

THE MYTH OF SUPERIORITY

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Get a group of civil rights lawyers together and there is at least one thing they would agree upon—they prefer to litigate in federal, not state, court.¹ Writing in 1977 from his decade-long experience as a civil liberties litigator, Burt Neuborne codified this sacred tenet in the pages of the *Harvard Law Review*.² In *The Myth of Parity*, Neuborne opined that federal courts were systematically preferable to state courts as a forum for the protection of federal constitutional rights. Neuborne's claim exceeded the simple proposition that federal judges were more politically liberal during this time period. Rather, he set forth an argument that federal courts were "*institutionally preferable* to state appellate courts as forums in which to raise federal constitutional claims."³

The experience of gay rights litigators in the twenty-two years since Neuborne's thesis was published challenge his assumptions in several interesting ways.⁴ Put simply, gay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts. That statement poses two challenges to Neuborne's thesis. First,

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1. Okay, they probably would also unanimously disdain the stinginess of existing attorneys' fee provisions, but that's another article.

2. Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). Neuborne has noted the universality of his thesis. See Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DePaul L. Rev. 797, 797 (1995) ("My perception [in the *Myth of Parity*] was hardly novel. Virtually any experienced constitutional litigator could—and would—have told the same tale in the 1970's.").

3. Neuborne, 90 Harv. L. Rev. at 1116 (cited in note 2) (emphasis added).

4. From 1987 to 1995, I was one of these litigators, working as a staff attorney with the ACLU's national Lesbian and Gay Rights Project.

it implies that the federal courts were never *institutionally* better situated to protect disfavored claimants and that all Neuberne really experienced in his time as a litigator was a greater representation of liberal judges in the federal courts. This point has intuitive appeal because during much of the succeeding two decades, the federal courts have largely been dominated by conservative Republican appointees.⁵ Perhaps Neuberne's preference for federal courts and pro-gay litigators' preference for state courts simply reflect short term trends in the political orientation of these fora. Yet the gay rights experience might suggest something more meaningful: perhaps it reveals *institutional* advantages of state courts in protecting individual rights that are missing from Neuberne's depiction of these competing fora.⁶

I. THREE PARITY DEBATES

Since the founding of the Republic, controversy has surrounded the proper role of the federal courts and their relationship to state courts in a federal judicial system.⁷ A central concern has been how cases involving federal rights, particularly federal constitutional rights, are allocated between these two judicial systems. Is a federal forum a necessary adjunct for the enforcement of a federal right? Or can state courts be trusted to protect federal rights? The constitution's Madisonian Compromise enables federal issues to be litigated in state courts, while simultaneously authorizing Congress to establish inferior federal courts as a forum for the litigation of federal questions and en-

5. By 1993, Republican presidents had appointed 75% of the sitting federal judges. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *Judicature* 282, 297 (1993). See also Erwin Chemerinsky, *Ending the Parity Debate*, 71 *B.U. L. Rev.* 593, 594 (1991) (stating that in the 1990s the "parity debate appears old and futile. 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").

6. This point is especially important in that Neuberne himself, though acknowledging the conservative makeup of the federal judiciary, continues to advocate its institutional advantages. See Neuberne, 44 *DePaul L. Rev.* at 799 (cited in note 2) ("I continue to believe that a relative institutional advantage for the plaintiff exists in federal court").

7. A brief history is set forth in Erwin Chemerinsky, *Parity Reconsidered: Defining A Role for the Federal Judiciary*, 36 *U.C.L.A. L. Rev.* 233, 239-55 (1988). Regarding the meaning of this history, compare Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 *Wm. & Mary L. Rev.* 605, 606 (1981) (arguing that state courts have been prime protectors of constitutional rights "in an unbroken line from the *Federalist Papers* down to today's Supreme Court opinions") with Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 230 (1985) (arguing that the Framers distrusted state courts and gave federal courts the preeminent role in defending federal rights).

sureing that the Supreme Court can have the last word on all determinations of federal law.

The constitutional structure that permits both state and federal courts to rule on federal issues sets the stage for the parity debate. At the center lies a comparison between the institutional competence of state and federal courts: those who believe federal courts institutionally superior argue, on this basis, for an expansion of federal jurisdiction,⁸ while others resist on the grounds that state courts are institutionally comparable to federal fora.⁹ The parity debate arises in a variety of doctrinal contexts,¹⁰ and has been especially palpable for the past half-century.¹¹

Dubbing the argument in favor of state court competence "the myth of parity," Burt Neuborne stepped into the debate in 1977 with a ringing and influential¹² endorsement of the superiority of federal fora. Neuborne's federal-forum-preference thesis emanated from his practice experience.¹³ But the preference also responded to growing Supreme Court jurisprudence limiting federal habeas corpus review of state criminal convictions. In fashioning that jurisprudence during the 1970s, the post-Warren Court justices relied upon the proposition that state courts are as institutionally capable of protecting federal constitutional rights

8. Neuborne's article, cited in note 2, is seen as the preeminent expression of federal superiority.

9. Classic defenses of state courts include Bator, 22 Wm. & Mary L. Rev. (cited in note 7), and Michael E. Solimine and James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 Hastings Const. L.Q. 213 (1983).

10. These include: the scope of federal habeas corpus review of state court convictions, see, e.g., *Stone v. Powell*, 428 U.S. 465 (1976); the ability of federal courts to enjoin state court proceedings, see *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and/or the extent to which they should abstain in deference to ongoing state proceedings, see *Younger v. Harris*, 401 U.S. 37 (1971), *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); the preclusive effect that state court judgments should be granted in later federal proceedings, see, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *Allen v. McCurry*, 449 U.S. 90 (1980); and the availability of relief under federal civil rights laws such as 42 U.S.C. § 1983, see, e.g., *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

11. Chemerinsky attributes this to three late-20th century developments: the application of the federal constitution to the states; the Warren Court's expansion of individual liberties; and state resistance to civil rights. Chemerinsky, 36 U.C.L.A. L. Rev. at 242-43 (cited in note 7). See also Chemerinsky, 71 B.U. L. Rev. at 594-98 (cited in note 5) (describing federalism dynamics that gave rise to parity debate in mid-20th century jurisprudence).

12. Chemerinsky asserts that Neuborne's article "spawned much of the academic literature on parity" between its publication in 1977 and 1990. Chemerinsky, 71 B.U. L. Rev. at 598 (cited in note 5).

13. Neuborne, 90 Harv. L. Rev. at 1115 (cited in note 2).

as are their federal counterparts.¹⁴ Neuborne argued that “three sets of reasons support a preference for a federal trial forum.”¹⁵

First, the level of technical competence which the federal district court is likely to bring to the legal issues involved generally will be superior to that of a given state trial forum. Stated bluntly, in my experience, federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts. Second, there are several factors, unrelated to technical competence—which, lacking a better term, I call a court’s psychological set—that render it more likely that an individual with a constitutional claim will succeed in federal district court than in a state trial court. Finally, the federal judiciary’s insulation from majoritarian pressures makes federal court structurally preferable to state trial court as a forum in which to challenge powerful local interests.¹⁶

Given this understanding of the comparative advantages of federal courts, Neuborne viewed the Supreme Court’s increasing

14. The *locus classicus* of this premise is a footnote in Justice Powell’s decision in *Stone v. Powell*:

The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the [exclusionary] rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 341-344 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is “no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.” Bator, [*Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963)] at 509.

Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976)). See also *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-11 (1975).

