An Empirical Assessment of Federal Question Jurisdiction

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For ages, judges and legal academics have claimed that federal question jurisdiction has three purposes: to provide litigants with a judge experienced in federal law, to protect litigants from state court hostility toward federal claims and to preserve uniformity in federal law. Although one could fill a small library with books and articles endorsing this conception of federal question jurisdiction, one would be hard-pressed to find a single article testing these rationales empirically.

This Article seeks to be the first such piece of scholarship. Based on a study of thousands of state court cases across fifteen different states, it first concludes that neither the state hostility nor uniformity rationales are borne out by empirical evidence. Next, it explains that federal judges, while likely more experienced than state judges in interpreting federal law, have superior experience only in certain specific areas of law. The Article then identifies a second purpose that is not often discussed in the context of statutory federal question jurisdiction: the protection of the federal governments' sovereignty interests. Like federal judicial experience, however, federal question jurisdiction only protects a specific type of sovereignty interest—the interest in controlling the meaning of sovereign law. After dismissing the suggestion that federal question jurisdiction is necessary to shoulder a large caseload, the Article then assesses the implications of the newly-adduced purposes of the jurisdictional grant by applying them to some common jurisdictional dilemmas.

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I. INTRODUCTION

The Supreme Court believes that federal question jurisdiction has three purposes: (1) to provide litigants with judges more "experience[d]" in federal law than state judges, (2) to provide litigants with judges more "solicit[ous]" of federal claims than state judges and (3) to promote the "uniform[]" interpretation of federal law.[1] Just about everybody else seems to believe this, too.[2] There is a problem with this, however: none of these beliefs have ever been verified with empirical evidence.

This Article undertakes the first empirical analysis of the purpose of statutory federal question jurisdiction. Relying on a study of thousands of state court civil opinions published in fifteen different states, it concludes that, while there is empirical evidence that federal judges likely have greater experience in some areas of federal law, there is little empirical evidence that federal judges will be more solicitous of federal claims or that state court adjudication of federal questions—whether at their current level or at

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[1] Grable & Sons Metal Products Inc. v. Darue Engineering. & Manufacturing Co., 125 S.Ct. 2363, 2368 (2005). Eight justices joined in this view and no justice dissented. Only Justice Thomas authored a concurring opinion. *See id*. at 2371 (Thomas, J., concurring). In his short, two-page opinion, Thomas argued that, although the majority reached the proper conclusion, it should have relied on a bright-line rule rather than a balancing test. Thomas did not voice, however, any disagreement with the majority's enunciation of the principles of experience, uniformity and solicitude.

[2] *See* notes 5-25, *infra*, and accompanying text.

a moderately increased level[3]—leads to greater uniformity in federal law. The Article further concludes that federal question jurisdiction also protects the federal government's interest in controlling the meaning of federal law[4] but does not shoulder significant caseload burdens.

The Article has seven parts. After this Introduction, Part II summarizes the prevailing beliefs on experience, solicitude and uniformity. The Article then addresses in Part III the uniformity and solicitude rationales and finds them either without empirical evidence or strongly contradicted by it. Part IV then adduces empirical evidence confirming the belief that the federal judiciary has greater experience than state courts in many, but not all, areas of federal law. This Part also uses empirical evidence to explain how federal question jurisdiction protects the federal government's sovereignty interest in controlling federal law (but *does not* protect other sovereignty interests, such as the right to appear in sovereign courts). Part V then dismisses an alternative purpose of the jurisdictional grant—that it shoulders a large caseload burden that would otherwise fall on the state courts. In Part VI, the empirically justified purposes—experience and sovereign control—are applied to some recurring jurisdictional questions. Part VII then concludes the Article by calling for increased empirical research on how federal and state courts interact in practice.

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[3] To be sure, this Article does not claim that statutory federal question jurisdiction could be completely abolished without affecting the uniformity of federal law. As no one deems the repeal of 28 U.S.C. § 1331 even remotely foreseeable, however, such a discussion is generally irrelevant to current decisions in this area. Nonetheless, because "a central task of the law of federal jurisdiction is allocating cases between state and federal courts," and uniformity beliefs apparently play a key role in allocation decisions, it is necessary to assess, as well as possible, how uniformity is or is not maintained through jurisdictional rules. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1216 (2004).

[4] While scholars and judges often speak of sovereignty in discussing federal courts' role, Friedman, *supra* note 3, at 1225; Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 80-81, sovereignty is rarely given a role in federal question jurisdiction in particular. Tellingly, the American Law Institute's landmark study of federal jurisdiction—which was authored by some of the most eminent scholars in the field—adopted the three-part description noted above and did not address any sovereignty concerns. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-65 (1969).

Moreover, even when scholars discuss sovereignty interests in the context of the federal courts, they typically fail to distinguish between the different types of sovereignty interests—which include controlling sovereign law and having the right to litigate in sovereign courts. This Article recognizes that the distinction is important and should be accounted for in federal question doctrine.

II. THE PREVAILING BELIEFS

Article III, Section 2 of the United States Constitution places within the "judicial power" of the federal courts "all Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties made . . . under their Authority."[5] This grant of judicial power is largely implemented by 28 U.S.C. § 1331, which employs language nearly identical to that used in Article III.[6] The primary impact of this statute is to make federal courts available to adjudicate federal questions. This Part explains the three purposes scholars and jurists attribute to such jurisdiction: the preservation of uniformity in federal law, the provision of a forum hospitable to federal law, and the provision of a judge likely to have experience in federal law.[7]

Before discussing the prevailing beliefs, however, it is important to note that § 1331 is just one way that federal courts obtain jurisdiction over federal claims. A number of federal statutes contain their own jurisdictional provisions such that, even if § 1331 were removed from the U.S. Code, these claims could still be brought in federal court.[8] While the current scope of federal question jurisdiction is thus a product of § 1331 as well as numerous particular jurisdictional grants, it is still possible to speak of federal question jurisdiction as a coherent whole. The arguments advanced in favor of federal question jurisdiction do not hinge on whether the grant is accomplished on a statute-by-statute basis or globally with a single statute. Indeed, two of the three beliefs about the need for federal question jurisdiction predate the creation of general federal question jurisdiction by almost a century.[9] Thus, while this Article often refers to "§ 1331" as a figurehead of federal question jurisdiction, one should note that the true federal ques-

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[5] U.S. Const. art 3, § 2.

[6] Section 1331 provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[7] For clarity's sake, I present the three purposes separately. This risks implying that some courts and scholars subscribe to some of the three purposes but not all of them as a package. This is not the case. The three part conception of federal jurisdiction is dominant in the judiciary and the academy. This is perhaps best exemplified by the Supreme Court's most recent pronouncement in *Grable, Grable,* 125 S.Ct. at 2368*,* as well as the American Law Institute's statement—written by the top scholars in the field at that point—that the jurisdictional grant serves these three goals. AMERICAN LAW INSTITUTE, *supra* note 4, at 164-65.

[8] *See* 18 U.S.C. 1964(c) (permitting civil claimants to sue in federal court); 42 U.S.C. § 2000e-5(f) (permitting federal courts to adjudicate civil actions "brought under" Title VII).

[9] *See* notes 10 & 13-14 *infra*, and accompanying text.

tion jurisdiction is accomplished by § 1331 and many jurisdictional provisions in other pieces of legislation.

A. *Uniformity*

In Federalist No. 80, Alexander Hamilton explained why federal courts must be available to adjudicate federal law. "The mere necessity of uniformity in the interpretation of the national laws," he explained, "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."[10]

In the centuries since Hamilton voiced this view, countless jurists[11] and scholars[12] have concurred. Moreover, the notion retains its currency

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[10] THE FEDERALIST NO. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961).

[11] Reed v. Farley 512 U.S. 339, 348-49 (1994) (explaining that federal jurisdiction is important to creating a "nationally uniform interpretation"); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 293 (1997) (stating that federal interpretation of federal law is a "means of serving a federal interest in uniformity"); Tafflin v. Levitt, 493 U.S. 455, 464 (1990) (noting in the context of exclusive federal jurisdiction that interpretation of federal law by a limited number of courts promotes the "desirability of uniform interpretation"); Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 151 (1988) (White, J. concurring) (stating that the "federal interest in uniformity" may require the case be heard in federal court); Merrell Dow Pharmaceuticals Inc. v. Thompson 478 U.S. 804, 826 (1986) (Brennan, J. dissenting) (explaining that one of the "reasons Congress found it necessary to add [federal question] jurisdiction to the district courts" is "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution") (quoting Martin v. Hunter's Lessee, 1 Wheat. 304, 347-348 (1816)) (emphasis in original); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 256 (1985) (Brennan, J. dissenting) (stating that an "essential function of the federal courts" is to "provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land"); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483-84 (1981) (stating in the context of exclusive federal jurisdiction that "desirability of uniform interpretation" is an interest advanced by the jurisdictional grant); Preiser v. Rodriguez, 411 U.S. 475, 514 (1973) (stating that the grant of federal jurisdiction was "designed" to "achieve greater uniformity of results" (citing Martin v. Hunter's Lessee, 1 Wheat. 304, 347-48 (1816)); Brown v. Allen, 344 U.S. 443, 541 (1953) (noting in the habeas jurisdiction context that, because the "uniformity of federal law [is] attainable only by a centralized source of authority, denial by a state of a claimed federal right must give some access to the federal judicial system"); Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 383 (1996) (explaining that, in the context of exclusive federal jurisdiction over federal securities actions, the only extant purpose is "to achieve greater uniformity of construction and more effective and expert application of that law.").

[12] ERWIN CHEMERINKSY, FEDERAL JURISDICTION § 5.2.1 at 265 (2003) ("Another frequently offered justification for federal question jurisdiction is the need to ensure uniformity in the interpretation of federal law."); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 101 (2d ed. 1990) (noting that "prece-

today. As noted in the Introduction, the Supreme Court in 2005 continued this tradition by stating that § 1331 jurisdiction provides a "hope of uniformity" in the interpretation of federal law.

B. *Solicitude*

Like the belief in uniformity, the belief that federal courts are more solicitous of federal claims than state courts (or conversely that state courts are more hostile to federal claims than federal courts) can be traced back to Alexander Hamilton.[13] Speaking on the issue, Hamilton explained

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dential confusion [will be] caused by the dramatic increase in the number of interpreting courts"); AMERICAN LAW INSTITUTE, *supra* note 4, at 165 ("The purpose of federal question jurisdiction is to promote uniformity in the application of federal law.") Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 157 n.1 (1953) (The existence of the federal courts' is important to "achieving widespread, uniform effectuation of federal law" given that the Supreme Court—the "Constitution's ultimate exponent of federal rights"—actually decides relatively few cases.); Chemerinsky & Kramer, *supra* note 4, at 83-85 (asserting that federal jurisdiction of some sort is necessary to assure the "uniform interpretation and application of federal law"); Friedman, *supra* note 3, 1241 (stating that state court adjudication of federal law will create "disuniformity" which is a "serious problem[]"); Jeffrey W. Grove, *Supreme Court Monitoring of State Courts in the Twenty-First Century: A Response to Professor Solimine*, 35 IND. L. REV. 365, 366 (2002) ("In my view, uniformity—or at least an increased potential of uniformity—is a value of the first rank."); Robert A. Schapiro, *Toward A Theory Of Interactive Federalism,* 91 IOWA L. REV. 243, 290 (2005); Christopher A. Cotropia, *Counterclaims, The Well-Pleaded Complaint, And Federal Jurisdiction,* 33 HOFSTRA L. REV. 1, 39 (2004) (stating that one of the "the purposes behind federal question jurisdiction" is the "goal of uniformity"); Eric J. Segall, *Article III As A Grant Of Power: Protective Jurisdiction, Federalism And The Federal Courts,* 54 FLA. L. REV. 361, 392 (2002) (stating that "federal jurisdiction was always intended to be instrumental" and that one of its goals is to "promote the uniformity and supremacy of federal law"); Donald Doernberg*, There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987) (finding that federal question jurisdiction exists in part out of "the need for uniformity in [the] interpretation and application [of federal law]"); Patti Alleva, *Prerogative Lost, The Trouble with Federal Question Jurisdiction after* Merrell Dow, 52 OHIO ST. L. J. 1477, 1495-96 (1991) (noting that federal question jurisdiction provides the "the potential for uniform interpretation of federal law"); Thomas B. Marvell, *The Rationales for Federal Court Jurisdiction: An Empirical Examination of Student Rights Litigation*, 5 WIS. L. REV. 1315, 1335 (1984) (noting uniformity as one of three rationales for federal question jurisdiction).

[13] I use the terms "federal solicitude" and "state hostility" interchangeably in this Article. While the Supreme Court often speaks euphemistically of "federal solicitude," scholars tend to more bluntly speak of "state hostility." *See, e.g.,* Alan D. Hornstein*, Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchial Analysis,* 56 IND. L.J. 563, 564-65 (1981) (stating that federal question jurisdiction avoids the risk of "state hostility" to federal interests).

> What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them.[14]

This view was echoed in the seminal case on federal question jurisdiction, *Osborn v. Bank of the United States*, where Chief Justice Marshall fielded arguments by legal luminaries Daniel Webster and Henry Clay. Arguing that the state law claim at issue in the case "arose under" federal law, the two asserted that "the constitution itself supposes that [the state courts] may not always be worthy of confidence, where the rights and interests of the national government are drawn in question."[15] While Chief Justice Marshall did not overtly cite this position in siding with Webster and Clay, it is strongly believed that it figured prominently in the Court's decision.[16]

Since that time, and emboldened by the events of the Civil War and Reconstruction,[17] the belief in federal solicitude towards federal claims has persisted in both judicial[18] and academic[19] writings and was recently reaffirmed by the Supreme Court in 2005.[20]

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14 THE FEDERALIST NO. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961).

