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

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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 understanding 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, 1989

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. 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, judgeships, 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. 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.

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, Williamsjames 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. 956 (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 times 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, fair-credit reporting, and clean air in the 1970s; rail safety, hazardous and solid waste, safe drinking water, wiretaps, video privacy, and equal access to justice in the 1980s;


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”).


to civil rights, the needs of soldiers and sailors, telephone consumers’ protection, and family and medical leave in the 1990s.

Such mandates worked to welcome both public and private litigants, and the federal docket tripled between 1960 and 1990. 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. 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.

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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”).


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


drew our attention. 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. Second, about thirty percent of the plaintiffs bringing cases now proceed pro se, without counsel, at the trial level; more than fifty percent do so on appeal. These numbers include many people who are not prisoners. 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. 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-


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&all&m%5Bvalue%5D%5Bmonth%5D=2015&m%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 se 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&m%5Bvalue%5D%5Bmonth%5D=2015&m%5Bvalue%5D%5Byear%5D.

jected to lawsuits for failure to provide indigent criminal defendants with constitutionally required counsel.\textsuperscript{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 availing 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.

Adjudication can therefore be one source of social solidarity, 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. 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. 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, the State Justice Institute received some five million federal dollars to support grants for innovations in state courts.

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

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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.


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.

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.
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.\(^{39}\)

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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.” Through the Post Office Act of 1792 and many statutes thereafter, Congress expanded the system that Benjamin Franklin had once headed.

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.” The 1792 Post Office Act created the system for the “conveyance of information” into “every part of the Union.” 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.” By 1831, the Post Office Department employed some 8000 people, about three quarters of the federal government’s civilian workforce at that time.


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.


43 An Act to Establish the Post-Office and Post Roads Within the United States, 2d Congress, ch. 7, 1 Stat. 292 (1792).
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 1855 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. 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.

Newspapers benefited 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. The post offices were, famously, a conduit for abolitionists, even as the South sought to suppress pamphleteering. The Civil War also provided the impetus for the “postal money order,” a safe method of sending money home. Railway mail, including sorting mail on moving trains, became common thereafter.

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...
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.\footnote{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).} 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 Galveston\footnote{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.} 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.\footnote{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.} Soon thereafter, government records included specific calls for courthouse construction.\footnote{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.} 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.\footnote{Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.} In 1871, Congress authorized federal courts to hear cases alleging deprivations of civil rights\footnote{Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13.} and, in 1875, Congress gave the federal courts what has come to be known as “general federal question jurisdiction” to hear claims (if the
amount in controversy sufficed) alleging a violation of rights arising under federal law.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{63}

\textbf{Figure 2: United States Post Office and Court House, Denver, Colorado, 1892}


\begin{flushleft}
\textsuperscript{60} Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.
\textsuperscript{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, \textit{supra} note 38, at 132–70.
\textsuperscript{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,\textsuperscript{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.\textsuperscript{65} For example, “Memphis received a courthouse even though no federal courts were held there,”\textsuperscript{66} and needs-assessment surveys were not authorized until decades later, in 1926.\textsuperscript{67} The U.S. Supreme Court garnered its first independent building in 1935, as depicted in a photo taken in that year.

\textbf{FIGURE 3: UNITED STATES SUPREME COURT, WASHINGTON, D.C., 1935}

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


\textsuperscript{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, \textit{Building the Federal Judiciary}, supra note 38, at 855.


\textsuperscript{66} Craig, supra note 62, at 163.

\textsuperscript{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

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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.
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.” 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. Meltzer argued that such hurdles of standing could be overcome, in part through congressional direction authorizing class actions to be brought by “plaintiffs who lack injury in fact” 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.”

More generally, Meltzer thought that the idea of either a judicial or a legislative monopoly on remedies was misguided. Repeatedly, he discussed the “incompleteness” of legislative enactments. Yet, in lieu of seeing such gaps as failures of bargaining, 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,” 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, Deterring Constitutional Violations, supra note 74, at 309–12.

