PARITY RECONSIDERED: DEFINING A ROLE FOR THE FEDERAL JUDICIARY

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Throughout American history, and especially for the past thirty years, discussions about the scope of federal jurisdiction largely have focused on whether federal courts are more willing and able than state courts to protect constitutional rights. This issue has been labeled the question of "parity" between federal and state courts.\(^1\)

Those favoring expansive federal court availability to decide constitutional claims frequently argue that state courts are not to be trusted to adequately protect constitutional rights.\(^2\) They contend that, in constitutional litigation

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1. A seminal article on the subject, and one responsible for focusing the debate around the concept of parity, is Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977). As used in this Article, the issue of "parity" is whether, overall, state courts are equal to federal courts in their ability and willingness to protect federal constitutional rights. The comparison might be of federal district courts with state trial courts; or it might be of the entire state court system as compared with federal district courts and courts of appeals; or even of the entire state court system with the federal district courts. See infra text accompanying notes 143–45.

2. Challenging the proclivity and ability of state courts to protect federal rights is not the only way to define a preeminent role for the federal courts in constitutional cases. For example, some contend that the structure and history of
between the government and private citizens, federal courts are more likely than state courts to rule in favor of individual liberties and against the government.³

Some proponents of parity maintain that state courts are as likely to protect individual rights as the federal courts.⁴ Others who argue for parity contend that even if the federal and state courts might reach different results, one set of outcomes is not preferable to the other.⁵ They suggest that since both court systems offer equally acceptable processes, jurisdiction should not be determined based on an assumption that one court system is superior.

The Warren Court expanded federal court jurisdiction based on the expressly stated premise that federal courts often are necessary to ensure adequate protection of constitutional rights. By increasing the availability of federal habeas corpus for state prisoners,⁶ expanding the scope of relief under 42 U.S.C. § 1983,⁷ limiting the circumstances in which federal courts must abstain,⁸ and minimizing the preclusive effects of state court judgments in federal court,⁹ the Constitution give federal courts this role. See, e.g., Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. Rev. 205, 230 (1985); see infra text accompanying notes 262–264.

3. See, e.g., Neuborne, Toward Procedural Parity in Constitutional Litigation, 22 Wm. & Mary L. Rev. 725, 727 (1981) (arguing that a court is qualitatively better if it is more likely to attach a high value to protecting individual liberties).

4. See generally Solimine & Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hastings Const. L.Q. 219 (1983) (arguing that state courts are as likely to rule in favor of constitutional claims as are federal courts).

5. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) (arguing that no set of results is preferable to any other; so long as there is a full and fair opportunity for a hearing, no relitigation is necessary of constitutional issues raised in habeas corpus petitions).

6. See, e.g., Fay v. Noia, 372 U.S. 391, 438 (1963) (state court prisoners may raise matters on federal habeas corpus that were not raised in state court unless they deliberately bypassed state procedures); Brown v. Allen, 344 U.S. 443, 469 (1953) (state court prisoners can relitigate federal constitutional claims on habeas corpus); see infra text accompanying notes 57–59.


8. See, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965) (permitting the federal court to enjoin state court proceedings); see infra text accompanying notes 83–85.

9. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (after federal court abstention, state court decisions on state law matters do not have res judicata effect on federal courts as to federal issues); see infra text accompanying notes 87–89.
courts should be accessible to protect constitutional rights.\textsuperscript{10} In contrast, the Burger Court frequently narrowed federal court jurisdiction, declaring that state courts were equally trustworthy in deciding constitutional claims.\textsuperscript{11} The Burger Court's confidence in the state courts is reflected in its restrictions on habeas corpus relief,\textsuperscript{12} limitations placed on section 1983 suits,\textsuperscript{13} expansion of the abstention doctrines,\textsuperscript{14} and an increase in the preclusive effects of state court decisions on the federal courts.\textsuperscript{15}

Academic discussions about the scope of federal jurisdiction frequently turn on whether state courts are thought to be as likely as federal courts to vindicate federal rights. While Professor Burt Neuborne and other critics of the Burger Court's jurisdictional decisions have assailed the assumption of parity as being an unjustifiable myth,\textsuperscript{16} others, such as Professor Paul Bator, defend the deference to state courts that is inherent in the Burger Court's approach.\textsuperscript{17}

The debate over parity continues with little sign of abatement or resolution. Each side musters quotations from the Supreme Court declaring either state court parity or federal court superiority. Each side develops reasons for its position on the comparative quality of the courts. But neither side advances the debate past an intuitive judgment as to whether state courts are equal to federal courts in their will-

\begin{itemize}
\item \textsuperscript{10} See infra text accompanying notes 51-56.
\item \textsuperscript{11} See infra text accompanying notes 51-56.
\item \textsuperscript{12} See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976) (state court prisoners may not relitigate fourth amendment claims on habeas corpus if they had a full and fair opportunity to litigate them in state court); see Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991, 1022-24 (1985); infra text accompanying notes 97-98.
\item \textsuperscript{13} See, e.g., Parratt v. Taylor, 451 U.S. 527 (1981) (§ 1983 does not create a remedy when the plaintiff only seeks a post-deprivation remedy for loss of property and the state provides an adequate post-deprivation remedy); see infra text accompanying notes 97-98.
\item \textsuperscript{14} See, e.g., Younger v. Harris, 401 U.S. 37 (1971) (federal courts may not enjoin pending state court criminal proceedings); see infra text accompanying notes 83-85.
\item \textsuperscript{15} See, e.g., Allen v. McCurry, 449 U.S. 90 (1980) (state court decisions have preclusive effect on federal courts deciding claims under 42 U.S.C. § 1983); see infra text accompanying notes 87-89.
\item \textsuperscript{16} Neuborne, supra note 1, at 1105-06.
\item \textsuperscript{17} See, e.g., Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981); Bator, supra note 5, at 523-28.
\end{itemize}
ingness and ability to protect federal rights. I fear that the debate over parity is permanently stalemated because parity is an empirical question—whether one court system is as good as another—for which there never can be any meaningful empirical measure. Because the issue of parity cannot be resolved, it is worth considering whether it is possible and desirable to define a role for the federal courts without evaluating the comparative abilities of the federal and state courts in constitutional cases. Several such approaches have been suggested. Some contend that considerations of comity and federalism require deference to state courts irrespective of parity. Others argue that it is for Congress to define federal court jurisdiction and that the courts should follow congressional directions and not make any independent judgments about the state courts. Still others suggest that the Constitution’s structure and history create a presumption for either federal or state court jurisdiction.

I believe, however, that these approaches cannot successfully define a role for the federal courts without regard to parity. Upon examination, these alternatives make implicit assumptions about the relative competence of state and federal courts.

This Article develops three points. Part I will show that current decisions and debates about the scope of federal jurisdiction have focused on the question of parity between federal and state courts. Part II will demonstrate that the debate about parity is unresolvable because parity is an empirical question for which there is no empirical answer. Part III will argue that the alternatives which have attempted to define a role for the federal courts without regard to parity are unsatisfactory.

Finally, Part IV sketches an alternative definition of the role of the federal courts. Simply stated, this Article proposes that litigants with federal constitutional claims should generally be able to choose the forum, federal or state, in

18. See, e.g., Allen, 449 U.S. at 96 (“comity between state and federal courts” is a “bulwark of the federal system”); see infra text accompanying notes 184–220.


20. See, e.g., Amar, supra note 2, at 230; see infra text accompanying notes 249–67.
which to resolve their disputes. This principle should guide Congress in enacting statutes defining federal court jurisdiction and the Supreme Court in fashioning jurisdictional rules where congressional intent is uncertain.

Federal courts exist under this perspective not because they are better than state courts, but rather because they are potentially different. The role of the federal courts is to provide an alternative forum for the vindication of constitutional rights. I will argue that such an approach is desirable because it maximizes the opportunity for upholding the Constitution, increases litigant autonomy, enhances federalism, and is consistent with the existing constitutional and statutory structure. After defending this principle of litigant choice, I consider the practical implications of such an approach and respond to some of the likely objections.

Several caveats about the limited scope of this Article are necessary at the outset. First, this Article considers the role of the lower federal courts, especially the federal district courts and courts of appeals; it does not address, except tangentially, the role of the United States Supreme Court or the place of specialized federal tribunals. In part, this is because the Supreme Court's role in assuring the uniformity and supremacy of federal law has not been the subject of substantial debate. Also, most of the discussion about parity

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21. I recognize that to assert federal and state courts are different is in itself an empirical claim. It is easier, however, to establish that there are differences between federal and state courts, such as in the manner of selecting judges, the length of their tenure, the nature of the background of judges, than to demonstrate that the differences matter in terms of quality. If there are no meaningful differences between federal and state courts, at worst, they are duplicative identical forums. And, in fact, advantages exist to such redundancy. See Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation, 22 Wm. & Mary L. Rev. 639 (1981).

22. Obviously, a great deal of attention has been paid to the proper role for the Supreme Court and especially as to how the Court and its jurisdictional rules should be structured to maximize its effectiveness. See, e.g., S. Estreicher & J. Sexton, Redefining the Supreme Court's Role (1986). However, there has not been recent dispute about the Supreme Court's role in assuring the uniformity and supremacy of federal law. Nor has the literature on federal and state court parity focused on the Supreme Court.

Many scholars argue, especially in considering the constitutionality of congressional restrictions on federal court jurisdiction, that the Supreme Court's jurisdiction must be analyzed together with that of the lower federal courts. See Amar, supra note 2, at 229-30; Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974); Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv.
has centered on jurisdictional doctrines determining whether parties can litigate their claims in federal district courts instead of state courts or whether state court decisions on constitutional issues should have preclusive effect in federal court.\(^3\)

Second, this Article examines the role of the federal courts only with respect to constitutional issues.\(^4\) I do not consider, for example, federal jurisdiction over either diversity cases or cases arising under federal statutes (except for those statutes which provide the vehicle for the vindication of constitutional rights, such as 42 U.S.C. § 1983 and the federal habeas corpus statutes). In part, the scope of this discussion is limited because the parity debate in the cases and scholarly literature has centered on constitutional cases. Further, the policy rationales for federal jurisdiction might

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L. Rev. 17 (1981). I am not disagreeing with this or even focusing on it. The central focus here is on the relationship of the lower federal courts and the state courts—considering topics such as the scope of habeas corpus review, the preclusive effect of state court decisions in federal court, the breadth of the abstention doctrines, and the like. The proposal defended in the last Part of this Article, that litigants with a constitutional claim should be able to choose whether to litigate in state or federal court, is relevant to the jurisdiction-stripping debate because the principle would necessitate the availability of original federal court jurisdiction for constitutional claims. I am not, however, contending that the litigant choice principle is constitutionally compelled and, thus, is not a basis for declaring restrictions on federal court jurisdiction to be unconstitutional.

23. This Article does not concentrate on the role of the courts of appeals. Therefore, those who argue that the structure of the Constitution requires a federal forum besides the Supreme Court, might favor federal court of appeals review of state court decisions. See Amar, supra note 2, at 233–34; Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984) (arguing that the structure and intent of article III requires a federal forum for constitutional claims, and that Supreme Court review is insufficient to fulfill this mandate); Eisenberg, supra note 22, at 552–53. My analysis neither supports nor refutes such a proposition. Primary attention here is on original jurisdiction; that is, whether constitutional cases may be brought in federal district courts as well as in state courts. The above-named scholars take no position on original jurisdiction, so long as some federal forum other than the Supreme Court is available. Thus, they could accept allowing litigants with constitutional claims to choose between state and federal court for original jurisdiction, so long as federal court of appeals review was available (or even relitigation in federal courts). I do not oppose or endorse such a possibility; rather, I simply note that the proposal contained herein is not incompatible with their views.

24. This Article focuses solely on allocating constitutional cases between federal and state courts. The desirability of alternative dispute resolution mechanisms for handling constitutional cases is beyond the scope of this Article and has not been part of the parity debate.
be sufficiently different in diversity and statutory cases as to warrant separate treatment.

I. THE ROLE OF PARITY IN DETERMINING THE SCOPE OF FEDERAL COURT JURISDICTION

A. Historical Background

The issue of the relative competence and trustworthiness of state and federal courts is not new. In fact, a major controversy in the drafting of the Constitution was whether lower federal courts were necessary. Although all present at the Constitutional Convention accepted the need for a federal judiciary,\textsuperscript{25} some believed that it was sufficient to create only a United States Supreme Court to review state court judgments. John Rutledge declared at the Convention that “the State Tribunals might and ought to be left in all cases to decide in the first instances, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of Judgments.”\textsuperscript{26}

Rutledge’s views were strongly disputed by those who expressed distrust in the ability and willingness of state courts to uphold federal law. James Madison stated, “Confidence cannot be put in the State Tribunals as guardians of the national authority and interests.”\textsuperscript{27} Madison argued that state judges, who were likely to be biased against federal law, could not be trusted and that appeal to the Supreme Court was inadequate to protect federal interests.\textsuperscript{28}

Ultimately, the Convention compromised between these two positions and pursuant to article III, gave Congress discretion to create lower federal courts. Such courts

\textsuperscript{25} M. FARRAND, THE FRAMING OF THE CONSTITUTION 79 (1913) (“That there should be a national judiciary was readily accepted by all.”).

I want to emphasize that I am presenting this history for the limited purpose of demonstrating that the issue of parity has been raised throughout American history. I am making no claim that this history is relevant or authoritative to modern constitutional interpretation. \textit{Cf.} E. CHERMERINSKY, INTERPRETING THE CONSTITUTION (1987) (criticizing constitutional interpretation based on the Framers’ intent). Nor am I making any effort to present a detailed history of discussions or events of these times. I simply want to show that there has been debate about the relative quality of federal and state courts.

\textsuperscript{26} 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 124 (1966).

\textsuperscript{27} 2 M. FARRAND, supra note 26, at 27-28.

\textsuperscript{28} \textit{Id.}
were created by the Judiciary Act of 1789 and have existed ever since.\textsuperscript{29}

The ratification of the Constitution and the enactment of the first Judiciary Act did not end the debate over the relative competence of federal and state courts. In one of the first important cases before the Supreme Court concerning the scope of federal question jurisdiction, Osborn v. Bank of the United States, Daniel Webster argued to the Court that the "[C]onstitution itself supposes that [state judicial systems] may not always be worthy of confidence, where the rights and interests of the national government are drawn into question."\textsuperscript{30}

Because the scope of federal government activity before the Civil War was limited, there were relatively few situations in which the Court directly confronted the issue of whether to trust state courts. Furthermore, the absence of general federal question jurisdiction prior to 1875—which in itself reflected trust in the state courts to adequately decide federal issues\textsuperscript{31}—limited the circumstances where the Supreme Court faced questions about the relative competence of the state and federal judicatures. Before the Civil War, the primary argument that state courts were not to be trusted to protect federal rights concerned perceived state court hostility to the rights of slaveowners.\textsuperscript{32} Many believed that federal courts were more disposed to protecting the federal rights slaveowners had to the possession and return of their slaves.\textsuperscript{33}

Doubts about the ability and willingness of state courts to protect federal rights surfaced with special force after the Civil War. There was widespread concern, particularly in Congress, that state courts in the South could not be trusted to protect the rights of the newly freed slaves. Simply put,

\textsuperscript{29} For an excellent argument that the framers of the Constitution did not trust state courts to interpret federal law, see generally Amar, supra note 2.

\textsuperscript{30} 22 U.S. (9 Wheat.) 738, 811 (1824).

\textsuperscript{31} See R. Posner, The Federal Courts 48 (1985) ("The fact that the lower federal courts were not given jurisdiction over federal-question cases suggests, somewhat surprisingly from a modern perspective, that the framers of the first Judiciary Act were not much concerned that state courts might be prejudiced against persons asserting federal claims."); Wright, In Praise of State Courts: Confessions of a Federal Judge, 11 Hastings Const. L.Q. 165, 166 (1984) (prior to Reconstruction state courts had primary responsibility for protecting federal rights).

\textsuperscript{32} Neuborne, supra note 1, at 1111–15.

\textsuperscript{33} See R. Cover, Justice Accused (1977).
"the Thirty-ninth Congress thoroughly distrusted the State courts and expected nothing from them but resistance and harassment."34 One congressman after another declared, as did Representative Stoughton, that "[t]he State authorities and local courts are unable or unwilling to [protect the constitutional rights of individuals] or punish [those who violated these rights]."35 Thus, Congress enacted statutes such as the Civil Rights Act of 1871 (which contained what is now known as 42 U.S.C. § 1983) with the explicit purpose of "throw[ing] open the doors of the United States courts" to individuals claiming to have been deprived of constitutional rights at the hands of state and local governments.36 Likewise, congressional creation of habeas corpus relief for state prisoners and the establishment of general federal question jurisdiction were accompanied by statements of distrust in the state courts.37

Yet, the experience of Reconstruction and the fervent expressions of federal court superiority in Congress did not end the dispute over the relative competence of federal and state courts. Even in the midst of Reconstruction, in 1875, the Supreme Court declared that "it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of [the] integrity or . . . ability" of the state courts.38

During the early part of this century, when the Supreme Court aggressively protected economic rights,39 federal courts were perceived as more disposed than state courts to enforce liberties such as freedom of contract and property

36. Id. at 376 (remarks of Rep. Lowe).
39. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (The maximum hours law for bakers unconstitutionally limited bakers' freedom of contract. Lochner is perceived as paradigmatic of numerous other Supreme Court decisions between 1887 and 1937; in fact, that time period often is called the Lochner era.).
Important expansions of federal court jurisdiction occurred because state courts were believed to be hostile to the Supreme Court’s economic substantive due process decisions.41

B. The Warren and Burger Courts

The issue of parity has taken on special importance since the outset of the Warren Court in the early 1950s. In the last thirty-five years, the Supreme Court has relied frequently on explicit statements of federal court superiority as a basis for expanding federal jurisdiction and, conversely, on claims of state court parity as a justification for restricting federal jurisdiction. Often parity has been at the core of the disagreement between the majority and the dissent.

Why did this issue become so important in the past thirty-five years? First, the application of the Bill of Rights to the states through the incorporation process greatly expanded the opportunity for state violations of constitutional liberties. Early in American history the Supreme Court held that the Bill of Rights did not apply to state government actions.42 Beginning late in the 19th century, slowly at first, and then at an accelerating pace after World War II, the Supreme Court held that the term “liberty” in the due process clause of the fourteenth amendment “incorporated” provisions of the Bill of Rights.43 Through this interpretive process, the Supreme Court applied almost all of the Bill of

40. Neuborne, supra note 1, at 1106–12.
41. See, e.g., Ex parte Young, 209 U.S. 123 (1908) (eleventh amendment does not prevent federal courts from enjoining unconstitutional conduct by state officers; the decision permitted an injunction against the Attorney General of Minnesota prohibiting enforcement of a state statute limiting railroad rates). Ex parte Young has long been recognized as being crucial to assuring state compliance with federal law. As Professor Charles Alan Wright noted: “the doctrine of Ex Parte Young seems indispensable to the establishment of constitutional government and the rule of law.” C. Wright, THE LAW OF FEDERAL COURTS 292 (4th ed. 1983).
43. See, e.g., Palko v. Connecticut, 302 U.S. 319 (1937) (articulating principle of selective incorporation of the Bill of Rights); Twining v. New Jersey, 211 U.S. 78 (1908) (recognizing that some of the Bill of Rights are applied to the states because it is part of the notion of due process); see also Crosskey, Charles Fairman, “Legislative History” and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5 (1948); Henkin, “Selective Incorporation” in the Fourteenth Amendment, 73 YALE L.J. 74 (1963).
Rights to the states, including most of the provisions dealing with criminal procedure. As the opportunity for claims of state violations of constitutional rights thus increased, so did concern over whether state courts were adequate to the task of assuring sufficient protection.

Second, the Supreme Court's expansion of individual liberties also created more opportunities for claims that states had violated constitutional rights. Especially during the Warren era, the Court interpreted the Constitution to include rights such as privacy and travel, and procedural protections. Usually these rights were recognized by the United States Supreme Court in the process of declaring state statutes unconstitutional. Thus, there was concern over whether state courts would adequately enforce and protect the newly recognized liberties.

Third, and probably most important, state resistance to civil rights, especially in the South, renewed distrust of the state courts. The post-World War II civil rights movement—from the invalidation of the Jim Crow laws that segregated every aspect of Southern life, to the school desegregation decisions and the civil rights marches and protests—highlighted that blacks in the South often were deprived of their constitutional rights and that they lacked adequate protection in state courts.

44. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (applying sixth amendment right to jury trials to states); Klopfer v. North Carolina, 386 U.S. 213 (1967) (applying sixth amendment right to speedy trial to states); Pointer v. Texas, 380 U.S. 400 (1965) (applying sixth amendment right to confront witnesses to states); Malloy v. Hogan, 378 U.S. 1 (1964) (applying fifth amendment right to be free of compelled self-incrimination to states); Gideon v. Wainwright, 372 U.S. 335 (1963) (applying sixth amendment right to counsel to states); Mapp v. Ohio, 367 U.S. 643 (1961) (applying fourth amendment right to be free from unreasonable searches and seizures and exclusionary rule to states); In re Oliver, 333 U.S. 257 (1948) (applying sixth amendment right to public trials to states).

45. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting privacy under the "penumbra" of the Bill of Rights and declaring unconstitutional a state statute prohibiting the use of contraceptives).

46. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel is a fundamental right).


Together, these pressures raised the question whether state courts are equal to the federal judiciary in their willingness and ability to protect constitutional rights.\textsuperscript{49} At a time of increasing litigation, the Supreme Court was called on to define federal court jurisdiction and frequently did so with reference to conclusions about the relative competence and trustworthiness of federal and state courts. What is most striking about the Supreme Court's statements about parity is their inconsistency. There are as many declarations that state courts are equal to federal courts as there are statements that federal courts are superior to state courts in protecting federal rights.\textsuperscript{50} The only pattern is that when the Court rules in favor of allowing federal jurisdiction it usually rejects the assumption of parity, but when it holds against permitting jurisdiction, the court declares that state courts are equal to federal courts in upholding the Constitution.

In general, the Warren Court expanded federal jurisdiction, relying on the premise that federal courts are necessary to vindicate constitutional rights.\textsuperscript{51} The Burger Court, in contrast, rejected attempts to expand federal court jurisdiction and often narrowed it, concluding that state courts could be trusted to adequately protect federal interests.\textsuperscript{52} Yet, neither Court was completely unanimous or consistent in its rulings or declarations about parity. In almost every case there were dissents: when the Court ruled in favor of federal court jurisdiction, the dissents proclaimed that state court parity made federal jurisdiction unnecessary;\textsuperscript{53} when

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\item \textsuperscript{49} These certainly are not the only factors that caused expansion in constitutional rights and greater attention to the comparative qualities of federal and state courts. The development of federally funded legal services, changing attitudes concerning litigation, and other contemporaneous social events undoubtedly also influenced the focus on individual liberties, and the concomitant attention to parity, during this time period.
\item \textsuperscript{50} Field, \textit{The Uncertain Nature of Federal Jurisdiction}, 22 WM. & MARY L. REV. 683, 685-86 (1981) (There is a long line of cases proclaiming the federal courts superior to the state courts and "an equally long, equally well-respected list of cases maintaining the contradictory position: state courts have the same responsibility toward federal claims that federal courts have and state courts cannot be presumed to do a less competent job.").
\item \textsuperscript{51} Fiss, Dombrowski, 86 YALE L.J. 1103, 1103 (1977) (Warren Court viewed the federal courts as "the primary guardian of constitutional rights").
\item \textsuperscript{52} Neuborne, supra note 1, at 1105 (Burger Court decisions based on assumption of parity); see infra text accompanying notes 60-96.
\item \textsuperscript{53} See, e.g., Patsy v. Board of Regents, 457 U.S. 496, 532-33 (1982) (Powell, J., dissenting) (arguing for exhaustion of state administrative remedies before fed-}
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the Court held against federal jurisdiction, the dissents challenged the majority's assumption of parity.\textsuperscript{54} Furthermore, the Warren Court sometimes found parity,\textsuperscript{55} and the Burger Court occasionally expanded federal court jurisdiction based on express statements that the federal judiciary is the primary guardian of constitutional rights.\textsuperscript{56}

The result is that the Court's statements about parity have been totally inconsistent and irreconcilable. Nonetheless, the Court has repeatedly justified its holdings by invoking conclusions about the relative competence of federal and state courts. To illustrate this, and to demonstrate the central role parity has played in decisions about federal court jurisdiction for the past thirty-five years, consider several specific doctrinal areas. Certainly, parity has not been the sole issue in these cases or the only basis for decisions. However, conclusions about parity have been integral to the Court's reasoning and results.

In many decisions involving the scope of federal habeas corpus relief for state prisoners, the Supreme Court based

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\textsuperscript{56} See, e.g., Rose v. Mitchell, 443 U.S. 545, 563 (1979) (allowing federal court habeas corpus re-litigation of challenges to state grand jury selection procedure because federal court review is necessary to correct state court constitutional errors); Steffel v. Thompson, 415 U.S. 425, 463–64 (1974) (permitting federal court declaratory judgment when there are no pending state proceedings because federal courts are the primary vindicators of federal rights); Mitchum v. Foster, 407 U.S. 225, 242–43 (1972) (holding that § 1983 is an exception to the Anti-Injunction Act, 28 U.S.C. § 2283, because of congressional assumption that federal courts were meant to be the primary protectors of federal constitutional rights). These cases might be viewed less as an expansion of federal court jurisdiction and more as a refusal to further restrict it.
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its rulings upon judgments about the trustworthiness of state courts. Discussions concerning parity have been especially important when the Court confronts the question of when a defendant may relitigate, via habeas corpus, issues that were raised and litigated in state court. The principle of collateral estoppel generally precludes a party from relitigating a matter that already was presented to a court and decided by it. Brown v. Allen, decided in 1953, created an important exception to this principle of finality for habeas petitions.\textsuperscript{57} The Supreme Court, in an opinion by Justice Frankfurter, observed that “even the highest state courts” have failed to give adequate protection to federal constitutional rights.\textsuperscript{58} As such, the Court concluded that federal habeas corpus review exists to remedy state court disregard or violations of a defendant’s rights. Brown v. Allen thus held that state prisoners could present claims of denials of constitutional rights in federal court on habeas corpus even if they fully litigated those arguments in state court. As Professor Hart noted, Brown established that “a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal court.”\textsuperscript{59}

In marked contrast, the Burger Court in Stone v. Powell held that fourth amendment search and seizure claims may not be relitigated on habeas corpus if the state court provided an opportunity for full and fair litigation of the issue.\textsuperscript{60} In partially overruling Brown v. Allen, the Court concluded that state prisoners generally should not be able to relitigate a contention that evidence obtained on the basis of an unconstitutional search and seizure was improperly admitted at trial.\textsuperscript{61} The Court emphasized that exclusionary rule claims do not relate to the accuracy of the fact-finding process, rejecting the argument that state judges would be less vigilant in protecting federal constitutional rights.\textsuperscript{62}

Whereas the Court in Brown v. Allen had explicitly noted frequent state court disregard of the Constitution, Justice

\textsuperscript{57} 344 U.S. 443 (1953).
\textsuperscript{58} Id. at 511.
\textsuperscript{59} Hart, The Supreme Court, 1958 Term, Forward: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 106 (1959).
\textsuperscript{60} 428 U.S. 465 (1976).
\textsuperscript{61} Id. at 494.
\textsuperscript{62} Id. at 489–94.
Powell—writing for the majority in *Stone v. Powell*—said that the Court is "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."63 Furthermore, the Court stated that there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [constitutional claims] than his neighbor in the state courthouse."64 Thus, *Brown* allowed relitigation of constitutional claims because of a belief that state courts were inadequately protecting rights; *Stone* found relitigation of fourth amendment claims in federal court unnecessary because state courts were fully able and willing to decide such issues.

A decision finding state courts to be equal to federal courts in protecting federal constitutional rights might require overruling *Brown v. Allen* and a prohibition against relitigation on habeas corpus so long as the state provides a full and fair hearing of constitutional claims.65 However, the Supreme Court has thus far refused to extend *Stone v. Powell* beyond fourth amendment search and seizure issues. In *Rose v. Mitchell*, for example, the Court held that challenges to the racial composition of grand juries may be raised in federal habeas review even though the claim was fully and fairly litigated in state court.66 Notably, the Court in *Rose* emphasized the need for federal court review to assure protection of the constitutional right. Writing for the Court, Justice Blackmun stated: "Federal habeas review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operate that system."67

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63. *Id.* at 494 n.35.
64. *Id.* (quoting Bator, *supra* note 5, at 509).
65. Even if federal and state courts were equal in protecting constitutional claims, there still might be reasons for allowing relitigation. See, e.g., Cover, *supra* note 21 (developing benefits of redundancy especially in terms of error correction); see Part IV of this Article (explaining why litigants should be able to choose the forum for vindicating constitutional rights and how this might lead to relitigation).
66. 443 U.S. 545 (1979); see also Kimmelman v. Morris, 447 U.S. 365 (1986) (claims of ineffective assistance of counsel may be relitigated on federal habeas corpus); Jackson v. Virginia, 443 U.S. 907 (1979) (challenges to constitutional infirmities of jury instructions may be relitigated on federal habeas corpus).
The Warren Court outlined several situations in which federal courts may hold de novo evidentiary hearings on habeas corpus review because of the special federal role in assuring protection of constitutional rights. In contrast, the Burger Court, in *Sumner v. Mata*, narrowed the circumstances under which evidentiary hearings are necessary, observing that “[s]tate judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinion as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office.”

Conclusions about parity also have been crucial in determining the ability of federal courts to enjoin state court proceedings. In *Dombrowski v. Pfister*, the Warren Court allowed a civil rights organization to obtain a federal court injunction against threatened future state court prosecutions under the Louisiana Subversive Activities and Communist Control Law. The Court held that the injunction was not barred by either the Anti-Injunction Act or principles of equity. Justice Brennan, writing for the majority, emphasized the need for federal court review to protect first amendment rights that might be chilled if they could be raised only as a defense in a criminal trial. Although the Court expressed general confidence in state courts, the dissent saw the majority’s opinion as based on “the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively.”

One of the most important legacies of the Burger Court, however, has been to prohibit almost completely federal courts from enjoining state court proceedings. This line of cases, often referred to as *Younger* abstention, has extended the proscription against federal court injunctions of

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69. *Id.* at 485–87.
71. *449 U.S. 539, 549 (1981).*
72. *380 U.S. 479 (1965).*
73. *Id.* at 483–84 (“It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court.”).
74. *Id.* at 499 (Harlan, J., dissenting); see also Fiss, supra note 51, at 1107 (describing *Dombrowski* as resting on assumption of state court inferiority).
state court proceedings from criminal cases\textsuperscript{74} to civil cases where the government is a party,\textsuperscript{75} to administrative proceedings,\textsuperscript{76} and ultimately to civil cases between private parties.\textsuperscript{77} It is based on the assumption that the state courts will adequately vindicate the federal interests.\textsuperscript{78} It is precisely because state courts can be trusted to uphold federal interests that it is unnecessary for federal courts to intervene and enjoin allegedly unconstitutional proceedings. Thus, in refusing to allow federal court injunctions the Court observed that it has "repeatedly and emphatically" rejected any assumption of state court inferiority.\textsuperscript{79}

Yet here also, the Burger Court has not been completely consistent and on those occasions where it has upheld the authority of the federal court to enjoin state proceedings, the majority emphasized the special role of the federal courts in safeguarding constitutional rights. In \textit{Mitchum v. Foster}, the Supreme Court held that 42 U.S.C. § 1983 was an express authorization of injunctions of state court proceedings and hence, an exception to the Anti-Injunction Act.\textsuperscript{80} Although section 1983 does not explicitly authorize such injunctions, the Court concluded that "[t]he very purpose of section 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 uncon-

\textsuperscript{74} See Younger v. Harris, 401 U.S. 37 (1971) (considerations of equity and comity prevent federal courts from enjoining pending state criminal prosecutions).


\textsuperscript{78} Maroney & Braveman, "\textit{Averting the Flood}": Henry J. Friendly, the Comity Doctrine, and the Jurisdiction of the Federal Courts—Part II, 31 SYRACUSE L. REV. 469, 508 (1980) ("Underlying the comity doctrine is the assumption that state and federal courts are equally competent to adjudicate federal constitutional claims.").

\textsuperscript{79} Moore v. Sims, 442 U.S. 415, 430 (1979); see also Huffman, 420 U.S. at 611 (declaring that state court judges are bound by the supremacy clause to uphold federal law).

\textsuperscript{80} 407 U.S. 225, 243 (1972).
stitutional action under color of state law."81 The Court stated that in enacting section 1983, Congress "was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to state courts."82

There is a definite tension between Younger v. Harris, in which the Court held that federal courts generally may not enjoin state court proceedings, and Mitchum v. Foster, in which the Justices ruled that section 1983 is an express authorization for injunctions. As Professor Redish explains:

The Younger doctrine assumes that an individual's federal constitutional rights can be adequately vindicated by raising them as defenses in the course of state prosecutions. Yet, if we are to believe the legislative history as described in Mitchum, the driving force behind the adoption of the Civil Rights Act was the conviction that state courts are unable to perform effectively the very function Younger assumes they can and do perform conscientiously. It is therefore difficult to see how Mitchum and Younger can co-exist, although the seeming inconsistency appears not to have troubled the Court.83

Yet another example where the Burger Court distinguished Younger and declared a preeminent role for the federal courts in upholding constitutional rights is Steffel v. Thompson.84 In allowing federal courts to issue declaratory judgments when state court proceedings are threatened but not pending, the Supreme Court declared that the lower federal courts have become "the primary and powerful reliances for vindicating every right given by the Constitution, laws, and treaties of the United States."85

The Court's perspective on federal and state court parity has also been important in determining the preclusive effect of state court decisions in federal court.86 For example,
in England v. Louisiana State Board of Medical Examiners, the Warren Court held that when a federal court abstains in a case and sends it to state court for a clarification of state law, the parties need only litigate the state law issues in state court. The state court litigation does not have res judicata effect as to the federal issues or prevent the parties from returning to federal court to litigate the federal law questions. Usually, res judicata prevents the splitting of claims; a party must present all claims, state and federal, in whatever court is hearing the matter. The Court in England, however, emphasized the desirability of federal court fact-finding and decision-making on federal law issues. The Court concluded that federal rights would not be adequately protected through review of the state court decisions by the United States Supreme Court. In light of the loss in judicial economy in having the case shuttle back and forth between federal and state courts, the primary reason for not having all of the issues tried in state court must be a conviction that federal courts are superior to state courts in deciding federal issues.

In other areas, the Burger Court accorded preclusive effect to state court decisions based on a premise that the state judiciaries were equal to the federal courts in their decision-making. In Allen v. McCurry, the issue was whether a state court ruling in a suppression hearing concerning the legality of a search had preclusive effect in a federal court section 1983 suit for damages based on a claim that the search was unconstitutional. The United States Court of Appeals for the Eighth Circuit concluded that the state court decision should not have collateral estoppel effect in federal court because of "the special role of the federal courts in protecting civil rights." The Supreme Court reversed, concluding

88. Id. at 416; see also id. at 436 (Douglas, J., concurring) (describing the importance of federal court decisions in terms of the "independence of federal judges, and the value of an escape from local prejudices").
89. For a discussion of the judicial economy costs of the abstention doctrines, see A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 48-50, 282-87 (1969) (delays of seven or nine years before resolution are not uncommon).
90. 449 U.S. 90 (1980).
that the lower court decision was based on an unacceptable "general distrust of the capacity of state courts to render correct decisions on constitutional issues." Because it had "confidence" in the state courts, the Court felt it appropriate to accord the state court's decision preclusive effect in the federal civil rights suit.

Although the Burger Court applied the reasoning in Allen v. McCurry in several other cases, the Court distinguished Allen in Haring v. Proise. In Haring, a unanimous Court held that a state court guilty plea does not preclude a later federal court civil suit under section 1983. What is remarkable about Haring is the Court's observation that federal courts should decide section 1983 claims because that statute reflects a "grave congressional concern that the state courts had been deficient in protecting federal rights." All of the cases described above concerning federal court injunctions of state court proceedings and the preclusive effect of state court decisions in federal court were brought under the same statute, 42 U.S.C. § 1983. When the Court ruled in favor of federal jurisdiction, such as in Mitchum and Haring, the Court emphasized that section 1983 was based on a fundamental distrust of the state courts. Yet, when the Court ruled against federal jurisdiction, such as in Younger and Allen, the Court rejected any assumption of state court inferiority. In some section 1983 cases, the Court declares that the statute was based on the belief that "state authorities had been unable or unwilling to protect the constitutional rights of individuals." In still other section 1983 suits, the Court "rejected the appellees' argument to the extent that it assumes that the state courts will not protect their constitutional rights."

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92. 449 U.S. at 105.
93. Id.
96. Id. at 323 (quoting Allen v. McCurry, 449 U.S. at 98–99).
The question of parity is important not only in deciding the scope of habeas corpus, the ability of federal courts to enjoin state court proceedings, the preclusive effect of state court judgments, and the availability of relief under section 1983, but in other areas as well. For example, in determining the scope of the abstention doctrines and the breadth of the federal question jurisdiction, the issue of the relative competence of federal and state courts has been integral to the Court's decisions.

To this point, I have attempted to demonstrate only that parity has been a central concern in the Supreme Court's jurisdictional decisions and that the Court has been markedly inconsistent in dealing with the parity issue. Before moving on, two qualifications are necessary. First, I recognize that all of the discussion about parity really might be a subterfuge; conservatives who believe that state courts are more likely to favor the government over the individual may simply be using the parity argument as a tool to advance their ideological agenda. Professor Neuborne explains that parity may be a "pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine." Generally, it is the more liberal Justices and commentators who favor federal court jurisdiction and the more conservative ones who oppose it. Perhaps conservatives actually oppose federal court jurisdiction because they dislike the foreseeable results and favor channeling cases to state court because it will more likely produce outcomes they prefer. From this perspective, the claim of

99. Davies, Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases, 20 U.C. Davis L. Rev. 1, 25 (1986) (The Warren Court's conviction that federal courts were necessary to vindicate rights meant that "[a]bstention during that period reached an all-time low. The Burger Court, in contrast, has revitalized the abstention doctrines in accordance with its deference to state court adjudication of cases in which states have a strong interest."); cf. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (compare disagreement between majority and dissent over whether federal court should abstain when challenged state statute has not yet been reviewed under state constitutional provision).

100. See, e.g., Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3242 (1986) (Brennan, J., dissenting) (The Court found no federal question jurisdiction; Justice Brennan objected, concluding that the federal forum "specializes in federal law and . . . is . . . more likely to apply that law correctly.").

101. Neuborne, supra note 1, at 1105-06.
state court parity provides a justification for placing matters in the state rather than in the federal judicial system.

In a decade when some conservatives openly attempt to restrict federal court jurisdiction over matters such as abortion, busing, and school prayer because of their belief that state courts would produce preferable results,\(^{102}\) it is tempting to argue that, at least for some, the claim of parity is disingenuous. Yet, accusations of intellectual dishonesty—that some are proclaiming parity precisely because they believe there is none—does nothing except produce a stalemate in the debate over federal jurisdiction. Surely, those who champion the state courts would reply that they honestly believe in parity. As I will argue in the next Part, the problem with the current decisions and discussions concerning federal jurisdiction is that there is a seemingly unresolvable deadlock between the two competing views of the state court systems. Arguing about the true motivations of those who believe in state court superiority will do nothing to resolve this impasse.

Second, by arguing that parity has been a central issue in decisions about federal jurisdiction I do not mean to imply that it has been the only concern. Both the Warren and Burger Courts were influenced by other major considerations, such as the importance of providing procedural protections for criminal defendants,\(^{103}\) the desirability of the exclusionary rule,\(^{104}\) and the benefits of providing many

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102. See, e.g., S.158, 97th Cong., 1st Sess. (1981) (bill restricting federal court jurisdiction over abortion cases); S. 481, 97th Cong., 1st Sess. (1981) (bill restricting federal court jurisdiction over cases challenging voluntary school prayer laws); see Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129–30 (1982) (goal of jurisdictional restrictions is the "de facto reversal, by means far less burdensome than those required of a constitutional amendment, of several highly controversial Supreme Court rulings dealing with such matters as abortion, school prayer, and busing"); see also Sager, *supra* note 22, at 69 ("If Congress enacts a selective jurisdictional limitation for cases that concern state conduct, it will be issuing an open, unambiguous invitation to state and local officials to engage in conduct that the Supreme Court has explicitly held unconstitutional.").

103. C. WHITEBREAD & C. SLOBOGIN, *Criminal Procedure* 3–9 (2d ed. 1986) (describing the differences between the Burger Court and Warren Court in criminal justice cases and a partial listing of cases where the Burger Court overruled or limited Warren Court precedents).

tiers of review instead of one decision-maker. My goal is to establish that the question of parity has been one very important consideration in the Supreme Court’s decisions concerning federal court jurisdiction. If federal courts are viewed as superior in protecting federal rights, then expansive federal jurisdiction seems necessary. But to the extent that state courts are assumed to be equally able and willing to protect federal rights, then federal court jurisdiction is far less important.

II. Parity: A Futile Debate

Commentators similarly have debated whether state courts are equal to federal courts in protecting individual rights. For example, critics of the Warren Court assailed the Court’s expansion of federal jurisdiction and its lack of trust in the state courts. Former Judge Henry Friendly, for instance, expressed confidence that state court judges would uphold the Constitution and criticized a trend whereby “state judges are being largely deprived of a role in enforcing the Constitution they have sworn to support.”

By contrast, critics of the Burger Court challenged its assumption of state court parity. In a powerful article entitled, “The Myth of Parity,” Professor Burt Neuborne observed: “[T]he assumption of parity is . . . a dangerous myth, fostering forum allocation decisions which channel constitutional adjudication under the illusion that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts.” In countless articles on particular doctrinal areas, authors criticize the Burger Court’s decisions by attacking the Court’s confidence in the state courts to adequately safeguard federal rights.

