

ARTICLES

Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity

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Introduction

Since the ratification of the Constitution nearly two centuries ago, cases arising under the Constitution or the laws of the United States have been adjudicated in the parallel systems of federal courts and the courts of each state. Despite this venerable tradition, the litigation of federal cases in state courts has remained a source of an equally long-lived and widespread controversy in judicial opinions and the academic literature.¹ The contemporary focus of this controversy is based, in particular, on arguments suggesting that state courts are institutionally incompetent to properly adjudicate federal rights, or are even hos-

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1. The number of applicable judicial opinions and related academic commentaries has grown spectacularly in the last decade. For useful overviews of both case law and academic opinions, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* chs. VII-VIII (2d ed. 1973 & Supp. 1981) [hereinafter cited as *HART & WECHSLER*]; M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (1980); *State Courts and Federalism in the 1980's*, 22 *WM. & MARY L. REV.* 599 (1981). The controversy has even moved Congress to propose the creation of a commission to study the jurisdiction of federal and state courts. *See, e.g.*, S. 675, 97th Cong., 1st Sess. (1981); S. 3123, 96th Cong., 2d Sess. (1980).

tile to the vindication of such rights.²

The purpose of this article is to explore the empirical component of this debate, that is, the presumed incompetency or hostility of state courts toward the adjudication of federal rights.³ We first review the establishment of the lower federal courts and state courts. We then turn toward the strands of the contemporary debate: the equitable doctrine of limiting the power of federal courts to enjoin or otherwise interfere with state court proceedings, the limitations upon federal courts in reviewing the validity of convictions obtained in state courts, and the ability of Congress to curtail the jurisdiction of lower federal courts.⁴

Having established the outline of the debate, we examine evidence from the social sciences and from contemporary notions of the proper role of federalism which is said to justify distrust of state courts. Finding such evidence to be wanting,⁵ we present our own study of the adjudication of certain federal rights in federal and state courts in the past decade. Our study indicates that state courts are no more "hostile" to the vindication of federal rights than are their federal counterparts,⁶

2. The seminal article advancing this argument is by Professor Neuborne. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

3. We are thus concerned with the adjudication of *federal* constitutional rights (or rights arising under federal statutes), not of *state* constitutional rights. In an era of perceived contraction of federal rights by the Burger Court, there has been a revived interest in the adjudication of personal liberties derived from state constitutions. See, e.g., Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085 (1982); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1 (1981); Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977); Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980). Indeed, some writers have actively encouraged state courts to circumvent restrictive federal court decisions by expanding interpretations of state constitutional provisions. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). See generally Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981).

4. See *infra* Part IB. We have chosen these particular doctrines to illustrate the contemporary debate over the comparative competence of federal and state courts to adjudicate federal rights, which we will hereinafter refer to as "parity." Other aspects of federal and state jurisdiction, such as the abstention doctrine or the scope of the Eleventh Amendment, can also implicate and be discussed in the framework of parity—the former because it postpones, the latter because it eliminates entirely, the adjudication of federal constitutional issues in federal courts. See M. REDISH, *supra* note 1, ch. IX; Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 198-200 (1981).

5. See *infra* Part IIA.

6. See *infra* Part IIB.

and we conclude that the opportunity for review by state appellate courts and the United States Supreme Court significantly mitigates concern over the institutional competence of state trial courts.⁷ In short, we argue that, within specified limits, "parity" does exist between federal and state courts.

I. Federal and State Court Parity: Antecedents and Contemporary Practice

A. The Madisonian Compromise and Beyond

As noted above, the debate over the existence of parity springs from the initial establishment of the lower federal courts by the Constitution. Article III of the Constitution provides that there "shall" be one Supreme Court, but the Congress "may" establish lower federal courts.⁸ Providing Congress with the discretion to create the latter courts was the culmination of a debate at the Constitutional Convention. Some of the Framers argued for the mandatory creation of federal tribunals inferior to the United States Supreme Court, to properly manage large caseloads and to serve as an enforcement arm for the President and the Congress.⁹ The opponents contended that such courts would be unnecessary and duplicative, since *state* courts were available to adjudicate federal cases. James Madison and James Wilson ultimately offered a plan to resolve the conflict, which has taken the name of the first of its authors. The Madisonian Compromise gave Congress the option to create or not to create lower federal courts; this Compromise was adopted at the convention as a part of Article III.¹⁰

The significance of the Compromise lies not so much in the discretion to create (since inferior federal courts were, in fact, established by the First Judiciary Act of 1789),¹¹ as in the contemplation that federal cases would be litigated in state courts. Indeed, not until 1875 did Congress expand the jurisdiction of the federal district courts to include

7. *See infra* Part III.

8. U.S. CONST. art. III, § 1, provides in part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

9. *See* HART & WECHSLER, *supra* note 1, at 11; Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-53 (1975).

10. *See* HART & WECHSLER, *supra* note 1, at 11-12; Redish & Woods, *supra* note 9, at 54.

11. *See* 1 Stat. 73 (1789). *See generally* HART & WECHSLER, *supra* note 1, at 32-35.

cases involving general federal questions.¹² Both civil and criminal federal cases have been adjudicated in state courts,¹³ and concurrent jurisdiction has been described as a "common phenomenon" by the Supreme Court.¹⁴ Congress unquestionably has the power to *exclude* the state courts from adjudicating federal cases, though in practice such exclusion has been the exception, not the rule.¹⁵ In adjudicating these cases, state courts are bound by the Supremacy Clause¹⁶ to apply relevant federal law, and thus are endowed with the same power and responsibility to enforce federal constitutional principles as are their federal counterparts.¹⁷

Bound by federal law and under the review of state appellate courts and, ultimately, the United States Supreme Court, state courts seem to be, in the abstract, appropriate forums for the adjudication of federal rights. This argument, however, has come under attack as failing to recognize the *lack* of parity—that state courts are *not* institutionally comparable to federal courts in vindicating federal rights. This conclusion considerably undermines the support for any doctrine that will deprive a plaintiff of a federal forum in which to vindicate federal rights. But before turning toward consideration of the empirical support for this conclusion, we will review categories of jurisdictional doctrine that highlight the current debate over parity.

B. Parity and the Contemporary Debate

I. *Younger v. Harris*

The prosecution of criminal actions in a state court can potentially raise a variety of federal constitutional questions, including the consti-

12. See Judiciary Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (1976 & Supp. V 1981)). The 1875 Act expanded the statutory grant of jurisdiction almost to the full extent of authorization found in U.S. CONST. art. III, § 2, cl. 1. See HART & WECHSLER, *supra* note 1, at 39.

13. See, e.g., *Testa v. Katt*, 330 U.S. 386, 390-93 (1947); Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925). See also, e.g., Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960).

14. See, e.g., *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 502-08 (1962). See also, e.g., *Hathorn v. Lovorn*, 102 S. Ct. 2421, 2428 (1982); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). See generally Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976).

15. See, e.g., HART & WECHSLER, *supra* note 1, at 418-19; Redish & Muench, *supra* note 14, at 313-14.

16. U.S. CONST. art. VI, cl. 2.

17. See *Hathorn v. Lovorn*, 102 S. Ct. 2421, 2430 (1982); *Tibbs v. Florida*, 102 S. Ct. 2211, 2220 (1982); *FERC v. Mississippi*, 102 S. Ct. 2126, 2139 n.28 (1982); *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 478 n.4 (1981); *Testa v. Katt*, 330 U.S. 386, 389 (1947); HART & WECHSLER, *supra* note 1, at 434-38.

tutionality of the state statute under which the prosecution is brought. Traditionally, a defendant in such an action must raise these issues in the state court system. However, a state defendant can also seek an equitable remedy in federal court, such as enjoining the state proceeding if he can show irreparable harm as a result of the prosecution. Federal courts were long reluctant to flesh out this narrow federal remedy,¹⁸ but the doctrine seemingly flourished with the decision in *Dombrowski v. Pfister*.¹⁹ The plaintiffs in *Dombrowski* sought to enjoin the enforcement of state laws alleged restrictive of their First Amendment rights. After restating the traditional reluctance of federal courts to exercise their equitable powers against state courts,²⁰ the majority nevertheless held that an injunction must issue since protracted litigation in state court would have a chilling effect on the exercise of First Amendment rights.²¹ Justice Harlan in dissent argued that the majority's approach was premised on the notion that state courts will not vindicate constitutional rights as effectively as federal courts²²—or, in other words, that parity was being ignored.

Harlan's dissent in *Dombrowski* effectively became the majority position six years later in the celebrated decision of *Younger v. Harris*²³ and its companion cases.²⁴ *Younger* held that, in the absence of ex-

18. See, e.g., *Douglas v. City of Jeannette*, 319 U.S. 157 (1943). See generally HART & WECHSLER, *supra* note 1, at 1009-13; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1278-81 (1977) [hereinafter cited as *Developments*]. The doctrine of equitable restraint is to be distinguished from the strictures of the Anti-Injunction Statute, 28 U.S.C. § 2283 (1976), which prohibits federal courts from enjoining state court proceedings, unless the injunction falls under three narrow exceptions. In *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court held that 42 U.S.C. § 1983 (1976)—under which most civil rights actions are brought—fell under the “expressly authorized by Act of Congress” exception found in the anti-injunction statute. 407 U.S. at 243 (construing 28 U.S.C. § 2283 (1976)). Nevertheless, *Mitchum* held that the barriers of equitable restraint must still be surmounted by a plaintiff utilizing § 1983. *Id.* For a further discussion of *Mitchum*, see *infra* note 58 and sources cited in notes 58-59.

19. 380 U.S. 479 (1965). For an article surveying lower courts after *Dombrowski*, and concluding that the decision led to extremely few injunctions being issued in cases claiming a chilling effect on First Amendment rights, see Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 606 (1970).

20. 380 U.S. at 484-85. Recently, Professor Laycock argued that, in light of earlier Supreme Court and lower court decisions, *Dombrowski* in fact stated the rule of equitable restraint more broadly than was justified. See Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979). For a response to Laycock, see HART & WECHSLER, *supra* note 1, at 286 (Supp. 1981).

21. 380 U.S. at 486-89.

22. *Id.* at 498 (Harlan, J., joined by Clark, J., dissenting).

23. 401 U.S. 37 (1971).

24. *Byrne v. Karalexis*, 401 U.S. 216 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971).

traordinary circumstances, a federal court could not enjoin a state criminal proceeding.²⁵ The majority opinion by Justice Hugo Black relied on traditional principles of equity doctrine, the notion of federal-state comity, and the values underpinning "Our Federalism."²⁶ *Younger's* progeny have come to rely explicitly on the values of parity,²⁷ and have expanded the concept of parity to preclude the use of injunctive or declaratory relief by federal courts to interfere with "quasi-criminal" state court proceedings,²⁸ civil contempt proceedings,²⁹ or civil litigation involving "important state interests."³⁰ In the past decade, judicially developed exceptions to *Younger* have been relatively infrequent,³¹ and *Younger* has become the primary focus for the critics of parity.³²

2. Stone v. Powell

Although federal courts had possessed the power to issue writs of habeas corpus on petitions by state prisoners since 1867,³³ that power usually was limited to considering only the validity of the jurisdiction

25. 401 U.S. at 53-54.

26. 401 U.S. at 43-44. For a sample of the enormous amount of literature on *Younger* and its progeny, much of it highly critical of the decisions and the concepts of parity, see M. REDISH, *supra* note 1, ch. XI; Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981); Fiss, Dombrowski, 86 YALE L.J. 1103 (1977); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193; Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978); Rosenfeld, *The Place of State Courts in the Era of Younger v. Harris*, 59 B.U.L. REV. 597 (1979); Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974); Maroney & Braveman, "Averting the Flood": *Henry J. Friendly, the Comity Doctrine, and the Jurisdiction of the Federal Courts* (pt. 2), 31 SYRACUSE L. REV. 469 (1980). For a lengthier compilation of articles, see Maroney & Braveman, *supra*, at 475 n.30.

27. In *Younger*, Justice Black described "comity" as the "proper respect for state functions." 401 U.S. at 44. This preference for comity can be construed as shading into the concept of parity—that is, avoiding "affront" to state courts by suggesting that they cannot properly adjudicate federal rights. See Redish, *supra* note 26, at 482-84; *Developments, supra* note 18, at 1284.

Nevertheless, only *Younger's* progeny were to explicate the concept of parity. See, e.g., *Moore v. Sims*, 442 U.S. 415, 429-30 (1979); *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 610-11 (1975).

28. See, e.g., *Hoffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

29. See, e.g., *Judice v. Vail*, 430 U.S. 327 (1977).

30. See, e.g., *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 102 S. Ct. 2515 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977).

