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THE FUTURE OF PARITY

MICHAEL E. SOLIMINE*

INTRODUCTION

In the dual enforcement of constitutional norms in the United States, state governmental institutions, and particularly state courts, are entrusted with adjudicating federal constitutional and statutory rights. That dual regime, in turn, gives rise to the issue of “parity,” the concept that state judges are presumed at some level to be as “willing and capable of giving claims” of federal rights a fair hearing as would federal judges.¹ I will address the future of parity by first considering its past.

To do that, I will reexamine an article by the late Paul M. Bator, presented at a symposium in January of 1981 at William and Mary School of Law, and published in its Law Review.² Bator was a prominent law professor at Harvard and the University of Chicago,³

* Donald P. Klekamp Professor of Law, University of Cincinnati College of Law. An earlier version of this Article was presented at the Conference on Dual Enforcement of Constitutional Norms, sponsored by the Institute of Bill of Rights Law at William and Mary School of Law on November 14, 2003. Thanks to Barry Friedman, Martin Redish, and Jim Walker for their helpful comments on an earlier draft. Any errors that remain are mine.

1. MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 59 (1999); see also *id.* at 58 (distinguishing between “weak parity,” described in the text, and “strong parity,” which assumes that state and federal courts are fungible).

2. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981). The symposium issue had additional contributions by distinguished federal courts scholars Martha Field, Burt Neuborne, and the late Robert Cover, and by several judges, including then Arizona Court of Appeals Judge Sandra D. O'Connor. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981); Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

3. Bator passed away in 1989. For a brief summary of his professional career, see

best known for being a co-author of the influential federal courts case book, *Hart & Wechsler's the Federal Courts and the Federal System*.⁴ As we shall see, Bator gave, in my view, extremely thoughtful and prescient consideration to a host of issues raised by parity, and to other issues subsumed by the present conference.⁵ Before turning to some of those issues in detail, I will briefly summarize his article.

Bator began by considering first principles. Why, he asked, "do the state courts have a role" at all in adjudicating federal constitutional rights?⁶ At first blush, it might seem that federal courts should be the primary (or perhaps exclusive) fora for the litigation of federal rights, whereas state courts should perform a similar role

Charles Fried, *Paul Bator*, 56 U. CHI. L. REV. 419 (1989); see also SOLIMINE & WALKER, *supra* note 1, at 120-21 n.57 (giving other examples of the influence of Bator's scholarship on federal courts jurisprudence). One of Professor Bator's articles even found its way into a dissent in the storied *Bush v. Gore* litigation. See *Bush v. Gore*, 531 U.S. 98, 136-37 (2000) (Ginsburg, J., dissenting) (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)); see also *id.* at 137 (citing O'Connor, *supra* note 2).

4. Bator was a co-author of the second and third editions of the book. See PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988); PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973).

5. Thoughtful observers on various sides of the parity discussion have recognized the probity of Bator's article. See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1241 (2004) (referring to the article as "justly renowned").

6. Bator, *supra* note 2, at 606. Bator's article, like this one, was concerned mainly with the adjudication of federal constitutional rights in state courts, in both civil (e.g., cases brought under federal causes of action, such as 42 U.S.C. § 1983) and criminal (e.g., issues typically raised by defendants) litigation. There is little direct discussion of state court litigation raising federal statutory rights (e.g., under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (2000)). The latter type of litigation raises various issues regarding parity that considerably overlap with constitutional litigation. See SOLIMINE & WALKER, *supra* note 1, at 63-85. And, of course, a particular state court case can raise both constitutional and statutory issues under federal law. Nonetheless, the present Article focuses mainly on the litigation of constitutional issues in state and federal courts. See also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 238 (1988) ("[T]he parity debate in the cases and scholarly literature has centered on constitutional cases."). One empirical study of federal issues litigated in seven state supreme courts in 1983 found that over ninety percent consisted of federal constitutional, rather than statutory, issues. Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 CONST. COMMENT. 347, 358-59 (1986). Litigant behavior in this regard would benefit from further empirical study.

for state law.⁷ The answer is that “an enormous tradition of federalistic rhetoric,” from the framing of the Constitution to present-day Supreme Court doctrine, supports the “legitimacy and desirability” of state courts having a significant role in explicating federal constitutional norms.⁸ To be sure, as Bator immediately acknowledged, “there is another rhetorical tradition, running directly to the contrary,”⁹ which would sharply limit or even eliminate that role. Bator further conceded that the “conventional arguments for federalism,”—“the benefits of dispersing powers and of having multiple laboratories of social experimentation”—seem, “at first glance, [of] doubtful” applicability to “the proper role of state judges in deciding issues of *federal law*.”¹⁰

In sorting out these problems, Bator first turned to the institutional arrangements that, in theory or in practice, would route some or all federal issues from state to federal courts. These avenues would include removing cases from state to federal court; automatically permitting collateral relitigation of state court resolution of issues in federal court (e.g., through habeas corpus); or permitting a state court defendant (or prospective defendant) to seek anticipatory relief of the federal issue in federal court.¹¹ Each of these devices is permitted, to varying degrees, under current law. Their current use, however, is severely circumscribed, and for good reason, according to Bator. The automatic, or even near-automatic, removal of all civil and criminal proceedings in state courts that raise federal issues would be “obviously unacceptable,” because it would add a large number of cases to the federal docket and might hinder cases from being resolved on other grounds.¹² Likewise, automatic collateral relitigation would exact “severe costs,” by both adding many cases to federal dockets and undermining “the deterrent and rehabilitative functions of the criminal law” through

7. See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 2-3 (2d ed. 1990).

8. Bator, *supra* note 2, at 606.

9. *Id.* at 607. Richard Fallon has labeled these the Federalist and Nationalist positions, respectively. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

10. Bator, *supra* note 2, at 608.

11. *Id.* at 610-21.

12. *Id.* at 611.

the denial of finality to criminal convictions.¹³ Finally, the anticipatory relief model, even one that ostensibly carves out only the federal issue for federal court resolution, ultimately is "the functional equivalent of removal," and thus shares the infirmities of removal.¹⁴

None of these arguments demonstrate, Bator said, "that we should never allow" these three options.¹⁵ Instead, all he

tried to show is that there are sufficiently weighty and serious doubts and disadvantages associated with these devices that it is extremely unlikely that anything like automatic or unlimited access to them will, in the foreseeable future, be permitted. Once we see the context, it is clear that claims favoring a federal forum will not and should not exact an unconditional surrender. The federalistic position cannot simply be routed.¹⁶

Neither the federal nor state courts should have a "monopoly" on the "task of defining and enforcing federal constitutional principles."¹⁷ The question will always be where to draw the line, "but line-drawing is the correct enterprise."¹⁸

In considering where to draw those lines, Bator considered a variety of issues regarding parity,¹⁹ to which I will turn in Part I. He concluded by emphasizing that he was not disparaging "the historic contribution which the federal courts have made to the task of transforming constitutional ideals into reality," and he conceded that "there may be periods when a highly interventionist position [by federal courts supervising state courts] is necessary and justified."²⁰ Yet, none of this detracts, he said, from his principle point that "state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles."²¹

13. *Id.* at 614.

14. *Id.* at 619.

15. *Id.* at 621.

16. *Id.*

17. *Id.* at 622.

18. *Id.*

19. *See id.* at 623-35.

20. *Id.* at 635.

21. *Id.* at 637.

In the balance of this Article, I consider how Professor Bator's analysis has stood up for over two decades, and what it tells us about the continued study of parity. In Part I, I consider functionalist critiques of parity, the work of law professors and political scientists who, since Bator's article, have empirically studied parity, and the strengths and weaknesses of that literature. Part II of the Article focuses on the prospect of disuniformity in the application of federal constitutional rights by the large number of state courts, and problems associated with the ability of the U.S. Supreme Court and the lower federal courts to monitor that application through the certiorari and habeas corpus process, respectively. Finally, Part III addresses how a variety of prospective changes to state court institutions affect parity. This includes the convergence of civil and criminal procedure in federal and state courts, and possible reforms of judicial selection and election processes in state courts.²²

I. EMPIRICAL STUDIES OF PARITY

As has been frequently remarked, parity has both a constitutional and empirical dimension, which can be regarded as "conceptually distinct."²³ The former concerns, among other things, how the framing and text of Article III of the Constitution, and jurisdictional statutes passed by Congress, does or should impact jurisprudential doctrine that variously routes cases to federal or state courts. The latter "asks whether state courts—in fact and on average—are as

22. As with Professor Bator's article, an exhaustive survey of various other issues of potential relevance to the parity issue is beyond the scope of the present Article. For example, Bator makes only passing mention of the then-nascent growth of litigation under state constitutional provisions, often seeking to expand personal rights beyond that found by federal courts under federal constitutional provisions. See *id.* at 605 n.1. For further discussion of this phenomenon, focusing particularly on the tension between simultaneously criticizing the ability of state judges to fairly enforce federal constitutional rights while extolling state judges' abilities to formulate rights-protecting state constitutional law, see SOLIMINE & WALKER, *supra* note 1, at 91-93. See also William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 622 (1999) (noting "an inherent tension" between critics of parity and supporters of state constitutional rights, as "it is unlikely that state courts would simultaneously be sympathetic to state constitutional arguments and unsympathetic to federal constitutional arguments").

23. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 325 (5th ed. 2003) [hereinafter HART & WECHSLER].

fair and as competent as federal courts.”²⁴ The two dimensions are of course related; one’s view of the realistic abilities of state courts will inevitably color one’s normative view of federal courts jurisprudence. Nonetheless, in this Article I focus primarily on the empirical dimension of parity.²⁵

A. The Empirical Literature

As Bator observed in his article, the “best summary of the functional arguments in favor of federal-court superiority”²⁶ is Professor Burt Neuborne’s oft-cited²⁷ article, *The Myth of Parity*.²⁸ Writing over a quarter-century ago, Neuborne set the parameters of the empirical debate. In brief, Neuborne argued that “three sets of reasons” supported a preference for federal court disposition of federal rights:

First, the level of technical competence which the federal district court is likely to bring to the legal issues involved generally will be superior to that of a given state trial forum. Stated bluntly, in my experience, federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts. Second, there are several factors, unrelated to technical competence—which, lacking a better term, I call a court’s psychological set—that render it more likely that an individual with a constitutional claim will succeed in federal

24. *Id.* at 323.

25. Professor Rubenstein further parses the parity debate by breaking down the issues into ones of forum allocation (“defining the proper role of the federal courts in a federal system and identifying what courts should hear what issues in what manner”), forum selection (“helping to describe how lawyers might consider what court system to enter if a choice between a federal and state forum exists”), and “whether the institutional arguments for or against parity merely provide a seemingly neutral discourse meant to mask naked political preferences.” Rubenstein, *supra* note 22, at 603. In this Article, I am concerned primarily with empirical arguments that underlie, to varying degrees, all three of these issues.

