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Exploring a Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation

I. INTRODUCTION

In April 1990 in *Yellow Freight System, Inc. v. Donnelly*,[1] the United States Supreme Court resolved a split among the circuit courts[2] and held that state and federal courts have concurrent jurisdiction over Title VII claims.[3] This decision strengthens a presumption that state courts, as a whole, can be equal to their federal counterparts in adjudicating federal employment discrimination claims.[4] It also further complicates the process of forum selection for employment discrimination litigants. Because plaintiffs now may present Title VII claims in state court, the doctrine of res judicata will bar any subsequent presentation of Title VII claims in federal court that the plaintiff could have raised in a prior state court action.[5] Plaintiffs who wish to pursue related state claims in state court without risking removal may have to abandon their Title VII claims to protect their choice of forum.[6] Consequently, the informed use of the forum selection process in making that choice is increasingly important. Now more than ever, litigants need an analytical framework to guide them in the forum selection process.

Scholars and commentators consistently have debated the proper role of the state and federal courts in the adjudication of federal claims.[7] One can trace the origins of this debate to the Framers of the

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1. 110 S. Ct. 1566 (1990).

2. For circuit courts holding that federal courts have exclusive jurisdiction over Title VII claims, see cases cited *infra* note 21. In *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402 (7th Cir. 1989), *aff'd*, 110 S. Ct. 1566 (1990), the Seventh Circuit held that state courts have concurrent jurisdiction over Title VII claims, thus creating a split among the circuits. For a discussion of the two positions, see *infra* subparts II(A) & (B).

3. *Yellow Freight*, 110 S. Ct. at 1570. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

4. *See Yellow Freight*, 110 S. Ct. at 1570 (acknowledging a "presumption that state courts are just as able as federal courts to adjudicate Title VII claims").

5. Even before the *Yellow Freight* decision, plaintiffs were not necessarily free to bring a Title VII claim in federal court subsequent to state court litigation of related claims. In Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), the Court held that state court decisions rejecting similar state employment discrimination claims may preclude subsequently raised Title VII claims. *Id.* at 484-85. Nevertheless, *Kremer* did not bar all subsequently raised Title VII claims. To the extent that a Title VII claim raised issues not covered by state law and, thus, could not have been litigated in state court, the claim was not precluded. *See* Catania, *Access to the Federal Courts for Title VII Claimants in the Post-*Kremer *Era: Keeping the Doors Open*, LOY. U. CHI. L.J. 209, 239 (1985) (noting that "[p]reclusion should not apply with respect to those Title VII matters that are broader than the rights under state law and which could not have been raised in the state proceeding").

6. Suits in which plaintiffs raise federal claims generally are subject to removal to federal court by defendants under 28 U.S.C. § 1441(b) (1988).

7. *See, e.g.*, Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L.

Constitution.[8] In recent years this debate often has focused on the issue of parity: whether or not the state courts, as a whole, provide adequate and trustworthy forums for litigants seeking protection of federal rights.[9] The parity debate raises issues significant to the determination of the proper roles of the federal and state courts in enforcing federal rights. Although no consensus has emerged,[10] the continuing debate is likely to influence the allocation of judicial resources by judges and leg-

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REV. 895 (1984); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 76 MICH. L. REV. 311 (1976); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

8. Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 215-16 (1983). At the Constitutional Convention, some of the Framers argued that state courts could not be trusted to provide adequate protection of federal interests and that the Constitution should provide for the creation of lower federal courts. Others contended that lower federal courts would duplicate the state courts unnecessarily and that Supreme Court review of state court decisions would protect federal interests sufficiently. James Madison and James Wilson proposed a compromise—the Madisonian Compromise—suggesting the immediate creation of the Supreme Court and a grant of discretion to Congress to create lower federal courts. The Framers incorporated this compromise in article III, § 1 of the Constitution. Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239-40 (1988); Solimine & Walker, *supra*, at 215-16.

9. Although not the first to suggest that federal courts provide litigants an inherently better forum in which to present federal claims than state courts, Professor Burt Neuborne is primarily responsible for framing the modern parity debate. *See* Neuborne, *supra* note 7. For other important contributions to the parity debate, see Bator, *supra* note 7 (arguing that state courts are as capable as federal courts of protecting federal rights); Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369 (1988) (arguing that the parity debate is unresolvable and suggesting that plaintiffs be allowed to select the forum in which to present constitutional and constitutionally based claims); Chemerinsky, *supra* note 8 (same); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988) (arguing that federal courts remain an inherently superior forum for the enforcement of federal rights); Solimine & Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127 (1989) (offering empirical data to support the argument that parity exists between state and federal courts); and Solimine & Walker, *supra* note 8 (same).

The modern parity debate questions whether federal courts are an inherently superior forum for the protection of federal constitutional and constitutionally created rights. Chemerinsky, *supra* note 8, at 235. Some federal discrimination law falls directly into this category. *See, e.g.*, 42 U.S.C. §§ 1981, 1983 (1988). The remainder of federal employment discrimination law, most notably Title VII, technically falls into the category of statutorily created rights, but may be viewed as a logical extension of constitutionally created rights. The Civil Rights Act of 1964 was largely an effort to correct the inability or unwillingness of the states to comply with the spirit if not the letter of the fourteenth amendment. Note, *Title VII and State Courts: Divining Implicit Congressional Intent with Regard to State Court Jurisdiction*, 28 B.C.L. REV. 299, 304 (1987) (noting that Congress enacted the Civil Rights Act of 1964 "in response to the nationwide persistence of racial and other discrimination against minority groups and the inadequacy of state efforts to combat discrimination"). Thus, many of the concerns expressed in the parity debate validly apply to the body of federal employment discrimination law as well.

10. Chemerinsky, *supra* note 8, at 236, 255-56 (arguing that the parity debate is unresolvable).

islators alike.

The *Yellow Freight* decision forces employment discrimination litigants and their attorneys engaging in the process of forum selection to confront many of the same issues raised by the parity debate. These issues, however, have a different significance for individual litigants confronted with a choice between state and federal forums. For litigants, the important inquiry is not whether state courts as a whole are as capable as their federal counterparts in protecting federal rights, but whether, in a given case, a particular state court or a particular federal court is more amenable to the claims or defenses litigants may raise. Thus, to be of value to individuals in developing a framework for forum selection, the parity debate must move to another level. Although the central question remains whether one forum is better than another, a pragmatic approach to forum selection requires an individualization of the parity debate.

The process of individualization should begin by framing the debate within the specific context in which the evaluation of and selection between forums will occur. Litigants must consider the dynamics of the context and also identify and consider its variable factors. These factors may include the breadth of rights and remedies offered under state and federal law, the degree to which one or the other may dominate the case, the comparative receptivity of state and federal courts to the issues raised, and the procedural advantages and disadvantages that may accompany the choice of forum. In the context of employment discrimination law, for example, litigants should consider the current trend toward a more conservative federal judiciary[11] and the concomitant contraction of federal employment discrimination claims[12] and measure these factors against any perceived improvement in the quality and expertise of the state judiciaries[13] and developing areas of protection for plaintiffs under state employment discrimination law.[14]

At one time, the perceived superiority of federal employment discrimination laws and greater enthusiasm of the federal judiciary for their enforcement led plaintiffs to select federal forums in almost reflex fashion.[15] Today the forum selection process is far more complex, and the presence of many variables contributes to that complexity.

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11. *See infra* notes 237-41 and accompanying text.

12. *See infra* notes 257-90 and accompanying text.

13. *See infra* notes 168-71 and accompanying text.

14. *See infra* notes 184-208 and accompanying text.

15. Arterton, *Employment Discrimination Claims in State Court: A Laboratory for Experimentation*, 13 N.Y.U. REV. L. & SOC. CHANGE 499, 499 (1984-85) (noting that lawyers were "previously well-conditioned" to choose federal law and federal courts for employment discrimination litigation).

This Note suggests a way for employment discrimination litigants to develop an analytical framework to guide them in selecting a forum. Part II outlines the *Yellow Freight* decision and identifies some questions the opinion raises for employment discrimination litigants engaging in the forum selection process. Part III reviews the modern parity debate and explores how litigants, by evaluating the issues raised by the debate at a second, more litigant-oriented level, might use that debate to develop an analytical framework for forum selection. Part IV discusses the development of such a framework in the context of employment discrimination law. To this end, Part IV examines the changing face of state employment discrimination law and litigation and explores why some plaintiffs now may prefer to seek recovery in state court and solely under state law. Part IV also addresses the recent trend toward a more conservative federal judiciary and the importance of that trend to employment discrimination litigants. Finally, Part IV suggests how litigants might weigh these factors in their search for the most amenable forum. This Note concludes that employment discrimination litigants can restructure and individualize the parity debate and use it to develop an analytical framework for the forum selection process that they can apply on a flexible, case-by-case, forum-by-forum basis. In this way, litigants can use the selection process to their greatest advantage.

II. THE *YELLOW FREIGHT* DECISION AND ITS IMPLICATIONS

A. Prior Decisions

Prior to the Supreme Court's decision in *Yellow Freight*, both state and federal courts disagreed on whether federal courts had exclusive jurisdiction over Title VII claims.[16] Much of this confusion stemmed from the absence of any express language in the statute providing for either exclusive or concurrent jurisdiction.[17] The Court consistently had held that analysis in questions of exclusive jurisdiction must begin from a presumption that state courts have the authority and competence to hear federal claims.[18] Only when Congress expressly or implicitly vested

16. *See* Note, *supra* note 9, at 310-16 & nn.97 & 122 (discussing disagreement among the courts and citing cases ruling in favor of and against concurrent jurisdiction).

17. Section 706(f)(3) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3) (1988), provides in part: "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under [Title VII]." The statute does not mention state courts.

18. The Court first articulated this presumption in Claflin v. Houseman, 93 U.S. 130 (1876). The Court observed that the state court has jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Id.* at 136; *see also* Tafflin v. Levitt, 110 S. Ct. 792, 795 (1990) (finding a "deeply rooted presumption in favor of concurrent state court jurisdiction"); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (noting that "the Court begins with the presumption that state courts enjoy concurrent

exclusive jurisdiction in the federal courts would the presumption of concurrent jurisdiction be overcome.[19] Title VII contains no express reservation of exclusive federal jurisdiction, and both the state courts and the federal district courts disagreed as to whether they could draw such an implication from the statute's language and legislative history.[20]

Despite the conflicting opinions of the state and federal district courts, the few federal circuit court decisions prior to *Yellow Freight* concluded that federal courts did have exclusive jurisdiction over Title VII claims.[21] In *Valenzuela v. Kraft, Inc.*[22] the Ninth Circuit found that the text of Title VII implied that Congress intended to vest jurisdiction over Title VII claims solely in the federal courts[23] because its enforcement provisions referred only to federal courts[24] and other parts of the statute incorporated federal procedure.[25] The court found further support for its conclusion in that the legislative history made no mention of state courts.[26] Finally, the court noted that the Supreme Court had not listed state courts in a recent discussion of the Title VII forums available to litigants.[27] From this combination of factors, the Ninth Circuit concluded that federal courts have exclusive jurisdiction over Title VII

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jurisdiction"); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962) (stating that the *Claflin* principle "has remained unmodified through the years").

19. In *Gulf Offshore*, 453 U.S. at 478, the Court outlined three circumstances in which the presumption of concurrent jurisdiction could be overcome: "[T]he presumption of concurrent jurisdiction can be rebutted [1] by an explicit statutory directive, [2] by unmistakable implication from legislative history, or [3] by a clear incompatibility between state court jurisdiction and federal interests."

20. *See* Note, *supra* note 9, at 311 n.97 (citing cases holding that federal courts have exclusive jurisdiction over Title VII); *id.* at 314 n.122 (citing cases holding that state courts have concurrent jurisdiction over Title VII).

21. Long v. Florida, 805 F.2d 1542, 1546 (11th Cir. 1986) *rev'd on other grounds*, 487 U.S. 223 (1988); Bradshaw v. General Motors Corp., 805 F.2d 110, 112 (3d Cir. 1986); Jones v. Intermountain Power Project, 794 F.2d 546, 553 (10th Cir. 1986); Valenzuela v. Kraft, Inc., 739 F.2d 434, 435-36 (9th Cir. 1984).

22. 739 F.2d 434 (9th Cir. 1984).

23. *Id.* at 435-36.

24. *Id.* at 435. The court did note, however, that § 706(f)(3) of the Act, 42 U.S.C. § 2000e-5(f)(3) (1988), "does not expressly state that federal jurisdiction shall be exclusive . . . [and,] by itself,. . . does not exclude the possibility of concurrent state-court jurisdiction." *Valenzuela*, 739 F.2d at 435; *see supra* note 17 (quoting relevant portion of statute).

25. *Valenzuela*, 739 F.2d at 435-36. The court referred to § 706(j) of the Act, 42 U.S.C. § 2000e-5(j) (1988), providing for appeals according to 28 U.S.C. §§ 1291-1292 (1988), and § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2) (1988), providing for the expedition of Title VII cases and for "preliminary or temporary relief . . . in accordance with rule 65 of the Federal Rules of Civil Procedure." *Valenzuela*, 739 F.2d at 436.

26. *Valenzuela*, 739 F.2d at 436.

27. *Id.* The court referred to Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in which the Supreme Court had listed the forums available to employment discrimination victims as: the Equal Employment Opportunity Commission (EEOC), state and local agencies, and the federal courts. *Id.* at 47.

claims.[28] The Third,[29] Tenth,[30] and Eleventh[31] Circuits subsequently reached the same conclusion.

