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ENDING THE PARITY DEBATE

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For more than a quarter of a century, the issue of parity has preoccupied discussions of federal court jurisdiction. In the 1953 case of *Brown v. Allen*, the Supreme Court concluded that federal habeas corpus petitioners may relitigate constitutional issues tried in state court because, in Justice Frankfurter's words, "even the highest state courts" had failed to give adequate protection to federal constitutional rights.[1] Since *Brown*, countless articles have debated whether state courts equal federal courts in their ability and willingness to vindicate constitutional claims.[2]

Now is the time to lay the parity debate to rest. During the 1950s and 1960s, the Supreme Court legitimately feared that state courts would frustrate federal decisions protecting civil rights and civil liberties. The widely assumed superiority of federal courts justified expanded federal jurisdiction. In the 1970s, the Burger Court restricted jurisdiction and answered objec-

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[1] 344 U.S. 443, 511 (1953) (Frankfurter, J., concurring).

[2] *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing for district court jurisdiction in collateral habeas corpus proceedings to redetermine federal questions decided in state courts, notwithstanding that both state appellate courts and the United States Supreme Court already had had opportunity to review); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (suggesting the assumption of parity is a dangerous myth); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981) (analyzing procedural discrepancy as a major stumbling block to litigating constitutional controversies in state courts); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988) (responding to theoretical attacks on the separation of powers critique of judge-made federal abstention doctrines); Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (arguing that state courts are no more hostile to the vindication of federal rights than are their federal counterparts); Solimine & Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127 (1989) (arguing that parity exists).

tions by proclaiming parity between federal and state courts.[3] By the 1990s, however, the parity debate appears old and futile. With conservative Reagan and Bush nominees dominating the federal bench, it is unrealistic to assume that federal courts are more likely than state courts to protect constitutional liberties.

Getting past the parity debate initially requires an understanding of how the issue came to dominate so much of federal courts scholarship. Part I of this Article suggests that the parity controversy emerged from deeply embedded features of post-1937 constitutional law and, most significantly, from an approach to federalism that posited federal legislative, but state judicial, dominance. Moreover, Part I argues that parity is a dangerous anachronism. By defining the role of federal courts mainly in terms of greater federal judicial willingness to protect constitutional rights, the critics of parity offer little need for a federal bench in a time of very conservative federal judges.

Part II contends that the parity debate results not only from historical events, but also from false assumptions about the issues to be decided by the Supreme Court in determining the scope of federal court jurisdiction. Briefly stated, the parity debate has assumed that it is for the *judiciary* to determine the relative competence of federal and state courts. In making this determination, the Court has assumed that federalism deserves great weight in allocations of power between the federal and state judiciaries. On the other hand, if parity had been more properly characterized as a *legislative* question, then the post-1937 deference to Congress in matters of federalism would have justified continuing access to federal courts.

Finally, Part III offers an alternative principle for defining federal court jurisdiction. This alternative suggests that litigants with constitutional claims generally should be able to choose between federal or state court.[4] This proposal is consistent with the text and intent of federal judicial statutes and, moreover, offers a way to end the long stalemated debate over parity.

I. PARITY AS AN ANACHRONISM

A. *How Parity Emerged as a Central Issue in Federal Courts Scholarship*

Since 1937, the Supreme Court has taken a seemingly paradoxical approach to federalism. On the one hand, the Court has refused to use federalism and state power as a limit on congressional powers. At the same time, however, the Court has used federalism as the basis for restricting federal judicial authority and for deferring to state courts.

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[3] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 493 n.35, 494 (1976) (partially overruling Brown v. Allen, 344 U.S. 443 (1953), and holding that fourth amendment claims cannot be relitigated in federal court on habeas corpus if the state court afforded a full and fair opportunity to litigate them).

[4] I have advanced this proposal previously in Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988).