82 Meltzer, Deterring 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,” and “a significant departure from historic norms.” 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. They argued that questions about what new laws applied to cases already decided were best understood as part of the law of remedies. Writing in 1991, they voiced concern about doctrines expanding sovereign and official immunity, which could undercut “effective redress to individual victims of constitutional violations.” The need to “keep government within the bounds of law” required more constitutional remedies than existed.

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.” For him, federal courts were an underutilized resource for complex diversity cases because, as a “neutral arbiter,” the federal judiciary could harmonize different legal rules and thereby lessen the challenges of litigation involving large scale, multinational actors.

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.”) 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

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88 Meltzer, The Supreme Court’s Judicial Passivity, supra note 86, at 410.
89 Id. at 389.
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

100 Id. at 65.
103 Meltzer, Sovereign Immunity: Five Authors, supra note 102, at 1016.
104 Id. at 1022–23.
106 Fallon & Meltzer, Habeas Corpus Jurisdiction, supra note 105, at 2111–12.
As this symposium’s essays in honor of Meltzer reflect, 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. 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; or judges “straining under caseloads that have increased far more quickly” than the number of judgeships.

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. Meltzer’s was a quest for principles, for responsible limits, and for identifying when particular remedies were “constitutionally required.” And, as others have noted, 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’ clauses and embraced in the early nineteenth century in


109 Meltzer, Deterring Constitutional Violations, supra note 74, at 328.


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,
Revising “Our Common Intellectual Heritage”

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

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).

was “without any of the customary . . . symbolic representations (scale, sword, book . . .).” 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.”

What did others see? A local newspaper objected to the “barefooted mulatto woman wearing bright-hued clothing.” 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. 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.” 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*, in 1971 in *Reed v. Reed*, and in 2015 in *Obergefell v. Hodges*. 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.
In his view, the on-the-ground work of that machinery was what posed the “central problems for constitutional law.”

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” society), it is useful to remember that the federal courts were once relatively lonely venues, looking for cases. 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

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901:</td>
<td>16,734</td>
</tr>
<tr>
<td>1950:</td>
<td>37,720</td>
</tr>
<tr>
<td>2001:</td>
<td>63,473</td>
</tr>
</tbody>
</table>

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

126 Id.


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 Authorized Judgeships: 1901, 1950, 2001*

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\(^{130}\) 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.5.2 (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.\textsuperscript{131}

A full account of appointments, including both the early and the more recent history, is depicted in \textit{Authorized Life-Tenured Lower Court Federal Judgeships, 1789-2015}.\textsuperscript{132} As Figure 7 details, between 1995 and 2015, new judgeships rose by 28, from 824 in 1995 to 852 in 2015.\textsuperscript{133}

\textbf{Figure 7: Authorized Life-Tenured Lower Court Federal Judgeships: 1789–2015}

\begin{figure}[ht]
\centering
\includegraphics[width=\textwidth]{fig7.png}
\caption{Authorized Life-Tenured Lower Court Federal Judgeships: 1789–2015}
\end{figure}

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

\textsuperscript{131} Data for Figure 6 are drawn from \textsc{Admin. Office Of The U.S. Courts, Judges And Judgeships: Authorized Judgeships} (2012), \url{http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/all-judgeships.pdf}; see also \textsc{Admin. Office Of The U.S. Courts, Chronological History Of Authorized Judgeships In U.S. District Courts}, \url{http://www.uscourts.gov/uscourts/JudgesJudgeships/docs/history-district-judgeships.pdf}.

\textsuperscript{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, \textit{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.

