Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts

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Recently, an eminent scholar proposed that issues of institutional competency are related to legal doctrines controlling access to courts. That scholar theorized that federal courts could properly fashion forum allocation “principles” from considerations of institutional competence. Professor Fischer discusses, in a critical vein, the necessary assumptions underlying that theory. He develops the argument that consideration of issues of institutional competence by the judiciary not only represents an unwarranted intrusion into the power and prerogative of Congress, but also is damaging to the judiciary as a public institution.

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I. INTRODUCTION

Since the formation of the United States of America, the coexistence of state and federal courts has vividly demonstrated the commitment to federalism\(^1\) that underlies our bifurcated system of law and government. Of course, the relationship between state and federal courts, like the relationship between nation states, has not always been smooth and harmonious. The nature of that relationship, however, has invariably served as a benchmark for assessing the character of federalism existent in the United States at any particular point in time.

In the beginning, the state courts were considered the dominant guarantors of the political and social values that had found expression in the form of constitutional government that became indigenous to the American experience. Only grudgingly did the states concede jurisdiction over these matters to the federal government, enabling it to implement a federal system of courts wherein the judicial power of the United States would find independent and sympathetic expression.\(^2\) Indeed, the opponents of a strong united government correctly perceived that a vibrant federal court system would serve as a powerful mechanism for the aggrandizement of national power.\(^3\) One of the great constitutional compromises prescribed that a federal judicial system of courts of original jurisdiction would be authorized by constitutional grant subject to the political power in the Congress to control and regulate such original jurisdiction.\(^4\) Hence, the federal court system was constrained from its creation by the branch of government most clearly under the control of the several states.\(^5\)

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1. Federalism can be descriptively defined as the vertical distribution of power between the national government and the states. G. Gunther, Cases and Materials on Constitutional Law 400 (9th ed. 1975). From a normative perspective, however, a meaningful formula to prescribe the proper scope of power exercisable by either the national government or the states, or both, has not been devised. Federalism seems to constitute the proper, though indefinable, equilibrium between the centripetal tendencies of the national government and the centrifugal tendencies of the states.


3. Id. at 212-13.

4. Id. at 223-24.

5. The Articles of Confederation had set up a system of voting by states, id. at 222-23. The states suffered a loss of power by reason of the change to the constitutional system of proportional representation and popular election to the lower assembly of the Congress. They were, however, visibly integrated into the higher assembly through U.S. Const. art. 1, § 3 which provides: "The Senate . . . shall be composed of two Senators from each State, chosen by the Legislature thereof . . .; and each Senator shall have one Vote."
In the first 150 years following that great compromise, few would have disputed that control over access to federal courts was properly vested in the Congress, i.e., subject to allocation as Congress deemed appropriate. Where access to a federal court was provided by Congress, that mode of access was mandatory upon the court;\(^6\) where Congress had declined to provide access, that decision was also controlling.\(^7\) Starting approximately fifty years ago, however, the theretofore accepted model of congressional control over access to federal courts began to be eroded\(^8\) and shifted from Congress to the Supreme Court of the United States. That shift in control was manifested most dramatically in the development of justiciability concepts,\(^9\) the expansion of

\(^6\) See Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821). In Cohens, the Court dealt with the issue of whether the Supreme Court had appellate jurisdiction to review writs of error from state court proceedings where one party was a state and the other a citizen of that state. In determining that the Court did have jurisdiction, Chief Justice Marshall stated: “It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution.” *Id.* at 404.

\(^7\) See Capron v. Van Noorden, 6 U.S. (2 Cranch) 125, 126 (1804). The Court held that the lower court had a duty to determine whether it had jurisdiction, as the consent of the parties did not suffice to grant the court jurisdiction to hear the case.

\(^8\) Frothingham v. Mellon, 262 U.S. 447 (1923), seems to mark the transition from preclude congressional control to sustained and largely successful judicial control over the question of access to courts. In Frothingham, the Court held that federal courts had no jurisdiction over a controversy unless it was of a justiciable nature: the parties had to demonstrate not only that a statute was unconstitutional, but also that they had incurred, or were in immediate danger of incurring, direct injury as a result of the enforcement of the statute. The Court also required that the injury sustained be unique to the parties, not one suffered in common with the general population. *Id.* at 488.

The selection of Frothingham is somewhat arbitrary, although there are good reasons for selecting this decision as signifying the beginning of judicial attempts to assume a dominant position over control of access to federal courts. Some commentators argue that judicial decisions construing the “arising under” language of general federal question jurisdiction, 28 U.S.C. § 1331 (1970), constitute a sustained judicial intrusion into the previously forbidden area of forum allocation decisionmaking. See, e.g., Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. Pa. L. Rev. 890 (1967). Nonetheless, Frothingham did mark the introduction of largely pragmatic considerations into the forum allocation decision. On the basis of hindsight, it appears that judicial attitudes toward access to federal courts have been more independent in the era after Frothingham than they were before it.

\(^9\) One hesitates to even suggest (by analogy or example) a definition of the term “justiciability.” A bolder soul is Professor Tribe. See L. Tribe, *American Constitutional Law* § 3-7 (1978). Professor Tribe describes the concept in terms of institutional psychology and maintains that justiciability is often determined according to how the Supreme Court Justices perceive their role and the limitations placed on their powers by the “case or controversy” language of U.S. Const. art. III, § 2. Within his discussion of the concept of justiciability, Professor Tribe includes the doctrines related to: advisory opinions, mootness, ripeness, injury in fact, political questions, standing and collusive suits. Id. at
postponement concepts, such as the abstention doctrine and the development of access-controlling devices, such as the Younger Doctrine. Most recently, judicial control over access to federal courts was evidenced by the limitation of the scope of post-conviction habeas corpus review of state criminal judgments.

It is this recent shift in control over access to federal courts from Congress to the Supreme Court that is the focus of this article. The question addressed is thus different in kind from most recent inquiries into the nature of the relationship between Congress and the federal courts. The concern here is not the power or right of Congress to create or abolish federal courts; rather, it is the identification of the proper governmental entity to determine the allocation of decisionmaking responsibility between state and federal courts.

A proper regard for our federal system of government necessitates that questions concerning access to courts of original jurisdiction be decided with due regard for the different spheres of responsibility that our political system places on institutions of

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10. See generally Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. PA. L. Rev. 1071 (1974). In cases where a federal constitutional claim is based on an unsettled question of state law, this doctrine requires the federal court to postpone its decision until after the state court settles the state law question. The doctrine is designed to minimize the risk that federal courts will misinterpret state law or unnecessarily adjudicate constitutional issues. Id. at 1077-78.


The rules that make up the doctrine were designed to limit the power of federal courts in order to preserve the autonomy of state governments. The limitations dealt specifically with the ability of the federal court to enjoin or grant declaratory relief against unconstitutional state action in instances where these claims could be brought up in state proceedings.

Id. at 152.

12. See Stone v. Powell, 428 U.S. 465 (1976). The Supreme Court limited habeas corpus access to federal courts by denying habeas corpus relief where the state court had already afforded the petitioner an opportunity to litigate fully a fourth amendment claim arising out of an allegedly unconstitutional search and seizure.

The question of access to a court is a functional component of the demands of our political process. Such a question must address the issue of political responsibility for deciding where certain cases are to be decided because where cases are decided will often have a profound impact upon how they are decided.15

The arguments and conclusions presented in this article are organized as follows: First, I will explore the propriety of an independent judicial decision regarding forum allocation between state and federal courts. The conclusion advanced is that sufficiently definable criteria necessary to measure empirically the institutional quality of state fora as a whole, as opposed to federal fora as a whole, do not exist. This lack of empirically definable criteria undercuts any proposal which would assign to the judiciary the task of rendering forum allocation decisions based upon criteria such as the relative general institutional competency of courts.

Second, I will address the issue of where the forum allocation decision should be made. The conclusion advanced is that the Constitution of the United States commits the forum allocation decision pro tanto to the Congress and that this separation of power and function has historically been recognized by the Supreme Court. Hence, a federal court has leeway to make a forum allocation decision only to the extent that Congress has duly committed such a power to that court pursuant to statute.

Finally, I will discuss the weight that should be given the

14. The plurality opinion in Elrod v. Burns, 427 U.S. 347 (1976) does not suggest a purely legal texture for the question. In Elrod, the Court detailed the unique relationship of federal and state courts in the context of dealing with the politically inspired firing of non-civil-service county employees. The Court rejected the argument that the hiring and firing of executive officers was a matter solely committed to the executive branch, stating: "The short answer to this argument is that the separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relationship to the States." Id. at 352. This may suggest that the relationship between the federal judiciary and the state judiciary is solely a problem for the respective judiciaries to resolve. Such an argument, however, would ignore the role given to Congress under art. III to control that relationship. See notes 60 to 88 and accompanying text infra. Certainly, the decision that Congress would control the relationship between state and federal courts, which arose from a fundamental compromise during the Constitutional Convention, see note 5 and accompanying text supra, of necessity warrants dismissal of any notion that the federal judiciary possesses the power to determine the whole of its subject matter jurisdiction.

15. That a case may be decided differently depending on where it is adjudicated does not justify result-oriented forum allocation decisions, as I shall explain in part IV of this article.
pervasive assumption that federal courts are, as judicial institutions, of better quality than state courts. The argument advanced here is that constitutional decisions of such sensitivity as the proper allocation of the federal judicial power should not be judicially controlled; to assign such a responsibility to the courts on no firmer foundation than mere speculation would undermine the image of judicial integrity. Moreover, even if we were to accept the prevalent assumptions which encourage the judiciary to make forum allocation decisions, such a process would be rational only if we knew \textit{a priori} what end results were the “correct” ones. Evaluation of an institution's competence to decide cases can be undertaken only if we have already clarified our goals; we cannot evaluate the means unless we define our ends. It is the absence of agreed upon concrete goals that makes reliance upon the measure of institutional competence, as a forum allocation determinant, a counterintuitive method of analysis.

II. \textbf{THE ABSENCE OF SATISFACTORY CRITERIA FOR DETERMINING INSTITUTIONAL COMPETENCE}

There is a recognized lack of empirical research and a paucity of other sound, accepted modes of investigation, study and analysis, on the topic of what institutional competency is and how it affects the judicial process on a system-wide basis.\textsuperscript{16} Even

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\item[16.] A distinction, however, does appear to exist between the methodology suggested by certain commentators and that suggested by the Court to define "competency." The term is not used identically by both parties. As used by the Court in \textit{Stone v. Powell}, 428 U.S. 465, 493-94 n.35 (1976), and by implication in \textit{Huffman v. Pursue, Ltd.}, 420 U.S. 592, 610-11 (1975), the term "competency" appears to connote the existence of empirically determinable criteria that may be used to measure qualitatively the ability of a court to adjudicate. Professor Neuborne, on the other hand, appears to use the term "competency" in a result-oriented, rather than an empirical, fashion. Under this standard, competency is principally measured by the likelihood that certain objectives or goals will be realized by the judicial process. Neuborne, \textit{The Myth of Parity}, 90 \textit{Harv. L. Rev.} 1105, 1106 (1977).

"Competency" also may be defined in a manner which neither the Court nor Neuborne address, but which is more descriptive of the actual roles the federal courts and the Congress have come to accept by compulsion of the Constitution and as a by-product of history. For forum allocation purposes, this definition of competency has a political connotation and consists of a court's, either state or federal, ability to render decisions which are acceptable to the Congress. This means that Congress' power to allocate the federal judicial power under art. III provides it with a significant and substantial political weapon to control the tenor of judicial decisions which involve matters of federal interest and concern. Hence, for purposes of formulating general rules of forum allocation, competency would be measured by Congress' allocation of the judicial function. \textit{Cf. Yakus v. United States}, 321 U.S. 414, 435-36 (1944) (upholding jurisdictional time limits on federal courts to hear cases on price control violations).
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proponents of the use of competency criteria for forum allocation decisions acknowledge that their judgments to date are based largely upon speculation. Thus, in the process of defining the impact and effect institutional competence criteria ought to have on the forum allocation decision, problems result from the inability to define just what institutional competency means and from uncertainty over the state of our problem-solving methodology.

This should not suggest that considerations of institutional competency are never appropriate. Certainly in the face of a factual showing of state institutional prejudice, inhospitality or bias to federal claims, a federal court has the duty to adjudicate the dispute even in cases where state remedies have not been exhausted. Nevertheless, the theory that nationwide, general rules regarding forum allocations between state and federal courts can be developed is erroneous; the notion that concepts of institutional competency can be generalized as easily as they are particularized warrants caution on the part of the federal courts before they proceed too far in their attempts to define and determine ab initio their own jurisdiction.