These themes—federal legislative dominance and federal judicial deference—stem from landmark decisions immediately following the constitutional revolution of the mid-1930s.[5] In cases such as *NLRB v. Jones & Laughlin Steel Corp.*[6] and *United States v. Darby*,[7] the Court clearly indicated that state sovereignty would not be used as a basis for invalidating federal laws. But almost simultaneously, in *Erie Railroad Co. v. Tompkins*, the Supreme Court proclaimed the use of federal common law in diversity cases to be an unconstitutional usurpation of state power.[8] While the former cases disavowed the tenth amendment as a limit on congressional powers, *Erie* appeared to rely on the tenth amendment in holding that federal common law was " 'an unconstitutional assumption of powers by the courts of the United States.' "[9]

This model, emphasizing federalism as a limit on the judiciary but not on Congress, continues to this day. For example, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court again emphasized that it would not use state sovereignty as the basis for invalidating a federal law.[10] Relying expressly on the writings of Professor Herbert Wechsler, the Court concluded that the political process adequately safeguards state interests and renders judicial limits on federal legislation unnecessary.[11]

At the same time, however, the Supreme Court has used federalism to limit federal judicial power. In *Younger v. Harris*, for example, the Court

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[5] Professor Ackerman has described this time as a major "constitutional moment" reflecting a significant shift in the controlling principles of constitutional law. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

[6] 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

[7] 312 U.S. 100 (1941) (upholding the regulation of wages and hours of employment under the Fair Labor Standards Act).

[8] 304 U.S. 64, 78-80 (1938) (declaring that the Supreme Court and lower federal courts "have invaded rights which . . . are reserved by the Constitution to the several states").

[9] *Id.* at 79 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (Holmes, J.)). Moreover, the *Erie* Court relied both on contemporary historical research by Professor Charles Warren that revealed the intent of the drafters of the Judiciary Act of 1789 and on the unfairness that resulted from allowing federal common law to be used in diversity cases. 304 U.S. at 72-73.

[10] 469 U.S. 528, 554 (1985) (stating that "nothing" in the Fair Labor Standards Act as applied "is destructive of state sovereignty or violative of any constitutional provision"). *Garcia*, however, was a 5-4 decision, and recent changes in the Court's composition (Justices Scalia, Kennedy, Souter, and Thomas replacing Justices Burger, Powell, Brennan, and Marshall) raise the possibility of a resurrection of "states' rights" as the basis for limiting federal legislative powers.

[11] *See id.* at 550-54 (noting that any restraint on Congress's exercise of commerce clause powers must be tailored to compensate for failings in the national political process); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954) (arguing that the national political process is "intrinsically well-adapted" to restraining new intrusions by the center on the domain of the states).

explicitly invoked "Our Federalism" as the basis for requiring federal courts to abstain from enjoining a pending state court criminal prosecution.[12] Similarly, in a series of decisions, the Court repeatedly has ruled that the eleventh amendment precludes federal court relief against state governments.[13]

This basic model, however, has not adequately described the entire period since 1937. In the 1950s and 1960s, especially, the Supreme Court perceived a need for federal judicial power that was inconsistent with deference to state courts. Most notably, of course, Supreme Court decisions invalidating laws mandating segregation met with substantial resistance from some state courts.[14] Aggressive enforcement by lower federal court judges was essential in desegregating many southern school systems.[15]

Simultaneously, the Supreme Court substantially expanded the application of federal constitutional rights against state and local infringement through the process of incorporation. Most notably, in the area of criminal procedure, the Court applied to the states protections such as the exclusionary rule under the fourth amendment,[16] the privilege against self-incrimination under the fifth amendment,[17] and the sixth amendment rights to counsel[18] and confrontation.[19] Not surprisingly, there was reason to question whether state courts would follow these newly imposed requirements.

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[12] 401 U.S. 37, 44-45 (1971) (" 'Our Federalism' . . . occupies a highly important place in our Nation's history and its future.").

[13] *See, e.g.*, Welch v. State Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987) (holding that the Jones Act does not authorize a state employee to sue the state in federal court); Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984) (holding that the eleventh amendment prohibits a federal court from granting injunctive relief against state officials on the basis of state law). For an excellent discussion of the tension between the Court's approach to the tenth and eleventh amendments, see Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of* Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363 (1985) (describing the eleventh amendment as an embodiment of state sovereignty principles).

[14] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (refusing to suspend the integration plan of the Little Rock school board until state laws had been challenged and tested in the courts).