31. *But see* *Steffel v. Thompson*, 415 U.S. 452, 460-63 (1974) (*Younger* deference does not extend to only threatened state court prosecutions). See also *Wooley v. Maynard*, 430 U.S. 705 (1977); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (applied exceptions of *Younger*).

32. See *supra* sources cited in note 26.

33. Act of Feb. 5, 1867, 14 Stat. 385, (codified at 28 U.S.C. § 2254 (1976)).

of a sentencing court.³⁴ The scope of the writ was finally expanded in the middle of the century by the landmark decision of *Brown v. Allen*,³⁵ where the Court held that a federal court could review the validity of a state court conviction when it rested on a determination of a federal constitutional claim.³⁶ The writ was further expanded in *Fay v. Noia*,³⁷ where habeas corpus relief was permitted despite the state prisoner's failure to properly appeal his conviction in the state court system.

A few commentators, along with Justice Lewis Powell, expressed disquietude over this expansion of relitigation of federal claims already addressed in state courts. Their concern was based particularly on the fact that the decisions of an entire state court hierarchy would thus be subordinated to the opinion of a single federal district judge.³⁸ These reservations were adopted by the Court in the past decade as a rationale for curtailing the expansion of the writ in the review of state court convictions. The most significant expression of this trend came in *Stone v. Powell*,³⁹ where the Court held that Fourth Amendment claims could be relitigated on habeas corpus only upon a showing that the petitioner did not have a full and fair opportunity to have that claim considered in the state court system.⁴⁰ In the course of the opinion, the Court expressly reiterated the concept of parity as providing the basis for deference to state court decisionmaking.⁴¹ While the

34. Stimulating overviews of the history of the writ of habeas corpus and the expansion of its use can be found in *Stone v. Powell*, 428 U.S. 465, 474-80 (1976); *Fay v. Noia*, 372 U.S. 391, 399-426 (1963); *id.* at 450-63 (Harlan, J., dissenting); HART & WECHSLER, *supra* note 1, ch. X, § 2; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

35. 344 U.S. 443 (1953).

36. *Id.* at 457-65.

37. 372 U.S. 391 (1963). *Fay*, of course, has been severely undercut by the "cause" and "prejudice" rule developed in *Engle v. Isaac*, 456 U.S. 107 (1982), and *Wainright v. Sykes*, 433 U.S. 72 (1977).

38. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 259-61 (1973) (Powell, J., concurring); HART & WECHSLER, *supra* note 1, at 1465-75; Bator, *supra* note 34, at 50; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

Empirical evidence has supported these doubts to some extent, since habeas petitions comprise a large percentage of the federal court caseload, HART & WECHSLER, *supra* note 1, at 8 (Supp. 1981), while very few petitions are granted. *Id.* at 422 (Supp. 1981) (citing P.H. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (1979) (3.2% of petitions granted)).

39. 428 U.S. 465 (1976).

40. *Id.* at 482.

41. *Id.* at 493 n.35. See also *California v. Grace Brethren Church*, 102 S. Ct. 2498, 2513 n.37 (1982). *Stone*, like *Younger*, came under heavy criticism in the academic literature. See, e.g., Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233 (1979). For a more reserved appraisal,

scope of *Stone v. Powell* is not without limits,⁴² the Court recently held in *Allen v. McCurry*⁴³ that the doctrine of collateral estoppel prevents a federal court from entertaining a section 1983 suit to reconsider a Fourth Amendment claim litigated in a state court suppression hearing.⁴⁴ Once again, the Court suggested that opposition to the holding could only be premised on a failure to recognize parity.⁴⁵

3. *Congressional Restriction of Lower Federal Court Jurisdiction*

The existence or nonexistence of parity is also a contemporary concern of the legislative branch. Once a relatively moribund topic, the power of Congress to deprive federal district courts⁴⁶ of jurisdiction to hear certain classes of cases has recently received increased attention in the academic literature and in the United States Congress. As we have already noted, Article III of the Constitution grants Congress discretion to create federal tribunals inferior to the Supreme Court. It has been assumed that such discretion includes the power to abolish such federal tribunals, that is, to withdraw their jurisdiction completely.⁴⁷ A

see Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule after Stone v. Powell*, 82 COLUM. L. REV. 1 (1982); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

42. The Court later held that the *Stone* limitation was not applicable to a claim that a state grand jury was selected in a racially discriminatory manner, *Rose v. Mitchell*, 443 U.S. 545, 560-61 (1979), or to a claim that evidence did not support a conviction beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 307, 321 (1979).

43. 449 U.S. 90 (1980).

44. *Id.* at 104-05.

45. *Id.* at 105. *Accord* *Kremer v. Chemical Constr. Corp.*, 102 S. Ct. 1883, 1895-96 (1982); *Rose v. Lundy*, 455 U.S. 509, 519 (1982); *Engle v. Isaac*, 456 U.S. 107, 128-29 (1982).

46. We do not consider congressional power to restrict the appellate jurisdiction of the Supreme Court, which is considered to be far narrower than the power with regard to lower federal courts. On that topic, see HART & WECHSLER, *supra* note 1, at 360-65; Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); 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, 30-33, 37-60 (1981); Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977). Indeed, we assume that parity can be justified by recognizing the ultimate opportunity for review of state court decisions by the Supreme Court. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). See also *infra* text accompanying note 163.

47. See, e.g., *Palmore v. United States*, 411 U.S. 389, 400-01 (1973); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). See also, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2867-68 n.15 (1982) (plurality opinion); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 117 (1981) (Brennan, J., concurring); HART & WECHSLER, *supra* note 1, at 330-31, 359-60; Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A*

corollary of this power is the discretion to "abolish" jurisdiction selectively by withdrawing jurisdiction over particular classes of cases.⁴⁸

Although buttressed by Supreme Court opinions, this seemingly unfettered discretion has come under attack recently in the wake of a renewed congressional interest in stripping federal courts of jurisdiction over controversial "social issues"—such as abortion, school prayer, and busing.⁴⁹ The debate again turns largely on arguments over the validity of parity. If certain cases are deprived of a federal forum, they could presumably be litigated in state courts with ultimate review possible by the Supreme Court. Some scholars, however, argue that the power to curtail federal court jurisdiction can no longer be derived from Article III in light of "changing circumstances," since such curtailment would destroy the federal court's "modern" role of providing uniform adjudication of federal rights.⁵⁰ To leave such rights to be adjudicated in state courts, they contend, not only leaves their vindica-

Reaction to Professor Sager, 77 Nw. U.L. REV. 143 (1982); Sager, *supra* note 46, at 33-36; Redish & Woods, *supra* note 9, at 46-47.

48. See HART & WECHSLER, *supra* note 1, at 12; Redish & Woods, *supra* note 9, at 47. But see Sager, *supra* note 46, at 68-74 (selectively restricting federal court jurisdiction to entertain certain rights impermissibly burdens the exercise of those rights).

49. For examples of such recent congressional proposals to limit the jurisdiction of lower federal courts, see S. 583, 97th Cong., 1st Sess. (1981) (abortion); H.R. 2347, 97th Cong., 1st Sess. (1981) (school prayer); S. 1005, 97th Cong., 1st Sess. (1981) (busing). For a lengthier compilation of bills, see Sager, *supra* note 46, at 18 n.3, 74 n.174. See also CITIZENS COMM'N ON CIVIL RIGHTS, "THERE IS NO LIBERTY . . ." A REPORT ON CONGRESSIONAL EFFORTS TO CURB THE FEDERAL COURTS AND TO UNDERMINE THE BROWN DECISION (Oct. 1982). None of these bills passed the 97th Congress.

Despite the recent outcry, congressional attempts (some successful) to restrict federal court jurisdiction have a long history and are not as unusual as some contemporary critics suggest. See generally HART & WECHSLER, *supra* note 1, at 360-65; Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965); Handberg & Hill, *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress*, 14 LAW & SOC'Y REV. 309 (1980).

50. See, e.g., Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Kaufman, *Congress v. The Court*, N.Y. Times, Sept. 20, 1981, § 6 (Magazine), at 44.

This theory seems to be a revival of Justice Story's argument that Article III *mandates* the creation of lower federal courts, and the complete vesting of federal jurisdiction therein once they are created. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 305 (1816) (Story, J.). See generally HART & WECHSLER, *supra* note 1, at 313. More recently, Professor Goebel has reached a similar conclusion based on his review of the deliberation at the Constitutional Convention. See 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 240-46 (1971). Both positions are unpersuasive: Story's view has been explicitly rejected by the Supreme Court, see, e.g., *Palmore v. United States*, 411 U.S. 389, 401 n.9 (1973), while Goebel's thesis does violence to the Madisonian Compromise and the language of Article III itself. See, e.g., HART & WECHSLER, *supra* note 1, at 12 n.46; Redish & Woods, *supra* note 9, at 59-61. Thus, the "modern role" or "changing circumstances" theory, prohibiting Congress from restrict-

tion to the whim of indifferent or hostile state judges, but fails to recognize that such decisions could not be effectively reviewed by an already overburdened Supreme Court.⁵¹ While these views may possibly be defended as good *policy*, we think that they cannot provide a *constitutional* basis to restrict congressional power, since most scholars have persuasively argued that they contradict the intent of the Madisonian Compromise and find no support in the language of Article III.⁵²

ing lower federal court jurisdiction, is without precedential or historical support. *See also, e.g., Sager, supra* note 46, at 35-36.

51. *See, e.g., Eisenberg, supra* note 50, at 510-11; Kaufman, *supra* note 50, at 98, 100, 102; Taylor, *Attacks on Federal Courts Could Shift Historic Roles*, N.Y. Times, May 16, 1982, at 1, cols. 2-3. *See also, e.g., Meserve, Limiting Jurisdiction and Remedies of Federal Courts*, 68 A.B.A. J. 159, 161 (1982).

These reasons are also advanced by critics of current congressional bills, *see, e.g., supra* note 49, restricting federal court jurisdiction over cases involving controversial issues. *See, e.g.,* 127 CONG. REC. S6780 (daily ed. June 23, 1981) (farming out important issues on individual rights to state courts would lead to "an ice age in constitutional law.") (statement of Prof. Tribe). *See, e.g., also Sager, supra* note 46, at 73-74; Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

52. As Professor Redish points out, the history or language of Article III is not susceptible to a flexible interpretation as envisioned by the proponents of the "changing circumstances" theory. *See Redish & Woods, supra* note 9, at 69-75. Moreover, there is little principled basis to distinguish congressional restrictions forbidden by the theory as compared to "neutral, housekeeping" restrictions permitted by the theory, such as the (now abolished) \$10,000 jurisdictional requirement, 28 U.S.C. § 1331(a) (1976), in federal question cases. Redish & Woods, *supra* note 9, at 69-75.

Professor Redish, however, would place his own limits on Congress' Article III power by relying on *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871). In *Tarble's Case* the Supreme Court overturned a writ of habeas corpus issuing from a Wisconsin state court which ordered the release of a United States Army soldier. The *Tarble's Case* opinion used particularly sweeping language in restricting the power of state courts to control federal officers. *Id.* at 407-09. As a critic of parity, Redish argues that the *Tarble's Case* language and result are fully justified given the primacy of federal courts in adjudicating federal rights. Redish & Woods, *supra* note 9, at 94-101. Based on *Tarble's Case*, Redish would forbid congressional restrictions of federal court jurisdiction which would permit only state courts to adjudicate the constitutionality of federal schemes, if the remedy in such cases would require enjoining or otherwise interfering with the activities of federal officers. *Id.* at 102. Nevertheless, Congress could explicitly ordain that state courts can directly control federal officers. *Id.* at 107. *See also Redish, supra* note 47, at 158-60.

While *Tarble's Case* is still cited as good law, *see, e.g., Davis v. Passman*, 442 U.S. 228, 245 n.23 (1979), it has come under severe criticism as simply being incompatible with the concept of parity. *See, e.g., HART & WECHSLER, supra* note 1, at 357 n.48, 427-30; Bator, *supra* note 26, at 632 n.64. Even the best-known critic of parity has called for a "rethinking" of *Tarble's Case*, since it would limit the reviewing function of state courts once they do adjudicate federal causes of action. *See Neuborne, Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 766 n.172 (1981). *See also Chisum*, Book Review, 33 STAN. L. REV. 1161, 1173-74 (1981). *Cf. Sager, supra* note 46, at 80-84 (even if one concludes that *Tarble's Case* was wrongly decided, state judges are still bound to respect and apply federal law under the Supremacy Clause).

