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COMMENT

WHY PARITY MATTERS

SUSAN N. HERMAN*

The debate about parity between state and federal courts is not over, even if some of its most vocal participants seem to have reached a consensus that parity should not be debated any further. Michael Wells and Erwin Chemerinsky come to bury the subject: Wells because he says that we already know the answer,¹ and Chemerinsky because he says that the answer cannot be known.² Having no interest in the subject of parity, they confine their attention to historical examinations of the motivations of those who have discussed whether federal courts excel in adjudicating federal constitutional claims. My perspective is different. I believe that we do not know as many answers as we need to know, and that the issue of parity is unimportant only to those who share the values reflected in Wells's and Chemerinsky's positions. Because that category does not now include a majority of the Supreme Court Justices and members of Congress, who make decisions about the scope of federal jurisdiction, academics cannot afford to ignore the potentially decisive question of how federal and state courts differ.

I. WHAT IS PARITY?

My partial disagreement with Wells is tempered by the fact that we may be asking different questions. I think that we cannot know the answer to the parity question because the debate is not susceptible to a "yes" or "no" answer, unless one is asking a very narrow version of that question. Parties to the parity debate have framed the issue in a variety of ways: whether federal and state court judges are "equally talented and equally sympathetic" to federal constitutional claims;³ whether state court judges show

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¹ Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of the Federal Courts*, 71 B.U.L. REV. 609 (1991).

² Chemerinsky, *Ending the Parity Debate*, 71 B.U.L. REV. 593 (1991).

³ Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 284 (1988); see also Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 233-34 (1988) (framing the parity debate in terms of whether federal courts are "more willing and able" than state courts to protect federal constitutional rights).

"widespread disregard" for federal constitutional claims;⁴ or whether the federal and state courts can be considered "functionally interchangeable."⁵ Wells and Chemerinsky agree that "parity" encompasses a "strong sense," asserting the fungibility of state and federal courts, and a "weak sense," asserting only that state courts provide a meaningful opportunity to air federal constitutional claims.

Wells claims, and I agree, that we can assume that state and federal courts are not in complete parity in the strong sense—they are not universally fungible. This assumption, however, is not helpful to anyone who demands parity only in the weaker sense. Because a range of views exists on the issue of how much federal and state courts must differ before the factor of parity should affect jurisdictional decisions, I would frame the parity debate more broadly—not as leading to a "yes" or "no" answer, but as a more complex study and comparison of federal and state courts' treatment of federal constitutional claims. Results of such studies are likely to vary among geographic areas and particular constitutional claims. There are more potential sources of difference between state and federal constitutional adjudication, in fact, than are suggested by the somewhat myopic focus of earlier parity discussions on judges' characteristics.⁶ I am willing to assume, along with Wells and Burt Neuborne, that article III, with its provision of life tenure and political insulation for federal judges, has effectively established federal court as the superior forum for adjudication of federal constitutional claims in at least some cases.⁷ But that assumption does not necessarily lead to the conclusion that full federal review of such claims is always necessary. Unlike Wells and Chemerinsky, some would ask a second question: is the federal forum so superior as to warrant expansive grants of federal review in all areas where the parity issue might arise?

The empirical inquiry into parity serves the normative question about when federal court review should be made available. If one's premise is that federal courts always should have jurisdiction over federal constitutional claims, regardless of state courts' competency, then parity or disparity is irrelevant. If one believes that federal court review is unnecessary as long as

⁴ Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 252 (1983).

⁵ Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06 (1977).

⁶ See *infra* note 44 (discussing previous studies of state and federal court differences).

⁷ Professor Neuborne ascribed these institutional differences between state and federal courts to such factors as life tenure, higher salaries, elite tradition, and better trained law clerks. Neuborne, *supra* note 5, at 1121-28; see also Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 331-38 (1988) (arguing that the institutional superiority of federal courts in adjudication of constitutional questions is a necessary byproduct of article III protections of judicial independence).

Article III does reflect the intention of creating a judiciary superior to the state judiciary in the adjudication of federal interests. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

state courts are reasonably receptive to federal constitutional claims, then parity, in the sense of equivalence, may still not matter, but disparity will. According to this latter view, the calculus concerning the need for federal jurisdiction will vary with the responsiveness of state courts to federal constitutional claims.