[15] *See* J. BASS, UNLIKELY HEROES 22 (1981) (describing the role of lower federal court judges in achieving desegregation).

[16] Mapp v. Ohio, 367 U.S. 643 (1961) (holding inadmissible in a state court all evidence obtained in unconstitutional searches and seizures).

[17] Malloy v. Hogan, 378 U.S. 1 (1964) (holding the fifth amendment privilege against self-incrimination applicable to the states through the fourteenth amendment).

[18] Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the sixth amendment right to counsel applicable to the states through the fourteenth amendment, and upholding an indigent criminal defendant's right to court-appointed counsel).

[19] Pointer v. Texas, 380 U.S. 400 (1965) (finding the sixth amendment right of an accused to confront adverse witnesses applicable to the states through the fourteenth amendment).

Therefore, the Court perceived a need for federal court habeas corpus review to ensure compliance.

The Warren Court generally expanded the scope of constitutional rights. By contrast, state courts at this time were not perceived as a major source for the creation or protection of new constitutional liberties. The focus on state courts and state constitutions as an independent source of rights did not emerge until the more conservative Burger Court created the desire for alternative avenues for protecting rights.

All of these perceptions and assumptions appeared to justify a *judicial* judgment that state judges were inferior to federal judges in their ability and willingness to protect constitutional rights. Federal courts were perceived as essential for the protection of civil rights and civil liberties. The composition of the federal bench reinforced this view. From 1932 until 1968, Democrats occupied the White House for twenty-eight years and appointed the vast majority of federal judges. Many thought that these judges were more likely to enforce desegregation, apply constitutional criminal procedure protections, and follow Warren Court decisions than were their state counterparts. The assumption of a lack of parity between federal and state courts is not surprising in this historical context.[20]

In the 1970s, the Burger Court wished to reassert federalism and deference to state power. Indeed, in *National League of Cities v. Usery*, the Burger Court briefly resurrected state sovereignty as a limit on congressional powers.[21] In large part, ideological considerations underscored the Burger Court's desire to reassert state court primacy. The Warren Court had seen federal courts as a tool for expanding and enforcing federal constitutional protections. The more conservative Burger Court sought, in particular, to restrict the rights of criminal defendants. More generally, the Burger Court saw no need for the greater protections inherent in broad federal court review and, moreover, it valued federalism more highly than had its predecessor. In order to reestablish federalism as the basis for state judicial primacy, however, the Burger Court needed to respond to the premise underlying the earlier expansions of federal jurisdiction—that federal courts were more able and willing to protect federal rights. On several occasions, the Burger Court expressly stated its belief that state courts were equal to the federal bench in vindicating constitutional rights.[22]

Not surprisingly, those who disagreed with the Burger Court's substantive

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[20] For a contemporary defense of parity, see Bator, *supra* note 2.

[21] 426 U.S. 833 (1976) (holding that federal labor laws, as applied to state governments, improperly impaired the ability of the states to structure their employment relationships).

[22] *See, e.g.*, Sumner v. Mata, 449 U.S..539, 549 (1981) ("[T]here is no reason to think that [both federal and state judges] are not doing their mortal best to discharge their oath of office."); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights [in state courts].").

orientation challenged its decisions restricting federal court jurisdiction based on the assumption of parity. In 1977, Professor Burt Neuborne wrote his seminal article, *The Myth of Parity*, which spawned much of the academic literature on parity of the past thirteen years.[23] Commentators objected to Supreme Court decisions that restricted habeas corpus, limited jurisdiction in section 1983[24] cases, and expanded abstention in constitutional cases, because the decisions channelled cases to state courts. The timing of Professor Neuborne's article proves crucial to an understanding of his views: it was written after the contractionist ideology of the Burger Court became clear, but several years before President Reagan began nominating large numbers of conservatives to the federal judiciary.

Indeed, liberal commentators, such as Neuborne, suggested that the Supreme Court was disingenuous in its proclamations of parity.[25] The Court appeared to favor state courts because they were more likely to rule in a fashion preferred by conservatives. In other words, there was a sense that the Court was professing parity to justify diverting cases to state courts, which, the Court believed, would rule quite differently from their federal counterparts. Parity thus came to be a part of almost all discussions of federal jurisdiction.

