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The Burger Court continues to remind us that our federal system is alive and well.[1] The states are not political anachronisms which merely impede the progressive nationalization of the court system and the law. State territorial boundaries reflect truly sovereign borders, not just convenient administrative divisions. Admittedly, federal law governs more areas of conduct than before, and federal adjudicative jurisdiction has expanded accordingly. In addition, the increased mobility of citizens and capital renders state lines less important as a practical matter. Still, we are told, these trends do not spell the demise of state sovereignty or the complete centralization of legal institutions and power.

The Court's increased attention to issues of federalism and state sovereignty has potential consequences in at least two separate doctrinal areas: federal jurisdiction and the conflict of laws. Most of the Court's sovereignty decisions have occurred in federal jurisdiction, where deference to "state sovereignty" has meant limiting the federal courts' perceived intrusiveness into state prerogatives. In conflict of laws, "state sovereignty" means restricting the opportunities of one state to disregard legitimate concerns of the others.[2] In both contexts, restrictive jurisdictional doctrines reduce the opportunity of one party to choose, at the expense of an alternative forum and its legitimate interests, the law and courts of the most advantageous forum. The effort to restrict litigant choice is often grounded either in the need to reduce forum shopping or simply in terms of comity and deference to the interests of the alternative state.

Although concerns for comity and the prevention of forum shopping are potentially as relevant between states as between a

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1 *E.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (despite growth in economic interdependence of states, state lines are still relevant for jurisdictional purposes); Younger v. Harris, 401 U.S. 37, 44 (1971) ("Our Federalism" requires that national government vindicate federal rights and interests without undue interference with a state's legitimate activities).

2 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 286, 292 (1980).

state and the federal government, these themes have not received equally serious treatment in the two contexts. In the federal/state arena, forum shopping is treated as a serious threat to relations between the superior sovereign and the inferior ones. In the Burger Court's view, deference to state interests requires strict limits on such activities.[3] Any differences in fora that might encourage forum shopping must be eradicated. To the extent that differences remain, litigants are denied choice and routed strictly to one forum or another.

In conflict of laws a more freewheeling attitude prevails. Although the Court speaks the language of state sovereignty,[4] its decisions permit virtually complete disregard of the interests of the other states. Forum shopping is a natural and permissible activity of all shrewd litigants. Variation amongst results is treated tolerantly, and by judicious choice of forum the moving party may choose amongst these various results. Indeed, "a plaintiff's choice of forum should rarely be disturbed."[5] This difference in the seriousness with which state sovereignty is treated raises an interesting question. Does the Burger Court believe that a particular state court is really more threatened by competition from a federal court than by competition from another state? If so, why? Perhaps because of academic specialization, the different meanings of comity in the two doctrinal areas have escaped notice and critique. Certainly the Court's opinions in these areas have not discussed the comparison.

This article examines why state sovereignty has been defined and viewed differently in these two facets of the federal system. We first examine four doctrinal issues which arise in both federal jurisdiction and conflict of laws: adjudicative jurisdiction, enforcement of judgments, sovereign immunity, and choice of law. The litigant's range of choice in these four areas is narrowly circumscribed in federal/state relations, but expansively interpreted in state/state relations. Themes of comity and state sovereignty arise in both areas, but are only taken seriously in the competition between federal and state courts. In effect, a federal court must defer to an alternative state forum in cases where another state need not.

We then discuss how this differential treatment might have evolved. To a certain extent, differential treatment may be justifi-

3 *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 104 (1980) (collateral estoppel effect given to state court judgment on federal constitutional issue; no universal right to litigate federal claim in federal district court); Younger v. Harris, 401 U.S. 37, 44-45 (1971) (federalism normally prevents federal court from enjoining pending state court proceedings).

4 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 286, 292 (1980).

5 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)).

able. At other times it results simply from shifting coalitions in opinions. This explanation may absolve particular Justices of any charges of inconsistency[6] but is hardly fortunate for legal doctrine. On occasion, its legitimacy seems highly doubtful. It may be, for example, that requiring a federal court to defer to a state court in instances when another state court need not defer is motivated by purely political concerns. The reason may be merely a preference for state courts over more liberal lower federal courts for the adjudication of civil rights cases.

While political motivations are very likely at work, we argue that the stringent restrictions on forum shopping in the federal/state context may be viewed more accurately as a reactive effort to cope with the unanticipated problems that the myth of federal/state court parity creates. The myth has both a procedural and a substantive aspect: It tells us that a federal and a state court are equally adept at the process of adjudicating issues of federal law and that therefore they will arrive at the same substantive results. Yet the two court systems do produce different results, and we believe that some differences may be structurally defensible. So long as formal jurisdictional theory denies these differences, however, it cannot address them. The end result is the worst of both worlds: We can neither make the two systems converge nor deal with their inevitable divergence rationally.

I. Protecting State Sovereignty in the Supreme Court: Doctrine

A. *Adjudicative Jurisdiction*

Interjurisdictional competition is perhaps most evident in the context of adjudicative jurisdiction. Federal jurisdiction and conflict of laws problems relating to adjudicative jurisdiction have a common structure. The moving party (usually the plaintiff, but occasionally the defendant as in removal cases)[7] has selected a forum (the "chosen forum"). The protesting party has an alternative forum in mind. The question is the extent to which the chosen forum must invalidate the moving party's forum choice and relinquish jurisdiction out of deference to the preferences of the protesting

6 For example, Justice Rehnquist and Chief Justice Burger are generally consistent in restricting forum shopping in both the state and federal contexts. They favored limiting jurisdiction in Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Allen v. McCurry, 449 U.S. 90 (1980); Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); and Nevada v. Hall, 440 U.S. 410 (1979). Justice White has been only slightly less consistent. Justices Brennan and Marshall were also consistent; they favored expanding forum power in each of these instances.

7 We also choose this terminology because the moving party may be both a plaintiff in one case and a criminal defendant in simultaneous state court litigation.

party and to the interests of the alternative forum in adjudicating the case.

In the federal/state situation, the chosen forum is a federal court and the alternative forum a state court. The would-be forum shopper presses to make the federal courts more generally available. This jurisdictional claim occurs primarily in the civil rights context, particularly when a criminal defendant challenges state law as violative of federal constitutional rights. Despite the apparent satisfaction of statutory jurisdictional criteria, however, the Court has increasingly restricted the civil rights plaintiff's choice of a federal forum and has urged aggrieved individuals to litigate in state court.

Because the history of this problem has been so adequately documented elsewhere,[8] we discuss the doctrine only briefly for the limited purpose of comparing it to the conflict of laws. The Supreme Court interpreted "Our Federalism" in *Younger v. Harris*.[9] *Younger* held that a federal court may not enjoin a state criminal prosecution on the ground of federal unconstitutionality unless the threatened injury is irreparable, great, immediate, and cannot be prevented by a defense against a single criminal prosecution. The Court invoked the principle that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[10] Comity protects the state against surrendering its control over its criminal laws to the federal court's judgment about their constitutionality. In effect, the defendant would have to raise any federal constitutional defense as a defense to the state prosecution. The defendant could not shop for a federal forum in presenting federal constitutional defenses despite the fact that jurisdiction was concededly authorized by the relevant statutory provisions;[11] such a practice would disturb state proceedings.

Since *Younger*, the Court has extended the ban on choice of forum in criminal proceedings brought by the state to include a variety of pending state civil proceedings. *Samuels v. Mackell*[12] denied

8 *See, e.g.*, Laycock, *Federal Interference With State Prosecutions: The Need For Prospective Relief*, 1977 SUP. CT. REV. 193, 193-97; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1117-18 (1977); Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59, 63-81 (1984); Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1020-39.

9 401 U.S. 37 (1971).

10 *Id.* at 46.

