
The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction

Gil Seinfeld†

TABLE OF CONTENTS

Introduction	97
I. Federal Question Jurisdiction—The Conventional Account	102
A. Bias	104
B. Uniformity	106
C. Expertise	108
II. The Conventional Account Reconsidered	109
A. Rethinking Bias	110
B. The Myth of Uniformity	114
1. The Size of the Federal Judiciary	115
2. The Uniformity Argument in Decline	119
a. Signals from Congress	120
b. Signals from the Court	122
C. The Limits of Federal Court Expertise	124
1. The Impossibility of “Expertise”	125
2. The Expertise Argument in Decline	129
III. The Federal Courts as a Franchise	132
A. The Federal Franchise	133
1. Procedural Conformity	134
2. The Distinct Cultures of State and Federal Court	139
3. The Competence Gap	146

Copyright © 2009 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† Assistant Professor of Law, University of Michigan Law School. Thanks to Evan Caminker, Ed Cooper, Daniel Halberstam, Don Herzog, Sarah Levine, Jessica Litman, Dan Meltzer, Richard Primus, Mathias Reimann, Judith Resnik, Michael Solimine, Mark Spindelman, and Chris Whitman for reading and commenting on earlier drafts and to Ed Cheng and Debra Chopp for helpful conversations about this project. I am also grateful to the participants in the Faculty Workshop at the University of Virginia School of Law and in the Junior Federal Courts Faculty Workshop at the American University Washington College of Law for their comments and suggestions and to Hyland Hunt and Erik Johnson for their research assistance.

B. The Federal Franchise and Jurisdictional Allocation 148

 1. The Nature of Jurisdictional Allocation 149

 a. Insider Status and Jurisdictional Allocation 149

 b. Technical Competence and Jurisdictional Allocation 151

 c. Different Branches, Different Directives 153

 2. The Future of Federal Question Jurisdiction 155

Conclusion 158

The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction

Gil Seinfeld

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.¹ 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 than state court judges in the interpretation and application of federal law.² By channeling federal question cases into the federal courts, the argument goes, we increase the likelihood of even-handed, uniform, expert adjudication of federal law. This “bias-uniformity-expertise” mantra 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,³ and it is

1. Congress established general federal question jurisdiction prior to 1875, *see* Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, but this measure was short-lived, *see* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132 (repealing Act of Feb. 13, 1801).

2. I have, in prior work, highlighted only the first two of these 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 that federal judges are superior to state judges when it comes 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 in this article.

3. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *Tafflin v. Levitt*, 493 U.S. 455, 464 (1990); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 809 n.6, 826-27 (1986) (Brennan, J., dissenting); *Hathorn v. Lovorn*, 457 U.S. 255, 271 (1982) (Rehnquist, J., dissenting); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483-84 (1981); *see also infra* notes 27, 37, 43 (citing cases advancing fragments of the conventional account). 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—has received considerable attention from the lower federal courts. Since *Grable* was handed down in 2005, this fragment of the decision has been quoted verbatim by the lower federal courts at least thirty-seven times.

frequently the starting point for scholarly analysis of these doctrines.⁴

Despite its prominence in judicial and academic discussions of federal jurisdiction, the bias-uniformity-expertise model has significant limitations. This is true 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 decide questions of federal law 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 account.⁵ Second—and this, no doubt, explains some of the

4. The most influential statement of this three-part justification for federal question jurisdiction comes from the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts*, published in 1969. See Am. Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* 164-68 (1969) [hereinafter ALI Study]; see also, e.g., David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. Chi. L. Rev. 268, 268 (1969); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1083 (1974); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 Ind. L.J. 309, 331 (2007); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 158-59 (1953); Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 Calif. L. Rev. 1515, 1517 (2007); 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); Michael Wells, "Available State Remedies" and the Fourteenth Amendment: *Comments on Florida Prepaid v. College Savings Bank*, 33 Loy. L.A. L. Rev. 1665, 1683 (2000) [hereinafter Wells, "Available State Remedies"]; Patti Allewa, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 Ohio St. L.J. 1477, 1499-1500 (1991); Christopher A. Cotropia, *Counterclaims, the Well-Pleaded Complaint, and Federal Jurisdiction*, 33 Hofstra L. Rev. 1, 37-38 (2004); Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. Kan. L. Rev. 1, 50 (2006); see also *infra* notes 28, 38, 44 (citing commentators advancing fragments of the conventional account). 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* 271-72 (5th ed. 2007); David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 328 (1978). Less prominent ones do too. See *supra* note 2.

5. 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 even-handed, uniform, or expert interpretation of federal law might be justified. See, e.g., ALI Study, *supra* note 4, 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); 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

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 federal judges are in fact more likely than their state court counterparts to vindicate federal claims, whether the lower federal courts meaningfully advance the interest in a uniform interpretation of federal law, and whether and when the claim of federal judicial expertise has genuine purchase.⁶

My critique of the bias prong of the conventional wisdom covers ground that others have been over before,⁷ so it is relatively brief. As the federal judiciary has become increasingly ideologically conservative, it has been noted that litigants pressing certain kinds of federal claims (specifically, claims of individual constitutional right) have fared increasingly poorly in federal court. It has been suggested, therefore, that it makes less sense today than it did decades ago to premise jurisdictional policy on the assumption that state courts are generally less willing than federal courts to vindicate federal claims. While it is too quick to leap from the premise that the federal judiciary has become more conservative to the conclusion that individual rights claimants will fare more poorly in the federal courts (much depends on the ideological valence of the particular claim at issue), these critiques highlight an important limit of the state bias argument for federal question jurisdiction. The argument is contingent on both historical and substantive factors, yet the conventional model makes no account of these contingencies.⁸

My challenge to the uniformity and expertise prongs of the conventional wisdom, which have not come under anything like the scrutiny that attends the

jurisdiction.”) 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—fell 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”); Mishkin, *supra* note 4, at 162, 184-85.

6. Professor Preis has recently challenged the empirical foundations of the conventional wisdom relating to federal question jurisdiction as well. *See* John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 *Wake Forest L. Rev.* 247 (2007). Though Preis’s method is substantially different from mine, our accounts of the deficiencies of the conventional model overlap, and we reach similar conclusions as to its overall (lack of) utility. Professor Preis and I arrive at very different conclusions as to how to think about the allocation of federal question cases between the state and federal courts. *Compare infra* Part III, with Preis, *supra*, at 292-300.

7. 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. *See supra* notes 3-4.

8. The fact that this prong of the conventional wisdom is historically contingent does not necessarily mean that it should be treated as irrelevant to jurisdictional policy. *See infra* Part III.B.2.

bias claim, calls into question the longstanding tendency of courts and commentators to think about matters of jurisdictional allocation in strictly relative terms. That is, the conventional account focuses on the question of 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 of 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 lower 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. And, frequently, they are not. Fundamental changes in the federal judiciary itself and in the scope and character of federal law have seriously undermined the lower federal courts' capacity to supply interpretive uniformity and place enormous burdens on the judge who wishes to achieve even basic familiarity with (much less bona fide expertise in) the diverse and complex questions of federal law that come before her. There is evidence, moreover, that both Congress and the federal courts are sensitive to these changes and their ramifications for jurisdictional policy. In particular, signals sent by both Congress and the federal courts in connection with the adjudicative authority of specialized courts and administrative agencies suggest that the lower federal courts no longer serve on the front lines of the battle to secure uniform, expert interpretation of federal law.

This is not to say that meaningful systemic differences between the state and federal courts do not exist, nor that the particular differences posited by the conventional model are entirely useless to students of federal jurisdiction. But a significant reorientation of the judicial and scholarly discourse in this area is in order. This Article begins this process of reorientation by developing 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 that the “Federal Franchise” 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.

The components of the Federal Franchise model—procedural homogeneity, cultural conformity, and technical competence⁹—should be familiar. The federal courts' capacity to provide these benefits has not escaped

9. I borrow this rather diplomatic bit of terminology—“technical competence”—from Burt Neuborne's classic article *The Myth of Parity*. Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1121 (1977) [hereinafter, Neuborne, *Myth*].

commentators' notice; indeed, there are points of connection between these features of federal court adjudication and the individual fragments of the conventional account.¹⁰ But prior scholarly discussion of these themes has been unsystematic, treating them as (at best) secondary considerations when it comes to the allocation of federal question cases between the state and federal courts. This Article attempts to weave together these previously disconnected strands of thinking about federal court adjudication and to develop them into a fully formed model of the federal judiciary as a franchise structure.¹¹ My further goal is to place the Federal Franchise model at the forefront of discussion about jurisdictional allocation, and to encourage a concomitant de-emphasis in such discussions on the constituent elements of the conventional account.

The Federal Franchise model shifts attention away from the question of what federal judges might do *to federal law*, and directs it, instead, to the experience of the lawyer and litigant *in federal court*. This, in turn, brings into focus the capacity of federal court jurisdiction to affect different classes of attorneys and clients in different ways. Specifically, the establishment of federal jurisdiction carries the promise of bringing some parties into a procedural and cultural space that is more comfortable to them, while ousting others from more familiar (state court) surroundings. It carries the promise, that is, of inverting the dynamics of insider and outsider status that might otherwise be in play.

In this way, the Franchise account offers a conception of federal question jurisdiction that is reminiscent of conventional thinking about party-based jurisdiction, diversity in particular. Diversity jurisdiction has long been defended as a means of rescuing out-of-state litigants from unfamiliar courts that might favor local interests at the expense of foreign ones.¹² The Federal Franchise model encourages thinking about federal question jurisdiction in

10. It is conceivable, for example, that the procedural and cultural homogeneity that characterizes the federal judiciary could marginally increase the likelihood that the federal courts will produce greater substantive uniformity in the interpretation of federal law. Likewise, the talk of federal judicial expertise that we see in connection with the conventional model might best be understood as a diplomatic way of referencing the superior technical competence of federal judges. *See infra* Part III.

11. There are differences between the technical definition of a business “franchise” and the conception of the federal courts I develop here. *See infra* note 116. But these differences are not germane to the core purpose served by the metaphor in this article. My description of the federal courts accords with the colloquial understanding of a “franchise;” one can walk into any individual outlet and experience it as familiar, regardless of location and regardless of whether one has been in that particular outlet before.

12. *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.”). Alternative accounts of the historical roots of diversity jurisdiction exist. *See, e.g.,* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 495-97 (1928) (arguing that diversity jurisdiction was established not out of concern that state courts would exhibit a generalized anti-outsider bias, but in order to provide parties with access to business-friendly federal common law and out of concern that state courts might exhibit anti-creditor bias).

much the same way; it invites courts and legislators to make judgments about jurisdictional allocation by reference to the issue of home-court advantage.

This has important consequences for the shaping of jurisdictional policy. 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. Rather, the Federal Franchise model sheds light on how to think about questions of jurisdictional allocation. Specifically, it countenances against conceptualizing questions of jurisdictional allocation as matters of fundamental constitutional structure and highlights, instead, the distributive consequences of jurisdictional decision-making.¹³ It lays bare the fact that decisions to channel cases into either the state or federal courts will sometimes have predictable consequences for identifiable classes of individuals (both lawyers and clients), and it suggests the propriety of legislators basing such decisions on their judgments as to the desirability of these consequences.

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 critically examines each component of the conventional account. It 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 its ramifications for jurisdictional policy.

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 has its own independent judicial system; and, since the Founding, state courts have been presumed competent to adjudicate questions of federal law.¹⁴ 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

13. I do not mean to suggest by this that “matters of fundamental constitutional structure” lack distributive consequences or that such consequences are irrelevant to the decision of fundamental issues of constitutional structure. My point, rather, is that, some questions (e.g., should questions of federal law be decided by the tribunals most likely to provide unbiased, uniform answers?) are more readily answered by reference to basic constitutional principles than others (e.g., should one or another class of litigants enjoy the benefit of access to the more familiar tribunal?).

14. 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* *Clafin 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 . . .”).

them appropriate subjects of federal jurisdiction? And what is it about state courts that makes them suboptimal forums for the adjudication of these disputes?

As to federal question cases, there has long been debate as to *which* particular cases ought to fall within the jurisdiction of the lower federal courts.¹⁵ 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.¹⁶ These justifications were rehearsed by the Supreme Court recently, 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.”¹⁷ As one commentator explained, this “three-part conception of federal jurisdiction is dominant in the judiciary and the academy.”¹⁸ In the sections that follow, I summarize each component of this account of federal question jurisdiction. I examine these components critically in Part II.

15. 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 (provided in the seminal case of *Osborn v. United States*, 22 U.S. (9 Wheat.) 738 (1824)), has been criticized as unduly broad. *See, e.g.*, *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting); *Osborn*, 22 U.S. (9 Wheat.) at 886 (Johnson, 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, e.g.*, *Louisville & Nashville R.R. Co. 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* ALI Study, *supra* note 4, at 188; Doernberg, *supra* note 5, at 600.

16. Doernberg, *supra* note 5, 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*.

17. *Grable*, 545 U.S. at 312.

18. Preis, *supra* note 6, at 250 n.6. As I detail in the sections 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 justification for federal question jurisdiction features prominently in the Study, *see* ALI Study, *supra* note 4, at 165-68, and the Study’s 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.

Just a few years before the publication of the ALI Study, Professor William Cohen published an article that focused intently on the state-court bias and federal expertise justifications for federal question jurisdiction. *See* William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. Pa. L. Rev. 890 (1967). In addition, the arguments for federal question jurisdiction that are advanced in the ALI Study featured prominently, some fifteen years earlier, in the work of one of the Study’s lead Reporters. *See* Mishkin, *supra* note 4, at 158-59, 171-72.

A. Bias

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 wrote 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.”¹⁹ “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.”²⁰

Throughout U.S. history, arguments of this kind have 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 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.²¹ 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.²² The enactment of what is now 42 U.S.C. § 1983, with its grant of jurisdiction to the federal courts (now codified at 28 U.S.C. § 1343) to hear claims against state actors for civil rights violations, has 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.²³ Likewise, the seismic shift in the law of federal jurisdiction embodied in the Jurisdiction and Removal Act of 1875,²⁴ which

19. The *Federalist* No. 81, at 481 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

20. *Id.*

21. 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, 1458 (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”) (emphasis added).

22. 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. Legal Hist.* 333, 337 (1969).

23. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 238-42 (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”).

24. Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470. The Jurisdiction and

established original and removal jurisdiction in the federal courts over all civil actions arising under federal law, was driven by distrust of the state courts' handling of federal questions.²⁵ And, finally, during the latter half of the twentieth 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.²⁶

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 major political party. Through the landslide election of 1874, Democrats were poised to take over the House of Representatives on March 4, 1875, ending fourteen years of Republican Party rule. Thus the establishment of general federal question jurisdiction can be understood as a last-ditch effort to deploy the judiciary to expand national authority in the interest of furthering Reconstruction-era policies. (Thanks to Richard Primus for pointing this out.)

25. See, e.g., G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 Mich. L. Rev. 17, 30 (1947) ("[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; 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.").

Some have argued that the jurisdictional changes wrought by the 1875 Act were motivated not only by concern about state court hostility toward 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 Kutler, *supra* note 22, at 157-60; Wiecek, *supra* note 22, at 341. This "economic rights" understanding of the forces motivating the passage of the 1875 Act finds some support in the Act's legislative history. 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 racism and regional hostility to federal laws designed to curb its effects. See Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 Wis. L. Rev. 1315, 1331 ("There is overwhelming evidence that Congress passed these laws because it believed that some state courts, especially in the South, were not upholding federal rights.").