B. *The Seventh Circuit's Rejection of* Valenzuela

The Seventh Circuit rejected the *Valenzuela* reasoning in *Donnelly v. Yellow Freight System, Inc.*[32] Unlike the *Valenzuela* court, the Seventh Circuit refused to read between the lines of the statute and its legislative history to find that Congress intended to divest state courts of jurisdiction over Title VII claims simply because the statute and legislative history refer only to federal courts and federal procedure.[33] The court instead found support for an implication of concurrent jurisdiction in the statute's legislative history, in which Congress recognized the importance of encouraging the development and use of state employment discrimination laws and remedies in addition to Title VII.[34] Because prior state actions could preclude Title VII claims later brought in federal court, the court concluded that a system of exclusive jurisdiction would deter plaintiffs from pursuing state-created rights in the state court system.[35] This deterrence, in turn, would hinder the development and evolution of state employment discrimination law and thus violate the express intent of Congress.[36]

The Seventh Circuit found no inherent incompatibility between Title VII and its adjudication in state courts.[37] In *Gulf Offshore Co. v. Mobil Oil Corp.*[38] the Supreme Court had suggested that the presence of certain factors might rebut the presumption of concurrent jurisdiction even if the statute or its legislative history does not imply that Congress intended to create exclusive federal jurisdiction.[39] Examples of significant factors include the need for uniform interpretation of a statute, an expertise in the field particular to federal judges, or a greater

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28. *Valenzuela*, 739 F.2d at 436.
29. Bradshaw v. General Motors Corp., 805 F.2d 110 (3d Cir. 1986).
30. Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986).
31. Long v. Florida, 805 F.2d 1542 (11th Cir. 1986), *rev'd on other grounds*, 487 U.S. 223 (1988).
32. 874 F.2d 402 (7th Cir. 1989), *aff'd*, 110 S. Ct. 1566 (1990).
33. 874 F.2d at 406-07.
34. *Id.* at 407.
35. *Id.* The court referred to 28 U.S.C. § 1738 (1988), which requires federal courts to give full faith and credit to state court judgments, and to Kremer v. Chemical Construction Corp., 456 U.S. 461, 484-85 (1982), in which the Supreme Court held that state court judgments may preclude Title VII claims subsequently presented in federal court. *Yellow Freight*, 874 F.2d at 407. For a discussion of *Kremer*, see *supra* note 5.
36. *Yellow Freight*, 874 F.2d at 407.
37. *Id.* at 407-08.
38. 453 U.S. 473 (1981).
39. *Id.* at 483-84.

receptivity of federal courts to the enforcement of a federally created claim.[40] According to the Seventh Circuit, however, none of these factors compelled a finding of exclusive jurisdiction in the case of Title VII claims.[41] A large body of federal precedent, which the Supremacy Clause bound the state courts to follow, would guide the state courts and help ensure uniformity.[42] Although federal judges had greater expertise in adjudicating Title VII matters, state judges had much experience interpreting and enforcing state employment discrimination laws, thus, ensuring their familiarity with similar Title VII issues.[43] The court also reasoned that state courts would be no less hospitable to Title VII claims than federal courts.[44] State courts already exercised concurrent jurisdiction over section 1983[45] claims and claims arising under the Age Discrimination in Employment Act.[46] This experience indicated that state courts already were sensitized to the policies underlying Title VII and suggested that state courts could provide a fair and receptive forum for Title VII claims.[47] Finally, that the federal courts remained open to plaintiffs—and through removal to defendants—further guaranteed the availability of a fair forum.[48] Thus, the court found nothing in the language, history, or policies underlying Title VII to defeat a presumption of concurrent jurisdiction.[49] The Supreme Court granted Yellow Freight's petition for certiorari[50] to resolve the split among the circuits created by the Seventh Circuit's decision.[51]

C. *The Supreme Court's Finding of Concurrent Jurisdiction*

The Supreme Court, in a unanimous opinion which closely paralleled that of the Seventh Circuit, also concluded that state courts have concurrent jurisdiction over Title VII claims.[52] The Court reiterated

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40. *Id.*
41. *Yellow Freight*, 874 F.2d at 407.
42. *Id.*
43. *Id.* at 407-08.
44. *Id.* at 408.
45. 42 U.S.C. § 1983 (1988). Section 1983 prohibits discriminatory treatment "under [the] color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." *Id.* The court observed that "similar, although not identical policy issues underlie both" Title VII and § 1983. *Yellow Freight*, 874 F.2d at 408.
46. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988), prohibits discrimination based on age. As the court noted, the statute closely parallels Title VII. *Yellow Freight*, 874 F.2d at 408-09.
47. *Yellow Freight*, 874 F.2d at 408-09.
48. *Id.* at 408.
49. *Id.* at 405-09.
50. Yellow Freight System, Inc. v. Donnelly, 110 S. Ct. 363 (1989).
51. Yellow Freight System, Inc. v. Donnelly, 110 S. Ct. 1566, 1568 (1990).
52. *Id.* at 1570.

that its analysis must begin with a presumption of concurrent jurisdiction, a presumption that only an affirmative ouster of the state courts by Congress would defeat.[53] The Court noted that unlike other statutes in which Congress expressly vested exclusive jurisdiction in the federal courts, Title VII contains no such provision.[54] This omission alone, the Court suggested, might provide sufficient proof that Congress did not intend to divest state courts of jurisdiction.[55] Nevertheless, the Court explored whether it could infer, from either the legislative history of Title VII or some inherent incompatibility between the statute's procedural provisions and its enforcement by state courts, that Congress unmistakably intended the federal courts to retain exclusive jurisdiction over Title VII claims.[56]

The Court acknowledged the persuasiveness of the argument that both the courts and agencies that interpret and enforce Title VII and most of the legislators responsible for its enactment and amendment believed that the federal courts had exclusive jurisdiction over Title VII litigation.[57] Nevertheless, the Court concluded that these beliefs were insufficient to rebut the presumption of concurrent jurisdiction, a core value of federalism.[58] The Court also dismissed the suggestion that the enforcement procedures of Title VII were incompatible with state court jurisdiction.[59] Noting that in prior cases it had rejected similar arguments that statutory references to specific federal procedures necessarily implied exclusive federal jurisdiction, the Court likewise rejected arguments that provisions for appeals under 28 U.S.C. sections 1291 and 1292, for injunctive relief under Federal Rule of Civil Procedure 65, and for the appointment of special masters under Rule 53 necessitate exclusive federal jurisdiction over Title VII litigation.[60] The Court, however, offered no explanation of how state courts should accommodate these procedures.[61] Finally, the Court observed that the greater exper-

53. *Id.* at 1568. The Court cited Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), and its recent decision in Tafflin v. Levitt, 110 S. Ct. 792 (1990). In *Tafflin* the Court found that the state courts had concurrent jurisdiction with the federal courts over claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C §§ 1961-1968 (1988). *Tafflin*, 110 S. Ct. at 799.

54. *Yellow Freight*, 110 S. Ct. at 1568-69.

55. *Id.* at 1569 (noting that the omission of an express provision of exclusive jurisdiction "is strong, and arguably sufficient, evidence that Congress had no such intent").

56. *Id.* at 1569-70.

57. *Id.* at 1569-70 & n.4.

58. *Id.* at 1569. The Court stated that even if the expectations that the federal courts would have exclusive jurisdiction "were universally shared," they would not be "an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction." *Id.*

59. *Id.* at 1569-70.

60. *Id.* at 1570.

61. One commentator has suggested that the incorporation of federal procedures need not be

tise of federal judges in Title VII matters is simply one factor that plaintiffs should consider in the forum selection process and is not a reason to question the competence of state courts to adjudicate Title VII claims.[62] The Court then affirmed the holding of the Seventh Circuit.[63]

D. Some Questions Suggested by Yellow Freight

The Supreme Court's holding in *Yellow Freight* was consistent with its prior decisions on exclusive federal jurisdiction.[64] Nevertheless, the decision does raise some important questions that now confront potential employment discrimination litigants. First, the decision raises the question of whether the Court's finding of concurrent jurisdiction necessarily results in the conclusion that litigants now may consider state courts equal to their federal counterparts. Are state courts, at some primary level, in parity with federal courts? The modern parity debate poses this question without providing a conclusive answer.[65] Some of the language in *Yellow Freight* indicates that the Court's answer to this question, at least in theory, is presumptively yes.[66]

Other language in the Court's decision, however, suggests that in some instances, at least in the area of employment discrimination law, litigants might prefer one forum over the other—that state and federal forums will not always be equally capable or receptive when presented with certain claims. By suggesting that plaintiffs should consider varying degrees of expertise when selecting a forum,[67] the Court seems to contradict the implication of parity found in its ruling. Yet one can interpret this apparent contradiction as a suggestion that a second level of parity exists, a level that litigants should explore in the forum selec-

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viewed as incompatible with concurrent jurisdiction. Section 706(f)(2) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(2) (1988), which provides for the use of Federal Rule of Civil Procedure 65 temporary and injunctive relief procedures, applies only to situations in which the EEOC seeks injunctive relief. Because Congress has the authority to limit the power of federal agencies, requiring state courts to apply Rule 65 in this circumstance does not violate state sovereignty. Furthermore, other sections incorporating federal procedures can be read to apply exclusively to federal courts. *See* Note, *Concurrent Jurisdiction Over Title VII Actions*, 42 WASH. & LEE L. REV. 1403, 1418-23 (1985). *But see* Mishkind & Burns, *How the Supreme Court's Decision in* Donnelly v. Yellow Freight *May Affect Title VII Claims*, 16 EMPLOYEE REL. L.J. 257, 263 (1990) (questioning the compatibility of Title VII's incorporation of federal procedure and concurrent jurisdiction).

62. *Yellow Freight*, 110 S. Ct. at 1570.

63. *Id.*

64. *See supra* notes 18-19 and accompanying text.

65. *See infra* notes 69-144 and accompanying text.

66. In *Yellow Freight* the Court stated that "[u]nder our 'system of dual sovereignty, we have consistently held that state courts have inherent authority and are thus *presumptively competent* to adjudicate' " federal claims. 110 S. Ct. at 1568 (emphasis added) (quoting Tafflin v. Levitt, 110 S. Ct. 792, 795 (1990)).

67. *Id.* at 1570.

tion process.

At this second level, the evaluation of parity is individualized by taking into account the particular courts and the particular claims involved. The *Yellow Freight* decision hints that plaintiffs may find it valuable to consider the relative competence, expertise, and receptivity of the state and federal courts and the procedural advantages and disadvantages that may inhere in the choice of forum. Differences, however, may be creatures of both choices of forum and choices of law. Thus, plaintiffs also should compare the availability of rights and remedies under federal and state law.

Many of the issues raised in *Yellow Freight* concern factors that are central to the forum selection process in a system of concurrent jurisdiction. The modern parity debate provides a starting point for defining, understanding, and evaluating these factors in general terms. For litigants to use the forum selection process to their greatest advantage, however, they should explore the issue of parity within an individualized structure that measures these factors on a case-specific basis.

III. The Modern Parity Debate and Beyond: An Impasse at the Primary Level of Parity and the Development of a Framework for Forum Selection at a Second Level

The Framers of the Constitution were the first to disagree about the proper role of the state courts in adjudicating federal claims.[68] Article III of the Constitution, which grants Congress discretion to create lower federal courts,[69] is the result of a protracted debate among the Framers about whether state courts rather than a national judiciary should be the primary enforcers of federal law.[70] At the center of the debate stood two conflicting core values of the Constitution: federalism and the need for a uniform body of national law.[71]

In recent years scholars have cast this ongoing debate in terms of "parity."[72] The modern debate acknowledges its historical roots in the tension between the core values of federalism and national uniformity, but focuses primarily on the institutional differences that bear directly and indirectly on evaluating the parity of the federal and state judicial systems. Yet no consensus exists among the major schools of the debate, and some of the debaters themselves recognize that the debate

68. *See supra* note 8.

69. Article III provides in part: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. I, § 1.

70. *See supra* note 8.

71. *See* Fallon, *supra* note 7, at 1142-64.

72. *See supra* note 9.

has reached an impasse.[73] The question then becomes whether the debate has outlived its usefulness.[74] This section surveys the major schools of the modern parity debate[75] and suggests that, although the debate may remain unsettled at its primary level, consideration of the debate's issues at a second level can provide a useful analytical framework to litigants and attorneys engaged in the forum selection process.

A. The Skeptics

In 1977, criticizing recent Supreme Court decisions which implied that state courts are equal to their federal counterparts in enforcing constitutional and constitutionally based federal rights, Professor Burt Neuborne posited that federal courts are and are likely to remain the better forum for the vindication of those rights.[76] He noted that parties seeking broad readings of federal rights consistently preferred federal forums.[77] For Neuborne, this preference was convincing evidence that litigants and their attorneys knew what the Court had failed either to recognize or to acknowledge—that a choice of a federal or state forum can alter the outcome of litigation.[78]

Neuborne suggested three institutional factors that account for

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73. *See* Chemerinsky, *supra* note 8, at 236, 255-56; Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 725-26 (1981) (acknowledging that the debate "has reached an impasse").

74. Professor Erwin Chemerinsky suggests that the debate indeed has outlived its usefulness. He observes that "focusing on parity is futile because ultimately the issue of parity is an empirical question for which no empirical measure is possible." Chemerinsky, *supra* note 8, at 256. For a summary of Chemerinsky's position, see *infra* notes 115-41 and accompanying text.

75. This section surveys only a small portion of the scholarship on the issue of parity. It does not purport to be a comprehensive discussion of the vast literature on the subject. Nevertheless, the Author believes that the scholars chosen well represent the major schools of the debate.

76. Neuborne, *supra* note 7, at 1105-06. Neuborne expressed concern over the Supreme Court's ruling in Stone v. Powell, 428 U.S. 465 (1976), specifically that the federal court could refuse to grant habeas corpus review to a state prisoner on a fourth amendment search and seizure claim when the state had provided a full and fair opportunity for the defendant to litigate the claim at trial. Neuborne criticized the Court's apparent assumption "that state and federal courts are functionally interchangeable forums." Neuborne, *supra* note 7, at 1105. Neuborne argued that "the assumption of parity is, at best, a dangerous myth" that has resulted in an improper channelling of constitutional litigation into state courts. *Id.*

Neuborne's definition of the better forum for constitutional litigation is "the one more likely to assign a very high value to the protection of the individual, . . . against the collective, so that the definition of the individual right in question will receive its most expansive reading and its most energetic enforcement." Neuborne, *supra* note 73, at 727. Not all participants in the parity debate agree with this definition. *See, e.g.*, Redish, *supra* note 9, at 337-38 (defining the better forum as that which is most likely to reach a decision "on the basis of a fair and neutral assessment of law, policy and facts"); *see also infra* notes 83-85 and accompanying text.

77. Neuborne, *supra* note 7, at 1106.

78. *Id.*; *see also* Neuborne, *supra* note 73, at 729 & n.10 (acknowledging the Court's partial retreat from its assumption of parity in *Stone* and its apparent recognition that the "choice of forum in constitutional cases is, if not outcome-determinative, at least outcome-relevant").

both the disparity in the treatment of federal rights between the two forums and the superiority of the federal judiciary.[79] First, because federal judges are selected from a smaller, more elite, and better qualified pool than state judges, the federal judiciary enjoys a higher level of technical competence.[80] Second, because the federal judiciary is the product of an elite tradition, a tradition inextricably bound to the enforcement of federal rights, federal judges feel greater pressure than their state counterparts to fulfill a guardianship role.[81] Third, federal judges, chosen by appointment and given life tenure, enjoy a greater independence from the political pressures and majoritarian influences brought to bear on state judges who are subject to election or reappointment processes.[82]

Professor Martin Redish agrees with Neuborne's general conclusion of federal court superiority.[83] Redish, however, defines the better forum not in terms of its propensity to broaden federal rights,[84] but rather as the forum that intuitively seems more likely to issue an impartial judgment that accurately reflects federal law and policy.[85] Redish narrows the focus of the parity debate by emphasizing the value of an independent federal judiciary.[86] For Redish, the institutional superiority of the federal judiciary as an enforcer of federal rights is clear, given its insulation from political pressure[87] and its greater expertise.[88]

Despite their firm belief in the superiority of the federal judiciary, neither Neuborne nor Redish rejects the system of concurrent jurisdiction. Neuborne acknowledges that the availability of state courts for the enforcement of federal rights can provide a desirable alternative if a

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79. Neuborne, *supra* note 7, at 1120-21. Neuborne focused his comparison on state and federal trial courts. *Id.* at 1118-19.

80. *Id.* at 1121-24. Neuborne further noted that higher federal salaries give the federal judiciary a more forceful recruiting tool than the states. Better qualified staffs also contribute to the superior technical competence of the federal judiciary. *Id.* at 1121-22.

Elsewhere, Neuborne has suggested that federal courts also offer litigants certain procedural advantages. Federal procedure offers attorneys a uniform body of procedural law and thereby a degree of familiarity and predictability. Furthermore, federal procedure is litigant-friendly because it affords litigants simplified pleading, liberal discovery, and superior class action procedure among other advantages. Such advantages, Neuborne proposes, contribute to the overall superiority of the federal courts. *See* Neuborne, *supra* note 73, at 733-47.

81. Neuborne, *supra* note 7, at 1124-27. Neuborne called this the "psychological set" of the judiciary. Neuborne also noted that federal judges are more likely to be receptive to Supreme Court dictates because they are members of the same bureaucratic structure. *Id.* at 1124-25.

82. *Id.* at 1127-28.