11 *Id.* at 40-41. The Court apparently assumed that the federal court had statutory jurisdiction, but held that the national policy against federal injunctions of pending state court proceedings deprived the federal court of power to enjoin enforcement of the statute at issue.

12 401 U.S. 66, 73-74 (1971).

federal declaratory relief to the defendants in a New York prosecution under a criminal anarchy statute. The Court reasoned that a declaratory judgment, as much as an injunction, would frustrate the basic policy against federal interference with state prosecutions. This reluctance to interfere has also extended to a state's appellate proceedings, which the defendant must exhaust despite his belief that chances of success on appeal are inauspicious. *Huffman v. Pursue, Ltd.*[13] decided that the litigant's attempted move into federal court was "a direct aspersion on the capabilities and good faith of state appellate courts."[14]

The trend continued in *Juidice v. Vail*,[15] in which the Court refused to allow a district court to enjoin state contempt proceedings authorized by statute for disobedience of a court-sanctioned subpoena. The state's interest in the contempt process, like the criminal proceeding in *Younger* and the quasi-criminal proceeding in *Huffman*, was sufficiently important to fall within the principles of *Younger*. *Younger* has also been applied to halt a federal suit seeking an injunction against enforcement of a state obscenity statute once state criminal proceedings had commenced,[16] and to bar federal interference in a civil action seeking return of welfare payments.[17] Once again, the Court was concerned about disrupting suits by the state in its sovereign capacity and about "the negative reflection on the state's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding."[18] The *Younger* doctrine has also been applied to a state agency's civil suit for emergency protection of children against parental abuse.[19]

The "comity" theme cannot be explained in terms of avoiding duplicative litigation.[20] That explanation of judicial economy, standing alone, should not render irrelevant those jurisdictional statutes that clearly vest concurrent jurisdiction.[21] Moreover, com-

13 420 U.S. 592 (1975).

14 *Id.* at 608.

15 430 U.S. 327, 338-39 (1977).

16 Hicks v. Miranda, 422 U.S. 332 (1975).

17 Trainor v. Hernandez, 431 U.S. 434 (1977).

18 *Id.* at 446.

19 Moore v. Sims, 442 U.S. 415 (1979).

20 The *Younger* line of cases did not rely on any of the federal jurisdictional statutes that address the problem of duplicative litigation. The Anti-Injunction Act, 28 U.S.C. § 2283 (1982), for example, was held inapplicable to § 1983 actions in Mitchum v. Foster, 407 U.S. 225 (1972).

21 The Supreme Court carved out another nonstatutory exception to the federal courts' exercise of concurrent jurisdiction in Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976), and Arizona v. San Carlos Apache Tribe of Arizona, 103 S. Ct. 3201 (1983). Statutes authorized federal jurisdiction over suits by the United States and by Indian tribes, the plaintiffs in these cases, and federal substantive law governed the extent of federal and Indian reserved water rights. The Court nevertheless required federal courts to defer to state court proceedings. One dissent in *San Carlos Apache* castigated the Court's

ity is not limited to situations in which a state court proceeding is pending. Even when the state has not yet initiated either a criminal or a civil proceeding, the prospective defendant is not entirely free to choose a federal forum in which to raise his federal constitutional claims.

One example of a restriction on federal court jurisdiction where no state proceeding is pending is *Fair Assessment in Real Estate Association v. McNary*,[22] in which the Court denied jurisdiction over a section 1983 action challenging the constitutionality of the administration of a state tax system. While recognizing that section 1983 did not require exhaustion of state remedies as a prerequisite to federal jurisdiction, the Court nevertheless held that comity barred the suit. The principle of avoiding interference with the state's fiscal operations was implicated even though no injunction or declaratory judgment was sought. Before section 1983 damages could be awarded, the court would have to declare that the tax system violated constitutional rights, an intrusion into the state's fiscal affairs. Regardless of the outcome, the very pendency of the suit would disrupt the state's revenue collection system. The Court observed that the nonexhaustion requirement for a section 1983 action, if applied to this case, would exacerbate the intrusiveness. Taxpayers "would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety."[23] Comity dictated that the taxpayers' rightful remedy was in state court, with ultimate review to the Supreme Court.

The emerging trend is easy enough to discern: deference to the alternative state forum. Turning our attention to the other federalism context, however, we find a contrary development. In the state/state context, the Supreme Court has ostensibly resurrected state sovereignty and the interests of the alternative forum as compelling considerations in several recent cases.[24] It has recognized that state sovereignty provides reasons for restricting jurisdiction. Nonetheless, in the context of state/state personal jurisdiction, the doctrine tolerates forum shopping to a far greater extent than in the federal/state context. The moving party has great latitude in deciding where to bring an action as between states *A* and *B*; either the plaintiff or the defendant, by suitable anticipatory filings, can

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preference for the state forum, asserting that the history of state-Indian antagonism and the federal government's fiduciary role toward Indian tribes justified precisely the opposite result. *Id.* at 3218 (Stevens, J., dissenting).

22 454 U.S. 100 (1981).

23 *Id.* at 113-14.

24 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *see also* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982) (explaining state sovereignty in terms of personal rights of individual defendants).

take advantage of this opportunity to choose the most favorable forum. A recent opinion, *Keeton v. Hustler Magazine, Inc.*,[25] suggests that a certain amount of forum shopping is the inevitable and natural result of a federal system.

Keeton involved a defamation action by a New York resident against Hustler Magazine. The statute of limitations applicable to the plaintiff's claim had run in every state except New Hampshire, and the only connection between the litigation and New Hampshire was one that New Hampshire shared with every other state in the country—some of the defamatory material printed in the defendant's magazine had been circulated to readers within the forum state. The defendant did no business in New Hampshire other than circulate the magazines in question.

Keeton's finding that the state of New Hampshire could constitutionally assert long-arm jurisdiction over the publisher recognizes that plaintiffs have a wide choice in picking a forum. Further, choice of law considerations do not eliminate, and may indeed inform, this choice. The Court was entirely unmoved by the defendant's forum shopping claim, and concluded that Keeton's choice of New Hampshire was "no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."[26] This laissez-faire treatment of the forum shopping problem is strikingly at odds with recent Burger Court opinions which disapprove of a moving party's efforts to obtain a federal forum. In that context, the fact that a perceived advantage prompts the choice renders the chosen forum suspect. The choice unfairly casts aspersions on the alternative forum's capabilities. Yet the conflict of laws decisions leave the impression that the moving party who does not take sharp advantage of differences in fora is something of a fool.

B. *Recognition of Judgments: State Interests in Enforcement or State Interests in Relitigation?*

We have seen that a federal court must in some cases defer when a state court has seized or might take adjudicative jurisdiction. "Comity," when invoked rhetorically, signifies that the moving party is about to be denied a choice between the state and federal courts. The same pattern occurs in recognition of judgments, although the legal issue is structured somewhat differently. In the judgments area, the problem includes a moving party, his or

25 104 S. Ct. 1473 (1984). One of the authors was counsel of record for the defendants in this case.

26 *Id.* at 1480.

her chosen forum, and the protesting party who wishes to preserve an earlier victory in the alternative forum's rendering court.

In this area, as in adjudicative jurisdiction, the federal standard of deference to a state court proceeding is much more exacting than the standard of deference which one state court must grant to another. This is true even though the same statute, 28 U.S.C. § 1738,[27] specifies both standards of deference. Even where the rendered judgment is not automatically entitled to substantive deference, as in the law of habeas corpus, the process is granted a wide berth under the principle of comity.

