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Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System

Judith Resnick
Yale Law School

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REVISING OUR “COMMON INTELLECTUAL HERITAGE”: FEDERAL AND STATE COURTS IN OUR FEDERAL SYSTEM

*Judith Resnik**

ABSTRACT

This Essay pays tribute to Daniel Meltzer’s insight that, to the extent “lawyers have a common intellectual heritage, the federal courts are its primary source.” I do so by analyzing how that heritage is made and remade, as political forces press Congress to deploy federal courts to protect a wide array of interests and state courts absorb the bulk of litigation.

The heritage that Meltzer celebrated and to which he contributed was the outcome of twentieth-century social movements that focused on the federal courts as hospitable venues, serving as vivid sources of rights and remedies. A competing heritage has since emerged, as the Supreme Court shaped new doctrines constricting judicial powers and rendering courts unavailable and unavailing.

Despite the Court’s reluctance to welcome claimants, Congress continues to endow the federal courts with new authority and significant funds. But what the federal government has thus far ignored are the needs of state courts, where 100 million cases are filed annually and states struggle to honor constitutional commitments to open courts and rights to counsel for criminal defendants.

Once state courts come into focus, two other and competing understandings of courts come to the fore. One merits the term “enabling courts,” as judges aim to equip litigants with lawyers and resources for conflicts related to families, housing, and health. From “Civil Gideon” movements and self-help forms to drug and reentry courts, new initiatives underscore the goals of using courts to be responsive to social needs. But another vector of court activities falls under the

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nomenclature of “exploitive courts,” using discriminatory fines, fees, and threats of jail for those unable to pay to turn courts into profit centers to augment localities’ budgets.

Inequality and racial tensions are the leitmotifs of this decade; it is neither surprising nor inappropriate that these issues are played out in public courts as well as in electoral politics. But these very inequalities counsel the need to develop a new intellectual heritage, premised on the interdependencies of state and federal courts, sharing the common purpose of fulfilling constitutional obligations in this democratic polity to enable access to their public services.

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Insofar as modern lawyers have a common intellectual heritage, the federal courts are its primary source.

—Daniel Meltzer, 1989¹

I. THE PRIMACY OF THE FEDERAL COURTS

Daniel Meltzer wrote that sentence in 1989, when he reflected on the two hundredth anniversary of the First Judiciary Act.² Each year as I teach Federal Courts, I am struck anew by how right he was. The image of and the doctrine produced by the federal courts shapes the imagination and understanding of law students as well as that of the legal academy, lawyers, judges, and the public at large. Honoring Daniel Meltzer by continuing to study the federal courts in his memory, I explore the forces that contributed to the changing contours of, and the gaps in, our “common intellectual heritage.”

First, I trace the early years of the federal judiciary that Meltzer esteemed, as it became a vivid form of national authority. Article III is the iconic statement of federal judicial power, but it is Congress that has brought that charter to life by endowing the federal courts with jurisdiction, judge-ships, and courthouses and hence propelled the federal courts to the fore. Yet that impact is obscured by the difficulties of tracking the bits and pieces of legislation, riders, and appropriations that cumulatively authorize and fund federal judicial work.

In contrast, case law is readily accessible and offers narratives embedded in individual stories alleging violations of specific legal rules and resulting in reasoned explanations of their applications. Fixing attention on the U.S. Supreme Court has become easy by its production of a predictable and tidy corpus, down to fewer than ninety opinions annually and concluding major pronouncements each year by July 1.³ Hence, the Court is the lens through which our “common intellectual heritage” has generally been seen.

Second, I provide a brief overview of Meltzer’s analyses of the work of the twentieth-century federal judiciary—called upon repeatedly to identify

1 Daniel J. Meltzer, *The Judiciary’s Bicentennial*, 56 U. CHI. L. REV. 423, 427 (1989) [hereinafter Meltzer, *The Judiciary’s Bicentennial*]. The article reflected on the 200 years since the First Judiciary Act, and the degree to which (despite *Erie*) the federal judiciary served as a “nationalizing force”—from constitutional and statutory interpretation to the ways in which legal education used federal law as exemplary. *Id.*

2 *Id.* at 427.

3 The Supreme Court decided seventy-four merits cases in the October 2014 term. See Kedar S. Bhatia, *Merits Cases by Vote Split*, SCOTUSBLOG (June 30, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_votesplit_OT14.pdf.

Recall that in 1877, the Supreme Court averaged “over 1,200 cases each year on its docket,” and on average, determined “a little more than 400,” its backlog was in excess of 750. See PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, *THE FEDERAL COURTS: AN ESSENTIAL HISTORY* 183 (2016) [hereinafter *THE ESSENTIAL FEDERAL COURTS HISTORY*]. In 1891, Congress created the intermediate appellate courts to ease that backlog. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (the “Evarts Act”). In 1925, Congress authorized the Court to choose most of its cases. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (the “Certiorari Act”).

rights and fashion remedies. Again, the iconic moments, such as *Brown v. Board of Education*, involve constitutional interpretations, yet Congress is the wellspring of judicial action. Between 1974 and 1998, Congress turned to the federal courts hundreds of times⁴ and deployed judges to work on an array of topics. Some arenas are well-known and others obscure, as rights to file cases range from legislation on truth-in-lending,⁵ fair-credit reporting,⁶ and clean air⁷ in the 1970s; rail safety,⁸ hazardous and solid waste,⁹ safe drinking water,¹⁰ wiretaps,¹¹ video privacy,¹² and equal access to justice¹³ in the 1980s;

4 See Administrative Office of the U.S. Courts, Legislation Enacted in the Past Twenty-Five Years Conferring Either Exclusive or Concurrent Federal Court Jurisdiction (Sept. 18, 1998) (on file with the Yale Law Library, which created a permalink at <https://perma.cc/MB3N-CEHD>) (AOUSC List of Legislation Conferring Exclusive or Concurrent Jurisdiction) [hereinafter AO Federal Jurisdiction Legislation, 1974–1998]. The list numbers 474, but not all of the statutes identified provide causes of action or new remedies in the federal courts.

5 Truth in Lending Act of 1968, Pub. L. No. 90-321, § 130, 82 Stat. 146, 157 (providing federal jurisdiction for consumer claims brought against creditors failing to disclose information required by the act), *amended by* Truth in Lending Act of 1974, Pub. L. 93-495, § 408, 88 Stat. 1500, 1518 (codified as amended at 15 U.S.C. § 1640(a) (2012)) (prescribing that courts consider particular factors in determining class action awards).

6 Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified at 15 U.S.C. §§ 1681–81x).

7 Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 113, 84 Stat. 1676, 1686 (amending the Clean Air Act to provide for federal jurisdiction over public enforcement actions), *amended by* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 111, 91 Stat. 685, 704–05 (codified as amended at 42 U.S.C. § 7413 (2012)) (providing expressly for civil penalties).

8 Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 606(c), 96 Stat. 2543, 2566 (codified at 45 U.S.C. § 1205 (2012)) (providing for judicial review of agency adjudications related to right-of-way claims in the United States District Court for the District of Alaska).

9 Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, §§ 233, 403, 98 Stat. 3221, 3257, 3271 (codified as amended at 42 U.S.C. §§ 6928, 6973) (providing that the Administrator of the Environmental Protection Agency (EPA) may commence a civil action in federal court for “appropriate relief, including a temporary or permanent injunction”).

10 Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 102, 100 Stat. 642, 647 (codified as amended at 42 U.S.C. § 300g-3) (providing that the Administrator of the EPA must bring a civil action in federal district court in order to assess a civil penalty greater than \$5,000, and that the Attorney General may recover the amount of an unpaid civil penalty by filing an action in federal district court); *id.* § 108(c) (allowing the Administrator to bring a civil action in federal district court to impose a civil penalty “against any person who tampers, attempts to tamper, or makes a threat to tamper with a public water system”).

11 Electronics Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified at 18 U.S.C. §§ 2420(a), 2707 (2012)) (amending the Wiretap Act and authorizing private civil enforcement by any “person whose . . . communication is intercepted, disclosed, or intentionally used in violation” of the law, and in violation of the Stored Communication Act, and providing for statutory damages).

12 Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. §§ 2701 note, 2710, 2711). The Act provides remedies for individuals alleging

to civil rights,¹⁴ the needs of soldiers and sailors,¹⁵ telephone consumers' protection,¹⁶ and family and medical leave¹⁷ in the 1990s.

Such mandates worked to welcome both public and private litigants, and the federal docket tripled between 1960 and 1990.¹⁸ During much of the second half of the twentieth century, the judiciary enthusiastically responded to calls for help—albeit tempered with managerial efforts focusing on augmenting resources.¹⁹ Meltzer parsed the resulting constitutional and statutory doctrines in search of appropriate balances between the courts and Congress when calibrating remedies for alleged injuries. Meltzer was thus both an heir to, and an expounder of, a common heritage, as he celebrated the remedial contributions of the federal courts while appreciating the limits of what courts could do. *Hospitable courts* is one way to capture the posture Meltzer commended the federal judiciary to adopt.

information about rented videos is disclosed; the statute was enacted after criticism about information obtained in relationship to Supreme Court nominee Robert Bork. *See* S. REP. NO. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5.

13 Equal Access to Justice Act Amendments, Pub. L. No. 99-80, § 1, 99 Stat. 183, 183-84 (1985) (codified as amended at 5 U.S.C. § 504 (2012)) (providing non-U.S. parties with a right to appeal an adverse fee determination to the federal court having jurisdiction to review the merits of the underlying agency adjudication).

14 Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified at 42 U.S.C. § 1981a) (providing for punitive damages in cases of intentional discrimination); *id.* § 115 (codified at 29 U.S.C. § 626) (amending the Age Discrimination in Employment Act of 1967 by providing a cause of action to aggrieved persons under the Act who exhaust administrative remedies through the Equal Employment Opportunity Commission).

15 Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, 105 Stat. 34.

16 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 227, 105 Stat. 2394, 2395-96 (codified at 47 U.S.C. § 227) (providing a private right of action for violations of the statute and "to recover for actual monetary loss from each such violation, or to receive \$500 in damages for each such violation").

17 Family and Medical Leave Act of 1992, Pub. L. No. 103-3, § 107, 107 Stat. 6, 15-17 (codified as amended at 29 U.S.C. § 2617) (providing eligible employees with a right of action in federal or state court for damages and equitable relief).

18 In 1960, there were 85,802 district court filings and, in 1990, 259,876 filings. ADMIN. OFFICE OF THE U.S. COURTS, 1960 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT 61-62 (1960); ADMIN. OFFICE OF THE U.S. COURTS, 1990 FEDERAL JUDICIAL CASELOAD STATISTICS 2 (1990). That mix included the staple of diversity jurisdiction (whose parameters narrowed during this time period) as well as the new and old statutory claims. *See* Marc Galanter, *The Life and Times of the Big Six; Or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 [hereinafter Galanter, *The Life and Times of the Big Six*].

19 At the prodding of Chief Justice Earl Warren, the American Law Institute (ALI) created a project on federal jurisdiction. *See* AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS I (1969). Interest in limiting diversity jurisdiction, as well as prisoner filings, dated back to decades before. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937-943 (2000) [hereinafter Resnik, *Trial as Error*].

Third, I consider the last few decades, during which the Supreme Court led a shift away from the heritage that Meltzer admired. The judiciary's leadership became insistent that federal courts should be asked to do less, rather than more. In place of the presumption of rights to remedies, a new and competing intellectual heritage emerged, bent on constricting the relief that federal judges provide. This approach has some of its seeds in Congress, which in the 1990s enacted a few statutes limiting or "stripping" jurisdiction in cases related to migrants and prisoners, and imposing new conditions in securities cases.²⁰ Yet Congress continued to dispatch the federal courts by formulating new federal rights that opened the doors for other litigants. Politics continued to produce the idea that giving (or limiting) federal jurisdiction was a "good" to bestow on constituents and on special interest groups. This attitude continued to generate a haphazard and wide array of new rights called "federal."

The greater source of cutbacks came from the judiciary, reading narrowly or overruling what Congress has authorized courts to do.²¹ As judicial overrides of new federal statutory rights and judge-made constraints on remedies become more frequent,²² new generations are being schooled to expect *unavailing courts*, unwilling to provide claimants with effective opportunities to respond in public venues.

Meltzer modeled the Court-Congress relationship as interdependent, and he repeatedly called for judges to fill gaps in statutes. The Supreme Court's last decades have undercut that cooperative relationship through an odd mix of decisions, sometimes abjuring equitable remedial power absent congressional directions and other times asserting judicial authority to reject congressional authorizations that courts could provide relief. The Court has thus shaped a common heritage largely hostile to rights and often in conflict with or untethered from Congress.

This body of law needs to be read in conjunction with three structural facts reflecting the "machinery of jurisdiction" to which Meltzer repeatedly

20 See, e.g., Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-607 (codified as amended at 8 U.S.C. § 1252 (2012)); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 42 U.S.C. § 1997e (2012)); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C. (2012)).

21 See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014) [hereinafter Burbank & Farhang, *Litigation Reform*]; Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) [hereinafter Resnik, *Constricting Remedies*].

22 See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). Before 1995, the Supreme Court struck 134 federal statutes, while between 1995 and 2003 it struck 33, a quarter of the pre-1995 total. Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893 (2003).

drew our attention.²³ First, certain forms of investments in the federal courts are declining; federal filings have flattened since the 1980s and the mix of cases has shifted.²⁴ Second, about thirty percent of the plaintiffs bringing cases now proceed pro se, without counsel, at the trial level;²⁵ more than fifty percent do so on appeal.²⁶ These numbers include many people who are not prisoners.²⁷ Third, about forty percent of federal civil filings were, as of 2015, consolidated under the “multi-district litigation” statute, creating aggregate litigation with court-approved lead lawyers representing a significant number of plaintiffs who had filed individual lawsuits.

That courts are now populated with individuals lacking the means to use them well and in need of assistance is a phenomenon felt acutely in state courts, teeming with litigants lacking lawyers. In 2010, California counted more than four million and New York more than two million self-represented civil litigants in their court systems.²⁸ Furthermore, localities such as Ferguson, Missouri have become a shorthand for exploitation by courts, which have been turned into revenue centers; that town used racially discriminatory policing and unfairly imposed fines and fees on their users. But neither its practices nor the problems they reflected were unique to any one locality. Other jurisdictions, from upstate New York to New Orleans, have been sub-

23 Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2537 (1998).

24 Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177 [hereinafter Moore, *The Federal Civil Caseload*]; cf. Galanter, *The Life and Times of the Big Six*, *supra* note 18.

25 The federal district court database details pro se filings back to 2005. See *Judicial Business*, U.S. COURTS, <http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=all&t=all&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D> (last visited May 23, 2016); *infra* FIGURE 15.

26 U.S. COURTS, U.S. COURTS OF APPEALS JUDICIAL FACTS AND FIGURES, PRO-SE CASES FILED, BY NATURE OF PROCEEDING tbl 2.4 (Sept. 30, 2014), <http://www.uscourts.gov/statistics/table/24/judicial-facts-and-figures/2014/09/30>; see *infra* FIGURE 14. In 1995, about 40% of the total of about 50,000 appeals were pro se. In 2014, 51% percent of about 60,000 appeals were pro se. Prison petitions remained relatively stable with about 13,000–14,000 in 1995 and in 2014, and hence the rise in pro ses in 2014 comes from non-prisoner petitions. A few federal district courts have pilot programs to help find lawyers to provide assistance; an example is the Pro Se Legal Assistance Project in the Eastern District of New York. See *Pro Se Centers Help Even the Odds for Litigants Without Lawyers*, U.S. COURTS (Aug. 20, 2015), <http://www.uscourts.gov/news/2015/08/20/pro-se-centers-help-even-odds-litigants-without-lawyers>.

27 About 8% of the 27–30% pro se filings at the district court level during the last decade were not prisoners. In 2014, non-prisoners filed 24,274 cases pro se. See *Judicial Business*, tbl.C-13, ADMIN. OFFICE OF U.S. COURTS (Feb. 25, 2016), <http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=all&t=all&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D>.

28 Jonathan Lippman, *New York’s Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL’Y REV. 13, 15 (2012) [hereinafter Lippman, *New York’s Template*]; see also Sargent Shriver Civil Counsel Act, 2009 Cal. Stat. 2498, discussed below, *infra* note 457.

jected to lawsuits for failure to provide indigent criminal defendants with constitutionally required counsel.²⁹

My fourth and concluding comments are about the present and future of the courts. Inequality and racial tensions are the leitmotifs of this decade; it is neither surprising nor inappropriate that these issues are played out in public courts as well as in electoral politics. But these very inequalities underscore the critical contributions that courts could make in building a sense of common purpose cutting across the many divides.

Meltzer's appreciation of the specific role that federal courts played in shaping our heritage entailed his choice of the word "common." The federal courts, as well as state courts, are one of our "commons"—non-denominational spaces structuring opportunities for disciplined public exchanges across bitter divides. The odd etiquette of the courtroom obliges disputants to hear opponents' claims and compels government, through its judges and jurors, to accord respectful and dignified treatment to all participants, regardless of their race, class, age, sexuality, and ethnicity.

While Meltzer counseled hospitality for federal courts, that posture is insufficient to respond to the current challenges. Likewise, the more recent embrace by the U.S. Supreme Court of unavailing courts is impoverished. To conclude, I sketch the contours of developing another common heritage about the role of courts, which I style "enabling" to reflect the transformation of the twentieth century when "we" all became eligible to be in court and turned state and federal courts into a remarkably relied-upon social service, with some 100 million filings annually. To honor state constitutional obligations to provide "open courts" and federal guarantees of Article III requires intellectual analyses built on the successes of courts during the last century and the resultant challenges.

Political movements of the past centuries shaped both state and federal court systems into potential havens for a diverse set of claims. Rather than bemoaning the pressures of swelling dockets, the number of filings should be understood as a tribute to a democratic concept of government officials—judges—aspiring to deliberate fairly, to deal with individuals, and to demonstrate in public that equality of treatment is the goal, albeit unevenly achieved in practice.

Given their resources and visibility, the federal courts have a special role to play. Hundreds of congressional enactments during the last centuries enable the federal courts to provide common ground for an eclectic set of rights holders—from consumers to sailors to video purchasers to waste manufacturers to family members to discrimination claimants—authorized to bring their arguments before judges empowered by and performing in front of the public.

29 See *Complaint—Class Action, Yarles v. Bunton*, No. 3:16-cv-31 (M.D. La. Jan. 14, 2016); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010); see also *Stipulation and Order of Settlement, Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Oct. 21, 2014); *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012); *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. 2009).

Adjudication can therefore be one source of social solidarity,³⁰ providing a resource for those in conflicts as well as for third parties, constitutionally endowed with rights to observe and critique the exchanges and the outcomes.³¹ On this account, the problem is not that too many are asking for help but that the responses in federal courts are distractingly focused on alternative dispute resolution that privatizes processes, diffuses disputes, and reduces opportunities for the public to see the utility of what courts do.³² Moreover, congressional funding continues to go disproportionately to the federal courts, dealing with a tiny fraction of litigation. While in fiscal year 2016 the federal judiciary was offered a billion dollars for building courthouses,³³ the State Justice Institute received some five million federal dollars to support grants for innovations in state courts.³⁴

Yet, adjudication in both sets of courts is increasingly becoming a luxury good, as the costs of lawyers and of litigation outstrip the wherewithal of most

30 I do not argue the role of adjudication to be either exclusive or necessarily preferable to other modes of generating shared commitments. One alternative is contract. See Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431 (2010). As Markovits explained, both adjudication and contract aim to “sustain stable integration in the face of the myriad competing aims” by requiring “respectful recognition,” albeit while relying on different modes of doing so. *Id.* at 469–70. Markovits detailed the distinction between gap-filling work by arbitrators, *id.* at 479, and the regulatory obligations of judges deciding statutory claims, *id.* at 482–83. He argued therefore that statutory rights should not be located in arbitration because third-party supervision was required. *Id.* at 482–88.

31 See generally Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1 (2011); Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

32 See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) [hereinafter Resnik, *Diffusing Disputes*]; Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014) [hereinafter Resnik, *Privatization of Process*].

33 *FY 2016 Funding Meets Judiciary Needs*, ADMIN. OFFICE OF U.S. COURTS (Dec. 21, 2015), <http://www.uscourts.gov/news/2015/12/21/fy-2016-funding-meets-judiciary-needs>. Included was “\$948 million to the General Services Administration, which is expected to fund construction costs of the top eight courthouse construction projects on the Judicial Conference’s courthouse priority plan, and partial funding for a ninth.” As one judge explained, “This is an unprecedented infusion of resources for new courthouse construction.” He continued,

Unsafe, overcrowded, and inefficiently designed courthouses threaten the ability of courts to successfully carry out their Constitutional and statutory duties. We are enormously grateful to Congress for recognizing both the integrity of the Judiciary’s planning process, as well as the central role the courthouse occupies in assuring the public’s confidence in its justice system.

Id.

34 Consolidated Appropriations Act, 2016, H.R. 2029 div. B, tit. IV, 114th Cong. (2015) (enacted as Pub. L. No. 114-113).

disputants. Responses need to underscore the interdependence both of courts and Congress and therefore of adjudication and politics, producing the amalgam of rights and resources, as well as the interdependence of federal and state systems, required to find paths to serve the diversity of claimants now authorized to use the courts.

What results from this integrated narrative? The federal courts canon on which Daniel Meltzer centered his teaching needs to be rethought so as to clarify how much state practices and doctrine drive federal constitutional law and bear the brunt of its impact. For example, the 1963 decision of *Gideon v. Wainwright* should be read with an understanding of the role played by dozens of states, funding indigent defense in the decade before. Their initiatives demonstrated the feasibility of providing counsel and therefore encouraged the U.S. Supreme Court to declare a national Sixth Amendment right to counsel.³⁵ In the decades since, as prosecution rates soared, the challenges and failures of state-level implementation were critical in the Court's refusal, in 2011, to require counsel in *Turner v. Rogers* before a civil contemnor could be sent, at the behest of a private opponent, to jail for twelve months.³⁶

Through this integrated narrative, the vulnerability of both court systems comes to the fore. Daniel Meltzer understood the role that federal law played in shaping legal identity; doing so seemed both obvious and relatively easy. In the twenty-first century, the challenges of sharing a sense of a "we," comprised of commitments to fair hearings and decisions anchored in facts, appear daunting. Many methods of linking Americans together are needed, and one is through sharing their identity as legal rights holders, able to share places called "the courts."

To continue to shape a *common* heritage of responsible and responsive law requires the federal judiciary to locate its work in supportive relationships with both Congress and state courts. The federal courts need to articulate new agendas that not only adopt a posture of "hospitality" (for which Daniel Meltzer called³⁷) but also to become *enabling courts* by fashioning innovative methods to facilitate and subsidize public participation from diverse segments of the body politic, bringing claims for and to justice.

II. NATIONAL NORMS, POLITICAL IDENTITY, AND FEDERAL INSTITUTIONS

A. *Developing National Services from Marine Hospitals and Post Offices to Federal Courts*

A brief historical overview is in order to underscore the work, ingenuity, and political gumption that produced the common heritage that those of us, coming of age in the latter part of the twentieth century, understood to form

35 372 U.S. 335 (1963); *see also infra* text accompanying notes 451–55.

36 564 U.S. 431 (2011).

37 *See, e.g.*, Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 424 (1974) [hereinafter Meltzer, *Standing*].

the core precepts of “the federal courts.”³⁸ To do so requires a baseline, provided by this photograph of the first major federal building erected in Galveston, Texas, in 1861, soon after Texas became a state.

FIGURE 1: UNITED STATES CUSTOM HOUSE, GALVESTON, TEXAS, 1861



United States Custom House, Galveston, Supervising Architect: Ammi B. Young, 1861; converted for use as a federal courthouse in 1917. Image reproduced courtesy of the National Archives and Records Administration.

I came upon this image in a search for information about federal courthouse construction in the nineteenth century. But, as the title indicates, the building was instead a Custom House. At the time, the U.S. government owned about fifty buildings outside of Washington, D.C., and none of them were courthouses. The early building types were, instead, custom houses and marine hospitals, sheltering national government services that, along with the American Post Office Department, steamboat inspectors, and a variety of local government activities, created a swath of public sector activities shaping the nation.³⁹

³⁸ My discussion relates to Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 *IND. L.J.* 823, 855 (2012) [hereinafter Resnik, *Building the Federal Judiciary*]; see also JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF CONSTITUTIONAL DEVELOPMENT* (2012) [hereinafter CROWE, *BUILDING THE JUDICIARY*]; THE ESSENTIAL FEDERAL COURTS HISTORY, *supra* note 3.

³⁹ See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009) [hereinafter BALOGH, *A GOVERNMENT*

The most expansive early federal system was the post office. Just as the Constitution authorizes the creation of federal courts, it also authorizes Congress to “establish Post Offices and post Roads.”⁴⁰ Through the Post Office Act of 1792 and many statutes thereafter, Congress expanded the system that Benjamin Franklin had once headed.⁴¹

The nation-building function was plain; James Madison extolled the post as a vehicle for uncensored and subsidized newspaper circulation that would (he hoped) promote “public opinion.”⁴² The 1792 Post Office Act⁴³ created the system for the “conveyance of information” into “every part of the Union.”⁴⁴ An impressive infrastructure was thus put into place and, by 1828, “the American postal system had almost twice as many offices as the postal system in Great Britain and over five times as many offices as the postal system in France.”⁴⁵ By 1831, the Post Office Department employed some 8000 people, about three quarters of the federal government’s civilian workforce at that time.⁴⁶

OUT OF SIGHT]; JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012) [hereinafter MASHAW, ADMINISTRATIVE CONSTITUTION]; RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (1998) [hereinafter JOHN, SPREADING THE NEWS].

40 U.S. CONST. art. II, § 8, cl. 7.

41 On debates about how to structure the postal system, see JOHN, SPREADING THE NEWS, *supra* note 39, at 30–37. John credited the Post Office Act of 1792 with shaping “American postal policy in three major ways”: by admitting newspapers “into the mail on unusually favorable terms” (and in turn facilitating the growth of the press); by prohibiting surveillance and censorship; and by creating procedures enabling the “extraordinarily rapid expansion of the postal network” from the seaboard into Appalachia. *Id.* at 31.

42 James Madison, *Public Opinion*, NATIONAL GAZETTE, Dec. 19, 1791, *reprinted in* 14 PAPERS OF JAMES MADISON (Robert Rutland & Thomas Mason eds., 1983). Whether the goal was to enable Habermasian-style discourse or to shape and thereby obtain popular approval is a source of dispute. See, e.g., Alan Gibson, *Veneration and Vigilance: James Madison and Public Opinion, 1785–1800*, 67 REV. POL. 5 (2005); Colleen A. Sheehan, *Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion*, 98 AM. POL. SCI. REV. 405 (2004).

The postal service has not been free of all forms of state control. Rather, “tampering” with the mails is a federal crime, and mailing “obscene” matters became a crime in 1865, expanded in 1873 under the Comstock Act. See 42 U.S.C. § 1341 (2012); Comstock Act, ch. 258, 17 Stat. 598-99 (1873); Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 507, 507; see also Ron Nixon, *Copy of Postal Service Audit Shows Extent of Mail Surveillance*, N.Y. TIMES (Aug. 13, 2015), <http://www.nytimes.com/2015/08/14/us/copy-of-postal-service-audit-shows-extent-of-mail-surveillance.html>.

43 An Act to Establish the Post-Office and Post Roads Within the United States, 2d Congress, ch. 7, 1 Stat. 232 (1792).

44 See RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 19 (2010) [hereinafter JOHN, NETWORK NATION] (citing Julian P. Bretz, *Some Aspects of Postal Extension into the West*, 5 AM. HIST. ASS’N ANN. REP. 145 (1909)).

45 JOHN, SPREADING THE NEWS, *supra* note 39, at 5. The Postal System was self-sustaining until the 1830s, when it went into debt. See MASHAW, ADMINISTRATIVE CONSTITUTION, *supra* note 39, at 179–80.

46 BALOGH, A GOVERNMENT OUT OF SIGHT, *supra* note 39, at 220; see also JOHN, SPREADING THE NEWS, *supra* note 39. At the time, payment came through commissions. BALOGH,

"Access to courts" is a familiar phrase. When reflecting on "our common heritage," equal attention should be paid to access to the economy, to interpersonal connections, and to national identity through federally subsidized mail services. A campaign for "cheap postage" produced the Post Office Acts of 1845, 1851, and 1855⁴⁷ that also marked a shift in services from requiring collection of fees on receipt to pre-paid stamped letters, which was a practice borrowed from English reforms.⁴⁸ As David Henkin recounted, once prices for letters dropped and paper and stamps were readily available, a culture of letter writing became part of ordinary people's lives—forging personal relationships across wide expanses as well as enabling information sharing about economics and land management.⁴⁹

Newspapers benefitted from rate cuts in 1851, and provisions were made for free distribution within counties where they were published. Bound books were accepted for mailing in the same year.⁵⁰ The post offices were, famously, a conduit for abolitionists, even as the South sought to suppress pamphleteering.⁵¹ The Civil War also provided the impetus for the "postal money order," a safe method of sending money home.⁵² Railway mail, including sorting mail on moving trains, became common thereafter.⁵³

In short, postal offices were commonplace long before federal courthouses; U.S. mail services were everywhere but federal judges were not. Single-purpose, dedicated buildings were not needed for the lower federal judiciary which, in the 1850s, included fewer than forty federal judges sitting

A GOVERNMENT OUT OF SIGHT, *supra* note 39, at 220; *see generally* NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

47 JOHN, *NETWORK NATION*, *supra* note 44, at 15–20. The 1855 Act amended the existing legislation to require prepayment on "all letters passing through or in the mail of the United States." Act of Mar. 3, 1855, ch. 173, 10 Stat. 641, 641–42.

48 *See* R.H. Coase, *Rowland Hill and the Penny Post*, 6 *ECONOMICA* 423 (1939); R.H. Coase, *The British Post Office and the Messenger Companies*, 4 *J.L. & ECON.* 12 (1961). In the United States, stamps were not required but were a "convenience," and supplemented the "Postmasters' provisional[]," which were in use in various localities. ARTHUR E. SUMMERFIELD, *U.S. MAIL: THE STORY OF THE UNITED STATES POSTAL SERVICE* 62 (1960). In 1855, prepayment by stamps became obligatory. *Id.* at 63.

49 DAVID M. HENKIN, *THE POSTAL AGE: THE EMERGENCE OF MODERN COMMUNICATION IN NINETEENTH-CENTURY AMERICA* (2006).

50 SUMMERFIELD, *supra* note 48, at 64–65. He credited Nathan K. Hall, the Postmaster General in the Fillmore Administration, with these innovations. Summerfield also complained that as a consequence, in the 1950s, "the average piece of second-class mail pays roughly a fifth of the cost of delivering it." *Id.*

51 HENKIN, *supra* note 49, at 24–25; JOHN, *SPREADING THE NEWS*, *supra* note 39, at 257–283.

52 SUMMERFIELD, *supra* note 48, at 79.

53 *See* JOHN, *SPREADING THE NEWS*, *supra* note 39, at 75–76. The costs, controversies, and conflicts over routes and politics are found in materials in 2 *THE AMERICAN POSTAL NETWORK, 1792–1914* (Richard R. John, ed. 2012). *See, e.g.*, B.B. Meeker, *Overland Mail Route from Lake Superior to Puget's Sound*, in 2 JOHN, *THE AMERICAN POSTAL NETWORK*, *supra*, at 103; Issac Hinckley, *Postal Cars or No Postal Cars? A Question to be Settled by the Action or Inaction of Congress (1874)*, in 2 JOHN, *THE AMERICAN POSTAL NETWORK*, *supra*, at 289.

in the then-thirty-seven district courts around the country. California, for example, had two federal judges after its admission as a state in 1850.⁵⁴ None of the judges had a courthouse “of their own” (to borrow from Virginia Woolf). Federal judges either used rooms in buildings such as the Custom House in Galveston⁵⁵ or relied on space provided in state courts or other facilities. Indeed, the word “courthouse” was hardly mentioned in congressional materials addressing the authorization for federal buildings in the pre–Civil War era.

The expansion of the federal government, both before and after the Civil War, produced the changes that shaped “the federal courts” as we have come to know them. In 1852, the Treasury Department created a unit called the Office of the Supervising Architect and centralized decisionmaking about federal buildings.⁵⁶ Soon thereafter, government records included specific calls for courthouse construction.⁵⁷ After a hiatus because of the Civil War, the Northern victory sparked new efforts to impose and demonstrate federal authority. Thus, two creatures of the 1789 Congress, the lower federal courts and the Treasury Department, came into closer contact because Congress repeatedly turned to the federal courts as instruments of federal norm enforcement.

As is familiar, in 1867, Congress gave federal courts authority to hear habeas corpus petitions from individuals held in state custody.⁵⁸ In 1871, Congress authorized federal courts to hear cases alleging deprivations of civil rights⁵⁹ and, in 1875, Congress gave the federal courts what has come to be known as “general federal question jurisdiction” to hear claims (if the

54 See *Chronological History of Authorized Judgeships—District Courts*, ADMIN. OFFICE OF THE U.S. COURTS, [hereinafter *Chronological History of Authorized Judgeships in the U.S. District Courts*], <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts> (last visited May 19, 2016).

55 See, e.g., Act of Mar. 3, 1851, ch. 32, 9 Stat. 598, 609 (appropriating funds for a custom house in Savannah, Georgia to be used for “furniture and fixtures for the accommodation of the officers of the revenue, as also for the post-office, and United States courts”). Thanks are due to Marin Levy, now a law professor at Duke, for her innovative research as a law student that taught me so much about early federal building programs.

56 No statutory authority supported the Secretary of Treasury when he first created the Office of the Supervising Architect, but legislation in the 1860s and thereafter made mention of the job. DARRELL HEVENOR SMITH, INST. FOR GOV'T RESEARCH, *THE OFFICE OF THE SUPERVISING ARCHITECT OF THE TREASURY: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 6–7 (1923). For example, the Act of Mar. 14, 1864, ch. 30, § 6, 13 Stat. 22, 27, provided for “one superintending architect, one assistant architect,” several clerks, and a messenger.

