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**Comment**

**\*645 PARITY AS A CONSTITUTIONAL QUESTION**

Akhil Reed Amar [\[FN1\]](#)

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There is much in Professor Chemerinsky's and Professor Wells's thoughtful Articles [\[FN1\]](#) with which I agree. My remarks, however, will focus on those areas in which I tend to disagree, or have a slightly different formulation of the issues. Both professors contend that parity should not be primarily understood as an empirical issue, but for rather different reasons—Wells because he thinks there is agreement about the empirical issue and Chemerinsky in part because he thinks that it is going to be difficult to find an answer to the empirical question. I agree with their conclusion, but will try to avoid taking sides by offering yet a third reason that I find more compelling. Chemerinsky also argues that the issue of parity should not be one for judicial policymaking. I agree with that, too, but I do not agree that it follows that Congress should have unfettered discretion to allocate jurisdiction between state and federal courts. I would like to argue that both professors have framed the issue of parity too narrowly by thinking only about state courts versus lower federal courts sitting in original jurisdiction. Neither professor seems to be thinking about parity in the larger context—about state court jurisdiction versus the federal judicial power of the United States as a whole. This is a context which would include not just original jurisdiction, but also appellate jurisdiction, not just lower federal court jurisdiction, but also Supreme Court jurisdiction. Widening the frame in this way would focus our attention on the ways in which lower federal courts could serve as *de jure* and *de facto* appellate tribunals over state courts in a wide array of doctrinal contexts. Let me now try to spell all that out.

Parity, to my mind, is not so much an empirical question as a constitutional question. In effect, the Constitution itself provides an answer to the empirical issue. We might debate whether a well-regulated militia is really necessary to a free state, but the preamble to the second amendment provides a constitutional answer to that. (We can, of course, amend the Constitution if we dislike its answer.) We might debate whether age really **\*646** correlates with wisdom, and whether a thirty-four year old could ever be wise enough to be president, but article II provides constitutional answers to these questions. We

might debate whether malapportioned districts are always unequal, but *Reynolds v. Sims* provides a constitutional answer to that empirical question. [FN2] I want to argue that there is a similar constitutional answer to the parity question implicit in the text, history, and structure of article III and in subsequent case law.

Wells actually talks about this a bit. He asserts that on the empirical question, there is widespread agreement that there is a difference between state and federal courts, but there is also agreement on the constitutional question that state courts are constitutionally adequate as triers in the first instance. [FN3] Hence, we see the Madisonian Compromise-lower federal courts need not even exist. I agree with Wells. But his weak sense of parity, which he deduces from the Constitution, is not fully specified, because it ignores an even weaker sense of parity, which I would infer from the Constitution. That weaker version of parity is as follows: state courts can be courts of original jurisdiction even in federal question cases. They are presumed to be constitutionally adequate as a general rule. But, they may not be the last word in federal question and admiralty cases because the text, history, and structure of article III mandate that the federal courts be the last word in those areas. The last word need not be vested in the Supreme Court, but it must be given to some federal court. The Constitution itself thus presumes parity among federal courts, but disparity between federal and state courts-at least where the question is which court may be given the last word on issues of federal law. [FN4]

