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Parity as Comparative Capacity: A New Empirics of the Parity Debate

Meredith R. Aska McBride

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PARITY AS COMPARATIVE CAPACITY: A NEW EMPIRICS OF
THE PARITY DEBATE

*Meredith R. Aska McBride**

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INTRODUCTION

The debate over parity—the relative competence of state and federal courts, particularly in the enforcement of federal constitutional rights—has a long pedigree. It began in 1787, at the Constitutional Convention in Philadelphia.¹ Most everyone agreed on the establishment of a single supreme court to give voice to a uniform body of federal law.² But views differed about the lower federal courts. Some, like James Madison, wanted to mandate such courts.³ Others, like Roger Sherman, thought the state courts could handle federal business first.⁴ Eventually, the delegates punted and left it up to Congress to allocate judicial power.⁵

Some two hundred years later, in 1977, Professor Burt Neuborne ignited the contemporary parity debate by making a detailed criticism of the competence of state courts as frontline enforcers of federal rights, animated by his own experience as a civil rights litigator.⁶ Neuborne believed that, in suits brought under 42 U.S.C. § 1983 to enforce federal rights, civil rights litigants were much more likely to secure effective

1. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

2. U.S. CONST. art III, § 1.

3. Resolutions Proposed by Mr. Randolph in Convention May 29, 1787, in NOTES OF DEBATES IN THE FEDERAL CONVENTION REPORTED BY JAMES MADISON 32 (1987).

4. FARRAND, *supra* note 1, at 1:125.

5. U.S. CONST. art. III, § 1.

6. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). The parity debate was prefigured by earlier waves of legal discourse grappling with much the same comparative problematics. From approximately the 1920s through the 1960s, calls to abolish diversity jurisdiction argued that state courts should be trusted to treat outsiders fairly; that state courts were better able to interpret their own laws; and states, as sovereigns within our federal system, deserved the respect of noninterference from the federal courts. See Henry Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1927); George Cochran Doub, *Time for Re-evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A. J. 243 (1958); see also Robert J. Sheran & Barbara Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1 (1978); Leslie A. Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203 (1965). And scholars, practitioners, and judges were nearly uniform in their insistence that the federal courts were overburdened with newly-created federal statutory rights (e.g., those stemming from the Jones Act) and had to let go of other types of claims in exchange. Diversity seemed like the logical choice. See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928). See, e.g., Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977).

Similarly, the parity debate of the 1970s–1990s took place against a backdrop of anxiety about the federal courts' workload. See, e.g., Henry Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 643 (1974); Tom C. Clark, *A Commentary on Congestion in the Federal Courts*, 8 ST. MARY'S L.J. 407 (1976). Such debates are rooted in the design of our federal system itself—after all, the framers provided for diversity jurisdiction precisely because they contemplated the possibility of state-court prejudice. See THE FEDERALIST NO. 82 (Alexander Hamilton); see also Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 239–40 (1948). Neuborne's article broke new ground, but draws upon longstanding allocational tensions.

relief in federal court.⁷

But Neuborne offered more than a how-to guide for litigants. He exposed what he viewed as the U.S. Supreme Court's assumption that state and federal courts were in parity as it decided questions about the allocation of judicial power between state and federal courts.⁸ In the course of doing so, Neuborne gestured at a number of institutional parameters that could, in theory, be measured empirically to provide a positive answer to the parity question.

Neuborne's work on parity struck a nerve. Some scholars endorsed the possibility of empiricism as a means of allocating cases between state and federal court; others rejected this position, invoking methodological and normative concerns. Professor Akhil Amar argued that the framers of Article III had already resolved the parity debate. Amar's influential two-tier thesis would require federal judges to handle federal question claims in either the first or last instance.⁹

Professor Martin Redish offered another view, arguing instead that Congress bears primary allocational responsibility.¹⁰ Anticipating current dissatisfaction with the U.S. Supreme Court's doctrines of prudential abstention, Redish argued for judicial deference to the jurisdictional statutes that govern access to federal court.¹¹ Paradoxically, his critique was based in part on the contention that a satisfactory answer to the parity question required empirical evidence, but that such evidence was methodologically impossible to procure. Therefore, Redish argued that scholars should drop the parity question altogether.¹² Professor Erwin Chemerinsky offered a simpler method, framing issues of parity in terms of litigants' forum selection; he was content to sidestep the empirical question and trust the lawyers.¹³

Indeed, a striking feature of parity scholarship has been its tendency to proclaim the parity debate at an end.¹⁴ In the past two decades, the parity debate has gone dormant, and the few articles that do call for its revival

7. Neuborne, *supra* note 6, at 1115.

8. *Id.* at 1130–31.

9. Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

10. Martin Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

11. *Id.* at 343–45.

12. *Id.* at 330.

13. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 604–06 (1991).

14. See, e.g., Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 259; Chemerinsky, *Ending the Parity Debate*, *supra* note 13.

have gone largely unheeded.¹⁵ Even Neuborne recanted, acknowledging that changes in the identity of the judges staffing state and federal courts may alter forum preference for the enforcement of civil rights claims.¹⁶

Just as parity was disappearing from law reviews, empiricists began developing and applying more sophisticated modeling techniques to assess the institutional parameters identified by Neuborne and others. These methods evaluate a surprisingly broad range of judicial behaviors and characteristics of state and federal court systems. Although it does not self-consciously attempt to extend the parity debate, the new scholarship on parity offers evidence called for by earlier writers.

Building on the new empiricism, this Article urges a reframing of the parity debate. Rather than focusing on the narrow question of the willingness and ability of state courts to enforce federal rights, the concern with state–federal parity should embrace a broader range of jurisdictional concurrency. Rather than attempting to influence the U.S. Supreme Court’s allocational decisions, the new empirics will better assist other actors in the state–federal judicial partnership. This Article therefore recommends that scholars interested in the relationship between state and federal courts focus on the *comparative capacity* of these court systems. So conceived, the parity question is methodologically tractable in light of intervening developments in the social sciences. The question is also newly relevant as movements for racial justice are actively working to abolish qualified immunity, grappling with whether this goal is better pursued at the state level, the federal level, or both.¹⁷

Part I of this Article provides a critical recapitulation of three themes that animated the parity debate as it unfolded some forty years ago, providing an intellectual history of this literature that explains why the parity debate ended—and why empirics are unhelpful to the debate as originally conceived. In particular, the parity debate foundered on its preoccupation with criticizing U.S. Supreme Court allocational decisions on the mistaken assumption that the doctrine was based on an empirical concept of state–federal court equivalence.

Part II argues for the possibility of a theoretically sophisticated

15. See, e.g., Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651 (1991).

16. Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995).

17. Section 4 of the BREATHE Act, drafted by the Movement for Black Lives, would abolish qualified immunity under federal law, abrogating that part of the U.S. Supreme Court’s § 1983 jurisprudence. See MOVEMENT FOR BLACK LIVES, THE BREATHE ACT: SECTION 4: HOLDING OFFICIALS ACCOUNTABLE & ENHANCING SELF-DETERMINATION OF BLACK COMMUNITIES 7, <https://breatheact.org/wp-content/uploads/2020/09/Section-4-The-BREATHE-Act-Summary.pdf> (last visited September 28, 2021); see also Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INSTITUTE: CATO AT LIBERTY (June 22, 2020, 11:31 AM), <https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity>.

empiricism of parity. It begins by retheorizing the parity debate itself. Then, the Part proposes a new model, conceiving of parity in terms of the comparative capacity of the state and federal court systems. Part II also shows that although empirics are of limited relevance to the allocational emphasis of the parity debate of the 1970s and 1980s, they are critical to a comparative notion of parity that contemplates a wider array of decisionmakers within the court systems.

Part III maps the existing empirical and methodological literature onto the comparative capacity model. In short, the data that earlier parity scholars feared were impossible to collect have, for the most part, already been gathered and analyzed.

Part IV discusses the implications of the new empirics of parity, calling for three changes in orientation to parity scholarship. First, given that both the state and federal courts must hear many cases every year regardless of whether particular classes of cases are allocated to one system or the other, the debate must focus primarily on helping both types of courts to perform at their best. Scholarship in this vein might productively be addressed to Congress and the state legislatures, whose job it is to resource the courts. Second, Part IV invites federal courts scholars to consider where existing jurisdictional doctrine opens the door for judges beyond those on the U.S. Supreme Court to consider empirical information comparing the state and federal courts. In particular, habeas and abstention cases are opportunities for litigants to brief, and federal district judges to evaluate, the quality of state-court adjudication. Finally, Part IV advocates the creation of a new normative model of an adequate court system. Such a model could be used to develop comparative empirical assessments of state and federal courts, in turn giving rise to a new set of arguments for directing resources or shifting allocational doctrine.

I. RETHEORIZING THE PARITY DEBATE

“The parity debate” is not one debate, but several. The claim that the conversation must come to an end, paradoxically, because it depends on intractable empirical questions is, at best, true as to only some of the many parity debates. This Part shows how empirical and normative questions matter differently in different discursive contexts, assessing parity at different levels of scale and with regard to different legal actors. By clarifying this conversation, this Part shows how it can move forward. It begins by distinguishing three separate parity debates, focusing in turn on the U.S. Supreme Court, Congress, and the individual litigant. Next, it provides a critical intellectual history of the parity debate, tracing the empirical and normative responses to Neuborne’s landmark article and

identifying productive and reductive interventions on both fronts. Finally, it focuses on the main theoretical problem of the earlier parity debate: its inability to recognize that it is not one, but many.

The parity debate has operated at three levels of scale—levels that differ in their respective susceptibility to empirical analysis. The first debate asks how the U.S. Supreme Court should allocate claims between the state court systems in the aggregate and the federal court system as a whole. The second takes place at the level of Congress, which passes jurisdictional statutes allocating particular causes of action to state court, federal court, or both. These statutes, combined with the Court's allocational jurisprudence, create a framework of concurrency within which empirical inquiries operate and become relevant.

The third debate takes place at the level of the individual litigant. (Here, the term “litigant” describes the party, often acting with advice of counsel.) Within the framework of concurrency created by Congress and the Court, litigants determine where to file claims. Whereas Congress and the Court make allocational decisions by comparing the state and federal court systems as a whole, litigants make their personal allocational decisions with regard to a small and specific set of fora. The scope of relevant factual information is thus far more constricted and, as a result, can be richer and more detailed.

Each of these debates draws upon different sources of information and law. The first and second have the power to shape the law; the third deals with law and facts as they exist. Empirical evidence, then, varies in the role it plays depending on the parity debate one is having. The next Sections question how some prior writers on parity have mapped empirics onto each level of scale and propose an alternate mapping.

A. Framing the Parity Debate: An Outcome-Driven Empirics of Constitutional Rights

The existing parity debate has been made less generative by its obsessive topical focus on constitutional rights, especially those associated with left politics. The resulting discursive trajectory has shaped the theorization of parity as well as its empirical assessment. Nearly every entrant to the field responds to Burt Neuborne's landmark 1977 article *The Myth of Parity*. That article begins with a discussion of *Stone v. Powell*,¹⁸ a Fourth Amendment habeas case in which the U.S. Supreme Court “appeared to assume that state and federal courts are functionally interchangeable forums likely to provide equivalent protection for federal

18. 428 U.S. 465 (1976).

constitutional rights.”¹⁹

Neuborne then moves to a forceful critique of that perspective: “I suggest that the assumption of parity is, at best, a dangerous myth, fostering forum allocation decisions which channel *constitutional* adjudication under the illusion that state courts will vindicate federally secured *constitutional rights* as forcefully as would the lower federal courts.”²⁰ The scope of Neuborne’s argument is confined to the relative competencies of state and federal courts in the adjudication of constitutional rights, making the argument that federal courts are more plaintiff-friendly. Neuborne nowhere claims that his article does any more than this; the text is explicitly grounded in his own practice as a civil liberties lawyer.²¹

The second part of the article takes up two empirical assumptions around which Neuborne structured his own litigation practice. First is that “persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court.”²² The second assumption is that, “to a somewhat lesser degree, federal district courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims.”²³ Neuborne “kn[e]w of no empirical studies that prove (or undermine) those assumptions,” and proceeded to lay out a series of institutional parameters that were relevant to his determination of whether state courts were trustworthy arbiters of constitutional rights.²⁴ In essence, the article sketches out an empirical rebuttal, based on a loose form of auto-ethnography, to what Neuborne views as the U.S. Supreme Court’s implicit empirical claim about the equivalence of state and federal courts.²⁵

Subsequent writers have advanced the parity debate on the grounds of Neuborne’s rebuttal: by attempting to pursue the empirical inquiries that Neuborne outlined; by justifying or attacking, on doctrinal and normative grounds, the Court’s “assum[ption] that no factors exist which render federal district courts more effective than state trial or appellate courts for the enforcement of federal constitutional rights”²⁶; and by providing alternate approaches to the assessment of state–federal court parity with regard to constitutional rights. Commentators after Neuborne, therefore,

19. Neuborne, *supra* note 6, at 1105.

20. *Id.* (emphasis added).

21. *Id.* at 1115.

22. *Id.* at 1115–16.

23. *Id.* at 1116.

24. *Id.*

25. *Id.* at 1117; *see also* AUTO/ETHNOGRAPHY: REWRITING THE SELF AND THE SOCIAL (Deborah Reed-Danahay ed., 1997).

26. Neuborne, *supra* note 6, at 1117.

have let his article establish the boundaries of the parity discussion in a way that Neuborne himself never explicitly intended.²⁷

Neuborne begins his process of empirical modeling by arguing that parity (particularly within the habeas context) is often assessed via “a comparison that tends to measure the federal district courts against state appellate courts,” and suggests instead that a cleaner assessment begins with a more rigorous theorization of “which state forum should be compared with the federal district courts to determine whether a comparative advantage exists.”²⁸ Neuborne advocates an apples-to-apples comparison of state trial courts with federal district courts.²⁹ Chemerinsky views the question as systemic, arguing that “[t]he parity question demands an overall comparison of the federal courts with the state courts,” but noting that the heterogeneity of both systems undermine the usefulness of such a comparison even if it could be produced.³⁰ Others have viewed the question as answerable only from the litigant’s perspective³¹ (which, as Resnik reminds us, must include recognition that “the often-invoked description of the federal courts as comprised of a three-tiered pyramid of courts fails to capture the sprawling structure into which the federal judicial system, consisting of courts, agencies, and private-affiliated decision makers, has evolved.”).³²

Amar thinks Neuborne’s model is too narrow, framing the parity question as “about state court jurisdiction versus the federal judicial power of the United States as a whole.”³³ In particular, Amar identifies the *failure* of the federal court system as a whole to perform this appellate function as the fulcrum of the parity question:

If the Supreme Court cannot discharge its appellate function today, the real question is whether lower federal courts need to fill the breach because they have constitutional parity with the Supreme Court in a way that state courts do not, and because they are article III tribunals in a way that state courts are not.³⁴

27. Ann Althouse, *Federal Jurisdiction and the Enforcement of Federal Rights: Can Congress Bring Back the Warren Era?*, 20 LAW & SOC. INQUIRY 1067, 1070 (1995) (“One would think, then, that the ‘Myth of Parity’ exercise would need to be wholly redone in response to changed conditions. Indeed, one might also question whether the subjective observations of a lawyer for a particular subcategory of litigants ought ever to have had great persuasive pull.”).

28. Neuborne, *supra* note 6, at 1118.

29. *Id.* at 1119.

30. Chemerinsky, *Ending the Parity Debate*, *supra* note 13, at 599–600; *see also* Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 259.

31. Redish, *supra* note 10, at 336.

32. Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 172 (1995).

33. Amar, *Parity as a Constitutional Question*, *supra* note 9, at 645.

34. *Id.* at 646–48.

For Amar, then, the Constitution also commands a recognition that the two systems are not similarly situated.

