THE CAPITAL OF AND THE INVESTMENTS IN COURTS, STATE AND FEDERAL

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Longstanding constitutional commitments appear to ensure rights to remedies for "every person." Nonetheless, courts were once exclusionary institutions contributing to the maintenance of racialized status hierarchies. Twentieth-century civil rights movements pushed courts into recognizing the authority of diverse claimants to pursue their claims. These movements also succeeded in legislatures, which invested in making constitutional obligations real through statutory entitlements, jurisdictional grants, and funding for tens of hundreds of courthouses, judgeships, and staff.

Courts thus became icons of government commitments to legal remedies, as well as battlegrounds about the authority of government to regulate power, both public and private. In this essay, I explore how the federal courts became the source of "our common intellectual heritage," why it is difficult to bring sustained attention to state courts, and why doing so has become pressing as economic inequalities in state and federal courts undermine adjudication's legitimacy.

Many of the new rights-holders had limited resources. Asymmetries in dispute resolution make aspirations to provide fair and equal treatment difficult. Because courts are public sites, the disparities are patent—bringing to the fore the problems facing litigants and courts. For some, responses lie in augmenting the capacity of courts to make good on their promises as information-forcing, conflict-exposing, and information-disseminating institutions. For others, the goal is to limit access to courts and undercut the legitimacy of their processes and outcomes. Illustrative is "Judicial Hellholes," which is the name of a yearly publication attacking jurisdictions in which plaintiffs succeed in obtaining remedies.

To clarify the normative stakes of conflicts over "rights to remedies" in "open" courts, I focus here on the infrastructure of state and of federal courts and data on users and needs. Filings in both federal and state courts have, in recent years, declined, while concerns about self-represented litigants and the inaccessibility of courts have risen. I argue that the legal academy needs to take on "class" (as in economic wherewithal) in courts and that Congress needs to provide fiscal support for both federal and state courts, on which enforcement of law depends, and I address the challenges of doing so.

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"That every Freeman for every Injury done him in his Goods, Lands or Person, by any other Person, ought to have Remedy by the Course of the Law of the Land, and ought to have Justice and Right for the Injury done to him freely without Sale, fully without any Denial, and speedily without Delay, according to the Law of the Land."

—Delaware Declaration of Rights and Fundamental Rules, 1776, § 12

"All courts shall be open, and every person, for an injury done 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."

—Connecticut Constitution of 1818, Article I, § 12

"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."

—Alabama Constitution of 1819, Article I, § 14

"That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered without sale, denial, or delay; and that no private property ought to be taken or applied to public use without just compensation."

—Missouri Constitution of 1820, Article XIII, para. 7

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

—United States Constitution, 1789, Article III, § 1

"No person shall be . . . deprived of life, liberty, or property without due process of law."

—United States Constitution, 1791, Amendment V

I
Promising Courts

Commitments to courts date back centuries. Influenced by the Magna Carta, Lord Coke, Blackstone, and English common-law traditions, the institutional configurations of federal and state courts in the United States impose duties on judges to decide disputes in public and in accordance with the law of the land. This "custom and usage"[1] was reflected in the Charter of the English Colony of West New Jersey, which in 1676 provided that in "all publick courts of justice for trials of causes, civil or criminal, any person or persons . . . may freely come into, and attend."[2] In later centuries, as the epigraphs illustrate, state constitutions ensconced these ideas as "rights."[3]

The rights announced were, however, incomplete. When those constitutions were adopted, "every person" did not, in any of the jurisdictions I quoted, refer to *everyone*. Indeed, drafters of many state constitutions were committed to protecting the property rights of landowners, creditors, and, in some places, slave owners.[4] Missouri's 1820 Constitution is an example; in addition to promising "open" courts to

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[1] Chapter 29 of the 1225 Magna Carta provided: "No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right." J.C. Holt, Magna Carta, appx. 12, 501 (2d ed. 1992). Chapter 40 of King Judge's 1215 Magna Carta reads: "To no one will we sell, to no one deny or delay right or justice." *Id.* at appx. 6, 441. The evolution is described in Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1320–24 (2003); and in William C. Koch, Jr., *Reopening Tennessee's Open Court Clause*, 27 U. Mem. L. Rev. 333, 357–63 (1997).

[2] Charter or Fundamental Laws of West New Jersey, Agreed Upon, ch. XXIII (1676), *reprinted in* Sources of Our Liberties 188 (Richard L. Perry ed., 1959).

[3] Miriam Seifter and others at the University of Wisconsin have compiled an interactive map archive of state constitutions that enables analysis. *Explore State Constitutions*, U. Wis. L. Sch. State Democracy Rsch. Initiative, https://50constitutions.org [https://perma.cc/ZSZ8-5XYB]. The Brennan Center for Justice's State Court Report program tracks developments in case law. Brennan Ctr. for Just., State Court Report, https://statecourtreport.org [https://perma.cc/Z5CY-DDAS]; *see also* Alliance for Just., Courting Change: 2023 Momentum for Movement Law, https://afj.org/why-courts-matter/courting-change-2023-momentum-for-movement-law [https://perma.cc/32W4-ZUHE]. HeinOnline's State Constitutions Illustrated database provides routes into state constitutional changes. *State Constitutions Illustrated*, HeinOnline, https://home.heinonline.org/content/state-constitutions-illustrated [https://perma.cc/8JPC-SZCJ]. Kyle Barry, the director of the State Law Research Initiative, maintains a blog about "state supreme courts, constitutions, [and] how they shape the criminal legal system." *Newsletter & Blog*, State L. Rsch. Initiative, https://behindthestatebench.com/newsletter-blog [https://perma.cc/EF3E-EZC6].

[4] *See* Kilmer v. Mun, 17 S.W.3d 545, 547–48, 554 (Mo. 2000) (citing David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1201 (1992)).

"every person," it insulated enslavement by restricting the legislature's power, which was not to pass laws:

> First, For the emancipation of slaves without the consent of their owners, or without paying them, before such emancipation, a full equivalent for such slaves so emancipated; and, Second, To prevent bona fide emigrants to this state, or actual settlers therein, from bringing from any of the United States, or from any of their territories, such persons as may there be deemed to be slaves, so long as any persons of the same description are allowed to be held as slaves by the laws of this state.[5]

As befitted those propositions, more than a century later the Missouri Supreme Court invoked its remedy clause in the 1940s to enforce racially restrictive covenants.[6]

Courts were thus one of many institutions maintaining racialized status hierarchies. The idea of courts as *sources* for recognition that all persons were equal rights-holders and as *resources* for the whole array of humanity is an artifact of the Reconstructions in the nineteenth and the twentieth centuries. Not until well into the twentieth century did U.S. law and practice embrace the proposition that race, gender, and class ought not limit access. As a consequence, constitutional texts such as Missouri's references to remedies for "every injury to person, property, or character" changed in two respects.[7] First, the word "person" was reread to be inclusive, and second, new forms of harm fell within the rubric of what constituted an "injury." Whole bodies of law came into being, as women and children inside households were recognized as juridical persons entitled to law's protection, alongside employees, consumers, victims of pollution, individuals claiming discrimination, and many others.

The interaction between constitutional obligations from earlier eras and developing legislative commitments to economic and personal security turned courts into universal entitlements with the potential to redistribute the use and the power of law. The results have included a radical uptake in the demand for court services, intense conflicts over judicial appointments, questions about whether constitutional obligations to provide courts requires legislatures to allocate resources for judges and subsidies for users, debates about the legitimacy of courts' power, and disagreements about what kinds of injuries should

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[5] Mo. Const. art. III, § 26 (1820).

[6] *See* Kraemer v. Shelley, 198 S.W.2d 679 (Mo. 1946), *rev'd on other grounds*, 334 U.S. 1 (1948).

[7] Mo. Const. art. XIII, § 7 (1820).

be cognizable in courts. Because state courts are the venue for more than ninety-five percent of the country's litigation, with some eighty million cases filed annually in recent years, states bear the weight of responding to that demand, negotiating for resources, and fending off attacks on their integrity and authority.[8]

On many metrics, legislatures and judiciaries have *risen* to the occasion. Once "every person" denoted all within the social order, pressures emerged for judges and jurors to be drawn from a broader array of people. As a result, courts around the country in this century look different than their predecessors.[9] Data from a 2023 Brennan Center report on the fifty states and Washington, D.C. calculated that forty-two percent of the seats on state supreme courts were occupied by women, with a separate tabulation identifying twenty percent held by people of color.[10] If accepting as a baseline that about half of the U.S. population are women and forty percent are people of color, gaps remain. If the comparison is to courts of the mid-twentieth century, the changes are evidence that judicial selection in this polity aims to include segments excluded in prior eras.

Other effects of these constitutional reinterpretations can be found in the array of claims filed, the diversity of the litigants, and the new constitutional questions that have arisen about the import of rights-to-remedies clauses, equal protection, and due process. Once court doors opened to people of all classes, many sought to invoke (or were brought into court to contest) their property and person. Thus, egalitarian democratic movements have not only changed but also have challenged courts, as adversarial systems require knowledge of rights and the economic means to pursue them. Questions about *constitutional*

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[8] In 2018, the National Center for State Courts tallied about 84 million cases; a 2022 count pegged the number at 64.4 million. *See* Ct. Stat. Project, Nat'l Ctr. for State Cts., State Court Caseload Digest: 2018 Data, at 7 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/YG9Y-HETV]; Morgan Moffett, Sarah Gibson, & Diane Robinson, *2022 Caseload Highlights*, Nat'l Ctr. for State Cts. (Jan. 16, 2024), https://www.courtstatistics.org/__data/assets/pdf_file/0026/97514/2022-Caseload-Highlights-Trial.pdf [https://perma.cc/FAF5-GGTR]. Given that about 270,000 cases (civil and criminal) were filed in the federal courts, about ninety-five percent of all cases are heard in state courts. *See* Alicia Bannon, *Choosing State Judges: A Plan for Reform*, Brennan Ctr. for Just. (Oct. 10, 2018), https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform [https://perma.cc/TW9L-TL4Z].

[9] *See generally* Judith Resnik, *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts*, 15 Law & Ethics of Hum. Rts. 1 (2021) [hereinafter Resnik, *Representing What?*].

[10] Amanda Powers & Alicia Bannon, *State Supreme Court Diversity—May 2023 Update*, Brennan Ctr. for Just. (May 15, 2023), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2023-update [https://perma.cc/28RH-YM49]. *See generally* Judith Resnik, *Asking About Gender in Courts*, 21 Signs 952 (1996).

entitlements to court-related subsidies—for filing and related fees, investigation, lawyering, translation, transcripts, evidence, and more—came to the fore.

When disputants' resources are asymmetrical and when government fees-for-services systematically exclude sets of claimants, promises of access and of remedies become illusory. If segments of the population are excluded as jurists or precluded as litigants, the legitimacy of this form of state power is at risk. These concerns prompted the U.S. Supreme Court to insist that, in a small slice of litigation, subsidies of some form were required for court-based expenses when people were involved in certain kinds of family conflicts and criminal prosecutions.[11] This provisioning supports individuals who have limited means to use the courts and, as Helen Hershkoff and I have described, it is "Janus-faced,"[12] in that it also is protective of the legitimacy of the social order.

Courts can therefore be understood as an affirmative obligation—a required government service. Over the centuries, a mix of historical practice, common law, and constitutional text have generated "waves of duties" (to borrow from Jeremy Waldron) that have instantiated courts as one of many institutions of government enforcing legal duties.[13] As with other such entitlements, realization has been incomplete. State constitutions are replete with enumerations of protections (such as for education, health care, and the environment, or a kind of "candy store" of rights) that sit atop robust commitments to open courts and access to remedies. The result is a struggle to meet demand. In some localities, government officials have exploited the need to be in court by imposing fees and fines as sources *of revenue*.[14] Moreover, as courts

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[11] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Boddie v. Connecticut, 401 U.S. 371 (1971); Brady v. Maryland, 373 U.S. 83 (1963). *See generally* Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 Harv. L. Rev. 78, 82–84 (2011) [hereinafter Resnik, *Fairness in Numbers*].

[12] Helen Hershkoff & Judith Resnik, *Constraining and Licensing Arbitrariness: The Stakes in Debates About Substantive-Procedural Due Process*, 76 SMU L. Rev. 613, 621, 631 (2023).

[13] Jeremy Waldron, *Rights in Conflict*, 99 Ethics 503, 510 (1989).

[14] *See, e.g.*, Geoffrey McGovern & Michael D. Greenberg, *Who Pays for Justice? Perspectives on State Court System Financing and Governance*, RAND Inst. for Civ. Just. 1, 15–19 (2014), https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR486/RAND_RR486.pdf [https://perma.cc/TH8B-7CPM]; Dep't of Just. Civ. Rts. Div., Investigation of the Ferguson Police Department 1, 2–5 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/569L-WJVJ]; Settlement Consent Decree at 1–2, United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Apr. 19, 2016); Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Ctr. for Just., Criminal Justice Debt: A Barrier to Reentry 1 (Oct. 4, 2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/BN88-X4GY]; Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah

became sources *of recognition* of new rights and remedies, political battles have intensified about the selection of judges and the outcome of their adjudication.

The impact, the import, and the challenges of state courts have not, however, been central to contemporary legal education. Indeed, from the perspectives of the curriculum and scholarship in many law schools, state courts have been "missing in action." Likewise, state courts' needs have not been met by Congress, which has provided virtually no economic support to accompany its many laws that depend on state-court enforcement. In contrast, the federal courts loom large in both the popular and legal imaginations.

In this essay, I explore some of the reasons for gaps in academic and congressional attention. I focus on the interaction among constitutional mandates *for* courts and legislative investments *in* courts, which have produced more than four hundred federal court buildings (housing some two thousand judges, some with Article III life tenure and others who are magistrate and bankruptcy judges) and thousands of state courthouses (staffed by some thirty thousand judges). Thus, I join a host of scholars comparing aspects of federal and state courts,[15] and I applaud

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Atchison, Brennan Ctr. for Just., The Steep Costs of Criminal Justice Fees and Fines 1, 6–7 (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fines-and-fees [https://perma.cc/DF98-FVYS]; Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N.C. L. Rev. 361 (2020) [hereinafter Resnik & Marcus, *Inability to Pay*].

[15] One line of research was prompted when the U.S. Supreme Court cut off access to federal courts to seek vindication of Fourth Amendment and other rights and asserted that state courts provided a sufficient alternative forum. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976). Thus, Burt Neuborne and others explored the question of "parity" between federal and state courts in the context of civil rights litigation. Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). Neuborne compared federal district courts to state supreme courts and argued that federal judges had the luxury of fewer cases, more law clerks, and the élan of being *in* the federal judiciary, all of which enabled them to be open to novel federal law development that would generate nationwide change. *See also* Michael E. Solimine, *The Future of Parity*, 46 Wm. & Mary L. Rev. 1457 (2005); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233 (1988). Another approach was to look at when and why U.S. Supreme Court Justices endorsed the power of states. *See, e.g.*, Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141 (1988). Yet others, including court systems themselves, launched inquiries on many topics, such as the impact of gender, race, and ethnicity. *See, e.g.*, Resnik, *Asking About Gender in Courts*, *supra* note 10. Another line of scholarship focuses on the impact of methods of selecting judges. Jed Handelsman Shugerman, The People's Courts: Pursuing Judicial Independence in America (2012).

Other work probed judicial culture and function across states. In the 1970s, researchers Bliss Cartwright, Lawrence Friedman, Robert Kagan, and Stanton Wheeler, supported by the National Science Foundation, sampled sixteen states' supreme court decisions at five-year intervals to gather data. A summary and critique come from Stephen Daniels, *A Tangled Tale: Studying State Supreme Courts*, 22 Law & Soc'y Rev. 833 (1988). A different methodology, also supported by federal funds, came from the Civil Litigation Research Project, analyzing data from

the generation of this Symposium, joining other efforts to bring state-court adjudication more readily into view. Recent additions include the Wisconsin searchable state-court constitution database, the Brennan Center's State Court Reports, and projects of the American Academy of Arts and Sciences (AAAS) and of the American Law Institute (ALI).[16]

II
Building a "Common Intellectual Heritage" Through Investing in the Federal Courts

Daniel Meltzer identified decades ago that "[i]nsofar as modern lawyers have a common intellectual heritage, the federal courts are its primary source."[17] Legal education is a contributor, often using federal law as its exemplar and training attention on the U.S. Supreme Court, where social and political movements have long aimed to ensconce competing visions of national power and constitutional meaning.

During the twentieth century, conflicts over the New Deal and the scope of congressional commerce powers were followed by the equality movements of *Brown v. Board of Education*, *Reed v. Reed*, the reproductive-freedom movement's *Roe v. Wade* (since overturned) and, in the twenty-first century, *Obergefell v. Hodges*.[18] Iconic cases in

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more than 1,600 cases filed in state and federal courts to learn about the time lawyers invested, the economic stakes of cases, and outcomes. *See* David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72 (1983). Possibilities have since expanded through analytics, permitting scanning and recoding texts. Illustrative is one data set of more than 200,000 cases aiming to capture trends in state supreme court dockets from 1995 to 2010. Matthew E.K. Hall & Jason Harold Windett, *New Data on State Supreme Court Cases*, 13 State Pol. & Pol'y Q. 427 (2013).

[16] Some decades ago, Jennifer Friesen shaped a compendium on state constitutions. *See* Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses (4th ed. 2006). The question of how state jurists interpret their constitutions is explored by several commentators. *See, e.g.*, Goodwin Liu, Brennan Lecture, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307 (2017); Ellen A. Peters, Brennan Lecture, *Capacity and Respect: A Perspective on the Historic Role of the States Courts in the Federal System*, 73 N.Y.U. L. Rev. 1065 (1998); Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 Rutgers U. L. Rev. 905 (2018); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 Notre Dame L. Rev. 1015 (1997); Margaret H. Marshall, *Threats to the Rule of Law: State Courts, Public Expectations & Political Attitudes*, 137 Daedalus 122 (2008); Frederick Schauer, *Our Informationally Disabled Courts*, 143 Daedalus 105 (2014); Judith Resnik, *Reinventing the Courts as Democratic Institutions*, 143 Daedalus 9 (2014). In 2022, the ALI launched the Principles of High-Volume Civil Adjudication Project, to address serious challenges facing state courts in adjudicating "high-volume, high-stakes, low dollar-value civil claims." Richard L. Revesz, *Project Spotlight: ALI Launches Two New Projects*, 45 A.L.I. Rep. 1 (2022).

[17] Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. Chi. L. Rev. 423, 427 (1989).

[18] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Reed v. Reed, 404 U.S. 71 (1971); Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 576 U.S. 644 (2015).

this decade of other movements' successes include *Dobbs v. Jackson Women's Health Organization* and *New York State Rifle & Pistol Association v. Bruen*.[19] In addition to being central to major debates, the Court has decided to have a small docket. It chooses its work and performs its own competence by opening its term each fall and, aside from its emergency docket, closing it by summer.

Yet to look at the Court as *the* engine of our "common intellectual heritage" is to miss the centrality of congressional action, prompted by and responding to the nationalization of the economy in the wake of wars, the Great Depression, and the struggle over individuals' rights and status. In the twentieth century, private legal institutions, such as the American Bar Association (ABA), the American Law Institute (ALI), and the American Association of Law Schools (AALS), contributed to the federalization of the legal profession and of the academy.