26. Bator, *supra* note 2, at 607 n.7.

27. SOLIMINE & WALKER, *supra* note 1, at 35 & n.24 (noting the frequency of citation of Neuborne’s article). Professor Ann Althouse has opined that the article has itself achieved a “mythic status.” *Id.* (citing Ann Althouse, *Federal Jurisdiction and the Enforcement of Federal Rights: Can Congress Bring Back the Warren Era?*, 20 LAW & SOC. INQUIRY 1067, 1071 (1995) (book review)).

28. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

district court than in a state trial court. Finally, the federal judiciary's insulation from majoritarian pressures makes federal court structurally preferable to state trial court as a forum in which to challenge powerful local interests.²⁹

Writing three years after the publication of Neuborne's article, Bator rightly acknowledged the "splendid statement of the case for superior federal court competence" by Neuborne.³⁰ He expressed skepticism, nonetheless, of the full breadth of many of Neuborne's arguments. He argued that "[i]n many cases the proper comparison is not between the federal courts and the state trial courts, but between the federal courts and the entire hierarchy of state courts."³¹ Many state supreme court justices, he continued, are "as well paid and have as much prestige as federal judges," and it was his experience that those he had met were "as expert on issues of federal constitutional laws as are federal judges."³² Although many state court judges are elected, he felt that at least at the supreme court level, "terms tend to be long enough to assure that at least the grosser threats to judicial independence are absent."³³ As for the superior "psychological set" of federal judges, Bator argued that the argument drew too deeply on a "special historical experience," the lamentable record of some state court judges during the modern civil rights era.³⁴ Moreover, the "elitism of the federal bench, its distance from much of the daily grind of the administration of justice, its specialization—all of these are advantages, but they are disadvantages too."³⁵

29. *Id.* at 1120-21. My brief summary of Neuborne's article cannot do full justice to the breadth and depth of his analysis, or to the historical and social science evidence he marshals in support. For a fuller discussion of Neuborne's article, see SOLIMINE & WALKER, *supra* note 1, at 34-45.

30. Bator, *supra* note 2, at 623 n.51.

31. *Id.* at 630.

32. *Id.* He added that although "the vindication of the federal constitutional right may be blocked by an incompetent or insensitive state trial judge," in a way that cannot be remedied on appeal, "once the state appellate system is folded into the consideration of the argument, claims for a clear federal superiority become greatly attenuated." *Id.* at 631.

33. *Id.* at 630. In "many states," he added, "the election of state supreme court judges is largely a formality." *Id.* at 630 n.62.

34. *Id.* at 631.

35. *Id.* at 634.

Others have since elaborated on Bator's arguments. For example, James Walker and I have responded to Neuborne in various ways. We agreed that much of the modern evidence concerning the failure of state courts to follow federal law was an "unfortunate aberration" of the civil rights era.³⁶ We also argued, among other things, that many state courts operate on a more professional basis than before, and many states have modeled their procedure after federal practice;³⁷ that for the most part state judicial elections are low-key affairs, with many judges running unopposed and majoritarian electoral pressure usually playing a minor role;³⁸ and that state appellate courts can and do adequately monitor rulings on federal issues by state trial courts.³⁹

Still, we acknowledged, as did Bator, that many of these contentions ultimately "rest on human insight rather than on empirical evidence."⁴⁰ To attempt to study parity more directly, Walker and I examined a random sample of more than one thousand cases from U.S. district courts and state appellate courts that: (1) were decided between 1974 and 1980; and (2) resolved claims under the First and Fourth Amendments, or the Equal Protection Clause of the

36. SOLIMINE & WALKER, *supra* note 1, at 36; *see also* JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS 124-26 (1998) (discussing hostility or annoyance of some state courts to Warren Court decisions of the 1950s and 1960s); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1780-81 (2003) (arguing that federal courts "enjoy a favorable reputation as protectors of liberty," in part because many of the well-known decisions of the Warren Court advancing constitutional rights were reviews, and reversals, of state court decisions, but further contending that "[m]uch of this has changed"); *cf.* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1371-72 (2004) (arguing that the entire criminal justice system in the South, not merely state judges, was at fault in the 1950s and early 1960s). For documentation of the divergence of federal and state courts in protecting constitutional rights in the 1950s and 1960s, *see* David W. Romero & Francine Sanders Romero, *Precedent, Parity, and Racial Discrimination: A Federal/State Comparison of the Impact of Brown v. Board of Education*, 37 LAW & SOC'Y REV. 809, 819 tbl.1 (2003) (stating that the results of their study of federal district courts and state supreme courts deciding cases involving challenge to state-sponsored discrimination before and after 1954 indicated, *inter alia*, that pro-plaintiff decisions increased from 38% to 74% in the former and 29% to 31% in the latter).

37. SOLIMINE & WALKER, *supra* note 1, at 37-38; *see also infra* Part III.A.

38. SOLIMINE & WALKER, *supra* note 1, at 41-42; *see also infra* Part III.B.

39. SOLIMINE & WALKER, *supra* note 1, at 44-45, 55-58.

40. Bator, *supra* note 2, at 623; *see* SOLIMINE & WALKER, *supra* note 1, at 34 (noting that debate over parity is often uninformed by empirical evidence).

Fourteenth Amendment.⁴¹ We chose those issues because of their high-profile nature and the possibility that counter-majoritarian pressures, of the kind highlighted by critics of parity, would be most evident in those cases.⁴² We coded a number of variables for each case, the most important of which was the outcome, in other words, whether the claimed federal right was upheld.⁴³ We found that all of the courts upheld the federal claim in 36% of the cases.⁴⁴ The breakdown for all federal and state court cases was 41.7% and 31.4%, respectively.⁴⁵ We concluded, among other things, that although litigants had a greater chance of success in federal courts, there was no evidence of systematic bias in state courts against the assertion of federal claims, as compared to the litigation of the same or similar issues in federal courts.⁴⁶

To my knowledge, this study was the first systematic, empirical examination of parity, in the sense of simultaneously studying outcomes of the same or similar federal issues in federal and state courts. There have been a number of additional studies in the past two decades, several of which I will briefly consider here.⁴⁷ Most, if not all, of the studies focus on the adjudication of a particular issue of federal law. For example, Brett C. Gerry examined how lower federal courts and state courts interpreted a U.S. Supreme Court decision involving the Takings Clause.⁴⁸ Gerry found that forty-

41. Our study was first published as an article, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). It is reprinted, in a substantially rewritten and updated form, in chapter 3 of SOLIMINE & WALKER, *supra* note 1. All future references to the study will be to the latter publication.

42. See SOLIMINE & WALKER, *supra* note 1, at 45. We also observed there that two of the well-known Supreme Court decisions premised implicitly (*Younger v. Harris*, 401 U.S. 37 (1971)) or explicitly (*Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976)) on the existence of some form of parity concerned the First and Fourth Amendments, respectively. SOLIMINE & WALKER, *supra* note 1, at 45.

43. For further details on the methodology of the study, see SOLIMINE & WALKER, *supra* note 1, at 45-46.

44. *Id.* at 47.

45. *Id.*

46. For further discussion of the results, see *id.* at 47-51.

47. For overviews of the empirical literature, see DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 105-17 (2003); SOLIMINE & WALKER, *supra* note 1, at 34-42, 54-55; Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233, 249-52 (1999); Romero & Romero, *supra* note 36, at 810-13.

48. See Gerry, *supra* note 47. The case in question was *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

seven reported federal cases and 112 reported state cases applied the decision, and that courts in both categories applied the decision in strikingly similar ways.⁴⁹ He concluded that the "results provide strong evidence of parity in the takings area."⁵⁰

Two studies have focused on gay rights. William Rubenstein canvassed a variety of cases in federal and state courts that adjudicated a variety of rights advanced by gays in the last two decades.⁵¹ He found that state courts had, in at least some circumstances on some issues, become as or more hospitable a forum as compared to federal courts.⁵² Referencing Neuborne's reasons for federal court superiority, Rubenstein suggested that state courts may be more competent on family law matters, where gay rights often arise;⁵³ that some state judges who "may more regularly interact professionally with gay people,"⁵⁴ may have a psychological set favorable, in some ways, toward gay rights claims; and that at least in certain jurisdictions, gay rights may not be counter-majoritarian or a high profile issue in judicial elections.⁵⁵

Daniel Pinello canvassed many of the same issues as the Rubenstein study, but did so by systematically examining reported decisions from eighty-six federal and 307 state courts in the last two decades.⁵⁶ Like Rubenstein, he found that state courts were more hospitable than federal courts to gay rights claims.⁵⁷ Specifically, when "adjudicating federal constitutional issues—the heart of Neuborne's concern—state tribunals resolved lesbian and gay rights claims 56.3% more positively than federal courts (47.2%

49. See Gerry, *supra* note 47, at 271-86 (describing methodology and results).

50. *Id.* at 285.

51. See Rubenstein, *supra* note 22, at 606-11. Rubenstein's study is empirical in the same sense as any doctrinal survey. It consists primarily of "anecdotal empirical evidence." *Id.* at 605. Also, the study "somewhat elide[s] the distinction between federal constitutional claims and state constitutional claims," so it must be read with caution in addressing the parity debate in "its purest form." *Id.* at 621.

52. *Id.* at 610-11.

53. See *id.* at 612-13.

54. *Id.* at 615.

55. *Id.* at 619-20.

56. See PINELLO, *supra* note 47, at 109-16 (reporting the findings of the study).

57. *Id.* at 116.

versus 30.2%).⁵⁸ He found that elected state judges, moreover, were more favorably disposed to such claims than appointed judges.⁵⁹

Another group of studies examines the adjudication of federal constitutional issues in state court, without simultaneously examining how the same issues are treated in federal court.⁶⁰ As Gerry observed, because “instances of overt state court *defiance* of clear Supreme Court mandates are quite uncommon, the results of ... [these] studies often turn[] largely upon” how the study operationalizes compliance with Supreme Court precedent.⁶¹ One recent study examined how state supreme courts applied Supreme Court precedent regarding the legality of confessions in criminal cases.⁶² A similar study examined how state supreme courts complied with Supreme Court precedent involving search and seizure.⁶³ A final example of this genre are studies of capital cases in state courts. James Liebman and his colleagues have documented that over half of death sentences handed down in those

58. *Id.* at 110.

59. *Id.* at 112-13.

60. This literature is often referenced as judicial impact research in political science circles, particularly as it pertains to how state courts apply U.S. Supreme Court decisions. See Gerry, *supra* note 47, at 253-57 (discussing the literature); Romero & Romero, *supra* note 36, at 811-12 (same). For more recent examples of this literature, see James N.G. Cauthen & C. Scott Peters, *Courting Constituents: District Elections and Judicial Behavior on the Louisiana Supreme Court*, 24 JUST. SYS. J. 265 (2003) (analyzing the votes in search and seizure cases of Louisiana Supreme Court justices who are elected by districts); Wayne A. Logan, “Democratic Despotism” and Constitutional Constraint: An Empirical Analysis of *Ex Post Facto* Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439 (2004) (analyzing state court treatment of claims asserted under *ex post facto* prohibitions).