B. *Getting Past Parity*

In the 1990s, parity seems a relic of an earlier time and a previous set of issues. First, there now is great uncertainty about how to compare the quality of federal and state courts. In the 1950s and 1960s, the desirability of courts enforcing desegregation orders and complying with Bill of Rights provisions was largely accepted in academic circles. But the standard for evaluating courts is now unsettled. More protection of individual liberties is hardly accepted as an unquestioned good: there is a deep division among scholars and on the bench as to the appropriate role for the judiciary. Even the desirability of rights as a concept has come under attack.[26] Furthermore, if federal courts are more likely than state courts to protect individual liberties aggressively, there is no agreement that this is desirable. It is impossible to discuss parity without having some agreed upon baseline for comparison. Unfortunately, no baseline appears to exist.

Second, the domination of federal courts by judges appointed by Republi-

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[23] Neuborne, *The Myth of Parity*, *supra* note 2 (criticizing the view that parity exists between federal and state courts and offering an institutional explanation for the preference of a federal forum for constitutional issues).

[24] 42 U.S.C. § 1983 (1990).

[25] Neuborne, *The Myth of Parity*, *supra* note 2, at 1117 ("The Supreme Court . . . presently seems bent on resolving forum allocation decisions by assuming that no factors exist which render federal district courts more effective than state trial or appellate courts for the enforcement of federal constitutional rights.").

[26] *See, e.g.*, Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (critiquing contemporary liberal rights theory).

can presidents undermines any basis for confidence in the federal bench as a source of systematic protection of individual liberties. More than half of the current federal judges were appointed by President Ronald Reagan. From 1968 until at least 1992, for twenty of twenty-four years, Republicans will have occupied the White House and selected federal judges. If the assumption of federal court superiority stemmed, in part, from years of Democratic appointees, then this sustained period of Republican domination diminishes any basis for greater trust in federal courts.

Third, the differences between federal and state courts do not necessarily translate into decisions that are more protective of individual liberties. Most commentators appear to believe that the general quality of the federal bench is greater than the average quality of state judges. But there is no reason to believe that "better" judges will produce decisions that systematically favor individual rights. Jurists such as Justice Antonin Scalia and Ninth Circuit Judge Alex Kozinski are respected for their brilliance, but they hardly instill confidence that federal courts will protect individual rights more often than their state counterparts.

Nor does the greater independence of federal courts necessarily mean that state judges are more likely to compromise constitutional rights.[27] Although all federal judges have life tenure, state court judges generally have some degree of insulation by virtue of features such as long terms, a tradition of non-partisanship and strong support for incumbent judges, and non-contested retention elections.[28] A survey of twenty years of election data from 1964 to 1984 found that in 1,864 judicial elections, only twenty-two judges (1.2%) were defeated.[29] Electoral accountability only undermines state judicial independence if state court judges fear that voters will use their decisions as the basis for casting their votes. But how many cases are of sufficient visibility to influence voters? Realistically, it is unlikely that many cases are decided differently because of fear of voter rejection at the next election. In fact, it appears that few voters are able to distinguish between judges in retention elections.[30]

Fourth and finally, the analytical problems in demonstrating parity or the lack thereof seem insurmountable. As I have argued previously, parity is an empirical question—which court system will perform better at a particular task—for which no empirical answer is likely to exist.[31] Additionally, the

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[27] *See* Redish, *supra* note 2 (arguing that the insulation of federal judges undermines the assumption of parity).

[28] Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 371 (1988) (responding to the criticism posed by Professor Redish with respect to institutional analysis and separation of powers analysis).

[29] Hall & Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 344, 347 (1987).

[30] *Id.* at 347.

[31] *See* Chemerinsky, *supra* note 4.

usefulness of any empirical answer is questionable. At best, data could provide an aggregate comparison of all state courts with all federal courts. State courts differ greatly from one another, however, and federal courts lack homogeneity as well. The parity question demands an overall comparison of the federal courts with the state courts. This comparison appears largely useless given the likelihood that on some issues, in some places, at some times, the federal courts will seem preferable for vindicating rights, while at other times and places the state courts will appear to be better. Absent marked overall differences between the systems, there is no reason to engage in a comparison.