The promulgation of the 1938 Federal Rules of Civil Procedure was pivotal in socializing law students, lawyers, and judges into a court structure unbounded by state lines. Those nationwide rules were followed by provisions for criminal procedure, evidence, and appellate procedure, all of which produced common vocabularies around areas of practice. For example, through the federal civil rules, lawyers and judges from East to West share shorthands such as "Rule 12(b)(6)," "*Twombly*," "*Iqbal*," "Rule 23(b)(3)," and "*Eisen*."

Repeatedly, Congress made impressive investments in the federal courts. While law school discussions frequently center on congressional powers to "strip" or "control" federal court jurisdiction, the legislature has generally been *jurisdiction-endowing.* Examples include grants of federal question jurisdiction, specialized civil rights jurisdiction, and the authority to rule on disputes involving foreign sovereigns, securities, intellectual property, the environment, and more. Congress has also opened federal courthouse doors through specific jurisdiction provisions attached to a panoply of statutory rights; many statutes encourage private enforcement by offering "litigation incentives" such as attorney fee-shifting and treble damages in antitrust lawsuits.[20] Across the political spectrum, members of Congress have sought to create new federal private causes of action to implement their views of what national norms should be.[21]

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[19] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022).

[20] *See* Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the U.S. (2010).

[21] *See generally* Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. Irvine L. Rev. 657, 660 (2021).

One form of investment is creating the power of federal judges to rule on cases through grants of jurisdiction, and another is money. In both national and state governments, the percentage of government budgets allocated to courts has been small (many argue too small)—one to two percent of total spending.[22] Comparing the federal judiciary with state courts, congressional investments in infrastructure and staff render federal courts richer. Dollars for courthouse construction is one example. In the 1980s, the federal judiciary launched a campaign to convince Congress to improve its facilities. By 1991, Congress had authorized $868 million in new construction funds to the General Services Administration (GSA), in charge of federal building and the "landlord" for federal entities.[23] In 1997, the Judicial Conference of the United States (JCUS) developed its *U.S. Courts Design Guide*, with revisions thereafter. That monograph called for district, magistrate, and bankruptcy judges each to have a courtroom of their own. The *Design Guide* explained that individual space for all "active judges" was "essential . . . to the fulfillment of the judge's responsibility to serve the public . . . presiding over the wide range of activities that take place in courtrooms requiring the presence of a judicial officer."[24] Congress supported that approach. From 1995 to 2006, federal courthouses

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[22] Richard Y. Schauffler & Matthew Kleiman, *State Courts and the Budget Crisis: Rethinking Court Services*, *in* The Book of the States 2010, at 289 (The Council of State Gov'ts ed., 2010); Rebecca L. Sandefur & James Teufel, *Accessing America's Access to Civil Justice Crisis*, 11 U.C. Irvine L. Rev. 753, 754–55 (2021); *see also Criminal Justice Expenditures: Police, Corrections, and Courts*, Urb. Inst. (Feb. 27, 2023), https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures [https://perma.cc/ZV73-HEA9]. State and local spending on courts varies by year and by state and locality. In 2017, for example, court spending at the county level was five percent of county general direct expenditures. *Id.* California's judicial branch receives approximately two percent of the state budget. Jud. Council of Cal., 2021 Court Statistics Report: Statewide Caseload Trends, 2010–11 Through 2019–20, at 1 (2021), https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf [https://perma.cc/JPR8-KWZS].

[23] Admin. Off. of the U.S. Cts., History of the Administrative Office of the United States Courts: Sixty Years of Service to the Federal Judiciary 195 (Cathy A. McCarthy & Tara Treacy eds., 2000). In the decade that followed, plans were made for 160 courthouses or renovations to be supported by $8 billion. *Status of Courthouse Construction, Review of New Construction Request for the U.S. Mission to the United Nations, and Comments on H.R. 2751, To Amend the Public Buildings Act of 1959 to Improve the Management and Operations of the U.S. General Services Administration: Hearing Before the Subcomm. on Pub. Bldgs. & Econ. Dev. of the H. Comm. on Transp. & Infrastructure*, 105th Cong. 22 (July 16, 1998) (statement of Robert A. Peck, Comm'r, Public Buildings Service, General Services Administration).

[24] Jud. Conf. of the U.S., U.S. Courts Design Guide 2–8 (1997); Jud. Conf. of the U.S., U.S. Courts Design Guide 2–8 (2007); Jud. Conf. of the U.S., U.S. Courts Design Guide 2–10 (2021).

constituted the federal government's largest construction project that tripled the space allotted to the federal judiciary.[25]

As with other government spending, the economic downturn in 2008 prompted Congress to call for cost-cutting. JCUS modified its policy of one-judge-per-courtroom to provide for sharing by senior district court judges and magistrate judges and by identifying courthouses to close so as to pay less "rent" to the GSA.[26] In 2013, the judiciary "adopted a three percent national space reduction target" and, in 2020, reported it had "removed" some "1.2 million useable square feet of space" and thereby avoided "$36 million in annual rent."[27] In addition, JCUS set a "'No Net New' policy," requiring circuits to "offset [new space] by an equivalent reduction in square footage within the same fiscal year."[28] In 2021, seeking funding for several "priority" buildings, the federal judiciary's footprint was down by another 27,000 square feet.[29] Nonetheless, investment in federal judicial resources remained robust. From 2016 to 2023, about two billion dollars were spent on federal courthouse construction;[30] in 2022, about 420 federal courthouses were in operation.[31]

Construction and maintenance of buildings is part of a larger fiscal picture. Financing for the federal judiciary comes principally from Congress, not from users. General tax revenues are the mainstay, supporting about ninety-five to ninety-six percent of the overall "judicial branch," a term that references courts and related units, including the Administrative Office of the U.S. Courts (AO), the Federal Judicial

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[25] *The Future of Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligations: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt. of the H. Comm. on Transp. & Infrastructure*, 109th Cong. 269 (2006) (statement of David L. Winstead, Comm'r, Public Buildings Service, General Services Administration).

[26] *Judicial Conference Adopts Courtroom Sharing Policy as Latest Cost-Saver*, U.S. Cts. (Sept. 16, 2008), https://www.uscourts.gov/news/2008/09/16/judicial-conference-adopts-courtroom-sharing-policy-latest-cost-saver [https://perma.cc/4HRK-AEA8]; James C. Duff, *Annual Report 2018: Director's Message*, U.S. Cts. (2018), https://www.uscourts.gov/statistics-reports/annual-report-2018 [https://perma.cc/2GU4-U862].

[27] Admin. Off. of the U.S. Cts., The Judiciary Fiscal Year 2021 Congressional Budget Summary, at iii (2020).

[28] Jud. Conf. of the U.S., Report of the Proceedings of the Judicial Conference of the United States 32 (2013).

[29] Admin. Off. of the U.S. Cts., The Judiciary Fiscal Year 2022 Congressional Budget Summary, at iii–iv (2021); *see also* Admin. Off. of the U.S. Cts., Facilities and Security – Annual Report 2017: Space Footprint Reduction (2017).

[30] *Facilities and Security – Annual Report 2023*, U.S. Cts. (2023), https://www.uscourts.gov/statistics-reports/facilities-and-security-annual-report-2023 [https://perma.cc/3K3V-DLNK].

[31] Courthouse was defined as "a facility that contains at least one courtroom of any type (e.g., district, magistrate, or bankruptcy courtroom)." U.S. Gov't Accountability Off., GAO-22-104034, Federal Courthouse Construction: Judiciary Should Refine Its Methods for Determining Which Projects Are Most Urgent 2 nn.3 & 5 (2022).

Center (FJC), Probation, the U.S. Sentencing Commission, and technology support services.[32] When the focus is on the federal courts alone, about five percent of the budget comes from litigant fees and from charges imposed for documents from the Public Access to Court Electronic Records (PACER). In the budget of the whole "branch," user income accounts for about four percent.[33] In practice, Congress allocates funds and holds back a percentage (the five percent mentioned above) to be garnered through fees. The judiciary in turn keeps some of that money in reserve, should a general budget "shutdown" occur.[34]

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[32] *See infra* Figure 4; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2022 CONGRESSIONAL BUDGET SUMMARY (2021).

[33] The judicial branch's budget is divided into several accounts; the line associated with the judiciary is *Courts of Appeals, District Courts, and Other Judicial Services* (CADCOJS) and comprises more than ninety percent of the entire judicial branch budget. *See* ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2023 CONGRESSIONAL BUDGET SUMMARY 13, 31 (2022). Congress provided $7.7 billion to fund the branch in FY 2021 and $8.1 billion in FY 2022. *See also* ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2022 CONGRESSIONAL BUDGET SUMMARY 11 (2021).

[34] *See* 28 U.S.C. § 1931. That statute provides that a portion of the filing fee be deposited to a special fund in the treasury to "offset funds appropriated for the operation and maintenance of the courts of the United States." With help from AO staff, we learned that the statutory setoffs come largely from filing and PACER fees, which are what the judiciary refers to as "user fees" in its materials. *Frequently Asked Questions*, PACER, https://pacer.uscourts.gov/help/faqs/pricing [https://perma.cc/85G4-T32G]. Given that bankruptcy filings number more than civil filings in recent years, bankruptcy fees were about fifty-five percent of the total filing fee collection in FY 2021. U.S. CTS., FY 2023 COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES: SALARIES AND EXPENSES 4.55, tbl.4.15 (2022).

In 2021, the federal judiciary collected over $5.6 million in bankruptcy filing fees. Dep't of Treasury, *Part Two Fiscal Year 2021 Details of Receipts, Table A - Receipts by Source Categories*, https://fiscal.treasury.gov/files/reports-statements/combined-statement/cs2021/rta.pdf [https://perma.cc/E6WU-3DD3]. Following the COVID-19 pandemic, the judiciary had a 1.8% increase in bankruptcy filings, despite "many consecutive years" of decline. *Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 116th Cong. (2020) (testimony of J. John Lungstrum, Chair, Committee on the Budget of the Judicial Conference of the United States), https://www.uscourts.gov/sites/default/files/judge_john_lungstrum_testimony_-_february_2020.pdf [https://perma.cc/2K73-Q3SE]. In Chapter 11 bankruptcies, parties may have to pay a quarterly fee, which is deposited into the United States Trustee System Fund. *See* 28 U.S.C. § 1930(a)(6). In Chapter 7 bankruptcies, the Trustee receives $60 of an administrative fee from the bankruptcy filing fee. *See* 11 U.S.C. § 330(e)(4)(A). In total, the judiciary collected $156 million in filing fees in FY 2021 and $170 million in FY 2022. *See* U.S. CTS., FY 2023 COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES: SALARIES AND EXPENSES 4.55, tbl.4.15 (2022); U.S. CTS., FY 2024 COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES: SALARIES AND EXPENSES 4.46, tbl.4.14 (2023).

The judiciary tracks PACER fees in a separate account and recorded $145 million in FY 2021 and $151 million in FY 2022. U.S. CTS., JUDICIARY INFORMATION TECHNOLOGY FUND 11.2, tbl.11.1 (2022); U.S. CTS., JUDICIARY INFORMATION TECHNOLOGY FUND 11.3, tbl.11.1 (2023). In the budget request for FY 2024, the federal judiciary estimated $170 million in court filing fees and an additional $144 million of revenue in PACER fees. *See* ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2024 CONGRESSIONAL BUDGET REQUEST SUMMARY 40 (2023); U.S. CTS., JUDICIARY INFORMATION TECHNOLOGY FUND 11.3, tbl.11.1 (2023). The judiciary's 2024 budget request to Congress asks for $9.1 billion in discretionary funding.

In terms of dollars, funding has increased over the decades along with the federal budget, while the percentage of government outlays has been relatively stable.[35] In 1970, the judicial branch's "expenditures" (a term of art including appropriations and fees) were $133 million, or $989 million in 2022 dollars.[36] A decade later, in 1980, Congress provided $567 million ($2.05 billion in 2022 dollars).[37] By 1990, the allocation was $1.65 billion ($3.64 billion in 2022 dollars).[38] For 2022, Congress

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ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2024 CONGRESSIONAL BUDGET REQUEST SUMMARY, at i (2023). All cited documents tracking these budget requests are available at https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/congressional-budget-request [https://perma.cc/A5XN-XSWY]. *See also* Thomas Kaplan, *Federal Courts, Running Out of Money, Brace for Shutdown's Pain*, N.Y. TIMES (Jan. 18, 2019), https://www.nytimes.com/2019/01/18/us/politics/courts-money-government-shutdown.html [https://perma.cc/6V55-VZGZ].

[35] Judiciary outlays have increased as a percentage of total federal government outlays since the 1960s; in 1962, they were about 0.05%; during the past thirty years, they have ranged around 0.1-0.2%. Off. of Mgmt. & Budget, *Table 4.1 – Outlays by Agency: 1962–2029*, THE WHITE HOUSE, https://www.whitehouse.gov/omb/budget/historical-tables [https://perma.cc/5W22-GAGC] [hereinafter *Table 4.1—Outlays by Agency*] (calculated by dividing "Judicial Branch" outlays by "[t]otal outlays"); *see also* ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2024 CONGRESSIONAL BUDGET SUMMARY 13 (2023), https://www.uscourts.gov/sites/default/files/FY%202024%20Congressional%20Budget%20Summary.pdf [https://perma.cc/67ET-Q4YA]; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2023 CONGRESSIONAL BUDGET SUMMARY 40, 41 (2022), https://www.uscourts.gov/sites/default/files/FY%202023%20Congressional%20Budget%20Summary.pdf [https://perma.cc/LWP4-3WQQ]; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2022 CONGRESSIONAL BUDGET SUMMARY 36 (2021), https://www.uscourts.gov/sites/default/files/fy_2022_congressional_budget_summary_fy_2022.pdf [https://perma.cc/QZ3W-3UVP]; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2021 CONGRESSIONAL BUDGET SUMMARY 11 (2020), https://www.uscourts.gov/sites/default/files/fy_2021_congressional_budget_summary_0.pdf [https://perma.cc/4VD8-JG3B]; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2020 CONGRESSIONAL BUDGET SUMMARY 36 (2019), https://www.uscourts.gov/sites/default/files/fy_2020_congressional_budget_summary_0.pdf [https://perma.cc/Y8TN-Y935]; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2019 CONGRESSIONAL BUDGET SUMMARY 35 (2018), https://www.uscourts.gov/sites/default/files/fy_2019_congressional_budget_summary_final_0.pdf [https://perma.cc/MQU3-RUUE]; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2018 CONGRESSIONAL BUDGET SUMMARY 33, 34 (2017), https://www.uscourts.gov/sites/default/files/fy_2018_congressional_budget_summary_0.pdf [https://perma.cc/WQ42-SE8Z]; ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2017 CONGRESSIONAL BUDGET SUMMARY 8 (2016), https://www.uscourts.gov/sites/default/files/fy_2017_federal_judiciary_congressional_budget_summary_0.pdf [https://perma.cc/778Z-8YRF]; Tracy Cui, *Funding for the Federal Judiciary: Evolution into Quasi-Independence* 31 (Harv. L. Sch. Briefing Papers on Fed. Budget Pol'y, Paper No. 65, 2019), https://scholar.harvard.edu/files/briefingpapers/files/65_-_cui_-_funding_for_the_federal_judiciary_evolution_into_quasi-independence.pdf [https://perma.cc/R7HW-CMQ4]. Note, however, a blip in this stability in FY 2013, when congressional sequestration cut approximately $350 million from federal judicial funding. This dip was recouped in following years.

[36] *Table 4.1—Outlays by Agency*, *supra* note 35; *CPI Inflation Calculator*, BUREAU OF LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/C9WH-N9QA].

[37] *Table 4.1—Outlays by Agency*, *supra* note 35; *CPI Inflation Calculator*, *supra* note 36.

[38] *Table 4.1—Outlays by Agency*, *supra* note 35; *CPI Inflation Calculator*, *supra* note 36.

allocated $8.5 billion, and for 2024, the judiciary requested $9.1 billion.[39] In terms of subparts of the judiciary, the AO, which Congress created in 1939, received $98 million in 2022; the FJC, which Congress launched in 1968, received another $30 million.[40] Federal judges are supported by a staff that has grown over the decades. Including AO and FJC positions, 6,647 people worked for the judicial branch in 1970; 13,207 in 1980; 22,399 in 1990;[41] and 30,000 in 2022.[42]

To glimpse resource allocations, I reproduce below two charts—called "The Judicial Dollar"—that were, for several decades, part of the AO's annual reports. In 1957, about two-thirds of the "judicial dollar" went to judges and "supporting staff personnel." A window into tensions between the courts and Congress is provided by the notation in the pie chart on air conditioning; it reflected the distress of members of Congress who were reluctant to authorize more judgeships when courthouses in some states closed during summer months. The Judicial Conference responded by creating a committee on air conditioning and a plan to bring cooling into some buildings.[43]

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[39] *Table 4.1—Outlays by Agency*, *supra* note 35; U.S. Cts., Funding and Budget—Annual Report 2023, https://www.uscourts.gov/statistics-reports/funding-and-budget-annual-report-2023 [https://perma.cc/WNP8-VLYA]. This 2024 request reflects proposed increases in the number of federal judges (about sixty-eight new positions) and in funding for the federal Defender Services Account. U.S. Cts., Annual Report 2023, https://www.us.courts.gov/statistics-reports/annual-report-2023 [https://perma.cc/KA8X-TLC2].

[40] 28 U.S.C. §§ 601–613; 28 U.S.C. § 331. The history is analyzed in Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 937–38, 950 & n.89 (2000) [hereinafter Resnik, *Trial as Error*]. In 2022, Congress appropriated $98,545,000 to the AO and $29,885,000 to the FJC. Consolidated Appropriations Act, tit. III, Pub. L. No. 117-103, 136 Stat. 49, 260 (2022).

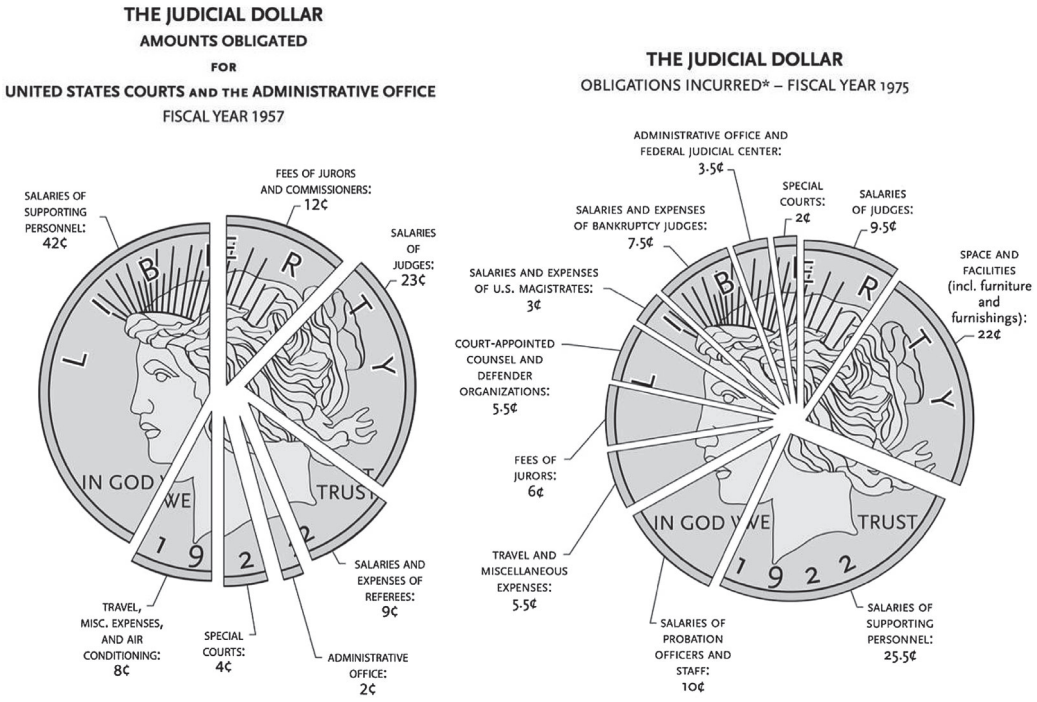
[41] Admin. Off. of the U.S. Cts., Annual Report of the Director of the Administrative Office of the United States Courts 127 tbl.28 (1991). For an overview of the development of the administrative apparatus of the U.S. courts and its corporate voice, see Resnik, *Trial as Error*, *supra* note 40, at 949–57.