15. Neuborne, 90 Harv. L. Rev. at 1120 (cited in note 2).

16. *Id.* at 1120-21. For a point-by-point refutation, see Solimine & Walker, 10 Hastings Const. L.Q. at 225-32 (cited in note 9); James M. Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. Miami L. Rev. 175, 184-96 (1980).

reliance on state courts—premised as it was upon the myth of parity—with suspicion and concern: “to the extent that constitutional cases can be shifted from federal to state trial courts, the capacity of individuals to mount successful challenges to collective decisions will be substantially diminished.”¹⁷

Neuborne’s text provides perhaps the strongest argument of federal court superiority. But it also provides a useful site at which to disentangle three aspects of the parity debate. For some judges and scholars the debate revolves around *forum allocation*—defining the proper role of the federal courts in a federal system and identifying what courts should hear what issues in what manner.¹⁸ For others the parity debate has operated as a discourse about *forum selection*, helping to describe how lawyers might consider what court system to enter if a choice between a federal and state forum exists.¹⁹ Thus, Neuborne began his consideration of parity in the latter voice—“As a civil liberties lawyer for the past ten years, I have pursued a litigation strategy premised on two assumptions. . . .”²⁰—but framed his conclusions in the former voice, “It is the recognition of [federal court superiority in safeguarding individual rights] and its troubling ramifications for the viability of constitutional rights—and not an uncritical assumption of parity—which should be the critical factor in current federal-state allocation decisions.”²¹ Still a third strand of the parity debate emerges from Neuborne’s article: the question of whether the institutional arguments for or against parity merely provide a seemingly neutral discourse meant to mask naked political preferences.²² Neuborne’s distrust of the neutral discourse of “forum allocation,” led him to write that all such talk might be a “pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less

17. Neuborne, 90 Harv. L. Rev. at 1131 (cited in note 2).

18. See generally Richard H. Fallon, Jr., Daniel J. Meltzer, David L. Shapiro, eds., *Hart and Wechsler's The Federal Courts and The Federal System* chapter IV (Foundation Press, 4th ed. 1996); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Michie Co., 2d ed. 1990).

19. For an overview on forum selection, see generally Note, *Forum Shopping Reconsidered*, 103 Harv. L. Rev. 1677 (1990).

20. Neuborne, 90 Harv. L. Rev. at 1115 (cited in note 2).

21. *Id.* at 1131. Like Neuborne, most commentators collapse these various strands. For example, Solimine and Walker, who undertook an empirical study of case outcomes to address questions of forum allocation, also use their data to address questions of forum selection. See Solimine & Walker, 10 Hastings Const. L.Q. at 240 n.121 (cited in note 9).

22. See 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, 611 (1991).

likely to be receptive to vigorous enforcement of federal constitutional doctrine."²³ Here Neuborne implies that beyond forum allocation and forum selection, the entire parity debate might be a mere mirage: i.e., the debate may be nothing more than each side's desire to identify seemingly neutral procedural rules that will achieve its substantive goals.²⁴

Much subsequent scholarship has sought to find a way out of the parity debate. Erwin Chemerinsky has labelled as "futile" attempts to resolve the non-neutrality allegations²⁵ and the forum allocation debate,²⁶ arguing that we should instead focus on enriching the forum selection opportunities available to constitutional litigants.²⁷ Chemerinsky contends that the parity debate is unresolvable both because there are no commonly-accepted criteria by which to measure the performances of the competing fora,²⁸ and because, even were there, there is no acceptable methodology for assessing the court systems' adherence to these criteria.²⁹ His emphasis on maximizing forum selection subtly

23. Neuborne, 90 Harv. L. Rev. at 1105-06 (cited in note 2).

24. Neuborne's desire that constitutional doctrine be "vigorously enforced" is itself, of course, a normative decision that may not be shared by all. But the "parity debate is politics" scholarship is not criticizing the parity debaters for their orientation toward constitutional enforcement. Rather, this strand of the parity debate is criticizing the debaters for wrapping their political preferences in what they pretend are neutral-sounding principles, while simultaneously believing that the neutral-sounding allocation decisions that they espouse will yield particular case outcomes which they favor.

25. Chemerinsky, 36 U.C.L.A. L. Rev. at 254 (cited in note 7) ("Arguing about the true motivations of those who believe in state court superiority will do nothing to resolve this impasse.").

26. Chemerinsky's characterization of the parity debate as non-resolvable is nicely captured by Professor Redish's characterization of Chemerinsky's thesis:

So much has been written by both jurists and scholars over the last twenty years on the issue of state and federal court "parity" that it has been difficult to imagine at this point anything new being said or some important and original insight being discerned. What I failed to anticipate, however, was the important and original insight that there was nothing new to be said on the issue.

Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 U.C.L.A. L. Rev. 329, 329 (1988) (footnote omitted).

27. Chemerinsky, 36 U.C.L.A. L. Rev. at 300-26 (cited in note 7).

28. See also Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power 2* (1990) ("it would be difficult to devise a system of measurement which could be used to answer" the question of whether "federal courts are better equipped to guard federal interests than their state counterparts"); Fischer, 34 U. Miami L. Rev. at 180-84 (cited in note 16).

29. Chemerinsky, 36 U.C.L.A. L. Rev. at 255-80 (cited in note 7). Martin Redish disagrees about the futility of resolving the debate; Redish asserts that the institutional factors, particularly popular election of state judges, render federal courts obviously more favorable tribunals for the resolution of federal rights. See, e.g., Redish, 36 U.C.L.A. L. Rev. at 334-35 n.21 (cited in note 26) ("When the issue is the constitutional protection of minority rights against majoritarian encroachment, [the majoritarian con-

shifts the debate away from arguments about which forum is "better" and toward a presumption that constitutional rights are best protected if widely enforceable.³⁰ By contrast, Martin Redish has argued that the forum allocation issue is non-debatable because, given Congressional authority to channel federal litigation as it sees fit, the Supreme Court had less discretion in the matter than the debate requires.³¹ Finally, Michael Wells has attempted to unmask the substantive sub-text of the debate, arguing that it is in fact a debate about outcome, not procedure.³²

Despite desires to resolve the parity debate, it is unlikely to fade away. Forum allocation questions will endure so long as our constitutional structure continues to allow federal cases to be heard in inferior federal courts and state courts. Similarly, forum selection, or forum shopping, will remain a "national legal pastime"³³ so long as lawyers can choose between at least two fora for the resolution of any claim. And, of course, there is no foreseeable end to the inquiry of whether procedure and substance are distinct entities such that we could discuss, in any rational way, the substantive neutrality of procedure.

Nothing in the following pages "settles" the parity debate. Little will provide much insight about proper forum allocation. Indeed, I would agree with Professor Chemerinsky that empirical evidence—particularly anecdotal empirical evidence of the type that follows—sheds little light on forum allocation decisions.³⁴ Yet both sides of the parity debate regularly summon anecdotal narratives to support their positions.³⁵ By describing

trol of state judiciaries] is sufficient to render dubious any claim to meaningful judicial independence in such a context.").

30. Chemerinsky, 36 U.C.L.A. L. Rev. at 303-10 (cited in note 7).

31. Redish argues that much of the parity debate ought to be subsumed by separation of powers doctrine, in that Congress has carefully dictated the answers to many parity questions (especially those involving abstention), which the Supreme Court has illegitimately ignored. See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L. J. 71 (1984). See also Fischer, 34 U. Miami L. Rev. at 196-211 (cited in note 16). But see Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 Ga. L. Rev. 1097 (1985); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985). Redish's responses can be found in Redish, 36 U.C.L.A. L. Rev. at 345-60 (cited in note 26).

Akhil Reed Amar offers a weaker version of a similar point, arguing that forum allocation is essentially dictated by the Constitution's command that the Supreme Court have the final word on all matters of federal law, regardless of which court system they originated in. See Amar, 65 B.U. L. Rev. at 205 (cited in note 7).