\textsuperscript{133} Data for Figure 7 are derived from the Administrative Office of the U.S. Courts’ \textit{"Chronological History of Authorized Judgeships"} for the Courts of Appeals and the District Courts. \textit{See Chronological History of Authorized Judgeships—Courts of Appeals, Admin. Office Of The U.S. Courts} (Feb. 23, 2016), \url{http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals}; \textit{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. 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. 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.” The sociological import of the Rules cannot be understated, as they shape (and have reshaped) expectations of what constitutes “the judicial” role. 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

Thereafter, both Congress and the civil rights social movement enlisted federal judges in service of their equality efforts. The ascendency 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.\footnote{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 sheep-herder. 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. \textit{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.\footnote{Russell R. Wheeler, \emph{Chief Justice Rehnquist as Third Branch Leader}, 89 \textit{Judicature} 116, 120 (2005).}

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.”\footnote{See, e.g., AO \textit{Ann. Rep.} 113 (1975); see also \textit{Judicial Conference Report} 65 (Sept. 1961) (detailing needs for “the cost of purchasing furniture and furnishings for judges’ chambers and courtrooms”); AO \textit{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”).} 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.”\footnote{Randy Gragg, \emph{Monuments to a Crime-Fearing Age}, \textit{N.Y. Times Mag.}, May 28, 1995, at 36.} 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.\footnote{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.).}

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 \emph{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, \emph{Wanna Make a Federal Case Out of It?}, 48 \textit{A.B.A. J.} 59 (1962) (speculating on the origins of the phrase).

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


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 McCardle 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 Boumediene151 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

147 74 U.S. 506 (1868).
152 See Meltzer, Ex Parte McCardle, supra note 107, at 57; Fallon & Meltzer, Habeas Corpus Jurisdiction, supra note 105.
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. 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. 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.

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 Corporation and, in 1976, authorized fee shifting for prevailing claimants in certain kinds of statutory cases. 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.

The volume of filings produced demand for more judges, and Congress responded both by making small increases in lifetime-tenured positions and by fashioning new genres of non–Article III judges in Article III courts. The number of Article III district court judgeships increased eighteen percent between 1986 and 2013. Some sitting judges took “senior status,” thereby opening up vacant slots while continuing to preside over a reduced caseload.

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). That statutory provision for auxiliary judges was followed in the 1980s by legislation

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 (PRLEDF, now called LatinoJustice/PRLDF), 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).
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.
creating bankruptcy judges.\footnote{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.\footnote{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,\footnote{166} the life-tenured judiciary has approved the transfer of substantial adjudicatory authority to non–Article III judges, with and without litigants’ consent.\footnote{167} As a result, the combined federal judicial workforce (including senior judges) numbered, as of 2015, more than 2300.\footnote{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.\footnote{169}


\footnote{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.


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.
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, 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.

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. 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,

reshaping federal rules, issuing court strategic plans, and lobbying Congress
to cut back on its openness to creating new federal rights.173 These initia-
tives were, in turn, part of a larger effort to constrain government’s regu-
latory 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 reli-
ance on the Commerce Clause. Chief Justice Rehnquist wrote the five-per-
son 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

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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 revi-
sions has been described by one lower trial judge as teaching her to “duck, avoid, evade.”
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,
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

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).
them as rescinding the individual recommendations of the 1995 Long Range Plan.\footnote{185}

The 1995 Plan worried about overuse of the federal courts, both by civil litigants and because of the “federalization of criminal law,” 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.”\footnote{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.\footnote{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.”\footnote{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.\footnote{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.”\footnote{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-

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\footnote{186} See also Task Force on Federalization of Crim. Law, Am. Bar Ass’n, The Federalization of Criminal Law (1998).


\footnote{188} Id. at 34, 38, 35.

\footnote{189} Id. at 28, 24.

\footnote{190} Id. at 18.

\footnote{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. 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. 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.”

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. 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.” To justify that holding, the Court noted the risk of passing on costs to the government; aside from creating a government contractor immunity, the Court did not explore techniques (such as price caps) to avoid the potential for added costs.

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.”

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. 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.