61. Gerry, *supra* note 47, at 254.

62. See Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision Making in Confession Cases*, 23 JUST. SYS. J. 109 (2002). This study covered a sample of 661 state court cases from 1970 to 1991 and measured compliance by, among other things, coding the result of the case (whether the confession was suppressed) and the facts cited by the state case. See *id.* at 119-22. The authors concluded, among other things, that Supreme Court precedent is followed. *Id.* at 122-23.

63. See Scott A. Comparato & Scott D. McClurg, *Ambiguity in the Transmission of Precedent: A Team Theoretic Approach to the Relationship Between the Supreme Court and State Supreme Courts* (Apr. 3-6, 2003) (paper presented at the annual meeting of the Midwest Political Sci. Ass’n, Chi., Ill., available at <http://www.siu.edu/~mcclurg/research/ambiguity-1.pdf>). This study examined a sample of 959 state court cases from 1983 to 1995, *id.* at 30, and measured compliance by comparing the result of the state court decision with the result of the Supreme Court case it was purporting to follow. *Id.* at 13-14. By this standard, 45% of the cases were non-compliant. *Id.* at 14.

courts are overturned, in some manner, by a later reviewing court.⁶⁴ Related studies have demonstrated that elected state court judges are more likely to uphold death sentences than their appointed counterparts.⁶⁵ Because the denial of federal constitutional rights is often the source of error, some have argued that these results considerably undermine the concepts of parity.⁶⁶

All of these studies examined court decisions. Another group of studies directly or indirectly examined parity by surveying the opinions of lawyers.⁶⁷ These studies generally concluded that "attorneys, when they have the choice, prefer federal court over

64. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1853-54 (2000). It is worth noting that the high error rate is due in part to state appellate courts (rather than only the U.S. Supreme Court on direct review, or later federal courts considering writs of habeas corpus) identifying errors in state trial courts. See *id.* at 1847-48. On this point, see also Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 220 (2004); Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64, 66-68 (2000). Larry Yackle presents a different perspective on the Liebman study. It is true, he says,

that state courts frequently identify constitutional errors in their own proceedings and correct those mistakes themselves, obviating any need for prisoners to petition the federal courts. During the period from 1973 to 1995, state courts found serious errors in 47 percent of the cases in which death sentences had been imposed at the trial level. Yet all too often state courts overlook violations of prisoners' federal rights. During the same period, 1973 to 1995, federal courts found serious errors in 40 percent of the *remaining* cases, that is, the cases in which state courts had previously affirmed convictions and death sentences.

Larry W. Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus*, in BEYOND REPAIR?: AMERICA'S DEATH PENALTY 58, 60 (Stephen P. Garvey ed., 2003).

65. See, e.g., Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1221-22 (1997); Gelman et al., *supra* note 64, at 230-31. For further discussion of this literature, see SOLIMINE & WALKER, *supra* note 1, at 118-19.

66. See, e.g., Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808-09 (2000); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760 (1995).

67. See, e.g., Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315 (surveying 267 attorneys involved in student rights cases); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992) (surveying 482 attorneys in cases removed from state to federal court). For an excellent review and summary of the literature, see Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961 (1995).

state court" when litigating federal constitutional rights.⁶⁸ Even on their own terms, however, these studies do not report overwhelming preferences for federal court, and reveal that the preference is often contingent on a host of case-specific factors.⁶⁹

B. Critiquing the Literature

Recognizing that none of the empirical literature on parity is, or purports to be, even remotely definitive, I have previously suggested that this demonstrates that state courts, on the whole, are not systematically underenforcing federal constitutional rights, and, with inevitable exceptions, are capable of fairly adjudicating those rights.⁷⁰ Yet, even that assertion of "weak parity," with its many qualifications and contingencies, has not gone unchallenged. The most trenchant criticism has been by Erwin Chemerinsky. First writing on this point in 1988, he advanced a series of arguments that, in his view, seriously undermine the utility of empirical literature.

In particular, Chemerinsky argued that establishing standards for comparisons is difficult.⁷¹ Simply because one court upholds an asserted federal constitutional right, and another denies it, does not necessarily mean that the latter is not "properly" adjudicating the

68. SOLIMINE & WALKER, *supra* note 1, at 69. Surveying this literature, James Gardner argued that changes in state court receptiveness to enforcing rights under federal and state law "seem very far from having penetrated public consciousness." Gardner, *supra* note 36, at 1783. He continued:

If actual litigation decisions are any guide, state courts today appear to be less trusted than federal courts when it comes to the protection of individual rights. Although evidence is difficult to come by, it appears that litigants, given a choice between suing in state and federal court, prefer to bring civil rights claims in a federal forum. Even when they proceed in a state court, litigants tend overwhelmingly to raise civil rights claims under the United States Constitution rather than under their state constitution, suggesting that they have more faith in the body of constitutional law developed by federal courts than in the similar body of law developed by state courts construing state constitutions.

Id. (footnotes omitted).

69. See Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 144 & n.124 (2003) (surveying this literature and finding that the results are "mixed").

70. See SOLIMINE & WALKER, *supra* note 1, at 42, 47-48, 55, 58-59.

71. See Chemerinsky, *supra* note 6, at 256-61.

right.⁷² Constitutional cases “often involve balancing government interests against individual liberties,” and it is arguably “wrong to presuppose that decisions in favor of the latter are preferable.”⁷³ Quality in this context, then, has inherently subjective components that make objective measurement difficult.

Chemerinsky also examined my and Walker’s study in some detail.⁷⁴ In that regard, he asserted, among other things, that Walker and I ignored dispositions by state trial courts by focusing on state appellate courts;⁷⁵ did not account for the variation in factual and legal issues in the types of cases we examined;⁷⁶ and provided data in the aggregate that might hide regional and other differences that could undermine our general support of parity.⁷⁷ He was no less critical of other empirical studies of parity. For example, the surveys of lawyers “only demonstrate what attorneys think about parity,” not what federal and state courts are actually doing.⁷⁸ For these and other reasons, Chemerinsky concluded that efforts to empirically “prove” parity are doomed.⁷⁹

Many have echoed Chemerinsky’s criticisms. For example, Bator and others agree that correctness or quality of decision in the respective fora is a slippery concept to study.⁸⁰ As Bator put it:

We should note that the semantic repertoire of our constitutional law—we tend to speak of constitutional “claims” and “rights” rather than constitutional “principles” or “rules”—subtly

72. *See id.* at 257-58.

73. *Id.* at 258.

74. *See id.* at 261-69.

75. *Id.* at 263, 267-68.

76. *Id.* at 263-64.

77. *Id.* at 266. For a detailed response to some of these criticisms, see SOLIMINE & WALKER, *supra* note 1, at 51-55.

78. Chemerinsky, *supra* note 6, at 269.

79. *See id.* at 273; *see also* REDISH, *supra* note 7, at 3 (elaborating on this point); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991) (same).

80. *See* Bator, *supra* note 2, at 631-33; Gerry, *supra* note 47, at 251-52 (criticizing Neuborne’s position in part due to Neuborne’s assumption that “a ‘good’ decision [is] ... one that rules in favor of an individual advancing a constitutional claim against the government”); *see also* Scott D. McClurg & Scott A. Comparato, *Rebellious or Just Misunderstood? Assessing Measures of Lower Court Compliance with U.S. Supreme Court Precedent* (Aug. 28-Sept. 1, 2003) (paper presented at the annual meeting of the Am. Political Sci. Ass’n, Phila., Pa. (analyzing various measures of compliance by federal and state courts with Supreme Court decisions), available at <http://www.siu.edu/~mcclurg/research/rebel.pdf>).

suggests that when a constitutional question arises, constitutional values are represented only by one side or another. One party is said to seek the vindication of the Constitution; the other must therefore be seeking to defeat or subvert it. But the reality is more complex. Even in the sphere of individual rights, it is misleading to suppose that the rejection of a particular constitutional claim imports less fidelity to constitutional values than its vindication. It was Holmes who reminded us that the limits contemplated for the coverage of a statute are as significant a part of its purpose as is its affirmative thrust. When a court upholds a state criminal statute against the claim that it violates the first amendment, it is rejecting one sort of constitutional claim, but it is also upholding principles of separation of powers and federalism which themselves have constitutional status. And, increasingly, cases no longer even present clean-cut confrontations between "individual" and "governmental" interests. (Which side represents "the individual" in a case involving the validity of affirmative action?)⁸¹

Others have gone so far as to assert that the empirical literature on parity is characterized by "rudimentary" statistical methods, as regression and other sophisticated forms of analysis are generally not used to test the effect of "potentially consequential independent variables."⁸² More generally, it is difficult, on the one hand, to draw broad conclusions on parity from a study of one type of case. On the other hand, the utility of a broader study, like that conducted by Walker and me, has its own problems, not the least of which is that we cannot hold constant all variables to attempt to parse out the sole influence of different fora litigating the "same" legal issue.⁸³

In short, many of the criticisms of Chemerinsky and others are well founded in varying degrees. In my view, however, it does not follow that the extant studies are in essence flawed, or that further research should not be conducted.⁸⁴ It means only that those studies should be used with caution,⁸⁵ and much more empirical work on

81. Bator, *supra* note 2, at 632-33.

82. PINELLO, *supra* note 47, at 107.

83. See SOLIMINE & WALKER, *supra* note 1, at 43 (acknowledging this problem, but positing that it can be dealt with, in part, by sampling a large number of cases).

84. For a similar conclusion by a self-described skeptic of parity, see Susan N. Herman, Comment, *Why Parity Matters*, 71 B.U. L. REV. 651, 662 (1991).

85. For a discussion of the rigor and usefulness (or lack thereof) of empirical research

parity could be done. A short list of further avenues in research would include examining in greater detail: (1) decisions of *trial* courts in federal and state systems; (2) unpublished dispositions in both systems; (3) familiarity and compliance with U.S. Supreme Court decisions by lawyers and judges; (4) the effect of judicial elections on the adjudication of federal rights in state courts; (5) the quality of advocacy of federal law in state court cases; and (6) the rate at which cases with federal legal issues are appealed within state court systems.⁸⁶

II. (DIS)UNIFORMITY IN FEDERAL AND STATE COURT ADJUDICATION OF FEDERAL RIGHTS

As the Supreme Court has recognized from an early time,⁸⁷ it is common ground in Supreme Court doctrine that federal and state courts should strive toward uniform application of federal constitutional rights. Likewise, it appears undisputed that the Court has the responsibility to ensure uniformity by reviewing state court

conducted and published by law professors (as opposed to that by social scientists, typically published in peer-reviewed journals), see Colloquium, *Exchange: Empirical Research and the Goals of Legal Scholarship*, 69 U. CHI. L. REV. 1 (2002).

86. Recently created databases of cases should help facilitate at least some further research in this area. See, e.g., Paul Brace & Melinda Gann Hall, *Comparing Courts Using the American States*, 83 JUDICATURE 250 (2000) (describing database of state supreme court decisions); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125-29 (2002) (describing database of federal court decisions); Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 J. LEGAL EDUC. 94 (1996) (same).