32. Wells, 71 B.U. L. Rev. at 609 (cited in note 22).

33. J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 333 (1967).

34. Chemerinsky, 36 U.C.L.A. L. Rev. at 255-79 (cited in note 7).

35. Compare Neuborne, 90 Harv. L. Rev. at 1115-16 (cited in note 2) (describing

the experiences of pro-gay litigators, I hope to enrich the forum selection aspects of the parity debate with a unique, yet perhaps generalizable, perspective.³⁶

II. AN UNCONTROLLED EXPERIMENT: THE EXPERIENCE OF GAY RIGHTS LITIGATORS

Most gay rights litigators grew up in the tradition from which Neuborne wrote.³⁷ They initially assumed, therefore, that federal courts would be more receptive to gay claims than would state courts. A series of First Amendment cases involving the associational rights of gay student groups in the 1970s supported this assumption.³⁸ But a long line of unsuccessful federal cases challenging discrimination against gay people cast doubt upon the federal forum preference.³⁹ Most centrally, the federal courts

how his practice experience supported federal forum preference) with Bator, 22 Wm. & Mary L. Rev. at 630 (cited in note 7) (stating that: "State supreme court justices as a group are as well paid and have as much prestige as federal judges. Those that I have met seem to me to be as expert on issues of federal constitutional law as are federal judges.").

36. See Wells, 71 B.U. L. Rev. at 609, 611 (cited in note 22) ("The real point of contention between the two sides is not parity, but rather the litigating advantage enjoyed by the party who is allowed to try the case in its chosen forum.").

37. Neuborne was a staff attorney with the New York Civil Liberties Union from 1967-1972, then the Assistant Legal Director of the ACLU from 1972 to 1974. After spending several years in legal academia—during which he authored the *Myth of Parity*—Neuborne returned to the ACLU as its Legal Director from 1983 to 1986. Association of American Law Schools, *The AALS Directory of Law Teachers* 732 (Foundation Press, 1998-1999).

The ACLU was the principal litigator of gay rights cases until several gay-specific public interest law firms (National Gay Rights Advocates and the National Center for Lesbian Rights in San Francisco; Gay and Lesbian Advocates and Defenders in Boston; and Lambda Legal Defense and Education Fund in New York) grew in size during the mid-1980s. Many gay rights lawyers in the United States continue to have close connections to the organization and to the basic federal court presumption that Neuborne articulates. For a brief history, see William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 Hastings L. J. 1101 (1997).

38. See *Gay Lib. v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied sub nom., *Ratchford v. Gay Lib.*, 434 U.S. 1080 (1978); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Students Org. of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972). The federal courts' protection of First Amendment rights in this context was affirmed in later years as well. See *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997); *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984), cert. denied, 471 U.S. 1001 (1985). I discuss these cases in further depth, see text accompanying notes 93-97.

39. For example, nearly every federal circuit has rejected constitutional challenges to the military's anti-gay policies. For citations, see William B. Rubenstein, ed., *Cases and Materials on Sexual Orientation and The Law* 663-66 (West Publishing Co., 2d. ed.

did not offer constitutional protection against state sodomy laws,⁴⁰ an experience which culminated in the Supreme Court's finding no federal constitutional violation in Georgia's criminalization of private, consensual, adult, sexual practices between two men.⁴¹

Following the Court's 1986 decision in *Bowers v. Hardwick*, pro-gay litigators were forced to move their sodomy law challenges across the street to the "inferior" state courts and to rely on state constitutional protections.⁴² But a funny thing happened after arriving at the disfavored forum: victory. Since *Hardwick* was decided in 1986, four state high courts have struck down their state sodomy laws on the grounds that these laws violate state constitutional norms.⁴³ More remarkably, these decisions

1997). The federal courts have rebuffed constitutional challenges to employment decisions in a variety of other contexts as well. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (security clearances); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (Federal Bureau of Investigation); *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984) (high school counselor), cert. denied, 470 U.S. 1009 (1985); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971) (library employee).

40. See, e.g., *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976) (summarily affirming decision of three judge district court that Virginia sodomy statute was constitutional); *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc) (reversing district court decision and upholding constitutionality of Texas sodomy law), cert. denied, 478 U.S. 1022 (1986).

41. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

42. Neuborne had foreseen this change, attributing it to an institutional characteristic of the federal judiciary—a greater responsiveness to Supreme Court command. Thus, Neuborne wrote:

If, as I believe, federal courts are more responsive than state courts to Supreme Court commands, contraction of federal constitutional rights by the Supreme Court will be reflected quickly at the district court level. If so, civil liberties lawyers may be forced to turn increasingly to state courts in hopes of protecting individual rights under state constitutions.

Neuborne, 90 Harv. L. Rev. at 1121 n.59 (cited in note 2) (internal citation omitted).

In a host of other important cases, pro-gay litigators had no choice: many family law issues had to be litigated in state fora, while many federal issues, such as challenges to the military's policy, had to be litigated in federal fora. See *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872) (limiting jurisdiction of state courts over federal officials).

43. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996), permission to appeal denied. A number of lower state courts have reached similar results. See *State v. Smith*, 729 So.2d 648 (La. App. 1999) (finding state sodomy law violates state constitution's right to privacy); *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993) (holding sodomy law unconstitutional); *State v. McGovern*, 1998 WL 252236 (R.I. Sup. Ct. Apr. 24, 1998) (finding state sodomy law violates state constitution's equal protection guarantee); *Williams v. Glendening*, No. 98036031/CL-1059 (Baltimore City Cir. Ct., Oct. 15, 1998) (finding state sodomy law not applicable to private, consensual, adult, same-sex conduct); *Michigan Organization for Human Rights v. Kelley*, No. 88-815820 CZ (Wayne County Cir. Ct., July 9, 1990) (holding sodomy law unconstitutional). But see *Missouri v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (en banc) (upholding constitutionality of Missouri sodomy law against federal and state

come from states—Kentucky, Tennessee, Georgia, and Montana (and intermediate appellate courts in Texas and Louisiana)—not exactly at the cutting edge of liberal politics. Yet these state decisionmakers have been anything but irresolute. Consider the derisive tone of the Kentucky Supreme Court, writing six years after the United States Supreme Court's decision in *Hardwick*:

To be treated equally by the law is a broader constitutional value than due process of law as discussed in the *Bowers* case. We recognize it as such under the Kentucky Constitution, without regard to whether the United States Supreme Court continues to do so in federal constitutional jurisprudence. "Equal Justice Under Law" inscribed above the entrance to the United States Supreme Court, expresses the unique goal to which all humanity aspires. In Kentucky it is more than a mere aspiration.⁴⁴

Family law has provided a second locus for some surprisingly empathetic decisionmaking on gay issues. Hawaii supplies the prime example. Its Supreme Court rendered a remarkable 1993 decision that the state's ban on same-sex marriages constituted sex discrimination, to be subjected to the highest judicial scrutiny.⁴⁵ New York's high court, in 1989, ruled that a gay male couple was the legal equivalent of a family, protecting a surviving gay man from eviction from his lover's rent controlled apartment upon the lover's death from AIDS.⁴⁶ California's courts have enabled same-sex couples to enforce living-together contracts of the type recognized by the state high court in *Marvin v. Marvin*.⁴⁷

Beyond these issues involving same-sex couples, state courts have provided a substantial measure of protection for gay parents. Most state courts now claim that they prohibit sexual orientation from being a factor in child custody and foster care decisions, absent some specific showing that the parent's orientation is harmful to the child. Though the standards are malleable, and not always followed, the situation has improved dramatically in the past 20 years.⁴⁸ Many state appellate courts

constitutional challenges).

44. *Wasson*, 842 S.W.2d at 501.

45. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

46. *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989).

47. 557 P.2d 106 (Cal. 1976). The state appellate courts acknowledged the existence of *Marvin*-like claims in cases involving same-sex couples in *Whorton v. Dillingham*, 202 Cal.App.3d 447 (1988) and *Jones v. Daly*, 122 Cal.App.3d 500 (1981).