57 In 1855, the Secretary of Interior and Postmaster General called for “sites for court houses and post offices” in Philadelphia, New York, and Boston. S. EXEC. DOC. NO. 33-30 (1855). The decision by Congress to create an office of the Supervising Architect was both evidence of the development of federal bureaucracy and (as Max Weber has taught us) an example of how once in place, a bureaucracy generates agendas for its own growth.

58 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

59 Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13.

amount in controversy sufficed) alleging a violation of rights arising under federal law.⁶⁰

Implementation came in part through better organization of federal lawyers. In 1870, Congress created the Department of Justice to add both resources to and a measure of control over a dispersed system. The Justice Department replaced the Interior Secretary by gaining "supervisory powers . . . over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States."⁶¹

Another technique to instantiate federal authority was construction, which gave the federal government a material presence in local communities. "Between 1866 and 1897 . . . the federal government built nearly three hundred new buildings throughout the Union."⁶² The 1892 U.S. Post Office and Court house built in Denver, Colorado, depicted in Figure 2, is one example of the combination buildings that became commonplace.⁶³

FIGURE 2: UNITED STATES POST OFFICE AND COURT HOUSE,
DENVER, COLORADO, 1892



United States Post Office (United States Post Office and Court House), Denver, Colorado. Supervising Architects: Mifflin E. Bell and Will A. Freret, 1892. Photographer: Wm. Henry Jackson. Image reproduced courtesy of the Denver Public Library, Western History Collection, WH-1573.

60 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

61 Act of June 22, 1870, ch. 150, § 15, 16 Stat. 162, 164. Crowe termed the post-Civil War era the judiciary's decades of empowerment. See CROWE, BUILDING THE JUDICIARY, *supra* note 38, at 132–70.

62 LOIS CRAIG, THE FEDERAL PRESENCE: ARCHITECTURE, POLITICS, AND SYMBOLS IN UNITED STATES GOVERNMENT BUILDING 163 (1978).

63 Note that the Denver Public Library catalogued the photograph in Figure 2 as a

The joining of post offices and courts meant that individuals had firsthand experiences of the utility of the national government as a service provider.

While investments in federal building in major hubs such as Denver made sense,⁶⁴ courthouse construction was not always tied to need. Appropriations for buildings rewarded loyal congressmen by giving their constituents “federal presents,” as one commentator put it.⁶⁵ For example, “Memphis received a courthouse even though no federal courts were held there,”⁶⁶ and needs-assessment surveys were not authorized until decades later, in 1926.⁶⁷ The U.S. Supreme Court garnered its first independent building in 1935, as depicted in a photo taken in that year.

FIGURE 3: UNITED STATES SUPREME COURT, WASHINGTON, D.C., 1935



United States Supreme Court, Washington, D.C. Architect: Cass Gilbert, 1935.

Archival image from 1935 reproduced courtesy of the National Archives and Records Administration.

“Post Office”; the title “Post Office and Court House” comes from the Federal Judicial Center’s archive of federal courthouses, which is a resource for all interested in the federal courts’ history. *Historic Federal Courthouses*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/courthouses.nsf/getcourthouse?OpenAgent&chid=9574402A6E0FFDF28525718B0055BA41> (last visited May 19, 2016).

64 The volume of mail as well as of litigation prompted the replacement of this building with a huge marble structure, running a full block in 1916—now known as the Byron White Courthouse and housing the Tenth Circuit. Discussion of that facility can be found in Resnik, *Building the Federal Judiciary*, *supra* note 38, at 855.

65 THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE, 1876–1915*, at 76 (Richard Balkin ed., 1991).

66 CRAIG, *supra* note 62, at 163.

67 *Id.*

Whenever I look at the Court's early photographs, I am struck by the dissonance between its façade and that era's architectural styles (Art Deco moving towards Modernism) that were then in vogue. The goal of this Greek Revival building was to convey the impression that it had always been there.⁶⁸

In short, whether in Denver or Memphis or Washington, the monumental edifices that housed the federal courts were built out of a mix of economic interests in nationalizing the economy, political efforts to enforce federal norms, pork barrel earmarks, and successful lobbying by lawyers, judges, and architects who were themselves forming national professional groups between the 1880s and the 1920s. It was this confluence that enabled the federal courts to become sources of our common narratives.

B. Hospitable Courts: Meltzer's Analysis of a Common Heritage of Constitutional Rights and Remedies

By the time that Daniel Meltzer began in the 1970s to write about the federal courts, the people laying claim to rights of entry were diverse. Between the Court's landmark civil rights cases and congressional legislation, the federal courts had become venues for individuals alleging discrimination based on race, ethnicity, gender, and age; laborers advancing Fair Labor Standards claims; social security recipients seeking benefits; consumers claiming violations of fair credit obligations and federal securities regulations; prisoners protesting conditions of confinement or alleging unconstitutional convictions; railroad workers seeking compensation for injuries; and environmentalists aiming to preserve wildernesses. Access for some of these claimants was facilitated by federal funding for the Legal Services Corporation, attorney fee-shifting, and procedural rules authorizing class actions and other forms of aggregation.

Meltzer's scholarship, spanning the decades from 1974 through 2013, focused on the doctrine produced by the federal judiciary as it elaborated its role in responding to this array of claimants. Beginning with Daniel Meltzer's unsigned 1974 *Harvard Law Review* note on third-party standing,⁶⁹ one finds the scholar who we (students of the federal courts) know well, aiming to build coherent theories out of a patchwork of cases. What Meltzer argued for, repeatedly, was a judicial posture of hospitality toward rights-seekers. He urged courts to adopt a flexible, pragmatic approach to fashioning workable, if limited, remedies.

The issue that Meltzer addressed in 1974 when he was still in law school was the authority of individuals to raise or defend claims by referencing legal rights of third parties. A then-current example was whether a white landowner could defend a damage action for breach of a covenant not to sell

68 See generally Paul Spencer Byrad, *Representing American Justice: The United States Supreme Court*, in CASS GILBERT, *LIFE AND WORK: ARCHITECT OF THE PUBLIC DOMAIN* 272 (Barbara S. Christen & Steven Flanders eds., 2001); see also Judith Resnik & Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 38 J. SUP. CT. HIST. 207 (2013).

69 Meltzer, *Standing*, *supra* note 37.

land to blacks by asserting that such an agreement violated the equal protection rights of the black purchaser; the Court permitted the vendor to do so.⁷⁰

Meltzer's point was that the Court's responses to such third-party interests (a presumption against, plus exceptions) were grounded in whether a specific litigant would prevail on the merits rather than in a general theory of why Article III ought to be read to enable federal judges to hear such arguments, win or lose.⁷¹ Meltzer argued that as long as individuals were themselves injured, the Court ought to "adopt a rule considerably more hospitable to the assertion" by such "dutyholder-claimants"⁷² of interests of those beyond their own so as to ensure protection for the "constitutional rights of third parties."⁷³

More than a decade later, in 1988, Meltzer returned to the topic of remedies; the context was the "chilly" reception of the Burger Court to cases involving police misconduct.⁷⁴ Meltzer distinguished between criminal defendants' allegations of police misbehavior in support of individual arguments to quash indictments or exclude evidence ("defensive" claims), and plaintiffs' affirmative (what he termed "offensive") efforts to obtain structural relief in cases like *City of Los Angeles v. Lyons* and *Rizzo v. Goode*.⁷⁵ Meltzer puzzled about why the Court was then relatively more receptive to defensive remedies than to offensive ones.⁷⁶

Meltzer counseled judges to be open to "offensive," injunctive remedies because they would be predicated on systemic information beyond an individual instance of police misbehavior. Moreover, such structural relief was important because "large public bureaucracies" could threaten "a greatly expanded list of individual rights," not directed at "identifiable individuals but at the public at large."⁷⁷

For example, he reminded readers that in *Rizzo v. Goode*, the district court-level injunction dismantled by the Supreme Court had called on the police department to develop "new complaint procedures designed to minimize recurrence of fourth amendment violations."⁷⁸ Meltzer argued that judges, "drawing upon deep traditions in our legal culture,"⁷⁹ had a special

70 *Barrows v. Jackson*, 346 U.S. 249 (1953) (discussed in Meltzer, *Standing, supra* note 37, at 425–26). Meltzer distinguished his concern from discussions of statutory overbreadth, in which litigants argue that, although their speech may not be protected, the speech of others should be. Meltzer, *Standing, supra* note 37, at 438–39.

71 Meltzer, *Standing, supra* note 37, at 427–28.

72 *Id.* at 434–43 & n.96.

73 *Id.* at 423.

74 Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 250 (1988) [hereinafter Meltzer, *Detering Constitutional Violations*].

75 *Id.* at 250.

76 *Id.* at 327–28.

77 *Id.* at 328.

78 *Id.* at 289.

79 *Id.* at 288.

competence to shape such “deterrent remedies.”⁸⁰ Meltzer also disagreed with the Court’s holding in *City of Los Angeles v. Lyons* that Mr. Lyons, who survived a police chokehold, could not seek injunctive relief because he could not show that he would again be a victim of the Los Angeles Police Department chokehold policy.⁸¹ Meltzer argued that such hurdles of standing could be overcome, in part through congressional direction⁸² authorizing class actions to be brought by “plaintiffs who lack injury in fact”⁸³ but who could serve as private attorneys general.

The need for an expansion of the strictures on standing came from the importance of the rights that were at stake and that were at risk. Thus, Meltzer called for courts to be open to private enforcement of rights through a careful contextual approach that, as he put it, “resist[s] wholesale exclusion of particular remedial techniques.”⁸⁴

More generally, Meltzer thought that the idea of either a judicial or a legislative monopoly on remedies was misguided.⁸⁵ Repeatedly, he discussed the “incompleteness” of legislative enactments. Yet, in lieu of seeing such gaps as failures of bargaining,⁸⁶ Meltzer thought that Congress could not, and ought not to try to, resolve all issues *ex ante*. Rather than aspiring for Congress to craft “all-complete statutory codes,”⁸⁷ Meltzer posited that lacunae were necessary and useful facets of legislation. As problems emerged, the judiciary could shape appropriate rules, extrapolating from statutes.

80 *Id.* at 287.

81 *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *see also* Meltzer, *Detering Constitutional Violations*, *supra* note 74, at 309–12.

82 Meltzer, *Detering Constitutional Violations*, *supra* note 74, at 309–12.

83 *Id.* at 312. The examples included the Fair Housing Act. *See id.* at 313 n.374 (citing *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 212 (1972) (White, J., concurring)). Meltzer also noted that “[o]n the other hand . . . the Court has at times said that article III imposes a uniform requirement that the plaintiff have suffered distinct and palpable injury, which cannot be avoided merely because Congress has authorized the suit.” *Id.* at 313 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979)).

84 *Id.* at 252. It is hard not to read these articles with the current array of policing tragedies in mind. With the hindsight of the New York City “stop and frisk” litigation, and the shootings and deaths—Michael Brown, Freddie Gray, and so many others—the question is whether, if federal courts had been permitted to lend help in the 1970s and 1980s, fewer harms would have occurred.

85 *Id.* at 299–300.

86 Meltzer did not favor a checklist for Congress, as the Federal Courts Study Committee had proposed. Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 395–97 [hereinafter Meltzer, *The Supreme Court’s Judicial Passivity*].

87 *Id.* at 396 (quoting *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469–70 (1942) (Jackson, J., concurring)).

The question of gaps has been addressed more recently by Sean Farhang. Based on an analysis of more than 200 statutes, Farhang found that Congress provided greater specificity and direction when authorizing enforcement of statutory rights in courts than when relying on administrative implementation. Sean Farhang, *Legislating for Litigation in the Age of Statute 19–34* (2015) (unpublished manuscript) (on file with author).

As the Supreme Court's jurisprudence became increasingly insistent on not doing so, Meltzer saw such doctrinal developments as "threats to the effectiveness of congressional legislation,"⁸⁸ and "a significant departure from historic norms."⁸⁹ Far afield from Jeremy Bentham's hostility to the common law and his preference for codification, Meltzer's work reflected ideas associated with the Legal Process School, extolling the institutional competencies and interdependencies of the courts and Congress.

Meltzer's commitment to judicially honed remedies can be found in several articles, including work on retroactivity and legal novelty, which he co-authored with Richard Fallon.⁹⁰ They argued that questions about what new laws applied to cases already decided were best understood as part of the law of remedies.⁹¹ Writing in 1991, they voiced concern about doctrines expanding sovereign and official immunity, which could undercut "effective redress to individual victims of constitutional violations."⁹² The need to "keep government within the bounds of law" required more constitutional remedies than existed.⁹³

Meltzer also thought that federal courts could make special remedial contributions because they were national institutions. He saw the need to streamline transaction costs in large-scale litigation and argued that federal judges could do so through the creation of "a single set of uniform federal choice of law rules, binding in the state as well as the federal courts."⁹⁴ For him, federal courts were an underutilized resource for complex diversity cases because, as a "neutral arbiter,"⁹⁵ the federal judiciary could harmonize different legal rules and thereby lessen the challenges of litigation involving large scale, multinational actors.⁹⁶

Meltzer's concerns grew as his measured approach diverged more and more from that of the Court, which continued shutting down avenues of relief. (As Professor Tara Grove reported, Meltzer told his students that his Federal Courts class might well have been called "999 ways to kick a case out of federal court."⁹⁷) In 1996, Meltzer wrote an essay for the *Supreme Court Review* and focused on *Seminole Tribe of Florida v. Florida*, which held that Congress could not rely on the Commerce Clause to authorize Indian Tribes to

88 Meltzer, *The Supreme Court's Judicial Passivity*, *supra* note 86, at 410.

89 *Id.* at 389.

90 See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) [hereinafter Fallon & Meltzer, *New Law*].

91 *Id.* at 1736.

92 *Id.* at 1736–37; see also Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016).

93 Fallon & Meltzer, *New Law*, *supra* note 90, at 1736–37.

94 Meltzer, *The Judiciary's Bicentennial*, *supra* note 1, at 438.

95 *Id.* at 439.

96 *Id.* at 438–40.

97 Email from Tara Leigh Grove, Professor of Law, William & Mary Law School, to author (Jan. 16, 2016) (on file with author).

bring lawsuits directly against states.⁹⁸ Objecting, Meltzer discussed the need for "retrospective state government liability."⁹⁹ He noted that, given the instability (analytically and in terms of the close vote) of sovereign immunity doctrine, *Seminole Tribe* might prove to be a "quixotic" decision, a "gesture in the direction of a diffuse conception of state sovereignty that in the end will not be generally enforced by the Court."¹⁰⁰

Yet in 1999, in *Alden v. Maine*, the Court concluded that its interpretation of state sovereign immunity precluded state probation officers from pursuing claims of violations of the Fair Labor Standards Act in state court.¹⁰¹ Meltzer bemoaned the inconsistency of the *Alden* Court's discussion about the legitimacy of federal regulation while making unavailable major mechanisms of enforcement.¹⁰² He criticized the Court for undervaluing the importance of "organizational liability for damages"¹⁰³ and for overvaluing the federal government's role in bringing enforcement actions. As Meltzer reported, private lawsuits then outnumbered government lawsuits "by a ratio of roughly ten to one," providing evidence of the "considerable costs to holding private enforcement unconstitutional."¹⁰⁴

A few years later, Meltzer was heartened (as was Richard Fallon) by the Court's rulings involving detention at Guantánamo Bay.¹⁰⁵ They praised the embrace of what they described as a "Common Law Model" that recognized the "broad rights" of American citizens not caught on battlefields to obtain adjudication in regular courts.¹⁰⁶ *Boumediene v. Bush* followed, and again Meltzer underscored the significance of the constitutional remedy guaranteed by Article I's injunction that, absent domestic insurrection or invasion, the writ of habeas corpus could not be suspended.¹⁰⁷

98 517 U.S. 44, 47 (1996); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 [hereinafter Meltzer, *The Seminole Decision*].

99 Meltzer, *The Seminole Decision*, *supra* note 98, at 47–60.

100 *Id.* at 65.

101 *Alden v. Maine*, 527 U.S. 706, 711–12 (1999).

102 See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1026–28 (2000) [hereinafter Meltzer, *Sovereign Immunity: Five Authors*]. Meltzer's discussion of the role played by "dignity" in the development of immunity doctrine, *see id.* at 1038–47, piqued my interest, and the result was the essay I co-authored with Julie Suk. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

103 Meltzer, *Sovereign Immunity: Five Authors*, *supra* note 102, at 1016.

104 *Id.* at 1022–23.

105 See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007) [hereinafter Fallon & Meltzer, *Habeas Corpus Jurisdiction*]; Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352 (2010).

106 Fallon & Meltzer, *Habeas Corpus Jurisdiction*, *supra* note 105, at 2111–12.

107 Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1; see also Daniel J. Meltzer, *The Story of Ex parte McCordle: The Power of Congress to Limit the Supreme Court's Appellate Jurisdiction*, in FEDERAL COURTS STORIES 57 (Vicki C. Jackson & Judith Resnik eds., 2010) [hereinafter Meltzer, *Ex Parte McCordle*].

As this symposium's essays in honor of Meltzer reflect,¹⁰⁸ the federal courts that he admired and so brilliantly understood produced a complex thicket of doctrine and practices. Meltzer sought rules that respected the authority of both Congress and the states while providing avenues for the articulation of new rights and remedies, responsive to individual violations of constitutional rights and to what he saw as the threats posed by "large public bureaucracies" whose practices put the "public at large" at risk.¹⁰⁹ Time and again, Meltzer's signatures were sympathetic readings of everyone's problems, be they victims of police misconduct; congressional staffers trying to craft language that inevitably needed judges to provide purposive interpretations to achieve statutory ends;¹¹⁰ or judges "straining under caseloads that have increased far more quickly" than the number of judgeships.¹¹¹

Meltzer's vision of a vital role for the federal courts was predicated on respect for individuals, for institutional actors, and for the needs of the judiciary itself. He aimed to generate legal doctrines that protected constitutional principles through avenues to judicial review while recognizing the risk of overuse of both rights and remedies. The common intellectual tradition that Meltzer not only inherited but also built was shaped by *Marbury v. Madison*, insisting on the important role that judges played in naming legal violations even when, *pace Marbury*, they could not provide remedies.¹¹² Meltzer's was a quest for principles, for responsible limits, and for identifying when particular remedies were "constitutionally required."¹¹³ And, as others have noted,¹¹⁴ Meltzer's optimism shines through.

C. Investing in and Democratizing the Federal Courts

The twentieth-century intellectual tradition that Meltzer admired was not inevitable but a product of social and political will that entailed intense conflicts. The rights-to-remedies ideology has deep roots, embedded in state constitutions' clauses¹¹⁵ and embraced in the early nineteenth century in

108 Richard H. Fallon, Jr., *On Viewing the Courts as Junior Partners of Congress in Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, 91 NOTRE DAME L. REV. 1743 (2016) [hereinafter Fallon, *On Viewing the Courts as Junior Partners*]; Henry Paul Monaghan, *An Essay in Honor of Daniel Meltzer: A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807 (2016) [hereinafter Monaghan, *An Essay in Honor of Daniel Meltzer*].

109 Meltzer, *Detering Constitutional Violations*, *supra* note 74, at 328.

110 Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 15 (2013) [hereinafter Meltzer, *Preemption and Textualism*].

111 Meltzer, *The Judiciary's Bicentennial*, *supra* note 1, at 431–31.

112 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (discussed in Fallon & Meltzer, *New Law*, *supra* note 90, at 1778–80).

113 Meltzer, *Congress, Courts, and Constitutional Remedies*, *supra* note 23.

114 Fallon, *On Viewing the Courts as Junior Partners*, *supra* note 108.

115 Examples come from ALA. CONST. art. I, § 14 (1819) ("All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay."), and CONN. CONST. art. I, § 12 (1818) ("All courts shall be open, and every person,

Marbury v. Madison. Yet the scope of rights-holding and of rights-holders was constrained in both state and federal courts. When the U.S. Supreme Court opened the doors to the first courtroom of its own in 1935, the now-familiar words “Equal Justice Under Law” adorned the entry to its front door. But that “equal justice” did not have the referent that it has today.

Courts were not then havens for all persons in the United States. Rather, federal law famously created and tolerated profound inequalities, as discrimination based on race, sex, gender, and much else was licit. One way to make this point is to consider a large mural, called *Justice as Protector and Avenger*, installed in 1938 behind a judge’s bench in a courtroom in Aiken, South Carolina.

FIGURE 4: JUSTICE AS PROTECTOR AND AVENGER



Justice as Protector and Avenger, Stefan Hirsch, 1938, Charles E. Simons, Jr. Federal Courthouse, Aiken, South Carolina.

Image reproduced courtesy of the Fine Arts Collection, United States General Services Administration.

The work was commissioned as part of the federal government’s Works Progress Administration (WPA), supporting new buildings and artworks around the country. The central female figure references the Renaissance Virtue Justice,¹¹⁶ inflected by the artist’s appreciation for twentieth-century Mexican muralists. As this WPA artist explained, his “figure of ‘Justice’”

for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”). See generally Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS. L.J. 917 (2012).

116 See generally JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 1–61 (2011).

was “without any of the customary . . . symbolic representations (scale, sword, book . . .).”¹¹⁷ Rather, the only “allegory” that he had permitted himself was “to use the red, white and blue [of the United States flag] for her garments.”¹¹⁸

What did others see? A local newspaper objected to the “barefooted mulatto woman wearing bright-hued clothing.”¹¹⁹ The federal judge in whose courtroom the mural was displayed called it a monstrosity, a “profanation of the otherwise perfection” of the courthouse, and wanted it removed.¹²⁰ The artist both protested and offered to repaint; he explained that he was “anxious to obliterate this ‘blemish,’ because [he] had certainly intended nothing of the sort.”¹²¹ A proposed compromise, to “lighten” Justice’s skin color, never took place because of the press coverage about what had become a national controversy; the National Association for the Advancement of Colored People and artists objected to the condemnation and to the alteration of the art. The denouement was to cover the mural with a tan velvet curtain, seen at the edges of the photograph.

In 1938, a picture of a seemingly dark-skinned woman could not pass, uncontested, into the deserving ranks of images that qualified to represent “Justice.” The draped wall echoed the limited responses of law for, in that era, people labeled “mulattos” also did not have much protection in courts. Thus, even as the U.S. Supreme Court’s 1935 building advertised the words “Equal Justice Under Law” above its front steps, the import that we take from it today—our common heritage—comes from decades after, as the Court insisted on equality in 1954 in *Brown v. Board of Education*,¹²² in 1971 in *Reed v. Reed*,¹²³ and in 2015 in *Obergefell v. Hodges*.¹²⁴ In the wake of these doctrinal commitments to equality for all persons, the phrase “Equal Justice Under Law” has become one of the Court’s taglines. And, although that exact phrase appears nowhere in the U.S. Constitution, since it appeared on the courthouse, it has been quoted in hundreds of opinions.

Daniel Meltzer understood both the importance of such doctrine and its dependence on what he termed the “machinery of jurisdiction and remedies that can transform rights proclaimed on paper into practical protec-

117 Letter from Stefan Hirsch to Forbes Watson, Advisor to the Section of Painting & Sculpture of the Treasury Department (May 18, 1938) (on file with GSA Archives, Public Building Services, Fine Arts Collection, 477, Stefan Hirsch).

118 *Id.*

119 See MARLENE PARK & GERALD E. MARKOWITZ, *DEMOCRATIC VISTAS: POST OFFICES AND PUBLIC ART IN THE NEW DEAL* 61 (1984).

120 Matthew Brody, *Controversy Shadows Mural*, *AUGUSTA CHRON.* (Ga.) (Aug. 26, 2001), http://chronicle.augusta.com/stories/2001/08/26/met_321475.shtml#Vvcxc8ddJEc.

121 Letter from Stefan Hirsch to Edward B. Rowan, Superintendent of the Section of Painting & Sculpture (Oct. 7, 1938) (on file with GSA Archives, Public Building Services, Fine Arts Collection 477, Stefan Hirsch).

122 347 U.S. 483 (1954).

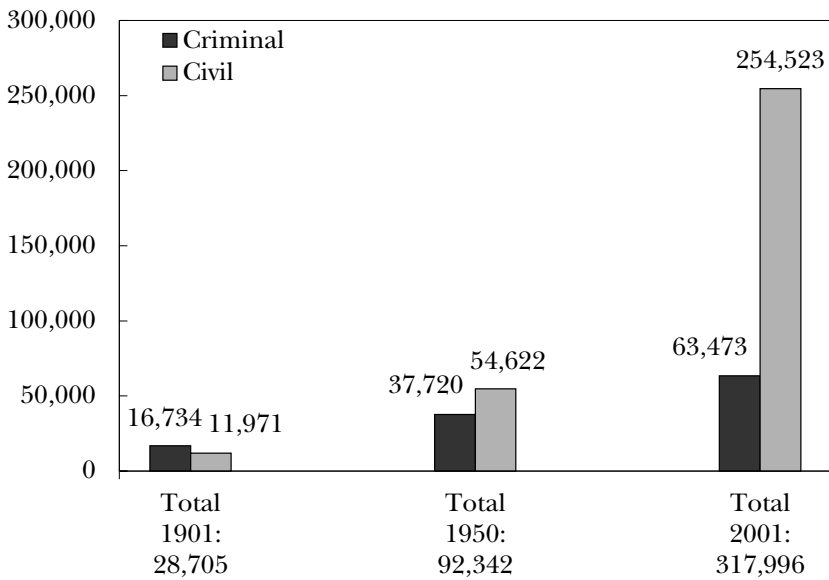
123 404 U.S. 71 (1971).

124 135 S. Ct. 2584 (2015).

tions.”¹²⁵ Indeed, in his view, the on-the-ground work of that machinery was what posed the “central problems for constitutional law.”¹²⁶

One piece of the fabrication—the filing of a lawsuit—is often taken for granted. Given that the contemporary literature is awash with the rhetoric of an overuse of courts (the litigation “explosion” and the “litigious” society¹²⁷), it is useful to remember that the federal courts were once relatively lonely venues, looking for cases.¹²⁸ Moreover, in light of the intellectual space that “the federal courts” have come to occupy, the numbers of filings at the beginning of the twentieth century seem surprisingly small.

FIGURE 5: CIVIL AND CRIMINAL FILINGS IN THE UNITED STATES DISTRICT COURTS: 1901, 1950, 2001



125 Meltzer, *Congress, Courts, and Constitutional Remedies*, *supra* note 23, at 2537.

126 *Id.*

127 See generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Elizabeth G. Thornburg, *Judicial Hellholes, Law-suit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097 (2008).

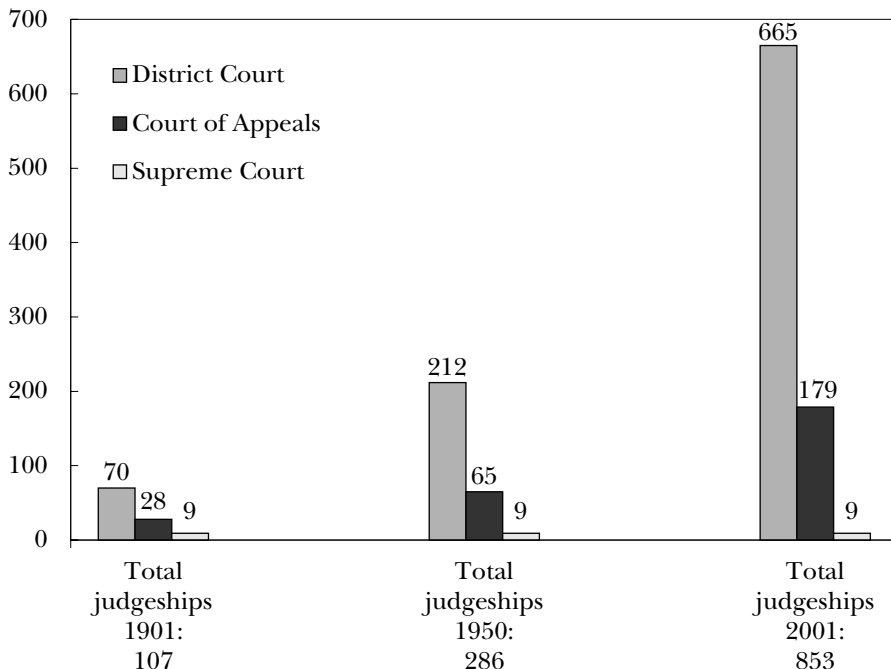
128 For details of the small number of cases filed in the early years of the federal courts, see THE ESSENTIAL FEDERAL COURTS HISTORY, *supra* note 3, at 13–105. Indeed, when a district judge opened business in Richmond, Virginia in 1789, there was “no business” and he closed the session. *Id.* at 61. In the years between 1817 and 1819, federal district courts in New York and Pennsylvania had caseloads ranging from 21 to 134 pending cases a year. *Id.* at 97.

The number of filings picked up after the Civil War; in Southern states, civil litigants turned to federal court for debt relief, and the federal government filed criminal cases seeking to get fees paid. *Id.* at 67. Thus, “white southerners gained the aid of the federal courts” through the Bankruptcy Act of 1867. *Id.* at 176. Northern federal courts likewise had a large increase in filings, with “a whopping 1229 cases” filed in Massachusetts in 1866. *Id.*

Figure 5, *Civil and Criminal Filings in the United States District Courts: 1901, 1950, 2001*, outlines the docket growth during that hundred-year span. At the beginning of the twentieth century, fewer than 30,000 cases were filed around the United States, and many more of them were criminal than civil. By the end of the twentieth century, more than 300,000 cases were filed annually, and many more were civil as compared to criminal.¹²⁹

Of course, the number of cases is but one metric, and the mix and their relative “weight” in terms of the amount of work entailed are important factors relating to the need for additional judges.¹³⁰ Figure 6, *Article III*

FIGURE 6: ARTICLE III AUTHORIZED JUDGESHIPS: 1901, 1950, 2001



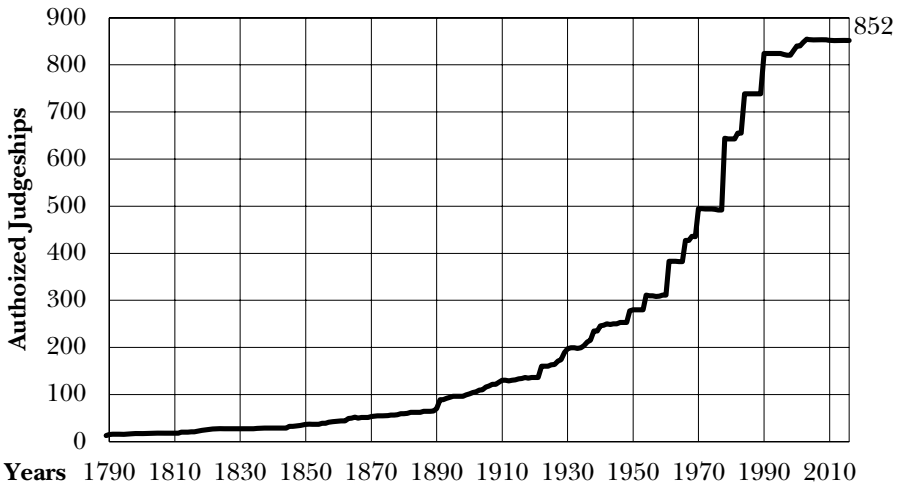
129 Data for Figure 5 are derived from multiple sources. Data for 2001 are from ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL CASELOAD STATISTICS: MARCH 31, 2001 tbls.C & D (2001). Data for 1950 are from David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 126 tbl.14 (1981) (citing ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1950)). Data for 1901 are from *id.* at 103 tbl.6 (citing 1 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934); 2 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 111 (1934)) and are estimated. Numbers do not include bankruptcy filings. During the 26 years from 1960 to 1986, civil filings “grew 398%.” Moore, *The Federal Civil Caseload*, *supra* note 24, at 1178.

130 For example, Richard Posner disaggregated filings between 1981 and 1996 by the kinds of cases. See RICHARD POSNER, FEDERAL COURTS: CHALLENGE AND REFORM 60–61, tbl.3.2 (1996) [hereinafter POSNER, FEDERAL COURTS 1996]. He attempted to identify other measures of workload in the lower courts. *Id.* at 65–79. For arguments that, given

Authorized Judgeships: 1901, 1950, 2001, details that the number of life-tenured judgeships rose from about 100 in 1901 to more than 850 in 2001.¹³¹

A full account of appointments, including both the early and the more recent history, is depicted in *Authorized Life-Tenured Lower Court Federal Judgeships, 1789-2015*.¹³² As Figure 7 details, between 1995 and 2015, new judgeships rose by 28, from 824 in 1995 to 852 in 2015.¹³³

FIGURE 7: AUTHORIZED LIFE-TENURED LOWER COURT FEDERAL JUDGESHIPS: 1789–2015



the addition of magistrate judge positions and greater reliance on senior status judges, overall judicial workload has not increased, see Moore, *The Federal Civil Caseload*, *supra* note 24, at 1187, and *infra* text accompanying notes 160–80.

131 Data for Figure 6 are drawn from ADMIN. OFFICE OF THE U.S. COURTS, JUDGES AND JUDGESHIPS: AUTHORIZED JUDGESHIPS (2012), <http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/all-judgeships.pdf>; see also ADMIN. OFFICE OF THE U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. DISTRICT COURTS, <http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/history-district-judgeships.pdf>.

132 Between 1950 and 2000, Congress added 578 life tenured judgeships, 46 of which were temporary. Between 1986 and 2014, Congress added 17.2% of district court judgeships that exist today. See Moore, *The Federal Civil Caseload*, *supra* note 24, at 1187–88. The authorized lower court life-tenured federal judgeships increased from 824 in 1995 to 852 in 2016. Congress authorized 37 new judgeships in total during this time: 31 permanent district court judgeships and six temporary district court judgeships. But because nine temporary judgeships lapsed or were made permanent during, the net total increase was twenty-eight. There were no new courts of appeals judgeships (either permanent or temporary) during this time.