15 Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 811 (1824).

16 The role of state hostility is revealed most obviously in Justice Johnson's dissent in *Osborn* itself. *See id*. at 871-72 (Johnson, J., dissenting) (stating that the "policy of the decision is obvious," namely to "render[] all the protection necessary, that the general government can give to this Bank"). Years later, Justice Frankfurter made the same observation. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (Frankfurter, J., dissenting) ("Marshall's holding [in *Osborn*] was undoubtedly influenced by his fear that the bank might suffer hostile treatment in the state courts that could not be remedied by an appeal on an isolated federal question."); *see also* James E. Pfander, *Article I Tribunals, Article III Courts, And The Judicial Power Of The United States*, 118 HARV. L. REV. 643, 713 n.314 (2004) ("*Osborn* itself grew out of a perception that federal instrumentalities may need protection from hostile state officers and state court judges who would otherwise adjudicate common law claims.").

17 *See* Marvell, *supra* note 12, at 1331-33.

18 Abelman v. Booth, 62 U.S. 506, 518 (1858) (Taney, C.J.) (stating that "local tribunals [adjudicating federal claims] could hardly be expected to be always free from the local influences"); *Merrell Dow*, 487 U.S. at 826 n.6 (Brennan, J. dissenting) ("Another reason Congress conferred original federal-question jurisdiction on the district courts was its belief that state courts are hostile to assertions of federal rights."). Another clue to the "sympathy" purpose behind federal question jurisdiction is the Klu Klux Klan Act of 1871,

C. *Experience*

While the uniformity and solicitude rationales originated early on in the republic, the notion that federal question jurisdiction provides litigants with judges experienced in federal law is much newer. Nonetheless, it is just as strongly established as other putative purposes of the jurisdictional grant. In describing the role federal question jurisdiction plays in the national judicial order, the American Law Institute explained in its *Study of the Division of Jurisdiction Between State and Federal Courts* that "[t]he federal courts have acquired a considerable expertness in the interpretation and application of federal law."[21] State courts, by contrast, have much less expertise because "federal question cases must form a very small part of the business of [state] courts."[22] "As a result, the federal courts are comparatively more skilled at interpreting and applying federal law, and are much

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enacted just four years prior to the general federal question statute. The Supreme Court has twice analyzed the federal jurisdictional provisions of the Klu Klux Klan Act (which is more commonly known as 42 U.S.C. § 1983 today) and concluded that a motivating force behind the jurisdictional grant was a mistrust of state, as compared to federal, authorities. *See* Mitchum v. Foster, 407 U.S. 225, 240-42 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial."); Patsy v. Florida Bd. of Regents, 457 U.S. 496, 502-07 (1982) ("A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the [Klu Klux Klan Act] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights.").

[19] *See* AMERICAN LAW INSTITUTE, supra note 4, at 164-65. (noting the "lack of sympathy" that federal claimants might encounter in state courts); REDISH, supra note 12, at 83 (stating, in the context of federal question jurisdiction, that "federal judges may often be more sympathetic to federal interests than are many state judges"); Mishkin, *supra* note 12, at 158 (noting that federal courts are more likely to give a "sympathetic treatment of Supreme Court precedents" than their "state counterparts"); David Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1, 2-3 (1968) ("Because of persistent state-federal hostilities, . . . we do not seem to have reached the point where Supreme Court review of state courts is always adequate to assure recognition of federal rights."), Alleva, *supra* note 12, at 1495-96 (noting that federal question jurisdiction makes us of federal courts' "sympathetic, but respectful, national perspective"); Hornstein, supra note 13, at 564 (stating that states may be "provincial[]" with respect to federal rights); Marvell, *supra* note 12, at 1330 (noting that the "reason most commonly cited for both federal court jurisdiction in article III" is that "federal judges are more likely to uphold federal law because they are more sympathetic to federally protected rights than state judges").

[20] Grable & Sons Metal Products Inc. v. Darue Engineering. & Manufacturing Co., 125 S.Ct. 2363, 2368 (2005).

[21] AMERICAN LAW INSTITUTE, *supra* note 4, at 164-65

[22] *Id*.

more likely correctly to divine Congress' intent in enacting legislation."[23] One need not look hard to find numerous courts[24] and scholars[25] who subscribe to this view.

III. UNIFORMITY AND SOLICITUDE: THE EMPIRICAL EVIDENCE

Since the time of Alexander Hamilton, federal jurisdiction apologists have claimed that the jurisdictional grant is necessary to preserve uniformity and protect litigants from state hostility. As explained below, however, these two purposes are unsupported by sufficient empirical evidence.

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[23] Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting).

[24] *Id*. at 826-27 (stating that § 1331 provides litigants with a "forum that specializes in federal law and that it is therefore more likely to apply that law correctly"); Gulf Offshore Co. v. Mobil Oil Co., 453 U.S. 473, 483-84 (1981) (noting the "expertise of federal judges in federal law"); U.S. v. Fausto, 484 U.S. 439, 464 n.11 (1988) (noting that, because the Federal Circuit focuses only on a single subject matter, it "brings to the cases before it an unusual expertise"); Preiser v. Rodriguez 411 U.S. 475, 514 (1973) (explaining that Congress enacted 28 U.S.C. § 1331 "to preserve and enhance the expertise of federal courts in applying federal law"); Medema v. Medema Builders, Inc. 854 F.2d 210, *213 (C.A.7 (Ill.),1988) (noting that exclusive federal jurisdiction "cultivate[s] [federal] uniformity and expertise"); Winningham v. U. S. Dept. of Housing & Urban Development 512 F.2d 617, 621 (5th Cir. 1975) ("Federal jurisdiction over actions arising under acts of Congress governing the conduct of federal officials [should be decided by federal] tribunals which have acquired experience and expertise in dealing with national legislation."); *see also* S.Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966) ("Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.").

[25] *See, e.g.,* REDISH, *supra* note 12, at 2 ("[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy. It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law."); Hornstein, *supra* note 13, at 564-565 (stating that state court adjudications of federal law carry a higher risk of "error"); Guido Calabresi, *Federal And State Courts: Restoring A Workable Balance*, 78 N.Y.U. L. REV. 1293, 1304 (2003) ("We are federal judges, we have more knowledge of federal law. You are state judges, you have more knowledge of state law. Let each of us do our job and not be insulted."); Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960) ("I start with the principle that the federal courts are the primary experts on national law just as the state courts are the final expositors of the laws of their respective jurisdictions."); Friedman, *supra* note 3, 1236-37; Alleva, *supra* note 12, at 1495 (stating that § 1331 takes advantage of federal courts' "expertise in discerning and interpreting federal interests"); Marvell, *supra* note 12, at 1333-34 (citing numerous sources for the proposition that "federal judges have much more expertise in deciding issues involving federal law matters than do state judges").

Moreover, the belief that state court adjudication of federal questions will decrease the uniformity of federal law is actually contradicted by significant empirical evidence.

A. *Uniformity*

The belief that federal question jurisdiction maintains uniformity in federal law is based on the supposition that, as the number of decision makers increases, the variability of final decisions will increase as well. In many respects, this supposition is entirely logical. For instance, if one asked 50 random people on the street to name their "personal hero," nearly 50 different answers would likely be generated. If the same question was then posed to 100 people, the variability of responses would almost certainly increase, resulting in something close to 100 different responses. Thus, in this example, as the number of decision makers doubles, the variability of decisions will likely double (or nearly double).

Were this the type of question regularly adjudicated in federal courts, one could reasonably expect state court adjudication of federal questions to increase the variability in federal law. Of course, this question is not the stuff of adjudication. Nor does the way in which respondents determine their answers resemble the methods of legal reasoning employed by courts. As explained below, state court adjudication of federal questions—at their current or a moderately increased level[26]—is not likely to increase disuniformity in federal law because (1) the nature of many legal questions sharply limits the variety of permissible answers, (2) norms of state court judging impose meaningful constraints on the variety of answers judges will select, and (3) the precedential effect of state federal-law decisions is relatively weak. Importantly, several or all of these three factors are likely operating at the same time, making it quite unlikely that state court adjudication—whether at its current or an increased level—significantly affects uniformity.

Before addressing each of these points, however, it is perhaps useful to speak more specifically about uniformity in the legal context. Those advocating uniformity in the law argue that "federal law should mean the

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[26] To reiterate the point noted in the Introduction, this Article does not claim that a wholesale revocation of federal jurisdiction would not affect the current level of uniformity in federal law. As I explain later in this section, state courts rely significantly on federal courts for guidance on federal questions. Thus, if federal courts were to disappear, state courts, initially at least, would be left without any previously valuable guidance on federal law. While it is plausible that, after the initial shock caused by the alteration in jurisdiction, state courts would come rely on each other for leadership, such a hypothesis ventures far beyond the support of the empirical evidence adduced in this Article.

same thing regardless of the forum."[27] This, however, begs an essential question if one is to evaluate legal uniformity in a world of courts and *stare decisis*: how is one to define the "meaning" of federal law? On one level, this is quite simple. Title VII of the Civil Rights Act of 1964, for example, applies only to employers with "fifteen or more employees."[28] If some courts held employers with less than fifteen employees liable under Title VII, while others only applied the law to employers with fifteen or more employees, it could be said that federal law had two different "meanings." Contrast this provision of Title VII, however, with another of its provisions, this one making it unlawful for an employer to "discriminate against any [employee] on the basis of . . . sex."[29] As interpreted by the Supreme Court, this provision prohibits employers from subjecting employees to a "hostile work environment" based on their sex.[30] Suppose one court found a workplace "hostile" under Title VII and another court found a separate workplace not hostile. Would this indicate that "hostile" had two different meanings?

Of course not. These two examples track the distinction between pure questions law and mixed questions of law and fact. Pure questions of law—like the employee numerosity requirement—are directly tied to variability in law; in fact, under the principle of *stare decisis*, answers to pure legal questions *are* the law. Mixed questions of law and fact, however, are different. Such questions are those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[31] Under this view, because the "rule of law is undisputed" mixed questions do not produce new "law."

More realistically, however, one must recognize that mixed questions of law, at some level, *do* make law. If one court finds a workplace where sexually suggestive pictures of women were publicly posted to be "hostile," while another court finds the posting of such pictures does not create a hostile work environment, "hostile" could be said to have two different meanings. But this example is unrealistic. Few cases turn on a single fact and even when they do, such facts are rarely so generic as to be transferable to other cases (thereby serving as precedent). In a hostile work envi-

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27 Donald L. Beschle, *Uniformity in Constitutional Interpretation and Background Right to Effective Democratic Governance*, 63 IND. L. J. 539, 539 (1988).

28 42 U.S.C. § 2000e(b).

29 42 U.S.C. § 2000e-2(a)(1).

30 Faragher v. Boca Raton, 524 U.S. 775 (1998).

31 Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

ronment case, for example, a court will likely base its decision on much more than the posting of a sexually suggestive picture, and even if it did not, other factors (such as the employee's frequency of exposure) would likely be relevant.

On the other hand, judicial resolution of mixed questions of law are often preceded by statements of the applicable law. Thus, before deciding whether a particular workplace is "hostile," courts often explain in somewhat general terms what "hostile" means. If different courts explained the meaning differently, "hostile" could again be said to have multiple meanings. In theory, such explanations of the law are mere dicta compared to the holding—which is the court's actual decision and has precedential effect. In practice, however, judicial explanations of the law—whether classified as holding or dicta—are relied upon by subsequent courts and have effect on the meaning of the law.

Where does this leave us in the study of uniformity? Ideally, a study of state court adjudication of federal law would ascertain the extent to which state courts "made" law—either through deciding pure questions of law or explaining law prior to deciding mixed questions. This is easier said than done, however. Classifying even one question as either a pure question of law or a mixed question is a notoriously difficult endeavor.[32] And to classify the many hundreds necessary for a complete empirical study might be next to impossible. Similarly, tracing the impact of hundreds of separate state court decisions over time would be highly burdensome, if not impossible. Thus, in presenting significant empirical evidence on federal questions in state and federal courts, this Article does not distinguish between pure and mixed questions of law. This is unlikely to affect the results presented herein, however, because the evidence marshaled on the uniformity issue does not hinge on the type of question presented. Rather, the Article studies the nature and methods of adjudication—all of which will apply with equal force regardless of whether the federal question is pure or mixed. With that, this section now turns to evidence disproving the uniformity rationale.

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[32] One court struggling with such issues has referred to mixed questions as "elusive abominations." S & E Contractors. Inc. v. U.S., 433 F.2d 1373, 1378 (Ct. Cl. 1970), *rev'd*, 406 U.S. 1 (1972). For an explanation of the complexity in this area, see Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 SO. CAL. L. REV. 235 (1991). For an argument that there is no such distinction at all, see Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1800 (2003).

1. The Nature of Legal Questions

As suggested at the outset of this section, questions 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—which might be called "open-ended"—imposes virtually no constraints on the range of answers. If the respondent were instead asked to name his "*currently-living* personal hero," the range of answers would be slightly more constrained and the question 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.

For example, consider the following typical federal question: when a school designs an individualized education plan for a student pursuant to the Americans with Disability Education Act (ADEA), and the student contends that the plan is insufficient, which party—the student or school—bears the burden of proving (or disproving) the plan's compliance with the ADEA?[33] In deciding this question, it is important to note that a judge will *not* be constrained by the text of the statute, for the statute is silent on the issue. Assume also, for the purposes of this example, that no other piece of positive law suggests an answer to the question. Even here, where the judge is free to simply meditate on the metaphysical nature of "burden" or the importance of education in a democratic society, she would still be forced to answer the question in one of two ways: either the student or school bears the burden.[34] And for that matter, even if a thousand separate judges from all walks of life were permitted to meditate on the question, the variability in responses would be limited to the same number potentially generated by two judges.