Some writers imply that the entire project of finding proper comparators is specious. For Wells, for example, the U.S. Supreme Court is to blame by creating unstable doctrinal terrain:

The Court insists that there is parity, but does not specify precisely what it means by parity: does it deem state courts the virtual equals of federal courts, in that the outcome of a suit would be the same in state as in federal court, or does it acknowledge a gap yet consider that gap too small to require a federal forum?³⁵

Without clarity in the doctrine, it is impossible to develop a comparative methodological approach. Elsewhere, Wells has identified this as the definitional problem of “weak” versus “strong” conceptions of parity:

The assertion of parity between state and federal courts may refer to a claim that a litigant will receive a constitutionally adequate hearing on a federal claim in state court. In contrast with this ‘weak’ sense of parity, the ‘strong’ sense of the term signifies the fungible nature of state and federal courts and the absence of a systematic difference in outcomes whether cases are allotted to state or federal courts.³⁶

A conspicuous problem of the literature is the lack of robust theorization that Wells identifies. Without a prior model of parity as strong (implying that courts of original jurisdiction in both systems are the relevant points of comparison), weak (implying that attention to the institutional characteristics of, and outcomes in, state court is adequate perhaps without comparison to federal court), or something else entirely à la Amar, it is difficult to develop a rigorous research design.

Neuborne also notes that state courts need not act in bad faith to be unreliable: the “comparison need only suggest that given the institutional differences between the two benches, state trial judges are less likely to resolve arguable issues in favor of protecting federal constitutional rights than are their federal brethren.”³⁷ This strongly implies that outcome, rather than process, is—for Neuborne—the relevant metric.

Indeed, subsequent efforts by federal courts scholars to take up Neuborne’s empirical charge have largely focused on whether constitutional rights plaintiffs get the same kinds of outcomes in state and federal courts.³⁸ Eisenberg, for example, conducted a descriptive study

35. Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 285 (1988).

36. Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Federal Courts*, 71 B.U. L. REV. 609, 610 (1991).

37. Neuborne, *supra* note 6, at 1119–20.

38. But win rates are not necessarily indicative about much regarding a court system as a whole. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System: Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998).

based on a sample of § 1983 cases filed in the Central District of California in 1975 and 1976, concluding that such cases (surprisingly) were not overburdening the federal court system.³⁹ Gerry, in 1999, compared state and federal district court interpretations of *Nollan v. California Coastal Commission*, concluding that the court systems are “startling in their similarity.”⁴⁰ Marvell, in 1984, claimed that “parity does not exist” on the basis of data about lawyers’ rationales for forum selection in student rights cases.⁴¹ Rubenstein used a similar outcomes-oriented research design to contest Neuborne’s central point, using his experience as a gay-rights litigator in the 1990s to argue that state courts are actually more favorable to the assertion of individual rights than federal courts.⁴² Solimine and Walker’s 1983 study is perhaps the best known of such outcome-focused work, defining parity as existing “if, holding all other factors constant, a litigant is, on the average, equally successful in both the federal and state court systems.”⁴³ They found, rather flatly, that, taking state appellate courts into account, parity *does* exist.⁴⁴ And Urquhart, writing in 2011, adopts Solimine and Walker’s methods to compare the success rates of litigants asserting federal claims after *Younger* proceedings in state courts versus federal courts, finding much higher success rates in the latter circumstance.⁴⁵ But such one-dimensional focus on outcomes alone has been critiqued. The serious methodological problems with such studies notwithstanding,⁴⁶ outcomes

39. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 521–24 (1981).

40. 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, 241, 285 (1999).

41. Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WISC. L. REV. 1315, 1338–39, 1358 (1984) (asserting that parity does not exist, empirically, and lawyers stating that federal judges are more likely to enforce federal law, among other reasons for choosing federal court). This study is an example of how earlier empirical studies of parity made claims that were disproportionately broad as compared with what their results show—here, claiming that parity simply does not exist, rather than asserting more modestly that the study showed substantial differences between the state and federal courts regarding one area of law, from the litigant perspective.

42. See generally William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999).

43. Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 232 (1983).

44. *Id.* at 232, 250. This is another study that overclaims.

45. Joshua G. Urquhart, *Younger Abstention and Its Aftermath: An Empirical Perspective*, 12 NEV. L.J. 1, 3, 44, 47 (2011). This study has serious methodological flaws, many of which are also present in Solimine & Walker, *supra* note 43: the use of a date range that seems arbitrary, reliance on Westlaw, undertheorized and informal approaches to coding, and an unsystematic approach to checking one’s work.

46. See Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 261–69 (highlighting methodological problems in the Walker & Solimine study, including: a focus only on decisions rather

alone are most relevant under strong-parity models that define parity as the complete fungibility of the two court systems.⁴⁷

Finally, Neuborne challenged the assumption that federal judges are “carpetbaggers,” instead emphasizing that they are “root[ed] in the communities they serve” just as much as state judges.⁴⁸ Other commentators did not really take up this point; thus, it is hard to know whether they agree with Neuborne or simply think the issue irrelevant.

After sweeping away what he viewed as incorrect factual assumptions, Neuborne built his comparative model by laying out “three sets of reasons” that support plaintiffs’ civil liberties attorneys’ preferences for federal fora.⁴⁹ Neuborne, unlike subsequent writers on parity, did *not* claim that these three reasons formed a comprehensive, comparative model of parity. They are: (1) the judges’ technical competence—Neuborne believed federal judges to be more competent; (2) the judges’ “psychological set”—Neuborne believed federal judges to be more amenable than state judges to plaintiffs asserting federal constitutional claims; and (3) the federal courts’ relatively greater “insulation from majoritarian pressures,” making them “structurally preferable to state trial court as a forum in which to challenge powerful local interests.”⁵⁰

Most contributors to the parity literature seem to agree with Neuborne that federal judges are more competent. Such competence includes not only the judges’ own technical skills, but also structural features of federal courts that (in these writers’ view) enable any judge to perform her best work. These features include comparatively higher pay, the higher numbers and perceived greater talents of law clerks to which they have access, and their somewhat more leisurely schedule.⁵¹ The greater selectivity and prestige of the federal bench is considered to draw a higher caliber of lawyer—though lawyer quality is not often defined in these writings—than the state bench.⁵² Chemerinsky cautions that “there is no

than including cases that settle, not taking account of the potential that state and federal courts may not be deciding a similar pool of cases depending on rates of and reasons for settlement, focusing only on state appellate courts without controlling for how many cases are appealed and on what grounds, not accounting for differences in the subject matter of cases or whether they are comparable in their substantive content, not analyzing the comparative likelihood that Congress as opposed to state legislatures will enact unconstitutional criminal statutes, not controlling for the availability of removal by claim type, not relying on independent metrics of court quality, not controlling for federal courts ruling against a claim on procedural grounds, and making an apples-to-oranges comparison of federal district and state appellate courts).

47. Wells, *supra* note 36, at 610; *see also* Herman, *supra* note 15, at 652–53; Neuborne, *supra* note 16, at 797, 803; Solimine & Walker, *supra* note 43, at 228.

48. Neuborne, *supra* note 6, at 1120.

49. *Id.*

50. *Id.* at 1120–21.

51. Paul Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623 (1981).

52. *Id.*

reason to believe that ‘better’ judges will produce decisions that systematically favor individual rights,” pointing to Justice Antonin Scalia and former Ninth Circuit Judge Alex Kozinski as two federal judges who were widely considered brilliant but who rarely decided in favor of individual rights.⁵³ From a litigant-choice perspective, Flango notes that attorneys themselves “tend to view federal judges as better trained, better supported with resources, and more impartial because they are not elected,” and that such attorneys attempt to funnel complex litigation to federal court in the belief that federal judges are better equipped to handle such cases.⁵⁴ But this may perpetuate a vicious cycle: state judges cannot be expected to manage complex questions of federal law if they never get a chance to do so.⁵⁵ Others have noted that it is unfair to scrutinize the competence of state-court judges in interpreting federal law without asking how good *federal* judges are at interpreting *state* law, such as in diversity cases.⁵⁶ Yet the precise contours of judicial competence remain unmapped.

Neuborne’s theory of “psychological set,” by contrast, has not been received as enthusiastically. Though Neuborne identifies it as one of his three primary reasons for preferring federal court, only Chemerinsky mentions it, and at some remove.⁵⁷ Some writers evaluate the consequences of judges’ relative levels of insulation from majoritarian and quotidian pressures; Bator, for example, cites the “intuitive” contention that a “sensitivity to federal rights is reinforced by the federal judges’ relative insulation from the daily grind of legal administration in our state and municipal lower criminal, family, and civil courts, which is said to breed cynicism and callousness with respect to abstract-sounding constitutional rights.”⁵⁸

Neuborne identifies the structural insulation created by Article III’s appointment and life tenure provisions as crucial to federal judges’ greater, even countermajoritarian inclination to enforce constitutional rights.⁵⁹ Redish regards these protections as definitive: “the absence of prophylactic protections of state judicial salary and tenure is so

53. Chemerinsky, *Ending the Parity Debate*, *supra* note 13, at 599.

54. Victor E. Flango, *Litigant Choice between State and Federal Courts*, 46 S.C. L. REV. 961, 973–74 (1995).

55. See Althouse, *supra* note 27, at 1078–79; Evan Tsen Lee, *On the Received Wisdom in Federal Courts*, 147 U. PA. L. REV. 1111, 1123 (1999); Neuborne, *The Myth of Parity*, *supra* note 6, at 1129; Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 97–99 (2009).

56. Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1299–1300 (2003); Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1173 (2007).

57. Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 277.

58. Bator, *supra* note 51, at 623.

59. Neuborne, *supra* note 6, at 1127.

inconsistent with concepts of basic fairness as to violate procedural due process.”⁶⁰ Bator concedes that federal judges are probably better “insulated from majoritarian pressures and will therefore be more receptive to controversial and unpopular constitutional principles,” but aspires nonetheless to help state courts “become a more hospitable forum, that the rhetoric of parity becomes reality.”⁶¹ No commentators seriously challenge the countermajoritarian affordances of Article III.⁶² The question becomes whether state judges can judge fairly despite being subject to electoral pressures.⁶³

In *The Myth of Parity*, Neuborne’s empirics of experience, mobilized to critique the U.S. Supreme Court’s recent jurisdictional decisions, invited subsequent commentators to think about parity as exclusively allocational and susceptible to assessment solely by recourse to case outcomes. This approach to parity is valuable in its own right, but limited, and the debate has consequently run aground. But this narrow view of parity contains within it a broader comparative terrain. Neuborne’s “three sets of reasons” draw in questions of judicial decision-making, litigant behavior, the resourcing of court systems, and the relationship between jurisdictional doctrines and the lower-court judges who must implement them.

B. Parity for Whom? Assessing Parity at Different Levels of Scale

To model parity empirically requires an answer to the antecedent question, “parity for whom?” The parity debate has stalled in large part because this question has not been theorized nor even fully surfaced. And parity looks much different from the vantage point of each actor and level of scale within the judicial system.

The U.S. Supreme Court’s responsibility is to assess the federal system as a whole, as compared with the state system as a whole, in making allocational decisions. The fundamental ground of this particular debate

60. Redish, *supra* note 10, at 335–36.

61. Bator, *supra* note 51, at 623–24.

62. See also Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 275–76; Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 722–23 (2010).

63. Solimine proposes avenues for further research. See Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1471–72 (2005). The empirical literature indicates that elections do have substantial impact on how state judges make decisions—see notes 168–195, *infra*, and accompanying text. See also Frost & Lindquist, *supra* note 62, at 722–23; Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1440–41, 1441–42 (1999). But see Bator, *supra* note 51, at 624 (“[I]t is virtually inevitable that 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.”).

is Article III. Jurisdictional statutes and the Court's own allocational jurisprudence are also relevant, not least as objects of critique.⁶⁴ First, normative views about state sovereignty dictate allocational approach.⁶⁵ That is, the Court often deals with allocation as a pure question of law, whether formally or functionally.⁶⁶ The empirical design implication of the U.S. Supreme Court's allocational task—to the extent that the Court or its observers seek to approach this work empirically, which this Article later argues that it (mostly) does not and should not—is that the Court needs both to have and to understand data on the aggregate federal courts and the aggregate state courts, so that it can direct classes of cases to classes of courts. As others have pointed out,⁶⁷ such an empirical task is difficult, if not impossible, posing conceptual problems of sampling and variability and practical problems of data collection and analysis. In part for this reason, commentators such as Amar and Redish have argued that parity should be assessed exclusively as a constitutional and perhaps statutory issue.⁶⁸

Litigants, by contrast, have responsibilities only to themselves. Litigants want to win and to feel fairly heard.⁶⁹ Parity from the litigant perspective looks very much like a comparison of win rates under particular doctrinal conditions in the first instance—"strong parity"—and like a set of parameters for procedural fairness and constitutional adequacy in the second instance—"weak parity."⁷⁰ The litigant-choice model advanced by Chemerinsky and others is therefore unsatisfying on its own. Even if we agree that as a matter of law litigants have a choice between federal and state courts where concurrent jurisdiction exists, we may still be interested in how they exercise that freedom of choice. That is, litigant choice should be used not to *foreclose*, but rather to *structure* empirics of parity. Information on attorneys' strategic decisions under conditions of concurrency tells us that, at a minimum, litigants often view the systems as different.⁷¹ In turn, litigants jockey for competitive

64. Amar and Redish, for example, are thinking about parity essentially from the U.S. Supreme Court's perspective. See Amar, *Parity as a Constitutional Question*, *supra* note 9, at 649; Redish, *supra* note 10, at 336.

65. See Part II, *infra*, for further discussion.

66. *Id.*

67. See Chemerinsky, *supra* note 13, at 599–600; Solimine & Walker, *supra* note 43, at 214–15; Amar, *Parity as a Constitutional Question*, *supra* note 9, at 645–46.

68. Amar, *Parity as a Constitutional Question*, *supra* note 9, at 645; Redish, *supra* note 10, at 332–33.

69. See, e.g., Tom R. Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

70. Wells, *supra* note 36, at 610; Chemerinsky, *Ending the Parity Debate*, *supra* note 13, at 602–04.

71. Flango, *supra* note 54, at 973–74; Seinfeld, *supra* note 55, at 138; Solimine & Walker, *supra* note 43, at 245; Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383,

advantage, giving rise to normative questions about how and whether jurisdictional design should privilege certain litigants.⁷² Parity for litigants is therefore partially empirical and partially normative. But the empirical information on which litigants rely is likely to be that of lived experience.⁷³ The prospect of moving beyond such rules of thumb to drill down into comparative data at the level of the individual court is as daunting as the prospect of aggregating such data.

At the highest level of abstraction—for U.S. Supreme Court Justices—empirics may not be possible, useful, or normatively desirable. Nonetheless, the Court processes hundreds, perhaps thousands, of petitions seeking review of state court decisions each year, providing the Justices with valuable, if slanted, information about lower courts' behavior.⁷⁴ At the lowest, most granular level—for litigants—a rough empiricism is inescapable. Congress also has the authority to pass jurisdictional statutes, and may choose to do so on the basis of either empirical or normative considerations, or both.⁷⁵ Empirics matter a lot if state and federal courts need to be fully fungible in order to be in parity but less so if they merely need to be loosely comparable or exceed some minimum level of constitutional adequacy.⁷⁶ In the end, as Herman writes:

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

412–13 (1991); e.g., Neuborne, *supra* note 6, at 1115–16.

72. See Amar, *Parity as a Constitutional Question*, *supra* note 9, at 648–49; Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1777–78 (1992); Wells, *supra* note 36, at 611; see also Clermont & Eisenberg, *supra* note 38, at 599. See generally Bator, *supra* note 51.

