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Recommended Citation

Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DePaul L. Rev. 797 (1995)
Available at: <https://via.library.depaul.edu/law-review/vol44/iss3/5>

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PARITY REVISITED: THE USES OF A JUDICIAL FORUM OF EXCELLENCE

*Burt Neuborne**

Longer ago than I wish to acknowledge, I urged judges and legislators to consider qualitative differences between state and federal systems in drawing jurisdictional lines in constitutional cases.¹ I argued that a series of institutional factors (including procedural differences) combined to give federal courts a comparative qualitative advantage for the individual in deciding close constitutional cases, at least at the trial level.² I pressed what would today be called a "weak" version of disparity.³ My point was not that state courts were incompetent or acting in bad faith, but that institutional factors would tend, over time, to make federal trial courts a more effective counter-majoritarian forum than their state counterparts.⁴ My perception was hardly novel. Virtually any experienced constitutional litigator could - and would - have told the same tale in the 1970's. Moreover, I pressed a weak version of the consequences of my argument, urging merely that impact on substantive decision-making be considered along with the traditional factors in allocating business between state and federal courts.⁵

Much has changed in seventeen years. Academics have vigorously

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1. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1131 (1977) [hereinafter Neuborne, *Myth of Parity*]; Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 727 (1981) [hereinafter Neuborne, *Toward Procedural Parity*].

2. Neuborne, *The Myth of Parity*, *supra* note 1, at 1118-19.

3. Commentators in the parity debate have distinguished between a "strong" disparity argument which verges on suggesting that state courts are inadequate as counter-majoritarian fora and a "weak" version which concedes the basic competence of state courts, but argues that the federal forum is institutionally better suited to the protection of the unpopular individual. This distinction is carefully described in Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 610 (1991). A similar dichotomy exists in the debate over diversity jurisdiction. See Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles,"* 78 VA. L. REV. 1769, 1799-1808 (1992).

4. Neuborne, *The Myth of Parity*, *supra* note 1, at 727.

5. Neuborne, *Toward Procedural Parity*, *supra* note 1, at 1117-18.

disputed the existence of qualitative differences between state and federal courts⁶ and it has been impossible to resolve the dispute empirically, principally because no agreement exists about what we mean as "better."⁷ The Supreme Court is no longer an engine of egalitarian reform. The lower federal courts have been politically altered by twelve years of openly ideological appointments. Several state courts have emerged as effective protectors of constitutional values. The changes have led some thoughtful observers to declare the parity debate passe.⁸

Given the changes, I agree that state/federal qualitative differences no longer play the role they played in the 60's and 70's in constitutional cases. In part, the change is due to a modest renaissance in state constitutional jurisprudence. Mostly, though, it flows

6. See, e.g., Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis*, 10 HASTINGS CONST. L.Q. 213, 214 (1983) (comparing results of all cases by: 1) court system; 2) outcome versus forum by case type; and 3) outcome versus forum for various subsamples, and arguing that parity could empirically be established); David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 327-28 (1973) (noting the different treatment of habeas corpus issues between the federal and state courts); Michael Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1308 (recognizing the relationship between federal and state issues in the treatment and the scope of habeas corpus in the context of the Free Speech Clause of the First Amendment). For more recent studies skeptical of the existence of a disparity, see Michael E. Solimine & James L. Walker, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 411-18 (1991); Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. PUB. POL'Y 127, 131 (1989).

As Susan Herman notes, the Solimine & Walker studies actually support a weak view of disparity. Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651, 660 (1991). She notes that their figures show that federal courts were 11.5% to 13.5% more likely to uphold a federal constitutional claim than a state counterpart. *Id.* I argued that it was precisely in the close cases, where reasonable judges might disagree, that the institutional differences would affect outcome. Neuberne, *The Myth of Parity*, *supra* note 1, at 416-17.

7. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 278-79 (1988) [hereinafter Chemerinsky, *Parity Reconsidered*] (stating that "without empirical measurement each side of the parity debate has an intuitive judgment about whether the institutional differences between state and federal courts matter in constitutional cases"); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 338 (1988) [hereinafter Thedish, *Judicial Parity*] ("The absence of dispositive empirical data does not revoke common sense.").