Professor Neuborne recently described several important criteria that he asserted belied any claim of equivalent institutional competency (parity) between state and federal courts. To prove that the institutional competence of federal trial courts is superior to that of state trial courts, Professor Neuborne relied on three basic arguments: (1) that federal judges as a whole possess greater technical competence than state judges and are better able to follow Supreme Court pronouncements because they better understand them; (2) that the "psychological set" of federal judges render them "more likely to enforce constitutional rights vigorously"; and (3) that because of their lifetime tenure federal judges are isolated from majoritarian pressures, freeing them to make unpopular constitutional decisions with no fear of

17. See Neuborne, supra note 16, at 1116. Neuborne admits that no study exists comparing the relative performance of state and federal courts in enforcing constitutional rights. Id. at 1116 n.46.
18. See, e.g., Marino v. Ragen, 332 U.S. 561, 563-64, 569-70 (1947) (Rutledge, J., concurring) (state procedures for redress so inadequate that federal court was compelled to grant habeas corpus relief before the state remedies were exhausted). See also HART & WECHSLER, supra note 13, at 1487-92.
19. Neuborne, supra note 16.
20. Id. at 1121-24.
21. Id. at 1124-27
These considerations provide a convenient perspective from which to assess whether sufficient competency criteria exist to enable generalized forum allocation decisions to be made by the judiciary. Of course, there are other reasons upon which a forum allocation may be predicated. Lawyers might consider such factors as the congestion of court calendars, the rules of evidence or the judicial assignment system (e.g., master calendar as opposed to individual calendar assignment), important reasons for selecting one court over another. These factors, however, do not constitute an inherent infirmity of the court as a court, which would render it incompetent to decide a case before it. On the other hand, the factors set forth by Professor Neuborne—technical competence, psychological set and insulation from majoritarian pressures—do focus upon the competency of courts qua courts to decide particular types of cases. Hence, it is from the perspective of these latter factors that the institutional competency issue will be addressed.

A. The Proper Perspective for Institutional Comparison

The first step in assessing institutional capacity for federal constitutional decisionmaking is to ascertain what is to be compared to what. Professor Neuborne, a believer in federal institutional superiority, noted a tendency to compare federal district courts with state intermediate appellate courts. He criticized this methodology as not evincing a fair consideration of factors such as the expense, delay and inconvenience that are occasioned if institutional equivalence does not exist until the appellate level is reached. Thus, he concluded that the appropriate institutional comparison should be between federal district courts and their state trial court counterparts.

A hierarchical view of the decisionmaking process, however, does not present a thorough and accurate view of the whole. This approach fails to take account of the many cases of federal interest that either do not long remain at the trial level or that can enter the federal trial courts for the first time only after a lengthy sojourn through the state judicial system. For example, in matters of habeas corpus for state prisoners, the federal trial courts first

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22. Id. at 1127-30. Majoritarian pressures are equated with "powerful local interests." Id. at 1127.
23. Id. at 1118-19.
entertain the issue after appellate level review in the state system. Moreover, many cases involving hard questions of state interest and individual rights involve situations in which the focus is upon the decision to be rendered by an appellate court. This is particularly true in the case of public interest litigation where jurisdictionwide resolution of the problem is desired. The merits of limiting comparisons of institutional equivalence to correlative trial courts seems especially inapt when we recognize the prevalent use of immediate appeal procedures, the extensive scope of appellate review of questions of law and facts.


25. It should not be surprising that attorneys who represent unpopular litigants seeking broad jurisdictionwide relief would prefer a court capable of providing the desired relief. The federal district court is generally perceived as fully capable of providing the desired relief. See, e.g., Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) (state penal system subject to compliance order); Wyatt v. Stickney, 344 F. Supp. 387 & 344 F. Supp. 373 (M.D. Ala. 1972), enforcing 325 F. Supp. 781 (M.D. Ala. 1971), modified sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (state mental health system subject to compliance order); Lee v. Macon County Bd. of Educ., 292 F. Supp. 373 (M.D. Ala. 1968), enforcing 325 F. Supp. 781 (M.D. Ala. 1971) (statewide desegregation of schools ordered); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd, 352 U.S 903 (1956) (during the height of the Montgomery bus boycott, city buses were ordered desegregated). Indeed, the intrusion of the federal judiciary into areas traditionally the sole domain of state prerogative has prompted the inevitable scholarly backlash; Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 STAN. L. REV. 661 (1978). Even if federal judicial intrusion into the legislative domain of the states is curtailed, however, judicial intrusion as a whole may not be, for broad equity actions brought by litigants seeking compliance with state and federal constitutional guarantees are also finding their way into state courts. See, e.g., Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (statewide equalization of school funding ordered); Sundance v. Municipal Court, CA 000257 (Mar. 20, 1978) (Superior Court, County of Los Angeles) (certain remedial changes ordered in action commenced by "chronic, homeless, indigent alcoholics" to challenge the constitutionality of prosecutorial practices regarding judicial practices with respect to, and pre- and post-conviction policies relating to, disorderly conduct charges stemming from alcoholism. See CAL. PENAL CODE § 647(f) (West 1975). The extension of state judicial authority even beyond that exercised by federal courts has not gone unnoticed or unapplauded. See Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977).

26. See, e.g., CAL. CIV. PROC. CODE § 904.1(f) (West 1973), which provides: "An appeal may be taken from a superior court in the following cases: . . . (f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction."

Thus, attempts to constrain certain actions or conduct either by the government (seeking to enjoin the complained of activity) or a party (seeking to enjoin government interference) can be immediately appealed from the denial of the preliminary injunction. Socialist Workers 1974 Cal. Campaign v. Brown, 53 Cal. App. 3d 879, 125 Cal. Rptr. 915 (Ct. App. 1975). Where time is of the essence, interlocutory appeals from ex parte applications may be appealed regardless of whether the application was contested below. See Jolicoeur v. Mihaley, 5 Cal. 3d 656, 488 P.2d 1, 96 Cal. Rptr. 697 (1971).

27. The scope of factual review upon appeal has been liberal in the first amendment area and only somewhat less extensive in the entire fourteenth amendment due process area. See generally HART & WECHSLER, supra note 13, at 601-10. State courts have gener-
and the tendency to appeal hard cases to higher courts.

Simply put, the argument for limiting institutional comparison to courts of the same systemic level does not adequately consider the vast panoply of procedural modalities by which issues of federal interest and concern are raised and resolved. The argument is, in turn, undercut to the extent that it casts a misleading picture of the manner, mode and method by which legal doctrine is formulated. The focus upon expense, delay and uncertainty as the determinant factors of institutional comparison asks too much and, in the end, proves too little.

Only by comparing judicial institutions as holistic systems can a true basis for institutional comparison be achieved, if at all. To treat all federal and state trial courts as independent units, divorced from their appellate superstructures, calls to mind the parable of the blind men examining the elephant. A view of the American judicial process that examines only one aspect of it, such as trial courts, and does so in isolation, cannot be expected to produce an accurate model of the whole. Nor can even an accurate view of a part of a judicial system necessarily be treated as representative of the whole system. Simply put, no level of any judicial system is an island; each level is interwoven into a totally interrelated and interdependent system.

B. Technical Competence

The popular argument here focuses upon the professional competence of the federal judge and of his staff, particularly his law clerk. This argument proceeds upon the assumption that with the assistance of a superior staff, the federal district judges will better "analyze complex, often conflicting lines of authority"
and "produce more competently written, more persuasive opinions" than their state court counterparts.  

Traditionally, an appointment to the federal bench has been considered a desirable position. It would seem logical to expect that the most competent individuals would gravitate to such positions if a merit system were used to select federal judges. Nevertheless, because the selection of federal judges is a political process of a high magnitude, it would seem logical to expect that competency is not necessarily the prime criterion for appointment to the federal bench. Moreover, no test or standard has

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30. For an amusing account of the highly political method by which many federal judges are selected, see Totenberg, Will Judges Be Chosen Rationally? 60 JUN. 92, 93-99 (1976). Ms. Totenberg also notes that the highly touted screening process effected by the ABA may be more apparent than real:

Cases . . . where an appointment is made despite ABA Committee disapproval, are extremely rare—they make up less than 1 percent of all appointments. The reason is that neither the president nor the ABA can afford the messy fight that ensues when such an appointment is made. The ABA almost invariably loses, because the senators resent the ABA's tromping on their prerogatives and perceive the ABA as looking down on politicians. (They are probably right on this last score.) The president, on the other hand, usually gets a lot of bad publicity for making an unqualified appointment.

So both sides prefer to avoid public fights, the president to protect his image, the ABA to preserve its influence and stature in the judge-screening process. The result is often negotiation and a change in the nominee's rating. The Justice Department may present the committee with some "new" piece of information, and the committee changes its mind about the rating. Prof. Harold Chase, who conducted a study of judicial selection for the Brookings Institution, surveyed a two-year period in the Kennedy administration and found that between the ABA's informal and formal reports on nominees, there was a change in nearly 30 percent of the ratings, usually resulting in an upgrading.

Id. at 96. Of course, problems similar to those attendant to the selection of federal judges are not unknown to the states. See Traynor, Who Can Best Judge the Judges?, 53 VA. L. Rev. 1266 (1967) (commenting upon the popular and political dissatisfaction resulting from popular elections of judges, short terms and small salaries). As noted, however, by a respected worker in the field: "None of these observations seem to be empirically demonstrable. At least, there is now no data which convincingly demonstrates that any particular differences in the qualities of judicial systems are related to differing modes of selection." P. Carrington & B. Babcock, Civil Procedure, Cases and Comments on the Process of Adjudication 128 (2d ed. 1977). An additional perspective worth considering is that of Professor Rosenberg, who utilized questionnaires submitted to 144 trial judges of varying experience in an attempt to ascertain what must be the first question of any analysis of judicial competency—what judicial qualities demonstrate judicial competency. Rosenberg, The Qualities of Justices—Are They Strainable? 44 Tex. L. Rev. 1063 (1966).

At the risk of extending an overly long note, I would like to point out that the qualities which by consensus were deemed most important (moral courage, decisiveness, reputation for fairness and upright, patience, good health (physical and mental) and consideration for others) are, for the most part, difficult, if not impossible, to predetermine
been suggested by which judicial competency can be measured. We are thus forced to rummage about for characteristics which may shed some light upon the question of how competent a particular judge is. Such incidents of office as life tenure, superior staff and insulation from the cynicism engendered by day-to-day law enforcement are often suggested as leading one intuitively to conclude that the federal judge who possesses these incidents of office is more competent that the state judge who lacks them. Unfortunately, the nexus between these incidents of office and the conclusion of greater competency has not been established, either intuitively or empirically. Life tenure might either protect a judge from majoritarian pressure or allow a judge to insulate himself from the legitimate demands of a modern society. A superior staff might mean a more argumentative, intellectual staff to one individual or a more pliant staff to another. In short, the advantages derived from reliance upon incidents of office to measure a judge’s competency will be rare, while the mischief produced by it, constant and pervasive.

This same observation holds true with regard to the generation of written opinions by the bench. It is perhaps a truism (but still worth stating) that the failure of trial judges to produce written opinions in support of their decisions is distressing. Being required to articulate in writing the reasoning which induced it to come to a particular decision aids the court more than any other factor in proving that it has thought the problem through and has come to a supportable resolution of the dispute. The

in a judicial candidate. As more precisely put by P. CARRINGTON & B. BABCOCK, supra, at 129-30:

A striking feature of these highest ranking attributes is that they tend to focus upon the personality or person of the candidate—what he is rather than what he has done; his innate or intrinsic qualities rather than his “external” attainments. They are more concerned with temperament, disposition, character, and attitude than with background, training, or formal achievement. Except for good health, they tend to be subjective and difficult to recognize and measure. Furthermore, they are qualities that do not relate uniquely to law, its study or its practice, and are not peculiar to lawyers or judges. They do not clearly differentiate those who are best equipped to be trial judges from other persons of virtue.

31. See notes 49-56 and accompanying text infra.

The matters suggested in the text [a written opinion] patently reach in effect beyond the furtherance of reckonability; they lead, for instance, toward not merely continuance but cumulation and refinement or refreshment of wisdom. They add the individual’s labor and pondered thought to his intuition and inspiration. They put well-nigh every opinioned deciding through something of a ripening process. Many an appellate judge agrees with Traynor,
that he has found no test of a decision which has the rigor offered by having an opinion to compose. The opinion-system holds relatively steady, moreover, not merely the succession of upshots, but the body of doctrine, the ways of work, and (not to be forgotten) the men's training in their office. And despite the increasing complexity of legal doctrine and despite, again, all that can be said about the power of skilled words to mask what has been done, there is in the opinion a real pressure to account to lay and legal public, and a real wherewithal for semi-check-up on the work.