73. Flango, *supra* note 54, at 973; Seinfeld, *supra* note 55, at 135–39. See generally Calabresi, *supra* note 56.

74. See, e.g., *The Statistics*, 134 HARV. L. REV. 610 (2020) (containing Harvard Law Review's compilation of statistics on the most recent U.S. Supreme Court term). The statistics do not show how many petitions for certiorari sought review of state court decisions, but the Court considered a total of 5,718 petitions, of which it granted review in 60. *Id.* at 618. Of the Court's 149 dispositions reviewed on writ of certiorari in October Term 2019, twenty-one of them, or 14 percent, originated in state courts. *Id.* at 619–20. Of course, it is difficult to know whether the distribution of cases granted is representative of the certiorari pool itself, but assuming it were, the Court would have reviewed approximately 800 petitions from state court decisions. The number could be higher, given that 4,201 of the petitions considered were filed *in forma pauperis*, *id.* at 618, and many of these are likely to have sought either direct review of state court decisions or indirect review via federal habeas claims. Only four of those 4,201 were granted review. *Id.*

75. See, e.g., Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1347–48 (2005); Richard Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1145–46 (1988).

76. Chemerinsky, *Ending the Parity Debate*, *supra* note 13, at 599–600; Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 259, 261–69.

irrelevant. If one believes that federal court review is unnecessary as long as state courts are reasonably receptive to federal constitutional claims, then parity, in the sense of equivalence, may still not matter, but disparity will.⁷⁷

II. REBUILDING THE PARITY DEBATE—FROM ALLOCATION TO INSTITUTIONS

The field of federal courts need not give up on parity. By changing focus from allocational doctrine to institutional comparison, both normative and empirical modes of analysis become newly relevant. This Part transitions from allocation to institutions. This Part begins by showing why the parity debate stalled on the question of empirics and recalibrates what the field can reasonably expect from data on the courts. Next, it pursues a close reading of the U.S. Supreme Court's late-twentieth-century allocational doctrine, showing how the earlier allocation-focused parity debate proceeded on the mistaken assumption that the Court based its decisions on empirics. This reading shows instead that the Court relies on normative conceptions of state sovereignty within our federal system. Having thus deconstructed the earlier empirics of parity, this Part ends by rebuilding a new empirical approach. The resulting comparative capacity model is methodologically sound, theoretically elegant, and enables an empirics that is more responsive to existing doctrine.

The parity debate of the 1980s and early 1990s petered out after influential writers in the field of federal courts agreed that the parity question was both inherently empirical and empirically intractable. This claim was enabled by a failure to disentangle the various parity debates from each other and examine how their differing normative claims required different forms of empirical inquiry. In other words, parity is not *an* empirical question but *many* empirical questions.

In 1988, Chemerinsky wrote, "I fear that the debate over parity is permanently stalemated because parity is an empirical question—whether one court system is as good as another—for which there can never be any meaningful empirical measure."⁷⁸ He further noted that developing criteria to enable measurement of such nebulous yet essential concepts as judicial competence, decisional correctness, and institutional quality is nearly impossible.⁷⁹ Chemerinsky "question[ed] the usefulness of an aggregate evaluation"—which he believes to be the only empirical path forward—"of court systems as large and varied as those of fifty states and

77. Herman, *supra* note 15, at 652–53.

78. Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 236.

79. *Id.* at 256–57.

ninety-one federal districts.”⁸⁰ Though he acknowledges the possibility that some kind of sprawling project might collect data on the court systems of individual states, he views this as a completely “different inquiry from the current focus on parity,” which he defines as “an *overall* comparison of the state court systems with the federal courts with regard to protecting individual liberties.”⁸¹

For Chemerinsky, then, no study (or perhaps even group of studies) can be designed to provide a *conclusive* empirical answer to a narrowly tailored version of the parity question. He explains: “The problem is that without empirical measurement, each side of the parity debate simply has an intuitive judgment about whether the institutional differences between federal and state courts matter in constitutional cases. Each side explains its position, but neither has any way to prove it or refute the opposing claim.”⁸² This is a remarkably positivist position for someone rejecting the possibility of empirics altogether. It is also unusual in the context of legal scholarship, which has established over hundreds of years a rich set of normative, qualitative, and logical styles of argument that are widely deployed—and widely considered rigorous and persuasive.⁸³ This positivist rejection of both empirical and nonempirical modes of analysis led to a foreclosure of the parity question, causing Chemerinsky to fall back on a “litigant choice principle” which he hoped would appeal to “both sides” and allow a final resolution of the question of parity without engaging, let alone relying upon, empirics.⁸⁴

Redish also thinks the parity debate is over, but because it never should have begun.⁸⁵ For Redish, the factual differences between the two systems, due to Article III, are so stark that they are self-evident and require no systemic investigation, as if the question could even be asked in the first place.⁸⁶ Amar finds these rationales superseded by one even more compelling: “Parity, to my mind, is not so much an empirical question as a constitutional question. In effect, the Constitution itself provides an answer to the empirical issue.”⁸⁷

This Article instead offers normative principles to ground, rather than end, the parity debate. The empirical assessment of parity is possible, but

80. *Id.* at 260.

81. *Id.* (emphasis in original). Chemerinsky also recognizes that a comparison between court systems could be grounded in other substantive bodies of law and/or heads of jurisdiction.

82. *Id.* at 278–79. *But see* Bator, *supra* note 51, at 623 (“It is immediately apparent that these contentions are intuitive; they rest on human insight rather than on empirical evidence or scientific measurement. But they surely cannot be dismissed on that account.”).

83. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2–3 (2002).

84. Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 300.

85. Redish, *supra* note 10, at 330–31, 342.

86. *Id.*

87. Amar, *Parity as a Constitutional Question*, *supra* note 9, at 645; see also *id.* at 646.

perhaps not definitively so—because no type of evidence, empirical or otherwise, can provide a definitive answer to any complex question, with few exceptions. An empirically-informed parity debate is likewise possible and desirable, but the field’s expectations will have to be brought into line with disciplinary methodological thinking. First, no *one* study will *definitively* tell us whether or not parity exists between the state and federal courts or any subset thereof. “[T]he debate is not susceptible to a ‘yes’ or ‘no’ answer, unless one is asking a very narrow version of that question.”⁸⁸ Like other careful and rigorous empirically-informed approaches to complex questions, the empirical evidence we should look to will consist in a body of work, with each piece making its own contribution and likely contesting other pieces of evidence. Those engaging in an empirically-informed parity debate should seek to make arguments marshaling various pieces of evidence rather than obediently looking to one study to end the conversation. (And even the most perfectly designed study would have to be repeated later in time.)⁸⁹

Second, regardless of how one conceives of parity, it cannot be assessed without recourse to a broadly comparative body of data about the state and federal courts as institutions. Even Neuborne’s narrow approach required a wide-ranging factfinding mission. Additionally, the empirical conversation cannot be limited to the federal courts literature but must be interdisciplinary, drawing on methods, insights, and studies from a variety of social science fields.

Third and finally, empirics alone, even so conceived, are insufficient to answer, let alone ask, the parity question. The parity literature as a whole has suffered from a lack of theoretical clarity. Without a nuanced normative and doctrinal definition of what it would mean for state and federal courts to be in parity, it is impossible to design studies that could measure parity in any convincing way. Wells identifies the confusion as one between “strong” and “weak” models of parity.⁹⁰ Bator identifies the stakes of the inquiry by arguing that:

The question is not, tout court, whether federal and state courts stand in parity. The question is whether a preference for the federal forum justifies removing to federal court all state court enforcement proceedings in which a federal question is raised; or justifies relitigating all federal questions already adjudicated in the state courts; or justifies separate federal litigation of all federal defenses in injunctive or declaratory actions in the face of

88. Herman, *supra* note 15, at 651.

89. See Althouse, *supra* note 27, at 1070; Chemerinsky, *Ending the Parity Debate*, *supra* note 13, at 603; Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1222–23 (2004); Herman, *supra* note 15, at 651–52; Resnik, *supra* note 32, at 172; Solimine, *supra* note 63, at 1487. See generally Neuborne, *supra* note 16.

90. See *supra* notes 70–77 and accompanying text.

pending or impending state court enforcement proceedings.⁹¹

Amar “suggest[s] instead that the *Constitution* itself has made certain policy decisions” and thus that the need for any empirics is obviated.⁹²

Each of these authors has committed to a differing view of parity, each of which has its own specific implications for research design and evaluation. Such commitments are generative; by contrast, those who have committed to no clear and particularized model of parity have been unable to move the conversation forward. By asking what parity might mean for different types of people, the field becomes able to propose new models.

A. *Moving Beyond Allocation*

Though earlier writers on parity found much to debate, they agreed on one thing: the U.S. Supreme Court made its allocational decisions on the basis of empirical assessment of the state and federal court systems. Early participants in the parity debate often attacked the empirical factors that were thought to inform the Court’s allocational doctrine. For example, Neuborne argued that the Court “presently seems bent on resolving forum allocation decisions by assuming that no factors exist which render federal district courts more effective than state trial or appellate courts for the enforcement of federal constitutional rights,” and that he “hope[d] to challenge the Court’s present assumptions” by means of his empirical discussion.⁹³ Wells said that “[t]he Court has changed its attitude toward and response to the gap between federal and state courts,” first ignoring that gap, then “prefer[ring] state adjudication *because of* the lack of parity.”⁹⁴ Chemerinsky wrote that “the Court has repeatedly justified its holdings by invoking conclusions about the relative competence of state and federal courts.”⁹⁵ As a result, the parity debate has been geared toward the U.S. Supreme Court and allocational critique.⁹⁶

This consensus, however, is unfounded. The Court does not now, and did not in the 1970s and 1980s, ground its allocational judgments in empirical assumptions or arguments. Instead, the Burger and Rehnquist Courts repeatedly used equitable discretion to establish nebulous doctrinal principles like comity and “Our Federalism” to navigate the fraught intergovernmental relationships of our federal system. The word *parity* itself is not used in any cases that ground the parity literature. This

91. Bator, *supra* note 51, at 610–11.

92. Amar, *Parity as a Constitutional Question*, *supra* note 9, at 649.

93. Neuborne, *supra* note 6, at 1117.

94. Wells, *supra* note 35, at 319–20.

95. Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 245.

96. Wells, *supra* note 36, at 609–10.

Section shows that the Court's reasoning is normative, grounded in principles of federalism and judicial administration, rather than empirical.

Removing this fundamental ground of the parity debate has at least two major implications. First, federal courts scholars should reconsider their reliance on empirically-inflected critiques of the Court's allocational doctrine, *unless* the aim of the critique is to undertake the much larger task of convincing the Court to change the epistemological basis of its allocational jurisprudence. Empirical arguments about the relative competence of state and federal fora are much better addressed elsewhere, such as when federal district court judges are deciding habeas or abstention claims. Second, the empirics of parity must go beyond steering filing decisions under particular conditions of concurrency. Accepting the jurisdictional framework as a given, or at least, as susceptible only to normative and doctrinal critiques, the field must understand, empirically, how this framework has structured all substantive dimensions of the relationship between the state and federal courts: in particular, where doctrine positions federal courts as coming into play only when state courts, individually or collectively, have failed in some way, and where the substantive law of one kind of government crosses forum boundaries, to be heard in the courts of the other kind of government.

Stone v. Powell was an inflection point in the development of the allocational relationship between state and federal courts, as the Burger Court constrained the Warren Court's expansive approach to federal jurisdiction. Neuborne critiqued the decision as reflecting a naïve "assum[ption] that state and federal courts are functionally interchangeable forums likely to provide equivalent protection for federal constitutional rights."⁹⁷ But *Stone* itself holds only that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."⁹⁸ *Stone* required only an *opportunity* for litigation of the federal constitutional claim—not a guarantee that the state court would necessarily find in favor of the plaintiff or that the result would be the same (one way or the other) in state as in federal court.

Indeed, the *Stone* Court recognized that the police likely obtained the evidence in question in a search that violated the Fourth Amendment.⁹⁹ Given that the opinion does not rule out the possibility that the state court completely *failed* to vindicate a valid constitutional claim, but nonetheless holds that the habeas petitioner did have a "full and fair opportunity" to

97. Neuborne, *supra* note 6, at 1105.

98. *Stone v. Powell*, 428 U.S. 465, 494 (1976).

99. *Id.* at 481–82, 490–95.

litigate that claim, the Court at best endorses “weak parity” here rather than, as Neuborne reads it, asserting “functional interchangeab[ility].” *Stone* hardly “celebrate[s]” parity.¹⁰⁰ Rather, it essentially asserts that state courts must be trusted to resolve most Fourth Amendment issues correctly most of the time. But Neuborne’s analysis seems to have skewed the parity debate. Subsequent commentators have continued to treat *Stone* as an empirically-based decision.

The abstention cases similarly show the Court’s reliance on normative equitable principles. Thinking about parity in terms of abstention reveals that the litigant choice principle is at best a partial solution to the problem. As the Court noted in *Mitchum v. Foster*, the statutory language of the Anti-Injunction Act¹⁰¹ could have formed the basis of the decision as to whether or not to abstain in *Younger v. Harris*, but instead “the Court carefully eschewed any reliance on the statute in reversing the judgment, basing its decision instead upon what the Court called ‘Our Federalism[.]’”¹⁰² A much earlier abstention case, *Railroad Comm’n of Texas v. Pullman Co.*, used similar language. As the *Pullman* Court noted, earlier cases “reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary.”¹⁰³ In these abstention cases, litigants, under conditions of concurrency, have properly chosen to file in federal courts—and have been rebuffed, because the federal forum has chosen to “further[] the harmonious relation between state and federal authority without the need of rigorous congressional restriction of [equitable] powers” by sending the case to another proper forum.¹⁰⁴

The abstention cases provide important, and contradictory, teachings about parity. First, litigant choice is not dispositive.¹⁰⁵ Second, federal courts focus on system-level, normative concerns in an effort to preserve the proper relationship between state and federal sovereigns. Such

100. Neuborne, *supra* note 6, at 1105.

101. 28 U.S.C. § 2283 (1948).

102. *Mitchum v. Foster*, 407 U.S. 225, 230 (1972).

103. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

104. *Id.* This phenomenon again casts doubt on Chemerinsky’s litigant-choice solution to the parity problem, echoing Redish’s question: “[W]hat are we to do if the different litigants wish to choose different forums?” Redish, *supra* note 72, at 1778.

105. By definition, the major abstention cases arose because one side wanted to be in federal court, and the other side wanted the case to remain in state court. Again, Bator’s caution that “[t]he limitations, too, count as setting forth constitutional values” is apt. Bator, *supra* note 51, at 631. The reservation procedures established in *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 419 (1964), exemplify this tension. A litigant may lose an abstention fight in federal court, be sent back to state court against her will, and then, if she fails to make an appropriate *England* reservation, will not be able to return to federal court due to res judicata issues.

decisions do not rest on particularized empirical determinations about the two fora. In fact, these philosophical concerns can be overridden not by proving simply that state and federal courts are not in strict parity, but only by showing that state courts are unusually deficient.¹⁰⁶ Third, however, and contrary to the Court's explicit language, federal courts' exercise of equitable discretion is potentially linked to an implicit judicial factfinding as to whether there are grounds for suspicion of the state court's willingness or ability to enforce federal rights under the circumstances.¹⁰⁷ The Court's opinion in *Colorado River Water Conservation District v. United States* exemplifies these contradictions, holding that the federal courts have a "virtually unflagging obligation" to exercise their jurisdiction inasmuch as abstention "is the exception, not the rule," and also abstention is appropriate in a host of situations where states simply have a strong interest in hearing the case in their own courts.¹⁰⁸ *Colorado River* both recognizes the primacy of federal jurisdiction where lawful and encourages the federal courts to defer to the state courts for reasons of respect for state sovereignty, *without* contending that the state courts are equally competent. In other words, *Colorado River*—decided in the same year as *Stone v. Powell*—is not at all concerned with parity in the "strong" sense of the term.

As with abstention, the empirical question of parity seems almost irrelevant to habeas jurisprudence in the twenty-first century. After the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁰⁹ and a series of U.S. Supreme Court decisions further narrowing the scope of review and relief under AEDPA, federal courts now ask only whether state-court proceedings either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."¹¹⁰ A state-court decision is only "contrary to" precedent if it is completely "opposite" to the conclusion "reached by [the Supreme] Court on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Court's]."¹¹¹ Together, Congress and

106. See, e.g., *Samuels v. Mackell*, 401 U.S. 66 (1971); *Steffel v. Thompson*, 415 U.S. 452, 454 (1974).

107. See, e.g., *Mitchum*, 407 U.S. at 238–42.

108. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976).

109. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

110. 28 U.S.C. § 2254(d)(1)–(2) (1996).

111. *Terry Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).

the Court have created a doctrine that does not rely on traditional considerations of parity in empowering state courts to make near-final determinations of constitutional rights. As a normative and positive matter, state courts need not even be comparable to, let alone “functionally interchangeable” with, federal courts in how they might decide the constitutional issues raised by habeas petitioners; they need only to reach results not “diametrically different” from how the U.S. Supreme Court has decided a particular issue.¹¹² If this can be considered parity, it is the weakest version possible.

Amar was right. As a doctrinal matter, “the *Constitution* itself has made certain policy decisions,” and along with Congress’ jurisdictional statutes and the Supreme Court’s interpretive decisions, it “provides every bit as much of an answer on the wider [allocational] question as it does on the narrower question of whether state courts are constitutionally adequate to hear federal questions in the first instance.”¹¹³ Forty years into the parity debate, it seems clear that the U.S. Supreme Court’s strongly normative approach to allocational issues relies mainly on a sense that state courts, as the judicial branches of coequal sovereigns, ought to be accorded respect in their determinations even if a federal court would likely come out quite differently on a particular question.

At the highest levels of scale, jurisdictional design does not presume parity—let alone interchangeability—between state and federal courts at the initial point of adjudication. Rather, the design aims to ensure a modicum of federal supervisory power over state decisions if they seem extraordinarily wrong. The empirical implications are clear: the primary doctrinal question susceptible of empirical inquiry is whether state courts are meeting a constitutional baseline of competence; federal district courts may have some degree of latitude, under the guise of equitable discretion, to consider facts about state-court competence; and Congress is a better target of allocational critique than the Court, as it conceivably could change jurisdictional statutes on the basis of different legislative factfinding.

B. Parity as Comparative Capacity

1. The Old Empirics of Parity: Methodological and Normative Problems

Federal courts scholars approaching parity empirically have done so in a thinly positivist manner.¹¹⁴ For these scholars, the parity question can

112. *Id.*

113. Amar, *Parity as a Constitutional Question*, *supra* note 9, at 645, 647.

114. By contrast, *see generally* Rubenstein, *supra* note 42. Rubenstein’s empirics of personal experience provide a richer comparative understanding of state and federal courts than do many of the

be answered definitively in one study,¹¹⁵ or at most a small handful of studies, relying on a strong conception of parity that can therefore be measured by comparing outcomes in the two systems.¹¹⁶ Such studies expressly limit themselves to constitutional rights enforcement, staying within the contours (unintentionally) established by Neuborne.¹¹⁷ Some of these studies have made use of advocates' views on federal and state court systems but have claimed that these are valid indicia of the characteristics of the court systems themselves, rather than a separate, albeit related, body of data.¹¹⁸ Most samples in empirical parity studies seem to be of convenience or, at best, weakly motivated.¹¹⁹ The analysis of outcomes data uses only basic descriptive statistics.¹²⁰ Such forays into empiricism have not satisfied more doctrinally-minded federal courts scholars.¹²¹

The methodological weaknesses of these studies are obvious, their *theoretical* problems less so. In relying uncritically on a “strong” theory of parity without asking how the meaning and implications of parity shift depending on one’s vantage point, such studies use empiricism to foreclose, rather than open up, the parity conversation. Instead, this Section argues that different models of parity that seem, at first, to be in opposition can be true simultaneously. “Strong parity” may be how litigants strategize where they are likeliest to win.¹²² But litigants may also care about securing “weak” forms of parity in terms of fairness of process as a minimum.¹²³

In this way, the attempt to advance the litigant-choice model as a means of escaping the orientation toward outcomes reveals itself to be misguided.¹²⁴ On what basis will litigants choose where to file their

more systematized empirical studies of parity coming out of the federal courts field.

115. See, e.g., Solimine & Walker, *supra* note 43, at 214–15; Gerry, *supra* note 40, at 237–38; Marvell, *supra* note 41, at 1338–39.

116. See, e.g., Solimine & Walker, *supra* note 43, at 226, 232; Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127 (1989).

117. See, e.g., Gerry, *supra* note 40, at 237; Solimine & Walker, *supra* note 43, at 214.

118. Marvell, *supra* note 41, at 1338–39; Flango, *supra* note 54, at 973–74. The reception history of Neuborne’s *The Myth of Parity* is perhaps the best example of this tendency.

119. See, e.g., Eisenberg, *supra* note 39, at 524; Marvell, *supra* note 41, at 1343–44; Solimine & Walker, *supra* note 43, at 238. Cf. Gerry, *supra* note 40, at 238.

120. See, e.g., Solimine & Walker, *supra* note 43, at 238–39 n.118; *id.* at 239–246.

121. See, e.g., Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 261–69.

122. Compare Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 300–01, with Amar, *Parity as a Constitutional Question*, *supra* note 9, at 649.

123. See Herman, *supra* note 15, at 652–53. But see Neuborne, *supra* note 16, at 803.

124. Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 300–01; see also Amar, *Parity as a Constitutional Question*, *supra* note 9, at 649; Bator, *supra* note 51, at 631–32; Redish, *supra* note 72, at 1778 (“Perhaps a greater problem with the free market rationale for litigant choice is the fact that competing litigants may have contradictory, or at least different, interests to be served in choosing a forum. For example, a plaintiff seeking to vindicate a federal right may prefer a federal forum because of its more

claims if not on a sense of competitive advantage? The litigant-choice framework enables academics to avoid taking an empirically-informed comparative position, but it does not allow a litigant to do likewise. By contrast, for system-level decisionmakers—namely, members of Congress and the Justices of the U.S. Supreme Court—and academic theorists, fairness of judging, or “weak” parity, becomes more determinative as one approaches a level of scale at which individual wins and losses recede in importance.¹²⁵ Weak parity matters when allocating *classes* of cases; strong parity matters when it’s your *own* case at stake. The two models are not mutually exclusive. Rather, they coexist, but they address themselves to different decisionmakers.

2. The New Empirics of Parity

A comparative-capacity model of parity both encompasses and explains the parity debate’s focus on the assertion of particular federal rights in state courts. The orientation toward comparative capacity is inspired by Neuborne, who framed his model as an “assess[ment of] the relative institutional capacity of state and federal courts to enforce constitutional doctrine.”¹²⁶ But the model proposed here goes beyond Neuborne. It situates parity as conceptually encompassing the entire landscape of concurrency and boundary-crossing—*all* claims that could be brought in either state or federal court. It deliberately includes forum choices at the beginning of the litigation (as in § 1983 or diversity cases) and cases that move from one system to the other depending on the progress of the litigation (as in habeas or abstention). The question of parity takes on particular salience where allocational doctrine explicitly sets up a comparison between, or contemplates a complementary role for, state and federal courts, *and* where facts on the ground seem to differentiate the state and federal court systems. Such “parity hot spots” are not static but change over time as allocational doctrine evolves and as practical realities—the politics of the courts, the makeup of the judiciary, and so forth—shift.

Pace Neuborne, this Section proposes three major reasons why parity hot spots may or may not emerge. First, as a threshold matter, allocational law creates affordances for parity to become relevant. Where litigants may choose to file in either state or federal court, the strategic litigant will attempt to determine where she will have an advantage. Where

elaborate procedural mechanisms, shorter dockets, and greater sensitivity to federal rights. For a mirror image of the exact same reasons, however, the defendant in the same case may prefer a state forum.”); Wells, *supra* note 36, at 611.

125. See Wells, *supra* note 36, at 610–11; see also Clermont & Eisenberg, *supra* note 38.

126. Neuborne, *supra* note 6, at 1118.

allocational doctrine simply does not allow for concurrency—for example, individuals charged with state crimes have no choice but to appear in state court—parity is irrelevant.¹²⁷ Without a doctrinal framework allowing for overlap between court systems, the question of parity is meaningless.

Second, certain areas of jurisdictional overlap draw heightened scrutiny under conditions of fact that make the choice of state versus federal court particularly salient. For example, the statutes and doctrines around habeas make the question of the adequacy of state court proceedings salient in the first place;¹²⁸ state judges face additional practical pressures to decide against criminal defendants in election years when the public expects a “tough on crime” approach, perhaps creating timeframes in which state courts are more likely to be hostile and even constitutionally deficient.¹²⁹ One might also imagine that § 1983 cases alleging police brutality, say, might fare differently in local state and federal courts depending on public opinion regarding crime and issues of racial inequality. State court judges facing reelection in years when the public is more concerned with crime may be more favorable to police; however, in the wake of the Black Lives Matter movement, it is conceivable that the reverse might become true.¹³⁰ In short, where there is more at stake for judges when they decide for or against a certain type of litigant, areas of mere doctrinal concurrency become central sites of the parity debate.

Third, questions of parity may arise because litigants themselves feel—justifiably or not—that there are differences that matter between state and federal courts. Recent developments in class action and diversity jurisdiction are particularly instructive. Though the parity debate has primarily focused on the viability of federal claims in state court, state causes of action in federal courts present much the same set of questions.

127. At least as a matter of initial forum choice, though they may seek injunctions or habeas review in federal court.

128. See *supra* Part II(a).

129. See, e.g., Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107 (2007); Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741 (2013); Brandice Canes-Wrone, Tom S. Clark & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23 (2014); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360 (2008).

130. Public opinion on contested issues seems to drive the decision-making of elected judges. See *supra* note 129. By contrast, where issues are less salient in the public discourse, elected judges are more independent. See Brandice Canes-Wrone, Tom S. Clark & Amy Semet, *Judicial Elections, Public Opinion, and Decisions on Lower-Salience Issues*, 15 J. EMPIRICAL L. STUD. 672 (2018) (showing that public opinion on environmental law, a low-salience issue, has little impact on judicial decision-making). Parity may be equally at stake with regard to both environmental law and criminal law, but a “hot spot,” where the independence of judges becomes at issue, may be more likely to emerge when the public pays attention.

Prior to 2005, class actions based on state law could be brought in state court, or in federal court if complete diversity was present.¹³¹ In that year, Congress passed the Class Action Fairness Act of 2005 (CAFA), which, among other reforms, extended federal diversity jurisdiction to class actions in which there is only minimal diversity (provided some other conditions are met).¹³²

Though much more could be said about CAFA, what is important here is that corporate litigants perceived state and federal courts *not* to be in parity, at least regarding class actions, and were able to formalize this preference through legislation.¹³³ Preexisting doctrine in the realm of diversity jurisdiction provided for rough but imperfect concurrency; CAFA intervened to channel a much larger subset of state-law class action claims to federal court. Contrary to many parity commentators' belief that the federal courts are more plaintiff-friendly, in the class action realm, defense and plaintiffs' bars alike believed state courts to be preferable for plaintiffs and federal courts for defendants.¹³⁴ This reveals that parity needs to be assessed anew in each doctrinal area.

For this reason, the comparative capacity model encompasses the existing parity debate and also goes beyond this narrow doctrinal context. The question of constitutional rights may be regarded as but one of the "hot spots" that lie at the intersection of doctrinal affordance, political salience, and litigant perception of competitive advantage. One might also update the old parity debate by considering how the assertion of constitutional rights has changed since Neuborne originally wrote. Litigants on the political right increasingly bring claims under a new constellation of constitutional rights.¹³⁵ Even when cabined to its original

131. 28 U.S.C. § 1332 (1996).

132. Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4. CAFA's changes to the diversity statute included, *inter alia*: defining class actions to include removed actions, 28 U.S.C. § 1332(d)(1)(B), 28 U.S.C. § 1711(2); increasing the amount in controversy requirement to \$5 million and permitting aggregation of multiple plaintiffs' claims to reach this amount, 28 U.S.C. § 1332(d)(2), (d)(6); instituting minimal as opposed to complete diversity, 28 U.S.C. § 1332(d)(2).

133. David Marcus highlights the continuity between CAFA and the earlier debate over diversity jurisdiction leading up to *Erie*. In the early twentieth century, Marcus writes, "[M]any lawyers believed that the federal judiciary as a whole harbored procorporate, antiregulatory tendencies that limited the reach of state law." Similarly, "CAFA supporters hope that this federalization of multistate class actions will result in fewer certified classes and thereby relieve defendants of liability of state law causes of action. Their faith in the statute rests on what they perceive to be an emergent hostility in the federal courts toward multistate class actions that allege state law causes of action." David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1252 (2007).

134. See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

135. See Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657 (2021). See also, e.g., John Yoo & James C. Phillips, *The Second(-Class) Amendment: The Supreme Court Should Put Gun Rights on the Same Level as Other Constitutional Requirements*, NAT'L REV. (Nov. 19, 2018, 6:30 AM), <https://www.nationalreview.com/2018/11/supreme-court-second->

doctrinal context, the parity debate can no longer treat all constitutional plaintiffs alike. Instead, what is required from the twenty-first-century perspective is a sensitivity to what Bator has called the “hidden assumption[s] of the argument”—“that the Constitution contains only one or two *sorts* of values: typically, those which protect the individual from the power of the state, and those which assure the superiority of federal to state law,” and to the “other sorts of values” that the Constitution contains, both granting power to the federal government and *confining* this power.¹³⁶ Now more than ever, “[t]he limitations, too, count as setting forth constitutional values.”¹³⁷ A contemporary approach to constitutional parity cannot stop with win rates but must look to how state and federal judges think about the subtle boundaries of constitutional rights, especially where rights come into conflict.¹³⁸

The parity debate is not singular and cannot be decided by a single empirical metric, no matter how robust the study design or how significant the results. Rather, parity has to be assessed by recourse to a broad set of institutional characteristics and a similarly broad ecosystem of actors—as exemplified by disciplinary approaches to the study of the courts.¹³⁹ Even if one begins by theorizing parity narrowly, it is impossible to proceed without drawing in factors that are equally applicable to broader definitions. For example, Solimine and Walker’s much-criticized study, which explicitly centered outcomes as of near-exclusive importance, had also to assess case type, right asserted, aspects of the case’s procedural posture, various characteristics of judges, and

amendment-rights/ (prominent conservatives call to reinvigorate gun rights litigation with the hope that Justice Kavanaugh will be receptive to expanding the scope of the Second Amendment); *see also* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (exemplifying one of the most prominent contemporary cases using the First Amendment to advance a right-wing, anti-union agenda); Darrell A. H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011). The Covid-19 pandemic has provided the latest opportunity for right-wing constitutional rights innovation. *See, e.g.*, Clare Lombardo, *Indiana University’s Vaccine Requirement Should Stand, Federal Judge Rules*, NPR (July 19, 2021, 6:51 PM), <https://www.npr.org/2021/07/19/1018010489/indiana-universitys-vaccine-requirement-should-stand-federal-judge-rules>; Ilya Somin, *A Takings Clause Lawsuit Against the CDC Eviction Moratorium, THE VOLOKH CONSPIRACY* (Aug. 3, 2021, 10:20 PM), <https://reason.com/volokh/2021/08/03/a-takings-clause-lawsuit-against-the-cdc-eviction-moratorium/>. *But see* Rubenstein, *supra* note 42.

136. Bator, *supra* note 51, at 631–32.

137. *Id.* (emphasis removed).

138. In Burt Neuborne’s 1995 article *Parity Revisited*, Neuborne suggests that the increasing conservatism of the federal courts more or less puts an end to the parity debate. Neuborne, *supra* note 16. However, this development merely shifts the terrain, generally in line with Paul Bator’s perspective on this point. *See supra* note 136 and accompanying text.