8. See, e.g., Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 594 (1991) [hereinafter Chemerinsky, *Parity Debate*] (stating that with conservative Reagan and Bush nominees dominating the federal bench, it is unrealistic to assume that federal courts are more likely than state courts to protect constitutional liberties); Wells, *supra* note 6, at 610 (1991) (stating that there seems to be general agreement that weak parity exists, but that strong parity does not). *But see* Herman, *supra* note 6, at 657 (arguing that because the majority of Supreme Court Justices and members of Congress still recognize a kind of parity between federal and state courts, the dispensation with the parity debate is inappropriate).

from a general decline in the ability to win a novel individual rights case anywhere. Unmistakable signals sent by the Supreme Court⁹ (and the people), coupled with the remaking of the federal judiciary during the Reagan/Bush years,¹⁰ have made conscientious judges - both state and federal - skeptical about efforts to push individual rights law beyond settled doctrine.¹¹ Nowadays, it doesn't much matter where you make a novel individual rights argument; it isn't likely to win.

Despite the changes, though, in those areas of constitutional law where existing Supreme Court doctrine holds open the chance of doctrinal growth,¹² I continue to believe that a relative institutional advantage for the plaintiff exists in federal court; an advantage resulting from a mix of political insulation, tradition, better resources and superior professional competence.¹³ Perhaps it is the myopia of a closed mind, but the years have reinforced my perceptions about the qualitative differences between state and federal trial courts. Through literally hundreds of constitutional cases, I have found a perceptible difference in the trial-level quality of judging in the two systems. While I have encountered state trial judges of great talent and a few federal judges who do not deserve to be on the bench, in the bulk of cases, regardless of outcome,¹⁴ I believe that federal judges performed at a higher professional level than their state counterparts. While most state trial benches performed competently, some federal trial judges achieved excellence. I do not wish to be misunderstood. I do not suggest that a crisis of competence exists at the state trial level; nor do I suggest that Cardozo has been reincarnated at the federal level. I do assert, though, that the average quality of professional judging at the federal trial level was "better" than at the state trial level, measured any way you want to —

9. See, e.g., *Herrera v. Collins*, 113 S. Ct. 853, 860 (1993) (holding that the defendant's claim of actual innocence did not entitle him to federal habeas corpus relief).

10. See Chemerinsky, *Parity Debate*, *supra* note 8, at 594 (noting that Reagan and Bush appointees dominate the federal bench).

11. See Redish, *Judicial Parity*, *supra* note 7, at 337 ("[I]t might be argued that in light of numerous conservative appointments to the federal bench in recent years, federal judges are often less likely to find in favor of the party asserting the constitutional right than the state courts.").

12. The 'takings' area, for example. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

13. For similar perceptions, see Redish, *Judicial Parity*, *supra* note 7, at 337; Wells, *supra* note 6, at 610.

14. I have tried to resist the temptation to confuse quality with acceptance of my litigation position.

speed, technical proficiency, treatment of precedent, persuasiveness, imagination, or intangible judgment; and that, occasionally, judging at the federal level transcended competence. Moreover, while, thankfully, the quality of judging in both systems rarely fell below competence generously defined, when it did so, more often it was at the state level.

I believe that my colleagues in the litigating bar share this perception. If they could talk frankly, I suspect that they would report a perceived quality gap between the average performance of state and federal trial benches. That is one reason why lawyers expend so much time and ingenuity jousting over questions of federal jurisdiction. Unfortunately, however, judicial policymakers, for understandable reasons, cannot openly acknowledge the existence of a quality gap.¹⁵ Instead, they develop "neutral" roadmaps of the ideal allocation of business between state and federal courts, pretending that the two systems are qualitatively fungible.¹⁶ While there is much wisdom to be found in recent efforts to rationalize the allocation of state and federal judicial business,¹⁷ until we acknowledge the quality gap that separates the two systems, I do not believe that we will ask a (perhaps *the*) crucial allocation question: What is the best use of a trial forum capable of excellence in a judicial system where the norm is minimal competence?