105. See Resnik, Tiers, 57 CAL. L. REV. 837 (1984) (describing different perspectives on the appropriate types of review of a court’s decision and how this influenced results in both the Warren and Burger Courts).
106. B. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 125 (1973); see also Bator, supra note 17.
107. Neuborne, supra note 1, at 1105; see also M. REDISH, supra note 83, at 2 (rejecting “the view of federal jurisdiction which recognizes the fungibility, or ‘parity’ of state and federal courts within the federal system”).
108. See, e.g., Davies, supra note 99, at 22–28 (criticizing abstention doctrines); Doernberg, supra note 37, at 646–50 (criticizing assumption of parity in decisions concerning the scope of federal question jurisdiction); Peller, In Defense of Federal Habeas Corpus Relitigation, 16 HARV. C.R.-C.L. L. REV. 579, 677–85 (1982) (criticizing assumption of parity in Burger Court decisions determining the scope of relit-
Despite decades of arguments in both court opinions and scholarly literature, the debate remains unresolved as to whether state courts are equal to federal courts in their ability and willingness to protect federal rights. Each side postulates its position, marshals appropriate supporting quotations and citations, and criticizes decisions and articles that reflect a contrary view. But that is as far as the dialogue goes. The debate over parity is the legal equivalent of the Lite Beer commercials where the one side yells, "tastes great," and the other screams, "less filling." As the two sides of the parity debate indignantly shout, "federal courts are better," or "state courts are just as good," the dialogue appears stalemated, fixed in a litany that appears as unresolvable and unchangeable as the scripts for the Lite Beer commercials.

I contend that focusing on parity is futile because ultimately the issue of parity is an empirical question for which no empirical measure is possible. Lacking a method to determine if state courts are as good or if federal courts are better, judges and scholars are left with their intuitions about the comparative virtues of the two court systems.

To demonstrate this, the first section of this Part explains why parity is an unanswerable empirical question. The second section explains why nonempirical attempts to answer the question—such as historical evidence or comparisons of institutional characteristics of state and federal courts—cannot end the deadlock. 109

A. Parity as an Unanswerable Empirical Question

Saying that one thing is as good or better than another requires criteria for comparison and a standard for evaluation relative to the criteria. Comparing automobiles, for instance, initially requires criteria—e.g., safety, reliability, cost, etc.—and then a basis for measuring performance of those factors. Likewise, claiming that one court system is as

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109. I am using the term "empirical" to refer to quantitative measures. Historical arguments concerning parity—which also could be regarded as a form of empirical research—are considered in the second section.
good or better than another requires a definition of "good" and a basis for evaluation relative to that standard. Yet, such a yardstick and data for comparing federal and state courts do not exist and are unlikely to be devised.

The first problem with such a comparison is the difficulty in defining quality. By what criteria are federal and state courts to be compared? Because there rarely is consensus as to what constitutes a "correct" decision, measurement surely cannot take the form of counting the number of "right" results produced by each court system. Nor is there likely to be meaningful comparison in terms of the technical competence of the state and federal judges. Devising a useful definition of judicial competence seems elusive; even if such a definition existed, the question would remain whether such differences really matter in determining outcomes.\(^{110}\)

1. Establishing Standards for Comparison

Some who claim that federal courts should have a preeminent role in hearing constitutional claims do have a definition of quality. The core of their argument is that federal courts are more likely than state courts to rule in favor of individuals asserting constitutional claims. That is, by their definition of quality the better court is the one that is more likely to rule against the government and in favor of an individual claiming a deprivation of a constitutional right or a denial of equality. Professor Neuborne, for example, explicitly adopts this definition of quality:

Comparative qualitative analysis, of course, presupposes the existence of a consensus as to what we mean by 'better.' My definition ... views the better forum as the one more likely to assign a very high value to the protection of the individual, even the unreasonable or dangerous individual, against the collective, so that the definition of the individual right in question will receive its most expansive reading and its most energetic enforcement. Such a definition of "better" is based on an assumption that it is socially desirable to route controversies involving asserted constitutional rights of individuals

\(^{110}\) For example, some argue that the information transmitted by attorneys to the courts can likely overcome differences in quality of the judges. See Solimine & Walker, supra note 4, at 244, 248.
to those judicial forums most likely to resolve them in favor of the individual.\textsuperscript{111}

Professor Neuborne’s definition of quality, however, is not universally accepted. Those who champion the state courts might respond that constitutional cases often involve balancing government interests against individual liberties and that it is wrong to presuppose that decisions in favor of the latter are preferable. Professor Paul Bator makes exactly this argument.\textsuperscript{112} Furthermore, Professor Bator argues that the Constitution contains other values, such as the importance of limitations on the federal government’s powers, and that state judges are likely to be more sensitive to these goals than are their federal counterparts.\textsuperscript{113} Thus, Professor Bator challenges Professor Neuborne’s definition of quality and concludes that “the claim that cases should be channeled to the federal courts because of the special receptivity of federal judges to constitutional values may embody a narrow and partisan vision of what constitutional values are.”\textsuperscript{114} According to Professor Bator, because neither set of results is demonstrably preferable, federal and state court systems should be treated as equals; both employ processes worthy of respect, even if they might yield different outcomes.\textsuperscript{115}

Although I believe a strong case can be made in favor of Professor Neuborne’s definition and the position that the judicial system should maximize the opportunity for protecting individual rights,\textsuperscript{116} it is important to recognize that

\textsuperscript{111} Neuborne, supra note 3, at 727.

\textsuperscript{112} Bator, supra note 17, at 630–31. Professor Bator writes:

We are told that federal judges will be more receptive to constitutional values than state judges. What is really meant, however, is that federal judges will be more receptive to some constitutional values than state judges. And the hidden assumption of the argument is that the Constitution contains only one or two sorts of values: typically, those which protect the individual from the power of the state, and those which assure the superiority of federal to state law.

\textit{Id.} at 631 (emphasis in original).

\textsuperscript{113} \textit{Id.} at 631.

\textsuperscript{114} \textit{Id.} at 633.

\textsuperscript{115} It should be noted that many others who argue in favor of parity claim that state courts are equally sensitive to federal constitutional rights and are as likely to uphold them as the federal courts. See, e.g., Stone v. Powell, 428 U.S. 465, 493–94 n.35 (1976) (declaring that state courts are as sensitive to constitutional claims as are federal courts); Solimine & Walker, supra note 4. Implicitly, they concede Professor Neuborne’s definition of quality.

\textsuperscript{116} See infra text accompanying notes 269–80.
such a definition would be disputed. Ultimately, the argument over quality would dissolve into a dialogue about the underlying purposes of the Constitution and world views about the desirable content of constitutional decisions. Such discussions undoubtedly are enlightening, but are unlikely to yield an accepted measure for comparing the quality of the courts.

A second problem with empirically determining whether there is parity is that even if quality could be defined, and even if it could be measured, at best the result would be an aggregate comparison of all state courts with all federal courts.\(^{117}\) As the term "parity" is used, it refers to an overall comparison of the federal courts with the composite of all of the state judiciaries. The state courts differ greatly from one another, just as the federal courts are not homogeneous.\(^{118}\) There is an enormous variance among the different states and many federal districts in their disposition toward protecting individual rights.\(^{119}\) Some state courts are more disposed toward upholding individual liberties than are some federal courts.\(^{120}\) There are many examples of state courts that have recognized and protected constitutional rights that the federal courts have rejected.\(^{121}\)

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\(^{117}\) I recognize that the comparison might be all state trial courts to all federal district courts, or all state courts to all federal district courts, or all state courts to all federal district courts and courts of appeals. No matter what set of courts is compared, my point is that an aggregate assessment of so many diverse courts is not a useful basis for forum allocation decisions.

\(^{118}\) *Cf.* D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 82-126 (2d ed. 1972) (regional and state variations in ideology).

\(^{119}\) *See* Bator, *supra* note 17, at 629 (potentially "tremendous variations in the quality of the bench from state to state"); *Field, supra* note 50, at 684 ("sympathy toward federal claims . . . differ[s] in the various regions of the country").


In fact, even if a particular state’s court system is compared with the corresponding federal courts, there might be differences depending on the issue examined. A specific state court, for example, might be more likely than the federal court to side with the individual in one type of constitutional case, but the federal court in that state might be more protective of constitutional rights on other issues.

I question the usefulness of an aggregate evaluation of court systems as large and varied as those of fifty states and ninety-one federal districts. Even if a net comparison could be done, it might hide true areas for concern. Imagine, for instance, that the aggregate data demonstrated that overall, the state courts were as likely as federal courts to protect constitutional rights. Statistically, that would demonstrate parity as that term is commonly used. Yet, it is possible that such data might reflect that there are many states which are slightly better than federal courts, but a few that are far worse in protecting individual liberties. In other words, under this hypothetical data, in most instances the choice between federal and state courts generally would not matter, but in some states the availability of a federal forum would be essential for vindicating individual liberties. Overall data showing parity would mask a substantial need for federal jurisdiction in some areas.

Similarly, aggregate data might mask differences among the court systems as to particular issues. Conceivably, the data could show that state courts tend to side with individual rights claims involving economic liberties, but federal courts are better in protecting political liberties. A net comparison between state and federal courts and their overall likelihood to rule in favor of a constitutional right might hide important differences that could be crucial in deciding jurisdictional rules.

One could, of course, try to assess variance among the states, such as through complex statistical analysis. The measurement could be broken down into an assessment of performance of the different court systems on particular issues. This, however, would be a different inquiry from the current focus on parity, which is an overall comparison of the state court systems with the federal courts with regard to protecting individual liberties. Furthermore, if the goal is, as Professor Neuborne argues, maximizing the protection of
individual rights, it is undesirable to consign individuals to
an inferior court system whose level of court, state or fed-
eral, is superior in most other areas of the country. Optim-
ally, cases would be channeled to the particular court in
each area which offered the best chance of protecting
rights.\textsuperscript{122}

Finally, and most important, even if quality were de-
\textsuperscript{122}See infra text accompanying notes 269–80 (arguing that allowing litigants
defined and even if aggregate measures were meaningful, an
to choose the forum for their constitutional claims would best channel such cases
accurate empirical comparison of federal and state courts in
to the court most likely to vindicate individual rights).
constitutional cases does not exist and methodologically
\textsuperscript{123}M. Redish, supra note 83, at 3.
probably cannot be done. As Professor Redish observed:

There are, to my knowledge, no statistical data to sup-
\textsuperscript{124}Solimine & Walker, supra note 4, at 214.
port the assertion that federal courts are, on the whole,
\textsuperscript{125}Id. at 226, 234–35 (describing comparison as between federal district
better equipped to guard federal interests than their state

\textsuperscript{123}See infra text accompanying notes 269–80 (arguing that allowing litigants
courts and state courts of appeals and supreme courts).
counterparts. Indeed it would be difficult to devise a sys-
tem of measurement which could be used to answer that
question empirically.\textsuperscript{123}

2. The Walker/Solimine Study

The most likely methodology for measuring federal and
state judicial performance in constitutional cases would be
to select some court systems and compare how they ruled in
particular kinds of cases. Such a study, however, likely
would be plagued by so many basic methodological problems as to render its conclusions—for or against par-
ity—relatively meaningless. To demonstrate this, consider
the one study which explicitly set out to quantitatively com-
pare constitutional rulings by federal and state courts.

Professors Solimine and Walker attempted to measure
empirically whether state courts are less competent or more
hostile toward constitutional rights than federal courts.\textsuperscript{124}
They compared the rulings of federal district courts with
state courts of appeals and state supreme courts as to several
particular constitutional issues.\textsuperscript{125} Specifically, they ex-

\textsuperscript{124}Solimine & Walker, supra note 4, at 214.
\textsuperscript{125}Id. at 226, 234–35 (describing comparison as between federal district
courts and state courts of appeals and supreme courts).
ment, the fourth amendment, and the equal protection clause of the fourteenth amendment.126

The authors found that in their sample, overall, federal courts decided in favor of the constitutional claim forty-one percent of the time, while state courts ruled in favor of the constitutional claim in thirty-two percent of the cases.127 They concluded that this difference was not statistically significant because taken together the state and federal courts in their study decided in favor of the constitutional claim thirty-six percent of the time, placing the state court’s thirty-two percent record only slightly below this benchmark.128 Thus, Professors Sölimine and Walker contend that their study establishes “that state courts are no more ‘hostile’ to the vindication of federal rights than are their federal counterparts . . . [and that] ‘parity’ does exist between federal and state courts.”129

This study has severe methodological problems. Although some might be corrected in future studies, many seem likely to plague any attempt to quantitatively compare federal and state courts. Because this is the one study that purports to empirically prove the existence of parity, it warrants detailed analysis. First, by focusing only on court decisions, they ignore cases that settle or might not even be brought because of perceived judicial hostility. The study examines only those cases where the federal district court or the state court of appeals or supreme court issued a written decision. Differences in the courts, however, might affect dispositions prior to decisions and might produce dissimilar cases for written rulings. For example, if litigants perceive the federal courts as more favorably disposed toward plaintiffs with constitutional claims than are state courts, then defendants in federal court and plaintiffs in state court are much more likely to settle.130 Parties always compare the costs of additional litigation with what they are likely to gain

126. Id. at 236.
127. Id. at 240.
128. Id. at 239–40; see infra note 146.
129. Id. at 214–15.
130. For the sake of simplicity, I am only focusing on civil cases where the plaintiff is raising a constitutional claim. The same analysis obviously could be applied where it is the defendant who is raising the constitutional claim.
by trying or appealing the case as opposed to settling it.\textsuperscript{131} At the very least, this means that counting decisions does not fully reflect the actual differences between the courts.

Furthermore, settlements could mean that the federal and state courts in the study were not confronted with similar cases. If, because of the parties' perceptions of likely outcomes, a higher percentage of defendants settle in federal court and a higher percentage of plaintiffs settle in state court, the remaining cases would not be identical. Federal courts would be left with comparatively weaker constitutional claims and state courts with comparatively stronger ones. Even if the courts ruled in favor of the constitutional claims in the same percentage of cases, the differences among the cases would prevent the study from proving anything about the actual quality of the courts. In fact, if federal courts had weaker cases for the party bringing the claim and the state courts had stronger cases, an identical percentage of rulings in favor of the constitutional claim would seem to disprove parity.

Similarly, by focusing on state courts of appeals and supreme courts (a problem more fully discussed below), the study ignores the fact that the perceived predisposition of the courts might keep appeals from ever being filed. For example, if the state courts of appeals and state supreme courts were likely to rule in favor of plaintiffs' constitutional claims, then in some instances, losing defendants might not appeal, figuring that their chances of prevailing on appeal did not justify the cost. As such, measuring only the decisions would underestimate the proclivity of the courts to uphold constitutional rights. Conversely, if the state courts of appeals and supreme courts were hostile to federal rights, then losing plaintiffs with constitutional claims might choose not to appeal. Again, looking solely to written decisions would underestimate the courts' hostility by not considering its effects in keeping cases out of the sample.

A second methodological problem with the study is that it does not account for possible differences in the content of

the cases. For example, the study focused on both civil and criminal cases. Criminal cases involve instances where individuals are prosecuted for violating criminal statutes and raise constitutional claims in challenging the investigative or trial procedures, or by challenging the constitutionality of the statute they are prosecuted for violating. State criminal prosecutions cannot be removed to federal court, and federal courts cannot enjoin prosecutions under unconstitutional state statutes. Hence, federal courts are hearing criminal prosecutions under federal statutes and state courts are deciding criminal cases brought under state statutes. The cases might not be comparable because Congress and the state legislatures might not be equally likely to enact unconstitutional statutes. If, for example, state legislatures are more likely to produce constitutionally defective statutes than is Congress, even state courts more hostile to federal rights still might declare a greater number of statutes to be unconstitutional.

The civil cases also might vary so much in content as to invalidate a comparison between federal and state courts based on the decisions reached. It is quite possible that the federal courts were hearing civil cases where the plaintiffs' complaints presented a constitutional claim, whereas the state courts were hearing constitutional claims raised as defenses. Currently, federal and state courts have concurrent jurisdiction over civil cases raising constitutional claims. That is, the plaintiff may file such a case in either federal or state court and if it is filed in state court the defendant may remove it to federal court. Therefore, the plaintiff might choose to litigate in federal court if that forum is perceived as more hospitable to constitutional claims. If the plaintiff believes he or she has a better chance of prevailing in state court, the case would be filed there, but the defendant would theoretically remove it to federal court. By this analysis,

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134. I recognize that other variables might affect the selection of forum, including convenience to parties and witnesses, the extent of court backlog, etc. See Bumiller, Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform, 15 LAW & Soc'y Rev. 749 (1980-1981) (importance of perception of prevailing as influencing choice of forum compared with other variables in diversity cases).
there would be far more civil cases raising constitutional claims in federal court than in state court because either the plaintiff or the defendant could bring a case to the federal forum. The data from Professors Solimine and Walker confirms this hypothesis.135

However, the cases which cannot be removed from state to federal court are those where the constitutional claim is not apparent on the face of the plaintiff’s complaint, such as when it arises as a defense.136 Thus, federal courts would be hearing cases where the plaintiff’s complaint alleged a violation of a constitutional right, but the state courts might be hearing a disproportionate number of cases where the constitutional issue arose as a defense. This might mean that the substantive content of the claims may vary because different kinds of constitutional arguments might appear as defenses rather than as the basis for complaints. Additionally, there might be a difference in the way a court treats constitutional issues depending on whether it is raised by the plaintiff or as a defense. In other words, the results of the study might reflect variations unrelated to the quality of the courts.

A third methodological problem with the study is that it does not provide a measure of the quality of the federal and state courts completely independent of one another. For example, except for fourth amendment claims, constitutional claims can be relitigated in federal court by state prisoners in criminal cases on habeas corpus.137 Therefore, the study’s finding that state courts are disposed toward constitutional claims in criminal cases raising the first amendment might be explained by the state courts’ awareness of federal habeas corpus review in such cases.138 As such, it would be wrong to use the study to support limiting federal court

135. There were 323 civil suits raising constitutional claims in federal court and 202 such suits in state court. Solimine & Walker, supra note 4, at 243–44.
137. See Stone v. Powell, 428 U.S. 465, 481–82 (1976) (fourth amendment claims cannot be raised on habeas corpus if the state provided a full and fair opportunity for a hearing); Brown v. Allen, 344 U.S. 443 (1953) (constitutional claims may be relitigated on habeas corpus).
138. Criminal cases involving the first amendment were the one area in which the study found that the state courts were more disposed toward the constitutional claim than the federal courts. However, it should be noted there were only eleven such federal cases.
habeas corpus relitigation based on a conclusion of state court parity.

Moreover, the study does not appear to control for instances in which the federal court ruled against the party raising a constitutional claim based on procedural grounds, such as the need to abstain and defer to the state court. Because many of these procedural rules were established by the Supreme Court based on an assumption of parity,\textsuperscript{139} counting such dismissals assumes the conclusion that it is being proven. Dismissals based on such jurisdictional rules do not measure actual federal court attitudes in constitutional cases, but instead only reflect the Supreme Court's assumption of parity.

A fourth methodological problem with the study is that the aggregate data supporting parity hide differences between the courts and the types of cases they likely confronted. In some areas, Professors Solimine and Walker found substantial differences between the state and federal courts. For example, in civil cases, the federal courts ruled in favor of first amendment claims fifty-four percent of the time, while the state courts in such cases decided in favor of the first amendment claims forty percent of the time.\textsuperscript{140} In equal protection cases, federal courts were twice as likely to rule in favor of the constitutional claim than were the state courts.\textsuperscript{141} These statistics should cause pause before one concludes that federal and state courts are fungible.

Moreover, the area where there was the least difference between federal and state courts involved fourth amendment claims raised in criminal cases.\textsuperscript{142} This might indicate parity between federal and state courts on this issue or, again, it might reflect differences in the content of the cases. Fourth amendment claims usually involve objections by defendants to the admissibility of evidence on the grounds that the evidence was unconstitutionally obtained. Assume that state and local police are more egregious in their violations

\textsuperscript{139} See supra text accompanying notes 63–96.

\textsuperscript{140} Solimine & Walker, supra note 4, at 243 (53.8% as compared with 40.9%).

\textsuperscript{141} Id. at 244, 245–46.

\textsuperscript{142} Id. at 243–244. The one area where state courts performed better than federal courts was in criminal cases under the first amendment, but as explained above there was a small sample of federal cases and this might reflect differences in the quality of the legislatures instead of the courts.
of the fourth amendment than federal agents. Even if the federal courts are generally more likely than the state courts to rule in favor of a fourth amendment claim in any particular case, the overall data might still show a relatively high degree of state court pro-defendant rulings because of the extreme violations of the fourth amendment. Again, the failure to control for the content of the cases, especially in light of possible differences in behavior between state/local police and federal agents, makes comparisons in fourth amendment cases suspect.