139. *But see* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252–53 (1997) (“To date, legal scholarship has been remarkably oblivious to this large and mounting body of political science scholarship on courts. Some political scientists have been correspondingly unconscious of the legal model.”).

some strategic considerations of litigants.¹⁴⁰ Or take Neuborne's single heuristic of "judicial competence." Any attempt to understand the concept of "competence" opens out onto a host of considerations such as insulation from majoritarian pressure,¹⁴¹ prestige,¹⁴² selectiveness,¹⁴³ salary,¹⁴⁴ time management,¹⁴⁵ clerk quality,¹⁴⁶ and the social classes of each type of judge.¹⁴⁷ No matter the theoretical point of departure, the empirical assessment of parity inevitably moves toward institutional comparisons encompassing many parameters; the scope of such comparison changes only by level of scale.

It is also critical that any empirical approach to the parity debates account for how different actors affect each other. The U.S. Supreme Court interprets congressional statutes but also sets the tone for the kind of legislation Congress might consider enacting; Congress creates frameworks of concurrency that create the terrain on which litigants make strategic choices but is also subject to litigant lobbies; the Court shapes new law based on the experiences and arguments of individual litigants who come before it who may not be served well by the lived reality of the court systems in which their concerns are heard. For example, one might ask with regard to CAFA how business litigants, in the aggregate, influenced Congress to make these particular allocational decisions.¹⁴⁸

Finally, empirical and normative considerations vary in salience to different actors. As this article has shown thus far, empirics matter very little, in the end, to many actors—such as the U.S. Supreme Court. The claim here is not that empirics put the parity debates to rest, but rather that they provide new ground for expanding the set of conversations around the comparative affordances of the state and federal courts.

III. EVALUATING COMPARATIVE CAPACITY: DATA AND METHODS ON THE COURTS AS INSTITUTIONS

This Part surveys empirical research on state and federal courts and the

140. Solimine & Walker, *supra* note 43, at 236–52. See in particular, *id.* at 238 n.118 (listing thirteen coded variables). See also *supra* notes 88–89 and accompanying text.

141. Bator, *supra* note 51, at 623; Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 275.

142. Chemerinsky, *Parity Reconsidered*, *supra* note 13, at 276; Neuborne, *supra* note 6, at 1120–21.

143. Neuborne, *supra* note 6, at 1121.

144. *Id.*

145. Bator, *supra* note 51, at 623; Neuborne, *supra* note 6, at 1121, 1124.

146. Neuborne, *supra* note 6, at 1122.

147. *Id.* at 1124.

148. For an examination of the legislative and lobbying history of the Class Action Fairness Act, see, e.g., Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385 (2005); Stephen P. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View of the Statute's Legal Significance*, 156 U. PA. L. REV. 1439 (2008).

tools and methods available to extend this research. It also identifies aspects of the parity debate where the empirics really do seem intractable or at least not useful. Any model of parity must identify institutional parameters of interest. This Part follows Neuborne in considering judicial competence, “psychological set,” and attorney demographics. Extending Neuborne, it adds a broader concept of judicial psychology and decision-making and an analysis of court resources and public trust and confidence in the courts.

In the attempt to review a vast literature, editorial decisions were inevitable. And this Part’s working definition of “the empirical literature” is catholic. Given the model of parity as a multitude of debates operating at different levels of scale, this Part likewise offers data right-sized to each, from systemic quantitative information to local case studies, personal reflections, to analyses of case outcomes. In short, it follows Lee Epstein and Gary King’s view of data as “just a term for facts about the world,” which may be “precise or vague, relatively certain or very uncertain, directly observed or indirect proxies, and they can be anthropological, interpretive, sociological, economic, legal, political, biological, physical, or natural.”¹⁴⁹ In so doing, this synthesis recognizes some legal scholarship as “empirical” that may not self-identify as such; under the Epstein and King definition, most legal scholars are already doing empirical work.¹⁵⁰ But the inclusion of a given study is not necessarily an endorsement.

This survey mainly encompasses disciplinary empirical work on the courts—from political science, economics, and psychology, among others. But the intended audience is primarily federal courts scholars, who could draw on this empirical work to make and critique the kinds of doctrinal and historical arguments most common in the field of federal courts. The analysis begins with data on judges—the individuals within court systems who hold the most power and therefore draw the most attention—and how they do their work. From judges themselves, we move to the objects and products of their labor: cases and their outcomes, including data on case complexity, docket composition, substantive legal issues, and judicial workload. This literature, when considered collectively, begins to outline what Neuborne and others think of as “judicial competence.”¹⁵¹ Such data contextualize outcomes-oriented research.

This Part then collects empirical data on attorneys and litigants—a comparatively less-studied area that is crucial to developing a proper

149. Epstein & King, *supra* note 83, at 2–3.

150. *Id.* at 3.

151. See *supra* notes 50–56 and accompanying text for a discussion of judicial competence in the context of the earlier parity debate.

empirics of the litigant-choice principle. In furthering a more expansive view of the courts as institutions, this Part assesses the wide array of data that the state and federal court systems collect in order to monitor and improve their own performance. It finishes by evaluating the place of the courts in the public sphere. Such institutional metrics provide a foundation for what is ultimately the most important comparative normative project on the courts: the development of a model of court quality that can be applied to both state and federal courts with the aim of enhancing the capacity of both court systems to serve litigants, the law, and the public. This Part concludes with reflections on gaps in the available data and practical considerations for future comparative research.

A. Judges as the Central Actors and Objects of Analysis

1. Judicial Demographics

By far the largest body of empirical data on the courts focuses on judges on the assumption¹⁵² that they are the most critical players in the system.¹⁵³ Who are judges? Our judiciary is far less diverse than the communities it serves, and the full effect of this discrepancy is not yet known. Though the diversity of federal judges is improving somewhat,¹⁵⁴ the state judiciary remains overwhelmingly white and male.¹⁵⁵ Comprehensive demographic information about both federal and state judges is readily available—in raw form,¹⁵⁶ and accompanied by

152. An assumption that seems reasonable but is untested.

153. A note about the citations in Part III.A: Because the literature on judges and judicial labor is so vast, there is simply not space to list all the bibliographic sources this author finds relevant. This author has selected those that are either most representative of the scope of the literature, most recent in time, most seminal, most comprehensive, or most squarely on point, with a bias toward articles appearing in disciplinary journals that may not be as frequently read in the legal academy, and to encourage interested readers to dive further into the literature.

154. Barry J. McMillion, CONG. RSCH. SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS (2017).

155. TRACEY E. GEORGE & ALBERT H. YOON, AMERICAN CONSTITUTION SOCIETY, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 2–3 (2016), <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf>. For interactive data, see Tracey E. George and Albert H. Yoon, *Gavel Gap*, AMERICAN CONSTITUTION SOC'Y, <https://www.acslaw.org/analysis/reports/gavel-gap/> (last visited Aug. 1, 2021).

156. See *Attributes of U.S. Federal Judges Database*, THE JUD. RSCH. INITIATIVE (JURI) AT THE UNIV. OF S.C., <http://artsandsciences.sc.edu/poli/juri/attributes.htm> (last visited Aug. 1, 2021); *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/demography-article-iii-judges-1789-2017-introduction> (last visited Aug. 1, 2021). See also *Judicial Diversity: A Resource Page*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/analysis/judicial-diversity-0>, Sept. 12, 2017 (last visited Aug. 1, 2021); Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/issues/courts>

sophisticated analysis.¹⁵⁷ In particular, Tracey George and Albert Yoon’s groundbreaking work on the “Gavel Gap” in the state judiciary—the difference in diversity between a given state’s judiciary and its population—highlights the relationship between a judge’s identity and her decisions.¹⁵⁸ The project aggregates data on every individual state judge, allowing for nuanced comparison. Gender influences case outcomes and panel dynamics.¹⁵⁹ And judicial nominees’ prior professional experience is increasingly homogeneous.¹⁶⁰ This work primarily focuses on U.S. Supreme Court and federal appellate court appointees, but the research questions and methods could be extended to federal district and state court judges. Salary information, which some commentators have indicated may affect whether qualified lawyers seek to become judges,¹⁶¹ is readily accessible online.¹⁶² Finally, detailed biographical and financial information is available in raw form via federal judges’ nomination papers.¹⁶³

2. Judicial Training

The literature contains somewhat less information about how judges develop their substantive legal knowledge, orient their decision-making, and interact with others in the court system. We know little about whether judicial training is effective and how it could be improved. The question of training is intimately linked with the concept of judicial competence.

/reports/2019/10/03/475359/building-inclusive-federal-judiciary/ (last visited Aug. 20, 2021). *But see Judicial Officer (JO) Demographic Data*, CAL. CTS., <http://www.courts.ca.gov/13418.htm> (last visited Aug. 1, 2021).

157. See McMillion, *supra* note 154; George & Yoon, *THE GAVEL GAP*, *supra* note 155.

158. George & Yoon, *Gavel Gap*, *supra* note 155.

159. See, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

160. Lee Epstein, Jack Knight, & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903 (2003); Lee Epstein, Andrew D. Martin, Kevin M. Quinn, & Jeffrey A. Segal, *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833 (2009); Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137 (2012).

161. See *supra* notes 60 and 144, and accompanying text.

162. See *Judicial Salaries: U.S. District Court Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/judges/judicial-salaries-us-district-court-judges> (last visited Aug. 8, 2021); *Judicial Salary Tracker*, NAT’L CTR. FOR STATE COURTS, <https://www.ncsc.org/salarytracker> (last visited Aug. 8, 2021).

163. See *Judicial Nominations*, U.S. SENATE COMMITTEE ON THE JUDICIARY, <https://www.judiciary.senate.gov/nominations/judicial> (last visited Aug. 8, 2021).

The Federal Judicial Center¹⁶⁴ and the National Center for State Courts¹⁶⁵ publicize information about the curricula and training programs they offer for sitting judges, which include everything from ethics and evidentiary decision-making to the practicalities of running trials and maintaining courtroom security. Some of this training is oriented toward changing a judge's personal affect—for example, reducing implicit bias.¹⁶⁶ However, the efficacy of such interventions has been questioned.¹⁶⁷

3. Judicial Selection Processes and Their Effects

The earlier parity debate often emphasized that federal judges¹⁶⁸ are appointed for life, whereas state judges are often elected or subject to electoral recall. Many scholars believed that elections made it hard for state judges to enforce federal rights, especially unpopular ones. For some, the disparity between systems was so obvious as not to be worth discussion;¹⁶⁹ for others, the question was live and as yet unanswered;¹⁷⁰ and for still others, the question was, very pragmatically, moot given state judges' constitutional obligation to enforce federal law, and given that the vast majority of litigation in the United States takes place before state judges.¹⁷¹ Four decades later, we know that the process of judicial selection influences subsequent decision-making and now seek to understand precisely how that influence works.¹⁷² And it is understood that the federal appointment process, too, shapes what later happens on the bench.¹⁷³

164. See, e.g., *Programs and Resources for Judges*, FED. JUDICIAL CTR., <https://www.fjc.gov/education/programs-and-resources-judges> (last visited Aug. 8, 2021); *Manuals, Monographs, & Guides*, FED. JUDICIAL CTR., <https://www.fjc.gov/education/manuals-monographs-guides> (last visited Aug. 8, 2021); see also FED. JUDICIAL CTR., ANNUAL REPORT: 2020, <https://www.fjc.gov/sites/default/files/materials/34/Federal%20Judicial%20Center%20Annual%20Report%202020.pdf>; *Federal and State Court Cooperation: Effectiveness of Implicit Bias Trainings*, FED. JUDICIAL CTR., <https://www.fjc.gov/content/337738/effectiveness-implicit-bias-trainings> (last visited Aug. 8, 2021).

165. See, e.g., *Areas of Expertise*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/Services-and-Experts/Areas-of-expertise.aspx> (last visited Aug. 8, 2021).

166. See *Effectiveness of Implicit Bias Trainings*, *supra* note 164.

167. Elizabeth Thornburg, *(Un)conscious Judging*, 76 WASH. & LEE L. REV. 1567 (2019).

168. The debate has primarily addressed Article III judges, setting aside magistrate judges, bankruptcy judges, ALJs, and so forth, all of whom should properly be included in any comprehensive study. See Resnik, *supra* note 32, at 174.

169. See *supra* note 60 and accompanying text.

170. See, e.g., Herman, *supra* note 15.

171. See *supra* note 58 and accompanying text; see also George & Yoon, *supra* note 155, at 3 (“State courts handle more than 90% of the judicial business in America.”).

172. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929 (2016).

173. See *infra* notes 191–193 and accompanying text.

Selection and election processes vary not only between the state and federal systems as a whole but among the states too. (Thus, though the earlier parity debate contrasted elected state judges as a group with appointed federal judges as a group,¹⁷⁴ it is important to take account of how variations in selection and election processes among the states may change the nature of the comparison.) The historical development and variety of state appointment and election models have been thoroughly mapped and analyzed.¹⁷⁵ Judicial elections are now more visible and politicized than ever before.¹⁷⁶ And there is a lively critical debate as to which system is best; though there is some consensus that appointed and life-tenured judiciaries are more independent, there are notable dissenters, many of whom also question whether complete independence from the voting public is desirable.¹⁷⁷

174. See *supra* notes 28–36 and accompanying text.

175. For systemic data and analysis, see Paul Brace & Melinda Gann Hall, *Project Overview*, STATE SUPREME COURT DATA PROJECT, <http://www.ruf.rice.edu/~pbrace/statecourt/index.html> (last visited Aug. 8, 2021); Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 JUST. SYS. J. 243 (2001); see also Jeff Yates, *On the Future of State Courts Research*, 30 JUST. SYS. J. 302 (2009).

For comparative and particularized studies, see, e.g., PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980); William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340 (1987); Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. 20 (2006); Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort through Interim Appointments*, 27 JUST. SYS. J. 1 (2006); James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 L. & SOC. REV. 899 (2008); Joanna M. Shepherd, *The Politics of Judicial Opposition*, 166 J. INST. & THEOR. ECON. 88 (2010); Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J. L. ECON. & ORG. 211 (2012); Ryan J. Owens, Alexander Tahk, Patrick C. Wohlfarth & Amanda C. Bryan, *Nominating Commissions, Judicial Retention, and Forward-Looking Behavior on State Supreme Courts: An Empirical Examination of Selection and Retention Methods*, 15 STATE POL. & POL'Y Q. 211 (2015); CHRIS W. BONNEAU & DAMON M. CANN, *VOTERS' VERDICTS: CITIZENS, CAMPAIGNS, AND INSTITUTIONS IN STATE SUPREME COURT ELECTIONS* (2015).

But see, e.g., Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965 (2007).

These studies also have some implications for judge competence or quality, see, e.g., Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluation and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L. J. 1313, 1319 (2009); Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL'Y 67 (2009); Floyd Feeney, *Evaluating Trial Court Performance*, 12 JUST. SYS. J. 148 (1987); Sheldon Goldman, *Judicial Selection and the Qualities That Make a "Good" Judge*, 462 ANN. AM. ACAD. POL. & SOC. SCI. 112 (1982).

Scholars have noted that the development of the elected judiciary is historically contingent, precipitated, perhaps, by economic anxiety and a desire to strengthen the power of the judiciary as against a corrupt legislature. See, e.g., Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

176. See *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* (Matthew J. Streb ed., 2007); HERBERT M. KRITZER, *JUSTICES ON THE BALLOT* (2015).

177. Compare studies arguing against judicial elections and for a greater degree of independence, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI.

Money matters—it helps to determine who is elected and how they decide cases.¹⁷⁸ Voters pay attention to a small number of high-salience issues like crime¹⁷⁹ and torts,¹⁸⁰ and comparatively less attention to low-salience issues like environmental law.¹⁸¹ For example, scholars report a direct relationship between the number of television ads aired drawing attention to incumbents' decisions in criminal cases and those judges' decisions in subsequent criminal cases; ads uniformly make judges “tougher on crime.”¹⁸² Campaign contributions from business interests strongly predict favorable judicial decisions.¹⁸³ And these effects are

L. REV. 689 (1995); Lee Epstein, Jack Knight, & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7 (2001); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003); JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012); Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929 (2016); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008) with those arguing in favor of a greater degree of majoritarian responsiveness, e.g., CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009); Eric A. Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal Reform*, 75 U. CHI. L. REV. 853, 855 (2008); Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 290 (2010); Lee Epstein, *Electoral Benefits: The Assault on the Assaulters of Judicial Elections*, 96 JUDICATURE 218 (2013).