83. Redish, *supra* note 9, at 329-30 & n.4.

84. *See supra* note 76.

85. Redish, *supra* note 9, at 337-38.

86. *Id.* at 333-38.

87. *Id.*

88. *Id.* at 333. Redish suggests that federal courts, merely by exposure, have greater expertise in federal law. Likewise, state courts have greater expertise in state law. *Id.*

state court is likely to read the right in question expansively. When favorable state court precedent exists, under either state or federal law, a litigant may wish to take advantage of the certainty offered in state court.[89] Neuborne also recognizes that if the Supreme Court is unsympathetic to a given position, the institutional superiority of the federal courts may be an insufficient reason to warrant their selection over state courts.[90] Redish notes that interaction between the state and federal judiciaries is a beneficial by-product of federalism—one that facilitates an exchange of knowledge and expertise.[91] He disputes, however, that the values of federalism diminish the argument for the institutional superiority of the federal judicial system.[92]

For both Neuborne and Redish, the central concern of the parity debate is ensuring that the federal courts, as inherently superior forums, remain available to litigants seeking vindication of federal rights.[93] Although a valid and important concern, this formulation focuses broadly on judicially developed systems of case allocation and does little to enlighten litigants and attorneys engaged in the process of forum selection. As Redish openly acknowledges, litigants bring a different perspective to the parity debate.[94] Litigants, however, can use the existing debate to inform the forum selection process. Many of the issues Neuborne and Redish raise in their evaluation of parity at its primary level suggest factors litigants can use in parity analysis at a second, more individualized and litigant-oriented level.

B. The Believers

The school of parity believers comprises two distinct branches. Some parity believers share Professor Redish's view that reaching conclusions about the existence of parity between state and federal courts is primarily an intuitive rather than an empirical process.[95] Other believers, however, maintain that empirical evidence establishes the existence of parity between the two forums.[96] Despite differences in

89. Neuborne, *supra* note 73, at 731.

90. *Id.*

91. Redish, *supra* note 9, at 331-32.

92. *Id.* at 331-33. Although Redish acknowledges that an empirical solution to the debate is unlikely, he argues that this lack of hard proof does not render the debate unresolvable. In the absence of empirical evidence, institutional superiority is the dispositive factor and leads to "an all but inescapable" conclusion of "nonparity." *Id.* at 332-33.

93. *See* Neuborne, *supra* note 7, at 1131; Redish, *supra* note 9, at 335-36.

94. Redish, *supra* note 9, at 338.

95. *See* Bator, *supra* note 7, at 623 (commenting that the arguments of parity skeptics "are intuitive [and] rest on human insight rather than on empirical evidence"); *cf.* Redish, *supra* note 9, at 332-33 (acknowledging that the debate cannot be resolved empirically, but arguing that nonparity is still the logical conclusion).

96. *See* Solimine & Walker, *supra* note 8, at 222-48; Solimine & Walker, *supra* note 9, at

method, the analyses and conclusions of the two branches are closely parallel. Both branches reject the skeptics' conclusion that the federal courts are institutionally superior to state courts.

Professor Paul Bator suggests that a broad comparison of the state and federal judiciaries is a deceptive oversimplification in light of the many variables at work within each system.[97] The quality of both the state and federal judiciaries, Bator argues, undoubtedly varies widely from jurisdiction to jurisdiction.[98] The skeptics also fail to factor the state appellate courts sufficiently into the equation. Bator suggests that quality and independence of state judiciary systems often are enhanced significantly at the appellate levels and that this enhancement undermines the argument for the institutional superiority of the federal judiciary.[99]

Bator also posits that the skeptics may measure the receptivity of the state courts to federal claims from a biased standard, a standard that equates rejection of a particular federal claim with the rejection of all federal values.[100] He proposes that the rejection of a federal claim simply may reflect a choice among conflicting federal values and that the state courts are not necessarily less sensitive to the entire body of federal values merely because they might make that choice differently than the federal courts.[101] Indeed, Bator suggests that state courts can provide a valuable and necessary second perspective that is lost when federal issues are confined to the federal judicial system.[102]

Professors Michael Solimine and James Walker agree with Bator that a proper comparison of the two systems should include the state

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131-48.

97. Bator, *supra* note 7, at 629-30.

98. *Id.* at 629. Pointing to recent improvement in the receptivity of many stato courts to federal claims, Bator observes that the quality of courts is not a static factor. *Id.* at 620-30. He further suggests that the skeptics' assumption that the federal judiciary is more sensitive to the enforcement of federal rights is, in part, the product of the historical experience of racial segregation. Because that era has passed, Bator argues, the assumption no longer has merit. *Id.* at 631. Michael Solimine and James Walker similarly argue that historical evidence of nonparity has only a "tangential relevance" to any current evaluation of parity. They point to the lack of any evidence that past aberrations, such as those that occurred during the post-Reconstruction period and the early years of the civil rights movement, are entrenched in the current state court system. Solimine & Walker, *supra* noto 8, at 223-25.

99. Bator, *supra* note 7, at 629-30.

100. *Id.* at 631-33.

101. *Id.* Bator observes: "Even in the sphere of individual rights, it is misleading to suppose that the rejection of a particular constitutional claim imports less fidelity to constitutional values than its vindication." *Id.* at 633. For example, when a court rejects a claim that a state law violates the Constitution, it may reject a particular individual's constitutional claims but at the same time uphold "principles of separation of powers and federalism which themselves have constitutional status." *Id.*

102. *Id.* at 634 (observing that "insight into issues of federal constitutional law should be available from both perspectives").

appellate courts, which tend to compensate for possible deficiencies of state trial courts.[103] Additionally, Solimine and Walker cite recent surveys and scholarship indicating increases in the salaries, support staff, and professionalism of state trial judges—measures that diminish the impact of the skeptics' technical superiority argument.[104] Furthermore, citing modern studies that show no strong, consistent correlation between the decisions of state judges and their political accountability,[105] Solimine and Walker deny that the accountability of state court judges through the electoral process necessarily influences their decisions.[106]

Solimine and Walker also offer data gathered in a survey of state appellate and federal district court opinions as direct empirical proof that state courts provide a forum roughly equal to that of federal courts in the vindication of federal rights.[107] This survey, they argue, further dilutes the skeptics' arguments by demonstrating that no systemic bias against the enforcement of federal rights taints the state court system.[108] Finally, Solimine and Walker assert that evidence of the institutional superiority central to the skeptics' position is insufficient to justify a conclusion of nonparity.[109]

The believers also offer normative arguments in favor of operating under an assumption of federal and state court parity. Because state courts inevitably will continue to decide at least some federal claims, treating them as second-class members of the judiciary may be counter-

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103. Solimine & Walker, *supra* note 8, at 226 & n.71.

104. *Id.* at 226-27 & nn.72-75.

105. *Id.* at 230-31. Furthermore, recent data showed an increase in the number of state judges that are appointed rather than elected. *Id.* at 228 & n.77.

106. *Id.* at 230-31. Solimine and Walker note that evidence of voter apathy also dilutes the arguments of the skeptics. *Id.* at 231.

107. *Id.* at 232-46. Solimine and Walker surveyed state appellate court opinions and compared the percentage of rulings in favor of and against individual constitutional rights. The claims surveyed included those made under the first and fourth amendments and the equal protection clause of the fourteenth amendment. Overall, 36% of the claims were upheld, and 64% were denied. State courts upheld claims in 32% of their cases; federal courts upheld claims in 41%. These individual figures, compared with the 36% overall figure, led Solimine and Walker to conclude that state courts are not clearly reluctant to uphold claims that federal district courts would uphold. *Id.* at 240. For further evaluations of the data collected, see *id.* at 242 & Table III, 243-44 & Table IV. For Solimine and Walker's response to criticism of their survey, see Solimine & Walker, *supra* note 9, at 137-148.

108. Solimine & Walker, *supra* note 8, at 246, 252.

109. *Id.* at 225-32. Although Solimine and Walker concede that the system of appointment and life tenure affords the federal judiciary greater insulation from majoritarian influence, they find the evidence that political accountability influences the decisions of state judges unconvincing and insufficient to warrant a conclusion of nonparity. *Id.* at 230-31; *see also* Solimine & Walker, *supra* note 9, at 137 (reaffirming prior conclusion "that the difference between federal and state judges is not sufficient to negate a presumption in favor of parity").

productive and a self-fulfilling prophecy.[110] In contrast, starting from the presumption that state courts are competent forums, willing to enforce federal rights enthusiastically, helps ensure that the assumption of parity is a self-fulfilling prophesy.[111] Embracing a system of concurrent jurisdiction demonstrates confidence in the competence and ability of state courts and provides them an incentive to assume an equal role in the enforcement of federal rights.[112] Furthermore, the expertise of state courts will increase with additional exposure to federal claims.[113]

Professors Bator, Solimine, and Walker agree that at least some form of nascent parity exists between the state and federal courts. Bator's argument is essentially a counterintuitive critique of the skeptics' analysis. Solimine and Walker have attempted to take the debate outside the realm of intuition and give it a quantitative foundation. Nevertheless, with many variables affecting the outcome of litigation, perhaps Redish and others suggest correctly that no empirical answer to the parity question exists, at least when the question is asked at its primary level.[114] As do the skeptics, the believers focus the debate on the proper role of the state courts in the enforcement of federal rights. Again, this broad focus is more allocation-oriented than litigant-oriented. Nevertheless, by offering alternative interpretations of the factors common to the analyses of parity at the primary and secondary levels, the believers' arguments can bring balance to the forum selection process.

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110. *See* Bator, *supra* note 7, at 625 (observing that "[i]f we want state judges to feel institutional responsibility for vindicating federal rights, it is counterproductive to be grudging in giving them the opportunity to do so"); Solimine & Walker, *supra* note 8, at 249 (acknowledging that preventing "state judges from hearing federal cases due to perceived institutional differences . . . [may create] a self-fulfilling prophecy"). *But cf.* Neuborne, *supra* note 7, at 1129-30 (arguing that even if continued avoidance of state courts does create a self-fulfilling prophecy, too much is at stake in important constitutional issues to resort to state courts for the sake of improving expertise).

111. Bator, *supra* note 7, at 624-29.

112. *Id.* at 624. Solimine and Walker observe that factors external to the state and federal judiciaries also may affect their ability to enforce federal rights. Solimine & Walker, *supra* note 8, at 246-50. They note, for example, that the parity debate often fails to account for the role of attorneys and litigants in securing enforcement of federal rights. *Id.* at 247-49. They suggest that attorneys can do much to inform the process and guide state courts through unfamiliar waters, thus helping the state courts to fulfill their role as co-enforcers of federal rights. *Id.* at 249-50.

113. Bator, *supra* note 7, at 624-25.

114. *See supra* notes 92, 95; *see also infra* notes 116-22 and accompanying text. The empiricists themselves concede that much of the evidence concerning the competence, receptivity, and bias of the courts provides only collateral support for arguments either for or against parity. Solimine & Walker, *supra* note 8, at 247-48.

C. Impasse and Alternatives

Professor Erwin Chemerinsky posits that the parity debate has reached an impasse and, thus, may have outlived its usefulness in determining the proper role for state and federal courts in adjudicating federal claims.[115] Chemerinsky believes that because no satisfactory empirical answer to the parity question exists,[116] the debate cannot move beyond the realm of intuition and gainsaying.[117] He argues that the process of defining the roles of the federal and state judiciaries must move beyond the framework of the parity debate.[118]

Chemerinsky rejects the possibility of an empirical solution to the debate for several reasons. First, he argues that before an empirical study can satisfy all debate participants, the participants must reach a consensus in defining the characteristics of a superior system.[119] The debaters, however, do not agree on a common standard of quality against which they can evaluate the state and federal judicial systems.[120] Second, a broad empirical analysis of state and federal court parity would not reflect interjurisdictional differences in the quality of either judicial system, nor would it reveal any tendencies of individual courts to be more or less receptive to specific federal issues.[121] Finally, Chemerinsky argues that devising an effective methodology for a broad comparison of the two systems is nearly impossible.[122]

Chemerinsky also rejects the dispositive value of intuitive responses to the question of parity.[123] Arguments based on historical factors prove unsatisfactory because each side of the debate uses history selectively.[124] Assumptions about the importance of institutional differences between the two systems also have failed to resolve the debate. Without empirical evidence confirming or disproving the conclusions drawn, neither side is likely to overcome the intuitions and arguments of the other.[125] Thus, the debate has reached a stalemate.[126]

As an alternative method of determining the proper roles of the

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115. Chemerinsky, *supra* note 8, at 255-80.

116. *Id.* at 256-73.

117. *Id.* at 256, 278-79. Chemerinsky observes that the debate seems to be "fixed in a litany that appears as unresolvable and unchangeable as the scripts for the Lite Beer commercials." *Id.* at 256.

118. *Id.* at 236, 279-80.

119. *Id.* at 258-59.

120. *Id.* at 257-59; *see also supra* note 76.

121. Chemerinsky, *supra* note 8, at 259-60.

122. *Id.* at 261. Chemerinsky also criticized the Solimine and Walker study at length. *Id.* at 261-69.

123. *Id.* at 273-80.

124. *Id.* at 273-75.

125. *Id.* at 278-79.

126. *Id.* at 279.

federal and state judiciaries in the adjudication of federal claims, Chemerinsky proposes shifting much of the responsibility for forum allocation to litigants.[127] He argues that litigants presenting constitutional claims should have the choice between state or federal court.[128] While Chemerinsky's suggested model resembles the present system of concurrent jurisdiction, it entails three significant changes.[129] First, the presence of a constitutional defense would provide a sufficient basis for a plaintiff to bring a nonfederal action in federal court.[130] Similarly, defendants presenting constitutional defenses to nonfederal actions brought in state court would be able to remove to federal court.[131] Finally, if a plaintiff chose to present a constitutional claim in state court and the defendant had no constitutional claim, the defendant could not remove the case to federal court.[132]

Chemerinsky suggests that several advantages inhere in following this system of litigant choice. First, the system requires no overall resolution of the parity debate because litigants would make decisions on a case-specific basis.[133] Furthermore, because the system allows litigants to seek the forum more likely to protect the particular right in question, it promotes the enforcement of constitutional rights.[134] Second, because the litigant-choice system increases the autonomy of litigants, it should produce concomitant increases in litigant satisfaction.[135] Third, because the system requires no overall judgment of the relative competence of the federal and state judiciaries, it enhances federalism.[136] One individual's decision that a federal forum is preferable in a particular case threatens the esteem of state judiciaries far less than an overall pronouncement that state courts are inherently inferior to federal courts.[137] Finally, Chemerinsky suggests that both sides of the parity debate should accept the litigant-choice system.[138] Because the system assures

127. *Id.* at 300-26.

128. *Id.*

129. *See id.* at 312.

130. *Id.* at 313-14.

131. *Id.* at 315.

132. *Id.* at 314-15. If both parties raise constitutional claims, a circumstance Chemerinsky characterizes as rare, then the current jurisdictional rules would apply. *Id.* at 313.

133. *See id.* at 300-02.

134. *Id.* at 302-05. Chemerinsky suggests that attorneys are in the best position to select the better forum. They have better access to information about local courts, can research local decisions, can exchange information with other attorneys, and can draw from their own experience. Chemerinsky concludes, however, that developing empirical proof of the better forum still remains unlikely. *Id.* at 302-03.

135. *Id.* at 306-08.

136. *Id.* at 308-10.

137. *Id.* at 308.