The leading case is *Allen v. McCurry*.[28] In *Allen*, the respondent was convicted in state court after an unsuccessful motion to suppress evidence allegedly obtained in violation of the fourth amendment. The respondent then brought a section 1983 action in federal court against the police officers who had seized the evidence. The Court held that the issue, once litigated, had the same preclusive effect in federal court under 28 U.S.C. § 1738 that it enjoyed in the courts of the rendering state.[29]

Later cases extended the interpretation of section 1738. In *Kremer v. Chemical Construction Corp.*,[30] the Court held that section 1738 required a federal district court to give preclusive effect to a state appellate court's affirmance of an administrative finding that petitioner's Title VII claim was meritless. The Court observed that a failure to find preclusive effect would not only violate comity but would also reduce states' incentive to work toward effective antidiscrimination systems.[31] Similarly, in *Migra v. Warren City School District*,[32] the Court held that the state court's decision against plaintiff's contractual employment claim precluded a section 1983 claim in federal court. Even though *Allen* addressed only issue preclusion, the Court found no distinction between the issue preclusive and claim preclusive effects of state court judgments. Denying preclusive effect in either case would equally reflect an unwarranted distrust of state courts:

> [Section 1738] embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial

27 28 U.S.C. § 1738 (1982) (requiring that full faith and credit be given to the "Acts, records and judicial proceedings" of any "State, Territory, or Possession" of the United States).

28 449 U.S. 90 (1980).

29 *Id.* at 105.

30 456 U.S. 461 (1982).

31 *Id.* at 478.

32 104 S. Ct. 892 (1984).

resources.[33]

Ordinarily, preclusion principles are justifiable in terms of judicial economy as well as comity. In one context, however, that of habeas corpus, avoidance of duplicative litigation is not an available explanation. The habeas trend requiring exhaustion of state remedies certainly rules out judicial economy as the motivating force. In *Rose v. Lundy*,[34] the prisoner's petition advanced two claims of relief for which he had exhausted his state remedies and two for which he had not. The Court announced a rule of total exhaustion, requiring federal dismissal of any petition that contains both exhausted and unexhausted claims.[35] Such dismissal confronts the petitioner with a choice of litigating unexhausted claims in state courts or proceeding with only exhausted claims in federal court. This latter course risks dismissal of subsequent federal claims. The Court thus reasoned that its rule would encourage state prisoners to seek full relief from state courts in the first instance. This diversion of cases from federal courts would give state courts first shot at all claims of constitutional error, increase their familiarity with federal constitutional issues, and provide a factual record of the exhausted claims for federal review.

The exhaustion requirement itself is not attributable to the Burger Court; it predated the Court by many years.[36] But *Rose v. Lundy* is an expansion not earlier anticipated. The Court has also quite recently expanded the list of "factual" issues on which the federal habeas court must defer to the state court's judgments.[37] Moreover, the Burger Court has brought the equivalent of claim preclusion into the habeas corpus context. Claim preclusion involves foreclosure of claims that were not litigated in previous proceedings. The Court introduced foreclosure in habeas by substituting a "cause and prejudice" standard for the "deliberate bypass" standard of the Warren Court. Under the liberal Warren Court decisions, a defendant would be foreclosed from presenting a new claim only if he or she had deliberately bypassed state procedures for asserting that claim in the earlier proceeding.[38]

Wainwright v. Sykes[39] adopted the cause and prejudice standard allowing claim preclusion, and the standard was exemplified and extended in *Engle v. Isaac*.[40] In *Engle*, the defendant failed to follow

33 *Id.* at 898.
34 455 U.S. 509 (1982).
35 *Id.* at 513-15.
36 28 U.S.C. § 2254 (1982) was originally enacted in 1966.
37 Wainwright v. Witt, 105 S. Ct. 844 (1985).
38 *See* Fay v. Noia, 372 U.S. 391, 438-39 (1963).
39 433 U.S. 72 (1977).
40 456 U.S. 107 (1982).

Ohio's requirement of contemporaneous objection to a jury instruction that incorrectly allocated the burden of proof on self defense. Barred by procedural default from raising his constitutional claim on direct appeal, the prisoner sought a writ of habeas corpus. The Court denied the writ for failure to meet the "cause and prejudice" standard, observing that federal intrusions into state criminal trials "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[41] The prisoner's explanation for failure to raise the claim was that it had not yet been recognized in Supreme Court precedent. The Court argued, however, that there was adequate reason to anticipate the defense. "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for a procedural default."[42]

The momentum toward increased federal recognition of state judgments appears to be building. Though reasoned primarily in terms of the legislative intent behind section 1738 and the policies of finality and judicial economy behind res judicata, the judgments decisions invoke the same unwillingness to question the ability of state courts as do the decisions in the adjudicative jurisdiction area.

Given this mounting trend of deference to the rendering court, it seems incredible that in the state/state context the rendering state's interest in the integrity of its judgments would be denied. Yet that is precisely what happened in *Thomas v. Washington Gas Light Co.*[43] The petitioner, a District of Columbia resident who was injured at his workplace in Virginia, received workers' compensation benefits from Virginia's Industrial Commission under that state's Workmen's Compensation Act. He then received a supplemental award from the District of Columbia under the District's own Act. A plurality of four, joined by three concurrences, held that the full faith and credit clause did not preclude these successive workers' compensation awards.

The opinion explained that a state has no legitimate interest in preventing another state from granting supplemental compensation when that other state would have had power to apply its entire workers' compensation law in the first place.[44] The determination that only another such state may relitigate amounts to no deference to judgments at all. It is simply the usual choice of law requirement that a state must have an adequate basis for applying its law. The

41 *Id.* at 128.
42 *Id.* at 134.
43 448 U.S. 261 (1980).
44 *Id.* at 286.

judgment, per se, is entitled to no force because relitigation is barred only when litigation would be barred anyway for other reasons.[45]

This denigration of a state's concern for the integrity of its judgments is simply astounding to any observer who has followed recent judgments law in federal jurisdiction. In federal jurisdiction, section 1738 was read literally to require the same effect that the rendering court would grant. This principle was dismissed cavalierly in *Thomas* on the ground that the rendering state might not trench on the prerogatives of the enforcing state this way.[46] Instead, the guiding principle was the interest of the enforcing court in providing protection for a litigant with whose interests it was concerned.[47] *Thomas* makes the state's interest in relitigation paramount and its interest in integrity of judgments subordinate or even faintly impertinent. This principle is strikingly similar to an argument rejected without serious consideration in the federal/state arena: namely, that federal courts might relitigate out of concern for a party asserting federal constitutional claims.

This divergence makes a state's interest in the integrity of its judgments crucial when the second court is federal but nonexistent when the second court is a state. Yet it is highly unlikely that a state, while deeply wounded by federal court relitigation, is unconcerned about another state doing exactly the same thing. Note that the injured worker in *Thomas* had no better explanation than the prisoner in *Engle* for his failure to raise a claim successfully in the first instance. In *Thomas*, the injured worker had simply made a poor choice about the best place to bring suit; he chose a forum with a less advantageous law. The prisoner in *Engle*, of course, did not choose a state forum at all; furthermore, he had even less ability to be aware of the novel constitutional defense than the worker had reason to know of a forum with more favorable workers' compensation law. One tends to be sympathetic to injured workers, who may not know their legal rights,[48] but is sympathy of this sort more appropriate than it is for prisoners with habeas claims?

Thomas seems particularly anomalous in light of the most recent Burger Court decision regulating federal enforcement of state

45 Where the second state has no power to apply its own law, it will not entertain a workers' compensation case because adjudicative jurisdiction is statutorily unavailable anyway. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 261-62 (1971). Thus, the plurality opinion reduces to a requirement that in order to relitigate, the forum must be in a position to litigate; this affords no protection to the judgment.

46 448 U.S. at 285.