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 (1927). 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. 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.

26. See, e.g., Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court*

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 the federal courts' capacity to secure uniformity—a pillar 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 modern times,²⁷ and continues to occupy a prominent place in academic commentary relating to federal question jurisdiction.²⁸

B. Uniformity

Though the interest in securing a uniform interpretation of federal law has been recognized as significant since the Founding,²⁹ 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 body of federal law.³⁰ But support for this claim is thin³¹ and is significantly

Trial, 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).

27. See sources cited *supra* note 3; see also *Perez v. Ledesma*, 401 U.S. 82, 110 n.7 (1971); *Reed v. Clark*, 984 F.2d 209, 211 (7th Cir. 1993); *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984); *Wright v. Prudential Ins. Co. of Am.*, 285 F. Supp. 2d 515, 522 n.17 (D.N.J. 2003); *Pena v. Downey Sav. & Loan Ass'n*, 929 F. Supp. 1308, 1317 n.5 (C.D. Cal. 1996); *Conservation Law Found., v. Browner*, 840 F. Supp. 171, 177 n.11 (D. Mass. 1993). 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 Cos.*, 127 S. Ct. 2301, 2306 (2007); *Wyoming v. Livingston*, 443 F.3d 1211, 1222-23 (10th Cir. 2006); *Paldmic v. Altria Corp. Servs., Inc.*, 327 F. Supp. 2d 959, 963 (E.D. Wis. 2004).

28. See sources cited *supra* note 4; see also James S. Liebman & 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); Carlos M. Vázquez, *The Federal "Claim" in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 Calif. L. Rev. 1731, 1731 (2007); Michael Wells, *Is Disparity a Problem?*, 22 Ga. L. Rev. 283, 300-01 (1988) [hereinafter Wells, *Disparity*]. But see *infra* notes 48-49 and accompanying text (noting expressions of skepticism as to the bias hypothesis).

29. 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).

30. See *Merrell Dow Pharms., 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

outweighed by the material indicating that passage of the 1875 Act was driven largely by the bias concern.³² 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."³³ 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."³⁴ From this perspective, the uniformity argument flows from the arguments relating to state-court bias and federal judicial expertise—we reduce the likelihood of outlier interpretations when judgments warped by bias or lack of understanding are kept to a minimum.

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.³⁵ This claim is based largely

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*, 478 U.S. at 804)); Pushaw, *supra* note 4, at 1522.

31. 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 it tells us nothing about the lower federal courts' capacity to serve this interest, and, 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. Deans 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.

32. See *supra* notes 24-25 and accompanying text.

33. ALI Study, *supra* note 4, at 165-66.

34. *Id.* at 166.

35. See *id.* at 166-67 (invoking the small size of the federal judiciary as a reason to expect it to produce a high measure of interpretive uniformity); see also, e.g., Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 Const. Comment. 347, 354 (1986) (discussing the possibility of vesting appellate jurisdiction over decisions from state courts in the regional federal appellate

on the common-sense notion that as the quantity of decisionmakers addressing a debatable question increases, the likelihood that they will produce divergent answers increases along with it.³⁶ 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 justifications for channeling federal question cases into the federal courts.³⁷ Likewise, commentators routinely argue that the lower federal courts offer significant advantages over the state courts where uniformity is concerned.³⁸

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.³⁹ Though incarnations of this line of argument had been kicking around for some time already,⁴⁰ the publication of the ALI Study helped this

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)”; 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”) [hereinafter Wells, *Substantive Interests*].

36. Of course, judges rely on prior decisions for guidance, even when those decisions come from other jurisdictions. Hence, even those who embrace this view of the relationship between the size of the federal and state judiciaries and the uniformity of federal law do not take the position that there is a one-to-one correlation between the number of courts adjudicating a given question and the quantity of interpretations likely to emerge. See *infra* Part II.B.

37. See sources cited *supra* note 3; see also, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 256 (1985); *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996); *Browne v. Nat’l Ass’n of Sec. Dealers*, No. 3:05-CV-2469-G, 2006 WL 3770505, at *5 (N.D. Tex. Dec. 14, 2006); *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 567 (D. Md. 2004); *Acosta v. Master Maint. & Const., Inc.*, 52 F. Supp. 2d 699, 708 (M.D. La. 1999).

38. See sources cited *supra* note 4; see also, e.g., *Chemerinsky & Kramer*, *supra* note 30, 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 5, at 647.

39. See *Marvell*, *supra* note 25, at 1333-34 (noting that “[e]xpertise, of course, was not part of the original rationale for federal question jurisdiction”); *Preis*, *supra* note 6, at 253 (characterizing the expertise-based justification for federal question jurisdiction as “newer”).

40. See *supra* note 18.

claim achieve prominence as well.⁴¹ The Study straightforwardly asserts that “the federal courts have acquired a considerable expertness in the interpretation and application of federal law,”⁴² and this claim has since become a central tenet of federal courts orthodoxy. The Supreme Court and the lower federal courts have sounded this theme repeatedly,⁴³ and it is now a stock component of scholarly writing about federal question jurisdiction.⁴⁴

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.⁴⁵

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 to tribunals with substantial experience (and, as a corollary, expertise) dealing with the body of law at issue. Hence the attractiveness of the expertise-based justification for allocating federal question cases to federal courts.

II

THE CONVENTIONAL ACCOUNT RECONSIDERED

In this Part, I critically examine each of the conventional justifications for vesting original federal question jurisdiction in the lower federal courts. I argue, in particular, that the empirical claims lying at the heart of the bias-

41. ALI Study, *supra* note 4, at 164-65.

42. *Id.*

43. See sources cited *supra* note 3; see also, e.g., Preiser v. Rodriguez, 411 U.S. 475, 514 (1973); Yong Wong Park v. United States, 472 F.3d 66, 71 (3d Cir. 2006); Rogers v. Platt, 814 F.2d 683, 695 (D.C. Cir. 1987); Simpson v. Union Pac. R.R. Co., 282 F. Supp. 2d 1151, 1156 (N.D. Cal. 2003); Dardeau v. W. Orange-Grove Consol. Indep. Sch. Dist., 43 F. Supp. 2d 722, 730 (E.D. Tex. 1999); Berry v. Blue Cross of Wash. & Alaska, 815 F. Supp. 359, 362 (W.D. Wash. 1993); W.R. Grace & Co. v. Vikase Corp., No. 90 C 5383, 1991 WL 211647, at *1 (N.D. Ill. Oct. 15, 1991).

44. See sources cited *supra* note 4; see also, e.g., Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. Pa. L. Rev. 825 (2005).

45. Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329, 333 (1988); see also ALI Study, *supra* note 4, 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.”).

uniformity-expertise model do not hold true across large swaths of cases implicating questions of federal law. It is far from clear, that is, that federal judges are generally more sympathetic to claims grounded in federal law than are state court judges; there is cause to question whether the lower federal courts contribute meaningfully to the uniform interpretation of federal law; and claims of federal judicial expertise in the interpretation of federal law are significantly overstated. My goal in this section is not to make the case that we ought to leave the conventional model behind, but that we ought to scale it back. I hope to highlight the limitations of the conventional model and thereby to raise the question whether it provides the muscular support for general federal question jurisdiction that is presumed in so much of the case law and scholarly commentary relating to the subject.

A. Rethinking Bias

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 establishing and retaining of federal question jurisdiction, the actual content of our jurisdictional law is, in important ways, difficult to reconcile with the 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 the Court has shaped jurisdictional doctrine around the presumption of state court competence in this regard. In particular, cases involving the proper scope of federal habeas corpus review of state criminal convictions, doctrines of abstention, and the application of *res judicata* principles to §1983 suits all contain language disclaiming the state bias narrative.⁴⁶

It is tempting to write off these statements as the 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.⁴⁷ But skepticism as to claims of a bias-

46. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 104 (1980); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (“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. . . . 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.”); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (“Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.”).

47. See Neuborne, *Myth*, *supra* note 9, at 1105-06 (“[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 decision making into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine.”).

based disparity in state and federal courts' adjudication of federal questions comes from other corners as well. Numerous authorities—among them strong believers in expansive federal jurisdiction in federal question cases—have expressed doubts as to whether the presumption of state-court bias in the adjudication of federal claims remains defensible.⁴⁸

Thus, in the 1977 article that framed the debate on the subject of state-federal court parity for a generation, Professor Neuborne remarked:

Federal district judges, appointed for life and removable only by impeachment, are as insulated from majoritarian pressures as is functionally possible, precisely to insure their ability to enforce the Constitution without fear of reprisal. State trial judges, on the other hand, generally are elected for a fixed term, rendering them vulnerable to majoritarian pressure when deciding constitutional cases. Thus, when arguable grounds supporting the majoritarian position exist, state trial judges are far more likely to embrace them than are federal judges.⁴⁹

By 1995, however, and in the wake of the appointment to the lower federal courts of a large number of conservative judges by President Reagan and the first President Bush, Professor Neuborne advanced a different view:

[S]tate/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.⁵⁰

48. See, e.g., *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (suggesting that the contention that state courts are apt to be hostile to federal claims “may be less compelling today than it once was”).

49. Neuborne, *Myth*, *supra* note 9, at 1127-28 (footnotes omitted).

50. Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DePaul L. Rev. 797, 798-99 (1995) [hereinafter Neuborne, *Parity Revisited*]. Similar claims abound in the literature. See, e.g., 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 court 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.”); 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 (1999) (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”).

After eight years of largely conservative judicial appointees by the second President Bush, Neuborne's observations seem all the more compelling.

To be sure, the fact that the federal judiciary has become more ideologically conservative in recent years does not mean that the benefits, for individual rights claimants, of access to a tribunal staffed by judges with life tenure and salary protection evaporate entirely (though modern commentary sometimes seems to assume as much). What takes place, instead, is a shift in the substantive terrain over which these protections do work.⁵¹ Thus, we might expect certain classes of claims—perhaps Second Amendment claims or equal protection challenges to affirmative action plans—to be vindicated more readily by today's federal judiciary than that of 1968.⁵² And, in some parts of the country at least, we might expect such claims to fare better in the federal system than they would before the state courts, and to do so for the same structural reasons that led scholars, in the past, to think of the federal courts as havens for unpopular groups pressing claims of individual constitutional right. A judge who must stand for reelection in a community that resoundingly approved an aggressive gun control measure might be far more reluctant to vindicate a Second Amendment challenge than a judge in that same community who enjoys the benefits of life tenure and salary protection. On the whole, it would seem that as the ideological character of the federal judiciary changes, some claims of individual constitutional right are likely to fare better, and others worse.⁵³

Taking heed of the shifting ideological character of the federal bench has significant ramifications for the state-court bias justification for federal question jurisdiction. First, if one is concerned not with the vindication of individual rights claims generally, but with the vindication of *particular* individual rights claims (i.e., claims with a specified ideological valence), then

In fact, there is evidence that at least some individual rights claims currently tend to fare *better* in the state courts than in the federal courts. *See, e.g.*, Daniel R. Piniello, *Gay Rights and American Law* 110-13, 275 (2003) (marking the relative success of gay rights claims in state and federal court); William B. Rubenstein, *The Myth of Superiority*, 16 *Const. Comment.* 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.").

51. *See* Purcell, *supra* note 50, at 695.

52. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (holding that the Second Amendment protects an individual right to keep and bear arms and invalidating the District of Columbia's handgun ban); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (deeming the University of Michigan's affirmative action policy unconstitutional); *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (holding the same as *Heller*); *Hopwood v. Texas*, 78 F.3d 932 (5th 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).

53. *See* Michael Abramowicz, *En Banc Revisited*, 100 *Colum. L. Rev.* 1600, 1605 (2000) ("A number of scholars have shown that judicial ideology, even when crudely measured by political affiliation, is a statistically significant predictor of case outcomes."); *see also id.* at 1605 n.21 (citing authorities).

the fact of federal judicial independence is not, on its own, a reason to favor channeling federal question cases into the federal courts. This is so because, from this perspective, judicial independence is a virtue only when judges take advantage of their insulation from majoritarian pressures to vindicate a specified subset of individual rights claims.⁵⁴ Of course, whether federal judges are apt to vindicate one's preferred set of constitutional rights is historically and ideologically contingent and, as a corollary, so too is this incarnation of the state-court bias justification for federal question jurisdiction.⁵⁵ As one commentator has explained, "the idea that the federal courts should be the authoritative voices of federal law and the primary vindicators of federal rights carries a profound but shifting social, political, and ideological meaning."⁵⁶

Second, even if one adopts a blanket preference for the vindication of individual rights claims (i.e., a preference not driven by the specific content of the claims at issue), it is difficult to say with confidence that the establishment of federal jurisdiction in federal question cases advances this ball significantly.

54. It is possible, of course, to advance the state bias argument for federal question jurisdiction without relying quite so heavily on the political accountability of state judges and the independence of federal judges. Hamilton's contention in *The Federalist*, that "the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes," can be understood this way. *The Federalist* No. 81, at 481 (Alexander Hamilton) (Clinton Rossiter, ed., 1961). This passage suggests that state judges will favor local interests over national ones not because state judges must stand before the voters (though Hamilton hits this point, too, in the very next passage); rather, Hamilton suggests here that state judges might themselves be possessed of "a local spirit" and might therefore adjudicate cases accordingly, regardless of any concerns they may have about reprisals at the ballot box. State judges, that is, are *of* the states and, not being employees of the federal government, might be more inclined to protect state interests over federal ones. Cf. Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Court*, 15 J. L. & Pol'y 1013, 1030 (2007) (discussing state courts' tendency in certain preemption cases to rely more heavily on state, rather than federal, law and positing that "[s]tate court judges, as creatures of state government . . . may be subtly predisposed to rely on state law"). But this line of reasoning seems more appropriate to a time—like the late eighteenth century—when the federal government might have appeared, at least to some, as something akin to an alien power seeking to impose policies and advance interests that were simply foreign. It seems fair to say that there was greater cause to fear intense, knee-jerk, anti-federal bias two hundred (or even forty) years ago than there is today. Centuries of economic and, in some ways, political and cultural interconnectedness will do that to a nation. Cf. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 944-45 (1994) ("Although some of the original thirteen states had unique political communities resulting from their separate origins, their uniqueness has long since given way to the national culture. . . . The nation-wide dispersion of ethnic and cultural identities, paralleling the dispersion of economic or ideological identities, does not mean that the concept of political community is inapplicable in the United States. What it means, rather, is that the United States has one political community, and that political community is the United States.").

55. See Friedman, *supra* note 50, at 1222 ("[P]arity inevitably is a dynamic rather than a static concept."). One can concede the historical contingency of the state-court bias claim and still maintain that the bias concern supplies a good reason to retain general federal question jurisdiction. There would be significant costs if Congress had to spring to action and expand or contract the scope of federal jurisdiction in response to each cycle of judicial appointments. See *infra* Part III.B.2.