[42] For 1970, see Admin. Off. of the U.S. Cts., The History of the Administrative Office of the United States Courts: Sixty Years of Service to the Federal Judiciary 95 (2000). For 1975–1990, see Admin. Off. of the U.S. Cts., Annual Report of the Director (1975, 1980, 1985, 1990). For 2000–2019, see *Federal Agency Programs: Federal Agency Injury and Illness Statistics by Year*, OSHA, https://www.osha.gov/enforcement/fap/statistics [https://perma.cc/8N2X-PY3T]. All numbers from 1975 and onward include judges and other employees, but do not include Supreme Court Justices or personnel. U.S. Cts., Annual Report 2022, https://www.uscourts.gov/statistics-reports/annual-report-2022 [https://perma.cc/S3UJ-GYDD].

[43] *See* Resnik, *Trial as Error*, *supra* note 40, at 960 & nn.130–32 (citing Letter from R.O. Jennings, the Acting Comm'r of Pub. Bldgs., to AO Dir. Chandler (Sept. 12, 1952), *Records Relating to Judicial Conference Committees, 1941–1957*, Entry 5, Box 58, *located in* Record Group 116, National Archives, Washington, D.C.). The 1955 Judicial Conference Report concluded that air conditioning was necessary in the "interest of efficiency" because of the "practical impossibility of holding court during summer months in many areas," and that the absence of air conditioning "has led sometimes to long vacations and unnecessary delay in disposing of judicial business." Jud. Conf. of the U.S., Annual Report of the Proceedings of the Judicial Conference of the United States 20 (1955).

The 1975-dollar pie chart, in turn, documented that, by then, Congress had expanded the federal judiciary by chartering two new kinds of judgeships—magistrate and bankruptcy judges—as well as creating a federal public defender service. That "dollar" also showed that the courts' footprint had come into view, with a line delineated for "space and facilities" including "furniture and furnishings." Support for judges and staff continued to garner about two-thirds of the funds.

FIGURE 1. ALLOCATIONS WITHIN THE FEDERAL JUDICIAL DOLLAR, 1957, 1975



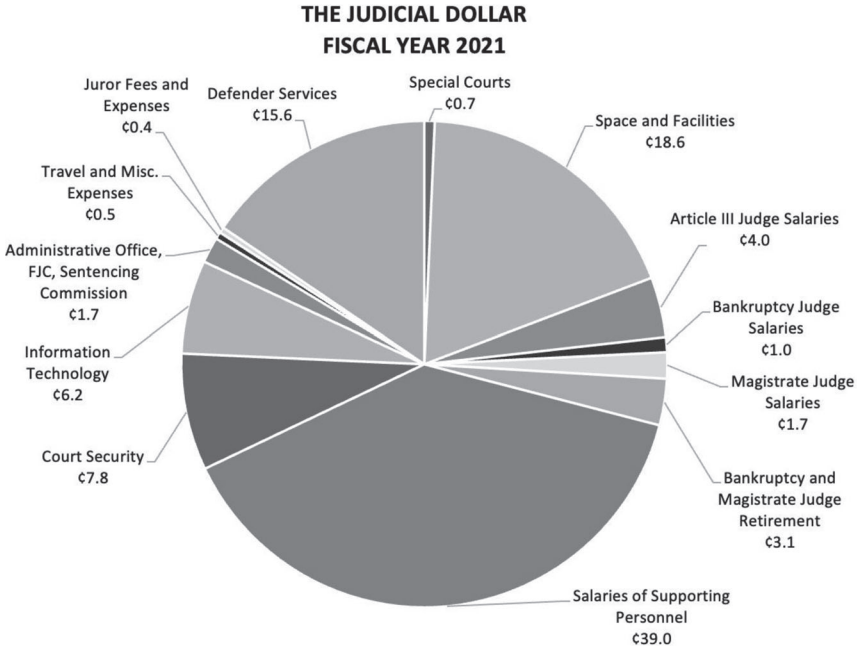
Reproduced from the Reports of the Administrative Office and with facsimile enhancements by Yale University Press, 2011[44]

The AO no longer publishes these kinds of pie charts. Figure 2—handcrafted by talented law students—permits a 2021 parallel view of allocations within the budget of under nine billion dollars. Using the earlier pie charts as a baseline, the shifting percentages are one way to see that life-tenured federal judges became a smaller part of the federal judicial staff—with about 870 authorized positions—and received four percent of 2021's funding. Magistrate and bankruptcy judges, another

[44] JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 176–77 (2011), *republished as an ebook* (2022), https://hdl.handle.net/20.500.13051/18178 [https://perma.cc/PSR3-LFTU].

850 or so positions, accounted for an additional five percent of the judicial dollar. The percent spent for public defenders was up, and technology was its own category. The share of the "judicial dollar" for jury trials declined as had the rate of trials itself—of about one hundred civil cases filed, less than one started a trial whether by judge or jury.[45]

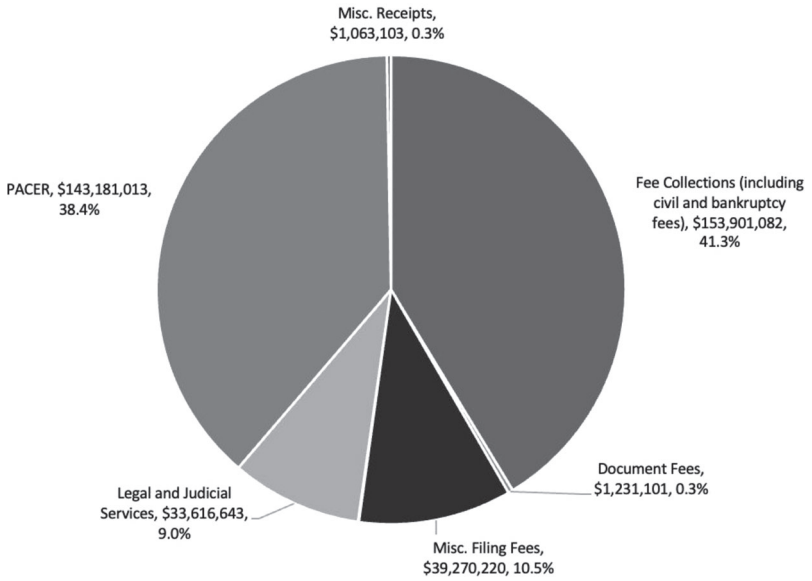
FIGURE 2. ALLOCATIONS WITHIN THE FEDERAL JUDICIAL DOLLAR, 2021



[45] ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2023 CONGRESSIONAL BUDGET SUMMARY 40, 41 (2022), https://www.uscourts.gov/sites/default/files/FY%202024%20Congressional%20Budget%20Summary.pdf [https://perma.cc/9BZL-Y4DS]. This data excludes the U.S. Supreme Court for fiscal year 2021. *Id.* at 13. This budget consists of congressionally appropriated funds (estimated and requested by the U.S. Administrative Office and Judicial Conference) as well as non-appropriated funds from filing, PACER, and document fees, other legal and judicial services, and carryforward funds from previous years. 28 U.S.C. § 605. The federal judiciary collected over $370 million in fees during FY 2021. More than forty percent of those fees come from 28 U.S.C. § 1931 filing fees: $190 out of each $350 of each filing fee is retained by the federal judiciary. Data for estimated total fee collections comes from *Part Two Fiscal Year 2021 Details of Receipts, Table A – Receipts by Source Categories*, DEP'T OF TREASURY, https://fiscal.treasury.gov/files/reports-statements/combined-statement/cs2021/rta.pdf [https://perma.cc/KM3R-334Z]. Judiciary fees are identified by the agency code "010," which refers to receipts to the federal judiciary. For each judicial dollar, jurors received twelve cents in 1957, six cents in 1975, and less than half of a penny in 2021. Another report identified that 1.3% of all lawsuits reached trial. David L. Schwartz, Kat M. Albrecht, Adam R. Pah, Christopher A. Cotropia, Amy Kristin Sanders, Sarath Sanga, Charlotte S. Alexander, Luís A.N. Amaral, Zachary D. Clopton, Anne M. Tucker, Thomas W. Gaylord, Scott G. Daniel & Nathan Dahlberg, *The SCALES Project: Making Federal Court Records Free*, 119 NW. U. L. REV. 23, 55 (2024); *see also* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) [hereinafter Galanter, *The Vanishing Trial*].

Given the saliency of user fees to discussions of state courts, the next pie chart details the kinds and amounts of user fees received by the federal courts.[46]

FIGURE 3. FEDERAL JUDICIAL FEE INCOME, FY 2021



Knowing more about federal court outputs is important to understanding the contours of "our common intellectual heritage." As analysts of state court filings put it, new court filings "measure the work yet to be done";[47] mapping the ups and downs of such filings is one way to consider the demand for this form of dispute resolution. Thus, I bring into focus the caseloads of the district and appellate courts, as well as a few data points on the resources of litigants on whom the judiciary depends for production of information.

District court filings (civil and criminal) rose from 127,280 in 1970 to 313,170 in 1985 before plateauing and, more recently, declining in some years.[48] In 2022, the civil filings of 240,000 were down almost

[46] Data for estimated total fee collections comes from *Part Two Fiscal Year 2021 Details of Receipts, Table A – Receipts by Source Categories*, *supra* note 45. Some of the categories, including "Fee Collections," are cross-referenced with data from the U.S. Courts. U.S. CTS., FY 2023 COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES: SALARIES AND EXPENSES 4.55, tbl.4.15 (2022).

[47] ALAN M. CARLSON & JOHN M. GREACEN, WHAT IS HAPPENING TO STATE TRIAL COURT CIVIL FILINGS? 17 (2024). This monograph was published by the American Bar Association.

[48] *Caseloads: Criminal Cases, 1870–2017*, FED. JUD. CTR., https://www.fjc.gov/history/work-courts/caseloads-criminal-cases-1870-2017 [https://perma.cc/7CPJ-AUNQ]; *Caseloads:*

eight percent from a prior decline in 2021.[49] At some points, more than a million bankruptcy petitions were filed annually. More recently, congressional changes to eligibility criteria and processes, along with COVID-19 economic aid packages contributed to lowering the volume.[50] In 2022, bankruptcy petitions were below 400,000.[51]

To be clear, measuring cases is not the same as counting people within lawsuits. Class actions are an obvious example, albeit not one tabulated in AO charts. Federal data does account for filings in multidistrict litigation; a panel of judges allocates each "MDL" to a single judge that becomes one case for accounting and, under the statute, is consolidated for pre-trial purposes only.[52] (In practice, MDLs, like other cases, generally terminate without trials.[53])

The AO has excluded several mega-MDLs in its trend analyses, and I have likewise excluded them in my discussion. For example, tens of thousands of filings were related to the *Combat Arms 3M Earplug Litigation* (*CAEv2*), which alleged that faulty earplugs provided by the 3M Corporation to the U.S. military resulted in impaired hearing for U.S. soldiers.[54] In April of 2019, the Judicial Panel on Multidistrict Litigation consolidated some seven hundred lawsuits in the Northern

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Civil Cases, U.S. a Party, 1870–2017, Fed. Jud. Ctr., https://www.fjc.gov/history/work-courts/caseloads-civil-cases-us-party-1870-2017 [https://perma.cc/2SNY-DZTR]; *Caseloads: Civil Cases, Private, 1873–2017*, Fed. Jud. Ctr., https://www.fjc.gov/history/work-courts/caseloads-civil-cases-private-1873-2017 [https://perma.cc/P3FV-ZBUT].

[49] U.S. Sup. Ct., 2022 Year-End Report on the Federal Judiciary 6 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf [https://perma.cc/SUM7-KL2K]; *Judicial Business 2021*, U.S. Cts., https://www.uscourts.gov/statistics-reports/judicial-business-2021 [https://perma.cc/Q7X6-NXBP].

[50] Marc Labonte, Cong. Rsch. Serv., R46411, The Federal Reserve's Response to COVID-19: Policy Issues (2021).

[51] In 1985, 383,510 bankruptcy petitions were filed, and in 1995, 883,457 petitions were filed. *Table 5.2*, *U.S. Bankruptcy Courts. Business and Non-business Bankruptcy Cases Filed by Chapter of the Bankruptcy Code*, U.S. Cts., https://webharvest.gov/peth04/20041101233316/http:/www.uscourts.gov/judicialfactsfigures/table5.02.pdf [https://perma.cc/6TET-B9HM]. In 2022, filings were down to 380,634. *Table F, U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending June 30, 2021 and 2022*, U.S. Cts., https://www.uscourts.gov/report-name/bankruptcy-filings [https://perma.cc/VV2G-JRYM].

[52] *See* 28 U.S.C. § 1407.

[53] Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1 (2021); D. Theodore Rave, *Management and Judging in Multidistrict Litigation*, 42 Rev. Litig. 291 (2023); *see also* Judith Resnik, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5 (1991).

[54] *See In re* Aearo Technologies, LLC, No. 22-02890, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023); Brendan Pierson, *How 3M Earplug Litigation Got to Be Biggest MDL in History*, Reuters (Apr. 2, 2021, 1:31 PM), https://www.reuters.com/article/world/how-3m-earplug-litigation-got-to-be-biggest-mdl-in-history-idUSKBN2BP1BP [https://perma.cc/P9XL-RG3S].

District of Florida.[55] Thereafter, the presiding judge issued an order facilitating "direct filing" for individuals (with or without counsel) to seek inclusion.[56] In 2020, more than 200,000 individuals filed; had they been included in the overall count of federal filings, the number of civil cases would have almost doubled and, in the judgment of the AO, distorted a description of filing trends.[57]

Turning to the circuit courts, appeals fell from about 45,000 cases in 2021 to around 42,000 in 2022.[58] As to decisionmaking processes, analyses come from Professors Merritt McAlister, Abbe Gluck, and others; they report that about two-thirds of pending appeals were argued in the early 1980s.[59] That fraction dropped to about one-quarter by 2011, and under twenty percent by 2020.[60] When issuing opinions, federal appellate courts deem about eighty-five percent "non-precedential" in the circuit rendering the judgment.[61]

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[55] Transfer Order from the JPML, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19md2885 (Apr. 3, 2019).

[56] Pretrial Order No. 5: Stipulated Order on Procedures for Direct Filing at 1, 3, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19md2885 (N.D. Fla. May 6, 2019).

[57] In 2020, 2021, and 2022, the Chief Justice's Year-End Reports noted, when discussing filing trends, that new filings in the 3M Combat Arms Earplug Products Liability Litigation (MDL No. 2885) were not included. For example, for the year 2022, the Chief Justice's report stated:

> The federal district courts docketed 274,771 civil cases in FY 2022, 20 percent fewer than the prior year. Once again, an unusually large number of filings were associated with an earplug products liability multidistrict litigation (MDL) . . . which consolidated more than 83,654 filings in 2021 and 34,410 filings in FY 2022. Excluding those MDL filings, total civil case filings fell eight percent to 240,361.

U.S. Sup. Ct., 2022 Year-End Report on the Federal Judiciary 6 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf [https://perma.cc/LPX6-TJTM]. The 2020 Director's Annual Report similarly excludes 3M filings from its filing trends. *U.S. District Courts – Judicial Business 2020*, U.S. Cts., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020 [https://perma.cc/P5VA-DAQL]. In 2021, the 3M Earplug filings numbered more than 83,000; the number of civil filings excluding that group was 260,913. 2021 Year-End Report on the Federal Judiciary 8 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/2CVG-J6VF]. The 2021 Director's Annual Report excluded 3M filings from its filing trends. *U.S. District Courts – Judicial Business 2021*, U.S. Cts., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021 [https://perma.cc/J4UL-LNYA].

[58] *Judicial Business 2022*, U.S. Cts., https://www.uscourts.gov/statistics-reports/judicial-business-2022 [https://perma.cc/B9TT-QUB3]; *Judicial Business 2021*, U.S. Cts., https://www.uscourts.gov/statistics-reports/judicial-business-2021 [https://perma.cc/9JP7-2RUE].

[59] Merritt E. McAlister, *Managing Out the Federal Appellate Judge*, 42 Rev. Litig. 165, 165, 180 (2023) [hereinafter McAlister, *Managing Out*]; Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1 (2022).

[60] Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137, 1153 (2022).

[61] *See* McAlister, *Managing Out*, *supra* note 59, at 1171.

Given that docket demands are a factor in assessing the adequacy of resources, one rough assessment stems from the relationship between the number of cases and funds for the judiciary. District court and bankruptcy filings (about 750,000 cases were initiated in 2022) and appellate filings at both circuit courts and the Supreme Court (another 45,000) totaled 795,000 for the twelve-month period ending September 30, 2022.[62] The judicial budget was about nine billion dollars. Without distinguishing among kinds of expenditures (infrastructure costs, security, staff, technology, pending cases, and much else), dollars per case filed were about $11,250.[63]

As noted, litigants and their lawyers are central sources of investment in courts and contributors to our "common intellectual heritage." Again, the federal courts are relatively rich as compared to state courts in terms of the percentage of cases that have lawyers and the resources of subsets of those litigators. Here I flag some forms of lawyering that are routinely available in federal courts and less so in all states. The U.S. Department of Justice and U.S. Attorneys' Offices around the country staff the criminal and some of the civil docket of the federal courts when the United States is a party. In addition, the Federal Public Defender Service is supported by the judiciary's budget. States have offices of attorneys general for affirmative and defensive litigation, and localities have yet more lawyers. Resources to those offices as well

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62 *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020).

63 The estimate of 750,000 cases filed in district courts and bankruptcy courts in 2022 comes from *Table C-1, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending September 30, 2022*, ADMIN. OFF. U.S. CTS. (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_c1_0930.2022.pdf [https://perma.cc/PV2Y-AD7G]; *Table D-3, U.S. District Courts—Criminal Defendants Commenced (Excluding Transfers), by Offense and District, During the 12-Month Period Ending September 30, 2022*, ADMIN. OFF. U.S. CTS. (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_d3_0930.2022.pdf [https://perma.cc/QVC3-V8CP]; and *Table F, U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending September 30, 2021 and 2022*, ADMIN. OFF. U.S. CTS. (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_f_0930.2022.pdf [https://perma.cc/H3P7-Z8FE]. The estimate of 45,000 cases filed in the courts of appeals and the U.S. Supreme Court comes from *Table B-1, U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2022*, ADMIN. OFF. U.S. CTS. (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_b1_0930.2022.pdf [https://perma.cc/47WR-CWYD]; and *Table B-2, U.S. Courts of Appeals—Petitions for Review on Writs of Certiorari to the Supreme Court, Commenced, Terminated, and Pending During the 12-Month Period Ending September 30, 2022*, ADMIN. OFF. U.S. CTS. (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_b2_0930.2022.pdf [https://perma.cc/EMM3-DKUA]. The nine-billion-dollar budget estimate comes from *Funding and Budget – Annual Report 2023*, ADMIN. OFF. U.S. CTS. (2023), https://www.uscourts.gov/statistics-reports/funding-and-budget-annual-report-2023 [https://perma.cc/XW76-CKZB]. The $11,250 thus comes from dividing $9 billion by the sum of 750,000 and 50,000.

as to private counsel that may be retained are not uniform across states. Moreover, not all states have comprehensive organizations devoted to criminal defense services.