47 *Id.*

48 *See id.* at 284-85 (injured worker often initiates compensation claim informally, while still hospitalized, without aid of counsel, and without special attention to choice of most appropriate forum).

court decisions, *Marrese v. American Academy of Orthopaedic Surgeons*.[49] *Marrese* involved a federal antitrust action over which federal courts have exclusive jurisdiction. Here, however, the federal court had to determine the preclusive effect of a prior state court judgment regarding a related common law claim. If the Court followed the plurality's approach in *Thomas*, there would automatically be no preclusive effect in federal court over a claim as to which that court had jurisdiction. Yet the *Marrese* Court remanded for a determination of whether state judgments law would preclude the claim—the issue declared irrelevant in *Thomas* because it would allow the rendering court to trench on the enforcing court's prerogatives. If state judgments law would preclude the claim, the only basis for nonrecognition would be a congressionally mandated exception to section 1738.[50] No such finding of congressional intent was either made or required in *Thomas*.

This unwillingness in state/state judgment recognition to impose limitations upon the chosen forum is reminiscent of the reasoning in the state/state adjudicatory jurisdiction situation, such as *Keeton*. Those states whose statutes of limitations had already foreclosed suit against Hustler Magazine (and to that extent, had conclusively disposed of Keeton's claim), had no constitutional interest sufficient to prevent New Hampshire from asserting jurisdiction over Keeton's claim. The claims of the alternative fora were disregarded. In both contexts, what happens, or does not happen, elsewhere is deemed irrelevant to the propriety of what happens in the proceeding in the moving litigant's chosen forum. This result is contrary to the federal/state situation, where the state proceedings are very relevant to and, as we have seen, often determine, which actions the federal court may or may not take.

The full faith and credit statute is clearly premised on a constitutional interest in interjurisdictional enforcement of judgments. Both federal and state judgment enforcement law is based upon this single statute. The *Thomas* decision, then, should be strictly limited to its facts or repudiated outright.[51] The plurality opinion in *Thomas* also seems inconsistent with the vision of full faith and credit in the state/state context that the Court articulated in *Underwriters National Assurance Co. v. North Carolina Life*.[52] Its ringing de-

49 105 S. Ct. 1327 (1985).

50 105 S. Ct. at 1333.

51 *See* Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1323 (1981) (criticizing plurality opinion). *See also* Sterk, *Full Faith and Credit, More or Less, to Judgments: Doubts About* Thomas v. Washington Gas Light Co., 69 GEO. L.J. 1329 (1981).

52 455 U.S. 691, 715 (1982) (full faith and credit clause prevents courts of North Carolina and of Indiana from reaching mutually inconsistent judgments on same issue).

fense of full faith and credit conspicuously makes no reference to the independent state interests in relitigating the controversy that figured prominently in *Thomas*. Furthermore, the Justices favoring enforcement in *Thomas* have been consistent in their pro-enforcement attitudes in federal courts.[53] The peculiarity of workers' compensation law persuaded several others to concur in the result without approving the plurality's reasoning.[54] Still, until a majority of the Court repudiates the plurality opinion[55] or limits the case to its facts, there is an embarrassing inconsistency between the section 1738 effect of a state judgment in state courts and in federal courts.

C. *Sovereign Immunity: Literalism or Liberal Reading?*

Concerns for comity also arise in sovereign immunity cases. In sovereign immunity, as in adjudicative jurisdiction, the question arises as to whether a particular forum can entertain an action over the other litigant's objection that the case should be brought in some alternative forum. The distinctive feature in the sovereign immunity context is that the protesting litigant, a governmental entity, asserts that the action can only be brought if it all in its own courts. Such claims have been markedly more successful in the federal/state context than the state/state context.

In the federal/state context, the guiding principle is the eleventh amendment.[56] On numerous occasions,[57] the Court has said that the eleventh amendment operates to constitutionalize the doctrine of sovereign immunity, which was wrongly repudiated in *Chisholm v. Georgia*.[58] Indeed, the sovereign immunity doctrine is essential to the Court's interpretation of the amendment. By its literal terms the amendment only prohibits suits brought by citizens of one state against another.[59] Such literalism has never been employed; liberal readings relying on broader sovereign immunity

53 *See* note 6 *supra*.

54 Under earlier Supreme Court precedents, the second state might relitigate if the first state left open the option of successive relitigation in another state. In concurrence, several Justices argued that this standard was met. 448 U.S. at 286 (White, J., concurring) (Burger, C.J., Powell, J., joining).

55 The Court has passed up an opportunity to reconsider the holding of *Thomas*. *See* Roadway Express, Inc. v. Warren, 163 Ga. App. 759, 295 S.E.2d 743 (1982), *cert. dismissed as improvidently granted*, 104 S. Ct. 476 (1983) (presenting same issue as *Thomas*).

56 U.S. CONST. amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

57 *See* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 906-07 (1984) (citing cases); Quern v. Jordan, 440 U.S. 313, 332, 341 (1979); Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934); *Ex parte* State of N.Y. No. 1, 256 U.S. 490, 497 (1921); Hans v. Louisiana, 134 U.S. 1, 15 (1890).

58 2 U.S. (2 Dall.) 419 (1793).

59 *See* note 56 *supra*.

principles have guided the important precedents. Thus in *Monaco v. Mississippi*,[60] the Court denied jurisdiction over a case brought by the principality of Monaco against the state of Mississippi, stating:

> Manifestly, we cannot rest with a mere literal application of the words of § 1 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control.[61]

The Court had earlier held the amendment to bar suit by a citizen against his or her own state in *Hans v. Louisiana*.[62]

The Burger Court has contributed substantially to the expansive reading of the eleventh amendment. It has emphasized that consent by a state to suit in federal court must be unequivocally expressed.[63] A waiver in state court does not amount to a waiver in federal court.[64] Although Congress may abrogate state court immunity, an unequivocal expression is still required.[65] Even where the suit is for violation of federal constitutional rights, a federal court may not award retroactive monetary relief.[66] Most recently, in the *Pennhurst* litigation,[67] the Court held that the eleventh amendment bars pendent jurisdiction over state law claims against state officials. That result springs directly from principles of federalism: "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."[68] This controversial result[69] provoked a stinging dissent.[70]

Meanwhile, the Court blazed a trail in the opposite direction in the conflict of laws. *Nevada v. Hall*[71] addressed an issue that, surprisingly, had never reached the Court before—whether one state was obligated to respect the sovereign immunity law of another. In

60 292 U.S. 313 (1934).

61 *Id.* at 322.

62 134 U.S. 1 (1890).

63 Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985). Edelman v. Jordan, 415 U.S. 651, 673 (1974).

64 Florida Dep't of Health & Rehabilitation Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981), *reh'g denied*, 451 U.S. 933 (1981).

65 *See* Quern v. Jordan, 440 U.S. 332, 342 (1979).

66 Edelman v. Jordan, 415 U.S. 651, 664-65 (1974).

67 104 S. Ct. 900 (1984).

68 *Id.* at 911.

69 *See generally* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984).

70 104 S. Ct. at 922 (Stevens, J., dissenting) ("This case has illuminated the character of an institution. . . . Nothing in the Eleventh Amendment, the conception of state sovereignty it embodies, or the history of this institution, requires or justifies such a perverse result.")