For comparative and reflective studies of selection systems, see Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306 (1994) (surveying judges who had faced retention elections, finding a high degree of support for the process); F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712 (2004); Lee Epstein, *Shedding (Empirical) Light on Judicial Selection*, 74 MO. L. REV. 563 (2009); G. ALAN TARR, *WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES* (2012); James L. Gibson, *Electing Judges: Future Research and the Normative Debate About Judicial Elections*, 96 JUDICATURE 223 (2013); Lawrence Baum, *Supreme Court Elections: How Much They Have Changed, Why They Have Changed, and What Differences It Makes*, 42 LAW & SOC. INQUIRY 900 (2017).

178. See Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 625 (2009); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 69 (2011). Compare Joshua B. Fischman, *Do the Justices Vote Like Policy Makers? Evidence from Scaling the Supreme Court with Interest Groups*, 44 J. LEGAL STUD. S269 (2015).

179. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107 (2007); Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741 (2013); Brandice Canes-Wrone, Tom S. Clark & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23 (2014).

180. See, e.g., Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999).

181. Brandice Canes-Wrone, Tom S. Clark, & Amy Semet, *Judicial Elections, Public Opinion, and Decisions on Lower-Salience Issues*, 15 J. EMPIRICAL LEGAL STUD. 672 (2018).

182. See JOANNA SHEPHERD & MICHAEL S. KANG, AMERICAN CONSTITUTION SOCIETY, *SKewed JUSTICE: CITIZENS UNITED, TELEVISION ADVERTISING AND STATE SUPREME COURT JUSTICES' DECISIONS IN CRIMINAL CASES* (2014), <https://www.acslaw.org/analysis/reports/skewed-justice/> (last visited Aug. 8, 2021). But see MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2015).

183. See Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The*

magnified where judges run in partisan elections.¹⁸⁴

Elections affect more than case outcomes;¹⁸⁵ they influence judges' reasoning¹⁸⁶ (but not necessarily writing style¹⁸⁷) and public interactions with the courts. Elections also influence the public legitimacy of the state court system,¹⁸⁸ and even citizens' litigiousness.¹⁸⁹ The structure and incentives of elections also affect voting behavior and public engagement with the election process.¹⁹⁰ But it is not only elected judges who are affected by public opinion and partisan influence.¹⁹¹ The political party of the official who appoints a judge correlates with the partisan slant of that judge's decision-making.¹⁹² And appointed judges are susceptible to influence by outside parties.¹⁹³

The literature on judicial paths to the bench is methodologically sophisticated, bringing to bear quantitative techniques from political

Empirical Relationship between Party Campaign Contributions and Judicial Decision Making, 44 J. LEGAL STUD. S161 (2015); LAWRENCE BAUM, DAVID KLEIN, & MATTHEW J. STREB, *THE BATTLE FOR THE COURT: INTEREST GROUPS, JUDICIAL ELECTIONS, AND PUBLIC POLICY* (2017).

184. See Kang & Shepherd, *Partisanship in State Supreme Courts*, *supra* note 183; see also, e.g., Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, 37 POL. BEHAV. 43 (2015).

185. Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169 (2009).

186. 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, 1207 (1997); Brandice Canes-Wrone & Kenneth W. Shotts, *When Do Elections Encourage Ideological Rigidity?*, 101 AM. POL. SCI. REV. 273 (2007); Kirk A. Randazzo, Richard W. Waterman, & Michael P. Fix, *State Supreme Courts and the Effects of Statutory Constraint: A Test of the Model of Contingent Discretion*, 64 POL. RES. Q. 779 (2011). For normative perspectives, see, e.g., Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012).

187. Greg Goelzhauser & Damon M. Cann, *Judicial Independence and Opinion Clarity on State Supreme Courts*, 14 STATE POL. & POL'Y Q. 123 (2014).

188. See JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* (2012).

189. Jeff Yates, Holley Tankersley, & Paul Brace, *Assessing the Impact of State Judicial Structures on Citizen Litigiousness*, 63 POL. RES. Q. 796 (2010).

190. See, e.g., Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147 (2007); Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457 (2008); Matthew J. Streb, Brian Frederick & Casey LaFrance, *Voter Rolloff in a Low-Information Context: Evidence from Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644 (2009).

191. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009).

192. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998); Mark J. McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q. 799 (2012); Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016).

193. See, e.g., Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72 (2005). But see Jenna Becker Kane, *Lobbying Justice(s)? Exploring the Nature of Amici Influence in State Supreme Court Decision Making*, 17 ST. POL. & POL'Y Q. 251 (2017).

science and econometrics¹⁹⁴ and comprising both aggregated data on the state courts as a whole and on individual states.¹⁹⁵ Still, those seeking to understand the effect of judicial selection and election processes on parity, especially from the litigant or local perspective, would benefit from data and analysis with a granular focus on particular states.

4. Judicial Decision-making as Process

Empiricists have also sought to understand, from multiple disciplinary perspectives, the *process* of judicial decision-making itself—the influence of external factors as well as processes intrinsic to the judge.¹⁹⁶ This literature illuminates what was earlier called “psychological set.” Indeed, scholarship on judicial decision-making offers a more nuanced consideration of how case outcomes come to be and whether two facially identical outcomes are indeed equivalent.¹⁹⁷

Political scientists have created a variety of models to understand the judicial mind.¹⁹⁸ The attitudinal model posits that a judge evaluates the facts and arguments of the case before her against her preexisting attitudes and commitments—most often, political.¹⁹⁹ Originally developed based on U.S. Supreme Court Justices, the attitudinal model has been applied to the state judiciary,²⁰⁰ allowing cross-systemic comparisons. It has been

194. See, e.g., Michael S. Kang & Joanna M. Shepherd, *Judging Law in Election Cases*, 70 VAND. L. REV. 1755, 1761 (2017); Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 387 (2000); Brian R. Sala & James F. Spriggs, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197, 205 (2004); Melinda Gann Hall, *The Controversy Over Electing Judges and Advocacy in Political Science*, 30 JUST. SYS. J. 284, 287 (2009).

195. Compare Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5 (1995) with, e.g., Andrew J. Clopton & C. Scott Peters, *Justices Denied: A Count-Level Analysis of the 2010 Iowa Supreme Court Retention Election*, 34 JUST. SYS. J. 321 (2013); John D. Echeverria, *State Judicial Elections and Environmental Law: Case Studies of Montana, North Carolina, Washington, and Wisconsin*, 16 VT. J. ENV. L. 363 (2015).

196. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* (2008); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997).

197. See *supra* notes 50 (psychological set), 38–47 (outcomes literature) and accompanying text.

198. See Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783 (2003).

199. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

200. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 744 (1995); Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1657 (2010).

richly generative, sparking critiques²⁰¹ and hybridizations.²⁰² As to the U.S. Supreme Court in particular, a rational choice alternative has posited that the Justices behave, at least in part, strategically. Rather than sincerely voting their preferences, judges in a rational-choice model seek to influence their colleagues' votes from certiorari to the final opinion.²⁰³ Both models explain judicial decision-making by recourse to something more than law itself.²⁰⁴ Though this research has seen a renewed flowering from the 1990s to the present, the strategic model of judicial behavior was a live area of discourse as early as the 1960s²⁰⁵—and thus would have been available to earlier parity writers.

Empiricists have sought to understand the relationship between a judge's identity and her decisions. George and Yoon are beginning to explore causal relationships between various demographic parameters and state case outcomes.²⁰⁶ A few studies have examined how a judge's social background influences her decisions.²⁰⁷ Academics believe that judicial ideology matters; judges often disagree.²⁰⁸ To some extent, this is a question of definitions. Judges will openly admit, for example, to interpretive models, such as originalism or textualism, that are ideologically inflected if not necessarily partisan in their politics.²⁰⁹ From

201. See, e.g., Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1 (2008); Dona Roy & Donald R. Songer, *Does the Attitudinal Model Explain Unanimous Reversals*, 31 JUST. SYS. J. 342 (2010); Ali S. Masood & Donald R. Songer, *Reevaluating the Implications of Decision-Making Models: The Role of Summary Decisions in U.S. Supreme Court Analysis*, 1 J.L. & CTS. 363, 364 (2013).

202. Michael C. Dorf, *Whose Ox Is Being Gored—When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. L. COMMENT. 497 (2007); Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 819 (2008); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008); Jeff Yates, Damon M. Cann & Brent D. Boyea, *Judicial Ideology and the Selection of Disputes for U.S. Supreme Court Adjudication*, 10 J. EMPIRICAL LEGAL STUD. 847 (2013).

203. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013).

204. See also NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019).

205. William N. Eskridge, Jr., *Reneging on History—Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613 (1991); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997).

206. See *supra* note 155 and accompanying text.

207. See, e.g., Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966); Daniel M. Schneider, *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer*, 35 VA. TAX REV. 201, 206 (2005).

208. See, e.g., Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985).

209. See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 243 (2009); JUSTICE ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); Harv. L. Sch., *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:28, YOUTUBE (Nov. 25, 2015),

the vantage point of today's empirical literature, Neuborne's caution that allocational decisions are motivated as much by ideology as by arid doctrine seems common-sensical.²¹⁰ The better question is how to measure the impact of ideology on decisions²¹¹ and the extent to which ideology is nakedly partisan.²¹²

Judges are also susceptible to the habits of mind of any human,²¹³ despite their efforts to overcome cognitive biases.²¹⁴ Empiricists have described the psychology of judicial decision-making,²¹⁵ using behavioral models,²¹⁶ assessing the impact of cognitive biases on judges' ability to

<https://www.youtube.com/watch?v=dpEtszFT0Tg> (recording of a November 18, 2015 interview of Justice Kagan as part of the Antonin Scalia Lecture Series at Harvard Law School) ("We're all textualists now"). *But see* Sara C. Benesh & Jason J. Czarnecki, *The Ideology of Legal Interpretation*, 29 WASH. U. J.L. & POL'Y 113 (2009).

210. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156–57 (1998). *See also* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Christina L. Boyd, *Federal District Court Judge Ideology Data*, <http://clboyd.net/ideology.html> (last visited May 15, 2019). *But see* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 259 (2005).

211. *See, e.g.*, Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752 (2007); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133 (2009); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2056–57 (2017).

212. *See, e.g.*, Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961); Todd Collins, *Is the Sum Greater than Its Parts—Circuit Court Composition and Judicial Behaviour in the Courts of Appeals*, 32 LAW & POL'Y 434 (2010).

213. Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 125 (2007).

214. *See, e.g.*, Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Victor D. Quintanilla, *Judicial Mindsets: The Social Psychology of Implicit Theories and the Law*, 90 NEB. L. REV. 611 (2012); Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, in ENHANCING JUSTICE, REDUCING BIAS (Sarah E. Redfield, ed. 2017); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 1 (2017); Jeffrey J. Rachlinski & Andrew Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary*, 94 NOTRE DAME L. REV. 521 (2018); Elizabeth G. Thornburg, *supra* note 167.

215. *See, e.g.*, Paul Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406 (1968); James W. Witt, *The Bases of Judicial Decision-Making: The Need for a Reappraisal*, 59 MARQ. L. REV. 551 (1976); Shari Seidman Diamond, *The Challenges of Socio-Legal Research on Decision Making: Psychological Successes and Failures*, 22 J.L. & SOC'Y 78 (1995); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227 (2006); Jeffrey J. Rachlinski, *Bottom-up versus Top-down Lawmaking*, 73 U. CHI. L. REV. 933 (2006); Shari S. Diamond, *The Psychology of the Decision-Making Process*, 17 ASIAN DISP. REV. 197 (2015).

216. *See, e.g.*, THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety ed., 2003); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008); Lee Epstein et al., *Ideology and the Study of Judicial Behavior*, in IDEOLOGY, PSYCHOLOGY, & LAW (Jon Hanson ed., 2012); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11 (2013); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. &

deal impartially with the facts—and litigants—before them,²¹⁷ and tracing how subtle and often unconscious influences like intuition,²¹⁸ emotion,²¹⁹ and heuristics²²⁰ sway decisions.²²¹ Like other humans, judges are influenced by those around them. Sophisticated analyses of the social dynamics of judicial panels have illuminated everything from when en banc review is granted²²² to when and how stridently judges choose to dissent.²²³

Judges also rely on the law—the extent to which is debated—in making their decisions. Empiricists have traced how doctrine itself, in combination with other factors, shapes judicial decision-making,²²⁴ in part through studying the uniformity of interpretation of federal statutes²²⁵

MARY L. REV. 2017 (2016).

217. See Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 31 (1999); Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information: The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Emma Cunliffe, *Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination*, 18 INT'L J. EVIDENCE & PROOF 139 (2014); John B. Meixner & Shari Seidman Diamond, *The Hidden Daubert Factor: How Judges Use Error Rates in Assessing Scientific Evidence*, 2014 WIS. L. REV. 1063, 1067 (2014).

218. See, e.g., R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381 (2006).

219. See Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 318–20 (2012); Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy*, 59 AM. J. POL. SCI. 37 (2015).

220. See Craig E. Jones, *The Troubling New Science of Legal Persuasion: Heuristics and Biases in Judicial Decision-Making*, 41 ADVOC. Q. 49 (2013).

221. See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

222. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 213 (1999).

223. Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 123 (2004); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 109 (2011); see also Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

224. See Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 517 (2006); Jeffrey R. Lax, *Constructing Legal Rules on Appellate Courts*, 101 AM. POL. SCI. REV. 591 (2007); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326 (2007); Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273 (2010); MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. POL. SCI. 131 (2011); Scott Baker & Pauline T. Kim, *A Dynamic Model of Doctrinal Choice*, 4 J.L. ANALYSIS 329 (2012); Jeffrey R. Lax, *Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law*, 74 J. POL. 765 (2012).

225. See, e.g., Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457 (1984); Christopher A. Cotropia, *Arising Under Jurisdiction and Uniformity in Patent Law*, 9 MICH. TELECOMM. & TECH. L. REV. 253 (2003); Jason J. Czarnecki, *An*

and state and lower federal courts' compliance with U.S. Supreme Court precedent.²²⁶ For example: Politically unified appellate panels “deferred to the agency [under *Chevron*] only 33% . . . of the time when the policy outcomes that would have resulted from adhering to doctrine appeared inconsistent with the panel’s political preferences,” but in the “presence of a whistleblower,” it is “almost twice as likely that doctrine will be followed when doctrine works against the partisan policy preferences of the court majority.”²²⁷ And state courts are, contrary to expectations, compliant with U.S. Supreme Court precedent in criminal confession cases, but “are evidently slightly less compelled than the circuit courts to make certain decisions as a consequence of the factual configuration of the case under consideration,” meaning that “due process protections . . .

Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law, 79 U. COLO. L. REV. 767 (2008); David L. Schwartz, *Practice Makes Perfect: An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223 (2008); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011); Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law*, 68 VAND. L. REV. 53 (2015); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016); Amy Semet, *Specialized Trial Courts in Patent Litigation: A Review of the Patent Pilot Program’s Impact on Appellate Reversal Rates at the Five-Year Mark*, 60 B.C. L. REV. 519 (2019). *But see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1639 (2008).