48. For an overview, see Rubenstein, *Cases and Materials on Sexual Orientation and The Law* at 808-11 (cited in note 39).

have permitted a gay or lesbian life-partner to adopt a lover's children ("second parent adoptions"), thereby creating numerous families throughout the United States in which children are being raised by two legal parents of the same sex.⁴⁹

Finally, state high courts have issued some of the strongest statements concerning sexual orientation discrimination. California's Supreme Court held sexual orientation discrimination to be a violation of the state's constitution nearly 25 years ago, simultaneously ruling that "coming out" was protected political activity under the state labor code.⁵⁰ And the highest court of the District of Columbia held that sexual orientation discrimination warrants the strictest form of judicial scrutiny, analogizing its protections in D.C. law to those of race discrimination.⁵¹

The careful consideration accorded by state courts in many of these gay rights cases has few federal court counterparts.⁵²

49. See *id.* at 866-74. See generally, Sonja Larsen, *Adoption of Child By Same-Sex Partners*, 27 A.L.R.5th 54 (Lawyers Cooperative Pub., 1995).

50. *Gay Law Students Ass'n v. Pacific Tel. and Tel. Co.*, 595 P.2d 592 (Cal. 1979). See also *Collins v. Faith School Dist. No. 46-2*, 574 N.W.2d 889 (S.D. 1998) (protecting school teacher from dismissal based on discussion of homosexuality); *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969) (holding that teacher could not be fired for homosexual conduct under immorality clause absent some nexus to his job performance). This earlier California ruling has a contemporaneous federal court counterpart in *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

51. *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987). Although the District of Columbia court system is federal in nature, the judges are not Article III judges.

52. Outside the First Amendment arena, there are only a handful of federal appellate court decisions ruling in favor of plaintiffs in gay rights cases since 1977, most of which have emanated from the Ninth Circuit. See *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998) (selective prosecution of lesbian articulates equal protection claim); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (persecution on the basis of sexual orientation in Russia grounds for asylum in the United States); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (anti-gay harassment in high school states equal protection claim); *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994) (Congressional statute bars discharge of gay servicemember on basis of statements alone); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991) (military must articulate rational basis to support anti-gay policy); *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc) (military equitably estopped from discharging openly gay servicemember), cert. denied, 498 U.S. 957 (1990).

The instances in which federal appellate courts have reversed affirmative federal district court decisions are, by contrast, almost too numerous to list. See, e.g., *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996) (reversing district court decision on military issue); *Equality Foundation of Greater Cincinnati, Inc., v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (reversing district court decision striking down Cincinnati ballot initiative); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (reversing panel decision in favor of gay soldier); *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992) (reversing district court decision holding sexual orientation discrimination to be suspect); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (reversing district court decision in favor of gay security clearance applicants); *Rowland v. Mad River Local Sch.*

For example, several years after the Hawaii marriage case, the U.S. Court of Appeals for the Eleventh Circuit upheld the firing of a lesbian attorney by the Georgia Attorney General because she and her partner had a private, religious marriage ceremony.⁵³ After a panel of the Eleventh Circuit had deemed the firing a violation of the attorney's freedom of association,⁵⁴ the full Eleventh Circuit, sitting en banc, reversed. The prime example of the court's disengagement from the constitutional issues at hand can be seen in its dismissal of the plaintiff's equal protection argument: "the record supports no reasonable inference that the Attorney General revoked Shahar's offer because of her sexual orientation—as opposed to her conduct in 'marrying' another woman."⁵⁵

It would be an exaggeration to suggest that state courts have been uniformly supportive of gay rights and federal courts uniformly opposed. The sheer number of state courts,⁵⁶ and the higher proportion of gay-specific cases that end up in state courts,⁵⁷ has led to a host of unsympathetic decisions in those fora.⁵⁸ Moreover, the federal courts, including the Supreme Court in *Romer v. Evans*,⁵⁹ have sometimes accorded protections

Dist., 730 F.2d 444 (6th Cir. 1984) (reversing jury decision in favor of fired bisexual high school counselor), cert. denied, 470 U.S. 1009 (1985); *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc) (reversing district court decision striking down Texas' sodomy law), cert. denied, 478 U.S. 1022 (1986).

53. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 693 (1998).

54. *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), vacated upon grant of reh'g en banc, 78 F.3d 499 (11th Cir. 1996) (en banc).

55. *Shahar*, 114 F.3d at 1111 n.27.

56. As Neuborne recounts, "There are about twice as many trial judges in California as in the entire federal system." Neuborne, 90 Harv. L. Rev. at 1121 & n.60 (cited in note 2).

57. See text accompanying notes 74-80.

58. See, e.g., *Missouri v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (en banc) (affirming constitutionality of state sodomy law); *Opinion of the Justices*, 530 A.2d 21 (N.H. 1987) (affirming constitutionality of ban on gay adoption as rationally related to government interest in limiting number of homosexuals in society); *State ex rel. Grant v. Brown*, 313 N.E.2d 847 (Ohio 1974) (affirming refusal of state official to grant corporate charter to gay organization on grounds that "promotion of homosexuality as valid life style is contrary to the public policy of the state"), cert. denied sub nom., *Duggan v. Brown*, 420 U.S. 916 (1975).

59. 517 U.S. 620 (1996). Though *Romer* is surely an example of a favorable federal court ruling on gay rights, Justice Kennedy's majority opinion is hardly "eloquent and technically precise." Neuborne, 90 Harv. L. Rev. at 1123 (cited in note 2). Various scholars' attempts to divine a general principle underlying the decision are evidence of the ruling's abstruseness. See, e.g., Akhil Reed Amar, Essay, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203 (1996) (arguing that the Bill of Attainder Clause "clarifies and supports" the majority's theory in *Romer*); Daniel Farber and Suzanna Sherry, *The Pariah Principle*, 13 Const. Comm. 257 (1996) (arguing that *Romer*

for pro-gay positions, most notably in the First Amendment cases discussed above.⁶⁰ I also doubt that state courts would handle some gay rights cases, such as the military challenges, any more sympathetically than federal courts have.

Nonetheless, the record just rehearsed supports at least two statements. The federal courts have not proved uniformly more hospitable to civil rights claims. And state courts have not abdicated their responsibilities to civil rights claimants. But more important than the scorecard, the gay rights experience suggests some insights into the institutional competence of state courts not evident in Neuborne's account.

evolves from a "firmly rooted" principle in existing constitutional law that "forbids the government from designating any societal group as untouchable"; Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 Vand. L. Rev. 361 (1997) (providing a normative foundation for *Romer* grounded in democratic theory); Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 Sup. Ct. Rev. 67 (placing the *Romer* decision in the context of debates about judicial activism and arguing that *Romer* is both radical and conservative—like the Warren Court itself).

The same is true of the Court's decision in another case of importance to gay rights advocates, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Though *Oncale*—the victim of same-sex sexual harassment—was not himself gay, his case had the support of gay rights groups who argued that the same-sex nature of the sexual harassment *Oncale* faced should not remove it from the protections of Title VII. See, e.g., Brief of Lambda Legal Defense and Education Fund, et al., *Oncale v. Sundowner Offshore Servs., Inc.*, 1997 WL 471805 (filed Aug. 11, 1997). Though the Court's outcome permits the prosecution of same-sex sexual harassment claims under Title VII, Justice Scalia's opinion sidesteps as many issues as it answers.

My point here is *not* that state courts are more elegant than federal courts. I am simply attempting to cast doubt upon Neuborne's contention that federal courts compose more technically proficient opinions than their state counterparts. Neither *Romer* nor *Oncale* were graceful opinions.