71 440 U.S. 410 (1979).

answering that a state need not,[72] Justice Stevens initially noted that whether the forum recognizes another state's sovereign immunity is a question of local law and a matter of comity.[73] He acknowledged that the Framers of the Constitution probably took it for granted that such comity would be extended.[74] The Justice also conceded that language used in the ratification debates and in several cases emphasized that nonconsenting states were never subject to suit.[75] Nevertheless, he limited such language to the federal/state context.[76] He then pointed out that the text of article III and the eleventh amendment were not literally pertinent.[77] In no other source—neither full faith and credit nor implicit structural arrangements—did he find a mandate for constitutional enforcement of interstate comity.[78]

Dissenting in *Hall*, Justice Blackmun stated that he would have found such a source in "a guarantee that is implied as an essential component of federalism."[79] The Justice cited other constitutional rights not grounded in specific textual provisions, such as the right to travel.[80] In a separate dissent, Justice Rehnquist focused on the "implicit ordering of relationships within the federal system."[81] He cited constitutional history reflecting the Framers' intent to make sovereign immunity secure[82] and Supreme Court precedent apparently recognizing a state's immunity in other states.[83] Moreover, he contrasted the literalism of the majority opinion with the Court's liberal readings in such cases as *Hans v. Louisiana* and *Monaco v. Mississippi*.[84] Finally, Justice Rehnquist speculated that adjudication in the courts of a sister state would be more of a threat than adjudication in a neutral (federal) forum.[85] Existing sovereign immunity law is thus backwards, from a policy point of view.

There is no obvious reason to support a liberal construction of federal limitations (in the name of comity and state sovereignty) while literally construing state limitations. It is unclear why state

72 Justices Powell and White, who joined the majority in *Hall*, later joined the majority opinion in *Pennhurst*. *Compare Hall*, 440 U.S. at 411, 427, 433, *with Pennhurst*, 104 S. Ct. at 903, 921-22. Justice Blackmun dissented in both cases.

73 440 U.S. at 416.

74 *Id.* at 419.

75 *Id.* at 419-20.

76 *Id.* at 420-21.

77 *Id.* at 421.

78 *See id.* at 421-27.

79 *Id.* at 430 (Blackmun, J., dissenting).

80 *Id.* (Blackmun, J., dissenting).

81 *Id.* at 433 (Rehnquist, J., dissenting).

82 *See id.* at 434-36 (Rehnquist, J., dissenting).

83 *See id.* at 437-38 (Rehnquist, J., dissenting).

84 *Id.* at 439-40 (Rehnquist, J., dissenting).

85 *Id.* at 442 (Rehnquist, J., dissenting); *cf. id.* at 434-36 (Rehnquist, J., dissenting).

sovereignty is more infringed by federal court adjudication than adjudication in state courts. The dissent in *Nevada v. Hall* had a good point: A state might well prefer a neutral federal forum over the court of a sister state. In the area of sovereign immunity, then, as in adjudicative jurisdiction and judgments, recent Supreme Court decisions have given state sovereignty more bite in the federal/state arena than in the state/state arena.

D. *Choice of Law and Deference to State Substantive Rules*

The contours of the choice of law for federal/state relations have been in place for several decades; indeed, some of the basic premises go back much further. In 1821, the Court held in *Cohens v. Virginia*[86] that it may reverse incorrect state interpretations of federal law and thus choose an authoritative federal version over the state one. The converse proposition—that federal courts must choose the authoritative state court version of state law—awaited the arrival of *Erie*.[87]

The more sophisticated choice of law problems that persist after *Erie* in the federal/state context also antedate the Burger Court. These move beyond the simple question of whether to apply state court precedents on state law issues or to adhere to Supreme Court views on federal issues. The modern choice of law problems examine the extent to which a court may employ its own local rules to implement a substantive right concededly stemming from another source. This is the famous "substance/procedure" distinction. We will not recall its tortured history here.[88] For present purposes, we only note the tightfistedness with which the distinction is applied in the federal/state arena, and the leniency in the state/state context.

Some legal rules are characterized as substantive for one purpose but procedural for the other. Statutes of limitations may be the most obvious example.[89] Burden of proof, likewise, is characterized as substantive for *Erie* purposes and procedural for conflicts

86 19 U.S. (6 Wheat.) 264, 413-23 (1821).

87 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

88 *See* Sedler, *The* Erie *Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813 (1962); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 722-55 (2d ed. 1973); *cf.* R. WEINTRAUB, *supra* note 45, at 45-52.

89 While refusing to label statutes of limitation explicitly as substantive or procedural in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), the Supreme Court required a federal court sitting in diversity to apply the statute of limitations of the state in which it sat. Given the *Erie* substantive-procedural dichotomy, this ruling implicitly labeled statutes of limitations as substantive. But in Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953), the Supreme Court held that a state could apply its own statute of limitations to a foreign substantive right. For conflict of law purposes this holding implicitly labeled the statute of limitations as procedural.

purposes.[90] The result can be a federal court deferring to the court of the state in which it sits (because burden of proof is substantive) but not then deferring to the state which created the cause of action (because burden of proof is procedural and forum law governs).[91] The rationale for a restrictive view of procedure in the federal/state context is a deep aversion to forum shopping, according to *Hanna v. Plumer*.[92] The aversion obviously does not extend to horizontal forum shopping between states. Again, this disparate treatment is not a product of the Burger Court. Its features have been basically in place for years.

While the Burger Court is not responsible for those doctrines, it did recently preside over what is surely the most expansive choice of law decision in Supreme Court history, *Allstate Insurance Co. v. Hague*.[93] In *Allstate*, a state was allowed to apply local law to a case based on only three connecting factors: post-transaction change of domicile by the plaintiff, completely unrelated business by the defendant, and employment in the forum by the plaintiff's deceased husband.[94] None of these factors had any relevance to the substantive dispute. All of the relevant events occurred in a different state, in which all of the parties resided at the time of the relevant transactions and injuries. Clearly, the Court's emerging standard for choice of law is "few-holds-barred." Comity, the Court seems to think, rarely requires one state to relinquish local policy objectives to another state's goals.[95]

The Court has recently reaffirmed *Allstate's* holding that the due process clause and the full faith and credit clause of the Constitution provide only modest restrictions on the forum's application of its own law. In *Phillips Petroleum Co. v. Shutts*,[96] the Court held that a Kansas state court with jurisdiction over a nationwide class action could not constitutionally apply Kansas law to all of the transactions in question. Yet the Court elaborated no detailed limitations on the state court's choice of the proper law for the various

90 *See* Sampson v. Channell, 110 F.2d 754 (1st Cir.) (under *Erie*, federal court bound to apply the law of burden of proof of Massachusetts, the state in which it sat), *cert. denied*, 310 U.S. 650 (1940); Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919) (under Massachusetts law, burden of proof is procedural so that local standards applied); *cf.* Central Vt. Ry. v. White, 238 U.S. 507 (1915).

91 Sampson v. Channell, 110 F.2d 754, 762 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).

92 380 U.S. 460 (1965).

93 449 U.S. 302 (1981).

94 *Id.* at 313-20 (plurality opinion).

95 The Court has stated that the full faith and credit clause does not require automatic subordination of a local policy. Nevada v. Hall, 440 U.S. 410, 422-23 (1979). *See generally* Brilmayer, *Credit Due Judgments and Credit Due Laws*, 70 IOWA L. REV. 95 (1984). *But see* McCluney v. Schlitz, 649 F.2d 578, 580-81 (8th Cir.), *aff'd mem.*, 454 U.S. 1071 (1981) (Missouri letter statute inapplicable to employee transferred out-of-state).

96 Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985).

transactions, observing that "in many situations a state court may be free to apply one of several choices of law."[97]

While *Phillips Petroleum* thus leaves intact *Allstate's* very minimal restrictions on choice of law in the state/state context, the Court continues to require that federal courts defer in choice of law matters to the courts of the states in which they sit. However lacking in deference a state court may choose to be, as a choice of law matter, *Klaxon Co. v. Stentor Electric Manufacturing Co.*[98] requires the federal court sitting in that state to follow closely behind. Comity to the local state courts is considered so crucial as to require the federal court to turn a deaf ear to other states' claims for deference. This schizophrenic attitude towards choice of law is identical to the schizophrenic approach towards adjudicative jurisdiction. Federal courts are obliged to defer blindly to the interests of the local state, which is simultaneously ignoring the needs of other states with the approval of the Supreme Court.