Naturally, the force of this argument depends on the extent to which federal questions admit of only a few answers. While the ADEA question described above admits of only two possible answers, other legal questions

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[33] 20 U.S.C. §§ 1400-1482 (2005).

[34] This point is an important one, for it discounts the objections that would likely be advanced by adherents to the Legal Realist and Critical Legal Studies movements. Under those schools of thought, text, precedent, and other forms of positive law impose only weak constraints on judges. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (2d ed. 1963); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997). This is undoubtedly true in a substantial number of cases. Yet, because the binary nature of legal questions constrains the judge in a way that she cannot avoid, the variability of legal answers will not be significantly increased even by judges determined to rule without regard for law. Put another way, while the Realists and CLS proponents might be correct that judges can manipulate positive law to reach their own conclusions, it is not always true that judges can manipulate the menu of decisions they can reach.

might admit of several different answers. The Due Process Clause of the Fourteenth Amendment, for example, lends itself a plethora of interpretations. It becomes necessary, therefore, to assess the incidence of binary or multiple interpretations of federal law. One useful way to assess this is to analyze the cases collected in *U.S. Law Week*'s periodic "Circuit Split Roundup."[35] In the "Roundup," *U.S. Law Week* lists "cases that acknowledge and describe disagreements in the federal courts of appeals on various questions."[36] A review of the splits noted during 1998, 1999, 2002 and 2003—some 1,017 cases—reveals that the great majority of splits are binary.

Table 1: Circuit Splits Reported in *U.S. Law Week*

	Two-way Splits	Three-way (or more) Splits	Total Splits
1998	299	21	320
1999	265	20	285
2002	155	20	175
2003	207	30	237
Total	926	91	1017
Percent of Total Splits	91%	9%	100%

As illustrated in Table 1, when federal courts split on the meaning of federal law, they almost always split into two camps. Only 9 percent of the time do federal courts split into three or more camps.[37] These statistics suggest that there is likely an "upper limit" on the variety of interpretations of federal law. Thus, it is improper to assume that state court adjudication

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[35] The use of *U.S. Law Week*'s "Circuit Split Round-Up" in this fashion is not new. Another commentator, Arthur Hellman (who has studied federal circuit splits in detail for the U.S. Government) has relied the resource in an extended study of the subject. Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 141-42 (2001).

[36] 67 U.S. LAW WEEK 2334 (Dec. 8, 1998).

[37] Of course, Table 1 only addresses instances where there is a split on the meaning of federal law. In cases where federal courts are in complete agreement on the meaning of federal law even though the law is susceptible to multiple (and reasonable) interpretations, state courts might still contribute to disuniformity inasmuch as they opt for one of the reasonable interpretations not chosen by the federal courts. As explained in Part III.A.2, *infra*, this prospect, while possible, is nonetheless generally unlikely.

of federal questions will automatically lead to a dramatic increase in disuniformity.

Besides pointing to the binary nature of many federal questions, this data is notable for a second reason. It illustrates the level of uniformity—or lack thereof, perhaps—in the federal system on its own. Over 1,000 disagreements of federal law—which, of course, include only the splits uncovered by *U.S. Law Week*—is quite significant. Moreover, one must remember that these 1,000 decisions include only splits between circuits. Federal district courts publish many times more opinions and no doubt disagree with themselves—both within and without the same circuit—on many issues that have not yet yielded published appellate opinions. These observations are important because the key issue in assessing uniformity in a world of state court adjudication is *not* whether disuniformity will occur, but whether its will occur *more often* when state courts decide federal questions. Given the high rate of disagreement already extant in the federal circuits, this sets a high bar for those supporting uniformity rationale to clear.

2. Norms of State Court Judging

Thus far, I have suggested that state court adjudication of federal questions is unlikely to dramatically increase variability in federal law because the nature of legal questions will, to a certain extent, constrain the range of available answers. This point, however, does not foreclose the chance that state court adjudication of federal questions might increase variability in federal law. For example, it is possible that federal courts, as a behavioral matter, tend to align themselves into two camps even though the federal question is amendable to more than two interpretations. In this case, it is quite plausible that state courts, not being part of the federal circuit environment, might opt for a third, fourth, or even fifth interpretation. Additionally, it is quite possible that, on issues where federal courts are in complete agreement, state courts might depart from the federal view and create variability where there was none before.[38] If one studies the norms of state

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[38] *See*, *e.g.,* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990) (rejecting the uniform view of the federal circuits on a preemption issue and siding instead with a state supreme court decision from another state). In an insightful paper, Professor Donald Zeigler has catalogued the "extraordinary number of different positions" state courts take on following federal precedent—including positions such as "slavishly follow" and "totally disregard." Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections On the Standards State Judges Should Use To Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1153 (1999). While Professor Zeigler's paper is a useful compendium of approaches state courts take, it is not (nor does it purport to be) an empirical analysis of how state courts handle federal precedent on the whole. No doubt, some state courts (like some

court judging, however, these inferences are not borne out. As explained below, (1) state courts routinely rely on federal precedent in making their decisions, making it likely their decisions will generally comport with those of the federal courts, and (2) even when state courts judge in the comparatively unconstrained field of state common law, the variability in their results remains limited quite limited.

State reliance on federal precedent. In deciding federal questions, state courts appear to rely heavily on federal precedent.[39] Evidence of this is presented in Table 2, below, which summarizes the results of a study of 190 randomly-selected state court opinions addressing federal questions.[40]

Table 2: State Court Reliance on Precedent In Resolving Federal Questions

	Number	Percentage
Total cases sampled	190	100
Total or almost total reliance on federal precedent	66	34.7
Reliance on federal and state precedent	45	23.7
Total or almost total reliance on state precedent	58	30.5
No reliance on precedent	21	11.1

federal courts) often resist binding or persuasive precedent. This study suggests, however, that such behavior is not typical in the courts.

[39] One must recognize at the outset that judges do not always speak truthfully in their opinions. As Larry Solan explained in an insightful book on language and judicial opinion-writing, judges face a "temptation to report the reasons behind their decisions less than fully and openly" because they must both justify their authority and appear neutral. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGING 2-3 (1993); *see also* Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 400 (2002) ("Our cultural conception of precedent . . . includes shared understandings of the judicial role, which includes the burdens of justification."). Admitting incertitude or extralegal motivations, though honest, would significantly interfere with the satisfaction of these goals. If Solan is correct that judges write opinions so as to just their authority (which is almost certainly true in at least some respects), the citation of federal precedent may be an effort to justify authority rather than truthfully explain one's decision. While this may be the case in some state cases citing federal precedent, it would be erroneous to assume that *all* citations of federal precedent are mere shams. Thus, while it would be imprudent to rest the entire uniformity analysis on this point alone, it is fair to include this among the other factors in this section.

[40] These opinions were sampled from 384 opinions published by state appellate courts of mandatory jurisdiction published during 1991 and 2001, which themselves were selected from over 4,000 state civil opinions publishing during those same years. For a full description of how these cases were collected, see notes 85-89 and accompanying text, *infra*.

As this data shows, federal precedent plays a significant role in state court resolution of federal questions. In 58 percent of the cases, state courts relied wholly or partially on federal precedent. While 58 percent is certainly significant, it also means that state courts *did not* rely on federal precedent in nearly 42 percent of the opinions. While this might give rise to concern, a closer analysis of the data refutes this.

According to the analysis of the circuit splits reported in *U.S. Law Week*, splits occur most often over questions of federal statutes or regulations rather than over constitutional questions. Of the 1017 circuit splits reported in 1998, 1999, 2002 and 2003, 87.4 percent pertained to federal statutes and only 12.6 percent involved constitutional questions.[41] Thus, to better assess state reliance on federal precedent, one should focus on the cases that are typically ripe for disuniformity.

Table 3: State Court Reliance on Precedent in Resolving Statutory Federal Questions

	Number	Percentage
Total statutory federal questions in sample	61	100
Total or almost total reliance on federal precedent	33	54.1
Reliance on federal and state precedent	13	21.3
Total or almost total reliance on state precedent	8	13.1
No reliance on precedent	7	11.5

As Table 3 illustrates, state courts rely heavily on federal precedent in resolving federal questions based on statutes. In these cases, state courts rely on federal precedent over 75 percent of the time. Thus, in the most common field where federal courts split, state courts rely on federal precedent exceedingly often. This, of course, does not guarantee uniformity in these cases, but it does suggest that state courts do not take a "free-lance" approach in deciding federal questions.[42] Instead, they appear to search for and adhere to federal precedent a significant portion of the time.

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[41] Specifically, of the 1,017 splits, 128 involved the federal constitution and 889 involved federal statutes.

[42] It is beyond the scope of this paper to inquire into *why* state courts rely on federal precedent less on civil constitutional questions, but one might guess that they are much

State common law decisions. Because "[t]here is no federal . . . common law," federal questions arising in state courts stem from federal statutes or the federal constitution.[43] Functionally speaking, the text of statutes or the constitution (as well as precedents interpreting these texts) impose stricter constraints on an interpreting court (whether state or federal) than pure common law imposes on a state supreme court. Thus, in assessing the degree to which state courts might split on interpretations of federal law, it is instructive to look to how they split on common law questions. If, given the wide discretion afforded to common law courts, state courts still split in a relatively few number of ways, this would suggest that state court interpretations of federal law would vary to the same degree (or even to a lesser degree) than federal court interpretations.

To assess the variability of common law between the states, I reviewed several hornbooks on three areas of law typically dominated by state common law: torts, contracts and property.[44] To make the analysis as methodical as possible, I paged through each book from start to finish and scanned for places where the authors noted splits of authority.[45] While I do not contend that this research provides a complete picture of the variability of law in these areas, I do think it provides a *representative* sample of the splits. The results are presented in Table 4, below.

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more familiar with the analysis of such questions—both because federal constitutional issues arise more often than statutory issues in state courts, see Table 11, *infra*, and because state constitutions often have provisions mirroring federal constitutional provisions. For an insightful study of state constitutional interpretation, see generally JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005).

[43] Erie R. Co. v. Tompkins, 304, U.S. 64, 78 (1938). This, of course, is a bit of an overstatement because, in limited circumstances, federal courts have created federal common law to protect federal interests. *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943). While state courts are occasionally called upon to apply (or even create) federal common law, *see* Anthony J. Bellia, *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005), such instances are quite rare relative to the instances of statutory and constitutional interpretation.

[44] The hornbooks used were DAN B. DOBBS, THE LAW OF TORTS (2000); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS (5th ed. 2003); RALPH E. BOYER, ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY (4th ed. 1991).

[45] While certain areas of state common law may be more prominent than others in terms of the number of adjudications, my goal was simply to discern the frequency of splits between states in as methodical a fashion as possible. Hornbooks, because they typically cover a broad spectrum of topics and aim to summarize the law (including majority and minority views), seemed the best choice to accomplish this task. Targeted research on specific splits between states would always risk the chance that the splits discovered were not representative of the whole.

Table 4: Variability of Common Law Between States in Torts, Contracts and Property[46]		
	Number	Percent of total
Torts – Total splits	51	100.0
Two-way splits	34	66.7
Three-way splits	8	15.7
Four-way splits	6	11.8
Five-way splits	3	5.9
Contracts - Total splits	90	100.0
Two-way splits	69	76.7
Three-way splits	16	17.8
Four-way splits	4	4.4
Five-way splits	1	1.1
Property – Total splits	67	100.0
Two-way splits	60	89.6
Three-way splits	6	9.0
Four-way splits	1	1.5
Five-way splits	0	0.0
Total Splits	208	100.0
Two-way splits	163	78.4
Three-way splits	30	14.4
Four-way splits	11	5.3
Five-way splits	4	1.9

As Table 4 illustrates, when state courts disagree on the content of traditional common law subjects, only two or three different positions typically emerge. Given the plenary discretion state judges enjoy in common law decision making, this suggests that some type of behavioral norm is likely at work.[47] This norm is likely to govern the state courts' decision making in federal questions as well.

3. Precedential Power

In addition to the close-ended nature of legal questions and state court judging norms, state court civil adjudications are unlikely to increase

[46] Descriptions of the specific splits and citations to the relevant pages of the hornbooks are on file with the author and available in electronic form upon request.

[47] It is beyond the scope of this Article to prove *why* state common law rules tend to split into only two or three camps. One could easily hypothesize, however, that the social sciences—particularly the field of behavioral economics—has much to say about the subject.

the disuniformity of federal law because they have relatively weak precedential effect. Significant disuniformity will only flow from decisions having significant precedential power. To be sure, inasmuch as a single decision differs from the settled view, that decision *in itself* creates some—albeit quite small—amount of disuniformity. But in the federal and state systems, where hundreds of thousands of federal questions are decided in civil cases each year, a single errant decision by a state trial court does little to affect the overall uniformity of federal law. On the other hand, a single decision by a federal circuit court on the same issue may have a significant impact on uniformity. Thus, to assess whether state court adjudications will injure the uniformity of federal law, one must assess the *impact* of state decisions. In the field of adjudication, a decision's impact on other courts can be measured by citations.[48] If a court issues an opinion that is never subsequently cited, it is reasonable to conclude the opinion had little effect on the law. To be sure, judges and clerks might read the opinion and apply its reasoning without citing it, but this is uncommon, especially given the judicial desire to justify the exercise of undemocratic authority.[49]

Before presenting the citation data, however, it is important to note two prerequisites for even a single citation: an appeal and a published opinion. First, although trial courts obviously address federal questions in the first instance, they rarely, if ever publish their opinions. Thus, trial court adjudications of federal law will, as a practical matter, never have precedential effect. To develop into precedent, the case must be appealed. While it is difficult to ascertain the civil appeal rate in the state courts, it is likely no more than 10.9 percent, which is the rate in the federal system.[50] Thus, nine

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[48] Studying citations to gauge the impact of judicial opinion is not new. *See, e.g.,* William M. Landes & Richard A. Posner, Legal Change, Judicial Behavior, and Diversity Jurisdiction, 9, J. Legal. Studies 367 (1980) (analyzing citation frequency to assess the force of precedent because "the number of citations to a case and the rate at which the case depreciates in later opinions appear to provide a reasonable proxies for the precedential value of an appellate decision"); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 415 (1991). James H. Fowler et al., *Network Analysis and the Law: Measuring the Importance of Supreme Court Precedents* (2006) available at http://ssrn.com/abstract=906827 (tracking citations to develop a "network" account of an opinion's precedential import).