Parallel issues about the allocation of federal court review arise in a number of different contexts: whether to provide exclusive or concurrent federal jurisdiction,⁸ whether to limit the availability of federal injunctive relief, and whether to provide for federal relitigation of facts previously adjudicated in state court. The same small number of factors will be considered in making any of these decisions. The first and most important factor should always be the goal of vindicating federal constitutional claims. Recent Supreme Court decisions also emphasize the importance of the values of federalism.⁹ A third factor on most lists is a concern about federal court house-keeping matters, such as additional caseload and expense incurred in any extension of federal review. Finally, the Supreme Court has suggested that the "need" for federal review must be considered.¹⁰ The final consideration is a logical one for anyone who thinks that the costs of federal jurisdiction may be weighty; if state courts can vindicate federal constitutional rights, then constitutional goals can be served without incurring the heavy costs of federal intervention into state affairs or of burdening the federal courts. Therefore, the Court has posited that if there is no reason to assume that state courts are incapable of enforcing the Constitution, federal review may be withheld in some circumstances.¹¹

⁸ For convenience, the term "jurisdiction" is used to refer to a variety of issues concerning the scope of federal court review.

⁹ These values include the autonomy of both state officials and state courts in making decisions governing their own conduct, and the federal constitutional interest in maintaining proper spheres for federal and state power. See, e.g., Aldisert, *State Courts and Federalism in the 1980s: Comment*, 22 WM. & MARY L. REV. 821 (1981); Althouse, *How To Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

¹⁰ *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976).

¹¹ See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (Black, J.) (discussing "proper respect for state functions" and expressing concern for "Our Federalism"); see also *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (reaffirming state courts' obligation to uphold federal law and expressing confidence in their ability to do so); *Moore v. Sims*, 442 U.S. 415, 429-30 (1979) (observing that the Court had repeatedly rejected the view that state courts could not competently adjudicate federal constitutional claims); *Stone*, 428 U.S. at 493-94 n.35 (refusing to assume that state courts lacked sensitivity to constitutional rights); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-11 (1975) (refusing to base a rule on the assumption that state court judges would not be faithful to the Constitution).

In an early brush with the issue of parity, the Supreme Court was willing to "very cheerfully admit" that state judges "are, and always will be, of as much learning, integrity, and wisdom" as federal judges. *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 346. This more positive assertion of parity, however, did not lead to greater reliance on the

II. THE SYLLOGISM OF PARITY

The parity debate began when Burt Neuborne perceived the Court's observations about the availability of state courts to be the minor premise of the unstated syllogism: if state and federal courts are "functionally interchangeable forums likely to provide equivalent protection for federal constitutional rights,"¹² then federal jurisdiction is superfluous; state and federal courts are indeed interchangeable; therefore, the Supreme Court may trim federal jurisdiction without compromising federal constitutional rights. Neuborne challenged the Court's minor premise, arguing that the Court's presumption that state courts are as competent as federal courts is not true.

This response overstates the Court's minor premise. Neither in Justice Powell's often-quoted remarks in *Stone v. Powell* nor in other decisions has the Court contended that state and federal courts are fungible, or that federal constitutional litigants would fare as well in state court.¹³ The Court has endorsed only the "weak" version of the parity claim, and only as a matter of presumption, not as an empirical observation.¹⁴ The Court does not ask whether state courts are equivalent to federal courts, but only whether they are good enough. Neuborne is not very interested in debating whether state courts are in parity in the weak sense because, in his view, federal review is necessary if there is any disparity at all.¹⁵ This is a chal-

state courts. It was in this very case that the Supreme Court upheld the constitutionality of the Judiciary Act of 1789, providing the Court with appellate jurisdiction over state court decisions, on the ground that the Constitution presumes that parties in the cases listed in article III must have access to a federal forum. *Id.* at 347.

¹² Neuborne, *supra* note 5, at 1105.

¹³ The Court has consistently used qualified and negative language. *Stone*, 428 U.S. at 493-94 n.35 (Powell, J.) ("[W]e are *unwilling* to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.") (emphasis added); see also *Allen*, 449 U.S. at 105 (reaffirming the statement in *Stone*); *Huffman*, 420 U.S. at 611 (declining to "base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities"); *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (asserting that state courts have the responsibility for vindicating federal constitutional rights and should not be presumed to be unable to do so).