Suppose each state were to maintain an underfunded system of medical clinics¹⁸ committed to serving 99% of the general health care needs of the population, staffed by health professionals chosen mainly by political parties and required to provide care to virtually all who request it. Suppose, also, that the underfunded state medical system, over time, painfully develops a competent corps of professionals who succeed in providing adequate but undistinguished ser-

15. Such an acknowledgment would tarnish the public perception of state courts, and therefore, frustrate their integrity.

16. For helpful recent efforts to rationalize the allocation of business between state and federal courts, see Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 68; Richard H. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1145 (1988); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles"*, 78 VA. L. REV. 1769, 1770-71 (1992) [hereinafter Redish, *Reassessing*].

17. See Redish, *Reassessing*, *supra* note 16, at 1825 (stating that "the modern Supreme Court has long premised its structuring of federal and state judicial relations on the assumptions that state and federal courts are fungible").

18. The hypothetical could equally be cast in educational terms, with teachers substituted for health professionals.

vice to the mass of the population. Suppose, finally, that the federal system maintains a parallel set of better funded clinics designed to deal with about 1% of the nation's health needs staffed with corps of physicians chosen on the basis of merit. Who should the federal clinics treat?

I do not know the answer, but I am certain that it should be framed, at least in part, in terms of how best to use medical institution capable of excellence in a world in which minimal competence is the norm. Should we think about state/federal judicial allocation in the same way?

Three objections to phrasing the allocation question in qualitative terms immediately arise. First, my assertion of a quality differential may be wrong, aberrational, or even unduly affected by the nature of a constitutional practice. Perhaps one or all three outcomes are correct. At this stage of the discussion, though, there is no need to get bogged down in arguments about how to measure quality. I concede at the outset that the quality differential cannot be proven in a way that would satisfy a social scientist. Indeed, many settings, the quality differential does not exist, or is so small that it affects nothing except aesthetics. Moreover, in many cases, outcome is a foregone conclusion regardless of the level of quality of the judging. Finally, I am concentrating solely on a comparison at the trial level. I make no assertion about the relative quality of appellate judging in the two systems, although the workload of most intermediate state appellate courts is crushing. On the other hand, it would be miraculous if quality differentials did not arise between two judicial systems with grossly disproportionate resources,¹⁹ greatly unbalanced time demands,²⁰ differing judicial selection techniques²¹ and disparate traditions.²² At this point, I will let the matter rest with an assertion and ask merely that we consider what the allocation rules should be if there were a quality differential.

A second objection to phrasing the judicial allocation question in medical or educational terms is that legal issues divide substantively or functionally into state and federal spheres,²³ while medical and

19. Neuborne, *The Myth of Parity*, *supra* note 1, at 1121-22.

20. *See id.* at 1122 n.67 (discussing the drastically higher caseload in the state system).

21. *Id.* at 1127-28.

22. *Id.* at 1124; *see also* HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 28-29 (1973) ("Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality. . . .").

23. *See* MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDI-*

educational services are arguably federalism neutral. My response is twofold. First, I fully agree that functional analysis related to inherent state/federal spheres should play a role in allocating judicial business. I argue only that functional analysis be supplemented by a perception that qualitative differences exist that should be taken into account in the final allocation decision.

A final objection is that judges (especially common law and constitutional judges), unlike doctors and teachers, actually generate their raw material by making avowedly discretionary, often political choices about how the law should grow.²⁴ Unlike judges, doctors do not create or knowingly alter the conditions they treat. Thus, while the capacity for technical excellence is critical to a doctor or a teacher, it is only one component in the armory of skills needed by a judge/lawmaker. I plead guilty, therefore, to over-emphasizing technical proficiency in defining excellence in judging. In some sense, I am over-emphasizing as a gauge of judicial quality, the time, resources and considerable intellectual ability needed to perform well as a "legal process," or more recently, a Dworkinian or Posnerian judge.²⁵ But, while I willingly acknowledge that such attributes do not exhaust what it takes to be an excellent judge, I do not believe that attributes unrelated to technical excellence (like empathy, compassion, demeanor and diverse life-experience) should play a substantial role in allocating jurisdiction (even though they are important in assessing ultimate judicial quality) because such attributes exist in equal parts in both state and federal settings. We are not yet at a point where an intellectually superior federal bench with a myopic view of the world must be compared with a less technically proficient state bench with the capacity to reflect diverse life experiences. As of now, neither bench is particularly diverse. One hopes