56. Purcell, *supra* note 50, at 695.

At any given time, federal judicial independence, working in tandem with ideological forces, seems likely to motivate the robust protection of some claims of individual constitutional right and rather feeble protection of others.⁵⁷ Once we concede that the terrain over which such independence has bite is heavily contingent on ideology, it becomes impossible to sustain a monolithic conception of the federal courts' orientation toward federal law, and the force of the state-court bias argument in favor of federal question jurisdiction is concomitantly diminished.⁵⁸

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 academic literature pertaining to federal jurisdiction overwhelmingly presume the federal courts' superiority to state courts along this dimension,⁵⁹ and this presumption has received only limited critical attention. My argument is not that this presumption is wrong; it is, rather, that the presumption is irrelevant.

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

57. I am assuming here that judicial treatment of claims at opposite ends of the ideological spectrum will move together as the ideological character of the bench changes. To put the point somewhat roughly, we might expect that just as it becomes more likely that a Second Amendment claim will be vindicated by a particular court, it becomes less likely that that tribunal will uphold a First or Fourth Amendment claim.

58. As is typically the case in connection with discussions of the state bias argument, I have focused my attention on claims of individual constitutional rights. Professor Sharkey, however, recently explored the question of whether state and federal courts differ systematically in their orientation toward certain federal *statutory* claims. In particular, Sharkey studied state and federal court decisions relating to the preemption of state law tort suits under the Federal Food, Drug, and Cosmetic Act. Sharkey reports that "[t]he difference between the paradigmatic state court approach and that of some federal courts, which read the pro-preemption directional force of Supreme Court precedents . . . as support for a highly deferential view toward regulatory preemption, is unmistakable." Sharkey, *supra* note 54, at 1031. "In the realm of FDA prescription drug preemption," she explains, "not only are federal courts more likely to defer to federal agencies, but — equally important in terms of explaining the decision-making process of courts — federal courts are more likely than state courts to solicit the views of the FDA and the FDA is more apt to intervene on its own in federal court cases." *Id.* at 1020. As Sharkey notes, however, to this point, "no stark outcome-based distinction between state and federal courts has emerged." *Id.* at 1045; *see also id.* at 1045 n.110. These sorts of findings merit close attention. If the differences in approach Sharkey identifies are, in fact, accompanied by differences in outcome, it would lend considerable punch to the state bias narrative.

59. *See supra* notes 37-38.

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 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.⁶⁰ This notion appears to be partially premised on assumptions about the overall size of the federal judiciary that are no longer valid; and it also 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, there is a growing body of evidence that when the need for a uniform interpretation of federal law is thought to be especially important, Congress and the Supreme Court are apt to channel cases *away* from the lower federal courts and to rely, instead, on adjudication by specialized courts and administrative agencies.

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.”⁶¹ Hamilton’s point is that as more and more courts are given jurisdiction to decide a particular question, the probability of their producing a uniform answer diminishes.⁶² And if uniformity is to be achieved within a

60. 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, within the constraints imposed by its rather small docket, the existence of Supreme Court jurisdiction contributes meaningfully to the uniform construction of federal laws.

The fact that Supreme Court review enhances uniformity as to those federal laws it is called upon to interpret lends some support to the argument for extending federal question jurisdiction to the lower federal courts. This is so because, due in part to the adequate and independent state ground doctrine, it is easier for the Supreme Court to reach questions of federal law on review of federal court decisions than on review of state court decisions. But the marginal difference in access to (already statistically unlikely) Supreme Court review for state and federal court judgments seems a rather small tail to be wagging the large dog of general federal question jurisdiction in the lower federal courts.

61. The Federalist No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

62. 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 he believed did not apply to the system of federal courts he envisioned. See Daniel J. Hulsebosch, *Constituting Empire* 249 (2005) (noting

system that permits many courts to hear a given question, review must be concentrated in a smaller number of courts (preferably one).

There are many more federal courts today, staffed by many more judges, than there once were. As initially established, the federal judiciary comprised thirteen districts and three circuits, staffed by a total of nineteen judges.⁶³ By 1891—at which time the circuit courts of appeals were created—there were sixty-seven judicial districts and nine circuit courts of appeals, staffed by a total of eighty-three judges.⁶⁴ And by 2006, the lower federal courts comprised ninety-four judicial districts and thirteen courts of appeals, staffed by more than 1,200 judges (both active and senior).⁶⁵ I cannot resist pointing out that if we are to credit Hamilton’s account—which posits that the conferral of final adjudicative authority on thirteen different tribunals entails the creation of an unwieldy, confusion-producing hydra—then the federal courts of appeals, which currently number thirteen (and from which the prospects of Supreme Court review are dim), constitute such a hydra. More to the point, even if we assume that there was a time in our history during which the lower federal courts, by virtue of their small number, had the capacity to contribute meaningfully to a uniform construction of federal law, changes in the size of the federal judiciary provide reason to reconsider this view.⁶⁶

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 30, 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”).

63. Act of Sept. 24, 1789, 1 Stat. 73. Federal law did not provide, at that time, for circuit judges. *See id.* Instead, the circuit courts, which exercised some original and some appellate jurisdiction, were each to be staffed by two Supreme Court justices and a district judge. *Id.*

64. Russell R. Wheeler & Cynthia Harrison, Fed. Jud. Ctr., *Creating the Federal Judicial System* 20 (3rd ed. 2005), available at <http://www.fjc.gov/>.

65. Admin. Off. of the U.S. Courts, 2007 Judicial Business of the United States Courts: Annual Report of the Director 42.

66. *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 465 (1990) (taking note of the “inconsistency . . . which a multimembered, multi-tiered federal judicial system already creates”); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383, 407 (1991); 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.”) [hereinafter Wells, *Naked Politics*].

It is an incomplete response to this argument 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 not⁶⁷) 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. An assessment of the relative capacities of state and federal courts in this regard simply does not speak to the question. And, indeed, as I explain in the next Section, though very little direct empirical evidence relating to this issue is available,⁶⁸ there are significant indications that both Congress and the Supreme Court have come to doubt whether the lower federal courts can contribute meaningfully to a uniform interpretation of federal law.

Before moving on to an examination of this material, two points bear emphasis. First, 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. As Dean Caminker has noted, “[i]n a mature legal system, there quite frequently exists a relatively small number of readily identifiable, plausible interpretations of precedent and sensible doctrinal constructs.”⁶⁹ For reasons explained by Professor Preis, this would seem equally true of interpretations of federal statutes and regulations:

[Q]uestions of law differ dramatically from other categories of questions. The difference lies in the range of available answers imposed by the question. The hero question posed above—[“who is your personal hero?”] which might be called “open-ended”—imposes virtually no constraints on the range of answers. If the respondent instead were asked to name his *currently living* personal hero, the

67. See *infra* text accompanying notes 69-70.

68. The exception is Preis, *supra* note 6.

69. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *Tex L. Rev.* 1, 56 (1994); see also Erwin Chemerinsky, *Federal Jurisdiction* § 5.2.1 (4th 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.”); Preis, *supra* note 6, 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”).

range of answers would thus be somewhat more “close-ended.” On the continuum between open-and close-ended questions, legal questions lie quite close to the close-ended pole.⁷⁰

Preis correctly notes that most questions of law, by their nature, are amenable to a sharply limited number of plausible answers. Given this, 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.

Second, the capacity of the lower federal courts to produce *divergent* interpretations of federal law (and the likelihood that they will) is frequently cited as an important virtue of the federal judicial system. By permitting legal issues to “percolate” in the lower federal courts, it is argued, we “allow[] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.”⁷¹ When the Supreme Court renders its decision, it is argued, it may benefit from the experience and insight of the lower federal courts.⁷² And, indeed, the fact that our scheme does not call for inter-circuit *stare decisis* suggests that the lack of interpretive uniformity among the lower federal courts is not only tolerable, but desirable.⁷³

70. Preis, *supra* note 6, at 260; *see also id.* at 261 (noting that, according to *U.S. Law Week’s* data relating to circuit splits, 91% of divisions of authority within the federal system are two-way splits, while only 9% involve courts offering three or more interpretations of the law). It is possible that three-way splits are more likely among the state courts than the federal courts and that these data are therefore not probative, but like Professor Preis, I am inclined to believe, instead, that the relative frequency of two-way as opposed to three-or-more-way splits reveals something about the character of the questions judges are asked to decide.

71. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984); *see also* Solimine, *supra* note 66, at 1481-86 (noting that some disuniformity, even within the federal system, is inevitable and, sometimes, “not especially problematic”).

72. *See, e.g.*, J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Calif. L. Rev. 913, 929 (1983) (“When circuits differ, they provide the reasoned alternatives from which the resolver of the conflict can derive a more informed analysis. The many circuit courts acts as the ‘laboratories’ of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments.”). *But see* Caminker, *supra* note 69, at 54-60 (discussing conventional arguments in favor of allowing percolation of legal issues among the lower federal courts and concluding that “the overall value of issue percolation in the lower courts for ultimate Supreme Court rulemaking has commonly been exaggerated.”).

73. *See, e.g.*, Estreicher & Sexton, *supra* note 71, at 716 (“From the absence of a rule of inter-circuit *stare decisis* and the presence of state and federal courts free to disagree with one another though operating in the same geographic jurisdiction, we derive a basic premise that disuniformity, at least in the short run, may be tolerable and perhaps beneficial.”); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111, 1155-58 (1990) (detailing the virtues of a system that does not provide for inter-circuit *stare decisis* and noting that “[i]ntercircuit dialogue not only benefits the quality of adjudication by the courts of appeals, but also aids the Supreme Court’s adjudication of cases involving conflicts among the circuits.”).

Of course, even without a binding rule of inter-circuit *stare decisis*, it seems likely that traditions of deference to the judgments of sister courts within the federal system are more pronounced than any such traditions may be across different states.⁷⁴ That is, a judge sitting on the U.S. Court of Appeals for the Seventh Circuit may be more respectful of Sixth Circuit precedent than an Illinois judge is of precedents from the Michigan courts. And this, in turn, could yield greater interpretive uniformity.

It is difficult to know just how potent these forces are. One would expect genuine differences of view on the best reading or application of federal law (fueled at times by ideological divisions within the federal system) to overwhelm the impulse to inter-circuit uniformity in some cases. This would be most likely to occur, moreover, in connection with those federal statutes and regulations that are ambiguous or controversial and, hence, more apt to yield interpretive divergence in the first place. At the very least, we can note that, whatever traditions of inter-circuit deference may be in place, circuit splits evolve regularly within the federal system. And on the whole, I am inclined to think that differences between the state and federal courts along this dimension have only a marginal effect on the propensity of each to produce a uniform interpretation of federal law.

2. *The Uniformity Argument in Decline*

Over the course of the twentieth century, and with increasing frequency over time, Congress has signaled that when the interest in uniformity is surpassingly important, primary interpretive authority should not be vested in the ordinary Article III courts. Instead, under these conditions, Congress has increasingly vested adjudicative power in administrative agencies and specialized courts. The Supreme Court, meanwhile, by narrowing the scope of judicial review of agency action, has exhibited skepticism as to the link between adjudication in the lower federal courts and the uniformity interest. To be sure, the forces motivating the enhanced adjudicative authority of specialized courts and administrative agencies are numerous and complex, and it would be a mistake to treat Congress's and the Court's decisions in this area as driven exclusively (or even predominantly) by the interest in securing a uniform interpretation of federal law.⁷⁵ Nevertheless, these statutory and doctrinal developments have all been justified, at least in part, by reference to the lower federal courts' limited capacity to advance the interest in uniformity, and these signals from Congress and the Supreme Court ought to be taken

74. To the extent this is true, it is likely because of the cohesiveness of the culture across the federal courts. I address the issue of federal court culture in detail in Part III.A.

75. Indeed, as I demonstrate in the Section that follows, at the very least, the uniformity interest has worked in tandem with the interest in securing expert adjudication to drive the expanded use of specialized courts and administrative agencies.

seriously.⁷⁶

a. Signals from Congress

With increasing frequency since the early twentieth century, Congress has directed that certain disputes be resolved (at least in the first instance) by administrative agencies and specialized courts. Many of these congressional judgments have been driven, in part, by doubt as to whether the lower federal courts are capable of supplying the interpretive uniformity required for federal law to function as intended. Thus, the establishment, in 1910, of the short-lived Commerce Court, which enjoyed exclusive jurisdiction to review decisions of the Interstate Commerce Commission (ICC), is said to have been driven by concern with “conflicts in court decisions begetting territorial diversity where unified treatment of a problem is demanded.”⁷⁷ Similarly, Congress’s establishment of the U.S. Court of Appeals for the Federal Circuit, which enjoys exclusive jurisdiction over 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.⁷⁸ And, 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,” which, apparently, Congress thought would not be forthcoming were appellate jurisdiction vested in the regional circuit courts.⁷⁹

76. There is a striking disconnect between, on the one hand, academic commentary on the allocation of cases between state and federal court—which tends to presume that the lower federal courts are equipped to advance the interest in interpretive uniformity, *see supra* note 38—and, on the other hand, scholarly discussions of the proper role of specialized courts and administrative agencies in the interpretation of federal law. The latter proceed from the premise that adjudication in the lower federal courts tends to undermine, rather than advance, the interest in uniformity. *E.g.*, David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 *Colum. L. Rev.* 1, 65 (1975); Revesz, *supra* note 73, at 1155-57.

77. Frankfurter & Landis, *supra* note 25, at 154.

78. *See generally* S. Rep. No. 97-275, at 3 (1981) (“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. . . . [T]here 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.”).

79. S. Rep. No. 91-1196, at 41 (1970). The D.C. Circuit has exclusive jurisdiction over a wide range of administrative law matters including appeals from decisions of the FCC, *see* 47 U.S.C. § 402(b) (2006), challenges to regulations promulgated under CERCLA, *see* 42 U.S.C. § 9613(a) (2006), and actions pertaining to the establishment of national primary drinking water

To be sure, it may be that when ICC orders, questions of patent law, or clean air regulations 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 in these particular situations. But that is precisely the point. It appears that when the uniformity interest features prominently in congressional decision-making relating to the allocation of adjudicative authority, Congress is more likely to turn away from the lower federal courts and to channel cases, instead, to alternative adjudicative bodies.⁸⁰

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.⁸¹ And Congress enacted a handful of statutes during the first half of the twentieth

regulations, *see* 42 U.S.C. § 300j-7(a)(1) (2006). The establishment of such jurisdiction, of course, fosters the development of a uniform body of law in the relevant areas. *See, e.g.*, S. Jay Plager & Lynne E. Pettigrew, *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”).

80. 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 73, at 1155 (noting that “a specialized court not subject to review in the generalist courts of appeals . . . would guarantee immediate uniformity of federal law”). A preference for adjudication by administrative agencies or specialized courts need not follow automatically 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; other considerations might militate against channeling cases into agencies and specialized courts. *See, e.g.*, Henry J. Friendly, *Federal Jurisdiction: A General View* 188 (1973) (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 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”); *id.* at 1156-61 (detailing advantages of allowing review of the decisions of specialized courts by generalist courts of appeals notwithstanding uniformity costs).