138. *Id.* at 310.

continued access to federal courts it should satisfy the parity skeptics.[139] Conversely, the system should be acceptable to the believers because it acknowledges the role of state courts as full-fledged enforcers of constitutional rights.[140]

Although both Chemerinsky and the parity debaters focus on the problem of forum allocation, Chemerinsky also recognizes the importance of forum selection to litigants. As Chemerinsky suggests, a resolution of the parity debate at its primary level is probably unnecessary for litigants to use the forum selection process to their advantage.[141] Yet Chemerinsky's proposed system, as well as the present system of concurrent jurisdiction, still requires litigants to evaluate potential forums at the second level of parity. That evaluation cannot avoid the issues raised by the parity debate completely, but it can approach them from a narrower, litigant-oriented perspective.

D. A Second Level of Parity: Factors for Developing an Analytical Framework for Forum Selection

The modern parity debate focuses on the proper role of the state and federal courts in the adjudication of federal claims and on the allocation of judicial resources within that context. Parity skeptics such as Neuborne and Redish argue that to ensure the maximum protection of federal rights, the inherently superior federal courts must remain open to litigants seeking vindication of those rights.[142] Parity believers such as Bator, Solimine, and Walker maintain that state courts can provide forums equally competent to their federal counterparts and, thus, should be given every opportunity to become full-fledged co-enforcers of federal rights.[143] Although the parity debate raises significant questions, it leaves those questions without definitive answers. Consequently, the debate itself remains unresolved and perhaps unresolvable.[144]

From the litigant's perspective, the present system of concurrent jurisdiction lessens the importance of resolving the parity debate at its primary level because that system generally allows plaintiffs with federal claims to choose between state and federal forums. To make an informed choice, however, plaintiffs must engage in a microcosmic version of the parity debate by determining which available forum is more likely to protect the right in question. Defendants contemplating re-

139. *Id.*
140. *Id.*
141. *Id.* at 300-01.
142. *See supra* notes 76-94 and accompanying text.
143. *See supra* notes 95-114 and accompanying text.
144. *See supra* notes 115-17 and accompanying text.

moval will make similar evaluations. Thus, litigants selecting a forum will consider many of the same issues raised by the parity debate, but at a second, more individualized and litigant-oriented level.

Litigants should begin the forum selection process by defining the standard against which they will measure the relative quality of available state and federal courts. This standard is the litigant's definition of the "better forum."[145] Litigants want to try their cases in the court more likely to rule in their favor. Therefore, from a litigant's perspective, outcome defines the better forum. Litigants must recognize that forum selection may be an outcome-determinative process and should evaluate relevant factors from this perspective.

In developing an analytical framework for forum selection, litigants first should consider those factors that may affect the institutional quality of the particular state and federal courts to which they have access. Here, the litigant's primary concerns are the competence, receptivity, and bias of the courts in question.[146] Because institutional quality may vary from issue to issue as well as from court to court, however, litigants should consider both the state and federal issues that might be raised in their cases. The breadth of rights and remedies available under state and federal law and the degree to which one may dominate the desired outcome of the case also will enter the evaluation of potential forums.

In evaluating the relative competence of the courts in question, litigants should focus primarily on the expertise of the courts in the particular area of law presented. The dominance of federal issues in which the federal court has greater expertise than the state court might create a presumption favoring selection of a federal court. The dominance of state issues may create a similar presumption favoring state court selection.[147] Nevertheless, the greatest value of expertise is ensuring a desirable degree of familiarity with the legal questions and underlying policies likely to be at issue; therefore, to evaluate a court's expertise a litigant should consider its experience in deciding issues under similar or parallel law.[148] Finally, an attorney's experience might help compensate for a court's lack of familiarity with a particular issue and may

145. *Cf. supra* note 76. The litigant's definition more closely resembles Professor Neuborne's than Professor Redish's.

146. *See supra* notes 80-88 and accompanying text.

147. *Cf.* Redish, *supra* note 9, at 333 (suggesting that state and federal courts are more familiar with and, thus, have more expertise in their respective areas of law).

148. *Cf.* Donnelly v. Yellow Freight System, Inc., 874 F.2d 402, 408 (7th Cir. 1989) (noting that state courts' experience with their own employment discrimination laws makes them familiar with discrimination issues), *aff'd*, 110 S. Ct. 1566 (1990). *But cf.* Yellow Freight System v. Donnelly, 110 S. Ct. 1566, 1570 (1990) (suggesting that the greater experience of federal judges in Title VII matters is a "factor the plaintiff may weigh when deciding where to file suit").

temper the importance of the expertise factor.[149]

Familiarity and expertise, however, do not result necessarily in a predisposition of a court to rule in the plaintiff's favor. Receptivity or bias may influence the outcome of a particular case and, thus, become important considerations in the forum selection process. Historical tendencies are important in evaluating receptivity and bias; however, litigants also must recognize the dynamic nature of these factors. Current trends in judicial decision making may overcome even long-standing presumptions created by a court's past history.[150]

Intertwined with the evaluation of receptivity and bias is the degree of judicial independence necessary to ensure a favorable outcome. Although most commentators agree that appointment and life tenure afford the federal judiciary greater insulation from political pressure and influence,[151] the importance of this insulation to a litigant seeking a particular outcome will depend on both the political volatility of a given issue and the likelihood that political pressure will influence the outcome.[152]

In addition to evaluating the institutional quality of the available forums, litigants should evaluate the procedural requirements that may accompany both the choice of forum and choice of claims and the potential of those requirements to work to a litigant's advantage or disadvantage. Even when the evaluation of institutional quality creates a strong preference for a particular forum, unfavorable procedural rules may make that preference less desirable. Among the many procedural elements[153] that may affect these choices are pendent jurisdiction

149. *See supra* note 112.

150. For a discussion of current trends in state employment discrimination law, see *infra* notes 201-08 and accompanying text. For a discussion of current trends in federal employment discrimination law, see *infra* notes 257-90 and accompanying text.

151. *See, e.g.*, Neuborne, *supra* note 7, at 1127 (noting that federal judges "are as insulated from majoritarian pressures as is functionally possible"); Redish, *supra* note 9, at 333 (arguing that "a clear disparity [exists between] the relative independence levels of state and federal judges"); Solimine & Walker, *supra* note 8, at 231-32 (conceding that the "superiority of a lifetime appointment in countering majoritarian pressures is rightly praised," but arguing that political accountability is unlikely to affect judicial decisions).

152. *See* Chemerinsky, *Evaluating Candidates*, 61 S. CAL. L. REV. 1985, 1989 (1988) (suggesting that "judges are inevitably going to be evaluated based on their past or likely rulings on specific, controversial topics"); Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1581 (1990) (arguing that "judicial independence necessarily varies from issue to issue"); Neuborne, *supra* note 7, at 1128 (arguing that risk of influence is greatest when issues "raise strong political passions").

153. This list of procedural elements is not exhaustive, but highlights some of the procedures that may affect the outcome of litigation. Nevertheless, litigants should conduct a thorough evaluation of all potential procedural problems. For a general discussion of the procedural superiority of the federal judicial system, see Neuborne, *supra* note 73.

rules,[154] issue and claim preclusion rules,[155] summary judgment procedures,[156] class action procedures,[157] and discovery rules.[158] Furthermore, when a plaintiff has a strong interest in remaining in state court, the defendant's ability to remove may necessitate the abandonment of federal claims to protect the plaintiff's choice of a state forum.[159]

In a system of concurrent jurisdiction, plaintiffs with federal claims generally enjoy the luxury of choosing between state and federal forums. Nevertheless, in exercising their choice, litigants should not rely on broad assumptions about the relative competence of the federal and state judiciaries. Rather, litigants should weigh carefully the many factors that may make one forum more amenable than the other. Because forum selection should be case specific, it cannot be a precise science. By identifying the factors most likely to affect the outcome of a particular case, however, litigants can use that process to their greatest advantage.

IV. Developing a Framework for Forum Selection in Employment Discrimination Litigation

Employment discrimination plaintiffs traditionally have preferred federal law and federal forums.[160] Recently, however, several commentators have recommended that plaintiffs seriously consider using state law and state courts in seeking redress for their grievances.[161] A growing number of plaintiffs are following this course.[162] As the role of state law and state courts in employment discrimination litigation increases, so does the need for a general framework to guide litigants in the forum selection process. This section suggests several factors that litigants

154. *See infra* notes 300-02 and accompanying text.

155. *See infra* notes 213-14 and accompanying text.

156. *See infra* notes 297-99 and accompanying text.

157. *See infra* notes 217-18 and accompanying text; text accompanying note 295.

158. *See infra* notes 219, 292-93 and accompanying text.

159. *See infra* notes 210-16 and accompanying text.

160. Arterton, *supra* note 15; Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 255 (1990) (noting that "[h]istorically civil rights advocates and litigants have preferred the federal courts"); Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U.L. REV. 777, 787 (1983) (observing that employment discrimination plaintiffs "will probably prefer to bring federal claims in federal court").

161. *See, e.g.*, Arterton, *supra* note 15, at 504-05 (suggesting that because of increasing conservatism in the federal judiciary, "state courts may be more receptive to employment discrimination claims"); Belton, *supra* note 160, at 255-56 (observing that state courts may present a more amenable alternative to federal courts); Saperstein, *Response*, 13 N.Y.U. REV. L. & SOC. CHANGE 509, 512 (1984-85).

162. *See* Mishkind & Burns, *supra* note 61, at 260 (noting that in Michigan, where state employment discrimination law offers broad remedies, plaintiffs are making "calculated decision[s]" to use state courts); Saperstein, *supra* noto 161, at 512-13 (same in California).

should consider in evaluating and comparing state and federal forums and in developing a framework for forum selection in employment discrimination litigation.

A. *Evaluating the State Forum*

1. Competence, Receptivity, and Bias in the State Judiciaries

As the parity debate demonstrates, much disagreement exists about the competence, receptivity, and bias of the state courts in adjudicating federal claims, particularly those involving civil rights.[163] While some argue that political accountability and lack of expertise work against the competence and receptivity of the state courts,[164] others discount the dispositive value of these factors in evaluating the state judiciaries.[165] In the area of employment discrimination law, the *Yellow Freight* decision seems to place the Supreme Court in the latter group.[166] Nevertheless, despite the Court's presumption that state courts generally are competent to hear and decide Title VII issues, the Court recoguizes that litigants themselves must evaluate the competence of the state courts.[167]

In order to assess accurately the expertise of the state courts in employment discrimination law, litigants must look beyond the courts' lack of experience in Title VII matters. The evaluation process must take into account a court's experience with state employment discrimination law and with other federal discrimination statutes within the state courts' concurrent jurisdiction.[168] Because most states have their own employment discrimination statutes, several of which are similar or parallel to Title VII,[169] litigants should have less concern that state courts will be unfamiliar with the administrative complexities, legal questions, or underlying policies of federal discrimination laws.[170] Even when a particular court or judge lacks familiarity with certain issues,

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163. *See supra* notes 76-114 and accompanying text.

164. *See supra* notes 76-94 and accompanying text.

165. *See supra* notes 95-114 and accompanying text.

166. *See supra* text accompanying notes 52-56; note 66 and accompanying text.

167. Yellow Freight System, Inc. v. Donnelly, 110 U.S. 1566, 1570 (1990) (noting that variance in the expertise of state and federal courts is a "factor that the plaintiff may weigh" in Title VII forum selection).

168. For a collection of federal statutes currently used to combat employment discrimination, see *infra* note 242.

169. For a survey of state employment discrimination statutes and their various provisions, see *infra* notes 188-95 and accompanying text. For a compilation of the texts of all state statutes, see 8A & 8B Lab. Rel. Rep. (BNA) 453:i-457:3513 (1990).

170. *See* Note, *supra* note 9, at 319 (suggesting that similar or parallel state laws ensure tbat "state courts are likely to have the requisite subject matter expertise and inclination to enforce federal laws adequately").

experienced attorneys and federal precedent can help educate a state court and, therefore, temper the court's lack of expertise.[171] Nevertheless, if a case presents particularly complex issues,[172] a lack of expertise may affect outcome.

The court's receptivity and bias are perhaps of greater concern to employment discrimination litigants considering a state forum. Many commentators have suggested that the election and retention procedures still used by most states leave state judges vulnerable to majoritarian pressures.[173] Such vulnerability is particularly threatening to minorities who are the most frequent victims of discrimination.[174] Although parity proponents suggest that the effects of accountability on the decisions of state courts have been overdramatized,[175] judicial elections such as the California Supreme Court retention election of 1986 indicate that when state judges rule in a countermajoritarian fashion on particularly volatile issues, the results can be dramatic.[176]

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171. *See* Solimine & Walker, *supra* note 8, at 247-49.

172. Employment discrimination class actions, for example, may be beyond the expertise of some state courts. *See* Arterton, *supra* note 15, at 504-05 (observing that "most state courts are inexperienced in handling large employment discrimination cases" and that some are unwilling to certify large classes).

173. *See* Eule, *supra* note 152, at 1583-84; Neuborne, *supra* note 7, at 1127-28; Redish, *supra* note 9, at 333-38. The various states currently employ several different methods of judicial selection that subject state judges to varying degrees of political accountability. These selection systems include partisan elections, nonpartisan elections, gubernatorial appointment, legislative election, and merit selection. Merit selection is a variant of gubernatorial appointment in which the governor selects an appointee from a list of nominees compiled by a judicial nominating committee. Typically, merit appointees face nonpartisan retention elections after serving a short initial term. *See* Pearson & Castle, *Alternative Judicial Selection Devices: An Analysis of Texas Judges' Attitudes*, 73 JUDICATURE 34, 34 (1989). For a compilation of state judicial selection, retention, removal, and replacement procedures, see COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1990-91, at 204-20, Tables 4.1-4.5.

174. *See* Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 185-86 (1984) (observing that "[h]istorically, many state courts have been unable to free themselves from local pressures and prejudice when adjudicating cases that involved race" but also suggesting that "it ought not be taken for granted that state courts cannot vindicate the rights of unpopular minorities within their jurisdiction").

175. *See, e.g.*, Solimine & Walker, *supra* note 9, at 136 (casting doubt on the "much-heralded and feared political accountability of the state bench").

176. In the 1986 California judicial retention election, Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso lost their seats on the state supreme court after a highly publicized and particularly vicious campaign. The most hotly debated issue in the campaign was the voting pattern of the justices on death penalty cases, an issue their opponents brought directly to the voters in a searing media campaign that equated a vote against the justices as a vote for the death penalty. Chemerinsky, *supra* note 152, at 1986-87. Also at issue were recent decisions overturning plebiscitary efforts at legislative redistricting. In a high profile media campaign, the justices' opponents characterized the justices' positions as contrary to the will of the people. Eule, *supra* note 152, at 1582-83 & n.353. Former Associate Justice Grodin observed the following about the 1986 campaign and election:

> The message which this phenomenon sends to judges is that if they want to avoid negative votes, it is best to produce results with which the voters will agree. The risk that judges will

When evaluating whether the political accountability of state judges will affect the outcome of a particular case, employment discrimination litigants should consider two issues. First, they must determine the political environment in which the case is presented. The volatility of employment discrimination issues may vary in different geographical areas and at different times within the same geographical area.[177] The sensitivity of judges to political pressure is likely to vary as well; judges may be particularly susceptible to political pressure during election years.[178] Second, litigants should determine the potential volatility of their particular case. A high-profile case is more likely to draw public attention and generate political pressure, while a low-profile case may slip by the public virtually unnoticed, creating less risk that political pressure will dictate the outcome.[179] Some commentators suggest that gauging the effects of political accountability on the judiciary is virtually impossible.[180] By narrowing their inquiry to specific issues within a particular state or district, however, litigants may gauge more successfully the vulnerability of judges to external political pressure and the potential of that vulnerability to result in outcome-affecting bias or receptivity in a particular case.