CIAL POWER 3 (1980) ("It seems intuitively appropriate to provide *federal* courts the primary responsibility for adjudicating *federal* law, and leave as the primary function of state courts the defining and expounding of state policies and principles.").

24. See, e.g., *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954). In *Brown*, the Court made a political choice about how and where the law should grow — in that case, away from the separation of races. *Id.* at 495. Thus, judges, unlike teachers and doctors, often create the very legal constructs which guide their subsequent decisions. See also *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (recognizing judges as "policy making employees" within the meaning of the Age Discrimination Act).

25. See Redish, *Judicial Parity*, *supra* note 7, at 331 ("Neither . . . judicial IQ, nor the judges' law school records can accurately depict the comparative competence levels of state and federal judges."); Chemerinsky, *Parity Reconsidered*, *supra* note 7, at 256-61 (arguing that no viable means exists that would enable one to empirically examine judicial competence in the parity debate).

that diversity will characterize both systems in the years to come making such comparisons irrelevant.

If the above objections are surmounted, what implications should a so-called quality gap between potential excellence and competence have for the allocation of judicial business? One possible response is none. At least one commentator argues that all any litigant is entitled to is a minimally competent judge.²⁶ If state trial courts are competent, the existence of an elite federal trial bench can simply be viewed as a random stroke of good fortune, with judicial business allocated strictly on the basis of functional or substantive criteria that ignore the quality gap. I'm not certain that such an approach would be wrong, especially since I suspect that whatever the allocative criteria, they will often track the legal areas where excellence is needed. It seems wrong, though, to ignore the relative capacity for judicial excellence in allocating judicial business. I assume that were we dealing with the medical hypothetical, we would not ignore the creative potential of the elite medical institution in allocating tasks. Why should we do so in allocating judicial business? Even if we agree that a litigant only has a right to a *competent* trial forum, surely the rest of us can hope for *excellence* in shaping and applying the law in areas where excellence is most needed. At bottom, the real cost of ignoring the quality differential is not deprivation of a particular litigant's right to justice, but the societal opportunity-cost of failing to use the best resources we have to solve our most difficult legal problems.

The notion that a quality differential between minimal competence and a capacity for excellence does not matter in allocating judicial business shades into a second, darker response. If all litigants are entitled to is a competent judicial forum, perhaps we do not need (or cannot afford) a trial bench capable of excellence. Such an approach looks at the federal courts and sees inefficiency, unused

26. Redish, *Judicial Parity*, *supra* note 7, at 337-38. With regard to a litigant's entitlement to a competent judge, Professor Redish states the following:

The issue in the parity debate is not whether, as a constitutional matter, state courts are or are not a technically competent forum to adjudicate constitutional rights. Rather the debate concerns whether the state and federal courts are equivalent, from the litigant's perspective, to adjudicate such matters. . . . [Thus, the issue] is not so much whether the court will find in favor of the [litigant's] constitutional right, but whether, whatever decision the court reaches, we can be assured that decision was reached on the basis of a fair and neutral assessment of law, policy, and facts.

Id. at 357-58; *see also* Wells, *supra* note 6, at 610 (arguing that "weak" parity means that "a litigant will receive a constitutionally adequate hearing on a federal claim in state court").

capacity and judicial self-indulgence. If competent judging is all that we ask, surely federal judges can be expected to do more. In fact, why shouldn't they simply function as another island of minimal competence in the legal sea, doing just about what the state courts are asked to do - only with a veneer of national substance.