81. 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 (2006) (federal crimes); 28 U.S.C. § 1333 (2006) (admiralty, maritime, and prize cases); § 1351 (suits against foreign consuls and vice-consuls).

century providing for exclusive jurisdiction in the federal district courts over certain causes of action contemplated by the relevant regulatory schemes.⁸² Since then, however, enactments calling for exclusive jurisdiction in the federal district courts have been few and far between.⁸³

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.⁸⁴ 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, suggesting that the Supreme Court likewise perceives limits on the lower federal courts' capacity to secure uniformity in the interpretation of federal law when uniformity matters most.⁸⁵

82. *E.g.*, 7 U.S.C. § 13a-2(2) (2006) (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 (2006) (violations of the Securities Exchange Act of 1934); 15 U.S.C. § 80a-35(b)(5) (2006) (breach of fiduciary duty claims against investment advisers under the Investment Company Act of 1940); 15 U.S.C. § 717u (2006) (violations of the Natural Gas Act of 1938); 40 U.S.C. § 3133(b) (2006) (actions on payment bond by party furnishing labor or materials in connection with the performance of federal contracts).

83. *See* 15 U.S.C. § 77p (2006) (securities fraud class actions); 29 U.S.C. § 1132(e)(1) (2006) (civil enforcement under ERISA). It bears mention that the former provision referenced here—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 such suits were being filed in state court, *under state law*, thereby circumventing the procedural constraints of the Private Securities Litigation Reform Act of 1995. *See* David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 Bus. Law. 1, 7-12 (1998).

84. *See supra* note 37.

85. The line of cases exploring the federal courts' jurisdiction over state law causes of action that require resolution of "substantial" questions of federal law does, to some degree, engage the interest in uniformity, but it 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, 816 (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*, 545 U.S. 308, 312 (2005), 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 Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006). And, 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, some courts apply the *Grable* rule with absolutely no discussion of the uniformity interest. *E.g.*, *Evans v. Courtesy Chevrolet II*, 423 F. Supp. 2d 669, 671-72 (S.D. Tex. 2006); *Buis v. Wells Fargo Bank*, 401 F. Supp. 2d 612, 617-18 (N.D. Tex. 2005); *Wisconsin v. Abbott Labs.*, 390 F. Supp. 2d 815, 823-24 (W.D. Wis. 2005). Some downplay the role of federal jurisdiction in safeguarding the interest in uniformity.

The Supreme Court's decision in *Chevron v. Natural Resources Defense Council*,⁸⁶ mandating judicial deference to reasonable agency interpretations of federal statutes, is an indicator of the Court's sense of the judicial role in circumstances calling loudly for uniform interpretation. As Professor 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 subdues this diversity, and thus enhances the probability of uniform national administration of the laws.*⁸⁷

Indeed, to the extent the *Chevron* doctrine manifests a preference for agency decision-making 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

E.g., Mikulski v. Centerior Energy 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. Sw. 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."). Only a small number afford the issue 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).

As I have demonstrated elsewhere, *see Seinfeld*, *supra* note 2, one could imagine the Court's jurisprudence of "complete preemption"—which authorizes the removal to federal court of state law causes of action—being grounded in the federal courts' capacity to provide a uniform interpretation of the federal statutes implicated in such suits. But the Court has made almost no effort to link the doctrine of complete preemption to the federal courts' supposed superiority when it comes to interpretive uniformity. And, indeed, if one thinks carefully about how the uniformity interest is implicated across preemptive federal statutes, the complete preemption rule, as currently constituted, makes little sense. *See id.* at 572-77.

86. 467 U.S. 837 (1984).

87. 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 today's conditions—with the Court hearing roughly half as many cases per year.

decision in *Skidmore v. Swift & Co.*,⁸⁸ 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.”⁸⁹ 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,⁹⁰ by the interest in securing a more uniform interpretation than can be expected from the lower federal courts.⁹¹ These judicially created doctrines in the area of administrative law indicate that the Supreme Court has long recognized that there are (sometimes intolerable) limits on the lower federal courts’ 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) forums 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.

C. *The Limits of Federal Court Expertise*

Of the conventional justifications for channeling federal question cases to the federal courts, the claim that federal judges have expertise in the interpretation of federal law is most compelling. There is significant intuitive 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 common-sense 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. My goal, in this section, is not to debunk the

88. 323 U.S. 134 (1944).

89. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

90. I say “in part” because, as we will see, *see infra* text accompanying note 113, 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.

91. Paul R. Verkuil et al., *A Black Letter Statement of Federal 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* *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439-41 (1907) (establishing the doctrine of primary jurisdiction and discussing the capacity of the ICC to supply regulatory uniformity and the lower federal courts’ incapacity to do so).

claim of federal judicial expertise in the interpretation of federal law, but to point out its limits. For if deployment of the term “expert” in this context conjures images of a judge who is a specialist in the myriad questions of law she is called upon to adjudicate—a substantive master of both the deep rhythms and detailed minutiae of the regulatory schemes she is called upon to interpret and apply—it is significantly overbroad.⁹² As I explain in this Section, federal judges are expert in the interpretation of federal law in a sense that is broad, but rather shallow, and the implications of such expertise for jurisdictional policy should be concomitantly modest.

1. *The Impossibility of “Expertise”*

The principal challenge for the judge who would lay claim to general expertise in the interpretation of federal law is grappling with its sheer bulk. The U.S. Code currently includes some fifty Titles, while the Code of Federal Regulations has ballooned to more than 100,000 pages. Between 1974 and 1998, moreover, Congress created 474 new causes of action eligible for federal jurisdiction.⁹³ Much of this is attributable to the advent of the modern regulatory state, which has underwritten a massive expansion in the quantity of cases falling within the federal courts’ federal question jurisdiction, and has helped to ratchet up the level of complexity associated with the adjudication of federal law.⁹⁴ 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.

Because of the explosion of federal law, it has become impossible for generalist judges sitting on federal district and circuit courts to develop specific expertise with respect to many of the subjects that come before them. Indeed, many scholarly commentators (usually working outside the federal jurisdiction cohort) take as a given the impossibility of generalist federal judges becoming experts in the myriad and often complicated bodies of law they are called upon to interpret and apply. As one prominent commentator explains:

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

92. Of course, some federal judges are substantive masters of some areas of federal law that come before them; but this is a far cry from the notion that such judges are masters of federal law generally.

93. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 956 (2000).

94. Friendly, *supra* note 80, at 23, 34-35; Richard A. Posner, *The Federal Courts: Challenge and Reform* 87-89 (1985). The explosion in federal court caseloads that took place during the latter half of the twentieth century is also attributable, in significant part, to an increase in criminal cases, to Congress’s enactment of new civil rights legislation, and to Supreme Court decisions expanding the scope of federal constitutional protections and the remedies available for their violation. See generally Friendly, *supra* note 80, at 18-27; Posner, *supra*, at 59-93.

be able to resolve a major 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.⁹⁵

Numerous others have made similarly sweeping statements as to the unlikelihood of federal judges developing expertise in the application of federal law generally;⁹⁶ and expressions of skepticism as to the expertise of generalist Article III judges in connection with specific areas of the law range across significant and sizeable portions of the universe of federal legislative action.⁹⁷

95. Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics*, 67 Geo. Wash. L. Rev. 797, 798 (1999).

96. See, e.g., Office of Tech. Assessment, U.S. Congress, *Intellectual Property Rights in an Age of Electronics and Information* 279 (1986) (“Judges 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.”).

See also Jon C. Blue, *A Well Tuned Cymbal? Extrajudicial Political Activity*, 18 Geo. J. Legal 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 Administrative 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.”); Sarang Vijay Damle, Casenote, *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.”).

97. E.g., Friendly, *supra* note 80, at 156-57 (patent law); Edward K. Cheng, *The Myth of the Generalist Judge: An Empirical Study of Opinion Specialization in the Federal Courts of Appeals*, 61 Stan. L. Rev. (forthcoming 2009) (manuscript at 23) (antitrust and tax) [hereinafter Cheng, *Myth of the Generalist Judge*]; Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Ohio St. L.J. 1037, 1077-82 (1995) (tax law); 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); 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 Law. 589, 601 (2006) (ERISA); Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 Tulsa L.J. 185, 199 (1996) (administrative 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) [hereinafter Cheng, *Independent Judicial Research*]; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 329 (1989) (science and economics).

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. And one could argue that such expressions of doubt do not directly implicate federal judges’ expertise when it comes to raw legal analysis or interpretation, and therefore do not undermine the expertise-based argument for federal question jurisdiction. But it is hard to see the value in channeling a group of cases to a particular court on the basis of that

Even the most casual engagement with the empirical evidence relating to the frequency with which federal judges confront different areas of federal law provides support for these claims.⁹⁸ Between 2002 and 2006, for example, the U.S. Court of Appeals for the Fourth Circuit disposed of a total of thirty-four cases falling under the heading of “environmental law.”⁹⁹ With fifteen authorized judgeships in the Fourth Circuit,¹⁰⁰ and judges sitting in panels of three, we can 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.¹⁰¹ During the same period, the judges on fully half of the circuit courts of appeals averaged fewer than three copyright cases per year, and those on seven of the twelve regional circuits averaged fewer than two antitrust cases per year.¹⁰²

To be sure, each year, each of the U.S. courts of appeals hears, for example, hundreds of civil rights claims and dozens of ERISA cases.¹⁰³ And

court’s supposed expertise in the relevant area of law if the factual scenarios and regulatory settings governed by that law are, in important ways, beyond the ken of the judges who are to hear the cases.

98. For less casual engagement with empirical data relating to the frequency with which federal judges interface with particular bodies of law, see Cheng, *Myth of the Generalist Judge*, *supra* note 97. Professor Cheng’s project focuses on instances of opinion specialization—scenarios in which judges author a significantly greater or lesser number of majority opinions in a given area than a random distribution would yield. Through this process, Cheng argues, federal judges informally deviate from the “generalist ideal,” *id.* at 2, and thereby allow the federal courts to capture the benefits of judicial expertise without some of the costs that attend other suggested means of increasing specialization among federal judges. *Id.* at 27-34. Because Professor Cheng’s research measures frequency of opinion writing relative to expected frequency, his definition of “specialist” differs from the understanding of “expert” I am working with here (which focuses on total quantity of exposures rather than frequency of actual exposure relative to expected exposure).

99. See Fed. Jud. Ctr., Federal Court Cases: Integrated Data Base, 2006, ICPSR Study No. 4685 (2007); Fed. Jud. Ctr., Federal Court Cases: Integrated Data Base, 2005, ICPSR Study No. 4382 (2006); Fed. Jud. Ctr., Federal Court Cases: Integrated Data Base, 2004, ICPSR Study No. 4348 (2006); Fed. Jud. Ctr., Federal Court Cases: Integrated Data Base, 2003, ICPSR Study No. 4026 (2005); Fed. Jud. Ctr., Federal Court Cases: Integrated Data Base, 2002, ICPSR Study No. 4059 (2005) [hereinafter, collectively, “FJC Dataset”].

100. In keeping with the casual nature of this empirical inquiry, I make no effort to account for judicial vacancies, on the one hand, or the workload borne by senior judges, on the other. These factors cut in opposite directions for purposes of calculating the average number of exposures per judge on a given court.

101. 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 a single environmental statute. 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: in the First Circuit, six authorized judgeships and thirty-three cases over five years; in the Fifth Circuit, seventeen authorized judgeships, forty-six cases; in the Seventh Circuit, eleven authorized judgeships, forty-four cases. See FJC Dataset, *supra* note 99.

102. See FJC Dataset, *supra* note 99.

103. 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”

there is, of course, a high degree of regional variation in the courts of appeals' exposure to different legal questions. Between 2002 and 2006, for example, the Second Circuit was responsible for more than one-fifth of the securities cases decided by the courts of appeals and, together with the Ninth Circuit, disposed of approximately 45% of the copyright appeals nationwide.¹⁰⁴ In these contexts, at least, the notion of experience-based expertise would appear to have some purchase. But whether the area of law in question is banking, civil RICO, food and 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.¹⁰⁵ At least in connection with areas of federal law yielding such low exposure rates, the experience-based expertise argument is exceedingly difficult to swallow.¹⁰⁶

This, in turn, invites a reprise of the argument presented in the previous Section. Specifically, it raises the question of whether any relative advantage federal courts offer over state courts in terms of their exposure to these areas of law entails an absolute level of exposure that is sufficient for a meaningful expertise benefit to accrue. In some circumstances, it would seem, the incrementally greater experience of federal courts over state courts in the adjudication of a particular question of federal law will produce an expertise-benefit that is, at best, *de minimis*.

For the claim of federal judicial expertise in the interpretation of federal law to be sensible across a wide spectrum of federal laws, then, it cannot quite (or at least it cannot only) be rooted in a subject-specific or, certainly, statute-specific notion of what counts as relevant experience. Instead, the argument must be that significant exposure to cases involving questions of federal law *generally* (i.e., regardless of the particular federal statute at issue) gives federal judges an interpretive advantage when they are called upon to adjudicate individual federal questions. Put otherwise, the argument must be that through their exposure to federal law generally, federal judges develop a "situation

and "Civil Rights Welfare" amount, for the most part, to fewer than ten 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.

104. See FJC Dataset, *supra* note 99.

105. It is worth noting, moreover, that the case quantities discussed in this section include cases decided summarily or by unpublished opinion. Such cases typically command less time and attention from federal judges, and are therefore less likely than cases disposed of through a signed, published opinion to contribute meaningfully to the educative process that implicitly underlies the experience-based expertise justification for federal question jurisdiction.

106. Because so many of these areas of law make up such tiny fragments of the federal docket, while a small number of subject matter areas—such as civil rights cases and employment discrimination cases—dominate civil filings in the federal courts, the notion of experience-based expertise would appear to have purchase in a sizeable fraction of the case federal judges actually hear. But even if this is true, it is a poor argument for establishing (or retaining) *general* federal question jurisdiction. If experience-based expertise is to be the metric, these figures recommend special jurisdictional statutes for the high-traffic areas of law, rather than a sweeping statute ushering all federal question cases into the federal courts.

sense¹⁰⁷—an inchoate set of helpful guiding intuitions—that aids their interpretive efforts whenever they interpret federal law, even federal law that they have encountered only infrequently or not at all.

Seen in this light, however, federal judicial “expertise” looks not so much like substantive mastery as it does vague familiarity. And while general familiarity and comfort working with federal law is surely useful when it comes to sound adjudication of federal questions, it does not provide the same robust support for the allocation of such questions to federal court as would be available were federal judges “experts” in the sense of having sustained experience grappling with the particular substantive legal rules and policy issues at stake in any given case.¹⁰⁸

2. *The Expertise Argument in Decline*

Whatever species of expertise generalist Article III judges bring to bear in the adjudication of federal questions, it is, at times, demonstrably insufficient to drive the construction of our jurisdictional rules. Much of the material indicating that Congress and the Supreme Court harbor doubts as to the lower federal courts’ capacity to contribute meaningfully to a uniform interpretation of federal law signals the same with respect to securing expert adjudication. Thus, numerous congressional enactments requiring the adjudication of certain federal question cases in administrative agencies and specialized courts, as well as judicially created doctrines calling for deference to the judgments of these bodies, have been justified by reference to the lower federal courts’ inability to supply the desired measure of expertise in interpreting and applying the relevant body of law. When the need for expert adjudication is acute, Congress tends to turn away from the (non-specialized) lower federal courts.¹⁰⁹

107. Cf. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 121-57 (1960).

108. See Currie & Goodman, *supra* note 76, at 81 (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).

109. The fact that I rely on the same body of evidence to support my claim that Congress and the Supreme Court harbor doubts as to the lower federal courts’ capacity to serve the interests in both interpretive uniformity and expertise might be taken to diminish the force of each argument individually. At any given time (or, even, in every instance) it is possible that one or the other of these concerns is *really* underwriting the jurisdictional shift or deferential stance and the other may be mere window dressing. But this concern need not detain us for long. Unless either the uniformity-based or expertise-based justifications is always the operative one, while the other is always a makeweight, the sheer quantity of examples of Congress and the Court invoking these interests seems sufficient to cover both bases. In any event, the best reading of the evidence I draw upon here is simply that Congress and the Supreme Court are often concurrently concerned about the lower federal courts’ capacity to serve either of these interests.