133 Data for Figure 7 are derived from the Administrative Office of the U.S. Courts' "Chronological History of Authorized Judgeships" for the Courts of Appeals and the District Courts. See *Chronological History of Authorized Judgeships—Courts of Appeals*, ADMIN. OFFICE OF THE U.S. COURTS (Feb. 23, 2016), <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals>; *Chronological History of Authorized Judgeships—District Courts*, ADMIN. OFFICE OF THE U.S. COURTS (Feb. 23,

Meltzer's attention to the "machinery" included an appreciation of the need for both public and private enforcement of rights.¹³⁴ As noted, Congress repeatedly paved the way to the federal courts for an array of claimants. Further, with the Certiorari Act of 1925, Congress turned control over the docket to the Supreme Court by giving it discretion to pick its cases.¹³⁵ The Court has since cut its caseload dramatically. The Court is thus unique among government institutions because it can regularly perform its own competency, by which I mean that it can take and decide whatever number of cases it wants to, within a term, and publicly be seen as remarkably efficacious.

Moreover, William Howard Taft's commitment to the federal rules project, which came to fruition (as did the Supreme Court building) after his death, linked federal judges across the country by giving them a structure for daily practices via the shorthand of "the Rules."¹³⁶ The sociological import of the Rules cannot be understated, as they shape (and have reshaped) expectations of what constitutes "the judicial" role.¹³⁷ Promulgating rules, coupled with the chartering in 1939 of the Administrative Office of the U.S. Courts and of the Federal Judicial Center in 1966, enabled the federal judiciary to gain autonomy from the Department of Justice, albeit not from the General Services Administration (GSA), which, since 1949, is the landlord for most federal buildings. Through the congressional license to have internal administrators, the judiciary gained the capacity to function as a third

2016), <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts>; see also *Authorized Judgeships*, ADMIN. OFFICE OF THE U.S. COURTS, (Feb. 26, 2016) <http://www.uscourts.gov/judges-judgeships/authorized-judgeships>. During those years, Congress added thirty-seven new judgeships, all at the district court level; because a few slots were "temporary" and lapsed, the net increase was twenty-eight.

134 Meltzer, *Sovereign Immunity: Five Authors*, *supra* note 102, at 1053 n.177.

135 See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1644 (2000).

136 A recent illustration comes from Chief Justice Roberts's year-end State of the Judiciary report, which centered on rule changes on discovery and the loss of the forms. For discussion of the rule revisions and objections to some, see Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093 (2015), and Letter from Brooke D. Coleman to the Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S. Advisory Comm. on Civil Rules (Feb. 7, 2014), http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_seattle_university_school_of_law_brooke_coleman_2.7.14.pdf. See also generally Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) [hereinafter Burbank & Farhang, *Federal Court Rulemaking*]; Letter from Stephen Burbank, David Berger, Professor for the Admin. of Justice, Univ. of Pa. School of Law, to the Comm. on Rules of Practice & Procedure (Feb. 10, 2014), <http://www.aceds.org/wp-content/uploads/2014/05/Stephen-Burbank-Comments-to-Committee-on-Rules-of-Practice-and-Procedure.doc>.

137 See Resnik, *Privatization of Process*, *supra* note 32.

branch, collecting its own data, running education programs for judges, budgeting, and making its annual case to Congress.¹³⁸

We who sit in law schools are very much a part of the transformation of the federal courts into a platform for public education. After 1938, law school classes on Pleadings and Remedies were replaced by Civil Procedure courses, centered on the Federal Rules. Under the tutelage of Harry Schulman, Wilbur Katz, Herbert Medina, Felix Frankfurter, Henry Hart, and Herbert Wechsler, the canon of "the federal courts" came into being, and students were schooled in what the casebook authors insisted was not "simply" procedure but a new body of jurisprudence, called the law of federal courts.¹³⁹

Thereafter, both Congress and the civil rights social movement enlisted federal judges in service of their equality efforts. The ascendancy in the 1960s of the federal courts in popular imagination is easily reflected in the phrase "don't make a federal case out of it," which gained currency in that decade.¹⁴⁰

138 See generally THE HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (Cathy A. McCarthy & Tara Treacy eds., 2000).

139 Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 961 n.37 (1994) (quoting Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 GA. L. REV. 697, 779–70 (1993)); see also Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1988)); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 681–87 (1989).

140 See ERIC PARTRIDGE, A DICTIONARY OF CATCH PHRASES 52 (1977) (defining the phrase to mean, colloquially, "Don't exaggerate the importance of something! Don't exaggerate the seriousness of my action—e.g., of a mistaken judgment: US: since c. 1950"); see also HAROLD WENTWORTH & STUART BERG FLEXNER, DICTIONARY OF AMERICAN SLANG 179 (1975) (citing use in 1957 and similarly defining the phrase as "[t]o overemphasize the importance of something").

An account going back further is provided in the book *Law Talk*, co-authored by Fred Shapiro, James E. Clapp, Elizabeth G. Thornburg, and Marc Galanter (2011). They identified a 1936 short story, printed in the *Chicago Daily Tribune*, in which a young "Colorado cowboy" named Barton runs off to Chicago with the even younger daughter of a sheepherder. When the local sheriff uncovers the runaways' whereabouts, he notifies the Chicago police and adds: "Please arrest and hold these parties, as the girl's folks are about crazy. If there is no law to hold Barton on we'll make a federal case of it." JAMES E. CLAPP, ELIZABETH G. THORNBURG, MARC GALANTER & FRED SHAPIRO, LAW TALK 161 (2011) (citing *Police Break in on Romance of the Range*, CHI. DAILY TRIB., May 22, 1936, at 1). Thereafter, the comedian Jimmy Durante used the phrase in a radio comedy skit in 1944 and used it thereafter. The researchers attribute the negative inferences to an exchange on Milton Berle's Texaco Star Theater in 1949. *Id.* at 163. Thanks are due to Yale Law Librarian Fred Shapiro for this research.

In terms of use in law, a review of data-based decisions indicates that the phrase was first used in opinions in the 1960s. For example, a Florida judge explained that a "person who suffers a major upset over a minor grievance is admonished not to 'make a federal case out of it.'" *Reynolds v. State*, 224 So. 2d 769, 769 (Fla. Dist. Ct. App. 1969) (upholding a prisoner's claim of access to Florida post-conviction remedies to review convictions

Fast forward to the 1980s and the chief justiceship of William Rehnquist, a person not always seen by Federal Courts scholars to be a cheerleader *for* the federal courts. Yet, while he was guiding the Court toward a conservative jurisprudence insistent on state authority, Chief Justice Rehnquist was also an institution builder. Working with Ralph Meacham, the Director of the Administrative Office of the U.S. Courts (AO), and judges from the Judicial Conference whom Rehnquist selected for its Executive Committee, Rehnquist obtained new resources for the federal judiciary. In 1971, the federal judiciary received \$145 million; by 2005, its budget was \$5.7 billion dollars, rising from under one tenth to two tenths of one percent of the federal budget; during that time period, staff positions rose from about 15,000 to 32,000.¹⁴¹

Buildings are again a way to make the results vivid. During the 1960s and 1970s, federal judges had talked about their needs for space in terms of “furnishings.”¹⁴² By the 1990s, judges aspired to retain serious architects to design signature courthouse buildings. Intersecting with federal government interest in “excellence in architecture,” the Rehnquist Administration obtained what one newspaper called the “largest public-buildings construction campaign since the New Deal: a 10-year, \$10 billion effort to build more than 50 new Federal courthouses and significantly alter or add to more than 60 others.”¹⁴³ The federal judiciary thereby had the “fastest growth in square footage” of any sector under the aegis of the GSA, and between 1996 and 2006, the space dedicated to the federal courts also doubled.¹⁴⁴

The “bailouts” and “stimulus” packages of the last decade may make those numbers seem small, but the sums devoted specifically to federal courts outstripped those provided to other federal agencies under the GSA. A summary is again provided by way of a photograph, a sampling of United States Courthouse Buildings and Renovations, finished from 1998 to 2002. Shown here are buildings (designed by architects such as Harry Cobb, Thom Mayne,

obtained allegedly in violation of *Gideon v. Wainwright*). Westlaw and Lexis databases of cases from both before and after 1944 include 79 cases employing the phrase, 63 from the federal courts and 16 from the state courts. *See also* Frederick Bernays Wiener, *Wanna Make a Federal Case Out of It?*, 48 A.B.A. J. 59 (1962) (speculating on the origins of the phrase).

141 Russell R. Wheeler, *Chief Justice Rehnquist as Third Branch Leader*, 89 JUDICATURE 116, 120 (2005).

142 *See, e.g.*, AO ANN. REP. 113 (1975); *see also* JUDICIAL CONFERENCE REPORT 65 (Sept. 1961) (detailing needs for “the cost of purchasing furniture and furnishings for judges’ chambers and courtrooms”); AO ANN. REP. 197 (1961) (noting needs for “items of furniture, carpeting, draperies, etc., out of the regular appropriation designated for this purpose” to upgrade when items “had become antiquated”).

143 Randy Gragg, *Monuments to a Crime-Fearing Age*, N.Y. TIMES MAG., May 28, 1995, at 36.

144 *The Future of the Federal Courthouse Construction Program: Results of a Gov’t Accountability Office Study on the Judiciary’s Rental Obligations: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs. and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 109th Cong. 269 (2006) (statement of David L. Winstead, Comm’r Pub. Bldgs. Serv., U.S. Gen. Servs. Admin.).

and Richard Meier) in Boston, New York, Florida, Washington, D.C., Virginia, Nebraska, Texas, and Oregon.

FIGURE 8: UNITED STATES COURTHOUSE CONSTRUCTION AND RENOVATION: A SAMPLING, 1998–2002



Top (left to right): John Joseph Moakley United States Courthouse (Boston, Massachusetts); Alfonse D'Amato United States Courthouse (Central Islip, New York); United States Courthouse (Tallahassee, Florida). Middle: Wayne Lyman Morse United States Courthouse (Eugene, Oregon); William B. Bryant United States Courthouse Annex (Washington, D.C.); Wilkie D. Ferguson, Jr. United States Courthouse (Miami, Florida). Bottom: United States Courthouse (Corpus Christi, Texas); Roman L. Hruska United States Courthouse (Omaha, Nebraska); Spottswood W. Robinson III and Robert R. Merhige Jr. Federal Courthouse (Richmond, Virginia). Photographers: Taylor Lednum, Thomas Grooms, and Frank Ooms.

Images reproduced courtesy of the Design Excellence Program, General Services Administration, 2016.

What I have just painted is a picture of the federal courts as a growth industry, with public and private funds coming into the federal judiciary, which became popular icons of government as well as pillars of American legal education. Hence, our "common intellectual heritage" for much of the twentieth century was that federal courts were central public (and architecturally distinguished) institutions, to be supported even when intense

disputes existed about their output. Calls for the impeachment of Earl Warren¹⁴⁵ and proposals to eviscerate federal court jurisdiction in cases about school busing, abortion, or religion (prompted in the wake of court rulings on these topics¹⁴⁶) did not stop Congress from investing and reinvesting in the federal courts.

The important point for those of us who teach about “court stripping” and interbranch conflicts is that doing so focuses on the exceptions. Our examples run from *Ex parte McCordle* in the nineteenth century¹⁴⁷ to the efforts to limit the impact of federal judges’ anti-labor sentiments in the early part of the twentieth century,¹⁴⁸ as well as the Detainee Treatment Act,¹⁴⁹ the Military Commissions Act,¹⁵⁰ and *Boumediene*¹⁵¹ in this century.¹⁵² Yet our common heritage has largely been produced by *joint-venturing* among the branches of the federal government, working together to expand the girth and authority of the federal courts.¹⁵³

145 See Charles J. Ogletree, Jr., *Judicial Activism or Judicial Necessity: The D.C. District Court’s Criminal Justice Legacy*, 90 GEO. L.J. 685, 693 (2002) (citing Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309, 326 (1995)).

146 Bills introduced to strip federal court jurisdiction over cases involving mandatory busing of children in school desegregation cases included: S. 528, 97th Cong., 1st Sess. (1981); S. 1005, 97th Cong., 1st Sess. (1981); S. 1147, 97th Cong., 1st Sess. (1981); S. 1647, 97th Cong., 1st Sess. (1981); S. 1743, 97th Cong., 1st Sess. (1981); S. 1760, 97th Cong., 1st Sess. (1981); H.R. 311, 97th Cong., 1st Sess. (1981); H.R. 340, 97th Cong., 1st Sess. (1981); H.R. 761, 97th Cong., 1st Sess. (1981); H.R. 867, 97th Cong., 1st Sess. (1981); H.R. 869, 97th Cong., 1st Sess. (1981); H.R. 1074, 97th Cong., 1st Sess. (1981); H.R. 1180, 97th Cong., 1st Sess. (1981); H.R. 2047, 97th Cong., 1st Sess. (1981); H.R. 3332, 97th Cong., 1st Sess. (1981). For proposed legislation to strip jurisdiction over cases involving voluntary school prayer, see S. 481, 97th Cong., 1st Sess. (1981); S. 1742, 97th Cong., 1st Sess. (1981); H.R. 72, 97th Cong., 1st Sess. (1981); H.R. 326, 97th Cong., 1st Sess. (1981); H.R. 408, 97th Cong., 1st Sess. (1981); H.R. 865, 97th Cong., 1st Sess. (1981); H.R. 989, 97th Cong., 1st Sess. (1981); H.R. 1335, 97th Cong., 1st Sess. (1981); H.R. 2347, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981). For jurisdiction-stripping bills related to abortion, see S. 158, 97th Cong., 1st Sess. (1981); S. 583, 97th Cong., 1st Sess. (1981); S. 1741, 97th Cong., 1st Sess. (1981); H.R. 73, 97th Cong., 1st Sess. (1981); H.R. 900, 97th Cong., 1st Sess. (1981). See generally Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992 (1982).

147 74 U.S. 506 (1868).

148 See THE ESSENTIAL FEDERAL COURTS HISTORY, *supra* note 3, at 220–22.

149 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

150 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

151 553 U.S. 723 (2008).

152 See Meltzer, *Ex Parte McCordle*, *supra* note 107, at 57; Fallon & Meltzer, *Habeas Corpus Jurisdiction*, *supra* note 105.

153 See generally Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250 (2012); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2446 (1998).

The details I have provided on buildings and judgeships reflect that, in the years between the 1960s and the 1990s, Congress dispatched the federal courts hundreds of times, regularly creating new causes of action endowing individuals with rights to go to the federal courts.¹⁵⁴ Further, as Sean Farhang has analyzed, Congress repeatedly used "incentives" such as treble damages to encourage the filing of lawsuits by both public and private actors. Congressional invitations to private parties to pursue their rights bore fruit. Farhang found that, in the first decade of the twenty-first century, the federal courts received about 20,000 employment discrimination cases a year, ninety-eight percent of which were filed by private litigants.¹⁵⁵ Moreover, between the 1940s and the 1960s, federal filings averaged about three per 100,000 people; by 1996, that rate had increased to twenty-nine per 100,000.¹⁵⁶

In short, not only were rights expanding as a formal matter; more people also saw the courts as potentially responsive to their claims. The capacity to use the courts improved when, in 1974, Congress created the Legal

154 See AO Federal Jurisdiction Legislation, 1974–1998, *supra* note 4. One analysis of statutory claims enacted between 1887 and 2004 concluded that Congress provided incentives for filing through "economic rewards for successful plaintiffs" who sought relief from private sector actors in 84% of the enactments, in 9% against states, and in 17% against the federal government. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* 55, 67 (2010) [hereinafter FARHANG, *LITIGATION STATE*]. Private sector defendants ranged from corporations to labor unions, as both liberal and conservative congresses authorized lawsuits to enforce their own view of the public good. *Id.* at 68. One variable (not discussed) affecting the distribution of incentives to pursue particular defendants is the shifting doctrine on sovereign immunity, and the Court's conclusion in 1996 that Congress lacked Commerce Clause authority to authorize actions by private parties seeking monetary relief against states. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

Enhancements include attorney fees, or punitive damages, or other forms of multipliers. FARHANG, *LITIGATION STATE*, *supra* at 62. These methods have a long history in U.S. law, dating back to the Interstate Commerce Act of 1887 and the Sherman Anti-trust Act of 1890. *Id.* at 63–66. Farhang chronicled that Congress provided 379 litigation incentives between 1887 and 2004. *Id.* at 66. Farhang's interest was in showing that while the scholarly literature hypothesized the enactment of such private rights provisions as predicated on "rent-seeking" lawyers, interest group issue lobbying, party alignments, and budgetary constraints, his view was that separation of powers was the more important variable, and that congresses repeatedly preferred private enforcement to endowing the executive branch with more authority. *Id.* at 68–84.

155 *Id.* at 3.

156 *Id.* at 12–13. Farhang sought to understand and to model why Congress relied on private enforcement of statutory rights, in part as an alternative to endowing executive branch actors with all the enforcement authority. Thus, rather than think about the expansion of rights claims in general, Farhang wanted to understand congressional action in mobilizing enforcement of state norms through private actors. In terms of rights-seeking more generally, Farhang noted that the rate of tort litigation in federal courts between the 1970s and 2005 tapered off, but he did not explore how the rise of doctrines such as *Erie*, federal preemption of state tort remedies, and limits on diversity affected that decline. *Id.* at 14–15.

Services Corporation¹⁵⁷ and, in 1976, authorized fee shifting for prevailing claimants in certain kinds of statutory cases.¹⁵⁸ Further, private sector institutional litigation organizations such as the American Civil Liberties Union reshaped their own capacity (often with support from foundations), and the number of specialized “Legal Defense and Education Funds” increased.¹⁵⁹

The volume of filings produced demand for more judges, and Congress responded both by making small increases in life-tenured positions and by fashioning new genres of non–Article III judges in Article III courts.¹⁶⁰ The number of Article III district court judgeships increased eighteen percent between 1986 and 2013.¹⁶¹ Some sitting judges took “senior status,” thereby opening up vacant slots while continuing to preside over a reduced caseload.¹⁶²

The more substantial response came at the behest of federal judges, prompting Congress to enact statutes creating a new federal judicial position, a magistrate (renamed magistrate judge in the 1990s).¹⁶³ That statutory provision for auxiliary judges was followed in the 1980s by legislation

157 Legal Services Corporation Act of 1974, Pub. L. No. 93–355, 88 Stat. 378.

158 The Civil Rights Attorney’s Fees Award Act of 1976, Pub. L. No. 94–559, 90 Stat. 2641.

159 During the first decades of the twentieth century, a wave of “liberal” groups, such as the American Civil Liberties Union (ACLU), the National Bar Association (NBA) (a group of African American lawyers), and the Legal Defense and Educational Fund (LDF) of the National Association for the Advancement of Colored People, came to the fore in search of new understandings of rights. Parallel entities—such as the Mexican American Legal Defense and Education Fund (MALDEF), the Puerto Rican Legal Defense and Education Fund (PRLDEF, now called LatinoJustice/PRLDEF), the Asian American Legal Defense and Education Fund (AALDEF), and the National Organization for Women’s Legal Defense and Education Fund (NOW LDEF)—formed between the 1960s and the 1980s, as did the Judicial Council within the NBA, to give voice to African American judges, and the National Association of Women Judges (NAWJ), committed to women’s equality. See Judith Resnik, *Representing What?* (2014) (unpublished manuscript) (on file with author).

160 See generally Judith Resnik, “Uncle Sam Modernizes His Justice”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002).

161 From 1986 to 2013, Congress created 116 district court judgeships, including temporary judgeships, and 11 appellate judgeships. See Figure 7, *Authorized Life-Tenured Lower Court Federal Judgeships: 1789–2015; Chronological History of Authorized Judgeships in the U.S. District Courts*, *supra* note 54.

162 Moore, *The Federal Civil Caseload*, *supra* note 24, at 1188, counted an increase of 122% in senior judgeships since 1986. Some judges, however, chose to leave the bench—in part to pursue more lucrative work. See Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA L. REV. 1 (2012).

163 Federal Magistrates Act of 1968, Pub. L. No. 90–578, 82 Stat. 1107 (codified at 28 U.S.C. §§ 631–69 (2012)). From 1986 to now, the number of full-time magistrates has grown 90%. Moore, *The Federal Civil Caseload*, *supra* note 24, at 1188.

creating bankruptcy judges.¹⁶⁴ By 2015, in several districts, non–Article III judges working inside the federal courts number as many or more than Article III district court judges.¹⁶⁵ That increase is part of the demand for more courthouses, as each of these judicial officers has, until recently, been thought to require a courtroom of his or her own. Although the current Chief Justice has suggested the limits of delegation,¹⁶⁶ the life-tenured judiciary has approved the transfer of substantial adjudicatory authority to non–Article III judges, with and without litigants’ consent.¹⁶⁷ As a result, the combined federal judicial workforce (including senior judges) numbered, as of 2015, more than 2300.¹⁶⁸

The reminder is that state judges, like state dockets, far outnumber the federal judiciary. According to the National Center for State Courts, about 100 million cases (including all kinds of filings) are brought to the more than 30,000 judges who preside in the state courts.¹⁶⁹

164 Bankruptcy Amendments and Federal Judgeships Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. (2012)).

165 As of 2015, twenty-four district courts had the same number of Article III district court and magistrate judgeships; ten district courts had more magistrate judgeships than Article III district court judgeships. When including bankruptcy judgeships, fifteen district courts had the same number of Article III judgeships as non–Article III (magistrate and bankruptcy) judgeships, and sixty-eight districts had more non–Article III judgeships than Article III district court judgeships. See 28 U.S.C. § 152; ADMIN. OFFICE OF THE U.S. COURTS, MAGISTRATE JUDGE POSITIONS AUTHORIZED AS OF THE SEPTEMBER 2015 JUDICIAL CONFERENCE (2015); *Table N/A—U.S. District Courts—Combined Civil and Criminal Federal Court Management Statistics (December 31, 2015)*, ADMIN. OFFICE OF THE U.S. COURTS (2015), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/12/31-2>.

166 See *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

167 See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938–39 (2015); *United States v. Hollingsworth*, 783 F.3d 556 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 535 (2015). On *Hollingsworth*, see Stephen I. Vladeck, *Petty Offenses and Article III*, 19 GREEN BAG 2D 67, 69–74 (2015).

168 Julia A. Gibbons, Statement to the Committee on the Budget of the Judicial Conference of the United States, before the House Subcomm. on Fin. Servs. and General Government Comm. on Appropriations (Mar. 25, 2015); Julia A. Gibbons, Statement to Committee on the Budget of the Judicial Conference of the United States, before the Senate Subcomm. on Fin. Servs. and General Government Comm. on Appropriations (Mar. 24, 2015) [hereinafter collectively *Gibbons Judiciary’s Budget 2015*] (describing 2353 judicial officers in the federal courts).

As Richard Posner noted in 1996, “Article III judges are a diminishing fraction of the total employees of the federal court system.” POSNER, *FEDERAL COURTS* 1996, *supra* note 130, at 8. The number of Article III judges had, since 1960, almost tripled, and the number of judicial employees had increased “approximately fivefold.” *Id.*

169 Since the 105 million cases in 2008, filings in state courts have declined; as of 2013, 94.1 million cases were filed. See Richard Y. Schauffler, Robert C. LaFountain, Shauna M. Strickland, Kathryn A. Holt & Kathryn J. Lewis, NAT’L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS 2* (2015). As of January 2015, 366 individuals sit on state courts of last resort, with an additional 1013 individuals on intermediate appellate courts, 10,736 in trial courts of general jurisdiction, and 15,560 in trial courts of limited jurisdiction. S. Strickland, R. Schauffler, R. LaFoun-

The assumption for many decades was that the past was prologue, that more people would turn to the federal courts; that Congress would be supportive; that federal judges would be welcoming, and that the legal profession, fueled by a growing number of law students at many universities, would expand. Indeed, federal courthouse construction built in extra spaces on the assumption that more judgeships and cases would be coming. The vertical charts that I have shown mapping twentieth-century growth in case filings and in judgeships capture some of the exuberance; the upward lines appear to suggest a never-ending surge of cases, resulting in demands for more lawyers, judges, and courthouses.

III. UNAVAILING COURTS: REVISITING PRESUMPTIONS ABOUT THE FEDERAL JUDICIARY'S REMEDIAL AUTHORITY

A less inviting heritage has, however, emerged and, as Meltzer analyzed, the interaction between the courts and Congress is pivotal. During the latter part of the twentieth century, leaders of the judiciary looked at the pictures of growth and, rather than celebrate, bemoaned the expansion. A language of "crisis" became pervasive,¹⁷⁰ as filings came to be seen as a problem to be solved. Rather than pursue significant additional judgeships, prominent members of the judiciary called for the need to "cap" growth in life-tenured positions through a moratorium on new judgeships.¹⁷¹

Chief Justice Rehnquist's era was not the first to seek to curb the federal courts; progressive era reformers also aimed to bound the aegis of federal judges, who were seen during the early part of the twentieth century as inhospitable to rights-claims by workers. Expanding administrative agency adjudication was one method of opening new fora for redress.

Dislike of the federal courts is not novel.¹⁷² Hostility by members of the Supreme Court towards the diverse users of the federal courts is. Thus, and in contrast to earlier campaigns to limit federal court use, the more recent effort is embedded *within* the judiciary, as the Supreme Court aimed to make structural and group-based redress less unavailable. The techniques ranged from developing new doctrines, reinterpreting statutes, expanding federal preemption, orienting incoming judges through educational programs,

tain & K. Holt, *State Court Organization*, NAT'L CTR. FOR STATE COURTS, tbls.II.20a & 35 (last updated Jan. 9, 2015), www.ncsc.org/sco.

170 See, e.g., POSNER, *THE FEDERAL COURTS* 1996, *supra* note 130.

171 See, e.g., FED. JUDICIAL CTR., *IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES* 13 (1993), [http://www.fjc.gov/public/pdf.nsf/lookup/impomora.pdf/\\$file/impomora.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/impomora.pdf/$file/impomora.pdf); see also FED. CTS. STUDY COMM., *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 8 (Apr. 2, 1990), [http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf) (describing how the federal judiciary would soon be at "the limits of [its] natural growth" and noting that some commentators had called for a cap of 1000 as the "practical ceiling" of life-tenured judges to ensure quality performances without "significant degradation of quality").

172 See, e.g., WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND THE LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).

reshaping federal rules, issuing court strategic plans, and lobbying Congress to cut back on its openness to creating new federal rights.¹⁷³ These initiatives were, in turn, part of a larger effort to constrain government’s regulatory capacities and activities.¹⁷⁴

A. *Curbing Rights and Remedies: Constricting Congressional Powers and Immunizing the Government*

Chief Justice William Rehnquist oversaw a growing bureaucracy able to gain funds for new courthouses, more judges, and staff. Yet he was also deeply skeptical of an expansive role for adjudication. Under his leadership and then that of Chief Justice John Roberts, the Court has limited the ability to bring lawsuits alleging illegal actions of state and federal governments as well as of private actors.¹⁷⁵ While guarding judicial prerogatives, the commentary and jurisprudence create an intellectual gestalt skeptical of the role of courts in generating remedies and in filling congressional gaps.

During his decades on the Court, Chief Justice Rehnquist steered the law towards ceding authority to state courts, thereby narrowing access to the federal courts for various groups, such as civil rights plaintiffs and habeas corpus petitioners. The doctrinal techniques varied. For example, in the 1970s in his decision (before becoming Chief Justice) in *Wainwright v. Sykes*,¹⁷⁶ Rehnquist began the line of cases finding that criminal defendants had forfeited federal constitutional claims, sometimes through their lawyers or their own inadvertence, and were therefore precluded from obtaining post-conviction review of alleged federal constitutional error. Rehnquist-era case law also began the decline in implying causes of action from statutes and the Constitution.¹⁷⁷

In addition, the Rehnquist Court imposed limits on congressional reliance on the Commerce Clause. Chief Justice Rehnquist wrote the five-person decision in *United States v. Lopez*, holding that Congress had exceeded its authority by creating the federal crime of possession of guns within a certain distance from schools.¹⁷⁸ Rehnquist also wrote the five-person majority in

173 Analyses of revisions of the Federal Rules have concluded that committees appointed by Chief Justices Rehnquist and Roberts have shaped increasingly “anti-private enforcement,” and thus anti-plaintiff, rule proposals. See Burbank & Farhang, *Federal Court Rulemaking*, *supra* note 136, at 1578–79. The impact of education programs and rule revisions has been described by one lower trial judge as teaching her to “duck, avoid, evade.” See Nancy Gertner, *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 428 (2016).

174 See ROBERT A. KAGAN, AMERICAN ADVERSARIAL LEGALISM IN THE EARLY 21ST CENTURY: AN AFTERWORD FOR THE 2D EDITION OF ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (forthcoming 2016).

175 See generally Burbank & Farhang, *Litigation Reform*, *supra* note 21.

176 433 U.S. 72 (1977); see also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 7 (1997).

177 See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002); *United States v. Stanley*, 483 U.S. 669, 684 (1987); *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

178 *United States v. Lopez*, 514 U.S. 549, 551 (1995).

United States v. Morrison, ruling that Congress lacked authority under either the Commerce Clause or the Fourteenth Amendment to enact the civil rights remedy in the Violence Against Women Act (VAWA), which had provided a federal civil action for victims of violence if they could prove gender-based animus.¹⁷⁹ Likewise, Chief Justice Rehnquist authored the opinion for the Court in *Seminole Tribe of Florida v. Florida*, which held that Congress could not rely on the Commerce Clause to authorize Indian tribes to enforce obligations that states bargain with them in good faith about constructing casinos on tribal lands.¹⁸⁰

Moreover, the tone set by Chief Justice Rehnquist as lead spokesperson for the federal courts fit his doctrinal approach. Rehnquist exercised his authority as Chair of the Judicial Conference to shape Federal Rule revisions through appointments to the committees that drafted them.¹⁸¹ He repeatedly used his annual “State of the Judiciary” addresses to counsel against expansion of federal jurisdiction.¹⁸² Both before and after the enactment in 1994 of VAWA’s civil rights remedy, for example, the Chief Justice invoked the statute as an example of the overuse of federal remedies.¹⁸³

Further, during his tenure chairing the Judicial Conference, the Conference took formal policy positions pressing Congress to cut back on federal jurisdiction. As part of a wave of millennium planning, the Conference charged a specially constituted committee to write a “Long Range Plan,” which in 1995 produced ninety-three recommendations adopted by the Judicial Conference.¹⁸⁴ (This document has been replaced by a 2010 “Strategic Plan” that was updated in 2015, but the newer plans caution against reading

179 *United States v. Morrison*, 529 U.S. 598, 627 (2000).

180 517 U.S. at 47; *see generally* Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State and Tribal: The Story of Seminole Tribe of Florida v. Florida*, in *FEDERAL COURTS STORIES* 329 (Vicki C. Jackson & Judith Resnik eds., 2010).

181 Analyses of the composition of rule committees come from Burbank & Farhang, *Federal Court Rulemaking*, *supra* note 136, from Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CINN. L. REV. 1084 (2015), and from Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform”*, *LAW & CONTEMP. PROBS.*, Spring/Summer 2001, at 197, 248–52; *see also generally* Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Resnik, *Constricting Remedies*, *supra* note 21.

182 William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, *THIRD BRANCH*, Jan. 1992, at 2–4 (calling for limits on the growth in the number of federal judges).

183 *Id.* at 1, 3 (“The Judicial Conference joins the Conference of Chief Justices (composed of the chief justices of the state courts) in opposing [these provisions] of the bill.”); William H. Rehnquist, *Remarks at Monday Afternoon Session*, in *AM. LAW INST., 75TH ANNUAL MEETING: REMARKS AND ADDRESSES* 13, 17–18 (May 11–14, 1998).

184 JUDICIAL CONFERENCE OF THE U.S., *LONG RANGE PLAN FOR THE FEDERAL COURTS* (1995) [hereinafter 1995 *LONG RANGE PLAN FOR THE FEDERAL COURTS*], <http://www.uscourts.gov/statistics-reports/publications/long-range-plan-federal-courts>. The 1995 Long Range Plan is also reprinted in 166 F.R.D. 29 (1996). Subsequent references refer to page numbers as printed in the original document.

them as rescinding the individual recommendations of the *1995 Long Range Plan*.¹⁸⁵)

The 1995 *Plan* worried about overuse of the federal courts, both by civil litigants and because of the “federalization of criminal law,”¹⁸⁶ and proposed a variety of methods to limit access and refocus law enforcement. The *Long Range Plan* urged Congress, when possible, to look to state courts and federal agencies in lieu of the federal courts so as to shape “sensible limitations on federal criminal and civil jurisdiction.”¹⁸⁷ The proposed solutions included increasing reliance on administrative agency adjudication when constitutionally permissible, as well as more judicial case management and alternative dispute resolution.¹⁸⁸ Further, the *1995 Long Range Plan* recommended that Congress “exercise restraint” by not creating new federal statutory rights or new federal crimes unless Congress determined that doing so advanced “clearly defined and justified federal interests” and “where federal interests are paramount.”¹⁸⁹

These recommendations were in service of avoiding what the *Long Range Plan* called a “nightmarish” future, which assumed a growth rate at a pace calculated “over the past 53 years,” producing a “bleak” picture about a wave of filings. As the *Long Range Plan* explained, in 1995, civil filings numbered about 240,000; the projection was that, by 2020, civil cases “could reach 1 million” and criminal filings could grow from 44,000 to 84,000.¹⁹⁰ This rising tide would, the planners thought, undermine federal court governance and the coherence of law. Moreover, users would be harmed because, as resources became scarcer, the results would be “delay, congestion, cost, and inefficiency.”¹⁹¹

These projections and the concerns that shaped them were part of a new “common intellectual heritage” that federal litigation was a *problem* to be solved by diverting cases and diffusing disputes. The doctrinal routes were, as already noted, varied. Here, I focus on the interaction between new bod-

185 The 2010 “Strategic Plan,” a slim eighteen-page document, stated that it was not an across-the-board “rescission of the individual policies articulated in the recommendations and implementation strategies” of the 1995 plan. JUDICIAL CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 18 (2010). That 2010 plan was updated in 2015 and explained that it should “not necessarily be interpreted as the “rescission of the individual policies articulated in the recommendations and implementation strategies” of the 1995 plan. JUDICIAL CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 19 (2015), <http://www.uscourts.gov/file/18424/download>.