60. See text accompanying note 38. See also *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc) (per curiam) (finding unconstitutional the firing of a public employee for proposed testimony in favor of civil rights for homosexuals, as testimony held to be protected speech not interfering with operation of office); *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir. 1974) (finding that school teacher's media appearances concerning homosexuality were protected speech that did not disrupt his workplace, but upholding his firing on other grounds); *Glover v. Williamsburg Local School Dist. Bd. of Educ.*, 20 F. Supp.2d 1160 (S.D. Ohio 1998) (holding that non-renewal of teaching contract because of sexual orientation violates federal equal protection clause); *Weaver v. Nebo School Dist.*, 29 F. Supp.2d 1279 (D. Utah 1998) (holding that firing of lesbian teacher/volleyball coach violated first amendment and equal protection clause); *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (upholding First Amendment right of male high student school to take male date to prom); *Aumiller v. University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977) (finding teacher's public statements about homosexuality did not disrupt workplace and thus employment safeguarded by First Amendment).

III. SOME NOTES ON THE INSTITUTIONAL COMPETENCE OF STATE COURTS

Neuborne identified three characteristics of the federal bench that, he contended, yielded systematically better results for civil liberties claimants: competence, mindset, and insulation from majoritarian pressures. In the context of gay rights claims, each of these factors favors state courts (or, at a minimum, does not favor federal courts). The state courts' record on gay rights issues thus emerges as a systemic, rather than political, result.

A. TECHNICAL COMPETENCE

Federal courts rarely involve themselves in domestic relations and probate matters. These matters are creatures of state law and are typically litigated in specialized state courts. The predilection for the state forum in these cases is so strong that the U.S. Supreme Court has interpreted Congress' grant of subject matter jurisdiction in diversity cases not to encompass domestic reactions.⁶¹

This jurisdictional limitation insulates federal courts from a primary site at which gay people (as gay people) interact with the legal system: family courts.⁶² Lesbians, gay men, and bisexuals appear in divorces, custody, and visitation decisions, as well as in the growing number of cases involving the formation and dissolution of gay families.⁶³ State judges, particularly family court judges, therefore deal with gay issues on a regular basis in a real world context. A family court judge might be asked to decide whether it is in the best interests of a child to be placed in the custody of a gay or non-gay parent. She has probably heard gay and bisexual people testify about their lives. She may have had to confront and analyze testimony about the nature of homosexuality or about the relationship between sexual orientation and parenting ability. She has had to weigh her biases concerning homosexuality in the trenches. Even if she has not had a gay-specific case, the family court judge regularly makes decisions about what is in "the best interests of the child." Because of the fact-bound nature of such decisionmaking, a state family court judge would appreciate the difficulty of making sweeping pronouncements about parenting abilities.

61. See *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

62. For a fuller discussion, see text accompanying notes 74-80.

63. See generally, Rubenstein, *Cases and Materials on Sexual Orientation and The Law* at 801-918 (cited in note 39).

Given this institutional familiarity, I would generally prefer to argue a case concerning gay parents in a state court than in a federal court. In considering a forum for a constitutional challenge to a statutory ban on gay foster care or adoption,⁶⁴ I would argue for a state trial court over a federal trial court. Such discriminatory state laws act to cabin state trial judge discretion. State trial judges appreciate how much discretion they need in employing the "best interests" standard and they will hardly be shocked that gay people are parents—even parents who often deserve custody or visitation. Make a federal case out of this local family law issue, however, and you risk pulling a panel of federal judges, who, from their "ivory tower"⁶⁵ lack the nuanced instincts necessary to comprehend the values at issue in the case.⁶⁶

I helped to represent an HIV-infected woman in South Carolina in the late 1980s.⁶⁷ She had been incarcerated in the state mental health facility without any due process whatsoever—she was literally picked up off the street by the state health agency and sent to the mental health facility because the health agency feared she was spreading HIV through the sharing of needles and/or prostitution. When called into the case, the ACLU adopted a Neubernian attitude—we filed a habeas corpus petition on behalf of the woman in federal court. In writing the petition, we carefully checked state law and learned that there was no statutory habeas corpus proceeding in the state courts in such a situation, thus arguably making the federal fo-

64. The state of Florida is currently the only state that retains an explicit ban on gay adoption. See Fla. Stat. Ann. § 63.042(3) (1997). The New Hampshire legislature recently repealed its ban. See 1999 New Hampshire Laws Ch. 18 (H.B. 90) (effective July 2, 1999), available in Westlaw, 1999 NH H.B. 90 (SN). Many states have regulations or informal policies making it more difficult for lesbians and gay men to adopt or become foster parents. See Rubenstein, *Cases and Materials on Sexual Orientation and The Law* at 863, n.5 (cited in note 39).

65. Neuborne, 90 Harv. L. Rev. at 1125 (cited in note 2).

66. The New Hampshire Supreme Court's decision on this precise issue, *Opinion of the Justices*, 530 A.2d 21 (N.H. 1987), as well as some decisions from Florida appellate tribunals, *Florida Dep't of Health and Rehabilitative Servs. v. Cox*, 627 So.2d 1210 (Fla. App. 1993) (en banc), aff'd in part and rev'd in part, 656 So. 2d 902 (Fla. 1995), weaken my argument slightly. In these cases, the state appellate courts did not demonstrate the sensitivity I suggest state court judges would. However, this may indicate an institutional distinction between appellate and trial courts more than it confirms a similarity between federal and state courts. Moreover, the primary point of my argument is that in forum shopping, litigants ought not automatically favor a federal tribunal. That particular state courts do not perform ideally in particular cases does not undermine the thrust of this thesis.

67. A fuller rendition of the case appears in William B. Rubenstein, *Law and Empowerment: The Idea of Order in the Time of AIDS*, 98 Yale L.J. 975, 984-86 (1989).

rum our only choice. Upon arriving at the federal court (in Columbia's Strom Thurmond Courthouse) on the day of the hearing, we were confronted by a Reagan-appointed federal district court judge who wanted nothing to do with the case. Notwithstanding the obvious federal constitutional violation by state officials, the federal judge refused to act, directing us to the state courts to exhaust non-existent state court remedies. So far, this story may show nothing more than a Neubernian bias by the civil liberties lawyers and a conservative bias by the federal court.

But what happened next is telling: upon crossing the street to state court, we were assigned to a state judge with an entirely different reaction. He was appalled that the state would have acted in such a flagrantly unconstitutional manner. Had we met a politically liberal judge? Perhaps, but more pertinently, we had met a judge who handled competency proceedings on a regular basis—he knew the statutory requirements for due process in these situations and appreciated the gravity of the state's error. Arguably a more liberal federal jurist would have been equally responsive, but the enormity of the disparity between what was legally required and what was actually done in the particular case was far more palpable to the jurist seasoned in these cases.

Neuborne appreciated the precise distinction I rely upon here, but drew a different conclusion from it: he described the day-to-day experiences of state judges as "cynicism-breeding," fearing that they "foster a jaded attitude toward constitutional rights."⁶⁸ Federal judges, Neuborne opined, because of their distance "from the pressures and emotions generated by the application of constitutional doctrine" are more likely to produce "a generous reading and vigorous enforcement of constitutional rights."⁶⁹ The story I tell here challenges this assumption. It certainly does not prove that all state judges are better situated to approach civil rights cases. But it does suggest that day-to-day experiences can breed institutional advantages, as well as disadvantages.⁷⁰

68. Neuborne, 90 Harv. L. Rev. at 1125 (cited in note 2).

69. *Id.* at 1125.

70. See also, Bator, 22 Wm. & Mary L. Rev. at 634 (cited in note 7) ("The elitism of the federal bench, its distance from much of the daily grind of the administration of justice, its specialization—all of these are advantages, but they are disadvantages too.")

B. PSYCHOLOGICAL SET

There are several characteristics of state judges—that they may more regularly interact professionally with gay people, that they are at the same level in our federal structure as their legislative counterparts, that their decisions are geographically bounded, and that there are a lot of them—which together create significant opportunities for civil rights lawyers. (Utilizing Neuborne's terminology, I will refer to these attributes of state judges as their "psychological" set, though neither of us utilize that term in a clinical fashion.)