Systematic data on private litigation investments is hard to come by. In terms of private-sector investors, the federal courts are associated with "big law" and with "repeat players," to borrow Marc Galanter's terms from *Why the "Haves" Come Out Ahead*.[64] Galanter explained that, by having a presence over time and cases, repeat players (unlike "one-shot players") had opportunities to shape litigation strategies to affect the structure and rules of decisionmaking.[65] Institutional litigants (including corporations and governments and their lawyers) are repeat players, as are third-party funders. In terms of the time lawyers invest in providing information to develop and present cases, some researchers have surveyed lawyers to gather data, and a few narratives explain the costs of particular lawsuits, as do attorney-fee applications to courts.[66]

Lawyers' income bears some relationship to the resources they invest in work. In 2023, partners (not all of whom were involved in litigation) in the highest-earning law firms received more than four million dollars annually.[67] While pay scales are much lower in other sectors of the profession (with overall median lawyer income at about $135,000[68]), sophisticated litigators can be found throughout the system. Moreover, specialized entities, such as "Legal Defense and Education Funds," have developed expertise in shaping litigation. Today's self-described "public interest" law firms have identified themselves with liberal or conservative agendas,[69] and national organizations such as the American Civil Liberties Union and the U.S. Chamber of Commerce

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64 Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

65 *Id.* at 118.

66 *See, e.g.*, Herbert M. Kritzer, Joel B. Grossman, Elizabeth McNichol, David M. Trubek & Austin Sarat, *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 Just. Sys. J. 7 (1984); Jonathan Harr, A Civil Action (1995); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001); Astrue v. Ratliff, 560 U.S. 586 (2010).

67 *Am Law 200 Trends & League Tables*, Law.com Compass (2023), https://www.law.com/compass/#/leaguetable/financials [https://perma.cc/52ZF-HFNG].

68 In 2022, the average wage for lawyers was $163,770, up 10.6% from 2021. *Profile of the Legal Profession* 33, A.B.A. (2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf [https://perma.cc/88YY-PK3S]. That same year, the median annual wage for all lawyers in the United States was $135,740, with the lowest ten percent earning less than $66,470, and the highest ten percent earning more than $239,200. U.S. Bureau Lab. Stats., Occupational Outlook Handbook 731 (2022–2023 ed.).

69 One example is Kaplan Hecker & Fink (renamed in 2024 Hecker Fink), whose founding partner, Roberta Kaplan, argued and won cases such as *United States v. Windsor*. *See* Resnik, *Representing What?*, *supra* note 9, at 6–7.

are famous for their impact on federal lawsuits.[70] Another infusion of resources for courts and litigants comes from aggregation; class actions, MDLs, and other forms permit cost sharing and economies of scale that attract significant capital investments in lawsuits.

Yet in thousands of cases, filings come from individuals who are self-represented and presumptively have limited resources. Many scholars have turned their attention to people without lawyers in both federal and state courts. A growing literature documents the challenges they face in terms of navigating litigation. In contrast to lawsuits staffed by lawyers who are a significant resource *for* courts, lawyer-less litigants are in need of assistance *from* courts. In 2023, the judiciary spent $94 million to employ 471 clerks (identified as "pro se" and "death penalty"), of whom most "receive, prepare, and process civil complaints filed against the government by prisoners and other individuals without attorney representation."[71] Those staff are needed because, according to AO data, about a quarter of the civil cases and about half of the appeals are filed without lawyers.

The AO began publishing information on these self-represented ("pro se") litigants at the trial level in 2005, when 76,314 individuals, or about thirty percent of the filings, came without lawyers.[72] Since then, the percentage of lawyer-less litigants has ranged from a quarter to almost a third of civil filings. At the appellate level, AO statistics date from 1993. From then through 2022, between thirty-four and fifty-two

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[70] An overview and critique come from Dan Dudis, The Chamber of Litigation (2016), https://www.citizen.org/wp-content/uploads/chamber_litigation_report_part_1.pdf [https://perma.cc/7A5Q-RE8W].

[71] *Appendix 1 – Court Support Staffing*, Admin. Off. U.S. Cts. app. 1.7 (2024), https://www.uscourts.gov/sites/default/files/fy_2025_appendix_01_court_support_staffing.pdf [https://perma.cc/Z3JX-BVAX]. In the Ninth Circuit, the "position of Pro Se Staff Attorney (PSSA) is sometimes referred to as Pro Se Law Clerk (PSLC)," and "PSSAs track the cases, drafting IFP and screening orders." *See* Memorandum from Charles R. Pyle, Chair of Pro Se Litigation Committee and James P. Donohue, Outgoing Chair of Pro Se Litigation Committee to Ninth Circuit Judicial Council 104 (Oct. 17, 2014), https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/prose/Pro_Se_Committee_Interim_Report_14.pdf [https://perma.cc/VNG2-KY2H]; *Courts of Appeals, District Courts, and Other Judicial Services: Salaries and Expenses*, Admin. Off. U.S. Cts. 4.8 (2024), https://www.uscourts.gov/sites/default/files/section_04_salaries_and_expenses.pdf [https://perma.cc/462A-6ZDM]. The formula for staffing levels (nine cases for a full-time death penalty clerk) suggests about fifty death penalty clerks in light of the pending caseload. *Appendix 1 – Court Support Staffing*, *supra*, at app. 1.7.

[72] *Table S-24*, *Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2005*, Admin. Off. U.S. Cts. (2005), https://www.uscourts.gov/sites/default/files/statistics_import_dir/s24.pdf [https://perma.cc/K3NB-3PLP].

percent of appellants were lawyer-less; in this decade, more than half of appellants are lawyer-less.[73]

My assumption had been that a substantial overlap exists between people who are self-represented and those who would file for fee waivers so as to proceed "in forma pauperis" (IFP).[74] Yet the AO does not organize its published materials to provide that information. A fuller account comes from the 2023 launch of the Systematic Content Analysis of Legal Events Open Knowledge Network (SCALES).[75] Supported by a National Science Foundation grant, SCALES obtained and recoded federal civil docket sheets (not full case files) from 2016 and 2017 as part of an effort to build "open knowledge networks" using tools able to "extract and transform data from court records, resolve and disambiguate entities, and enable the automated identification of litigation events."[76] During those two years, about 163,700 civil cases were *without* lawyers at filing. Coding of docket sheets by SCALES identified forty percent (about 65,500) of those cases as having a docket sheet indicating either grants or denials of applications for fee waivers.[77] Yet, because SCALES coded sixty percent (98,300) of the cases under a category it called "None," which included dockets that had no application for a fee waiver and dockets that had no definitive answer on any such application, knowledge of the overlap between self-representation and

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[73] *See U.S. Courts of Appeals Pro Se Appeals Commenced and Terminated, by Circuit During the Twelve Month Period Ended September 30, 1993*, *in* U.S. COURTS: SELECTED REPORTS, ADMIN. OFF. U.S. CTS. AI-44 (1993); *Table B-9*, *U.S. Courts of Appeals—Pro Se and Non-Pro Se Cases Commenced and Terminated, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2022*, ADMIN. OFF. U.S. CTS. (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_b9_0930.2022.pdf [https://perma.cc/Q2Y4-QRFW].

[74] *See* 28 U.S.C. § 1915.

[75] *See generally* Adam R. Pah, David L. Schwartz, Sarath Sanga, Zachary D. Clopton, Peter DiCola, Rachel Davis Mersey, Charlotte S. Alexander, Kristian J. Hammond & Luís A. Nunes Amaral, *How to Build a More Open Justice System*, 369 SCI. 134, 135 (2020). SCALES is comprised of all civil cases filed in federal district courts in 2016 and 2017, as well as all cases filed from 2001–2021 in the Northern District of Illinois. *SCALES*, https://scales-okn.org/about-the-project [https://perma.cc/8ZUM-GGHP]; *SCALES OKN Data Files*, https://scalesokndata.ci.northwestern.edu [https://perma.cc/PGX8-LMY5]; Schwartz, Albrecht, Pah, Cotropia, Sanders, Sanga, Alexander, Amaral, Clopton, Tucker, Gaylord, Daniel & Dahlberg, *supra* note 45.

[76] U.S. Nat'l Sci. Found., *A1: Systematic Content Analysis of Litigation Events (SCALES) Open Knowledge Network to Enable Transparency and Access to Court Records* (Aug. 22, 2020), https://www.nsf.gov/awardsearch/showAward?AWD_ID=2033604&HistoricalAwards=false [https://perma.cc/DX52-ULLC].

[77] *SCALES Data Explorer*, https://satyrn.scales-okn.org/sign-in [https://perma.cc/P3PV-P52F]. AO data provides information on pro se filings that is not cross-referenced with data on self-representation. *See Table B-9*, *supra* note 73.

IFP requests was less than complete.[78] SCALES researchers have since updated their data to provide additional information about the "None" category to distinguish cases whose docket sheets recorded no decision on IFP applications from cases where no applications were made. Using that additional information, we concluded that twelve percent (12,600) of cases within the "None" category included an IFP application.[79]

Without lawyers, people may not know they can request that fees be waived; for those that do, Professor Andrew Hammond has documented a lack of uniformity across the districts on the process and criteria for waiver requests.[80] Incarcerated people face yet other hurdles as the 1996 Prison Litigation Reform Act required court screening when cases are filed and prevented prisoners bringing a host of claims from obtaining fee waivers; instead, if granted waivers, they must pay periodically the $350 filing fee.[81]

The availabilty of funds to collect and analyze data is part of an analysis of the vitality of public and private institutions, which need to track and understand their own practices. Indeed, the federal courts' data collection is one route to it becoming "our common intellectual heritage." Yet even as federal data collection is ample when compared with that of many states, it is less useful than it should be because of the methods used.[82]

The information the AO codes comes from litigants, who are required to fill out a "civil cover sheet" when filing lawsuits; thereafter, court clerks enter data onto docket sheets. The form used as the civil cover sheet generates confusion because it asks filers to identify one cause of action as well as the "nature of suit," categories that overlap or are the same.[83] Moreover, many people drafting complaints advance more than one legal claim. A 1999 publicly available AO coding guide,

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[78] Discussion of the challenges and analyses of a segment of the data are in Judith Resnik, Henry Wu, Jenn Dikler, David T. Wong, Romina Lilollari, Claire Stobb, Elizabeth Beling, Avital Fried, Anna Selbrede, Jack Sollows, Mikael Tessema & Julia Udell, *Lawyerless Litigants, Filing Fees, Transaction Costs, and the Federal Courts: Learning from SCALES*, 119 Nw. U. L. Rev. 109, 134–35 (2024).

[79] *Id.*

[80] Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478, 1485–1507 (2019).

[81] 28 U.S.C. § 1915(b)(1).

[82] *See, e.g.*, Zachary D. Clopton & Aziz Z. Huq, *The Necessary and Proper Stewardship of Judicial Data*, 76 Stan. L. Rev. 893, 897–99 (2024); Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 Law & Contemp. Probs. 55, 56–67 (1988); Deborah R. Hensler, *Why We Don't Know More About the Civil Justice System—and What We Could Do About It*, S. Cal. L. Rev., Fall 1994, at 12–13; Galanter, *The Vanishing Trial*, *supra* note 45, at 477; Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 Brook. L. Rev. 841, 855 (1993).

[83] JS 44 Civil Cover Sheet, U.S. Cts. (2024), https://www.uscourts.gov/sites/default/files/js_044_-_civil_cover_sheet_1.pdf [https://perma.cc/5Z6K-DUHR].

directing clerks on coding, includes ambiguous definitions, some of which lump events that ought to be delineated.[84] Moreover, after filing, court staff enter data at intervals rather than in a "dynamic" system that updates information in real time, such as whether an attorney has withdrawn or entered an appearance. Atop the "noise" from coding problems, the format of PDFs does not make searches and analyses straightforward. Although JCUS has described its goal of creating a nationwide, searchable database; none exists as of 2024.[85]

As noted, SCALES has opened more avenues for data analyses, and a few scholars have been given access to bulk data for a period of years (one such dataset ends in 2014) that permits, after recoding, analyses of issues such as pleading rules and the use of protective orders.[86] Otherwise, unless eligible for fee waivers, getting information requires paying the federal judiciary for PACER.[87] Well-resourced

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[84] Tech. Training & Support Div., Admin. Off. U.S. Cts., Civil Statistical Reporting Guide 3:17 (1999), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Using_Court_Records_Appendix/Civil_Statistical_Reporting_Guide.pdf [https://perma.cc/7LUL-EAGF]. As of the spring of 2023, revisions to the code book were underway. Zoom Interview with Administrative Office of the U.S. Courts Staff (Mar. 20, 2023).

[85] *See* Jud. Conf. of the U.S., Report of the Proceedings of the Judicial Conference of the United States 13 (2021), https://www.uscourts.gov/sites/default/files/jcus_sep_21_proceedings_-_final.pdf [https://perma.cc/8WY8-2C8H].

[86] *See, e.g.*, Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 Stan. L. Rev. 369 (2016); Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 Duke L.J. 99 (2024) [hereinafter Engstrom, Engstrom, Gelbach, Peters & Schaffer-Neitz, *Secrecy by Stipulation*]; David Freeman Engstrom, Nora Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Garret Wen, *Shedding Light on Secret Settlements: An Empirical Study of California's STAND Act*, 91 U. Chi. L. Rev. (forthcoming 2024) (on file with author) [hereinafter Engstrom, Engstrom, Gelbach, Peters & Wen, *Shedding Light on Secret Settlements*].

[87] The AO has guidelines on PACER fees; account holders do not owe fees until they exceed $30.00 in charges in one quarterly billing cycle. Fees are not charged for judicial opinions or if accessing materials via courthouse public access terminals. Parties in a case receive a free electronic copy of all documents filed electronically if the law requires receipt or the filer directs it. Chapter 13 bankruptcy trustees may also download a free list of their cases every ninety days. Individual litigants or groups, including "indigents, bankruptcy case trustees, pro bono attorneys, pro bono alternative dispute resolution neutrals, Section 501(c)(3) nonprofit organizations, and individual researchers associated with educational institutions," may request an exemption from fees from individual courts. *Electronic Public Access Fee Schedule*, U.S. Cts. (2019), https://www.uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule [https://perma.cc/K2AU-EE2B].

Educational institutions do not receive institutional exemptions. The guidance also directs courts *not* to exempt individuals or groups that "have the ability to pay the statutorily established access fee," including "state or federal government agencies, members of the media, [and] privately paid attorneys." *Id.*; *see also Options to Access Records if you Cannot Afford PACER Fees*, PACER, https://pacer.uscourts.gov/my-account-billing/billing/options-access-records-if-you-cannot-afford-pacer-fees [https://perma.cc/X7QH-PKTL]; Jonah B.

users often gain access by buying materials from private systems such as LexisNexis and Westlaw.[88]

My sketch of facets of federal-court resources should not be read as supporting the proposition that funds are sufficient for the needs of the courts or their litigants. To persuade Congress to support more judgeships, staff, and facilities, the AO gathers data (such as its "weighted" caseload measure, hours on the bench, and time to disposition) and regularly argues shortfalls in resources.[89] Moreover, as noted, inside the judiciary's budget are a variety of services, including security services, "rent," and paying federal public defenders as well as other ("panel") lawyers for criminal defendants and for investigation, experts, and translators.

To assess the adequacy of funding levels requires developing information on a host of variables, such as accessibility and security of facilities; support for entry for litigants; subsidies for litigants to provide adequate information; the usefulness to third parties of information disseminated through courts; the functionality of current procedures; the kind and quality of outcomes; the decisions written; affirmations on appeal; implementation of decisions; case-law developments; and the impact of legal rules. Data does not suffice without means to assess adequacy in diverse categories of performance. Currently, no shared vision exists about the information to be systematically gathered, how to do so, and the metrics by which to evaluate the materials accumulated.

In short, I have only skimmed the surface in terms of knowledge about, outputs of, and investments in the federal courts. Nor have I accounted for the impact of media attention, scholarly endeavors, public-private partnerships, and more. What I have shown is that our "common intellectual heritage" has been built through an impressive investment of public and private resources into a relatively small court system with an apex court that generates fewer than eighty decisions a year. We who read, learn, and explain the contours of court activities can navigate its relatively manageable scale, which is part of why the federal judiciary has been able to shape shared narratives.

Gelbach, *Free PACER*, *in* Legal Tech and the Future of Civil Justice 328 (David Freeman Engstrom ed., 2023).

[88] Members of Congress have proposed expanding access. *See, e.g.*, Open Courts Act of 2021, H.R. 5844, 117th Cong. (2021).

[89] *See* U.S. Cts., Federal Court Management Statistics, December 2023: Explanation of Selected Terms (2023), https://www.uscourts.gov/sites/default/files/explanation_of_selected_terms_december_2023.pdf [https://perma.cc/2MZU-CHMW].

III
Federal Constitutional Endowments to U.S. Courts and Capacious State Constitutional Commitments to Their Courts

The substantial federal court system I have outlined is predicated on relatively skimpy constitutional texts. The United States' 1776 Constitution had neither a remedies nor an open-court clause. During ratification, proposals came from representatives in Virginia, North Carolina, and Rhode Island for language reminiscent of some provisions quoted at the outset, but they were not adopted then or in the 1791 Bill of Rights.[90] Federal constitutional commitments to courts come instead from Article III, which inscribed a Supreme Court and gave Congress authority to "from time to time ordain and establish" inferior courts, which it did in the First Judiciary Act.[91] Article III also outlines categories of federal court jurisdiction and methods for the selection of and the salary and tenure protections for federal judges.

Additional sources of entitlements to adjudication come from limitations on congressional power to suspend the writ of habeas corpus,[92] the First Amendment's right to petition for redress,[93] and the Supremacy Clause's reference that state-court judges are "bound" by federal law.[94] Moreover, in the little-read Treason Clause of Article III, proceedings must be "open."[95] This amalgam could be understood to have adopted conventional views on rule of law and judicial duties; one can understand the "plan of the Convention" to make rights to

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[90] North Carolina and Virginia proposed that the amendment read: "[E]very freeman ought to find . . . remedy by recourse to the law[] for all injuries and wrongs he may receive . . . . He ought to obtain right and justice freely . . . completely and without denial, promptly and without delay, . . . and that all establishments or regulations contravening these rights, are oppressive and unjust." 2 Documentary History of the Constitution of the United States of America 268 (Washington, Dep't of State 1894). Rhode Island's proposed amendment stated: "That every freeman . . . ought to obtain right and justice freely without sale, compleatly and without denial, promptly and without delay, and that all establishments or regulations contravening these rights, are oppressive and unjust." *Id.* at 379; *see also* 1 The Debates and Proceedings in the Congress of the United States 79 (Washington, Gales & Seaton 1834) (reporting that "[s]everal amendments were proposed but none of them were agreed to"); History of Congress; Exhibiting a Classification of the Proceedings of the Senate and the House of Representatives from March 4, 1789 to March 3, 1793, at 165 (Phila., Lea & Blanchard 1843); Koch, *supra* note 1, at 372–74.

[91] U.S. Const. art. III, § 1; Judiciary Act of 1789, ch. 20, §§ 1-4, 1 Stat. 73, 73-75.

[92] U.S. Const. art. I, § 9.