One might discount the evidence I rely upon here on the ground that Congress’s invocation of the interests in expert, uniform interpretation of the law are pretexts for steering cases into tribunals likely to produce preferred substantive outcomes. See, e.g., Cecil D. Quillen, Jr.,

Thus, the centralization of appellate review over patent claims in the Federal Circuit was designed, in significant part, to help secure the benefit of expert adjudication in patent cases.¹¹⁰ And 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.¹¹¹ Similarly, the D.C. Circuit's accumulation of expertise in administrative law is widely cited as one of the principal benefits of centralizing review of agency action in that body.¹¹² And, again, 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 decision-making can be expected to flow.¹¹³

Innovation and the U.S. Patent System, 1 Va. L. & Bus. Rev. 207, 229 (2006). But it would take a rather strong version of this argument to support the proposition that concerns relating to uniformity and expertise did little or no work in motivating the establishment of some of these special tribunals. In the area of patent law, for example, even if it is the case that Congress's establishment of the Federal Circuit was driven in part by a desire to increase the frequency with which patents are upheld, it remains the orthodox view that the interest in uniformity loomed large in the process leading to the passage of the Federal Courts Improvement Act. *See, e.g.*, Robert L. Harmon, *Patents and the Federal Circuit* 1161 (8th ed. 2007) ("The Federal Circuit was created, in part, for the purposes of achieving uniformity in the exposition and application of substantive patent law. In creating the Federal Circuit, congressional emphasis was on the need for greater uniformity in patent law and for freeing the judicial process from the forum shopping caused by conflicting patent decisions of the regional circuits.").

110. S. Rep. No. 97-275, at 6 (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 96th 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").

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

112. *See, e.g.*, S. Rep. No. 99-56, at 24 (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.* *Telecomms. Research & Action Ctr. v. Fed. Commc's Comm'n.*, 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 a key benefit 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*, at 24 ("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.").

113. *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (explaining that "well-reasoned views of an expert administrator rest on a body of experience and informed

To be sure, many of the federal question cases that are currently channeled into agencies and specialized courts involve highly technical areas of law. And one should therefore pause 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.

But this line of reasoning proceeds from the premise that experience in the adjudication of federal questions only goes so far. 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 will not yield the desired measure of expertise. In the era of the modern administrative state, this universe is expanding.¹¹⁴

Furthermore, as to those 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 account is endemic to the case law on federal jurisdiction, far less

judgment to which courts and litigants may properly resort for guidance" (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)) (internal quotation marks omitted); *Pharm. Research & Mfrs. of Am. 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."); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-62 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference"); *Chevron U.S.A., Inc. v. Natural Res. Def. 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 the EPA's "great expertise" left it "in a better position to do so," and (3) "[j]udges are not experts in the field."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that "the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"); *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1344 (D.C. Cir. 1989) ("[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), *vacated on other grounds*, 498 U.S. 1117 (1991).

114. My point is not that state courts *are* up to the task of supplying expert adjudication in these contexts; rather, I am asserting that, contrary to the conventional view, the lower federal courts appear not to be up to the task either.

common is sustained discussion of the federal courts' experience with, and concomitant expertise in, the adjudication of federal law.¹¹⁵ 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 the more expertise in the adjudication of federal law is highly valued and, therefore, the subject of sustained attention, the more likely it is that Congress will turn away from the lower federal courts. Adjudication pursuant to the default rules of federal question jurisdiction is far more likely when the matter of expertise operates largely on the periphery of legislative concern. Under those conditions, vague familiarity may do just fine.

III

THE FEDERAL COURTS AS A FRANCHISE

Each of the conventional justifications for the conferral of federal question jurisdiction on the lower federal courts is unsatisfying in important ways. Sweeping changes in the scope and character of federal law that have occurred since the early twentieth century, as well as the significant expansion and changing character of the federal judiciary, have undermined many of the assumptions underlying the bias-uniformity-expertise model. This raises important questions about the federal judiciary and the proper allocation of cases between the state and federal courts. Specifically, to what extent do today's federal courts play a unique role in the federal system? And, 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

115. The Supreme Court's decision in *Grable* provides 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 Prods., Inc. v. Darue Eng'g & Mfg.*, 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 Galler, *supra* note 97; 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. See *supra* text accompanying note 105.

between them?

In attempting to answer these questions, I train my attention on what federal court access means for *lawyers* and *litigants*, and I resist the temptation, reflected in the conventional approach, to speculate as to what federal court adjudication might mean for the content and direction of federal *law*. For while the differences between state and federal court when it comes to the interpretation of the law may be narrow(ing), the contrast in litigants' experience within the two systems is stark. This contrast matters to the attorneys and clients who must make judgments as to where to file (and whether to remove), and a sensible jurisdictional policy should account for it.

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 store 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 do many litigants (and, more to the point, their attorneys) value the opportunity to walk into a 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.¹¹⁶ To be sure, there is significant variation, along a variety of different dimensions, within the federal court system (more on this below¹¹⁷); but in important ways, 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

116. Two disclaimers: First, it turns out that Starbucks is not actually a “franchise” in the technical sense. That is, individual Starbucks stores tend to be company-operated; they are centrally owned and controlled local outposts of the Starbucks Corporation, not independently owned franchises run by individuals licensed to use the Starbucks name, trademark, etc. Second, individual federal courts are, like individual Starbucks stores, better thought of as centrally owned and controlled local outposts (in this case, of the judicial branch of government), rather than individual franchisees with significant autonomy to structure their provision of services or employment practices. Nevertheless, for two reasons, I will continue to use the term “franchise” here. First, it is far catchier than the cumbersome “centrally owned and controlled local outposts.” Second, colloquial use of the word “franchise” appears to be consistent with my conception of the federal courts; the niceties of whether a national chain operates through a franchising arrangement or otherwise are lost on most people. *See, e.g.*, DreamFranchises.com, Starbuck Franchise Facts & Information, <http://www.dreamfranchises.com/starbucksfranchise.asp> (last visited May 30, 2008) (“It’s funny that among all the industry related searches among search engines like Google and Yahoo, the search for ‘Starbucks Franchise’ is among the most popular. Yes thousands of people each month for one reason or another go looking for a ‘starbucks franchise’ online.”). The metaphor is designed to conjure an image of the federal courts as nationwide purveyors of dispute resolution services prized in large part for the regularity of the product they provide.

117. *See infra* text accompanying notes 123-124 & pp. 188-89.

high measure of professionalism and competence. For those called upon to litigate in jurisdictions spread across the country, then, the federal courts are the forum of predictability and stability,¹¹⁸ and, for litigants generally, they represent our legal system's "forum of excellence."¹¹⁹

These features of federal court practice are not foreign to the discourse relating to the proper scope of federal jurisdiction. But they figure more prominently in discussions of diversity jurisdiction than they do in the discussion of federal question cases. To the extent these characteristics of the federal courts do seep into discussions of federal question jurisdiction, they play a peripheral role, as the bias-uniformity-expertise model tends to drive discussion. This Part provides a detailed account of the constituent elements of the Federal Franchise. Part III.B considers the relationship between the Federal Franchise model and principles of jurisdictional allocation.

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. The Federal Rules of Civil Procedure and Appellate Procedure apply throughout the federal judicial system and do not control in state court.¹²⁰ Each state has its own unique codes of procedure governing litigation in its courts.¹²¹ When it comes to the fundamental rules of practice, then, the Federal

118. I develop this point in detail below, but it is worth noting, 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 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 provide strong support for the conclusion that federal courts contribute meaningfully to the uniform interpretation of federal law.

119. I borrow this term from Professor Neuborne. See Neuborne, *Myth*, *supra* note 9.

120. 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 much in common with one another and the federal rules; forty-two states and Puerto Rico have adopted the Federal Rules of Evidence in one form or another. See Jack B. Weinstein et al., *Evidence*, i (9th ed. 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. Moreover, even the states that have adopted the Federal Rules do so to varying degrees. So it seems likely that at least some benefit in terms of homogeneity of evidentiary rules comes with litigating in the federal courts.

121. Many states also use fragments of the Federal Rules of Civil Procedure as a model for their own procedural rules. But the recent trend has been away from state conformity to the Federal Rules of Civil Procedure, see John B. Oakley, *A Fresh Look at the Federal Rules in State*

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 more familiar and predictable. However, as the quantity of states in which a given 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 to navigate the complexities of local practice successfully. The conformity of procedural rules within the Federal Franchise is therefore a significant attraction for these attorneys and, by extension, their clients.¹²²

Of course, the adoption of local rules of procedure by federal district and appellate courts creates variance in the rules of procedure applicable within the federal judiciary.¹²³ Indeed, one commentator, bemoaning the rampant proliferation of local rules, scheduling orders, and local practices, has gone so far as to claim that “federal practice is more fractured than at any time since the Supreme Court prescribed the original federal rules during 1938.”¹²⁴ But the measure of procedural heterogeneity tolerated within the federal system is constrained in important ways. First, 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.¹²⁵ Hence, large portions 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.¹²⁶ And while the success of these efforts has been uneven—

Court, 3 Nev. L.J. 354, 355 (2003), and (as I specify below) the diversity of procedural rules one confronts as one moves from state to state can be dizzying.

122. Another benefit of access to the federal rules of procedure (one not limited to attorneys with significant practice experience in the federal courts) is that the federal rules are adapted to accommodate multi-state cases. *See, e.g.*, David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 328 (1977) (highlighting advantages of the federal rules relating to personal jurisdiction over out-of-state defendants, the reach of the subpoena power, consolidation through the judicial panel on multidistrict litigation, transfer, and other devices).

123. *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*.

124. Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 Notre Dame L. Rev. 533, 533 (2002).

125. *See* Fed. R. Civ. P. 83.

126. Wright et al., *supra* note 123, § 3151 (“[C]oncerns about the variety and content of

significant divergence in rules of practice persist within the federal system¹²⁷—the mere fact that such divergence is widely conceptualized as a problem¹²⁸ is telling. This attitude toward local rulemaking shapes the agenda for regulators that are empowered to limit the discretion granted to 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.

States, of course, are free to enact their own rules of practice and procedure. And variation in such state rules is endemic and potentially bewildering. It is not simply that idiosyncratic rules of procedure might ensnare the untutored outsider (though this is surely a concern¹²⁹). The more

local rules, and about the proliferation of standing orders of individual judges, have led to amendments of both the statute and Rule 83.”); *see also* Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 382, 390-91, 393-94 (2000) (eliminating provisions of the FRCP governing discovery that retained a “local option” for individual federal courts to establish rules different from those prescribed by the FRCP themselves); *id.* at 384 (noting that “[t]he Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice”).

127. 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 Prac. & Proc., Jud. Conference of the United States, *Local Rules Project*, Part I 1 (1988); *see also, e.g.*, Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. Colo. 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.”).

128. *See, e.g.*, Tobias, *supra* note 124, at 543 (lamenting the fact that “[t]he substantive content of . . . local measures and the provision made for their adoption, communication, and application seemed more responsive to the needs of judges, attorneys, and parties in the local districts or of those judges vis-à-vis the counsel and litigants, than to national uniformity . . .”). The basic thrust of Professor Tobias’s argument is at odds with the point I develop here. His article tracks the increasing proliferation of local rules within the federal judiciary and advocates reforms designed to reverse this trend. Still, his argument reinforces my claim that there is widespread agreement that the homogeneity of procedural rules within the federal system (however imperfectly achieved) is a virtue. Indeed, the achievement of such homogeneity has been the stated purpose of numerous innovations in the law of federal civil procedure, beginning with the enactment of the federal rules themselves. *See* Tobias, *supra* note 124, at 537 (“The Committee [that drafted the federal rules] intended to craft a national code of procedure which was simple, uniform, and trans-substantive[.] . . . The Committee correspondingly fostered uniformity by commanding all of the federal districts to apply identical procedures.”).

129. For example, an attorney attempting to initiate a class action in Mississippi might be surprised to learn that it is the only state in the country without a class action procedure of any

fundamental problem is that the very foundations of trial litigation—pleading and discovery—vary in important ways from state to state. Thus, while most states allow for notice pleading, some still require traditional code pleading, meaning that courts differ significantly 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 such allegations must be presented.¹³⁰ Discovery regimes likewise vary significantly from state to state and do so in connection with virtually every facet of the discovery process, from depositions to interrogatories, to document requests.¹³¹ Quite obviously, divergence across legal regimes in the rules governing such fundamental matters taxes the uninitiated.

Variation in procedural rules within the federal system notwithstanding, access to the federal courts permits attorneys with nationwide practices to attain at least basic procedural competence in gross. And this, in turn, means that 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.

One might object, at this point, that I have neglected my earlier admonitions as to comparative thinking when it comes to questions of jurisdictional allocation. That is, even if there is *greater* procedural homogeneity within the federal judicial system than there is among state courts, this ought not to affect our thinking about the proper scope of federal jurisdiction unless, in absolute terms, the procedural homogeneity that characterizes federal court practice provides a meaningful benefit to attorneys with the option of litigating before them. The challenge, in other words, is not simply to identify differences between the state and federal courts, but to identify differences that *matter*. And given the chorus of scholars lamenting the proliferation of local rules within the federal judiciary,¹³² more must be said before procedural homogeneity can sensibly be suggested as a policy-driving feature of federal practice.

And there is plenty more to say. The literature on forum choice strongly suggests that attorneys seriously consider the advantage of litigating on familiar

kind. Mississippi crams all would-be class actions into joinder rules that were never intended to accommodate mass litigation. See Robert H. Klonoff, *The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 Miss. C. L. Rev. 261, 261 (2005).

130. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* 253 & n.15, 293-94 (4th ed. 2005); see also Oakley, *supra* note 121, at 361-82 (surveying different pleading regimes applicable in the state courts).

131. See Oakley, *supra* note 121, at 401-02; see also Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 Vand. L. Rev. 1167, 1184-87, 1210-46 (2005) (describing widespread variance in rules of discovery among state courts). Koppel also emphasizes the difficulties created within the federal system, from the perspective of procedural uniformity, as a result of the proliferation of local rules. Koppel, *supra*, at 1179-84.