87. In the "supremely important case," CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 46 (6th ed. 2002), of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Supreme Court held that it possessed power to review federal issues decided by state courts. See *id.* at 342-52. In the course of that decision, the Court emphasized the need for uniformity in the judicial exposition of federal law. See *id.* at 347-48. Without the Court's jurisdiction to review state court resolution of federal law,

[j]udges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states.... The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

Id. at 348.

decisions on federal law.⁸⁸ Professor Bator agreed with these propositions. As already noted, Bator conceded the desirability of federal and state courts achieving uniformity in the application of federal law.⁸⁹ Likewise, he intended “to cast no doubt on the need for federal *appellate* review of state court judgments on questions of federal law,” in order to provide “uniform and authoritative pronouncements of federal law.”⁹⁰ In this Part, I examine whether federal courts possess the institutional capacity to monitor the development of federal law in state courts and, in turn, whether absolute uniformity of federal law is possible or even desirable in all circumstances.

A. Federal Court Monitoring of State Courts

By any measure, the vast majority of particular adjudications of federal constitutional rights take place in state courts, with most of those found when one or more of the protections in the Bill of Rights are at issue in state criminal proceedings.⁹¹ In an article published in 1990, shortly after his death, Bator estimated that “more than 20,000 cases” per year in state courts turned “on a decisive issue of federal law.”⁹² In theory, an appreciable number of those could be

88. *Compare Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 816 & n.14 (1986) (accepting propositions that uniform application of federal law among federal and state courts is desirable and that the Supreme Court has a role to play in assuring that uniformity), *with id.* at 827 & n.6 (Brennan, J., dissenting) (agreeing with these propositions, but expressing skepticism that the Supreme Court alone can play such a monitoring role). *Merrell Dow* involved an issue of federal statutory, not constitutional, law, but its institutional analysis seems applicable to both.

89. *See supra* text accompanying notes 9-10.

90. Bator, *supra* note 2, at 635.

91. *See Michigan v. Long*, 463 U.S. 1032, 1042-43 n.8 (1983) (noting that the “vast bulk” of criminal litigation takes place in state courts); ROBERT A. CARP ET AL., *JUDICIAL PROCESS IN AMERICA* 52, 70 (6th ed. 2004) (reporting that as of 2000, about 62,000 criminal cases were commenced in U.S. district courts, while 4.9 million criminal cases were filed in state courts of general jurisdiction); *cf.* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554-56 (2004) (discussing complicated relationships among rising criminal caseloads in state courts, apparently decreasing crime rates, and the constraints time and money place on prosecutors).

92. Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 679 (1990). He did not specifically say how he so estimated. Perhaps it was derived in some way from the 300,000 cases in the U.S. district courts, plus the 33,000 cases in the U.S. courts of appeals, that he reported. *See id.* at 678-79. At any rate, the 20,000 figure seems within the ballpark of the actual number.

reviewable by the U.S. Supreme Court, should the parties to those cases appeal them up through the entire state court system—though they would always remain a small percentage of the total.

The Supreme Court is busy enough reviewing cases raising federal issues from the federal courts. Does it also have the capacity to review systematically such cases from the state courts? Writing two decades ago, Bator was not sanguine. “Serious questions can,” he wrote, “be raised about whether the appellate jurisdiction of the United States Supreme Court constitutes sufficient appellate capacity to perform this function,”⁹³ but he did not elaborate on the point. Five years after that, Justice William Brennan was also pessimistic about the Supreme Court’s institutional capacity to review state court decisions:

One might argue that this Court’s appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law is interpreted and applied uniformly.... [However], having served on this Court for [thirty] years, it is clear to me that, realistically, it cannot even come close to “doing the whole job”⁹⁴

The Supreme Court’s most recent Terms might seem to belie this pessimism. With *Lawrence v. Texas*⁹⁵ striking down the Texas anti-sodomy statute as the most notable example, the Court in the 2002 Term reviewed at least ten decisions from state courts raising important issues of federal constitutional law.⁹⁶ Similarly, in the

93. Bator, *supra* note 2, at 635-36.

94. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting).

95. 539 U.S. 558 (2003).

96. See *Stogner v. California*, 539 U.S. 607 (2003) (upholding Ex Post Facto Clause challenge to state statute extending criminal statute of limitations for sex-related child abuse offenses); *Virginia v. Hicks*, 539 U.S. 113 (2003) (rejecting First Amendment challenge to trespass conviction in low-income housing development); *Fitzgerald v. Racing Ass’n*, 539 U.S. 103 (2003) (challenging state taxation of gambling under Equal Protection Clause); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003) (asserting that First Amendment did not preclude civil fraud action against fundraising corporation); *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488 (2003) (rejecting Full Faith and Credit Clause challenge to suit against state agencies immunized by statute in courts of another state); *Jinks v. Richland County*, 538 U.S. 456 (2003) (upholding constitutionality of 28 U.S.C. § 1367(d)); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (declaring Due Process

2003 Term, the Court in *Blakely v. Washington*,⁹⁷ reviewing a decision of the Washington Supreme Court, invalidated the State of Washington's criminal sentencing scheme.⁹⁸ The Court's ruling threw into doubt the validity of the federal sentencing guidelines and also those of many states.⁹⁹ The Court also decided several other significant cases on review from state courts, all concerning the rights of defendants in criminal cases.¹⁰⁰ One might come away from these Terms with the impression that the Supreme Court is performing admirably in its review of federal constitutional lawmaking by state courts. Such an impression would be misleading, for the 2002 and 2003 Terms continued two trends that support the laments of Bator and Brennan: a historically low total number of (1) cases reviewed on the merits and (2) cases reviewed from state courts.

When Bator and Brennan were writing, the Supreme Court was reviewing about 130 cases on the merits each Term, with about one-fourth of those cases consisting of appeals from state courts.¹⁰¹ They

Clause limits on awards of punitive damages); *Virginia v. Black*, 538 U.S. 343 (2003) (upholding First Amendment challenge to statute banning cross burning); *Ewing v. California*, 538 U.S. 11 (2003) (upholding California's "three-strikes" law); *Pierce County v. Guillen*, 537 U.S. 129 (2003) (affirming constitutionality of federal statute regulating discovery in state courts); see also *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam) (dismissing writ of certiorari as improvidently granted in highly-watched commercial speech case).

97. 124 S. Ct. 2531 (2004).

98. *Id.* at 2538.

99. See *id.* at 2550 (O'Connor, J., dissenting) ("Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."); Linda Greenhouse, *Justices, in Bitter 5-4 Vote Split, Raise Doubts on Sentencing Guidelines*, N.Y. TIMES, June 25, 2004, at A1.

100. See *Missouri v. Seibert*, 124 S. Ct. 2601 (2004) (defining scope of protections of *Miranda* warnings); *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 124 S. Ct. 2451 (2004) (Fourth Amendment and failure to identify oneself to police); *Iowa v. Tovar*, 124 S. Ct. 1379 (2004) (Sixth Amendment and propriety of guilty plea); *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (clarifying earlier case concerning the Confrontation Clause); *Illinois v. Fisher*, 124 S. Ct. 1200 (2004) (Due Process Clause and destruction of evidence sought by defendant); *Illinois v. Lidster*, 124 S. Ct. 885 (2004) (Fourth Amendment and highway checkpoints); *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (Fourth Amendment and search of car passengers); see also *Johnson v. California*, 124 S. Ct. 1833 (2004) (dismissing case involving alleged racial use of peremptory jury challenge for lack of jurisdiction).

101. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 76 (3d ed. 2003) (compiling data from the Terms of the Court in the 1980s); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 352-53 (2002) (documenting review of state court decisions in 1980s).

were concerned about the availability of Supreme Court review even then. Yet, those numbers inexorably declined, as the Rehnquist Court began accepting fewer cases for review. In the past ten Terms, only about eighty cases per Term have been decided on the merits, and only about twelve of those on average have been appeals from state courts.¹⁰² The 2002 and 2003 Terms essentially followed this trend.¹⁰³

We should be concerned, but not *unduly* so, by the Court's shrunken docket insofar as it impacts parity. One useful metaphor to frame the hierarchal court relationship is that of principal and agent.¹⁰⁴ The Supreme Court is the principal, monitoring the activities of its agents, the state courts. Yet, simply because not every case is reviewed, or even reviewable,¹⁰⁵ does not mean that the agents are shirking their obligation under the Supremacy

102. EPSTEIN ET AL., *supra* note 101, at 75-76 (compiling data from 1926 to 2001 Terms); Solimine, *supra* note 101, at 352-55 (compiling and analyzing data from 1989 through 1999 Terms). Various explanations have been offered for the decline of the number of cases decided on the merits by the Court, including the almost total elimination of the Court's mandatory appellate jurisdiction; the change of Court personnel; changes in the ideological makeup of the judges on the lower federal courts; and fewer appeals being pursued by the federal government. For further discussion of those and other reasons, see Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; Philip Allen Lacovara, *The Incredible Shrinking Court*, AM. LAW., Dec. 2003, at 53.

103. See *The Supreme Court, 2003 Term, The Statistics*, 118 HARV. L. REV. 497, 506 (2004) (summarizing data from the 2003 Term, in which the Court decided seventy-eight cases on the merits, with eight of those originating in state courts); *The Supreme Court, 2002 Term, The Statistics*, 117 HARV. L. REV. 480, 488-89 (2003) (summarizing data from 2002 Term, in which the Court decided seventy-eight cases on the merits, with twenty-one of those originating in state courts).

104. See Solimine, *supra* note 101, at 355-58 (developing this model). There is political science literature developing this model, from which I drew, particularly Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994) (applying model to U.S. courts of appeals decisions on the Fourth Amendment); see also Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171 (2001) (applying model to Supreme Court review of en banc decisions of the U.S. courts of appeals); Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819 (2003) (providing general overview of model for federal courts).

105. See Friedman, *supra* note 5, at 1219 ("Although there are those throughout history who have claimed that Supreme Court review is adequate to address federal interests, at present no one plausibly can argue that Supreme Court review *standing alone* is enough.") (footnotes omitted and emphasis added).

Clause to follow federal law. If state courts were wildly misconstruing or ignoring federal law, we would expect high rates of reversal of such decisions in the Court, or other evidence that considerably undermined the notion of parity. This is not the case.¹⁰⁶ That is to say, state judges, who surely realize that the chance that any particular decision will be reviewed by the U.S. Supreme Court is quite small, nevertheless, on the whole, still follow constitutional doctrine announced by the Court. By the same token, the paucity of Supreme Court review places considerable pressure on the presumed existence of some form of parity.¹⁰⁷

Perhaps future Courts will increase the size of the docket, if only periodically. It seems, however, that such changes will not make much difference.¹⁰⁸ Even during the Warren Court Era, when about 150 cases were being decided each Term, only a small fraction of state court (and federal court, for that matter) cases were being reviewed by the Court. It speaks well of lower court judges, both federal and state, that they generally follow federal law, to the extent that compliance can be measured, even when the prospect of Supreme Court review is low.¹⁰⁹ Anecdotal evidence suggests,

106. Solimine, *supra* note 101, at 354-58; see also *supra* Part I.A.

107. See Friedman, *supra* note 5, at 1220; see also Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 20-21 (Stephen B. Burbank & Barry Friedman eds., 2002) (hypothesizing that "both a strong tradition of binding authority and a hierarchical structure providing more than one opportunity for review can act as powerful checks on decisional independence" by judges, but suggesting that political scientists have not fully explored this issue with respect to lower courts).