[93] *Id.* amend. I.

[94] *Id.* art. VI, cl. 2.

[95] *See id.* art. III, § 3, cl. 1. That provision reads: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

remedies available in federal courts.[96] Atop the text, which installed the Supreme Court, endorsed state-court adjudication, and raised the prospect of lower federal courts, legislation followed. By the time of the Bill of Rights, the "common understanding" had materialized in grants of jurisdiction to federal courts. *Marbury v. Madison*'s pronouncement of rights to remedies—assuming jurisdiction was constitutionally available—flowed thereafter.[97]

Turning to the states, "open" courts and "right-to-remedy" clauses were, and are, plentiful. As quoted at this essay's outset, the 1776 Delaware Declaration of Rights provided for "every Freeman" to have remedy "speedily without Delay" against any "other Person" for "every Injury done him in his Goods, Lands or Person," in accordance with "the Law of the Land."[98] The first constitutions of Maryland (1776) and Massachusetts (1780), and the second of New Hampshire (1784), had similar iterations.[99] Pennsylvania's 1776 version instructed that all "courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay,"[100] and North Carolina's 1776 provision limited remedies to those restrained "of [their] liberty."[101]

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[96] That phrase comes from recent Supreme Court decisions about the interplay between sovereign immunity and federal court jurisdiction. *See* PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 500 (2021); Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 584 (2022).

[97] The decision followed state courts in making judicial review available; *Marbury*'s innovation was its conclusion that courts had the power of judicial review of executive actions. William Michael Treanor, *The Story of* Marbury v. Madison*: Judicial Authority and Political Struggle*, *in* Federal Courts Stories 29, 29–56 (Vicki C. Jackson & Judith Resnik eds., 2010).

[98] Del. Declaration of Rts. of 1776, § 12.

[99] Md. Const. of 1776, Declaration of Rts., art. XVII; Mass. Const. art. XI; N.H. Const. art. XIV.

[100] Pa. Const. of 1776, § 26. Pennsylvania's current constitutional provision is similar: "All courts shall be open; and every man 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." Pa. Const. art. 1, § 11.

[101] N.C. Declaration of Rts. of 1776, § XIII. North Carolina's second Constitution, adopted in 1868, retained this provision, N.C. Const. of 1868, art. I, § 18, but also added a broader provision: "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." *Id.* art. I, § 35. North Carolina's current constitution, adopted in 1970, includes both the narrow and broader provisions, in near-identical form to those in the 1868 Constitution. N.C. Const. art. I, §§ 18, 21.

Of the original thirteen colonies, states including due process language were Connecticut, Delaware, Massachusetts, Maryland, North Carolina, New Hampshire, New York, Pennsylvania, Virginia, Rhode Island, and South Carolina. *See* Conn. Const. of 1818, art. I, § 9 ("[N]or be deprived of life, liberty or property, but by due course of law."); Del. Const. of 1792, art. I, § 7 ("[N]or shall be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land."); Mass. Const. of 1780, art. I, § XII ("No subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."); Md. Const. of 1851, art. XXI ("That no freeman ought to be . . . deprived of

Early state constitutions gave civil and criminal litigants rights to jury trials and protected jury factfinding. Criminal defendants had a variety of additional protections, such as rights to disclosure of charges, representation, confrontation, speedy trials, and jurors specifically from their vicinity.[102]

Rights of the public were also specified, as remedy clauses often provided that "all courts shall be open."[103] This phrase, found in the Delaware Constitution of 1792,[104] was reproduced in several other states.[105] In this century, twenty-seven state constitutions have formulations of the phrase, including "all courts shall be open," justice shall be "openly" administered,[106] calls for "public" courts,[107] prohibitions on "secret" proceedings,[108] protections for attending jury trials (which in

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his life, liberty or property, but by the judgment of his peers, or by the law of the land."); N.C. DECLARATION OF RTS. of 1776, § 7 ("That no Freeman ought to be . . . deprived of his Life, Liberty or Property, but by the Law of the Land."); N.H. CONST. art. XV ("And no subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land."); N.Y. CONST. of 1821, art. VII, § VII ("[N]or be deprived of life, liberty or property, without due process of law."); PA. CONST. of 1776, art. IX ("[N]or can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers."); VA. DECLARATION OF RTS. of 1776, § 8 ("[T]hat no man be deprived of his liberty except by the law of the land, or the judgment of his peers."); R.I. CONST. of 1842, art. I, § 10 ("[N]or shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land."); S.C. CONST. of 1778, art. XLI ("That no freeman of this State be . . . deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land."). Those without any such provisions were Georgia and New Jersey. One of the earliest uses of the phrase "due process" comes from a 1354 statute protecting against loss of property or life "without being brought in Answer by due Process of the Law." Liberty of Subject, 28 Edw. 3 c. 3 (1354) (Eng.).

102 I analyzed the impact of these rights in Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 app. 3, at 1035–54 (2012) [hereinafter Resnik, *Constitutional Entitlements*].

103 For examples of constitutions in which the phrases were in tandem, see DEL. CONST. of 1792, art. I, § 9; and KY. CONST. of 1792, art. XII, § 13. For an example of a constitution where they were not in tandem, see VT. CONST. of 1777, ch. II, § 23, which stated "[a]ll courts shall be open, and justice shall be impartially administered, without corruption or unnecessary delay . . . and if any officer shall take greater or other fees than the laws allow him, either directly or indirectly, it shall ever after disqualify him from holding any office in this State." Thanks to Adam Grogg for researching state constitutional provisions.

104 DEL. CONST. of 1792, art. I, § 9.

105 I also provide listings in Resnik, *Constitutional Entitlements*, *supra* note 102, at 999–1020 (app. 1), 1021–34 (app. 2).

106 *See* FRIESEN, *supra* note 16, at 91–92. The number included varies depending on which terms are in focus.

107 For example, South Carolina proclaims that all "courts shall be public." S.C. CONST. art. I, § 9.

108 Oregon both specifies that courts are open and that no court shall be "secret." OR. CONST. art. I, § 10.

turn are guaranteed in all the original states' constitutions),[109] and, in two instances, protections for the press as well.[110] (To be clear, limits on access to records of various kinds exist, as do an array of protective orders, and on occasion, filings are sealed.[111])

Many state constitutions have directives on selection of judges, the number of justices required for decisions, tenure in office, mechanisms for protecting independence, parameters of jurisdiction, and duties owed to other branches of government and the public.[112] For example, Massachusetts, New Hampshire, and Rhode Island instructed justices to reply when governors or legislatures ask for opinions.[113] The early constitutions of both Idaho and Illinois called

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109 *See, e.g.*, N.C. Declaration of Rts. of 1776, § IX ("That no Freeman shall be convicted of any Crime, but by the unanimous verdict of a Jury of good and lawful Men, in open Court, as heretofore used.").

110 *See, e.g.*, Ga. Const. of 1777, art. LXI ("Freedom of the press, and trial by jury, to remain inviolate *forever*."); S.C. Const. of 1790, art. IX, § 6 ("The trial by jury, as heretofore used in this state, and the liberty of the press, shall be for ever inviolably preserved."). The original Declarations of Rights of Delaware, Maryland, and Virginia all included protection of the liberty of the press. *See, e.g.*, Del. Declaration of Rts., § 23 (1776); Md. Const. of 1776, Declaration of Rts., § 38; Va. Declaration of Rts. of 1776, § 12. Similar provisions remain in place today. *See, e.g.*, Del. Const. art. I, § 5; Md. Const., Declaration of Rts. art. 40; Va. Const. art. I, § 12.

111 *See* Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 Nev. L.J. 1631 (2015) [hereinafter Resnik, *Contingency of Openness*]; Engstrom, Engstrom, Gelbach, Peters & Schaffer-Neitz, *Secrecy by Stipulation*, *supra* note 86.

112 The Maryland Declaration of Rights and the Massachusetts Constitution offered guarantees of judicial independence before Article III's version. Maryland's 1776 provision stated that "the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people," and therefore that "all judges ought to hold commissions during good behaviour." Md. Const. of 1776, Declaration of Rts., § 30. Mass. Const. art. XXIX provided: "It is . . . not only the best policy, but for the security of the rights of the people, and of every citizen, . . . the judges of the supreme judicial court should hold their offices [while] they behave themselves well, and . . . should have honorable salaries ascertained and established by standing laws." *See* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L.J. 929, 985–86 & n.260 (2002).

113 Mass. Const. pt. 2, ch. 3, art. II ("Each branch of the Legislature, as well as the Governour and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions."); N.H. Const. pt. 2, § 74 ("Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.") (same as of 2024); R.I. Const. art. X, § 3 ("The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly." (taken generally from the R.I. Const. of 1842, art. X, § 3, replacing its 1663 charter)).

on judges to "report" to the legislature or governor on "defects and omissions" in the laws.[114]

Some constitutions also directed their supreme courts to write or publish opinions, make them freely available, permit anyone to republish them, and explain reasons for dissent. Kentucky's 1792 Constitution imposed the "duty of each judge of the Supreme Court, present at the hearing of such cause, and differing from a majority of the court, to deliver his opinion in writing . . . ."[115] West Virginia directed judges in its 1872 Constitution to "prepare a syllabus of the points adjudicated" in cases with written opinions.[116] The Constitutions of Arizona, California, and Michigan insisted that opinions "shall be free for publication by any person."[117] Illinois's current constitution, adopted in 1970, requires

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114 Idaho's 1890 constitutional requirement that its judges report to the legislature "such defects and omissions in the Constitution and laws as they may find to exist" remains. IDAHO CONST. art. V, § 25. Illinois's requirement is that the Illinois Supreme Court "shall report" to the general assembly, in writing, "improvements in the administration of justice." ILL. CONST. art. VI, § 17. This instruction, which did not appear in the Illinois Constitutions of 1818 or of 1848, was added in the 1870 Constitution in a form akin to that of Idaho; it stated all judges of inferior courts "report in writing" each year, to the governor, "such defects and omissions in the Constitution and laws as they may find to exist, together with appropriate forms of bills to cure such defects and omissions in the laws." ILL. CONST. of 1870, art. VI, § 31.

115 KY. CONST. of 1792, art. V, § 4. That provision is not included in Kentucky's most recent state constitution, ratified in 2020. *See generally* KY. CONST.

116 W. VA. CONST. of 1872, art. VIII, § 5. West Virginia's current constitution is an amended version of its 1872 constitution, and includes the same requirement. *Id.* art. VIII, § 4.

117 ARIZ. CONST. of 1910, art. VI, § 16. Arizona's current Constitution provides that "[p]rovision shall be made by law for the speedy publication of the opinions of the supreme court, and they shall be free for publication by any person." ARIZ. CONST. art. VI, § 8; *see also* CAL. CONST. of 1849, art. VI, § 12 ("[J]udicial decisions shall be free for publication by any person.") (superseded by the California Constitution of 1879, that did not address the issue and revised in 1966, art. VI, § 14, to state that Supreme Court opinions "shall be available for publication by any person"); MICH. CONST. art. IV, § 35 ("All laws and judicial decisions shall be free for publication by any person."). The same provision existed in Michigan's 1850 Constitution, MICH. CONST. of 1850, art. IV, § 36, but not in Michigan's initial 1835 constitution. The Michigan Constitution also provides: "Decisions of the supreme court, . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision and . . . denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent." MICH. CONST. art. VI, § 6.

Maryland's Constitution provides similarly that "[p]rovision shall be made by Law for publishing Reports of all causes, argued and determined in the Supreme Court of Maryland and in the intermediate courts of appeal, which the justices or judges thereof, respectively, shall designate as proper for publication." MD. CONST. art. IV, § 16. In addition, New Jersey's 1884 Constitution required judges to provide "reasons . . . in writing," N.J. CONST. of 1884, art. VI, § 2, but neither New Jersey's original 1776 constitution nor its current constitution, in place since 1947, contain a similar provision.

rules for "expeditious and inexpensive appeals."[118] Utah's Constitution guarantees appeal.[119]

In addition, state constitutions regularly protect judicial salaries (as does the U.S. Constitution), and some address support of their respective court systems. For example, the North Carolina Constitution of 1776 provided "[t]hat the Governor, Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General, shall have adequate Salaries during their Continuance in Office."[120] The current iteration, added in 1970, states that:

> [t]he General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this Article, but the salaries of Judges shall not be diminished during their continuance in office. In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs.[121]

Missouri's 1820 Constitution, later repealed, provided that its judges "shall receive for [their] services a compensation which shall not be diminished during [their] continuance in office, and which shall not be less than two thousand dollars annually."[122] Missouri's current Constitution reads:

> All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. No judge shall receive any other or additional compensation for any public service. No supreme, appellate, circuit or associate circuit judge shall practice law or do law business. Judges may receive reasonable traveling and other expenses allowed by law.[123]

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118 Ill. Const. art. VI, § 16.
119 Utah Const. art. I, § 12.
120 N.C. Const. of 1776, § XXI (repealed 1868). This provision has since been amended.
121 N.C. Const. art. IV, § 21.
122 Mo. Const. of 1820, art. V, § 13 (repealed 1865).
123 Mo. Const. art. V, § 20. This current provision is in the 1976 Supplement to the Missouri Constitution, which contains the amendments of that year.

Many other constitutions (including Arizona,[124] Idaho,[125] Maryland,[126] and Michigan[127]) have parallel protections.

In terms of court funding, examples include North Carolina's current constitution, which reads:

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[124] The state's first constitution, dated 1910, contains the following provision:

> The salaries of the judges of the Supreme Court shall be paid by the State. One-half of the salary of each of the judges of the superior court shall be paid by the State, and the other one-half by the county for which he is elected. Until otherwise provided by law, each of the judges of the Supreme Court shall receive an annual salary of five thousand dollars. Until otherwise provided by law, the judges of the superior courts in and for the counties of Maricopa, Pima, Yavapai, Gila, and Cochise shall each receive four thousand dollars per annum; . . . and the judges of the superior courts in and for the counties of Coconino, Apache, Navajo, Santa Cruz, Yuma, Pinal, Graham and Mohave shall each receive three thousand dollars per annum.

ARIZ. CONST. of 1910 art. VI, § 10.

Arizona's current constitution further provides that "The salary of any justice or judge shall not be reduced during the term of office for which he was elected or appointed." ARIZ. CONST. art. VI, § 33. Arizona's original constitution also provided for the compensation of Supreme Court clerks ("who shall . . . receive such compensation, by salary only, as may be provided by law," ARIZ. CONST. of 1910 art. VI, § 17), superior court clerks ("who shall . . . receive such compensation, by salary only, as shall be provided by law," ARIZ. CONST. of 1910 art. VI, § 18), and superior court commissioners ("as may be deemed necessary, who shall . . . receive such compensation as may be provided by law," ARIZ. CONST. of 1910 art. VI, § 19). These provisions, though, are absent from Arizona's current constitution as amended to 2022. *See* ARIZ. CONST. art. VI.

[125] The 1998 Idaho Constitution read:

> The salary of the justices of the Supreme Court, the salary of judges of the court of appeals, the salary of the judges of the district court and the salary of magistrate judges shall be as provided by statute, and no justice of the Supreme Court, judge of the court of appeals, judge of the district court or magistrate judge, shall be paid his salary, or any part thereof, unless he shall have first taken and subscribed an oath that there is not in his hands any matter in controversy not decided by him which had been finally submitted for his consideration and determination, thirty days prior to the taking and subscribing such oath.

IDAHO CONST. art. V, § 17.

[126] Maryland's 1956 Constitution read: "The salary of each Chief Judge and of each Associate Judge of the Circuit Court shall not be diminished during his continuance in office." MD. CONST. art. IV, § 24 (amended 1956).

[127] Michigan's provision reads:

> Salaries of justices of the supreme court, of the judges of the court of appeals, of the circuit judges within a circuit, and of the probate judges within a county or district, shall be uniform, and may be increased but shall not be decreased during a term of office except and only to the extent of a general salary reduction in all other branches of government. Each of the judges of the circuit court shall receive an annual salary as provided by law. In addition to the salary received from the state, each circuit judge may receive from any county in which he regularly holds court an additional salary as determined from time to time by the board of supervisors of the county. In any county where an additional salary is granted, it shall be paid at the same rate to all circuit judges regularly holding court therein.

MICH. CONST. art. VI, § 18 (paragraph break omitted).

> The General Assembly shall provide for the establishment of a schedule of court fees and costs which shall be uniform throughout the State within each division of the General Court of Justice. The operating expenses of the judicial department, other than compensation to process servers and other locally paid non-judicial officers, shall be paid from State funds.[128]

Missouri provides:

> All expenses incurred in administering sections 25(a)-(g), when approved by the supreme court, shall be paid out of the state treasury. The supreme court shall certify such expense to the commissioner of administration, who shall draw his warrant therefor payable out of funds not otherwise appropriated.[129]

Florida's formulation is that:

> All justices and judges shall be compensated only by state salaries fixed by general law. Funding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c), shall be provided from state revenues appropriated by general law.[130]

As to federal constitutional limits on the mechanisms for self-funding, the iconic example is *Tumey v. Ohio*, in which the U.S. Supreme Court held unconstitutional that local judges in Ohio received funds from fines imposed when enforcing laws prohibiting the sale of alcohol.[131]

IV
The Metes and Bounds of State Courts

When seeking to write a parallel account for the states of the sketch I provided about the infrastructure and resources of the federal system, I was reminded of another reason that the federal courts became our "common heritage." States have no collective AO and FJC, nor do they share one definition of a "case," gather information in the same way, have interactive electronic filing systems, or a combined database of their courts' decisions and rules. As for hiring law students as clerks, the

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128 N.C. Const. art. IV, § 20. This provision was not included in the original 1776 constitution of North Carolina nor the subsequent 1868 constitution.

129 Mo. Const. art. V, § 25(e). This provision was not included in the state's original 1820 constitution but was added in 1976.

130 Fla. Const. art. V, § 14(a). This provision was not included in the state's original constitution but was added in 1998.

131 273 U.S. 510 (1927).

state courts had no shared system until 2023, when apex courts launched an online application system, Court Opportunity Recruitment for All (CORA) to parallel the federal courts' Online System for Clerkship Application and Review (OSCAR).[132]

To understand the investments in and the outputs of state courts requires delving into each state's website, scattered reports from the U.S. Department of Justice's Bureau of Justice Statistics (BJS) and the Bureau of Labor Statistics (BLS), materials from the National Center for State Courts (NCSC), the ABA, the Institute for the Advancement of the American Legal System (IAALS), and research by groups of scholars and other research institutes. Below are a few data points.

In 2010, the number of judges working in state courts was about 30,000, according to a BJS publication.[133] In 2023, the BLS estimated that about 24,000 state and local municipal judges, magistrate judges, and magistrates worked in courts. BLS counted an additional 14,000 administrative judges and hearing officers employed in state and federal governments, as well as 2,600 arbitrators, mediators, and conciliators.[134] No national count appears available for the number of state and local courthouses around the country.

Information on state court filings comes from the NCSC, a private organization founded in the 1970s, in part because Chief Justice Warren Burger hoped to enable states to defend themselves better from claims of violation of federal law. Funded through a mix of grants and corporate donations, the NCSC is a hub of state-court data; in addition to serving as a clearinghouse, the NCSC undertakes targeted research projects.[135] As

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132 *See CORA*, Nat'l Ctr. for State Cts., https://ncsc.org/consulting-and-research/areas-of-expertise/racial-justice/resources/workforce/cora [https://perma.cc/F877-U8PU]; *About OSCAR*, OSCAR, https://oscar.uscourts.gov/about [https://perma.cc/QSS2-WD5P].