132. E.g., Tobias, *supra* note 124; Koppel, *supra* note 131.

procedural turf and that the commonality of procedural rules across the federal system supplies a meaningful benefit to attorneys called upon to litigate in different courts across the country. For example, in discussing the litigation of civil rights claims, Professor Neuborne explained as follows:

The existence of a fair degree of nationwide procedural uniformity, whatever its content, acts as a powerful magnet drawing constitutional litigation into the federal courts. . . . Were each constitutional case to be litigated under the bewildering array of state procedures currently in use, the capacity of a relatively small, centralized bar to respond to complex cases in unfamiliar procedural settings would be seriously impaired.¹³³

Empirical studies of attorney preferences as between state and federal court likewise indicate that “[l]awyers’ familiarity with and partiality for state or federal procedural rules” had a significant impact on their choice of forum.¹³⁴ As one commentator explained: “[s]ome attorneys prefer the familiarity of federal procedure to filing in a county where they do not regularly practice because ‘federal courts all speak the same language.’”¹³⁵ “[A]cross all locations,” one study revealed, attorneys who filed in federal court “rated . . . their general preference for the federal rules of procedure among the most important reasons for choosing the federal courts.”¹³⁶ Indeed, though the establishment of diversity jurisdiction has long been justified by reference to fear of bias against out-of-staters, the study revealed that “in most instances, local factors related to relative court efficiency *and the attorney’s familiarity with state or federal courts* are more important [to a filing decision] than any perceived bias.”¹³⁷

133. Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 Wm. & Mary L. Rev. 725, 733-34 (1981); see also *id.* at 734-35 (discussing the value of procedural familiarity to civil rights litigators).

134. Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 Law & Soc’y Rev. 749, 772 (1981).

135. Victor E. Flango, *Attorneys’ Perspectives on Choice of Forum in Diversity Cases*, 25 Akron L. Rev. 41, 71 (1991); see also Bumiller, *supra* note 134, at 772 (“[T]he choice of forum . . . is influenced by the existence of separate state and federal ‘cultures of attorneys’ which result from lawyers’ familiarity with and partiality for state or federal procedural rules.”) (emphasis added); *cf. id.* at 770 (“Among lawyers in the state sample who, when given the hypothetical situation would choose to remain in state court, the chief concerns are familiarity with judges and preference for the rules of procedure in state courts.”).

136. Bumiller, *supra* note 134, at 770. In the Flango study, fully half of the attorneys in a sample drawn from federal court filings classified “familiarity with court operations” as “important” or “very important” to their choice of forum, while only 26% deemed this factor “unimportant.” See Flango, *supra* note 135, at 58-61. To these attorneys, “familiarity with courts operations” was the seventh most significant of thirty-one factors influencing their choice of forum; of the six factors ranked as important or very important by a larger number of attorneys, most related to the residency of the litigants or the competence and quality of the judges. *Id.*

137. Bumiller, *supra* note 134, at 752 (emphasis added). *But see* Flango, *supra* note 135, at 58-61 (finding familiarity with court operations to be among the more significant factors influencing the decision to file in federal court, but less significant than litigant status as an in-

Hence, the establishment of a national franchise of courts, with basic procedural rules held in common across the franchise, carries the promise of shifting lawyers onto or off of their favored procedural terrain. There is significant evidence that attorneys care about these procedural differences and sometimes shape their choice of forum around them.

2. The Distinct Cultures of State and Federal Court

The notion that “federal courts all speak the same language” speaks to more than just codified rules of procedure, for a litigator’s comfort zone is fashioned not only through deep knowledge of the applicable substantive law and procedural rules, but also through familiarity with the trappings and uncodified conventions of the setting in which she litigates. Such familiarity determines, to a great extent, whether an attorney feels “at home” when litigating in a particular forum. Access to the federal courts can benefit practitioners along this dimension by providing a measure of cultural homogeneity across courts 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 explicit rules of dealing, but more subtle cultural norms as well. This requires time, energy, and significant resources if it is to be done in shop after shop after shop.¹³⁸

stater or out-of-stater).

138. I am not suggesting 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 am I suggesting 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 that, in addition to having their own rules of practice and procedure, state courts (particularly at the trial level) have their own unique cultures and that, in some circumstances, it can be extremely challenging for an outsider to adapt to them.

Nor, finally, 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 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 will often be better able to do within a familiar legal culture and under familiar rules of practice

Individual outposts within a 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 consumers who have never before entered the particular branch in which they happen to find themselves on a given occasion. In many ways, the federal judiciary operates in precisely this fashion. It offers a standardized, highly professional, elite legal culture in which a certain kind of attorney and client (more on this later¹³⁹) will feel at home.

Numerous factors contribute to the standardization of legal culture within the federal judicial system. Judges across the system are selected through the same mechanism of presidential nomination and Senate confirmation. For the most part, these judges select clerks through a single process and from the same applicant pool of recent law school graduates.¹⁴⁰ Funding for individual districts and courts is coordinated through a single bureaucracy, thus assuring a measure of equity in resource allocation across the system. Moreover, as Professor Resnik has emphasized, through the establishment of the Judicial Conference of the United States and the Administrative Office of U.S. Courts, the federal judiciary has developed a kind of “corporate persona,”¹⁴¹ as well as “a means of conversing internally and a basis upon which to develop programmatic aspirations.”¹⁴² The array of issues now addressed by “The Federal Courts” as a collective (through the Judicial Conference and AO) include “federal judges’ salaries, their cost of living increases, pensions, travel budgets, sharing courtrooms (as compared to having a courtroom of one’s own), building and maintenance, staff and employment policies, and the nature of federal judges’ assignments, that is, jurisdictional grants.”¹⁴³ The Judicial Conference has also served as a vehicle through which the federal judiciary seeks to educate its members by conducting seminars and through the publication and circulation of written materials.¹⁴⁴ These educative processes help to spread across the federal bench a sense of “how we do things here.” Collaborative efforts such as these provide opportunities for federal judges to work and learn together and foster a sense of shared endeavor. And while some

and procedure—to the prospect of stumbling upon a jurisdiction with a legal culture that somehow suits the attorney particularly well.

139. See *infra* text accompanying notes 182-183.

140. 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. See Neuborne, *Myth*, *supra* note 9, at 1122. I address the issue of technical competence below. See *infra* Part III.A.3. For present purposes, however, I mean to emphasize that judges who are selected through a single process (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 processes of election by non-overlapping bodies of varying size or appointment by different individuals.

141. Resnik, *supra* note 93, at 929.

142. *Id.* at 938.

143. *Id.* at 955.

144. *Id.* at 944-46.

of the issues addressed by federal judges in these contexts do not affect litigants directly, it is plausible that repeated collaboration among judges, on whatever job-related subjects, contributes to the homogenization of culture within the courtroom.

I do not wish to overstate the point. Individuals can work together to advance common goals while still operating quite differently from one another in performing professional responsibilities outside of the collective. For example, though members of a law faculty work together on all manner of administrative tasks (hiring, tenure decisions, admissions, building projects, etc.), there is, typically, significant diversity in the “culture” of individual faculty member’s classrooms. Still, it seems uncontroversial to suggest that the conventions and ethos of an institution are spread among members, in part, through collaborative undertakings and that the sharing of these conventions will affect the performance of tasks that are part of the institution’s mission, but undertaken on an individual basis.

Among the most prominent features of the culture of the federal judiciary is its status as an elite national institution, a “distinctive and unique venue.”¹⁴⁵ This status attaches to the judges who sit on the federal bench and the attorneys who appear before them regularly. As one commentator has noted, federal courts serve as “the flagship of the national elite of the bar.”¹⁴⁶ In contemporary legal culture, federal court is the place where important matters are decided *by* important people *for* important people.¹⁴⁷ The fact that this perception of the

145. *Id.* at 929. Federal judges have taken an active role in preserving their elevated place in the hierarchy of our legal culture. This is evident, for example, in the Judicial Conference’s opposition to the conferral of Article III status on bankruptcy judges, see Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 Harv. J. on Legis. 1, 7-12 (1985) (detailing aggressive lobbying efforts of Chief Justice Burger and the Judicial Conference in connection with the Bankruptcy Act of 1978), and in Chief Justice Warren’s opposition to the conferral of Article III status on Tax Court judges, see Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 Cornell L. Rev. 985, 993 (1991). In addition, as Professor Resnik has documented, over the course of the twentieth century, the Judicial Conference has lobbied more and more in opposition to the expansion of federal jurisdiction. See generally Resnik, *supra* note 93, at 967-69, 974-79. Constraining the scope of federal jurisdiction can be a means of assuring that federal courts are not compelled to hear cases thought to be unimportant and so “beneath them,” and/or a means of assuring that the federal docket does not grow so large as to require the appointment of many more federal judges thereby diluting the prestige associated with appointment to the Article III judiciary.

146. See Paul D. Carrington, *Class Struggle in Civil Procedure: A Dialogue* 34-35 (unpublished and undated manuscript, on file with author).

147. On federal court being the forum for the decision of “important” matters, see Resnik, *supra* note 93, at 968-69. On the relationship between confining federal jurisdiction to important matters and the caliber of federal judges, see Frankfurter & Landis, *supra* note 25, at 251 (“[M]en of large scope and intellectual distinction—the kind of lawyers who alone ought to be put on the district courts—will refuse to be drawn into police court work.”). And, on the elite status of attorneys who practice before the federal courts, see Resnik, *supra* note 93, at 973 (discussing the ABA’s suggestion to the Judicial Conference in the 1920s that the federal courts establish special standards for the admission of lawyers).

federal courts is so widely held both reflects and helps constitute the distinctiveness of federal court culture.

The cultural cohesiveness of the federal court system allows attorneys with experience litigating in the national courts to develop a kind of cultural competence at the wholesale level and thereby to feel a sense of comfort and familiarity as they practice across that system. Cultural competence encompasses a vast and diverse array of features of the litigation process. It includes knowing: whether, when, and where to stand in court; what sorts of direct communication with the judge's chambers are appropriate; whether to enlist the court in the process of encouraging settlement; and whether the judge will tolerate a measure of informality. In the extreme, cultural competence might extend to knowing whose name to drop in the hope of currying favor with the judge. But even outside the extreme case, in the aggregate, unfamiliarity with these and other nuances of court culture can leave an attorney feeling out of place.

To see how different the state and federal courts are in this respect, 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.¹⁴⁸ 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."¹⁴⁹ Moreover, it would be entirely reasonable for you to count an attorney's extensive 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. 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 partly because of the federal system's high measure of procedural homogeneity. But it is also attributable to the fact that the federal courts, despite important cultural differences between them (many of which

148. 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 the perceived value of 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.

149. In part, when attorneys tout their practice experience in the federal courts in such 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 with—indeed, it supplies part of the content behind—my claim that the federal judiciary is characterized by a high measure of cultural conformity.

likely mirror broader, regional differences in culture), are characterized by a high measure of cultural conformity that permits the federal litigator to experience herself as an insider as she moves from court to court within the system.

Along this dimension, too, the relevant empirical literature indicates that state and federal courts are perceived as distinct, and that the cultural distinctions between the two court systems loom large when filing decisions are made.¹⁵⁰ Thus, one study of cases filed in state court and removed to federal court revealed that “among plaintiff attorneys, familiarity with state court was the single most frequently cited reason for filing decisions,”¹⁵¹ and that more than 60% of attorneys who removed qualified cases to federal court were motivated, in part, by “attorney convenience” (an umbrella term comprising factors including “familiarity with court operations”).¹⁵² Moreover, among defense attorneys for whom federal court practice constituted more than 50% of their work, 77% cited familiarity with federal court as a factor in their decision to remove.¹⁵³ “By removal,” noted authorities have explained, “the defendant defeats the plaintiff’s forum advantage, inducing such changes as dislodging the plaintiff’s lawyer from a familiar and favored forum, and more generally reversing the various biases, costs and other kinds of inconveniences . . . that led the plaintiff to prefer state court.”¹⁵⁴

It is surely the case, of course, that 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 earlier, “steeped in the unique culture of that particular [place].”¹⁵⁵ And to the extent this is true, cultural competence is less portable, even within the federal system. Indeed, the phenomenon of law firms (including very large firms with thriving federal court practices) routinely

150. Bumiller, *supra* note 134, at 772; *see also* Flango, *supra* note 135, at 92 (noting that, along with “quality of judges,” “familiarity with court operations” was most closely associated with attorneys’ decisions whether to file in state or federal court).

151. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 425 (1992).

152. *Id.* at 400-01. Attorney convenience ranked behind only one factor—“judge qualities”—in supplying a reason for these attorneys’ perception of an advantage in federal court. *Id.* For purposes of this survey, “attorney convenience” includes “familiarity with court operations,” “geographic convenience for self or client,” and burdensomeness of pretrial filing requirements. *Id.* at 403. Though the study does not break down its findings relating to “attorney convenience” among these distinct factors, it appears that, for those respondents not appearing in rural state courts (roughly 80% of the sample), geographic convenience was a relatively less significant factor, which suggests that familiarity with court operations and/or pretrial filing requirements pulled the laboring oar. *Id.* This is consistent with the findings of the Flango study. *See* Flango, *supra* note 135, at 75, 78 (“most attorneys perceived no difference between state and federal courts in terms of geographical convenience”).

153. Miller, *supra* note 151, at 402-03.

154. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 599 (1998).

155. *See supra* p. 139.

retaining local counsel to aid with practice in individual U.S. district courts and even circuit courts suggests that, even within the federal judiciary, legal culture is constructed at the local and not the national level.¹⁵⁶ 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 case that the overwhelming majority of practitioners fall far short of attaining genuine cultural competence in most of the 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 insider status on a court-by-court basis, federal courts might still be able to provide litigators with benefits relating to judicial culture. This stems from 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 further in state court than it does in the federal system and, hence, access to federal court can help an attorney or litigant to neutralize the disadvantages of outsider status.¹⁵⁷

Standards of professionalism among state courts, particularly at the trial level, are lower than they are among federal courts, and the likelihood of local, personal relationships coming into play in the far smaller trial-level units of the state judiciaries is higher.¹⁵⁸ 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 noted in the context of a 2006 *New York Times* exposé of New York State's shabby system of Town and Village Courts:¹⁵⁹ “[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.”¹⁶⁰ The

156. See Purcell, *supra* note 50, at 717 (noting the importance of “local ‘federal courtroom culture,’ the complex of assumptions, attitudes, and practices that characterize[] [a] state’s elite federal bench and bar”).

157. This, of course, is one of the crucial premises underlying the establishment of diversity jurisdiction. See *supra* note 12 and accompanying text.

158. Cf. Georg Simmel, *The Sociology of Georg Simmel* 96-97 (Kurt H. Wolff trans. & 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”).

159. 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 New York State Unified Court System, Town & Village Courts Introduction, <http://www.courts.state.ny.us/courts/townandvillage/introduction.shtml> (last visited Nov. 18, 2008). 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.*

160. William Glaberson, *Broken Bench: In Tiny Courts of New York, Abuses of Law and*

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.”¹⁶¹

Further evidence of this phenomenon can be found in the empirical literature:

One defendant’s attorney in South Carolina removed a case to federal court because the plaintiff’s attorney was a small county senator. The federal jury would be drawn from a wider area, not just the plaintiff’s county. . . . A Milwaukee attorney removed to federal court because the case involved a large industry from a small town where the plaintiff was an important businessperson in the community. Several other attorneys feared the influence of the opposing party’s family in the county or the hometown influence of a corporation in a community. The incidence of fear of bias supports a theory that out-of-state residents seek protection from the ‘provincialism’ of rural areas.¹⁶²

In another study, attorneys who expressed a preference for federal court explained that preference by reference to “cases where the state judge formerly represented the plaintiff, where the judge had been a law partner of the plaintiff attorney, where plaintiff attorney was a political supporter of the judge, and where plaintiff attorney was a politically important local figure.”¹⁶³ The point is perhaps best encapsulated by a comment made by one attorney who generally preferred to remove cases from state courts in smaller, rural counties: “I remove qualified cases to federal court . . . to avoid being ‘home-towned’ by the judge and/or jury.”¹⁶⁴

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.¹⁶⁵ My point, rather, is that on the whole, it is reasonable to expect the idiosyncrasies of local culture to carry 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

Power, N.Y. Times, Sept. 25, 2006, at A1 [hereinafter Glaberson, *Tiny Courts*].