The debate over parity, springing from the genesis of federal courts, continues to range today over a spectrum of jurisdictional issues. Scholars continue to dispute the proper allocation of litigation between state and federal courts. Some believe the debate is at an "impasse," since empirical verification of the existence of parity is thought to be virtually impossible.⁵³ We respectfully disagree. While recognizing the limitations of any statistical inquiry, we think that the existence of parity is subject to affirmance or denial in light of the current decisions of state and federal courts. Indeed, critics of parity have themselves relied, to a limited extent, on empirical evidence which, they claim, casts doubt on the existence of parity.⁵⁴ It is to a review of such evidence, and to our own inquiry, which we now turn.

II. Empirical Comparisons of Federal and State Courts

A. The Myth of Parity

Skeptics of parity typically settle on two rationales to suggest a litigant's preference for a federal forum. First, they argue that historical considerations—notably, the outcome of the Civil War and the passage of the constitutional amendments during the Reconstruction Era—have elevated the federal government in general, and federal courts in particular, to a place of prominence over their state counterparts. In addition, they assert that contemporary institutional differences between federal and state courts justify preference for the former over the latter.

The first rationale provides a starting point for those who question the existence of parity. The debate over parity, as they see it, was largely settled with the defeat of the secessionist states in the Civil War.⁵⁵ Centralized government and the federal judicial power were enhanced by the passage of the Reconstruction constitutional amendments,⁵⁶ by the broadening of the jurisdiction of the federal courts in

53. See M. REDISH, *supra* note 1, at 3; Neuborne, *supra* note 52, at 726.

54. See, e.g., Neuborne, *supra* note 2, at 1116-17 n.46.

55. See M. REDISH, *supra* note 1, at 2; Maroney & Braveman, *supra* note 26, at 505-08; Redish & Woods, *supra* note 9, at 97-101. See also Neuborne, *supra* note 2, at 1114-15.

We also note that the Justices of the Supreme Court who have criticized parity have also relied mainly on historical considerations, and have eschewed any reference to empirical data discussed later in this article. See, e.g., *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 124 n.11 (1981) (Brennan, J., concurring); *Stone v. Powell*, 428 U.S. 465, 526 (1976) (Brennan, J., joined by Marshall, J., dissenting); *Steffel v. Thompson*, 415 U.S. 452, 463-64 (1974) (Brennan, J.).

56. U.S. CONST. amend. XIII (ratified 1865); amend. XIV (ratified 1868); amend. XV (ratified 1870).

1875,⁵⁷ and by the passage of 42 U.S.C. section 1983 to enforce civil rights.⁵⁸ These developments were hastened, to a large extent, by the perceived hostility of state courts to the enforcement of federal rights created by the amendments.⁵⁹ They say, quite frankly, that all of these developments are proof that there was no parity between state and federal courts, and that there was systematic hostility to the vindication of federally created rights. Moreover, the asserted dismal performance of state courts (particularly in the South) in the modern civil rights era lends modern validity to this historical construct.⁶⁰

One cannot quarrel, of course, with the supremacy of the national government, nor with the hostility of some courts to the enforcement of federal rights, after the Civil War. Doubters of parity, however, can marshal no evidence to suggest that state courts continued to be systematically hostile to federal rights after Reconstruction.⁶¹ To the extent that the hostility was revived in some state courts during the 1950's

57. See *supra* note 12.

58. In *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court canvassed the legislative history of § 1983 and concluded that the Reconstruction legislation, including § 1983, was enacted in large part due to the antipathy of state officials and state courts towards federal rights. *Id.* at 242-43. Section 1983 was, in short, "a product of the vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . ." *Id.* at 242. See *Patsy v. Florida Bd. of Regents*, 102 S. Ct. 2557, 2562-63 (1982). See also Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 23-24 (1980).

59. See *Patsy v. Florida Bd. of Regents*, 102 S. Ct. 2557, 2562-63 (1982). See also *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1973); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930); Redish & Woods, *supra* note 9, at 97-99.

60. A few state judges in the 1950's and 1960's enjoined the enforcement of federal civil rights laws; the injunctions were overturned by federal courts based on, *inter alia*, the authority of *Tarble's Case*. See, e.g., *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961). See generally Redish & Woods, *supra* note 9, at 89-90. In addition, Southern state courts in that period were perceived as being generally hostile to civil rights. See Meltsner, *Southern Appellate Courts: A Dead End*, in SOUTHERN JUSTICE 136 (L. Friedman ed. 1965). But see *infra* note 62.

For a more recent example, compare the ultimately unsuccessful actions of a state judge in Louisiana who attempted to interfere with the busing remedy decreed by a federal judge in a school desegregation case. See Marcus, *The Louisiana Judicial Slugfest*, Nat'l L.J., Jan. 19, 1981, at 1, cols. 1-3.

61. We know of no effort to systemically survey state court opinions after the Reconstruction Era to determine their attitudes toward civil rights, or any other federal right. This paucity of evidence has continued into modern times. Cf. *infra* note 96 (discussing published data on state supreme courts from 1870 until the present). See Hurst, *The Function of Courts in the United States, 1950-80*, 15 LAW & SOC'Y REV. 401 (1981). Interestingly, two writers have recently argued that, in the pre-World War I era, state courts exhibited a surprisingly expansive attitude toward the interpretation of the rights of freedom of the press and of speech under the First Amendment. See Anderson, *The Formative Era in First*

and 1960's,⁶² it was an unfortunate aberration not reflected on a nationwide basis today.⁶³ In short, it can be argued 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.⁶⁴ While the origin of parity has its roots in history, we think the continued validity of parity should not forever be governed by events of over a century ago.

The second rationale—alleged institutional incompetence—is also lacking in significant force. Although most critics of parity have been content to rely on rather abstract, conclusory assertions as to historical changes in federalism, they have asserted some empirical evidence concerning the comparative expertise of federal and state courts. The primary source of this evidence has been the much-cited article by Professor Burt Neuborne,⁶⁵ which, after an extensive review of social science data, concludes that federal courts are institutionally more competent than state courts to enforce federal rights. Professor Neuborne deserves much credit, we think, in grounding his criticism of parity in evidence derived from the social sciences. After reviewing his arguments, however, we suggest that they are ultimately inconclusive and do not provide a compelling basis to discard parity.

In his article, Neuborne advanced three reasons supporting a preference for federal courts over state courts. First, federal courts will have a higher level of technical competence in dealing with complex

Amendment Theory, 1870-1915, 24 AM. J. LEGAL HIST. 56 (1980); Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE. L.J. 514, 557-58 (1981).

62. See *supra* note 60. While the hostility of many state government officials in the South towards civil rights in that period hardly requires documentation, the hostility of state courts is more problematic. Indeed, one study of all race relation cases in Southern state supreme courts between 1954 and 1963 indicated that 33% of all dispositions were favorable to the black parties. See Vines, *Southern State Supreme Courts and Race Relations*, 18 W. POL. Q. 5 (1965). This figure is strikingly similar to the results of our own study. See *infra* text accompanying notes 122-38. The Vines study concluded that the record of Southern judges "is more favorable to Negro claimants than in any other part of the state political system." Vines, *supra*, at 18.

63. See Neuborne, *supra* note 2, at 1119. In particular, Professor Neuborne points out that the "widespread breakdown of Southern justice which motivated enactment of the Civil Rights Act of 1871, and similar breakdowns during the height of the civil rights movement which provoked calls for significant expansions of federal jurisdiction, do not exist today." *Id.* at 1119 n.55 (citations omitted). For a favorable modern assessment of one of the more notorious of the Southern supreme courts, see M. Porter & G. Tarr, *Judicial Federalism and the Alabama Supreme Court* (Sept. 1982) (paper delivered at the Annual Meeting of the Am. Pol. Sci. Ass'n, Denver, Colo.).

64. See, e.g., Block, Book Review, 1981 AM. B. FOUND. RESEARCH J. 571, 572. Even critics of parity acknowledge the limited utility of the historical evidence. See, e.g., M. REDISH, *supra* note 1, at 274 n.100.

65. Neuborne, *supra* note 2.

legal issues.⁶⁶ Second, the “psychological set” of federal judges insures their greater receptivity to enforcing the interpretations of federal rights outlined by the Supreme Court and other federal courts.⁶⁷ Finally, the federal judiciary’s insulation from majoritarian pressures suggests that federal judges will be more likely to reach decisions that may require challenging the power of local interest groups.⁶⁸ These three factors, Neuborne concludes, make the notion of parity, at least on a nationwide basis, a dangerous “myth.”

In arguing the existence of “technical competence” of federal—as opposed to state—judges, Neuborne focuses on the individual members of the bench. He argues that a higher level of quality will be reflected in the federal judiciary, since the requirement of Senate approval of federal judicial appointments establishes a floor of competence higher than that in the states. In addition, the prospect of high compensation leads a greater number of qualified individuals to seek federal, rather than state, judicial positions. In contrast, the selection processes for state judges are based either on political patronage systems or on elections. The disparity is exacerbated, Neuborne contends, by the necessity of comparing federal district judges with state *trial* judges, rather than with those on state appellate courts.⁶⁹ Finally, the assistants to a federal judge, particularly the law clerks, may tend to outstrip their state counterparts in ability and dedication.⁷⁰

These arguments, we think, are not compelling. At the outset, the proper comparison is between federal judges and the *entire* state court system, including appellate courts. Such a comparison considerably ameliorates the asserted failings of state courts.⁷¹ In any event, modern state trial judges and courts are not functioning at the antediluvian level suggested by Neuborne. Surveys of current state trial judges, for example, indicate that increasingly they are paid more and are organ-

66. *Id.* at 1121-24.

67. *Id.* at 1124-27.

68. *Id.* at 1127-28.

69. *Id.* at 1116 n.45, 1118-19. Neuborne argues that three factors require the comparison between federal district courts and state *trial* courts. First, delay in reaching decisions at the trial and appellate levels may deter individuals from litigating the denial of their constitutional rights. Second, appellate court ability to review the findings of fact by lower courts is limited. Third, appellate court judges may be subject to the same majoritarian pressures as are their state counterparts. *Id.*

70. *Id.* at 1122-23.

71. *See infra* text Part III. Professors Bator and Fischer share our concern with the failure to include state *appellate* courts in the equation. *See* Bator, *supra* note 26, at 630; Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. MIAMI L. REV. 175, 182-84 (1980).

ized on a more professional basis.⁷² An earlier study by Kenneth Dolbeare characterized state trial judges as largely uncreative defenders of the status quo.⁷³ More recent scholarship depicts a quite different image, suggesting that the qualities of state judges will vary from state to state and city to city, depending on their organizational environment, their ties to the local political system, and the judicial role in which they see themselves.⁷⁴ Moreover, the staff support for state trial judges has been increasing so that many judges now have or share law clerks, as do their federal colleagues.⁷⁵ Finally, the alleged disparity in

72. As to the salaries of state judges, see *Rank Order of Judicial Salaries, Income, and Population*, 4 STATE CT. J. (No. 4) 27 (1980). On the improving caliber of state trial courts, see J. RYAN, A. ASHMAN, B. SALES, & S. SHARE-DUBOW, *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* (1980) [hereinafter cited as *AMERICAN TRIAL JUDGES*]; Sheran & Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1, 47-50, 60-61 (1978). While systematically collected, much of this evidence, we admit, impacts only indirectly on the competence of state judges to adjudicate federal rights. The same can be said, however, of virtually all of the evidence, much of it impressionistic, marshalled by Neuborne. See, e.g., Fischer, *supra* note 71, at 180 & n.16. Cf. Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implication for Reform*, 15 LAW & SOC'Y REV. 749 (1981) (survey of lawyers concerning necessity of diversity jurisdiction).

The increasing professionalism of state courts is indicated by the many state judicial systems which have adopted, in whole or in part, the Federal Rules of Evidence and the Federal Rules of Civil Procedure. See, e.g., 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, T-1 to T-198 (Supp. 1982) (21 states have adopted various forms of the Federal Rules of Evidence); Sheran & Isaacman, *supra*, at 49-50 & n. 240 (40 states have adopted versions of Federal Rules of Civil Procedure). In addition, Neuborne himself has argued that federal, rather than state, "collateral rules" (such as those relating to attorney's fees, defenses and immunities, remedies, burdens of proof, discovery, and the like) should be required in § 1983 actions litigated in state courts. See Neuborne, *supra* note 52, at 747-48, 780-87. His proposal would further lessen the alleged deficiencies in state court procedures.

73. See K. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS: STATE COURT POLICY IMPACT AND FUNCTIONS IN A LOCAL POLITICAL SYSTEM* (1967). Neuborne cited Dolbeare's highly caustic appraisal as "[t]he only serious study" of state trial benches. See Neuborne, *supra* note 2, at 1116-17 n.46.