The study’s choice to compare federal district courts with state courts of appeals and supreme courts poses a final, particularly important methodological problem. At minimum, this is a curious basis for evaluation if the goal is comparing federal court systems with state courts. Logically, the comparison would either include the courts of appeals in both systems or it would focus only on federal district courts and state trial courts. The study thus is structured in a way that ignores any defects in state trial courts or any benefits of federal appellate review.

The failure to examine state trial courts is an especially serious flaw in the study. If state trial courts were hostile to federal claims, such an attitude might be reflected in fact-finding related to constitutional claims. Because appeals courts generally review only questions of law, substantial evidence of non-parity would be overlooked. A potentially large bias in the state system against federal claims would not be reflected in the data measuring appeals court decisions.

Also, if state trial courts disproportionately ruled against constitutional claims, a number of losing parties might not appeal—perhaps because of costs or frustration or, as described above, because of their perception of the improbability of reversal in the court of appeals. Again, with respect to cases not appealed, a bias in the state system against federal claims would not be revealed in a study examining the courts of appeals.

Furthermore, even if state courts of appeals corrected all errors of state trial courts so that the entire state court system was equal to federal district courts, it is questionable whether this really establishes parity. It would mean that a party with a constitutional claim has as great a chance of pre-
vailing after litigating through two or three tiers of the state courts as he or she does by going in the first instance to the federal district court.\textsuperscript{143} Because the additional litigation imposes costs on both the parties and the court system and delays the vindication of rights, the federal district court could be preferred over a state system where vindication of constitutional rights required appeals.\textsuperscript{144}

Professors Solimine and Walker attribute their failure to consider state trial courts, in part, to the almost complete absence of written state trial court opinions.\textsuperscript{145} This simply illustrates one of the inherent problems in trying to compare the two court systems.

I have focused at length on the methodological problems with this study, not only to refute its claim of empirically establishing parity,\textsuperscript{146} but more importantly, to illustrate the difficulties in any quantitative comparison of

\begin{itemize}
\item \textsuperscript{139} Professors Solimine and Walker say that there is no reason to believe that there would be more delay in the state system than in the federal one because there is no evidence of more docket congestion in state courts. \textit{Id.} at 234 n.98. Even if this is true, it misunderstands the cause of delay—the additional appeals necessary to gain vindication of rights when the comparison is between the federal district courts and the state courts of appeals and supreme courts.
\item \textsuperscript{144} Neuborne, supra note 1, at 1119. Professor Neuborne writes: The expense, delay, and uncertainty which inhere in any appellate process render ultimate success after appeal far less valuable than speedy, accurate resolution below. . . . [I]n many constitutional cases, the factfinding process plays a critical role in resolution of the controversy. These two factors combine to render the trial forum often the most critical stage, and thus the appropriate institutional comparison should be between federal district courts and their state trial counterparts.
\item \textsuperscript{145} Solimine & Walker, supra note 4, at 235 ("[A] study of opinions of state trial courts is virtually impossible. Full written opinions . . . are a rarity, and even the full opinions are rarely reported.")
\item \textsuperscript{146} Actually, I believe Professors Solimine and Walker's data could be read as proving a lack of parity. They found that federal courts ruled in favor of constitutional claims in 41\% of cases, but state courts did so in only 32\% of cases. \textit{Id.} at 240. Intuitively, that seems to be a significant difference. The authors dismiss it on the basis of a benchmark which they create by calculating the overall number of cases in which the federal and state courts taken together rule in favor of the constitutional claim. \textit{Id.} at 239. Because the state figure of 32\% is so close to the overall benchmark of 36\%, they dismiss the difference as statistically insignificant. But why should the comparison be between the state's performance and the benchmark, rather than be between the state and federal courts' decisions? There is an element of double-counting in Professors Solimine and Walker's methodology. They use the state figure to create a lower benchmark and then dismiss any difference between the state's figure and the benchmark as insignificant.
\end{itemize}
court systems. Most of the failings described above—failure to account for out-of-court dispositions, failure to control for the content of the cases, an inability to assess the courts independent of each other, the limited usefulness of aggregate data—likely would confound other efforts to compare empirically the state and federal courts.

3. Other Studies of Parity

Because of the difficulties in directly proving one court system to be better than or as good as another, some scholars have devised alternative empirical measures which they claim to establish or refute parity. One type of study involves surveys of attorney attitudes concerning differences between state and federal courts. For example, Thomas Marvell contacted attorneys who litigated student rights cases and asked them their reasons for selecting one forum over another.147 Over fifty percent of the attorneys said they believed federal courts were more likely than the state courts to rule in favor of constitutional claims.148 Thus, Mr. Marvell concludes that his survey "presents empirical research which shows that parity does not exist."149

For several reasons, this study, and other opinion surveys, are unlikely to be accepted as proving the superiority of federal courts. Nor would opinion polls demonstrating lawyer confidence in state courts prove parity. At most, such surveys only demonstrate what attorneys think about parity; they do not and cannot prove anything about the actual differences between the courts. Those who believe that state courts are as likely to protect rights as are federal courts would argue that the attorneys' judgments lack empirical support and should be given little weight in determining whether parity exists.150

Also, the Marvell study could be criticized as establishing only that at one point in time federal courts were per-

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148. Id. at 1354.
149. Id. at 1358. Mr. Marvell states that he believes that his study empirically disproves parity between state and federal courts. Id. at 1571–72.
150. I am not arguing that attorney judgments are incorrect about the respective quality of the courts. Rather, I argue only that defenders of parity will not accept these opinion polls as empirical proof about the courts' comparative ability and willingness to protect federal rights. See infra text accompanying note 271.
ceived as more hospitable to one type of claim—not that federal courts are inherently more likely to protect rights than are state courts. As the composition of the federal judiciary changes, as a result of substantial appointments by a conservative President, for example, then the preferences could shift.\textsuperscript{151} Attorneys litigating student rights cases might thus prefer, at certain points in time, to proceed in state courts.

For this reason, survey research is unhelpful as a basis for formulating jurisdictional rules. Opinions of attorneys about the respective court systems probably will vary over time. Jurisdictional rules, however, are not likely to change each time there is a shift in attorney attitudes.

Furthermore, the methodological problems described at the beginning of this section apply to this study and other survey research. Some, such as Professor Bator, who claim that parity exists probably would argue that even if federal courts are more likely to uphold constitutional claims, that does not make them better or preferable. Also, Mr. Marvell's study only yields an aggregate set of opinions about state and federal courts across the country. But the study found that in some areas the plaintiffs' attorneys preferred to litigate student rights cases in state courts. Thus, blanket jurisdictional rules based on aggregate conclusions about parity would assign constitutional claims in some instances to the less sympathetic court.

I am not arguing that the attorneys were wrong in their perceptions or that the survey did not accurately measure their attitudes. Rather, the study is simply not likely to be accepted as proving anything about the actual comparative quality of state and federal courts.

The final type of empirical study compares Supreme Court reversal rates of state supreme courts as opposed to the United States Courts of Appeals.\textsuperscript{152} If the Supreme

\textsuperscript{151} By the end of his current term, President Reagan will have appointed almost half of the federal judiciary. See infra text accompanying note 163.

\textsuperscript{152} See, e.g., Epstein & O'Connor, States Before the U.S. Supreme Court: Direct Representation in Cases Involving Criminal Rights, 1969–1984, 70 JUDICATURE 305 (1987); Solimine & Walker, supra note 4, at 225 n.62 (relying on Vines's data to argue that state courts are comparable to federal courts); Vines, Southern State Supreme Courts and Race Relations, 18 W. POL. Q. 5 (1965) (examining Supreme Court reversals of race relation decisions of southern courts between 1954 and 1963).
Court reverses the federal courts of appeals as frequently, or more so, than it does the state courts, then it is claimed that parity is proven. Conversely, if the state supreme court decisions are overturned more often, then it is argued that federal court superiority is established.

Such studies suffer from many serious flaws. First, comparing reversal rates of decisions by federal courts of appeals and state supreme courts ignores differences between the trial courts. As explained earlier, if one system's trial courts are more hostile to constitutional rights than the other's courts, this hostility might be reflected in adverse fact-finding or discouraged litigants not appealing—factors that would not be reflected in a study of appeals courts decisions.

Second, by focusing on cases only where decisions were reached and by ignoring out-of-court dispositions, the study may not be measuring substantial differences between the appeals courts. If a state's supreme court was perceived as hostile to federal claims, then fewer appeals would be filed in the state courts by those with constitutional arguments than in a system where the state's appeals courts were perceived as more receptive. In other words, evidence of the state court's hostility would not be reflected in the study. Moreover, if state courts were perceived as more hostile and federal courts more hospitable, then appeals in state court would be filed only when there were relatively strong claims, but a greater number of somewhat weaker appeals might be filed in federal court. The disparity in the composition of the cases might explain the Supreme Court's reversal rates more than any differences between the courts.

Third, the percentages of reversals might merely reflect the Supreme Court's assumption of parity or its deference to state courts. For example, perhaps because of considerations of federalism and comity, the Supreme Court might use a different standard in reviewing decisions from state courts than decisions from federal courts. Thus, there could be a number of instances where the Court would have reversed a decision had it come from the federal court of appeals but did not take the case when it was litigated in the state courts. There would therefore be a lower rate of reversals of state courts than of federal courts not because of dif-
ferences or similarities between the courts, but due to the Court's approach to review.

Finally, and most importantly, the percentage of cases in which there is a reversal is not revealing of the comparative quality of federal and state courts. The majority of the Supreme Court's docket is comprised of two types of cases—those in which the Supreme Court has discretion to grant review, otherwise known as certiorari jurisdiction, and those in which the Court is obligated to decide the case, commonly termed appeals jurisdiction. In those instances in which the Court has discretion, the number of decisions reversed is more revealing than the percentage of reversals. If the Supreme Court reverses fifty cases from one jurisdiction, but only five from another, one would doubt the similarity between these two jurisdictions, even if in each instance the Court reversed half of the cases in which certiorari had been granted—fifty out of one hundred, and five out of ten, respectively.

The other major type of case on the Supreme Court's docket are "appeals." Here, a study of reversal rates is systematically biased in favor of the state courts. The Supreme Court, in part, hears appeals from state courts if they rule a state statute constitutional and hears appeals from a federal court of appeals that rules a state statute unconstitutional. This means that there is a substantial difference in the content of the cases coming from the state as opposed to the federal court. Every time a state supreme court declares a state statute constitutional, there is a possibility of an appeal which would invoke the Court's mandatory jurisdiction. But when a federal court of appeals upholds a state statute, certiorari is the only mechanism to bring the case before the Supreme Court. Because of the presumption of constitutionality, probably far more statutes are upheld than invalidated. The state courts' reversal rates are thus artificially lowered because of the instances in which the Supreme Court summarily affirms decisions ruling against constitutional challenges.

The flaws in these studies are more than the kind of minor methodological problems that can be identified in all quantitative research. They are basic difficulties that under-

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mine the reliability of the conclusions and make it quite unlikely that the studies will be persuasive to any except those who already share the position proven by the research. Although parity is an empirical question, no empirical answer seems possible.

B. Nonempirical Attempts to Resolve the Question of Parity

Recognizing the improbability of empirically establishing state court parity or federal court superiority, several commentators have tried to prove their assertions by using other types of evidence. Specifically, those who argue that federal courts are preferable to state courts in vindicating constitutional rights most frequently rely on claims about historical experience and observations about the institutional characteristics of the two court systems.\textsuperscript{154} Unfortunately, neither form of proof is likely to resolve the parity debate.

First, those who believe that federal courts should have the preeminent role in enforcing constitutional rights describe a history of state court hostility to federal claims. Professor Neuborne shows that before the Civil War, the federal forum was used to implement the fugitive slave laws, which enforced the rights of slaveowners under the Constitution’s fugitive slave clause.\textsuperscript{155} In that instance, access to state courts was sought by the antislavery movement, which perceived the states as less likely to enforce federal laws which supported slavery. After the Civil War, the perception of the relative trustworthiness of the federal and state courts shifted and federal courts were turned to because of great hostility in the Southern states to former slaves.\textsuperscript{156} During the Lochner era, Professor Neuborne argues, federal courts were more disposed than the state courts to protecting the

\textsuperscript{154} See, e.g., Neuborne, supra note 3, at 726 (need for qualitative analysis on the question of parity); Neuborne supra note 1, at 1111–15 (experience), 1115–30 (institutional characteristics); Zeigler, supra note 108, at 46–48 (institutional differences between state and federal courts).

\textsuperscript{155} Neuborne, supra note 1, at 1110–11. The Fugitive Slave Clause is found in U.S. Const., art. IV, § 2, cl. 3.

\textsuperscript{156} As described earlier, Congress expanded federal court jurisdiction during this time specifically because of perceived state court hostility to federal constitutional rights. See supra text accompanying notes 34–37; see also M. Redish, supra note 83, at 299 (post-Civil War hostility to federal rights).
economic rights established by the Supreme Court.157 Most recently, there is evidence of substantial state court hostility toward protecting the rights of blacks during the civil rights movement of the 1960s.158 Based on this history, some scholars maintain that federal courts should be available to safeguard constitutional liberties.159

However, others deny that there is a consistent pattern of state court hostility to federal rights. Professors Solimine and Walker argue:

Doubters of parity, however, can marshal no evidence to suggest that state courts continued to be systematically hostile to federal rights after Reconstruction. To the extent that the hostility was revived in some state courts during the 1950's and 1960's, it was an unfortunate aberration not reflected on a nationwide basis today.160

In fact, Professors Solimine and Walker argue that the Southern states' hostility towards civil rights during the 1960s was not, for the most part, reflected in their state courts.161 Ultimately, resolving the historical dispute would require a comparison of the federal and state court decisions during that time period and would entail all of the empirical problems described above.

More importantly, those who proclaim that there is parity between federal and state courts dismiss the past as irrelevant. They contend that even if state courts once were hostile to federal rights, times have changed. They argue, for example, that there has been a steady increase in the quality of state judiciaries.162

Additionally, there have been changes in the composition of the federal judiciary. Republicans have occupied the White House for sixteen of the past twenty years. By the time his term ends, President Reagan will have appointed

157. Neuborne, supra note 1, at 1108.
158. See, e.g., Davies, supra note 99, at 31 (state court hostility to federal rights during the 1960s).
159. See, e.g., M. Redish, supra note 83, at 299; Neuborne, supra note 1, at 1108; Peller, supra note 108, at 667-68.
160. Solimine & Walker, supra note 4, at 224-25 (footnotes omitted).
161. Id. at 225 n.62.
162. Bator, supra note 17, at 630 ("There are many states where it is clear that, in the past ten years, there have been substantial improvements in the receptivity of state judges to federal constitutional claims.").
more than half of the nation's federal judges. Studies demonstrate that judges appointed by Republicans are more likely to vote in a conservative manner and against individual liberties than their Democratic counterparts. Thus, while the judges appointed by Presidents Roosevelt, Truman, Kennedy, and Johnson, constituting most of the federal bench during the 1960s, might have been more disposed towards individual rights than the state courts during that time, there is no reason to believe the situation is the same today.

History will not resolve the parity debate. Those who defend state court parity simply argue that the past is irrelevant in evaluating contemporary courts. They contend that "whatever the historical scorecard of state courts in enforcing federal rights, such a record has only a tangential relevance to the modern debate over parity."

A different explanation for why federal courts are more able and willing to protect constitutional rights involves a comparison of institutional characteristics of the two judicial systems. The contention is that the many differences between the federal and state courts make the federal judiciary more predisposed than the state courts to ruling in favor of constitutional claims.

One such difference is the political insulation of the federal judiciary. Federal judges have life tenure, whereas judges in forty-six of the fifty states face some form of elec-

164. See Note, All the President's Men: A Study of Ronald Reagan's Judicial Appointments to the United States Court of Appeals, 87 Colum. L. Rev. 766, 779 (1987) (finding judges appointed by Republican Presidents to be more conservative than those appointed by Democrats, though not generally finding President Reagan's judges to be substantially more conservative than those appointed by other Republican Presidents).
165. Solimine & Walker, supra note 4, at 225.
166. See, e.g., Maroney & Braveman, supra note 78, at 508-09 ("institutional differences between state and federal courts lead to the conclusion that the former are not equally equipped to resolve constitutional questions"); Neuborne, supra note 1, at 1115-28; Zeigler, Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts, 38 Hastings L.J. 665, 686 (1987) (arguing that institutional factors make federal courts more likely to vindicate constitutional claims).
toral review.\textsuperscript{167} In constitutional cases, courts often are asked to act in a counter-majoritarian fashion protecting minorities or individual rights from discrimination or infringement by elected officials. The claim is that federal judges, with the protections of their jobs and salaries assured by article III of the Constitution, will be more willing to defy political pressure and vindicate constitutional rights than would state judges who must face the voters.\textsuperscript{168}

Another alleged difference is that, overall, federal judges are of a higher quality than their state counterparts.\textsuperscript{169} In part, this stems from the differences in the selection processes used for federal and state judges. The federal selection process, which generally includes bar association review, evaluation by Senators, and scrutiny by the incumbent administration, is thought to yield more uniformly qualified judges than the state processes.\textsuperscript{170} Moreover, the existence in almost all states of electoral selection or review of judges is thought to deter some highly qualified individuals who do not want to participate in such a political process.\textsuperscript{171}

Other factors, too, are believed responsible for a more uniformly well-qualified federal judiciary. The smaller number of federal judges enhances the prestige of serving on that bench and thus attracts the most qualified individuals to federal judgeships.\textsuperscript{172} Some believe that there is a strong relationship between exclusivity, prestige, and the

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\textsuperscript{168} See C. McGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 16 (1969) (importance of political insulation of federal courts); R. POSNER, supra note 31, at 187-88 (state court hostility to rights of criminal defendants because of political accountability); Maroney & Braverman, supra note 78, at 508 (describing importance of political insulation in school desegregation cases); Neuborne, supra note 1, at 1127-28.

\textsuperscript{169} See R. POSNER, supra note 31, at 144 ("[I]t is widely believed that federal judges are, on average [an important qualifier], of higher quality than their state counterparts."). Of course, such discussions about quality raise major problems in defining quality.

\textsuperscript{170} See H. FRIENDLY, supra note 106, at 146 (differences in methods of appointment make federal judges generally of a higher quality); R. POSNER, supra note 31, at 46.

\textsuperscript{171} R. POSNER, supra note 31, at 46-47 ("[A]ny electoral process will discourage a very large number of well qualified persons from seeking judicial office.").

\textsuperscript{172} Neuborne, supra note 1, at 1121.
\end{flushleft}
quality of the judges. The generally larger salaries for the federal bench than for state judges also are thought to yield higher quality judges. Furthermore, it is argued that institutional factors such as more and better law clerks, lower caseloads, and more frequent handling of constitutional issues may produce more technical competence in federal courts than in the state judiciaries.

Finally, it is claimed that the "psychological set" of federal judges makes them more likely to rule in favor of constitutional claims. Federal judges, it is suggested, are more likely to see their primary role as upholding the Constitution than are their state counterparts.

It is argued that these factors, taken together, make the federal courts superior to the state courts for the protection of constitutional rights. No less than the American Law Institute concluded in its study of the federal courts: "[I]t is difficult to avoid concluding that the federal courts are more likely to apply federal law sympathetically and understandingly than are state courts."

Yet, despite all of these factors, the Supreme Court frequently has concluded that state judges are as able and willing to protect constitutional rights as are federal judges. Likewise, scholars arguing in favor of parity dispute the above factors and especially contest whether they cause federal courts to be superior to state courts in protecting rights. They contend that state court systems as a whole are as likely to rule in favor of constitutional liberties as are federal courts. For example, they dispute claims about the superior quality of federal judges. Professor Bator writes:

State supreme court justices as a group are as well paid and have as much prestige as federal judges. Those that I have met seem to me to be as expert on issues of

173. But see infra text accompanying notes 338–40 questioning this thesis.
174. R. Posner, supra note 91, at 47 (in 1982, the difference was an average of $74,300 for federal judges and $54,000 for state judges).
175. Maroney & Braveman, supra note 78, at 510 (better law clerks and lower caseloads mean better quality in the federal courts); Neuborne, supra note 1, at 1121 (more technical competence in the federal courts).
176. Neuborne, supra note 1, at 1124.
177. A.L.I., supra note 89, at 166. The 1969 date of this conclusion should be noted. The study was undertaken during the 1960s, when there was Southern resistance to civil rights, and before the Nixon, Ford, and Reagan nominees to the federal bench.
178. See supra text accompanying notes 63–64, 74–79, 90–93.
federal constitutional laws as are federal judges. . . .

[T]he case for channeling cases to the federal courts on the ground that sufficiently competent and expert consideration of constitutional issues cannot be expected from the state appellate courts has simply not been made.179

Advocates of the parity position also deny that electoral accountability of state judges influences their rulings in constitutional cases. Professors Solimine and Walker write that "[i]t does not follow . . . that elections of state judges . . . will influence the subsequent decisions of elected judges. Recent scholarship indicates a weak linkage . . . between environmental variables such as public opinion, and court functions."180

Moreover, it is argued that even if there are differences between state and federal courts, these disparities do not necessarily translate into federal courts being more disposed to protecting federal constitutional rights.181 Even if federal judges are of a higher quality than state judges because of greater salary, more prestige, or better institutional support, that does not mean that there are differences in the way the judges handle constitutional cases. In fact, there is no reason that better judges are necessarily more disposed toward safeguarding individual liberties.