186 See also TASK FORCE ON FEDERALIZATION OF CRIM. LAW, AM. BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW (1998).

187 1995 LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 184, at 22.

188 *Id.* at 34, 38, 35.

189 *Id.* at 28, 24.

190 *Id.* at 18.

191 *Id.* at 19. Under this scenario, the Long Range Plan predicted that “civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers.” Further, district trial judges were already spending “fewer of their working hours in civil trials than ever before,” and “the future may make the civil jury trial—and perhaps the civil bench trial as well—a creature of the past.” *Id.* at 19–20.

ies of Supreme Court case law that expanded immunities, contracted rights, and constricted remedies.

A first exemplar comes from the 1988 decision of *Boyle v. United Technologies Corp.*, a lawsuit alleging that a member of the military had drowned, trapped under water because the helicopter's manufacturer, Sikorsky, had allegedly designed a defective escape hatch.¹⁹² The family sued the company, but the Court (in a five-person majority opinion by Justice Scalia) rejected the claim based on the Court's creation of a then-new federal common law immunity for government contractors.¹⁹³ The Court explained:

This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.

. . . .

Petitioner's . . . contention is that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree. In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law. But . . . [in] a few areas, involving "uniquely federal interests," . . . state law is pre-empted and replaced, where necessary, by . . . so-called "federal common law."¹⁹⁴

The dispute involved private parties, but the Court identified a "uniquely federal" interest in the government's procurement policies, to be protected to ensure no "second-guessing" through state tort-based claims.¹⁹⁵ Although bills had been proposed in Congress but not enacted, the Court put into place a common law rule that no liability for product defects could be imposed if a defendant established that "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."¹⁹⁶ To justify that holding, the Court noted the risk of passing on costs to the government;¹⁹⁷ aside from creating a government contractor immunity, the Court did not explore techniques (such as price caps) to avoid the potential for added costs.

192 487 U.S. 500 (1988).

193 A defendant asserting such an immunity would have to show that "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

194 *Id.* at 502, 504 (citations omitted).

195 *Id.* at 504, 511.

196 *Id.* at 512.

197 *Id.* at 511-12 ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs.").

Justice Brennan's dissent raised an objection that can be understood in Meltzer's terms, that "large public bureaucracies" have the capacity to threaten "a greatly expanded list of individual rights" through actions that were not directed at "identifiable individuals but at the public at large."¹⁹⁸ Justice Brennan explained that, under the majority's approach, low-level federal government personnel gained the power to insulate private actors from liability through decisions approving ("rubberstamping") producer-supplied product specifications: "a federal procurement officer . . . might or might not have noticed" a potential defect.¹⁹⁹ In a separate dissent, Justice Stevens added that Congress, not the courts, ought to assess what he termed "the novel question of policy" entailed in "balancing" the costs of government programs and the safety of individuals.²⁰⁰

A parallel to *Boyle* comes from a more recent decision by the Seventh Circuit, sitting en banc in 2012 in *Vance v. Rumsfeld*.²⁰¹ This case (like *Boyle*) involved government contractors and judicial lawmaking. In *Vance*, however, the private contractors, Donald Vance and Nathan Ertel, were the plaintiffs, alleging that when they had worked in Iraq in 2006, they had been tortured by federal military interrogators.²⁰² Vance and Ertel claimed that, after they warned the government about possible arms-running, military personnel accused them of wrongdoing, put them into solitary confinement, held them for months "*incommunicado*," and subjected them to violence, sleep deprivation, and extremes of light, sound, and temperatures.²⁰³ A government-convened "Detainee Status Board" eventually determined that Vance and Ertel were "innocent" of the claims made against them and ordered their release.²⁰⁴

The question in *Vance* was whether the Constitution, statutes, or the common law gave these men access to the federal courts to seek redress. Unlike *Boyle*, Congress had legislated a form of immunity by providing in the Defense Detainee Treatment Act of 2005 protection for members of the military from liability if they "did not know that the practices were unlawful."²⁰⁵ That phrasing could be read to imply that liability was possible, if plaintiffs

198 Meltzer, *Detering Constitutional Violations*, *supra* note 74, at 328.

199 *Boyle*, 487 U.S. at 515 (Brennan, J., dissenting, joined by Justices Marshall and Blackmun). Justice Brennan also noted the many bills that had been introduced in Congress but not enacted. *Id.* at 515 n.1.

200 *Id.* at 532 (Stevens, J., dissenting).

201 701 F.3d 193 (7th Cir. 2012) (en banc).

202 *Id.* at 195–96.

203 *Id.* at 196; *see also Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 961 (N.D. Ill. 2010) (noting plaintiffs' allegations that during their detention, they were subjected to "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques").

204 *Vance*, 701 F.3d at 196.

205 42 U.S.C. § 2000dd-1(a) (2012) (quoted in *Vance*, 701 F. 3d at 201).

could prove that persons ought to have known of the unlawfulness. Further, as the dissent by Judge Hamilton detailed, Congress had also provided a cause of action in 1991 in the Torture Victim Protection Act for relief for victims, if alleged torturers could be found in the United States.²⁰⁶

Thus, judges could have used these two congressional directives, coupled with the Court's 1991 decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,²⁰⁷ to permit the case to proceed beyond the motion to dismiss. Moreover, the Supreme Court's case law declining to imply constitutional causes of action against the military, including famously when military personnel were given LSD,²⁰⁸ related to individuals *in* the military and hence to activities that could fall under the umbrella of injuries "incident to service," rather than those relating to private parties such as Vance and Ertel.

But the Seventh Circuit majority declined to recognize either a *Bivens* or an implied statutory cause of action, rejected what it termed an "extra-statutory" cause of action, and replaced the narrower immunities of the Supreme Court's law with a broader set of protections absent new congressional action.²⁰⁹

When considering whether to create an extra-statutory right of action for damages against military personnel who mistreat detainees, we assume that at least some of the conditions to which plaintiffs were subjected violated their rights. . . . The conduct alleged in the complaint appears to violate the Detainee Treatment Act

. . . [T]he choice of remedies for military misconduct belongs to Congress and the President rather than the judicial branch.²¹⁰

Vance and *Boyle* share an eerie symmetry. In both cases, judges filled the gaps. Meltzer's analysis of the judiciary's role in protecting individuals from bureaucratic government action (be it the potential for under-supervision of contract specifications in *Boyle* or for licensing of torture in *Vance*) would have predicted that judges would be "hospitable" to shaping paths, even if narrow, for relief if predicated upon sufficient evidentiary bases. But instead, *Boyle* immunized private actors contracting with the military, and *Vance* immunized the military from private actors claiming torture. These two decisions, like the *Long Range Plan*, new habeas corpus, sovereign immunity, and Commerce Clause doctrine, craft a presumption of unavailing courts that leave government bureaucracies free from judicial oversight.

206 28 U.S.C. § 1350 (2012) (cited in *Vance*, 701 F.3d at 211 (Hamilton, J., dissenting, joined by Rovner and Williams)).

207 403 U.S. 388 (1971).

208 *United States v. Stanley*, 483 U.S. 669 (1987).

209 As discussed below, the argument is made also that courts ought to reject statutory causes of action, if judges determine that plaintiff's harm is not the kind of "real" harm or "injury" required by Article III. See *infra* Section III.D.

210 *Vance*, 701 F.3d at 198, 203.

B. *Narrowing the Judiciary’s Equitable Powers: Grupo Mexicano and Great-West Life & Annuity Company*

Another technique for limiting the judicial role comes through the Court’s approach to equitable powers under federal statutes, interacting with the familiar phrase in the U.S. Constitution that the “judicial Power shall extend to all Cases, in Law and Equity.”²¹¹ Two examples, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*²¹² and *Great-West Life & Annuity Insurance Co. v. Knudson*,²¹³ decided in 1999 and 2002 respectively, involved creditor and debtor disputes. In both cases, Justice Scalia wrote a five-person majority opinion, and Justice Ginsburg authored a four-person dissent.

At issue in these cases was the authority of federal judges to provide remedies. Neither case involved structural injunctions nor monetary relief involving public actors, and thus neither drew sustained attention from constitutional scholars.²¹⁴ Yet *Grupo Mexicano de Desarrollo* and *Great-West Life & Annuity* work in tandem with the more familiar cases to reiterate the leitmotif of unavailing courts. Under these doctrinal developments, federal judges do not have the power to shape ordinary remedies that give relief in various kinds of commercial transactions.

A few details of each case are in order. In *Grupo Mexicano*, the creditor, Alliance Bond Fund, requested what is known as a “stop-injunction” to prevent the dissipation of assets while it pursued contractual rights for money damages.²¹⁵ Federal District Judge John Martin concluded, after two hear-

211 U.S. CONST. art. III, § 2, cl. 1. A rich interpretation of the breadth of this grant—through admiralty and maritime jurisdictional powers as well as through law and equity—is in James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015).

212 527 U.S. 308 (1999).

213 534 U.S. 204 (2002). Both Meltzer and I wrote about *Great-West*. See Meltzer, *The Supreme Court’s Judicial Passivity*, *supra* note 86, at 346–52; Resnik, *Constricting Remedies*, *supra* note 21; see also Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000); John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003).

214 Renewed attention to this body of law comes from Samuel Bray, in a prize-winning federal courts essay. See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015). Bray argued that the Court’s doctrine is, despite the merger of law and equity in the 1930s, drawing and enforcing lines between legal and equitable remedies. Unlike Meltzer and myself, Bray is more admiring of the new jurisprudence of the Court, which he describes as seeking to keep equity distinctive even when courts of equity no longer exist. See *id.* at 1053–54.

In 2016, the pattern continued, as the Court returned to ERISA and interpreted the statutory authorization for plan fiduciaries “to obtain . . . equitable relief” to preclude suits to attach a participant’s general assets. See *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016). Justice Ginsburg again dissented, albeit this time alone, and cited the criticism of the Court’s understanding of equity leveled in Langbein, *supra* note 213. *Montanile*, 136 S. Ct. at 662 (Ginsburg, J., dissenting).

215 Alliance had invested in Grupo Mexicano de Desarrollo (GMD), a holding company involved in building roads in Mexico. Unable to meet its obligations, GMD restructured its

ings, that Alliance would “almost certainly” prevail on the merits but that, by then, the defendants’ assets would likely be insufficient to pay the judgment.²¹⁶ To protect the utility of its final judgment, the court enjoined the defendant from transferring assets but specifically did not preclude Grupo Mexicano from declaring insolvency.²¹⁷ The Second Circuit agreed; the appellate court invoked federal procedural rules authorizing the use of state remedies “for the purpose of securing satisfaction” of judgments as well as for preliminary injunctive relief.²¹⁸

Justice Scalia’s majority opinion reversed.

Because such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents’ contract claim for money damages.²¹⁹

Rejecting the view of four dissenters that the constitutionally endowed “judicial power” over “all Cases, in Law and Equity” entailed authority to respond to the “grand aims of equity” by fashioning appropriate remedies,²²⁰

debts by assigning priority in specific notes to the Mexican government and other creditors. After not being paid, Alliance invoked the diversity jurisdiction of the federal district court to bring a damages action for breach of contract. As an interim measure, Alliance requested a preliminary injunction to freeze GMD’s assets. The defendant conceded in affidavits that by assigning assets to competing creditors, it had less than \$6 million remaining to satisfy \$75 million of debt owed to Alliance. *See* Grupo Mexicano de Desarrollo, S.A., 527 U.S. at 310–12; *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 691–92 (2d Cir. 1998).

216 *See* Petition for Certiorari at App. 26a, *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. 308 (No. 98-231) (including the order dated December 23, 1997, from the Southern District of New York that had granted the preliminary injunction based on a finding that “the probability that Plaintiffs will succeed on the merits of their underlying claim for breach of contract is almost certain”); Brief for Respondent at Joint App. 79aa, *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. 308 (No. 98-231) (including the transcript of the district court proceedings).

217 Brief for Respondent at Joint App. 79aa, *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. 308 (No. 98-231) (including the transcript of the district court proceedings).

218 The relevant rules are FED. R. CIV. P. 64 (providing that, after an action is commenced, “all remedies . . . for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the State”), and Fed. R. CIV. P. 65 (providing for preliminary and permanent injunctions). The Second Circuit saw the two as “complementary,” and while all agreed that New York law did not provide for a freeze order, the Second Circuit determined that federal “general equitable power” supported the remedy once the exacting requirements for preliminary injunctive relief were met. *See Alliance Bond Fund*, 143 F.3d at 692, 695.

219 *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 333. Justice Scalia wrote for himself, the Chief Justice, and Justices O’Connor, Kennedy, and Thomas. Justice Ginsburg issued the dissent, joined by Justices Stevens, Souter, and Breyer. The decision was unanimous in one respect, that the issuance of a permanent injunction had not rendered the controversy moot because, if as claimed, the issuance of the preliminary injunction was wrongful, GMD would be able to recover on the bond. *Id.* at 315, 335 n.2.

220 *Id.* at 342 (Ginsburg, J., dissenting).

the majority held that, absent congressional direction, federal judges lacked the authority to create this form of interim relief.

When doing so, the majority read the 1789 congressional grant of jurisdiction to the federal courts over "all suits . . . in equity" to permit only those remedies available during the founding era or provided by other statutory authority or justified by special public interests. Ironically, given Justice Scalia's prior creation of a common law immunity for government contractors and his subsequent expansive reading of the Federal Arbitration Act, Justice Scalia explained his interpretation as consistent with democratic obligations that judges be restrained. He invoked Justice Story's concerns about English equity as "the most formidable instrument of arbitrary power, that could well be devised."²²¹

Central to the paradigm is a reading of the Article III grant of "judicial Power" to "all Cases, in Law and Equity." My puzzle is about why those words should not be seen to incorporate then-common (the word used purposively) practices of state and federal judges.²²² Starting with the textual reference in Article III to "courts," we know that, unlike some of the other institutions created by the Constitution, courts were familiar to the Framers, who knew well the justice systems in England, the colonies, and the states. Further, the Framers borrowed methods of protecting judges (tenure during good behavior, guaranteed salaries, and competency over certain subject matters) from state constitutions and from England.²²³ The concept of judicial indepen-

221 *Id.* at 332 (majority opinion) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 19 (Boston, Little, Brown & Co. 1886)) (also describing equity as placing "the whole rights and property of the community under the arbitrary will of the Judge"). Justice Scalia also repeated a commentator's characterization of a freeze-asset injunction as a "nuclear weapon." *Id.* at 329, 332 (quoting RICHARD N. OUGH & WILLIAM FLENLEY, THE MAREVA INJUNCTION AND ANTON PILLER ORDER: PRACTICE AND PRECEDENTS xi (2d ed. 1993)); see also Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, address given at Princeton University (Mar. 8–9, 1995), in THE TANNER LECTURES ON HUMAN VALUES 1995 at 86, <http://tannerlectures.utah.edu/lecture-library.php>.

222 An expansive literature, much of it focused on judges' role in statutory interpretation, addresses the topic. See, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911 (2015); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997)). Another facet is courts' inherent or supervisory powers. See, e.g., Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

223 See THE ESSENTIAL FEDERAL COURTS HISTORY, *supra* note 3, at 13–14; Wythe Holt, "Federal Courts as the Asylum to Federal Interests": *Randolph's Report, the Benson Amendment, and the "Original Understanding" of the Federal Judiciary*, 36 BUFF. L. REV. 341 (1987); Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421.

dence had its roots in the English Act of Settlement and in several of the state constitutions.²²⁴

Early federal courts were tied to state courts in other ways. In 1789, Congress required lower federal courts to align themselves in various ways with state courts' practices, for several decades in a static fashion and subsequently in a dynamic manner.²²⁵ When law and practices came to be coded as "state" or "federal" or "English" or "American" is a subject of dispute, but some aspect of the "common law" was a law *in common*.²²⁶ Moreover, English equity law was, in the early period, a source of authority for the federal judiciary, as some state courts lacked equity powers or had hybrid systems.²²⁷

Further, despite the *Grupo Mexicano* majority holding abjuring federal common law making, federal courts' jurisprudence is filled with it. The areas are so wide-ranging that debate is had about whether to think about a line of cases related to common law as a delineated genre or as a series of unrelated examples, ranging from the "act of state doctrine" in foreign affairs and commercial transactions with the United States to labor law, admiralty, and statutes of limitations,²²⁸ as well as the already-detailed federal defense of

224 See *supra* note 223.

225 See Conformity Act of 1872, Ch. 255, 17 Stat. 196. The complexities are analyzed in Kristin A. Collins, "A Considerable Surgical Operation": *Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 259–65 (2010) [hereinafter Collins, *Article III, Equity, and Judge-Made Law*], in Kristin A. Collins, *Article III, Social Movements, and the Making of the Modern Federal Courts* (2016 manuscript on file with the author), and in Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 930–31 (1987).

226 See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

227 See generally Collins, *Article III, Equity, and Judge-Made Law*, *supra* note 225.

228 See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001); *Wilson v. Garcia*, 471 U.S. 261 (1985); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975). Scholarly comment abounds. Of course, many—Daniel Meltzer included—have written about the question in the context of federal common law. See, e.g., Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513 (2002); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) [hereinafter Monaghan, *Foreword*].

The *Erie*-based argument that federal courts lack common law powers has sometimes been read contextually to mean that federal courts cannot make common law only in those cases that arise under state law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Proponents of this position, such as Professor Martha Field, also detail the many instances of federal common lawmaking to undercut the argument that federal courts are incompetent to develop law. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986). Another understanding of the constitutional flaw, to the extent one existed in *Erie*, is that the courts ought not to make common law in an area where Congress could but has not done so. See Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in CIVIL PROCEDURE

immunity for government contractors. And unlike the Court’s cutting off of equitable developments absent congressional permission, the other doctrines were shaped without such permission and sometimes in the face of congressional inaction on bills, such as proposals seeking to create government contractors’ immunity as a defense to liability.²²⁹

In 2002, the *Grupo Mexicano* majority returned to the question of equitable relief and again read out a role for judicial responsiveness to the problems presented. The case related to the Employment Retirement Income Security Act (ERISA), and the issue was whether reimbursement by a recipient of medical expenses paid by a plan was due because she had received funds in a settlement against a car’s manufacturer. As Meltzer explained, *Great-West Life & Annuity Insurance v. Knudson* raised the legal question whether Congress, which had in ERISA authorized “equitable” remedies for violations,²³⁰ had left “a health insurance plan without any federal remedy for breach of a subrogation obligation” even when state remedies were possibly preempted.²³¹

Meltzer thought that the Court ought to have read the statute to enable it to permit relief. Instead, the majority ruled out repayments of funds as permissible in equity.

[Section] 502(a)(3) [of ERISA], by its terms, only allows for *equitable* relief. We will not attempt to adjust the “carefully crafted and detailed enforcement scheme” embodied in the text that Congress has adopted. Because petitioners are seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money—§ 502(a)(3) does not authorize this action.²³²

John Langbein has argued that this interpretation is a misunderstanding of the historical powers of equity, which did provide for compensatory damages; an “award of money damages” was “a classic form of equitable relief”²³³ as well as a remedy at law. When I wrote about this case in 2003, I worried about the impact of *Great-West* on a myriad of statutes that referenced equitable relief,²³⁴ as well as its implications for structural remedies in injunction

STORIES 21 (Kevin M. Clermont ed., 2d ed. 2008). Moreover, given the murky bases of the decision in *Erie* itself (which lacks specificity on what exactly was unconstitutional), I read it as an example of federal common lawmaking. Given that one can read Article III’s jurisdictional bases, including diversity, to support authority for judge-made law, *Erie* represents a decision to decline to do so based on principles of comity, such as deference to state or legislative lawmaking. See generally John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427 (1958); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

229 Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

230 Employee Retirement Income Security Act, Pub. L. No. 93-406, § 502(a)(3) (codified at 29 U.S.C. § 1132(a)(3) (2012)).

231 Meltzer, *The Supreme Court’s Judicial Passivity*, *supra* note 86, at 383–84.

232 *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002).

233 Langbein, *supra* note 213, at 1351–52.

234 Resnik, *Constricting Remedies*, *supra* note 21, at 265–67.

actions. Meltzer focused on the decision's burdens on Congress; he criticized the Court for unfairly expecting legislators "to anticipate all of the uncertainties," let alone be able to respond through provisions in statutes.²³⁵

As noted earlier, Meltzer saw the incompleteness of legislation as an appropriate facet of congressional processes.²³⁶ He thought that the Court undervalued congressional challenges in forecasting all the work that federal statutes would need to do, and undercut its own useful role in filling gaps. Thus, the Court had made it more difficult "for Congress to legislate effectively"²³⁷ by insisting on the judicial "powerlessness to fashion" rules of decision for remedies.²³⁸ But instead of this generative interdependency, *Grupo Mexicano* and *Great-West Life & Annuity Insurance* contribute to a new "common intellectual heritage" that renders the federal courts unable to be responsive when faced with ordinary claims made by individuals and commercial entities.

C. *Precluding State and Federal Adjudication as Old Statutes Gain New Purposes: From AT&T to DIRECTV*

If *Grupo Mexicano* and *Great-West* insist on waiting for Congress before offering remedies, the Court has taken a different tack through untethering itself from texts and imposing its own reading on specific statutory grants to close off litigation. A major example (discussed by Meltzer in his 2013 article on textualism and preemption²³⁹) is the Court's expansion of what is now called the Federal Arbitration Act (FAA), enacted in 1925. In recent decades, the Supreme Court has enabled defendants to use the FAA as a form of immunity. The Court has required state and federal courts to enforce both obligations to arbitrate and bans on class actions, even when such provisions are placed by potential defendants into form job applications or shrink-wrapped product service documents.

To clarify the Court's imprint on the FAA requires a thumbnail account of the 1925 statute and of the Court's readings of the statute.²⁴⁰ In the 1920s,

235 Meltzer, *The Supreme Court's Judicial Passivity*, *supra* note 86, at 387–88. While I share his view of missteps by the Court in this line of cases, I want to register a concern about the term he chose—"passivity." Like the term "activism," the nomenclature of "passivity" is ill-advised. Judges always have to decide *something*, and appellations of decisions evidencing activism or passivity obscures that they are making decisions that ought to be analyzed as confirming or departing from precedents and as either wise or unwise judgments.

236 Meltzer applauded Jonathan Siegel's formulation that in "the name of preserving legislative power, the textualists actually reduce it, by compelling Congress to meet an impossible standard of drafting perfection before its instructions can be carried out properly." Meltzer, *The Supreme Court's Judicial Passivity*, *supra* note 86, at 388 (quoting Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 325 (2001)).

237 Meltzer, *The Supreme Court's Judicial Passivity*, *supra* note 86, at 345.

238 *Id.* at 370–71. As I read Meltzer, positing the courts as junior partners does not fully capture his analyses of the two branches working interactively.

239 Meltzer, *Preemption and Textualism*, *supra* note 110, at 12–14, 31–32.

240 See also Resnik, *Diffusing Disputes*, *supra* note 32.

the American Bar Association and the Chamber of Commerce worked to enact legislation to make agreements to arbitrate enforceable in federal courts. Their efforts, focused on commercial actors seeking to use arbitration in lieu of litigation, produced the 1925 statute authorizing the federal courts to enforce agreements, if "written . . . in any maritime transaction or a contract evidencing a transaction involving commerce," by concluding that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Further, the 1925 Act expressly exempted the only workers that Congress clearly had the power to regulate under the Commerce Clause as it was then read: "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²⁴¹

From 1925 to 1985, interpretations of the FAA were true to this model, predicated on bargains struck after negotiations between relatively equal partners to contracts. One example comes from the 1953 decision in *Wilko v. Swan*,²⁴² in which a brokerage customer objected to being forced, at the behest of the broker, to use arbitration, which had been included as an obligation in a form contract. The U.S. Supreme Court sided with the customer and explained that, even if some buyers and sellers "deal[t] at arm's length on equal terms," the federal securities laws were "drafted with an eye to the disadvantages under which buyers labor."²⁴³ Further, arbitrators' "award[s] may be made without explanation of their reasons and without a complete record of their proceedings," and hence, one could not examine "arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact.'"²⁴⁴

As the brief quotes from the opinion illustrate, the Court's decision was based on two distinct rationales. A first problem centered on the formation of the contract. Structurally unequal bargaining positions suggested the absence of real negotiations, making it unwise to enforce a provision against a party who might not have been able to negotiate. A second problem focused on the arbitration itself, which the Court described as too informal and flexible to enforce federal statutory rights reliably. In contrast, when judges made rulings, they were subjected to regulatory oversight. Their adjudication had to be based on rules of evidence; the obligations to keep records enabled appellate review.²⁴⁵ In short, the Court read the FAA as appropriate only for volunteers, choosing to strike bargains within its ambit.

Starting in the mid-1980s, the Court revised its approach and reread the 1925 Act as applicable to employees and consumers who could not negotiate terms on job applications and form contracts. When doing so, the Court adverted to parties' consent but focused on another justification: that arbitra-

241 Pub. L. No. 48-401, 43 Stat. 883 (1925).

242 346 U.S. 427 (1953).

243 *Id.* at 435.

244 *Id.* at 435-36.

245 *Id.* at 436-37.

tion could provide as effective a means of vindication of rights as did adjudication.²⁴⁶

The Court first used the phrase “effective vindication of rights” in its purposive interpretation of the Federal Arbitration Act²⁴⁷ in 1985 in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which was also the first case in which the Court applied the FAA to preclude litigation of a federal statutory right.²⁴⁸ A car dealer in Puerto Rico, Soler Chrysler-Plymouth, alleged that the two other parties (a Japanese automobile manufacturer and the Chrysler Corporation) had violated federal antitrust laws because they were part of an “international cartel that has restrained competition in the American market . . . [and] allegedly prevented the dealer from transshipping some 966 surplus vehicles from Puerto Rico” to other U.S. dealers.²⁴⁹

In addition to the FAA, the Court relied on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which the United States had joined fifteen years earlier), when holding that arbitration was mandated.²⁵⁰ The *Mitsubishi* ruling could easily have been cabined: the three parties were businesses (albeit with different resources), and consent to the contract was not much in question.²⁵¹ Moreover, given the Court’s discussion of the need for “comity” in international cases, one could read the decision to apply only to transnational transactions.²⁵² The Court explained it was confident that international arbitrators would be loyal to national legal norms; the opinion added that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”²⁵³

The Court’s next steps in the relocation of statutory claims to arbitration could also have been limited ones, dependent on supervision of arbitrations by federal agencies such as the Securities and Exchange Commission (SEC). For example, in 1987, in *Shearson/American Express Inc. v. McMahon*, Justice O’Connor wrote for the Court to enforce a pre-dispute arbitration clause “between brokerage firms and their customers.”²⁵⁴ She explained that since

246 I parse the case law developments in Resnik, *Diffusing Disputes*, *supra* note 32, at 2874–920.

247 Meltzer, *Preemption and Textualism*, *supra* note 110, at 13–14; *see generally* Resnik, *Diffusing Disputes*, *supra* note 32.

248 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

249 *Id.* at 640 (Stevens, J., dissenting).

250 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

251 The dissent argued that there had been “no genuine bargaining” about the arbitration terms. 473 U.S. at 666 (Stevens, J., dissenting).

252 “[E]ven assuming that a contrary result would be forthcoming in a domestic context,” the Court emphasized the importance of “international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes.” *Id.* at 629 (majority opinion).

253 *Id.* at 637.

254 482 U.S. 220, 222 (1987).

the 1950s era of *Wilko v. Swan*, the SEC has gained statutory authority to ensure that arbitration was “adequate to vindicate Exchange Act rights,” and therefore that enforcing that obligation would not result in “a waiver of ‘compliance with any provision’ of the Exchange Act.”²⁵⁵

“Effective vindication” became the mantra thereafter, but the Court has since deemed that test to be satisfied without individually negotiated contracts, international transactions, or federal administrative oversight. Indeed, the Court has imputed effective vindication in a host of settings and has declined to scrutinize the arbitration systems that consumers and employees are now required to use.

Given that common heritages are built on artifacts as well as texts, the two pages of an “Application for Employment” (Figure 9) is an important emblem, to be produced and reproduced to illustrate the activities putting Daniel Meltzer’s understanding of the judicial role at risk.

The two-page form comes from the record in *EEOC v. Waffle House, Inc.*, decided by the U.S. Supreme Court in 2002.²⁵⁶ Waffle House provided this job application to Eric Baker, who signed the documents in South Carolina in 1994. The illegibility may annoy readers but it is relevant. Reading the actual words had little utility, for those seeking employment did not have the option of negotiating the terms.

What did the form require? It warned against taking food or equipment and imposed a requirement that employees agree to polygraph tests and to pay the costs of items lost while under their superintendence.²⁵⁷ The application further required that all disputes go to arbitration, and that the parties had to split the costs. Specifically:

The parties agree that any dispute or claim concerning Applicant’s employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and

255 *Id.* at 238; *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

256 *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

257 In the words of the form:

I agree that Waffle House, Inc. may deduct from any monies due me, an amount to cover any shortages which may occur and will indemnify Waffle House, Inc. against any legal liability for withholding said shortages from monies due me as a result of my employment with Waffle House. If there are any shortages or losses in money, food, or equipment which is assigned to me or to which I have access, I agree to submit to a polygraph or other scientific evaluation test conducted in compliance with applicable law

Joint App. at 61a, *EEOC v. Waffle House*, No. 99-1823, 2001 WL 34093975 (May 25, 2011).

assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.²⁵⁸

FIGURE 9: WAFFLE HOUSE EMPLOYMENT APPLICATION

WAF F L E
H O U S E
AMERICA'S PLACE TO WORK
AMERICA'S PLACE TO EAT®

MUST BE COMPLETED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT
(PLEASE PRINT PLAINLY)

| TO BE COMPLETED UPON EMPLOYMENT | |
|---------------------------------|------------|
| Work Location _____ | Rate _____ |
| Position _____ | Date _____ |

To Applicant: We deeply appreciate your interest in our organization and assure you that we are sincerely interested in your qualifications. A clear understanding of your background and work history will aid us in placing you in the position that best meets your qualifications and may assist us in possible future upgrading.

Name Bakon ERIC SCOTT Date JUNE 23, 1994
 Social Security No. 251-15-4653
 Telephone No. (803) 744-4777
 Present Address 106 CAYDALE ST. GASTON SC 29053
 Relationship: Partner/Partner Address: 106 Caydale St. Gaston SC 29053 Telephone No. (803) 744-4777

GENERAL INFORMATION

To Applicant: READ THIS INTRODUCTION CAREFULLY BEFORE ANSWERING ANY QUESTIONS IN THIS BLOCKED-OFF AREA. The Civil Rights Act of 1964 prohibits discrimination in employment practice because of race, color, religion, sex, or national origin. P.L. 88-360 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years old.

The following requested information is needed for a bona fide occupational qualification, business necessity, or other legally permissible reasons. Answers to any questions below will not automatically bar employment to any applicant. Questions pertaining to race, color, sex, national origin, age, and marital status are necessary to insure our compliance with applicable discrimination laws.

Race: White Birthdate: 10/27/74 Sex: Male Height: 5'11" Weight: 175 lbs.
 Marital Status: Single Engaged: No Married: No Separated: No Divorced: No Widowed: No
 Number of dependents including yourself: 0 Are you a citizen of the U.S.A.? Yes
 Have you ever been bonded? NO If yes, on what job? _____
 Have you ever been convicted of a crime in the past ten years? NO If yes, describe in full: _____
 Are you now or have you been a user of or addicted to: Drugs: NO Alcohol: NO

What kind of car do you drive? Make Buick Model Skyhawk Year 1985
 Will you use your car to get to work? Yes
 If not, what method of transportation will you use to get to work? _____
 Position(s) applied for _____ Rate of pay expected \$ _____ per/hr. \$ _____ per/wk.
 Would you work Full-Time Part-Time _____ Specify days and hours if part-time _____
 Were you previously employed by Waffle House? NO If yes, when and where? _____
 List any friends or relatives working for us and where None
 If your application is considered favorably, on what dates will you be available for work? Two weeks from today to 94
 Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? cl Pan A
Food work in THE Food business for 4 years.
 Have you been refused a Health Permit to work at any occupation? NO If yes, explain fully: _____
 Can you lift 20 lbs to shoulder height? Yes
 Are you able to remain standing on your feet for a full 7-10 hour shift? Yes
 Are you able to sweep, mop, etc.? Yes
 MILITARY SERVICE: Are you a veteran? NO If yes, date(s) of service: _____ Branch: _____
 Rank attained: _____ Date/Type of dismissal: _____
 Are you a member of any Reserve organization or National Guard? NO

• IMPORTANT •
NOTICE TO APPLICANT

Before we can hire you, the Government requires that we review and verify certain information. Please bring the following items with you on your first day.

1. Drivers license with your picture AND
2. A U.S. social security card OR an original or certified copy of your birth certificate.

If you don't have any of the above, please tell the unit manager and he will tell you what other documents are acceptable for completing the I-9 form.

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

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FORM # 4002

EXHIBIT A

Joint Appendix at 59, 61, EEOC v. Waffle House, No. 99-1823 (May 25, 2001).