74. Neuborne is correct in pointing out that relatively little work has been done on the performance of state trial judges, particularly on the civil side. See, e.g., Ryan, *Measuring Judicial Performance in Trial Courts: Conceptual, Empirical, and Political Problems*, 10 POLICY STUD. J. 734 (1982); Sarat, *Judging in Trial Courts: An Exploratory Study*, 39 J. POL. 368, 369-70 (1977). What work has been done, however, flatly contradicts many of Dolbeare's broad conclusions. Moreover, Dolbeare's study was limited to New York judges in the early 1960's, while later studies have analyzed other geographical locales. See Levin, *Urban Politics and Judicial Behavior*, 1 J. LEGAL STUD. 193 (1972); Galanter, Palen & Thomas, *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699 (1979); J. Walker, *Judges as Lawyers and Public Officials* (1974) (Ph.D. Dissertation) (available in University of California at Berkeley Library).

75. See *AMERICAN TRIAL JUDGES*, *supra* note 72, 227-43. Law clerks for federal judges are typically recent graduates of law school, serving for one- or two-year terms, while those for state judges are sometimes "career" clerks and serve for considerably longer periods. See, e.g., Oakley & Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286 (1979) (study of California

selection procedures is somewhat overdrawn. On the one hand, the selection process for *federal* judges has always been, and continues to be, "political" in nature.⁷⁶ On the other hand, many states now *appoint*, rather than elect, judges, suggesting that selection based on patronage by local machine politics is, at least, ameliorated to some extent by the use of an ostensible merit selection.⁷⁷ The proper perspective, we acknowledge, is a comparative one: even if state trial judges have fewer shortcomings than asserted by the critics of parity, the quality of federal judges (however measured) is clearly higher. However, the evidence indicates that the disparity is *not* so great as to be able to discard parity out of hand.

In contrast to the technical competence argument, the "psychological set" thesis focuses on the receptivity of state judges to the directives of the Supreme Court. Neuborne suggests that a "series of psychological and attitudinal characteristics" make federal judges more likely to enforce federal institutional rights.⁷⁸ The psychological characteristics,

judges). The former, some contend, will be more attuned to recent developments in federal law than the latter, and will, in turn, serve as more valuable sources of information for judges. *Id.* at 1287-89.

76. Candidates for the federal bench are typically nominated by the senators from each state, who usually choose along party lines. *See, e.g.,* Glick, *Federal Judges in the United States: Party, Ideology, and Merit Nomination*, 12 LOY. L.A.L. REV. 767, 781 n.27 (1979); Sheran & Isaacman, *supra* note 72, at 11. The "merit selection" nominating commissions established by President Carter led, in fact, to a selection of more federal judges from the President's own party than had occurred under the five previous presidents. *See, e.g.,* Glick, *supra*, at 805-06. *See also* Goldman, *Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts*, 1974 ARIZ. ST. L.J. 211; Goldman, *Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts*, 18 W. POL. Q. 755 (1965). This procedure has led to the occasional appointment of a judge to the federal bench who would even embarrass the critics of parity. *See, e.g.,* Note, *On Trial: Judge Julius Hoffman*, 10 SANTA CLARA LAW. 385 (1970); Caldwell, *Harold Cox: Still Racist After All These Years*, Am. Law., July, 1979, at 1.

77. The most recent statistics indicate that for judges of supreme courts, one-half of the states hold elections, the governor appoints in 21 others, and the legislature appoints in the remaining four; for judges of states which have appellate courts, 17 states hold elections, with the governor appointing in 15 others; finally, for judges of trial courts, 33 states hold elections, in 19 states the governor appoints, and in the remaining three the legislature appoints. *See* Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 178 (1980); Sheran & Isaacman, *supra* note 72, at 41 n.217. *See generally* Berreby, *The Bench Meets the Ballot*, Nat'l L.J., Nov. 1, 1982, at 1, cols. 1-3.

In any event, studies of the characteristics of appointed and elected state judges indicate that there is a surprising lack of difference between them. *See, e.g.,* Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579 (1972); Flango & Ducat, *What Differences Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 30-34 (1979).

The significance of state election of judges is considered at greater length in notes 84-87 and accompanying text, *infra*.

78. *See* Neuborne, *supra* note 2, at 1124.

he says, draw on the elite tradition of the federal judiciary, as well as the enhanced bureaucratic receptivity of federal judges to the rulings of the Supreme Court. Similarly, the attitudinal characteristics of state judges make it more likely that they will share the socioeconomic values of the defenders of the status quo in constitutional cases, and be more likely to rule accordingly.

Again, we cannot deny the institutional élan of the federal judges or their increased familiarity with and receptivity to Supreme Court pronouncements. There is little evidence, however, that state judges have, deliberately or unknowingly, evaded the implementation of Supreme Court decisions. Indeed, the evidence indicates, to the surprise of researchers, that state supreme courts have, for the most part, uniformly enforced United States Supreme Court mandates.⁷⁹ This suggests that state judges have their own sense of the necessity to comply with Supreme Court directives.⁸⁰ Finally, the notion that judges

79. Two studies of the decisions of state supreme courts, for example, have found that they have "generally enforced the requirements" of *Miranda v. Arizona*, 384 U.S. 436 (1966). See Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. L. & CRIMINOLOGY 886, 911 (1981); Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda and the Use of Judicial Impact Analysis*, 27 W. POL. Q. 38 (1969). See also Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973); M. Porter & G. Tarr, *supra* note 63. On the civil side, Professor Franklin, in his survey of federal and state court decisions implementing the Supreme Court's libel decisions, found that *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny were enforced to such an extent in state courts that virtually no plaintiffs recovered. See Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795; Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455.

Another study found no significant differences between state and federal judges in their disposition of reapportionment cases. See Beiser, *A Comparative Analysis of State and Federal Judicial Behavior: The Reapportionment Cases*, 62 AM. POL. SCI. REV. 788 (1968). Finally, one recent study found that prisoners' rights cases were handled more sympathetically in federal appeals courts than in state supreme courts. See Haas, *The "New Federalism" and Prisoner's Rights: State Supreme Courts in Comparative Perspective*, 34 W. POL. Q. 552 (1981). However, the Haas study was not as broad as ours, and even he acknowledged that state courts have been as liberal as their federal counterparts on other criminal and civil rights issues. *Id.* at 569.

In arguing that "the impact of state hostility to Supreme Court mandates has been noted," Neuborne cited Beatty, *State Court Evasion of United States Supreme Court Mandates during the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260 (1972). Neuborne, *supra* note 2, at 1116 n.46. The Beatty study, in fact, found that in only 27% of cases remanded by the United States Supreme Court to state courts, did the party obtaining the remand eventually lose. See Beatty, *supra*, at 262. Beatty concluded that, "at a time when disunity, disobedience and defiance persist in many aspects of intergovernmental relations, it is refreshing to find that most state courts of last resort have an admirable record of compliance." *Id.* at 284.

80. Compliance by state and federal courts with Supreme Court mandates can be analyzed under three hypotheses or models. The hierarchical model suggests that lower courts

will invariably vote on the basis of their social backgrounds is vastly overstated; the relevant studies are virtually unanimous in concluding that there is a very weak correlation between background characteristics and judicial voting behavior.⁸¹ The upshot, again, is to call into doubt the "psychological set" indictment of parity.⁸²

The last argument Neuborne makes is that the lifetime tenure of federal judges provides a barrier against local political pressures influencing a decision. In contrast, the necessity of elections may force their state brethren to heed the wishes of the future electorate. Such majoritarian pressures can endanger the enforcement of institutional rights protecting minorities.⁸³

The superiority of a lifetime appointment in countering majoritarian pressures is rightly praised. It does not follow, however,

simply implement Supreme Court directives automatically. *See, e.g.*, Gruhl, *supra* note 79, at 887. The bureaucratic model argues that due to institutional restraints, such as inefficiency and recalcitrance, *see* Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959), or incomplete intercourt communication, *see* G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS (1977), lower courts implement directives inconsistently. Finally, the interaction model argues that due to the very few cases actually decided by the Supreme Court, lower courts are usually left to formulate policies in the vast interstices of case law. *See, e.g.*, Baum, *Lower Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 216 (1978); Gruhl, *supra* note 79, at 887. *See generally* S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 187-203 (1970); Gruhl, *Anticipatory Compliance with Supreme Court Rulings*, 14 POLITY 294 (1981). Most researchers feel that the latter two models provide the best explanations. *See, e.g.*, Gruhl, *supra* note 79, at 911. If so, the measure of "evasion" is likely to yield few insights on the validity of parity.

81. The initial studies exploring the relationship between background characteristics and voting behavior suggested that the correlation was a relatively high one. *See, e.g.*, Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961). Later studies, however, have uniformly concluded that the correlation is low and that background variables provide little explanatory power on a consistent basis over many cases. *See, e.g.*, Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969); Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-78*, 75 AM. POL. SCI. REV. 355, 355 (1981). *Cf.* Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551, 1562-63 (1966) (social background of judges is not only factor determining their voting behavior).

The correlation argument is, in any case, something of a double-edged sword, since federal judges can be analyzed in the same manner. The results have been the same whether federal or state judges have been studied. *See, e.g.*, Walker, *A Note Concerning Partisan Influence on Trial-Judge Decision Making*, 6 LAW & SOC'Y REV. 645 (1972).

82. *See, e.g.*, Fischer, *supra* note 71, at 191-92. With laudable candor, Neuborne admits "the inherent difficulty of proving the validity of these psychological factors," and that "in many cases . . . they may not operate." Neuborne, *supra* note 2, at 1127 n.79.

83. *See* Neuborne, *supra* note 2, at 1124-27.

that elections of state judges, to the extent they are still held,⁸⁴ will influence the subsequent decisions of elected judges. Recent scholarship indicates a weak linkage, on a consistent basis, between environmental variables, such as public opinion, and court functions.⁸⁵ More importantly, elections of state supreme court judges are characterized by low turnout and a lack of salient "issues" to be weighed by voters, as compared to other electoral contests.⁸⁶ While perhaps not complementary of the attentiveness of state electorates, this evidence suggests that most state judges are unlikely to feel in danger of being "punished" for decisions upholding constitutional rights.⁸⁷

84. See *supra* note 77.

85. See, e.g., Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making*, 14 LAW & SOC'Y REV. 343 (1980). Gibson argues that initial *role orientations* account for differences in decisionmaking, rather than the prospect of electoral sanctions. See *id.* at 360-66. There are, of course, several instances in which judges have seemed to change their behavior in response to expressions of public opinion. Recent action by the California Supreme Court upholding the validity of the "Victim's Bill of Rights," Proposition 8, (Prim. Elec. June 8, 1982) (adding CAL. CONST. art. I, § 28, repealing art. I, § 12, and amending both the Penal and Welfare & Institutions Codes) is a case in point. See also P. STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981). But not all of these instances are necessarily undesirable or unhealthy. For a study of California trial judges suggesting that public opinion exerts greater control on judicial behavior than suggested in this paragraph, see Kuklinski & Stanga, *Political Participation and Government Responsiveness: the Behavior of California Superior Courts*, 73 AM. POL. SCI. REV. 1090 (1979). Kuklinski and Stanga do not suggest, nor does their data support, a contention that state judges sacrifice constitutional principles. The point of their work is that the public can participate in ways other than voting.

Furthermore, historically, pressures are by no means limited to state judges. It should be remembered that U.S. Supreme Court Chief Justice Marshall masterfully avoided impeachment (and strengthened his Court) by sacrificing the patently legitimate appointment of the unfortunate Mr. Marbury. See M. COHEN, *THE FAITH OF A LIBERAL* 178-80 (1945).

86. See, e.g., P. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 36-177 (1980) (study of all elections for state supreme court justices in non-Southern states between 1948 and 1974). For studies reaching similar conclusions, see Jacob, *Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin*, 1966 WIS. L. REV. 801; Volcansek, *An Exploration of the Judicial Election Process*, 34 W. POL. Q. 572 (1981); Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731.

87. The argument that judges are unresponsive to outside constituencies can, again, apply to both state and federal judges. For example, several studies found high correlation between the sentencing patterns by federal judges of convicted draft resisters, and public opinion of the Vietnam War. See, e.g., Cook, *Public Opinion and Federal Judicial Policy*, 21 AM. J. POL. SCI. 567 (1977); Kritzer, *Federal Judges and Their Political Environments: The Influence of Public Opinion*, 23 AM. J. POL. SCI. 194 (1979).