108. Henry Hart recognized over 40 years ago:

Does a nation of 165 million[] realize any significant gain merely because its highest judicial tribunal succeeds in deciding 127 cases by full opinion instead of 117? 137 cases? 147 cases? Or even 157 cases? The hard fact must be faced that the Justices of the Supreme Court of the United States can at best put their full minds to no more than a tiny handful of the trouble cases which year by year are tossed up to them out of the great sea of millions and even billions of concrete situations to which their opinions relate. When this fact is fully apprehended, it will be seen that the question whether this handful includes or excludes a dozen or so more cases is unimportant. It will be seen that what matters about Supreme Court opinions is not their quantity but their quality.

Henry M. Hart, Jr., *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959).

109. Solimine, *supra* note 101, at 358; see also David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003) (conducting a study of a sample of search and seizure decisions by U.S. courts of appeals

moreover, that important cases in state courts involving federal constitutional law will work their way up the appellate ladder, and possibly be reviewed by the Supreme Court. There is considerable evidence that the Court relies, at least in part, on various cues in deciding which cases to review, including identified conflicts between federal and state court decisions, and amicus briefs filed by the federal government, the states, or interest groups.¹¹⁰ In this way, the Supreme Court can be aided in its monitoring function.¹¹¹ Even in an era of a shrunken docket, it is no stretch for Arthur Hellman to conclude that: "From the earliest days of the nation's history, no function of the Court has ranked higher than the protection of federal rights from hostility or misunderstanding on the part of state courts. We would not expect the Court to break with that tradition, and it has not."¹¹²

Federal habeas corpus review of criminal convictions in state court provides another possible avenue of monitoring of the application of federal constitutional law in state courts. Bator

between 1961 and 1990, which concluded, inter alia, that fear of review and reversal by the Supreme Court did not account for widespread compliance with Court doctrine); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1641-47 (1995) (discussing how the Supreme Court can use relatively few cases decided on the merits to monitor compliance with doctrine by lower courts); Donald R. Songer et al., *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137 (2003) (answering the title's question "yes" in a study of decision making by federal courts of appeals judges in diversity cases that are almost never reviewed by the Supreme Court).

110. See LAWRENCE BAUM, *THE SUPREME COURT* 109-17 (7th ed. 2001).

111. Solimine, *supra* note 101, at 359. Although extended discussion of state constitutional law developments is beyond the scope of the present Article, see *supra* note 22, the possible effect of *Michigan v. Long*, 463 U.S. 1032 (1983), is worth mentioning. That case controversially established a presumption in favor of the Supreme Court being able to review a state court case that apparently relies on both federal and state constitutional law, when the state case does not clearly indicate that state law compels the decision. *Id.* at 1040-41. I have elsewhere argued that *Michigan v. Long* does not improperly disrupt state judicial making or inappropriately aggregate power to the Supreme Court. See Solimine, *supra* note 101, at 340-44; see also Robert M. Howard et al., *Ideology, Constraint and the Elimination of Supreme Court Review: Examining State Court Use of Adequate and Independent State Grounds* 22 (Apr. 3-6, 2003) (paper presented at Annual National Conference of the Midwest Political Sci. Ass'n, Chi., Ill. (on file with author) (concerning empirical study of state supreme courts, which concluded that *Michigan v. Long* has "had little effect" on the expansion of state constitutional law). For further discussion of the application of *Michigan v. Long* in the Supreme Court, see Michael Esler, *Michigan v. Long: A Twenty Year Retrospective*, 66 ALB. L. REV. 835 (2003).

112. Hellman, *supra* note 102, at 428 (footnote omitted).

considered the point in his article. Why, he asked, "can't federal habeas corpus simply be characterized as an alternate form of federal appellate review, justified precisely because direct Supreme Court review of state court judgments does not provide sufficient appellate capacity?"¹¹³ He proceeded to argue that the analogy fails. For one thing, in pure appellate review, the U.S. Supreme Court is the reviewing body, while in habeas, a single U.S. district judge is, in effect, superintending the state court system.¹¹⁴ Federal district courts, moreover, cannot be expected to achieve uniformity of federal law by themselves, even taking into account review of *their* habeas decisions by the U.S. courts of appeals and, possibly, the U.S. Supreme Court.¹¹⁵ Bator acknowledged that he was neither making a "sharp logical distinction between federal appellate review and federal collateral relitigation," nor "asserting that it [was] ... inconceivable for the federal district courts to play a role in the appellate supervision of state courts adjudicating federal questions."¹¹⁶ Yet, he concluded that habeas review was simply not a substitute for direct review by the Supreme Court.¹¹⁷

In my view, Bator gets this mostly right. Even in theory, habeas review will at best play a marginal role in monitoring state courts. It applies only to state *criminal* litigation—though that is usually more important than civil litigation, as one's life or liberty cannot be deprived by the latter. Although over 20,000 habeas petitions have been filed annually in U.S. district courts in recent years, that amounts to a tiny percentage (1.71%) of persons incarcerated in state prisons.¹¹⁸ Federal courts, moreover, rarely grant such petitions (about 1-4% in any given year).¹¹⁹ On important issues,

113. Bator, *supra* note 2, at 636 n.68.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. HART & WECHSLER, *supra* note 23, at 1312 (noting data from 2000); *see also* SOLIMINE & WALKER, *supra* note 1, at 122-23.

119. HART & WECHSLER, *supra* note 23, at 1313. The very low rate of grants of habeas petitions can be interpreted as an endorsement of parity. *E.g.*, SOLIMINE & WALKER, *supra* note 1, at 123. No doubt, however, it is also a function of the increasing restrictions placed on the power of federal judges to grant habeas petitions, culminating in the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1224 (1996) (codified mainly at 28 U.S.C. §§ 2244, 2254, 2261-2266). The relative scarcity of the filing and granting of habeas petitions might suggest that federal courts

however, habeas has proven to play a role. For example, many errors of federal constitutional law in state capital cases have been uncovered through habeas relief.¹²⁰ That role may or may not continue, depending on the success of campaigns to limit or eliminate capital punishment in the states. Then, too, other issues played out in state criminal proceedings (e.g., DNA testing, war on terrorism measures, etc.) may provide an appropriate opportunity for more active federal habeas relief in the future.¹²¹

should pay more, not less, attention to those cases. For a brief discussion of the impact of the AEDPA, see SOLIMINE & WALKER, *supra* note 1, at 121-22. For much more extensive discussion of the AEDPA and of other recent developments in federal habeas corpus, see HART & WECHSLER, *supra* note 23, at 1296-1399; and LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS* (2003).

120. See HART & WECHSLER, *supra* note 23, at 1300-01; Yackle, *supra* note 64, at 59-60; Gelman et al., *supra* note 64, at 215-16, 249-52.

121. See SOLIMINE & WALKER, *supra* note 1, at 124-27 (acknowledging pros and cons of federal habeas review but supporting its continued existence for several reasons, including as a necessary supplement to direct Supreme Court review); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 819-20 (1992) (supporting habeas review based on, inter alia, a dynamic view of the ebb and flow of perceptions of parity and the rise and fall of the salience of legal issues presented in habeas cases); Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1916 (2003) ("[T]he possibility of direct Supreme Court review is so vanishingly slight that the responsibility must be allocated elsewhere, if the idea of federal supervision of state judicial systems is not to become pure fiction.").

To be sure, to fully equate direct review with habeas review, one could expand the ambit of the latter, as various commentators have advocated. See, e.g., Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253-55 (1988); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2009-10 (1992); Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 302-04 (2003). Yet, especially in light of the AEDPA, habeas review is now considerably narrower than direct review, and probably will remain that way. Notably, Bator was an advocate of a narrower role for habeas. See Bator, *supra* note 3. Even Bator, however, did not assert that habeas has no role to play in monitoring state courts. For excellent overviews of various models of habeas, see Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 983-1003 (2000); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 582-87 (1993). Hoffstadt persuasively argues that current habeas doctrine is best characterized as an "appellate model," as "many aspects of federal habeas review make it look like a final layer in a single process of appellate review that begins in state court after a conviction is handed down and ends with federal habeas." Hoffstadt, *supra*, at 993-94; see also J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J. L. & PUB. POLY 109, 154-67 (2004) (defending current habeas regime as respectful of state interests and indicative of a shared responsibility between Congress and the federal courts in shaping habeas doctrine).

B. Disuniform Application of Federal Rights

Even if state courts did not adjudicate issues of federal law (or did not exist at all), there would still be the potential for lack of uniformity in federal law. The Supreme Court does not decide every case, and out of necessity the lower federal courts are charged with applying federal law. Some disuniformity is inevitable. The situation is only exacerbated by adding state courts to the mix, which adds to the total number of cases involving judges who lack Article III protections and are not considered experts in federal law.

Federal law, virtually by definition it would seem, should in theory be uniform throughout the country.¹²² Bator recognized the problem of reconciling that principle with federalism. Decentralized authority and other virtues of federalism do not advance the project of applying uniform, federal law.¹²³ Later on, though, he suggested a different tack:

You may remember that at the outset of this lecture I said that conventional federalistic arguments relating to “decentralization” seem inapposite to this issue. But I now ask for your second thoughts. Are they not in fact highly relevant? Do we not derive enormous benefits from having a variety of institutional “sets” within which issues of federal constitutional law are addressed? The creative ferment of experimentation which federalism encourages is *not* irrelevant to the task of constitutional adjudication. And, given this context, it becomes clear that many of the arguments made in favor of the federal forum are, precisely, arguments in favor of partnership, not arguments for a federal monopoly.¹²⁴

122. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (arguing that there should be only one authoritative interpretation of the Constitution). In making this point, I acknowledge but take no position regarding the ongoing debate as to whether the Supreme Court is or should be the sole authoritative expositor of federal constitutional law. For an overview of that debate, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

123. See *supra* text accompanying note 10.

124. Bator, *supra* note 2, at 634. Interestingly, writing a few years later, Bator appears to have tracked back to his initially articulated position. In a review of RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985), Bator quoted Posner as saying that “the proposition that federal law ought to be the same everywhere in the country is not

So, was Bator correct? Is disuniform federal law an oxymoron? In answering these questions, it is first worth observing that, for various reasons, there are many examples of nonuniform federal law. Consider the First Amendment status of obscenity. The Supreme Court has held that obscene material enjoys no protection under the Amendment, and that each community is entitled to decide for itself what is obscene, based on its own standards.¹²⁵ The Court has specifically recognized the nonuniform nature of this aspect of federal law:

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.¹²⁶

Obscenity regulation presents the unusual situation of non-uniformity being formally entrenched in federal law. Yet, there are many other examples of ostensibly uniform federal law being

persuasive. If uniformity is desirable (as it is), so is [sic] diversity and competition." Paul M. Bator, *The Judicial Universe of Judge Richard A. Posner*, 52 U. CHI. L. REV. 1146, 1154-55 (1985) (book review) (quoting POSNER, *supra*, at 163). Bator found

these remarks baffling. If we want "diversity and competition" with respect to a given field of law, our federal system provides an easy and intelligible way to obtain them: we should leave the question to state law. But it is incoherent and unjust to say that questions of tax and antitrust and social security should be governed by federal law but that that federal law should have different meanings in different circuits.