[49] *See* SOLAN, *supra* note 39, at 2-3 (explaining the judiciary's desire to justify its authority when drafting judicial opinions).

[50] Theodore Eisenberg, *Appeal Rates in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 663, 664 tbl.1 (2004) (finding the federal civil appeal rate to be 10.9% in cases filed between 1986 and 1997). While it is plausible that federal questions involving constitutional rights and certain statutory rights against discrimination might be appealed at a higher rate because of the liti-

out of ten times, a decision of federal law will not even make it to a court that publishes opinions. If a case reaches that level, however, it is still unlikely that it will develop into precedent because state appellate courts likely publish no more than 10 percent of their opinions.[51] Taken together, therefore, the appeal and publication factors suggest that only 1 in 100 federal questions will even ripen in to precedent that could potentially be cited.

If a case is fortunate enough to be that 1 in 100, however, the data below suggests that there is only a small likelihood that it will serve as meaningful precedent. Presented in Tables 5 and 6, below, are the results of a study of 190 state court opinions resolving federal questions.[52] Table 5 contains the citation history for 110 opinions issued in 1991 and Table 6 contains the citation history for 80 opinions issued in 2001.[53]

Table 5: Citations to State Federal-Question Opinions Issued in 1991

Citations	Opinions with that number of citations	Percent of total opinions
0 citations	50	45.5
1 citation	22	20.0
2 citations	9	8.2
3 citations	11	10.0
4 citations	4	3.6
5 citations	2	1.8

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gant's investment in the matter, I have uncovered no empirical evidence that this is the case.

[51] While there is little data on state publication rates, I computed a rate of 6.1 percent elsewhere in this Article. *See* note 91, *infra*, and accompanying text. While I have no reason to doubt this value, federal court publication rates are commonly thought to be near 20 percent. *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999) (finding that, nationally, 78.9% of appellate decisions went unpublished in 1995 and 1996 and that, in the Fourth Circuit, that rate was as high as 90.3%); David Greenwald & Frederick A.O. Schwarz, *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1135, 1146-47 (2002) ("[A]ppellate judges designate for exclusion from the Federal Reporter approximately 80% of the opinions they write."). In light of the federal rate, and for ease of explanation in this case, I assumed a 10 percent publication rate.

[52] Citations were counted using the Westlaw database. Each of the 190 opinions was "Key Cited" to determine the number of opinions that citing to the sample opinion for its resolution of a federal question.

[53] These citations were counted in August 2006. I divided the citation count into two tables because, theoretically at least, the number of citations for 1991 opinion should be higher than the number of a 2001 opinion at any single point in time. As some scholars have noted, however, precedent "depreciates" in value and, after a certain period of time, is no longer cited with regularity. Landes & Posner, *supra* note 48, at 376-80.

6 citations	3	2.7
7 citations	2	1.8
8 citations	1	0.9
9 citations	5	4.5
10 citations	1	0.9
Average # of citations per opinion		1.76

Table 6: Citations to State Federal-Question Opinions Issued in 2001		
Citations	Opinions with that number of citations	Percent of total opinions
0 citations	41	51.2
1 citation	16	20.0
2 citations	10	12.5
3 citations	6	7.5
4 citations	4	5.0
5 citations	1	1.3
6 citations	1	1.3
7 citations	0	0.0
8 citations	1	1.6
9 citations	0	0.0
10 citations	0	0.0
Average # of citations per opinion		1.11

Tables 5 and 6 illustrate that the federal questions resolved by state courts do not likely have significant impact on the content of federal law. Nearly half the opinions, for example, have yet to be cited even once for the federal question they resolved. While some opinions clearly have guided other courts, the percentage of opinions with over 5 citations is quite small—just 13 percent for the 1991 opinions and 3 percent for the 2001 opinions.[54] Moreover, the average number of citations for both sets of opinions is well below 2. While certainly not conclusive, this data nonetheless suggests that state court opinions resolving federal law do not have strong precedential force and are therefore unlikely to significantly injure uniformity.

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[54] Moreover, some citations are not especially indicative of precedential value. In some cases, opinions are cited not to support an argument, but just to note that another court has addressed the issue. In other cases, opinions might be cited for their arguments, but with a "but see" signal, indicating that the opinion is not persuasive.

A useful way to consider the combined impact of the above empirical evidence is to consider the chain of events that must occur for state court adjudications to decrease the level of uniformity currently extant at the federal level. First, the federal question must be amendable to a variety of different interpretations or the federal courts must be in uniform agreement as to the meaning of that federal question. If either of these conditions are satisfied (which, as shown above, is not extremely common), the state court must then pay little heed to federal precedent and depart from its usual habit of choosing among views currently established in other courts. If, in the minority of cases where this might occur, a state court actually decides a question of federal law incorrectly, it must then publish that opinion and have it relied upon as precedent for disuniformity to flourish. Moreover, because trial courts very rarely publish opinions, the matter will likely have no precedential effect until it proceeds to the appellate level, which only occurs in a small fraction of cases. For disuniformity to emanate from that court, of course, it too must ignore federal precedent, depart from other settled views, publish its opinion, and have it relied upon as precedent. This, of course, is unlikely.

Having addressed the uniformity rationale, this Article now turns to the solicitude rationale.

B. *Solicitude*

Another belief that animates federal question jurisdiction is the belief that federal courts are likely to be more "solicit[ous]" of federal claims than state courts.[55] Put differently, this belief contends that federal courts somehow *care* more than state courts about federal claims, or conversely, that state courts care less about federal claims.[56] Given this understanding,

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[55] Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mfg., 125 S.Ct. 2363, 2368 (2005).

[56] While it is tempting to conclude that "solicitude" is simply an alternate expression that for the supposed lack of parity between state and federal courts, this conclusion would be much too facile. As is well known in the federal courts field, the parity debate is chiefly animated by three issues: technical competence, psychological set, and susceptibility to majoritarian pressures. Given that this conception of the debate includes the issue "technical competence," it is clear that any reference to federal "solicitude" should not be understood to generally refer to the alleged lack of parity between the state and federal courts. As explained above in Part II, the common beliefs justifying federal question jurisdiction include uniformity, solicitude *and* expertise. If solicitude referred to parity in general, it would render the expertise factor irrelevant. While this may seem like an overly literal reading of recent Supreme Court precedent, the view aligns closely with history. At the outset of the republic, Hamilton defended federal jurisdiction as a necessary protection from state hostility. Of course, as there was no such thing as a federal judge when Hamil-

the question then becomes: is there any empirical evidence for this? As explained below, the answer is no. Many of the arguments in favor of federal solicitude rest on logic rather than hard empirics and the empirical evidence that does exist cannot support a jurisdiction-wide presumption of federal solicitude. In this section, I briefly describe the prominence of logic and absence of empiricism in the beliefs regarding federal solicitude. After that, I explain in further detail why logic in particular cannot produce a useful rule on federal solicitude.

1. The Prominence of Logic

The notion that federal courts are more solicitous of federal claims than state courts stems chiefly from two arguments.[57] First, federal judges are insulated from "majoritarian pressures" making them freer to rule in favor of political minorities (who are often advancing constitutional claims).[58] Second, federal judges possess a "psychological set" favoring the enforcement of constitutional rights.[59] This Article *does not* endeavor to test the merits of these claims; rather, it simply seeks discern the bases for these beliefs.

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ton spoke, and no such thing as general federal question jurisdiction until 1875, it is practically impossible to read expertise into the historical defenses of federal question jurisdiction. Indeed, it was not until the mid-twentieth century that commentators came to agree that "federal courts have acquired a considerable expertness in the interpretation and application of federal law, . . . most noticeabl[y] with regard to what are called 'federal specialties,' . . . such as bankruptcy and federal antitrust litigation." AMERICAN LAW INSTITUTE, *supra* note 4, at 164-65.

[57] Many prominent scholars base their belief in federal "solicitude" on these arguments. *See, e.g.,* Martin Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333 (1988) (noting that an "inescapable logic inference" makes federal courts preferable to state courts with respect to civil rights claims); RICHARD A. POSNER, FEDERAL COURTS: CHALLENGE AND REFORM 277 (1996) (stating that "systematically different conditions of employment" between state and federal judges permit one to infer that federal courts are preferable to state courts in advancing civil rights claims).

[58] This insulation is due to the disparity in job security between state and federal judges. Unlike most state judges, federal judges enjoy life tenure (subject to the unlikely prospect of impeachment and removal) and salary guarantees. For a summary of state judicial selection methods, see Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 314-60 (2002).

[59] This psychological set flows from federal judges' (1) recognition that they are "heirs of a tradition of constitutional enforcement," (2) greater kinship with the Supreme Court and its mission, and (3) "ivory tower" mentality that allows them to recognize the primacy of rights without the pressure and emotions attending many state trials. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124-27 (1977).

A cursory analysis of both claims reveals that they are based almost exclusively on logical reasoning rather than empirical evidence. For example, the claim that federal courts are more insulated from majoritarian pressures than state courts is based in part on the observation that federal judges, unlike most state judges, have life tenure and need never stand for election. As an observation, it is hard to dispute this claim; federal judges *do* have life tenure and state judges *are* often subject to election.[60] But to claim that state judiciaries are therefore captive to the electorate—*and* that such captivity affects judicial decision making in civil rights cases—ventures into the realm of logical inference.[61] This is not to say that the inference is wrong *per se*, of course; it is just to clarify the etiology of the belief.

Like the "majoritarian pressure" argument, the "psychological set" argument is also without empirical support. While federal judges, on average, may have common backgrounds and traditions that are distinct from those of state judges, there is little empirical evidence confirming this. Moreover, even if there were, there is no evidence whatsoever that this common mindset translates into solicitude. This is not to say that judges' psyches have no influence on their decision making (though scholars vigorously dispute the degree of this influence), but simply to point out that there is no evidence connecting a common psyche (assuming one even exists) with substantive results that could fairly be described as solicitous of federal law.

Thus, the classic arguments for solicitude are, as admitted by one of their chief proponents, merely "assumptions" that are not "prove[n] or undermine[d]" by any "empirical studies."[62]

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[60] This observation was more true at the time Professor Neuborne made it than it is today. *See* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1491-94 (2005) (noting electoral reforms in state judiciaries).

[61] For instance, this claim rests on a variety of premises which are highly arguable and do not ineluctably flow from the central observation. As Erwin Chemerinsky has observed, this claim "rests, in part, on the assumptions that judicial elections are based on evaluations of how judges decide cases; that state court judges recognize this (or fear it) and are influenced in their decision-making by future electoral review; and that federal judges are not affected by the same public sentiments." Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 372 (1988).

[62] Neuborne, *supra* note 59, at 1116.

2. The Impotence of Empirics

Given the tenuous inferences involved in the traditional arguments for federal solicitude, many scholars have explored the issue from an empirical perspective. Yet, as a distinguished empirical scholar in the field recently admitted, "none of the empirical literature on parity is, or purports to be, even remotely definitive."[63] To be sure, the studies have provided important insights. Daniel Pinello's study of federal and state decisions on gay rights, for example, forcefully suggests that state courts may in fact be more hospitable to gay litigants than federal courts.[64] Another scholar investigated a particular species of takings claims and concluded that judicial analyses in state and federal courts "are startling in their similarity."[65] Others have compared decisions of appointed and elected judges in state death penalty cases and concluded that "selection processes systematically influence, in the long term, the overall predispositions of those on the bench."[66]

While these and other empirical studies represent important strides in the field, they nonetheless fail to advance a comprehensive account of federal judicial solicitude (or lack thereof). Empirical data on cases involving gay rights, takings, or death penalty cases are not generalizable across the entire spectrum of federal questions. Data on majoritarian pressures in death penalty cases, for example, tells us little (if anything) about how state and federal judges are likely to adjudicate claims under the Railway Labor Act[67] or the Telecommunications Act of 1996.[68] And even if they did, however, states undoubtedly differ considerably among themselves with respect to their "solicitude" for federal law, making it likely that some states will be more solicitous of federal claims than the federal courts, and some states

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63 *See* Solimine, *supra* note 60, at 1469.

64 DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 110-17 (2003). For another empirical study involving gay rights, see William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMM. 599 (1999) (concluding that states may be as or more hospitable to gay rights than federal courts).

65 Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J. L. & PUB. POL'Y, 233, 285 (1999).

66 Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, J. POL. 1206, 1207 (1999).

67 45 U.S.C. § 151 et seq. (2005). Of course, one could hypothesize that state judges facing re-election might rule in favor of railroad employees more often than railroads (or, depending on importance of campaign contributions, rule in the opposite fashion), but this would be an effort at logical deduction rather than empirical observation.