First, as to familiarity: state courts' interactions with lesbians and gay men not only give them substantive expertise that might make them institutionally better situated to rule favorably for gay people. Such interactions also breed familiarity with lesbians, gay men, and bisexuals. One would hope that familiarity would in turn produce tolerance, if not acceptance, and hence lead to more favorable outcomes. This point is slightly different from the first point: there I suggested that a state judge's general familiarity with family law might make her more understanding of the problems of gay discrimination in that setting. Her background might provide this substantive advantage because she has actually heard gay cases. But whether she has or not, she appreciates the general subject matter area in a way a federal judge may not. My point in this sub-section is more gay-specific: here I mean to suggest that state judges are more likely to have encountered and dealt professionally with gay people themselves. And I assume that such personal interactions make bias less likely.

A few examples will help illuminate the point. When, in the late 1980s, the ACLU embarked on an effort to challenge the constitutionality of Florida's ban on homosexual adoption, we considered the various fora in which such a case might be lodged. One axis of decisionmaking pitted the state courts (trial and appellate) against the Florida federal district courts, Eleventh Circuit, and Supreme Court. Within each system, there were also geographic distinctions to consider. After selecting the state court system, we lodged an initial action in the state judicial district encompassing Key West, Florida. Our hypothesis, proven correct,⁷¹ was that a state judge in Key West would have

71. See *Seebol v. Faire*, No. 90-923-CA-18 (16th Judicial Circuit, Monroe County, Florida, Mar. 15, 1991) (holding state law unconstitutional). Because the state did not appeal this decision, its affirmative outcome was isolated to Monroe County. The deci-

a familiarity with gay people that would work to our client's favor in the case. When New York's high court ruled in 1989 that a gay couple was the legal equivalent of a family,⁷² the court was split into three camps—a plurality of three, a concurrence, and two dissenters. All three of the judges in the plurality (Titone, Kaye, Alexander) were from New York City, as was the concurring judge (Bellacosa), while both dissenters (Simons, Hancock) were from upstate.⁷³ Each of these examples involves geographical comparisons among state court judges—not between state and federal court judges—but the examples nonetheless demonstrate my general point: that a judge's familiarity with gay people might affect her sympathies. It follows that if state judges are institutionally situated so as to interact with gay people more often than federal judges, then they might systemically have less bias in gay cases.

I would guess that the three primary ways gay people interact with the legal system in which their sexual orientation might be put at issue is in family law cases;⁷⁴ criminal cases;⁷⁵ and as jurors.⁷⁶ Because of this fact, state judges in their judicial capacity are far more likely to have dealt, in a professional environment

sion is reprinted in William B. Rubenstein, ed., *Lesbians, Gay Men, and The Law* 517-22 (New Press, 1993).

72. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989).

73. Chief Judge Wachtler had recused himself.

74. Family law cases constitute, by far, the largest category of reported case law concerning gay people, a fact that is striking in that family law cases are infrequently reported. Yet as a person's sexual orientation is not generally visually identifiable, it is understandable that it would emerge as an issue most often in the area of law most intrusive into the personal realm.

75. Men with same-sex sexual desires have long been a subject of the criminal law. See generally, Nan D. Hunter, Sherryl E. Michaelson, and Thomas B. Stoddard, *The Rights of Lesbians and Gay Men: The Basic ACLU Guide to a Gay Person's Rights* 118-31 (1992). Police throughout the United States have traditionally arrested men for engaging in sexual activities in quasi-public places. Whether or not these men claim a gay sexual identity (many are married), their activities bring their sexuality to the regular attention of local state prosecutors, defense attorneys, and judges.

More recently, criminal justice agencies have been charged with collecting statistics on sexual orientation-related hate crimes. See Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990). These agencies have had to develop policies for the reporting and handling of anti-gay bias.

76. A person's sexual orientation can emerge in the jury box either if it has some relevance to the case at hand or if the basic voir dire questions provoke information relating to it. See generally, Paul R. Lynd, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 U.C.L.A. L. Rev. 231 (1998). When I served on a civil jury in San Francisco, I was asked to stand in open court and describe where I lived, with whom, and whether I was married. In responding to these questions, my sexual orientation was revealed (as was that of a number of other gay men and lesbians in the pool, as well as that of many married and unmarried heterosexuals).

and in a professional manner, with lesbians and gay men.⁷⁷ Moreover, many of these state judges are former state prosecutors. They are more likely to have encountered lesbians and gay men in routine local criminal cases or in hate crimes statistic collection than would their federal counterparts, many of whom spent their careers prosecuting federal crimes or representing corporate clients. Often, state judges are local political figures. As such, they probably have responded to a myriad of gay issues and interacted with gay (and anti-gay) political groups. Finally, many state judicial ethics codes bar bias on the basis of sexual orientation while the federal code of judicial ethics does not.⁷⁸ And state court systems have taken a tentative lead over their federal counterparts in studying bias on the basis of sexual orientation in the profession and at the bar.⁷⁹ These developments add to the mindset of the state jurist an aspirational edict that gay people be treated fairly in the courtroom.

All of these institutional differences suggest that many state court judges will have a familiarity with lesbians and gay men and with gay issues not necessarily shared by their federal counterparts.⁸⁰ That familiarity might tend to make gay people less exceptional and gay rights cases less shocking to state courts than to federal courts.

A second aspect of the state judge's psychological set that renders her institutionally preferable to a federal court concerns

77. There are also more openly-gay state judges than the single openly gay federal judge. See William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias In the Legal Profession*, 8 U.C.L.A. Women's L.J. 379, 401-2 (1998). Cf. Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and The Federal Courts, 66 N.Y.U. L. Rev. 1682, 1698 (1991) (arguing that the "less visible relationship between women and the federal courts is supported by pervasive ideological, legal, and sociological assumptions and actions").

78. See Jennifer G. Brown, *Ethics and Equal Protection: Anti-Bias Rules as an Imperfect Substitute for Heightened Scrutiny* (1999) (unpublished manuscript, on file with author).

79. See generally Rubenstein, 8 U.C.L.A. Women's L.J. (cited in note 77). Judith Resnik makes a similar point about the relationship between the federal and state courts regarding gender bias:

Those who governed the state courts developed a sense of urgency about the relationship of courts to women. After inquiry, many state task forces concluded that women were "denied credibility" in courts and faced "a judiciary underinformed about matters integral to many women's welfare." Yet that urgency to study bias against women was not shared by those who governed the federal courts.

Resnik, 66 N.Y.U. L. Rev. at 1690 (cited in note 77) (footnotes omitted).

80. This conclusion cries out for a further exploration of the ways in which lesbians, gay men, and bisexuals might become more visible in the federal courts. Compare Resnik, 66 N.Y.U. L. Rev. at 1700-29 (cited in note 77) (discussing "women's places in 'the federal courts'").

her relationship to her state legislature. No matter what forum they select, plaintiffs in constitutional cases face an enormous countermajoritarian hurdle when asking a court to set aside a legislative enactment. But plaintiffs who pursue such a challenge to a piece of state legislation in federal court double their burden—they complicate the separation of powers concern with a federalism concern. Now they are not only asking a judge to reverse a legislative enactment, they are asking a *federal* judge to reverse a *state* legislative enactment. The federal courts' sensitivity to this concern, only heightened during the Rehnquist era, suggests that state judges have one less institutional barrier when reviewing state legislative enactments than do their federal counterparts.

The fact that a state court is reviewing state legislation or executive action suggests yet another institutional advantage—the consequences of its decision are geographically bounded. Plaintiffs' attorneys might prefer a victory in federal court on federal constitutional grounds as it would have wider effects. The opposite outcome in *Bowers v. Hardwick* would, for example, have eliminated sodomy laws throughout the United States in one decisive swoop. But for that very reason, federal judges may be more hesitant in their rulings.