¹⁴ In *Stone*, Justice Powell did not clearly indicate whether he would understand parity in its strong or weak sense. He did not contend that federal and state court judges are equally receptive to constitutional claims—just that there is no reason to assume that state judges will be unreceptive. *Stone*, 428 U.S. at 493-94 n.35; see Wells, *supra* note 3, at 321-22 (describing the Court's analysis of parity as "ambiguous and fragmentary").

Neuborne's response, using the words "functionally interchangeable," is also ambiguous as to whether courts are to be judged by function or result. Neuborne, *supra* note 5, at 1105.

¹⁵ In Neuborne's view, the Court's protestations about the efficacy of the state courts mask, albeit very thinly, hostility to the substantive constitutional claims raised in habeas corpus or § 1983 proceedings, and serve as a pretext for directing constitutional claims to a forum that the Court believes is less sympathetic to constitutional claimants.

lenge to the Court's major premise. The Court seems willing to tolerate some disparity with concomitant cost to the vindication of federal constitutional rights, because this cost offsets what the Court perceives as the enormous countervailing cost of not adequately respecting the values of federalism.¹⁶ Neuborne, who finds disparity less tolerable and federalism less compelling, would not willingly sacrifice any of the constitutional interests at stake. But the question of how much disparity is tolerable is not answered by the Court's willingness to presume that state courts do an adequate job of vindicating federal rights any more than it is answered by Neuborne's presumption that state courts are inferior. When presumptions war, facts become necessary.

III. PARITY AS AN EMPIRICAL QUESTION

The significance of attempts after Neuborne's article to measure the relative effectiveness of state and federal courts can best be seen by projecting what might happen if a serious disparity were found. If one could show the Supreme Court, for example, that its presumption in *Stone v. Powell* was wrong, and that state courts are significantly more hostile to fourth amendment claims than federal courts, the Court could reassess its decision to remit most fourth amendment claims to state court. The Court could then overrule *Stone*, or perhaps more narrowly find that litigants in a particular state had not had a full and fair opportunity to litigate their fourth amendment claims.¹⁷ Similarly, the Court's prohibition on injunctions against pending state criminal prosecutions in *Younger v. Harris* rests in part on the

Neuborne, *supra* note 5, at 1105-06. Wells makes a similar point from a different perspective by characterizing the parity debate as a battle between the litigants for an advantageous forum with plaintiffs assuming, as does Neuborne, that federal courts will afford them the advantage. See Wells, *supra* note 3, at 285 (arguing that the allocation issue often hinges on the "political" value preference of a perceived advantageous forum).

¹⁶ What Neuborne describes as the Court's hostility to federal constitutional rights is equally explicable as an overvaluing of the values of federalism.

¹⁷ *Stone v. Powell* already offers this exception, which litigants may prove on a case-by-case basis. *Stone*, 428 U.S. at 494-95 n.37. This exception demonstrates that the Court does believe disparity to be relevant to decisions about providing federal court review. Interestingly, the Court allows district judges, in individual cases, to decide whether a state court is an inadequate forum. This approach reflects the Supreme Court's unwillingness to generalize about the lack of competence of state courts; the Court presumes the competence of state courts, but permits the presumption to be rebutted in particular cases.

Because of its views on federalism, the Court is not likely to eliminate this presumption, no matter how great a showing of disparity might be made. If empirical evidence demonstrated, however, that the courts of a particular state routinely failed to provide a meaningful opportunity for litigation of a particular type of claim, whether for procedural reasons or through simple hostility, the Supreme Court could plausibly implement an intermediate approach. For example, the Court could allow federal review of such claims from that particular jurisdiction, without requiring each allegedly

assumption that the state courts will adequately adjudicate federal constitutional claims, including those based on the first amendment, as part of their criminal processes.¹⁸ If studies were to show that state courts, or specific state courts, regularly reject meritorious first amendment claims,¹⁹ the Court could reevaluate the *Younger* ruling, perhaps providing an exception for litigants who could establish that their state courts do not typically provide a full and fair opportunity to litigate such claims.²⁰

That such a Supreme Court response seems implausible shows that Neuborne correctly accused the Court of stacking the deck by undervaluing the constitutional rights at stake.²¹ Wells's hypothesis that attraction to the parity debate reflects a legal process-inspired longing for neutral values²² may be true, but it does not accurately describe the way in which the Court has been using its presumption of parity. The Court's approach is in no way neutral, for the Court seems likely to demand a very high showing of disparity before responding with any expansion of federal court review. Neuborne's approach, claiming that any cost to constitutional rights is too high, is not neutral either. The diverging approaches are based, quite simply, on different views of the significance of the constitutional and federalism values presented.