Id. at 1155. Both Posner and Bator, however, were primarily addressing the narrower point of federal legal issues "percolating" through the U.S. courts of appeals prior to resolution by the Supreme Court. Bator was no fan of percolation. *See infra* note 136.

125. *Miller v. California*, 413 U.S. 15, 36-37 (1973). For an excellent discussion of regulation of obscenity as an example of nonuniform federal law, see Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 995-97 (2002).

126. *Miller*, 413 U.S. at 32-33 (citations and footnotes omitted). The Court also observed: The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes

Id. at 32 n.13.

applied in a nonuniform way. Many federal constitutional rights are, of course, often framed at a high level of generality so that their application by federal and state judges is nonuniform, in the sense of turning heavily on the facts and circumstances of a particular case.¹²⁷ Perhaps many or most federal constitutional rights could be so characterized. As James Gardner has pointed out, "the fact that some right or liberty may be constitutionally guaranteed does not, in our system, affirmatively grant anyone the right to engage in any particular behavior."¹²⁸ The broad articulation of a negative right, that all levels of government cannot suppress, is typically uniform throughout the country.¹²⁹ In contrast, if the Court issues "a stingy ruling on individual rights,"¹³⁰ it is up to various states and localities to determine whether to take steps to regulate the conduct in question.¹³¹ Even narrowly focused federal rights often have nonuniform application, simply by virtue of various federal district courts, and federal appellate courts (not to mention state courts), coming to different conclusions on the same issue. Circuit splits on federal law are not an uncommon phenomenon, and not all such splits are advanced to, much less resolved by, the Supreme Court.¹³²

127. To illustrate this point by simple example: some federal rights are relatively clear-cut rules (e.g., the First Amendment right to burn flags, see *Texas v. Johnson*, 491 U.S. 397 (1989)), and one would expect relatively little litigation regarding that right, and little opportunity for nonuniform application in the United States. On the other hand, many rights are standard-like, and their identification and vindication depend heavily on the facts and circumstances of particular cases. Consider, for example, the right to attend a racially desegregated public school. See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691 (2004) (discussing the Supreme Court's delegation of implementation of school desegregation mandates to lower federal courts, and the fact that implementation often turns on, and gives considerable deference to, local conditions).

128. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1044 (2003).

129. See Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 890-91 (1989).

130. Gardner, *supra* note 128, at 1044.

131. See *id.* at 1044-48.

132. See LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 101 (2001); see also Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995) (study of unresolved circuit conflicts, finding that disruption and uncertainty generated by such conflicts is often less than commonly assumed); Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 (same); Arthur D. Hellman, *Never the Same River Twice:*

This lack of uniformity resonates, at least to some extent, with the functional values of federalism. Those values are said to be, among other things, permitting states in a federation to protect liberty by checking the authority of the national government; making it more likely that the diverse interests of various sub-groups in a geographically large nation will be better recognized and served by smaller governmental units; and allowing states to serve as "laboratories of experimentation" on various issues, which can benefit other, observant states and the federal government, should they decide to act as well.¹³³ Nonuniform federal law as such would not seemingly serve the first interest,¹³⁴ but it could advance the second or third. Given the wide diversity of views on various issues throughout the nation, some disparity in federal law can be tolerable or even welcome.¹³⁵ Similarly, disparate rulings on federal law may permit an issue to percolate in federal and state courts, which may benefit the Supreme Court's resolution of the issue, if and when it chooses to resolve it.¹³⁶

The Empirics and Epistemology of Intercircuit Conflicts, 63 U. PITT. L. REV. 81 (2001) (discussing the extent and significance of intercircuit conflicts, and discussing how and to what extent the Supreme Court does, or should, resolve such conflicts).

133. For more extensive discussion of these values, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397-400 (1997) (discussing states as laboratories of experimentation); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213-14 (1998) (discussing perceived benefits of federalism); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987) (book review) (discussing same). For more skeptical treatment of these values, see Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1 (2002) (arguing federalism undercuts the virtues of decentralization); Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481 (2004) (arguing that, at least in some circumstances, mobile citizens may resist decentralization of federal authority); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing federalism is both not desirable and not actually our system of government).

134. But see Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004) (arguing that resolution of establishment and free exercise claims under the First Amendment should in part turn on local conditions, and should not be assumed automatically to have one national resolution).

135. See *supra* note 132 and accompanying text.

136. SOLIMINE & WALKER, *supra* note 1, at 71. Interestingly, Bator was skeptical of the purported benefits of percolation. See Bator, *supra* note 92, at 689-91. He particularly referenced financial and other costs associated with uncertainties of what national law is, *id.* at 689-90, and that continued litigation on a particular issue will not necessarily yield more enlightened results. *Id.* at 690-91. Various empirical assumptions underlie some of Bator's analysis which, by my reading, are undermined to a degree by the scholarship of Arthur Hellman. See *supra* note 132.

In a similar fashion, Judge Richard Posner has argued that the need for uniformity in federal law can be examined from the perspective of interstate spillovers.¹³⁷ He contends that national law is most appropriate to combat interstate externalities, by preventing localities from imposing costs on out-of-staters.¹³⁸ From this perspective, it appears, some disuniformity in federal law is tolerable. Consider federal constitutional rights conferred by the Bill of Rights or by the Fourteenth Amendment. Most such rights, he says,

are simply unrelated to externalities or related to them only tenuously. Consider the oppression of blacks by the southern states after Reconstruction. Unless one treats moral outrage as a cost—a step that pretty much erases the distinction between internal and external cost—the costs of that oppression were borne mainly by the southern rather than the northern states Even more clearly, rights against age discrimination, sex discrimination, cruel and unusual punishments, double jeopardy, ineffective counsel in criminal cases, and similar rights that occupy much of the attention of the federal courts today have little to do with interstate spillovers.¹³⁹

This seems largely correct. The perpetrators and targets of constitutional rights violations will often, it seems, though of course not always, be from one state.¹⁴⁰

None of this is an argument against the creation of federal law.¹⁴¹ It simply means that disuniform federal constitutional law is prevalent and, in some and perhaps many instances, not especially

137. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 280-92 (1996).

138. See *id.* at 281-84. Posner is speaking primarily of the allocation of cases and causes of action between federal and state courts, but his point applies as well to the need for uniform, federal constitutional and statutory law in the first instance. See *id.* at 295-96.

139. *Id.* at 288-89.

140. Cf. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) (“[T]he typical § 1983 suit ... most commonly involves a dispute wholly within one State.”).

141. Cf. POSNER, *supra* note 137, at 289 (arguing that even rights that have little to do with interstate spillovers may be appropriate to be enforced by federal judges, given the latter’s Article III protections, expertise in enforcing federal law, and the fact that such rights “are likely to be asserted by people who are politically disfavored in state courts not because they are nonresidents—most of them are residents—but because, being poor or otherwise on the social margins, they lack political influence”).

problematic. To be sure, in some instances there will be interstate externalities; or lack of uniformity will generate litigation, inhibit planning, and lead to other costs;¹⁴² or that on some issues federal resolution of an issue will be normatively desirable.¹⁴³ That all said, it would seem that the "federal monopoly" Bator spoke of is unnecessary.

142. SOLIMINE & WALKER, *supra* note 1, at 71; see Robert W. Hahn et al., *Federalism and Regulation*, REGULATION, Winter 2003-2004, at 46.

143. Irrespective of the presence or absence of interstate externalities, the desirability of fashioning uniform, national law "unavoidably seems to have a normative component." Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 91 (1998); see, e.g., John Kincaid, *Extinguishing the Twin Relics of Barbaric Multiculturalism—Slavery and Polygamy—from American Federalism*, 33 PUBLIUS: J. FEDERALISM, Winter 2003, at 75, 76 (abolishing slavery and polygamy demonstrates that "the federal Constitution is premised on liberal individualism and is thus hostile to governmental institutionalizations of territorial multiculturalism"). But see Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1599 n.165 (2004) (arguing that the national solution to racial discrimination embodied in the Fourteenth Amendment is consistent with federalism as it "was adopted after experience had demonstrated that competitive federalism did not provide adequate protection for the ex-slaves and their descendants"); Solimine, *supra*, at 89-91 n.30 (arguing that national solutions to slavery and polygamy are justifiable, in part, on interstate externality grounds).

Another recent example of a federalism debate dominated by normative concerns is that of same-sex marriage. Many proponents and opponents of gay marriage seem to be calling for a national, uniform resolution of the issue. For example, the proposed amendment to the U.S. Constitution endorsed by President Bush in the spring of 2004 would have seemingly barred the federal government or any state from recognizing gay marriage. See Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1. Others, in contrast, have argued that the issue should not be resolved in a uniform manner and ought to be left to the individual states as laboratories of experimentation and for other federalist reasons. See, e.g., JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 174-78 (2004); Michael S. Greve, *Same-Sex Marriage: Commit It to the States*, FEDERALIST OUTLOOK (Am. Enter. Inst. for Pub. Pol'y Research) Mar. 2004, at 1; Richard A. Posner, *Wedding Bell Blues*, NEW REPUBLIC, Dec. 22, 2003, at 33, 36-37 (book review); Cass R. Sunstein, *Federal Appeal*, NEW REPUBLIC, Dec. 22, 2003, at 21, 22-23; John Yoo, *Let States Decide*, WALL ST. J., Feb. 27, 2004, at A8. But see David Frum, *The Marriage Buffet*, WALL ST. J., Oct. 16, 2003, at A22 ("[The result of the] federalist solution would be that the young people of the country would be presented with 50 different buffets, each of them offering two or more varieties of quasi-marital relationships. In such a world, the very concept of marriage would vanish.").

For further discussion of the fact and desirability of leaving difficult public policy issues raising moral questions to state, rather than national, resolution, see Kimberly A. Hendrickson, *The Survival of Moral Federalism*, PUB. INT., Summer 2002, at 96; Lund & McGinnis, *supra*, at 1598-1604; Alan Wolfe, *Moral Federalism*, RESPONSIVE COMMUNITY, Summer 2000, at 49.