A parallel to Boyle comes from a more recent decision by the Seventh Circuit, sitting en banc in 2012 in Vance v. Rumsfeld. 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. 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. A government-convened “Detainee Status Board” eventually determined that Vance and Ertel were “innocent” of the claims made against them and ordered their release.

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.” That phrasing could be read to imply that liability was possible, if plaintiffs

198 Meltzer, Deterring 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.
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.  

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* 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 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.

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. 

*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.

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207 403 U.S. 388 (1971).
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-

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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
nings, that Alliance would "almost certainly" prevail on the merits but that, by then, the defendants' assets would likely be insufficient to pay the judgment.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{220} 

debits 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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.”

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. 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. 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 Pillar 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.


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

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

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, 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[ed] at arm’s length on equal terms,” the federal securities laws were “drafted with an eye to the disadvantages under which buyers labor.” 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.’”

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. 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-

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

“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. 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. 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).


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 . . . .

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

FIGURE 9: WAFFLE HOUSE EMPLOYMENT APPLICATION

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: Baker, James

Social Security No.: 012-34-5678

Telephone No.: (555) 555-5555

Present Address: 123 Main Street

City: Anytown

State: Ohio

Relationship: Single/Divorced/No

Address: 123 Main Street

City: Anytown

State: Ohio

Phone No.: (555) 555-5555

Relationship: Single/Divorced/No

Are you a citizen of the United States? Yes

Are you a member of the U.S. Armed Forces? No

Have you ever been arrested or convicted of any crime, including minor traffic violations? No

Are you a juvenile under the age of 18? No

What kind of car do you drive? Make: Ford

Model: Mustang

Year: 1994

Will you use your car to get to work? Yes

Position(s) applied for: Cashier

Rate of pay expected: $10

Part: Full-time

Specify days and hours if part-time: Monday through Friday, 9 AM to 5 PM

Were you previously employed by Waffle House? Yes

If yes, where and when?

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? This week: Monday to Friday

Next week: Monday to Friday

Are there any other experiences, visits, or questions which you feel would especially fit you for work with the Company? No

Employment Dates in the Food Industry:

Have you been released a Health Permit to work at any occupation(s)? Yes

If yes, again later:

Can you lift 20 lbs. to shoulder height? Yes

Are you able to remain standing on your feet for a full 10-hour shift? Yes

Are you able to sweep, mop, etc. Yes

MILITARY SERVICE: Are you a veteran? No

If yes, dates of service: None

Branch: None

Past attitudes: None

Are you a member of any Reserve organization or National Guard? No

What is the type of discipline?

Are you a regular or occasional applicant at Waffle House, Inc.? Regular

If regular, at what location?

If occasional, at what locations?

Are you familiar with the policies and procedures of Waffle House, Inc.? Yes

If you do not have any of the above, please state the reasons and be prepared to explain:

EXHIBIT A


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 he was fired. Baker went to the Equal Employment Opportunity Commission (EEOC), which filed an Americans with Disabilities Act (ADA)
lawsuit, alleging discrimination because of the seizure.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{itemize}
\item \textsuperscript{260} Id. at *1.
\item \textsuperscript{261} Id.
\item \textsuperscript{262} Id. at *2.
\item \textsuperscript{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).
\item \textsuperscript{264} EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).
\item \textsuperscript{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).
\item \textsuperscript{266} See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
\end{itemize}
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.) As is now famil-
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. As is also familiar, the U.S. Supreme Court reversed the California decision in *AT&T v. Concepcion*, decided five to four in 2011. 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.”

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, the Consumer Financial Protection Bureau (CFPB), and by way of analyses of web-based information.

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268 C AL. 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).