Chemerinsky, who has much in common with Neuborne in his assessment of these relative values, attempts to break this deadlock by adding an additional factor to the list. Chemerinsky's litigant choice model, with its digni-

aggrieved party to make a showing of having been denied a full and fair opportunity to litigate a particular constitutional claim.

¹⁸ *Younger*, 401 U.S. at 44 (restraining federal equity jurisdiction with respect to pending state criminal proceedings).

¹⁹ Compare Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 339-40 (1973) (finding successful less than 4% of habeas corpus petitions challenging state court convictions on any ground in Massachusetts from 1970 to 1972) with Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1324 & n.99 (asserting that first amendment claims succeed more often than other claims raised in habeas corpus petitions and noting that, from 1963 to 1978, 44% of all federal first amendment habeas corpus petitions succeeded).

²⁰ This approach resembles the exception in *Stone*. See *supra* text accompanying note 17. *Younger* already contains an exception to the limited availability of federal injunctive relief in state criminal prosecutions where "extraordinary circumstances" allow the showing of "the necessary irreparable injury . . . in the absence of the usual prerequisites of bad faith and harassment." *Younger*, 401 U.S. at 53. The novelty would be allowing empirical evidence of state court hostility to constitutional claims to be considered an "extraordinary circumstance."

²¹ Neuborne, *supra* note 5, at 1106 (stating that forum-allocation decisions, like the one in *Stone*, are not outcome-neutral but rather are indirect decisions on the merits, decisions that "weaken disfavored federal constitutional rights by remitting their enforcement to less receptive state forums").

²² See Wells, *supra* note 1, at 618.

tary values,²³ provides a rationale for offering federal court review regardless of the competence of state courts. In Chemerinsky's view, this rationale would justify an expansive provision of federal jurisdiction because of the value of empowering litigants to choose their own forum, even if state and federal courts are fungible.²⁴ Therefore, Chemerinsky concludes that he has mooted the parity debate because the relative competence of state and federal court would no longer matter. However, he only reaches his prescription of a generous dosage of federal jurisdiction because he has not viewed the values opposing federal jurisdiction—the federalism and federal house-keeping values—as providing much of a counterweight. One who agrees with the Supreme Court's prevailing view of the significance of those opposing values could add Chemerinsky's factor to the list and still conclude that the costs of federal jurisdiction outweigh its benefits. Adding this factor may render the parity debate moot for Chemerinsky, given his own value choices, but it would not tip the balance for everyone—certainly not for the current Supreme Court.

The disinterest, and even the hostility, that Chemerinsky and Wells show to the parity debate may well be attributable to the context in which the issue first arose—as the Court's excuse for cutting back on the scope of federal court review. If the issue were disparity—if the Court or Congress were demonstrably open to the idea that federal jurisdiction should be expanded (or at least not further contracted) whenever the state courts were shown not to be receptive to particular constitutional claims—would discussions of parity still seem dangerous, anachronistic, or irrelevant?

Disparity might prove to be only of academic interest because, as noted previously, the Court might well cling to its presumption of the adequacy of state court adjudication even in the face of considerable empirical evidence that constitutional litigants would fare better in a federal forum. The Court's tolerance of disparity, however, might not be limitless. Furthermore, arguments about parity may be raised in Congress. I fully agree with Chemerinsky that the Court has been asking itself too many questions about whether it wishes to exercise jurisdiction which Congress has conferred.²⁵

²³ See Chemerinsky, *supra* note 2, at 604-05.

²⁴ Chemerinsky's two-way street, which does not assume that federal court is always a superior forum, avoids some of the insult to state courts and the federalist system which some would perceive in Neuborne's analysis. See Chemerinsky, *supra* note 2, at 605.

²⁵ Professor Redish has argued that the Court's excessive modesty at times threatens constitutional separation of powers principles. See Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (asserting that the federal judiciary's abstention doctrines violate the separation of powers principle); Redish, *supra* note 7, at 342-68 (viewing the parity debate through separation of powers analysis).