Advocates who contend that there is parity between federal and state courts argue that other factors which are the same in the two court systems—such as the oath to uphold the Constitution, the judicial role, and the transmission of information from attorneys—are more important in determining results than any differences between the courts.182 Thus, defenders of parity argue that there are minimal variations between the state and federal courts and those differences do exist have little effect on the decision-making process.

The problem is that without empirical measurement, each side of the parity debate simply has an intuitive judg-

179. Bator, supra note 17, at 630–31. It should be noted that Professor Bator is comparing state supreme courts with federal district courts, a comparison criticized earlier. See supra text accompanying notes 143–45.
181. Id. at 229.
182. Bator, supra note 5, at 509 (state judges use same process of decision-making as federal judges); Solimine & Walker, supra note 4, at 248 (information flow to judges an important determinant of results).
ment about whether the institutional differences between federal and state courts matter in constitutional cases. Each side explains its position, but neither has any way to prove it or refute the opposing claim. Justices and commentators have impressionistic judgments about the relative abilities and proclivities of federal and state courts, but there seems to be no way to confirm or dislodge those impressions. For this reason, one group continually asserts that there is no parity, while the other proclaims that parity exists, and the debate stagnates. Discussions about parity seem futile.

There are many possible directions for analysis in light of this conclusion. One possibility would be to try again to devise an empirical measure of federal and state court behavior in constitutional cases to try to prove or deny parity. Although it would be expensive, better studies can be undertaken—such as a survey that was not limited to cases in which there were written opinions, careful "matching" of cases to assure similar content, and data accounting for possible differences between geographic areas.

Another possibility is simply to continue to have jurisdictional rules based on assumptions about parity. One might conclude that parity must remain the key question in determining the scope of federal jurisdiction. If federal courts are superior to state courts, jurisdictional rules should reflect this, but if state courts are as good, then federal jurisdiction is far less important. By this view, the issue of parity cannot be avoided even if the conclusion is based on intuition. After all, the analysis in this Part establishes only that the parity debate is stalemated, not that parity is the wrong question.

Yet another alternative is to try to find an acceptable way to define a role for the federal courts without regard to parity. Perhaps after examination the conclusion will be that none exists and that a conclusion about parity must be a starting premise in designing jurisdictional rules. On the other hand, if a role for the federal courts can be defined irrespective of parity, then there is a chance for finding consensus between both sides of the parity debate and for ending the tremendous inconsistency of Supreme Court
decisions on federal jurisdiction. Perhaps an alternative principle exists which can be used to define consistently the scope of federal jurisdiction.

III. ATTEMPTS TO DEFINE A ROLE FOR THE FEDERAL COURTS WITHOUT REGARD TO PARITY

At least three principles might be used to define a role for the federal courts irrespective of their comparative quality with state courts in constitutional cases. The first, "comity," requires that federal courts respect the dignity of state courts as those of another sovereign and avoid friction with state judiciaries. The second is based on the principle of "legislative supremacy" and asks the Supreme Court to implement congressional decisions about federal jurisdiction and not make independent judgments about parity. Third, a presumption may be placed either against or in favor of federal court jurisdiction, arguing in defense of this option that the structure and history of the Constitution gives state or federal courts the preeminent role in deciding constitutional issues.

None of the above perspectives succeeds in avoiding the question of parity. In fact, each makes implicit assumptions about the parity issue.

A. Comity

The Burger Court frequently stated that federal court jurisdiction must be exercised in a manner that does not insult the state courts or cause friction with them. This concern has been captured in the term "comity"—the respect owed to the state's courts as those of another sovereign.

183. See infra Part IV. Of course, if consistency were the only goal, it could be achieved by making an arbitrary choice always to follow either the assumption of parity or the assumption of federal court superiority.


185. See, e.g., Younger, 401 U.S. at 41-45. Certainly, this is not the only way to view the concept of comity. Comity could be defined in terms of allowing federal courts to hear federal claims and state courts to decide state claims or in terms of maximizing relitigation and redundancy. See generally Cover, supra note 21. I am focusing on comity as it has been used especially by the Burger Court.
The principle of comity might be simply an outgrowth of an assumption of state court parity. That is, one could argue that assuming state courts are as good as federal courts, they deserve respect and jurisdictional principles which reflect their equal quality. However, if comity is based on an assumption of parity, it cannot be used to define federal jurisdiction irrespective of parity. Analysis of comity would collapse immediately into the dispute over whether state courts are equal to federal courts in their ability and willingness to protect constitutional rights.

Alternatively, comity might be developed as a principle independent of any assumptions about parity. The argument would be that whatever their actual comparative quality, and perhaps especially because quality cannot be measured or known, federal jurisdictional principles must be based on respect for state courts.

I am not suggesting that the Burger Court used comity irrespective of parity. On the contrary, its decisions restricting federal court jurisdiction were based on an assumption of state court parity.186 The Court never explicitly declared that comity was an alternative independent argument; even without regard to parity, comity requires deference to the state courts. Nonetheless, in theory, the concept of comity articulated by the Burger Court can be used independently as a principle for defining federal court jurisdiction. Especially if one begins with the premise that the debate over parity is futile, one might turn to comity as a separate principle for defining federal jurisdiction. It is this possibility that I consider here.

The Burger Court often proclaimed the need to respect the dignity of the state courts, avoiding federal jurisdictional principles that might implicitly insult state judges or cause friction with them. In Younger v. Harris, the Court held that federal courts may not enjoin pending state court criminal prosecutions because, in large part, of comity.187 In Younger, and in its progeny extending Younger's principles to civil cases, the Court emphasized that an injunction halting state court proceedings is a "negative reflection" on the compe-

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186. See supra text accompanying notes 63–64, 74–79, 90–93.
187. 401 U.S. at 41–45.
tence of state courts and a disruption bound to cause friction between the court systems. 188

The principle of comity articulated in Younger was extended to prevent federal courts from granting damages to remedy injuries suffered as a result of allegedly unconstitutional state tax systems. 189 In Fair Assessment in Real Estate Association, Inc. v. McNary, the Court refused to allow the federal court to decide a section 1983 challenge to the constitutionality of a state’s tax collection practices because “such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity.” 190

In O’Shea v. Littleton, the Supreme Court held that a complaint alleging a practice of racial discrimination by state courts in sentencing and setting bail had to be dismissed. 191 In part, the dismissal was because a “periodic reporting system [that might be used to evaluate state court conduct] would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity.” 192 Likewise, in Rizzo v. Goode, the Supreme Court dismissed a class action suit alleging a practice of illegal and unconstitutional police mistreatment of minority citizens. 193 The Court stated that “these principles [of comity and federalism] likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments.” 194

Similarly, in holding that state court decisions should have preclusive effect in federal section 1983 actions, the Court emphasized that “comity between state and federal courts” is a “bulwark of the federal system” and that the dignity of the state courts necessitates federal judicial respect

188. Trainor v. Hernandez, 431 U.S. 434, 446 (1977); Judice v. Vail, 430 U.S. 327 (1977); see also Bator, supra note 17, at 620 (“it is obvious that especially sensitive political nerves are likely to be touched if federal judges are free to enjoin—or to declare unconstitutional—state court enforcement proceedings on the basis of claims which could be adjudicated in those proceedings”).
190. Id. at 113.
192. Id. at 501.
194. Id. at 380.
for state court judgments. In limiting the scope of habeas corpus review, the Court frequently emphasized that "[f]ederal habeas review creates friction between our state and federal courts, as state judges—however able and thorough—know that their judgments may be set aside by a single federal judge, years after it was entered and affirmed on direct appeal."  

Thus, comity has been emphasized by the Supreme Court and might be used to fashion jurisdictional rules. The principle would be that federal court jurisdiction should be defined in a way that does not cause friction with or offend state court judges.

I contend, however, that comity is an undesirable concept for defining federal jurisdiction and, as used by the Burger Court, it has been an oft-invoked slogan without justification or adequate substantive content. First, it must be recognized that the very existence of federal courts and most federal jurisdiction is based on a distrust of state courts. Diversity jurisdiction, for instance, exists because of a fear that state courts will be parochial and protect their own citizens at the expense of out-of-staters. Removal jurisdiction, especially in the civil rights removal context, reflects a distrust of state courts. General federal question jurisdiction was created in 1875 because of fear about state court hostility to federal claims. In fact, the Framers, such

196. Kuhlmann v. Wilson, 477 U.S. 436, 453–54 n.16 (1986); see also Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982); Bator, supra note 17, at 614–15 (Habeas corpus "creates a peculiarly abrasive and intrusive relationship between the federal and state courts, since it subordinates the entire hierarchy of state tribunals to a single federal district judge even in cases where there is no showing that the state courts failed to provide a fully hospitable forum for the litigation of the federal claim." (footnote omitted)).
199. See supra text accompanying notes 34–37.
as James Madison, who argued for the existence of lower federal courts did so because of doubts about the state courts, especially in cases involving federal law and out-of-state citizens.200

Therefore, because the existence of federal courts and federal jurisdiction is, in itself, an implicit insult to the state courts, it does not make sense to say that jurisdictional principles must be defined to avoid offending the dignity of state courts. In light of the insult to state courts represented by the very existence of federal jurisdiction, it is not clear how much additional affront there is in allowing federal courts to enjoin unconstitutional state court proceedings or in expanding habeas corpus jurisdiction.

Second, the concept of comity, reflecting a concern for the dignity of state courts and the need to avoid federal court friction with state courts, is based on an unexplained and undefended theory about the psychology of state judges. For example, the claim that federal habeas corpus relief for state prisoners causes friction with state courts assumes that state court judges carefully follow the progress of their cases in federal court and hence are upset when their decisions are reversed. Yet, I have seen no evidence for this assertion, and given the case load of state court judges, it is questionable that they have the time to keep track of the ultimate disposition of most of their cases.

In fact, if it is assumed that state judges do follow federal habeas petitions, then an argument could be made that habeas review decreases friction between federal and state judges. In the vast majority of instances, federal courts deny habeas petitions. One study found that in only 3.2 percent of cases were habeas petitions granted in whole or in part and only 1.8 percent resulted in the release of the petitioner.201 Commentators agree that generally less than five percent of habeas petitions are granted.202 Therefore, because federal courts side with state judges in over 95 percent of the cases, if state judges follow the disposition of their


cases, habeas review should serve as positive reinforcement, not a source of friction.203

More generally, it is not clear that state judges perceive federal court jurisdiction either as an insult or a source of friction. State judges might believe that just as state courts are the preeminent interpreter and enforcer of state law, so do federal courts occupy that role with regard to federal law. This view is one of mutual respect and role specialization; no insult, other than whatever is inherent to the existence of federal courts, is implied. Alternatively, state court judges might view the jurisdictional statutes as creating a choice of forum for constitutional litigants. Professor Redish explains that allowing federal courts to enjoin unconstitutional state court proceedings is not an insult from this perspective:

The extent of the insult [to state judges] caused by a federal injunction . . . is debatable. Allowing a defendant in a state criminal proceeding to obtain a federal determination of his constitutional claim might be viewed simply as offering a choice of forum for the adjudication of his constitutional rights, a choice traditionally considered a valuable element of modern federalism.204

I am not making any claim about the actual psychology and views of state court judges. Rather, the point is that there are many possible ways state courts can view federal jurisdiction. The Burger Court and like-minded commentators have not defended their assumptions about what insults or causes friction with state court judges.

Third, a commitment to comity as a principle for defining federal jurisdiction would lead to jurisdictional principles much different than those created by the Burger Court. Consider, for example, the Younger doctrine—that federal courts should not enjoin pending state court proceedings. The underlying concern is that federal courts should respect the state's interest "in not having its judicial process grind to

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203. The argument in response would have to be that it is the existence of habeas review, rather than the results, which creates friction. But it is hard to imagine that offense would be taken from a process which occurs years after the state court trial, is largely invisible to the state court judge, and usually sides with the state court judges.

204. M. Redish, supra note 83, at 299.
a halt while the federal courts decide constitutional questions."

Yet, under the principle of Pullman abstention, federal courts abstain from ruling when a state court's clarification of state law might make a federal constitutional ruling unnecessary. The principle of Pullman abstention is based, in part, on the desirability of allowing state courts to determine their own law. In fact, the Pullman Court explicitly said that such an approach would decrease friction between federal and state courts. Under Pullman abstention, the federal court stays its proceedings and sends the matter to state court for a clarification of state law. After the state court rules, the parties may return to federal court for a decision on their federal law claims.

Under Pullman abstention, then, federal proceedings grind to a halt so that state courts can interpret state law. True adherence to the principle of comity would seem to dictate that it is permissible to interrupt state court proceedings for the federal court to clarify federal law, just as Pullman abstention causes federal courts to interrupt their proceedings to allow state courts to clarify state law.

An even more powerful way in which concern for comity and friction might change jurisdictional principles involves the Supreme Court's frequently stated deference to state courts so long as they provide a full and fair hearing. Ap-

207. Id. at 501.
208. Id.
210. I recognize that there are several responses to this position. First, one could argue that in Pullman abstention, federal courts are staying their own proceedings, which is not the same as federal courts enjoining another court. Yet, I question whether this distinction matters if the governing principle is comity, mutuality, which would give each court system a preeminent role in interpreting that jurisdiction's law. Second, one could argue that it is Pullman that is wrongly decided, not Younger, and neither Court should interrupt its proceedings out of deference to the other. This, however, seems to reflect less respect for a co-equal sovereign than does a principle that state courts should have the preeminent role of interpreting state law and federal courts should have that role with regard to federal law.
211. See, e.g., Allen v. McCurry, 449 U.S. 90, 103–104 (1980) (no relitigation of constitutional claims in § 1983 suits if the state court "has given the parties a full and fair opportunity to litigate federal claims"); Stone v. Powell, 428 U.S. 465,
lication of this principle would require careful federal court inquiries into the adequacy of the state court proceedings. Such examinations, with the attendant conclusions of state court inadequacy in particular cases, risks even greater friction with the state courts. As Professor Resnik notes: "[I]n some sense, the state courts are at greater risk under Stone v. Powell because it authorizes a broad inquiry into the soundness of their procedures. The alternative question, of whether a case was correctly decided, seems less intrusive."213

The claim here is not that comity necessarily would mean a reversal in current rules limiting federal court jurisdiction. Rather, it is important to recognize that true concern for comity does not necessarily lead to less federal jurisdiction. Comity denotes mutuality, something which seems absent from Supreme Court decisions that use comity only as a way for justifying limiting the authority of the federal courts.

Finally, and most importantly, if federal courts are superior to state courts, then it should not matter whether expansive federal court jurisdiction would insult state judges. Insult would be deserved; correcting errors and protecting individuals who are wrongfully incarcerated are more important than harmony between levels of government.214 Surely, "jurisdictional doctrine should not translate into an empty display of respect or carefulness to avoid wounding the egos of state judges."215 Federal court enforcement of constitutional rights, such as in desegregation and reapportionment cases, frequently causes friction between federal and state governments. Yet, such tensions are accepted as a part of constitutional governance.

494 (1976) (no relitigation of fourth amendment claims on habeas corpus if the state provides a full and fair hearing).

212. Redish, supra note 19, at 108 ("a detailed, probing case-by-case federal judicial inquiry into the adequacy of substantive and procedural state remedies necessarily entails a significant increase in the federal courts' workload and in the frictions of judicial federalism").


214. See Zeigler, supra note 166, at 688 ("Comity . . . is largely a matter of courtesy and politeness . . . . A case alleging denial of fundamental rights should not be dismissed out of hand simply because the relief sought might make a state judge feel bad.").

In other words, comity cannot operate as a principle for defining federal jurisdiction independent of parity. If there is not parity, then federal jurisdiction is justified regardless of the insult or friction. Conversely, if there is parity between federal and state courts in constitutional cases, then, arguably, federal jurisdiction is unnecessary and the principle of comity is superfluous.

Some, most notably Professor Paul Bator, argue that insults to state judges are to be avoided because they diminish the quality of state judicial performance. Professor Bator contends that open recognition of state court inferiority would create a self-fulfilling prophecy and further lessen the quality of state courts in deciding constitutional issues. According to this position, even if state courts are inferior, jurisdictional principles should not take this into account because it only would make state courts worse.

There are several problems with this thesis. First, again, it is based on an unjustified theory of the psychology of state judges. Professor Bator assumes that federal court jurisdiction would demoralize state court judges and impair their performance. It is equally possible that the scope of federal jurisdiction would not matter to state judges, that they are now doing the best they can and would continue to do so; or that the implicit insult would motivate them to improve to meet the higher expectations. For example, if state judges follow the ultimate disposition of their cases in federal court and dislike being reversed, it seems quite possible that they might be careful to protect constitutional rights to minimize the chances of being overruled.

Second, Professor Bator’s theory presumes without explanation that the harms of the decrease in state judicial performance outweigh the benefits of the error corrections to be gained from more expansive federal jurisdiction. Professor Bator’s concerns could be addressed by allowing all constitutional claims to be litigated de novo in federal court,

217. Id.
218. Cover & Aleimkoff, supra note 104, at 1046 ("If state court judges knew that errors would be corrected by a federal court requiring a retrial, they might be more solicitous toward claims brought before them.").
219. Professor Bator’s argument is that even if federal courts are better, open recognition of this would be counter-productive.
thereby negating any effects of state court hostility or incompetence in constitutional cases.\footnote{220}

Finally, Professor Bator does not explain whether there is a threshold after which federal court jurisdiction insults state courts and adversely influences their performance, or whether the insult is continual, with each additional increase in federal jurisdiction causing a new affront and a further decrease in performance. If it is the latter, then the very existence of federal courts, and all of the prior statements by the Supreme Court of federal court superiority, already have demoralized state courts. If so, then Professor Bator's theory would establish that there is not parity between federal and state courts—contradicting the very position he frequently has expressed. The question then would become how much insult each additional expansion of federal court jurisdiction would add to state court judges, and how much would that hurt state court handling of constitutional cases. Alternatively, if the insult occurs only after a certain point, then that threshold would need to be identified.

In sum, comity—as the Supreme Court has defined the concept—does not succeed in avoiding the issue of parity. Those who believe federal courts to be superior reject considerations of comity because protecting dignity or lessening friction is less important than safeguarding rights. Those who contend there is parity can defend a role for the federal courts without regard to comity; in fact, comity would merely be the respect owed to equally capable courts. Either way, discussions about comity cannot be independent of the debate about federal and state court parity.

B. Legislative Supremacy

The parity issue might be avoided by according Congress plenary authority to determine federal court jurisdiction. By this principle, the federal courts should follow congressional direction—exercising and refusing jurisdiction only where instructed to do so by the legislature. The Supreme Court need not, and should not, fashion its own jurisdictional rules. It is for Congress to determine the scope of federal court jurisdiction and the relationship be-

\footnote{220. In Part IV, I argue for such a principle of allowing litigants with constitutional claims to choose whether to proceed in federal or state court.}
between federal and state courts. Hence, it is unnecessary and
wrong for the Court to face the question of parity and define
federal jurisdiction based on conclusions concerning the rela-
tive quality of federal and state courts.221 According to the
legislative supremacy view, "virtually all the debate over the
relative competence of federal and state courts as enforcers
of federal rights becomes logically irrelevant, except to the
extent it is directed exclusively to a call for legislative
revision."222

There are strong arguments supporting this position. The
Supreme Court has held that Congress has broad au-
thority to determine the jurisdiction of the lower federal
courts.223 The Court on several occasions concluded that
because Congress has discretion as to whether to create
lower federal courts, it also has discretion to determine their
jurisdiction.224 To the extent that Congress has enacted
statutes defining federal jurisdiction, it would violate separa-
tion of powers for the courts to disregard them unless they
were unconstitutional.225

Additionally, because the issue of federal court review
of state court judgments and proceedings is a question of
federalism, Congress is the appropriate institution to decide
the scope of federal court jurisdiction. Professor Herbert
Wechsler, in a famous article, argued that the national politi-
cal process best determines the proper relationship be-
tween the federal and state governments:

[T]he extent that federalist values have real signifi-
cance they must give rise to local sensitivity to central in-
tervention; to the extent that such a local sensitivity
exists, it cannot fail to find reflection in Congress. . . .

The national political process in the United States—and
especially the role of the states in the composition and

221. Redish, supra note 19, at 74 (under principle that Congress should define
federal court jurisdiction, "the focus of the policy argument [is] not . . . whether
state courts could do as good a job as the federal courts").

222. Id. at 77.

223. See, e.g., Lauf v. E.G. Shiner & Co., 303 U.S. 323 (1938); Sheldon v. Sill, 49
U.S. (8 How.) 441 (1850). There is a rich literature on the subject of Congres-
sional control over lower federal court jurisdiction. See, e.g., Bator, Congression-
al Power Over the Jurisdiction of the Federal Courts, 17 VILL. L. REV. 1030 (1982); Eisen-
berg, supra note 22; Sager, supra note 22.