We have already travelled much further down such a road than we think. The steady proliferation of garden variety criminal cases now threaten to engulf the federal trial bench in a mass of trials, generally involving narcotics offenses, that call for competent judging, but nothing more.²⁷ The practice of randomly diverting urban street drug arrests into federal court simply uses up a scarce national resource for no reason other than political posturing.²⁸ The sentencing guidelines have turned federal judges into bureaucrats at the one phase in the criminal trial process that cries out for excellent judgment.²⁹ The twenty-five percent of the civil docket represented by diversity cases³⁰ are, often, literally indistinguishable from identical cases pending in the state courts; cases generally requiring competent judging, but nothing more. Unless checked, the growing tendency to fill the federal trial courts with cases that do not have any need for trial forum capable of excellence threatens to destroy the capacity for excellence that has been the federal trial bench's principal defining characteristic.

In 1988, I was a member of the United States delegation to a Conference on the Rule of Law hosted by the Soviet Union. One of the Soviet delegates told a story about Russian culture that captures what we are slowly doing to the federal trial bench.

Imagine that an angel flies down and touches a Parisian on the shoulder. "You may have anything you wish", the angel says. The Parisian would respond: "I want great food, heart-stopping romance and marvelous clothes". "You got it", says the angel.

The next morning the angel appears in Rome. "You may have anything you wish", the angel repeats. The Roman replies: "I want fast cars, lots of

27. See William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 *STETSON L. REV.* 651, 695 (graphically illustrating increases in federal drug and fraud trials).

28. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 150001, 108 Stat. 1796 (1994).

29. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 *S. CAL. L. REV.* 357, 364 (1992) ("Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats.").

30. See, e.g., *American Inst. of Chem. Eng'rs v. Rebel-Friel Co.*, 682 F.2d 382, 392 (2d Cir. 1982) (stating that diversity cases comprise twenty-five percent of the civil cases commenced in the federal district courts).

money and a torrid love life". "You got it", says the angel.

The third morning the angel appears over Moscow. "Anything you wish is yours" the angel assures a startled Muscovite. The Muscovite thinks for a while and says: "My neighbor has a goat. I have no goat. I want you to kill my neighbor's goat."

Assuming that we do not succeed in killing the federal goat, what legal tasks should we ask it to perform? One obvious potential model for the use of an elite trial forum is remedial. We could ask it to backstop other courts by monitoring them and stepping in when they fail. Using an elite trial forum to retry issues bungled by earlier courts is a tempting use of the resource, especially when the consequences of first-line judicial failure are extremely significant and the likelihood of judicial failure is unacceptably high. In fact, that is what we do in habeas corpus cases³¹ and in decisions to re-prosecute on federal charges after a state acquittal.³² It is, however, very inefficient. Remedial jurisdiction at the trial level forces two trial courts (and their appellate consorts) to do the same work. If the consequences and risk of first-line failure are so great, why not ask the elite forum to perform the trial tasks in the first place?

In most habeas corpus settings, of course, such an approach is impossible because the volume of ordinary criminal cases is too great. In the habeas corpus area, the inefficiency of remedial trial jurisdiction in the elite forum is justified by the serious consequence of first-line judicial failure —unconstitutional loss of liberty. Moreover, in the 1960's, the potential for first-line judicial failure was unacceptably high. The Warren Court revolution in criminal procedure was in high gear.³³ The ordinary courts were unfamiliar with and skeptical about many of the new norms.³⁴ On the other hand, as ordinary courts and law enforcement officials became more familiar with (and more sympathetic to) basic aspects of post-Warren Court criminal procedure,³⁵ the likelihood of first-line error decreased and

31. See generally ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* § 15.3 (2d ed. 1994) (providing a discussion of the procedures in habeas corpus review).

32. See *infra* notes 46-52 and accompanying text (providing examples of decisions to re-prosecute on federal charges after a state acquittal).

33. See generally Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1321 (1977) (discussing the development of criminal procedure under the Warren Court).