161. William Glaberson, *Broken Bench: Small-Town Justice, With Trial and Error*, N.Y. Times, Sept. 26, 2006, at A1 [hereinafter Glaberson, *Small-Town Justice*].

162. Bumiller, *supra* note 134, at 760-61.

163. Miller, *supra* note 151, at 412; *see also id.* at 428 (“[R]espondents described how locality-based bias operates, for example, through the medium of politically powerful and respected local attorneys influencing local juries.”).

164. Flango, *supra* note 135, at 64.

165. Indeed, the authors of each of the empirical studies on which I rely heavily here emphasize that the reasons for attorney preferences for federal court reflect significant regional variation and, as is evident from the passages quoted above, insider status and immersion in the unique culture of a particular state court tend to affect forum selection more dramatically in smaller, rural counties. *Cf.* Shapiro, *supra* note 122, at 332-40 (discussing regional variation in the soundness of justifications for diversity jurisdiction).

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."¹⁶⁶ The core of his argument is that because the federal judiciary is far smaller than the state judiciaries (in the aggregate),¹⁶⁷ and because federal judgeships are generally better compensated and more prestigious than state judgeships,¹⁶⁸ 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 in a state judgeship.¹⁶⁹ 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."¹⁷⁰ Finally, Neuborne notes that significant disparities in the caliber of judicial clerks in the two systems, as well as the heavier caseload faced by most state court judges, would yield a higher level of performance by federal judges, even if members of the state and federal benches were, on

166. Neuborne, *Myth*, *supra* note 9, 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 she is not, generally speaking, an especially talented legal analyst. See Marvell, *supra* note 25, at 1333-35 (classifying "expertise" and "caliber of judges" as distinct justifications for the establishment of federal question jurisdiction, but asserting that the latter "is a marginal reason for the existence of federal question jurisdiction" that is "not mentioned often").

167. Neuborne noted that, at the time of his writing, there were "about twice as many judges in California as in the entire federal system." Neuborne, *Myth*, *supra* note 9, at 1121. California currently employs nearly 1,500 judges and more than 2,000 "judicial officers," see Jud. Council of Cal., Admin. Off. of the Courts, 2007 Court Statistics Report, xiii, 143, again nearly doubling the total number of judges in the Article III judiciary.

168. Neuborne, *Myth*, *supra* note 9, 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 United States Courts, Judicial Salaries Since 1968, <http://www.uscourts.gov/salarychart.pdf>. Trial judges in the New York state courts, however, 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 Nat'l Ctr. for State Courts, Judicial Compensation in New York: A National Perspective 24 (2006). For both trial and appellate judges, then, the best paid members of the New York State judiciary earn approximately 82% as much as their federal counterparts.

169. Neuborne, *Myth*, *supra* note 9, at 1121-22.

170. *Id.* at 1122.

average, equally talented.¹⁷¹

There is, understandably, a fair bit of tiptoeing around this point in the relevant literature and case law.¹⁷² It is unseemly to speak of a talent gap between one pool of judges and another (especially 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 craftsmen than their counterparts on the state courts. And, tiptoeing to one side, it is not difficult to identify commentators who share this view.¹⁷³ The first set of observations offered by Neuborne on this subject represent the most persuasive considerations. Federal judgeships are more prestigious and pay significantly better 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.

The *New York Times* account discussed in the prior Section provides a stark indication of just how low the floor can be in state court when it comes to legal sophistication:

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

171. *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”).

172. *See, e.g.*, ALI Study, *supra* note 4, 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”); Redish, *supra* note 4, 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”); Wells, *Disparity*, *supra* note 28, at 298 (noting that “[o]ut of sensitivity or decorum,” critics of doctrines constraining federal court jurisdiction “generally refrain from direct attacks on state judges”).

173. *See, e.g.*, Friendly, *supra* note 80, at 146 (acknowledging that federal trial courts are “somewhat better” than most state courts); Shapiro, *supra* note 122, at 329 (suggesting that “federal courts may provide . . . in some areas, better judges, at least at the trial level”); Wells, “*Available State Remedies*”, *supra* note 4, at 1683 (“[F]ederal judges are, generally speaking, likely to be more talented than state judges.”).

candidate since 1999 had failed.¹⁷⁴

The empirical evidence relating to forum choice likewise indicates that attorneys perceive a competence gap between the state and federal courts and that this gap plays a prominent role in filing decisions. Thus, the author of one study noted that “the perceived higher quality [of] judges in the federal courts is a consistently important factor [driving filing decisions].”¹⁷⁵ And another study revealed that attorneys mentioned “judicial qualities” more often than any other factor as a reason for filing in federal court,¹⁷⁶ and that among these qualities, “judicial competency was by far the most important reason cited for [the choice of forum].”¹⁷⁷ The author reported, further, that “[v]irtually all of the defense attorneys and a large proportion of the plaintiff attorneys said that federal judges are more competent.”¹⁷⁸

Hence, in addition to offering a familiar procedural and cultural space to attorneys called upon to litigate in forums scattered across the country, federal jurisdiction provides access to a bench widely thought to be of high(er) caliber. When one adds to the mix the resource advantage that federal judges typically enjoy over state court judges in terms of clerks, support staff, information management, and physical facilities,¹⁷⁹ the points relating to judicial competence and federal court culture merge to fill out our picture of the Federal Franchise. The picture is one in which a professional, competent judge is endowed with resources that facilitate the efficient management of litigation and the rendering of a sound, informed judgment worthy of respect.

B. The Federal Franchise and Jurisdictional Allocation

So what does all of this mean for purposes of allocating cases between the

174. Glaberson, *Tiny Courts*, *supra* note 160, at A1; *see also id.* (“Again and again, the commission’s records show, justices have failed to remove themselves from cases involving their own families.”).

175. Bumiller, *supra* note 134, at 768.

176. Miller, *supra* note 151, at 400; *see also id.* at 431 (“Comparative judicial qualities, such as competency concerns, are much more significant to attorneys’ forum selection than concerns about bias.”).

177. *Id.* at 414. More than half of the attorneys citing judicial competence as a reason for selecting federal court classified it as a “very strong” reason for doing so. *Id.* at 414-15.

178. *Id.* at 433; *see also* Flango, *supra* note 135, at 69 (“Over half of the attorneys identified from state cases (55%) and 79% of the attorneys identified from federal cases regarded the overall competence of the judiciary and the quality of the judges as reasons for choosing federal court.”); *id.* at 81 (“Attorneys who consider competency of the judiciary as a major consideration in forum selection decision tend to favor federal courts.”); Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. Leg. Stud. 93, 98 (1980) (reporting that “judges are superior” was the reason most frequently cited by attorneys for their decision to file diversity cases in federal court).

179. *See, e.g.*, Flango, *supra* note 135, at 106 (“Attorneys who usually practice before federal courts saw judges as better trained and better supported with clerks, interns and law libraries. This type of comment indicates that the greater resources available to federal courts is one reason that the ‘quality’ of judges is perceived to be better.”).

state and federal courts? More specifically, if the most important differences between the systems reside in the franchise-like quality of the federal judiciary, and not in federal judges' capacity to provide an evenhanded, uniform, expert interpretation of the law, what does this mean for the future of federal question jurisdiction? The answer, as I detail in this section, does not come in the form of a bright-line rule; the Federal Franchise model supplies no strict formula directing the extension of federal question jurisdiction to some cases or its denial in others. Instead, the model tells us *how to think* about the allocation of federal question cases between state and federal courts. In sharp contrast to the conventional approach, the Federal Franchise model does not frame this question of jurisdictional allocation as a matter of basic constitutional structure or sound federalism. Instead, it highlights the political character of this allocative decision and focuses on the distributive consequences of alternative jurisdictional arrangements.

1. The Nature of Jurisdictional Allocation

a. Insider Status and Jurisdictional Allocation

The conferral of federal jurisdiction over a class of cases can have significant ramifications for the dynamics of insider status in litigation. As discussed in the previous section, attorneys often have strong preferences for either state or federal court based on their relative familiarity with the procedural rules and cultural norms that prevail in each. When only state courts have subject matter jurisdiction over a given class of cases, plaintiffs are free (personal jurisdiction permitting) to file in the state tribunal they find most convenient and/or familiar. For defendants (particularly, non-local ones), this could mean being forced to litigate on unfamiliar turf; and this, in turn, might mean hiring local counsel, paying handsomely to a national law firm that has already invested in broadening the scope of its procedural competence and cultural capital, or simply foregoing the benefit of procedurally competent, insider counsel. For defendants called upon to litigate frequently in courts scattered across the country, a significant expenditure of resources would be necessary to avoid repeatedly being handicapped in court by outsider status. When the federal courts are available, however, the insider/outsider dynamic may be turned on its head. “[A]ttorneys who are unfamiliar with federal court will be forced to litigate in the federal courts,” and “[their] [c]lients will face disadvantages due to their attorneys’ lack of experience, including the possibility of paying higher fees to cover the costs of attorney on-the-job training.”¹⁸⁰

180. Miller, *supra* note 151, at 446; *see also* Bumiller, *supra* note 134, at 771 (“[S]ome attorneys have a ‘state court partiality’ and little experience or desire to litigate in the federal courts.”); Clermont & Eisenberg, *supra* note 154, at 599 (noting that removal to federal court has

Federal question cases are, of course, witness to a wide variety of alignments, with individuals, corporations, and government entities playing the role of plaintiff or defendant at different times. And many such cases pit locals against one another. Nevertheless, other than the United States government (which is the subject of a discrete head of jurisdiction in Article III),¹⁸¹ the parties most likely to become ensnared in litigation in forums spread throughout the country are corporations engaged in commercial activity on a more or less nationwide basis. These corporations, moreover (often defendants), are more likely than either private individuals or corporate entities doing business on a geographically circumscribed scale to be represented by elite lawyers practicing at elite, national law firms that undertake a relatively large share of federal court litigation.¹⁸² For these lawyers and their clients, access to a national judicial franchise is particularly valuable, and it is on these parties and attorneys that many of the benefits provided by federal court access are concentrated.¹⁸³

Observing this fact, however, only tees up the jurisdictional question, it does not answer it. This is because acknowledging the fact that the benefits of federal court access are concentrated on identifiable parties introduces a “baseline” problem to the task of jurisdictional allocation. The conferral of federal jurisdiction permits attorneys with nationwide practices and parties who find themselves litigating in many different jurisdictions to force adversaries off of their home turf and thereby to neutralize the cultural capital these adversaries have taken pains to cultivate. But is it *unfair* for these lawyers and litigants to be able to file in (or remove to) the forum they find more comfortable? Or does denying federal court access unfairly burden national litigants and lawyers with the tasks of adapting to the procedural idiosyncrasies of state court practice and compensating for the near-monopoly on cultural capital enjoyed by locals? Who should bear the costs of being an outsider?

There are many ways of thinking about this question. To the extent the advantage enjoyed by state court insiders is the stuff of reciprocal favors among longtime professional acquaintances (recall: “we are all more or less friends up

the effect of “dislodging the plaintiff’s lawyer from a familiar and favored forum, and more generally reversing the various biases, costs and other kinds of inconveniences . . . that led the plaintiff to prefer state court.”)

181. U.S. Const. art. III, § 2, cl. 2 (conferring jurisdiction on the federal courts over “controversies to which the United States shall be a Party”).

182. See Miller, *supra* note 151, at 398-99.

183. The picture I paint here—of the corporate defendant as the outsider in state court, and the individual plaintiff as the insider—will not, of course, accurately depict the operation of the insider-outsider dynamic in every case. Attorneys other than those at elite national firms (and, by extension, their clients) can enjoy the benefits that come with repeat-playing in the federal courts. And some of the most extreme cases of insider advantage involve corporations litigating in state courts in their own backyards. See, e.g., Bumiller, *supra* note 134, at 761 (noting that several attorneys feared “the hometown influence of a corporation in a community.”).

there¹⁸⁴), the argument for federal court access is stronger. For while the fact that one party or another enjoys the benefits of insider status is not always pernicious (and is sometimes unavoidable), when that status takes on the form of simple cronyism, it should be stifled. As the discussion in Part III.A suggests, however, outright judicial prejudice against outsiders is not a prerequisite to the existence of an insider advantage. Some lawyers practice frequently in Michigan; others do not. And while the former may well enjoy a leg-up on the latter when litigating in Michigan courts, it is far from clear that this is reason to extend federal court jurisdiction to cases in which this asymmetry exists.¹⁸⁵ Where insider status is not accompanied by blatant prejudice in favor of regulars, the argument for federal jurisdiction on the basis of the factors highlighted by the Federal Franchise model is less compelling.

Moreover, the costs of outsider status may fall more heavily on the shoulders of some lawyers/litigants than others. It is possible, that is, that corporate defendants represented by elite national law firms are (due to resource advantages) better able to compensate for their outsider status in state court than, say, an individual plaintiff represented by a solo practitioner who is forced to litigate in an unfamiliar federal tribunal. Where insider status is a zero-sum game—either the local lawyer gets to do battle in her own backyard or the seasoned federal litigator can access the more familiar federal system—we might want to place the burden of outsiderism on the party best able to bear it.

The Federal Franchise model does not tell us which of these perspectives on the insider/outsider dynamic is more appropriate. Observing the franchise-like qualities of the federal judiciary therefore does not lead ineluctably to any particular allocation of cases between the state and federal courts. Instead, the model provides guidance by highlighting the fact that *these* questions merit careful consideration when allocative judgments are made. The model makes clear that a judgment as to whether federal jurisdiction is to exist is unavoidably a judgment about how the dynamics of insiderism are to play out. This judgment is inherently a distributive 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.

b. Technical Competence and Jurisdictional Allocation

The federal courts' comparative advantage over the state courts in terms of resources and technical competence likewise yields no detailed prescription for purposes of jurisdictional allocation. It begs the question: which cases merit

184. See *supra* note 161 and accompanying text.

185. Indeed, if asymmetric levels of comfort and familiarity alone were sufficient to justify allowing a party to opt out of a particular forum, this would trigger a game of jurisdictional ping-pong any time one party felt more at home in state, and the other in federal, court.

the attention of the most able and well-supported 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.¹⁸⁶ Alternatively, 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.¹⁸⁷ One might reason, instead, 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. Reasonable arguments could be made in support of each of these propositions.

I do not think we can say, *ex ante*, that a particular class of litigants stands to benefit most from having cases heard by judges possessed of superior technical competence. (Are technically competent judges likely to produce outcomes that benefit plaintiffs or defendants? Corporations or individuals? The individual or the State?)¹⁸⁸ Hence, considerations of distributive justice

186. The existence of federal habeas corpus review for state court criminal convictions—though significantly constrained by federal statute and judicial doctrine—proceeds from precisely this premise.

187. See, e.g., Friendly, *supra* note 80, at 90; Chemerinsky & Kramer, *supra* note 30, at 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 . . .").

188. 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. This is so, he argues, because constitutional claimants bear a special burden by virtue of their seeking to upset judgments that enjoy the imprimatur of democratic decision-making and, in some cases, long-established tradition. Judges with greater technical competence, he claims, are more likely to comprehend possibly complicated arguments as to why the law requires a break from the status quo. Neuborne, *Myth*, *supra* note 9, at 1123. As Professor Neuborne acknowledges, however, 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, 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.