More recently, several federal circuit courts of appeal have been accused of being unfairly partisan to certain litigants, leading to "forum-shopping" by lawyers. See McGarity, *Multi-Party Forum Shopping for Appellate Review of Administration Action*, 129 U. PA. L. REV. 302, 307-12 & n.42 (1980). See also *Federal Venue Statutes: Hearing on S. 739 and S. 1472 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. of the*

Based on this review, we conclude that the institutional factors Neuborne relied upon—only indirect indicators of parity in any case—do not survive close scrutiny. The social science evidence supporting the alleged institutional deficiencies of state court judges does not prove that state judiciaries are ignoring federal constitutional rights. Thus, as Neuborne and other scholars have admitted,⁸⁸ there is no *direct* evidence concerning the existence of parity. We now turn to our study, which attempts to set forth a preliminary presentation of data bearing on this issue.

B. Adjudication of First, Fourth, and Fourteenth Amendment Rights in Federal and State Courts: A Contemporary Survey

In order to establish direct evidence for the existence of parity, we undertook an empirical study of federal and state cases where federal constitutional issues were raised. The purpose of the study was to discover if there were any discernible differences in the way these issues were resolved in these two court systems. Similar treatment of issues would constitute evidence of the existence of parity, while significant and consistent differences in treatment would be support for the position that parity is a “myth.”⁸⁹

For reasons stated above, we believed that the differences between federal and state treatment of constitutional issues had been exaggerated by the critics of parity.⁹⁰ Therefore, we formulated the following operational definition: Parity exists if, holding all other factors constant, a litigant is, on the average, equally successful in both the federal and state court systems.

The reason for stating the problem in this fashion is to stress the fact that we are interested in *outcomes* of cases. The heart of parity or lack thereof is the treatment of the claim raised by the litigants. Considerations like judicial salaries, elegance of surroundings, and pedigrees of law clerks, all pale into insignificance when measured against

Judiciary, 96th Cong., 2d Sess. (1980); VENUE AT THE CROSSROADS (S. Schlesinger ed. 1982).

88. See, e.g., M. REDISH, *supra* note 1, at 3; Neuborne, *supra* note 2, at 1116 & n.46; Maroney & Braveman, *supra* note 26, at 509 n.278.

Apparently, the only two comparative studies prior to our own are those by Beiser and Haas. See *supra* note 79.

89. See Neuborne, *supra* note 2, at 1105. Theoretically, of course, there are other possible positions. One could explain differences in overall treatment of constitutional issues based on criteria other than those mentioned by Professor Neuborne. However, we believe there is strong intuitive force to the position we have taken.

90. See *supra* text Part II A.

results.⁹¹ If there is a systematic and consistent lack of sympathy for federal constitutional claims in state courts, then parity is a myth.

There are literally hundreds of factors that can affect the outcome of a court decision.⁹² There are also several causes suggested for the lack of parity between state and federal forums.⁹³ A research design must account for these factors and concentrate on the most important measure—the results of the claim. In social science research, it is seldom possible to use true experimental design methods where all factors can truly be held constant.⁹⁴ Thus, for example, no one can really know how the “same case” would be handled in both state and federal courts. This problem is overcome by sampling a number of cases from both federal and state systems in order to generalize about the relative performances of those systems.

By sampling a large enough number of cases and by carefully choosing the sample, a researcher is able to “average out” the substantive differences among the cases.⁹⁵ Thus, differences such as strength of claim, talent of counsel, and so forth, can be, in effect, held constant, and the effect of the forum in which the case is heard can then be determined.

Before proceeding with a discussion of the results of the sampling of cases, several points should be raised concerning the methodology used. The use of published opinions for empirical judicial research is neither new nor unique.⁹⁶ As with all data sources, these opinions have

91. *See, e.g.*, Neuborne, *supra* note 2, at 1122. The authors who cite these factors assume that they are causes of differential results; however, the causal link is not established.

92. *See infra* text Part III.

93. *See, e.g.*, Neuborne, *supra* note 2, at 1118-130.

94. For a discussion of the differences between experimental and nonexperimental design, see D. CAMPBELL & J. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1966).

95. The size of the sample is the major determinant of the confidence with which a researcher can generalize to the larger “universe.” *See generally* H. BLALOCK, *SOCIAL STATISTICS* 553-77 (rev. 2d ed. 1979). Basically, a larger number of cases helps to insure that the sample more closely resembles that body of cases known as the “universe” under study. With a small sample it takes only a few cases to distort the result. With a larger sample, the odds against distortion are much higher.

96. There is an enormous body of literature in both law and the social sciences that uses the published opinions of courts as its data base. One of the most sanguine views of the utility of opinions for such research was that of the legendary Karl Llewellyn, set forth in *THE COMMON LAW TRADITION: DECIDING APPEALS* 514 (1960). For a recent caveat on the unrestrained use of case opinion data, see Cartwright, *Conclusion: Disputes and Reported Cases*, 9 *LAW & SOC'Y REV.* 369 (1975). Traditionally, opinions of the U.S. Supreme Court have been the major source of data for empirical doctrine. An example is the pioneering work of C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1942* (1948), and the work of Glendon Schubert, *e.g.*, *THE JUDICIAL MIND: THE ATTRIBUTES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963* (1965).

strengths as well as weaknesses. One immediate question that arises about the present study is the choice of courts to be studied. We chose state appellate and supreme courts and federal district courts.⁹⁷ A legitimate question can be raised as to whether the data are comparable.⁹⁸ There are three reasons for choosing these courts to compare. By

A more recent and more relevant study in the massive inquiry into state supreme court decisionmaking funded by NSF Grant No. GS-384-13. This has led to several articles, including Kagan, Cartwright, Friedman & Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981) [hereinafter cited as *Citation by SSC*], and, by the same authors, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977) [hereinafter cited as *Business of SSC*].

97. Actually, our sample includes five different "types" of courts: state intermediate courts of appeals, state courts of last resort, a very few state trial courts, federal district courts, and three-judge panels. The state trial courts are not statistically significant in the sample and the instance of three-judge federal courts arises only in the early years of the sample, before such panels were limited by Congress in 1976. See 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4235 (1978). For a study using a sample from the *Federal Supplement*, see Walker, *supra* note 81.

98. Neuborne argues that the proper comparison is between trial-level courts in the two systems, *see supra* note 69, but his arguments are not convincing. First, he seemingly argues that delays will characterize the litigation process in state, but not federal, courts. This broad assumption is unwarranted. Until recently, there have been virtually no statistics kept on docket congestion and delay in state or federal courts. See, e.g., *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 518-19 n.23, 520 n.25 (1981). What little data has been kept at the trial court level indicates that the median interval from the filing of a complaint to disposition in civil cases, in both systems, typically averages almost two years, with delay slightly more pronounced in state courts. *Id.* at 519-20. For similar results in five states, see Grossman, Kritzer, Bumiller & McDougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86, 102-03 (1981). See also Trotter & Cooper, *State Trial Court Delay: Efforts at Reform*, 31 AM. U.L. REV. 213 (1982). Dispositions are usually quicker for criminal cases, due to plea bargaining and the application of federal and state speedy trial acts. See, e.g., Martin & Prescott, *The Magnitude and Sources of Delay in Ten State Appellate Courts*, 6 JUST. SYS. J. 305 (1981); Nardulli, *The Caseload Controversy and the Study of Criminal Courts*, 70 J. CRIM. L. & CRIMINOLOGY 89 (1979). In both areas, the disparity between federal and state court delay is hardly of a quantum nature so as to call into question the validity of parity. Second, while we admit that factual records will assume importance in criminal and other cases raising constitutional questions, *see, e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 & n.25 (1978); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *see also* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 136-48 (1980) (importance of factfinding in revealing unconstitutional motivations), the increasing use by state courts of the Federal Rules of Evidence and of Civil Procedure, *see supra* note 72, suggests that important facts will not go unreviewed by state appellate courts. In a related vein, a recent empirical study of discovery procedures found few disparities (relevant to our study) between procedures in state and federal trial courts. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 787, 804-35. Finally, it is doubtful, as Neuborne argues, that "majoritarian pressures," to the extent that they exist on a systemic basis at all, apply with equal vigor to state appellate judges as they apply to state trial judges. We have already indicated that many appellate judges are appointed, not elected, and that those who are elected rarely are forced to defend unpopular decisions before the electorate. *See supra* notes 77, 84-87 and accompanying text.

far the most important reason has to do with the nature of parity itself. Parity refers to the equal ability of the state and federal court *systems* to handle federal constitutional claims.⁹⁹ The dynamics of state court behavior are such that important federal constitutional claims will tend to be appealed at a higher-than-average rate, whereas in the federal system federal constitutional claims are likely to be fully litigated at an earlier stage. In any case the critics of parity concede that a relevant comparison between federal district courts and state appellate and supreme courts can be made.¹⁰⁰

A second reason is that a study of opinions of state trial courts is virtually impossible. Full written opinions (as opposed to short orders or entries) are a rarity, and even the full opinions are rarely reported. On the other hand, a significant portion of state appellate and supreme court and federal trial court opinions make their way into print.¹⁰¹ Finally, the use of state appellate court opinions recognizes the role of these courts as the supervisors of state court systems.¹⁰² In the area of

99. We mean this both as we have defined parity, and as parity is relevant to the Supreme Court cases that gave birth to this discussion. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465 (1976); *Younger v. Harris*, 401 U.S. 37 (1971).

The question before us is whether the constitutional claim can be fully and fairly litigated in the state system as well as in the federal system. Neither we, nor the Supreme Court Justices writing in these cases, have ever said there would be an exact parallel in the time frame (or court level) for each claim litigated. Furthermore, the model of parity posed by its critics neglects the actual decisionmaking processes of both federal and state courts. *See infra* text Part III.

100. *See* Neuborne, *supra* note 2, at 1116 n.45. For support of the notion that important federal issues will be appealed at a higher rate, see Rathjen, *Lawyers and the Appellate Choice: An Analysis of Factors Affecting the Decision to Appeal*, 6 AM. POL. Q. 387 (1978); Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567 (1981).

101. West Publishing Company reports all federal district court opinions sent to it, virtually in the order received, in the *Federal Supplement*. It also publishes significant state court opinions in its regional reporter series. There would be no uniform way of sampling state trial court decisions. For a discussion of the problem of unpublished opinions in state appellate courts, see Marvell & Kuykendall, *Appellate Courts—Facts and Figures*, 4 STATE CT. J. 9 (Spring 1980), and in federal district courts, see Vestal, *A Survey of Federal District Court Opinions: West Publishing Company Reports*, 20 SW. L.J. 63 (1966). The consensus of these and other authorities seems to be that "significant" opinions will be published. *See also* Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791 (1975). In any case, all studies consulted relied entirely on published opinions. For a recent study covering all *unpublished* opinions and orders in § 1983 actions in one federal district court, see Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 524-26 (1982). Our study provides a partial response to Eisenberg's suggestions that a similar survey be made of state courts. *Id.* at 524 & n.179.

102. *See, e.g.*, Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191 (1978). The author concludes that the state supreme court is the significant supervisor of state trial courts through its power to reverse. While her discussions and data

federal constitutional rights it is the appellate courts that must be relied on to make the major interpretation of the validity of claims, especially where the litigant has no initial choice of forum.¹⁰³

Federal constitutional claims can involve a host of different issues. For our sample we decided to focus on claims based on three particular constitutional areas: the First Amendment,¹⁰⁴ the Fourth Amendment,¹⁰⁵ and the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁶

First Amendment claims were chosen because they reflect concerns that are fundamental to the political system and to federalism. They encompass a wide variety of issues, both civil and criminal. We feel that of all the areas of constitutional law, they are most likely to expose hostility and parochialism on the part of one set of judges or another.¹⁰⁷ Moreover, it is most appropriate to this study that these claims be included, because two key cases in the parity issue—*Dombrowski v. Pfister*¹⁰⁸ and *Younger v. Harris*¹⁰⁹—both raised First Amendment claims.

refer to supreme courts, we think there is nothing preventing the analysis from applying to state appellate courts as well.

103. For the sake of analysis we may divide federal constitutional claims into two types: those in which a litigant has a choice of forum and those in which he does not. We have no firm figures on which is the more "popular" forum for cases when there is a choice. However, the conventional wisdom is that plaintiffs in federal constitutional cases, or at least their counsel, ought to, and do, prefer the federal court. *See, e.g.*, Neuborne, *supra* note 2, at 1115. It is to this conventional wisdom that we address this study.