133 Quality Judges Initiative, *FAQs: Judges in the United States*, Inst. for the Advancement of the Am. Legal Sys. 3, https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf [https://perma.cc/Y734-H3A5].

134 *May 2023 National Occupational Employment and Wage Estimates*, U.S. Bureau of Lab. Stats. (May 2023), https://www.bls.gov/oes/current/oes_nat.htm [https://perma.cc/7ZBD-5RUC]; *Occupational Employment and Wage Statistics: May 2023 Occupation Profiles*, U.S. Bureau of Lab. Stats. (May 2023), https://www.bls.gov/oes/current/oes_stru.htm [https://perma.cc/HU6T-VFTW]. Totals were calculated by summing values for Judges, Magistrates, and Other Judicial Workers (identified by code "23-1021"), Arbitrators, Mediators, and Conciliators (identified by code "23-1022"), and Judges, Magistrate Judges, and Magistrates (identified by code "23-1023"). BJS collects information on the federal executive, which is why its compilation includes federal agency administrative law judges and hearing officers.

135 NCSC was founded in 1971; its agendas include issues and trends in state court administration. *Vision, Mission & History*, Nat'l Ctr. for State Cts., https://www.ncsc.org/about-us/vision-mission-and-history [https://perma.cc/BWD9-5BAK]. From 1975 to 2018, NCSC published caseload digests in annual reports. *See generally* Nat'l Ctr. for State Cts., *Annual Report Archive 1975–2018*, Ct. Stat. Project, https://www.courtstatistics.org/csp-annual-caseload-reports [https://perma.cc/4X3L-T5QK]. In 2019, NCSC moved from

of 2018, the NCSC recorded that states received 83.8 million new cases, of which fifty-three percent were traffic cases, about twenty percent were criminal cases, and twenty percent were civil cases not related to family life.[136] Like the federal system, filings have declined in recent decades: 2018 filings were down from 1992, when more than 93 million filings were logged, and from 2008, when 106 million cases were filed.[137] Further, in every major category of case, filings had declined overall between 2012 and 2020.[138] An update from a 2024 monograph published by the ABA looked at filings per capita in five states (California, Illinois, Minnesota, Ohio, and Texas). Identifying an overal decline in filings, the authors reported that they were "stunned at the disparity . . . from state to state."[139]

I provide additional windows into the use of courts from states in different parts of the country with varying populations. I begin with two large jurisdictions, California and Texas. In 2021, California had a population of 39 million,[140] 440 courthouses, 500 more "court buildings," and 1,757 judges and justices. In 2020, the state's judiciary responded

publishing static digests to a dynamic online tool, CSP STAT. *See generally* Nat'l Ctr. for State Cts., *CSP STAT*, Ct. Stat. Project, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat [https://perma.cc/RCD3-NXUT]. CSP STAT and the earlier annual reports sometimes list different case totals. In 2023, NCSC staff explained that variation comes in part from differently including "[p]ublishable" or both "[p]ublishable" and "[n]ot publishable" data. Whether data is "[p]ublishable" depends on whether it is "sufficiently representative of the reporting unit's caseload" and adheres to the definitions and counting rules in the State Court Guide to Statistical Reporting. *See* Nat'l Ctr. for State Cts., *State Court Guide to Statistical Reporting*, Ct. Stat. Project 66, https://www.courtstatistics.org/__data/assets/pdf_file/0031/88735/State-Court-Guide-to-Statistical-Reporting.pdf [https://perma.cc/39UK-8B5A]. Other variations come from whether states report case totals from every type of court within that state or have incomplete statistics. For non-responding states or states unable to report data, NCSC analysts either pull materials from official court/state publications (e.g., published annual reports) to make estimations or carry forward the most recent data submission.

136 Nat'l Ctr. for State Cts., *State Court Caseload Digest: 2018 Data*, Ct. Stat. Project 7 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/HTD3-S3DQ].

137 Nat'l Ctr. for State Cts., *State Court Caseload Statistics: Annual Report 1992*, Ct. Stat. Project, at xi, https://www.courtstatistics.org/__data/assets/pdf_file/0030/29748/1992-SCCS.pdf [https://perma.cc/LND9-ALCZ]; Nat'l Ctr. for State Cts., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads*, Ct. Stat. Project 19 (2010), https://www.courtstatistics.org/__data/assets/pdf_file/0022/29803/2008-EWSC.pdf [https://perma.cc/X4T6-7C5P]. *See generally* Nat'l Ctr. for State Cts., *Annual Report Archive 1975–2018*, Ct. Stat. Project, https://www.courtstatistics.org/csp-annual-caseload-reports [https://perma.cc/4X3L-T5QK].

138 Nat'l Ctr. for State Cts., *2020 Incoming Cases in State Courts: Caseload Highlights*, Ct. Stat. Project, https://www.courtstatistics.org/__data/assets/pdf_file/0020/72254/CLHL_2020_Incoming_Cases-.pdf [https://perma.cc/CA2C-YJ4P].

139 Carlson & Greacen, *supra* note 47, at 2.

140 *QuickFacts: California*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/CA/PST045223 [https://perma.cc/25JJ-PNWB].

to more than 5.3 million cases, with 6,470 filings, 6,417 dispositions, and 78 opinion dispositions by its Supreme Court. The California Courts of Appeal disposed of 20,772 total cases.[141] Texas, with 29.5 million people,[142] is home to more than 240 courthouses,[143] in which approximately 3,202 judges and justices serve.[144] In 2019, the Texas judiciary reported resolving 8.6 million cases of which about 9,000 were tried. Texas has two courts of last resort; in 2021, the Texas Supreme Court reported ninety-seven cases and seventy-two dispositions, and the Texas Court of Criminal Appeals reported over 7,700 total dispositions.[145]

Data on Illinois from 2015, where 12.8 million people lived then,[146] described 121 courthouses staffed by 1,062 judges and justices.[147] In 2020, its courts received 1.6 million filings and disposed of 1.4 million cases, a decline from the prior year when 2.3 million filings and 2.1 million dispositions were made.[148] The Illinois Supreme Court received 1,766 new cases in 2020; the state's appellate courts had 3,659 filings and disposed of 5,449 matters, which was a decline (perhaps due to COVID-19) from the year before.[149] Illinois reported

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141 *2021 Court Statistics Report: Statewide Caseload Trends 2010–11 Through 2019–20*, Jud. Council of Cal., 1–3, (2021), https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf [https://perma.cc/8YKH-VEKP]. Of these appellate court cases, 8,736 were disposed of by written opinion, 3,847 without written opinion, and 2,256 without a record filed. *About California Courts*, Cal. Cts., Jud. Branch of Cal., https://www.courts.ca.gov/2113.htm [https://perma.cc/D94A-PAYF]; State of Cal. Dep't of Fin., Infrastructure 93–94 (2023), https://ebudget.ca.gov/2023-24/pdf/Revised/BudgetSummary/Infrastructure.pdf [https://perma.cc/WZ3E-SQ6G].

142 *QuickFacts: Texas*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/TX/PST045223 [https://perma.cc/H5ED-JKCJ].

143 *Texas Historic Courthouse Preservation Program*, Tex. Hist. Comm'n (Aug. 2023), https://www.thc.texas.gov/public/upload/forms/factsheets/thc-thcpp-factsheet2023.pdf [https://perma.cc/5SZV-CN8A].

144 *Court Structure of Texas*, Tex. Jud. Branch (Oct. 2023), https://www.txcourts.gov/media/1457606/court-structure-chart-october-2023.pdf [https://perma.cc/V4DN-LW5Z].

145 The Honorable Nathan L. Hecht, Chief Just. of the Sup. Ct. of Tex., The State of the Texas Judiciary: An Address to the People of Texas (Apr. 5, 2023), https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2023.pdf [https://perma.cc/ETG5-DZKZ]; *Texas Supreme Court Summary of Docket Activity*, Tex. Jud. Branch, https://www.txcourts.gov/media/1452987/sc-activity-2021.pdf [https://perma.cc/ZMF8-E5NT]; *Court of Criminal Appeals Annual Reports*, Tex. Jud. Branch, https://www.txcourts.gov/media/1452988/cca-annual-reports-fy21.pdf [https://perma.cc/E9E7-C5U8].

146 *QuickFacts: Illinois*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/IL/PST045223 [https://perma.cc/ND4D-JENA].

147 *Illinois Judges 2015*, Northwestern Law, at 5–7, https://illinoisjudges.law.northwestern.edu [https://perma.cc/2HBT-5DSG].

148 Admin. Off. of the Ill. Cts., Illinois Courts Annual Report 2020, at 57 (2020), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/ce15804b-b4a7-4503-8ba9-4c609b160616/2020%20Annual%20Report%20Administrative%20Summary.pdf [https://perma.cc/4LKZ-LLD8].

149 *Id.* at 38, 92.

that thirty-seven percent of the 2020 appellate filings came from lawyer-less litigants.[150]

Moving to the Northeast, New York's judiciary budget accounted for more than 300 courts.[151] In 2021, when New York had a population of 20 million,[152] the New York Court of Appeals, the state's highest court, decided 1,658 applications, heard fifty-eight oral arguments, and ruled on eighty-one appeals and 988 motions.[153] The New York Appellate Division dealt with 7,711 filings, disposed of 13,933 cases, heard 4,278 oral arguments, and decided 20,468 motions.[154] The New York State trial courts received 2.2 million filings in 2021 (down from 3.3 million in 2017) and disposed of approximately 156,000 civil and felony criminal cases.[155] Connecticut, with 3.6 million people,[156] reported on its thirty-three courthouses, 201 authorized judgeships, and more than 4,200 additional state judiciary staff. In 2021, Connecticut received 224,569 cases and disposed of 205,794; the Supreme Court accepted 101 cases and disposed of 112; the Appellate Courts accepted 665 and disposed of 928, and the Superior Courts received 233,055 filings and disposed of 266,102.[157]

Is the number of people holding jobs as judges and the number of cases filed a lot or a little? Are the filings reflective of the volume of violations of legal rules? Measuring demand, need, and the optimum level of services is complex, as can be seen when economists aim to determine what quantity of claims would deter misbehavior, provide remedies, not induce over-claiming, and not over-price underlying useful

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150 *Id.* at 53.

151 N.Y. State Unified Ct. Sys., Budget: Fiscal Year 2025, at i (2023), https://www.nycourts.gov/LegacyPDFS/admin/financialops/FPCM-PDFs/V2_jdbgt/FY2025_FINAL-JudiciaryBudget.pdf [https://perma.cc/FWL7-SQ64] [hereinafter State of New York Judiciary Budget FY 2025].

152 *QuickFacts: New York*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/NY/PST045223 [https://perma.cc/KY2J-DKB6].

153 N.Y. State Unified Ct. Sys., 2021 Annual Report 57 (2021) [hereinafter N.Y. 2021 Annual Report].

154 *Id.* at 58.

155 State of New York Judiciary Budget FY 2025, *supra* note 151, at i; N.Y. 2021 Annual Report, *supra* note 153, at 59–63.

156 *QuickFacts: Connecticut*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/CT/PST045223 [https://perma.cc/G5HN-6XTG].

157 *State Courthouses*, State of Conn. Jud. Branch, https://www.jud.ct.gov/directory/courthouses.htm [https://perma.cc/2DYP-XVR2]; *Fast Facts About the Judicial Branch*, State of Conn. Jud. Branch, https://www.jud.ct.gov/external/media/facts.htm [https://perma.cc/G4WW-B5B8]; *Biennial Report & Statistics 2020–2022: Safeguarding Fair and Impartial Courts During Turbulent Times*, Conn. Jud. Branch, 42–45, https://www.jud.ct.gov/Publications/ES191_2022.pdf [https://perma.cc/X9N9-BSGH].

activities.[158] Social scientists have discussed the challenges individuals face in "naming, blaming, and claiming"—that people may not know they have been injured, identify the reasons, and seek redress.[159] An example of practices that taught us to do so comes from Professor Stephen Yeazell, who tracked how, by requiring people who seek reimbursement from automobile insurance policies to file claims and to provide information on potentially liable individuals, that industry helped to produce potential litigants.[160]

Meanwhile, some commentators argue that people in the United States are too prone to seek redress ("litigiousness"), while other analysts underscore the problem with such pronouncements. Institutional structures and regulations (such as health insurance) alter the incentives and potential to seek court-based relief.[161] As to estimates of the frequency of filing lawsuits after injuries have been identified, decades ago, the Civil Litigation Research Project estimated that of 100 conflicts, about eleven percent resulted in a filed claim.[162] In the 2024 publication, *What Is Happening to State Trial Court Civil Filings*, the researchers concluded that the declining levels of filing in the five states studied did not relate to "population, geography, or demographics," nor to business cycles.[163] Furthermore, they identified no data on a "general improvement in the fairness of business practices or less contentious interpersonal relationships." Rather, they raised concerns about "unmet civil legal needs," as they pointed to many "large-scale public surveys" that people did not know they had legal rights or the ways to pursue relief.[164]

And what about content? Who is seeking what remedies and how are courts responding? As the ABA researchers discussed, data-collection

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158 *See generally* Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 Int'l Rev. L. & Econ. 99, 99 (1999); A. Mitchell Polinsky & Steven Shavell, *Costly Litigation and Optimal Damages* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18594, 2012); Louis Kaplow, *Optimal Design of Private Litigation*, 155 J. Pub. Econ. 64, 64–65 (2017).

159 William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 Law & Soc'y Rev. 631, 631 (1980–81).

160 *See* Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DePaul L. Rev. 183, 185–86 (2001).

161 *See generally* Stephen J. Carroll, Deborah R. Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse & J. Scott Ashwood, Asbestos Litigation 23 (2005); Stephen J. Carroll, Deborah R. Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse & J. Scott Ashwood, Asbestos Litigation Costs, Compensation and Alternatives (2005).

162 Trubek, Sarat, Felstiner, Kritzer & Grossman, *supra* note 15, at 86.

163 Carlson & Greacen, *supra* note 47, at 227.

164 *Id.* at 235, 228.

problems are legion.[165] Even as technology could make answers simpler, in many jurisdictions, private companies control the platforms on which state-court data sits. As Professor Tanina Rostain has explained, "vendor capture" is a major obstacle to gathering knowledge about filings and outcomes in state courts: "One or two private companies dominate the court technology market."[166] Her examples included Tyler Technologies, which has annual revenues of close to two billion dollars each year; its economic success may come in part by encouraging "new court adoptees to implement high cost bespoke systems" that generate a "lack of standardization."[167] Press reports and lawsuits detail shortfalls, errors, including people erroneously held in detention. The challenges of deploying technologies, often laid on top of decentralized and at times poorly organized record systems, are significant.[168] Todd Venook has mapped more facets of "digital courts" in which programs offer methods ("Guide and File") for pursuing claims as well as online dispute resolution.[169] Like Rostain, Venook has concerns that private entrepreneurs control the infrastructure and have not developed user-friendly programs.[170] In addition, public access is not free, and the designs do not build in low-cost means to modify mechanisms, to learn about how courts and litigants interact, and to facilitate interstate comparisons.[171]

More insight comes from the NCSC's *Landscape of Civil Litigation in State Courts*, issued in 2015 and based on data from 2012. NCSC researchers culled almost a million cases filed in ten major urban counties in the United States and learned that the largest set of cases were small-scale commercial disputes in which creditors used courts to collect debt. Under the category of "contracts" fell debt collection, landlord/tenant disputes, and foreclosures, which totaled sixty-four percent of filings; small claims were another sixteen percent; about nine percent were tort (automobile, personal injury, medical malpractice); and seven percent real property.[172] Most cases the NCSC analyzed were

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165 *Id.* at 227–35.

166 Tanina Rostain, *Access to Justice as Access to Data*, 119 Nw. L. Rev. 1, 13 (2024).

167 *Id.* at 11–12.

168 Austin Carr, *Tyler Tech's Odyssey Software Took Over Local Government and Courts*, Bloomberg News (Sept. 5, 2024, 5:00 AM), https://www.bloomberg.com/news/features/2024-09-05/tyler-tech-s-odyssey-software-took-over-local-government-and-courts [https://perma.cc/DK4K-3WTQ].

169 *See* Todd Venook, Enterprise Justice: Tyler Technologies and the Private Provision of Court Services (Sept. 12, 2024) (unpublished manuscript) (on file with author).

170 *Id.* at 54–59.

171 *Id.* at 58.

172 Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, The Landscape of Civil Litigation in State Courts 18–19 (2015). Data, collected in 2012, was drawn from

lawyer-less on at least one side (seventy-four percent of defendants, and eight percent of plaintiffs); in six percent of the cases studied, parties were lawyer-less on both sides.[173]

The problems judges encounter when responding to lawyer-less litigants are detailed in moving accounts by a group of researchers documenting in 2023 the poverty of court-based proceedings with ill-equipped judges interacting with individuals who had limited knowledge of the procedures.[174] State-by-state analyses offer more numbers on decades past in which litigants have been lawyer-less. California recorded 4.3 million people in civil litigation without the assistance of lawyers in 2004.[175] A year later, New York counted 2.3 million civil litigants without lawyers—including almost all tenants in eviction cases, debtors in consumer credit cases, and ninety-five percent of parents in child support matters.[176]

During the decades that followed, some states and localities created measures to redress some of the difficulties, such as rights to counsel for subsets of claims and assistance from "navigators" or other non-attorney personnel. Those programs were funded by state budgets or special

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Maricopa (AZ), Santa Clara (CA), Miami-Dade (FL), Oahu (HI), Cook (IL), Marion (IN), Bergen (NJ), Cuyahoga (OH), Allegheny (PA), and Harris (TX) counties. *Id.* at 15.

173 *Id.* at 32.

174 *See* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 509–10 (2022); Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1471 (2022); Anna E. Carpenter, Alyx Mark, Colleen F. Shanahan & Jessica K. Steinberg, *Foreword: The Field of State Civil Courts*, 122 COLUM. L. REV. 1165, 1165 (2022).

175 JUD. COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 2 (2004). The information was presented in support of the Sargent Shriver Civil Counsel Act, creating a pilot program for litigants to obtain counsel. CAL. GOV'T CODE §§ 68650-51 (West 2009).

176 JONATHAN LIPPMAN, STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 4 (2011), https://www.courts.state.ny.us/CTAPPS/news/SOJ-2011.pdf [https://perma.cc/DH93-YZNB]. In 2010, then-Chief Judge Lippman created the Task Force to Expand Access to Civil Legal Services in New York. *Permanent Commission on Access to Justice*, N.Y. CTS., https://ww2.nycourts.gov/accesstojusticecommission/index.shtml [https://perma.cc/62NL-AWS3]. The Task Force received $25 million in state funding in 2011, with a plan to increase to $100 million per year by its fourth year. TASK FORCE TO EXPAND ACCESS TO CIV. LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 5 (2010). In 2015, New York established the Permanent Commission on Access to Justice through Part 51.1 of the Rules of the Chief Judge to "continue the vital mandate of the Task Force." *Civil Legal Services*, THE FUND FOR MODERN COURTS, https://moderncourts.org/programs-advocacy/access-to-justice/civil-legal-services [https://perma.cc/L9Z2-NFE8]; N.Y. Comp. Codes R. & Regs. tit. 22, § 51.1. As of 2018, the Task Force requested its annual $100 million in funding be maintained "at its current level to address the ongoing access-to-justice gap for low-income New Yorkers." PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2 (2018).

grants.[177] As of 2024, the U.S. Department of Justice's Office for Access to Justice, the ALI, and the AAAS are "on the case," shaping programs and projects to respond, as are a national network on self-represented litigants and many law schools that have institutes or "laboratories" to generate paths to legal remedies with or without lawyers.