Furthermore, the Court has engaged off and on in an endeavor to limit federal legislative jurisdiction in order to protect state substantive interests. The limitations on federal legislative jurisdiction stemmed from unanticipated applications of the tenth amendment. *National League of Cities v. Usery*,[99] which has recently been overruled, demonstrated that concerns for state sovereignty placed limits on the applicability of otherwise valid laws. The Court held that the Fair Labor Standards Act, insofar as it directly displaced the states' freedom to structure integral operations in areas of traditional governmental functions, was not within the authority given to Congress by the commerce clause.[100]

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that matter.[101]

While not a choice of law case in the traditional sense, *National League of Cities* certainly speaks to questions of legislative jurisdiction. The law itself was not wholly unconstitutional or lacking an affirmative regulatory basis; there was simply an enclave of state power[102] into which Congress might not reach.

97 *Id.* at 2981.
98 313 U.S. 487, 496 (1941).
99 426 U.S. 833 (1976).
100 *Id.* at 852.
101 *Id.* at 845.
102 *Cf.* Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974) (use of the "enclave terminology").

In *Garcia v. San Antonio Metropolitan Transit Authority*,[103] the Court held that the Fair Labor Standards Act's application to the operations of a public transit authority did not contravene any affirmative limit to Congress' power under the commerce clause. The Court determined that the Constitution's structuring of the federal government, rather than any "freestanding conceptions of state sovereignty,"[104] insulated states from the excessive reach of Congress' power under the commerce clause. The federal system's procedural safeguards, rather than "judicially created limitations on federal power," protect state sovereign interests.[105] *Garcia*, by recognizing that the political process protects the interests of state sovereignty, may narrow the divergence between doctrinal developments in the federal/state area and in the state/state area to some degree.

Yet *Garcia* does not resolve the tension. First, several members of the Court are simply awaiting an opportunity to overrule it.[106] Second, the opinion makes no effort to unify the treatment of federal/state and state/state comity. All in all, the opinion simply reinforces the feeling that comity is just a political football. There is no consistent intellectual approach to the topic precisely because the issue is subject to shifting political coalitions. One can hardly be blamed for wondering whether some other, more principled, analysis may be possible.

II. Analysis

Comparing conflict of laws doctrine to federal jurisdiction challenges assumptions about state sovereignty that ordinarily go unexamined. First, the analogy shows that comity and sovereignty do not automatically require deference to the alternative forum. Standards may be set which take another forum's interests into account without simply relinquishing one's own. Second, asserting jurisdiction despite the legitimate concerns of other fora is not necessarily an unwarranted intrusion, but may be the consequence of a balancing of competing legitimate claims. Third, if co-equal sovereigns can assert jurisdiction despite the obligation of deference to one another, why should the same not be possible between the federal government and the states? These observations raise two questions. Is the Supreme Court as serious about state sovereignty in the conflicts context as it sometimes claims to be? And, is its

103 105 S. Ct. 1005 (1985).

104 *Id.* at 1017.

105 *Id.* at 1018.

106 *Id.* at 1021 (Powell, J., dissenting); *Id.* at 1033 (Rehnquist, J., dissenting); *Id.* (O'Connor, J., dissenting). *Garcia* was a 5-to-4 decision.

concern for state sovereignty in the federal/state context sincere, or a disguise for purely political maneuvering?

A. *Variety and Uniformity*

The search for the causes of the phenomenon of differential state sovereignty begins with a simple observation about the political structuring of the states and the federal government. The states are all jurisdictionally equivalent to one another, while the federal government is jurisdictionally complementary to the states. When the federal government was created, certain powers previously subject only to state authority were vested in the federal government. The federal government was thus composed of a subset of the powers previously possessed by the states. The federal government and the states have different functions from one another. In contrast, since the states had originally possessed complete residual power, and since all states gave up the same powers to the federal government, they still possessed identical powers after the adoption of the Constitution.[107]

While all the states possessed the same authority, it was to be expected that they would exercise those powers differently. Precisely because they all were to address the same issues, their views might directly conflict. The states are allowed—indeed, expected—to disagree on substantive issues. This simple fact of life has been elevated to something of a virtue. Our metaphor for the states is "the fifty laboratories," which through the process of experimentation and competition evolve ever better substantive rules of law.[108] Federalism supposedly enhances, rather than impedes, their ability to disagree with each other.

The federal government and the states are supposed to operate in tandem, not in competition. They do not address identical sets of issues; their jurisdiction is differentiated along substantive lines. Furthermore, in those situations where both the state and federal governments might address the same issue, hierarchical rules specify which law governs in case of conflict. If there is an adequate constitutional basis for the federal rule, it preempts state law. Absent a basis for federal regulation, state law prevails under the *Erie* doctrine. While the metaphor for state/state conflicts is

107 In addition, there are some constitutional requirements that Congress act uniformly with regard to all states. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1, 4 (uniform taxes, laws of naturalization and bankruptcy); *Id.* § 9, cl. 6 (commerce regulations and revenues may not prefer one state over another).

108 This idea that the states serve as 50 laboratories for the development of "new social, economic, and political ideas" has been frequently recognized by the Supreme Court and commentators. *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788 n.20 (1982).

"fifty laboratories," the slogan for federal/state conflicts might be "one right answer."

This may be an overly simplistic view, but it motivates much jurisdictional law. Note the jurisdictional consequences of this simple view. As between the states, it makes a great deal of difference to which state's authority a litigant falls prey. State substantive rules are expected to be different; therefore it matters which law is chosen. And state courts are widely separated geographically; again, it is clear what is at stake in a choice of forum. When one considers also that state choice of law rules may point towards different substantive laws, the forum choice directly implicates the substantive law choice as well.

Conversely, if one were to assume that all fora were identical, then they would all be interchangeable. The simplistic view of federal/state relations would lead one to conclude that relatively little was at stake in rules of adjudicative jurisdiction. First, state and federal courts are not widely separated geographically; as a practical matter, it would seem that litigants should not have a strong preference. Second, both sets of courts are obliged to apply the same substantive law; federal law if a valid federal rule exists, and state law otherwise. Again, the choice of forum apparently would not matter.

In one sense, this is the Burger Court's general outlook. Numerous cases have explained the decision to decline jurisdiction on the ground that state courts are as adept as federal courts in applying federal law.[109] But something is askew. If federal courts are truly functionally equivalent to state courts, then there is nothing at stake in revising jurisdictional rules to reflect the need for comity. The litigant who would have preferred state court has nothing serious to complain about, since the court systems are interchangeable. And the alternative state forum should not be concerned about competition, because there would be no systematic bias in litigant choice between the two sets of courts. Allocation of dispute resolution would be random and not reflect on their abilities or undercut their judicial business in any serious way.

Why, then, is state sovereignty taken seriously in the federal jurisdiction context and disregarded in the conflict of laws context? We know that state laws differ substantively from one another. If federal and state courts are fairly comparable, deference to the alternative forum should be a less important goal than in conflicts, rather than a more important goal. If the Burger Court indeed believes that uniformity makes the choice of jurisdiction less crucial, a

109 *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 105 (1980); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

reasonable assumption, then it should put its energies into increasing respect for state sovereignty in the conflict of laws, and not in the law of federal jurisdiction.

B. *The Relative Sophistication of Conflict of Law Rules*

The first response to this apparent paradox is that such attention is less necessary precisely because it has always been well recognized that differences between the states exist. In short, the conflicts rules inherited by the Burger Court already accommodate the legitimate interests of the protesting litigant and the alternative forum to some degree.