224. See, e.g., Palmore v. United States, 411 U.S. 389 (1973); Lauf, 303 U.S. 323
(1938); Sheldon, 49 U.S. (8 How.) 441.

225. Redish, supra note 19, at 74.
selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.\textsuperscript{226} The Supreme Court, in \textit{Garcia v. San Antonio Metropolitan Transit Authority}, recently relied on Wechsler’s theory to justify complete judicial deference to Congress in matters of federalism arising under the Commerce Clause.\textsuperscript{227} Likewise, it can be argued that Congress should allocate power between federal and state courts.

Such an approach, if followed, might cause a substantial change in many principles defining federal court jurisdiction. For example, the legislative history is clear that Congress enacted section 1983 and the statute allowing federal habeas corpus review for state prisoners because of a grave distrust of state courts.\textsuperscript{228} As the Supreme Court has recognized, the very purpose of these statutes “was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.”\textsuperscript{229} In light of Congress’s desire to expansively open federal courts to constitutional claims, it is questionable whether the Supreme Court’s recent narrowing of jurisdiction under the civil rights and habeas corpus statutes can be squared with a model that gives Congress plenary authority to define federal court jurisdiction.

Furthermore, as Professor Redish suggested, the abstention doctrines fashioned by the Supreme Court are inconsistent with a view that Congress should determine the scope of federal jurisdiction.\textsuperscript{230} Professor Redish persuasively argued that it violates separation of powers for the Court to create abstention doctrines and refuse to exercise


\textsuperscript{227} 105 S. Ct. 1005 (1985).


jurisdiction granted by Congress. Where Congress deems it appropriate, statutes command federal court abstention.231 Under the view that Congress determines federal court jurisdiction, the Supreme Court may not create additional abstention requirements.

I do not wish to challenge the principle that it is for Congress to define federal jurisdiction. Rather, my argument is only that this approach does not eliminate the need to address whether parity exists between federal and state courts in their handling of constitutional cases.

First, the principle of legislative supremacy in defining federal court jurisdiction simply shifts the question of parity from the courts to Congress. In deciding issues such as the breadth of federal court jurisdiction, when state court decisions should have preclusive effect in state courts, and whether federal courts can enjoin state court proceedings, Congress would still need to consider the comparative quality of federal and state courts in constitutional cases. All of the arguments about parity would shift to the legislative forum. The absence of an empirical measurement of parity would mean that a majority of Congress would substitute its intuitive judgment about parity for that now made by the Supreme Court. In other words, this approach does not provide a way to define federal jurisdiction irrespective of parity; it merely changes who makes the judgment.232

Second, even if the Supreme Court is committed to following Congress's determination of federal jurisdiction, the Court still will have a great deal of discretion in fashioning jurisdictional rules. The Court will need some principle for exercising this discretion and determining federal court jurisdiction where Congress is silent or its intent is unclear. The Court will turn to considerations of parity unless there is an alternate principle for defining federal jurisdiction.

In part, the Court has discretion in determining federal court jurisdiction because of ambiguity in Congress's intent

232. It might be argued that it is preferable for Congress to make the judgment about parity instead of the courts because of Congress's sensitivity to both federal and state interests or the desirability of having an intuitive judgment made by a politically accountable body. Here, I am not challenging this, but rather, only arguing that the definition of federal court jurisdiction still would turn on conclusions about parity.
as expressed in the legislative history of the jurisdictional statutes. The problems and inherent uncertainties in relying on legislative histories are familiar.233

Consider, for example, the dispute over the scope of federal habeas corpus review for state prisoners and the Court's inability to decide such jurisdiction based solely on congressional intent. Conservatives, such as Professor Paul Bator, argue that the Reconstruction Act which authorizes habeas relief for state prisoners had limited objectives. Professor Bator contends that the drafters of the Act thought that only challenges to the jurisdiction of the tribunal could be raised in federal court on habeas corpus under the statute.234 Bator argues that there is not sufficient evidence to show that "it was the purpose of the legislature to tear habeas corpus entirely out of the context of its historical meaning and . . . convert it into an ordinary writ of error with respect to all federal questions."235 Several Supreme Court Justices have expressed a similar limited view of Congress's intent.236

However, other commentators and Justices see a much broader congressional purpose underlying the Reconstruction Act. They argue that Congress strongly distrusted state courts and therefore allowed state prisoners access to federal courts to assure protection of federal rights.237 After reviewing the legislative history and the early case law, Professor Gary Peller explicitly disagreed with Professor Bator and argued that Congress, in enacting the Reconstruction Act, meant to allow state prisoners to relitigate their consti-


234. Bator, supra note 5, at 466; see also Oakes, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966).

235. Bator, supra note 5, at 475.


tutional claims in federal court on habeas corpus.\textsuperscript{238} Several Justices also have expressed this view.\textsuperscript{239}

At the very least, the legislative history is uncertain, making it probable that the Court will need to turn to other principles to define federal jurisdiction. Moreover, it is quite likely that one's reading of the ambiguous legislative history will be influenced by one's views about parity. It is hardly coincidental that Professor Bator, a strong advocate of the parity position, finds no congressional desire to broadly expand federal jurisdiction, while Professor Peller, a critic of the assumption of parity, has a very different reading of the legislative history.\textsuperscript{240} Historiographers long have argued that our reading of history is affected by our existing beliefs and ideas.\textsuperscript{241}

More generally, there will be many jurisdictional issues where congressional intent is nonexistent or unclear, providing the Court with substantial discretion in defining federal court jurisdiction. As Professor Althouse recently explained: "[a]lthough Congress initially prescribes the jurisdiction of the federal courts, the courts themselves find extensive room for interpretation of these grants of jurisdiction."\textsuperscript{242} For example, in the Anti-Injunction Act, Congress allows federal courts to enjoin state court proceedings if there is an express statutory authorization.\textsuperscript{243} In deciding that section 1983 is such an authorization, the Court made an interpretive decision of the kind that frequently arises even under relatively clear statutes.\textsuperscript{244} Such choices are inevitably influenced by underlying principles, such as whether there is parity between federal and state courts.

Admittedly, a principle of legislative supremacy might resolve many questions of federal jurisdiction without re-

\textsuperscript{238} Peller,\textit{ supra} note 108, at 618-20.
\textsuperscript{240} Again, it is likely that parity is not the determinative belief. Yet, both views about parity and the legislative history stem from underlying views about the proper allocation of power between federal and state governments and the probable results each court system will produce. See\textit{ supra} text accompanying note 101.
\textsuperscript{242} Althouse,\textit{ supra} note 215, at 1486.
\textsuperscript{244} Althouse,\textit{ supra} note 215, at 1487 n.14.
gard to parity. Nonetheless, this approach would not resolve all issues concerning the scope of federal jurisdiction. For many questions, the Court would have discretion and absent an alternative principle would rely, explicitly or implicitly, on considerations of parity. Thus, given the impasse in the parity debate, identifying an alternative principle to use in those circumstances where legislative intent is uncertain or non-existent remains desirable.

Third, an underlying problem with the principle of legislative supremacy in defining federal jurisdiction is that the principle authorizes the complete elimination of lower federal court jurisdiction or its restriction in particular kinds of cases. The principle accords Congress plenary power in establishing federal courts and determining their jurisdiction. Potential restrictions on federal court jurisdiction in constitutional cases are very troubling if state courts are not equal to federal courts in their ability and willingness to protect constitutional rights. For example, Professor Eisenberg argued that the existence of lower federal court jurisdiction is "constitutionally required" in order to assure the vindication of federal rights. He contended that, in light of the enormous proliferation of litigation, review by the Supreme Court is insufficient to assure adequate protection of federal interests.

Thus, the desirability of according to Congress complete authority to define federal court jurisdiction turns, in part, on whether there is parity between federal and state courts. Arguments over Congress's power to determine federal court jurisdiction likely will become, in part, a debate over whether congressional restrictions on jurisdiction are acceptable in light of the parity or nonparity of federal and state courts.

245. For example, Professor Redish makes a persuasive case that the abstention doctrines should not exist under such a principle and that parity would be irrelevant to reaching that conclusion. Redish, supra note 19, at 74-75.

246. Eisenberg, supra note 22, at 513; see also Amar, supra note 2, at 230 (an alternative argument for the existence of lower federal courts).

247. Eisenberg, supra note 22, at 511, 513.

248. I am not denying that Professor Eisenberg's thesis is controversial, nor denying that someone could believe there is no parity but still accord Congress authority to restrict federal court jurisdiction. My point is instead that there likely is a relationship between the power one is willing to grant Congress in defining federal jurisdiction and one's views on the issue of parity.
In short, although the legislative supremacy approach has many strengths, it will not avoid the need for facing the parity question.

C. Relying on Presumptions to Resolve the Parity Debate

Frequently, when there is empirical uncertainty, analysis turns to presumptions. Presumptions offer a basis for action in a world of incomplete information and empirical questions for which there are not empirical answers. Both sides of the parity debate have attempted to defend their position by creating and invoking presumptions.

Some commentators maintain that state courts should be presumed to be adequate and federal jurisdiction should exist only when state courts provide insufficient protection of federal rights. Professor Bator argued:

[The state court should be allowed] to adjudicate, and to do so dispositively, if—but only if—there was or will be a “full and fair opportunity” to litigate the constitutional question in the state court. . . . [I]f it is shown that the state forum was or will be inhospitable, if corrective process is unavailable in the state court system, then the federal court will step in to adjudicate the federal claim. 249

Similarly, in a recent article, Professor Althouse suggests that federal jurisdiction should be reserved for when the “states either are failing to follow or are misapplying federal law.”250 According to Professor Althouse, so long as states are performing adequately, federal jurisdiction is unnecessary.251 Many Burger Court decisions held that federal courts should defer to state court decisions, such as on habeas corpus review or in granting preclusive effect to state court rulings, unless it is demonstrated that the state courts failed to provide a full and fair hearing on the federal claim.252 The effect is to create a presumption in favor of state court jurisdiction.

249. Bator, supra note 17, at 626.
250. Althouse, supra note 215, at 1489.
251. Id. at 1489, 1508.
Alternatively, some argue that federal courts presumptively should be available to decide federal constitutional claims. For example, Professor Redish writes: "It seems intuitively appropriate to provide federal courts the primary responsibility for adjudicating federal law, and leave as the primary function of state courts the defining and expounding of state policies and principles."  

Consistent adherence to either presumption would bring about a marked change in many jurisdictional principles. For example, allowing state courts to decide federal questions, unless they are demonstrated to be inadequate, would lead to much broader abstention principles than now exist and might, if followed by Congress, result in the complete elimination of the general federal question jurisdiction. Conversely, a presumption that federal courts should decide federal constitutional claims is incompatible with many jurisdictional doctrines created by the Burger Court, such as those preventing federal courts from enjoining unconstitutional state court proceedings, giving preclusive effect to state court decisions in constitutional cases, and preventing relitigation of fourth amendment claims on habeas corpus.

However, such presumptions will not end the stalemate in the parity debate. Rather, arguments over the presumptions will simply replicate the existing impasse in determining whether state courts are equal to federal courts in protecting constitutional rights. Each side will assert its presumption and deny those of the opposition. The presumptions are axioms; one either accepts or rejects them. Undoubtedly, those who believe in parity will choose the presumption that accords state courts responsibility for deciding constitutional claims, while those who deny parity will select the presumption that gives federal courts the preemi-

254. In Wisconsin v. Constantineau, 400 U.S. 433 (1970), Chief Justice Burger, in dissent, took such a position. He argued that the federal court should not decide a constitutional challenge to a state statute until the state courts have considered it under the state constitution. Id. at 440.
255. Cf. H. Friendly, supra note 106, at 76 (urging the "[i]nitial reference of private civil rights disputes to state administrative or judicial processes").
nent role in constitutional cases. The debate over presumptions is at least as futile as that over parity.

In fact, the absence of empirical evidence for or against parity makes it likely that the presumptions would be virtually irrebuttable. It would be extremely difficult for a litigant to prove that a state court system was incompetent in dealing with constitutional claims or was hostile to federal rights. Advocates of such a presumption in favor of state courts have not explained what evidence of state inadequacy will be sufficient to justify access to the federal forum. Except in cases in which the state procedures were defective, there probably would not be a finding of state court inadequacy even if the state courts were less able and willing to protect federal rights.

Under current Supreme Court cases requiring deference to state courts unless they are proven inadequate, instances in which the state courts were deemed insufficient are rare. Perhaps because of the empirical problems in proving inadequacy, and a commitment to avoiding friction with the state courts, federal courts are loathe to find state courts incompetent. As Professor Zeigler notes, “[v]irtually any theoretically available state remedy will be deemed adequate, even if it is futile in practice.”259 In other words, a presumption of state court competency and adequacy would be virtually irrebuttable.

Correspondingly, the presumption in favor of federal jurisdiction also is irrebuttable. Defining federal courts as having the preeminent role in enforcing and applying federal law leaves no room for demonstrating the superiority of state courts. Those who advocate broader state court jurisdiction flatly reject a definition which accords the federal courts the primary responsibility for deciding constitutional claims.260

Certainly, each side might try to justify its presumption. For instance, both sides are likely to argue that their position is supported by the structure of the Constitution and the Framers’ intent. Professor Bator argues that the primacy of state courts runs “in an unbroken line from the Federalist Pa-

259. Zeigler, supra note 166, at 685 n.113.
260. See, e.g., Allen, 449 U.S. at 103-04 (rejecting notion that there is a right to litigate federal claims in federal court).
pers down to today’s Supreme Court opinions.” He contends that the Framers intended for state courts to be the primary protectors of federal rights and thus, his presumption in favor of state courts is justified historically.

Professor Akhil Amar recently argued the opposite position: that the Framers distrusted state courts and the structure of the Constitution gives federal courts the preeminent role in protecting federal rights. Professor Amar wrote that article III affirms “the parity of all federal judges, and its equal and opposite recognition that non-Article III state court judges do not enjoy such constitutional parity. . . . It would have been grossly out of character for the Framers to have committed ‘ultimate’ trusteeship of the Constitution to state judges.”

This historical argument seems particularly difficult to resolve because the text and the Framers’ intent can be invoked to support either position. The Constitution accords Congress discretion as to whether to create lower federal courts; however, there is also a textual argument that article III compels the existence of a federal forum for federal claims. The structure of the Constitution does contemplate a federal judicial power, but it also contemplates federalism.

Nor do the Framers’ views resolve the issue. Some at the Constitutional Convention wanted to leave all cases to state courts, reviewed only by the Supreme Court; others, such as Madison, insisted on the creation of lower federal courts. One’s historical conclusions are likely to reflect one’s preferences concerning federal jurisdiction. Finally, and most importantly, the relevance of the Framers’ intent for contemporary constitutional interpretation is very debatable.

261. Bator, supra note 17, at 606.
262. Amar, supra note 2, at 230. Professor Amar describes his purpose as “establish[ing] as a matter of constitutional law what Burt Neuborne has already argued persuasively as a matter of sociology: state judges do not enjoy parity with Article III judges.” Id. at 238 n.115.
263. Id. at 230, 238.
264. Id. at 230, 238.
265. See supra text accompanying notes 25–30.
In sum, there is little difference between creating a presumption for or against federal jurisdiction and making an assumption about parity. Both judgments are largely intuitive and offer little probability of resolving the stalemated debate.\textsuperscript{267}

IV. AN ALTERNATIVE TO PARITY: INDIVIDUALS WITH CONSTITUTIONAL CLAIMS SHOULD BE ABLE TO CHOOSE WHETHER TO LITIGATE IN FEDERAL OR STATE COURT

Many debates are unresolvable. A theological discussion between a believer and an atheist over the existence of God, or a political discussion between a liberal and a conservative about the virtue of their views, is likely to end as it began. Perhaps the above analysis is simply a lengthy demonstration that the debate over the scope of federal court jurisdiction is also unresolvable. In this sense, this Article explains why the debate over federal jurisdiction and parity has not been settled after thirty years of judicial and scholarly attention.\textsuperscript{268}

This Part explores an alternative principle for defining federal court jurisdiction that does not rely on assumptions of parity and to which potentially both sides of the debate might agree. Specifically, individuals with constitutional claims generally should be able to choose whether to litigate in federal or state court. This principle should guide Congress in enacting jurisdictional statutes and the Supreme Court in fashioning the common law of jurisdictional rules when congressional intent is nonexistent or uncertain. Under the litigant choice principle, the role of the federal courts in constitutional cases is to provide an alternative forum to the state courts, which, as argued below, maximizes the opportunity for the protection of individual liberty, increases litigant autonomy, and enhances federalism.

The litigant choice principle avoids the parity question because jurisdictional rules implementing it allow the party

\begin{footnotes}
\footnotetext[267]{See \textit{supra} text accompanying notes 166–82, 197–220.}
\footnotetext[268]{I recognize that the focus should not be only on whether each side has a chance of persuading the other. It is perhaps more important to consider those who are undecided about the scope of federal jurisdiction. I believe the proposal suggested in this Part offers an alternative that avoids asking them to make an intuitive choice for or against parity.}
\end{footnotes}
with a constitutional claim to choose the forum. The jurisdictional rules are not designed to channel cases to either federal or state courts; the litigant choice principle is not based on any overall evaluation of the comparative qualities of the state and federal court systems. Those who strongly believe in the importance of federalism can subscribe to this approach because it preserves a role for both federal and state courts. The premise of concurrent federal and state court jurisdiction is consistent with the Constitution and current federal jurisdictional statutes. At the same time, those who believe that federal courts are superior to state courts can agree to this principle because it provides litigants with constitutional claims complete access to the federal courts.

Several clarifications of this proposal are useful at the outset. First, although I speak generally of constitutional claims, my primary concern is with cases involving individual rights and liberties. This includes the Bill of Rights, the equal protection clause, the contracts clause, and the prohibitions against ex post facto laws and bills of attainder. Because, for the reasons discussed below, I prefer to be over-inclusive and allow litigant choice in more rather than fewer cases, I speak generally of constitutional claims.

Second, I contend that the litigant choice principle is usually, but not always, a desirable basis for devising jurisdictional rules. There are circumstances where there are strong countervailing reasons for not allowing individuals with constitutional claims to select the forum. For instance, issues pertaining to questions of federal separation of powers should not be litigated in state courts. The federal government's interest in having disputes among its branches resolved in federal court seems greater than the values served by the litigant choice principle. Generally, though, the litigant choice principle is a desirable and useful basis for jurisdictional rules. Even if the litigant choice principle is rejected for some types of claims—for instance, if it is deemed unacceptable to allow the federal government to be sued in state court—it should be followed for as many types of constitutional cases as possible.

This Part is divided into three sections. The first section presents the advantages of allowing litigants a choice of forum in constitutional cases. In the second section, some
of the practical implications of this principle for federal jurisdictional rules are noted. Finally, possible criticisms and problems are addressed.

A. Advantages of Allowing Litigants with Constitutional Claims to Choose Between Federal and State Courts

The litigant choice principle has many advantages. First, permitting a party with a constitutional claim to choose whether to litigate it in federal or state court maximizes the opportunity for protecting constitutional rights. As discussed above, there is enormous variation among the state and federal courts throughout the country. In a nation with fifty state court systems and ninety-one federal districts, it is likely that some state courts will be superior to the federal courts in protecting individual rights, while in other areas, the state courts will be inferior to the federal judiciary. In fact, in most areas, the courts probably vary depending on the particular issue; a state court might be better in upholding some constitutional rights, but worse as to others.

The litigant choice principle allows a party with a constitutional claim to choose between state or federal court and thus to select the forum likely to provide the most sympathetic hearing. The litigant, and his or her attorney, are in the optimal position to assess in that geographic area which court offers the better chance of vindicating the particular constitutional claim.

Some might argue, however, that lacking empirical evidence about actual differences between the courts, attorneys are unable to make reliable choices and might even misperceive the differences between the particular state and federal courts. Although these information problems exist, I believe that the litigant choice principle offers the greatest likelihood of channeling cases to the most sympathetic forum. Attorneys have access to the best possible information concerning differences in the courts in their area. They can research the state and federal courts’ decisions in

269. See supra text accompanying notes 117–22.
270. H. Fink & M. Tushnet, Federal Jurisdiction: Policy and Practice 17 (1984) ("The litigant choice rule would rest on the view that litigants are likely to do a better job in assessing which forum will protect federal interests than either Congress or the courts.").
271. See supra text accompanying notes 147–51.
their locale as to the specific issues involved in their case and, from observation and conversations, they can gain knowledge about litigation resolved without written opinions. Also, lawyers formulate impressions about each court's general disposition towards constitutional claims. Moreover, attorneys have strong incentives to determine as accurately as possible which forum offers them the best chance of prevailing in any case. Although such information is imperfect, it offers the maximum opportunity for protecting constitutional rights. Ultimately, empirical proof is unlikely; however, if the goal is directing a case to the court most sympathetic to the particular constitutional claim, it is preferable to allow the litigant to choose the forum rather than use random assignment or a blanket rule for the entire country.