Wells has disagreed with Redish on this subject. Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097, 1133 (1985) (concluding that judge-made rules restricting jurisdiction are not a judicial usurpation of power, but are part of a "common law of federal jurisdiction over constitutional remedies"). Wells posits that the

But the Court's lack of deference to legislative choice does not make the question of parity irrelevant. If Congress, rather than the Court, makes the decisions regarding jurisdiction over federal constitutional claims, only the decisionmaker, not the nature of the decisionmaking process, changes. Congress is likely to show as much interest in federalism and federal housekeeping costs as the Court does, and is as unlikely to be persuaded by Chemerinsky's attempt to sidestep this balancing process.

The Supreme Court's decisions about exercising the power granted by section 1983 and the habeas corpus statutes are subject to congressional review. In weighing the demands of federalism and plaintiffs' interest in the availability of a federal forum, Congress has final authority to decide when federal jurisdiction warrants the added burden in financial costs, in increased caseload, and in insult (perceived or real) to state judiciaries.²⁶ Professor Redish has argued that such congressional deliberation is purely hypothetical because Congress has not shown any inclination to revise civil rights jurisdiction in any dramatic way since 1948.²⁷ But there are many contexts in which Congress is called upon to consider the scope of federal court review of constitutional claims. Proposals to restrict habeas corpus jurisdiction, for example, are rampant.²⁸ Arguing disparity may be the best way to persuade Congress to consider legislation to loosen or remove some of the judicial restrictions on the role of the federal courts, restrictions that Professor Redish deplures.

I also agree with Chemerinsky that we do not yet have satisfying data on which to base our conclusions about the proper scope of federal jurisdiction.²⁹ But I take that to mean that debate and study should continue, not be abandoned.

Supreme Court may usefully manipulate its jurisdiction to serve its own substantive agenda. Wells, *supra* note 1, at 637-41.

²⁶ The Reconstruction Congress empowered the federal courts to review civil rights claims largely because of perceptions of disparity. The civil rights statutes which culminated in § 1983 and its companions were created to provide a federal forum by a Congress which perceived state courts to be insufficiently reliable. See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . ."); *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (reviewing legislative debates to show that Congress wished to provide a federal remedy where state remedies might be only theoretically available).

²⁷ Redish, *supra* note 7, at 344.

²⁸ This is not the first year in which a Habeas Corpus Reform Act has been proposed. See, e.g., H.R. REP. NO. 18, 102d Cong., 1st Sess. (1991); H.R. REP. NO. 1090, 101st Cong., 1st Sess. (1989); S. REP. NO. 1285, 100th Cong., 1st Sess. (1987); H.R. REP. NO. 1127, 99th Cong., 1st Sess. (1985). Comprehensive Crime Control Acts also regularly propose limits on habeas corpus review. See, e.g., S. REP. NO. 1225, 101st Cong., 1st Sess. (1989).

²⁹ Professors Solimine and Walker have concluded on the basis of empirical work that state courts are not significantly less receptive than federal courts to the vindication of

Chemerinsky also contends that the debate about parity must remain at an

federal rights. Solimine & Walker, *supra* note 4, at 214; *see also* Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 411 (1991) (relying on studies to argue that state courts, particularly at the appellate level, continue to improve in their adjudication of federal constitutional rights); Solimine & Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 137 (1989) (claiming that data show that state courts lack systematic hostility to federal rights and in some cases are even more inclined than the federal courts to find in favor of federal claims).

Solimine and Walker's interesting, although flawed, study of 1000 reported cases compares the results of federal district court opinions and state appellate court opinions in cases involving first amendment, fourth amendment, and equal protection claims. *See* Solimine & Walker, *supra* note 4, at 234-36 (explaining legitimacy of data and comparability of state and federal courts chosen for the study). Whether the proper comparison is between state appellate courts and federal district courts or state trial courts and federal district courts is certainly an important question. *See* Neuborne, *supra* note 5, at 1116 n.45, 1118-19 (asserting that the comparison should be between state and federal trial courts). Relying on only reported opinions also obviously overlooks large numbers of cases which are settled, tried and not appealed, or disposed of in proceedings such as summary judgment motions or motions to dismiss, without published opinions.