104. U.S. CONST. amend. I.

105. U.S. CONST. amend. IV.

106. U.S. CONST. amend. XIV § 1, cl. 4.

Of course the application of Amendments I and IV to the states has come through a series of Supreme Court decisions interpreting the Due Process Clause of the Fourteenth Amendment, notably *Gitlow v. New York*, 268 U.S. 652 (1925), and *Mapp v. Ohio*, 367 U.S. 643 (1961). The equal protection requirement is applied to the federal government through the Due Process Clause of the Fifth Amendment, as in *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Rostker v. Goldberg*, 453 U.S. 57, 62 n.3 (1981).

107. Indeed, many of the landmark First Amendment cases involve social "pariahs" of one sort or another—members of what Mr. Justice Stone called "discrete and insular minorities." *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). These people, whether for religious or political reasons, are most in need of First Amendment protection. *See generally* *Brown v. Socialist Workers '74 Campaign Comm.*, 103 S. Ct. 416, 420 (1982); *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3423-25, 3433-34 (1982); M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* (1966); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576-77 (1978); Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978).

108. 380 U.S. 479 (1965).

109. 401 U.S. 37 (1971).

Fourth Amendment claims have many of the same features as First Amendment claims. They encompass a broad spectrum of issues that are salient in the public mind.¹¹⁰ They are therefore likely to be good bellwethers of possible public pressure on a judge. Furthermore, another key "parity case"—*Stone v. Powell*¹¹¹—raised a Fourth Amendment claim.

Equal protection claims strike to the heart of the parity question and indeed to the whole question of federalism. The Fourteenth Amendment was adopted for the express purpose of establishing federal supervision over state treatment of freed slaves.¹¹² It reflected belief on the part of Congress that there would not be parity of treatment between state governments and the federal government.¹¹³ Therefore, contemporary comparative treatment of equal protection claims by state and federal courts is a particularly apt measure of the existence or nonexistence of parity.

110. The Fourth Amendment, in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), was used to impose the "exclusionary rule" on the state governments. The rule requires the suppression of evidence obtained in violation of the Constitution. Perhaps no other decision in the criminal justice area has led to more popular dissatisfaction with the court. See, e.g., R. HARRIS, *THE FEAR OF CRIME* (1968); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343 (1980). Many academic commentators, of course, support the rule. A recent example is Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981). In *Illinois v. Gates*, 51 U.S.L.W. 4709 (1983), the Supreme Court recently declined to decide whether the exclusionary rule should be modified after ordering reargument on precisely that issue.

111. 428 U.S. 465 (1976).

112. See J. TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Tussman, & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). See also R. BERGER, *GOVERNMENT BY JUDICIARY THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982).

113. Whatever the historical posture of Congress on the issue of parity was, see *supra* notes 58-59, there is evidence that it has changed over the years. To the extent that congressional intent is relevant, it is not clear that Congress still continues to prefer a federal forum in many constitutional cases. For differing perspectives on this question, see *Patsy v. Florida Bd. of Regents*, 102 S. Ct. 2557 (1982); *Kremer v. Chemical Constr. Corp.*, 102 S. Ct. 1883 (1982); Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 410 n.59 (1982). This proposition may be tested very soon when Congress is asked to act on proposals by the Attorney General to alter the forum allocation formula significantly. See ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT 42 (1981). See also Bator, *supra* note 34, at 441. A recent piece of legislation designed to limit federal involvement in state criminal procedures is S. 2903, 97th Cong., 2d Sess. tit. III (1982). See also Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036 (1982).

Obviously, many important federal constitutional claims are not included. Noteworthy are the entire broad range of due process claims in both civil and criminal cases, and cases arising under the Sixth and Eighth Amendments. Therefore, this study draws its conclusion only as to the three stated areas. There is, however, no apparent reason why there should be a great difference in judicial performance in the excluded areas.

A sample size of at least one thousand total cases was originally decided upon.¹¹⁴ A time frame of approximately seven years was chosen to give a reasonably compact sample.¹¹⁵ In order to achieve a degree of consistency in reporting, both among the several state courts and between the federal and state courts, the West Reporting System was used exclusively.¹¹⁶ Four hundred thirty-eight federal district court cases were chosen from the *Federal Supplement*. Six hundred eight were chosen from the various regional state court reporters.¹¹⁷

For federal cases, odd-numbered volumes from 393 to 511 were chosen. Within each volume an average total of twelve cases in three targeted subject areas was chosen at random and coded by the authors. If a case raised multiple federal claims, only the first claim encountered was used. Although the number of cases of each type differed from volume to volume, on the average about half of the relevant reported cases in each volume were sampled. For state cases, the method was the same, except for the fact that a lower percentage of the reported cases raised relevant federal constitutional claims. Therefore, in most instances, the sampled cases constituted almost the entire population for the sampled volumes.

For the purposes of this study, thirteen variables were coded.¹¹⁸

114. A sample of this size can normally be relied on to give results accurate to within 3% for percentages near 50%. See H. BLALOCK, *supra* note 95. Error margins for smaller subsamples are somewhat larger, but statistical measures are used that account for sample size.

115. We are not measuring historical change, and therefore tried to minimize the effects of appointments, structural changes, legislative changes, and so forth. For a study that did just the opposite by looking at state supreme courts over a one hundred year period, see Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978) [hereinafter cited as *Evolution of SSC*].

116. Cases were chosen from the section in each reporter captioned "Statutes Construed." Each case was checked to see if it was relevant to the subject matter of the study. Some purely procedural cases that did not actually raise a constitutional issue were excluded, although they were listed in these sections.

117. The regional reporters are: *Atlantic Second*, *Northeast Second*, *Northwestern Second*, *Pacific Second*, *Southeastern Second*, *Southern Second*, and *Southwestern Second*.

118. The variables coded were: (1) case name, (2) citation, (3) year decided, (4) state, (5) court level (i.e., district, appellate, supreme), (6) state law (applicability of the 14th Amendment) or federal law, (7) issue (amendment involved, subject matter), (8) type (crimi-

The most important, of course, was the relevant outcome of the case, that is, whether the federal constitutional claim was upheld or denied. About 10% of the cases were double-coded. Several dozen were re-recorded when routine data checks pointed out inconsistencies or clerical errors. We believe that the 1,046 cases represent a statistically valid sample of the targeted cases for the years 1974 through 1980.¹¹⁹

The first step in the analysis of the entire sample is to establish a norm, or benchmark, for success in constitutional claims.¹²⁰ Table I shows the overall results of all cases, federal and state, which raise the aforementioned constitutional issues.

TABLE I
Results of All Cases

Claim Upheld	Claim Denied
36% (N=374)	64% (N=672)

The 36% figure becomes the standard in our work, against which we measure results of other subsamples (i.e., groups of cases that share some factor in common).

The next step is to look at federal and state cases separately—that is, at the two subsamples: constitutional claims in federal district courts and constitutional claims in state appellate and supreme courts. Table II shows the results of this step.

nal or civil), (9) outcome, (10) cases cited (number, by court level), (11) length of opinion, (12) reversal or affirmance, and (13) dissents. For a study using a virtually identical methodology to code state court decisions, see M. Porter & G. Tarr, *supra* note 63.

119. The character of the sample of cases was compared to that in other studies (notably *Business of SSC*, *supra* note 96), and found to be comparable as to regional differences, rates of reversal, length of opinion, and citation practices. The authors are presently preparing a more extensive evaluation of these factors for future presentation.

120. By “norm or benchmark” we mean simply a measure of what has taken place. This in no way implies that there is a certain proportion of federal constitutional claims that ought to be decided a certain way. There is even a temptation, which one must overcome, to assume that each claim upheld is a victory for the Constitution, while each one denied is a defeat. As Professor Bator has so eloquently pointed out, constitutional litigation is a process of balancing a variety of constitutional principles and ideals. See Bator, *supra* note 26, at 631-33. No matter what the outcome, if a claim is fully, fairly, and conscientiously litigated, we are all winners.

TABLE II

Results by Court System

	Upheld	Denied
Federal Court	41% (N=183)	59% (N=255)
State Court	32% (N=191)	68% (N=417)

Lambda = 0.000

In federal district court, 41% of all claims based on the federal Constitution were upheld while 59% were denied. In state appellate and supreme courts, 32% of the same claims were upheld, while 68% of the claims were denied.

These percentages lend themselves to several common sense interpretations. For example, one could say there is a nine percent greater chance of success in federal court over the same range of issues. Or, one could make the conjecture that if a litigant were to take the identical case to both a state and a federal court, nine times out of ten the decision would be the same. We believe that whatever common sense interpretation is chosen, there is support for the contention that there is no clear reluctance on the part of state courts to uphold a federal claim that would be upheld in federal district courts.¹²¹

But there are also several specific statistical measures that can be used to interpret the relationship between forum and decision and that can also help in analyzing other subsamples. One measure we can use to see whether the data of the whole sample or any subsample is statistically significant, is through the calculation of what is known as a *Z* score.¹²² In any array of data such as Table II, there is always the possibility that the proportion arrived at occurred simply by chance.

121. One question that arises is whether, from the point of view of the plaintiff's attorney, the 10% difference is, by itself, enough to encourage a preference for the federal forum. We believe not. The reason for this belief is rooted in the nature of the aggregate data. An attorney with no other information, who litigates over 1,000 cases over a seven year period might well like the 10% "edge" he seems to have in federal court. But the attorney *does* have other information about the facts of his cases and about his clients. He may also know of trends of particular courts in deciding the issues that his clients' cases will present. It is on this information that he must litigate, not on the aggregation of information from all other similar cases.

122. For an explanation of the procedure using *Z* scores involving proportions, see H. BLALOCK, *supra* note 95, at 197. For a study which uses this methodology, see Note, *supra* note 102, at 1198. Although the approach used therein is similar to ours, we have been unable to replicate some of its results.

We say that the data is significant if there is less than a five percent probability that such an array could be the result of pure chance.¹²³ The array in Table II is statistically significant because there is less than a five percent chance that it could have occurred randomly.¹²⁴

But statistical significance and relevance are not the same thing.¹²⁵ In order to make claims about the relevance of the data, one needs to know the strength of the relationship between outcome and forum. An appropriate statistical measure must be chosen to determine this relationship. The measure we have chosen is *Lambda*. It is based on the statistical method known as proportional reduction in error.¹²⁶ In plain language, this measure answers the following question: How helpful in predicting outcomes of cases is a knowledge of forum? If we can make no better prediction about outcome by relying exclusively on a knowledge of forum, we can say there is little relevance or importance to the data. Conversely, if we could always correctly predict outcomes simply from a knowledge of forum, there would be a "perfect" relationship and obviously much relevance to the data. When *Lambda* is computed for the data in Table II, it shows a very weak relationship between forum and outcome. Therefore, we believe it is correct to characterize the difference in outcomes as statistically significant (*i.e.*, not random), but not important.

Even though the overall percentages are generally supportive of parity, they by no means settle the issue. In the first place, parity does not mean exact numerical equality. Parity means that there is no *systematic* bias on the part of state courts to deny federal claims (such purported bias being based on environmental factors mentioned by critics of parity).¹²⁷ In order to test for such bias, we must break down the sample of cases and look at several categories in turn.

Table III sets out the relevant results for all cases when controlled for case type. Of the total sample, about half were criminal cases and half were civil cases.¹²⁸

123. The .05 level is a customary significance level in social science research. See H. BLALOCK, *supra* note 95, at 161.

124. The relevant *Z* score for this table is 3.62, which is significant at the .0002 level.

125. See H. BLALOCK, *supra* note 95, at 162 ("[S]tatistical significance does not necessarily imply striking differences or ones that are important to the social scientists.").

126. The most important works in this area are by Goodman and Kruskal. See, e.g., their *Measures of Association for Cross Classifications*, 49 AM. STATISTICAL ASS'N J. 732 (1954). For a general discussion of the concept see H. BLALOCK, *supra* note 95, at 307-11.

127. See *supra* notes 66-70 and accompanying text.

128. The *Z* score for civil cases is 1.48, which is significant at the .07 level. For criminal cases it is 6.02, which is significant at the .37 level.

TABLE III¹²⁹

Outcome Versus Forum by Case Type

	Civil Cases		Criminal Cases	
	Upheld	Denied	Upheld	Denied
Federal Court	44.6% (N=144)	55.4% (N=179)	33.9% (N=39)	66.1% (N=76)
State Court	33.2% (N=67)	66.8% (N=135)	30.5% (N=124)	69.5% (N=282)
	Z = 1.48		Z = .602	

This evidence is particularly useful because it goes directly to two points raised by Professor Neuborne—that is, the espoused differences in majoritarian electoral pressures on, and the psychological set of, federal vis-à-vis state judges.¹³⁰ Certainly a judge with one eye on the public opinion polls would be well aware of the tremendous attention that issues of crime and punishment garner with the voting public.¹³¹ Furthermore, accused or convicted criminals are an easy target for a judge who wants to “go into the tank” for the sake of public approval. It is a great tribute to the independence of the American state judiciary

129. The *Lambda* obtained is .102, which is not very strong at all. However, a strong caution is in order. *Lambda* was designed for use in 2 x 2 Tables. When controlling for a given level of another variable (e.g., civil or criminal), another factor is added and this changes the comparative value. For a true picture of the relationship, a more complicated statistical model is necessary, using multivariate techniques.