That turns out to be relevant, because perhaps today's Supreme Court cannot as a practical matter guarantee federal rights claimants their article III right to a day in federal court, at least on appeal. Because of certiorari, which was introduced at the turn of the twentieth century, and the tremendous proliferation of federal question cases that has occurred, today's Court cannot ride herd over fifty state courts deciding thousands of federal questions every year in a way that the Supreme Court, as originally constituted, could discharge its review function. We need to think about whether the Constitution, in effect, requires substitutes for the Supreme Court-other federal courts sitting in quasi-appellate jurisdiction or in de jure appellate jurisdiction over state courts. [FN5] And, that is where the parity debate in the \*647 courts has been fought in recent years. It has been in habeas corpus, which is about de facto appellate jurisdiction, in cases like *Stone v. Powell*. [FN6] It has been in the *Younger v. Harris* line of cases, in which a large part of the debate is whether after a trial in state court there is any way a litigant can get back into lower federal court. [FN7] That is what *Huffman v. Pursue, Ltd.*, for example, was all about. [FN8] It is at the heart of the *Railroad Commission v. Pullman* [FN9] line of abstention cases-for example, in the *England v. Louisiana State Board of Medical Examiners* reservation. [FN10] It is at the core of *Pennzoil Co. v. Texaco Inc.*, [FN11] and attempts to build up the so-called Rooker-Feldman doctrine [FN12] preventing relitigation in federal courts once state courts have heard a case. It also underlies *Allen v. McCurry* [FN13] and *Migra v. Warren City School District Board of Education*, [FN14] involving issues of relitigation under 28 U.S.C. § 1738. [FN15]

So that is where the parity debate has been, and Wells is too narrow in asking just the question of state court original jurisdiction without going further. I believe the Constitution provides every bit as much of an answer on the wider question as it does on the narrower question of whether state courts are constitutionally adequate to hear federal questions in the first instance. Unless the wider debate is engaged, we are really not talking about what is on the table, politically and analytically.

Chemerinsky argues that precisely because the issue of parity should not be a judicial policy question, it should be a legislative question. Congress should decide, and federal courts should simply defer to congressional intent. Here too, I think that this view is premised on an implicit, if not explicit, claim that the Constitution gives Congress complete power to structure federal jurisdiction. I think that is so, as to original jurisdiction [\[FN16\]](#)-we can have state courts or lower federal courts, and the Madisonian Compromise says both options are open to Congress. But as to the judicial power of the United States as a whole, once again, I believe the Constitution imposes \*648 limits. I do not think that those are sufficiently identified and focused on by Chemerinsky. If we took seriously his proposed litigant choice principle we would be left with the following implications. If you are claiming, for example, a federal constitutional right against the federal government, and you bring the suit in state court and the state court decides in your favor and against the federal government, the federal government should not be allowed to appeal to the United States Supreme Court. This result would maximize constitutional rights if we defined rights (as does Chemerinsky) as vested in individuals, rather than the government. Yet, such a rule has never been the law. The government has always been able to appeal to the Supreme Court. I believe that is the correct result, even if the constitutional restriction is a restriction on states rather than the federal government. Some scholars question whether section 25 of the first Judiciary Act covered those cases in which a state court ruled against the state government and in favor of the individual litigant. I believe the Act did cover these cases, [\[FN17\]](#) but in any event, the Court today undoubtedly has appellate jurisdiction in these cases after *Ives v. South Buffalo Railway Co.* [\[FN18\]](#) and the modification of the jurisdictional statute in the 1910s. [\[FN19\]](#)

It is not just the Supreme Court's appellate jurisdiction that we have to focus on. If the Supreme Court cannot discharge its appellate function today, the real question is whether lower federal courts need to fill the breach because they have constitutional parity with the Supreme Court in a way that state courts do not, and because they are article III tribunals in a way that state courts are not. For example, 200 years ago, lower federal judges were Supreme Court justices-that is what circuit riding was all about. So, unless one expands the parity frame, both Chemerinsky's litigant choice principle and the substantive values approach of Wells are fundamentally incomplete.