68 47 U.S.C. § 151 *et seq*. (2005).

less solicitous than the federal courts.[69] Yet, the rules of federal jurisdiction must apply uniformly across the nation. Thus, the only way to implement the empirical project on solicitude is to aggregate the data on *all* state courts with respect to *all* federal questions and compute a "net" solicitude factor. This, of course, is wholly implausible. Even if it were not, however, there can be no doubt that our *current* empirical knowledge of solicitude falls far short of this level and that solicitude is without sufficient empirical evidence permitting it to play a *current* role in federal question jurisdiction.

3. A Note On the Use of Logic

Unlike the uniformity rationale—which is contradicted by empirical evidence—the solicitude rationale is neither contradicted nor confirmed by empirical evidence. In this situation, one might argue that, in the absence of empirical data, it is reasonable, and even appropriate, to rely on logical inferences. That is, in the absence of concrete evidence that elections exert majoritarian pressures on judges, for example, one may nonetheless properly assume that such pressures somehow affect their decisions. In this sense, logical inferences act as a "second best" method of getting at the truth. It is not the preferred method, but the alternative is simply to throw up one's hands and give up.

The problem with using logic in this instance mirrors the impotence of empirics discussed above. For example, even if one could rationally infer that elections impose majoritarian pressures on state judges such that judges are likely to have less sympathy for federal claims, this inference would only hold true for the 39 states that actually use elections to choose judges.[70] Moreover, even within those 39 states, it is not likely to hold true to the same degree. Some states elect their supreme court judges but appoint lower court judges, while other states elect all of their judges.[71] Sometimes, the method of choosing judges differs even within a single court. In the Kansas trial courts, for example, the governor appoints some judges

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[69] For example, in some cases, state courts preceded the federal courts in the development of individual rights. *See* Shirley S. Abrahamson, *Reincarnation of State Courts*, S.W. L. J. 951, 956 (1982) ("By the time the United State Supreme Court had imposed [the requirement that indigent criminal defendants be represented by counsel], most states appointed counsel at public expense, as called for by state constitutions, state laws, or state practice. In *Gideon v. Wainwright*, the Supreme Court was bringing the few laggards into line.").

[70] Behrens & Silverman, *supra* note 58, at 314-60 (collecting judicial selection methods for each state and the District of Columbia).

[71] *Id*.

while the electorate chooses others.[72] Not only do states differ in their use of elections, but they differ considerably in their election *methods*. For example, some states hold partisan elections while others hold non-partisan elections and still others hold retention elections after initial appointments.[73]

In light of this picture of state judicial selection methods, one must doubt whether a *single* inference can be safely drawn about majoritarian pressures on state judges. While one might be able to infer pressure or lack of pressure for a particular state, the methods of logic do not lend themselves to the aggregation of inferences necessary to adopt a single federal position on the matter. Thus, because states differ quite dramatically in the factors that allegedly underlie hostility towards federal law, logic is—like the current empirical evidence—mostly impotent in informing jurisdictional rules.

IV. THE EMPIRICALLY-JUSTIFIED PURPOSES OF § 1331

Having explained that there is no empirical basis for claiming that federal question jurisdiction maintains the uniformity of federal law or provides a litigant with a solicitous forum for federal claims, the Article now turns to the uses that are empirically justified. As this Part explains, the jurisdictional grant serves two purposes: (1) providing litigants with judges who have considerable experience in federal law and (2) protecting the federal government's sovereignty interests in controlling the content of federal law.

A. *Experience*

Federal question jurisdiction allows litigants having civil claims based on federal law to bring their claims before courts having substantial experience in massive areas of federal law in which state courts have little or no experience.[74] Note that the experience here is confined to *civil* cases.

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72 *Id*. at 329.

73 For a complete summary of state judicial selection methods, see *id*. at 314-60.

74 I use the term "experience" deliberately. While some courts and scholars refer to federal judicial "expertise," experience is a more appropriate term. The problem with "expertise" is that it invites confusion with a portion of the parity debate whereby federal judges are alleged to have a greater degree of "technical competence"—attributable to their supposed heightened intellectual abilities as well as their access to superior law clerks. Nueborne, *supra* note 59, at 1121-24. As noted above, the differing abilities of state and federal courts, if they even exist, is a complex question that many doubt can ever be empirically resolved. Using the term "experience" rather than "expertise" thus makes it clear that the purposes of federal question jurisdiction are not built on the ever-shifting sands of the parity debate.

Because this Article explores the purposes of federal question jurisdiction (which obtains only over civil cases), it makes sense to study the civil cases adjudicated in state and federal courts. While state criminal prosecutions often involve federal questions (typically based on the Fourth, Fifth and Sixth Amendments), these cases are not cognizable in federal courts and there is virtually uniform agreement that such cases should not be litigated in federal court.[75] Thus, the appropriate universe of cases to consider in an analysis of federal question jurisdiction is limited to civil cases.[76]

At first glance, it might seem like state courts would have significant experience applying federal law in civil cases. Under various interpretations of § 1331 or other judge-made doctrines, federal questions appear in state civil proceedings on a somewhat routine basis. For instance, because state courts have concurrent jurisdiction with the federal courts over most federal issues, parties may choose to litigate their federal disputes there.[77] Or, where the only federal question in a case arises as a defense, the parties are obliged to rely on state courts to resolve their claims.[78] Similarly, if a federal question on the face of complaint is not "substantial," a federal court

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[75] *See, e.g.*, Friedman, *supra* note 3, at 1241 (sovereign law should be litigated in sovereign courts). Of course, scholars have debated the Supreme Court's ruling in *Younger v. Harris*, 401 U.S. 37 (1971), that state criminal defendants may not challenge on-going state court prosecutions in federal courts. *See, e.g.*, Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (arguing that judicial abstention violates separation of powers); Michael Wells, *Why Professor Redish is Wrong about Abstention*, 19 GA. L. REV. 1097 (1985) (disagreeing with Professor Redish); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2 (1990) (arguing that abstention doctrine is the product of a "dialogic process of congressional enactment and judicial response"). Yet a suit of this type would amount to a collateral federal action that could not alternately be filed in state court. It therefore differs greatly from the typical civil case involving a federal question where the claimant may chose to file in either state or federal court.

[76] While state habeas proceedings as well as certain parole hearings are often couched as civil actions, I excluded such cases from the state cases surveyed because, although they are civil in nature and may involve federal questions, they could not be filed in federal court under federal question jurisdiction. This is so *not* because federal question jurisdiction excludes such cases, but because the Court has concluded they are cognizable only under the federal courts' habeas jurisdiction. Heck v. Humphrey, 512 U.S. 477 (1994).

[77] Testa v. Katt, 330 U.S. 386, 394 (1947 (holding that state courts must adjudicate federal questions if they have "jurisdiction adequate and appropriate under established local law to adjudicate" the federal question); Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("[W]e have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the Untied States.").

[78] Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); *see also* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986) ("A defense that raises a federal question is inadequate to confer federal jurisdiction.").

may not assert jurisdiction under § 1331 and the parties must litigate the matter in state court.[79] In still other cases, even where a substantial federal question is plead on the face of the complaint, a federal court may still choose to abstain from hearing the matter thereby relegating the parties to state court.[80] Based on these doctrines, many scholars have long presumed that state courts decide significant numbers of federal questions in civil cases.[81]

Despite this presumption, there is a complete dearth of data on what federal questions state courts *actually* decide. To my knowledge, no individual or organization has ever made an effort to catalog the number and nature of federal questions that state courts routinely decide.[82] To begin to fill this gap in the scholarship, I reviewed the published opinions issued by the appellate courts of 15 states during 1991 and 2001.[83] Although much more research must be done, it is clear from the research thus far that state courts decide a relatively modest number of civil cases involving federal questions. Moreover, the federal questions state courts do decide are con-

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[79] Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mfg., 125 S.Ct. 2363, 2368 (2005) (holding that federal question jurisdiction does not obtain unless a federal question is "substantial" such that a "federal forum may entertain [the question] without disturbing any congressionally approved balance of federal and state judicial responsibilities.")

[80] Younger v. Harris, 401 U.S. 37, 40-41 (1971) (holding that a federal court must abstain from adjudicating claims involved in a currently-pending criminal proceeding); Middlesex County Ethics Comm. v. Garden State Bar. Ass'n, 457 U.S. 423, 432 (extending *Younger*; holding that a federal court may not adjudicate federal issues involved in a currently-pending civil enforcement proceeding); Buford v Sun Oil Co., 319 U.S. 315 (1943) (holding that a federal court should permanently abstain from hearing federal claims involving unclear law and complex state regulatory frameworks).

[81] *See, e.g.*, Skelly Oil Co. v. Phillips Petroleum, 339 U.S. 667, 673 (1950) (Frankfurter, J.) (noting that abrogating the well-pleaded complaint rule would cause the federal courts to be overrun with a "vast current of litigation"); Mishkin, *supra* note 12, at 162 (stating that, granting federal courts "virtually the full constitutional range of jurisdiction over federal questions might well flood the national courts, thereby deflecting them from their real functions").

[82] To my knowledge, only three studies have addressed this issue, though all of them were narrow in scope. Two studies have focused only on federal questions adjudicated in state supreme courts and a third study, while more comprehensive in terms of courts, only focused on § 1983 actions. *See* Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 CONST. COMM. 347 (1986) (studying federal questions decided in the supreme courts of 7 states); National Center for the State Courts, *Comparison of Federal Legal Influences on State Supreme Court Decisions in 1959 and 1979* (1981) (researching federal law adjudicated in four state supreme courts by counting citations to federal cases); Solimine, *supra* note 48, at 413-19 (researching § 1983 claims decided in state courts).

[83] The states were Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming.

fined to a rather slim category of cases.[84] This suggests that state courts have much less experience than federal courts in a variety of federal questions and therefore that federal question jurisdiction offers litigants a forum with judges likely to be much more experienced than state courts in federal law.

Before presenting the results of this study, it is necessary to explain the study's methodology. First, the universe of state cases studied were opinions published in West's Pacific[85] reporter during 1991 and 2001 by courts of mandatory jurisdiction.[86] To determine which cases in that universe potentially involved federal questions, I used the Westlaw database to identify cases in this reporter (decided during 1991 or 2001) that contained the term "U.S.C.A."[87] Anytime a state court refers to a federal statute or the federal constitution—regardless of how the court cites the provision or even if the court *fails* to cite the provision[88]—West inserts a citation containing "U.S.C.A." into the "Headnote" dealing with that portion of the opinion. After obtaining a list of cases containing the term "U.S.C.A.," I then read the cases to determine which ones actually involved the resolution of a federal question. This was necessary because, in many instances, state courts cited federal law not as part of any analysis of a federal question, but simply

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[84] I recognize, of course, that state courts decide many questions (both state and federal) that are not memorialized in a published opinion. This fact is unlikely to affect the conclusions reached in this paper because the conclusions rely on percentages rather than aggregate numbers of cases. As long as the publication rate is roughly similar among federal question and non-federal question cases (and there is no reason to believe it would significantly differ), the percentages are likely to be trustworthy.

[85] I chose to focus on West's Pacific reporter because it covers the same states as those within the Ninth and Tenth Circuits of the federal system. This allows one to make greater use of federal court statistics, which are often grouped by circuit.

[86] In most states, courts of mandatory jurisdiction—*i.e.*, courts that *must* hear cases properly within their subject matter jurisdiction—are trial and intermediate appellate courts. Some states, however, do not have intermediate appellate courts and rely on their supreme courts to handle appeals. These courts, although typically called "supreme courts," are nonetheless courts of mandatory jurisdiction. The states in this study without intermediate appellate courts are Montana, Nevada and Wyoming.

[87] Additionally, during most of the 1990s, West published an index at the beginning of each volume listing the cases reported within that volume that cited federal law of any type. At some point, West stopped publishing this index and the only way to discern which state cases potentially involve federal law is to search the Westlaw database for the term "U.S.C.A."

[88] For instance, if a state court deals summarily with an equal protection claim under the federal constitution and does not cite to the federal constitution, West would still insert "U.S.C.A. Const. Amend. 14" into the Headnote dealing with that portion of the case.

as background or as part of a tangential statement.[89] While reading the cases, I noted the federal law that the court interpreted as well as the Headnote under which the decision appeared. The product of this process, therefore, was a list of all federal questions decided by state courts of mandatory jurisdiction in civil cases during 1991 and 2001.

Turning to the results of the study, one notices immediately that, on the whole, state courts do not decide huge numbers of civil federal questions. Among the civil opinions published by the appellate courts of mandatory jurisdiction in the 15 states of the Ninth and Tenth Circuits, federal questions arose in roughly 10% of the civil opinions published in 1991 and 2001.[90]

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[89] For example, many states sanction attorneys for committing criminal acts. In issuing a disciplinary opinion dealing with an attorney who has violated a federal wire fraud statute, for example, the state court will often cite the federal wire fraud statute as predicate to sanctioning the attorney. Although the state court cited federal law, it did not resolve any federal question. *See, e.g.*, People v. DeRose, 35 P.3d 708 (Colo. 2001).

[90] I calculated the total number of published civil opinions from courts of mandatory jurisdiction in two steps. First, I searched the Westlaw "allstates" database for all published civil opinions during 1991 for the 15 states covered in the Pacific reporter. To do this, I constructed a search that would retrieve every published opinion (1) having an "P.2d" in its citation, (2) issued during 1991 by a lower court (3) but that did not have any criminal law "topic numbers" listed in any Headnotes, (4) did not have any references to a "table" or "memorandum" opinion, and (5) did not contain the words "not reported"—which often indicate an unpublished opinion. (Table or memorandum opinions are typically opinions listing cases that have been denied or granted certiorari, or listing cases that have otherwise received a summary disposition.) For this example, the specific Westlaw search instructions were:

> ci("p.2d") & da(aft 12/31/1990 & bef 1/1/1992) & co(low) % to(110 197 203 349 350H) ci(table) ci(mem!) ci("not reported")

I then repeated this search using the year 2001.