Political accountability is not the only gauge of receptivity available to employment discrimination litigants. Current trends in judicial decision making and lawmaking are of particular importance in the ever-evolving area of employment discrimination law. Litigants can use such trends as a measure of receptivity at all levels of a state court system. In some state courts, for example, the development of common-

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receive and act upon that message, unconsciously if not consciously, is substantial. . . . In any event, the potential that the pendency or threat of a judicial election is likely to have for distorting the proper exercise of the judicial function is substantial and palpable.

Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988).

177. For example, during the highly publicized 1990 senatorial campaign of David Duke in Louisiana, racial issues were at the forefront. Duke, a former Ku Klux Klan leader, garnered 44% of the total vote and approximately 60% of the white vote while running on a platform that included strong criticism of affirmative action programs. *See* Maraniss, *Duke Emerges from Loss Stronger than Ever; Ex-Klansman Draws 44% of Louisiana Vote Against 3-Term Senator*, Wash. Post., Oct. 8, 1990, at A1; Schram, *Louisiana White Voters Raise Hatred's Banner*, Newsday, Oct. 11, 1990 (Viewpoints), at 68 (city ed.).

178. *See* Chemerinsky, *supra* note 152, at 1987 (observing that involvement of judges in preelection campaign activities, especially fundraising, "might cause people to wonder whether decisions made in the months before a retention election reflect the justice's convictions or a move to appease the voters").

179. *See* Eule, *supra* note 152, at 1581 & nn.350-51 (recognizing that most judicial elections "are issueless and colorless," but noting that recent studies suggest that the likelihood of voting against retention increases in direct proportion to a voter's level of knowledge).

180. *See, e.g., id.* at 1583 (conceding that "[i]t may well be impossible to establish empirically that the threat of electoral reprisal affects judicial behavior"); Grodin, *supra* note 176.

law alternatives to traditional statutory remedies has expanded the avenues of relief available to plaintiffs and may indicate an increase in the receptivity of the state judiciaries.[181]

Perceptions of competence, receptivity, and bias may create a presumption favoring or disfavoring selection of a state forum. Yet these factors can vary widely, making broad generalizations about state forums both difficult and potentially misleading.[182] Nevertheless, framing an evaluation of these factors within a specific context can do much to inform the forum selection process.

2. The Changing Face of State Law

The degree to which state or federal law dominates the outcome of a case may strengthen a presumption favoring one forum over another. To protect the choice of a state forum, however, a plaintiff may have to sacrifice federal claims,[183] making a choice between forums a potential choice between claims as well. Within the forum selection process, the plaintiff must evaluate and compare rights and remedies available under state and federal law.

When Congress enacted Title VII in 1964, approximately one-half of the states had some type of employment discrimination statute.[184] Since that time the body of state laws has grown considerably; forty-nine states have enacted employment discrimination legislation.[185] Furthermore, because Congress designed Title VII to supplement, rather than replace, state laws, plaintiffs may seek recovery under federal and state laws simultaneously.[186]

Many state statutes that are similar to Title VII actually provide more comprehensive coverage than Title VII. Title VII, for example,

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181. *See infra* notes 201-08 and accompanying text (discussing judicial development of common-law alternatives to statutory employment discrimination laws).

182. *See* Bator, *supra* note 7, at 629 (noting that "there are tremendous variations in the quality of the bench from state to state" among both state and federal judges).

183. Because presenting a federal claim in state court leaves plaintiffs vulnerable to removal to federal court by defendants, pleading only state claims is the sole means by which plaintiffs can guarantee that their suits will remain in state court. *See infra* notes 210-16 and accompanying text.

184. Catania, *supra* note 160, at 783 n.24.

185. Alabama is now the only state without a general statute prohibiting employment discrimination, although the Alabama Code does contain provisions providing for equal public employment opportunities for the blind, the visually impaired, and the physically disabled when the handicap does not prevent the employee from performing the tasks required. *See* ALA. CODE §§ 21-7-1, 21-7-8 (1975). The main statutes of Georgia, Mississippi, and Virginia also apply only to state employment. *See* GA. CODE ANN. §§ 45-19-20 to 45-19-42 (1990); MISS. CODE ANN. § 25-9-149 (Supp. 1990); VA. CODE ANN. §§ 2.1-116.10, 2.1-374 (1987). For a compilation of the texts of current state statutes, see 8A & 8B Lab. Rel. Rep. (BNA) 453:i-457:3513 (1990).

186. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1973).

applies to employers with fifteen or more employees.[187] Some state statutes apply to employers with only a single worker.[188] Additionally, unlike Title VII, some state statutes prohibit discrimination based on marital status[189] and sexual preference.[190] Several state statutes also offer broader remedies than those available under Title VII, including recovery of punitive[191] and compensatory damages.[192] Moreover, several state statutes provide for jury trials while Title VII claimants have no right to a jury.[193]

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187. *See* 42 U.S.C. § 2000e(b) (1988).

188. The statutes of eight states and the District of Columbia apply to employers of one or more employees. *See* ALASKA STAT. § 18.80.300 (1986); D.C. CODE ANN. § 1-2502(10) (1987); HAW. REV. STAT. § 378-1 (1988); ME. REV. STAT. ANN. tit. 5, § 4553 (1989); MICH. COMP. LAWS ANN. § 37-2103 (West 1985); MINN. STAT. ANN. § 363.01(17) (West Supp. 1991); MONT. CODE ANN. § 49-2-101(8) (1989); OR. REV. STAT. § 659.010(6) (1989); S.D. CODIFIED LAWS § 20-13-1(7) (1987). Other state statutes range in coverage from employers of two or more employees, *see* WYO. STAT. § 27-9-102(b) (1987), to employers of 15 or more employees. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1461(2) (1985); ILL. ANN. STAT. ch. 68, para. 2-101(B)(1)(a) (Smith-Hurd 1989).

189. Several state statutes prohibit discrimination on the basis of marital status. *See* ALASKA STAT. § 18.80.200 (1986); CAL. GOV'T CODE § 12,921 (West 1980); CONN. GEN. STAT. ANN. § 46a-60 (West 1986); DEL. CODE ANN. tit. 19, § 711 (1985); D.C. CODE ANN. § 1-2512 (1987); FLA. STAT. ANN. § 760.01 (West 1986); HAW. REV. STAT. § 378-1 (1988); ILL. ANN. STAT. ch. 68, para. 1-102 (Smith-Hurd 1989); MD. ANN. CODE. art. 49B, § 16 (1986); MICH. COMP. LAWS ANN. § 37.2102 (West 1985); MINN. STAT. ANN. § 363.03 (West Supp. 1991); MONT. CODE ANN. § 49-2-303 (1989); NEB. REV. STAT. § 48-1104 (1988); N.H. REV. STAT. ANN. § 354-A:8 (1984); N.J. STAT. ANN. § 10:5-10 (West 1976); N.Y. EXEC. LAW § 296 (McKinney 1982); N.D. CENT. CODE § 14-02.4-03 (Supp. 1989); OR. REV. STAT. § 659.030 (1989).

190. A few state statutes prohibit discrimination based on sexual orientation. *See* D.C. CODE ANN. § 1-2512 (1987); MASS. ANN. LAWS ch. 151B, § 4 (Law. Co-op. Supp. 1990) (excludes pedophiles); WIS. STAT. ANN. § 111.36(1)(d) (West 1988).

191. Some state statutes expressly provide for an award of punitive damages. *See, e.g.*, IDAHO CODE § 67-5908(e) (1989); MINN. STAT. ANN. § 363.071(2) (West Supp. 1991). Some courts have found that recovery of punitive damages is within the scope of some state statutes even absent express provisions for such a remedy. *See, e.g.*, Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); Abbate v. Hyatt Corp., 28 Fair Empl. Prac. Cas. (BNA) 542 (D.D.C. 1982). Litigants should consult local statutes and case law to assess the current availability of punitive damages under state statutes.

192. Several state statutes expressly provide for the award of compensatory damages. *See, e.g.*, D.C. CODE ANN. § 1-2553(a)(1)(D) (1987); KAN. STAT. ANN. § 44-1005, -1042 (1986); LA. REV. STAT. ANN. § 23-1006(D) (West 1985); MINN. STAT. ANN. § 363.071(2) (West Supp. 1991); MO. ANN. STAT. § 213.111(2) (Vernon Supp. 1991); N.Y. EXEC. LAW § 297(4)(c) (McKinney 1982). Other statutes may provide for recovery of damages for humiliation and embarrassment. *See, e.g.*, KY. REV. STAT. ANN. § 344.230(3)(h) (Baldwin 1983). Some courts have held that compensatory damages are available under some state statutes. *See Cancellier*, 672 F.2d at 1312. Litigants should consult local statutes and case law to assess the current availability of compensatory damages under state statutes.

193. Some state statutes expressly provide for the availability of jury trials. *See, e.g.*, IDAHO CODE § 67-5908(1) (1989); KAN. STAT. ANN. § 44-1011 (1986); N.M. STAT. ANN. § 28-1-13 (1987); R.I. GEN. LAWS § 28-5-24.1 (1986). Some courts have held that other state statutes allow jury trials. *See, e.g.*, Green v. American Broadcasting Co., 647 F. Supp. 1359 (D.D.C. 1986); Loomis Elec. Protection, Inc. v. Schaefer, 549 P.2d 1341 (Alaska 1976); Gallaway v. Chrysler Corp., 105 Mich. App. 1, 306 N.W.2d 368 (1981); Slohoda v. United Parcel Serv., 207 N.J. Super. 145, 504 A.2d 53 (1986). An overwhelming majority of federal courts have held that Title VII litigants have no right

The state statutes, however, do have certain drawbacks. Some of these statutes are the exclusive state remedy for claims falling within their scope and may bar recovery under other state statutes or common-law theories.[194] Also, some statutes disallow or fail to provide for the recovery of attorney's fees.[195] Thus, plaintiffs must consider whether desired remedies are available exclusively under state or federal law.

In evaluating the breadth of state law, litigants also should look to state court precedent. Theories of recovery under state statutes in some jurisdictions may be similar or identical to theories of recovery under Title VII. In interpreting state statutes, some state courts look to federal court interpretations of Title VII for guidance;[196] others expressly have adopted federal court Title VII jurisprudence.[197] Recent contractions of federal employment discrimination law by the Supreme Court,[198] however, may result in a similar contraction of state claims if a state court employs federal Title VII analysis in its interpretation of state law.[199] Litigants should study state court decisions for indications of whether the courts have accepted or may accept the new federal

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to a jury trial. *See infra* note 254.

194. *See, e.g.*, KY. REV. STAT. ANN. § 344.270 (Baldwin 1983); MASS. ANN. LAWS ch. 151B § 9 (Law. Co-op. 1982 & Supp. 1990); N.H. REV. STAT. ANN. § 354-A:13 (1984); N.Y. EXEC. LAW § 300 (McKinney 1982); PA. STAT. ANN. tit. 43, § 962(b) (Purdon 1964); *see also infra* note 208.

195. At least two state courts have held that their respective state statutes do not permit recovery of attorney's fees. *See* Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976); Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303, 358 N.E.2d 235 (1976). Several state statutes make no provision as to the availability of attorney's fees, including Idaho, Indiana, Kansas, Maryland, Mississippi, Nevada, New York, Ohio, Pennsylvania, South Dakota, Wisconsin, and Wyoming. Other states either have statutes expressly providing for attorney's fees, *see, e.g.*, ALASKA STAT. § 18.80.130(e) (1986); MICH. COMP. LAWS ANN. §§ 37.2605(2)(i), 37.2802 (West 1985), or case law holding that attorney's fees are available. *See, e.g.*, Burt v. Abel, 466 F. Supp. 1234 (D.S.C. 1979); E.D. Swett, Inc. v. New Hampshire Comm'n for Human Rights, 124 N.H. 404, 470 A.2d 921 (1983). Litigants should consult local statutes and case law to assess the current availability of attorney's fees.

196. *See, e.g.*, Dawson v. Superior Court, 163 Ariz. 223, 226, 786 P.2d 1074, 1076 (Ct. App. 1990); Lynch v. City of Des Moines, 454 N.W.2d 827, 833 n.5 (Iowa 1990); Chappell v. Southern Md. Hosp., 320 Md. 483, 496, 578 A.2d 766, 773 (1990); Smith v. FDC Corp., 109 N.M. 514, 517, 787 P.2d 433, 436 (1990); *cf.* Turner v. IDS Fin. Servs., 459 N.W.2d 143, 146-47 (Minn. App. 1990) (declining to follow Supreme Court holdings on proper starting point for running Title VII statute of limitation in applying state law even though the court often looks to Supreme Court interpretations of Title VII for guidance in interpreting Minnesota Human Rights Act).

197. *See* Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97, 570 A.2d 903, 907 (1990) (recoguizing the adoption of "Supreme Court's analysis of unlawful discrimination claims brought under Title VII" in application of New Jersey Law Against Discrimination).

198. *See infra* notes 257-81 and accompanying text.

199. *See* North Carolina Dep't of Correction v. Hodge, 99 N.C. App. 602, 612, 394 S.E.2d 285, 290 (1990) (adopting mixed-motive evidentiary methodology of Price-Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785 (1990)).

court jurisprudence.[200] Nevertheless, because some state statutes offer broader coverage, superior remedies, and jury trials, plaintiffs may find these statutes attractive supplements or potential alternatives to federal law.

One of the more interesting developments in state employment discrimination law has been the creation of common-law alternatives to state and federal statutory schemes and the concomitant erosion of the traditional employee-at-will doctrine.[201] Many state courts have developed exceptions to the employee-at-will doctrine under contract and tort theories, including implied covenant of good faith and fair dealing, tortious interference with contract, intentional infliction of emotional distress, invasion of privacy, fraud, and defamation.[202]

Common-law alternatives provide several advantages for plaintiffs. First, common-law theories may allow recovery of compensatory and punitive damages.[203] Second, jury trials are usually available for common-law claims.[204] Third, the statutes of limitations for common-law claims generally exceed those found in Title VII and state employment discrimination statutes.[205] Finally, plaintiffs seeking recovery under common-law theories generally are not bound by administrative procedural requirements and instead can proceed directly to court.[206] Federal employment discrimination law does not preempt common-law claims, and plaintiffs may join common-law and federal statutory claims in one action.[207] Some state statutes, however, are exclusive remedies and bar

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200. One commentator observes that some stato courts have rejected restrictive rulings of the Supreme Court when applying state statutes. *See* Belton, *supra* note 160, at 256.

201. The employee-at-will doctrine holds that when an employer hires an employee for an indefinite period "either party may terminate the employment relationship at any time with or without cause or notices in the absence of a limiting statute or agreement of the parties." Morris & Gray, *Current Developments in Wrongful Discharge*, in 1 EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS [an ALI-ABA Course of Study] 5 (1990).

202. A comprehensive survey of the development of common-law alternatives to state and federal employment discrimination statutes is beyond the scope of this Note. For materials addressing this topic in detail, see C. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS I-1 to I-43 (rev. ed. 1988); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 743-70 (2d ed. 1983); Morris & Gray, *supra* note 201; Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65 (1985); Wald, *Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination*, 36 HARV. WOMEN'S L.J. 35 (1982); Note, *Reversing the Presumption of Employment at Will*, 44 VAND. L. REV. 691 (1991).

203. C. RICHEY, *supra* note 202, at I-4.

204. *Id.* at I-4 to I-5.