The argument that the litigant choice principle maximizes the opportunity for the protection of constitutional rights assumes, of course, that it is desirable to maximize the likelihood of vindicating such claims. While some may challenge this premise, most of the participants on both sides of the parity debate already have conceded this goal. Those who maintain that federal courts are superior to state courts explicitly contend that the objective should be to maximize the opportunity for protecting individual liberties.

Many who argue that there is state court parity do not contest this objective; rather, they maintain that state courts are equally likely to rule in favor of the individual and against the government in constitutional litigation. Their claim is not that state courts are superior because they would produce different, and by their view, better results. Instead, they contend that state courts are equally sympathetic to federal rights, thereby admitting the desirability of maximizing the opportunity for safeguarding individual liberties. For these defenders of parity to claim now that state courts are preferable because they offer less likelihood of protecting individual rights would be a shift of position.

Moreover, analytically, it makes sense to design court systems and jurisdictional rules so as to maximize the oppor-

272. See supra text accompanying notes 112–15.
273. See Neuborne, supra note 3, at 729.
274. See, e.g., Solimine & Walker, supra note 4.
tunity for protecting constitutional rights. Logically, the court system must strive toward one of the three following goals: maximization of the opportunity for the protection of rights, minimization of the opportunity for the protection of rights, or neutrality as to the opportunities for protecting rights.

The first, maximizing the opportunity for the protection of rights, is most consistent with this country's commitment to individual liberties and upholding the Constitution. It would be strange to place the presumption against the protection of constitutional rights. In other words, in light of a clear and consistent social commitment to individual liberties—reflected by the liberties' enshrinement in the Constitution, their supremacy over all other government actions, and their place in the nation's consciousness—it would not make sense to design jurisdictional rules that were hostile or indifferent to this goal.

To say that the system should maximize the opportunity for protecting constitutional rights obviously does not imply that the individual raising a constitutional claim always should win. Constitutional cases almost invariably involve some form of balancing of the individual's rights and the society's interests. The point is only that individuals alleging constitutional violations should have a chance to be heard in the forum, state court or federal court, that they perceive to be most sympathetic.

One response to this is that it risks the over-protection of constitutional rights. Yet, as Professors Fink and Tushnet observe, "there is no such thing in constitutional terms, as over-protecting liberty. If there were, statutes going beyond constitutional minimum protections would be questionable, and they generally are not." Furthermore, in light of the empirical uncertainty, a choice must be made as to what risk of error is most acceptable. It is better to risk over-protection of individual liberties by having very sympa-

275. There is ample jurisprudential literature defending the importance of protecting rights. Such arguments, obviously, can be used to justify the desirability of maximizing the opportunity for the protection of rights. See, e.g., R. Dworkin, Taking Rights Seriously (1977).

276. Cf. H. Fink & M. Tushnet, supra note 270, at 17 ("one system may over-protect federal interests").

277. Id. at 17.
thetic courts than to permit under-protection in more hostile judiciaries.

More important, none of the participants in the parity debate can raise the concern about over-protecting rights and remain consistent with his or her current position. Those who argue against state court parity expressly accept the goal of maximizing the opportunity for protecting rights. Many who declare that there is parity between state and federal courts also accept this objective, but claim that there is no essential difference between the court systems in their treatment of constitutional claims. Therefore, shifting cases from one court system to another would not, according to their position, change results or risk over-protecting or under-protecting rights.

Finally, others who argue in favor of state court parity contend that no set of outcomes is preferable to any other—that the system only can seek a fair process for each case. But if all results must be accepted as equally desirable, then there cannot be an argument that there ever is too much or too little protection. In fact, if such advocates of parity contend that there is over-protection under the litigant choice principle, they implicitly concede the possibility that there could be under-protection now. Once advocates of parity admit that results can be evaluated, they abandon their argument that all outcomes must be accepted as equally acceptable.

Therefore, if the premise of maximizing the opportunity for protecting constitutional rights is accepted, then the litigant choice principle naturally follows because individuals are in the best position to know which court offers the greatest opportunity for vindicating the claim. This position is based on a normative argument—that it is desirable to maximize the protection of rights; and an empirical argument—that parties and their attorneys are likely to choose the forum which is most sympathetic to their case.

278. See, e.g., Solimine & Walker, supra note 4.
279. See, e.g., Bator, supra note 17.
280. I recognize that it is possible to raise objections, such as judicial economy; that is, even if the goal is conceded, the costs of the litigant choice principle outweigh its advantages. These possible objections are discussed in the final section of this Part. See infra text accompanying notes 332-46.
A second benefit of allowing individuals with constitutional claims to choose between federal and state court is that it enhances litigants' autonomy. Professor Resnik explains that "[w]hile we have procedural doctrines . . . that impose some constraints on litigants' choices, we have generally remained loyal to litigants' autonomy."281 That is, unless there are reasons for not doing so, litigants should be allowed to make as many choices as possible about the proceedings. Litigant autonomy is not absolute, or the only value to be maximized in designing jurisdictional rules. Rather, autonomy is one goal to be served in situations where there are not overriding interests. For instance, full adherence to allowing litigants a choice of forums might justify permitting the parties to proceed in the state of their choice; however, all of the values underlying the concepts of personal jurisdiction and venue explain why litigants' choices among states are restricted.

Furthering litigant autonomy enhances individual dignity. Professor Resnik continues: "Implicit in litigants' autonomy is concern about respect for individual dignity. To enhance dignity, government should provide individuals with choices about protection and assertion of their rights."282 Litigant autonomy is also desirable as a way of maximizing satisfaction with the system; individuals are more likely to respect a decision when they had a choice as to the forum.283 Simply put, it is desirable to permit individuals to make choices that are likely to be determinative of important aspects of their lives. Allowing individuals with

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281. Resnik, supra note 105, at 846–47.
282. Id. at 847. There is a voluminous literature defending the importance of autonomy and defining it. After reviewing this literature, Professor Marcy Strauss concluded:

[Autonomy . . . denotes the ability to make choices about one's life; it is the right of self-determination. It is a value endorsed both by religious and secular scholars and is a basic precept of Anglo-American law. It has been described as 'one of our highest social values.' Indeed, '[o]ne might reasonably claim that the most humane principle advanced by the post-theistic West is that of personal human autonomy'.


constitutional claims to select whether to litigate in federal or state court increases the choices individuals make, and thereby enhances litigant autonomy. Especially if people believe that where a case is heard makes a difference, the process will seem fairer and autonomy increased if litigants can select the forum.

Individual autonomy is not fostered under the current jurisdictional rules. Often neither side gets to select the forum; the case is consigned by the jurisdictional rules to state court. For example, in *Fair Assessment in Real Estate Association v. McNary*, the Supreme Court held that section 1983 suits for damages to compensate for allegedly unconstitutional tax systems could not be brought in federal court because of considerations of comity.\(^\text{284}\) Neither side had any choice as to the forum. Likewise, when a substantial constitutional issue arises as a defense, even when it will be the only matter in dispute, the federal courts are not allowed to hear the case.\(^\text{285}\) The litigants with constitutional claims have no choice. In such instances, the litigant choice principle would expand choices and autonomy.

Also, constitutional claims usually arise in litigation between the government and individuals because of the state action requirement; the Constitution limits government, not private citizens.\(^\text{286}\) Individual autonomy, therefore, is something possessed by the person alleging a constitutional violation; the government obviously cannot invoke a claim of personal autonomy. As in the typical constitutional case, the government is the opposing party.\(^\text{287}\) Allowing individuals with constitutional claims to choose the forum enhances their autonomy without decreasing anyone else’s autonomy.

It might be argued that litigant autonomy is not implicated at all because almost always, the attorney, not the party, will choose the forum.\(^\text{288}\) However, giving an individ-

\(^{284}\) 454 U.S. 100 (1981).
\(^{285}\) Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (federal issues must be presented on the face of a well-pleaded complaint for federal question jurisdiction to exist).
\(^{286}\) The Civil Rights Cases, 109 U.S. 3, 17 (1883).
\(^{287}\) For a discussion of the rarer situations where there are two private parties with constitutional claims, see infra text accompanying notes 302-05.
\(^{288}\) Moreover, under the rules of professional responsibility, attorneys should consult with clients before making important choices potentially affecting the outcome of the litigation. See Model Rules of Professional Conduct Rule 1.4
ual the authority to make an important choice enhances autonomy even if that person delegates the decision to someone who is more likely to choose wisely because of greater information and expertise. In other words, I have more autonomy if the law allows me to choose, even if I permit someone acting in my best interests to decide for me, than I would have if I had no choice or someone selected against my wishes or without my consent.

A third benefit of allowing individuals with constitutional claims to choose whether to proceed in federal or state court is that federalism is enhanced. A central notion of American federalism is concurrent governance. Professor Richard Leach explains that “shared functions [are] . . . the core of American governmental operation and of the theory of federalism as well.” Although the term federalism connotes states’ rights and has been used primarily by conservatives to impede the federal protection of individual liberties, in a much more neutral sense federalism refers to the existence of two sovereigns with governing authority over the same area.

The litigant choice principle creates concurrent jurisdiction in all constitutional cases. Both the federal and state courts have jurisdiction, and it is up to the party asserting a constitutional claim to choose where to proceed. The principle thus preserves a role for the state courts; it in no way denigrates them. As such, the litigant choice approach avoids the negative consequences which Professor Bator claims arise from casting aspersions on the ability or willingness of state courts to protect federal rights.

In fact, the litigant choice principle could exemplify federalism at its best as a technique for enhancing the protection of constitutional rights. In a recent article, Professor

(1988); Model Code of Professional Responsibility EC 7-7, 7-8 (1988); see also Strauss, supra note 282, at 356–57 (arguing for greater client participation in decision-making about the handling of representation).

289. Redish, Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism, 19 GA. L. REV. 861, 877 (1985). There certainly are other definitions of federalism, but many include as an integral component the notion of concurrent governance.

290. Id. (quoting R. Leach, American Federalism 15 (1970)).


Akhil Amar contends that the underlying objective of federalism is maximizing individual liberties.\textsuperscript{293} Professor Amar argues that federalism optimally serves this function when it creates competition between federal and state governments in the protection of liberty. He writes:

\begin{quote}
[A] healthy competition among limited governments for the hearts of the American people can protect popular sovereignty and spur a race to the high ground of constitutional remedies. Each government can act as a remedial cavalry of sorts, eager to win public honor by riding to the rescue of citizens victimized by another government's misconduct.\textsuperscript{294}
\end{quote}

Professor Amar argues that when the federal and state courts have concurrent jurisdiction they will compete with each other in the protection of individual liberties. Each court system will act to make its forum attractive for litigants asserting constitutional claims. Others express a similar view about the desirability of concurrent jurisdiction as a way for spurring the vindication of constitutional rights. Professor Althouse writes that competition enhances federalism and individual liberties because the "state makes a 'separate sphere' for itself by inducing plaintiffs who generally would prefer a federal forum to choose state court instead in order to claim state-created rights."\textsuperscript{295} Professor Charles Alan Wright also observes that "the existence of concurrent state and federal jurisdiction acts as a spur to higher standards of justice in each system of courts."\textsuperscript{296}

Whether the courts actually would compete to attract litigants is questionable. Each court system undoubtedly has enough business that it might not want to try to acquire more. In fact, one might say, not completely facetiously, that in these days of overburdened judicatories, the incentive may be to express hostility to constitutional claims to convince the litigants to take their cases elsewhere. This, of course, is an over-simplification because it ignores the desire judges have to possess a reputation for high quality deci-

\textsuperscript{293} Amar, supra note 291.

\textsuperscript{294} Id. at 1428. Professor Amar is speaking of competition between legislatures in providing causes of action. I am extending his thesis by focusing on competition between court systems, an extension that he does not expressly discuss, but which seems compatible with his thesis.

\textsuperscript{295} Althouse, supra note 215, at 1525-26.

\textsuperscript{296} C. Wright, supra note 41, at 135.
sions in constitutional cases and the incentive jurisdictions have to keep litigation affecting them in their courts.

At minimum, the litigant choice principle enhances federalism by creating a concurrent role for the federal and state governments. At best, it offers a chance for maximizing individual rights by creating a competition between forums.

These federalism advantages make it possible for both sides of the parity debate to subscribe to the litigant choice principle. Obviously, critics of state courts can support the litigant choice principle because it allows individuals to litigate their constitutional claims in federal court whenever they wish. While access to the federal courts is assured, there also is the ability to go to state courts when they are perceived to be more sympathetic to constitutional claims.

Proponents of parity can also endorse the litigant choice principle. Professor Bator, perhaps the preeminent spokesperson against federal court supremacy, writes that federalism is a “partnership,” not a “federal monopoly.”\textsuperscript{297} The litigant choice principle avoids creating either a federal or a state monopoly over constitutional litigation.

Furthermore, Professor Bator writes that it is

\begin{quote}
 an independent argument in favor of a jurisdictional rule
\end{quote}

if it can be shown to create such an incentive . . . for hospitable reception of claims of federal rights in the state courts; whereas it is an argument against a jurisdictional rule if it removes pressure from the state courts to improve their processes for the litigation of federal constitutional issues.\textsuperscript{298}

As described above, the litigant choice principle creates an incentive for each court system to be hospitable to federal constitutional claims to attract such litigation. Thus, the litigant choice principle offers the possibility of ending the impasse in the debate over federal jurisdiction and, more importantly, of maximizing the opportunity for protecting individual liberties, of increasing litigant autonomy, and of enhancing federalism.

\begin{footnotes}
 \textsuperscript{297} Bator, \textit{supra} note 17, at 634.
 \textsuperscript{298} Id. at 626.
\end{footnotes}
B. *Doctrinal Implications of Allowing Litigants With Constitutional Claims to Choose Between Federal and State Court*

In enacting statutes that define federal court jurisdiction, Congress, as stated, generally should allow litigants with constitutional claims to choose between federal and state courts. Furthermore, where congressional intent is unknowable, because of its nonexistence on a particular topic or because of its ambiguity, the Supreme Court should fashion the common law rules of federal jurisdiction so as to allow litigants with constitutional claims generally to choose their forum.

To a large extent, existing statutes already support such an approach. Statutes create broad federal court jurisdiction over all issues arising under the Constitution of the United States. The state courts also can exercise jurisdiction in these cases because there are no statutes creating exclusive federal court jurisdiction in constitutional cases. Hence, the Supreme Court could immediately begin following the litigant choice principle in defining federal court jurisdiction.

In fact, there is compelling evidence that the litigant choice principle was intended by Congress when it defined federal court jurisdiction. The congressional creation of concurrent state and federal jurisdiction in constitutional cases, which allows the plaintiff to choose state or federal court, and removal jurisdiction, which permits the defendant to take a case from state to federal court, evidences Congress’s desire to leave forum selection to the parties. More specifically, in enacting section 1983, which is the basis for most constitutional litigation against state and local governments, Congress sought to allow litigants with constitutional claims to choose between state and federal court. As the Supreme Court explained, “many legislators interpreted the bill [the Civil Rights Act of 1871] to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief.”

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assessing the doctrinal implications of the litigant choice principle, I consider first civil, then criminal cases.

1. The Litigant Choice Principle and Civil Litigation

In civil cases, the party—plaintiff or defendant—raising a constitutional claim should get to choose whether to litigate the case in state or federal court. After the party raising a constitutional claim has selected the court, the matter should remain in that court system until there is a final judgment and all appeals within that system are exhausted. Recourse to the Supreme Court would be available after a final judgment from the highest state court or the federal court of appeals. The selected court's decision should have preclusive collateral estoppel and res judicata effect in all other courts, as is true today.

Before explaining how this would change jurisdictional rules, it is important to address the question about circumstances in which both the plaintiff and the defendant raise constitutional issues in civil cases. Usually, only one side asserts a constitutional right. Because of the state action requirement, most cases containing constitutional issues involve an individual as one party and the government as the other. The Constitution bestows rights and liberties on individuals, not on the government. When there is a lawsuit between the government and an individual, it is the latter who should get to choose.

It might be argued that the government has an important interest in the selection of the forum because it can raise constitutional issues such as federalism and separation of powers, even though these do not take the form of constitutional rights. Yet, to a large extent, the underlying rationale for structuring government using a separation of powers

301. A modification of this principle can be made by those who believe that a federal court must be available to hear federal claims and that Supreme Court review is insufficient. See Amar, supra note 2; Eisenberg, supra note 22. They could argue that a litigant with a constitutional claim can choose whether to proceed in state or federal trial court and, either way, should be able to appeal to the federal court of appeals.

302. For an excellent description of why it is incorrect to speak of the constitutional rights of the government, see Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial, 60 S. CAL. L. REV. 1019 (1987).

303. See Bator, supra note 17, at 633 (arguing that focusing on constitutional rights gives too little weight to other values).
and federalism is the belief that these techniques will maximize the long-term protection of individual rights.\textsuperscript{304} Because the Constitution is designed to protect the individual from the government, in a suit between the individual and the government, the individual should be allowed to choose the forum.

Constitutional issues arise in litigation between two private parties relatively infrequently.\textsuperscript{305} If only one of these parties asserts a constitutional claim, then that party determines the forum under the litigant choice principle. In the rare circumstance in which the litigation is between two private parties and each asserts a constitutional claim, the litigant choice principle provides no basis for forum selection. The current jurisdictional rules could remain unchanged. If the plaintiff's complaint alleges a federal question, the plaintiff can bring the case to federal court. If the plaintiff files a case in state court that might have been brought in federal court, the defendant may remove it to federal court. Otherwise, absent another basis for federal court jurisdiction, the case must be litigated in state court. Since situations where two private individuals assert constitutional claims will be rare, the litigant choice principle applies in the vast majority of instances.

The litigant choice principle would change current jurisdictional rules in civil cases in two important respects. First, it would allow federal court jurisdiction based on constitutional claims raised as a defense. Currently, constitutional issues and other federal questions may be litigated in federal court only if they are on the face of the plaintiff's well-pleaded complaint.\textsuperscript{306} A case cannot be heard in federal court if the constitutional issue in the case arises only as a defense, even if it is the sole matter in dispute. This court-created rule should be changed; federal courts should be

\textsuperscript{304} Amar, supra note 291, at 1519.

\textsuperscript{305} For example, in libel cases between private parties, first amendment issues often arise. See, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964).

\textsuperscript{306} Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908). I am assuming, of course, that there is not an independent basis of federal court jurisdiction, such as diversity jurisdiction.
available to hear constitutional claims regardless of which party raises them.\textsuperscript{307}

The reason for having federal court jurisdiction in constitutional cases applies whether the plaintiff or the defendant raises the constitutional issue. Federal courts exist to provide an alternative forum for the vindication of rights, thereby maximizing the opportunity for the protection of liberties, increasing litigant autonomy, and enhancing federalism. All of these objectives are served just as effectively by allowing defendants with constitutional claims to choose the forum as they are by permitting plaintiffs with such claims to select the court.\textsuperscript{308}

In a recent article, Professor Doernberg explained how federal court jurisdiction would be determined if the well-pleaded complaint rule were discarded. Professor Doernberg argues that the standard articulated by Justice Cardozo in \textit{Gully v. First National Bank} should guide federal courts: “the party seeking federal jurisdiction [must] demonstrate the existence of a dispute based upon federal law that can, if adjudicated, determine the outcome of the case.”\textsuperscript{309} In the context of the litigant choice principle, the plaintiff can invoke the federal forum if he or she alleges that the outcome of the case is likely to be determined by a federal constitutional question. Alternatively, if the case is filed in state court, the defendant may remove it to federal court by making the same showing.\textsuperscript{310}

A second change in civil cases pertains to removal jurisdiction. Under the litigant choice principle, if the plaintiff presents a constitutional claim, the plaintiff can bring the case in either federal or state court. Therefore, if the plain-

\textsuperscript{307} Doernberg, \textit{supra} note 37, at 661 (federal issues should be adjudicated in “federal courts, irrespective of where in the structure of the case the issue was technically located”).

\textsuperscript{308} Id. at 650–51 (“the presence in a particular case of the reasons of policy underlying federal jurisdiction are independent of which party introduces the federal question”).

\textsuperscript{309} Id. at 656. Professor Doernberg argues that this principle “is considerably easier to apply” than the current test. Id. at 657.

\textsuperscript{310} Professor Doernberg describes in more detail the actual determination of federal court jurisdiction in the absence of the well-pleaded complaint rule. Id. at 658. The rule would be consistent with article III because in \textit{Osborn v. Bank of the United States}, 22 U.S. (9 Wheat.) 738, 822 (1824), the Supreme Court said that for purposes of the Constitution a case arises under federal law if its outcome is likely to be determined by the resolution of a federal question.
tiff files a constitutional claim in federal court, it remains there; this is the current scenario when the plaintiff initiates such a suit in federal court.

What happens if the plaintiff with a constitutional claim chooses state court? Currently, the defendant can remove the case to federal court assuming that it is a matter that could have been brought to the federal forum in the first instance.\textsuperscript{311} Under the litigant choice principle, however, when the plaintiff has a constitutional claim and the defendant does not, the plaintiff can choose to have the matter heard in state court. The defendant should not be able to remove such a case to a federal forum. This is one place where adherence to the litigant choice principle would require modification of the jurisdictional statutes.