All of the above suggests that the parity debate is futile and dangerous. If the defense of federal court jurisdiction in constitutional rights cases rests on the assumption of federal court superiority, then there is little reason to preserve such jurisdiction if parity is assumed. This is not to suggest that Congress is likely to eliminate section 1331[32] or that the Court will gut it in the foreseeable future. Rather, emphasizing the parity issue poses a risk for those who believe in the availability of federal courts for constitutional cases. The more the question is phrased in terms of parity, the more it seems that federal court jurisdiction should be based exclusively on this judgment.[33] A meaningful approach to federal jurisdiction must transcend the focus on parity.

II. WHERE DID WE GO WRONG? DEVISING A NEW ANALYTICAL FRAMEWORK

The previous section argued that the focus on parity was, in part, the result of history and constitutional doctrine: the Warren Court wanted federal courts to protect civil rights and civil liberties during the 1950s and 1960s and thus departed from the post-1937 deference to state judiciaries. The Burger Court, committed to federalism and desiring to contract constitutional rights in many areas, sought to reassert the post-1937 framework and answered objections by proclaiming parity.

This section will argue that the parity debate as it has developed in the scholarly literature has been based on several analytical errors. Recognizing and correcting these mistakes can provide the foundation for a new approach to defining federal court jurisdiction—an approach that transcends considerations of parity.

First, parity discussions have assumed that the federal judiciary needs to make a judgment about the relative competence of federal and state courts. Indeed, even Supreme Court decisions have appeared to express judicial

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[32] 28 U.S.C. § 1331 (1990) (federal question jurisdiction).

[33] For a discussion of the justifications for federal jurisdiction, see Chemerinsky & Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67 (attempting to construct a minimal model of federal jurisdiction).

views about the parity question. For example, *Brown v. Allen*[34] and *Stone v. Powell*[35] both expressed judgments about state courts in determining the ability of federal habeas corpus petitioners to relitigate issues tried in state court. Professor Neuborne's article appeared directed at refuting the Supreme Court's judgment that state courts are equal to federal courts in their ability and willingness to protect constitutional rights.[36] Most of the academic literature has centered on supporting or refuting Professor Neuborne's view.[37]

An alternative approach, however, would consider jurisdictional questions, and parity in particular, as questions for Congress. Such an approach is consistent with Congress's general ability to determine federal court jurisdiction[38] and with the post-1937 view that Congress is in the best position to allocate power between the federal and state governments.[39] More generally, Professor Martin Redish recently has argued persuasively that courts violate tenets of separation of powers when they refuse to follow statutes defining federal jurisdiction.[40]

A focus on legislative judgments makes the parity debate, as it has developed, entirely unnecessary. As Professor Redish explained, focusing on congressional actions renders "virtually all the debate over the relative competence of federal and state courts as enforcers of federal rights . . . logically irrelevant, except to the extent that it is directed exclusively to a call for legislative revision."[41]

Almost all of the issues concerning parity have arisen in suits under 42 U.S.C. § 1983 or federal habeas corpus statutes. These statutes, however,

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[34] 344 U.S. 443 (1953).

[35] 428 U.S. 465 (1976).

[36] Neuborne, *The Myth of Parity*, *supra* note 2.

[37] *See, e.g.*, sources cited *supra* note 2.

[38] *See, e.g.*, Lauf v. E.G. Shiner & Co., 303 U.S. 323 (1938) (relying on congressional determination of federal court jurisdiction to overturn district court injunction); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (pointing to a congressional act to deny circuit court jurisdiction). There is a rich literature on the subject of congressional control of federal court jurisdiction. *See, e.g.*, Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (exploring congressional power under article III of the Constitution to regulate the jurisdiction of the lower federal courts); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (arguing against attempted congressional restrictions of federal judicial jurisdiction).

[39] *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (arguing for judicial deference to Congress in matters of federalism); Wechsler, *supra* note 11.