205. *Id.* at I-5.

206. Arterton, *supra* note 15, at 503.

207. Jones v. Intermountain Power Project, 794 F.2d 546, 552-53 (10th Cir. 1986). Whether federal courts will exercise pendent jurisdiction over such claims, however, is uncertain. The lower federal courts have split on the propriety of exercising pendent jurisdiction over state common-law claims joined to Title VII claims. *See infra* notes 300-01 and accompanying text.

recovery under state common-law theories when state statutes also apply.[208]

State employment discrimination law now offers many plaintiffs a myriad of statutory and common-law alternatives to traditional federal remedies. If state law provides broader rights and remedies than those available under federal law, a plaintiff's preference for the state forum may be strengthened. Nevertheless, preserving the choice of a state forum may come at the cost of abandoning federal claims to prevent removal; thus, plaintiffs must consider carefully whether the desired outcome is more likely under state or federal law. For this reason a thorough evaluation and comparison of current state and federal law, as well as the receptivity of the respective judiciaries to that law, will be an important part of the forum selection process.

3. Procedural Advantages and Disadvantages

One last factor employment discrimination litigants must consider in evaluating the state forum is the possibility that procedural advantages or disadvantages may inhere with the choice of the state forum. Assuming that they have met administrative procedural requirements,[209] plaintiffs selecting state courts still may confront procedural

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208. Several courts have held that the availability of state statutes precludes recovery under common-law claims arising from the same discriminatory acts. *See, e.g.*, Chappell v. Southern Md. Hosp., 320 Md. 483, 578 A.2d 766 (1990); Crews v. Memorex Corp., 588 F. Supp. 27 (D. Mass. 1984); *see also supra* note 194 and accompanying text.

209. This Note addresses forum selection in the context of litigation, therefore, it does not discuss the prelitigation administrative procedures required by Title VII and many state statutes. Briefly, Title VII requires that complainants file their complaints with the EEOC within 180 days of an alleged discriminatory act if there is no comparable approved state or local agency. 42 U.S.C. § 2000e-5(e) (1988). In states that have approved fair employment practices (FEP) agencies, the complainant must file the charge with that agency within the state's time requirement. *Id.* § 2000e-5(c). The complainant then cannot file a claim with the EEOC for 60 days after filing with the state agency. *Id.* In these states, the complainant must have filed with the EEOC within 300 days of the discriminatory act or within 30 days after the receipt of notice that the state agency has terminated proceedings, whichever is earlier. *Id.* § 2000e-5(e). If within 180 days of receiving a complaint the EEOC either has failed to bring an action or has dismissed the claim, the EEOC will issue the complainant a right-to-sue letter. Within 90 days of receiving this notice, the complainant must file a complaint in the court of choice or he will waive the right to sue. *Id.* § 2000e-5(f)(1).

A complete survey of the administrative practices and requirements of the various states is beyond the scope of this Note. In summary, however, state administrative requirements typically take one of three forms. Some states require complete exhaustion of state administrative remedies before a complainant may proceed with state claims in state court. *See, e.g.*, GA. CODE ANN. §§ 45-19-36 to 45-19-39 (1990); ILL. ANN. STAT. ch. 68, para. 1-101, 7-102, 8-103 (Smith-Hurd 1989). Some states require that complainants begin by filing a charge with the appropriate state agency and permit the complainant to bring suit if the agency has not taken action within a specified time or has dismissed the claim. *See, e.g.*, MASS. ANN. LAWS ch. 151B, §§ 5, 9 (Law. Co-op. 1982 & Supp. 1990); PA. STAT. ANN. tit. 43, § 962(c) (Supp. 1990). Finally, some states do not require plaintiffs to pursue administrative remedies prior to filing suit. *See, e.g.*, MICH. COMP. LAWS ANN. § 37.2801-03 (West 1985); N.J. STAT. ANN. § 10:5-13 (West Supp. 1990); N.Y. EXEC. LAW § 297 (McKinney 1982

hurdles. In some cases, these hurdles will mitigate against the selection of a state forum.

The primary procedural disadvantage to plaintiffs selecting a state forum is removal. Under the federal removal statute, defendants generally may remove to federal district court any case in which the plaintiff asserts a federal claim.[210] Plaintiffs asserting claims under Title VII or other federal statutes in state court, therefore, risk having the whole case—including state as well as federal claims—removed to federal court.[211] Nevertheless, because the federal court's jurisdiction over pendent state claims is discretionary, the district judge may remand the state claims and retain only the Title VII claims.[212]

If the district court remands state claims, plaintiffs who choose to proceed in separate forums risk losing the claim first litigated and then having the second claim barred by issue preclusion rules.[213] The other alternative for plaintiffs is simply to abandon one of the claims.[214] Plaintiffs who select state court after concluding that it is more likely to produce the desired outcome probably will abandon federal claims. Although a decision to abandon federal claims will leave plaintiffs in essentially the same position of having filed only state claims initially, much time, energy, and money may be wasted in the process.[215]

If the district court exercises jurisdiction over the pendent claims, plaintiffs face much the same choice. Either they must abandon the federal claims to have the state claims remanded to state court or they must proceed with all claims in federal court. Again, plaintiffs with a strong preference for state court probably will abandon the federal claims.[216] Although defendants may choose not to remove, plaintiffs can guarantee their choice of a state forum from the outset only by abandoning federal claims. Thus, if a plaintiff determines that a state forum is more likely to produce a favorable outcome, the plaintiff should consider foregoing federal claims at the beginning of the suit.

Other procedural problems may inhere in the choice of a state fo-

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& Supp. 1991). Litigants should examine local statutes and case law to determine which, if any, exhaustion requirements state law imposes.

For a general discussion of the various federal and state administrative prerequisites to filing suit, see Catania, *supra* note 160, at 818-32.

210. *See* 28 U.S.C. § 1441 (1988).

211. *See id.*

212. *See infra* notes 300-02 and accompanying text.

213. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 (1982).

214. *See* Mishkind & Burns, *supra* note 61, at 260-61 (suggesting that when defendants remove Title VII and joined state claims from state to federal court some "plaintiffs will abandon their Title VII claim in order to defeat federal jurisdiction").

215. *See id.* (observing that removal of Title VII and joined state claims will raise issues of pendent jurisdiction and "will engender additional motion practice and costs").

216. *Id.*

rum as well. Attorneys generally agree that many state courts are ill-equipped to handle the complexities of large class actions.[217] Employment discrimination plaintiffs who wish to pursue remedies as a class, therefore, must evaluate carefully the state courts' ability to handle class actions effectively.[218] Plaintiffs also may encounter more restrictive discovery rules in state court[219] and then must weigh the need for liberal discovery against the preference for the state forum. Other potential hurdles plaintiffs should consider are the state's evidentiary rules, pleading requirements, and any other procedures that may affect outcome.[220] One procedural advantage that may accompany the choice of the state forum, however, is the more stringent summary judgment standard often found in state courts.[221]

Despite the procedural difficulties that may accompany state court proceedings, mere inconvenience should not defeat litigants' choice of a state forum when that forum clearly presents the best chance to achieve the desired outcome. Only when procedure risks defeating a favorable outcome should litigants surrender a clear choice of forum. When, however, the federal and state forums appear to provide roughly equal opportunities for recovery, potential procedural problems may become a deciding factor.[222]

B. Evaluating the Federal Forum

1. Competence, Receptivity, and Bias in the Federal Judiciary

The traditional plaintiff preference for federal courts in employment discrimination litigation is largely due to perceptions of the federal judiciary's greater expertise and receptivity.[223] Even those who

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217. *See* Arterton, *supra* note 15, at 504-05; Neuborne, *supra* note 73, at 740-42; Saperstein, *supra* note 161, at 512.

218. *See* Saperstein, *supra* note 161, at 512 (generally advocating use of state courts and state claims in employment discrimination suits but noting that "[c]hoosing between state and federal court in a major class action is a much closer question").

219. Arterton, *supra* note 15, at 505 (observing that "extensive discovery needs of discrimination plaintiffs are more likely to be met adequately by a federal district judge applying federal rules than by more restrictive state courts").

220. *See generally* Neuborne, *supra* note 73, at 733-47 (discussing potential procedural inferiorities of state courts).

221. Recent Supreme Court decisions have made it much easier for defendants to prevail on summary judgment motions in federal court. *See infra* notes 296-99 and accompanying text. In state courts, however, defendants moving for summary judgment generally face stringent tests. Mishkind & Burns, *supra* note 61, at 261.

222. *See* Neuborne, *supra* note 73, at 733 n.23 (noting that "a lawyer is unlikely to be diverted from the substantively superior forum by procedural concerns, unless they act as door-closing devices," and that when forums appear "roughly equivalent, differences in procedure will exert the strongest influence on choice of forum").

223. *See* Belten, *supra* note 160, at 255 (suggesting that the traditional preference for federal courts stems from fears that state courts "would not be sympathetic to the enforcement of federal

argue that state courts provide equally amenable forums for those seeking vindication of federal rights do not dispute the general expertise and receptivity of the federal judiciary.[224] Nevertheless, the developing role of state courts and state law in the area of employment discrimination indicates that these perceptions are changing. Because competence, receptivity, and bias potentially may determine the outcome of litigation, employment discrimination litigants must consider the extent to which traditional assumptions of expertise and receptivity still apply to federal forums.

Of these factors, the expertise of the federal judiciary in employment discrimination matters is certainly the area least assailable. The federal courts generally are well versed in employment discrimination law[225] and are likely to remain so because of their frequent exposure to employment discrimination litigation.[226] This experience assures litigants that federal courts are familiar with the legal questions and underlying policies likely to be at issue under either federal or state law.[227] Of course, the experience of individual courts may vary, and litigants still must investigate the particular courts to which they have access to discover potentially outcome-affecting deviations from the norm.[228]

Commentators disagree about the continued significance of past cycles in the receptivity of the federal courts to civil rights issues.[229] Nevertheless, they acknowledge that the federal courts, like the nation itself, have both contracted and expanded civil rights at different points

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rights" and the "perceived notion that the 'quality of justice' in federal courts was substantially superior to the 'quality of justice' in state courts").

224. The argument of parity proponents is that state courts are equally capable of protecting and enforcing federal rights as their federal counterparts, not that they are equally inadequate. *See supra* notes 95-114 and accompanying text.

225. *See* Yellow Freight System, Inc. v. Donnelly, 110 S. Ct. 1566, 1570 (1990) (recognizing the experience of federal courts in Title VII matters).

226. *See* Shapiro, *Using State Civil Rights Statutes in Federal Civil Rights Litigation*, 35 FED. B. NEWS & J. 113, 113 (1988) (noting that "[t]he most common civil rights cases in federal courts today are those involving claims of employment discrimination"). Whether, in light of the *Yellow Freight* decision, the steady stream of employment discrimination cases into federal court will abate significantly remains to be seen.

227. Because the same policies underlie Title VII and state statutes and because many state statutes closely resemble Title VII, federal courts are unquestionably familiar with the legal issues and policies. Furthermore, because under pendent jurisdiction rules federal courts should remand novel questions of state law, they may avoid issues in which they are inexperienced. *See infra* notes 300-02 and accompanying text (discussing federal courts' exercise of pendent jurisdiction over state claims).

228. Newly seated district court judges, for example, may lack experience in employment discrimination matters. Nevertheless, the availability of the vast body of federal precedent to guide the court as well as the corrective mechanism of the appellate courts may compensate for the lack of hands-on experience.

229. *See generally supra* note 98.

in history.[230] The post-Reconstruction era, for example, remains a period noted for federal courts' failure to uphold the rights of racial minorities.[231] Some commentators suggest that the federal courts recently have entered an era similar in temper to that of the post-Reconstruction period in the area of employment discrimination law.[232] These commentators question assumptions about the continuing receptivity of the federal courts to employment discrimination plaintiffs and their claims.[233]

Employment discrimination plaintiffs considering a federal forum must be concerned greatly about the recent trend toward a more conservative federal judiciary and the potential effect of that trend on the receptivity and bias of the federal courts.[234] Both parity skeptics and believers agree that the insulation of the federal judiciary from the electoral process affords them desirable insulation from majoritarian pressure.[235] Insulation from political pressure, however, cannot be equated with insulation from politics. Although federal judges may be able to divorce themselves from the public, they are less likely to divorce themselves from personal political and judicial philosophies.[236]

During the 1980s, the federal judiciary underwent a radical change in composition.[237] President Reagan's conservative political agenda em-

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230. *See* Bator, *supra* note 7, at 632 n.64 (noting "cruelties inflicted on individuals by the federal government and solemnly legitimized by the Supreme Court in the 1940's and early 1950's"); Neuborne, *supra* note 7, at 1106-15 (discussing historical cycles in the sympathies of the federal and state courts); *see also* Note, *Reconstruction, Deconstruction, and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 478-508 (1990) (charting uneven history of Congress and the federal courts in protecting and enforcing federal rights).

231. *See* Belton, *supra* note 160, at 246-47; Neuborne, *supra* note 7, at 1114-15; Ralston, *Court vs. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205, 207 (1990); Note, *supra* note 230, at 486-93.

232. Commentators base such arguments on current trends in federal judicial decision making. *See* Belton, *supra* note 160, at 248-49; Note, *supra* note 230, at 504.

233. *See* Belton, *supra* note 160, at 247 (observing that through decisions of the 1988 Term "the Court has played a pivotal role in halting promising developments in eliminating discrimination"); Note, *supra* note 230, at 508 (noting that unless Congress acts, the decisions of the 1988 Term could result in "a reversion to a period of court-supported practices of discrimination under the reinterpreted laws").

234. *See infra* notes 237-41 and accompanying text.

235. *See supra* note 151.

236. Indeed, presidents generally try to select judicial candidates that espouse ideologies compatible with their own. *See* Chemerinsky, *supra* note 152, at 1990 (observing that "[i]t is no accident that virtually every president in history has selected judicial nominees who shared the incumbent administration's basic political beliefs").

237. Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 321 n.3 (1989) (noting that "[b]y November of 1988, [President Reagan] had installed 79 judges on appellate courts and 272 judges on district courts—more than 48 percent of all federal judges"). Reagan also elevated Chief Justice William Rehnquist to the leadership of the Court and appointed three Associate Justices to the Supreme

phasized the reduction of governmental control in many aspects of society and included the halt and reversal of recent expansions in employment discrimination law rights and remedies.[238] Several commentators have suggested that this agenda has caused the federal judiciary to become increasingly conservative.[239] Two manifestations of this growing conservatism are an apparent decrease in the receptivity of the federal courts to employment discrimination issues and a concomitant contraction of federal employment discrimination law. Although litigants will encounter these manifestations to varying degrees in different federal courts,[240] even individual members of the judiciary who remain sensitive and sympathetic to the claims of employment discrimination litigants cannot insulate themselves from the dictates of the Supreme Court. The Court's spate of restrictive rulings during the 1988 Term,[241] has diminished the ability of even traditionally receptive federal judges to accommodate employment discrimination plaintiffs. Thus, although the federal judiciary remains insulated from majoritarian pressures, political agenda-setting still may exert some influence on the receptivity of the federal courts.

In evaluating the federal forum, employment discrimination litigants should consider the potential effect of the federal judiciary's new conservatism on the outcome of a given case on two levels. First, a litigant must assess the degree to which federal courts can be receptive to the litigant's claim in light of recent Supreme Court and lower federal court rulings. Second, the litigant must assess the degree of receptivity the specific, available courts are likely to exercise. Thus, to use the forum selection process to its best advantage, litigants should evaluate both an individual court's ability and its willingness to provide the desired outcome. Litigants cannot rely exclusively on judicial trends, but should evaluate federal forums on a case-specific basis and from an outcome-oriented perspective.