The fact that benefits are realized by the court in preparing an opinion, however, does not necessarily mean that all opinions ought to be published. See Jacobstein, Some Reflections on the Control of the Publication of Appellate Court Opinions, 27 STAN. L. REV. 781 (1974); Vestal, Publishing District Court Opinions in the 1970's, 17 LOY. L. REV. 673 (1971) [hereinafter cited as Publishing District Court Opinions].

33. See Publishing District Court Opinions, supra note 32. The notion that federal judges produce more written opinions is no doubt enhanced by the existence of numerous reporters which publish the decisions of federal trial judges. See, e.g., Vestal, A Survey of Federal District Court Opinions: West Publishing Company Reports, 20 Sw. L.J. 63, 68-69 (1966). Certainly, the knowledge that what is written will find its way into print must spur many a judge (and his law clerk) to write the type of opinion he otherwise would not. This is so because opinions published in the Federal Supplement are generally not solicited from the judge. Rather, the West Publishing Company, the publisher of Federal Supplement, "contacts each federal district court judge when he is appointed and notifies him that the company is interested in publishing opinions which he wishes to have included in the West Publications. Although the West Publishing Company makes the final decision, it is hard to imagine that the company would refuse to publish an opinion sent in by a judge." Id. at 77 (emphasis added) (footnote omitted).

34. Contrast with the extensive system for reporting federal trial court decisions, see note 33 supra, the minimal attention given to state trial court opinions. See M. PRICE & H. BITNER, EFFECTIVE LEGAL RESEARCH, 387-409 (1953). The state trial judge who considers writing an opinion cannot count on making a contribution to the ongoing development of the law. Rather, his contribution is limited to advising the parties to the litigation of his settlement of the controversy. Thus, the state trial judge, knowing his work will be relied upon only within the confines of the controversy before him, must weigh the benefits and burdens of opinion writing against the practical utility of preparing (or reviewing) findings of fact and conclusions of law. Finally, even when the state judge prepares an opinion, he still may be required to prepare findings of fact and conclusions of law; the opinion, however, appears to suffice in federal court. This practice, no doubt, tends to encourage opinion writing by federal judges and discourage opinion writing by state judges.

35. Among federal trial judges, the incidence of reported opinion writing varies significantly. For example, Professor Vestal has observed:
State trial judges do prepare competently written, persuasive opinions on difficult issues of law adjudicated before them. I must admit that I share the assumption that federal trial judges prepare written opinions with greater frequency than their state counterparts, even though there are no doubt instances to the contrary. But whether this assumption rests upon an exception or is reflective of institutional dissimilarities between state and federal trial courts is unknown. Since the perception of greater federal opinion writing rests upon untested and possibly erroneous assumptions, it hardly provides a proper foundation for the

You will note that the number of published opinions [from the Fifth Circuit] rose from 259 (1962) to 293 (1963) to 377 (1968). Pages increased from 1105 to 1514. The increase, 1968 over 1962, for all practical purposes, occurred in Louisiana (73), Texas (22), and Florida (20).

In examining what is happening now, it seems desirable to look at the opinion writing practice with more care. ... The ratio of opinions reported to cases terminated is rather interesting. In Louisiana the district judges published one opinion for every 29 cases terminated. (In 1962 this was 1 for every 39). On the other hand, the ratio was 1 to 79 cases terminated in Texas and 1 for every 92 cases terminated in Florida. (1 to 113 in 1962).

The available statistics also show the ratio of final opinions per terminations by court action. Mississippi has a ratio of 1 to 16. Louisiana has a ratio of 1 to 26. Florida has a ratio of 1 to 56. The Mississippi figure is explained in some measure by the fact that a relatively low percentage of the cases terminated by court action. The total figures on termination and opinion writing and reporting should be noted. More than 22 thousand cases were terminated in the circuit with only 277 number opinions reported by West Publishing Company.

Another way to look at the available information is to examine the opinion writing practices of individual judges. [In reference to] the judges sitting for the full fiscal year of 1968. ... [i]t should be noted that the opinion writing and reporting practices of the various judges vary considerably. One judge from Texas had no opinion published; seven judges had a single opinion reported; nine judges had two opinions reported; six had three; seven had four. Thus, thirty judges had four or fewer opinions published.

At the other end of the scale the top was 36 by one judge, followed by 22, 20, 17, 16, 15, and two at 14. These eight judges had 154 of the 377 opinions. It also should be noted that six of these eight prolific judges are from Louisiana.

[In reference to] the judges in the Fifth Circuit sitting the full fiscal year 1962. ... [n]ote that a number of the judges served both full years. ... Time has not allowed sufficient research into the reporting of opinions by district judges, however, a comparison of the two years allows certain tentative observations. One might wonder whether the judges would write more or fewer opinions after they had been on the bench for an additional five years. As a group, they wrote and reported fewer opinions. In fiscal 1962, they reported 117 opinions; in 1968 they reported 82. There were some marked changes. Judge 502 in Alabama went from 11 to 2. Judge 515 in Georgia went from 6 to 1. On the other hand, Judge 501 in Alabama went from 5 to 10.

*Publishing District Court Opinions, supra note 32, at 675-76.*
establishment of a doctrine of forum preference.

Federal judges may have a higher level of technical competence in particular geographic areas; however, this compliment does not stand up as a generalization. In California, for example, the caliber of state court judges, both trial and appellate, is thought by many to be on par with that available in the federal courthouse.\(^3\) In any event, since technical competence is such a matter of individual predilection and disposition, generalization must be recognized as dangerous and fraught with the potential for error.

Someone has yet to demonstrate a relationship between institutional competence and the ability to follow Supreme Court pronouncements. Whatever the level of general institutional receptivity toward established doctrine as binding or as persuasive precedent,\(^3\) individual personal judgment is both inevitable and proper.\(^3\) The conscientious judge, state or federal, decides the case according to the law. Judges who lack the ability to apply the law to the facts pose a problem regardless of where they preside.

An additional consideration is that the federal judicial system is not foolproof. Incompetent judges do exist and, in this regard, the federal system is, at present, seriously undermined because the only methods for removing federal judges are either to impeach them or to insulate them from caseloads.\(^3\) These ineffective devices should be contrasted with the model plans now used by many states to remove or censure incompetent and abusive judges.\(^4\) Even if the number of actual removals and cen-

\(^{36}\) I should think the same would be true in many of the states.

\(^{37}\) See Neuborne, supra note 16, at 1124-25.

\(^{38}\) Nor should individual personal judgment be ignored by overzealous allegiance to an institutional norm. See Johnson, The Role of the Judiciary with Respect to the Other Branches of Government, 11 GA. L. REV. 455, 466-67 (1977).

\(^{39}\) See, e.g., Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970) (affirming, without reaching the issue, an order directing that no new cases or proceedings be assigned to plaintiff federal district court judge).

\(^{40}\) The difference in federal and state treatment is exemplified by the presence in most states of a program for the review of questionable judicial conduct. The removal provisions for each state are described in Gasperini, Anderson & McGinley, Judicial Removal in New York: A New Look, 40 FORDHAM L. REV. 1, 37-40 (1971). Provisions authorizing removal or lesser sanctions against errant judges have been developed either through internal adoption of canons of judicial ethics by state courts, see Comment, The Procedures of Judicial Discipline, 59 MARY. L. REV. 190, 199 (1976), or through legislative control or constitutional provision. The California system (employing a Commission on Judicial Qualifications) has been adopted by thirty-five states and represents the model of accommodating the conflicting goals of judicial independence and judicial accountabil-
sures has been small, the *in terrorem* effect of such models has been sobering and clearly beneficial to the administration of justice.

Inevitably, we deal with considerations that, rather than demonstrating the greater institutional competency of one system over the other, point instead to the strengths and weaknesses of each system. Any attempt to match these institutional considerations is futile. For example, even if one concedes that the law clerks available to the federal judge are generally intellectually superior to those available to the state court judge, how do you balance more "competent" law clerks against a model program for removal of incompetent judges? Is it appropriate to make nationwide assumptions where there are significant local deviations? I would suggest that analytically one cannot and should not. That trial attorneys attempt such feats every day through a process of speculation is immaterial. If judicial forum allocation decisions could be predicated upon possibilities, the variables introduced would be endless. As the number of variables precludes any reasoned prediction of the better, more competent forum, any meaningful conclusions regarding the institutional competency test for forum allocation are lost in a sea of conjecture. Speculation is hardly the substance out of which one should fashion a constitutional doctrine that would be predicated upon "principled" decisionmaking.

Behind the facade of the measurement of institutional competence lies the larger issue of what roles are appropriate for state and federal courts to play in the federal system of government we espouse. Resolving that issue requires coming to grips with whether the ultimate goal is to minimize the position of the states and the state courts in the realm of exposition of constitutional doctrine and to reduce them to mere ministerial functionaries by transferring all major decisionmaking responsibilities to the federal government and the federal courts. Such a goal is not necessarily good or bad. It might be that the great compromise of dual state and federal courts engineered by the founding fathers, which is discussed in Part III of this article, no longer makes sense after two hundred years. Making such a determination, however, would require a basic theoretical reformulation of the nature of federalism to which this country has adhered these

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*See Frankel, Judicial Accountability, 49 L.A.B. Bull. 411 (1974); Comment, supra at 203. Federal efforts to control errant judges remain largely uncertain. See 65 A.B.A.J. 1459 (1979).*
past two centuries. Therefore, if reformulation is desired, it ought to be made—at least in basic design—by Congress, the constitutionally qualified political entity.\footnote{41}

C. Psychological Set

It has been argued\footnote{42} that elitism, bureaucratic receptivity, and the ivory tower syndrome\footnote{43} constitute "a series of psychological and attitudinal characteristics which render federal district judges more likely to enforce constitutional rights vigorously."\footnote{44} No modern empirical studies exist, however, that would support the proposition that the federal judiciary, as compared to the state judiciary, has a "superior" receptivity, on an institutional basis, to Supreme Court pronouncements.\footnote{45} "Core" cases, in which a judge seeks only to apply a legal rule, give rise to little serious dispute; "penumbral" cases, in which the applicability and meaning of a given decision may be matters of legitimate contention, are a different matter altogether.\footnote{46} The competent judge, state or federal, does not give blind bureaucratic obedience to a prior decision without consideration of the context in which the prior decision was rendered. Instead, as Llewelyn stated:

An ignorant, and unskillful judge will find [the doctrine of precedent] hard to use; the past will bind him. But the skillful judge—he whom we would make free—is thus made free.

\footnote{41. See text accompanying notes 48-56 infra. Of course, Congress' power might not be unfettered. Under National League of Cities v. Usery, 426 U.S. 833 (1976), the federal courts may have the power to review congressional actions which undermine the viability of state government and state interest. But see Tushnet, Constitutional and Statutory Analyses in the Law of Federal Jurisdiction, 25 U.C.L.A. L. Rev. 1301 (1978) (arguing that Congress has near unfettered discretion to allocate federal jurisdiction without contravening any judicially enforceable safeguards of federalism).}

\footnote{42. See Neuborne, supra note 16, at 1124-26.}

\footnote{43. The "ivory tower syndrome" is described as "[insulation] from the more cynicism-breeding dimensions of constitutional law." Id. at 1125.}

\footnote{44. Id. at 1124.}

\footnote{45. This statement is not intended to suggest that analyses of certain institutionwide receptivity criteria have not been undertaken. See Grossman, Social Backgrounds and Judicial Decision-Making, 79 Harv. L. Rev. 1551 (1966); Haines, General Observation of the Effects of Personal, Political, and Economic Influences in the Decisions of Judges, 17 Ill. L. Rev. 96 (1922). The net result of such studies, however, has been to generate speculation about the effect of these criteria upon the decisionmaking process, rather than to test empirically the theory that federal judges are more receptive. I do not mean to denigrate the efforts of competent scholars; empirical testing may be impossible due to certain policies and values (e.g., right to privacy) inherent in our legal system.}

He has the knife in hand; and he can free himself."

Certainly, there are Supreme Court decisions of such overwhelming magnitude that they articulate a policy determination of universal application. The task presented to courts in subsequent cases, however, is not overturning the enunciated holding, but determining its parameters, its scope, its depth and its intended effect. It is no more proper to say that such psychological factors as elitism, bureaucratic receptivity and the ivory tower syndrome
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demonstrate that federal courts are more competent than state courts to decide constitutional cases than it is to say that courts composed of judges with a particular judicial philosophy are more competent than courts composed of judges with a different judicial philosophy. It might be true that a judge with particular predilections will often render a decision consistent with those predilections, but this tendency does not make that judge more competent unless competency is defined as reaching a particular decision. If competency means something else, however, if it connotes the obligation to render a decision consistent with the law, to reason with precision, clarity and perception, and to do justice in the particular case before the court, then the particular psychological set of a judge should be immaterial in a forum allocation decision. Labelling a judge competent because of his predilections in certain categories of decisions could be dangerous for it runs counter to promoting those very qualities that we should cherish in our judges.