For example, the due process minimum contacts test for personal jurisdiction explicitly addresses the problem of unfairness to the litigant protesting jurisdiction.[110] A defendant forced to defend in a location far removed from his or her home base faces serious hardship. Furthermore, in the course of protecting a litigant from having to defend far from home when he or she has no connections with the forum that the plaintiff has selected, the Court simultaneously protects the sovereign interests of the defendant's major base of operations.[111] If there are too few contacts to try the case locally without creating unfairness to the defendant, then there is probably some other state which has more contacts with the controversy and a stronger interest in adjudication. Although the Burger Court may have broken new ground in enunciating this explicit state sovereignty criterion, state sovereignty was already protected in the minimum contacts doctrine it inherited.

The same reasoning applies in the other doctrinal areas we describe. In the sovereign immunity context, *Nevada v. Hall* implicitly did offer some protection to states. In *Hall*, a Nevada state car had been involved in an automobile accident in California. California courts clearly would have had personal jurisdiction had the defendant been an individual, but the suit was brought against the state of Nevada. The California Supreme Court, determining that Nevada's claim to sovereign status became less compelling when it chose to send its instrumentalities outside of the state, held that "state sovereignty ends at the state boundary."[112] By exceeding its geographical limits, Nevada's position became analogous to that of a

110 *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

111 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (concept of minimum contacts "protects the defendant against the burdens of litigating in a distant or inconvenient forum" and ensures that "states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.").

112 *See* Hall v. University of Nevada, 8 Cal. 3d 522, 525, 105 Cal. Rptr. 355, 357, 503 P.2d 1363, 1365 (1972) (en banc).

state officer who transgresses the substantive bounds of traditional state prerogatives by violating the federal Constitution, thus forfeiting immunity.[113] Once put in context, *Hall* may recognize limits on incursions into sister state sovereignty that are comparable to the limits due process places in the context of adjudicative jurisdiction.

So also with choice of law problems. Due process has always required that a forum have adequate connections with a case so that application of local law is fair to the protesting party. In affording this protection to a party, a court simultaneously recognizes the interests of other states in which the dispute was primarily centered. The Court might have interpreted state sovereignty restrictively in *Allstate Insurance Co. v. Hague*, and paid too little attention to the due process rights of the defendant.[114] But it started from a group of precedents which already took these considerations into account; the cumulative effect of choice of law due process jurisprudence still recognizes that the differences in state law require protection of such interests.

The judicially developed law of federal jurisdiction that the Burger Court inherited, however, did not make explicit accommodation to the interests of a state in entertaining litigation, or to the interests of one of the litigants in bringing the action in state court.[115] Jurisdictional statutes either assume that the federal and state courts are comparable, or provide for access to federal court where some reason exists to believe that the federal court might be superior. For example, diversity jurisdiction is premised on a concern that state courts may discriminate against out-of-state residents. But neither the view that state and federal courts are interchangeable nor the recognition that federal courts might be preferable in limited classes of cases can give rise to a vested interest in access to state court. If the two court systems provide the same product, nothing turns on the choice between them. On the other hand, if the state court would provide its own citizen with an unfair advantage, the litigant cannot claim such an unfair advantage as a right. No state court has a right to retain jurisdiction so that it may discriminate.

Thus, the federal jurisdiction rules the Burger Court inherited

113 *Cf. Ex parte* Young, 209 U.S. 123 (1908) (state officer acting in violation of the Constitution no longer qualifies as "state" for purposes of eleventh amendment).

114 *See generally* Brilmayer, *supra* note 51 (criticizing *Allstate Insurance Co. v. Hague*). The decision was roundly criticized in the conflicts literature. *See* J. MARTIN, CONFLICT OF LAWS CASES AND MATERIALS 338 (2d ed. 1984) (discussing scholarly reaction to the decision).

115 Of course, the Warren Court recognized the interests of one of the litigants in access to a *federal* forum. *See* Zwickler v. Koota, 389 U.S. 241, 248 (1967) ("In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.").

were based on the assumption that no particular deference to the state as an alternative forum was necessary. Neither of these premises generates doctrinal explanations of why a state court might have a right to keep cases, or why a party might legitimately prefer to be in state court. In order to generate such doctrine, the Court had to alter a set of underlying premises that failed to grant explicit recognition to the alternative forum's needs—hence its numerous decisions explaining the importance of state sovereignty in federal jurisdiction. It simply had much further to go than it did in conflict of laws, and its greater discussion of state sovereignty in the federal jurisdiction context merely brings that bundle of doctrines into line.

Our descriptive thesis is that the Burger Court has simply restricted a power which the federal courts have always taken for granted but which the states have never had; namely, the opportunity to be totally unconcerned with the interests of the alternative forum it was preempting. If true, this explanation serves to present the fundamental issue. Is such a strategy legitimate? Is it even rational?

One important legitimacy question concerns the separation of powers implications of such a strategy. In short, if Congress has vested the federal courts with jurisdiction, are courts empowered to decide that the statutory grants did not take state sovereignty sufficiently into account? This crucial issue has recently been addressed,[116] and we decline to address it further here. Instead, we question whether such a strategy is rational, honest, and consistent with other premises the Court has claimed to hold.

The Court has often said that the federal courts and the state courts are comparable in expertise, sensitivity to federal rights, and so forth. If convincingly stated, this may serve to refute the premise that federal courts are superior. But all it can create is parity; that is, it merely shows that nothing turns on which court entertains an action. By itself, it can never explain why the needs of the alternative state forum ought to be taken into account, or why one litigant's preference for state court should be dispositive. If the fora are truly interchangeable, litigant preference will be random and neither court will undercut the other.

Indeed, the Burger Court makes its own task more difficult. If the goal is to explain why state courts are preferable, it should be focusing on the differences between state and federal courts. By insisting on complete parity, it undercuts its other efforts to change the allocation of jurisdiction. One can only conclude that its efforts

116 *See* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

to restrict the reach of statutory jurisdictional rules are based on a definite but never openly acknowledged belief that the two sets of court systems are different in significant ways.

C. *The Myth of Parity*

How different *are* the state and federal courts? Are the differences inevitable and eradicable, or temporary? Some of the literature asserting differences between the state and federal courts has a particular political slant. Such arguments take the position that federal courts are superior in certain respects and that in certain instances a litigant should have a right to litigate in federal court. But the question of whether differences exist can be approached without any advance conclusions about whether or how those differences ought to be resolved. Balanced examination shows that some of these arguments look better than others.

Consider first the following straightforward argument that differences may exist. The federal courts were first authorized because the Framers of the Constitution realized that the state courts were deficient in certain respects. State courts might be biased against out-of-staters, or against federal claims. If the state courts were perfect, there would be no need for federal courts. Thus, when the Framers and Congress established the lower federal courts, they would have assumed that these courts were superior in these respects. Also, when Congress extended jurisdiction over certain federal causes of action such as the civil rights claims, the reason was that state courts were inadequate. Hence, federal courts are superior with regard to such problems.

This superficial explanation is inadequate. Initially, it seems plausible that the federal courts must be superior, because if they were only as good as the state courts they would be superfluous and would not have been created. But this takes a static view of an essentially dynamic situation. Perhaps it was true that, at the time the civil rights acts were adopted, the state courts were biased or incompetent. But the competitive pressure of an alternative forum might, in the long run, compel the state courts to achieve the same level of competence as their competitors. They would have to follow federal court results closely, at the risk of losing their business. Any systematic difference would inhere to the disadvantage of one of the litigants, who would then either file in federal court initially or remove.