34. See Ann Althouse, 100 HARV. L. REV. 1485, 1490 (1987) (explaining that state courts were very engaged in absorbing the new Warren Court standards).

35. Cf. Peter Arenello, *Rethinking of the Functions of Criminal Procedure: United States Supreme Court and Courts of Appeal*, 72 GEO. L.J. 185, 240 (1983) (stating that the Warren Court used rules rather than standards, thereby providing clear guidance to law enforcement officials).

the need for an elite second trial court opinion decreased as well. The recent history of habeas corpus jurisdiction is an accurate barometer of the perceived change in the need for a remedial trial forum of excellence in the area of criminal procedure.³⁶ My own view is that the Court has significantly underestimated the potential for error in the first-line courts and seriously compromised the ability of the federal trial courts to assist in the growth of criminal procedure law. But, for the purposes of this discussion, the fine-tuning (some might say judicial mugging) of habeas corpus is a textbook example of deciding whether an elite remedial trial forum is worth the cost.

Why use the federal trial courts, though, as a remedial forum in settings where the federal court is capable of performing the trial function as a first-line matter? In cases under 42 U.S.C. § 1983, for example, we have elected to forego the remedial model in favor of treating the federal trial courts as the first-line judicial forum.³⁷ Two recent "remedial" responses to inept performances by ordinary courts in high stakes criminal cases pose the issue squarely. In the Rodney King and the Lemrick Nelson, Jr. cases, the Department of Justice elected to re-try the defendants in federal court on federal civil rights charges after they were acquitted of serious felonies in state courts in California and New York.³⁸ What makes the two cases significant is the nature of the judicial "failure" that triggered remedial action. Under the *Petite*³⁹ policy, federal courts have occasionally been asked to re-try defendants on federal civil rights charges after acquittal in state court when the state proceedings were seriously deficient.⁴⁰ But neither the King nor the Nelson pros-

36. See generally CHEMERINSKY, *supra* note 31, at § 15.5 (discussing the recent history of habeas corpus).

37. 42 U.S.C. § 1343(a) (1994) ("The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.").

38. See Patricia Hurtado, "It's Not Fair," *Nelson Distraught at Facing Federal Trial*, NEWS-DAY, Aug. 17, 1990, at A5; Susan H. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 609 (1994).

39. The policy is named for *Petite v. United States*, 361 U.S. 529 (1960), which granted a petition by the United States to vacate a federal conviction obtained after a state acquittal under circumstances where no "compelling" need for a second trial existed. *Id.* at 531.

40. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 10-11 n.60 (1995) (stating that under the "Petite Policy," the Justice Department will generally refrain from prosecuting an individual after a state prosecution for the same crime, unless there are compelling reasons for a second trial); see also *United States v. Jones*, 808 F.2d 561, 565 (7th Cir. 1986) (stating that under the "Petite Policy," a prosecutor may obtain special approval for a successive prosecution in a case which the state proceeding has

ecutions were deficient enough at the state level to warrant being labelled shams or exercises in ineptitude. While they were hardly models of excellence, each was a marginally competent, good faith effort at prosecution. In each case, however, the best that could be said about the state prosecution was that it was marginally competent. The original trial judge in the *King* case misbehaved by having *ex parte* communications with the prosecution opening the door for a disastrous change of venue to Simi Valley.⁴¹ Moreover, the prosecutor made no effort to resist a trial in Simi Valley, despite the notoriously pro-police atmosphere there.⁴² The *Nelson* trial judge lost control of his courtroom and the police performed very badly as witnesses, to say nothing of investigators.⁴³

The case for an excellent trial forum in both the *King* case and *Nelson* case does not turn on the innate difficulty of the issues. Rather, it turns on the need to reassure the nation that the legal system is capable of handling racially-charged cases in a just manner. The appearance of injustice presented by the weak performance of the first-line courts in both cases created a powerful argument for use of the elite federal trial court as a remedial forum. But the inefficiency cost of using the federal courts that way is appalling. First and foremost, requiring a defendant to stand trial again on the same facts after an acquittal in a competently administered first-line prosecution violates double jeopardy.⁴⁴ After all, double jeopardy is nothing more than a recognition that the cost to a defendant of mul-

left "substantial federal interests demonstrably unvindicated").