D. Insulation From Countermajoritarian Pressures

The importance of the courts in developing and defining constitutional rights has given rise to a belief that judges can only perform those functions, or can only perform them at optimal levels, if they are insulated from popular accountability. Thus, it is argued that the constitutional grants of life tenure and freedom from salary impairment constitute an institutional benchmark which distinguishes the federal judiciary from its largely popularly elected state brethren.

One might intuitively suspect that between two classes of

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48. If federal judges are so insulated, it is highly suspect that this factor would put them in a better position to pass upon constitutional topics. Even the Platonic Guardians, who possessed all wisdom, did not act in ignorance of the practical consequences of their decisions. PLATO, THE REPUBLIC AND OTHER WORKS 117-18 (B. Jowett trans. 1973).
INSTITUTIONAL COMPETENCY

individuals—one class protected from accountability, the other class subject to it—the class insulated from accountability will function with a greater degree of freedom than the accountable class. Yet, it cannot be argued that nonaccountability a fortiori equals competency. As observed earlier, when applying intuitive concepts to the judicial decisionmaking process, generalizations are fraught with difficulty. It has not been proven that state courts are so less competently staffed than federal courts as to warrant a general finding of federal institutional superiority. That positions on state courts do not carry the “prestige” associated with positions on the federal courts is true; however, this does not necessarily undermine the vitality of state courts as competent decisionmaking tribunals. Indeed, if one reflects upon the historic function of state courts as expositors of political and social rights, one sees little support for the theory of federal superiority.

Although the point was raised in a somewhat different context, striking support for the argument of basic institutional equivalency was noted by Professor Hans Linde. Professor Linde observed that decisions which are characterized as “undemocratic” when performed by federal courts are routinely made by state courts. Similarly, in many cases state courts ad-

50. See notes 28-40 and accompanying text supra.
51. See notes 57-58 and accompanying text infra. Especially in the era prior to the Civil Rights Cases of 1883, the state courts were thought the dominant guarantors of individual civil liberties, such as free speech. 109 U.S. 3 (1883). In that case, the Court recognized that the federal government had to guarantee certain rights in order to prevent state action from infringing on those rights. The Court recognized, however, that the fourteenth amendment does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers . . . when these are subversive of the fundamental rights specified in the amendment.

Id. at 11. See generally Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). In Barron, the Chief Justice Marshall wrote: “In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local government.” 32 U.S. (7 Pet.) at 249.
53. A wider view of the constitutional system would, for example, place in perspective the traditional agonizing over the “undemocratic” character of judicial power and the Supreme Court’s supposedly anomalous role in the national political structure. Throughout the states it is taken for granted that large areas of lawmaking are left to the courts. When a state court alters the law of products liability, abolishes sovereign or charitable tort immunity, redefines the insanity defense, or restricts the range of self-exculpation in con-
dress a variety of political issues because they do not rely on access-constraining doctrines such as justiciability to avoid a judicial determination on the merits. Moreover, issues are no less important nor is the potential for controversy any less significant simply because the issues are raised in a state court rather than a federal court.

Professor Linde's observations point to the conscientious attempts by state courts to exercise the judicial function in a manner consistent with historical processes and social needs and should put to rest the notion that state courts are slaves to majoritarian pressures. In practice, both state and federal courts are counter-majoritarian, although this does not imply that either system of courts is inconsistent with democratic governance.

tracts of adhesion, its action is rarely attacked as "undemocratic." Nor is this judicial role peculiar to matters of common law subject to legislative reversal. The accepted dominance of courts in state law extends to their "anti-majoritarian" role in review of their coordinate political branches in state and local governments. Yet neither judges nor critics seem concerned that state courts should fear for their own institutional survival. Nor is it seriously argued that the accepted judicial dominance in the state is legitimated by the fact that, unlike the federal judiciary, state judges are subject to periodic election.

Id. at 248 (footnote omitted).

54. [T]here are hardly any state analogues to the self-imposed constraints on justiciability, "political questions," and the like that occupy students of the Supreme Court. State courts settle contests over public offices, pass on the propriety of proposed public expenditures and even of proposed constitutional amendments, often at the suit of mere "taxpayers." The "legalitarian" urge toward judicialization that Professor Bickel deplores seems to have been taken for granted at the state level long before the Warren Court as a desired safeguard against slipshod government.

Id. (footnote omitted).

55. Nor do the holdings of state courts simply deal with less important or less controversial matters than those of the Supreme Court. In half the states, for instance, judges were enforcing the exclusion of illegally seized evidence before the Supreme Court imposed it on the other half. State courts were deep in controversy over the position of religion in education long before it became a federal issue; some have remained so since. In California, the Supreme Court anticipated federal constitutional protection for racially mixed marriages by nineteen years, invalidated the most bitterly debated popular initiative of modern times, began a revolution in the historic assumptions of local school financing, and decreed an end to the death penalty which for decades had been a subject of political debate. And on the original battleground of the revolt against judicial supremacy—the bold reversals of "unreasonable" legislative regulation of economic affairs—many state courts have simply refused to follow the Supreme Court's withdrawal of review of this area.

Id. at 248-49 (footnote omitted).

56. Professor Currie's wise admonition comes to mind: "There is much in our Constitution that protects against what Mill called the 'tyranny of the majority'; perhaps
With the similarity of protections afforded in many state constitutions to those found in the Bill of Rights, state courts can be expected to be competent, experienced and knowledgeable in the areas of law, and sensitive to the problems, that arise in the adjudication of close constitutional questions. Acceptance of any argument challenging the competency of state courts to follow the Constitution necessarily calls into question the willingness and ability of state courts to follow their own organic, fundamental law. There is no evidence that state courts have proved unequal to the task.

The argument of those who believe that state courts will fail to give adequate and satisfactory protection to federal interests and individual rights appears based on aberrational state court pronouncements rather than on the norm of state court decisions. Acceptance of that argument would logically lead to a policy designed to replace state enforcement and protection of constitutional rights with federal enforcement and protection whenever possible. That policy would, in turn, represent an unsupported interference with the principle of federalism. Moreover, many of the ringing Supreme Court decisions of the 1960's to which one naturally turns for an example of the inability of state courts to protect constitutional claims or federal interests, simply do not provide the desired support. Constitutional theory that escaped the Supreme Court for over one hundred years can hardly be held up to demonstrate generalized state hostility or incompetency to handle such claims. A period of great Supreme Court activity that serves as the harbinger of totally new doctrines—and of the consequent redrawing of federal-state relationships—must be expected to arise, like the phoenix, out of the ashes of state (and federal) practices that are seen as improper only in retrospect. Once the new doctrine emerges and is sufficiently refined so that its permanence and contours can be ob-

judicial review is undemocratic in the complimentary sense, as is the Bill of Rights.” D. Currie, FEDERAL COURTS, CASES AND MATERIALS 34 (2d ed. 1975). For a valuable discussion of the relationship between judicial review and democratic governance, see Bishin, Judicial Review in Democratic Theory, 50 S. CAL. L. REV. 1099 (1977).

57. See, e.g., California Declaration of Rights, CAL. CONST. art. I; Florida Declaration of Rights, FLA. CONST. art. I; Virginia Bill of Rights, VA. CONST. art. I.

58. Indeed, as Professor Linde has observed, in many respects state courts had independently proceeded to develop many of the constitutional provisions that are often erroneously believed to have originated in the Warren Court, such as guaranteeing the separation of religion from public schools and protecting racially mixed marriages. Indeed, in many respects the Warren Court was more of a follower than a leader. See Linde, supra note 52, at 249 nn. 70-72.
served, however, state court implementation can be expected. Excepting the aberrational case, state courts have met these expectations.\(^{59}\)

### III. THE CONSTITUTIONAL COMMITMENT OF THE POWER TO ALLOCATE JURISDICTION OVER MATTERS IMPLICATING FEDERAL INTERESTS

The resolution of all state-federal forum allocation questions begins with article III, section I, of the Constitution of the United States, which provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."\(^{60}\) Although the provision is not free from ambiguity, the accepted view is that the Constitution vests in Congress the power to determine when and, most important for our purposes, how federal judicial power is to be allocated.\(^{61}\)

In implementing its constitutional authority, Congress is generally deemed to have intended that state and federal courts have concurrent jurisdiction to adjudicate federal matters unless clear and convincing evidence to the contrary exists.\(^{62}\) This fol-

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59. See generally Brennan, supra note 25.

60. U.S. Const. art. III, § 1.

61. That the power to create includes the power to control and limit is quite universally accepted. See Palmore v. United States, 411 U.S. 389, 400-01 (1973). See generally Hart & Wechsler, supra note 13, at 844-47.


Speaking upon the subject of the federal judiciary, the Federalist distinctly asserts the doctrine, that the United States, in the course of legislation upon the objects entrusted to their direction, may commit the decision of causes arising upon a particular regulation to the federal Courts solely, if it should be deemed expedient; yet that in every case, in which the State tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth.

I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of Congress to withdraw the whole, or any part of those cases, from the jurisdiction of the State Courts, is, as I think it must be, admitted.

The practice of the general government seems strongly to confirm this doctrine; for at the first session of Congress which commenced after the adoption of the constitution, the judicial system was formed; and the exclusive and concurrent jurisdiction conferred upon the Courts created by that law, were clearly distinguished and marked; showing that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction, where it was deemed proper, merely by a grant of jurisdiction generally.

lows from article III of the Constitution and has been reflected in our legal history. As noted by the Court in Charles Dowd Box Co. v. Courtney:

Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule. This court's approach . . . has been to affirm the state court's jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

Thus, the Constitution created a federal judicial power and vested in Congress the power to allocate and restrict that jurisdiction. Since Congress has not limited federal subject matter jurisdiction to federal courts, the inescapable conclusion is that state courts may decide questions of federal law. Indeed, there seems to be little doubt about the validity of the above statement, and the point is conceded by the proponents of federal institutional superiority. What is disputed is the question of how much credit a federal court must give to a congressional expression of concurrent jurisdiction. A proponent of federal superiority would argue that, because of the institutional infirmities of state courts as compared to federal courts, a federal court need not interpret the establishment of concurrent jurisdiction as warranting federal deferral to state court adjudication. On the other hand, the Supreme Court has consistently proceeded on the assumption that state and federal courts are interchangeable fora, likely to provide equivalent protection for federally guaranteed rights. Accordingly, deferral or avoidance of the

64. Id. at 507-08. The benefit of vesting the federal judicial power in both state and federal courts is that the equilibrium of a federal system is retained by not imparting centripetal power to the national court system. See also THE FEDERALIST No. 82 (A. Hamilton).
65. Although in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337 (1816), the Court suggested that state courts were incapable of entertaining federal causes of action, that suggestion has never received any acceptance by the Court and might have found expression for ulterior motives. See HART & WECHSLER, supra note 13, at 314 (suggesting that the statement was designed to prod Congress to increase the original jurisdiction of the inferior federal courts). Indeed, the Court has expressly affirmed the power of state courts to entertain federal causes of action. Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("[I]f the state court has jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.").
66. Neuborne, supra note 16.
67. Id. passim.
case and the consequent resolution of the dispute in state court will not necessarily impinge upon federally guaranteed rights of the petitioner.

Both positions are flawed for different reasons. The arguments of the proponents of federal superiority miss the mark: although it is correct to question the deferral and avoidance practices established by the Supreme Court in the areas of federal law open to concurrent jurisdiction, the argument of federal institutional superiority fails to address the primary question whether the judiciary can properly reformulate a congressional forum allocation decision. Similarly, recent statements by the Supreme Court in Stone v. Powell express the belief that on an institutional basis, forum interchangeability exists but those statements fail to address the question whether such a finding warrants either deferral or avoidance of the case. In essence, while the Court’s assumptions in Powell regarding institutional parity between state and federal courts in adjudicating constitution claims are largely correct as abstractions, it is improper to use those assumptions in concrete cases without first determining whether the assumptions retain validity in the face of a congressionally created model of rights and remedies.

Thus, both arguments regarding institutional parity fail to give adequate consideration to the nexus between the issue of institutional competency and the question of the relationship which should exist between the judiciary and the Congress. Nor, for that matter, does either argument adequately deal with the role the federal courts ought to maintain. Consequently, they fail to define accurately the proper attitude with which a federal court should address a forum allocation question.