Thus, the simple fact of two sets of courts does not necessarily mean differentiation. More successful proof of differences relies upon observation of actual differences in functioning. Such differ-

ences are strongly asserted in the literature.[117] First, article III judges have life tenure and may thus be less susceptible to majoritarian political pressures.[118] Their bureaucratic orientation points them toward greater fidelity to federal law.[119] Their clerks and staff may be superior.[120] Especially in habeas corpus cases, they focus exclusively on enforcing federal constitutional rights, without the prejudices and distractions of conducting trials of criminal cases.[121]

To continue the argument, authors have noted that correcting such systemic problems requires original jurisdiction in the federal trial courts; Supreme Court review is not enough. As an appellate court, it has very limited fact finding capabilities. If the harsh treatment of citizens of other states or federal claims is accomplished through findings of fact, then appellate review is not an adequate safeguard. In addition, the Supreme Court's docket precludes review of every case.[122]

The weakness in these arguments, if one exists, is the lack of proof that state judges are biased. Perhaps state judges are aware of these influences and conscientiously counteract them. Proving bias may be too subjective to be empirically verifiable. But the Court itself ought not reject too quickly the idea that federal judges are more authoritative interpreters of federal law. After all, it has recognized that state judges are more authoritative interpreters of *state* law; that is the premise underlying the abstention doctrines.[123] Furthermore, that premise has not been thought to insult federal court judges, who are bound to carry out state law to the best of their abilities.

More objective observations exhibit the differences between the courts. The federal courts offer different rights and remedies. A defendant in a state criminal trial who presents a constitutional claim may be unable to get class-based relief, prospective relief, or interlocutory review.[124] No amount of subjective sensitivity on the part of state court judges will surmount such structural differences in the nature of the relief ordered.

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117 *See* Laycock, *supra* note 8, at 202-22; Neuborne, *supra* note 8, at 1118-28.

118 *See* Neuborne, *supra* note 8, at 1127-28.

119 *See id.* at 1124-25.

120 *See id.* at 1121-22.

121 *See id.* at 1125-26 (federal judges insulated from distasteful fact patterns so that they can solely test abstract constitutional doctrine); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78, 81, 135 (1964) (federal habeas courts isolate federal rights, considering constitutional claims free from effect of prejudicial state rules).

122 In addition, federal issues arising in the state courts may be mooted on appeal by the existence of an adequate state ground.

123 *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 302-30 (4th ed. 1983) (discussing abstention doctrines).

124 Laycock, *supra* note 8, at 194.

Nevertheless, comparable arguments may favor a state forum. State courts can offer remedies that federal courts cannot. These remedies inhere to the benefit of the state. A federal court entertaining a civil rights claim arising out of a criminal prosecution, for example, will not impose a criminal conviction even if the constitutional claim is denied. Thus a federal court has much to offer criminal defendants, at least in terms of delay if not a victory on the merits, while imposing few risks. The state, on the other hand, stands to gain nothing by duplicative litigation in the federal courts. This argument applies with even greater force to federal habeas jurisdiction, which offers the prisoner a potential remedy of a new trial or release from prison, while placing the state as prosecutor in a no-win situation.

The unilateral advantages to the defendant of a federal forum and the unilateral advantages to the prosecution of a state forum owe much to the structure of public law litigation. State courts are well situated to handle cases on behalf of the state by offering the state the remedy which it seeks but offering few remedies advantageous to the defendant. Federal courts, conversely, are well situated to handle cases on behalf of the individual litigant, offering the remedy he or she seeks but not providing the remedy sought by the state. Typically, one sovereign's courts do not enforce the criminal law of another's.[125] Thus, each party prefers to be a moving party, choosing and litigating in the forum which offers only the remedies advantageous to his or her side.

These differences may figure as heavily in the battle over allocation of a federal forum as any perceived differences in abstract sympathies to federal constitutional rights. Even where there are no differences in sympathies to unpopular claims, the state will clearly prefer a state forum. Indeed, it is plausible to wonder whether the deference which the Burger Court accords to "state interests" is not deference to the state qua party, rather than to the state qua alternative forum. Many cases in which state sovereignty plays an important role are the cases in which the state is a party to the litigation. If state sovereignty protected the interests of the state qua forum, then the Burger Court should be as concerned with private civil cases as with public law cases. Since it has made no effort to redefine jurisdiction in private civil cases, it seems reasonable to suspect that its solicitude is triggered by the state's party status.

Whether the Court is favoring the state as a party or as an alternative forum, the reasons that the state prefers state court are

125 Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 46 (1974).

identical to the reasons that the individual prefers the federal forum. Even if one assumes the utmost good faith and expertise in the state courts, the states are inevitably bound to prefer litigating in state court, where there is something to be gained through litigation. And the individual rights-holder is bound to prefer litigating in federal courts, where a wider range of remedies is available, and the state will have no remedies in return. Identifying differences merely states the problem; it does not show how to solve it. And it highlights the difficulties of insisting that there are no differences, while surreptitiously resolving all of the differences in favor of one party to the litigation.

III. Conclusion

If the Supreme Court were to free itself from its misconceived insistence that federal and state courts are virtually interchangeable, then it would be in a better position to explain why it considers the state courts to be superior.[126] Not all differences are pernicious, or insulting to the states. By not identifying these differences, though, it is impossible to explain why a state has a legitimate interest in litigating in state court, or why federal court litigation is more intrusive than state court application of the same constitutional standard. Once the differences are recognized, a system for apportioning jurisdiction fairly and openly should naturally develop.

That is the solution in the conflict of laws, and it is a solution which should provide guidance by analogy. Comity is not a tacked-on afterthought, and less of a political football. Such apportionment cannot be undertaken if it is consistently denied that there are any relevant differences between the two competing courts. Jurisdictional history is littered with examples of the difficulties in arriving at a fair apportionment when the prevalent norms require that institutions in power deny the existence of any differences.[127]

126 The Court in Rose v. Lundy, 455 U.S. 509 (1982), suggested one possible rationale for preferring state to federal courts for adjudication of habeas claims: Given first opportunity to review all claims of constitutional error, the state courts "may become increasingly familiar with and hospitable toward federal constitutional issues." *Id.* at 518-19. A concurring opinion noted that this conception of comity appeared "more destructive than solicitous of federal-state comity;" requiring the habeas petitioner to exhaust a frivolous claim in state court "hardly demonstrates respect for the state courts" and would deplete the state judiciary's time and resources. *Id.* at 525 (Blackmun, J., concurring in the judgment).

127 For example, prior to *Erie Railroad* there was no principled method for choosing whether the litigants got the state or federal version of "common law." This led to the observation in that opinion that some litigants were denied equal protection because the assignment of legal rule was essentially arbitrary, depending solely on whether diversity existed. Yet such an allocative system could not be provided without institutionalizing the differences of opinion.

Similarly, retroactivity analysis can proceed only with recognition that the new rule is

If the Court is unwilling to institutionalize differences that are simply too difficult for the jurisdictional structure to admit, then jurisdictional doctrines accommodating those differences cannot be developed. But if the Court declines specifically to recognize these differences, its current doctrines of "state sovereignty" will exhibit inconsistency. These doctrines can only be harmonized by recognizing that differences in the court systems exist, and that something is at stake in the choice between them. Openly addressing precisely what is at stake would go a long way towards reconciling the two different faces of federalism.

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different from the old. Retroactivity analysis allocates jurisdiction between two courts at different points in time. Once it is conceded that a ruling really amounts to a "change" in law, then it makes sense to ask whether earlier decisions need to be reopened.

A third example involves conflict between the circuits. When a case is transferred to another state for trial, it takes the transferor court's law with it. Van Dusen v. Barrack, 376 U.S. 612 (1964). However, it does not take the transferor circuit's version of federal law with it. *See* Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686, 702 (1984) (requirement that each court of appeals interpret federal law independently prevents formation of rule requiring transferee court to follow another circuit's interpretation of federal law). To respect transferor law that way would institutionalize splits in the circuit; to fail to do so incorporates forum shopping for choice of law purposes into the transfer process.