Let me just say a few more words about Chemerinsky's proposal, and I will conclude with the basis for the heavy-handed constitutional claim that I have been making. His litigant choice principle, to my mind, is nicely responsive to Wells's argument that we need to have a substantive commitment before we can decide issues of jurisdictional allocation. If both parties want to be in the same court, whether state or federal, there is obviously no problem. The tricky question is what happens when one party wants to be in federal court and the other party wants to be in state court. Chemerinsky says, in effect, that we should give the choice to the party claiming the substantive constitutional right. Implicit here is the notion that "the government doesn't have constitutional rights." [\[FN20\]](#) This was what the late Professor \*649 Paul Bator, for example, challenged. He challenged the idea that the fourteenth amendment (which declares individual rights against states) is part of the Constitution, but the tenth (which limits the scope of rights that people have against the state) is not. He argued that the limits of constitutional rights were as much a part of the Constitution as their affirmative scope. [\[FN21\]](#) But if each side of any constitutional case is virtually always claiming a constitutional right, as Bator would suggest, the litigant choice principle may seem to self-destruct; it applies only if one side, and not the other, is seen as claiming a constitutional "right." Chemerinsky's approach thus works only if we reject

Bator's view of what counts as a constitutional right. [\[FN22\]](#) I think Chemerinsky forthrightly admits as much, but I wanted to emphasize this admission-for it is, indeed, the substantive value choice which Wells claims is necessary.

Chemerinsky also, in proposing legislative choice, talks about the habeas statutes and the congressional intent there. It is not so clear to me that the congressional intent was as broad as he suggests. It is not clear that federal habeas was about federal court review of state judges, rather than state executives (the classic understanding of habeas) unless state courts were acting beyond their jurisdiction (hence all sorts of limitations on federal habeas corpus under the Act of 1867 for much of its early life). [\[FN23\]](#) Thus, to build an argument on congressional intent in the habeas statutes, for example, is quite possibly to build it on sand.

I want to suggest instead that the Constitution itself has made certain policy decisions. I shall use the very same traditional rules of legal analysis that Chemerinsky, for example, would likely appeal to in trying to make the argument that Congress has made certain policy decisions (in sections 1331, 1343, and 1983 and in the habeas statutes). First, the constitutional text says that "the judicial power of the United States shall be vested" in a federal judiciary, which includes the Supreme Court and lower federal courts, but not state courts-hence the argument that there is parity among federal \*650 judges but not between federal judges and state judges-and must extend, at least on appeal, "to all federal question and admiralty cases." Other provisions in the Constitution confirm this parity among article III judges. The Constitution itself establishes parity among federal judges, supreme and inferior, by prescribing identical rules for presidential appointment, Senate confirmation, life-tenure, undiminishable salary, and so on, for all federal judges (but not for state judges). [\[FN24\]](#)

From our history, both before and after ratification of our Constitution, it is equally clear that a federal court must be empowered to speak the last word on all federal questions. That is why every federal question that was shunted over to state courts as an original matter 200 years ago was subject to Supreme Court appellate review under section 25. The first Judiciary Act also echoed the Constitution's emphasis on the fundamental parity among federal judges- hence the whole idea of circuit riding, with Supreme Court Justices riding circuit with lower federal judges. The Justices sat with other federal judges, never with state judges. Lower federal courts were allowed to decide many important constitutional questions free from Supreme Court appellate review; state courts were never so treated. [\[FN25\]](#)

Finally, consider the case law, and in particular, what I think is the most important case in federal jurisdiction-*Martin v. Hunter's Lessee*. [\[FN26\]](#) Martin agrees with Wells and Chemerinsky that the empirical question need not be addressed. But Martin does not say that we are left with only substance; Martin does not say that we are left with only litigant choice; Martin says that we are left with the Constitution itself. Here is the quote, and here I end.

"[W]e very cheerfully admit" that "the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States ...." [\[FN27\]](#) However, " t he Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to

obstruct or control, the regular administration of justice." [\[FN28\]](#)

Thus Martin reminds us that the Constitution itself says that the last word on federal question cases cannot be left with state judges, but can be left with federal judges, whether on the Supreme Court or on lower federal courts.

[\[FNa\]](#). Professor of Law, Yale Law School. This Comment is a lightly edited and footnoted version of remarks delivered at the American Association of Law Schools section on federal courts in January 1991.