A final advantage of state courts is that the sheer quantity of state judges suggests, in a country as diverse as ours, that the opportunities for exceptional positions are greater. Only one state supreme court has ever accepted the notion of same-sex marriages, the decision was rendered by only three judges, and it cut against a large body of contrary case law. Nonetheless, the Hawaii Supreme Court's decision in *Baehr* constituted a momentous turning point for the gay rights movement.⁸¹ Neuborne notes that the federal bench is drawn from a "homogenous" socioeducational class, one he believes makes federal judges more apt to be protective of constitutional values.⁸² Yet that very homogeneity restricts opportunities for exceptional, even deviant, pronouncements. For a small and relatively new social movement, securing outlying but affirmative rulings may be more productive than attempting to secure an unattainable national consensus. A single court ruling can make the previously unthinkable suddenly real.

81. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

82. Neuborne, 90 Harv. L. Rev. at 1126 (cited in note 2).

C. MAJORITARIAN PRESSURES

Neuborne argued that majoritarian pressures worked against civil rights and that federal courts, best insulated from such pressures, would best protect civil liberties.⁸³ This is too simple a picture. Majoritarian pressures on state courts can often make these courts more—not less—institutionally responsive to minority claims.

True, the need to be reelected sometimes requires judges to trim their legal sails to the prevailing winds.⁸⁴ But political processes are typically far more complicated. For those running for office, voters, not “public opinion,” is what counts. In areas where a minority group has some political presence, a judge might need to solicit the support (or at least ensure against the opposition) of that minority, even though it is only a minority. If the concern about majoritarian pressure is that judges will decide cases to get votes, in some places state judges might decide cases with an eye towards gay voters.⁸⁵

83. See also Redish, 36 U.C.L.A. L. Rev. at 333-38 (cited in note 26) (“Can one realistically suggest that we can trust the independent judgment of [elected state judges] in cases challenging the constitutionality of state action?”).

84. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386-87 (1821), Chief Justice Marshall expanded on this concept, noting that “In many States the judges are dependent for office and for salary on the will of the legislature. . . . When we observe the importance which [the Constitution] attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist.” But as defenders of state courts point out, the premise is refuted by the many counter-majoritarian decisions state courts routinely make. See generally, Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L.J. 227, 248-49 (1972).

85. I am indebted to my colleague Dan Lowenstein for pointing out that this proposition would be especially likely in situations in which an issue would be visible enough to be noticed by gay people (or at least politically-active gay people), but not so highly visible as to attract the attention and interest of the public generally. Some gay-specific family law issues would seem to fit into such a category. Openly gay people might well be aware of a local judge’s record in custody or visitation cases or in granting second parent adoptions to gay parents. At the same time, the general public would probably not even be aware of the existence of such issues.

This is not to suggest, as does Justice Scalia without any empirical support, that because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.

Romer v. Evans, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting) (citations omitted). My contention is far narrower: that in certain carefully defined situations, a discrete and insular minority group might have more political power on a local level than would conventionally be expected and thus might occasionally benefit rather than suffer from an elected judiciary. See generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985) (arguing that “anonymous and diffuse victims of poverty and sexual discrimination” may be more worthy of judicial protection from majority rule than discrete and insular minorities).

Second, this political point has a significant corollary—state judges hobnob with local political groups, particularly local bar groups, while their federal counterparts have no need to. The annual dinners of local gay bar associations can become bogged down by the recognition of each state court judge in attendance. The judges are there, in part, to keep their electoral fences in order. They may also be there because they desire the backing of the constituent bar association as they ascend the ranks of the state judiciary. Sometimes they are there simply because they are politicians and this is what politicians do. But no matter why they are there, once they are there, they become more informed about the gay community, including its issues, its leaders, and its lawyers. Whether this translates into favorable judicial rulings or not, it ought to contribute to familiarity with gay people that would make extreme anti-gay legal rulings less likely.⁸⁶

Third, federal judges' insulation from political developments can be harmful if political trends are developing in ways that are helpful to one's cause. Life tenure implies less turnover and may translate into an older federal judiciary. With an emerging social group like lesbians and gay men, it is likely that younger judges will harbor fewer unreflective biases. In one of the gay-related military challenges, a federal district court judge referred to the plaintiff as a "homo."⁸⁷ It is not surprising to learn that the judge was in his 80s at the time. That judge would be unlikely to be sitting on a state court bench.

Lesbians and gay men do not constitute a significant voting bloc. They might therefore be at great disadvantage in a system of elected judges. But gay issues are rarely the direct subject of judicial elections. The highest profile example of such an election concerned the removal of a Texas state court judge after he made anti-gay comments in sentencing the killers of a gay man.⁸⁸ State judicial candidates may well reflect the general attitudes of their constituents, but it is difficult to identify directly negative consequences to gay people flowing from the fact that state judges are often elected.⁸⁹ Against this presumption must be

86. See Part III(B).

87. For reference to the incident, see *Steffan v. Aspin*, 8 F.3d 57, 60 (D.C. Cir. 1993).

88. See *Anti-Gay Dallas Judge Wins Another Term*, Seattle Times A2 (Mar. 15, 1990), available at 1990 WL 3203101.

89. Indeed, it is rare that any political issue affects the re-election of state court judges, who are retained by voters about 98-99% of the time, hence "judges rarely decide cases with an eye to electoral review." Erwin Chemerinsky, *Federal Courts, State Courts, and The Constitution: A Rejoinder to Professor Redish*, 36 U.C.L.A. L. Rev. 369, 372

weighed the positive consequences of judicial elections outlined above⁹⁰ and the fact that federal judicial appointments have brought us anything but a civil rights-friendly judiciary.

IV. IMPLICATIONS

Pro-gay litigants have met with surprising success in state courts in the past decades. The sodomy law cases, coupled with the Hawaii marriage decision and some related family law cases, suggest that state courts can be hospitable fora for civil rights cases. I have suggested that the gay rights experience highlights some *institutional* strengths of state fora—substantive expertise, human familiarity and a psychological set receptive to constitutional challenges, and a sensitivity to political change. I draw no conclusions from these observations whatsoever about how Congress or the Supreme Court ought to allocate cases between state and federal courts. The conclusion I do draw is that civil rights attorneys generally should do what gay rights attorneys specifically have done: abandon an automatic presumption in favor of federal courts and weigh the available opportunities in state courts in light of this history.

Although this account provides a more complicated picture of forum selection decisions than Neuborne drew in 1977, several qualifications must be noted. First, I have somewhat elided the distinction between federal constitutional claims and state constitutional claims. In its purest form, the parity debate concerns whether state courts can be trusted to enforce federal constitutional rights. Most of the pro-gay state court rulings that I discuss have relied on state constitutional (and non-constitutional) norms. In this sense, the story I tell here might simply serve as proof of the importance of state constitutions, an

(1988); see also *id.* at 371 n.7 (citing studies demonstrating that judges are generally retained about 98-99% of the time). Chemerinsky states generally:

Electoral accountability only undermines state judicial independence if state court judges fear that voters will use their decisions as the basis for casting their votes. But how many cases are of sufficient visibility to influence voters? Realistically, it is unlikely that many cases are decided differently because of fear of voter rejection at the next election. In fact, it appears that few voters are able to distinguish between judges in retention elections.

Chemerinsky, 71 B.U. L. Rev. at 599 (cited in note 5) (footnote omitted). For a sympathetic review of the social science literature, see Solimine & Walker, 10 Hastings Const. L.Q. at 230-32 (cited in note 9).

90. It might seem contradictory that elected judges associate politically with gay groups even though their retention hinges little on these groups' acceptance. Yet many of these judges seek to move up through the ranks of the state judiciary, an ambition which can be influenced by organized bar groups.

argument made by Justice Brennan in the same volume of the Harvard Law Review as Neuborne's *Myth of Parity*.⁹¹ But there is an inherent tension between the Brennan and Neuborne theses—it is unlikely that state courts would simultaneously be sympathetic to state constitutional arguments and unsympathetic to federal constitutional arguments.⁹² Hence even if the relatively positive experience of pro-gay litigators in state courts does not directly contradict Neuborne's thesis, it nonetheless significantly weakens it.