[40] Redish, *Abstention, Separation of Powers and the Limits of Judicial Federalism*, 94 YALE L.J. 71 (1984) (arguing that judge-made abstention doctrine violates separation of powers in the absence of express congressional delegation of authority).

[41] *Id.* at 77.

demonstrate clear legislative distrust of the state courts. All were adopted after the Civil War at a time of great fear that state judiciaries would obstruct the protection of federal rights. As the Supreme Court has recognized, the very purpose of section 1983 "was to interpose the federal courts between the states and the people, as guardians of the people's rights."[42]

Had the Warren Court and its supporters grounded the expansion of federal court jurisdiction on the congressional judgment about parity, the debate might have developed much differently. As explained earlier, while post-1937 constitutional law has emphasized deference to state courts, it also has deemed Congress the proper governor of relations between federal and state governments. Therefore, the Burger Court could not have restricted federal court jurisdiction based on its own judgments concerning parity; restrictions on jurisdiction would have needed to be predicated on interpretations of congressional intent.[43]

Second, the parity debate often has mistakenly equated the *comparability* of federal and state courts with their *fungibility*. Some defenders of parity seek to establish that federal and state courts are essentially identical in their probable results.[44] As I have argued at length elsewhere, however, no meaningful empirical studies are likely possible. Even comparing decisions of the courts does not account for all of the cases that settle because of perceived differences between the judiciaries.[45] Thus, a strong claim that federal courts and state courts are fungible seems impossible to establish.

A milder version of the parity claim holds that state courts are equally deserving of respect as federal courts. In other words, state courts are *com-*

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[42] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[43] In an earlier article, I questioned whether assuming legislative supremacy could have avoided the parity debate. Chemerinsky, *supra* note 4. I now think that I gave insufficient weight to this approach. First, I argued that emphasizing the legislature's choice would simply shift the focus of the debate from the courts to the legisiature. *Id.* at 292. Although this is true, there also would be a major shift in the nature of the debate if the focus were on Congress's objective rather than the Supreme Court's judgment. Second, I maintained that there are many ambiguities in legislation that necessitate judicial judgments. *Id.* Again, while this is true, the judicial judgments need not focus on parity. Rather, the Supreme Court could interpret federal statutes, such as § 1983 and the habeas corpus law, with the background assumption of a preference for federal over state courts. *See* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 408 (1989) (discussing the importance of background assumptions in statutory construction). Third, I suggested that positing legislative supremacy could allow Congress unlimited authority to restrict federal court jurisdiction. Chemerinsky, *supra* note 4, at 295. But this does not necessarily follow; other constitutional provisions—such as due process and equal protection—could limit the scope of congressional restrictions on jurisdiction.

[44] *See, e.g.*, Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, *supra* note 2.

[45] Chemerinsky, *supra* note 4, at 261-69 (examining methodological problems in comparing state and federal courts).

parable to federal courts, though not fungible.[46] This argument, however, seems accurate but incomplete. Federal and state courts are comparable in that both offer a judicial process, sufficient to meet constitutional requirements of due process, to resolve legal disputes. While they may appear comparable, they also differ in important respects. For example, federal judges have the life tenure and salary protections offered by article III; state judges in almost all states face at least some level of electoral accountability. Furthermore, federal judges are generally thought to be of higher quality—however that is defined—than their state counterparts.

These descriptive differences do not necessarily support any normative conclusions about how judicial business should be allocated. Attackers of parity all too often automatically infer conclusions about superiority from descriptive statements of variances between federal and state courts. On the other hand, defenders of parity too easily assume that comparability means that there are not important differences between the judicial systems. Ultimately, the most accurate and least assailable premise for future analysis is that federal and state courts are comparable, though different in many respects.

Third, the parity discussion has wrongly ignored the contingency of judgments concerning the relative quality of court systems. Even if a definition of quality is stipulated—such as likelihood of vindicating constitutional rights claims—the merits of the judiciaries are likely to vary over time, by place, and by issue. At some points in history, some federal courts might be better than some state courts on some issues; but at other times, some state courts might be more likely to vindicate federal rights than some federal courts. Defenders of parity try to prove too much when they seek to show that state courts are always as "good" as federal courts. Likewise, attackers of parity err when they seek to demonstrate the overall superiority of the federal judiciary.