V
Financing State Courts

Turning from judges, litigants, and lawyers to funding, many state judiciaries have not had stable financial streams akin to that of the federal courts. After the 2008 financial crisis, a majority of state judiciaries received between ten and fifteen percent less funds than in 2007.[178] Many courts reduced hours, staff, and services. In that decade, Massachusetts's Chief Justice Margaret Marshall described the system as at "the tipping point of dysfunction," with staff cut by some eight percent.[179] The Georgia judiciary lost fourteen percent of its budget in 2010; responses included fewer court hours, suspension of civil trials in some venues, and reliance on volunteers for administrative work.[180]

What are the funding sources and how could state courts meet their needs as they compete with other government services? Potential revenue streams are affected by constituitonal provisions and statutes organizing state budgets. The issues include which entities within a state have the power to impose "taxes," what, under a state's law, is a "tax" as contrasted with a "fee" or "assessment," and how funds flow in and

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[177] Studies of court "navigator" programs and the efficacy of efforts to assist self-represented litigants are ongoing. *See, e.g.*, Mary E. McClymont, Nonlawyer Navigators in State Courts: An Emerging Consensus (2019), https://www.law.georgetown.edu/tech-institute/wp-content/uploads/sites/42/2023/06/Nonlawyer-Navigators-in-State-Courts.pdf [https://perma.cc/Z234-QJXG]; *see also* Margaret D. Hagan, *A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly*, 6 Ind. J. L. & Soc. Equal. 199, 199 (2018); D. James Greiner, Cassandra W. Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 Harv. L. Rev. 901, 905 (2013).

[178] Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, 143 Daedalus 96, 97 (2014).

[179] Greg A. Rowe, Keeping Courts Funded: Recommendations on How Courts Can Avoid the Budget Axe 1–3 (2012), https://www.ncsc.org/__data/assets/pdf_file/0025/17269/keeping-courts-funded.pdf [https://perma.cc/S5SD-HXVB]; David Rottman & Jesse Rutledge, *Facing Down a Budget Crisis, Rising Workloads, Two Judicial Elections and Living with Facebook: The State Courts in 2009*, *in* The Book of the States 2010, at 283, 283 (The Council of State Gov'ts ed., 2010).

[180] Rowe, *supra* note 179, at 2.

out.[181] Some states have constitutional caps on overall spending which, at times, can be avoided through lease-purchase agreements with third parties holding debt that is not subject to requirements of taxpayer approval. For example, and with guidance at times from the federal government, states have used that method for funding new prisons.[182]

The complexities of identifying the resources available to state courts in specific jurisdictions stem from their diverse organizational structures. For example, in 2023, the judges of the New York Court of Appeals complied with their constitutional mandate to approve "itemized estimates of the annual financial needs" of the judiciary. Its lengthy document described a $2.47 billion budget as aiming to provide a "first-class justice system" to all.[183] That accounting detailed a panoply of services and the gaps across an array of courts, including the state's lower courts (supreme and county courts, family courts, surrogate's courts, and multi-bench courts), city and district courts, New York City's Housing Courts, drug treatment courts, and the Court of Claims.[184] "Town and Village" courts were described as "principally funded by the localities that they serve," which means that, aside from some help with technology, training, and research, these courts (sometimes staffed by non-lawyers) derive resources from fines, fees, and assessments.[185]

Many other states (including large jurisdictions such as Georgia, Illinois, and Texas) do not have unified court systems, which makes difficult tracking the dollars charged to litigants and the fees collected by counties and localities. Specialized research groups, such as the Fines and Fees Justice Center (FFJC) and the Center on Budget and Policy Priorities (CBPP), have provided windows into many jurisdictions.[186] In 2016, a special task force in Illinois generated hundreds of pages with flow charts, such as the one in Figure 4, to identify the various fees and surcharges imposed.[187]

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[181] *See, e.g.*, People v. Johnson, 992 N.W.2d 247 (Mich. 2023); People v. Cameron, 929 N.W.2d 785 (Mich. 2019).

[182] *See, e.g.*, Bernie Gallagher, *State Limits on Revenue and Budgets Limit Democracy*, Ctr. on Budget & Pol'y Priorities (June 27, 2023), https://www.cbpp.org/blog/state-limits-on-revenues-and-budgets-stifle-democracy [https://perma.cc/5M29-UMXL]; Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 87–127 (2007).

[183] State of New York Judiciary Budget FY 2025, *supra* note 151, at i.

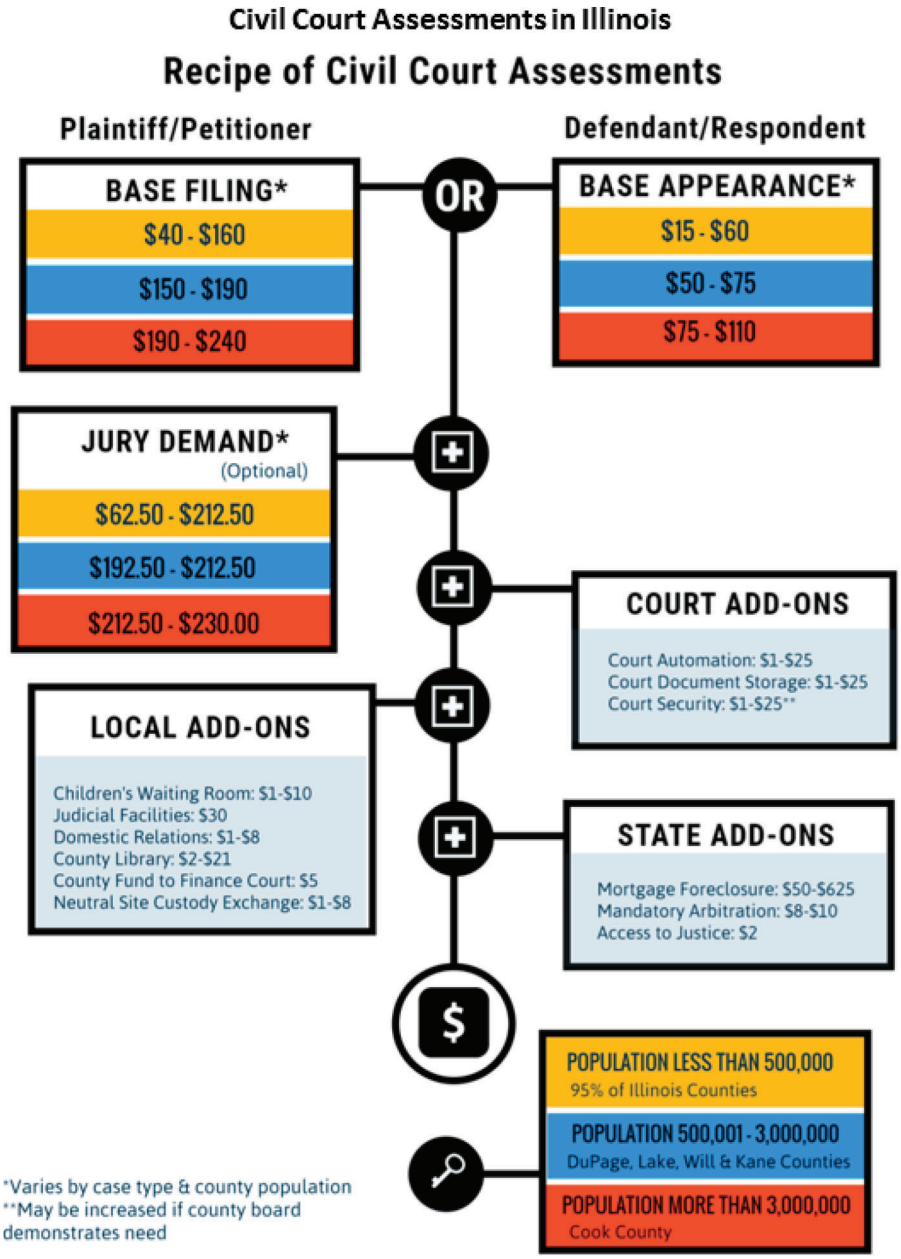
[184] *Id.*

[185] *Id.* at 59.

[186] Fines & Fees Just. Ctr., https://finesandfeesjusticecenter.org [https://perma.cc/8ZDX-XWDF]; Ctr. on Budget & Pol'y Priorities, https://www.cbpp.org [https://perma.cc/JAD3-4TMS].

[187] Ill. Sup. Ct. Statutory Ct. Fee Task Force, Illinois Court Assessments: Findings and Recommendations for Addressing Barriers to Access to Justice and Additional Issues Associated with Fees and Other Court Costs in Civil, Criminal, and Traffic Proceedings

FIGURE 4.



10 (2016); ILL. SUP. CT. STATUTORY CT. FEE TASK FORCE, REPORT ON IMPLEMENTATION OF 2016 TASK FORCE RECOMMENDATIONS AND ADDITIONAL PROPOSED MEASURES FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE AND EXCESSIVE FINANCIAL BURDENS ASSOCIATED WITH FEES AND COSTS IN ILLINOIS COURT PROCEEDINGS 11 (2023).

On the chart, one entry is for "base appearance" charges. That term denotes that when defendants "appear," they are required to pay to contest claims. Illinois is one of several states requiring payment for those brought into court involuntarily. Claire Johnson Raba and Dalié Jiménez analyzed 2.2 million California court records from 2009 to 2020, drawn from sixteen counties in the state. They documented that, whatever the amount creditors sought, California required a minimum of $225 for defendants to respond and that obtaining a waiver of that charge was "complex, unfriendly, and only available to the most indigent."[188]

One set of questions is where and how money comes in, and another is where it goes. Some jurisdictions require that "fees" be tied to the specific services rendered to avoid being categorized as "taxes" that courts do not have the power to impose. Chilling examples of the exploitation of court functions to turn them into revenue centers come from many sources, with a high-profile account centered on Ferguson, Missouri. In 2016, the U.S. Department of Justice demonstrated that police, working through municipal courts in Ferguson, Missouri, targeted racial minorities to provide income for the locality through extracting fees and fines.[189] Another example of abuse comes from litigation in Louisiana where fees went to judges' health care and other funds.[190]

Yet another question is the wisdom and constitutionality of imposing access fees. In the eighteenth century, Jeremy Bentham labeled the English fee system a "tax upon distress."[191] In the twenty-first century, FFJC is one of several organizations advocating for the abolition of many assessments on litigants.[192] Within the last decades, FFJC, the Brennan Center at NYU, the Vera Institute, the Urban Institute, Berkeley Law's Policy Clinic, and the CBPP have produced a wealth (so to speak) of reports, litigation, and legislation addressing the harms, such as patterns of regressive assessments that land on people

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188 Claire Johnson Raba & Dalié Jiménez, Pay to Plead: Finding Unfairness and Abusive Practices in California Debt Collection Cases (Apr. 11, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4611756 [https://perma.cc/CS4B-SQHK].

189 *See* C.R. Div. US Dep't of Just., Investigation of the Ferguson Police Department 42–62 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/9EKY-NS43]; Consent Decree at 79, United States v. City of Ferguson, No. 4:16-cv-00180-CDP (E.D. Mo. 2016) (No. 12-2).

190 *See* Cain v. City of New Orleans, 281 F. Supp. 3d 624, 630 (E.D. La. 2017).

191 2 Jeremy Bentham, *A Protest Against Law-Taxes*, *in* The Works of Jeremy Bentham 1033, 1033 (John Bowring ed., 1843).

192 *About Us*, Fines and Fees Just. Ctr., https://finesandfeesjusticecenter.org/about-fines-fees-justice-center [https://perma.cc/NR6N-FR2T].

with limited income and that often have racially disproportionate impacts.[193]

Supporting courts is one of many challenges for states and municipalities, as potential streams of income come from taxes and fees of various kinds. Variation in use of courts to produce income is dramatic. One study analyzed some six hundred cities and towns and learned that fees and fines funded an average of approximately ten percent of municipal services. That research identified a few jurisdictions in which fines and fees revenue was above fifty percent of municipal income and a few with revenue below two percent of a budget.[194]

Many commentators have addressed the problems with current funding models; concerns include the inadequacy of resources for all kinds of court needs including compensation for judges, compliance with federal constitutional obligations on the provision of lawyers for indigent criminal defendants, and support for self-represented individuals. One proposal is that states develop trust accounts for their courts to ensure resources.[195] As noted, others have sought abolition of court-access fees through moving to a taxpayer-funded system.[196] (As

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193 *See* The Clearinghouse, https://finesandfeesjusticecenter.org/clearinghouse [https://perma.cc/73BV-FBT4]; Ram Subramanian, Jackie Fielding, Lauren-Brooke Eisen, Hernandez Stroud & Taylor King, Brennan Ctr. for Just., Revenue Over Public Safety: How Preverse Financial Incentives Warp the Criminal Justice System 11–14 (2022), https://www.brennancenter.org/our-work/research-reports/revenue-over-public-safety [https://perma.cc/22SP-RR7M]; Chris Mai & Maria Rafael, Vera Inst. of Just., The High Price of Using Justice Fines and Fees to Fund Government in New York (2020), https://www.vera.org/downloads/publications/the-high-price-of-using-justice-fines-and-fees-new-york.pdf [https://perma.cc/EZZ2-MYU7]; Alicia Bannon, Mitali Nagrecha & Rebekah Diller, Brennan Ctr. for Just., Criminal Justice Debt: A Barrier to Reentry 4 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/SU67-3W4M]; Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. Rev. 401, 404 (2020). *See generally* Anna VanCleave, Brian Highsmith, Judith Resnik, Jeff Selbin & Lisa Foster, Money and Punishment, Circa 2020 (Arthur Liman Center for Public Interest Law, 2020) https://law.yale.edu/sites/default/files/area/center/liman/document/money_and_punishment_circa_2020.pdf [https://perma.cc/7KYH-YH7S]; Resnik & Marcus, *Inability to Pay*, *supra* note 14, at 363.

194 For example, in Morrison, Colorado, fines and fees constituted 45.3% of general revenues, and in Reeves, Louisiana, fines and fees constituted 84.4%, while in Boston, Massachusetts, fines and fees were under 2% of general revenues, and in Palm Beach, Florida, fines and fees were 1.4%. *See* Courtney Sanders & Michael Leachman, Ctr. on Budget & Pol'y Priorities, Step One to an Antiracist State Revenue Policy: Eliminate Criminal Justice Fees and Reform Fines 5 (2021), https://www.cbpp.org/sites/default/files/9-17-21sfp.pdf [https://perma.cc/T3PH-GZGX] (citing Mike Maciag, *Addicted to Fines*, Governing (Aug. 19, 2019), https://www.governing.com/archive/gov-addicted-to-fines.html [https://perma.cc/UK4E-DYXX?type=image]).

195 Graetz, *supra* note 178, at 101.

196 *See* Subramanian, Fielding, Eisen, Stroud & King, *supra* note 193, at 11–14, 34; Mai & Rafael, *supra* note 193, at 9; Bannon, Nagrecha & Diller, *supra* note 193, at 4–5.

discussed, the federal courts receive about ninety-five percent of their budget from Congress.[197])

One issue facing proponents of more funding is whether to frame shortfalls in constitutional terms—as breaches of guarantees of judicial independence, open courts, rights to remedies, due process, and equal protection, and whether to make those arguments to legislatures and through litigation. For example, in the late 2000s, New York state judges filed a lawsuit after being unable to persuade the state legislature to raise their pay; they argued that the failure for decades to do so undercut judicial independence.[198] Federal judges had also pressed legislators for pay raises and relied on Article III's protection that their salaries not be diminished in lawsuits seeking cost-of-living increases.[199] Debate has also been had about whether constitutional provisions for courts create judicially enforceable rights, as well as whether constitutions barred imposing certain economic burdens on litigants.

While a small line of decisions addresses some of these issues, using lawsuits to get financing for courts has not produced an extensive body of law requiring legislative action. Nor have courts buffered litigants from being asked to pay a variety of charges. In some jurisdictions, criminal defendants are mandated to defray the costs of their trials, even as methods of "pricing" services are riddled with failures of quantification and offer no accounting of the public benefits from court decisions.[200] A federal constitutional constraint on turning charges to individuals into time spent in detention developed in the 1970s and 1980s, when the U.S. Supreme Court addressed the legality of common practices in which states and localities "convert[ed]" fines into obligations to "work off" those sums—at $1.00 or $5.00 a day—on a prison "farm."[201] The

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197 ADMIN. OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2022 CONGRESSIONAL BUDGET REQUEST SUMMARY (2021).

198 *See* Maron v. Silver, 925 N.E.2d 899 (N.Y. 2010).

199 *See, e.g.*, Williams v. United States, 240 F.3d 1019, 1024 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002) (Breyer, J., joined by Scalia & Kennedy, JJ., dissenting from the denial of certiorari); Beer v. United States, 696 F.3d 1174, 1183–84 (Fed. Cir. 2012) (en banc). The 2012 decision concluded that failures to provide COLA increases were unconstitutional; a settlement followed thereafter.

200 A few decisions support the principle that courts may compel legislative funding for their operation. *See, e.g.*, Ralston v. State, 522 P.3d 95, 100 (Wash. Ct. App. 2022). On the other hand, in 1995, the Michigan Supreme Court held that the state had no obligation to fund state court trial operations in their entirety, and that counties had no private cause of action against the state for monetary judgment. Grand Traverse Cnty. v. State, 538 N.W.2d 1, 4, 8 (Mich. 1995). Courts have also held that litigants have no actionable claims for underfunding. *Ralston*, 522 P.3d at 98. Michigan also upheld the requirement that defendants pay a percentage of estimated costs of their felony trials. People v. Cameron, 929 N.W.2d 785 (Mich. 2019).

201 Tate v. Short, 401 U.S. 395, 396–99 (1971); Williams v. Illinois, 399 U.S. 235, 236 (1970).

Court concluded that when liberty is at stake, judges must inquire into a person's "ability to pay."[202]

Whether lawsuits have been filed or not, state judiciaries have to ask for money from their coordinate branches. As David Barron explained, "rather than sticking to the numbers," some state courts made the pitch for funds by arguing that, because judiciaries were specially situated with a constitutional mandate to be independent, sufficient levels of funding were required.[203] Yet, as Barron pointed out, determining what levels of access or service were obligatory was difficult.[204] For example, rights to public education have produced parallel debates about the constitutional adequacy of provisioning. Moreover, Barron underscored that state judiciaries were embedded in a web of relationships with executive and legislative branch actors. They needed to convince, not antagonize, legislators.[205] To the extent judges sought "fiscal independence," including through litigation, Barron worried they put themselves at risk of backlash from legislatures who might try to enact legislation to curb judges' "decisional independence."[206]

To date, the literature on state court financing has not focused on the potential for obtaining significant infrastructure revenue from the federal government. One basis for federal financing comes from the many statutes enlisting state courts in the enforcement of federal law. A 2022 NCSC analysis counted some three hundred instances when Congress imposed such obligations related to a wide array of topics, including conservation, banking, financing, child welfare, crime, and national defense,[207] but did not provide resources to do so.

As of 2024, only a sliver of support for state court programs exists. In 1984, after six years of lobbying spearheaded by the Conference of Chief Justices of the State Courts, Congress chartered the State Justice Institute (SJI), a private nonprofit corporation run by an unpaid Board of Directors selected by the President through nominations from the

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202 *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 674 (1983). While some lower courts thereafter applied that reasoning to bail and driver license suspensions, some federal appellate courts refused to apply the *Bearden* analysis to other than when physical liberty was at stake. *See, e.g.*, Fowler v. Benson, 924 F.3d 247, 260–61 (6th Cir. 2019).