Second, because the first search only focused on lower court opinions (due to the "co(low)" search term), I then searched specific jurisdictions without intermediate appellate courts for the same type of cases. To collect such cases from the jurisdiction of Montana, for example, I searched the "mt-cs" database using the following search terms:

> ci("p.2d") & da(aft 12/31/1990 & bef 1/1/1992) % to(110 197 203 349 350H) ci(table) ci(mem!) ci("not reported")

The only difference between this search and the one noted above is the absence of "co(low)." After retrieving cases from the states without intermediate appellate courts (which, in the Pacific reporter, include Montana, Wyoming and Nevada), I added these cases to the total cases retrieved in the first search.

Table 7: State Civil Opinions: Federal vs. Non-Federal Questions in States of the Ninth and Tenth Circuits				
	1991		**2001**	
	Total	**%**	**Total**	**%**
Total civil opinions published by appellate courts of mandatory jurisdiction	2,290	100	1,712	100
Civil opinions published by appellate courts of mandatory jurisdiction resolving a federal question	219	9.6	165	9.6

While this quantity of federal questions appears rather insignificant, it reveals little standing alone. Instead, it must be compared to the number of federal questions heard in federal appellate courts. Moreover—because the goal here is to assess experience, which is a trait of individual judges rather than courts—one must compare the federal questions resolved *per appellate judge*. This comparison is presented in Table 8, below.

Table 8: Federal Questions Decided Per Judge In State And Federal Appellate Courts in 2001		
	State	**Federal**
Estimated federal questions resolved in civil cases by state appellate courts of mandatory jurisdiction[91]	2705	4,729

[91] To meaningfully compare state and federal court adjudications of federal law, it is necessary to choose a single metric—total published opinions or total resolved cases. On the state level, the only feasible way to count the number of state court adjudications is to use West's Pacific reporter—which, by definition, contains published opinions. These results are published in Table 7. On the federal level, the only feasible way to count federal court adjudications is to use the statistics kept by the Administrative Office of the U.S. Courts—which list total recorded cases. (Theoretically, one could page through the Federal Reporters to count cases, but this would be an excessively onerous task and is not feasible without a substantial research team.) In light of this divergence, I elected to convert the state published opinions to total resolved cases by multiplying the number of published opinions by the publication rate of 6.1%.

I calculated this rate by dividing the number of opinions published by intermediate appellate courts during 2001 in 12 states West's Pacific reporter by the number of cases disposed of by the same courts during 2001. According to Westlaw the intermediate appellate courts in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, New Mexico, Oregon, Utah and Washington published 2,223 opinions during 2001. (I left the state supreme courts of Montana, Wyoming and Nevada out of this calculation because, although courts of mandatory jurisdiction, their publication rates are likely to be different due to their status as supreme courts.) According to a report by the National Center for State

Number of appellate judges on court	243[92]	60[93]
Federal questions resolved per appellate judge	11.1	78.8

Thus, according to Table 8, the average federal appellate judge has seven times more experience with federal questions that the average state appellate judge. Yet, appellate experience is not an especially useful metric for comparing state and federal courts. In both the state and federal systems, trial judges have the final say in the great majority of cases. Thus, a truer picture of experience—that is, one experienced by most litigants—must focus on the experience of trial judges.

This is easier said than done, however. Because state trial courts rarely, if ever, publish opinions, the only way to estimate the number of federal questions adjudicated in trial courts is to use appeal rates. Yet, while there is reliable data on federal appeal rates,[94] there is no such data on state appeal rates. This is perhaps due to the wide variety of specialized courts in state systems, many of which appeal to differing intermediate appellate or supreme courts.[95] This makes it quite difficult to arrive at any

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Courts, these same courts disposed of 36,618 cases during 2001. Brian J Ostrum, et al., *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project*, Table 2 (2003) available at http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html. This yields a publication rate of 6.1%.

Notably, this number differs somewhat significantly from federal publication rates of roughly 20 percent. *See* note 51, *supra*. If the state publication rate were actually higher than 6.1 percent, the number of federal questions likely resolved in state appellate courts would actually be significantly lower. For example, if the rate were 20 percent instead of 6.1 percent, the number of federal questions adjudicated in state courts would be only 825 rather than 2,705.

[92] Ostrum, *et al.*, *supra* note 91, at 8-59.

[93] Surprisingly, the most reliable way to count the number of federal judges at specific point in time is consult a volume of West's Federal Reporter containing cases from that point in time. This number, which includes both active and senior circuit judges, was calculated using volume 240 of the Federal Reporter, Third, pages xii-xiii. The number includes both active and senior circuit court judges, but does not include the periodic participation of visiting judges in the cases.

[94] *See* Eisenberg, *supra* note 50, at 663, 664 tbl.1 (finding the federal civil appeal rate to be 10.9% in cases filed between 1986 and 1997).

[95] For example, many states have a variety of limited subject matters courts—such as municipal courts, juvenile courts, family law courts, probate courts, water courts etc—which may appeal to several different courts, which in turn may themselves appeal to different courts. *See* Ostrum, *et al.*, *supra* note 91, at 3-59 (containing charts of court structures for each state and the District of Columbia). Federal questions may arise in any of

single appeal rate for the state system. Thus, to compare trial court experience, it is necessary to assume a variety of different state court appeal rates. In Table 9, federal questions in state trial courts are calculated using a conservative, moderate and liberal appeal rate and the federal questions per trial judge are then calculated.[96]

Table 9: Federal Questions Decided Per Judge In State And Federal Trial Courts in 2001		
	State	**Federal**
Estimated federal questions resolved in trial courts	27,050 (at 10% appeal rate) 54,100 (at 5% appeal rate) 270,500 (at 1% appeal rate)	43,385[97]
# of judges on trial courts	2,865[98]	193[99]
Federal questions resolved per trial judge	9.4 (at 10% appeal rate) 18.9 (at 5% appeal rate) 94.4 (at 1% appeal rate)	224.8

Even under the most conservative appeal rate of 1%, federal trial judges still adjudicate more than two times the number of the civil federal questions than state courts. If the appeal rate is a more plausible 5%, however, federal judicial experience exceeds that of states judiciaries' by a factor of 12. And

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these courts, but are certainly more likely to appear in courts of general jurisdiction. Thus, it is difficult if not impossible to calculate a single, representative appeal rate.

[96] I chose these appeals rates based on the evidence of appeal rates in both state and federal courts. In state courts, the only available data on appeal rates places the rate at 0.7%. James P. George, *Access to Justice, Costs and Legal Aid*, 54 AM. J. OF COMP. L. 293, 298-99 (2006) (placing the appeal rate at 0.7% after excluding traffic court cases). At the federal level, appeal rates in civil cases have repeatedly been placed near 10%. See Eisenberg, supra note 50, at 663, 664 tbl.1. Using these two rates as end points, I chose 5% as a mid-point appeal rate.

[97] This number was calculated using a 10.9% appeal rate. *See* Eisenberg, supra note 50, at 664 tbl.1.

[98] *See* Ostrum, *et al*., *supra* note 91, at 8-59. In counting the judges on the state trial courts, I counted only judges in courts of general jurisdiction. Many state courts have courts of limited jurisdiction (such as small claims, family or probate courts) in which federal questions might conceivably appear. Nonetheless, significant numbers of federal questions are unlikely to appear in these types of cases and, to compare state court and federal experience in the most conservative manner, I excluded these from the total. If these judges were added to the total state judge count, state inexperience with federal law would be even more pronounced.

[99] These judges were counted by referring to the list of judges published in 2001 in volume 142 of the Federal Supplement, Second, pages vii-xxiv.

if the state appeal rate turns out to be at or near 10%, federal experience with civil federal questions would be nearly 24 times state court experience.

One must be careful, however, not to ignore the law of diminishing returns with respect to experience. That is, while federal trial judges might hear 2 times the number of civil federal questions as state trial judges (assuming the conservative appeal rate of 1%), state trial judges might still develop significant experience in federal law from those adjudications. After all, adjudicating 94 cases each year is likely to have an educational effect on state judges. The difficulty with this hypothesis, however, is that there are tens of thousands of different federal laws (whether enacted as a constitutional provision, statute, regulation, or some other form). State trial judges might indeed gain significant experience in a federal law if they addressed the same provision 94 times each year, but they might gain very little experience if they adjudicate a particular federal question no more than once every couple years. The only way to properly assess state trial judge experience, therefore, is to consider the incidence of particular federal questions adjudicated in state courts. As Table 10 makes clear, the majority of federal questions resolved in state civil opinions are constitutional questions.

Table 10: State Civil Opinions Resolving Federal Questions: Statutory v. Constitutional Questions

	1991		2001	
	Total	**%**	**Total**	**%**
Civil opinions resolving federal question(s)	219	100	165	100
Civil opinions resolving only statutory federal question(s)	60	27.4	42	25.5
Civil opinions resolving only constitutional federal question(s)	142	64.8	105	63.6
Civil opinions resolving statutory and constitutional federal questions	17	7.8	18	10.9

This suggests that state court experience—whatever its specific degree—is concentrated in constitutional rather than statutory law.[100] Yet a fuller picture of state court experience with federal constitutional law can be had by

[100] These results are generally consistent with a small study of federal questions taken up in state supreme courts. *See* Meador, *supra* note 82. In that study, Professor Meador surveyed the civil and criminal opinions of seven state supreme courts in 1983 and found that well over 90% of the federal questions decided involved questions of constitutional rather than statutory law. *Id*. at 351.

looking at the specific constitutional questions it adjudicates in civil cases, which are presented in Table 11 below.

Table 11: Constitutional Federal Questions Resolved in State Civil Opinions[101]				
	1991		**2001**	
	Total	**%**	**Total**	**%**
Total civil constitutional questions	172	100	148	100
Bill of Attainder	1	0.6	1	0.7
Confrontation Clause	0	0.0	1	0.7
Contracts Clause	2	1.2	0	0.0
Dormant Commerce Clause	2	1.2	2	1.4
Double Jeopardy	1	0.6	2	1.4
Eighth Amendment	0	0.0	2	1.4
Equal Protection	17	9.9	20	13.5
Ex Post Facto Clause	2	1.2	2	1.4
First Amendment	17	9.9	15	10.1
Fourth Amendment	6	3.5	2	1.4
Full Faith and Credit	3	1.7	1	0.7
Incrimination Clause	0	0.0	3	2.0
Indian Commerce Clause	1	0.6	0	0.0
Interstate Compact Clause	0	0.0	1	0.7
Presentment Clause	1	0.6	0	0.0
Procedural Due Process	84	48.8	65	43.9
Seventh Amendment	5	2.9	0	0.0
Sixth Amendment	3	1.7	0	0.0
Substantive Due Process	5	2.9	5	3.4
Supremacy Clause	10	5.8	14	9.5
Takings	10	5.8	6	4.1
Void for Vagueness	2	1.2	6	4.1

Looking at Table 11, one sees that roughly 75 to 80 percent of the constitutional questions adjudicated in civil cases are confined to just five types of questions: equal protection claims, first amendment claims, procedural due process claims, supremacy claims and takings claims. While the courts hear few civil cases in other areas, one must be careful not to conclude that they

[101] Note that this table presents the number of constitutional federal *questions*, while Tables 7 and 8 presented the number of federal question *opinions*. Because many cases contained more than one constitutional question, the total constitutional federal questions in this Table differ from the total opinions containing constitutional federal questions.

therefore have little experience in those areas. Due to state courts' criminal and habeas dockets, they have significant experience—perhaps experience even superior to federal courts—with claims under the Fourth, Fifth, Sixth and Eighth Amendments. State courts also likely have additional experience in due process, equal protection, first amendment and takings claims because many states have constitutional provisions on these subjects that mirror (or at least are interpreted as mirroring) the federal constitutional provisions.[102] Thus, the picture that emerges with respect to state courts' experience in the area of constitutional law is this: state courts likely have fairly significant experience with federal questions predicated on the Bill of Rights and the Fourteenth Amendment, but have much less experience with questions predicated on the main body of the constitution or certain amendments (such as the Ninth, Tenth, and Eleventh Amendments). Or, to put a bit differently, state courts likely have significant experience adjudicating certain categories of individual rights claims, but very little experience adjudicating questions of federalism and constitutional structure. To be sure, this generalization does not hold true in all specific instances,[103] but on the whole, it is more correct than not.

A much different picture, however, is painted by state court interpretation of federal statutes. Unlike the constitutional questions often adjudicated in state court, statutory questions are much more variegated. Moreover, state courts have no alternate way to develop experience in these areas of law, as they do in constitutional cases due to their criminal and habeas dockets and analogous state constitutional provisions. Consider Tables 12 and 13, below.

Table 12: Statutory Federal Questions Resolved in State Civil Opinions in 1991		
Statute	**Total**	**%**
Total statutory federal questions	83	100
42 U.S.C. § 1983	16	19.3
Bankruptcy Act	15	18.1
Federal Employees Liability Act	4	4.8
Indian Child Welfare Act	4	4.8
Farm Credit Act	4	4.8
Fair Labor Standards Act	3	3.6
42 U.S.C. § 1985	3	3.6

102 *See generally* GARDNER, *supra* note 38.

103 For instance, state courts seem to decide more Supremacy Clause issues—which are structural issues—than substantive Due Process issues—which concern individual rights.