A few jurisdictions, of which California is one, require providers of consumer arbitrations to publish data about their services.\textsuperscript{273} As of 2011, a Hastings Law School study tallied twenty-six arbitration providers in California and identified eleven providers following these requirements.\textsuperscript{274} The American Arbitration Association (AAA) is one of those that does comply and, moreover, provides significant amounts of information.\textsuperscript{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, \textit{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.

\begin{center}
\textbf{FIGURE 11: CONSUMER ARBITRATIONS FILED WITH THE AMERICAN ARBITRATION ASSOCIATION: 2009–2014}
\end{center}

\begin{tabular}{|l|l|l|l|}
\hline
\textbf{Sources} & \textbf{Types} & \textbf{Average per Year} & \textbf{Total} \\
\hline
AAA Data, Provider Organization Report & AAA-defined consumer claims & 1,460 & 7,303 \\
\hline
June 2009–July 2014 & AAA claims involving AT&T & 85–120 million users & 27 & 134* \\
\hline
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 \\
\hline
\end{tabular}

\* 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


\textsuperscript{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. 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. 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.”

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. CFPB researchers identified 616 individual arbitrations during a three-year period, of which a third were brought by companies against the individuals.

The judicial insistence on an expansive interpretation of the FAA continued in the 2015–2016 Supreme Court term. In DIRECTV, Inc. v. Imburgia, 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. 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

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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.
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 Associates288 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

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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).
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. 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.” Her objection (echoed by Justice Thomas most recently in DIRECTV) 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. 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. 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).
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.”

A case on the docket in 2012 ended without reaching the “no-injury” question, and the issue was posed again in the 2015–2016 term in Spokeo Inc. v. Robins, 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. The FCRA, dating from 1970, protects consumers by authorizing federal agencies and state attorneys general to bring cases

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).


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(c).

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,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{305}

\textsuperscript{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”).


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. The Ninth Circuit reversed, and the Supreme Court granted review. 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. 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 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).
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, Mr. Robins’s complaint passed the “plausibility” test that the Supreme Court has imposed on pleadings.

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. 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. 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-


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.
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.

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. 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. 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.

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


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.\(^\text{320}\)

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 III\(^\text{321}\) or that Article II’s Take Care Clause permitted enforcement of the statute only by the executive, unless individuals have “actual injuries.”\(^\text{322}\)

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,” a “bare violation of statutory duties,” an “uninjured plaintiff,” a “wholly uninjured persons,” no “real-world sense” of injury or no “real” injury, “no-harm class actions,” a “technical violation,” a “statutory injury,” “statutory injury-in-law,” the absence of “actual harm,” an “empty suit,” and “negligible or infinitesimal” economic loss.

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. The work of her 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).


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.


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.


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 individual recouped little benefit and administrative expenses (including lawyers’ fees) take the bulk of monetary awards. Id. at 4–5, 23–24.

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

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. 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.” 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.

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. 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.” 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.”

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 Congress 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.”

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

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 Id. at 1553.
340 Id. at 1554, 1556 (Ginsburg, J., dissenting, joined by Sotomayor, J.).
341 Fallon, On Viewing the Courts as Junior Partners, supra note 108.
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” 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 experiments 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 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 Monaghan) 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).
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), the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)), 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), 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. 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. 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.


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. Further, the Court’s inventive interpretations of IIRIRA left windows open for migrants to obtain judicial review of certain decisions by the executive. 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. 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, and by an occasional habeas petitioner such as the one whose lawyer left the firm without safeguarding his client’s access rights.

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.

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. 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

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358 See, e.g., FARHANG, LITIGATION STATE, supra note 154, at 19–24.
FMLA. The 1994 Violence Against Women Act (VAWA) authorized damage actions for victims of gender-based violence (later rejected by the U.S. Supreme Court), as well as new federal criminal penalties. 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.

Other statutes have a lower profile. In 1997, Congress added enforcement authority against violations of the Atlantic Striped Bass Conservation Act and created a new federal crime of “electronic theft.” 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.

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

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sue the perpetrators. 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.