Even putting these problems aside, it is not clear what to make of the resulting statistics. The federal courts in the study, for example, are found to have upheld constitutional claims (presumably in the three categories listed above) in 33.9% of criminal cases, and 44.6% of civil cases, while state courts upheld comparable claims in 30.5% of criminal cases and 33.2% of civil cases. Solimine & Walker, *supra* note 4, at 242. These might be statistically significant differences only if like cases are being considered. To evaluate whether the pools of cases are comparable, one would need to know whether the federal statistics for criminal cases include only federal criminal proceedings, or whether federal habeas corpus cases are treated as criminal cases. If the former, the similarity of results may then depend in large measure on whether the governmental behavior at issue is similar. Is the Drug Enforcement Administration more or less respectful of fourth amendment rights than local police? Is Congress better at drafting statutes not violative of the first amendment than state legislatures? Do the same equal protection problems arise in the more homogeneous world of federal criminal prosecution? The ostensibly similar state court results might be shockingly disrespectful of federal rights if the behavior the state courts are considering significantly differs from the behavior of federal agents.

If, on the other hand, the federal statistics include habeas corpus cases, the state court results become much less impressive even without further information. Because of the doctrine of exhaustion of state court remedies, *see* 28 U.S.C. § 2254(b) (1988), most claims raised in federal habeas corpus proceedings have been previously submitted to the state courts and denied. Therefore, if the state court grants one first amendment claim in a criminal case and the federal court grants one claim of a state court defendant in a federal habeas corpus case (or if each court grants 30% of claims before it in this category), it cannot be said that the state and federal courts are equally receptive to first amendment claims. If the state court had been as receptive to first amendment claims as the federal court, the state court would have granted both claims, and neither would have been presented to the federal court at all.

Some of these design flaws could be corrected. In a more recent study, for example,

impasse because we cannot agree on a measure of superiority. Some might contend that state courts are not the "functional equivalent" of federal courts unless they rule in favor of constitutional plaintiffs as often as federal courts do. Others, such as Paul Bator,³⁰ would argue that state courts are adequate if they provide a "full and fair opportunity" to air constitutional claims, even if their average results differ. The Solimine and Walker study, for example, concluded that federal courts were 11.4 to 13.5% more likely than state courts to uphold federal constitutional claims in the civil cases studied.³¹ The authors discounted the disparity as insignificant,³² but a constitutional litigator like Neuborne might well find it disturbing.

This is indeed an impasse, but it is not an impasse on the empirical question of parity. It is an impasse on the fundamental normative questions potentially implicated in any decision about federal court jurisdiction. Should federal courts be made available to hear federal claims in all cases or only in those cases in which state courts are believed or perhaps demonstrated to be inadequate? How inferior must state courts be before federal jurisdiction is deemed necessary? To avoid this impasse, one could take an empirical approach to identifying the differences between state and federal courts and then see whether reasonable people with different values could agree on the necessity of federal jurisdiction in a particular instance. If all could agree that disparity might matter, an empirical study of parity could provide a basis for resolving what would otherwise be a stalemate.

Professor Chemerinsky states that continuing the parity debate is "dangerous" because empirical questions are unanswerable, and he urges us to concentrate on other defects in the syllogism on which *Stone* is based.³³ Chemerinsky's principal challenge focuses on the major premise that federal jurisdiction is unnecessary if the state courts are competent. I agree that federal jurisdiction does not become expendable merely because some state courts are doing a good job at some specific point in time. In addition, there are reasons, such as Chemerinsky's litigant choice principle, for permitting federal courts to hear constitutional claims even if their results are not always or predictably "superior" to results in state courts.³⁴ Federal juris-

Professor Solimine compared treatment of § 1983 cases in state and federal courts and included information about the disposition of summary judgment motions and whether cases terminated before or after trial. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 416 (1991).

³⁰ Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (arguing that state courts should be allowed a role in the litigation of federal constitutional claims as long as those claims are given a full and fair hearing).

³¹ See Solimine & Walker, *supra* note 4, at 242.

³² *Id.* at 244 ("[W]e believe that these data show no clear, across-the-board hostility on the part of state courts to claims of federal constitutional rights . . .").

³³ Chemerinsky, *supra* note 2, at 599-600.