226. *See, e.g.*, Richard M. Johnson, *Compliance and Supreme Court Decision-Making*, 1967 WIS. L. REV. 170 (1967); Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208 (1978); John Gruhl, *Anticipatory Compliance with Supreme Court Rulings*, 14 POLITY 294 (1981); Charles A. Johnson, *Do Lower Courts Anticipate Changes in Supreme Court Policies—A Few Empirical Notes*, 3 LAW & POL’Y Q. 55 (1981); James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC’Y REV. 631 (1991); James F. Spriggs II, *Explaining Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RES. Q. 567 (1997); Malia Reddick & Sara C. Benesh, *Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework*, 21 JUST. SYS. J. 117 (2000); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534 (2002); Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMP. L. STUD. 369 (2005); Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504 (2008); Pamela Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30 (2009); Sara C. Benesh & Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 MARQ. L. REV. 795 (2009); Jennifer K. Luse, Geoffrey McGovern, Wendy L. Martinek & Sara C. Benesh, *Such Inferior Courts: Compliance by Circuits with Jurisprudential Regimes*, 37 AM. POL. RES. 75 (2009); Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, & Scott Camarato, *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891 (2010); Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325 (2013); Sara C. Benesh, Jennifer K. Jacobson, Amanda Schaefer & Nicole Simmons, *Supreme Court GVRs and Lower-Court Reactions*, 35 JUST. SYS. J. 162 (2014); Joseph L. Smith & James A. Todd, *Rules, Standards, and Lower Court Decisions*, 3 J.L. & CTS. 257 (2015); Yosh Halberstam, *Trial and Error: Decision Reversal and Panel Size in State Courts*, 32 J.L. ECON. & ORG. 94 (2016); Michael P. Fix, Justin T. Kingsland, & Matthew D. Montgomery, *The Complexities of State Court Compliance with U.S. Supreme Court Precedent*, 38 JUST. SYS. J. 149 (2017). *But see* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 442 (2007).

227. Cross & Tiller, *supra* note 192, at 2172.

are not uniformly enforced across the judicial system.”²²⁸ Federal judges deciding state law questions rely to some extent on the decision-making of state supreme court justices via certification.²²⁹ Some work calibrates the influence of doctrine and other considerations like politics, identity categories, or implicit biases on, say, the harshness of criminal sentencing.²³⁰ This literature provides point and counterpoint to Neuborne’s contention that the Burger Court’s jurisdictional decisions were politicized, informed more by docket paranoia and distaste for particular kinds of litigants than by the law itself.²³¹ Judges are also influenced by social pressures in combination with doctrine—for example, appellate judges’ reversal decisions depend in part on the law and in part on the race of the lower court judge;²³² lower court judges base their decisions both on their conception of the law and on a desire to avoid reversal and its emotional and reputational costs.²³³ Law matters, but so do personality, politics, and social context.²³⁴

5. Judicial Working Conditions

This Section considers the empirical information available on how judges work—what one might see if one could shadow a judge in her daily tasks. Of course, most judges have people who do just that: clerks.²³⁵ Earlier writers on parity identified clerks as important for several reasons. Clerks extend a judge’s ability to complete work, and thus judges who are allotted more clerks functionally have more time to devote to each case. Clerks’ research, writing, and analysis capabilities

228. Benesh & Martinek, *Context and Compliance*, *supra* note 226, at 817.

229. See Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEG. 157, 161 (2003).

230. See, e.g., Albert W. Alschuter, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005); Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 405 (2011); Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMP. LEGAL STUD. 729, 729 (2012); Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161 (2016).

231. Neuborne, *supra* note 6, at 1117–18.

232. Maya Sen, *Is Justice Really Blind? Race and Reversal in U.S. Courts*, 44 J. LEGAL STUD. S187 (2015).

233. See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518 (2012); Alma Cohen, Alon Klement & Zvika Neeman, *Judicial Decision Making: A Dynamic Reputation Approach*, 44 J. LEGAL STUD. S133 (2015).

234. This fact seems to support the realist outlook of earlier writers on parity. See, e.g., Neuborne, *supra* note 6, at 1106.

235. See, e.g., Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131 (2014).

help determine the range of considerations a judge will contemplate as she reasons through a case; clerks may even advocate for particular interpretations of the law.²³⁶ Some work has sought to trace and collect the personal experiences of clerks, especially those employed by U.S. Supreme Court Justices, both for descriptive purposes and in an attempt to trace clerk influence.²³⁷ More recently, empiricists have identified clerks as valuable data points possibly indicating judges' views.²³⁸ For example, clerks' political leanings are correlated with the ideologies of the judges for whom they work; for judges with unknown ideologies, then, clerk data is tempting.²³⁹ Such data is hard to come by, which perhaps explains the reliance on the relatively prominent U.S. Supreme Court clerks in such research.²⁴⁰ Clerks are also judicial actors in their own right, supporting their judge's work and, perhaps, influencing her perspective.²⁴¹ Some empiricists have even gone so far recently as to compare the influence of law clerks over judges' decisions to that of Rasputin over the Romanovs.²⁴² And the focus on clerks naturally invites the as yet unasked and unanswered question of how other court employees, such as legal assistants or courtroom deputies, may influence

236. See, e.g., Bator, *supra* note 51; Neuborne, *supra* note 146 and accompanying text.

237. See, e.g., ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006); Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125 (1973); Zachary Wallander & Sara C. Benesh, *Law Clerks as Advisors: A Look at the Blackmun Papers*, 98 MARQ. L. REV. 43 (2014).

238. See Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333 (2014); Kyle Rozema, Adam Bonica, Adam Chilton, Jacob Goldin & Maya Sen, *The Political Ideologies of Law Clerks*, 19 AM. L. & ECON. REV. 97 (2017); Kyle Rozema, Adam Bonica, Adam Chilton, Jacob Goldin & Maya Sen, *Measuring Judicial Ideology Using Law Clerk Hiring*, 19 AM. L. & ECON. REV. 129 (2017).

239. Rozema et al., *The Political Ideologies of Law Clerks*, *supra* note 238, at 124.

240. For aggregated data on clerks, see *Law Clerk Hiring Historical Statistics*, OSCAR, https://oscar.uscourts.gov/oscar_data (last visited Aug. 8, 2021); NALP, *COURTING CLERKSHIPS: THE NALP JUDICIAL CLERKSHIP STUDY* (2000), <https://www.nalp.org/courtingclerkships> (last visited Aug. 8, 2021); *A Demographic Profile of Judicial Clerks—2006 to 2016*, NALP (Oct. 2017), <https://www.nalp.org/1017research>. See, e.g., Kelly J. Lynch, *Best Friends—Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33 (2004) (emphasis on Supreme Court clerks).

241. See TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008); Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24 (2008); Scott Armstrong, *Supreme Court Clerks as Judicial Actors and as Sources*, 98 MARQ. L. REV. 387 (2014); Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court's Agenda-Setting Process*, 98 MARQ. L. REV. 75 (2014); Todd C. Peppers, Michael W. Giles & Bridget Tainer-Parkins, *Surgeons or Scribes: The Role of United States Court of Appeals Law Clerks in "Appellate Triage,"* 98 MARQ. L. REV. 313 (2014); Christopher D. Kromphardt, *U.S. Supreme Court Law Clerks as Information Sources*, 3 J.L. & COURTS 277, 278–80 (2015).

242. Kyle Rozema, Adam Bonica, Adam Chilton, Jacob Goldin & Maya Sen, *Legal Rasputins? Law Clerk Influence on Voting at the U.S. Supreme Court*, 35 J.L. ECON. & ORG. 1 (2019).

judges' work processes.

The federal and state courts themselves have been energetic in gathering data and developing metrics that enable observers to understand core questions about judicial labor. Quantitative data describe and analyze the state and federal courts' workloads at every level of granularity from individual states and federal circuits up through aggregated data on the system as a whole,²⁴³ including type of claim brought;²⁴⁴ judges' caseloads, weighted for complexity;²⁴⁵ and case dispositions.²⁴⁶ By compiling these data into workload assessments, court systems can better manage caseloads and assess the need for additional personnel.²⁴⁷ Thus, the federal and state courts have both provided the data and created the kinds of metrics called for in earlier conversations on parity.²⁴⁸

243. See, e.g., *State Court Organization*, BUREAU OF JUST. STAT., <https://bjs.ojp.gov/data-collection/census-state-court-organization#documentation-0> (last visited Aug. 8, 2021). Compare *Research*, FED. JUD. CTR., <https://www.fjc.gov/research> (last visited Aug. 8, 2021) (compiling and making available data for analysis, such as the Integrated Database (IDB) of all federal cases filed since 1970), and *Integrated Database (IDB)*, FED. JUDICIAL CTR., <https://www.fjc.gov/research/idb> (last visited Aug. 8, 2021) with Matthew Kleiman, Cynthia G. Lee, & Brian J. Ostrom, *Workload Assessment: A Data-driven Management Tool for the Judicial Branch*, NAT'L CTR. FOR STATE COURTS (2013), <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2088>.

The Court Statistics Project collects and analyzes data on all 50 states' courts. See *NCSC Analysis*, COURT STAT. PROJECT, <https://www.courtstatistics.org/ncsc-analysis> (last visited Aug. 8, 2021); see also R. Schauffler, R. LaFountain, S. Strickland, K. Holt & K. Genthon, eds., *Interactive Data Displays*, COURT STAT. PROJECT, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays> (last visited Aug. 8, 2021); S. Strickland, R. Schauffler, R. LaFountain & K. Holt, eds., *State Court Organization Data*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/sco/data> (last visited Aug. 8, 2021).

244. See, e.g., PAULA HANNAFORD-AGOR, COURT STAT., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS: EXAMINING DEBT COLLECTION, LANDLORD/TENANT AND SMALL CLAIMS CASES*, https://www.courtstatistics.org/_data/assets/pdf_file/0027/53658/caseload-highlights.pdf (last visited Aug. 8, 2021).

245. See *Judicial Business of the United States Courts*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> (last visited Aug. 8, 2021); *Court Statistics*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Court-statistics.aspx> (last visited Aug. 8, 2021). For historical context on the federal caseload data available, see *History of Federal Caseload Reporting*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/courts/history-federal-caseload-reporting> (last visited Aug. 8, 2021).

246. *Statistical Tables for the Federal Judiciary*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary> (last visited Aug. 8, 2021) (federal courts); *Interactive Data Displays*, *supra* note 243 (state courts).

247. See, e.g., *Workload Assessment*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/services-and-experts/areas-of-expertise/workload-assessment> (last visited Aug. 8, 2021).

248. See *supra* note 145 and accompanying text; see also, e.g., INDIANA JUDICIAL BRANCH, *Weighted Caseload Measures*, <https://www.in.gov/judiciary/iocs/3330.htm> (last visited May 10, 2019). But see Sheppard, *supra* note 216 (effect of time pressure on judicial decision-making).

B. Litigant Characteristics and Behaviors

Though we know quite a lot about judges and their work, we know relatively less about the attorneys and litigants who appear before them. The empirical data here are patchy and generally too aggregated to be useful comparatively. We know quite a bit about the practice of forum-shopping, especially with regard to patent and asbestos litigation.²⁴⁹ From a parity perspective, we can infer that attorneys and litigants forum-shop because they perceive a meaningful difference between fora.²⁵⁰ Case-type data tells us something about litigants: for example, the federal courts track prisoner, habeas, and pro se litigation.²⁵¹ Litigant and attorney identity, especially in disputes with a partisan valence, seems to matter to outcomes;²⁵² quality of advocacy, to the extent it can be measured, may not.²⁵³

Broad demographic statistics about the legal profession are available from the American Bar Association and others.²⁵⁴ Unfortunately, these are neither causal nor localized enough to make meaningful comparison between attorneys working primarily in state as opposed to federal practice, for example, as suggested by earlier parity commentators.²⁵⁵

249. See, e.g., Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889 (2001); Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365 (2006); James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & C.R. L. REV. 355, 359 (2008); Scott E. Atkinson, Alan C. Marco & John L. Turner, *The Economics of Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 411 (2009); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011); William H. J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151 (2013).

250. See, e.g., Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41 (1991).

251. See, e.g., *Judicial Business 2018*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/judicial-business-2018> (last accessed Aug. 8, 2021); see also Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819 (2018).

252. See, e.g., Kyle C. Kopko, *Litigant Partisan Identity and Challenges to Campaign Finance Policies: An Examination of U.S. District Court Decisions, 1971–2007*, 36 JUST. SYS. J. 212 (2015); Adam Feldman, *Who Wins in the Supreme Court: An Examination of Attorney and Law Firm Influence*, 100 MARQ. L. REV. 429, 434 (2016).

253. See, e.g., Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 73 (2010); Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571 (2013); Adam Feldman, *Counting on Quality: The Effects of Merits Brief Quality on Supreme Court Decisions*, 94 DENV. L. REV. 43 (2016); Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter: The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881 (2016). But see, e.g., Geoffrey P. Alpert, *Inadequate Defense Counsel: An Empirical Analysis of Prisoners' Perceptions*, 7 AM. J. CRIM. L. 1 (1979); Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCH. REV. 81, 104 (2001).

254. See *Legal Profession Statistics*, AM. BAR ASS'N (AUG. 5, 2019), https://www.americanbar.org/about_the_aba/profession_statistics/.

255. See Flango, *supra* note 54, at 973.

One longitudinal sociological and ethnographic study on the Chicago bar²⁵⁶ provides an example of what would be necessary to explore the comparative empirical questions that Neuborne and others had in mind—whether, for example, there are subtle local hierarchies of status and education between attorneys who practice primarily in state court versus those who practice primarily in federal court.

Such data might enrich the litigant-choice principle advanced by Chemerinsky and others. Thicker information could reveal how and why litigants make choices, the impact that litigant choices have on other actors in the system—particularly judges—and the relationship between such impact and case outcomes. For this reason, and because litigants and counsel are the most numerous categories of court-system actors, additional empirical work in this realm would be helpful.

C. Empirical Reflexivity in the Court Systems

Our nation's court systems regularly deploy data in service of their own improvement. The federal courts are required by statute²⁵⁷ to collect and report on a wide array of data points.²⁵⁸ The state courts are not uniformly required to do this, but the National Center for State Courts (NCSC) acts as a clearinghouse for such information and marshals it in service of state court improvement.²⁵⁹ The NCSC's workload assessment, and the Federal Judicial Center's caseload metrics for example, are designed to enable court administrators to ask their respective legislatures for additional judges and resources.²⁶⁰ CourTools has created a set of metrics to assess trial court performance²⁶¹ which could easily be applied in service of the parity question. Federal courts hearing habeas or abstention claims might even be able to make use of such information, if briefed, in understanding the quality of justice available in the relevant state court.

In short, the courts have understood the uses of empirics for self-improvement²⁶² and for making the case for financial and human

256. JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

257. Federal Judicial Center Statute, 28 U.S.C. §§ 620–629 (1992).

258. *See supra* notes 243–247 and accompanying text.

259. *About Us*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/about-us> (last visited Aug. 8, 2021).

260. *See supra* notes 243–247; *see also* 28 U.S.C § 620(b)(2).

261. *Trial Court Performance Measures*, COURTOOLS, <https://www.courttools.org/trial-court-performance-measures> (last visited Aug. 8, 2021).

262. JUD. CONF. OF THE U.S., *STRATEGIC PLAN FOR THE FEDERAL JUDICIARY* (2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf; *see also* FED. JUD. CTR., *Research*, *supra* note 243; *About Us*, *supra* note 259; *see also* David F. Levi & Mitu Gulati, *Judging Measures*, 77 U.M.K.C. L. REV. 381 (2008); Jonathan Remy Nash & Rafael I. Pardo, *An Empirical*

resources²⁶³ to the legislative and executive branches. The state courts in particular have heeded Bator's call: because they hold such responsibility under our current allocational model (no matter what one thinks of this arrangement from a normative perspective), they had better perform their role as well as possible.²⁶⁴

D. Establishing Comparative Benchmarks

The question of parity between state and federal courts must also be situated with respect to two other comparative questions: First, are the federal courts really the gold standard? Second, how do U.S. courts compare with the courts of other countries? International rule-of-law rankings place the United States lower than one might hope.²⁶⁵ The American public similarly has a not entirely favorable view of the courts.²⁶⁶ Indeed, improving the American public's perceptions of and trust in the court system is a major strategic goal of the federal courts.²⁶⁷ Unlawful corruption is a problem, particularly in certain states.²⁶⁸ "Lawful corruption," or the various means by which special interests are permitted to influence litigation outcomes,²⁶⁹ is a much bigger problem.²⁷⁰

Investigation into Appellate Structure and the Perceived Quality of Appellate Review, 61 VAND. L. REV. 1745 (2008).