258 Respondent's Brief in Opposition at 2, Waffle House, 534 U.S. 279 (No. 99-1823).

| Name and Occupation | Address | Phone Number |
|---------------------|--------------------------------|--------------|
| Kristi GUNTER | 100 Hwy 201 Gaston SC 29053 | 791-6001 |
| Dennis Adams | 154 N. Main St Gaston SC 29053 | 494-0277 |
| NETA GUNTER | 1800 10th Gaston SC 29053 | 791-1260 |

RECORD OF EDUCATION

| School | Name and Address of School | Dates Attendance Mo./Year | Course of Study | Circle Last Year Completed | Did You Graduate? | GPA | List Diploma or Degree |
|-----------------|----------------------------|---------------------------|-----------------|----------------------------|------------------------------------------------------------------------|-----|------------------------|
| High | Sunder High School | 90-94 | Business | 1 2 3 4 | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No | | Diploma |
| College | | | | 1 2 3 4 | <input type="checkbox"/> Yes <input type="checkbox"/> No | | |
| Other (Specify) | | | | 1 2 3 4 | <input type="checkbox"/> Yes <input type="checkbox"/> No | | |

WORK EXPERIENCE (List below last three employers, starting with last one first)

| | NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS | FROM | | TO | | DESCRIBE IN DETAIL THE WORK YOU DID | STARTING HOURLY RATE | LAST HOURLY RATE | REASON FOR LEAVING | NAME OF SUPERVISOR |
|-----|--------------------------------------------------|------|-----|-----|-----|---------------------------------------------------------|----------------------|------------------|---------------------------|--------------------------|
| | | MO. | YR. | MO. | YR. | | | | | |
| I | Little Ceasars Restaurant | 1 | 94 | - | - | Plc. Runce; handle money; open; wash; prep; clean; etc. | 4.15 | 5.50 | still employed | PATTI PHONE: 791-1701 |
| II | Winn-Dixie | 6 | 93 | 7 | 94 | Deli. Ass. make Run chks. prep. clean, etc. | 4.35 | 4.35 | 3 wks. | Sharon PHONE: - |
| III | Bi-rite | 12 | 92 | 5 | 93 | Logger, Stocker | 4.75 | 4.75 | Manager, Audited - 1 wks. | Sam Waffle PHONE: - |

NOTICE TO EMPLOYEES

Failure to be truthful on the application may affect the applicant's subsequent ability to receive workers' compensation benefits. The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements or omission of facts called for on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial credit record through any investigative or credit agencies or bureaus of your choice. I further understand that I am an "Employee at Will" and that Waffle House, Inc. does not guarantee my employment for any specific period of time.

In making this application for employment I also understand that an investigative consumer report may be made whereby information is obtained through personal interviews with my neighbors, friends, or others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics, and modes of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigative consumer report.

I FULLY UNDERSTAND THAT IF ASSIGNED TO ANY POSITION WHEREBY MONIES, EQUIPMENT, OR OTHER SUPPLIES OF WAFFLE HOUSE, INC. ARE ASSIGNED TO ME, I SHALL BE ACCOUNTABLE FOR THE AFORESAID ITEMS AND LIABLE FOR ANY SHORTAGES IN SAME. I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFFLE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYGRAPH OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW DURING ANY INVESTIGATION OF SUCH SHORTAGE OR LOSS, AS PART OF THIS APPLICATION PROCESS AND AS A CONDITION OF MY CONTINUED EMPLOYMENT. AT THE REQUEST OF WAFFLE HOUSE, INC. I AGREE TO SUBMIT TO TESTING TO DETERMINE MY USE OF DRUGS OR ALCOHOL. I UNDERSTAND THAT REFUSING TO SUBMIT TO A TEST OR A POSITIVE RESULT IN ANY TEST INDICATING DRUG OR ALCOHOL USE MAY RESULT IN MY IMMEDIATE TERMINATION FROM EMPLOYMENT.

IF THE POSITION TO WHICH I AM ASSIGNED SHALL BE A POSITION WHERE I NORMALLY RECEIVE TIPS, I UNDERSTAND THAT IT IS MY OBLIGATION TO REPORT ALL TIPS TO THE INTERNAL REVENUE SERVICE FOR INCOME TAX PURPOSES. THIS MAY BE DONE EITHER BY REPORTING THEM ON THE PRELIST OR ON MY TAX RETURN AT THE END OF THE YEAR, DELIBERATELY NOT REPORTING ALL INCOME COULD RESULT IN SEVERE PENALTIES. I UNDERSTAND AND ACKNOWLEDGE THAT WAFFLE HOUSE IS TAKING A CREDIT AGAINST MY WAGES FOR TIPS RECEIVED, IN THE EVENT I DO NOT RECEIVE TIPS EQUAL TO THAT CREDIT. I SHALL NOTIFY MY UNIT MANAGER SO THAT MY TIPS CAN BE COUNTED AND ADDED TO ESTABLISH WHAT LEVEL OF TIPS I AM MAKING. I UNDERSTAND WAFFLE HOUSE, INC. IS ALSO BOUND TO REPORT TO THE IRS THE AMOUNT OF THOSE TIPS THAT THEY COUNT. THE TIPS COUNTED WILL BE POSTED BY THE UNIT MANAGER ON THE PRELIST.

MEAL POLICY: As a part of your compensation, Waffle House allows its employees to eat during their shift at a reduced rate. This includes 1 full meal if your workday is 4 hours or less and 2 full meals if your workday is over 4 hours. In addition, beverages and snacks as desired are allowed. The only limitation is that dinner steaks, chicken and pork chops are not offered under this meal policy. Please try to eat the meal at some time during the shift. However, this should be during a slow time and must not interfere with customer service. To cover the cost of the meal, drinks, snacks and the time to eat these items, Waffle House will deduct from your paycheck an amount based on the number of hours worked that day. Please see your Unit Manager for the schedule of meal charges.

I have read and understand the above notice and agree to comply with the provisions above.

Signed this 23 day of June, 19 91 Signature of Applicant

Joint Appendix at 59, 61, EEOC v. Waffle House, No. 99-1823 (May 25, 2001).

Eric Baker signed the application at one venue, but was hired at another Waffle House, miles away. Baker had a seizure soon after he started work, and that was fired.²⁵⁹ Baker went to the Equal Employment Opportunity Commission (EEOC), which filed an Americans with Disabilities Act (ADA)

²⁵⁹ EEOC v. Waffle House, Inc., No. Civ.A. 3:96-2739-O, 1998 WL 35168489, at *1 (D.S.C. Mar. 23, 1998).

lawsuit, alleging discrimination because of the seizure.²⁶⁰ In defending the federal case, Waffle House argued that the EEOC could not bring the lawsuit because Eric Baker had signed the job application committing him exclusively to arbitration.²⁶¹

The lower court judge rejected Waffle House's views, and concluded that because Baker signed the form in one place and was hired after a discussion in another, the form did not constitute a contract.²⁶² The Court of Appeals reversed in part; it held that, while the EEOC could pursue injunctive relief, it could not seek back pay for Baker.²⁶³

The U.S. Supreme Court disagreed; although Eric Baker was precluded, the EEOC was not, as it had a statutory mandate to bring claims, including remedies for employees like Baker.²⁶⁴ The Court's decision is a vital source of precedent for the public enforcement of employment discrimination laws, as other defendants have sought unsuccessfully to stop state agencies from pursuing remedies.²⁶⁵ But the ruling also exemplifies that the Court now applies the 1925 FAA to employees, even if arbitration mandates are found in form job applications.²⁶⁶ Another step in the expansion of arbitration can be seen by looking at a document that came with my cell phone. Again, reading it is difficult, and again, the image is expressive of the point that being able to read it is irrelevant. It is not negotiable.

260 *Id.* at *1.

261 *Id.*

262 *Id.* at *2.

263 *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 813 (4th Cir. 2002). The court distinguished between the EEOC's pursuit of "the public interest in a discrimination-free workplace" and hence that seeking an injunction was permissible and the EEOC's effort to protect Baker's "individual rights," which the Fourth Circuit said the EEOC could not do. *Id.* at 812–13. In dissent, Judge King argued instead that under "fundamental principles of contract law," Mr. Baker had not entered into a written employment agreement, and hence, that the court ought not reach the issue of the EEOC's case, as Baker himself was not precluded from using the courts. *Id.* at 813–17 (King, J., dissenting).

264 *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

265 *See, e.g., Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727 (Iowa 2014); *Joulé, Inc. v. Simmons*, 944 N.E.2d 143 (Mass. 2011); *People v. Coventry First LLC*, 915 N.E.2d 616 (N.Y. 2009).

266 *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

FIGURE 10: DOCUMENT ACCOMPANYING THE PURCHASE OF A CELLULAR PHONE, 2002

INDEPENDENT ARBITRATION

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.

This form stipulates that if disputes arise, I must use arbitration or small claims court. Neither I nor the provider can be a part of a class action. (This symmetry, while ironic, has legal utility as some courts have required symmetrical constraints to make such documents enforceable.²⁶⁷) As is now famil-

²⁶⁷ See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (holding that state law may find unconscionable an agreement requiring consumers to arbitrate their claims while allowing the provider to choose arbitration or litigation). A more recent decision questioned but did not decide whether symmetrical constraints were required. See *THI of N.M. at Hobbs Ctr., LLC, v. Patton*, 741 F.3d 1162, 1170 (10th Cir.

iar, many judges thought this form unenforceable because the provider could exempt itself from liability. In California, for example, both a statute and a decision by the Supreme Court of California took that view under the state law of unconscionability.²⁶⁸ As is also familiar, the U.S. Supreme Court reversed the California decision in *AT&T v. Concepcion*, decided five to four in 2011.²⁶⁹ The Court read the Federal Arbitration Act as preempting state bans on class action waivers.

Recall the 1950s Court in *Wilko v. Swan* had two criticisms of mandated arbitration. One was the inability to bargain. That problem is all the more acute today. The documents that bind parties to arbitrate do not merit the term “contract.” Not only is bargaining unavailable (even for clients with resources) but also the terms provided by some, such as those of wireless providers like AT&T, make plain that categorizing the interaction as a contract is a mistake; providers assert their right unilaterally to “change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time.”²⁷⁰

The *Wilko* Court’s other problem was about the lack of public regulatory function because arbitrators’ decisions were unsupervised. I have a third criticism to offer, which is that obligations to arbitrate individually can stymie the pursuit of claims rather than be a route to their vindication. The evidence for this proposition comes from delving into the data on the use of arbitration, available from a small number of sources including research by legal scholars,²⁷¹ the Consumer Financial Protection Bureau (CFPB),²⁷² and by way of analyses of web-based information.

2014); *see also* Alltel Corp v. Rosenow, 2014 Ark. 375, at *8–9 (2014) (holding unenforceable an arbitration agreement lacking mutuality and explaining “there is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system” (quoting Independence Cty. v. City of Clarksville, 386 S.W.3d 395, 399 (Ark. 2012))).

268 CAL. CIV. CODE § 1751 (West 2015) (“Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.”); Discover Bank v. Superior Court, 113 P.3d 1100 (2005).

269 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

270 *Wireless Customer Agreement* § 1.3, AT&T, <http://www.att.com/legal/terms.wirelessCustomerAgreement.html> (last visited May 20, 2016).

271 *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 87–115 (2015); Alexander J.S. Colvin & Mark Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR REV. 1019, 1026–35 (2015); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 843–44 (2010); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 813–16 (2008).

272 *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT § 1028(a) (2015) [hereinafter 2015 CFPB ARBITRATION STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<http://perma.cc/P5B9-JPSZ>].

A few jurisdictions, of which California is one, require providers of consumer arbitrations to publish data about their services.²⁷³ As of 2011, a Hastings Law School study tallied twenty-six arbitration providers in California and identified eleven providers following these requirements.²⁷⁴ The American Arbitration Association (AAA) is one of those that does comply and, moreover, provides significant amounts of information.²⁷⁵ Assisted by several thoughtful law students, I mined the AAA database to learn about individual use of arbitration. Because of AT&T's leadership in insisting on arbitration and on class arbitration bans, we focused on claims brought against AT&T.

The California statute requires five years of information; each quarter, as data come up, the AAA takes down the oldest quarter. We analyzed filings from 2009 to 2014. What we learned was that between 2009 and 2014, AT&T had, each year, some 85 million to 120 million customers. But, what the posted logs from the AAA taught us was that, as detailed in Figure 11, *Consumer Arbitrations Filed with the American Arbitration Association: 2009–2014*, during those five years, 134 people, or fewer than 30 a year, brought individual arbitrations against AT&T.

FIGURE 11: CONSUMER ARBITRATIONS FILED WITH THE AMERICAN ARBITRATION ASSOCIATION: 2009–2014

| Sources | Types | Average per Year | Total | |
|-----------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|----------------------------------|-------|-------|
| AAA Data, Provider Organization Report | AAA-defined consumer claims | | 1,460 | 7,303 |
| June 2009–July 2014 | AAA claims involving AT&T | 85–120 million users | 27 | 134* |
| Consumer Financial Protection Bureau, 2015 Arbitration Study January 2010–December 2012 | AAA claims in credit card, prepaid card, checking account, payday, private student, and auto market loans | 80 million credit card consumers | 616** | 1,847 |

* All 134 of the consumer claims involving AT&T were filed by consumers.

** Of the 616 consumer arbitrations a year, approximately two-thirds were filed by consumers.

What might be the explanation for this low rate of claims? One could hypothesize a lack of a need to do so, either because AT&T was compliant

273 See CAL. CIV. PROC. CODE § 1281.96 (West 2015) (originally enacted in 2002, effective in 2003, and amended in 2014).

274 DAVID J. JUNG, JAMIE HOROWITZ, JOSE HERRERA & LEE ROSENBERG, PUB. L. RES. INST., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96, at 9, 51 (2013), <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update>.

275 AAA's Vice President for Statistics and In-House Research provided guidance on analysis of the materials posted. See Resnik, *Diffusing Disputes*, *supra* note 32, at 2812 n.25. Data for Figure 11 are drawn from AAA Data, *July 2009–June 2014, Provider Organization Report*, and 2015 CFPB ARBITRATION STUDY, *supra* note 272.

with legal obligations or responsive to consumer complaints. But evidence of misbehavior during this time period comes from the federal government which, joined by state attorneys general, filed lawsuits against several wireless providers and alleged violations of federal laws through, for example, imposing extra charges.²⁷⁶ Soon after filing, these cases were settled with funds set up for consumer reimbursement as well as penalties paid to the state and federal governments.²⁷⁷ This form of collective action pursued by governments is further evidence of the importance of collectivity and of the consequences of the Court's sanctioning of class action bans. Few individuals can afford to pursue small value claims; mandating single-file arbitration serves as a means of erasing rights, rather than enabling their "effective vindication."²⁷⁸

As Figure 11 also reflects, the data that we developed were paralleled by findings of the Consumer Financial Protection Bureau (CFPB), which issued a report in the spring of 2015 about arbitration in five credit card markets that involved hundreds of millions of consumers.²⁷⁹ CFPB researchers identified 616 individual arbitrations during a three-year period, of which a third were brought by companies against the individuals.²⁸⁰

The judicial insistence on an expansive interpretation of the FAA continued in the 2015–2016 Supreme Court term. In *DIRECTV, Inc. v. Imburgia*,²⁸¹ the Court reached out to review a decision by an intermediate appellate court in California. At issue was a "contract" providing that "if the law of your state" made a waiver of class arbitration unenforceable, the obligation to arbitrate was likewise unenforceable.²⁸² The litigation was filed in 2008 against DIRECTV; the claim was that the company had violated state law through imposing early termination fees. At that time, the law of

276 See, e.g., *FTC v. T-Mobile USA*, No. 2:14-ev-00967 (W.D. Wash. Dec. 19, 2014); *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014).

277 See, e.g., Stipulated Order for Permanent Injunction and Monetary Judgment at 16, 31, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227-HLM (N.D. Ga. Oct. 8, 2014) <http://www.ftc.gov/es/system/files/documents/cases/141008attstip2.pdf> (requiring that AT&T report to the FTC on its compliance with the settlement order for at least six years); Stipulated Order for Permanent Injunction and Monetary Judgment at 10, *FTC v. T-Mobile USA, Inc.*, No. 2:14-ev-00967 (W.D. Wash. Dec. 19, 2014); Diane Bartz, *Update 1-U.S. Settles Lawsuit over T-Mobile US's Unauthorized Charges*, REUTERS (Dec. 19, 2014), <http://www.reuters.com/article/2014/12/19/t-mobile-us-usa-settlement-idUSL1N0U31F120141219>; see also Resnik, *Diffusing Disputes*, *supra* note 32, at 2878–79 (discussing different measures of "effective vindication" and their difficulties).

278 I elaborate this argument and explain why one could read the Court's case law as imposing a deprivation of property without due process in *Diffusing Disputes*. See Resnik, *Diffusing Disputes*, *supra* note 32, at 2818–24.

279 2015 CFPB ARBITRATION STUDY, *supra* note 272.

280 *Id.* §§ 1, 5.

281 136 S. Ct. 463 (2015).

282 *Id.* at 466.

California (as described above) rendered the class-action waiver unenforceable.²⁸³

A few years later, the California appellate court held that, given the specific terms in the form agreement that called for the application of California law, the obligation to arbitrate was not enforceable.²⁸⁴ In 2015, the U.S. Supreme Court reversed. Over Justice Ginsburg’s dissent (joined by Justice Sotomayor) that courts were to “give the customer, not the drafter, the benefit of the doubt” and hence provide “effective access to justice,”²⁸⁵ the majority decision by Justice Breyer insisted that under the Court’s approach, arbitration was obligatory.²⁸⁶

The oddities of this decision merit comment. Unlike the class action waiver at issue in *AT&T v. Concepcion* that affected millions of people and the provisions in hundreds of documents related to consumer goods and employment, the *DIRECTV* dispute related only to older claims under clauses that lawyers, drafting for those imposing arbitration, should no longer use. The particular provision obliging that either arbitrations proceed individually or that no one arbitrate at all is itself evidence that those imposing arbitration do so to preclude public collective actions, rather than because they are wedded to arbitration per se.

Further, as Justice Ginsburg explained in dissent, FAA preemption had, before this case, been unusual in that the federal statute could itself be “preempted” (if you will) by parties’ intent, when set forth in contracts.²⁸⁷ Indeed, the Court had in its 2008 decision in *Hall Street Associates*²⁸⁸ noted that parties could “choose” the governing law to apply. Yet the *DIRECTV* majority rejected what the contract drafters had specified, which was using California state law as it then was.

From *Grupo Mexicano* to *Great-West Life* and *AT&T v. Concepcion* and *DIRECTV*, the Court has been, as Meltzer argued, purposivist in its

283 CAL. CIV. CODE § 1668 (West 2015); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

284 *Imburgia v. DIRECTV, Inc.*, 225 Cal. App. 4th. 338 (Cal. Ct. App. 2014), *rev’d* *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

285 *DIRECTV*, 136 S. Ct. at 471 (Ginsburg, J., dissenting). Justice Thomas dissented separately that the FAA did not, in his view, apply in state court. *Id.* (Thomas, J., dissenting).

286 *Id.* at 471 (majority opinion). In light of the holding in *DIRECTV*, the Court in *Schumacher Homes of Circleville, Inc., v. Spencer* summarily vacated and remanded a case decided by the West Virginia Supreme Court. *See Schumacher Homes of Circleville, Inc. v. Spencer*, 136 S. Ct. 1157 (2016), *granting cert., vacating, and remanding* *Schumacher Homes of Circleville, Inc., v. Spencer*, 774 S.E.2d 1 (W. Va. 2015).

287 *DIRECTV*, 136 S. Ct. at 473 n.1 (Ginsburg, J., dissenting).

288 *See id.* at 473–74 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008)). Justice Ginsburg quoted *Hall Street* when, in her dissent in *DIRECTV*, she discussed the ability under the FAA for parties to “tailor some, even many, features of arbitration by contract, including . . . procedure and choice of . . . law,” and noting that parties could even “choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia.” *See id.* at 468.

interpretation of statutes.²⁸⁹ But the majority's purposiveness has been in service of rendering courts unresponsive. The Court has come to attribute to Congress a disinterest in enabling access to the federal courts and in judicial gap-filling remedies.

In shaping this sequence of remedial constraints, majorities often invoke the Court's obligation to defer to congressional mandates. Yet, the Court's approach has been, as Justice O'Connor put it in a case on the FAA, to build "an edifice of its own creation."²⁹⁰ Her objection (echoed by Justice Thomas most recently in *DIRECTV*²⁹¹) was that Congress had designed the FAA as a procedural forum-allocation rule for the federal courts and not as a substantive obligation that applied in state courts.²⁹² But the majority rejected that reading. The result is that a presumption of preclusion has come to lace the law.

D. Statutory Rights and Specified Damages: Spokeo's Injuries in Law, in Fact, and in Cases in the Federal Courts

The Court's interpretation of the FAA limits the remedies for claimants, whether asserting federal or state rights. Another effort aims to cut off private plaintiffs altogether from being able to bring claims under certain kinds of federal consumer protection statutes.²⁹³ A developing line of argument insists that even when Congress has created private causes of action for failures to comply with statutory duties, and a specific individual can assert a particular violation of that statute (an "injury in law"), that breach does not necessarily create the kind of "injury" that constitutes a "case" for purposes of Article III. Thus, litigants have asked the Court to assert its power to override congressional decisions making certain forms of behavior actionable wrongs.

The defense bar's promotion of drawing such distinctions between something styled an "injury in law" and an "injury in fact" gained momentum in the last two decades as part of the quest to curtail class actions. When Congress couples a statutory right with a statutory remedy (the payment of \$100, for example, in lieu of a requirement to put on proof of economic injury), and plaintiffs proceed as a class, a finding of liability can impose

289 Meltzer, *Preemption and Textualism*, *supra* note 110, at 56.

290 *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). And, as Meltzer explained, in preemption, there has been a "dominance in this area of a nontextualist approach to interpretation." Meltzer, *Preemption and Textualism*, *supra* note 110, at 56.

291 Justice Thomas "remain[s] of the view that the [FAA] does not apply to proceedings in state courts." *DIRECTV*, 136 S. Ct. at 471 (Thomas, J., dissenting).

292 *Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984) (O'Connor, J., dissenting).

293 The Court has taken other liberties with federal statutes creating rights. I have already noted the Court's 2000 override of the civil rights remedy in the Violence Against Women Act. *See United States v. Morrison*, 529 U.S. 598 (2000); *supra* note 179 and accompanying text.

significant costs. In response, the potential defendants have spawned a debate under the moniker of a “no-injury claim.”²⁹⁴

A case on the docket in 2012 ended without reaching the “no-injury” question,²⁹⁵ and the issue was posed again in the 2015–2016 term in *Spokeo Inc. v. Robins*,²⁹⁶ which resulted in an ambiguous holding remanding the issue to the Ninth Circuit. Thomas Robins filed a proposed class action alleging that Spokeo Inc., which runs a website, had violated the Fair Credit Reporting Act (FCRA) by inaccurately describing his education and financial status as well as failing to follow the required procedures for posting information.²⁹⁷ The FCRA, dating from 1970,²⁹⁸ protects consumers by authorizing federal agencies and state attorneys general to bring cases²⁹⁹ if credit agen-

294 Some commentators trace this idea of “no-injury” to the current Chief Justice who, when at the Solicitor General’s Office in the early 1990s, represented Secretary of the Interior Manuel Lujan before the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Roberts had previously argued on Lujan’s behalf in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). In 1993, while in private practice, he wrote an essay defending the Court’s decision in *Lujan v. Defenders of Wildlife*. See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). Yet that essay is more focused on the *Lujan* scenario of generalized injury; the other examples of legislative overreach he used did not address the specific statutory claims now in focus.

295 See, e.g., *First Am. v. Edwards*, 132 S. Ct. 2536 (2012), *cert. dismissed as improvidently granted*. At issue was whether a conflict of interest as defined by the Real Estate Settlement Provider Act gave rise to redress, despite the lack of economic injury. In oral argument, Chief Justice Roberts asked questions about the distinction between injury in fact and injury in law, as he challenged the argument that “violation of a statute is injury-in-fact” rather than “injury-in-law” and noted that “what is required [for standing] is injury-in-fact.” Transcript of Oral Argument at 32, *Edwards*, 132 S. Ct. 2536 (No. 10-708).

296 See *Spokeo Inc. v. Robins*, 135 S. Ct. 1892 (Mem.) (2015), *granting cert. to Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). The Court’s decision by Justice Alito, 136 S.Ct. 1540 (2016), is discussed below. See *infra* notes 336–41.

297 See Complaint at 8, *Robins v. Spokeo*, No. CV10-05306-ODW-AGRx, 2010 WL 11240827 (C.D. Cal. Jul. 20, 2010).

298 See Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified at 15 U.S.C. §§ 1681–81x (2012)).

299 See 15 U.S.C. §§ 1681s(a)–(c) (providing for enforcement of the FCRA by the FTC, the Consumer Financial Protection Bureau, and state attorneys general).

State attorneys general can rely on the statute as well as on state analogues. See Brief of Amici Curiae States of Massachusetts, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Minnesota, Mississippi, New Mexico, New York, Oregon, and Washington in Support of Respondent at 1, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339). The statute expressly preempted certain state claims, including state defamation, invasions of privacy, and negligence, unless based on “false information furnished with malice.” See 15 U.S.C. § 1681h(e).

As of 2011, the Consumer Financial Protection Bureau had dealt with more than “43,000 complaints about inaccuracies on credit reports.” See Brief for Experian Information Solutions, Inc., as Amicus Curiae Supporting Petitioner at 24, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339). As of February 25, 2016, the CFPB had received 84,443 credit-reporting complaints. See *Beta Consumer Complaints Visualization, Number of Complaints by Product*, CONSUMER FIN. PROT. BUREAU, <https://data.consumerfinance.gov/view/wkue-ycpk> (last visited May 20, 2016).

cies reported inaccurate or misleading information,³⁰⁰ and by creating private rights of action.

In 1996 amendments, Congress added that, for “willful” violations, courts could award damages in private actions specified by statute as an alternative to sums established through evidentiary hearings.³⁰¹ Specifically, the FCRA instructs courts either to award damages as proven or to rely on “damages of not less than \$100 and not more than \$1,000.”³⁰² As argued to the Supreme Court, permitting FCRA statutory damages reflects the “difficulty of documenting that injury, given the structural characteristics of the offending conduct.”³⁰³ Identifying what false information passed from one database to another, and then reached which entities to result in lost opportunities (for jobs, or credit, and the like) entails costly, if not insurmountable, problems of proof. Specifying damages is one way to lower the transaction costs of litigants and save the time of federal judges.

Spokeo, joined by many amici, objected to Robins’s claim on several grounds. One was that the alleged errors, describing him as “wealthier” and better educated than he was, did not constitute a “harm.”³⁰⁴ But the larger objection was to the proposed class action, and hence that the \$100–\$1000 of specified damages could be multiplied many times over. As the case proceeded through the courts, Spokeo’s amici argued that a lawsuit like Robins’s “threatens to greatly expand . . . [the] intended scope of consumer protection” and would expose “credit bureaus . . . to potentially massive class action cases brought by or on behalf of persons without any real-world harm.”³⁰⁵

300 15 U.S.C. § 1681(b) (describing the purpose of the act as “requir[ing] that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information”).

301 See Pub. L. No. 104-208, tit. II, subtitle D, § 2412, 110 Stat. at 3009–446 (1996) (codified at 15 U.S.C. § 1681n(a)(1)(A)) (“Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . .”). For negligent violations of the act, a consumer may obtain only “actual damages.” 15 U.S.C. § 1681o(a).

302 15 U.S.C. § 1681n(a)(1)(A).

303 Brief of Amici Curiae Information Privacy Law Scholars in Support of Respondent at 12, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

304 See, e.g., Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner at 3–4, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

305 Brief of Trans Union LLC as Amicus Curiae in Support of Petitioner at 1–2, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339). As explained by the U.S. Chamber of Commerce, collective relief with statutorily specified damages could impose large economic penalties when the class members have not suffered real economic losses. Brief of the Chamber of Commerce of the United States of America, The American Hotel & Lodging Association, The American Tort Reform Association, The International Association of Defense Counsel, The National Association of Manufacturers, and The National Federation of Independent Business as Amici Curiae in Support of Petitioner at 12–26, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339). See also Brief of the Coalition for Sensible Public Records Access; American Escrow Association; American Land Title Association; Consumer Mortgage Coalition; National

A district judge concluded that Mr. Robins’s allegations that the misinformation hurt his employment prospects were too speculative to constitute the harm required by Article III. The lower court dismissed the lawsuit by drawing the distinction between the allegations of statutory violations (taken to be true at that stage) and the “actual” harm required by the Court’s Article III jurisprudence.³⁰⁶ The Ninth Circuit reversed, and the Supreme Court granted review.³⁰⁷ Before discussing its ruling, the arguments presented to the Court merit analysis.

Spokeo is, of course, not the first case in which judges have examined the nature and quality of an individual’s injury, and the general doctrinal rubric has been “standing.” During the last few decades, the Court’s jurisprudence has focused on the concreteness and specificity of injuries, as well as on whether individuals fall within the “zone” of interests that a statute addresses. A major exemplar in the 1990s was *Lujan v. Defenders of Wildlife*, involving the Endangered Species Act (ESA), which obliged environmental impact statements for federally funded projects and authorizing “any person” (including organizations) to “commence a civil suit on his own behalf” for failures to do so.³⁰⁸ One question was whether that obligation applied off-shore, and the federal government’s answers varied depending on who was the U.S. President. When alterations of the Aswan Dam were contemplated, environmentalists argued that the government had to comply with the ESA. In a plurality opinion, the Court concluded that the plaintiffs, living in the United States far from the area, could not show a specific particularized injury (“injury in fact”), nor the requisite nexus and relationship between the alleged harm (a loss of animal habitat and maybe of the animals themselves), the alleged violation (procedural failures), and the relief requested (stopping the funding).³⁰⁹

Association of Realtors; and Real Estate Services Providers Council, Inc. (RESPRO) as Amici Curiae in Support of Petitioner at 6, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (arguing that meritless settlements will result out of fear of “overwhelming liability”); Brief for Amici Curiae Time Inc. and Seven Media Organizations in Support of Petitioner at 4, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (warning of the “chilling effects of unbridled class actions brought—or even threatened—by uninjured plaintiffs”). The question of the propriety of class actions in this context was also in focus in the Supreme Court argument. See Transcript of Oral Argument, *Spokeo, Inc. v. Robins*, No. 13-1339 (2015).

306 *Robins v. Spokeo*, No. CV10-05306-ODW-AGRx, 2011 WL 1793334, at *1 (C.D. Cal. May 11, 2011).

307 *Spokeo*, 135 S. Ct. 1892, *granting cert. to Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014).

308 *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); see also Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (2012)).

309 See *Lujan*, 504 U.S. at 560-62 (plurality opinion). Justice Stevens would have ruled that the plaintiffs had standing but lost on the merits, see *id.* at 581-82 (Stevens, J., concurring in the judgment), and Justices Souter and Kennedy noted that while Congress could create new rights and remedies, Congress needed to provide more specificity about who could enforce them, see *id.* at 580 (Kennedy, J., concurring in part and concurring in the

But *Spokeo* offered a different paradigm than *Lujan*, in that Mr. Robins presented the very kind of particularized harm (the circulation of false information about him) that the FCRA protects and for which it specified remedies. Moreover, given that the Federal Trade Commission had sued and settled with the defendant Spokeo for other violations of the FCRA,³¹⁰ Mr. Robins's complaint passed the "plausibility" test that the Supreme Court has imposed on pleadings.³¹¹

The briefing before the Supreme Court in *Spokeo* clarified the kinds of decisions the Justices could have made. A first question was about statutory interpretation, as some of Mr. Robins's critics argued that the statute, which discussed the "adverse effect" of credit information on a specific plaintiff, required proof of actual harm.³¹² A sub-issue was whether inaccurate personal information that seems positive could impose adverse effects, as Mr. Robins alleged, and whether making such misinformation about a person's education and wealth available electronically imposed "real" injuries that Congress can protect through new statutes.³¹³ Related to the statutory interpretation question was the allocation of authority between private and public actors. Spokeo's amici argued that enforcement of these rights by federal and state agencies sufficed, and they urged the Court to limit private enforce-

judgment). The Court has many standing decisions, and a recent example is *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2663 (2015).

310 Complaint for Civil Penalties, Injunction and Other Relief, *United States v. Spokeo, Inc.*, No. 2:12-cv-05001 (C.D. Cal. Jun. 7, 2012) (alleging that Spokeo violated the FCRA by selling detailed information profiles of consumers to companies in the human resources, background screening, and recruiting industries without complying with several FCRA requirements). Spokeo paid \$800,000 to the FTC to settle the charges. See Consent Decree and Order for Civil Penalties, Injunction, and Other Relief at 4, *United States v. Spokeo, Inc.*, No. 2:12-cv-05001 (C.D. Cal. Jun. 7, 2012).

311 See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); see also Brief for Center for Democracy & Technology, Electronic Frontier Foundation, New America's Open Technology Institute and World Privacy Forum as Amici Curiae Supporting Respondent, at 14–17, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (arguing that "self-regulation" within the credit reporting industry does not "eliminate the need for a private right of action in the Fair Credit Reporting Act").

312 See Brief for Experian Information Solutions, Inc. as Amicus Curiae Supporting Petitioner at 17–18, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

313 See Amicus Curiae Brief of Center for Digital Democracy in Support of Respondent at 2–3, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339). Some of the amici in support of Mr. Robins argued the importance of private enforcement in particular, as public agencies had limited resources and often settled actions. Thus, violation of the statute alone without a showing of additional injuries ought to suffice. See, e.g., Brief for Center for Democracy & Technology et al. as Amici Curiae Supporting Respondent, *supra* note 311, at 3–5.