³⁴ See, e.g., Chemerinsky, *supra* note 3, at 302-10 (listing advantages of litigant choice principle such as enhancing litigants' autonomy and enhancing federalism).

diction can be viewed as part of a dialectical process that may lead both state and federal courts to do a better job.³⁵ The choice of forum can serve as what Neuborne has characterized as a "self-correcting constitutional compass."³⁶ Even if state courts are functionally equivalent to federal courts now, they may not continue to be so; even if the state courts in one jurisdiction are more than adequate to decide federal constitutional claims, state courts in other jurisdictions may not be.

These are good reasons for rejecting the major premise of the *Stone* syllogism.³⁷ But arguments against the major premise of the Supreme Court's scissor-happy attitude to federal court review do not relegate the minor premise to insignificance. Empirical evidence that state courts are not receptive to federal constitutional claims is more likely to break the impasse between the institutional interests camp and the federalist camp than is the litigant choice theory.

Another reason that the litigant choice option does not avoid questions about the scope of federal court review is that the principle does not provide any basis for answering many of the questions as to which parity has been a factor. The litigant choice principle merely demands the provision of some federal forum. But the Supreme Court, in most of the areas described above, has not closed the door to the federal courthouse altogether. Instead, it has limited the availability of federal injunctive relief in some cases,³⁸ and has deferred to state court findings of fact in others.³⁹ I assume that the litigant

³⁵ Cover and Aleinikoff have argued that the redundancy of review by two independent courts provides greater protection for constitutional rights. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-47 (1977); see also Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981) (arguing in favor of a system of federalism in which institutions are in tension with one another).

³⁶ Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 731 (1981) (arguing that concurrent jurisdiction guides litigation into the forum more protective of individual rights).

³⁷ An additional reason centers on Akhil Amar's analysis of federal jurisdiction in some circumstances as being directly traceable to article III. See Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 229-34 (1985) (arguing that the Framers did not necessarily intend the creation of lower federal courts, but did intend that some federal court be available to provide a final resolution for any federal question).

³⁸ E.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983) (holding that injunctive relief is unavailable against the police practice of using chokeholds when plaintiffs cannot show any likelihood of being subjected to this police practice in the future); *Younger*, 401 U.S. at 53-54 (holding that injunctive relief is unavailable against state criminal prosecution allegedly violative of the first amendment).

³⁹ See, e.g., *Sumner v. Mata*, 449 U.S. 539, 550 (1981) (finding that federal courts in habeas corpus proceedings should defer to state appellate court findings of fact); *Allen*, 449 U.S. at 104-05 (disallowing federal relitigation of a federal constitutional claim decided in an earlier state court proceeding). Other restrictions are also proliferating.

choice principle implies that a petitioner can always enter federal court in a habeas corpus proceeding, for example.⁴⁰ But what happens once the case is pending? Does the litigant choice principle then mean that constitutional litigants are entitled to injunctive relief without regard to federalism-based limiting doctrines, like *Younger*, or that they may relitigate all facts found by the state courts? These were the very questions which led to the need for a debate over parity.

IV. PARITY AND THE CHOICE OF FORUM

Finally, parity will continue to be an issue regardless of the outcome of Supreme Court or congressional debates about the scope of federal jurisdiction because the issue arises every time a litigant chooses whether to raise a constitutional claim in federal or state court.⁴¹ I find it ironic that Professor Chemerinsky despairs that law professors and social scientists are not able to gain any useful information about the relative merits of state and federal courts, but nevertheless assumes that every plaintiff's attorney knows whether federal or state court is preferable in each case. Without further study of the consequences of bringing a claim in state or federal court, litigants and attorneys can rely only on intuition and anecdote.⁴²

To aid litigants in their choice of forum, comparisons of state and federal courts should include more than information about the predilections of state and federal judges.⁴³ There are differences in the state and federal bar and in the familiarity and convenience of state courts, as well as in their rules of

See e.g., *McCleskey v. Zant*, 111 S. Ct. 1454, 1457 (1991) (applying a judicially created doctrine that the failure to raise constitutional claims in an earlier habeas corpus proceeding constituted an abuse of the writ and precluded consideration of the claim in a later habeas corpus proceeding).

⁴⁰ Would this mean that the Court or Congress would have to overrule cases such as *McCleskey*, which allowed the abuse of the writ defense, and *Teague v. Lane*, 489 U.S. 288, 316 (1989), which disallowed claims based on new rules of law raised in habeas corpus proceedings?

⁴¹ I agree with Professor Wells that the parity debate encompasses issues pertaining to litigant choice of forum. I do not agree, however, that this is the only significant issue involved.