[\[FN1\]](#) Chemerinsky, Ending the Parity Debate, 71 B.U.L. REV. 593 (1991); Wells, Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts, 71 B.U.L. REV. 609 (1991).

[\[FN2\]](#) [377 U.S. 533, 568 \(1964\)](#).

[\[FN3\]](#) Wells, *supra* note 1, at 611, 614-15.

[\[FN4\]](#) I have elsewhere elaborated the arguments underlying this reading of article III. See Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. REV. 205 (1985) [hereinafter Amar, Two Tiers]; Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499 (1990) [hereinafter Amar, Judiciary Act]; Amar, Reports of My Death Are Greatly Exaggerated: A Reply, 138 U. PA. L. REV. 1651 (1990).

[\[FN5\]](#) But would not such a requirement constitute a repeal of the Madisonian Compromise? Strictly speaking, no. See Amar, Two Tiers, *supra* note 4, at 268 n.213 (discussing alternative option of drastically enlarging and restructuring the Supreme Court).

[\[FN6\]](#) [428 U.S. 465 \(1976\)](#).

[\[FN7\]](#) [Younger v. Harris, 401 U.S. 37 \(1971\)](#).

[\[FN8\]](#) [420 U.S. 592 \(1975\)](#).

[\[FN9\] 312 U.S. 496 \(1941\).](#)

[\[FN10\] 375 U.S. 411 \(1964\).](#)

[\[FN11\] 481 U.S. 1 \(1987\).](#)

[\[FN12\] See Amar, Judiciary Act, supra note 4, at 1535-36.](#)

[\[FN13\] 449 U.S. 90 \(1980\).](#)

[\[FN14\] 465 U.S. 75 \(1984\).](#)

[\[FN15\] 28 U.S.C. § 1738 \(1988\)](#) provides that state statutes and judicial proceedings "shall have full faith and credit in every court within the United States."

[\[FN16\] The original jurisdiction of the Supreme Court presents special issues. See Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443 \(1989\).](#)

[\[FN17\] See Amar, Judiciary Act, supra note 4, at 1529-33.](#)

[\[FN18\] 201 N.Y. 271, 94 N.E. 431 \(1911\).](#)

[\[FN19\] See generally P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 501-03 \(3d ed. 1988\).](#)

[\[FN20\] E. Chemerinsky, Remarks at the American Association of Law Schools Section on Federal Courts \(Jan. 1991\) \(tape recording on file at Boston University Law Review\).](#)

[\[FN21\] Bator, The State Courts and Federal Constitutional Litigation, 22 WM. & MARY L. REV. 605, 631-35 \(1981\) \("The limitations, too, count as setting forth constitutional values."\).](#)

[FN22] Analytically, I find Professor Bator's position persuasive. Nevertheless, it is wholly coherent for Professor Chemerinsky to make a substantive commitment that certain constitutional rights-holders (individuals) should be privileged over other parties invoking constitutional norms (governments) even while conceding the analytic point that, strictly speaking, these latter parties can be seen as rights-holders too. Is this, then, a mere word game? Not at all. Because of the truth of Bator's analytic point, article III, I submit, requires that if a government is shunted into state court under Chemerinsky's litigant choice principle, and if the government loses there on federal grounds, the government must be allowed to appeal to some federal court-even though this appeal "weakens" constitutional "rights" as Chemerinsky defines them.

[FN23] See generally [Fay v. Noia, 372 U.S. 391, 450-63 \(1963\)](#) (Harlan, J. dissenting); Bator, [Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 474-93 \(1963\)](#).

[FN24] See generally sources cited supra note 4. But see Note, Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role", [100 YALE L.J. 1013 \(1991\)](#) (discussing the ways in which the Constitution limits its general affirmation of parity among federal courts).

[FN25] See generally sources cited supra note 4.

[FN26] [14 U.S. \(1 Wheat.\) 304 \(1816\)](#).

[FN27] [Id. at 346-47](#).

[FN28] [Id.](#) (emphasis added).

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