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. In 2012, after the Supreme Court had ruled that the First Amendment protected anti-gay protestors at the funeral of a U.S. soldier, Congress crafted a civil remedy for those alleging that individuals had disrupted the funeral of a member of the armed services.

In 2015, Congress created federal oversight of insurance brokers through a

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367 Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-195, § 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).


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.\footnote{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. \footnote{373}{See, e.g., \textit{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. \textit{Id.} at 6; \textit{see also} Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, \textit{Private Enforcement}, \textit{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, \textit{supra}, at 662–66. Farhang also found that many individuals, rather than politically organized plaintiffs, filed suit. \textit{See Farhang, Litigation State}, \textit{supra} note 154, at 11. In his sample, interest group litigation constituted 2–5% of published federal appellate decisions between 1960 and 2004. \footnote{374}{See generally Jerry L. Mashaw, \textit{The Supreme Court's Due Process Calculus for Administrative Adjudication} in \textit{Mathews v. Eldridge: Three Factors in Search of a Theory of Value}, \textit{44 U. Cin. L. Rev.} 28 (1976).}}

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.\footnote{373}{See, e.g., \textit{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. \textit{Id.} at 6; \textit{see also} Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, \textit{Private Enforcement}, \textit{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, \textit{supra}, at 662–66. Farhang also found that many individuals, rather than politically organized plaintiffs, filed suit. \textit{See Farhang, Litigation State}, \textit{supra} note 154, at 11. In his sample, interest group litigation constituted 2–5% of published federal appellate decisions between 1960 and 2004. \footnote{374}{See generally Jerry L. Mashaw, \textit{The Supreme Court's Due Process Calculus for Administrative Adjudication} in \textit{Mathews v. Eldridge: Three Factors in Search of a Theory of Value}, \textit{44 U. Cin. L. Rev.} 28 (1976).}} 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 \textit{Spokeo}). But private enforcement can also \textit{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.\footnote{374}{See generally Jerry L. Mashaw, \textit{The Supreme Court's Due Process Calculus for Administrative Adjudication} in \textit{Mathews v. Eldridge: Three Factors in Search of a Theory of Value}, \textit{44 U. Cin. L. Rev.} 28 (1976).} 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
federally funded building programs. The exception is the federal judiciary’s inability to obtain increases in salaries, which is an ongoing source of concern.

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. A “no net new” policy was put into place, requiring that any circuit seeking additional space had to identify reductions through trade-offs, such as “courtroom sharing” and cutting back on projections for space for new judgeships.

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


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.\textsuperscript{380} In addition, and based on concerns about “longer-term funding prospects,”\textsuperscript{381} the courts requested $7 billion in discretionary appropriations for 2016, a 3.9% increase over 2015.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{385}

\textsuperscript{380} Gibbons Judiciary’s Budget 2015, \textit{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.” \textit{Id.} at 1. Those 2015 operations funded support for 2,352 judicial officers (including both Article III and non–Article III magistrate and bankruptcy judges) and some 28,500 court employees. \textit{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).

\textsuperscript{381} Gibbons Judiciary’s Budget 2015, \textit{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.

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


\textsuperscript{385} \textit{Id.}
Revising “Our Common Intellectual Heritage”


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.\footnote{386} As Chief Justice Rehnquist explained when introducing the 1995 \emph{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.”\footnote{387}

Seeking to keep the number of life-tenured judgeships small,\footnote{388} the Judicial Conference argued that limiting workload would make the federal courts “more accessible”\footnote{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.”\footnote{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.”\footnote{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.”\footnote{392} In this future, the “federal courts have by and large become criminal courts and forums for those who cannot afford private justice.”\footnote{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 \emph{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.