41. M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1870-71 (1993) (stating that while the venue issue was being appealed in the *King* case, the trial judge contacted the prosecutor's office *ex parte* to inform them that the venue issue would be handled properly); *id.* at 1861-62 ("Changing venue to a county where demographics suggested that a predominate number of residents would be sympathetic to the defendant police officers and suspicious of the complaining witness . . . cast a shadow on how judicial discretion was exercised in the venue decision.").

42. *Id.* at 1861, 1876 (stating that the prosecutor in the *King* case did not vigorously resist the change of venue to a town that is the home to scores of retired police officers).

43. Pete Bowles & Patricia Hurtado, *Crown Heights; The Story That Won't Go Away, Report Will Rap Major Bungling in Nelson's Case*, NEWSDAY, July 18, 1993, at 7 (stating that sources indicated that police officers may have given prosecutors a different version of the events than they gave to the jury); Michael Powell, *Mayor to Blame — Riot Report Says Dinkins Failed to Order Crackdown*, NEWSDAY, July 21, 1993, at 3 (stating that the Girgentis riot report was critical of the district attorney's office and the police investigation in the *Nelson* case).

44. U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."); Herman, *supra* note 38, at 612 (stating that the American Civil Liberties Union concluded that the defendant officers in the Rodney King case were twice put in jeopardy for the same offense because the Supreme Court has never held that re prosecution following an acquittal is permissible under the Double Jeopardy Clause).

multiple trials on the same facts is unacceptably high, even if it means reaching the wrong result. I know full well that the Supreme Court has developed an end-run around double jeopardy in order to preserve the remedial role of an elite federal trial court in extreme settings.⁴⁵ But, assuming that the Court chooses to adhere to current double jeopardy doctrine, every time the end-run is used, the defendant risks being treated with fundamental unfairness. Moreover, the remedial trial never really erases the sense of injustice created by a poor performance by the first set of courts. If anything, it simply creates a new level of real and perceived injustice by appearing to treat some victims better than others.

It would be far preferable to abandon the remedial model in such cases in favor of a joint state-federal task force that would work together to investigate the alleged crime, make a careful decision to prosecute the case in a forum (state or federal) capable of dealing with it effectively and, finally, cooperate in the actual prosecution. The goal in such cases should not be first-line marginal competence backstopped by remedial excellence. The cases deserve excellence the first time they are tried.

In many settings, it should be possible to identify those legal disputes that have a claim on a trial forum of excellence and route them into the federal courts as a forum of first resort. It is, I believe, what we have done through much of our history. We have identified legal disputes of national scope that would most benefit from resolution in a trial forum of professional excellence and routed those disputes into the federal trial courts. In the 19th century, when development of a common law merchant for an expanding nation was the great task of the legal system, a combination of diversity jurisdiction and *Swift v. Tyson*⁴⁶ entrusted the task to the federal trial courts.⁴⁷ In the early years of the 20th century, when the legal relationship

45. *Abbate v. United States*, 359 U.S. 187, 195 (1959) (holding that under the Fifth Amendment, a federal prosecution is not barred by a prior state prosecution of the same person for the same acts); *Bartkus v. Illinois*, 359 U.S. 121, 138-39 (1959) (holding that a subsequent state court trial of defendant for armed robbery after defendant was acquitted in federal court of the same acts does not deprive defendant of due process).

46. 41 U.S. 1 (1842). *Swift* involved a commercial law issue where there was no controlling state statutory or constitutional provision, but there was state common law on point. *Id.* at 18. The issue was whether the federal court should follow the state common law or whether it could develop its own law. *Id.* The Supreme Court held that in a diversity case, if there is no state constitution or statutory provision, and no local interest, the federal courts should develop their own body of common law. *Id.* at 19.