Also with respect to removal jurisdiction, a defendant should be able to remove a case to federal court by alleging that the outcome of the case likely will turn on a federal issue. Defendants now may remove cases to federal court only if the plaintiff's complaint supports federal jurisdiction. Under the litigant choice principle, where the plaintiff in a civil case does not raise a constitutional issue, but the defendant does, the defendant should be able to remove the matter to federal court.

Finally, perhaps the most significant change in removal jurisdiction is that defendants alleging constitutional claims should be able to remove cases from federal to state court. Again, if the plaintiff does not raise a constitutional issue, but the defendant does, the defendant chooses the forum. Therefore, if the plaintiff filed the action in federal court, perhaps based on a federal statutory question, the defendant with a constitutional claim should be able to exercise the right to determine the forum and move the case to state court. This illustrates that the litigant choice principle truly makes no assumptions concerning the inherent superiority of either forum, leaving it entirely to the party with a constitutional claim to determine where it should be litigated.\textsuperscript{312}

I emphasize, however, that even if changes are not made in jurisdictional statutes to fully implement the litigant


\textsuperscript{312} One possible problem is that this might lead to litigation against the federal government in state court. See infra text accompanying notes 341–46.
choice principle, there are many areas in which the Court can apply the principle in interpreting existing jurisdictional statutes.

2. The Litigant Choice Principle and Criminal Cases

Criminal prosecutions generally occur in the forum of the prosecutor; actions for violations of state laws occur in state court and federal prosecutions occur in federal court. An individual prosecuted in state court must raise all constitutional objections in the state court and must exhaust all appeals within the state court system. Then if the convicted defendant claims that his or her conviction violated federal law, he or she may present a habeas corpus petition to the federal court. The federal court need not give preclusive effect to the state court's decision on constitutional issues, except for fourth amendment claims if there was an opportunity for a full and fair hearing in state court.

These current jurisdictional rules are not in accord with the principle that litigants with constitutional claims should be able to choose the forum. For example, if an individual who is prosecuted in state court challenges the constitutionality of the statute that is the basis for the prosecution, the issue must be litigated in state court. The reverse, of course, also is true; if someone is prosecuted in federal court under an allegedly unconstitutional statute, he must raise his constitutional claim in federal court. Similarly, if a defendant raises constitutional challenges to the admissibility of evidence or court procedures, the claims must be litigated in the forum of the prosecution. Basically, the defendant is not permitted to select the forum in criminal cases.

Adhering to the litigant choice principle in criminal cases would change jurisdictional rules dramatically. In fact,

313. See Wainwright v. Sykes, 433 U.S. 72 (1977) (matters not raised at trial may not be raised on federal habeas corpus unless there is good "cause" for the failure to raise them and "prejudice").

314. See Rose v. Lundy, 455 U.S. 509 (1982) (federal habeas corpus may only be brought if appeals on all claims presented in the habeas petition have been exhausted).

315. Stone v. Powell, 428 U.S. 465 (1976) (fourth amendment claims may not be relitigated on habeas corpus if the state provided a full and fair hearing on them).

the changes likely would be so radical that the principle cannot be applied in criminal cases in the same manner as in civil cases. To demonstrate the difficulty in applying the litigant choice principle in criminal cases, consider three different ways in which this principle could be implemented in criminal cases.

The simplest way would be to allow criminal defendants raising constitutional issues to remove the case from state to federal court or from federal to state court. If the defendant could show at the outset of the proceedings that the outcome of the case likely would turn on a question of constitutional law, the defendant could select whether to have the prosecution occur in state or federal court. Such litigation would fit within the scope of the federal courts' jurisdiction under article III because long ago the Supreme Court declared that cases arise under federal law if a question of federal law is likely to be determinative of the outcome in the litigation.

Allowing removal of criminal prosecutions would be a radical change. Some prominent scholars have advocated the idea in the past. Charles Warren stated that the "doctrine that no Court could enforce the penal laws of another Government seems to have been established as a judicial [pronouncement], without much reasoning." Professor Warren believed federal courts should be available to hear state criminal cases and "the State Courts, if they are willing, may take concurrent jurisdiction of . . . certain Federal crimes." Moreover, to the extent that judicial economy is an important objective, such an approach could decrease re-litigation and thereby save judicial resources. Instead of

317. I am assuming that the state courts would extend reciprocity and would be willing to accept such cases. If not, Congress could force the state courts to hear the cases. See, e.g., Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (ability of Congress to control state administrative and adjudicatory procedures); Testa v. Katt, 330 U.S. 386 (1947) (duty of state courts to hear federal cases).
320. Id. at 594.
321. For a fuller discussion of the judicial economy objection, see infra text accompanying notes 332–40. There would be other disadvantages to decreasing re-litigation, especially in reducing error correction and other benefits that stem from jurisdictional redundancy. Therefore, it is conceivable that even if the lit-
the current practice of having the constitutional issue litigated in state court and relitigated on federal habeas corpus, the matter could be litigated once in the forum of the defendant's choice.\textsuperscript{322}

Allowing removal of criminal cases when the defendant raises a substantial constitutional issue would gain all of the advantages of the litigant choice principle. The defendant could choose the forum which offered the opportunity for maximizing the protection of rights. Enhancing litigant autonomy by allowing a choice of forum seems especially important in criminal cases, where the coercive power of the state is brought to bear against an individual.\textsuperscript{323} Federalism is served because the courts of either jurisdiction would be available to provide a remedy against the other.\textsuperscript{324}

The likely objection to allowing removal of criminal cases is that states have an interest in having state law prosecutions in state court and the federal government could claim a similar interest as to federal prosecutions. Interestingly, this argument implicitly assumes that there is a difference between federal and state courts and, in fact, that state courts are better for state law issues and federal courts are better for federal law issues. But most of those who believe in parity do not think that one court is better than another.\textsuperscript{325} And those who argue against parity state as their objective the maximization of constitutional rights; for the reasons stated earlier, allowing criminal defendants with

gart chooses to be in state court, relitigation of constitutional claims on federal habeas corpus might be available. \textit{See} Cover, \textit{supra} note 21 (describing benefits of relitigation and jurisdictional redundancy).

\textsuperscript{322} See R. Posner, \textit{supra} note 31, at 191 (efficiency gains by allowing removal of criminal cases from state to federal court).

\textsuperscript{323} Resnik, \textit{supra} note 105, at 847 ("Autonomy provides a basis for legitimation of the coercive power of the state.").

\textsuperscript{324} Now, under certain circumstances, state governments, in effect, can remove cases from federal to state court. If a person brings a constitutional challenge to a state statute in federal court, and soon thereafter the state prosecutes the person in state court under the statute, the federal court must abstain and the state court decides the constitutional issue. Hicks v. Miranda, 422 U.S. 332 (1975).

\textsuperscript{325} Nor can advocates of state court parity claim, consistent with their other arguments, that state courts should hear state court criminal prosecutions because state courts are more familiar and expert in state law. That position would imply that federal courts are more familiar and expert in federal law, undermining any claim of parity.
constitutional claims to choose the forum would accomplish this goal.

Nonetheless, I recognize that allowing removal of criminal cases from one jurisdiction to another would be an enormous change. After two hundred years of generally allowing each jurisdiction to try its own criminal cases, revising the rules to allow for removal seems quite improbable.

An alternative approach to removal in criminal cases would be to allow parties with constitutional claims to interrupt the ongoing litigation and go to the other forum to present the constitutional issues. For example, if a person prosecuted in state court challenged the constitutionality of a statute which was the basis for that prosecution, the individual could litigate the constitutional issue in either federal or state court before standing trial. If the defendant chose to litigate the issue in federal court, the state court proceedings would be stayed pending the resolution of the constitutional claim. In essence, the procedure would be identical to that now followed under Pullman abstention which requires that federal courts abstain and send cases to state court for a clarification of state law; federal proceedings are stayed pending the state court's decision of the state law issue.\textsuperscript{326}

There are many disadvantages to such an approach. Unless there was a limit on the number of times a defendant could go to the other forum to raise constitutional issues, the case would shuttle back and forth between the courts.\textsuperscript{327} In fact, criminal defendants, anxious to delay their possible conviction, could use this technique to greatly protract the litigation and the ultimate resolution of their case.\textsuperscript{328} Given the long delays of many years that are common in instances of Pullman abstention, there likely would be substantial opposition to allowing a defendant to take a potentially determinative constitutional claim to either federal or state court.

A final alternative would be to force the defendant to litigate initially in the jurisdiction of the prosecution, but to

\textsuperscript{326} England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (procedure in instances of Pullman abstention); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

\textsuperscript{327} Althouse, supra note 215, at 1508 (disadvantages of cases shuttling back and forth between federal and state courts).

\textsuperscript{328} The incentive to delay would vary depending on many variables. For example, a defendant released on bond has a great incentive to delay, as would one facing a possible death sentence.
permit complete relitigation of constitutional claims in the forum of the defendant's choice. In other words, if a state court defendant indicates at the outset that he or she wants to litigate constitutional claims in federal court, the defendant would later have the right to do so de novo. A defendant denied a choice of forum would not be bound by the court's decisions on the constitutional issues. Essentially, except for fourth amendment claims, this approach is now followed in criminal cases for state court prisoners. If the defendant raises a constitutional challenge in state court, the defendant, after exhausting all state appeals, may relitigate it in federal court on habeas corpus. The major change under the litigant choice principle is that a federal court defendant preferring to have the constitutional issue tried in state court could relitigate the matter there. This approach allows each jurisdiction to continue to hear its own criminal cases and also avoids disruptions of ongoing proceedings.

The primary disadvantage to relitigation is its costs to judicial economy. But the traditional objection to habeas corpus relitigation as an affront to federalism is mooted under the litigant choice principle because just as a state prisoner could take constitutional issues to federal court, so could a federal prisoner seek habeas in state courts. The litigant choice principle truly implements a notion of comity and reciprocity.

But, permitting state courts to grant habeas corpus relief to federal prisoners might be found objectionable. Tarble's Case long has prevented state courts from granting such a remedy. However, I do not believe that the supremacy clause of the Constitution requires federal courts to hear cases against the federal government. Federal law is supreme over state law; it does not necessarily imply anything about which court interprets and applies the law.

On the other hand, the federal interest in uniform interpretation of federal law and the long tradition against state court habeas corpus for federal prisoners are reasons for not following the litigant choice principle for federal criminal defendants. Again, even though there are some places where there are reasons not to apply this principle—such as, not allowing state courts to grant habeas relief to federal

prisoners—that does not deny that in other areas it is desirable and useful.

This Article is not arguing for the full implementation of the litigant choice principle in criminal cases. There are, however, many areas where the Court could follow this rule in criminal litigation without any congressional revision of jurisdictional statutes and without creating a radical change in procedure. For instance, the Court might modify judicially-created rules to allow federal courts to hear challenges to the constitutionality of state statutes that are the basis for criminal prosecutions. Also, the Court could follow the litigant choice principle by not according preclusive effect in federal civil litigation to state court decisions in criminal cases, reasoning that the litigant did not have an opportunity to choose the forum in which to raise the constitutional issue. Where reasonable, the litigant choice principle should guide jurisdictional rules in both civil and criminal cases with constitutional issues.

C. Potential Problems With the Litigant Choice Principle

Although many of the potential objections to the litigant choice principle focus on the doctrinal implications discussed above, other possible criticisms include the undesirability of increased federal court litigation and of allowing suits against the federal government to be litigated in state court.

1. Judicial Economy

It might be argued that the litigant choice principle will increase federal court litigation. The proposal comes at a time when influential commentators on the federal judicial system—such as Justice Scalia and Judge Posner—urge a reduction in the federal courts' workload.

At the outset, it is important to note that it is unclear what effect the litigant choice principle will have on the federal courts' dockets. If there truly is parity between federal

and state courts, it is unlikely that the litigant choice principle would spur the wholesale removal of constitutional cases from state to federal court. In fact, if state courts truly are equal to the federal courts in cases including constitutional principles, then some federal cases might be removed to state court. Professor Neuborne, one of the foremost critics of the assumption of state court parity, observes that "if we are lucky, the healthy movement toward serious constitutional jurisprudence in the state courts will continue to the point where civil rights—civil liberties lawyers in large numbers will be tempted to resort to them."533

Of course, federal court litigation will increase if federal courts are more able or willing to vindicate constitutional claims than are the state courts. Also, given variations among courts, it is possible that in some areas of the country, federal court litigation will increase and in other places, state court workloads will expand. The cumulative effect on federal courts, however, is not predictable.

The litigant choice principle might not cause a substantial overall increase in the amount of litigation. Its largest effect would be to shift cases from one court system to the other, with society's total expenditure on courts and litigation not substantially growing. Judicial economy is not lessened if the only effect is to change the court hearing the case.534 The litigant choice principle could even cause an overall reduction in the amount of litigation if defendants raising constitutional issues in criminal cases chose the forum and there was little opportunity for relitigation. It is simply uncertain what effect the litigant choice principle will have and how much it might add to the courts' dockets.535

333. Neuborne, supra note 3, at 731.

334. See Neuborne, supra note 1, at 1129 ("[L]imiting access to the federal courts, therefore, does not really solve the problem of overburdened judges. The burden is merely shifted to institutions which are often even less able to cope with the caseload."). There might be an objection that it is particularly undesirable to increase federal court caseloads because of the negative effect on judicial prestige and recruitment if the size of the federal judiciary grows. This is discussed below; see infra text accompanying notes 338–40.

335. One possible cause for increased litigation would be cases that are now settled because of perceived judicial hostility, which might be litigated if a more sympathetic forum were available. Yet, it also is possible that some cases that are tried now might be settled by the other side if the forum were changed to one more likely to rule in favor of the constitutional right.
Moreover, even if there were an increase in the federal judicial workload and even if it were established that this is an undesirable end, that is not necessarily a reason to reject the litigant choice principle. An alternative solution would be to eliminate federal jurisdiction in some types of non-constitutional cases.\textsuperscript{336} Upholding the Constitution and vindicating individual rights is one of the court system’s highest missions. In light of the advantages of allowing litigant choice of forum in constitutional cases, it would be worth removing other types of matters from the federal docket before consigning constitutional issues to state court solely on judicial economy grounds.\textsuperscript{337}

Finally, even if there were a substantial increase in the workload of the federal courts, the benefits of the change likely would exceed its costs. There would be a marked growth in federal dockets only if litigants perceived the federal forum to be superior to the state courts. But if so, that is a strong reason for expanding the federal courts. There are two possible costs to doing so: more expenditures of federal revenue and a possible decrease in the attractiveness and quality of the federal bench.

In terms of expending more revenues, current spending on the federal district courts and courts of appeals is quite modest. Presently, only a billion dollars annually is spent on all lower federal courts in the country.\textsuperscript{338} Given the size of the federal budget, even doubling or tripling this figure would have very little effect on federal spending.

The other cost to increasing the size of the federal courts is that the decreased exclusivity of federal judges would lessen the prestige of the position, reducing the quality of the bench.\textsuperscript{339} This is a major theme of Justice Scalia’s and Judge Posner’s claims: increased size means reduced prestige and quality. Yet, I am skeptical of this claim for several reasons. First, if the size of the court system correlates with quality, then the smaller federal judiciary is, by defini-

\textsuperscript{336} See Amar, supra note 2, at 269 (urging elimination of diversity jurisdiction if necessary to make room for constitutional claims).

\textsuperscript{337} Neuborne, supra note 1, at 1129 (importance of having constitutional litigation in federal courts exceeds benefits for many other categories of cases).

\textsuperscript{338} Annual Report of the Director of the Administrative Office of the United States Courts (1986) ($1,097,319,000 is the total expenditure for lower federal district courts and courts of appeals in fiscal year 1987).

\textsuperscript{339} R. Posner, supra note 31, at 33.
tion, superior to the state courts. In other words, the argument refutes an assertion of parity. Put differently, those who claim that there is parity between the federal and state courts cannot make the argument that the size of the court system substantially determines quality.

Second, the relationship between size and quality is in itself an empirical issue for which there are only intuitive judgments. Even if there is a measure of quality, it is not clear that a federal bench of 1,400 judges, more than twice the current size, would have less prestige than exists now or would have more trouble attracting the "best" individuals. In light of the prestige of federal judgeships, even a marked increase in the size of the federal bench should have little adverse effect on recruitment.

In fact, the size of the federal judiciary relative to the population actually has decreased over time, making it relatively even more exclusive. In 1789, there was one federal judge for every 218,289 people; in 1986, there was one federal judge for every 325,595 people.\(^{340}\)

Finally, and perhaps most importantly, the problem of increased numbers of judges reducing the quality of the bench actually collapses entirely into the issue of cost. If prestige decreases, then it simply would take more money to attract the best people into judgeships. Although it is conceivable that no politically realistic sum would attract the best individual, it is hard to believe that there would be a shortage of impeccably qualified men and women for the federal bench, especially if there were a substantial salary increase. In other words, all of the judicial economy arguments are far too speculative to justify rejection of the litigant choice principle.

2. Litigation Against the Federal Government in State Courts

Allowing individuals to litigate their constitutional claims in either federal or state court means that some people likely will choose to be in state court. Although the pri-

\(^{340}\) In 1790, the population was 3,929,214. There were 19 federal judges (6 Supreme Court and 13 district court judges). 1 Stat. 20 (1789). In 1986, the population was 240,941,000. There were 740 article III federal judges (9 Supreme Court, 168 court of appeals and 563 district court judges). 28 U.S.C. §§ 4, 133 (Supp. 1988).
mary focus of this Article is on constitutional litigation against state and local governments and their officers, it is worth noting that true adherence to the litigant choice principle would permit suits against the federal government to be brought in state court. A person alleging unconstitutional federal actions could decide to proceed in state court.

This would necessitate a change in jurisdictional rules because now the federal government and its officers can remove all suits against them from state to federal court. The state court also is now limited in the remedies it can award against the federal government. State courts, for instance, cannot grant habeas corpus to federal prisoners or issue orders of mandamus to federal officials.

Under the litigant choice principle, however, individuals raising constitutional issues in suits with the federal government could select the state courts. Permitting claims against the federal government to be litigated in state court illustrates that the litigant choice principle truly reflects and embodies comity. This mutuality of authority between federal and state courts is more consistent with notions of federalism than is the preference for state courts over federal ones that characterizes many current jurisdictional rules.

Yet some could argue that state courts might be hostile to the United States government, thus justifying the federal government’s authority to remove such suits to federal court. However, neither side of the parity debate should be comfortable making this argument. Those who have argued that there is parity between state and federal courts are unlikely to claim that state courts will be hostile to the federal government; such an argument is inconsistent with the assumption of parity and implicitly supports a preeminent role for federal courts in deciding federal issues. Those who deny the existence of parity between state and federal courts contend that safeguarding individual rights should be the most important objective of the court system. Therefore, if an individual believes that he or she has the best chance of

344. See Neuborne, supra note 3, at 727.
receiving protection in state court, the individual should be able to litigate the case there, even if there is some risk to the federal government's interests. Of course, United States Supreme Court review ultimately would remain.

Moreover, I contend that it would be desirable to allow state courts to provide remedies against unconstitutional federal actions. Just as the federal courts could provide a check against unconstitutional state government conduct, so could state courts provide protection against the federal government. In a recent article, Professor Amar argued that federalism and the protection of individual liberties are best served by granting state governments the authority to remedy unconstitutional federal government actions. Professor Amar contends that each level of government should be able to "deploy its sovereign powers to police the constitutional limits on the other's powers and remedy the other's constitutional violations." Thus, expanding the ability of state courts to issue remedies against the federal government should not be especially troublesome and might even be beneficial in increasing the protection of individual liberties and enhancing federalism. However, I recognize that allowing state courts to give relief against the federal government might be perceived as unacceptable. As such, it might be politically necessary to limit the litigant choice principle to constitutional claims against state and local governments and their officers.

CONCLUSION

Almost all articles on the topic of federal jurisdiction discuss the issue of parity between federal and state courts. Some vociferously contend that state judiciaries are equal to federal courts in their ability and willingness to protect federal rights. Others respond with comparable certainty that

345. Amar, supra note 291, at 1492–1506.
346. Id. at 1492–93. Professor Amar argues that allowing states to grant habeas corpus to federal prisoners is consistent with the intent of the Framers and the structure of the Constitution. Id. at 1509. Professor Amar's central focus, however, is on allowing state governments to create causes of action against federal officers. For the most part, he does not examine the ability of state courts to give remedies against the federal government.
federal courts are superior to state courts in constitutional litigation.

Yet, both sides face substantial problems in establishing their positions. For instance, if one believes that state courts are truly as good as federal courts, then federal courts seem superfluous. Advocates of parity offer little explanation as to why the federal judiciary even need exist. By contrast, those who proclaim federal court superiority can be challenged to prove their assertion. Such proof is not likely.

Allowing litigants with constitutional claims to choose the forum makes sense in terms of the underlying policies behind federal jurisdiction and, at the same time, has the potential of ending the impasse in the parity debate. If nothing else, it promises to advance a discussion that has been stalemated for far too long.