III. PROSPECTS FOR PARITY

Much discourse on parity is characterized by its static nature. The respective capabilities of federal and state courts are often described as snapshots, taken at the time of the writing. The better view is to examine parity as a fluid and dynamic concept, with changes—for good or ill—in both federal and state courts over time.¹⁴⁴ This Part will examine how two aspects of state courts have changed, and possibly will continue to change into the future: (1) the adoption by states of federal procedure for use in their own courts; and (2) changes in state judicial selection systems.¹⁴⁵

144. As Bator put it:

I hope I have persuaded you that, no matter where we draw the line, it is virtually inevitable that the state courts will in fact continue to be asked to play a substantial role in the formulation and application of federal constitutional principles; the arguments in favor of the federal forum will not lead to a monopoly. If this is so, a new problem of fundamental significance emerges: we must try to create conditions to assure optimal performance by the state courts. Since it is given that they will continue to play a role, we might even ask how their performance can be improved. The comparative competence argument tends to assume a static universe. But in creating institutional designs, it is a mistake to think in static terms; the problem is, at least in part, a process problem. It is not enough to assert that the federal forum may be the more hospitable forum; we must also create conditions for assuring that the state courts will become a more hospitable forum, that the rhetoric of parity becomes a reality.

Bator, *supra* note 2, at 624; see also Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991) (discussing situations where it is appropriate for federal courts to defer to state court resolution of federal law).

145. There are, of course, other aspects of state courts and of law generated in those courts that is worthy of future study. Those topics could include:

(1) The interaction and cross-fertilization of federal constitutional law and state constitutional law. For some suggestions, see SOLIMINE & WALKER, *supra* note 1, at 117 (discussing the development of state constitutional law in death penalty jurisprudence and its possible effects on federal law); Joseph T. Walsh, *The Evolving Role of State Constitutional Law in Death Penalty Adjudication*, 59 N.Y.U. ANN. SURV. AM. L. 341 (2003) (discussing same). See generally Gardner, *supra* note 128, at 1037-43 (discussing other examples).

(2) Revisiting the rational allocation of cases between federal and state courts, as a matter of current doctrine and statutes, or as the current allocation doctrine and statutes might be changed. For some suggestions, see POSNER, *supra* note 137, at 280-92; Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293 (2003); Friedman, *supra* note 5.

(3) How international law could or should affect the adjudication of federal and state constitutional rights in state courts. For a sample of the literature, see Mark Tushnet, *Federalism and International Human Rights in the New*

A. Convergence of Federal and State Practice

Well over half of the states model some of their important rules of practice on the federal rules. Thirty-two states, by court rule or statute, substantially replicate the Federal Rules of Civil Procedure.¹⁴⁶ As of 2004, forty-one states have adopted various versions of the Federal Rules of Evidence.¹⁴⁷ In addition, most states have adopted versions of the Federal Rules of Criminal Procedure.¹⁴⁸ I have previously argued that the adoption of federal rules by state courts is some evidence of parity.¹⁴⁹

Of course, this phenomenon cannot bear a great deal of weight. Although the formal rules of procedure followed in state court systems are important, no less important is how judges and lawyers in those systems implement the rules in day-to-day litigation. We have much less information on this. Many states, moreover, have *not* modeled their important rules after the federal rules.¹⁵⁰ Even in

Constitutional Order, 47 WAYNE L. REV. 841 (2001); Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937 (2003); Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003).

(4) The role of the executive and legislative branches of states in enforcing federal constitutional and statutory rights, and of parallel state rights. For discussions of this point, see Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000); Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543 (2003).

146. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377-78 (1986).

147. See 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5009 (Supp. 2004) (listing states).

148. See Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130 (1996). Much state criminal procedure, of course, is in the form of United States Supreme Court interpretation of the Bill of Rights, given the incorporation of most of those provisions to the states.

149. See SOLIMINE & WALKER, *supra* note 1, at 38 n.29, 81-82; see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1177-79 (1999) (expressing confidence that state courts, in complex state constitutional law litigation, can efficiently gather and process facts by, among others, using amicus briefs and special masters).

150. On the other hand, the procedural rules or codes of those states are nonetheless, in many instances, similar to those in federal courts. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1155 (1986). For a careful survey of practice in

those states that have, the rules may not necessarily have kept pace with changes to the federal model. With respect to the Federal Rules of Civil Procedure, for example, John Oakley recently observed that “[f]ederal procedure is less influential in state courts today than at anytime in the past quarter-century.”¹⁵¹ In particular, almost all of those jurisdictions that adopted versions of the federal rules have not amended their own rules to keep pace with changes to the federal rules.¹⁵² In these circumstances, precise congruence between federal and state procedure cannot be regarded as a controlling measure.

That said, any casual student of procedure will quickly come to realize that the procedures followed to adjudicate a right can have a powerful effect on the outcome. For that reason, the Supreme Court has long invalidated state procedure that, in various ways, improperly impacts the vindication of a federal right.¹⁵³ Wherever it is proper to draw that line,¹⁵⁴ federal and, indeed, state judges are

three such states—Illinois, Pennsylvania, and Nebraska—with respect to pleading practice in civil rights and other cases, see Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311 (2001).

151. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2002/2003).

152. See *id.* at 354-55, 382-83. The lack of conformity can be attributed to, among other things, the number and rapidity of amendments to the federal rules, as well as to the controversial nature of some of them, even within the federal system (e.g., automatic disclosure in discovery). Carl Tobias, *The Past and Future of the Federal Rules in State Courts*, 3 NEV. L.J. 400, 403 (2002/2003).

153. See, e.g., *Johnson v. Fankell*, 520 U.S. 911 (1997); *Felder v. Casey*, 487 U.S. 131, 153 (1988) (holding that Wisconsin notice of claim statute is preempted when § 1983 actions are brought in state courts). See generally HART & WECHSLER, *supra* note 23, at 453-64 (discussing when federal procedure must be used instead of state procedure when federal causes of action are litigated in state court). Many of the cases involve various state rules of substance or procedure applied to federal civil causes of action litigated in state courts. Some of these causes of action (e.g., 42 U.S.C. § 1983) will involve federal constitutional rights.

154. See generally Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057 (1989) (exploring means of resolving inconsistencies between state and federal procedure); Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111 (1998) (noting that the federal government's authority does not necessarily allow it to exercise complete power over state courts); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998) (discussing the ability of the federal government to commandeer state courts and the implications of that power); Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295 (1988) (discussing issues concerning the settlement of civil rights cases).

thus empowered to set aside state procedural law that will unduly interfere with the proper adjudication of federal constitutional rights.¹⁵⁵

In a similar fashion, Congress has considerable authority to pass legislation that encourages or imposes changes on procedures in state courts, beyond that mandated by federal constitutional law.¹⁵⁶ Wholesale preemption of state procedure in this way is both unlikely and unnecessary. Instead, Congress has selectively intervened to encourage or mandate changes in state court procedures that may affect the adjudication of federal rights. As one example, in 1996 Congress passed legislation that places restrictions on state prisoners seeking habeas relief in capital cases, but only when the state establishes a mechanism providing for competent counsel in state post-conviction proceedings.¹⁵⁷ A second example occurred in 2003 and 2004, when Congress was considering legislation that would grant states money to defray the costs of DNA testing for inmates claiming wrongful conviction who met certain criteria, and to eliminate a backlog of DNA samples submitted for analysis by rape victims.¹⁵⁸ Congress can thus join the federal courts to monitor, and in some instances, regulate, procedural processes in state civil and criminal cases that implicate federal constitutional rights.

155. For a survey of various state procedures that might be subject to preemption in this regard, see Burt Neuborne, *Toward Procedural Parity in Constitution Litigation*, 22 WM. & MARY L. REV. 725, 780-86 (1981) (discussing rules regarding attorneys fees, defenses and immunities, pleadings, class actions, statutes of limitations, and discovery). For a similar survey, see Herman, *supra* note 154, at 1113-34.

156. The Supreme Court recently reiterated that authority. See *Jinks v. Richland County*, 538 U.S. 456 (2003) (upholding the constitutionality of 28 U.S.C. § 1367(d), mandating that state courts toll the running of any statute of limitations while claims within supplemental jurisdiction of a federal court are adjudicated there, before dismissal without prejudice); *Pierce County v. Guillen*, 537 U.S. 129 (2003) (upholding the constitutionality of a federal statute regulating certain aspects of discovery in state court).

157. The legislation is a provision of the AEDPA, codified in various sections of 28 U.S.C. §§ 2261-2266. See HART & WECHSLER, *supra* note 23, at 1301-02. So far, only Arizona has qualified for these provisions. See *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002). But see James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 334 n.84 (2002) (criticizing the failure of states to be "willing to provide the resources needed to qualify for the significant habeas advantages the Act would then make available").

158. Jennifer A. Dlouhy, *Add-Ons End Years of Wrangling, Clear Path for DNA Testing Bill*, CONG. Q. WKLY., Oct. 16, 2004, at 2442.

B. State Judicial Selection Reforms

One factor frequently cited by critics of parity is that state courts are called upon, like federal courts, to enforce federal constitutional rights that are frequently counter-majoritarian in nature. Most state judges, unlike their federal counterparts, are subject to periodic election of some sort. As a result, the fear is that state judges will be beholden to the electorate and less than enthusiastic about giving a fair hearing to persons who advance those rights. Bator acknowledged these points but argued that they were overstated.¹⁵⁹ The proper comparison, he said, was "between the federal courts and the entire hierarchy of state courts."¹⁶⁰ Although many are elected, he conceded, at least "at the state supreme court level, terms tend to be long enough to assure that at least the grosser threats to judicial independence are absent,"¹⁶¹ and "in many states," he asserted, "the election of state supreme court judges is largely a formality."¹⁶²

Bator, in my view, got this about half right. Most state judges are subject to some sort of periodic election. As of today, thirty-nine states have some type of election for some or all of their judges.¹⁶³ Despite this apparent great potential for public pressure, there is considerable (if indirect) evidence that, on the whole, little such pressure takes place. The reason is that considerable systematic evidence, collected by political scientists, demonstrates that most judicial elections are qualitatively different from many elections for the other branches of government. For example, judicial elections

159. See Bator, *supra* note 2, at 629.

160. *Id.* at 630.

161. *Id.*

162. *Id.* at 630 n.62.

163. To briefly summarize: for state supreme courts, thirty-eight have partisan (six courts) or nonpartisan (fifteen) elections, or uncontested retention elections after initial appointment (seventeen). For those thirty-nine states with intermediate appellate courts, seventeen have partisan (five courts) or nonpartisan (twelve) elections, while fourteen have uncontested retention elections after initial appointment. For trial courts of general jurisdiction, twenty-eight states have partisan (eight) or nonpartisan (twenty) elections, four states use a combination of elections, while seven use uncontested retention elections. For complete compilations of each state's laws on judicial elections, see Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 314-60 (2002).

are typically low-key affairs, with low turnout and considerable voter roll-off (i.e., voters casting ballots for other races but declining to cast ballots for judicial races).¹⁶⁴ Few voters have information about judges as candidates, and, as a result, heavily rely on such cues as party affiliation, name recognition, or incumbency.¹⁶⁵ Many judges first obtain their office by appointment to fill a vacancy, and regardless of whether they are incumbents, most judges in putatively contested elections run unopposed.¹⁶⁶ In light of these factors, then, it seems there is little evidence to suggest state judges are regularly "punished" at the polls for enforcing federal constitutional rights.