I have made a second noticeable adjustment to Neuborne's thesis to make my point: Neuborne wrote primarily of federal civil liberties claims, while I have discussed issues that primarily concern civil rights and family law. On civil liberties issues involving gay people—e.g., First Amendment claims—the federal courts have been remarkably solid, as Neuborne suggested they would be.⁹³ But from this I draw an important conclusion: if federal courts enjoy an institutional advantage with regard to civil liberties issues, perhaps state courts have some institutional advantages in safeguarding group rights when equality claims are involved.⁹⁴ Why would this be the case?⁹⁵ Liberty claims, for ex-

91. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). See also Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Texas L. Rev. 1141 (1985); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St John's L. Rev. 399 (1987); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980). The fact that a number of landmark federal constitutional decisions were long pre-dated by state constitutional rulings provides further proof of the importance of state constitutions. Thus, for example, the California Supreme Court struck down the state's miscegenation laws in 1948, *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), nearly 20 years prior to the United States Supreme Court's ruling in *Loving v. Virginia*, 388 U.S. 1 (1967).

92. But see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (rejecting federal constitutional privacy challenge to prohibition on same-sex marriage while accepting state constitutional equal protection challenge).

93. See text accompanying notes 38 & 60.

94. It is interesting to note that Solimine and Walker's empirical survey found a similar disparity. In civil cases, federal courts upheld First Amendment claims 53.8% of the time, while state courts upheld such claims only 40.3% of the time. By contrast, in civil cases, federal courts upheld Fourteenth Amendment claims 32.8% of the time, while state courts upheld such claims 28.7% of the time. see Solimine & Walker, 10 Hastings Const. L.Q. at 243-44 (cited in note 9). Federal courts had a slight advantage in both instances, but a statistically significant advantage only in the First Amendment arena. Though I make this observation about their data, I would not defend Solimine and Walker's methodology in light of later critiques. See, e.g., Chemerinsky, 36 U.C.L.A. L. Rev. at 261-69 (cited in note 7). But see Michael E. Solimine and James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 Harv. J.L. Pub. Pol'y 127 (1989) (responding to critics).

95. Cf. Bator, 22 Wm. & Mary L. Rev. at 631-32 (cited in note 7) (asking whether federal judges are superior to state judges on questions of civil liberties only, and not,

ample free speech claims, are often brought on behalf of iconoclastic individualists undertaking provocative acts. Neuberne makes a strong argument that the insulation and scholarly tradition of federal judges may make them more intellectually responsive to such claims. Equality claims, however, are brought on behalf of social groups. In the case of gay people, the social group is widely dispersed throughout the population, is organized electorally in some geographical areas, and reappears regularly in certain portions of the legal system. The repeat nature of gay issues in family courts may create institutional advantages in state courts.⁹⁶ Moreover, the imbeddedness of the gay rights struggle in on-going political processes creates opportunities in, as well as disadvantages from, elected state fora. State judges not only handle gay issues and interact with gay people more often than federal judges, but, perhaps most importantly, these interactions are often at a deeper and more meaningful level of engagement than those between gay people and federal judges. A federal judge ruling on a first amendment claim is engaged in an abstract intellectual enterprise. A family court judge ascertaining the best interests of a child has her hands in the guts of day-to-day gay family life. The opportunities for pro-gay societal change may be much greater in such settings.⁹⁷ These factors distinguish the equality plight of lesbians and gay men from the liberty concerns of random individualists.

The argument suggests that state courts have the potential to be more hospitable to group claims if the group at issue enjoys certain critical organizational characteristics: if legal issues central to the group are regularly litigated in state courts and if group members are electorally organized and are able to utilize the ballot box. If I am correct, these criteria would help explain the disparate experiences of civil rights litigators and women's

perhaps on other constitutional questions).

96. See generally Marc Galanter, *Why The "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & Soc'y. Rev. 95 (1974).

97. Following the intellectual lead of Michael J. Sandel, see *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521 (1989), a number of scholars have recently argued that pro-gay advocates should engage in, rather than bracket, moral forms of argument in legal discourse. See, e.g., Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237 (1996); Carlos A. Ball, *Moral Foundations For a Discourse On Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 Geo. L.J. 1871 (1997). See also Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 Stan. L. Rev. 45 (1996); Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643 (1993). The types of issues litigated in state courts may afford such opportunities more easily than do the abstract legal principles with which federal judges are, conventionally speaking, most comfortable.

rights supporters in state courts. Blacks in the South in the 1950s were systematically denied the opportunity to vote, not permitted to organize politically, and were disproportionately poor and unable to influence judicial elections. Women appear regularly in family law cases in state courts, vote in high numbers, and are widely dispersed throughout the socio-economic strata. Judith Resnik has suggested that these types of factors help explain why state courts have responded more quickly to issues of gender bias than have the federal courts.⁹⁸ These criteria can also help explain why, and when, state courts have an institutional advantage with regard to group-based equality claims, similar in nature to federal court superiority regarding liberty claims.⁹⁹

While my experience leads me to qualify Neuborne's assessment of institutional advantages, both of our conclusions need to be further qualified: We must ask when and whether such institutional factors outweigh straightforward political considerations. Whatever their alleged institutional advantages, the federal courts have proved unsympathetic to a wide variety of civil liberties and civil rights concerns because of the political ideology of those who have appointed and confirmed federal judges for the past several decades. Similarly, gay litigants may have had more success in state courts recently not because of the institutional factors I spell out here, but simply because the judges in these fora reflect a broader ideological spectrum.

Given the complicated mix of institutional competence, political orientation, and other forum selection factors,¹⁰⁰ I would not suggest that my argument be read as an inevitable presumption in favor of a state forum in civil rights cases generally, or in gay cases specifically. A litigator would be remiss were she to abandon a careful analysis of both the political character and the institutional characteristics of the forum choices available. I can imagine many situations in which I would prefer a particular federal court to a particular state court.¹⁰¹ In making this analysis in the future, though, I hope litigators will take into account the institutional advantages of state courts discussed in this article.

98. Resnik, 66 N.Y.U. L. Rev. at 1683-1700 (cited in note 77).

99. See generally Donald J. Farole, Jr., *Interest Groups and Judicial Federalism: Organizational Litigation in State Judiciaries* (Praeger, 1998) (on the role of interest groups in rights litigation).

100. For example, a litigator might select a particular forum because of the speed with which her claims will be addressed; if this is a primary concern, it could trump ideology or institutional competence in certain circumstances.

101. See generally Chemerinsky, 71 B.U. L. Rev. at 605 (cited in note 5).

If in so doing, they abandon an inevitable presumption in favor of federal fora, I will have accomplished my goal.¹⁰²

V. CONCLUSION

The federal courts have hardly provided a haven from discrimination for lesbians, gay men, and bisexuals during the past quarter century. Conversely, state courts have reached some rather remarkable results in gay rights cases. The superficial explanation for this disparity lies in the character of the judges appointed by Ronald Reagan and George Bush. In this piece I have attempted to explore the possibility of a more subtle explanation: namely, that state courts might enjoy some institutional advantages in the resolution of civil rights claims. The exploration leads me to urge civil rights litigators generally to abandon a rebuttable presumption in favor of federal courts and to consider the possibility of a rebuttable presumption in favor of state courts. Such a conclusion may seem heretical, as the superiority of federal courts has been a sacred tenet of civil rights litigators for decades, handed down from generation to generation. But, to paraphrase Holmes, civil rights lawyers' notions about forum selection cannot persist from blind imitation of the past.¹⁰³

102. Apologies to Kenji Yoshino, from whom I learned how to conclude an article. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 Yale L.J. 485, 571 (1998).

103. O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) (stating that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").