Mr. Robins's proponents pointed to various kinds of injuries from inaccuracies, such as being excluded from job searches, losing out on insurance, and being assumed to be untrustworthy. *Id.* at 12–13. They also argued that inflated credentials, such as those alleged by Mr. Robins, could cause candidates to be excluded as overqualified for some jobs. *Id.* at 13.

ment.³¹⁴ Robins’s defenders insisted that public and private incentives diverged, and cited the settlements of such public actions as evidence of the need for private enforcement.³¹⁵

A second line of argument was about whether the FCRA is innovative or better understood as a statutory analogue to injuries long recognized by constitutional and common law. Some of Robins’s amici argued that the FCRA protected “reputation and property” as had the common law, which also provided remedies (for example, based on publication if a person was libeled) that do not turn on “proof of further harm” beyond the violation itself.³¹⁶ Thus, examples such as trespass or the violation of a right to vote were cited for the proposition that law did not require all injuries to be cashed out in economic loss.³¹⁷ Remedies scholars offered a related analysis, that the “law of restitution and unjust enrichment creates remedies and causes of action based on *gain* to defendant rather than *loss* to plaintiff,” and that at the founding, plaintiffs could recover “statutory damages or penalties in an action of debt” without proof of specific damages to themselves.³¹⁸

A third tack was to defend the power of Congress to identify and to “define new legal rights” and authorize their vindication.³¹⁹ Rather than

314 See Brief for the Coalition for Sensible Public Records Access, et al. as Amici Curiae Supporting Petitioner at 25–31, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (arguing that public enforcement, via state agencies and Congress, was sufficient); see also Brief for Ebay Inc., Facebook, Inc., Google Inc., and Yahoo! Inc. as Amici Curiae Supporting Petitioner at 4–6, 19–20, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

315 See Brief for Center for Democracy & Technology et al. as Amici Curiae Supporting Respondent, *supra* note 311, at 16–17.

316 See Brief of Amici Curiae State of Massachusetts et al., *supra* note 299, at 3, 23–24 (pointing to publication of false information and to trespass, as well as infringement actions); see also Brief of Amici Curiae Public Citizen, Inc. et al., in Support of Respondent at 7, 18, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (“[A]s a man is said to have a right to his property, he may equally be said to have a property in his rights” (quoting James Madison, *Property*, NAT’L GAZETTE, Mar. 27 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266)). This brief also gave examples of deprivations of legal rights from English common law, including the loss of the right to vote and the diversion of water. *Id.* at 8–9. It also cited harm to reputation, privacy, and defamation as harms that did not require proof of injury other than the action itself in both English and U.S. common law. *Id.* at 18–21.

317 See Brief for Public Law Professors as Amici Curiae in Support of Respondent at 19–20, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339); Brief of Restitution and Remedies Scholars as Amicus Curiae in Support of Respondent at 2, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

318 Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 2, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (emphasis added).

319 See *Vt. Agency of Nat. Res. v. United States* 529 U.S. 765, 773 (2000); see also *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before [H]owever, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”). An oft-cited example is the mechanism that Congress crafted to enforce the Fair Housing Act of 1968. The statute makes unlawful the denial of housing based on race; the Court recognized the ability of a black woman who planned to rent an apartment but was denied information to bring a lawsuit for the violation of the Fair Housing Act.

being moored in analogies to the common law, the claim was that invention is more than appropriate when technologies change. In the *Spokeo* litigation, the examples proffered included environmental and aesthetic injuries, with citations to many cases in which Justices such as Anthony Kennedy have specifically recognized the legislature's power to identify new rights and remedies.³²⁰

The one vector on which the disputants agreed was that the stakes were about separation of powers. While Robins's supporters insisted on locating rights-creation in Congress by warning the judiciary not to intrude into the legislature's province, Spokeo's proponents posited either that Congress was trenching on the Court's role in bounding Article III³²¹ or that Article II's Take Care Clause permitted enforcement of the statute only by the executive, unless individuals have "actual injuries."³²²

The Constitution does not use the word "injury" (concrete, particularized, or speculative), nor does it offer the phrases "causes of action," "claim for relief," or terms such as "nexus" and "redressability." But the idea that not all experiences of harm produce legally cognizable "cases" is commonplace. The concept of a cause of action is slippery precisely because of a space between what people experience as harm (the withdrawal of an invitation to dinner, rejection from being admitted to universities, loss of recreational opportunities, sexual harassment, breaches of promises to marry, household violence) and what law recognizes as actionable. As the examples just proffered make plain, what kind of injuries law redresses changes over time through constitutional and common law and by virtue of new legislation. Further, as the many cases turning on the idea of "standing" make plain, debates can readily be had about the requisite kinds of relationships between potential defendants and plaintiffs.

What is new is the effort to persuade judges that although Congress has regulatory authority under its Commerce Clause powers to prohibit specified actions, impose duties on how to treat individuals, and authorize private enforcement if specified breaches occur, judges should use their own metrics to decide that the harms Congress has recognized do not suffice to constitute "cases" as required by Article III.

The novelty of this argument can be seen in the array of phrases deployed to try to escape the majoritarian presumption that Congress can

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). In *Spokeo*, the Privacy Scholars argue that Congress ought also be able to recognize that technology can impose new forms of injury. Brief of Amici Curiae Information Privacy Law Scholars in Support of Respondent at 17–27, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339); see also Brief of Amici Curiae Public Citizen, Inc. et al., *supra* note 316, at 6.

320 See *Lujan*, 504 U.S. 555 (Kennedy, J., concurring); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

321 See Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner at 8–23, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

322 Brief of the American Bankers Association, the Consumer Bankers Association, the Mortgage Bankers Association, the Clearing House, and the Financial Services Roundtable as Amici Curiae at 3, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

make such judgments and expand the common law rights-to-remedies traditions. Hence, both the briefing in *Spokeo* and the literature more generally grope for language to license the judicial trump. Proffered were "injury in law," "injury in fact,"³²³ a "bare violation of statutory duties,"³²⁴ an "uninjured plaintiff,"³²⁵ "wholly uninjured persons,"³²⁶ no "real-world sense" of injury or no "real" injury,³²⁷ "no-harm class actions,"³²⁸ a "technical violation,"³²⁹ a "statutory injury,"³³⁰ "statutory injury-in-law,"³³¹ the absence of "actual harm," an "empty suit,"³³² and "negligible or infinitesimal" economic loss.³³³

These terms have attracted a good deal of scholarly attention. Professor Patricia Moore has analyzed the deployment of these phrases, the history of the word "injury" in Black's Law Dictionary, and the absence of case law recognizing "injury-in-law" as a viable concept.³³⁴ The work of her's and others makes plain that the many briefs aimed to reopen debate about the wisdom of the enactment of the FCRA and of other statutes that, coupled with class actions, could impose significant penalties on defendants. Thus, as Henry

323 Sometimes these arguments invoke the Chief Justice's article on standing. See, e.g., Brief of the American Bankers Association et al. as Amici Curiae at 9, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339) (citing Roberts, *supra* note 294).

324 Brief of Amici Curiae New England Legal Foundation and Associated Industries of Massachusetts in Support of Petitioner at 5, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

325 *Id.* at 15.

326 Brief of Trans Union LLC as Amicus Curiae in Support of Petitioner, *supra* note 305, at 24.

327 *Id.* at 3.

328 *Id.* at 7.

329 Brief of Public Justice, P.C., et al. as Amici Curiae in Support of Respondent at 18, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

330 Brief of Amicus Curiae Consumer Data Industry Association in Support of Petitioner at 14, *Spokeo*, 135 S. Ct. 1892 (No. 13-1339).

331 Brief of the Chamber of Commerce et al., *supra* note 305, at 9.

332 Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599 (2015).

333 This phrase comes from a report seeking to identify what it describes as an empirical search for such cases; researchers classified cases by determining that plaintiffs had not suffered "actual or imminent concrete harm," the "only harm was a technical statutory violation," economic loss was "negligible or infinitesimal," and the recover was "unrelated to compensating" plaintiffs' losses. See Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions 9–10* (Feb. 1, 2016) (unpublished manuscript), <http://ssrn.com/abstract=2726905>. Thus, the researchers supplied their own view of harm and then identified "432 no-injury cases" in state and federal courts resolved between 2005 and 2015. *Id.* at 1. The exemplary federal statutes included the FCRA, as well as the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, and the Electronic Funds Transfer Act. More than 97% were resolved without trial, and the research summary appears to want to conclude—albeit without data on claiming rates for the class actions studied—that individuals recouped little benefit and administrative expenses (including lawyers' fees) take the bulk of monetary awards. *Id.* at 4–5, 23–24.

334 See Patricia W. Hatamy Moore, *Spokeo, Inc. v. Robins: The Illusory "No-Injury Class" Reaches the Supreme Court*, 2 ST. THOMAS J. COMPLEX LITIG. 1 (2016).

Monaghan underscored in this symposium, the debate reflected that “injury ‘in fact’ has a strongly normative component.”³³⁵

In May of 2016, Justice Alito provided a response for the Court, which sent the case back to the Ninth Circuit for analysis of the distinction that he drew between “concreteness and particularization,” each of which, the Court directed, required independent evaluation.³³⁶ In terms of guidance on the delineation (which appears to be elusive), Justice Alito said that “intangible injuries” could be “concrete”; when determining “whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.”³³⁷ Those statements could be read as agreeing with the briefs arguing on behalf of Robins and evoking both the precedents about remedies and deference to Congress. Yet the majority also noted that Robins could not “satisfy the demands of Article III by alleging a bare procedural violation” unless he had also plausibly claimed that harms flowed.³³⁸

Justice Thomas offered a concurrence that delineated common law private rights from public rights; the latter were what he deemed to be interests more appropriately protected by the Executive.³³⁹ For Justice Thomas, Mr. Robins had “no standing to sue Spokeo, in his own name, for violations of the duties that Spokeo owes to the public collectively.”³⁴⁰ Justice Ginsburg, joined by Justice Sotomayor, dissented. Reading the majority as concluding that Robins met the “particularity requirement,” the dissent argued that he had also met the showing of a particularized “concrete” injury; Robins complained of “misinformation about his education, family situation, and economic status.”³⁴¹

These disagreements among the jurists raise questions about what norms supply answers about the role to be played by federal judges. The posture of the Court that Meltzer advanced as either an “agent” or a “junior partner” to Congress³⁴² and the approach embraced by proponents of a textualist approach would seem to require deference to congressional directives. Indeed, in 2014, in a unanimous decision authored by Justice Scalia, the Court concluded that it was neither supposed to “apply its independent policy judgment to recognize a cause of action that Congress has denied,” nor “limit a cause of action that Congress has created merely because ‘prudence’ dictates.”³⁴³

But even if judges were to shift away from deference or the interdependency remedial gap-filling (that I read Meltzer to have commended) and

335 Monaghan, *An Essay in Honor of Daniel Meltzer*, *supra* note 108, at 1818.

336 *Spokeo Inc. v. Robins*, 136 S. Ct. at 1540, 1548.

337 *Id.* at 1549.

338 *Id.* at 1550 (using a statement of an erroneous zip code as an example of a dissemination that would not constitute harm).

339 *Spokeo*, 136 S. Ct. 1540, 1550 (Thomas, J., concurring).

340 *Id.* at 1553.

341 *Id.* at 1554, 1556 (Ginsburg, J., dissenting, joined by Sotomayor, J.).

342 Fallon, *On Viewing the Courts as Junior Partners*, *supra* note 108.

343 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014).

become overseers, the question returns: What norms supply answers for how such an overseer ought to behave? Two competing common heritages can now be drawn upon, one counseling hospitality and the other committed to limiting both judicial and congressional authority to provide remedies in courts.

As the majority and concurring opinions in *Spokeo* illustrate, which approach seems more "plausible"³⁴⁴ has changed. In earlier decades, I watched students in my Federal Courts classes react with distress when confronted with victims (such as the member of the armed services who drowned in *Boyle*, or the unwitting subjects of LSD experiments³⁴⁵ as well as those alleging torture as in *Vance*) who lost the chance to prove their claims of rights. They were in the generations schooled under the heritage presuming federal courts to be hospitable. In these last few years, however, I have encountered much less outrage. Instead, I have found students in search of the "logic" behind the dizzying array of doctrines resulting in remedial preclusion. ("999 ways to kick a case out of federal court," as Meltzer put it.) Students increasingly take at face value arguments that judges ought to create immunities, even when Congress has not expressly done so. The illogic of refusing to imply causes of action but implying limits on liability is subsumed by a larger narrative that courts *ought* to be unavailing.

These students have thus incorporated the attitude that courts (and new lawyers) should be suspicious of plaintiffs seeking redress, whether they be members of "the public at large" (per Meltzer) or specific victims, and whether the harms sound in tort, torture, misinformation on the web, or the environment. Many of these rulings are not harking to a conservative (lower-case c) approach to judicial interpretation but rather calling for expansive exercises of judicial authority. In lieu of the common law development of constitutional remedies that Meltzer (as well as Richard Fallon and Henry Monaghan³⁴⁶) has commended, the Court has developed diverse methods of preclusion rendering courts unavailable in the face of an array of alleged wrongdoings by both private and public actors.

IV. CONGRESSIONAL LOYALTY TO THE FEDERAL COURTS

At the outset, I joined Daniel Meltzer in seeing the federal courts as the font of the "common intellectual heritage." Yet I also resisted too heavy a reliance on the federal judiciary by arguing the centrality of Congress in bringing the courts into play. And, indeed, even as the Supreme Court during the last four decades has tutored us on the propriety of barriers to the federal courts, Congress continued, by and large, to provide ways for more people to use them.

344 "Plausibility" is the test the Court has required for the adequacy of federal complaints. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

345 See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 502 (1988); *United States v. Stanley*, 483 U.S. 669, 671–72 (1987).

346 Fallon & Meltzer, *New Law*, *supra* note 90; Monaghan, *Foreword*, *supra* note 228.

Of course, an account of the decades has complexity, as Congress has sometimes limited access, just as the Supreme Court has sometimes opened the doors, either by refusing the congressional constraints or by recognizing new rights, such as Second Amendment gun claims. Thus, in the mid-1990s, what for Federal Courts scholars had been hypotheticals about “jurisdiction stripping” turned into reality, as Congress imposed specific limits on access to federal courts for certain kinds of litigants. In a trio of enactments (the Prison Litigation Reform Act (PLRA),³⁴⁷ the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),³⁴⁸ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),³⁴⁹ Congress targeted prisoners, migrants, and welfare recipients and curtailed their ability to make use of courts. And in 2006, in the Military Commissions Act (MCA),³⁵⁰ Congress did the same for those in detention at Guantánamo Bay.

Further, Congress has responded to criticisms of securities litigation and class actions by imposing new requirements for the filing of such cases. The Private Securities Litigation Reform Act of 1995 (PSLRA) created a series of pre-conditions to filing securities class actions, structured the requirements for attorneys to collect fees, and changed some of the requirements for pleading claims, potentially making it more difficult to bring cases.³⁵¹ In contrast, the Class Action Fairness Act of 2005 (CAFA) opened new doors to federal courts by relaxing diversity requirements so that defendants in single-state class actions involving large numbers of people could remove such cases to the federal courts.³⁵² Interest in such removal stemmed, at least from those pressing for CAFA’s enactment, on the assumption that federal judges would be less hospitable to class actions than many state court judges.

347 Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 42 U.S.C. § 1997e (2012)). The impact of the PLRA is analyzed in Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015).

348 Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at scattered sections of the U.S. Code).

349 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C. (2012)).

350 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2631 (codified at 10 U.S.C. §§ 948a *et seq.* (2012)).

351 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, §§ 101, 109 Stat. 737, 737-49 (codified at 15 U.S.C. §§ 77z-1, 78u-4 (2012)). The impact of the statute has been debated. See, e.g., Stephen J. Choi, Karen K. Nelson & A.C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35 (2009); Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year’s Experience: A Statistical and Legal Analysis of Class Action Securities Fraud Litigation Under the Private Securities Litigation Reform Act of 1995* (John M. Olin Program in Law and Econ., Working Paper No. 140, 1997).

352 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2012)); see generally Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. 1439 (2008).

In a few contexts, the Court has, in turn, rebuffed some jurisdictional incursions while tolerating others. As is familiar, in *Boumediene v. Bush*, decided in 2008, a five-person majority held the MCA unconstitutional in its limiting habeas corpus petitions by individuals detained pre-trial by the federal government at Guantánamo Bay.³⁵³ Further, the Court's inventive interpretations of IIRIRA left windows open for migrants to obtain judicial review of certain decisions by the executive.³⁵⁴ And, while the Court has largely deferred on the PLRA and on AEDPA, it has done so in part when these statutes converge with the Court's own decisions constraining court access for prisoners and criminal defendants.³⁵⁵ On the other hand, the Court has also authorized judicial review of claims brought by some prisoners, such as those in California's prisons who were so densely incarcerated as to be unsafe,³⁵⁶ and by an occasional habeas petitioner such as the one whose lawyer left the firm without safeguarding his client's access rights.³⁵⁷

More generally, the examples of congressional jurisdiction-stripping in the 1990s remain aberrational. Thus, even as the Court limited its authority to create new rights, Congress continued to respond to diverse problems (sometimes related to Supreme Court decisions) by deploying the federal courts. Below, I offer a sampling of the groups that have succeeded during the past twenty years in mobilizing congressional support for new rights, implemented in part through federal litigation. I then sketch the federal judiciary's success (aside from judges' salaries) in securing funding and consider the ways in which the political economy reflected in these congressional acts underscores the function of the federal courts and of private rights as part of the American political identity. Thus, even as members of Congress sometimes assail judges as "activists," the Congress as a body has remained a judiciary loyalist, prompted by an array of incentives to keep endowing the federal courts in a variety of ways.³⁵⁸

Some of the new rights of the recent decades are well known, such as the Americans with Disabilities Act (ADA) of 1990, which authorized "any person alleging discrimination on the basis of disability" in violation of the Act to file a complaint in federal court.³⁵⁹ The Family Medical Leave Act (FMLA) of 1993 both gave employees unpaid leave for care-giving and the authority to enforce those rights if employers, including state governments, violated the

353 *Boumediene v. Bush*, 553 U.S. 723 (2008); see generally Stephen Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011).

354 *INS v. St. Cyr*, 533 U.S. 289 (2001); *Felker v. Turpin*, 518 U.S. 1051 (1996).

355 See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

356 *Brown v. Plata*, 563 U.S. 493 (2011).

357 See, e.g., *Maples v. Thomas*, 132 S. Ct. 912 (2012).

358 See, e.g., FARHANG, LITIGATION STATE, *supra* note 154, at 19–24.

359 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 107, 104 Stat. 327, 336 (codified as amended at 42 U.S.C. § 12117 (2012)).

FMLA.³⁶⁰ The 1994 Violence Against Women Act (VAWA) authorized damage actions for victims of gender-based violence (later rejected by the U.S. Supreme Court),³⁶¹ as well as new federal criminal penalties.³⁶² In 1996, as discussed, Congress amended the Fair Credit Reporting Act to provide for civil liability for a consumer reporting agency's "willful noncompliance" with the Act.³⁶³

Other statutes have a lower profile. In 1997, Congress added enforcement authority against violations of the Atlantic Striped Bass Conservation Act,³⁶⁴ and created a new federal crime of "electronic theft."³⁶⁵ And as concerns mounted about whether computers would crash as the century turned, Congress contemplated a path to federal courts that, as it turned out, was not needed.³⁶⁶

Since 2000, Congress has continued to enlist the federal judiciary in protecting rights ranging from remedies for victims of global trafficking to interference with public wilderness lands in New Mexico. In 2003, for example, Congress created a new "private right of action" for victims of forced labor, human trafficking, and child sex trafficking, all of whom were authorized to

360 Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 107, 107 Stat. 6, 15 (codified as amended at 29 U.S.C. § 2617 (2012)). The Court upheld some applications of the FMLA against states, but ruled out obtaining damages from states for violations of other provisions. *Compare Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that state employees may recover money damages in federal court for state failures to comply with the family-care provision of the FMLA), *with Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012) (holding that Congress could not abrogate states' sovereign immunity for damages under FMLA's self-care provision).

361 Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941 (codified as amended at 42 U.S.C. § 13981). As is also familiar, the Court later limited both of these statutes; in *United States v. Morrison*, 529 U.S. 598 (2000), the Court held the civil rights remedy of the 1994 VAWA unconstitutional.

362 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23.

363 Fair Credit Reporting Act, Pub. L. No. 104-208, § 2412 (1996) (codified as amended at 15 U.S.C. § 1681n (2012)). The authority to do so for claims not asserting actual damages is now pending before the court. *See Spokeo, Inc., v. Robins*, 135 S. Ct. 1892 (2015) (granting petition for writ of certiorari).

364 The Atlantic Striped Bass Conservation Act Amendments of 1997, Pub. L. No. 105-146, § 5, 111 Stat. 2672, 2674 (codified at 16 U.S.C. §§ 5154(c), (d) (2012)).

365 No Electronic Theft Act, Public L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended in scattered sections of 17 and 18 U.S.C. (2012)).

366 Drafts of some of the bills proposed federal jurisdiction, including class actions, S. 96, 106th Cong. §§ 401-03 (1999), alternatives introduced federal defenses, *see* H.R. 775, 106th Cong. (1999). The Y2K Act provided jurisdiction, and potential defenses, to actions stemming from disputes relating to computer failures at the year 2000. Pub. L. No. 106-37, 113 Stat. 185 (1999) (codified at 15 U.S.C. §§ 6601-17). The Judicial Conference opposed the expansion of its jurisdiction. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, ADDENDUM TO THE REPORT OF THE COMMITTEE ON FEDERAL-STATE JURISDICTION 17 (Mar. 1999).

sue the perpetrators.³⁶⁷ In 2004, responding to exploitation of student athletes, Congress authorized states to bring federal cases on behalf of their resident student athletes who entered into contracts based on misleading information.³⁶⁸ In 2005, the Ojito Wilderness Act designated some new recreational areas in New Mexico through using federal lands in trust for the Zia Pueblo and created private enforcement rights to ensure public access to the newly designated wilderness land.³⁶⁹ In 2012, after the Supreme Court had ruled that the First Amendment protected anti-gay protestors at the funeral of a U.S. soldier,³⁷⁰ Congress crafted a civil remedy for those alleging that individuals had disrupted the funeral of a member of the armed services.³⁷¹ In 2015, Congress created federal oversight of insurance brokers through a

367 Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 1595, 117 Stat. 2875, 2878 (creating rights for any victim to bring a damage action “in an appropriate district court of the United States” against “the perpetrator”). Under the Act, successful plaintiffs can recover “reasonable attorneys fees,” and judges were required to stay civil cases “during the pendency of any criminal action arising out of the same occurrence.” *Id.* §§ 1595(a)–(b). In 2008, the statute was amended to authorize lawsuits against “whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter.” *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 221(2), 122 Stat. 5044, 5067 (codified at 18 U.S.C. § 1595(a)).

368 Sports Agent Responsibility and Trust Act, Pub. L. No. 108-304, § 5, 118 Stat. 1125, 1127–28 (2004) (codified at 15 U.S.C. § 7804) (authorizing filings on behalf of students harmed by misleading or false statements to induce the athlete “to enter into an agency contract” or the provision of gifts to do so). States can seek equitable relief, damages, restitution, or “other compensation,” but can only file if the state’s attorney general has “reason to believe that an interest of the residents of that State has been or is threatened.” *Id.* § 5(a)(1).

369 Ojito Wilderness Act, Pub. L. No. 109-94, §§ 3–4, 119 Stat. 2106, 2108–10 (2005) (codified at 16 U.S.C. § 1132 note) (designating lands in New Mexico as “wilderness” within the scope of the National Wilderness Preservation System and providing a continuing public right of access to the land for enumerated uses, to be enforced by “any person” through a civil action for declaratory or injunctive relief in the United States District Court for the District of New Mexico). Included in the new wilderness land was federal land that the Secretary of the Interior would “take into trust, on behalf of the Pueblo of Zia.” *See* S. REP. NO. 109-13, at 5–6 (2005).

370 *See Snyder v. Phelps*, 562 U.S. 443 (2011). When a member of the U.S. armed services who died “in the line of duty” in Iraq was buried in Kansas, members of the Westboro Baptist Church picketed near his funeral and held signs, with slogans such as “Thank God for Dead Soldiers” and “Don’t Pray for the USA.” *Id.* at 447–48. A jury awarded millions of dollars in damages to the soldier’s father, but the Court held that the First Amendment protected the protestors’ speech, given the distance of the picketers from the funeral.

371 Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 601, 126 Stat. 1165, 1195 (codified at 18 U.S.C. § 1388). This amendment, which aimed to survive challenges under *Snyder*, authorized the Attorney General and immediate family of members of the Armed Forces to sue individuals if alleging that they were subjected, within two hours before or after a funeral, to protests within 300 feet of the funeral that disturbed “the peace or good order” of such funeral. *See* 18 U.S.C. §§ 1388(c)(1)–(3) (2012). The statute provides for “statutory damages” of “not less

National Association of Registered Agents and Brokers and authorized “[a]ny person aggrieved by a decision or action” of that association, after exhausting administrative remedies, to sue that association.³⁷²

Analysts have sought to account for the political economy that prompts Congress repeatedly to create new rights by arguing that they reflect commitments to decentralized, private enforcement.³⁷³ From the vantage point of the “common intellectual heritage,” these many enactments shape a national political identity commending, rather than criticizing, “litigiousness.” The authority to bring cases could be conceptualized as turning individuals into “private attorneys general” representing the public good (in a manner to which Justice Thomas objected in *Spokeo*). But private enforcement can also *meld* the public and the private, as individuals function not as representatives of others but as themselves, personally entitled to the status of worthy claimant in public courts.³⁷⁴ Moreover, this status is generative for the government, as individuals, constitutionally entitled to “petition for redress” (to borrow from the First Amendment), forge a relationship with the state and expect the state to be responsive to them.

In addition to continuing to confer rights of access to federal courts, Congress has remained steadfast in funding the federal courts, whose budget lines are small when compared to other federal programs but ample when compared to state judiciaries. Despite the Great Recession and contraction in the last decade, the federal judiciary has been successful in garnering significant dollars both directly and through some of the targeted anti-recession

than \$25,000 or more than \$50,000 per violation” as well as for “actual damages” and also creates a presumption of willfulness to disturb the funeral. *Id.* §§ 1388(d), (e).

372 See National Association of Registered Agents and Brokers Reform Act of 2015, Pub. L. No. 114-1, § 332, 129 Stat. 3, 26 (codified at 15 U.S.C § 6762(a)). The purpose of the statute was to create methods, through “licensing, continuing education” and other multistate methods to improve governance of insurance brokers, including through criminal background checks. *Id.* § 322.

373 See, e.g., FARHANG, LITIGATION STATE, *supra* note 154, at 5. Possible explanations include anxiety about central control as well as competition for power between Congress and the Executive, which may be dominated by different parties. Under this approach, the U.S. is a “weak” state in that, unlike some European countries, the preference is not to use organs of the state for enforcement. *Id.* at 6; see also Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013). They noted that private enforcement can both shift costs to private actors and rely on knowledge gathered outside government, as well as insure against administrative failures to implement legislative rights and enhance participatory democracy. Burbank, Farhang & Kritzer, *supra*, at 662–66. Farhang also found that many individuals, rather than politically organized plaintiffs, filed suit. See FARHANG, LITIGATION STATE, *supra* note 154, at 11. In his sample, interest group litigation constituted 2–5% of published federal appellate decisions between 1960 and 2004.

374 See generally Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

federally funded building programs.³⁷⁵ (The exception is the federal judiciary’s inability to obtain increases in salaries, which is an ongoing source of concern.³⁷⁶)

In some respects, the judiciary has been pressed into “cost containment,” including shrinking the judiciary’s “footprint.” In a 2013 report, “space reduction” was “priority Number One for the Space and Facilities Committee,” which aimed to reduce working spaces by three percent within five years.³⁷⁷ A “no net new” policy was put into place, requiring that any circuit seeking additional space had to identify reductions through trade-offs,³⁷⁸ such as “courtroom sharing” and cutting back on projections for space for new judgeships.³⁷⁹

Nonetheless, the 2016 budget allocations included funds to support construction of new courthouses in Tennessee, Ohio, North Carolina, Iowa, South Carolina, Alabama, Georgia, and Texas, as well as buildings earmarked for Mississippi and Vermont. In all, a billion dollars was provided that could be used for buildings. More generally, as the federal judge chairing the Judicial Conference’s Committee on the Budget explained to Congress when testifying in March of 2015, the judiciary had received “a 2.8 percent overall

375 U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-307, RECOVERY ACT: GSA’S COURTHOUSE PROJECTS ILLUSTRATE OPPORTUNITIES TO IMPROVE MANAGEMENT PRACTICES AND ANALYZE ENVIRONMENTAL OUTCOMES (2015).

376 See, e.g., CHIEF JUSTICE JOHN G. ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (Jan. 2007), <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf>. The Chief Justice stated that the failure to raise judicial pay had “reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.” *Id.*; see also CHIEF JUSTICE JOHN G. ROBERTS, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–4 (Jan. 2006), <http://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf>; AM. BAR ASS’N & FED. BAR ASS’N, FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM (2001), <http://www.fedbar.org/PDFs/Government-Relations/Federal-Judicial-Pay-Erosion-A-Report-on-the-Need-for-Reform.aspx?FT=.pdf>. Cost-of-living increases have come after judges have filed class-action lawsuits arguing that failing to do so violates Article III’s promise that judicial salaries not be diminished. See *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 1997 (2013).

377 31 *Court Facilities to be Downsized in First Year of Cost-Cutting Project*, ADMIN. OFFICE OF THE U.S. COURTS (Oct. 15, 2013), <http://www.uscourts.gov/news/2013/10/15/31-court-facilities-be-downsized-first-year-cost-cutting-project>.

378 Two years later, the judiciary’s budget chair testified that the 2013 goals of “3 percent space reduction target” would generally be met by 2018. Gibbons Judiciary’s Budget 2015, *supra* note 168, at 3–4 (detailing a 12% reduction, or 242,402 square feet, from the “courts’ rent bill,” largely through cutting spaces for probation and other court employees).

379 James C. Duff, Director of the Administrative Office of the U.S. Courts, before the Subcommittee on Financial Services and General Government of the Committee on Appropriations of the U.S. Senate, March 24, 2015, at 2. Duff, appreciative of support, mixed details of cost containment with need, when asking for a 3.8% increase for the AO, aiming for 3.8% above 2015.

increase in discretionary appropriations above fiscal year 2014.”³⁸⁰ In addition, and based on concerns about “longer-term funding prospects,”³⁸¹ the courts requested \$7 billion in discretionary appropriations for 2016, a 3.9% increase over 2015.³⁸²

The Senate Committee announced in turn that it was aiming for “\$6.9 billion for the federal courts, an increase of \$163 million above the FY2015 enacted level. This will provide sufficient funding for all federal court activities, including timely and efficient processing of federal cases, court security, and supervision of offenders and defendants.”³⁸³ And in December of 2015, the Administrative Office confirmed that the Consolidated Appropriations Act of 2016 contained \$6.78 billion in discretionary funding, providing a 1.2% increase “from the previous year and essentially equal to the Judiciary’s final budget request.”³⁸⁴ In short, as the Judiciary’s budget chair put it, this was “the third consecutive year that the Judiciary has received essentially full funding of its appropriations requirements,” and it was clear that Congress “treated the Judiciary as a top funding priority.”³⁸⁵

380 Gibbons Judiciary’s Budget 2015, *supra* note 168. That support built on the “5.1 percent appropriations increase Congress provided the Judiciary for fiscal year 2014” and therefore, together, matched what the judiciary thought it needed to recoup from “2013 sequestration cuts.” *Id.* at 1. Those 2015 operations funded support for 2352 judicial officers (including both Article III and non–Article III magistrate and bankruptcy judges) and some 28,500 court employees. *See also* James C. Duff, Director of the Administrative Office of the U.S. Courts, before the Senate Subcomm. on Fin. Servs. and General Government Comm. on Appropriations at 6 (Mar. 24, 2015). Duff made virtually the same statement to the house subcommittee on March 25, 2015, including his discussion of efforts to “increase diversity in the federal courts.” James C. Duff, Director of the Administrative Office of the U.S. Courts, before the House Subcomm. on Fin. Servs. and General Government Comm. on Appropriations at 5 (Mar. 25, 2015).

381 Gibbons Judiciary’s Budget 2015, *supra* note 168, at 2. Judge Gibbons reported that, while the revenue enabled the courts to fill vacancies in the offices of court clerks, public defenders, and probation, the judiciary worried that the spending cap growth of 2.4% through 2021 would mean that the courts could not meet the anticipated needs.

382 *Id.* at 2. The statement included hopes for three new magistrate judge positions, *id.* at 8, and more compensation for court-appointed counsel and security funding and increased daily fees for juries from \$40 to \$50, *id.* at 11.

383 Press Release, Sen. John Boozman, Senate Comm. Agrees to Boozman’s FY2016 Financial Services Appropriations Bill (July 23, 2015), <https://www.boozman.senate.gov/public/index.cfm/press-releases?ID=3C202CBF-B0B3-4274-8AF2-63E2CA714F94>.

384 *FY 2016 Funding Meets Judiciary Needs*, ADMIN. OFFICE OF THE U.S. COURTS (Dec. 21, 2015), <http://www.uscourts.gov/news/2015/12/21/fy-2016-funding-meets-judiciary-needs>.

385 *Id.*

V. ENABLING COURTS: NEW HERITAGES OF GAP-FILLING FOR NEEDY JUSTICE—FEDERAL AND STATE

A. *The Federal Docket in Decline*

The heritage that Daniel Meltzer celebrated, with federal courts as central expositors of American law, continues to be invoked. Indeed, limiting access to the federal courts has been justified as conserving the federal courts' capacity to do so.³⁸⁶ As Chief Justice Rehnquist explained when introducing the 1995 *Long Range Plan*, it aimed to preserve the "core values of the rule of law," "equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability," at risk because of the "limited financial resources of the federal government."³⁸⁷

Seeking to keep the number of life-tenured judgeships small,³⁸⁸ the Judicial Conference argued that limiting workload would make the federal courts "more accessible"³⁸⁹ by avoiding the "nightmarish" scenario of too many cases. Otherwise, "civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers."³⁹⁰ Further, district trial judges were already spending "fewer of their working hours in civil trials than ever before," and "the future may make the civil jury trial—and perhaps the civil bench trial as well—a creature of the past."³⁹¹ The projected denouement was that the "federal district courts, rather than being forums where the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice."³⁹² In this future, the "federal courts have by and large become criminal courts and forums for those who cannot afford private justice."³⁹³

Two decades have passed since these concerns were put forth, and as I detail below, the goals of reducing case filings have been met; indeed, filings were leveling off in the decade before the *Long Range Plan* was issued and have been flat since. Yet the population of people unrepresented by lawyers has grown in the appellate courts, and the capacity of "the weak" to call for accountings from "the strong" has been constrained by limits on class actions, preclusion of claims through FAA preemption, and growth in immunity doctrines. The identification of the federal courts with oppressive sentencing laws makes vivid their role as "criminal courts," and the number of trials has continued to decline, as have the hours judges spend on the bench.