⁴² Actually, Professor Chemerinsky appears to have raised this point with the intention of highlighting the local nature of the inquiry into parity. As he points out, it is futile to generalize about whether state and federal courts are equivalent because state courts differ so dramatically among themselves. More careful studies, focusing on particular localities, would be helpful to litigants who would like to move beyond the anecdotal level and into the level of probabilities.

⁴³ In addition to studies of reported opinions like those of Solimine and Walker, studies of docket sheets and related statistics can provide useful information about cases which may have been settled or dismissed. In § 1983 actions, one measure of success might be the award of attorney's fees to the "prevailing party," available in federal or state court under 42 U.S.C. § 1988. *See Maine v. Thiboutot*, 448 U.S. 1, 9 (1980) (holding that § 1988 provides for attorney's fees in any § 1983 action). Questionnaires

procedure.⁴⁴ Despite Professor Neuborne's assumption of the procedural superiority of federal courts,⁴⁵ state court more and more frequently provides a preferable forum for procedural reasons. I have argued recently that, in hearing federal claims, state courts are not bound by federal court restraining doctrines based on considerations of comity and federalism.⁴⁶ State court litigants in section 1983 actions, therefore, should be able to obtain injunctive relief that might have been unavailable in federal court.⁴⁷ Chemerinsky's vision of jurisdictional redundancy as a two-way street in which some might desire state court review of the federal courts' work becomes less far-fetched as the composition of the federal bench and the procedural features of federal constitutional litigation continue to cramp federal court review. We may soon need to revisit *Tarble's Case*⁴⁸ to ask whether a state court can enjoin unconstitutional behavior by federal agents when federal court relief is unavailable.⁴⁹

submitted to constitutional litigators might also provide a useful source of information as to whether various forums provided full and fair litigation of constitutional claims.

⁴⁴ S. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS 413-24 (1988); Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOKLYN L. REV. 1057, 1059-60 (1989).

In one interesting study, attorneys in ten jurisdictions were asked whether, jurisdiction being equally available, they would prefer to litigate civil actions in state or federal court. Of 252 respondents, 193 expressed preference for state court and 34 for federal court. The principal reasons given for preferring state court included quicker disposition of cases, familiarity, and proximity. The respondents preferred state court even though the majority of them considered federal judges more competent and federal procedure superior. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 app. at 816 (1981).

⁴⁵ See Neuborne, *supra* note 5.

⁴⁶ Herman, *supra* note 44, at 1115-23, 1130-31.

⁴⁷ See, e.g., *Langford v. Superior Court*, 43 Cal. 3d 21, 37 n.6, 729 P.2d 822, 833 n.6, 233 Cal. Rptr. 387, 398 n.6 (granting preliminary injunctive relief in a § 1983 action to plaintiffs who had suffered from the police department's use of motorized battering rams, without requiring the showing of likelihood of future harm demanded by the Supreme Court in *Lyons*), *cert. denied*, 484 U.S. 824 (1987).

⁴⁸ *Tarble's Case*, 80 U.S. (13 Wall.) 397, 401 (1872) (prohibiting state court from issuing a writ of habeas corpus against a federal official).

⁴⁹ If a federal litigant sought injunctive relief against a practice of the Drug Enforcement Agency, for example, that litigant might be precluded from obtaining federal injunctive relief if future violations were merely speculative. See, e.g., *Lyons*, 461 U.S. at 105 (concerning likelihood of suffering same injury in future); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (finding that individually named respondents' claim of real and immediate injury did not suffice to establish federal jurisdiction because it depended upon what a small number of unnamed police officers might do to them in the future); *O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974) (holding that the attempt to anticipate future injury would be speculative and conjectural). A state court, as in the *Langford* case, see *supra* note 47, might not be subject to such federal court-oriented restrictions.

Therefore, I cannot agree with Professor Wells that the parity debate is over simply because we know that federal and state courts are somewhat different from each other. Neither can I agree that the institutional differences noted by Professor Neuborne establish that federal courts over a decade later are categorically more likely to uphold constitutional claims. We need to know how federal and state courts, in various parts of the country, differ in their treatment of particular constitutional claims. I also disagree with Professor Chemerinsky that we cannot glean useful information by continuing to study and discuss this issue. We simply need to be more careful about how we obtain and use this information.

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