance of constitutional decisionmaking countenances in favor of channeling constitutional cases to the most competent judges. *Id.* at 1124, n.71. I have more sympathy for this claim than I do for the notion that competence and an expansive conception of individual constitutional rights go hand-in-hand.

judgments as to which cases merit the attention of the technically superior forum cannot sensibly be premised on an assessment of whether one interest group or another should accrue a particular benefit. Hence, when I characterize the question of which cases to channel into the technically superior forum as “political,” I mean only that there are no judicially enforceable principles to constrain the answers. That is, it is hard to see how a court, faced with a congressional enactment allocating cases between the state and federal judiciaries could justifiably tinker with or, certainly, reject such a judgment on the basis of its own conclusion as to which cases are most in need of access to a forum of excellence.<sup>133</sup>

#### CONCLUSION

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Professor Neuborne also claims, finally, that “[a] randomly correct decision by an inarticulate court . . . is of far less value to the general protection of constitutional rights than the same decision by a court which can produce an eloquent and technically precise opinion to guide similarly situated persons.” And this, he claims, provides an additional reason to believe that technically competent courts are likely to be more inviting for constitutional claimants. But it is hard to see why the opposite proposition is not also true. That is, I would expect an eloquent and technically precise opinion *rejecting* a claim of constitutional right to carry greater weight than an inarticulate opinion of the same general ilk. In this respect, it would seem, technically competent courts are of equal value to those opposed to the advancement or expansion of individual constitutional rights as they are to those in favor of such expansion.

<sup>133</sup> Cf. Redish, *supra* note \_\_ at 115 (“Well accepted principles of separation of powers mandate that an electorally accountable legislature make the basic policy decisions concerning how the nation is to be governed. The authority to make these policy decisions necessarily includes the authority to employ the federal judiciary to enforce the substantive statutory programs adopted by Congress. Absent a finding of unconstitutionality, it is not the judiciary’s function to modify or repeal a congressional enforcement network unless Congress has clearly delegated such authority to the judiciary.”)

One way to resolve the issue of which federal question cases are most deserving of the federal courts’ attention—or, more accurately, one way to render this issue beside the point—is to argue that it is important to have access to a forum of excellence in *all* of the different contexts mentioned above, and to wield the technical competence claim as an argument in favor of retaining, or even expanding, the federal courts’ general federal question jurisdiction. And if the point is taken one step further, one could argue that federal question cases ought to be privileged over diversity suits. *See, e.g.*, Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928)) Run-of-the-mill diversity suits typically do not involve matters of individual constitutional right, complex regulatory policy, or national economic significance (though, of course, they occasionally do) and, hence, do not partake of any of the obvious reasons to prefer adjudication in the technically superior forum. Short of supporting a blanket preference for federal court adjudication of federal question cases over diversity suits, however, the issue of technical competence provides little firm instruction as to which cases to channel into the federal system. Certainly, this distinction between the state and federal judiciaries offers little basis for judicial second-guessing of congressional judgments relating to jurisdictional allocation.

The bias-uniformity-expertise mantra has dominated thinking about federal question jurisdiction for decades. It is sprinkled liberally throughout the caselaw expounding on the contours of the federal courts' jurisdiction in cases involving questions of federal law, and is the jumping off point for scholarly commentary on the merits of judicial doctrine in this area. To be sure, neither judges nor academic commentators speak with one voice about these matters. In particular, the question of whether state courts can be trusted fairly to adjudicate questions of federal law has spawned a rich body of academic literature, with recognized authorities offering answers ranging from "yes, they can," to "no, they can't," to "the question is unanswerable." (And judges, also, famously disagree on the question of state-federal parity along this dimension.) The presumptive accuracy of the uniformity and expertise claims, however, has gone largely unchallenged; and, on the whole, the bias-uniformity-expertise model continues to lie at the core of current thinking about federal question jurisdiction.

Despite the manifest centrality of this model to the judicial and scholarly discourse relating to federal question jurisdiction, there is significant evidence that its explanatory power is limited across a variety of different contexts and that the factual premises underlying the model are suspect. This is not to say that the state and federal courts are fungible and that allocating cases between the two systems is inconsequential. But the important differences between the courts in the two systems, at least at present, are not the ones highlighted by the conventional wisdom.

Accordingly, courts and commentators should get out of the habit of reciting the tripartite mantra of federal question jurisdiction. To the extent judicial and scholarly references to the bias-uniformity-expertise model actually influence decisions about the

allocation of cases between federal and state court, they threaten to spawn flawed jurisdictional policies; and, even if cases relying on the bias-uniformity-expertise account generate tolerable jurisdictional rules, gesturing in the direction of these justifications for federal question jurisdiction obscures the characteristics that genuinely distinguish the state and federal courts.

I have suggested that the crucial distinctions between the state and federal courts are best captured by thinking of the federal courts as a kind of franchise—a series of local installations in a national chain that offer common rules of procedure and cultural norms, as well as a generally high measure of competence, to the litigants and lawyers who appear before them. These characteristics of the federal courts make them particularly attractive to lawyers and litigants who would, absent access to the federal judicial system, be forced to invest considerable time and energy getting up to speed on the distinct rules of practice and cultural norms applicable in state courtrooms across the country. And, of course, the establishment of a forum of excellence allows for a higher quality of adjudication in whatever class of claims fall within its jurisdiction.

Taking heed of these sorts of distinctions between the state and federal courts recommends an approach toward questions of jurisdictional allocation that is quite different from those that predominate in the case law and modern academic commentary, though it does not demand any particular alteration in the extant rules of federal question jurisdiction. Instead, this analysis recommends reorienting our efforts to define the contours of this jurisdiction around the inherently political questions of on which litigants, and across what substantive areas, we would like the benefits of the Federal Franchise to accrue. This does not mean abandoning the goal of establishing



jurisdictional rules that are clear and predictable. It means only that it is a mistake to try to derive such rules directly from overarching principles of judicial federalism.