In order to test for interaction effects among other explanatory variables in the sample, we used the FUNCAT procedure of the Statistical Analysis System [“SAS”]. SAS is a computer procedure copyrighted by the SAS Institute, Cary, North Carolina. This procedure provides a logit (regression-like) equation. We used *outcome* as the response variable and *forum*, *amendment*, and *type* (i.e., criminal or civil case) as explanatory variables. The results of that analysis were as follows: (1) the response variable, *outcome*, is not influenced by any interactions of the three explanatory variables (either the three-factor interaction or any of the pairwise interactions); (2) the *outcome* variable is marginally ($p = .071$) affected by the *forum* variable; (3) the *outcome* variable is significantly ($p = .0001$) affected by the *amendment* variable (in particular, a significantly higher proportion of the 4th Amendment cases are denied than are 1st Amendment cases); and (4) the *type* variable has no significant effect on *outcome* ($p = .36$). For a more complete explanation of the statistical basis of FUNCAT, see Grizzle, Starmer & Koch, *Analysis of Categorized Data by Linear Models*, 25 BIOMETRICS 489 (1969).

130. See *supra* text at notes 67-68.

131. Survey data has consistently ranked crime as a very salient issue among the public. See Sheley & Ashkins, *Crime, Crime News, and Crime Views*, 45 PUB. OPIN. Q. 492 (1981). But cf. *supra* note 85 and accompanying text (suggesting a weak linkage between public opinion and court functions).

that such a parity exists between them and their allegedly more isolated brethren on the federal bench.

The psychological set argument fares no better in the face of these data. Allegedly, state judges are more hardened to constitutional claims because they deal with more examples of the impact of crime and criminals, yet our data show that they do not seem to be systematically acting on their psychological feelings by refusing to recognize constitutional claims. Perhaps the notion of psychological set is overblown, or perhaps judges who are trained to be impartial are able to overcome their personal feelings more easily than others not so trained and socialized.

In order to obtain a clearer picture of the variance between federal and state cases, Table IV sets out six categories of cases and the relevant results for each.¹³²

TABLE IV

Outcome Versus Forum for Various Subsamples

	Civil Cases		Criminal Cases	
	Upheld	Denied	Upheld	Denied
1st Amendment				
Federal Court	53.8% (N=92)	46.2% (N=79)	36.4% (N=4)	63.6% (N=7)
State Court	40.3% (N=31)	59.7% (N=46)	51.2% (N=22)	48.8% (N=21)
	Z = -1.649		Z = .395	
4th Amendment				
Federal Court	42.9% (N=9)	57.1% (N=12)	33.3% (N=31)	66.7% (N=62)
State Court	33.3% (N=1)	66.7% (N=2)	30.2% (N=92)	69.8% (N=213)
	Z = N/A, Low N		Z = .54	

132. Relevant Z scores are noted at the bottom of each table.

	Civil Cases		Criminal Cases	
	Upheld	Denied	Upheld	Denied
	14th Amendment (Equal Protection)			
Federal Court	32.8% (N=43)	67.2% (N=88)	36.4% (N=4)	63.6% (N=7)
State Court	28.7% (N=35)	71.3% (N=87)	17.2% (N=10)	82.8% (N=48)
	Z = -.521		Z = 1.30	

Apparently, there is no pattern to these results. In two categories—Fourteenth Amendment civil cases and Fourth Amendment criminal cases—there are no statistical differences between state and federal courts. In one category—equal protection criminal cases—there is a large percentage difference. In the Fourth Amendment civil category, there is a difference, but it is close to the average for all cases.¹³³ The proportion of claims upheld is relatively high for both state and federal courts in the First Amendment civil category. And in the First Amendment criminal category, the state average for upholding claims is actually somewhat *higher* than that of federal courts. We believe that these data show no clear, across-the-board hostility on the part of state courts to claims of federal constitutional rights, and that they therefore support the premise enunciated in Supreme Court opinions of the existence of relative parity between the state and federal systems.

Since forum choice alone is clearly not a powerful explanation for the statistical differences evidenced here, it is incumbent upon us to speculate as to the reason for their existence. We will do this by positing an alternative model to support the existence of parity—one which is based not exclusively on environmental components of alternative forums, but rather on factors of informational flow and organizational relationship. There is no need, for the purposes of this study, to explain in detail the reasons for each of the differences. In order to add to the “credibility” of the data, however, we can discuss each of the categories and propose likely (but not “proven”)¹³⁴ explanations.

Variances among First Amendment civil cases are the most difficult to interpret. Here both federal and state courts are likely to uphold a higher percentage of claims than the overall average would indicate. But the gap between federal and state courts is increased from 9.5% to

133. See *supra* Table II.

134. See *supra* note 129.

13.5%. Notice, however, that the proportional rise in claims upheld is very close indeed—27.6% to 31.0%. This indicates that there is some “tracking” or concordance between the general treatment of First Amendment civil cases by the courts.

First Amendment criminal cases pose a much different set of questions. In these cases there is a tendency for state courts to uphold claims at a higher rate—51.2% versus 36.46%. Although obviously puzzling and damaging to the arguments of those who suspect a hostility on the part of state courts to federal constitutional claims, a quite plausible explanation is available. We may be witnessing an entirely separate, yet important, parity problem—the parity between state and local legislative bodies and the Congress of the United States.¹³⁵ An overwhelming proportion of state cases involved state and local criminal laws. Federal legislative behavior—due to better staff work, the resources of the Justice Department, the centrality of Washington, D.C., and the lesser number of federal criminal laws—may be more responsive to constitutional limitations, raising the possibility that states are more likely to pass laws which run afoul of the First Amendment. This possibility would lead to a higher percentage of “worthy” claims in state courts.

Although there are some interesting Fourth Amendment civil cases in the data set, the sample sizes are too small to make any reasonable assumptions. Fourth Amendment criminal cases are, we believe, not only the strongest evidence for the existence of parity, but also invite the most plausible explanation based on our preferred model of constitutional decisionmaking. Although these cases would seem to be the most likely to fit the pattern assumed by the skeptics of parity,¹³⁶ in point of fact they present the closest parallel performance levels among the categories. At work in these cases is an informal flow of information between federal and state courts—mostly on the law of search and seizure, but on other issues as well—which keeps both sets of courts on very close parallel tracks. Judges, lawyers, prosecutors, and policemen are all close to the “state of the art” in this area because of the obvious and clearly defined penalties for failure to be so—that is, imposition of the exclusionary rule.¹³⁷

The final two categories are civil and criminal equal protection cases. In equal protection claims raised in criminal cases there is a very

135. See generally D. HERZBERG & A. ROSENTHAL, *STRENGTHENING THE STATES: ESSAYS ON LEGISLATIVE REFORM* (1972).

136. See, e.g., *Stone v. Powell*, 428 U.S. 465, 502 (1976) (Brennan, J., dissenting).

137. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961). See also *supra* note 110.

large difference between federal and state performance (over two-to-one "in favor" of federal courts). We believe this shows the empirical truth of an old chestnut: that the Equal Protection Clause, like patriotism, is the last refuge of scoundrels.¹³⁸

In equal protection civil claims, there is clear statistical parity between state and federal courts. A total of 32.8% of the claims were upheld in federal court while 28.7% were upheld in state court. This correlation is supportive of parity because this type of case is arguably central to the entire question of federalism. One of the consistent historical arguments offered by the skeptics of parity is the alleged hostility of state courts to attempts by the federal government to enforce the civil rights of minority groups, women, and others protected from discriminatory state action by the federal Constitution. Yet in these data, not only is there no discernible pattern of hostility, but there is perhaps the closest statistical similarity of treatment among the categories examined.

In summary, we see that comparing the outcome of federal constitutional claims presents a complex model of judicial behavior, not the uniform hostility that the doubters of parity would have us believe. But the statistical evidence for the existence of parity is not the end of the discussion; it is merely the beginning. Now that we can say that there is scant evidence of a systematic hostility to federal constitutional rights in state courts, we must ask: What are the consequences of this conclusion?

III. Information Flow and Appellate Review: The Significance of Parity

A. Information Flow and Litigant Influence: Impact on the Performance of State Judges

In discussing the issue of parity, there is a tendency to concentrate on the characteristics of individual judges.¹³⁹ Our own study uses the products of these judges—written opinions—as its major data base.

138. Samuel Johnson gets credit for the quote on patriotism. See J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, L.L.D. 115 (MacMillan, 1908). Holmes applied it to equal protection in a civil case. In denying an equal protection claim based on a state's practice of sterilizing feeble-minded inmates of an asylum while not similarly treating nonconfined persons, Holmes said: "It is the usual last resort of constitutional arguments to point out shortcomings of this sort." *Buck v. Bell*, 274 U.S. 200, 208 (1927).

139. All of the major criticisms by Professor Neuborne go to this issue. See, e.g., *supra* notes 66-68 and accompanying text. He includes training, psychological set, environment, and electoral pressures in his causal model of state judicial inferiority. See Neuborne, *supra* note 2, at 1121-28.

But this concentration must be tempered by a recognition of the context in which judicial decisions are made.

The judge is not a totally free actor, and the judicial system is not self-executing. Before a judge can make a decision, a litigant must file suit. Judges are bound by oath to follow the Constitution and by training and temperament to follow precedent. Not every case presents the same sort of problems to the court. In the case of constitutional issues, the range of situations presented to a judge is truly remarkable. In some cases judges are merely asked to follow clear precedents, often those created by the United States Supreme Court. In others they are asked to chart new ground and begin a precedent-creating process—literally to conceive of new constitutional rights.¹⁴⁰ The skills of attorneys, particularly their relative abilities to deliver information, can profoundly affect the outcome of the case, no matter what the judge is being asked to do. Furthermore, our data have shown that the outcome of cases involving federal constitutional issues does not depend mainly on forum, and that the automatic preference for federal courts evoked by the critics of parity, is short-sighted at best. Therefore, it is incumbent upon us to consider other factors involved in the outcome.

Arguing that other actors besides the judge affect the decision-making process in a court system, particularly at the trial level, is perhaps to state the obvious.¹⁴¹ However, virtually all of the literature on parity appears to take the obvious for granted, and assumes that the validity of parity rises (or falls) on the asserted quality of the individual judge. Even conceding that the lower “quality” of state trial judges will undermine parity (a concession we are unwilling to make),¹⁴² litigants’

140. See, e.g., *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (state court established right of equalization of school financing). See also cases cited in Neuborne, *supra* note 52, at 725-26 n.2.

141. A number of studies have conceptualized courts as “organizations,” particularly in the criminal context, claiming the relationships between the judge, attorneys, and other court personnel to be as important as the legal issue to be decided by the judge. See generally M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); M. HEUMAN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS* (1978); P. NARDULLI, *THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE* (1978); J. EISENSTEIN & H. JACOB, *FELONY JUSTICE* (1977); Mohr, *Organizations, Decisions, and Courts*, 10 LAW & SOC’Y REV. 621 (1976). The organization model, of which information flow is but one aspect, has perhaps less relevance in the civil context.

The same analysis can, of course, be applied to federal courts. See Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 67-68 (1981); Heydebrand, *The Context of Public Bureaucracies: An Organizational Analysis of Federal District Courts*, 11 LAW & SOC’Y REV. 759 (1977).