A. The Constitutional Scheme

The framers of the Constitution envisioned a basic relationship between state and federal courts wherein the state courts would be the primary tribunals for the protection of constitu-

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71. The Court assumed state judges are as capable of applying the fourth amendment as are federal judges because both handle such claims on a daily basis. Id. at 493-94 & n.35.
tional rights. This point was clearly made by Professor Hart in his famous *Dialectic.* Indeed, even those who disagree with the "full power" theory of congressional control over the jurisdiction of the federal courts concede the correctness of Hart’s interpretation of the framers’ intent.

Consequently, literal interpretation of the Constitution and unqualified acceptance of the framers’ intent would suggest that the assumption made in *Stone v. Powell*—that state and federal courts are interchangeable and likely to provide equivalent protection of federal constitutional rights—is at least consistent with the constitutional scheme. Indeed, inasmuch as the framers contemplated that state courts, rather than federal courts, would function as the primary guarantors of constitutional protections, the need for the assumption of institutional equivalency dissipates. Absent a congressional grant of access to federal courts, the federal judicial power is exercisable by the states. Therefore, one must necessarily conclude that the constitutional scheme assumes that state courts will be generally faithful to their constitutional responsibilities; indeed, any other construction would be disingenuous. Yet, should state courts prove unfaithful or unequal to the task, the framers provided Congress a retained power under article III to reestablish the desired equilibrium of federalism.

Nonetheless, the argument is advanced on occasion that the mere fact that Congress has consistently expanded access to federal courts necessarily undermines the constitutional assump-

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In the scheme of the Constitution, [the state courts] are the primary guarantors of Constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court’s appellate jurisdiction and been upheld in doing so, then we really would be sunk.

Q. But Congress can regulate the jurisdiction of state courts, too, in federal matters.

A. Congress can’t do it unconstitutionally. The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution.

*Id.* at 1401 (footnote omitted).

73. For example, Professor Redish, who challenged the utility of the traditional interpretation for current application, see Redish & Woods, supra note 13, at 45, concedes the validity of the traditional interpretation itself insofar as it reflects the probable intent of the framers. Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 314 (1976).

It is important to note that the argument proceeds from the mere fact of congressional action; the argument does not attempt to discern congressional intentions in the matter with respect to specific statutory schemes. The argument correctly identifies a prime concern: the potential treatment in state court of federal interests. It fails, however, to establish a link between the perceived need to provide access to a federal forum via express congressional legislation in certain situations and the perception that the judiciary can properly identify those situations and provide such access, either independently or in derogation of congressional intent.

The examples used by Professor Neuborne in his critique of the notion of institutional equivalency—the fugitive slave legislation and the post-Civil War reconstruction legislation—illustrate the point. Professor Neuborne asserts that these congressional acts clearly evidence a congressional perception of federal institutional superiority. To an extent, Professor Neuborne's argument is correct. The fugitive slave legislation and the post-Civil War reconstruction legislation were indeed conceived and implemented by Congress because of the hostility of state fora to the adjudication of certain defined federal interests. The Fugitive Slave Act of 1850 was in direct response to attempts by several northern states to close their courts to slaveholders, certainly a course of suspect constitutionality.

The post-Civil War legislation creating access to the federal courts was almost entirely directed at securing for "Negroes [their] newly granted civil rights." The possibility that the recently freed slaves would receive equal justice before the state courts of the Confederacy was so obviously nonexistent that creation of a federal forum was absolutely necessary. On the other hand, the 1875 Judiciary Act, which created general federal question ju-

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75. See, e.g., Neuborne, supra note 16.
76. Id. passim.
78. Neuborne, supra note 16, at 1113.
79. See Testa v. Katt, 330 U.S. 386 (1947) (where a state court would entertain same type of claim as created by federal statutory scheme, it may not deny enforcement to the federal law in its own courts).
80. See HART & WECHSLER, supra note 13, at 846.
81. 6 FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION & REUNION 1864-68 (part 1, 1971) passim.
82. Act of Mar. 3, 1875 ch. 137, § 1, 18 Stat. 470. Prior to 1867, the notion that state courts would correctly adjudicate federal interests was so pervasive that even with respect to writs of habeas corpus Congress relied upon state courts in most instances. The
risdiction, passed "almost unnoticed inside or outside the halls of Congress." The circumstances under which that Act was passed hardly indicate a belief that a federal forum was essential to adjudicate federal questions because of a widespread perception of state court inferiority. These examples of congressional action, rather than supporting a charge of general institutional disparity, indicate, if anything, a generally purposeful congressional response to specific, demonstrated needs in limited situations with the purpose of providing a forum that would serve as a counterbalance to a hostile state forum. Where Congress legislated broadly (as it did with general federal question jurisdiction), it did not do so on the basis of a perceived general institutional disparity between state and federal fora. One would strain the historical context by arguing that specific instances of perceived or actual state court bias or prejudice mandate an across-the-board assumption of the lack of institutional equivalency. A specific congressional response to a particular problem simply does not support a broadly based thesis attacking (or, for that matter, defending) the concept of institutional equivalence of state and federal courts.

An analysis of general congressional practices attendant to the creation of federal remedial or regulatory schemes demonstrates a consistent congressional attitude which appears to be completely at odds with any suggestion that Congress views state courts as necessarily less competent institutions than federal courts. The practice of Congress is to vest state and federal courts with concurrent jurisdiction over federal matters so as to expand the number of fora available for the enforcement and protection of federal rights, not to divest state courts of existing jurisdiction. It is difficult to rationalize such practices if Congress is at the same time supposed to be stating that state courts

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original grant to the federal courts to issue writs of habeas corpus was accompanied by a limiting provision allowing the writ to issue generally only where the custody was by authority of the United States. Act of Sept. 24, 1789, ch. 20., 1 Stat. 73, 81-82. The expansion of habeas relief, coupled with interference with state authorities, only really began with the Force Act of 1833, ch. 57, § 7, 4 Stat. 634, which resulted from the nullification movement in South Carolina. See Dobie, Habeas Corpus in the Federal Courts, 13 Va. L. Rev. 433, 442 (1927).

83. Hart & Wechsler, supra note 13, at 846-47.
84. It has been argued that the increase in federal court caseloads subsequent to the 1875 Act was largely due to the desire of litigants not to litigate actions involving federally chartered railroads before inhospitable state fora. Id. See generally Pacific Removal R.R. Cases, 115 U.S. 1 (1885).
are inferior tribunals for the adjudication of federal interests.

Yet, the above characterization of congressional power might suggest an inconsistency. Once Congress has resolved that in certain instances a new cause of action needs effectuation in federal courts, it might be thought inconsistent for Congress also to provide, by the vesting of concurrent jurisdiction, that the federal interest will find adequate protection in state courts. If state courts are supposed to be adequate, why is it also necessary to provide access to a federal forum? While the inconsistency appears provocative, it is more apparent than real and can be reconciled in several ways.

First, since the basic decision whether to create a federal right which will displace state law is essentially a political question in the hands of Congress, then deciding where to litigate federal interests cannot be any less a political question; thus, that matter is also committed to Congress. The latter naturally and inevitably follows from the former. And because the forum allocation decision is largely a political decision, the creation of concurrent jurisdiction might simply represent a political compromise which will assist the passage of the remedial or regulatory scheme; it might constitute a thoughtless decision by a Congress accustomed to the vicissitudes of inertia, or it might be even more basic and profound. It may, as Professor Hart once observed, be reflective of "[c]ommon sense and the instinct for freedom alike [which] can be counted upon to tell the American people never to put all their eggs of hope from governmental problem-solving in one governmental basket."

Second, congressional creation of concurrent jurisdiction might more profitably be viewed as a congressional statement

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86. See generally Wechsler, The Political Safeguards of Federalism; The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954); see also Note, supra note 62, at 509-10 (1957).

When Congress creates a new cause of action it must determine the extent to which the remedy provided will be available in the federal courts. The possible alternatives are to vest the federal and state courts with concurrent jurisdiction, or to confer exclusive jurisdiction on either system. Congress has generally chosen to grant concurrent jurisdiction and, if the statute contains no express provision to the contrary, such a grant may be presumed. However, exclusive jurisdiction has been given to the federal courts in several major areas. 

The purpose of the Note is to consider the factors relevant to a legislative choice between concurrent and exclusive jurisdiction.

that uniformity in the creation and application of federal law is less important than is making available to American citizens the most sympathetic forum they can find to seek redress for claimed infringements of their federal rights. In essence, creation of concurrent jurisdiction could support a finding that Congress desired that litigants be allowed to forum shop between state and federal courts. Such a finding would not be illogical. Congress could certainly have intended for federal litigation to be brought in the most sympathetic forum, and concurrent jurisdiction would allow forum shoppers to correct for local variations between state and federal judiciaries.\textsuperscript{88}

\textbf{B. The Ascertainment of Congressional Intent to Displace State Fora}

The preceding analysis suggests two general themes. First, congressional enactment of concurrent jurisdiction, without more, expresses congressional neutrality on the question of institutional competence of particular courts to adjudicate federal interests, rather than reflecting a definite preference. Second, there is no constitutional provision prohibiting Congress from expressing a preference or allowing a litigant to express a preference for one forum (state or federal) over the other. These two concepts delineate the problem of forum allocation faced by federal courts. Simply put, it is not the business of federal courts to make basic decisions regarding where federal rights are to be adjudicated; it is the business of federal courts to determine whether Congress has made a forum allocation decision and, if so, what the forum allocation decision is and whether it exceeds the power granted to Congress by the Constitution. Having made those determinations, a federal court is not justified in further considering the propriety of a congressional forum allocation decision.

The concept of congressional neutrality on the question of competency follows from the basic presumption of concurrent jurisdiction. As discussed earlier, the basic constitutional scheme provides that any forum allocation decision made by Congress would be oriented towards the creation of concurrent jurisdiction.\textsuperscript{89} Consistent with this view is the basic principle developed

\textsuperscript{88} See Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1285 (1977).

\textsuperscript{89} See text accompanying notes 49-72 supra.
in *Clafin v. Houseman*, under which the judiciary presumes concurrent jurisdiction from congressional silence unless the Congress "expressly or by fair implication" creates exclusive jurisdiction. The federal courts, however, as often as not have failed to follow this presumption of concurrent jurisdiction, either by ignoring the *Clafin* principle altogether or by giving an expansive interpretation to the "fair implication" exception. Unfortunately, the courts have failed to be explicit when describing the circumstances under which the *Clafin* principle will not be followed or when describing other tests as alternatives to the *Clafin* presumption.

Several solutions to the problem of determining whether Congress intended to create exclusive or concurrent jurisdiction have been suggested. Under one approach, the judiciary seeks to ascertain congressional intent by examining legislative history. Under a second approach, the judiciary eschews reliance upon legislative history in favor of an "ad hoc" analysis of the practical needs of the federal system. The legislative history test is simply an alternative for ascertaining legislative intent. Referring a court to an undefined search for legislative intent or purpose, of course, leaves the court with a great degree of leeway because as the argument goes, "legislative intent" is a myth. There are no external constraints on the purposes ascribed to the legislature by a court. On the other hand, it has been contended that legislatures do have a goal or purpose when they enact a statute. That purpose, it is argued, is what is actually meant by the term "legislative intent," and one can utilize various tools, including the legislative history of a statute, to discern what the goal or purpose was.

Legislators certainly have an "intent" when they enact a statute. Whether the intent is meaningful or capable of assessment, however, is another matter. Nevertheless, given our common law tradition and the general terms which accompany many pieces of legislation, the judicial search for legislative intent is
not likely to be disregarded as a tool for statutory interpretation. The variety of controversies which call upon the courts to apply a statute preclude any realistic expectation that courts could avoid some analysis of the leeways of the statute to ascertain its applicability. In any event, to the extent that agreement of some sort can be obtained that a definable legislative intent exists, there is only a grey area between statutory interpretation and judicial innovation. "Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issue at hand attenuates." The development of effective standards for interpreting the legislative history of congressional forum allocation decisions would minimize the chances of judicial deviation from actual "legislative intent."

The second approach, based on the practical needs of the federal system, suffers in that it encourages the courts to intrude upon matters not properly within their province. The mere absence of congressional expression of its opinion on a matter within its purview does not authorize the courts to make a decision in that field. On the other hand, the "practical needs" test does present a utilitarian method for resolving controversies involving overbroad congressional delegations of jurisdictional decisions. For example, the Supreme Court's treatment of general federal question jurisdiction under section 1331 of title 28 of the United States Code as narrower than its appellate jurisdiction under article III, section 2, is no doubt reflective of this "practical needs" argument.

98. Hart & Wechsler, supra note 13, at 770.
99. Redish & Muench, supra note 73, at 329.
100. See Mishkin, The Federal Question in the District Courts, 53 Colum. L. Rev. 157 (1953):

In any event, it should be clear that while the power of Congress must of necessity extend to an extremely wide range of cases, the actual assignment of all such suits to the national courts might well prove unwise and self-defeating.