386 Chief Justice Rehnquist introduced the Judicial Conference's 1995 *Long Range Plan*, replete with recommendations on retrenchment that were explained as in service of "conservation." See 1995 LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 184, at vii.

387 *Id.* at vii.

388 *Id.* at viii.

389 *Id.* at 5.

390 *Id.* at 18–19.

391 *Id.* at 19–20.

392 *Id.* at 20.

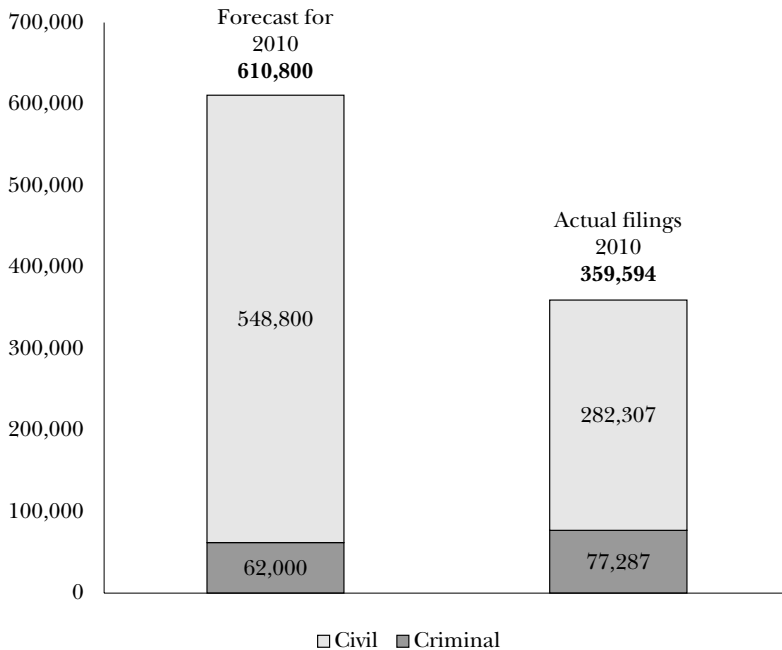
393 *Id.*

Given that much of the activities within courts take place in chambers and often off-the-record, a different “nightmarish” scenario has emerged. Absent a willingness to rejuvenate its public practices, reorient its concerns, and coordinate more with state courts, the federal judiciary will have a diminishing capacity to contribute to a “common intellectual heritage.”

1. Flattening and Clumped Filings

When worrying about the growth in federal filings, the *1995 Long Range Plan* projected that, absent substantial changes, in 2010, more than 610,000 cases would be filed in the federal courts. As Figure 12, *1995 Projections of, and the Federal District Court Caseloads in, 2010*, shows, hindsight enables us to know that rather than that number, some 360,000 cases were begun, a number close to the 324,000 cases filed in 2000. Not included in either estimate were bankruptcy filings.³⁹⁴

FIGURE 12: 1995 PROJECTIONS OF, AND THE FEDERAL DISTRICT COURT CASELOADS IN, 2010



394 Data for Figure 12 are drawn from multiple sources. Projected filings data are from the JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 15, tbl. 3 (1995), <http://www.uscourts.gov/statistics-reports/publications/long-range-plan-federal-courts>. Actual filings data are from ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, 2010, tbls. C, and D Cases (Mar. 31, 2010), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2010>. I discuss bankruptcy trends in Resnik, *Privatization of Process*, *supra* note 32, at 1830, fig.13 and accompanying text.

A broader picture comes from Figure 13, *Growth Rate of Federal District Court Filings: 1905–2015*, which provides an overview of civil and criminal filings from 1905 to 2015.³⁹⁵ As the charts detail, federal filings are flattening.³⁹⁶ While some districts remain busy, filings in other districts were, as of 2015, down to about 160 per judge.³⁹⁷ If the trend line holds stable, both the

395 Data for Figure 13 about the years 1905–1998 are from William F. Shughart & Gökhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904–2002* (ICPSR 3987), INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH (Jan. 4, 2016), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987>. For data for years 1999–2012, see FED. JUDICIAL CTR., *HISTORICAL CASELOADS IN THE FEDERAL COURTS* (Jan. 4, 2016), http://www.fjc.gov/history/caseload.nsf/page/caseloads_main_page. Data for 2000 until 2015 were also adapted from tables C & D of the respective yearly reports accessible at ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL JUDICIAL CASELOAD STATISTICS* (Jan. 4, 2016), <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics>. The effective annual growth rate reflects growth that would have occurred if filings had increased at a constant rate during the prior five years. This rate, based on actual growth in each of the five years, has been smoothed out. Five-year growth rates for 1905–1908 are based in part upon estimated filings during 1900–1903, projected backwards from years with reported numbers. Data do not include bankruptcy filings.

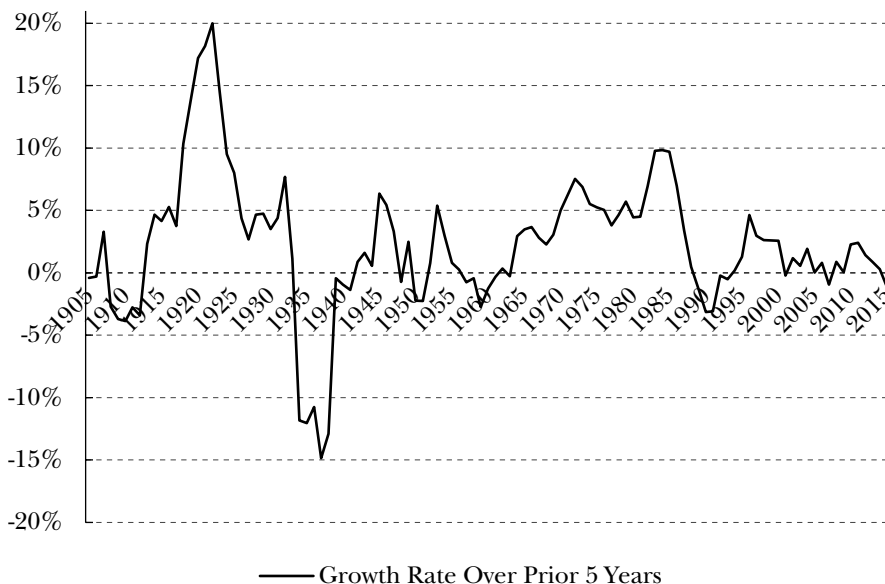
Note that Professor Moore, who also has analyzed caseload data for the last decades, refined her analysis to exclude some filings based on her view that the AO double counted. See Moore, *The Federal Civil Caseload*, *supra* note 24, at 1187. Depending on which cases are included, the growth since 1986 is 9% (her figure) or 12% or 32%. *Id.*

396 Professor Moore termed the trend “stagnant.” See *id.* at 1177. Disaggregating by categories, some areas have been growth areas, prompting discussions for example of a contemporary “crisis” in patent cases, which grew from about 2500 in 2000 to 5000 in 2014. But a longer-term analysis argued that the critical surge in filings came in the nineteenth century. Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 *YALE L.J.* 848, 852 (2016).

397 Federal Court Management Statistics from the end of 2015 detail 158 civil filings per judge in the D.C. District Court, and 180 including criminal filings that were then described as 205 weighted filings. ADMIN. OFFICE OF THE U.S. COURTS, *TABLE N/A—U.S. DISTRICT COURTS—COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS 2* (2015), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/12/31-2>. In contrast, the District of Idaho judges handled about 308 civil and 504 including criminal cases, with weighted filings at 494. *Id.* at 71.

The AO described weighted filings to account for the different amounts of time district judges require to resolve various types of civil and criminal actions. The Federal Judiciary has employed techniques for assigning weights to cases since 1946. In 2004, the Judicial Resources Committee of the Judicial Conference of the United States approved a civil and criminal case weighting system proposed by the Federal Judicial Center. On a national basis, weighted filings did not change significantly after the implementation of the new case weights. More than two thirds of all district courts saw their weighted filings change by 10% or less. Average civil cases or criminal defendants each receive a weight of approximately 1.0; for more time-consuming cases, higher weights are assessed (e.g., a death-penalty habeas corpus case is assigned a weight of 12.89); and cases demanding relatively little time from judges receive lower weights (e.g., an overpayment and recovery cost case involving a defaulted student loan is assigned a weight of 0.10). See *Explanation of Selected Terms*, USCOURTS.GOV, <http://www.uscourts.gov/file/19823/download> (last visited July 12, 2016). Nationally, according to the highlights from the 2015 AOUSC Judicial Business update, civil case filings fell 6% to 279,036. *Judicial Business 2015*, ADMIN. OFFICE OF

FIGURE 13: GROWTH RATE OF FEDERAL DISTRICT COURT FILINGS: 1905–2015



rate of civil filings and, over time, the number of cases will, as the Long Range planners had hoped, decline.³⁹⁸

The composition of the caseload has also changed. When Marc Galanter mapped the kinds of cases that predominated in the 1980s, he identified the “big six” to be contract (19%), tort (17%), recovery (such as on student loans, 16%), prisoner (12%), civil rights (8%), and social security (6%).³⁹⁹ By 2013, when Patricia Moore studied the caseload, tort filings topped the list at almost a quarter of the docket, followed by filings involving prisoner (up to 20%); civil rights (up to 12%); contract (down to 9%); social security (relatively stable at 7%) and labor (at 6%).⁴⁰⁰

THE U.S. COURTS, <http://www.uscourts.gov/statistics-reports/judicial-business-2015> (last visited May 20, 2016).

398 The flattening of filings was apparent in the mid-1990s, as Posner analyzed. *See* POSNER, *FEDERAL COURTS* 1996, *supra* note 130, at 63–64. Moreover, as he noted, the mix had changed, and civil cases declined and the caseload composition shifted to criminal cases. *Id.* at 64. Further, the docket of the appellate courts suggested that their work had also become increasingly focused on criminal and prisoner cases. *Id.*; *see also* Moore, *The Federal Civil Caseload*, *supra* note 24, at 1191.

399 Galanter, *The Life and Times of the Big Six*, *supra* note 18. The title related to an essay by Justice Scalia, who had remembered the federal courts from his law school days as dealing with great, as contrasted with “mundane,” cases. Antonin Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Council of Bar Presidents, New Orleans, La. (Feb. 15, 1987). Professor Galanter’s data showed that, while law students in the 1960s saw the vivid examples of civil rights litigation, the docket of the federal courts in the 1960s, like in the 1980s, was full of ordinary diversity cases. Galanter, *Life and Times of the Big Six*, *supra* note 18, at 925.

400 Moore, *The Federal Civil Caseload*, *supra* note 24, at 1210.

Within categories, other shifts had taken place. While the 1980s tort litigation was a mix of malpractice and motor vehicles, the 2013 federal court tort filings were largely product liability cases, gathered under the multi-district litigation statute and dealing with issues such as asbestos, medical devices, and diet drugs.⁴⁰¹

A more dramatic picture of the current caseload emerges by looking at what happens after cases are filed. In the fall of 2015, almost forty percent of the pending cases were consolidated pre-trial under the 1968 “multi-district litigation” statute (MDL).⁴⁰² By way of contrast, in 1986, fewer than 1400 cases were part of MDL proceedings; in 2013, almost 90,000 cases, about thirty-two percent of the caseload, were in MDL proceedings.⁴⁰³ Returning to 2015, of 341,813 federal civil cases pending,⁴⁰⁴ 132,529 were concentrated in 271 proceedings aggregated before a single judge, based on a decision by a panel of judges that the statutory criteria for aggregation (“civil actions involving one or more common question of fact . . . pending in different districts”) had been met.⁴⁰⁵

2. Poor Litigants

The clumping of cases is one way to augment resources of individuals; MDLs, as many commentators recount, become de facto class actions in which repeat-player lawyers dominate the landscape of plaintiff steering committees.⁴⁰⁶ But for other private litigants with limited funds, lawyers are scarce. For those without contingency fee options and seeking assistance from public resources, the options are few. In 1980, Congress appropriated \$300 million to the Legal Services Corporation (LSC); had that level of fund-

401 *Id.* at 1212–13. She also noted that the number of individual filings put under the MDL rubric in 1986 numbered 1367, and in 2012, those filings were 22,391. *Id.* at 1215. The concentration of MDLs with certain judges and lawyers is detailed in Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. (forthcoming Jan. 2017), <http://ssrn.com/abstract=2768171>.

In terms of individual litigants, Farhang tallied that between 1994 and 2004, an average of 165,000 private civil litigants filed cases to enforce federal statutory rights. FARHANG, LITIGATION STATE, *supra* note 154, at 10. That rate represented a per capita increase, from 3 per 100,000 population in 1967 to 29 per 100,000 in 1996 (a growth of 1000% between 1960s and 1990s). *Id.* at 12–13.

402 28 U.S.C. § 1407 (2012); *see generally* Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS. 5 (1991).

403 Moore, *The Federal Civil Caseload*, *supra* note 24, at 1214.

404 *See* TABLE C-1. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015, ADMIN OFFICE OF THE U.S. COURTS (Sept. 30, 2015), <http://www.uscourts.gov/file/19511/download>. The pending cases use the end date of September 30, while the MDL reports on the fifteenth of each month.

405 *See* 28 U.S.C. § 1407(a); MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Oct. 15, 2015), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDLDockets_By_District-October-15-2014.pdf.

406 *See, e.g.*, Burch, *supra* note 401.

ing remained steady, Congress would have, in 2013 dollars, appropriated about \$848 million rather than the \$365 million it did.⁴⁰⁷

Moreover, in the 1990s, Congress prohibited LSC lawyers from bringing class actions,⁴⁰⁸ thus precluding aggregation as a means of providing economies of scale. Indeed, in 2014, the LSC estimated that more than sixty-three million Americans were eligible for its services (keyed to federal poverty guidelines and permitting aid to families of four that earn \$30,000 or less⁴⁰⁹), but that LSC lawyers could help only one in five of those eligible.⁴¹⁰ And for those hoping that their cases will attract lawyers because of the potential to recoup fees from opponents, the Court's narrowing interpretations of when success permits fee-shifting makes that route riskier for lawyers.⁴¹¹

Federal courts are thus increasingly filled either with well-to-do litigants; with litigants who via MDLs have attenuated relationships with the lawyers representing those aggregates; or with litigants who have no lawyers at all. The Administrative Office of the U.S. Courts has tracked the percentage of cases filed pro se in the appellate courts since the mid-1990s, and collected parallel data at the trial level in the last decade. As Figure 14, *Pro Se Civil Filings in the U.S. Courts of Appeals: 1995–2014*, details, the percentage of self-represented litigants rose at the appellate level from about forty percent in 1995 to more than fifty percent since 2012.⁴¹² In 2014, more than 28,000

407 2013 LSC by the Numbers, LEGAL SERVS. CORP. (July 2014), lsc.gov/media-center/publications/2013-lsc-numbers.

408 See Class Actions, 45 C.F.R. § 1617.3 (2016).

409 LEGAL SERVS. CORP., 2014 ANNUAL REPORT (2015), <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC2014AnnualReport.pdf>.

410 FY 2016 Budget Request, LEGAL SERVS. CORP. (2016), <http://www.lsc.gov/media-center/publications/fy-2016-budget-request#bfrtoc-afy-2016-budget-requesta>.

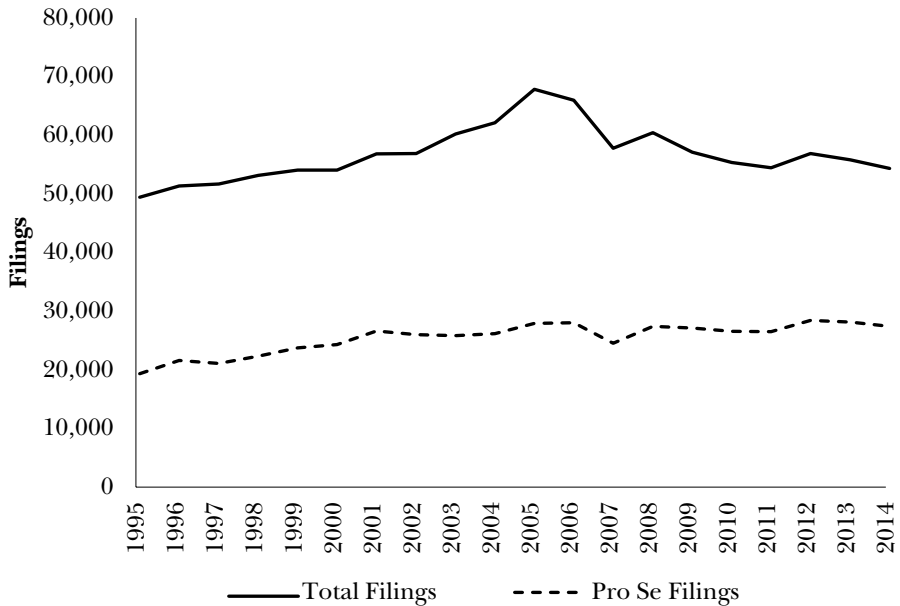
411 See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001); see also *Astrue v. Ratliff*, 560 U.S. 586, 600–04 (2010) (Sotomayor, J., concurring) (discussing the adverse consequences of the Court's holding on attorneys who are unable to obtain fees under the Equal Access to Justice Act due to a Government offset to satisfy the prevailing litigant's pre-existing debt). Fee shifting statutes may have distinctive tests for when litigants can recoup. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (clarifying the “exceptional” case standard for fee-shifting in patent cases under 35 U.S.C. § 285); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 245 (2010) (holding that a litigant must obtain “some degree of success on the merits” in order for the litigant's attorney to recover fees under 29 U.S.C. § 1132(g)(1), the fee-shifting provision for most ERISA actions (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983))).

412 Data in Figure 14, *Pro Se Filings in the U.S. Courts of Appeals: 1995–2014*, for years 1996 through 2014 come from Pro Se Cases Commenced, by Source—in the Administrative Office of the U.S. Court's Judicial Reports (1996 - 2014), available at Judicial Business, tbls. B-19, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/report-names/judicial-business?tn=B-19&pt=All&t=37&m%5Bvalue%5D%5Bmonth%5D=Cy%5Bvalue%5D%5Byear%5D=>.

Data for 1995 are from Table 2.4—U.S. Courts of Appeals-Pro Se Cases Filed, available at U.S. COURTS OF APPEALS JUDICIAL FACTS AND FIGURES, tbl. 2.4, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/statistics/table/24/judicial-facts-and-figures/2014/09/>

appeals were lawyer-less on at least one side, and about 12,000 of those appellants were not prisoners.⁴¹³

FIGURE 14: PRO SE FILINGS IN THE U.S. COURTS OF APPEALS: 1995–2014



The number of pro se filings in the district courts has been tracked since 2004. As Figure 15, *Pro Se Civil Filings in the U.S. District Courts: 2004–2014*, details, the rate remains constant, at just under thirty percent or about 75,000 civil cases per year.⁴¹⁴ In response, federal courts have developed staff positions dedicated to pro se filings and, if critics are correct, delegated much of the decisionmaking to such staff.⁴¹⁵

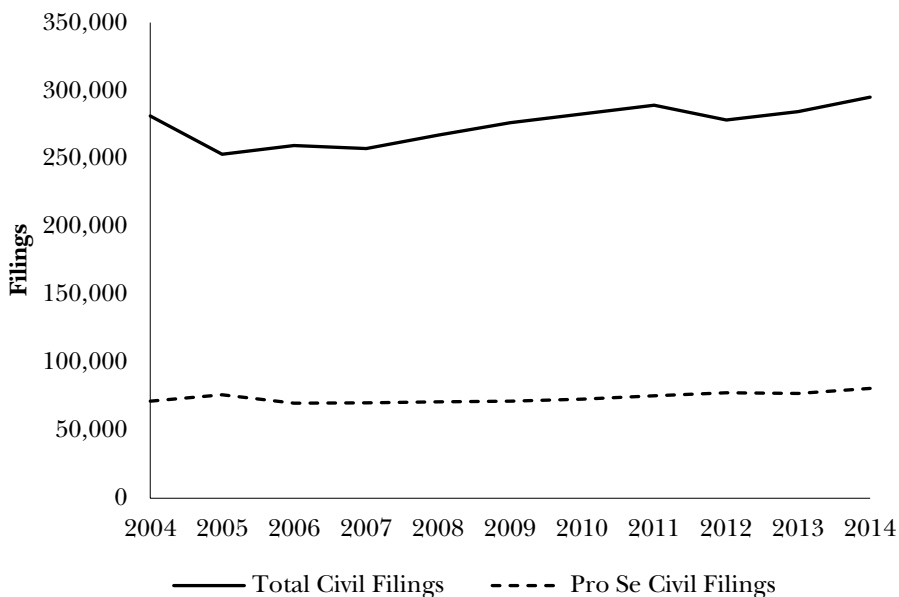
30. The categories provided by the Administrative Office are: “Criminal,” “Prisoner Petitions,” “U.S. Civil,” “Private Civil,” “Bankruptcy Appeals,” “Administrative Agency Appeals,” and “Original Proceedings and Miscellaneous Applications.”

413 ADMIN. OFFICE OF THE U.S. COURTS, TABLE B-19—U.S. COURTS OF APPEALS JUDICIAL BUSINESS (2014), <http://www.uscourts.gov/statistics/table/b-19/judicial-business/2014/09/30>.

414 Data for Figure 15, *Pro Se Civil Filings in the U.S. District Courts: 2004–2014*, come from Table C-13 the Administrative Office of the U.S. Court’s Judicial Reports for each year from 2004 until 2014. See *Judicial Business*, tbl.C-13, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=all&t=all&m%5Bvalue%5D%5Bmonth%5D=C-y%5Bvalue%5D%5Byear%5D> (last visited May 20, 2016).

415 See Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims* (Feb. 8, 2016) (unpublished manuscript), <http://ssrn.com/abstract=2722106>. Macfarlane reviewed court rules as well as websites to clarify the charter to such staff in many circuits and districts and explored the constitutional problems with delegating so much decisionmaking to non–Article III actors.

FIGURE 15: PRO SE FILINGS IN THE U.S. DISTRICT COURTS: 2004–2014



Thus, while the aspirations of the 1995 Judicial Conference that filing rates be slowed have come to fruition, that slowdown has not achieved the planners' goals that a lively mix of users remain in the federal courts. Instead, the federal courts have become venues dominated by bankrupt petitioners, joining a stream of criminal defendants, self-represented civil plaintiffs, and product liability or other MDL claimants linked together in proceedings before individual judges.

Another goal of the 1995 planners was to protect trials. Data on the growing infrequency of trials comes from the American Bar Association, which sponsored a research project on what has come to be known as the "vanishing trial."⁴¹⁶ In the 1960s, trials took place in about ten percent of the civil cases brought to federal courts.⁴¹⁷ By 2014, trials began in about 1 out of 100 civil cases closed that year.⁴¹⁸ In absolute numbers and with trials broadly defined to include evidentiary hearings, the federal courts com-

416 See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (supported by the American Bar Association Section on Litigation).

417 See POSNER, *FEDERAL COURTS* 1996, *supra* note 130, at 68–69 tbl.3.4. In 1995, Posner identified 3.4% of civil cases as "reaching trial." *Id.* at 68.

418 See Table C-4—U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2014, ADMIN. OFFICE OF THE U.S. COURTS (2014), <http://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2014/12/31>.

pleted fewer than 5000 civil trials⁴¹⁹ and about 7400 criminal trials in 2014.⁴²⁰

Judges do a good deal of adjudication without trials, as they decide motions and manage cases. Thus, another measurement is what some researchers call “bench presence,” the hours that judges spend in court. After reviewing statistics gathered by the Administrative Office (AO), researchers reported a “steady year-over-year decline in total courtroom hours” from 2008 to 2012 that continued into 2013. Federal judges spent less than two hours a day on average in the courtroom, or about “423 hours of open court proceedings per active district judge.”⁴²¹

Of course, judges do more than sit in court; a needed, but absent, data point is the number of opinions that judges write.⁴²² The Supreme Court’s charter to federal trial judges to scrutinize pleadings for their “plausibility” and the welcoming posture towards summary judgment have produced volumes of decisions, referenced in various empirical studies,⁴²³ albeit not (yet) tracked in the AO tables on the “judicial business.”

The *Long Range Plan* and the 2010 and 2015 *Strategic Plans* that followed worried about judicial overload. Thus a question often asked is whether federal judges have more to do now than in past decades. Assessing whether and how the workload and activities of federal judges have changed, let alone

419 In the twelve-month period ending September 30, 2014, civil bench trials numbered 2848, and civil jury trials completed numbered 1922; 3533 civil bench trials and 2980 civil jury trials were held during the same period in 2001. See ADMIN. OFFICE OF THE U.S. COURTS, TBL. T-1: U.S. DISTRICT COURTS—CIVIL AND CRIMINAL TRIALS COMPLETED, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2014 (2014), <http://www.uscourts.gov/statistics/table/t-1/judicial-business/2014/09/30> [hereinafter U.S. DISTRICT COURTS—CIVIL AND CRIMINAL TRIALS COMPLETED 2013–14]; ADMIN. OFFICE OF THE U.S. COURTS, TBL. T-1: U.S. DISTRICT COURTS—CIVIL AND CRIMINAL TRIALS COMPLETED, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2001, <http://www.uscourts.gov/statistics/table/t-1/judicial-business/2001/09/30>.

The AO’s definition of “trial” is broad, as the table “includes land condemnation trials, hearings on temporary restraining orders and preliminary injunctions, hearings on contested motions, miscellaneous civil cases, and other contested proceedings in which evidence is introduced.” *Id.* But the data do not include civil trials by magistrate judges by consent under 28 U.S.C. § 636(c). *Id.* (noting that AO data include “trials conducted by district and appellate judges only; all trials conducted by magistrate judges are excluded”).

420 Bench trials numbered 5196 and jury trials numbered 2200. See U.S. DISTRICT COURTS—CIVIL AND CRIMINAL TRIALS COMPLETED 2013–14, *supra* note 419.

421 Jordan M. Singer & Hon. William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565–66 (2014).

422 Former federal district court judge Nancy Gertner has been concerned that this important facet of trial judges’ work has been given second seat to management of cases. See Gertner, *supra* note 173, at 428.

423 Ray H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2012); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012); Alex Reinert, *The Impact of Ashcroft v. Iqbal on Pleading*, 43 URB. LAW. 559 (2011).

deciding on what timeframe to use as a benchmark, is difficult. Variables that could be taken into account include the relationship of filings and adjudication to the country's population; the changing costs of litigation; the creation or attrition of federal rights; the development of new categories of judges (such as magistrate and bankruptcy judges); increased reliance on senior judges; outsourcing to other courts and administrative agencies; mandating arbitration; and rule revisions such as refocusing judges on pre-trial work as "case managers."⁴²⁴

Rather than despair at problems of comparability, both the federal judiciary's administration and scholars have been eager to find measures of federal court responsiveness; they have turned to numbers such as cases per judge and the time to disposition. For example, factoring in the increased number of judicial workers and the changing case mix, Patricia Moore concluded that, on average, a federal district court judge had the same number of weighted filings in 2013 as judges had in 1986.⁴²⁵ (During that interval, she noted, the U.S. population grew thirty-two percent.⁴²⁶) In addition, the time to disposition was relatively stable. Civil cases that concluded without "any court action" in 1986 took four months; in 2013, they took five months. Cases with "court action" were disposed of in seven months in 1986, and in 8.5 months in 2013.⁴²⁷

To translate these shifts into litigants' experiences and into opportunities for the public to observe the exchanges between litigants and judges, I rely on a description by an esteemed federal district court judge asking the question about how to depict judges in civil cases dealing with the "business of the district courts."

So how might reality television portray a federal "trial" judge . . . ? In an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.⁴²⁸

424 Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Resnik, *Trial as Error*, *supra* note 19; *see also* CROWE, BUILDING THE JUDICIARY, *supra* note 38, at 197–237. Crowe identified the decade before World War II as when the federal judiciary bureaucratized, *id.* at 197–238, and this period as one of specialization, *id.* at 21–24, 238–69. My view is that while Congress authorized the Administrative Office between the world wars, the judiciary did not shift toward a more bureaucratic form until the 1960s, with the advent of magistrate judges, the expansion of judgeships, and the enlargement of the functions of the central staff.

425 Moore, *The Federal Civil Caseload*, *supra* note 24, at 1187 & n.39 (citing census data).

426 *Id.*

427 *Id.* at 1199 figs.6 & 7, 1200–01. If the case went to trial, time to disposition went from 19 months to 24.1 months, *id.* at 1201, but only 1% of cases went to trial, *id.* at 1202.

428 D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 462 (2007).

B. *Vulnerable Heritages: The Post Offices and the Courts*

In writing in 1996 about the federal courts, Richard Posner concluded his book by describing how the work of an appellate judge in decisionmaking was "collective in a profound sense": each judge was "a member of a community of judges composed of the predecessors of the current judges as well as the current judges themselves."⁴²⁹ Like the heritage at the center of Daniel Meltzer's work, Posner's intergenerational enterprise relies on public judicial decisionmaking. Yet the declining number of trials, of hours on the bench in public, and of filings, coupled with the privatization of process through pre-trial management and alternative dispute resolution, limits the public dimensions of the federal courts. Moreover, appeals focused on whether grants of motions to dismiss or of summary judgment were ill-founded tilt discussion towards procedural rules rather than the shape of rights and their remedies.

Nonetheless, the older common heritage of responsive, hospitable courts producing an expanding jurisprudence continues to dominate discussions of the federal courts. That impression is understandable, given the importance of the public space (literal and metaphorical) that federal courts occupy. Yet, as I noted at the outset, the federal courts were once linked to another prominent federal government service, what was called the U.S. Postal Office. Both institutions shared facilities and political commitments to nation-building through redistributive egalitarianism. Given the difficulties of imagining the federal courts in decline, a brief reflection on what some call the "death spiral"⁴³⁰ of what is now called the U.S. Postal Service is in order.

As discussed at the outset, post offices and courthouses were two constitutionally chartered methods of shaping a national political identity through the provision of services in localities around the country. By the twentieth century, federal support for these services was significant. One commentator reported in 1900 that the "average cost of sending" letters to Alaska was "\$450, in return for which the Post-office Department received only the price of a two-cent stamp, the same amount that carriers a letter" from one part of New York City to another.⁴³¹ In that year, this government statistician explained that the "tax that a large proportion of Americans paid every time they sent a letter" had the "'unanimous approval' of the people," as it was understood to "be necessary to ensure" access to "intelligence" that was "cheap and convenient in localities in which remunerative rates were prohibitively high."⁴³²

429 POSNER, *FEDERAL COURTS* 1996, *supra* note 130, at 382.

430 NYE STEVENS, CONG. RESEARCH SERV., RL31069, *POSTAL SERVICE FINANCIAL PROBLEMS AND STAKEHOLDER PROPOSALS* 11 (2002).

431 H.T. NEWCOMB, *THE POSTAL DEFICIT: AN EXAMINATION OF SOME OF THE LEGISLATION AND ADMINISTRATIVE ASPECTS OF A GREAT STATE INDUSTRY* 9-10 (1900).

432 JOHN, *NETWORK NATION*, *supra* note 44, at 20 (quoting NEWCOMB, *supra* note 431, at 9). Newcomb found no evidence that "New Yorkers objected to the transfer of postage . . . to cover the cost of mail delivery in Texas and Alaska." *See id.* (citing NEWCOMB, *supra* note 431, at 9). This 'post office principle,' explained political economist Henry C. Adams in

Universal service, rural free delivery, and air transportation altered the possibilities of contact for people around the country and changed interpersonal and economic relationships. The U.S. Post Office turned the federal government into a daily presence and, unlike police officers knocking at one's doors, government-dispatched mail services delivered holiday cards and packages. Moreover, post offices were egalitarian on many metrics, including that women gained jobs as "postal mistresses" long before women joined the federal bench.

During the second half of the twentieth century, the leadership of both the courts and the post office looked to private businesses as models for their work. In 1970, Congress converted the U.S. Post Office, which had been a department of government, into the U.S. Postal Service (USPS), which became a semi-independent agency. However, Congress did not give this new entity an unfettered competitive position. Rather, it operates under congressional mandates on what it must provide (such as universal service and first class mail) and about what it cannot do, with limits imposed on the kinds of auxiliary services the Postal Service can offer.⁴³³

In 2007, Congress mandated that the Postal Service have fully funded (or what is called pre-funded) pensions;⁴³⁴ those economic challenges (resulting in missed payments and multi-billion dollar financial deficits) have

1918, "subsidized different sections and classes to provide every citizen with access to mail 'on equal terms.'" *Id.* at 20 (quoting HENRY C. ADAMS, DESCRIPTION OF INDUSTRY: AN INTRODUCTION TO ECONOMICS 258 (1918)). But he also noted Congress had launched an investigation into "excessive prices . . . paid to the railroad companies" for mail transportation and commended a focus on methods to reduce the postal deficit. NEWCOMB, *supra* note 431, at 91. Newcomb encouraged "friends of the postal establishment" to consider whether modifications "without public detriment" would "insure a more generally satisfactory relation between its income and its expenditures." *Id.* at 12. Newcomb also noted that the "rapidly declining" deficit (of \$5,385,688 as of June 30, 1900) was not too large and better than "a surplus, which would constitute an actual tax upon those who use the mails." *Id.* at 155. But he also argued that economies were likely needed, including more efficient organization. *Id.* at 156.