142. See *supra* Part IIA.

attorneys can provide a court with informational resources to overcome institutional deficiencies.¹⁴³ A judge's lack of familiarity with federal law could be corrected to some extent, for example, by the briefs filed and the oral arguments delivered by attorneys. In short (to use terminology derived from systems theory),¹⁴⁴ the *input* of information can be influenced by the litigants, while the conversion of the data may depend almost entirely on the judge. The input function can be particularly significant in making a judge aware of "social" or "legislative" facts,¹⁴⁵ which at times assume importance in constitutional decisions requiring the balancing of individual rights and state interests.¹⁴⁶

An adequate flow of important information is arguably helpful to any trial judge. But the existence of parity, as we have defined it, does not solve all problems within our judicial system. Information flow itself may be skewed. One side may be in a better position to deliver its version of the facts and law to a judge. Frequent litigants, or "repeat players," have advantages in this regard over the infrequent litigant, or "one shotter."¹⁴⁷ Likewise, the organized bar, particularly in large cit-

143. See AMERICAN TRIAL JUDGES, *supra* note 72, at ch. IV.

The studies suggesting the importance of information flow to judges were developed in connection with appellate courts, but we see no reason not to apply the model to trial judges as well. See T. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM (1978); Lamb, *Judicial Policy-Making and Information Flow to the Supreme Court*, 29 VAND. L. REV. 45 (1976); Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

144. The systems theory in political science, advanced by David Easton and other scholars, postulates that the actors in any political system are affected by a great number of "inputs" in their decisionmaking, or "conversion" function. The "output" of this function will affect the input in a feedback process. See D. EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS (1965). These concepts have been applied to the study of federal and state courts. See H. GLICK & K. VINES, STATE COURT SYSTEMS ch. I (1973); S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM (2d ed. 1976).

145. "Legislative" facts concerning broad issues of public policy, are to be distinguished from the usual "adjudicative" facts, which concern only the immediate parties in litigation before a court. See C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, 766-69 (2d ed. 1972).

146. See T. MARVELL, *supra* note 143, chs. 10-13; Daynard, *The Use of Social Policy in Judicial Decision-Making*, 56 CORNELL L. REV. 919 (1971).

147. The concepts are borrowed from Marc Galanter. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter argues that repeat players are not only more likely to understand the "rules" of litigation, but have the resources and incentive to shape the rules in their favor, and hence are more likely to determine outcomes in cases. *Id.* at 98-103, 125. See also Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823 (1977); Grossman, Kritzer, Bumiller, Sarat, McDougal & Miller, *Dimensions of Institutional Participation: Who Uses the Courts, and How?*, 44 J. POL. 86 (1982).

ies, tends to be split into professional hemispheres, with some attorneys practicing largely in federal courts and others confining their work to state courts.¹⁴⁸ The former undoubtedly would be more familiar with federal law than the latter. What does it benefit a criminal defendant, forced to press his constitutional claim in state court, to know that parity exists, if all the information is "flowing" across the street in federal court?

But if attorneys are willing to pursue federal cases in state courts, the skewed system can be rectified. Cases presenting important federal issues, which the critics of parity are particularly fearful of forcing into state court, can still be litigated by those interest groups that pursue the same cases in federal court.¹⁴⁹ To prevent state judges from hearing federal cases due to perceived institutional differences, it has been said, creates a self-fulfilling prophecy: "[I]f state courts are widely scorned, important matters are habitually removed from their jurisdiction and incentives to exert political or social pressures to maintain or improve their quality are removed from prospective litigants."¹⁵⁰ Of course, to the extent that one adopts the assumption that a substantial number of state courts are not equal to the task of adjudicating, or are openly hostile to, federally protected rights, the concern with this abandonment of state court systems diminishes.¹⁵¹ But since we believe that our

148. See J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR ch. II (1983); Galanter, *supra* note 147, at 114-19.

149. The use of "managed" litigation by interest groups was first noted by David Truman, D. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION ch. XV (1951), and Clement Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS 20 (1958). See generally C. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900 (1972). See also Brown, Book Review, 24 EMORY L.J. 1937 (1975). While some argue that most cases brought to the Supreme Court are the products of interest group activity, see, e.g., H. SPAETH, AN INTRODUCTION TO SUPREME COURT DECISION-MAKING 26 (rev. ed. 1972); C. VOSE, *supra*, at 332, this is undoubtedly an overgeneralization. See Hakman, *Lobbying the Supreme Court—An Appraisal of "Political Science Folklore,"* 35 FORDHAM L. REV. 15 (1966). Nevertheless, the importance of interest groups in bringing test cases concerning federal constitutional rights remains in a large number of cases. See O'Conner & Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 LAW & SOC'Y REV. 311 (1982); K. O'Conner & L. Epstein, *The Rise of Conservative Interest Group Litigation* (paper delivered at the Annual Meeting of the Midwest Pol. Sci. Ass'n, Milwaukee, Wis., April, 1982).

In addition, interest groups often file amicus curiae briefs in courts, further augmenting the information available to judges. See Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

150. *Developments, supra* note 18, at 1284 (footnote omitted). See also *Engle v. Isaac*, 456 U.S. 107, 128-29 (1982); *Rose v. Lundy*, 455 U.S. 509, 519 (1982); Bator, *supra* note 26, at 625; Neuborne, *supra* note 2, at 1129.

151. See, e.g., Redish, *supra* note 26, at 482-84.

data demonstrate no such inequality or hostility, we are very concerned with the self-fulfilling prophecy argument.

In summary, the fact that state courts may have been neglected in the past in favor of federal forums does not necessarily chart the course for the future. The Supreme Court seems ready to reverse this trend,¹⁵² and this will certainly have serious implications for the future of state judicial systems.

B. State Appellate Courts: Curing the Limitations of Trial Courts

As our empirical study indicates, we shifted the focus of attention away from state trial courts exclusively, to the entire state judiciary, including both intermediate appellate and supreme courts. Whatever the limitations of state trial courts (which, we have attempted at great length to suggest, are not extreme), every case raising a federal issue in a trial court can be appealed to a higher court and, in theory, to the United States Supreme Court. Hence, the issue of parity should be examined from the perspective of comparative court systems and not from that of comparative trial judges.

The reviewing functions of state appellate and supreme courts help to guarantee the continued validity of parity.¹⁵³ For state trial judges, the prospect of review and the potential for reversal by the appellate court system, are incentives to respect federal constitutional rights.¹⁵⁴ State appellate courts themselves are subject to review by state supreme courts and by the United States Supreme Court. Any systemic hostility to the enforcement of federal rights is unlikely to persist under the threat of review by higher courts.

The state and federal appellate review system alone, as the Supreme Court has suggested, can help to insure the continual existence of parity.¹⁵⁵ And, the trust placed in this system is further reinforced by the latest data on state appellate courts. Some thirty-two

152. See *supra* Part IB. For a recent example, see *Rose v. Lundy*, 455 U.S. 509 (1982).

153. See *supra* note 102.

154. See Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271-75 (1976); Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629 (1980); Note, *supra* note 102, at 1195. Professor Landes and Judge Posner argue that a judge will follow precedent, including cases enforcing federal constitutional rights, due to the threat of appellate review and to the fact that other judges would disregard *his* decisions if precedents were ignored. See Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). The Landes and Posner model, we admit, is premised, to some extent, on a legal climate where cases are many and precedents are clear. In fact, the opposite may be true for many constitutional cases. See, e.g., Neuborne, *supra* note 2, at 1123.

155. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976); Bator, *supra* note 26, at 626-27.

states now have intermediate appellate courts,¹⁵⁶ and, as we have already suggested, such courts are considered to have a benign effect on state appellate review in general. This leads to a lower overall caseload, with the consideration of more constitutional and "public law" cases by state supreme courts.¹⁵⁷ Such structural changes are said to encourage "activism" by state supreme courts, and, we think, lead to a heightened sensitivity to federal constitutional rights.¹⁵⁸ Furthermore, the model of information flow outlined above has been applied to a study of decisions by state supreme courts.¹⁵⁹ The studies confirm, at least in part, the validity of these assumptions, suggesting that state courts are willing to go beyond the confines of the adversary system in uncovering and relying upon "social and empirical information."¹⁶⁰ This again, supports the ability of the state supreme courts adequately to resolve complex constitutional questions.

The empirical data collected to date, including our own study, bear out the validity of the reviewing functions of state courts. We have already pointed out that past studies have shown little hostility (if any) to the enforcement of federal rights by state supreme courts.¹⁶¹ Other studies have pointed out that state supreme courts have been willing to overturn criminal convictions or declare statutes unconstitutional at increasing rates.¹⁶² Our study indicates that, in the past decade, state appellate courts as a whole have been upholding federal constitutional rights at only slightly lower rates than federal district courts. In short, the available empirical evidence confirms the sensitivity of state appellate courts to the enforcement of federal rights. Finally, the possibility of an ultimate review and reversal by the United

156. See Marvell & Kuykendall, *supra* note 101; Project, *The Effect of Court Structure on State Supreme Court Opinions: A Re-examination*, 33 STAN. L. REV. 951, 952 n.2 (1981).

157. See Atkins & Glick, *Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort*, 20 AM. J. POL. SCI. 97 (1976); *Evolution of SSC*, *supra* note 115, at 999-1000. See also *Citation by SSC*, *supra* note 96.

158. *Evolution of SSC*, *supra* note 115, at 990-1000; *Business of SSC*, *supra* note 96, at 154; Project, *supra* note 156. These sources suggest that "activism" can be conceptualized through a higher rate of upholding constitutional rights, as well as through more frequent reversals, more frequent dissents, and longer opinions with more citations.

159. See T. MARVELL, *supra* note 143 (study from 1971 to 1975 of 112 written decisions of six state supreme courts). Interestingly, Marvell concurrently studied 30 opinions from the United States Circuit Court of Appeals for the Sixth Circuit, and found few differences in the manner in which information was presented to federal court, or in the citation practices of federal court. *Id.* at 134-35.

160. Marvell found that nearly one-half of the state court decisions cited "social facts," *id.* at 153, with most of the facts supplied by the court's own search, *id.* at chs. IX-XIII. See also *Citation by SSC*, *supra* note 96.

161. See *supra* studies cited in notes 62 & 79.

162. See, e.g., *Evolution of SSC*, *supra* note 115, at 994-98.

States Supreme Court stands as a guarantee that state court judgments consistently hostile to existing federal rights will not be ignored.¹⁶³

Conclusion

Spurred by a revival of interest over determining the proper rules for allocating the disposition of federal constitutional questions between federal and state forums, the debate over parity continues apace. However, any consideration of empirical evidence has been noticeably absent from this debate, with the exception of the voice of Professor Neuborne. We examined the relevant empirical evidence from two perspectives. First, we reviewed the institutional differences between state and federal trial courts, and concluded that those disparities are not extreme. Second, we outlined our own study comparing the adjudication of federal rights in state appellate courts and federal trial courts. Based on our study, we concluded that there is simply no widespread disregard for the vindication of federal rights in state appellate courts. This conclusion considerably undermines the assumptions of the skeptics of parity.

To defend, at least to a qualified extent, the existence of parity is not inconsistent with contemporary notions of federalism. Recent judicial decisions¹⁶⁴ and scholarly commentaries¹⁶⁵ indicate that the viability of federalism remains a topic of legitimate concern in the legal

163. *See supra* notes 154-55 and accompanying text. The argument that ultimate review of state court decisions by the United States Supreme Court is not a viable alternative rests on grounds similar to those rejecting the comparison between state appellate courts and federal trial courts. *See supra* note 69. For example, Professor Sager recently argued that such a role by the Supreme Court is impossible to fulfill, since there is no "mechanical link" between the Court and state judiciaries, and because state courts will control the factfinding process, the timing of litigation, and the availability of interim injunctive relief. *See Sager, supra* note 46, at 73-74. *See also* Redish, *supra* note 47, at 153-54. We do not find the first three factors persuasive, for reasons developed at some length in this paper. As for the final factor, Sager cites no evidence indicating that state courts, as a rule, will be unable to grant litigants appropriate injunctive remedies. In any event, this factor is mitigated by Neuborne's suggestion that federal "collateral rules," including those concerning remedies, can and should apply in § 1983 actions litigated in state courts. *See Neuborne, supra* note 52, at 787.

164. *See, e.g.*, *National League of Cities v. Usery*, 426 U.S. 833 (1976) (interpreting 10th Amendment to the Constitution).

165. For studies generally sympathetic to the goals of federalism, see Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Nagle, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81; Guida & Solimine, *Congressional Power and the Federal System: A Constitutional Analysis of the Proposed Energy Mobilization Board*, 50 U. CIN. L. REV. 1 (1981). *See generally* Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1980).

community. Even the harshest critics of those who claim parity exists do not call for a complete abandonment of state participation in the determination of federal cases. Ultimately, the Supreme Court seeks a balance between state and federal interests,¹⁶⁶ and accommodation of both interests in the federal and state court systems.

The federal government has an interest in seeing that the Constitution is followed in state courts. The states have an interest in seeing that their judicial procedures are taken seriously by all citizens and by the federal courts. Our study of the empirical bases for parity indicates that the Supreme Court decisions based on a premise of parity are not a threat to federal constitutional rights. They are, however, a challenge to maintain and enhance the quality of state judicial systems, without which our federal system cannot operate.

166. *See, e.g.*, M. REDISH, *supra* note 1, at 4.