... But to include such suits within the language of the general federal question statute would involve the national courts in all the litigation surrounding the ownership of other property of which the United States is only too happy finally to be rid. The price of symmetry would then be an overloading of the federal courts with a concomitant loss in their performance of more significant tasks. If Congress, in full awareness of the situation, had unequivocally called for such a result, then it would be the duty of the courts to obey. But, short of that, only blind subservience to form would choose such a course when confronted (as Congress was not) with the consequences it would entail. The only feasible solution, therefore, is to vary the treatment of the phrase "arising under" depending on the instrument in which it appears.
While the "practical needs" test cannot be ignored, it would be a mistake to treat it as an independent standard in this area. Rather, the proper role of a "practical needs" test can only be ascertained by identifying the needs of a federal system. But, because the central, unresolved problem lies in developing a consistent and predictable methodology for making forum allocation decisions, identifying the "decisionmaker" becomes as important as identifying the needs. The determination of where conflicts are to be resolved could have a profound impact upon the ultimate resolution of the conflict; however, to note that different results might arise as a result of allocating decisionmaking responsibility between state and federal courts only begins the inquiry. A much more fundamental inquiry remains: In a nation fundamentally committed to rule by law, where does the basic authority to allocate the federal judicial power reside? As that authority is committed to one branch of government, the Congress, there is little to recommend in judicial decisions that treat the forum allocation issue as wide open to plenary judicial evaluation.

A sound approach for the proper resolution of state-federal forum allocation issues would retain responsibility and impose

Thus, whenever in the course of litigation in any tribunal the determination of a federal issue becomes crucial, it must be possible for the United States Supreme Court to have the final say; the "arising under" clause of the Constitution must, therefore, be broad enough to comprehend such cases. But to require their inclusion within the same phrase of the statute conferring original federal jurisdiction merely because the terminology is the same, would be to allow form to eclipse problems of substance.

Id. at 159-60, 162-63 (footnote omitted).

101. Professor Hart saw the problem clearly:

The question obviously cuts deep into basic issues of how governments ought to function and how they can best function. If one conceives of the job of governing as a job of affirmative direction of social affairs, with responsibility, in Professor Fuller's expressive phrase, of "planning for determinate ends," then a federal organization will necessarily appear inefficient. To make a large-scale organization manageable there must be decentralization in any case, but the guiding geniuses of a central command would naturally prefer to have the lines of authority run straight from them to the remotest of their delegates. If, on the other hand, one thinks of private activity as the prime motive power of social life, the test of efficiency is different. The job of government appears then as a job of providing a favorable framework for collaborative living—as a job, in other words, of planning for such "indeterminate ends" as establishing justice, insuring domestic tranquility, providing for the common defense, promoting the general welfare, and securing the blessings of liberty to the members of the society and their posterity.

Hart, supra note 87, at 490 (footnote omitted) (emphasis in original).
accountability where the Constitution places it—with Congress. Thus, judicial assessment of congressional intentions ought to be based upon the clearest expressions of congressional intent possible. Where the court is unable to discern clear evidence of congressional intent, it should resolve the allocation question in favor of concurrent jurisdiction, premised upon a constitutional assumption of institutional equivalency.

The suggested approach would ameliorate several problems with the *Claflin* presumption. First, by requiring clear evidence of congressional intent, courts would avoid needless speculation into congressional designs. Were federal courts inclined to use a more constrained approach to forum allocation decisions, the resultant consistency and return to constitutional conformity would be meaningful and beneficial. Judicial insistence that Congress make clear forum allocation decisions would put responsibility and accountability where the Constitution places it—with Congress. Judicial interpretation of intent would then be necessary only in those cases where Congress has not specifically defined the basis for forum allocation. In such cases, a stricter *Claflin* presumption would require a finding of concurrent jurisdiction when clear evidence was lacking, because concurrent jurisdiction is the one interpretation of congressional failure to speak, or speak clearly, which is most consistent with the Constitution and with the entire panoply of congressional legislation. Thus, the clear evidence test would enable a court to identify what ought to be the proper perspective in ascertaining how Congress intended the forum allocation to be made.

Second, by abrogating the "fair implication" test, the "clear evidence" approach would avoid needless inconsistencies in the formation of legal doctrine. In other words, having created by judicial fiat an exception (exclusive jurisdiction) so as to avoid an otherwise utilitarian presumption (concurrent jurisdiction), the federal courts are in turn forced to extend that exception at the expense of other principles. For example, while exclusive federal jurisdiction of federal antitrust actions was implied from the

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102. Recently, the Court has moved toward requiring Congress to state clearly its purposes in enacting legislation by refusing to construe statutory language in such ways as to ameliorate the stricture of a particular application of the statute to a particular case. See, e.g., Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (Endangered Species Act of 1978 required injunction prohibiting completion of a dam that would have destroyed habitat of endangered species even though the dam was virtually complete and Congress had appropriated large sums of public money after appropriation committees were apprised of the impact of the dam upon the endangered species).
need for uniformity,103 such jurisdiction did not preempt state courts from hearing defenses predicated on the Sherman Act.104 Although a state court determination of such a defense is statutorily entitled to full faith and credit in the federal courts,105 it was held in Lyons v. Westinghouse Electric Corp.106 that a state court defendant was not estopped from relitigating the antitrust question in federal court because that forum's exclusive jurisdiction "should be taken to imply an immunity of their decisions from any prejudgment elsewhere."107 Hence, the goal of uniformity was only achieved through questionable limitations on the doctrine of collateral estoppel and the credit due state judgments.

Unfortunately, if the goal is uniformity, the approach of the Court is counterintuitive. If the rationale for implying exclusive jurisdiction is uniformity in the creation, interpretation and application of federal law,108 the same rationale suggests the need for federal preemption. Yet, while the Court has found exclusive federal jurisdiction by "fair implication," it has not allowed federal preemption to develop in a like manner. Rather, the Court has required "clear evidence" that Congress sought to exclude the field from state control.109 Because this disparity in tests al-

103. See Redish & Muench, supra note 73, at 316 n.26.
105. 28 U.S.C. § 1738 (1970). The statute provides that a state judicial proceeding shall have the same full faith and credit in federal courts as in the rendering state court. The statute was designed to cause state judgments functionally to run to federal courts in the same manner and to the same extent as state judgments were given faith and credit in other states under the full faith and credit clause of the Constitution. U.S. Const. art. IV, § 1. See Degnan, Federalized Res Judicata, 85 Yale L.J. 741, 743-44 (1976). Yet, the judicial treatment of the statute has been inconsistent, and this inconsistency has largely developed from the Supreme Court's failure to achieve coherence in its development of forum allocation principles. See, e.g., Comment, Collateral Estoppel Effect of State Court Judgment in Federal Antitrust Suits, 51 Calif. L. Rev. 955 (1963); Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360 (1967). See generally Developments in the Law—Section 1983 and Federalism, supra note 88, at 1331-37.
107. Id. at 189. Thus, the finding of exclusive jurisdiction for treble damage actions under the federal antitrust laws, itself questionable, see Redish & Muench, supra note 73, at 316-17, led in turn to an extension of federal jurisdiction by a dubious avoidance of 28 U.S.C. § 1738 in Lyons.
108. See Note, supra note 62, at 511-14.
109. The doctrine of federal preemption of state authority has its origin in the "supremacy clause" of the Constitution, which declares that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the
allows state courts to continue determining federal defenses in the Lyons grey area between exclusive jurisdiction and preemption, the goal of uniformity can be reached only by wholesale revision of numerous interconnected doctrines, such as preclusion by judgment, without any showing that the creature constructed by the courts resembles the congressional original.

The determination that Congress has provided a scheme for concurrent jurisdiction does not end the inquiry. It must still be ascertained whether Congress intended that any system of preferences exist with respect to forum allocation between state and federal courts. The mere fact that Congress has vested concurrent jurisdiction in both state and federal courts is not dispositive of the question of whether the litigant must receive a hearing in the federal forum he selects. Congressional intent or the purposes sought to be achieved, as gleaned from the statutory scheme, could substantially impact upon the forum allocation decision.

supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

When a state's exercise of its police power is challenged under the supremacy clause, a federal court begins "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947), quoted in Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

Express preemption occurs when Congress has stated expressly either in a federal statute or in the legislative history pertaining thereto that federal regulation was intended to be exclusive. See, e.g., Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956); Pennsylvania v. Nelson, 350 U.S. 497, 501-02 (1956); Schwabacher v. United States, 334 U.S. 182, 197 (1948).

Federal preemption may also be found by implication:

Such a [congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 331 U.S. at 230 (citations omitted).

Finally, even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978). A conflict in this sense may be found in at least two types of circumstances. First, conflict preemption will occur "where compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Second, a conflict will be found where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
The point was demonstrated in *Monroe v. Pape*,110 in which an action was brought in federal court pursuant to its concurrent jurisdiction over civil rights suits under section 1983 of title 42 of the United States Code.111 Writing for the Court in *Monroe*, Mr. Justice Douglas discerned from the legislative history of section 1983 three purposes underlying its enactment: (1) to override discriminatory state laws; (2) to provide a federal remedy where the state remedy was inadequate; and (3) to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice.112

Had the Court stopped at this point, some justification for the use of deferral doctrines, such as abstention, in section 1983 cases might be justified; the above-categorized statutory policies would not mandate the exercise of federal jurisdiction in every case of alleged discriminatory conduct, but only under those circumstances where the state remedy is inadequate. Thus, case-by-case determinations requiring the federal plaintiff to demonstrate the inadequacy of a state remedy would be consistent with the congressional plan. The majority, however, went beyond the above three purposes and discerned a modern purpose to provide a supplemental federal remedy.113

Although the judicial discovery of this modern purpose was associated with the problem of exhaustion of state remedies, it has manifest impact upon the forum allocation question. If Congress intended that a federal plaintiff could seek the “supplemental” federal remedy before invoking state remedies, then Congress must have intended that its jurisdictional grant to federal courts be respected. It seems anomalous, however, for the federal courts to find a supplementary federal remedy independent of the inadequacy of state remedies and yet disregard congressional desires by directing the federal plaintiff to forego his federal remedy for a state remedy pursuant to forum allocation

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   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
112. 365 U.S. at 173-74.
113. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.
doctrines such as the abstention or the Younger doctrines.\textsuperscript{114}

Where Congress has created a scheme of concurrent jurisdiction, the federal plaintiff should be allowed to adjudicate his claim in federal court not because the federal forum is judicially determined to be better—such a decision would represent a direct affront to a congressional determination to the contrary—but rather because the state, by instituting an action in its own court, should not be permitted to deny the individual a right the Congress has given the plaintiff, the right of immediate access to a federal court.

IV. THE ROLE OF INSTITUTIONAL PARITY

Thus far, I have argued that judicial forum allocation decisions predicated upon evaluations of institutional equivalence between state and federal courts are unsound. This is because of: (1) the largely illusory character of criteria for measurement of institutional parity, and (2) the essential commitment of forum allocation questions to the Congress. Thus, the Court’s task, rather than formulating forum allocation rules itself, is to exercise deference and follow the lead of Congress.

Yet, it could be argued that in some instances the Court has ignored the above formulation of proper Court-Congress relations with no resultant adverse effects on our federal system.\textsuperscript{115} If the forum allocation decisions of the judiciary were similarly innocuous, despite their fallacious reasoning, the points raised in this article would be largely dissipated;\textsuperscript{116} however, this is not the case. Judicial involvement in forum allocation decisions under the rubric of comparative institutional analysis of equivalence is

\textsuperscript{114} See notes 10 & 11 supra.

\textsuperscript{115} The situation I have in mind is the Court’s development of the federal question doctrine. While the doctrine has developed in an artificial manner, the general dimensions of the doctrine have been beneficial. See notes 77-84, 99-100 and accompanying text supra.


For that matter, by what may seem a strange method to those who do not understand the theory of the Common Law, it is precisely some of those cases which have been decided on incorrect premises or reasoning which have become the most important in the law. New principles, of which their authors were unconscious or which they have misunderstood, have been established by these judgements. Paradoxical as it may sound, the law has frequently owed more to its weak judges than it has to its strong ones. A bad reason may often make good law.

\textit{Id.} at 163.
so fraught with danger to the continued viability of meaningful judicial decisionmaking that any suggestion of its propriety must be stilled.

Acceptance of generalized institutional analysis would be disadvantageous to the courts in two ways. First, a judicial willingness to accept cases based upon a finding of the greater institutional competence of one forum over another potential forum would call into question judicial integrity and seriously erode a necessary bastion of judicial independence—popular support for the judiciary. Second, the need for forum allocation decisions is only present where the "correct" result can be foretold and it can reasonably be anticipated that the closed-out forum would reach the incorrect result. Thus, if "correct" results cannot be foretold in the type of sensitive case that raises the forum allocation question, the search for institutional parity or disparity is meaningless.