Table 12: Statutory Federal Questions Resolved in State Civil Opinions in 1991		
42 U.S.C § 1988	3	3.6
5 U.S.C. § 8336-38	3	3.6
Social Security Act	2	2.4
National Labor Relations Act	2	2.4
Consumer Credit Protection Act	2	2.4
42 U.S.C. § 1981	2	2.4
Parental Kidnapping Prevention Act	2	2.4
ERISA	1	1.2
Uniformed Serv. Fmr. Spouses Prot. Act	1	1.2
Labor Management Relations Act	1	1.2
Truth in Lending Act	1	1.2
Railway Labor Act	1	1.2
Patent Jurisdiction	1	1.2
Clayton Act	1	1.2
28 U.S.C. § 1447	1	1.2
30 U.S.C. § 29	1	1.2
Federal Land Policy Act	1	1.2
Mineral Lands Leasing Act	1	1.2
Vocational Rehabilitation Act	1	1.2
General Allotment Act	1	1.2
25 U.S.C. § 261-64	1	1.2
Food Stamp Act	1	1.2
Fed. Property & Admin. Servs. Act	1	1.2
Equal Credit Opportunity Act	1	1.2
Federal Credit Union Act	1	1.2

Table 13: Statutory Federal Questions Resolved in State Civil Opinions in 2001		
Statute	**Total**	**%**
Total statutory federal questions	63	100
Indian Child Welfare Act	11	17.5
42 U.S.C. § 1983	5	7.9
Bankruptcy Act	5	7.9
Social Security Act	3	4.8
Labor Management Relations Act	3	4.8
Healthcare Quality Improvement Act	3	4.8
National Labor Relations Act	3	4.8
ERISA	2	3.2

Table 13: Statutory Federal Questions Resolved in State Civil Opinions in 2001		
Fair Labor Standards Act	2	3.2
Federal Arbitration Act	2	3.2
42 U.S.C. § 1981	2	3.2
18 U.S.C. § 1151	2	3.2
Communications Act of 1934	2	3.2
Title VII	1	1.6
Americans with Disabilities Act	1	1.6
Gun Control Act	1	1.6
ICC Termination Act	1	1.6
Uniformed Serv. Fmr. Spouses Prot. Act	1	1.6
Rehabilitation Act	1	1.6
National Trails System Act	1	1.6
Columbia River Gorge . . . Mgmt. Plan	1	1.6
Federal Railroad Safety Act	1	1.6
28 U.S.C. § 1333	1	1.6
Food Security Act	1	1.6
Immigration Reform and Control Act	1	1.6
Emerg. Medical Trmt. & Active Lab. Act	1	1.6
Communications Decency Act	1	1.6
Full Faith & Cred. for Child Supp. Or. Act	1	1.6
Title VI	1	1.6
42 U.S.C. § 1988	1	1.6
10 U.S.C. § 1408	1	1.6

Unlike the constitutional questions heard in state courts (which were mostly confined to five types of claims), federal statutory questions are not concentrated in any particular area. The only questions appearing with any regularity involve § 1983, the Bankruptcy Act and the Indian Child Welfare Act (ICWA). The Bankruptcy Act and ICWA cases—which comprise about a quarter of the statutory questions—are unimportant for the present analysis, however. Litigants wishing to file for bankruptcy must do so in federal court.[104] Thus, although state courts may have experience in a particular portion of the bankruptcy code,[105] that experience is not "available" to a

[104] Federal courts have exclusive jurisdiction over bankruptcy proceedings. 28 U.S.C. § 1334 (2005).

[105] State cases involving the Bankruptcy Act typically involve questions of whether state judgments assessing fines against a bankruptcy petition violate the Act's automatic stay on all subsequent actions against the debtor. *See, e.g.*, Miller v. National Franchise

claimant choosing between state and federal court. Similarly, the ICWA regulates child custody disputes involving Native Americans that are filed in state courts.[106] Thus, this question—though federal in nature—is in practice an insufficient predicate for federal question jurisdiction.

With these cases put aside, one sees that state court experience with federal statutes is highly limited. State courts hear only a scattering of claims based on federal legislation. While approximately 30 different statutes appeared in state opinions in 1991 and 2001 respectively, the number of adjudications per statute was little more than token. Roughly 75 percent of the statutes were adjudicated only one or two times in over 15 states. And only one statute (42 U.S.C. § 1983) was ever addressed more than 10 during *both* 1991 and 1992.[107] Thus, state court experience with federal legislation appears to be highly limited.

* * *

In sum, while state courts likely have significant experience adjudicating certain types of federal individual rights claims, they have little experience on the whole with federal law. This lack of experience is particularly extreme in the field of federal statutes. The Article now turns to the federal governments sovereignty interests, a portion of which are protected by federal question jurisdiction.

B. *Sovereignty*

Under the classic conceptions of sovereignty, a sovereign has the implicit authority to determine the rules of the territory over which it is sovereign.[108] If the sovereign chooses a system of government that relies on judicial interpretation of that sovereign's law, the sovereign has a keen interest in (1) having the opportunity to craft its own law through adjudication, and (2) appearing as a party before its own courts rather than the courts

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Servs. Inc., 807 P.2d 1139 (Ariz. App. 1991) (considering whether automatic stay entered by federal bankruptcy court pursuant to 11 U.S.C. § 362 prohibits garnishment of debtor's salary).

[106] *See* 25 U.S.C. 1901 *et seq*. (2005).

[107] While the Bankruptcy Act and Indian Child Welfare Act were each adjudicated more than ten times on one occasion, as noted above, such statutes are relatively unhelpful in assessing state court experience. *See* notes 104-106, *supra*, and accompanying text.

[108] The classic conceptions of sovereignty stem from the writings of Thomas Hobbes and John Locke. *See* Helen Stacy, *Relational Sovereignty*, 55 STAN L. REV. 2029, 2032-34 (2003).

of some other sovereign. As explained below, statutory federal question jurisdiction serves the first, but not the second, sovereignty interest.[109]

Lawmaking Interests. Under the United States Constitution, Congress has the primary authority to make law. Because the judiciary adheres to a principle of *stare decisis*, however, judicial interpretation of federal law—whether by state or federal courts—has the effect of law. The federal government, therefore, has a strong interest in having the opportunity to adjudicate questions of federal law. Without this opportunity, state courts would essentially control the meaning of federal law.[110]

Using § 1331, litigants file approximately 140,000 federal question cases each year.[111] Of course, only a portion of these yield judicial opinions by district or appellate courts that become positive law,[112] but without this

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[109] England v. La. State Bd. of Med Exam'rs, 375 U.S. 411, 415-16 (1964) (noting the state courts' role as the "final expositors of state law" and the "primacy of the federal judiciary in deciding questions of federal law"); Friedman, *supra* note 3, at 1241 ("A sovereign's interest in . . . defining the rules that govern [its] society, seeing that those laws and rules are obeyed, and punishing those who transgress them . . . is a quintessential aspect of sovereignty."); Martin Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles*", 78 VA. L. REV. 1769, 1774 (1992) (stating that "it makes practical sense for a sovereign's courts to have primary responsibility for adjudication of that sovereign's law"); Chemerinsky & Kramer, *supra* note 4, at 80-81 (noting the role of federal courts in serving sovereignty interests).

[110] While the federal government would still maintain the ability to review state court decisions through the U.S. Supreme Court's appellate jurisdiction, *see* 28 U.S.C. § 1257, it would be virtually impossible for the Supreme Court to meaningfully superintend the meaning of federal law on its own. For discussions of the Supreme Court's modern docket and monitoring abilities, see Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 739, 743 (2001) (noting the Court's decrease in docket size from an about 150 cases prior to the 1980s to between 70-80 currently) and Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1704-13 (2000) (noting the plenary discretion afforded to the Supreme Court to decline appellate jurisdiction). While Professor Solimine recently observed that "available evidence seems to indicate that the Supreme Court has been able, to a tolerable degree, to carry out the monitoring function [of state courts]," such evidence says little about the Supreme Court's ability to monitory state courts in a world without statutory federal question jurisdiction. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 359 (2002).

[111] Administrative Office of the United States Courts, Table 4.8: U.S. District Courts, Civil Cases Filed by Jurisdiction, available at http://www.uscourts.gov/judicialfactsfigures/contents.html (listing number of cases filed under § 1331 for past 6 years, which ranged from 138,441 to 165, 241).

[112] According to a study of over 1,600 state and federal cases, only 20 percent remained in the judicial system long enough to be resolved on the merits either by pretrial

jurisdictional grant, the federal courts would have only limited opportunities to rule on federal questions.[113] Thus, § 1331 is the main avenue through which the federal government can control the content of its own laws. This is far from shocking, of course, but it is repeatedly ignored in assessing the purposes of federal question jurisdiction.[114]

Litigant Interests. A different situation is presented, however, with the federal government's interest as a party to litigation. Under this type of sovereignty interest, the federal government has an interest in suing and being sued in its own courts. While this is a preeminent interest of a sovereign, the question here is whether statutory federal question jurisdiction serves this interest.

The answer is no. Several statutes other than 28 U.S.C. § 1331 grant the federal courts jurisdiction over cases where the federal government is a litigant. For instance 28 U.S.C. § 1345 grants "district courts . . . original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof authorized to sue by Act of Congress." Similarly, both § 1346 and 1441(b) guarantee the federal government, its agencies and officers access to a federal forum if sued. Beyond jurisdiction in the district courts, litigant interests are broadly protected by the Court of Federal Claims, which, generally speaking, has jurisdiction over non-tort suits for money damages against the United States government.[115] In addition to these jurisdictional provisions, numerous other statutes guarantee the federal government access to a federal forum.[116]

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motion or a trial on the merits. Herbert M. Kritzer, *Adjudication to Settlement, Shading in the Gray*, 70 JUDICATURE 161, 163 (1986).

[113] Federal courts also have jurisdiction over civil cases where the U.S. government is a party. These cases, however, are much less numerous (approximately 55,000) and are typically limited to specific areas of law. *See* Administrative Office of the United States Courts, Table 4.8: U.S. District Courts, Civil Cases Filed by Jurisdiction, available at http://www.uscourts.gov/judicialfactsfigures/contents.html. (listing number of cases filed in federal court in which U.S. government was a party). Moreover, many cases—such as those involving the Federal Tort Claims Act—require federal courts to apply state law. *See* 28 U.S.C. § 2671 *et seq*. (2005).

[114] *See* note 4, *supra*.

[115] *See* 28 U.S.C. § 1491 (2005).

[116] *See, e.g.,* 28 U.S.C. § 1347 (granting district courts jurisdiction over a partition action where the United States is a joint tenant); 28 U.S.C. § 1348 (granting district courts jurisdiction over cases involving corporations organized under an Act of Congress where the United States owns more than half the corporation's capital stock); 28 U.S.C. § 1355 (granting district courts jurisdiction to enforce "any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress"); 28 U.S.C. § 1357 (granting district courts jurisdiction for "injury to person or property on account of any act done by him, under any Act of Congress, for the protection or collection of revenues, or to enforce the right of citizens of the United States to vote in any state"); 28 U.S.C. § 1358 (granting dis-

Thus, while the federal government clearly has an interest in suing or being sued in a federal forum, many statutes other than § 1331 accomplish this goal.

Still, one could argue that such statutes are duplicative of § 1331 and that § 1331 alone could serve this interest. After all, many federal statutes, such and the Civil Rights Act and RICO statute, contain jurisdictional provisions that are duplicative of § 1331.[117] Moreover, the Supreme Court has clearly held that a case "arises under" federal law for the purposes of Article III if the federal government is a party to the action.[118] This ignores, however, that the Court has interpreted § 1331's "arising under" clause much more narrowly than the Article III clause.[119] Under this narrower understanding, a case whose federal nature stems only from the United States' status as a party would not fall within the "arising under" jurisdiction of § 1331.[120]Thus, if statutory federal question jurisdiction were abolished, the federal government's litigant interests would not be harmed at all.

* * *

As explained above in Part IV, federal question jurisdiction under 28 U.S.C. § 1331 serves two particular purposes. It provides litigants with access to judges likely to be experienced in federal law (particularly in statutory form) and it allows the federal government to control the meaning of federal law. With these two purposes presented, the Article now turns to

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trict courts jurisdiction over "all proceedings to condemn real estate for the use of the United States or its departments or agencies"); 28 U.S.C. § 1361 (granting district courts jurisdiction over "any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff"); 28 U.S.C. § 1444 (permitting the United States to remove a state court foreclosure action to federal court).

117 *See* note 8, *supra* (noting redundant jurisdictional statutes)

118 *See* Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 811 (1824).

119 Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494-95 (1983) ("Although the language of § 1331 parallels that of the "Arising Under" clause of Art. III, this Court never has held that statutory "arising under" jurisdiction is identical to Art. III "arising under" jurisdiction."). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 5.2 at 266-67 (2003) (addressing the distinction between jurisdiction under Article III and under § 1331). For excellent historical accounts of the statutory grant of jurisdiction see James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942) and Roy Forrester, *The Nature of a "Federal Question*", 16 TUL. L. REV. 362, 374-77 (1942).

120 One exception to this would be in the field of government contracts. In resolving contract disputes in which the U.S. government is a party, courts typically apply federal common law, which is a sufficient hook for federal question jurisdiction under § 1331. *See, e.g.,* Almond v. Capital Props., Inc., 212 F.3d 20 (1st Cir. 2000); Montana v. Abbot Labs., 266 F. Supp. 2d 250 (D. Mass. 2003).

another purpose that might be attributed to the jurisdictional grant but is nonetheless not proven by empirical evidence.

V. A NOTE ON CASELOAD

It is tempting to think that, in addition to the purposes explained above, federal question jurisdiction also shoulders a large caseload burden. Without federal question jurisdiction, the argument goes, state courts would be besieged by an avalanche of federal claims. When one looks more closely at the data, however, this claim is not borne out.