433 For example, the Postal Service requested that it be permitted to cut back to five-day a week delivery. See USPS, DELIVERING THE FUTURE: A BALANCED APPROACH, FIVE-DAY DELIVERY IS PART OF THE SOLUTION (2010), <https://about.usps.com/news/electronic-press-kits/five-day-delivery/plan/5day-plan-delivery.pdf>; U.S. Postal Service in Crisis: Proposal to Prevent a Postal Shutdown: Hearing before the S. Comm. on Homeland Security and Gov't Affairs, 112th Cong. (2011) (statement of Postmaster General/CEO Patrick R. Donahoe). The Postal Service also sought to offer new services, such as transporting beer and wine. See Ron Nixon, *Trying to Stem Losses, Post Office Seeks to End Saturday Letter Delivery*, N.Y. TIMES (Feb. 6, 2013), <http://www.nytimes.com/2013/02/07/us/postal-service-plans-to-end-saturday-delivery.html>; see also Ron Nixon, *Postal Service Reports Loss of \$15 Billion*, N.Y. TIMES (Nov. 15, 2012) [hereinafter Nixon, *Postal Service Reports Loss of \$15 Billion*], <http://www.nytimes.com/2012/11/16/us/politics/postal-service-reports-a-nearly-16-billion-loss.html>.

434 See KEVIN R. KOSAR & KATELIN P. ISAACS, CONG. RESEARCH SERVICE, R43349, U.S. POSTAL SERVICE RETIREE HEALTH BENEFITS AND PENSION FUNDING ISSUES, CONGRESSIONAL RESEARCH SERVICE (2015).

raised questions about the USPS’s economic viability.⁴³⁵ The mix of new electronic mail technologies and congressional mandates and constraints, in contrast to the unrestrained operations of private providers, has made major inroads into the vitality of the USPS.⁴³⁶ Yet more people continue to have access to snail mail than email; about half the population did not, as of 2014, pay bills online, and 3-D printers have yet to replace mail-orders of packaged goods.

But signs of the shrinkage of this federal service can be found around the country. In 2009, 13,000 fewer post offices existed than had in 1951, with more cutbacks underway.⁴³⁷ (How to count has become complex, as the USPS differentiated among five kinds of “postal facilities,” including “contract postal units” in stores.⁴³⁸) In 2013, the *New York Times* ran a story about the declining fortunes of the Postal Service; featured were four historic post office buildings, in Annapolis, Washington, D.C., West Chester, Pennsylvania, and Norwich, Connecticut, all up for sale.⁴³⁹ One of those four buildings is depicted below.

435 *Id.* at 2; see Nixon, *Postal Service Reports Loss of \$15 Billion*, *supra* note 433. Included in that loss was the expense of more than \$11 billion to be paid into the Postal Services’ “future retiree health benefits fund.” *Id.* Further, at that point, the volume of mail declined by 5%, down from 168.3 billion pieces to 159.9 billion pieces, and operating revenues likewise declined slightly, down from \$65.7 billion to \$65.2 billion. *Id.*

436 See DANIEL J. RICHARDSON, CONG. RESEARCH SERV., R43162, THE U.S. POSTAL SERVICE’S FINANCIAL CONDITION: A PRIMER, CONGRESSIONAL RESEARCH SERVICE (Dec. 30, 2014).

437 *Restoring the Financial Stability of the U.S. Postal Service: What Needs to Be Done?: Hearing Before the H. Subcomm. on Fed. Workforce, Postal Service, and the District of Columbia*, 111th Cong. 108 (2009) (testimony of Dale Goff, Pres., Nat’l Ass’n of Postmasters of the U.S.), <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg50649/html/CHRG-111hhrg50649.htm>.

438 See KEVIN R. KOSAR, CONG. RESEARCH SERVICE, R41950, THE U.S. POSTAL SERVICE: COMMON QUESTIONS ABOUT POST OFFICE CLOSURES (May 29, 2013); see generally KEVIN R. KOSAR, CONG. RESEARCH SERVICE, R42590, U.S. POSTAL SERVICE: BACKGROUND ANALYSIS OF H.R. 2309 AND S. 1789 IN THE 112TH CONG. (July 9, 2012) [hereinafter KOSAR 2012].

439 Robin Pogrebin, *Post Office Buildings with Character, and Maybe a Sale Price*, N.Y. TIMES (Mar. 8, 2013), <http://www.nytimes.com/2013/03/08/arts/design/preservationists-fight-postal-service-over-sales.html>; *Postal Service Looks to Sell Historic Buildings*, N.Y. TIMES (Mar. 7, 2013), <http://www.nytimes.com/interactive/2013/03/07/arts/design/postal-service-looks-to-sell-historic-buildings.html>.

FIGURE 16: HISTORIC POST OFFICE FOR SALE



U.S. Post Office, 340 Main Street, Norwich, Connecticut. Photographer: Fred R. Conrad. The photograph accompanied the story, *Postal Service Looks to Sell Historic Buildings*, N.Y. TIMES (Mar. 7, 2013). Copyright The New York Times/Redux.

In contrast to the sampling of nine federal courthouses renovated or built in the early twenty-first century provided in Figure 8, evocative federal post office buildings like the one in Norwich, Connecticut were among those on route to being de-accessioned through a campaign to relocate “post offices” by opening up stalls selling stamps inside malls and other commercial enterprises.⁴⁴⁰ As the distinctive community post office buildings are

440 KOSAR 2012, *supra* note 438, at 4; Pogrebin, *supra* note 439. As of 2015, the United States Postal Service has sold two of the four buildings featured in the news story. The building at 1215 31st Street in Washington, D.C., was sold to developers in 2013. The State of Maryland purchased the Annapolis building and planned to use the building for state offices. Pamela Wood, *Sale of Downtown Annapolis Post Office Building Will End Era . . . Eventually*, BALT. SUN (May 16, 2013), http://articles.baltimoresun.com/2013-05-16/news/bs-md-ar-post-office-20130516_1_post-office-academic-classicism-freda-sauter; Daniel J. Sernovitz, *A Look at Anthony Lanier’s Vision for the Georgetown Post Office*, WASH. BUS. J. (Oct. 31, 2013), http://www.bizjournals.com/washington/breaking_ground/2013/10/east-bancs-take-on-the-old-georgetown.html?ana=E_wash_rdup&s=newsletter&ced=2013-10.

After the story was written, USPS decided not to sell the Norwich building. Adam Benson, *It’s Official: Downtown Norwich Will Keep Its Post Office*, BULLETIN (Norwich, Ct.) (Jan. 21, 2014), <http://www.norwichbulletin.com/article/20140121/News/140129906>. The post office in West Chester, Pennsylvania, was, as of 2014, on the market. Jeremy Gerrard, *Post Office Wants to Sell West Chester Building*, DAILY LOCAL NEWS (West Chester, Pa.) (Feb. 21, 2014), <http://www.dailylocal.com/article/DL/20140221/NEWS/140229966>; *see generally Historic Post Offices Sold or for Sale 2009–2014*, SAVETHEPOSTOFFICE.COM, https://www.google.com/fusiontables/DataSource?docid=1CQ5K6SyhDBz2RnxB2qtAQ-w3iiltEx_qktAV60#rows:id=1002E (last visited July 12, 2016).

spun off, the connections thin between the experience of the federal government as a direct service provider and what is now called the U.S. Postal Service, whose abbreviation (USPS) blurs with that of the private carrier (UPS). Moreover, the name of another private service, Federal Express, which uses red, white, and blue for its documents, conveys an impression that it could be a national project. Further, all the private services free-ride the federal government investments in mail delivery, which helped to produce numbered street addresses and created the "zip code" in the 1960s.⁴⁴¹

More confusion comes from how electronic users find the USPS, which once used "USPS.gov" and thus shared the ".gov" reserved for other government service providers, including federal judges. But even as the Postal Service has been held by the Supreme Court to be inseparable from the United States for purposes of antitrust laws,⁴⁴² the USPS switched to become "USPS.com," embracing the ".com" nomenclature of the private business sector.

The criticisms leveled against post offices were that they were inefficient and that the private sector with more modern technology could do better. Parallel criticisms are leveled against courts, as exemplified by my discussion about the degree to which private arbitration is lauded. Yet the private providers of postal services or of adjudication have no enduring commitments to egalitarian redistribution. These alternative private services offer little by way of subsidies or public access to their processes and outcomes. What the contemporary assault on public postal subsidies ought to make plain is that impressive stone buildings dotting communities around the country are no guarantee of the longevity of the services provided in their halls.

C. *Comity: Creating a Collective Culture of Court Services*

What Daniel Meltzer taught us was to focus on how common cultures are shaped and nurtured. Given the tensions between the cultures of hospitable and of unavailing courts, and given the challenges that both federal and state courts face, my hope is that "we" who have cultural and legal capital can expand lawyers' "common intellectual heritage" by situating the federal courts in a larger landscape. Even if some of the rulings constricting access render courts unavailing prove (given the narrow margins and changing composition of the Supreme Court) to be what Meltzer termed "quixotic,"⁴⁴³ more than either hospitable or unavailable federal courts are needed. Our common heritage requires acknowledging the degree to which the federal and state courts systems are deeply interdependent and reassessing how,

441 See JOHN T. TIERNEY, *THE U.S. POSTAL SERVICE: STATUS AND PROSPECTS OF A PUBLIC ENTERPRISE* 78–90 (1988) (detailing the history of the "zone improvement plan"—zip—code).

442 *U.S. Postal Serv. v. Flamingo Indus. (USA), Ltd.*, 540 U.S. 736, 746 (2004).

443 Meltzer, *The Seminole Decision*, *supra* note 98, at 61.

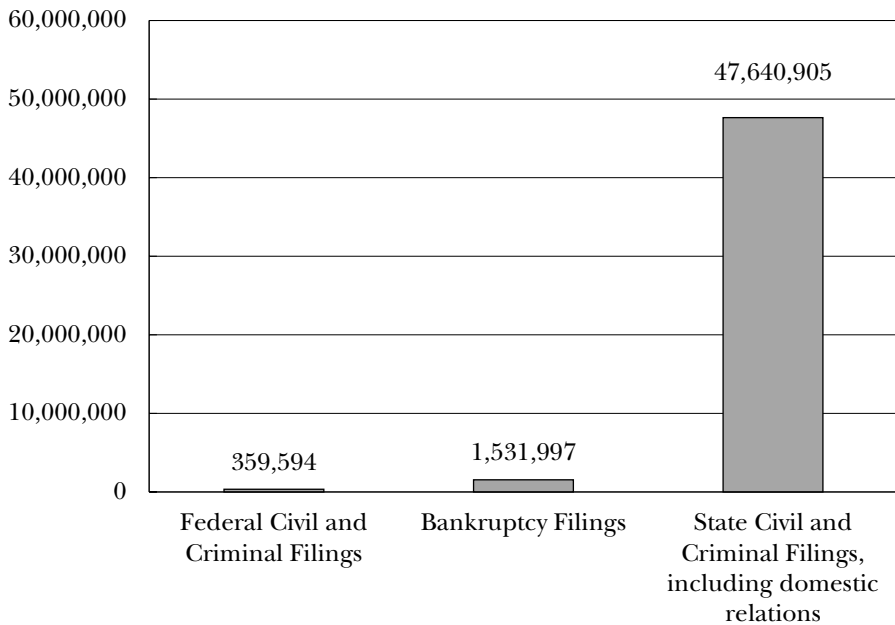
given the constitutionally stipulated judicial services, both can be enabling for their users.

Doing so entails first, reorienting the federal judiciary to reject the rhetoric of an institution beleaguered by its users; and second, bucking the trend of becoming a luxury good available only to those with great resources or with no alternatives. Given the success of the federal judiciary in Congress, it remains the best-endowed court system in the country. Federal judges need not only reprise their partnership and joint work with Congress but should also ally their work with that of state courts and help those courts obtain congressional support. The academy, in turn, needs to identify state courts as central intellectual sources for modern lawyers in working with federal judges to craft an interdependent system of what I term “enabling courts.”

In some respects, this effort can be nested in doctrines of federalism that are central to federal courts jurisprudence, which has long invoked ideas of comity, explained as respectful of state courts. But the focus needs to expand beyond deference and questions of preemption to how the federal judiciary is both dependent on and could be helpful to the state courts as they shape and then implement federal constitutional precepts—parts of the “machinery” that Meltzer described as giving life to constitutional precepts.

One final image is therefore in order, a bar chart, *Comparing the Volume of Filings in State and Federal Courts, 2010*. As Figure 17 depicts, the federal courts in that year received about 360,000 civil and criminal filings, along with more than a million bankruptcy petitions. Those numbers are small when contrasted with the volume of state court annual filings, which total more than 47 million, if juvenile and traffic filings are excluded, and some 100 million when these additional cases are included.⁴⁴⁴

FIGURE 17: COMPARING THE VOLUME OF FILINGS IN STATE AND FEDERAL COURTS, 2010



This chart is in one respect a measure of the intellectual advantage of the federal courts, made accessible through the small number of filings, the circumscribed body of U.S. Supreme Court decisions, the limited sets of federal procedural rules, the two research agencies (the AO and the FJC), supported by more than \$100 million annually,⁴⁴⁵ and through national law school curricula.

In contrast to the substantial economic support of the federal judiciary, the federal government provided about \$14 million in grants to the National Center for State Courts (NCSC). That organization which was founded in 1971 as a non-profit organization in part to support state court advocacy

444 Data for Figure 17 are drawn from the ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Caseload Statistics, 2010, tbls C-1, D-1 and F, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>. Data on state filings are from the National Center for State Courts, Court Statistics Project, National Civil and Criminal Caseloads (2010), <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx>. The number of state filings is an estimate, as states do not uniformly report data; this number does not include juvenile or traffic cases. See ROBERT LAFOUNTAIN, SHAUNA STRICKLAND, RICHARD SCHAUFFLER, KATHYRN HOLT & KATHYRN LEWIS, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS 6 (2015).

445 Appropriations for the Administrative Office of the U.S. Courts in 2016 were \$87.6 million (a 3.8% increase over 2015) and for the Federal Judicial Center \$27.7 million (a 2.7% increase over 2015). See MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., R44078 JUDICIARY APPROPRIATIONS FY 2016, at 8 (2015).

before the U.S. Supreme Court and which has developed into a research and education support organization for the Conference of State Court Chief Justices and state courts more generally.⁴⁴⁶ The federal government gave another \$5 million in 2015 to the State Justice Institute (SJI),⁴⁴⁷ an entity that Congress created in 1984 to provide grants “to improve the quality of justice in state courts” by understanding innovative methods of responding to “common issues.”⁴⁴⁸ The low budgets of both the NCSC and the SJI are reflected in their relative invisibility to the legal academy.

The 2010 chart in Figure 17 is also a measure of the challenges that state courts face when gathering data, given varying definitions of case filings, a myriad of levels of courts and collection methods, and a wealth of doctrine. Yet models of thinking across court systems to conceptualize shared questions of structure, method, and substantive rules come from the work of comparative constitutional law scholars,⁴⁴⁹ identifying categories that permit analysis across jurisdictional systems. If state courts are brought into this shared metanarrative, those courts are not only in focus when doctrine and statutes delineate the boundaries of federal law (such as the habeas corpus jurisprudence, the Anti-Injunction Act, and *Younger* abstention) but also as centrally animating and contributing to a federal-state courts canon.

The outlines of the intellectual-heritage-in-the-making come into view by looking at the vastness of the courts, and by appreciating that expansion as the success of nineteenth-century promises of “open courts” and “rights to remedies” that turned, through twentieth-century social movements, into entitlements for all persons. Courts have become a central government service. By embracing federal and state courts as both the results and the sources of practices and ideas foundational to those heritages, the contemporary challenges of running these services and the unfairness that continues to reside within them become vivid.

Thus, a first element of this common heritage is the acknowledgement that hundreds of millions of people see courts as potentially responsive institution. Just as it is hard to grasp that federal courts may be in decline, it is difficult to imagine the world of the 1930s, when the depiction of *Justice as*

446 See NAT'L CTR. FOR ST. COURTS, NATIONAL CENTER FOR STATE COURTS ANNUAL REPORT 2015 (2015), <http://www.ncsc.org/~media/Files/PDF/Annual%20Reports/2015-Annual-Report.ashx>.

447 CONG. BUDGET OFFICE, UNAUTHORIZED APPROPRIATIONS AND EXPIRING AUTHORIZATIONS 20 (2016) (citing State Justice Institute Reauthorization Act of 2004, Pub. L. No. 108-372, 118 Stat. 1754). The 2008 authorized appropriations were \$7 million. For fiscal year 2016, Congress authorized \$5,121,000 for the State Justice Institute. Consolidated Appropriations Act, 2016, H.R. 2029 div. B, tit. IV, 114th Cong. (2015) (enacted as Pub. L. No. 114-113).

448 *About SJI*, STATE JUSTICE INST., <http://www.sji.gov/about-sji> (last visited May 20, 2016). The National Center for State Courts does not appear to have direct funding but, in its reporting in 2013, detailed the receipt of about \$14 million federal in funds. See IRS Form 990, National Center for State Courts, 2013, at 9.

449 Vicki C. Jackson, *Honoring Dan Meltzer—Congressional Standing and the Institutional Framework of Article III: A Comparative Perspective*, 91 NOTRE DAME L. REV. 1783 (2016).

Protector and Avenger (Figure 4) was draped because the image of that Virtue was perceived to be of a "mulatto." Promises that "all courts shall be open" seem now naturally to invite all persons in as users. This remarkable achievement stems from rule-of-law values interacting with egalitarian democratic movements that oblige courts to be venues respectful of all users.

Second, once state courts are part of the exposition of state and of federal law, the accounts of the development of bodies of law change. The current litigation about same-sex marriage has helped to underscore the centrality of states in developing constitutional doctrine.⁴⁵⁰ Integrating the role of states into analyses of other major decisions is a means of refocusing the heritage on the interdependencies of state and federal systems and the degree of dependence of federal law on state developments.

One example comes from the landmark case of *Gideon v. Wainwright*, decided in 1963 by the U.S. Supreme Court.⁴⁵¹ By then, the United States Supreme Court had held that federal criminal defendants had the right to appointed counsel⁴⁵² but that rule did not apply to states. Yet, between the 1940s and the 1960s, dozens of states came to provide free legal assistance to indigent felons and then advocated to the Supreme Court that it should read the Federal Constitution as obliging them to do so. Specifically, twenty-two states sided with Mr. Gideon;⁴⁵³ only Florida, joined by Alabama and North Carolina, argued that the Sixth Amendment did not mandate a blanket right to counsel but that judges could appoint a lawyer based on "the totality of facts in a given case."⁴⁵⁴ In addition to being relevant sources for developing federal constitutional doctrine, the Court's ruling supported extant state defenders. As Sara Mayeux has detailed, the Massachusetts public defender system gained stature, even as indigent defense continued to suffer from a lack of funding and overworked lawyers.⁴⁵⁵

Fifty years later, questions of supporting litigants, including those facing imprisonment, remain central. State courts have again laid the groundwork, albeit not in a way that prompted the U.S. Supreme Court to insist on more rights to counsel. The difficulty (in light of the surge in prosecutions since the 1980s) of implementing *Gideon* was proffered as a reason not to require lawyers for other impoverished litigants. Thus, in 2011, the U.S. Supreme Court refused to require counsel when a civil contemnor was faced with

450 See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

451 372 U.S. 335 (1963).

452 *Johnson v. Zerbst*, 304 U.S. 458 (1938).

453 Brief for the State Government Amici Curiae, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 75209; see generally William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150 (1963).

454 Amicus Curiae Brief for the State of Alabama, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115123, at *8.

455 Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15 (2016).

twelve months in jail for failing to pay child support to the mother of his child.⁴⁵⁶

Yet many states justices are advocates for the right to counsel for poor claimants dealing with fundamental needs, such as shelter and family relations, as well as more help for criminal defendants.⁴⁵⁷ As Jonathan Lippman, the former Chief Judge of New York explained, the “very reason [that courts] exist” is to provide equal justice to all, and that mandate entails providing representation to the “poor and the indigent.”⁴⁵⁸ He succeeded in prompting the New York state legislature to adopt a joint resolution that the “fair administration of justice requires that every person who must use the courts have access to adequate legal representation,”⁴⁵⁹ and in 2015, \$85 million had been budgeted for civil legal assistance.⁴⁶⁰

These initiatives reflect that, although the language about a “crisis” of the federal courts has subsided as filings have flattened,⁴⁶¹ that term remains apt for courts in the United States and elsewhere.⁴⁶² State budgetary difficulties have resulted in the literal shutting down of courts, closed to business despite pressing needs such as domestic violence protection orders and childcare subsidies.⁴⁶³ Procedure circles are preoccupied with what scholars

456 *Turner v. Rogers*, 564 U.S. 431 (2011).

457 In 2011, Chief Justice Ronald M. George and California’s Judicial Council prompted California to enact the Sargent Shriver Civil Counsel Act—for pilot projects based in selected courts to provide appointed counsel for “low-income parties in civil matters involving critical issues affecting basic human needs.” CAL. GOV. CODE § 68651(b)(5) (West 2011); Cal. Assemb. Bill No. 590, 2009–2010 Sen., Reg. Sess., at 1–3, 13 (Cal. 2009), http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.pdf; see also Lippman, *New York’s Template*, *supra* note 28.

458 JONATHAN LIPPMAN, *THE STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 5* (2011), <http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf>; see also AM. BAR ASSOC., *GIDEON: BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 7–8* (2004).

459 Assemb. Res. 1621, 2010 Assemb., Reg. Sess. (N.Y. 2010); Lippman, *New York’s Template*, *supra* note 28, at 4.

460 PERMANENT COMM’N ON ACCESS TO JUSTICE, *REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2* (2015), <http://nylawyer.nylj.com/adgifs/decisions15/122915report.pdf>.

461 In the preface to the second edition of *Federal Courts*, published in 1996, Posner explained that “the recession of caseload in all but the courts of appeals” prompted him to revise the title to *The Federal Courts: Challenge and Reform*. See POSNER, *FEDERAL COURTS 1996*, *supra* note 130, at xiii.

462 John Thomas, The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Address to the Organization Justice: Reshaping Justice (Mar. 3, 2014), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf>.

463 See PETER T. GROSSI, JR., JON L. MILLS & KONSTANTINA VAGENAS, NAT’L CTR. FOR STATE CTS., *FUTURE TRENDS IN STATE COURTS 2012: CRISIS IN THE COURTS: RECONNAISSANCE AND RECOMMENDATIONS* (2012), http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/Crisis_Grossi.ashx.

term the "Age of Austerity," as commentators address how courts can function given the volume of filings and the economic constraints.⁴⁶⁴

In the introduction to a 2016 volume entitled *Beyond Elite Law: Access to Civil Justice in America*,⁴⁶⁵ Martha Minow termed the American "failure to ensure access" to courts "shameful."⁴⁶⁶ The argument from many of the contributors was that a major shift was required; as the former Chief Justice of Texas, Wallace Jefferson, put it, a "culture of service" needed to be created.⁴⁶⁷

In response, court-based litigant services are becoming regular features of courthouses. Court employees' ranks have not only been augmented by architects, engineers, and court information officers, but also by "court assistance officers" (CAOs), sometimes also known as "pro se" clerks.⁴⁶⁸ From kiosks and self-help forms on the web to staff, courts are trying to assist people entering their legal systems. Further, national institutions of state court judges (the Conference of Chief Justices of State Courts, the National Center for State Courts, the National Association of Women Judges) have, during recent decades, put themselves at the helm of reforms through a focus on sentencing, juvenile justice, and task forces on gender, race, and ethnic bias in the courts.

The need for state subsidies brings a third facet of our developing twenty-first-century heritage to the fore, that discussions of courts necessarily require a focus on the poor people using them, whether they are filing cases or hailed in as defendants. When poverty in courts becomes central to the "federal courts canon," the image of state and local courts is not only the leadership that state justices have taken in the *Civil Gideon* movement but also a darker role, the exploitation of poor people entering their halls.

"Ferguson" is a shorthand, as that city in Missouri used its police and court systems to exploit residents through imposing fines and fees under racially discriminatory policies. After the tragic death of Michael Brown spurred inquiry into policing and the town's use of its courts, the Supreme Court of Missouri put the Ferguson Municipal Court under what was in essence a receivership.⁴⁶⁹ The Department of Justice launched an investiga-

464 See, e.g., XANDRA KRAMER & SHUSUKE KAKIUCHI, GENERAL REPORT OF THE XV WORLD CONGRESS OF PROCEDURAL LAW: RELIEF IN SMALL AND SIMPLE MATTERS IN AN AGE OF AUSTERITY (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610773.

465 See *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* (Sam Estreicher & Joy Radice eds., 2016).

466 Wallace Jefferson, Foreword, in *BEYOND ELITE LAW*, *supra* note 465.

467 *Id.* at xxiv.

468 For example, the Idaho court system authorizes Court Assistance Officers to provide those without legal representation "with educational materials, court approved forms, limited assistance in completing court forms, and information about court procedures." *Idaho Court Administrative Rule 53: Court Assistance Services*, STATE OF IDAHO JUDICIAL BRANCH (amended Aug. 4, 2005), <https://www.isc.idaho.gov/icar53>.

469 Order Transferring the Honorable Roy L. Richter, Eastern District, Missouri Court of Appeals, to the 21st Judicial Circuit (St. Louis Cty.) (Mo. Mar. 9, 2015) (en banc) (citing

tion⁴⁷⁰ that, in the winter of 2016, resulted in a federal lawsuit against Ferguson. The government alleged that police had engaged in a “pattern or practice of stopping, searching, citing, and arresting individuals without legal justifications,”⁴⁷¹ and in prosecuting and imposing resolutions of “municipal charges in a manner that violates the due process and equal protection rights of defendants.”⁴⁷² A settlement, with detailed plans to revise practices, followed in the spring of 2016.⁴⁷³

Ferguson is, unfortunately, not aberrational. A series of lawsuits, many in state courts (in part because of *Younger* abstention), have challenged comparable practices in other localities. Remedial efforts come from state as well as federal interventions. For example, the Ohio Supreme Court has issued a “bench card” directing judges about how to avoid intimidating impoverished individuals unable to pay fines and fees.⁴⁷⁴ In the spring of 2016, the Department of Justice sent a letter to the chief justices of all the state courts, asking them to direct lower court judges “not [to] incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful,” exploring alternatives to jail for those unable to pay; not conditioning “access to a judicial hearing on the prepayment of fines or fees,” and not using warrants or driver license suspensions as means of “coercing the payment of court debt.”⁴⁷⁵

Thus far, federal courts have not been in focus as a source of unduly high fees, in part because of the system of “in forma pauperis” waivers, provided by statute and required for at least some litigants by constitutional law.⁴⁷⁶ But the federal judiciary has raised the prices of filing fees for a variety of kinds of cases, and hence imposed more expenses on those who are marginal but not indigent. Specifically, the costs of filing a civil complaint have risen from \$250 in 2005 to the current \$350; the cost of docketing an appeal is \$500.⁴⁷⁷

the court’s authority under the Missouri Constitution to order temporary transfers “as the administration of justice requires”).

470 U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

471 Complaint at 10, *United States v. City of Ferguson*, No. 4:16-cv-00180 (E.D. Mo. Feb. 10, 2016), <http://www.justice.gov/opa/file/823486/download>.

472 Complaint at 14, 20, 23, *Ferguson*, No. 4:16-cv-00180.

473 Consent Decree, *Ferguson*, No. 4:16-cv-00180 (Mar. 17, 2016).

474 SUPREME COURT OF OHIO, OFFICE OF JUDICIAL SERVS., COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (Sept. 2015), <http://www.supremecourt.ohio.gov/publications/jcs/finescourtcosts.pdf>.

475 See Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, and Lisa Foster, Dir., Office for Access to Justice (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

476 28 U.S.C. § 1915 (2012); see generally *Boddie v. Connecticut*, 401 U.S. 371 (1971).

477 See *Revised Court of Appeals Miscellaneous Fee Schedule*, ADMIN. OFFICE OF THE U.S. COURTS (Aug. 14, 2014), <http://www.uscourts.gov/services-forms/fees/revised-court-appeals-miscellaneous-fee-schedule>.

Bankruptcy fees were likewise up in 2014,⁴⁷⁸ as administrative fees for filing petitions under Chapters 7, 12, and 13 increased by \$29 to \$75 (raising the total cost of filing a petition under Chapter 7 to \$335, under Chapter 12 to \$275, and under Chapter 13 to \$310).⁴⁷⁹ Given that more than a million bankruptcy petitions are filed annually, filing fees from bankruptcy come in at about three times the rate of civil filings. In a 2014 article, I estimated that as of 2014, bankruptcy petitioners filing under Chapter 7 provided some \$250 million in revenue, while civil filing fees garnered the federal courts about \$100 million that year.⁴⁸⁰

The fourth, and related, facet of this developing common heritage is the decline of adjudication and the question about its potential for revitalization. In a 2015 monograph, *The Landscape of Civil Litigation in State Courts*, the National Center for State Courts analyzed almost a million cases disposed of in 2012–2013 in ten urban counties.⁴⁸¹ Like the federal courts, the caseload mix had changed. In contrast to data in a 1992 survey, in which about half the claims involved tort cases,⁴⁸² the 2012–2013 data found that two thirds of the filings were contract claims, and more than half of those involved debt collection and landlord-tenant disputes. In more than three quarters of the cases, "at least one party was self-represented, usually the defendant."⁴⁸³ Three quarters of the judgments were below \$5200; four percent were disposed of through adjudication.⁴⁸⁴ In short, most cases ended within about

478 See *Bankruptcy Court Miscellaneous Fee Schedule*, ADMIN. OFFICE OF THE U.S. COURTS (Aug. 20, 2014), <http://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule>; *Notice of Fee Changes Effective June 1, 2014*, U.S. BANKR. COURT, S.D.N.Y. (Apr. 30, 2014), <http://www.nysb.uscourts.gov/news/notice-fee-changes-effective-june-1-2014>.

479 Administrative fees for filing petitions under Chapters 9, 11, or 15 increased by \$504 to \$550 (raising the total cost of filing a petition under Chapters 9, 11, and 15 to \$1717). See *Notice of Fee Changes Effective June 1, 2014*, *supra* note 478.

480 Resnik, *Privatization of Process*, *supra* note 32, at 1832 fig.15.

481 NAT'L CTR. FOR STATE COURTS & STATE JUSTICE INST., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* (2015) [hereinafter *STATE COURT 2012–2013 CIVIL LITIGATION*].

482 That study looked at case outcomes in the seventy-five "most populous counties in the country," and at about 750,000 dispositions. CAROL J. DEFRANCES, JOHN A. GOERDT, PATRICK A. LANGAN & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 6* (1995).

483 In 1992, attorneys had represented both parties in 95% of the cases; in 2012–2013, in 24% of the cases. *STATE COURT 2012–2013 CIVIL LITIGATION*, *supra* note 481, at 31; CONFERENCE OF STATE COURT ADM'RS & NAT'L CENTER FOR STATE COURTS, *STATE COURT GUIDE TO STATISTICAL REPORTING* (Version 2.0) 31–32 (2014).

484 Adjudication for these purposes included a judge or jury trial, summary judgment, and binding arbitration. *STATE COURT 2012–2013 CIVIL LITIGATION*, *supra* note 481, at iv. In the 1992 survey, 62% of the cases were disposed of through settlements, and 3% were disposed of by judge or jury trial. *Id.* at 21, 25. Thus, of the almost one million cases, 32,124 trials took place, of which 1109 (3%) were jury trials, and 31,015 (97%) were bench trials. *Id.* at 25–26. Jury awards exceeded \$500,000 in 17 (3%) of the cases, and 75% of the jury awards in tort cases were below \$152,000. *Id.* at 28. The 2012–2013 study also

one year, involved litigants without lawyers, and entailed administrative resolutions rather than adjudication.

These data need to be linked to those mapping the “vanishing trial,” the decline of “bench presence” in the federal system, and the rise of arbitration diverting adjudication away from judges. The vitality of courts, both state and federal, as venues for debating rights and remedies becomes a central problem for constitutional doctrine and in practice. The questions of what Article III, the Petition Clause, or the Due Process Clauses require of coordinate branches of government by way of support of access to courts are raised as part of the current Federal Courts canon, but the inquiry shifts from examples such as detainees at Guantánamo Bay to a broad swath of litigants. State-side, the issues center on how to interpret constitutional provisions about “open courts” and “rights to remedies.”

During the second half of the twentieth century, conflicts about the federal courts focused on whether federal judges had wrongly or rightly insisted that other institutions (Congress, the executive branch, schools, prisons, religious organizations) acknowledge or implement particular rights. The heritage in the making requires addressing whether courts have the constitutional obligation to insist on their own vitality and on their capacity to be responsive to claims of rights to use them. Courts are, of course, moored in the governments that deploy them, and hence the larger question is about the sustainability of democratic governments.

Daniel Meltzer was an optimist, and those of us following in his wake need to continue to imagine flourishing government institutions, able to assist as well as to respond to those in conflict. Because members of the academy are both producers as well as consumers of the heritage, we can insist on thinking about how to implement commitments to the egalitarian redistribution of authority that courts can provide and that Meltzer admired. To appreciate Meltzer’s formulation of the importance of the concept of a “common intellectual heritage” requires considering what heritages need now to be built.

A step for those of us in the academy is to amend the title of the course, currently known as “Federal Courts,” that has Daniel Meltzer’s imprint. Retitling the class “Federal and State Courts in the Federal System” denotes not only that the variegated relationships of these two court systems is already embedded in the discussion but also that sources beyond the federal courts are central to what twenty-first-century lawyers, making a common intellectual heritage, need to know about the challenging work that law has yet to do.

noted that, as contrasted with 1992, both parties were represented in 24% of the bench trials. *Id.* at 25.