A. The Image of the Judiciary in a Modern Political Society

Central to the argument of those who suggest federal superiority is the belief that access to the federal judiciary should be favored because "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." The tone of the argument implies that there is a need to better the odds that the constitutional claimant will prevail. Therefore, the question that we must ask is whether providing a more favorable forum for a particular kind of claimant is a desirable goal. It has been acknowledged that "since constitutional decisions serve to guide third persons..., the clarity and persuasiveness of judicial opinions in constitutional cases assume great importance." It must also be acknowledged that it is equally important for the

118. Thus, Neuborne asserts: "However, by uncritically assuming parity, the Supreme Court has avoided the difficult, but critical, issue of whether concerns for federalism, efficiency, and caseload outweigh the importance of having constitutional claims heard by the more sympathetic and competent forum." Id. at 1117-18; see id. at 1121 n.59, 1125 n.74. Neuborne's argument proceeds upon an implicit assumption that the federal constitutional right is capable of definition, measurement and assignment to one of the litigants. Although he concedes that major constitutional litigation does involve right versus right questions, id. at 1119, I find it difficult to divorce the above statements from the premise that some rights are clearly more equal than others and only federal courts (because of their greater institutional competence) have the means of identification.
119. Id. at 1123.
litigants and third parties to believe that the decision rendered came from an impartial tribunal. The moral force and acceptability of a decision will be greatest when it is made by one who neither has, nor appears to have, a psychological commitment to the result.

We cannot excise, to any significant extent, individual predilections in judicial decisionmaking, nor should we necessarily attempt to do so. We can, and should, however, avoid consciously engrafting a result orientation into our judicial system via a perceived partiality in deciding certain classes of cases. It would constitute a serious error to create in this manner a psychological counterweight to the deliberative processes of judicial decisionmaking. A perceived bias on the part of the judiciary would lead to the erosion, if not the loss, of that fundamental backbone of many decisions of constitutional magnitude—popular willingness to follow an unpopular decision.\textsuperscript{120} If law is to achieve its objectives in society, it must not only be just, but it must also appear just. Before men will submit to law, they must believe that it is law, and not one man's opinion of what should be law, to which they are submitting.

Disrespect for the judicial system borne out of a public perception of institutional favoritism would inevitably lead to a lessening of public willingness to abide by, and give allegiance to, judicial decisions.\textsuperscript{121} As Mr. Justice Holmes warned, there is but slight awareness that a great part of our law is open to reconsideration with but a slight change in public attitudes.\textsuperscript{122} This is not to say that, as a general principle, a decision on the merits

\textsuperscript{120} The willingness of the general public to abide by unpopular decisions can be explained to some extent by the greater confidence that the American public holds for the Supreme Court as an institution than for either the Congress or the President. A 1975 Harris survey found confidence in the Court nearly twice as great as that held for the Congress or the Executive. See The Harris Survey, "Record Lows in Public Confidence," released October 6, 1975, quoted in Rifkind, Are We Asking Too Much of Our Courts, 70 F.R.D. 96, 99 n.4 (1976). Nevertheless, although public confidence in the Court exceeds, for the present, that of the other branches, the general low levels of public confidence (Supreme Court (26%), Congress (13%), Executive (13%)) indicate that public confidence is a resource on the endangered values list.

\textsuperscript{121} Learned Hand captured the point nicely when he observed:

I often wonder whether we do not rest our hours too much upon constitutions, upon laws and upon courts. These are false hopes; believe me these are false hopes. Liberty lies in the hearts of men and women; when it dies there, ... no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.


\textsuperscript{122} Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897).
should be based on the popular will, for that would substitute expediency for principled decisionmaking. Constitutional government and the popular will are often found to be at cross purposes. Nonetheless, our history has demonstrated a willingness to tolerate minority rights and hence set constitutional government at a point of equilibrium that often frustrates the desires of the majority.

A major reason for this tolerance has been the belief imputed to most Americans that the judgments rendered by courts reflect a national commitment to certain levels of moral rectitude—a national conscience, so to speak—arrived at through impartial reflection. Impartial reflection does not mean that a judge will not view the proper resolution of the problem from the perspective of his own values. It does mean, however, that a judge will have no stake in the matter other than his moral commitment and that he will be honest with himself and, to the best of his ability, confront his own values. He can then assess the problem from the perspective of attempting to arrive at a reasonable solution in light of his knowledge of his own predilections and of the consequences of his decision.

Thus, it is important to distinguish popular acceptance of judicial decisions, which measures the effectiveness of the decision by popular compliance, from popular acceptance of the court as an institution. Although the populace is perhaps not always so discriminating as to separate totally the decision itself (which they do not like) from the methodology by which the decision was reached, they are likely to accept the decision for so long as the decisionmaking process remains above reproach. On the other hand, a judicial process perceived as being partial can hardly be expected to advance the acceptability of decisions which adversely affect significant portions of the body politic.

123. The need to consider public attitudes does not, of course, provide an ultimate guide for decisionmaking. Law, however, must have a practical side. Even if the public does not possess a philosophical right to disobey, it invariably possesses the power to disobey and to work a reordering of social policies. Consequently, judicial decisionmaking which increasingly takes on more than mere private dispute resolution, must be increasingly sensitive to the public reception its decisions will receive. The Court has no actual power to effectuate its decrees by force or by control of the purse. Its only real power is to compel acceptance by its position and prestige. The Court can be neither totally philosophical nor crassly pragmatic. It must judiciously attempt to reach reasonable accommodations of competing social policies without becoming overly political in the process, for, if it ever does become overtly political, it would soon lose not only its prestige, but also its power to the more politically adept institutions of our national government.

In a viable system of constitutional adjudication, the public must perceive the judiciary as fair and impartial, else the resulting decision will be tinged rightly or wrongly, with the appearance of unfairness. An unexamined willingness to predicate development of constitutional doctrine upon recourse to an institutionalized system of perceived doctrinal bias will, in the end, call into question the very ability of the courts to provide impartial solutions to problems of constitutional magnitude. If the judiciary's solution to the problem of a perceived state prejudice is to counter that prejudice with a federal bias, the solution is not very satisfactory.125

B. The Limits of Judicial Decisionmaking in a Federal System of Government

Those who would urge courts to use institutional criteria to make forum allocation decisions are basically instrumentalists. They believe the courts have a basic social goal—enhancing constitutional claims made by individuals against the sovereign power of the state126—and in their eyes, institutional competence may be measured or assessed by how well courts have achieved that social goal.127 Thus, notwithstanding the prior arguments, one could suggest that evaluation of institutional competence is not complex; it merely requires correlation of court performance against the attainment of social goals. Moreover, it could be argued that courts set goals all the time and that therefore courts should not be powerless to aid the attainment of those goals by channeling litigation into appropriate fora. In conclusion, it could be argued that everything I have said ignores what many, if not most, of those involved with the judicial system believe—that the identical case will receive different treatment and reach a correspondingly different result in state court than the same case in federal court, and that the federal courts are a more favorable forum for the adjudication of questions involving constitutional guarantees.128 Indeed, these are common assumptions

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125. "One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in the action that savors of prejudice ..., arbitrary whim, or fitfulness." B. Cardozo, The Nature of the Judicial Process 112 (1921).
126. See note 118 and accompanying text supra.
127. See Linde, supra note 52, at 229-30.
128. The potential judicial power of the United States over federal question cases must necessarily be extremely broad. The situations in which a sympathetic forum may be required for the vindication of national rights cannot always be foreseen, and there must be power under the Constitution to pro-
While the above arguments are formidable, they do not provide sufficient support for a doctrine justifying forum allocation rules based upon judicial evaluation of the institutional competence of alternative state and federal tribunals. Instead, when fully examined, the arguments are shown to rely mainly upon theoretical abstractions which, although provocative, have little utility when applied to a real judicial system.

The primary concern of those who advocate measuring institutional competence to decide particular types of cases is the possibility that the state court decision will be different in kind, not that the decision will be different in degree. Of course, geographic and cultural considerations can legitimately form a part of doctrinal development so that diversity and experimentation within limits of reason will not only be tolerated, but also encouraged. In the long run, one should expect differences in degree among similar cases arising out of state and federal courts to the same extent as one would expect differences among similar cases arising out of the various federal circuits. And, as with the certiorari policy of the Supreme Court, small differences would be tolerated until or unless they amounted to important conflicts or differences in kind.

Concern over the likelihood that the state court will render a decision that is different in kind creates a basic problem for the advocates of judicially determinable institutional equivalence. In the absence of a factual showing of state court inability to provide a full and fair opportunity to be heard, the proponents of that theory could substantiate their concern only if they could establish in advance the "correct" answer to the problem; otherwise, the state decision is as likely to be correct as the federal decision only different. This is commonly overlooked, perhaps

vide for those eventualities.

Mishkin, supra note 100, at 162.

129. Thus, Professor Neuborne stated:

As a civil liberties lawyer for the past ten years, I have pursued a litigation strategy premised on two assumptions. First, persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court. Second, to a somewhat lesser degree, federal district courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims. I know of no empirical studies that prove (or undermine) those assumptions. Yet, they frequently shape the forum selection strategy in constitutional cases today as they have in the past.

Neuborne, supra note 16, at 1115-16 (footnotes omitted).
because most legal writing has the benefit of hindsight and a judicial statement of what the "correct" answer is. Nevertheless, the perception that a particular court is sympathetic to a constitutional claim necessitates foreknowledge of how the claim ought to be resolved. This makes the institutional parity argument particularly troublesome because it rests upon the untested, yet necessarily implicit, assumption that the constitutional claim of one party is \textit{a priori} valid and should prevail. Thus, the theory requires that the whole system of judicial review be restructured or modified so the predetermined meritorious constitutional claims of some will not suffer or be chilled by delayed recognition.

If we could foretell with certainty, and with some consensus, the proper resolution of constitutional claims, the institutional parity evaluation approach might have some utility. Usually, however, it is the very absence of certainty and consensus that creates a constitutional case. When individuals have no disagreement about their rights and there is no dispute concerning the exercise of their rights (certainty and consensus), there is no need for judicial intervention. Such a view of the universe of problems subject to constitutional adjudication is extremely narrow, however, and would provide solutions only to the easy cases involving clear, accepted rights versus clear, acknowledged wrongs. A judicial system that can only find justification when directed at the moral leper of the community hardly validates itself. Adversaries can perhaps safely view all dispute adjudication from a right versus wrong perspective but it is doubtful whether the courts can adopt such a perspective unless they could tolerate being perceived publicly as adversaries. Such a public perception would be undesirable for the obvious reason that it would destroy the appearance of impartiality so vital to the judicial role.

In our present day society, it is not the problem of the clear right versus the clear wrong that presents the hard judicial case. Rather, the truly hard case which must be subjected to constitutional scrutiny is the problem of the alleged right versus the alleged right. Although we may philosophize on what the result should be and whether the result reached was correct from a moral, as opposed to a critical, perspective,\textsuperscript{130} we rarely know

\textsuperscript{130} I would distinguish moral from critical analysis on the following basis. Critical analysis implies neutral or impartial observation of the essential factors to be considered in the process of rendering the decision. Recognizing that criticism can never be truly
before the decision is rendered which of the alleged rights was preferred and which was negligible or perhaps even false. And after the decision is rendered, we know only in a descriptive sense what the "correct" decision is—that reached by the court—but we perhaps never know in a normative sense what the "correct" decision ought to have been.

Nevertheless, strong arguments are being made that single, correct answers do exist. The most vocal proponent of the argument is Professor Dworkin whose analysis seems primarily directed at legitimating the judicial process by showing that "the law," rather than unbridled judicial discretion, controls in constitutional adjudications. The case he makes, however, is also capable of extrapolation to the issue of forum allocation. In other words, it might be argued that if there exist "right" answers to which claimants are entitled, the judicial system ought to enhance the movement of litigation to those fora most likely (because of greater, identifiable institutional competence) to reach the "right" answer.

Yet, notwithstanding Professor Dworkin's able presentation, his "right answers" thesis is problematic for two reasons. First, Dworkin's analysis often seems to equate a well-reasoned, logically correct answer with a necessarily right answer. Such an

neutral, critical analysis presupposes that interest, bias or prejudice be frankly acknowledged and discounted by the reviewer to the extent possible. See Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 664-71 (1960). Moral analysis, on the other hand, begins from a set perspective from which the problem is viewed. See D. Richards, The Moral Criticism of Law 52, 59 (1977). In essence, moral analysis develops a value standard while critical analysis is methodological in orientation.