Court: Justice Sandra Day O'Connor, Justice Antonin Scalia, and Justice Anthony Kennedy.

238. *See* Note, *supra* note 230, at 501-04 (summarizing the Reagan agenda in the area of civil rights).

239. A plethora of books and articles discuss the increased conservatism of the federal judiciary during the Reagan administration. *See, e.g.*, H. SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988); Coyle, *The Judiciary: A Great Right Hope*, NAT'L L.J., Apr. 18, 1988, at 22; Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (1986).

240. Despite the perceived overall conservatism of the federal judiciary, some lower federal courts' rulings seem anything but conservative. In Alabama, for example, District Judge William Acker recently has held that Title VII plaintiffs are entitled to jury trials. *See* Walker v. Anderson Elec. Connectors, 736 F. Supp. 253 (N.D. Ala. 1990); Walton v. Cowin Equip. Co., 733 F. Supp. 327 (N.D. Ala. 1990); Beesley v. Hartford Fire Ins. Co., 723 F. Supp. 635 and 717 F. Supp. 781 (N.D. Ala. 1989).

241. *See infra* notes 257-89 and accompanying text.

2. The Contraction of Federal Claims

The degree to which federal law dominates the outcome of a particular case may create a presumption favoring the selection of federal court. Plaintiffs must compare the desired result with the potential outcome under federal and state law to determine which offers the rights and remedies that better protect and compensate the plaintiff. Even with its recent contraction in certain areas, federal law still may provide an employment discrimination plaintiff the better chance of success.

Of the various provisions of federal law available to employment discrimination plaintiffs,[242] Title VII is the most accessible and, therefore, is the most significant.[243] Briefiy, Title VII prohibits discrimination based upon race, color, religion, sex, or national origin.[244] Title VII generally applies to employers of fifteen or more employees, employment agencies, and labor organizations.[245] Title VII prohibits discriminatory treatment in hiring, firing, compensation, promotion, and other employment decisions regarding the terms, conditions, or privileges of employment.[246]

Seeking recovery under Title VII may be advantageous to victims of employment discriimination for several reasons. First, Title VII provides a uniform body of well-established law and thus a gnaranteed

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242. In addition to Title VII, several other federal statutes offer significant protection to victims of employment discrimination in various circumstances. The Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988), prohibits discrimination based on race, color, or ethnicity in the making and enforcing of contracts and allows plaintiffs to seek recovery of compensatory and punitive damages. *See* Johnson v. Railway Express, Inc., 421 U.S. 454, 460 (1975) (dictum). Recently, however, the Supreme Court has limited severely the application of this statute in the area of employment discrimination. See the discussion *infra* at notes 283-89 and accompanying text. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988), prohibits discriminatory treatment under color of state law or local law, thus protecting employees from discriminatory state action. Section 1983 allows recovery of compensatory and punitive damages. *See* Smith v. Wade, 461 U.S. 30, 56 (1983); Carey v. Piphus, 435 U.S. 247, 255-57 (1978). Both § 1981 and § 1983 require plaintiffs to show intentional discrimination. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982); Washington v. Davis, 426 U.S. 229 (1976).

More recent federal enactments specifically directed at employment discrimination include the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988) (prohibiting gender-based wage discrimination); tbe Age Discrimination in Employment Act of 1967, *id.* §§ 621-634 (prohibiting age-based discriminatory employment practices by employers of 20 or more employees, employment agencies, and labor organizations); and Title I of the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12, 111-112, 117 (West Supp. Dec. 1990) (prohibiting employment practices that discriminate against qualified disabled individuals and providing the same remedies as Title VII).

243. *See* Wald, *supra* note 202, at 36 n.8 (commenting that "Title VII is crucial to a long range battle against employment discrimination because it alone, of all [federal] remedies currently available, is geared to redress systematic, class-wide discrimination, with an emphasis on the *effect* of a discriminatory practice rather than the *intent* of an employer").

244. 42 U.S.C. § 2000e-2(a)(1) (1988).

245. *Id.* §§ 2000e(b), 2000e-2(a)-(c).

246. *Id.* § 2000e-2(a)-(d).

floor of protection to those falling under its auspices. Second, Title VII requires the use of a conciliation process to encourage the settlement of disputes without litigation.[247] Third, Title VII enables employees to seek redress for discriminatory treatment under two distinct theories: disparate treatment[248] and disparate impact.[249] Fourth, Title VII expressly provides for a variety of equitable relief including reinstatement and back pay, as well as attorney's fees.[250] Finally, Title VII's theories of recovery facilitate the pursuit of recovery as a class.[251]

Nevertheless, Title VII has certain inherent disadvantages that, in some cases, may lessen its effectiveness in redressing the rights of victims of employment discrimination. First, Title VII does not apply to employers of fewer than fifteen workers.[252] Second, Title VII may not compensate victims of discrimination completely, because it provides only equitable relief, not compensatory or punitive damages.[253] Third, due to the equitable nature of the relief granted under Title VII, Title VII denies litigants the opportunity for a jury trial.[254] Furthermore, although other federal statutes may supplement Title VII, these statutes

247. *Id.* § 2000e-5(c)-(f).

248. Under the disparate treatment theory, the plaintiff must prove an intentional act of discrimination on the part of the employer. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

249. Under the disparate impact theory, an employer is liable for the employment practices that have a discriminatory impact upon a protected group when the employer had knowledge of reasonable alternatives to those practices. The Court first set out the test for disparate impact in Griggs v. Duke Power Co., 401 U.S. 424 (1971), but recently redefined the disparate impact theory and made proving disparate impact more difficult for the plaintiff in Wards Cove Packing Co. v. Atenio, 109 S. Ct. 2115 (1989). *See infra* notes 263-75 and accompanying text.

250. 42 U.S.C. § 2000e-5(g), (k) (1988).

251. *See* Wald, *supra* note 202, at 38 (suggesting that Title VII class actions are "a particularly appropriate vehicle in cases in which discrimination results from the disparate impact of a general employment policy, rather than from actions aimed at specific employees").

252. 42 U.S.C. § 2000e(b) (1988).

253. Because the remedies enumerated in § 2000e-5(g) are equitable in nature, courts consistently have found that compensatory and punitive damages are not available to Title VII plaintiffs. *See, e.g.*, Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 374-76 (1979) (dictum); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 138 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986); Henson v. Dundee, 682 F.2d 897, 905 (11th Cir. 1982); Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981); DeGrace v. Rumsfield, 614 F.2d 796, 808 (1st Cir. 1980).

254. Although the Supreme Court has yet to rule on the availability of jury trials in Title VII cases, the circuit courts addressing the issue have agreed that jury trials are not available to Title VII litigants. *See, e.g.*, *Shah*, 642 F.2d at 272; Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979); Harmon v. May Broadcast Co., 583 F.2d 410, 410-11 (8th Cir. 1978); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301, 308 (6th Cir. 1975); Robinson v. Lorrilard Corp., 444 F.2d 691, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969). Recently, however, Judge William Acker of the Northern District of Alabama has rejected this view and granted jury trials to Title VII litigants. *See supra* note 240. For a history and general discussion of jury trials and Title VII, see Comment, *Beyond the Dicta: The Seventh Amendment Right to Trial by Jury Under Title VII*, 38 KAN. L. REV. 1003 (1990).

are not without their own limitations.[255] In the end, Title VII remains the most effective federal remedy for victims of private employment discrimination.[256]

Despite the initial importance of federal statutes, particularly Title VII, in combating the causes and effects of employment discrimination, several recent Supreme Court decisions challenge the continued efficacy of federal remedies and receptivity of the federal courts to employment discrimination claims. During its 1988 Term, the Supreme Court handed down seven decisions that signaled a turnabout in the Court's willingness to extend federal protection to victims of employment discrimination and severely contracted the availability and breadth of federal remedies.

In *Price Waterhouse v. Hopkins*,[257] the first of these cases, the Court addressed the issue of burden of proof in Title VII mixed-motive cases.[258] A plurality of the Court held that once a plaintiff proves that an impermissible motive influenced an employer's decision in a mixed-motive case, the burden of proof shifts to the employer. The employer, however, still can escape liability by showing that legitimate business concerns also were factors in the employer's decision.[259] Critics of the Court's decision maintain that allowing employers who have considered improper motives in making employment decisions to escape full liability undercuts the deterrence policy underlying Title VII.[260] Allowing the employee partial relief, rather than allowing the employer to escape full liability, would fulfill the deterrence policy more effectively.[261] Thus, although the burden-shifting framework established in *Price Waterhouse* favors plaintiffs, the decision is a mixed blessing because it also signals

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255. *See supra* note 242.

256. *See* Catania, *supra* note 160, at 782 (noting that "[T]itle VII probably is the most frequently invoked protective mechanism in employment discrimination litigation").

257. 109 S. Ct. 1775 (1989) (plurality decision).

258. A mixed-motive Title VII case is one in which the employer has made employment "decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 1785. Before *Price Waterhouse*, lower courts were split on who carried the burden of proof in a mixed-motive case and what standard of proof was required. *Id.* at 1784 n.2 (summarizing the wide variety of opinions among the circuits).

259. *Id.* at 1795. The lower court had held that if the employer shows that he would have made the same decision without considering the impermissible motive, the employer could avoid equitable relief, but not costs and attorney's fees. The D.C. Circuit held that if the employer met a clear and convincing standard of proof the employer could avoid full liability. *Id.* at 1783-84.

260. *See* Note, *supra* note 230, at 532 (arguing that the Court's decision allows employers "to continue their discriminatory practices with little more than a slap on the wrist," but leaves plaintiffs "empty-handed, unable to recover even attorney's fees or litigation expenses from a proven wrongdoer").

261. *Id.* at 536 (arguing that "failure to correct *Price-Waterhouse* could severely dampen the enthusiasm of civil rights lawyers and plaintiffs to initiate mixed-motive cases").

a lack of sensitivity to the policies underlying Title VII.[262]

One month later, in *Wards Cove Packing Co. v. Atonio*,[263] the Court delivered Title VII litigants a far more crushing blow by striking down interpretations of a 1971 case, *Griggs v. Duke Power Co.*[264] In *Griggs* the Court had ruled that Title VII prohibited an employer's policies that had a disparate impact on minorities, even in the absence of discriminatory intent.[265] Job-related policies, however, were excluded from this ruling.[266] Lower courts had interpreted this decision as placing the burden of proving job-relatedness on the employer after the employee's prima facie showing that the practice caused a disparate impact.[267] Because *Griggs* allowed minorities to attack practices that resulted in discrimination in fact without having to prove an actual intent to discriminate, *Griggs* became an important vehicle for fulfilling the goals of Title VII.[268]

The Court rejected the popular interpretation of *Griggs* in *Wards Cove*, holding that after the initial showing of disparate impact, only a burden of production shifts to the employer-defendant. To overcome the showing of disparate impact, the employer need only produce evidence that the questioned practice is necessary to the employer's business. The plaintiff retains the burden of persuasion.[269] If the employer presents evidence of business necessity, the plaintiff then must prove that less discriminatory alternatives existed of which the employer was aware but refused to adopt.[270] Furthermore, the Court held that establishing even a prima facie disparate impact case requires the plaintiff to present statistical evidence linking specific practices to specific disparities in the employer's work force.[271]

Wards Cove has engendered much criticism.[272] Not only has the Court's redefinition of the disparate impact theory made pleading and

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262. *Id.* at 531-32.

263. 109 S. Ct. 2115 (1989).

264. 401 U.S. 424 (1971).

265. *Id.* at 431.

266. *Id.*

267. *See* Note, *supra* note 230, at 520.

268. *Id.* at 499 (noting that *Griggs* has been of great importance in making the Civil Rights Act of 1964 an effective remedy for discrimination); Belton, *supra* note 160, at 225 (observing that "[o]f the more than 100 employment discrimination cases decided by the Supreme Court since the passage of Title VII in 1964, [*Griggs*] has been the most important in eliminating employment discrimination").

269. *Wards Cove*, 109 S. Ct. at 2126. Nor did the business practice in question have to be " 'essential' or 'indispensable' to the employer's business." *Id.* "[E]vidence of a business justification" was enough for the employer to carry his burden. *Id.*

270. *Id.* at 2126-27.

271. *Id.* at 2124-25.

272. *See, e.g.*, Belton, *supra* note 160, at 244-49; Ralston, *supra* note 231, at 212-13; Note, *supra* note 230, at 517-21.

proving claims much more difficult,[273] it also may give employers an easy escape at the end of a losing case. Because plaintiffs must show reasonable, but *known and unadopted*, alternatives to the employers' practices, employers may be able to delay adoption of the alternatives until after a plaintiff makes a successful showing of their existence during the litigation, thereby mooting a losing case.[274] If this result deprives plaintiffs of a recovery after long and costly litigation, it will deter future potential plaintiffs from pursuing valid claims against their employers.[275]

In the weeks following *Wards Cove*, the Court issued three decisions that further diluted the protections afforded plaintiffs under Title VII. In *Martin v. Wilks*[276] the Court held that a group of white firefighters claiming reverse discrimination could attack collaterally an affirmative action plan approved by the district court even though the white firefighters had notice and an unexercised opportunity to intervene in the prior Title VII suit.[277] In *Lorance v. AT&T Technologies*[278] the Court found that the statute of limitations had run on a Title VII suit challenging the employer's seniority system as sexually discriminatory by holding that the statute ran from the date that the employer adopted the seniority system, not from the date the system adversely affected the plaintiffs.[279] Finally, in *Independent Federation of Flight Attendants v. Zipes*[280] the Court held that plaintiffs could not recover attorney's fees from unsuccessful intervenors in a Title VII suit unless the intervention was "frivolous, unreasonable, or without foundation."[281]

Title VII claims were not the only employment discrimination casualties of the 1988 Term. The Court also narrowed the scope of section 1981.[282] In *Patterson v. McLean Credit Union*[283] the Court held that section 1981 did not protect against discriminatory conduct that arose after contract formation. Prior to *Patterson*, decisions of the Court had supported broader readings of section 1981.[284] For example, the statute

273. Belton, *supra* note 160, at 240-41.

274. Note, *supra* note 230, at 521. Defendants presumably must learn of the alternatives because plaintiffs have to show the reasonable alternative during the trial to rebut the business justification defense. *Id.*

275. *Id.* (noting that "chilling of Title VII claims is inescapable").

276. 109 S. Ct. 2180 (1989).

277. *Id.* at 2185-88.

278. 109 S. Ct. 2261 (1989).

279. *Id.* at 2265, 2267.

280. 109 S. Ct. 2732 (1989).

281. *Id.* at 2736.

282. 42 U.S.C. § 1981 (1988).

283. 109 S. Ct. 2263 (1989).