Professor Neuborne also claims 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." *Id.* at 1123. And this, he claims, provides an additional reason to believe that technically competent courts are likely to be more inviting for constitutional claimants. *Id.* at 1124. 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

appear to be a non-starter in this context. Accordingly, while it seems perfectly sensible to take the position that federal question jurisdiction should extend to “the most important cases” (so that we may take advantage, in these cases, of the technical competence of federal judges), this intuition falls far short of supplying detailed guidance to those charged with crafting jurisdictional policy.

Still, note the difference in character between the considerations encouraged by this fragment of the Federal Franchise model and the considerations we typically focus on when working within the conventional approach. If one accepts the central tenets of the conventional view—if one believes that only the federal courts can be relied upon to provide evenhanded, uniform, expert interpretation of federal questions—the argument for expansive federal question jurisdiction follows almost ineluctably. This is because basic principles of federal supremacy, as well as the foundational premise that national law should apply equally across the country,¹⁸⁹ militate powerfully against the exercise of jurisdiction by tribunals that cannot be relied upon to provide an unbiased, reasonably uniform construction of federal law. But while the conventional approach encourages jurisdictional decision-making by reference to these bedrock principles of federalism, the Federal Franchise model would have such decision-making pivot on largely political judgments as to the relative importance of different classes of cases and, as noted in the prior section, on questions of distributive justice.¹⁹⁰

c. Different Branches, Different Directives

The analysis here yields two suggestions for those called upon to set jurisdictional policy. First, it discourages heavy reliance on the bias-uniformity-expertise construct. Second, it encourages policymakers to treat the design of a jurisdictional regime as a matter of politics and distributive justice rather than

to carry greater weight than an inarticulate opinion of the same general ilk. On the whole, I am inclined to agree with Dean Chemerinsky’s claim that “there is no reason that better judges are necessarily more disposed toward safeguarding individual liberties.” Chemerinsky, *supra* note 4, at 278.

189. See Seinfeld, *supra* note 2, at 573.

190. There are hazards associated with encouraging Congress to think and talk openly about jurisdictional allocation in distributive terms. In particular, doing so might invite powerful interests to attempt to capture the process of jurisdictional lawmaking, and there is cause to wonder whether the conception of distributive justice likely to be instantiated in law as a result of such a process will be satisfying. But this concern does not strike me as sufficient reason to ignore the distributive character of jurisdictional lawmaking or to keep it under wraps. To begin with, there are often powerful interests, fully capable of exerting influence on the federal legislative process, on either side of a jurisdictional issue, so efforts at capture may trigger natural countermeasures. Moreover, parties with the sophistication and resources to shape Congress’s construction of jurisdictional policy to accommodate their own ends are likely to do so whether or not Congress’s consideration of the distributive consequences of jurisdictional decisions is transparent. If anything, encouraging congressional candor along this dimension carries the promise of attracting parties to the bargaining table who might otherwise be absent.

constitutional principle.¹⁹¹

However, these directives operate differently for Congress and the federal courts, for while Congress must be attentive to both of these considerations, the latter directive applies to the courts only conditionally. Unless and until Congress undertakes to redraw our jurisdictional lines in light of a particular vision of how the costs and benefits of outsider status in litigation should be distributed, and in light of its conception of which cases merit the attention of the most technically competent judges, it would be inappropriate for federal judges to reshape the law of federal jurisdiction by reference to these considerations.

To begin with, without legislative intervention such a change in jurisdictional doctrine would be impossible to justify by reference to statutory text or legislative intent,¹⁹² and even if it would be a good idea for Congress to reshape the law of federal question jurisdiction in light of the concerns that lie at the heart of the Federal Franchise model, that does not mean courts should simply pretend that it already has. If Congress were to inject considerations of distributive justice into the jurisdictional calculus, it would be perfectly appropriate for a federal judge to fill in gaps and ambiguities in the resulting statutory scheme in light of her best understanding of the conception of distributive justice embraced by Congress. But any move in this direction by the courts prior to congressional action would raise concerns of institutional legitimacy and would inject even more uncertainty into the law of federal jurisdiction than exists already.¹⁹³

191. As we have seen, the model also sheds light on what some of the distributive consequences of different jurisdictional regimes might be.

192. In fairness, this would not distinguish this particular jurisdictional doctrine from other important fragments of our jurisdictional scheme. *See* Seinfeld, *supra* note 2, at 545 n.25 (noting that the well-pleaded complaint rule cannot be justified by reference to the text or legislative history of the federal question statute).

193. Of course, one hopes that congressional consideration of these issues would yield more detailed guidance than is provided by our current federal question statute and its legislative history. If it did not—if, for example, Congress considered the relevance of the franchise-like qualities of the federal courts to the proper scope of federal question jurisdiction and simply determined that the federal question statute ought to retain its current form—the interpretive challenges that the federal courts have faced in this domain for decades would endure. Courts would still be left to determine, for example, whether the presentation of a federal defense suffices to underwrite original federal question jurisdiction and whether original federal question jurisdiction will lie over a state law cause of action that raises a substantial question of federal law. The prevailing answers to these questions are provided by a patchwork of judicially created rules intermittently rooted in concerns of judicial administration (principally docket control), *see, e.g., Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 811 (1986); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900), and the conventional wisdom relating to the purposes served by federal question jurisdiction, *see, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (reciting the tripartite mantra of federal question jurisdiction). It should come as no surprise that the doctrines that have emerged from this process have proven unstable and unsatisfying.

I doubt whether this sort of approach—which would be necessary were congressional guidance with respect to federal question jurisdiction to remain as vague as it now—would prove

2. *The Future of Federal Question Jurisdiction*

What, then, should become of federal question jurisdiction? The analysis here leaves us with a handful of justifications for retaining the federal courts' original jurisdiction in federal question cases, each of which, standing alone, is rather modest. It is arguable that, in the aggregate, these justifications supply sufficient reason to retain general federal question jurisdiction, but this hodgepodge of reasons falls well short of suggesting that doing so is imperative.

Two of these justifications represent watered-down fragments of the conventional account. First, it seems safe to say that the lower federal courts have significant subject matter expertise in connection with a smattering of federal questions—those that fall within the high traffic areas of federal practice.¹⁹⁴ And as to other areas of federal law, it is plausible that federal judges have developed a situation sense or vague familiarity that could aid the interpretive effort on the margins. The former point seems a good reason to authorize targeted grants of federal jurisdiction, while the latter supplies a justification, albeit a weak one, for general federal question jurisdiction.

Second, while it is the case, as noted earlier, that the bias prong of the conventional wisdom is historically contingent, this does not necessarily mean that it should be treated as irrelevant to jurisdictional policy. For even if state and federal courts' relative inclination to vindicate federal claims shifts significantly over time, it might make sense to establish a policy of easy access to federal court in federal question cases so that Congress need not perpetually be in the business of monitoring the two systems' treatment of federal claims and tinkering with jurisdictional boundaries accordingly.¹⁹⁵ This might make especially good sense, moreover, if over the full arc of U.S. history, and notwithstanding changes in the ideological character of the federal courts, the federal judiciary has, on average, been more protective of federal rights than the state judiciaries.

But even this variant on the state-court bias argument must be deployed with caution. It is hazardous to ground jurisdictional policy in a generalization

more fruitful even if the Federal Franchise model (instead of the bias-uniformity-expertise account) were to drive congressional and judicial decision-making in this area. Under these conditions, any role played by the Franchise model in judicial decision-making would raise the legitimacy concerns outlined above; and, if fused together with efforts to control federal dockets, the jurisdictional anomalies that characterize the law today would likely persist.

194. As to some of these, it should be noted—for example, questions of constitutional law that come up in civil rights litigation—there is reason to think many state courts enjoy experience-based expertise as well.

195. Of course, the federal courts have long been in the habit of modifying the scope of federal jurisdiction under other statutory grants in light of changing perceptions of state courts' treatment of federal claims. *See supra* note 46 and accompanying text. Perhaps the lesson here is that the courts ought not to do this and should, instead, always treat federal courts' presumed greater hospitality to federal claims as an equally strong justification for ushering federal question cases into the federal courts.

about comparative judicial behavior of such broad historical sweep. While there have been periods in our history during which federal claims were prominently (and sometimes controversially) protected more vigorously by the federal judiciary than the state judiciaries—property and contract claims during the *Lochner* era and civil rights claims during the Warren Court era leap immediately to mind—this protection has been concentrated on particular federal claims with a particular ideological valence. During these periods, other kinds of federal claims gained less traction in the federal courts.¹⁹⁶ This is not to say that state courts were generally more receptive to these claims at the relevant times; my point, rather, is that focusing on a particular category of claims that were famously vindicated by federal courts during any given era might mask important instances of federal hostility during the same period to other kinds of claims grounded in federal law.

Furthermore, even if the state bias claim has resonance when viewed through a long-term historical lens, relying on it as a background justification for general federal question jurisdiction can have untoward results. This is particularly so during eras (such as the current one) in which the notion of a general federal solicitude for claims grounded in federal law is relatively weak. Where this is true, the bias claim may serve as a makeweight argument for judicial tinkering at the margins of federal question jurisdiction, thereby obscuring different and perhaps sounder reasons for the extension of federal question jurisdiction to a given set of cases, or making the argument for such extension appear stronger than it really is.¹⁹⁷ More fundamentally, the bias argument propagates a vision of state and federal courts' responsiveness to federal claims that, within an appropriately circumscribed historical frame, is simply a myth. And it is difficult to know precisely what the consequences of propagating that myth may be. One cannot reject out of hand the possibility that repeating such claims about state courts' orientation toward federal claims, regardless of their accuracy at any given time, will affect the behavior of legislators, attorneys, and state court judges themselves.¹⁹⁸ Like the expertise prong of the conventional account, then, the state-court bias argument is relevant to sound thinking about whether to retain general federal question jurisdiction, but it provides only tempered support for such a jurisdictional rule.

196. *E.g.*, *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (rejecting due process and equal protection challenges to Oklahoma law regulating opticians and optometrists); *Abrams v. United States*, 250 U.S. 616 (1919) (rejecting First Amendment challenge to convictions under the Espionage Act); *Twining v. New Jersey*, 211 U.S. 78 (1908) (refusing to incorporate the Fifth Amendment protection against self-incrimination against the states).

197. *E.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

198. *Cf.* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963) ("I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective consciousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will be called by someone else.").

Further (and similarly qualified) justifications for retaining general federal question jurisdiction emerge from the Federal Franchise model developed in Part III.A. First, it is at least arguable that because of the national reach of federal law, federal questions are disproportionately likely to be of high importance and, hence, are good candidates for adjudication by richly supported, technically superior judges. Second, and more controversially, we might want the federal courts to adjudicate federal question cases in order to mitigate the costs faced by litigants who would otherwise find themselves in unfamiliar state tribunals. The argument for doing so would be especially strong if it were the case that outsider status in state court frequently meant being subjected to blatant prejudice on the part of judge or jury.

Note, however, that even if there were consensus that the federal courts ought to be deployed in order to mitigate the costs of outsider status for certain litigants, this would provide only limited support for retaining general federal question jurisdiction. This is because the diversity statute carries the potential to sweep into the federal courts many of the cases that would qualify for federal jurisdiction under the line of reasoning outlined here. It is often the case, when one party enjoys a significant advantage over the other by virtue of her familiarity with state court procedural rules and cultural norms, that the case pits an in-stater against an out-of-stater. And diversity jurisdiction will supply an independent basis for jurisdiction in many¹⁹⁹ of these cases.²⁰⁰

199. The overlap is not perfect, of course. The diversity statute's amount-in-controversy requirement will filter out of the federal courts low value claims without regard to whether the insider/outsider dynamic is in play. And one need not be from out of state to be an "outsider" in state court. See Bumiller, *supra* note 134, at 762 ("Local bias is as much 'intra-state' prejudice as 'inter-state' prejudice.").

200. This should not be surprising. Seen through the prism of the Federal Franchise model, the considerations relevant to determining the proper scope of federal question jurisdiction look an awful lot like the considerations long thought to underlie the establishment of diversity jurisdiction—both revolve around the dynamics of outsider status in litigation. See *supra* note 12 and accompanying text. 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 courts' exercise of jurisdiction in diversity cases not only takes the possibility of blatant bias by the state judge out of the equation; it stifles the more subtle advantages enjoyed by in-staters by virtue of their familiarity with local rules and norms as well. See Bumiller, *supra* note 134, at 752 (noting that "in most instances, local factors related to relative court efficiency and the attorney's familiarity with state or federal court are more important than any perceived bias") (emphasis added). Indeed, Bumiller suggests that these sorts of disparities might justify retaining diversity jurisdiction even though it "may not serve the constitutionally designed purpose of protecting the interests of out-of-state residents in foreign state courts." *Id.*

The capacity of diversity jurisdiction to obviate the need for federal question jurisdiction in some cases is not without historical antecedent. As noted earlier, concerns relating to state judicial bias in enforcing the debt provisions of the Treaty of Paris weighed heavily on the minds of some advocates of expansive federal jurisdiction during the Founding generation. See *supra* note 21 and accompanying text. But the paradigmatic 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, both of which were provided for in the Judiciary

A final consideration in favor of retaining general federal question jurisdiction is not captured by either the bias-uniformity-expertise view or the Federal Franchise approach. It is that the federal government ought to bear the costs of adjudicating the disputes spawned by Congress's enactment of federal law and establishment of so many causes of action. One could take the position, that is, that federal courts should adjudicate questions of federal law not because state courts are apt to mangle it, nor because some litigants would prefer it, but because an ethic of sovereign responsibility requires it.

CONCLUSION

The bias-uniformity-expertise mantra has shaped the discourse relating to federal question jurisdiction for decades. It is sprinkled liberally throughout the case law 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 matters 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 occupy a prominent place in legal and scholarly discussion of the need for and proper contours of federal question jurisdiction.

But there is significant evidence that the explanatory power of this model is limited, and that the factual premises underlying it hold true across a far narrower set of cases than is typically let on. This is not to say that the state and federal courts are fungible and that decisions allocating cases between the two systems are inconsequential. But the most important differences between courts in the two systems, at least at present, are not the ones highlighted by the conventional wisdom.

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 group of local installations in a national chain, offering common

Act of 1789 (though narrowed by an amount-in-controversy requirement of \$500). This might explain why the 1789 Act did not establish general federal question jurisdiction despite concerns relating to enforcement of the Treaty. See generally Holt, *supra* note 21; see also Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77, 89 (1997) ("Diversity and the Court's expansive interpretations of it to protect commerce and capital tended to sweep in many cases raising federal constitutional issues."); *id.* at 92 ("[T]he Court saw the resolution of federal questions as no mere incidental benefit of diversity jurisdiction, but rather as one of its defining purposes.").

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 make the federal courts 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.

The Federal Franchise model does not produce sharp jurisdictional lines or pointed directives for purposes of jurisdictional lawmaking. But taking heed of the distinctions between the state and federal courts that lie at the heart of the Federal Franchise model recommends an approach toward jurisdictional allocation that is quite different from the currently prevailing model. It highlights the distributive element of jurisdictional line-drawing and shunts more fundamental questions of judicial federalism to the background.