Fourth, as alluded to before, the parity discussion has centered too much on an unanswerable empirical question: which court system is better? Given the enormous measurement problems, the optimal and only response is an intuitive answer to what appears to be a quantitative question.

Finally, the discussion of parity has not sufficiently focused on the underlying normative question: what is the existence of federal courts supposed to accomplish in constitutional cases? There are many possible answers. For example, some would suggest that the systemic goal should be to maximize the protection of individual rights. Others might argue that the objective is to provide an alternative forum for litigation of national significance. Those who defend parity appear to believe that federal courts simply provide a judicial alternative and that restrictions on jurisdiction are unimportant because state courts are an equally desirable forum. But those who attack parity see the systemic goal as maximizing constitutional rights, and believe

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[46] The late Professor Paul Bator used this concept to defend parity. *See, e.g.*, Bator, *supra* note 2; Bator, *supra* note 38.

that federal courts are generally more likely to do so. In short, too much of the parity discussion has proceeded without sufficient attention to the underlying goals to be achieved.

III. STARTING OVER

Courts and commentators should abandon discussions about parity. Instead, federal statutes should be read as embodying a desire to allow litigants with constitutional claims to choose between federal and state courts. Where possible, the Supreme Court should create jurisdictional rules that facilitate this choice.

Note, at the outset, that this approach would eliminate the need to focus on parity. The federal courts need not judge the comparative competence of the judiciaries. Indeed, a virtue of this approach is that it rests on the simple premise that *Congress* intended federal courts to provide an alternative forum to state courts for the protection of constitutional rights. Judicial formulations of jurisdictional rules—and scholarly commentary about them—need not indulge in abstract discussions about the nature of court systems.

More specifically, this approach to federal court jurisdiction avoids many of the errors engendered by the emphasis on parity. First, as described above, this approach focuses on the congressional judgment to have federal courts serve as an alternative forum in constitutional cases. This is consistent with allowing Congress to determine the proper relationship between the federal and state governments, a dominant premise of modern federalism analysis.

Statutory language, however, does not directly answer all the questions which parity was asked to resolve. Federal habeas corpus statutes do not indicate whether habeas petitioners should be able to litigate in federal court matters previously decided in state court.[47] Nor does section 1331 or section 1983 indicate whether Congress meant to allow abstention in cases presenting federal constitutional claims.[48] But these statutes embody a basic background norm that can be used in their interpretation: Congress desired to make federal courts available to litigants raising constitutional claims.[49] By enacting section 1983 and the federal habeas corpus statutes, Congress indicated distrust of state courts. Yet, despite this distrust, Congress did not create exclusive federal court jurisdiction for section 1983 claims. In the Civil Rights Act of 1871, Congress created a federal cause of action for violations of federal rights by those acting under color of state law and author-

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[47] For a disagreement over Congress's intent on this issue, compare Peller, *In Defense of Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982) (criticizing the Supreme Court's rejection of *Brown v. Allen*'s model of habeas review) with Bator, *supra* note 2.

[48] For a persuasive argument that such abstention violates the separation of powers principle, see Redish, *supra* note 40.

[49] For a lengthy discussion of the importance and use of background norms in statutory interpretation, see Sunstein, *supra* note 43, at 464-66.

ized federal jurisdiction. Thus, employing the litigant choice principle as a background norm for jurisdictional decisions is quite consistent with the non-exclusive statutory structure and with congressional intent.

More generally, section 1331, which authorizes general federal question jurisdiction, should be read as making available federal courts to decide federal law issues. Adopted in 1875, at a time of great distrust in many state courts, section 1331 copied the expansive language in article III of the Constitution authorizing federal courts to decide cases arising under the Constitution, laws, and treaties of the United States. Yet, section 1331 does not create exclusive federal court jurisdiction for federal question cases. Again, the intent appears to have been to allow litigants to choose.