131. In this context, a "correct" decision which protects individual rights envisions the use of the term "right" in a legal rather than moral or jurisprudential sense.

For legal purposes a right is only a hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space.

Holmes, Natural Law, 32 Harv. L. Rev. 40, 42 (1918), reprinted in O. Holmes, Collected Legal Papers 310, 313 (1921).


135. See Dworkin, supra note 133, at 3:

If it is true that an exchange of promises either does or does not constitute a valid contract, and that someone sued in tort either is or is not liable in damages, and that someone accused of a crime either is or is not guilty, then at least every case in which these issues are dispositional has a right answer. It may be uncertain and controversial what that right answer is, of
equation confuses the judge's obligation to decide by a reasonable process with the obligation to reach an objectively "correct" decision. Second, Dworkin fails to prove his contention that even a skeptical empiricist must agree that there are "correct" answers to controversial questions, because the hypotheticals upon which Dworkin premises his proof ignore the basic requirement of constitutional disputes—meaningful controversy. Meaningful controversy cannot exist if, as Professor Dworkin contends, one party, and only one party, comes into court with "an institutional right to the decision of the court." In this section, I will explore these two basic objections to Professor Dworkin's theory.

Professor Dworkin's most recent defense of the "right answer" theory deals primarily with establishing right answers when the choice is between alternative factual hypotheses. Thus, we must first ask whether Dworkin can validly extend the theory to other aspects of judicial decisionmaking in which the choice is between principles and theories. Dworkin describes in another work, for example, the intellectual processes by which a judge finds the correct answer to hard cases. First, the judge must fashion a theory to govern his use of existing institutional materials, such as common law precedents, statutes and the Constitution. Next, he must develop a set of principles "that builds a bridge between the general justification of the practice of precedent, which is fairness, and his own decision about what that general justification requires in some particular hard case." Finally, he must proceed to the "correct" answer by means of "arguments generated by principles."

Yet, Professor Dworkin's judge cannot convince anyone that his decision is uniquely correct or even necessarily better than other equally well-reasoned answers simply by virtue of the

course, just as it is uncertain and controversial whether Richard III murdered the princes. It would not follow from that uncertainty that there is no right answer to the legal question, any more than it seems to follow from the uncertainty about Richard that there is no right answer to the question whether he murdered the princes.

136. Id. at 25-26.
137. R. DWORKIN, supra note 134, at xii (emphasis added).
138. Dworkin, supra note 133, passim.
139. Dworkin's theory of adjudication is outlined in R. DWORKIN, supra note 134, at 81-130.
140. Id. at 116-17.
141. Id. at 116.
142. Id. at 86.
power of the inclusiveness and order of his methodology. Instead, his methodology is but a step, albeit a necessary one, to the formation of a reasoned expression of opinion on any matter. That the judge's opinion is law only results from his station. The methodological process itself is not peculiar to legal decision-making; it is endemic to all learned pastimes, for without reasoned discussion, meaningful communication is largely impossible.

Dworkin correctly notes that it is in the controversial "hard cases" that the right answer thesis faces the most trying examination. \(143\) Dworkin nonetheless denies that controversial questions present the judge with anything approaching a Hobson's choice. Rather, he maintains that a "correct" answer exists and that it is simply the task of the conscientious judge to find it. To demonstrate the legitimacy and nature of the process, Professor Dworkin analogizes to a situation involving participants in a literary game wherein a group of critics proposes to discuss *David Copperfield* as if that book involved real people. \(144\)

Dworkin notes that the facts in this literary game are not "hard" facts in the sense of being scientifically demonstrable, but rather facts treated as established because of the logical coherence of the participants' arguments.

[This exercise] does require the assumption, I think, that there are facts of narrative consistency, like the fact that the hypothesis that David had a sexual relationship with Steerforth provides a more satisfactory explanation of what he subsequently did and thought than the hypothesis that he did not.

That is not, I take it, a hard fact. It is not the sort of fact that is even in principle demonstrable by ordinary scientific methods. . . . In some cases, the argument will be so strong for a particular proposition, no doubt, that we should say that any participant who did not agree with that proposition was simply incompetent at the exercise. In other cases, we should not say this at all; we should say that there is so much to be said on both sides that competent participants might reasonably disagree. \(145\)

Dworkin then has an empirical philosopher enter the discussion and declare the game worthless because it does not deal in

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143. Dworkin, supra note 133, at 23.
144. Id. at 19-20.
145. Id. at 25.
"hard" facts. Dworkin suggests that even this philosopher, were he to join the game, would soon develop principles of narrative consistency by which he could rank the hypotheses of the various participants in order of plausibility. Dworkin intends to demonstrate that given the operative rules and parameters of any game, it is possible to discern the "best" answer or proposition. Dworkin analogizes the process of adjudication to the literary game because it too does not deal with "hard" facts and because it proceeds by means of ranking arguments to determine the right answer, the answer which best fits the relevant legal materials.

We need not object to Dworkin's contention that certain facts may logically be accepted as established without scientific proof simply because they are supported by the better argument. For example, if we see footprints in the snow we may construct a thesis reaching the conclusion that someone has walked through the snow. We cannot unequivocally prove that fact, but we can construct a compelling, rational argument that the existence of the footprints is most likely to be explained by that thesis than by others. We can also accept Dworkin's observation that participants in an argument, even our skeptical philosopher, would be inclined to rank the respective hypotheses. The question is whether we can accept Dworkin's conclusion that by ranking the various arguments and ultimately arriving at an answer, the participants have necessarily found the "best" answer and thus proven that right answers do exist.

Dworkin's thesis turns on a subtle use of the term "right" answer. For him, an answer is correct not because it is inherently correct, as for example, a proposition that is self-evident; but because it is the best-reasoned solution to a controversial case. Thus, the "correct" answer is the one reached by the best-reasoned methodology. In other words, the best-reasoned answer becomes the answer.

Now I believe Dworkin's suggestion that methodology is the

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146. Id.
147. In the pure Lockean sense, a "self-evident truth" was an uncontrovertible proposition: "The mind cannot but assent to such a proposition as infallibly true, as soon as it understands the terms." 2 LOCKE, AN ESAY CONCERNING HUMAN UNDERSTANDING 227 (Fraser ed. 1894). In the realm of constitutional adjudications there would appear to be few "self-evident truths." Indeed, Professor Dworkin's use of a ranking methodology cannot be squared with any view that his correct answer theory rests upon a proposition that the right answer is "self-evident."
prime component of a legally correct decision is accurate, yet I differ with his suggestion that a consensus on ranking of arguments can be achieved or that such a consensus necessarily transmutes an argument into a theorem. The need to choose between alternatives does not mean that one of the alternatives is necessarily better than the other; they may be equally good or bad. Unfortunately, the “right” answer terminology carries the connotation of moral certainty and moral obligation. Yet, such certainty is truly illusory, for it is not necessarily true that shared agreement on the proper ranking of arguments is any real evidence of the intrinsic worth of the arguments, although it may reflect the worth of the argument qua argument.

Moreover, once we take the “controversial” problem out of the realm of a literary game and place it in a real context, one in which “controversy” has real meaning and impact, the possibility of reaching anything other than a transitory consensus dissipates. For example, the correctness of setting a culprit free because the constable has blundered in collecting evidence is neither analytically nor morally clear, particularly because a social cost is extracted whether the culprit is incarcerated or set free. Thus, it is meaningless to say that a decision which either narrowly or expansively construes the exclusionary rule is the correct decision.

Neither is it morally clear that the mother’s bodily integrity and privacy outweigh the value of the fetal existence. Whether these values are loosely characterized as qualities or given the status of rights or entitlements, in attempting to strike the balance, the judiciary must make a decision which enhances some alternatives and impairs others. Lost beneath the controversy engendered by such decisions is the evident fact that these de-

148. Dworkin is not as explicit in his emphasis on methodology as I am; however, his thesis certainly suggests that methodology is the key to reaching the “correct” answer.


150. E.g., Roe v. Wade, 410 U.S. 113, 153 (1973). In Wade and its companion case, Doe v. Bolton, 410 U.S. 179 (1973), the Court held that the right of privacy recognized in prior cases was “broad” enough to encompass a woman’s decision whether to terminate
ctions constitute trade-offs. For example, the Supreme Court’s delineation of periods in which state intervention in a mother’s decision to terminate a pregnancy is permitted\textsuperscript{151} represents nothing more than an attempt to come to a decision which is both reasonable under the complex circumstances and consistent with accepted generalities.\textsuperscript{152} This sort of solution might be the most that can reasonably be expected of courts staffed by ordinary mortals who are called upon to solve problems of life and death. Consequently, we should not blindly accept such a trade off as the morally correct decision any more than we would in the case of the exclusionary rule. Such a decision may be “defensible,” but it is no substitute for the “right” decision that instrumentalists need but cannot find.

If the proponents of result orientation cannot point to a correct solution which the court should reach \textit{a priori}, of what importance for purposes of forum allocation are institutional proclivities to decide a case one way or another? Unless we are willing to resurrect the Blackstonean view that law is discovered and not made, or to indulge in the fiction that answers to complex questions are written on the Constitution in invisible ink which only the most institutionally competent court can discern, we must recognize that the definitively “correct” decision is an illusion. There are often a number of alternatives within the range of reason that may be selected with propriety by a court of competent jurisdiction.

The absence of foreseeable, single right answers does not by

\textsuperscript{151} The Court divided the human gestation period into three trimesters. It discussed the rights of the mother and the rights of the state to intervene to preserve the life of the fetus against a standard which viewed the mother’s right to privacy and bodily integrity as fundamental and subject to infringement only if the state could demonstrate a compelling interest. During the first trimester of pregnancy, the state may not interfere with the mother’s basic decision as to whether to carry the fetus. During the second trimester, the state, though it is still precluded from interfering with the basic decision whether to carry the fetus, may require certain procedures to promote safe abortions. It is only in the last trimester, once the fetus becomes viable in the sense that it is capable of assisted survival outside the womb, that the state may interfere with a mother’s decision to terminate the pregnancy.

\textsuperscript{152} The Court in \textit{Roe v. Wade}, 410 U.S. 113 (1973), was silent as to why the fetal interest was deemed so inconsequential prior to viability. Nor were the trimester periods of demarcation themselves adequately defined and justified, except with reference to the concept of fetal viability and risk to the mother accompanying either pregnancy termination or childbirth. See Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 \textit{Yale L.J.}, 920, 924-26 (1973). See generally L. Tribe, \textit{supra} note 9, at 921-34.
any means denigrate the judicial process. Even if one is not convinced of the absolute correctness of the particular view expressed, one should still be able to accept it as a good decision entitled to allegiance and respect as long as it is reasonable and arrived at by a rational process. To conclude that one should not be bound by reasonable decisions diminishes the value of the finality accorded judicial judgments and assumes that such decisions are reached by disingenuous and arbitrary means. Hence, if there is any room for evaluation of institutional competency, it is limited to ascertaining whether institutionally the system proceeds to issue resolution by rational procedures. To ask more intrudes upon Congress' right under article III to allocate the federal judicial power between state and federal courts; to require less deprives the judicial process of its very essence—reasonableness.

V. Conclusion

The judiciary's use of institutional competency criteria to render forum allocation decisions indicates a failure to accord the proper respect for the congressional determinations of comity and federalism which are implicit in any statutory scheme vesting concurrent jurisdiction in state and federal courts. Although questions of institutional parity might enter into the forum allocation decision as a component of a legitimate decision to provide claimants with a bench better equipped to cope with particularized problems involving federal interests, it does not necessarily follow that the judiciary may properly make such determinations. The fallacy of the institutional competency arguments lies not so much in the view of equivalence, or the lack thereof, but in the failure to recognize that the mere existence of a factor potentially relevant to forum allocation decisions does not *ipse dixit* establish that courts are the proper political entity to evaluate the problem and strike the balance.

The major problem with the use of institutional parity criteria is the assumption that the determination of institutional competence is properly part of the judicial search for the "correct" decision. The history of Congress' allocation of the federal judicial power created by article III, however, demonstrates, if anything, that the various congressional grants of exclusive and concurrent jurisdiction over matters of federal interest are the result of political responses to the perceived necessities of an era, rather than a grand design to obtain "correct" results. The
fundamental flaw in the federal superiority argument is not just its failure to define criteria that would demonstrate the existence or nonexistence of institutional parity between federal and state court systems, but also its failure to appreciate the inherently political context in which congressional determinations of forum allocation are made. Once Congress makes those determinations, it is particularly inappropriate for the courts to modify that determination by way of generalized doctrines that focus upon considerations other than the fairness of the hearing actually accorded the litigant in the congressionally acceptable court.