263. JUD. CONF. OF THE U.S., *supra* note 262, at 24; *Budget Resource Center*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/information-and-resources/budget-resource-center> (last visited Aug. 8, 2021).

264. Bator, *supra* note 51, at 624.

265. WORLD JUST. PROJECT, RULE OF LAW INDEX 2020 (2020), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf. The United States' overall ranking is 21. Most concerning, it is one of the 25 previously-stable countries whose rule of law is declining. WORLD JUST. PROJECT, RULE OF LAW INDEX 2020 INSIGHTS 14 (2020), <https://worldjusticeproject.org/sites/default/files/documents/WJP%20Insights%202020%20-%20Online%20.pdf>.

266. In 2019, sixty-five percent of Americans had at least some confidence in state courts—a twelve percent decrease from the previous year. Confidence in the U.S. Supreme Court also declined from 2018 but to a lesser extent (four percent). *See* GBA STRATEGIES, NAT'L CTR. FOR STATE COURTS, 2019 STATE OF THE STATE COURTS—SURVEY ANALYSIS 2 (2019), https://www.ncsc.org/_data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf. *But see* Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709 (2011).

267. *Issue 2: Preserving Public Trust, Confidence, and Understanding*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/issue-7-enhancing-public-understanding-trust-and-confidence> (last visited Aug. 8, 2021).

268. Oguzhan Dincer & Michael Johnston, *Measuring Illegal and Legal Corruption in American States: Some Results from the Corruption in America Survey*, HARV. UNIV. EDMOND J. SAFRA CTR. FOR ETHICS (Dec. 1, 2014), <https://ethics.harvard.edu/blog/measuring-illegal-and-legal-corruption-american-states-some-results-safra>.

269. *See supra* notes 172–195 and accompanying text.

270. *See* Dincer & Johnston, *supra* note 268; *see also* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013). *But see* Stratos Pahis, *Corruption in*

Ultimately, the comparative capacity project must point not only to which court system is “better” for a given purpose, but also to how *both* the state and federal courts can be improved.

E. Empirical Lacunae

Though the parity debate can never be answered conclusively, the wealth of data available on the courts provides many avenues for exploration and argument. There is an imbalance between state and federal data—far more is available on the federal courts. What’s more, the metrics used for each system often differ, making comparison harder. But because both court systems have made such progress in developing metrics and analytics, it is conceptually straightforward to continue developing information on both court systems in parallel.

The scale and aggregation of the data that exist also makes it somewhat difficult to grasp local variability. Even where data are available on all fifty states,²⁷¹ it seems likely there could still be substantial differences from one to another. Some of these gaps might be filled with more qualitative, granular research such as ethnographies. But these would have to be carefully conceived and designed to be both particularized and generalizable, given that it is impossible to do qualitative work on every court in the country. Indeed, though filling the gaps in the comparative data set is not conceptually difficult, it would require a substantial infusion of both human and financial resources. Nonetheless, the conceptual clarity means that those able to pursue such studies face few problems of research design.

Finally, there are still areas where good data may remain elusive. Despite groundbreaking advances in the psychological study of judges and clerks’ willingness to share their experiences, it seems unlikely that academe will ever fully crack open the black box of real-world judicial decision-making. Modeling the quality of attorneys, beyond imperfect proxies like education and years of experience, seems too subjective to be useful. And even where data are available, they may be unusable for certain purposes at scale. For example, though nationwide comparisons of the state and federal caseloads are available, they do not necessarily tell the U.S. Supreme Court where to send one type of case or another and why. Some questions remain in the sphere of the normative.

Our Courts: What It Looks Like and Where It Is Hidden, 118 YALE L.J. 1900 (2009).

271. COURT STATISTICS PROJECT, *National Overview*, <https://www.courtstatistics.org/nsc-analysis/national-overview> (last visited Aug. 8, 2021).

IV. CONCLUSION: A NEW COMPARATIVE CONVERSATION

The earlier parity debate stalled because it concerned itself almost exclusively with allocation and, implicitly, with trying to persuade the U.S. Supreme Court to change its allocational jurisprudence. It critiqued the Court for affirming a strong-parity model when in fact the Court did not base its decisions on *any* kind of parity claim, much less one of fungibility. But federal courts scholars can find new ways into thinking about the comparative capacities of the state and federal courts by making use of the wealth of empirical research that has since emerged. This Article also proposes empirical interventions for other decisionmakers—such as legislators, litigants, and federal district judges.

Empirics about the courts may or may not matter much to the U.S. Supreme Court. Indeed, it is hard to see how the Justices could make good use of empirical evidence of such a wide and diverse system even if they wanted to do so. But facts *are* relevant to the hundreds of federal judges, thousands of state judges, and millions of attorneys and litigants who comprise our nation's court systems, and to the legislators who are tasked with resourcing the courts—and to the critics and policy thinkers whose role is to suggest new ways forward. These actors may not be able to control the allocation of entire classes of cases, but they influence the cases they touch directly and may base their decisions—where to file, whether to abstain, how to argue or decide a habeas claim—on knowledge of the courts in their ambit.

Future additions to the parity debate could most productively make use of empirical data in the kinds of hot spots where the question of comparison between the state and federal courts becomes most relevant.²⁷² Parity hot spots emerge where allocational doctrine enables concurrency between the state and federal courts, or contemplates federal courts stepping in where state courts can be said to be inadequate in some way, *and* where conditions of fact make the choice of forum particularly salient. This conclusion plays out three such case studies and then opens onto a broader, empirically-informed parity debate.

First, and most importantly, we can all participate in the project of helping the courts to attain the highest degree of competence possible. Bator is right: regardless of one's normative priors, “[i]t 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.”²⁷³ Rather

272. See *supra* notes 127–138 and accompanying text.

273. Bator, *supra* note 51, at 624.

than debating how to allocate millions of cases²⁷⁴ among a finite judicial workforce,²⁷⁵ both systems, but particularly the state courts, appear to require an infusion of resources. Allocational doctrine in the twentieth and twenty-first centuries has suffered from a sort of “docket paranoia,” particularly with regard to the federal courts, which has resulted in calls to abolish diversity jurisdiction and the significant curtailment of federal jurisdiction over § 1983 and habeas claims among others.²⁷⁶ But the federal courts hear *less than ten percent* of all cases filed in the United States.²⁷⁷ The federal judiciary may well be overworked; that does not mean, however, that the state courts can take on more cases.

It is up to legislators to direct resources to state courts. State legislatures, of course, need only decide to spend more money on their courts. But the U.S. Congress should also consider granting money to the states for this purpose. Congress could simply decide that the adequacy of state courts is a compelling national interest that deserves funding in its own right. But to the extent that Congress and the U.S. Supreme Court feel that parts of the federal docket should be shifted to the states, the federal government may, according to some readings, be strongly advised to provide funding to facilitate this shift. On one hand, the Constitution provides both that the state courts are legally sufficient to handle all federal judicial business,²⁷⁸ and that the state courts have the “power and duty” to hear federal claims, under the Supremacy Clause.²⁷⁹ On the other hand, a state could argue that the federal government is improperly commandeering its courts to handle what is a federal responsibility.²⁸⁰

274. In 2016, the last year for which aggregated data is available, 84.2 million cases were filed in state courts. See COURT STAT. PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2016 DATA 1 (2018), https://www.courtstatistics.org/_data/assets/pdf_file/0029/23897/sccd_2016.pdf. In 2019, 376,762 cases were filed in the federal district courts. See *Federal Judicial Caseload Statistics 2019*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> (last visited Aug. 8, 2021).

275. For example, in the twelve-month period ending June 30, 2020, each federal district judge carried an average of 885 pending cases. See U.S. COURTS, UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE 1 (2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf.

276. See *supra* note 6.

277. George & Yoon, *Gavel Gap*, *supra* note 155.

278. U.S. CONST., art. III, § 1.

279. See, e.g., *Testa v. Katt*, 330 U.S. 386, 390 (1947).

280. The federal government may not “commandeer” “state officers to execute federal laws.” *Printz v. United States*, 521 U.S. 898, 904 (1997). Any federal law of sufficient scope to provide meaningful assistance to the state courts in discharging their duties to hear federal cases might be cast as the kind of compulsion of “state officials to administer a federal regulatory program” disavowed in *Printz*. *Id.* at 936. But the *Printz* Court suggests a way forward for cooperative federalism, following “Hamilton’s statement in *The Federalist* No. 36 . . . that the Federal Government would in some circumstances do well ‘to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments’—which surely suggests inducing state officers to come aboard by paying them, rather

And practically speaking, it may be politically infeasible to add many more cases to state dockets without providing additional resources. Theoretically, state courts should not require any compensation or incentive to hear any number of federal claims.²⁸¹ But out of fairness to the states, and out of a desire to ensure robust and fair adjudication of all claims, policymakers may choose to draw on the commandeering analysis.

Second, judicial actors other than the U.S. Supreme Court might engage empirical information. Both scholars and litigants should consider how they might direct mixed normative and empirical arguments toward these decisionmakers, particularly in the areas of abstention and habeas. Abstention doctrine relies heavily on the rhetoric of equity, leaving substantial room for federal district judges to exercise their “wise discretion” and “considerations of wise judicial administration” in choosing whether to keep the case.²⁸² Federal district judges could consider a wide array of data points about the particular state court in question, to determine whether a given case is one of the rare instances when abstention is appropriate.²⁸³ Some of these may be issues of law: for example, *Pullman* directs a district court to consider whether the relevant state’s law “appears to furnish easy and ample means” for deciding the question, such as certification.²⁸⁴ A court might also consider the scope and adequacy of a state’s procedural law. The U.S. Supreme Court took such considerations into account in *Mitchum v. Foster*, noting, after reviewing Reconstruction-era history, that § 1983 was enacted against the backdrop of Congress’ concern that “state instrumentalities could not protect” federal constitutional rights.²⁸⁵

But a district court need not be limited to law. A litigant could brief the issue by recourse to data about the particular state court’s track record, attempting to make or rebut a “showing that . . . obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim.”²⁸⁶ Such data might include information about the capacity of the state court as compared with the federal court: the amount of time it will take to decide the case; data on any discrepancy in win rates for the given type of claim, along with any

than merely commandeering their official services.” *Id.* at 914. It is certainly in the spirit of *Printz*, if not required by its letter, for the federal government to make significant grants to the state courts in support of their duty and capacity to hear federal claims and enforce federal rights.

281. *Testa*, 330 U.S. at 391.

282. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 645 (1941); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quotations omitted).

283. *Colorado River*, 424 U.S. at 817.

284. *Pullman*, 312 U.S. at 645.

285. *Mitchum*, 407 U.S. at 242.

286. *Pullman*, 312 U.S. at 645.

potential explanations for this discrepancy, such as a tendency of elected judges to decide against that type of litigant; a strong likelihood of implicit bias by judges against litigants of the same demographic; and, following *Colorado River*'s exhortation to “conserv[e] judicial resources,” a consideration of the impact of that single case, or class of cases, on the state’s court system as compared with the local federal courts.²⁸⁷

And because federal courts are to abstain only rarely under conditions of concurrency,²⁸⁸ empirical data situating the case among other similar conflicts would also help the court to determine, for example, whether the case “bear[s] on policy problems of substantial public import,” or whether the state has a “coherent policy” on point and the precise extent to which the case at issue would disturb that policy—in essence, determining whether the case is truly, verifiably exceptional.²⁸⁹ Lower courts have broad discretion in making abstention determinations, with very little doctrine to guide the decision. Comparative capacity empirics can help litigants and courts to fill that gap.

And federal district judges evaluating habeas petitions might look to empirical information about the state court that convicted the petitioner to calibrate their evaluations of whether that individual had a “full and fair” opportunity to litigate her claims in that forum.²⁹⁰ In particular, a habeas petitioner’s briefing might direct the federal judge to the literature on judicial elections, and to the fact that elected state judges tend to be “tough on crime” in the periods immediately preceding an election,²⁹¹ especially where crime has been the subject of television advertising for or against judicial candidates.²⁹² A habeas petitioner who was convicted only a few months before an election, especially of a type of crime that received media coverage, would have a strong argument that the federal judge should view the validity of the state court’s adjudication with more skepticism than someone convicted shortly *after* an election or of a less sensationalized crime. If the federal judge believed the state court’s decision to be swayed by the election cycle, that could be grounds for finding that the state court had made an “unreasonable application” of federal law,²⁹³ or that the habeas petitioner had not had a “full and fair” opportunity to litigate her claim—dramatically changing the scope of the

287. *Colorado River*, 424 U.S. at 817; *see supra* notes 128–130 and accompanying text.

288. *Colorado River*, 424 U.S. at 818.

289. *Id.* at 814.

290. *Stone v. Powell*, 428 U.S. 465, 469 (1976).

291. *See supra* notes 129, 130.

292. *See supra* note 182.

293. *See supra* notes 109–112 and accompanying text.

case.²⁹⁴ But current habeas doctrine also contains another important teaching for federal courts thinkers: because the U.S. Supreme Court after AEDPA has essentially been confined to statutory interpretation in determining the boundaries of federal habeas, jurisdictional arguments, especially those based on empirics, are far more productively directed to Congress than the Court. Such arguments are needed: given that we know state courts are less willing to enforce bedrock criminal rights, revision of the habeas statutes to enable more expansive federal review should be an urgent priority.

Third, the question of parity from the litigant perspective remains underdeveloped. Normatively, we need multiple, context-specific definitions of quality advocacy which would in turn enable empirical assessment. We need a fuller normative conversation about what makes courts constitutionally adequate from the litigant's perspective to ensure that litigants' interests in fair adjudication are met even if they do not win. Empirically, we need highly granular information such that litigants can compare, or at least understand, the particular courts in which their case might be heard rather than relying on data about the court systems as a whole. Industry already provides some of this particularized information via big-data capabilities.²⁹⁵

More broadly, federal courts scholars writing in doctrinal, theoretical, and historical modes must develop normative models for the adequacy of court systems—both comparative and singular—and the actors therein that can both make use of existing data and generate further factfinding. A few points of contention from the parity debate of the late twentieth century seem definitively to have been resolved by the data and methods that have been developed since. Such facts can then ground new normative conversations. For example, we now know that judicial selection processes make a difference. Participants in the earlier parity debate argued about whether elected state judges were as independent as appointed federal judges; because we now know that the answer to that question is, on the whole, “no,” we can engage the debate taking place in the political science literature as to whether or not it is *desirable* for judges to be fully independent from the public. We also know that, relative to the state courts, the federal courts are not overburdened. Therefore, normative critiques of jurisdictional doctrine might focus not on whether classes of cases should be excluded from the federal courts due to system capacity alone; rather, we might think normatively about which kinds of

294. If the *Stone* Court had found that Mr. Powell had not had a “full and fair” opportunity to litigate his claim in state court, his Fourth Amendment claim would have been back in the case, allowing him to exclude the murder weapon from evidence—a potentially transformative result. 428 U.S. at 468–71.

295. See, e.g., *Free Report on Any Federal Judge or Opposing Counsel*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/c/free-litigation-analytics-report> (last visited Aug. 8, 2021).

cases are best suited for the particular affordances of each court system and seek to resource each of these systems appropriately.²⁹⁶ And future writers on parity might think about how they can address their critiques not only to the U.S. Supreme Court but also to Congress, given Congress' unique ability to shape jurisdiction based on factfinding about the courts. The data are, for the most part, available. Scholars should use them to move both the literature and the courts themselves forward.

The flourishing of data on the courts since the proclaimed end of the parity debate calls for the reconsideration of empirical questions embedded therein. But the empirics also invite a reconceptualization of parity on new terms as a comparison of the characteristics and capacity of the state and federal courts. This Article has untangled the earlier parity debate to bring the two literatures into conversation and to spark new comparative work. Above all else, the important question is not which court system is "better," but rather how both court systems can best be supported in their crucial work.

296. See Neuborne, *supra* note 16, at 803.