Second, the litigant choice principle avoids the illusion of federal and state court fungibility. The litigant choice principle acknowledges the reality that, at various places, at various times, and for various issues, either federal or state courts might be more likely to vindicate federal claims. Litigants and their attorneys can best determine, within their respective geographic areas, which court, state or federal, offers the best chance of upholding their particular constitutional claim. There are differences between federal and state courts, and the litigant choice principle allows litigants to decide how, if at all, those differences matter. Thus, the litigant choice principle avoids two erroneous assumptions: (i) that federal and state courts are identical; and (ii) that descriptions of differences necessarily establish normative superiority.

Likewise, the litigant choice principle recognizes—indeed embraces—the contingency of comparisons between federal and state courts. Precisely because variations depend on time, place, and issue, it is better to avoid sweeping judgments by allowing litigants themselves to decide which court offers the best forum for vindicating their constitutional rights. In this way, the litigant choice principle renders unnecessary sweeping empirical judgments about which court is better. With no need to make general judgments about quality, the empirical inquiry is avoided.

Finally, the litigant choice principle focuses attention on the basic question of why federal court jurisdiction is worth having. For those who believe in parity, federal courts exist primarily to provide an alternative forum. If federal and state courts are comparable in protecting rights, why not allow the litigants to make the choice? Absent serious costs to this approach, there is every reason to leave the choice to the parties. At the same time, for those who deny the existence of parity, the litigant choice principle permits parties raising constitutional claims to choose federal court. If federal courts are superior to state courts, the effect is the same as if jurisdictional rules channelled cases to federal court.

The goal here is not to work out the details of the litigant choice principle, but rather to suggest it as a background norm that can replace assumptions about parity.[50] In general, the Supreme Court should read section 1331,

[50] For an elaboration of the manner in which the litigant choice principle would operate, see Chemerinsky, *supra* note 4, at 301-26.

especially in section 1983 cases and in federal habeas corpus statutes such as section 2254, as authorizing federal courts to resolve federal law questions. When in doubt, the assumption should be that the statutes meant to allow federal jurisdiction.

More specifically, if both the plaintiff and the defendant in a civil case want to litigate the matter in state court, the federal jurisdictional question will not arise. If both the plaintiff and the defendant want to litigate the case in federal court, they will be able to, assuming that a reading of jurisdictional statutes permits it. Conflict only arises when one party prefers federal court and the other prefers state court. Here, the rule should be that the party seeking protection of a federal constitutional right may choose the forum. If both are raising constitutional rights, then the litigant choice principle provides no basis for favoring one preference over the other. An alternative principle, such as the desire to preserve the plaintiff's choice of forum or the desire to allow removal by defendants in federal question cases, should then control.

Although this discussion focuses on federal constitutional claims, the analysis can be easily expanded to the statutory realm. For example, section 1331 can be viewed as authorizing litigant choice in all federal question cases.

In criminal cases, the desire to leave prosecutions in the government's choice of forum makes application of the litigant choice principle more difficult. For example, it is not realistic at this time to suggest that state court criminal prosecutions should be removable to federal court when federal constitutional issues are presented. Following the principle that the party raising a constitutional right should be able to choose the forum, however, criminal defendants should be able to preserve their ability to have federal courts hear their claims. Allowing relitigation of constitutional claims on habeas corpus could most easily accomplish this, even where the issue has been previously subjected to a full and fair hearing in state court.

CONCLUSION

In every area of law, conceptual frameworks develop for analyzing problems. The conceptual framework reflects shared perceptions and emerges from the needs of particular problems. Once in place, a conceptual framework strongly influences both the nature of the dialogue and the form of analysis. The parity debate is a paradigm of the way in which a particular framework becomes entrenched and shapes analysis. The focus on parity made sense in the 1950s and 1960s when state courts were hostile to civil rights and civil liberties. In the 1970s, parity provided the vocabulary for justifying restrictions on federal court jurisdiction and also the basis for criticisms of these decisions. But in the 1990s, the debate seems stale and misguided.

Interestingly, the underlying questions about the appropriate scope of federal court jurisdiction remain alive and important. Ultimately, the answers

must be found in judgments about the appropriate role of the federal courts and the desirability of the substantive law which might result from federal, rather than state, benches. In other words, the greatest cost of the parity debate is that it has obscured too much and has failed to provide a way of thinking about or dealing with the hard questions concerning the federal court system.