284. *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 661-62 (1987) (observing in dicta

had provided victims of racial harassment the possibility of full compensatory and punitive damages and other remedies unavailable under Title VII.[285] Because many section 1981 plaintiffs were victims of racial harassment in a continuing employment relationship, the traditional Title VII remedies of back pay and injunctive relief were inadequate.[286] *Patterson* severely limited the types of relief available to victims of racial harassment. A week later, in *Jett v. Dallas Independent School District*,[287] the Court held that section 1981 did not reach discriminatory acts of local governments.[288] In combination, *Patterson* and *Jett* have reduced drastically the availability of section 1981 as a weapon against employment discrimination.[289]

Employment discrimination litigants engaging in the forum selection process are affected by the decisions of the 1988 Term in two ways. First, and most obviously, the decisions have limited substantially the rights and remedies available to employment discrimination plaintiffs under federal law. Narrowing federal statutes makes pleading and proving claims more difficult for plaintiffs and concomitantly relaxes the burden on employers to justify their actions. The Court not only has made federal roads of redress less accessible to victims of employment discrimination, but also more difficult for them to travel. Litigants must consider these developments when weighing the relative importance of state and federal claims to the desired outcome. Second, by narrowly reading both Title VII and section 1981, the Court has indicated that it will be less receptive to employment discrimination claims and plaintiffs than in the past. When evaluating the federal forum, employment discrimination litigants must consider that this new temperament is likely to influence the receptivity of the lower federal courts as well.[290] To the extent that these decisions reflect the trend toward a more conservative federal judiciary, and a related trend toward a narrower read-

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that "Section 1981 has a much broader focus than contractual rights . . . guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference").

285. Note, *supra* note 230, at 510-11.

286. *Id.*

287. 109 S. Ct. 2702 (1989).

288. *Id.* at 2720-22.

289. *See* Ralston, *supra* note 231, at 216 (stating that after *Patterson* and *Jett* § 1981 covers "virtually nothing in the area of employment discrimination").

290. These decisions, of course, remain susceptible to congressional reversal. In the proposed Civil Rights Act of 1990 Congress addressed many of the setbacks suffered by employment discrimination plaintiffs in the 1988 Term. Although the Act passed both houses of Congress, President Bush vetoed the Act, and an attempt to override the veto failed. *See* Note, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 597 (1991). Plaintiffs should watch for future legislative attempts to reverse some or all of these decisions.

ing of federal employment discrimination law, they will continue to be an important indicator of the potential outcome in the federal forum.

3. Procedural Advantages and Disadvantages

As in the evaluation of the state forum, litigants considering a federal forum should contemplate any procedural advantages or disadvantages that may inhere in the forum choice. Professor Neuborne suggests that the uniform body of procedural rules and the predictability that those rules inject into federal court litigation make the federal judiciary a more litigant-friendly forum than its state counterparts.[291] Certain basic procedural advantages that often accompany the choice of a federal forum may be of special importance to employment discrimination litigants.

One significant advantage that federal procedure offers plaintiffs is its liberal discovery policy.[292] Because employment discrimination is often difficult to prove, access to information in the employer's control may be essential to a plaintiff's case. Discovery is especially important in disparate impact cases in which plaintiffs will have to present statistical data only available in the employer's records.[293] Liberal pleading requirements and evidentiary rules also contribute to the desirability of federal forums.[294] The recognized superiority of federal class action procedure and the federal judiciary's experience in managing the complexities of large class actions also are undoubted advantages for plaintiffs interested in pursuing relief as a class.[295]

Despite this user-friendly reputation of the federal courts, recent developments in federal procedural law suggest that the courts are less friendly than they once were to certain classes of claims and plaintiffs.[296] One of the manifestations of a new federal procedural philosophy is the expanding use of summary judgment to dispose of cases.[297]

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291. Neuborne, *supra* note 73, at 733-47.

292. *Id.* at 745-46; *see also supra* note 219.

293. Because Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), places an even greater burden on the plaintiff in gathering statistical evidence, the need for liberal discovery is greater than ever. *See supra* notes 272-75 and accompanying text. Interestingly, in *Wards Cove* the Court rejected arguments that its holding was "unduly burdensome on Title VII plaintiffs" because liberal federal discovery rules "give plaintiffs broad access to employers' records in an effort to document their claims." *Wards Cove*, 109 S. Ct. at 2125. In light of *Yellow Freight*, this reasoning seems less persuasive because liberal discovery may not be available in many state courts.

294. *See* Neuborne, *supra* note 73, at 737-39.

295. *See supra* notes 217-18 and accompanying text.

296. *See* Levit, *supra* note 237, at 321 (arguing that a "combination of judicial overload and injudicious federalism [practiced by recent appointees to the federal bench] is operating to shunt certain classes of litigants away from federal courts").

297. *Id.* at 327-30. In 1986 the Court issued three opinions establishing the Court's new posi-

Under this new philosophy, summary judgment no longer appears to be a disfavored procedure, even when cases present fact-intensive questions such as that of intent.[298] Thus, new attitudes toward summary judgment procedures could prove particularly costly to plaintiffs in traditionally fact-driven employment discrimination suits.[299]

Another procedural obstacle plaintiffs may face in choosing a federal forum is the possibility that the court will not allow joinder of state claims. Some lower federal courts have used pendent jurisdiction rules to prevent plaintiffs from presenting state employment discrimination claims in conjunction with Title VII claims when the state claims allow jury trials or more expansive remedies than Title VII.[300] Now that plaintiffs may present Title VII claims in state court, some federal courts may be even less receptive to pendent state claims.[301] Because

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tion on summary judgment. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986), the Court held that the courts should consider the evidentiary standard plaintiffs must meet at trial in considering whether summary judgment is appropriate. Not only does the decision make it harder for plaintiffs to survive a summary judgment motion by demanding a higher standard of proof at an early stage, but, as Levit observes, it "reflects a willingness to view summary judgment favorably, even when the primary issue is state of mind." Levit, *supra* note 237, at 327. In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held that a summary judgment movant need not "support its motion with affidavits or other similar materials *negating* the opponent's claim," but rather could point merely "to an absence of evidence to support the nonmoving party's case." *Id.* at 323, 325. In addition, the Court expressly stated that summary judgment was not a "disfavored procedural shortcut." *Id.* at 327. Finally, in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986), the Court again emphasized the liberalization of summary judgment procedures.

298. *See supra* note 297.

299. *See* Mishkind & Burns, *supra* note 61, at 261 (suggesting that the Court's 1986 "summary judgment Trilogy" makes increased possibility of summary judgment in federal court an important factor when Title VII plaintiffs choose a forum).

300. *See, e.g.*, Monegon v. Shellcraft Indus., 590 F. Supp. 956 (D. Vt. 1984); Frye v. Pioneer Mach., 555 F. Supp. 730 (D.S.C. 1983); Bennett v. Southern Marine Management Co., 530 F. Supp. 115 (M.D. Fla. 1982); Jong-Yul Lim v. International Inst., 510 F. Supp. 722 (E.D. Mich. 1981). *But see* Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986) (exercising pendent jurisdiction over state law claims); Phillips v. Smalley Maintenance Servs., 711 F.2d 1524 (11th Cir. 1983) (same); Meyer v. California and Hawaiian Sugar Co., 662 F.2d 637 (9th Cir. 1981) (same). Courts also may refuse to exercise pendent jurisdiction over state law claims that present unsettled issues of state law. *See* Grubb v. W.A. Foote Memorial Hosp., Inc., 641 F.2d 1486, 1499-1500 (6th Cir. 1984). For a thorough discussion of the confusion surrounding the exercise of pendent jurisdiction over state law claims in Title VII suits, see Catania, *supra* note 160; *see also* Note, Aldinger v. Howard, *Title VII and Pendent Jurisdiction: Has the Tail Been Cut From the Dog?*, 63 U. DET. L. REV. 723 (1986).

301. In Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986), the Tenth Circuit held that the court could exercise pendent jurisdiction over the plaintiff's common-law claims as well as his Title VII claims. *Id.* at 552-53. The court's decision, which came well before the *Yellow Freight* holding, rested in part on its finding that the federal courts had exclusive jurisdiction over Title VII claims. Because the federal forum was the only forum in which plaintiffs could present all their claims simultaneously, the court reasoned that it should exercise pendent jurisdiction to prevent a forced bifurcation of claims. *Id.* at 553. Since the *Yellow Freight* decision, the Tenth Circuit's reasoning apparently no longer holds true, thus casting into further doubt the

these courts subject plaintiffs to the risks of issue preclusion by forcing them to split claims,[302] plaintiffs with strong state claims may choose to avoid district courts that rarely exercise pendent jurisdiction. Similarly, plaintiffs with strong federal claims may choose to abandon state claims over which the federal court refuses to exercise jurisdiction to avoid the risks of issue preclusion.

In the past, federal procedural rules offered litigants a uniform and generally litigant-friendly atmosphere in which to proceed. Some of the procedural advantages of federal court, most notably liberal discovery and superior class action procedures, may be particularly useful to employment discrimination plaintiffs. Nevertheless, the federal courts now appear to be developing and using procedural restrictions as a means of docket control; thus, plaintiffs must consider this factor in evaluating the federal forum. If the federal forum is clearly superior in other respects, however, mere procedural inconvenience generally should be insufficient to overcome a preference for the federal forum. Only when a particular federal procedure presents a distinct risk of negatively affecting outcome should plaintiffs surrender a clear choice of federal forum. When, however, the federal and state forums appear to provide roughly equal opportunities for recovery, the potential procedural advantages of the federal forum may become a deciding factor.[303]

C. Choosing the Forum: Weighing the Variables

In making a selection between state and federal forums, employment discrimination litigants must balance the many factors that potentially could affect outcome. Because these factors may vary from time to time and forum to forum litigants must consider them within the context of the given case. Thus, this section of the Note provides an overview of the operation of the balancing process.

First, plaintiffs must compare the breadth of rights and remedies under state and federal law and determine which, if either, will dominate the desired outcome of the given case. Thus, the plaintiff must determine whether desired or necessary opportunities and remedies are available exclusively under state or federal law. Here the plaintiff should consider the availability of and the need for compensatory and punitive damages, equitable relief, attorney's fees, and jury trials and investigate developing trends as well as established principles of state and federal law.

If, for example, equitable relief such as back pay and reinstatement

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pendent jurisdiction issue.

302. *See supra* note 5.

303. *See supra* note 222 and accompanying text.

will not compensate the plaintiff adequately, and state claims, either statutory or common law or both, provide for the recovery of compensatory and perhaps punitive damages, then the plaintiff certainly will want to present state law claims. In time-consuming and complex cases, the availability of attorney's fees under Title VII may become a dispositive factor if state law disallows such recovery. If a plaintiff seeks primarily equitable relief, the availability of a jury trial may be less important than when the litigant seeks monetary damages.

The importance of these factors is dependent on the circumstances of the particular case, but these examples demonstrate that the relative value of state and federal law depends primarily on the type of relief sought and the law under which that relief is available. If recovery is roughly equal under state and federal law, then the relief factor becomes outcome-neutral, and the plaintiff will base forum selection on the remaining factors alone. If, however, either state or federal law will dominate the desired outcome of the case, that domination creates a preference for the forum associated with that law, and remaining factors either will strengthen or overcome the preference.

Litigants also must compare the competence, receptivity, and bias of the particular courts and court systems in question. At the local level, the expertise of both state and federal courts may vary. Nevertheless, because of frequent exposure to employment discrimination issues, the federal courts are likely to possess the requisite expertise. State courts may have less experience, but increasing exposure to employment discrimination issues is equalizing the expertise factor in many states.

Receptivity is a significant factor in both state and federal forums. Although political accountability exposes state judges to more majoritarian pressure, the political climate of a particular community and the volatility of the issues may heighten or diminish the impact of political accountability. As a further measure of a court's receptivity, plaintiffs should look to current trends in judicial expansion of state law remedies. In contrast, the trend toward a more conservative judiciary has made federal courts generally less receptive to employment discrimination claims. Litigants must evaluate the degree to which local judges are susceptible to that trend. Personal political and judicial philosophy may affect a particular judge's receptivity. The restrictions imposed by recent Supreme Court opinions also dictate limits on the receptivity of all courts to federal claims. Regardless of the claims that may dominate the case, evaluation of the receptivity factor is particularly important because receptivity potentially could influence the outcome of any given case. An inordinate level of either receptivity or bias on the part of a particular court could overcome a forum preference

based on dominant claims.

Finally, litigants must weigh and balance procedural advantages and disadvantages that may inhere in each forum. Certainly, if the availability or unavailability of a certain procedure is likely to affect the outcome of a given case, procedure may work to overcome even a strong preference for a particular forum. For example, on the basis of the claims available and the receptivity of the potential courts, a plaintiff may find a state forum more attractive; however, because the plaintiff may be unable to acquire the necessary proof without liberal discovery, the liberality of the state's discovery rules may determine the choice of forum.

Perhaps the most important procedural decision facing plaintiffs who favor state forums is whether and when to surrender federal claims. Although plaintiffs who have joined federal claims in state court have the option of dropping federal claims to defeat removal, the time and expense of this procedure may be wasted if the state law offers the plaintiff all necessary remedies on an equal or superior basis to federal law and the available state courts are more dependably receptive. In this situation, the plaintiff may prefer to sacrifice federal claims from the outset of litigation, particularly when it appears likely or certain that the defendant, if given the opportunity, will remove to federal court. If, however, the state claims and forum offer only a slight advantage, the plaintiff should think carefully about sacrificing any potential avenue of recovery. When federal claims offer a remedy perhaps unavailable under state law, but a potential federal forum appears particularly hostile, the plaintiff still might prefer to plead all claims in state court and then decide whether to abandon federal claims in the event of removal.

Unlike state court plaintiffs who, through removal, immediately risk losing their choice of forum when they join state and federal claims, federal court plaintiffs enjoy more flexibility in pleading. Nevertheless, plaintiffs who favor federal forums also may encounter problems when they attempt to join state and federal claims, problems that can endanger the advantages that accompany their forum selection. If the federal court declines to exercise pendent jurisdiction over state law claims, the plaintiff who chooses to remain in federal court has two options. The plaintiff may litigate state and federal claims in separate forums, thereby running the risks of issue preclusion, or the plaintiff may abandon state claims to avoid those risks. Thus, federal court plaintiffs may find themselves in a situation similar to that of state court plaintiffs, forced to abandon some of their claims to preserve the advantage of the chosen forum, if not the choice itself.

Litigants, however, should not regard procedural hurdles as auto-

matically dispositive factors. When mere procedural inconvenience is unlikely to influence outcome, such inconvenience should not overcome a strong preference for a particular forum. Only where state and federal forums are roughly equal in all other respects should a preference for the basic procedural convenience or familiarity of a particular forum determine forum selection.

Many factors may operate to make one forum more amenable than another, and Part IV has suggested several factors that employment discrimination litigants should consider when selecting a forum. These factors, however, may vary from case to case, state to state, and time to time and must be balanced anew in each individual case. Thus, employment discrimination litigants must arrange these factors in a flexible framework for application on a case-specific basis in order to use the forum selection process to their greatest advantage.

V. CONCLUSION

Although, at one time, employment discrimination victims sought redress in federal courts in almost reflex fashion, today the once clear choice of federal courts is fading. The *Yellow Freight* decision reinforces the growing role of state courts and state law in employment discrimination litigation. As that role increases, however, so does the complexity of the forum selection process for litigants.

Debates about the proper role of the state and federal courts in the protection of federal rights and the adjudication of federal claims focus broadly upon the proper allocation of judicial resources; the modern parity debate shares this focus. Because the parity debate seeks to measure the relative efficacy of the state and federal courts as protectors and enforcers of federal rights at a primary level, it raises many of the same issues litigants must consider in the forum selection process. Litigants, however, will consider these issues at a second, more individualized level. At the second level of parity, litigants can develop a framework for forum selection that they can apply on a flexible, case-by-case, forum-by-forum basis.

Because litigants try to predict outcome when selecting a forum, the process may be inseparable from the realm of intuition. Litigants, however, can conduct that process within a carefully constructed framework applied on a case-specific basis. By doing so, employment discrimination litigants can do much to inform their intuition and to make, what perhaps must be a guess, a best guess.

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