In 2003, 142,591 cases were filed in federal court pursuant to federal question jurisdiction.[121] In that same year, litigants filed 100.1 million cases in state courts.[122] If federal question jurisdiction were abolished and the state courts had to absorb 142,591 federal question cases, the caseload of the state courts would increase only a tiny 0.14%. Yet, it is likely improper to use the states' total caseload, since it undoubtedly includes many small cases such as traffic court cases and small claims court cases, which require significantly fewer judicial resources to adjudicate. To better assess the marginal burden that federal question cases would impose, one must consider the specific types of cases adjudicated in state courts. These are listed in Table 14, below.

Table 14: Total Incoming Cases in State Courts in 2003 (in millions)[123]

Case Type	Unified & General Jurisdiction	Limited Jurisdiction
Traffic	14.0	40.6
Criminal	6.2	14.4
Civil	7.6	9.4
Domestic	4.1	1.6
Juvenile	1.4	0.8
Total	33.3	66.8

Looking at Table 14, one immediately sees that limited jurisdiction cases account for the great majority of state cases. While these are not always

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121 *See* Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics, Table C-2, available at http://www.uscourts.gov/caseload2005/contents.html.

122 Richard Y. Schlauffler et al., *Examining the Work of State Courts, 2004: A National Perspective from the Court Statistics Project*, 14 (2005), available at http://www.ncsconline.org/d_research/CSP/2004_Files/EW2004_Main_Page.html.

123 *Id*.

small in size (a divorce case in a limited jurisdiction family court, for example, may require significant court resources to resolve), it is likely that most cases in these courts are small. Similarly, some cases in the courts of general or unified jurisdiction—such as traffic cases—do not individually impose large burdens the state courts. A better picture of state caseloads (for the purposes of this Article, at least) would include all non-traffic cases in courts of unified or general jurisdiction—which number 19.3 million. Using that value, an addition of 142,591 federal question cases would only increase state caseloads by a negligible 0.7%.

Certainly, if faced with the task of absorbing the federal courts' federal question docket, state judges and court administrators would claim that state courts do not have the capacity to absorb even a 0.7% increase in caseload. This may well be correct, but it does not mean that federal question jurisdiction therefore shoulders a huge caseload burden. It might suggest, however, that federal question jurisdiction therefore provides federal claimants with a forum that will review their claims more quickly than alternative fora. While there is certainly something to this (federal courts *do* tend to dispose of cases more quickly than state courts) the difference in case processing time is not so substantial that it rises to the level of a specific purpose accomplished by federal question jurisdiction.[124] Moreover, even if one recognized this as a limited purpose of the jurisdictional grant, it would not be useful in deciding jurisdictional questions. While different cases will implicate experience and control interests to different degrees, all cases will implicate the expediency issue to the same degree. That is, regardless of the subject matter of a case or the federal law involved, federal courts assessing their jurisdiction will always be justified in assuming that federal adjudication will proceed somewhat more quickly than state courts in adjudicating the claim. Thus, the expediency factor—though perhaps enlightening in general—does little to help courts actually determine the contours of federal jurisdiction.

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[124] According to the Administrative Office of the U.S. Courts, federal district courts disposed of civil cases, on average, in 8.3 months from time of filing. *See* Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, March 31, 2004, at http:// www.uscourts.gov/caseload2004/tables/C05Mar05.pdf. According to a study of 36 urban trial courts across the country, state courts disposed of civil cases, on average, in 417 days—or 13.9 months—from the time of filing. *See* John A. Goerdt, *Reexamining the Pace of Litigation in 39 Urban Trial Courts*, 39, Table 3.2 (1991), available at http://www.ncsconline.org/WC/Publications/KIS_CasManReexam PaceLitig.pdf.

VI. EXPERIENCE AND CONTROL IN PRACTICE

Replacing the "uniformity-solicitude-experience" regime with an "experience-control" regime has important implications for many federal question doctrines, particularly those that are explicitly based on the traditional purposes.[125] While the chief purpose of this Article has been simply to adduce the empirical evidence on the jurisdictional grant rather than explore its doctrinal implications, a short exploration of one area of law will illustrate the potential import of this evidence. Thus, this Article briefly discusses the doctrines of concurrent jurisdiction, exclusive federal jurisdiction, and exclusive state jurisdiction.

Under the Supreme Court's view, "nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law."[126] Thus, there is a "deeply rooted presumption in favor of concurrent state court jurisdiction."[127] This presumption, however, has been criticized as contradicting the traditional purposes of federal question jurisdiction. That is, a presumption of concurrent jurisdiction causes numerous meaningful federal questions to end up state court, where they will injure the uniformity of federal law.[128] In light of the evidence presented in this Article, however, the criticisms are misplaced and the doctrine is entirely justified. State court adjudications of federal law have little effect on its uniformity

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125 Other than concurrent and exclusive jurisdiction, which are discussed in this part, the shift in purposes identified in this Article will certainly be relevant to three particular subjects in federal jurisdiction: the well-pleaded complaint rule, federal jurisdiction under counterclaims, and substantial federal question jurisdiction. Each of these subjects has been debated in terms of the traditional purposes of federal question jurisdiction and the new purposes identified in this Article offer a new perspective on the debate. *See* Doernberg, *supra* note 12 (claiming that the well-pleaded complaint rule contradicts the traditional purposes of the federal question jurisdiction); Larry D. Thompson, *Adrift On a Sea of Uncertainty: Preserving Uniformity in Patent Law Post-*Vornado *Through Deference to the Federal Circuit*, 92 GEO L.J 523 (2004) (arguing that has the Supreme Court decision *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc*, 535 U.S. 826 (2002), which held that counterclaims containing a federal question cannot provide a basis for federal question jurisdiction, will injure the uniformity of patent law); John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 46 U. CIN. L. REV. __ (forthcoming 2006) (using the traditional purposes of federal question jurisdiction to assess the appropriate jurisdictional rule substantial federal question cases).

126 Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962).

127 Tafflin v. Levitt, 493 U.S. 455, 459 (1990).

128 *See* Chemerinsky & Kramer, *supra* note 4, at 84. Other concerns, such as with state hostility or experience in federal law are not implicated by concurrent jurisdiction because, if the case contains a substantial federal question, either party may choose to have the case heard in federal court. The plaintiff may file the case their in the first instance or the defendant may remove it there. 28 U.S.C. § 1441 (2005).

because legal questions are extremely close-ended, state courts typically follow narrow paths which tend to adhere to federal precedent, and state opinions that depart from settled views are highly unlikely to have significant precedential effect. Thus, contrary to views of many, concurrent jurisdiction is entirely unproblematic in the field of federal jurisdiction.

Of course, although federal jurisdiction is presumed to be concurrent with the states, exclusive federal jurisdiction is warranted if the presumption is rebutted. Under Supreme Court precedent, one may rebut the presumption by showing "an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[129] The first two grounds for rebutting the presumption in favor of concurrent jurisdiction are tied to Congress' prerogative to make federal jurisdiction exclusive while the third is tied to the judiciary's prerogative.[130] Regardless of who decides whether federal jurisdiction over a particular subject matter should be exclusive, however, the ultimate inquiry appears the same. Exclusive jurisdiction is warranted by "the desirability of uniform interpretation [of federal law], the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.'"[131] In light of the principles upon which exclusive federal question jurisdiction has thus far been based, as well as the new principles identified in this Article, the question becomes: which grants of exclusive jurisdiction are justified and which areas of concurrent jurisdiction deserve to exclusive jurisdictional status?

Currently, several types of legal questions are heard only within the exclusive jurisdiction of the federal courts: admiralty,[132] patent and copyright,[133] bankruptcy,[134] antitrust,[135] and federally-regulated securities,[136]

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129 Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

130 Of course, it is eminently debatable whether the judiciary has any prerogative at all in this respect. Moreover, in a case decided soon after *Tafflin v. Levitt—Yellow Freight Systems v. Donnelly*, 498 U.S. 820 (1990)—the Supreme Court did not claim authority to craft exclusive jurisdiction doctrine on its own. Instead, it stated the exclusive jurisdiction turns solely on whether Congress "affirmatively divest[s] state courts of their presumptively concurrent jurisdiction." *Id*. at 823. Nonetheless, *Gulf Offshore* and *Tafflin*, which both claim judicial authority to craft jurisdiction under the "clear incompatibility" approach, are the more commonly cited and accepted authorities on the subject.

131 *Tafflin*, 493 U.S. at 464 (citing *Gulf Offshore Co*., 453 U.S. at 483-84). While the quoted factors are from the Supreme Court's understanding of the "clear incompatibility" inquiry, the policy decision undertaken by Congress admits of the same considerations. *See* Redish, *supra* note 109, at 1811 (noting that "[t]he most striking aspect of [the reasons advanced in favor of exclusive federal jurisdiction] is their similarity to the justifications generally given for the provision of general federal question jurisdiction in the first place").

132 28 U.S.C. § 1331(1) (2005)

133 28 U.S.C. § 1338(a) (2005).

among others.[137] Viewed in light of the purposes of federal experience and the desire to control the content of federal law, as well as the reality that concurrent jurisdiction supplemented by the right of removal[138] (rather than exclusive state jurisdiction) is the alternative, one sees that exclusive jurisdiction is *never* warranted. While federal courts no doubt have superior experience in these areas (especially because exclusive jurisdiction has divested the states of *any* experience), concurrent jurisdiction allows either party to bring the suit before an experienced federal tribunal. With respect to the federal government's interest in controlling the content of federal law, the evidence reveals that, while litigants may seek state court review of scores of different federal statutes, in practice they rarely do. Thus, opening up the state courts to subjects traditionally within the realm of exclusive federal jurisdiction is likely to have little effect on federal ability to control the meaning of federal law.

Unlike concurrent or exclusive federal jurisdiction, exclusive state jurisdiction over federal law *completely* divests litigants of any opportunity to invoke any experience of a federal judge as well as divests the lower federal courts of any opportunity ability to control the content federal law.[139] Without concurrent jurisdiction, removal is impossible and thus will not preserve litigant interests in these circumstances. Yet, on the whole, exclusive state jurisdiction is not troublesome. First, given that federal questions within the state courts' exclusive jurisdiction were placed there by Congress (rather than the judiciary), it is doubtful that the federal courts have any superior experience to bring to the matter. Moreover, some federal statutes in

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134 28 U.S.C. § 1334 (2005)

135 *See, e.g.*, Miller v. Granados, 529 F.2d 393, 395 (5th Cir. 1976) (concluding that federal courts should have exclusive jurisdiction over antitrust suits brought under the Sherman and Clayton Acts); Washington v. American League of Pro. Baseball Clubs, 460 F.2d 654, 658 (9th Cir. 1972) (same); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 363 (6th Cir. 1967) (same).

136 15 U.S.C. § 78aa (2005).

137 Other less prominent areas of exclusive federal jurisdiction include maritime prize cases, 28 U.S.C. § 1332(2); suits against consuls or vice-consuls, 28 U.S.C. § 1351, suits for recovery or enforcement of civil fines, penalties or forfeitures under federal statutes, 28 U.S.C. § 1355; suits seeking review of certain customs decisions, 28 U.S.C. § 1583; quiet title actions against the United States, 28 U.S.C. § 2409(a); suits under the Natural Gas Act, 15 U.S.C. 717u; suits under the Miller Act, 40 U.S.C. § 270(b); and state suits for violations of the Commodity Exchange Act, 7 U.S.C. § 13a-2(2).

138 28 U.S.C. § 1441 (2005).

139 Examples of federal laws creating exclusive state court jurisdiction include the Indian Child Welfare Act, 21 U.S.C. § 1901 *et seq*. (2005), and the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2005), and 12 U.S.C. § 1819 (2005) (addressing suits against the FDIC as a receiver that involve only the rights or obligations of depositors, creditors, and stockholders under state law).

the state courts exclusive jurisdiction concern subject matters over which they have traditionally exercised jurisdiction.[140] Second, although exclusive state jurisdiction divests the lower federal courts of control over federal law, it does not divest the Supreme Court of its appellate jurisdiction over state final judgments involving federal law.[141] While, as noted above, the Supreme Court's ability to superintend state supreme court decisions is highly limited,[142] this ability is not so lame that it can not address the relatively few federal laws within the state courts exclusive jurisdiction. Were Congress to place more subject matters within this category of jurisdiction, however, federal control over federal law might suffer in significant ways. Were that to occur, federal question jurisdiction would be advisable.

VII. CONCLUSION

It is customary to conclude articles of this sort with a summary of the conclusions presented within it. As I trust such conclusions have been sufficiently explained throughout, I instead close this paper with a short observation on the continuing need for empirical studies on the federal and state courts. It is somewhat amazing that, in an age when legal research has been hugely simplified by computers, so much doctrine in the realm of federal jurisdiction still rests on untested (albeit sometimes logical) suppositions. Time and again, the top scholars in this field have recognized that "a central task of the law of federal jurisdiction is allocating cases between state and federal courts."[143] Yet, to this day, there is surprisingly little evidence on what our allocation doctrines *actually* accomplish—that is, what types of cases actually appear in state and federal courts. This paper has attempted to make a small dent in this paucity of scholarship. To be sure, however, much more needs to be done. While those in academia are well-equipped at studying data, they are less able to gather data. Therefore, progress in this area will occur only with contributions by other institutions, such as the Administrative Office of the U.S. Courts and the National Center for State Courts. These institutions have contributed mightily thus far, but have not always focused on data that has doctrinal relevance. A new focus on this area, as well as increased effort by many academics, will contribute much to the field in the coming years.

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140 *See* Indian Child Welfare Act, 21 U.S.C. § 1901 *et seq*. (granting state courts exclusive jurisdiction over child custody matters involve Native American children).

141 *See* 28 U.S.C. § 1257 (2005).

142 *See* note 110, *supra*, and accompanying text.

143 Friedman, *supra* note 3, at 1216.