One can turn this lack of an electoral check around, and argue that it demonstrates that at least some of these judges are beholden to local elites, and thus (presumably) unlikely to rock the boat by going out of their way to enforce federal rights.¹⁶⁷ More importantly, and contrary to Bator's arguments, there is indeed increasing evidence that many elections for state supreme courts are hotly contested, costly, and highly politicized affairs.¹⁶⁸ And although

164. See SOLIMINE & WALKER, *supra* note 1, at 41.

165. See *id.*

166. *Id.* For a review of the considerable evidence to support these assertions, up to 1999, see SOLIMINE & WALKER, *supra* note 1, at 41-42. See also Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79 (1999) (noting that fewer judges are being defeated, they are receiving an ever-growing affirmative vote, and retention elections are drawing an increasing number of voters). For a sample of the literature since then, see Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13 (2003) (examining the influence of elections on judicial independence from the viewpoint of voters); Michael W. Bowers, *Judicial Selection in the States: What Do We Know and When Did We Know It?*, 2 RES. JUD. SELECTION 3 (2002) (examining methods of judicial selection and assessing whether they satisfy their objectives); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004) (constructing a theory of sentencing and electoral control); Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559 (2002) (examining Ohio's recent use of judicial elections as a means of determining whether this form of judicial selection has significant value); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791 (2004) (examining the politicization of New York City elections).

167. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726-42 (1995) (discussing the dangers of elective judiciaries); Huber & Gordon, *supra* note 166, at 249 (considering the electoral incentives of trial judges).

168. For a discussion of numerous examples from the 1990s to the present, see AM. BAR ASS'N, *JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY* 18-36 (2003) [hereinafter ABA REPORT]; Owen G. Abbe & Paul S.

most of the controversy is driven by decisions on state law (e.g., challenges under state constitutions to tort reform legislation),¹⁶⁹ there are some examples of state supreme court justices being challenged and sometimes defeated for their voting in criminal justice death penalty cases (which often, though not always, turn on federal constitutional issues).¹⁷⁰ Likewise, there is some evidence that supreme court justices, in states with the death penalty, vote more often to uphold capital convictions and sentences in election years.¹⁷¹

Still, it is not unfair to call these exceptions to the rule of low-profile judicial campaigns. The majoritarian pressures of the exceptions are indeed troubling, but they do not support a conclusion that state judges, at any level, are *systematically* forfeiting federal constitutional rights due to a fear of the electorate.¹⁷² More empirical research on this point would nevertheless be welcome.¹⁷³

Herrnson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286 (2002) (detailing the shift to competitive elections); Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973 (2001) (discussing the positive and negative aspects of popular elections); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 79 (considering means of lowering the risks associated with elections); Clive S. Thomas et al., *Interest Groups and State Court Elections: A New Era and Its Challenges*, 87 JUDICATURE 135 (2003) (discussing the notion that judicial election campaigns are becoming increasingly political). *But cf.* Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 35 (2004) (documenting increased spending for and competitiveness of state supreme court elections, but arguing that further research is necessary to establish linkages between the two).

169. See ABA REPORT, *supra* note 168, at 20-22 (giving examples from numerous states).

170. *Id.* at 19-20; see Bowers, *supra* note 166, at 11 (discussing examples from California); see also Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 596 (2004) (discussing effect of media attention on decisions by state judges in death penalty cases).

171. See Brace & Hall, *supra* note 65, at 1223; Gelman et al., *supra* note 64, at 230-31.

172. See Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 78-82 (1996).

173. For some suggestive studies in this regard, see Francine Sanders Romero et al., *The Influence of Selection Method on Racial Discrimination Cases: A Longitudinal State Supreme Court Analysis*, 2 RES. JUD. SELECTION 19, 29-30 (2002) (noting that a study of 126 cases from state supreme courts from 1955 to 1996 involving racial discrimination—including but not limited to federal constitutional law cases—showed that selection system was not related to outcome); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 51-52 (1998) (highlighting a study of state supreme court decisions from 1970 to 1995 involving personal jurisdiction, which showed that selection system had little effect).

In the short term, at least, there is little prospect that current elective systems will change. Rhode Island was the last state to adopt a form of merit election for its judges,¹⁷⁴ in 1994,¹⁷⁵ and there has been little overall movement to that method in the past couple of decades. Indeed, several states have expressly rejected proposed adoptions of merit elections in that time period.¹⁷⁶ In the short term, again, the trend toward more contentious campaigns for judicial office will be exacerbated by the Supreme Court's decision in *Republican Party of Minnesota v. White*,¹⁷⁷ which held certain ethical limits for such campaigns unconstitutional under the First Amendment.¹⁷⁸

Yet, countervailing trends will be at work, as well. Virtually all lower court judicial races will remain relatively quiet. And even for the high profile positions on state supreme courts, various measures may serve to ameliorate the perceived pathologies of contested and contentious elections. Such measures would include lengthening terms of office, increasing salaries to attract qualified lawyers from the private sector, raising the minimum qualifications to be a judge, publicly financing judicial campaigns, providing for increased disclosure (particularly by interest groups) of contributions to judicial campaigns, and using voter guides to educate the public in such elections.¹⁷⁹

174. Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 852 (2002).

175. Barton P. Jenks, III, Essay, *Rhode Island's New Judicial Merit Selection Law*, 1 ROGER WILLIAMS U. L. REV. 63, 64-65 (1996).

176. See Bierman, *supra* note 174, at 851, 852, 862-63; G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1446 (2003); see also F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 453-65 (2004) (discussing various reasons states have not adopted merit selection).

177. 536 U.S. 765 (2002).

178. *Id.* at 788. For a discussion of the likely effect of *White*, see ABA REPORT, *supra* note 168, at 29-30; Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563 (2004); Brendan H. Chandonnet, Note, *The Increasing Politicization of the American Judiciary: Republican Party of Minnesota v. White and Its Effects on Future Judicial Selection in State Courts*, 12 WM. & MARY BILL RTS. J. 577 (2004).

179. For an extensive discussion of these alternatives, see ABA REPORT, *supra* note 168, at 74-82; David C. Brody, *The Relationship Between Judicial Performance Evaluations and Judicial Elections*, 87 JUDICATURE 168 (2004); Thomas et al., *supra* note 168, at 143-44.

Charlie Geyh, the reporter for the ABA's recent extensive report on state judicial elections, see ABA REPORT, *supra* note 168, at xi, has recently argued that the sort of incremental

CONCLUSION

I conclude where I began. In his article, Professor Bator observed that his objective was not to revisit the entire corpus of legal and policy issues concerning the adjudication of federal constitutional issues in state courts. Rather, he said, his purpose was "a narrower one: to demonstrate that the state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles."¹⁸⁰ He concluded that "state courts are and should be seen as a valuable and enriching resource when they participate in the great task of federal constitutional lawmaking."¹⁸¹

Although perhaps not particularly paradigm-shifting today, Bator's words were near revolutionary two decades ago. At least in academia, there was great skepticism of the ability or willingness of most state courts and state judges to enforce federal constitutional norms. Only a few years earlier, the skepticism had been bolstered greatly by Burt Neuborne's justly influential critique of many of the explicit or implicit empirical underpinnings of parity.¹⁸²

reforms described in the text have, and will continue to, fail, because "judicial elections are ultimately unsalvageable as a means to promote judicial accountability" or independence. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 44 (2003). He goes on to outline strategies for convincing states eventually to abandon judicial elections entirely. See *id.* at 72-79. I sympathize with Geyh's goals, but I do not entirely share his pessimism regarding the efficacy of the concededly incremental reforms. First, those reforms, if taken seriously, have the potential to blunt many of the problems associated with these elections. See Abrahamson, *supra* note 168, at 977-78, 992-1003 (advancing this point at greater length). Second, evaluations of electoral systems should not escape comparative treatment, and on that score it is arguable that some of the characteristics of state judicial races (i.e., ill-informed voters; high re-election rates for incumbents) are often shared by elections for nonjudicial offices in the states (and, indeed, for federal offices). See Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 (2003); Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001). Third, as I discussed in Part I, I am not convinced that state judicial elections, on the whole, have been a disaster, or even especially problematic for, the enforcement of federal constitutional rights by state courts. None of which is to say that parity has benefitted by the presence of the state court elections, or that non-elective forms of judicial selections are not worth exploring or implementing.

180. Bator, *supra* note 2, at 636-37.

181. *Id.* at 637.

182. See Neuborne, *supra* note 28. Much of the academic literature of the time was also critical of parity. See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (1st ed. 1980).

Since Bator wrote, the literature on parity has been enriched by a variety of theoretical and empirical perspectives. My objective in this paper has been narrow, as well. I have attempted to demonstrate that it is a worthwhile project to unpack and, to the extent possible, empirically examine the institutional settings of state courts. Permitting and encouraging state courts to adjudicate federal rights nevertheless raises a variety of concerns regarding the uniformity and coherence of federal law. The bottom line is that parity is a multifaceted concept, one that cannot be the subject of binary evaluation. It is inappropriate to ask whether parity exists, or to ask whether parity is a myth. Yet, there are so many federal and state judges, adjudicating so many different federal claims in different contexts, that it is absurd to come to simplistic conclusions on the past and present scope of parity.¹⁸³

Perhaps this is an easy time to examine (and, for some of us, to defend) parity. Henry Monaghan has recently suggested that the current relationship between the Supreme Court and state courts is, on the whole, a "very amicable" one, but, he says, it would be a mistake to automatically assume that the relationship is "unproblematic and enduring."¹⁸⁴ Rather, he continues, resistance to full implementation of federal constitutional norms can occur "at the retail level. While we see little evidence of that today, today is today, not yesterday, and not tomorrow."¹⁸⁵ So, too, neither the

183.

Disparity abounds. Some state systems are better than other state systems; some state judges are wiser or fairer than other state judges; some state supreme courts are more willing to interpret state constitutional law more expansively than federal constitutional law. Some federal circuits are better than other federal circuits; some federal circuit panels within one circuit are more likely to uphold claims of constitutional rights; some federal district judges are more sympathetic to First Amendment claims than to Fourth Amendment claims. And, yes, some federal judges are wiser, fairer, braver, or more proplaintiff than some state judges. In a given city, the state judges may on the average be more liberal than the local federal district judge. And the Supreme Court over the years varies in how much it protects constitutional rights. Disparity is real life. But is it so permanent and one-sided that jurisdictional doctrine should be designed to rescue federal claimants from the state courts?

Althouse, *supra* note 144, at 1004.

184. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1965 (2003).

185. *Id.* (footnotes omitted).

concept of parity nor its study can be static. Studying and evaluating parity in the future will no doubt continue to be a challenging and enriching endeavor, for both its supporters and its skeptics.