\footnotesize{\begin{itemize}
\item \footnote{386} Chief Justice Rehnquist introduced the Judicial Conference’s 1995 \emph{Long Range Plan}, replete with recommendations on retrenchment that were explained as in service of “conservation.” See 1995 \emph{Long Range Plan for the Federal Courts}, \emph{supra} note 184, at vii.
\item \footnote{387} \emph{Id.} at vii.
\item \footnote{388} \emph{Id.} at viii.
\item \footnote{389} \emph{Id.} at 5.
\item \footnote{390} \emph{Id.} at 18–19.
\item \footnote{391} \emph{Id.} at 19–20.
\item \footnote{392} \emph{Id.} at 20.
\item \footnote{393} \emph{Id.}
\end{itemize}}
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

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**Figure 12: 1995 Projections of, and the Federal District Court Caseloads in, 2010**

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. As the charts detail, federal filings are flattening. While some districts remain busy, filings in other districts were, as of 2015, down to about 160 per judge. If the trend line holds stable, both the...

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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/159825/download (last visited July 12, 2016). Nationally, according to the highlights from the 2015 AO/USC Judicial Business update, civil case filings fell 6% to 279,036. *Judicial Business 2015*, Admin. Office of
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


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.  

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). 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. Returning to 2015, of 341,813 federal civil cases pending, 192,529 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.

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. 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-
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


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


appeals were lawyer-less on at least one side, and about 12,000 of those appellants were not prisoners.\footnote{13}

\begin{figure}[h]
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\caption{Pro Se Filings in the U.S. Courts of Appeals: 1995–2014}
\end{figure}

The number of pro se filings in the district courts has been tracked since 2004. As Figure 15, \textit{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.\footnote{14} 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.\footnote{15}

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.”


\footnote{14} \textit{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. \textit{See Judicial Business}, tbl.C-13, \textsc{Admin. Office of the U.S. Courts, \url{http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=all&m%5Bvalue%5D%5Bmonth%5D=C-y%5Bvalue%5D%5Byear%5D} (last visited May 20, 2016).}

\footnote{15} \textit{See Katherine A. Macfarlane, Shadow Judges: Staff Attorney Adjudication of Prisoner Claims (Feb. 8, 2016) (unpublished manuscript), \url{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.}
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-

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.
pleted fewer than 5000 civil trials and about 7400 criminal trials in 2014. 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.”

Of course, judges do more than sit in court; a needed, but absent, data point is the number of opinions that judges write. 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, 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


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”).


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.

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.”

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. (During that interval, she noted, the U.S. population grew thirty-two percent.) 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.

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.
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.” 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 pretrial 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” 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. 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.”

430 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...
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raised questions about the USPS’s economic viability.\footnote{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.} 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.\footnote{See Daniel J. Richardson, Cong. Research Serv., R43162, The U.S. Postal Service’s Financial Condition: A Primer, Congressional Research Service (Dec. 30, 2014).} 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.

FIGURE 16: HISTORIC POST OFFICE FOR SALE


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


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 constraining 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,

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
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, 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

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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. The federal government gave another $5 million in 2015 to the State Justice Institute (SJI), 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.” 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, 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...
"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. 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. By then, the United States Supreme Court had held that federal criminal defendants had the right to appointed counsel 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; 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.” 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.

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

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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 rela-
tions, 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 prompt-
ing 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 busi-
dess, despite pressing needs such as domestic violence protection orders and
childcare subsidies.463  Procedure circles are preoccupied with what scholars

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 mat-
ters involving critical issues affecting basic human needs.”  CAL. GOV. CODE § 68651(b)(5)
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 Tem-
plate, supra note 28, at 4.
460  PERMANENT COMM’N ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE
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
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 CJTS., 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-


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
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,” and in prosecuting and imposing resolutions of “municipal charges in a manner that violates the due process and equal protection rights of defendants.” A settlement, with detailed plans to revise practices, followed in the spring of 2016.

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. 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.”

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. 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.
Bankruptcy fees were likewise up in 2014, 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). 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.

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. 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, 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.” Three quarters of the judgments were below $5200; four percent were disposed of through adjudication. In short, most cases ended within about

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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.


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.