47. *Id.*

between the capital and the emerging regulatory state was a dominant national concern, the word-magic of *Ex parte Young*,⁴⁸ federal question jurisdiction, and causes of action for equitable relief springing directly from the constitution routed the cases to the federal trial courts.⁴⁹ During the past 35 years, when the national preoccupation was articulation of a constitutional standard protecting the politically weak from majoritarian overreaching,⁵⁰ the sudden discovery of the "true" meaning of § 1983 in *Monroe v. Pape*⁵¹ entrusted the front-line trial role to the federal courts.⁵²

We should not be surprised, therefore, when efforts are made to route contemporary issues of great importance to federal trial courts. For example, when adherents of the Violence Against Women Act⁵³ were successful in establishing a federal cause of action for violence caused by animus against women, they sought a federal trial forum precisely because they hoped that routing cases about violence against women to an elite trial forum might help us shed light on why men continue to beat women and how we can make them stop.⁵⁴ Similarly, when efforts are made to federalize the law of mass torts,⁵⁵ the hope is that elite trial fora can evolve an optimal legal response to a crucial modern legal problem that has

48. 209 U.S. 123, 159-60 (1908) (holding that the Eleventh Amendment does not bar suits against federal officers to enjoin violations of federal law).

49. *Id.* at 168.

50. *Cf.* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982) (discussing how to protect fundamental rights without unduly interfering with majoritarian norms).

51. 365 U.S. 167 (1961). In *Monroe*, the plaintiff alleged that police officers broke into his home, ransacked it, and held him at the police station without allowing him to contact an attorney. *Id.* at 169. The issue before the Court was whether this conduct occurred under the color of law. *Id.* at 172. The Court held that "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 184.

52. *Id.* at 191.

53. Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796 (1994).

54. Steven B. Weisburd & Brian Levin, Symposium, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21, 24 (1994) (stating that the Violence Against Women Act recognizes a federal cause of action in tort for gender motivated deprivations of civil rights). Judith Resnik has argued that gender has played a significant role in deciding whether an issue has been "important" enough to warrant federal jurisdiction. *Housekeeping: The Nature and Allocation of Work in the Federal Courts*, 24 GA. L. REV. 909 (1990).

55. See Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1630 (1992) ("[R]eformers have offered a piecemeal approach to mass-tort litigation that would federalize jurisdiction and consolidation procedure, federalize various coercive devices to collect individual cases in one forum and enjoin litigation elsewhere, and federalize applicable law.") (footnotes omitted).

resisted conventional solutions.⁵⁶

The problem, of course, is that there are more hard problems than there are elite legal resources. Using the medical analogy, everyone thinks that their sickness merits the elite health facility. Worse, once an issue gets a foothold in federal court, it is almost impossible to dislodge it. Thus, last century's (and last generation's) needs now take up much of the federal court's time and energy. We must, I believe, do two things if we are to derive the maximum advantage from our federal trial bench. First, in resolving the fierce competition for new entry into the federal system, we must require a claim to demonstrate that it requires more than merely a competent trial judge. Such a showing might involve either the inherent complexity of the issues, or the pressing nature of the subject matter. Equally importantly, we must be prepared to jettison those claims that once required more, but that because of changes in the law and in the society, may now be adequately processed by forums of competence.

I have left the most desirable approach for last, not because I think it less important, but because I think it almost impossible to achieve. Instead of killing the goat, we could try to provide a goat for everybody. In other words, if federal trial courts exhibit flashes of excellence because they have material advantages, we could attempt to upgrade the resources available to state trial courts. The problem is one of size and resources. Building and staffing an institution of excellence may become impossible once it reaches a given size. Moreover, it may not be efficient to build fora of potential excellence to handle claims that merely require competence. My sense is that, even if we improve the level of state trial judging, a quality gap will exist into the future. Whether we will take full advantage of the gap, ignore it, or level it down remains to be seen.

56. See *id.* at 1634 ("Perhaps the movement for a federalized choice-of-law regime in mass-tort litigation will ultimately persuade some reformers of the general wisdom of federalized choice of law.") (footnote omitted); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1-2 (1991) (stating that current state conflicts schemes "generate waste and unfairness").