203 David J. Barron, *Judicial Independence and the State Court Funding Crisis*, 100 Ky. L.J. 755, 758 (2012).

204 *Id.* at 760.

205 *See id.* at 761–64.

206 *Id.* at 782–83.

207 Nat'l Ctr. for State Cts. & State Just. Inst., The Role of State Courts in our Federal System: An Analysis of How State Courts are Charged with Implementing Federal Law 13–15 (2022) [hereinafter NCSC, The Role of State Courts]; *see also* Haaland v. Brackeen, 599 U.S. 255, 286–87 (2023); Abbe R. Gluck, *Our [National] Federalism*, 123 Yale L.J. 1996, 1998–2000 (2014) [hereinafter Gluck, *Our [National] Federalism*].

state chief justices. Its charge was to improve "judicial administration in State courts."[208]

Aiming for "a national program of assistance designed to assure each person ready access to a fair and effective system of justice," SJI gives grants and encourages "coordination and cooperation with the Federal judiciary in areas of mutual concern."[209] Its projects have included "futures planning" (when the twenty-first century approached), studies of domestic violence, drug courts, services for translation and for self-represented litigants, and more.[210]

Congressional funding has not matched the ambitions of providing training, research, technical assistance, and networking. When first founded, SJI received $8 million in funding ($24.1 million in 2024 dollars).[211] In all, SJI's funding has ranged from a low of $2.25 million in 2004 ($3.6 million in 2024 dollars) to $13.55 million from 1992 to 1995 ($24.65 million in 2024 dollars). Current funding hovers around $7 million. In total, over almost four decades, SJI has received about $257 million, of which it gave away more than $190 million.[212] (In 2022, the U.S. Supreme Court's budget was $112 million; for 2024, the Court requested $150 million.[213])

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208 State Justice Institute Act of 1984, Pub. L. No. 98-620, §§ 203–04, 98 Stat. 3336, 3336–38 (codified as amended at 42 U.S.C. §§ 10702–0703).

209 42 U.S.C. § 10702 (a)–(b); *see also* STATE JUST. INST., CELEBRATING 30 YEARS OF IMPROVING THE ADMINISTRATION OF JUSTICE IN OUR STATE COURTS: 1984–2014, at 5, 7–44 (2014), https://www.sji.gov/wp-content/uploads/SJI-30th-Anniversary-Report-1.pdf [https://perma.cc/WG27-PRDD] [hereinafter STATE JUST. INST., CELEBRATING 30 YEARS].

210 *See* STATE JUST. INST., CELEBRATING 30 YEARS, *supra* note 209, at 7–37.

211 NCSC, THE ROLE OF STATE COURTS, *supra* note 207, at 6.

212 In its first decade, SJI awarded over $100 million in grants. STATE JUST. INST., 10 YEARS: IMPROVING THE QUALITY OF AMERICAN JUSTICE 1987–1997, at 1, 7–8 (1997). In the eighteen-year period from 2002–2019, SJI awarded approximately $62 million in grants. *See* STATE JUST. INST., GRANTS, REQUESTS AND REWARDS FY 2005–2019, https://www.sji.gov/wp-content/uploads/SJI-Grant-Awards-FY-05-19_with-Award-Numbers.pdf [https://perma.cc/52RJ-EJMW]; GUIDESTAR, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (FORM 990), STATE JUSTICE INSTITUTE 2 (2002), https://pdf.guidestar.org/PDF_Images/2002/621/301/2002-621301780-1-9.pdf [https://perma.cc/6FPF-BND6]; GUIDESTAR, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (FORM 990), STATE JUSTICE INSTITUTE 2 (2003), https://pdf.guidestar.org/PDF_Images/2003/621/301/2003-621301780-1-9.pdf [https://perma.cc/3ZGR-BEJA]. Since 2020, SJI's annual budget requests have included between $5,759,000 and $7,174,000 for grant awards. *See, e.g.*, STATE JUST. INST., FISCAL YEAR 2021 BUDGET REQUEST 26 (2020), https://www.sji.gov/wp-content/uploads/FY-2021-SJI-Budget-Request-2.pdf [https://perma.cc/T95W-GDMQ]; STATE JUST. INST., FISCAL YEAR 2022 BUDGET REQUEST 27 (2021), https://www.sji.gov/wp-content/uploads/FY-2022-SJI-Budget-Request-3.pdf [https://perma.cc/X675-93TU]; STATE JUST. INST., FISCAL YEAR 2024 BUDGET REQUEST 28 (2023), https://www.sji.gov/wp-content/uploads/FY-2024-SJI-Budget-Request.pdf [https://perma.cc/CKD6-PDK6].

213 *See* Consolidated Appropriations Act, Pub. L. No. 117-103, 136 Stat. 49, 258 (2022); U.S. CTS., SUPREME COURT OF THE UNITED STATES: SUMMARY STATEMENT RELATING APPROPRIATION ESTIMATES TO THE CURRENT APPROPRIATION 1 (2023), https://www.uscourts.gov/sites/default/

VI
Materializing (and Not) Constitutional Commitments to Courts: "Judicial Hellholes," Doors Closing, Doors Opening

What does this brief survey of federal and state constitutions and of court infrastructure teach? A first lesson is that the many words on constitutional pages have *materialized*. During more than two centuries, federal and state governments developed a sprawling set of services in an impressive array of institutions called "courts." Regulated by layers of statutes and rules, courts are in the budgets of federal and state governments. (I have not detailed the extensive other adjudication regimes that are provided by state and federal agencies and by Indian Tribal Courts.)

Second, as forecast in the text of the U.S. Constitution's Article III, federal law has woven state courts into its fabric. An assumption of access to courts pervades both the Constitution and the Bill of Rights. Moreover, as has been documented through a series of articles by Abbe Gluck, in the compilation by NCSC, and by others, federal law's *dependence* on state enforcement can be found in hundreds of federal statutes detailing roles for states and their courts.[214]

In addition to building state courts in, federal and state law are interdependent, as reflected in the doctrinal complexities that shape the variegated interactions between the court systems. Within the legal academy, students learn about doctrines involving removal and remand between the two court systems, as well as through statutes and case law elaborating federal review of state convictions through habeas corpus, practices of abstention and comity, and the scope of Supreme Court oversight through the muddy parameters of the ideas of independent and adequate state grounds. (This embeddedness prompted me some years ago to rename the "Federal Courts" class I offer; it is now "Federal and State Courts in the Federal System." And, but for the limits on the school's registration forms, I would have included Indian Tribal Courts,

files/Section%2001a%20Supreme%20Court%20Salaries%20and%20Expenses.pdf [https://perma.cc/ZYF2-JU73].

214 *See, e.g.*, Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 Fordham L. Rev. 1749 (2013); Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): Complementary Account (and Some Challenges) to the Nationalist School*, 59 St. Louis U. L.J. (2015); Gluck, *Our [National] Federalism*, *supra* note 207; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 Yale L.J. 534 (2011); NCSC, The Role of State Courts, *supra* note 207.

as I teach about the insights into federalism and sovereingty to be gleaned from all three court systems.)

Third, the comparative wealth of federal courts could be a benchmark for states; federal judges do not report excess resources even as they are less strapped than state and administrative judges. Given that the U.S. Constitution always contemplated state courts as vital to the country, Congress should be more forthcoming. The Judicial Conference has a state/federal committee that could be directed to build on the Conference's impressive successes with the legislature. This and other joint bodies of state and federal jurists could request that Congress direct streams of federal taxpayer dollars toward support of state courts.

Indeed, one puzzle is why federal funding for state courts is not already robust. In the mid-twentieth century, Herbert Wechsler expounded on the "political safeguards of federalism," as he posited that representatives *from* states would protect the interests *of* states.[215] Although his cheerful account has since been contested on various grounds,[216] members of Congress have regularly succeeded in obtaining funds for a variety of services, including locating federal courts—and other buildings—in their areas as one way to bring resources to their communities. Given the centrality of courts to government, those legislators ought to join in a bipartisan effort to have federal funding for state court buildings and their programs.

Yet, and fourth, one explanation for the lack of such an initiative comes from conflicts about the services that courts—and the governments that empower them—should provide. Courts (as well as administrative agencies) are battlegrounds in conflicts about regulation and deregulation, public accountability, and privatization. Not all (including some jurists) welcome enhancing the capacity of courts to enable robust opportunities to contest rights, to equip individuals of limited resources with the ability to marshal law on their own behalf, and to provide the public with ready access to claims filed and remedies given or rejected.

A vivid example of the construction of barriers to courts comes from the expansion in the last forty years by the U.S. Supreme Court of the import of the 1925 Federal Arbitration Act (FAA), which has been reread to preempt federal and state laws creating rights to

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215 *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–57 (1954).

216 *See, e.g.*, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001).

court-based and group-based remedies.[217] Another example is the U.S. Supreme Court's interpretation of Article III's "case or controversy."[218] Together, these and other statutory and doctrinal developments have blocked many consumers, employees, prisoners, civil rights claimants, tort plaintiffs, and others from using courts.

Here, I use the FAA as illustrative. Before the 1980s, the Court had not read the FAA to permit providers of goods and services to push consumers out of court. In a famous 1953 decision involving a broker who had sought to enforce a clause mandating arbitration against a customer claiming a violation of federal securities statutes, the Court explained its concerns with unequal bargaining power and with unregulated and potentially unfair processes.[219] In more recent decades, however, a majority have not only permitted manufacturers and employers to yoke their customers and employees to arbitration, but also to preclude the use of class or other forms of collective actions. In 2011, the Court held that state courts must enforce arbitration clauses that ban class actions in courts or arbitration.[220] In 2018, the Court expanded on its FAA law related to employment; at issue was the relationship between labor statutes which author joint and concerted action and the FAA. The Court held that employees could be required, as a condition of continued employment, to waive all rights to collective action (whether in courts or arbitration) and to proceed, if at all, in private and single-file in the venue chosen by their opposing employer.[221] Thus, the Court has enforced clauses in employee and consumer documents drafted

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217 *See* Federal Arbitration Act, Pub. L. No. 80-282, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1–16), as amended in 2022 by the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. § 402); Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 Lewis & Clark L. Rev. 611, 618 (2020) [hereinafter Resnik, Garlock & Wang, *Collective Preclusion*]; Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 682–84 (2018).

218 *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021). *See generally* Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. Pa. L. Rev. 1495 (2017); Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 Mich. L. Rev. 1 (2023); Helen Hershkoff & Judith Resnik, *Contractualisation of Civil Litigation in the United States: Procedure, Contract, Public Authority, Autonomy, Aggregate Litigation, and Power*, *in* Contractualisation of Civil Litigation 419 (Anna Nylund & Antonio Cabral eds., 2023). In terms of declining state court filings, see generally Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 Emory L.J. 1445 (2015).

219 *See* Wilko v. Swan, 346 U.S. 427, 435–37 (1953).

220 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011); *see also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).

221 Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018).

by employers and manufacturers to prevent collective redress and preclude the use of courts.

When explaining its new readings, the Court praised arbitration as a speedy and effective alternative to courts.[222] Yet the mass production of *arbitration clauses* has not resulted in a massive number of *arbitrations*. Instead, the number of documented consumer arbitrations is a tiny fraction of the universe of potential claimants. I have described as one example a collection of data on arbitrations involving wireless services—the context in which, in 2011, the Supreme Court enforced the ban on class arbitrations imposed by AT&T Mobility.[223]

According to information from the American Arbitration Association, which has been designated by AT&T to administer its arbitrations and which complies with state-reporting mandates, 134 individual claims (about twenty-seven per year) were filed against AT&T between 2009 and 2014.[224] During that period, the estimated number of AT&T wireless customers rose from 85 million to 120 million people, and lawsuits filed by the federal government charged the company (and other major providers) with a range of legal breaches, including systematic overcharging for extra services and insufficient payments of refunds when customers complained.[225]

More recent analyses provide similar findings of *expanding mandates* to arbitrate and *little use* of arbitration. In addition, many companies have non-disclosure requirements instructing individuals who *do* pursue claims *not* to speak about what happened. Whether such obligations are enforceable in general involves the intersection of federal and state law. In the wake of the #MeToo movement, Congress amended the FAA for the first time since 1925 and made unenforceable both predispute arbitration obligations and non-disclosure clauses in sexual harassment and assault cases. That 2022 amendment states that "no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case . . . filed under Federal, Tribal or state law and relate[d]

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222 *See Concepcion*, 563 U.S. at 345–46.

223 *See id.* at 351–52.

224 Details of the data collection and analysis can be found in Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2894 (2015). Updated analysis is available in Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 648–51 (2018) [hereinafter Resnik, *A2J/A2K*]; and Resnik, Garlock & Wang, *Collective Preclusion*, *supra* note 217, at 675.

225 Resnik, *A2J/A2K*, *supra* note 224, at 650, 655.

to the sexual assault dispute or the sexual harassment dispute."[226] It also precluded enforcement of non-disclosure agreements.[227]

Some state legislatures have likewise insisted on limitations on non-disclosure mandates in cases involving sexual misconduct[228] and found confidentiality terms objectionable in other instances. For example, in 2008, the Washington Supreme Court ruled that some arbitration confidentiality terms were substantively unconscionable and invoked the state's open-courts provision as evidence of the public policy against closing off access to information.[229] More generally, a robust line of cases supports public access to watch litigation, and some courts have applied that precept to new sites of adjudication.[230] Furthermore, in the last few years, the Court has been somewhat more restrained in interpreting the reach of the FAA's mandates.[231]

In addition, other facets of state law could impose constraints. Before the U.S. Supreme Court insisted on the expansive preemptive force of the FAA, a few state courts read their constitutional and statutory commitments to "open courts" and "rights to remedies," along with contract doctrine, to limit obligations to arbitrate.[232] The AT&T litigation in California is one example; that state's statutes and case law

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226 Federal Arbitration Act, Pub. L. No. 80-282, 61 Stat. 699 (1947) (codified as amended at 9 U.S.C. §§ 1–16), as amended by the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, § 2(a), 136 Stat. 27 (2022). The "Speak Out Act" sought to limit "pervasive" sexual harassment and assault in the workplace. Speak Out Act, Pub. L. No. 117-224, 136 Stat. 2290 (2022) (codified as amended at 42 U.S.C. §§ 19401–04). The statute provides that the Act should be known as the "Speak Out Act." *Id.* § 1.

227 "With respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law." Speak Out Act § 4(a), 136 Stat. at 2291 (codified as amended at 42 U.S.C. § 19403(a)).

228 *See* Rachel L. Wagner, *Women's Autonomy in Nondisclosure Agreements for Sexual Misconduct Cases*, 82 Mont. L. Rev. 409, 409–11 (2021).

229 McKee v. AT&T Corp., 191 P.3d 845, 857–59 (Wash. 2008) (en banc); *see also* Resnik, Garlock & Wang, *Collective Preclusion*, *supra* note 217, at 638–42.

230 *See* N.Y.C. L. Union v. N.Y. City Transit Auth., 684 F.3d 286 (2d Cir. 2012); Del. Coal. for Open Gov't v. Strine, 733 F.3d 510 (3d Cir. 2013); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cnty., 478 U.S. 1 (1986); Presley v. Georgia, 558 U.S. 209, 210 (2010) (per curiam). *See generally* Resnik, *Contingency of Openness*, *supra* note 111.

231 In 2019, in *New Prime Inc. v. Oliveira*, the Court held that independent contractors engaged in foreign or interstate commerce could go to court pursuant to the FAA's exemption for contracts involving employees engaged in foreign or interstate commerce. New Prime Inc. v. Oliveira, 586 U.S. 105, 110–12 (2019); *see also* Sw. Airlines Co. v. Saxon, 596 U.S. 450, 453 (2022); Morgan v. Sundance, Inc., 596 U.S. 411, 413–14 (2022); Myriam Gilles, *Arbitration's Unraveling*, 172 U. Pa. L. Rev. 1063 (2024).

232 *See* State v. Neb. Ass'n of Pub. Emps., Local 61, 477 N.W.2d 577, 580–82 (Neb. 1991); Phoenix Ins. Co. v. Zlotky, 92 N.W. 736, 737 (Neb. 1902); German-Am. Ins. Co. v. Etherton, 41 N.W. 406, 406 (Neb. 1889).

aimed to prevent a better-resourced potential defendant from cutting off claimants.[233]

Such concerns about a shift away from courts to arbitration are longstanding. As the Nebraska Supreme Court explained in 1902, to enforce contracts to arbitrate would "open a leak in the dike of constitutional guaranties which might some day carry all away."[234] Many decades later, in 1987, Nebraska's legislature enacted a version of the Uniform Arbitration Act whose words tracked parts of the FAA,[235] albeit with more constraints (such as that contracts be "entered into voluntarily and willingly") and more exemptions (such as for cases arising under the state's Fair Employment Practice Act).[236] In 1991, the Nebraska Supreme Court held that the Act violated the state constitution's open court/rights-to-remedy clause.[237] In response, various businesses, the state's Chamber of Commerce, and others proposed amending the state constitution. Although opposed by a coalition including trial lawyers,[238] they succeeded, and Nebraska's Constitution changed in 1996. The text continues to include that courts be open and "every person . . . shall have a remedy"; an addendum authorizes the legislature to "provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract."[239]

This outsourcing to arbitration is one form of privatization of process; another is reformatting procedures in courts. Forms of closure have become pervasive within federal litigation. Elsewhere, I have mapped various forms of privatization, including managerial conferences held in chambers and alternative dispute resolution

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233 *Discover Bank* became the shorthand for the California approach. *See* Discover Bank v. Superior Ct., 113 P.3d 1100 (Cal. 2005). *See generally* Resnik, *Fairness in Numbers*, *supra* note 11, at 124–28.

234 *Phoenix Ins. Co.*, 92 N.W. at 737.

235 *Compare* L.B. 71, 90th Leg., 1st Sess., 1987 Neb. Laws 259 (codified at NEB. REV. STAT. § 25-2602 (1991)), *with* the Federal Arbitration Act, 9 U.S.C. §§ 1–14.

236 NEB. REV. STAT. § 25-2602 (repealed 1997). Other states have also imposed limits. *See, e.g.*, MONT. CODE ANN. § 27-5-114(2), *invalidated by* Nw. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 321 B.R. 120 (Bankr. D. Del. 2005).

237 State v. Neb. Ass'n of Pub. Emps., Loc. 61, 477 N.W.2d 577, 581–82 (Neb. 1991) (citing NEB. CONST. art. I, § 13).

238 *See, e.g.*, Editorial, *1996 Field of Amendments Contains Two Worthy of a Yes*, OMAHA WORLD HERALD (Neb.), May 7, 1996, at 10; Leslie Boellstorff, *Amendments May Be "Innocent Bystanders*," OMAHA WORLD HERALD, May 12, 1996, at 4B.

239 NEB. CONST. art. I, § 13 (amended 1996). *See generally* John M. Gradwohl, *Arbitrability Under Nebraska Contracts: Relatively Clarified at Last*, 31 CREIGHTON L. REV. 207 (1997).

processes that do not provide for public access.[240] Furthermore, researchers have analyzed thousands of federal lawsuits and found that judges frequently permitted stipulated protective orders that sealed the information produced in many kinds of cases as well as stipulated secrecy for settlements.[241]

In addition to efforts to limit using courts, to suppress claims through bans on aggregate proceedings, and to restrict public access to interactions that do occur in court, conflicts about the role of courts have produced spurts of funding into state judicial elections. Some targets have been individual judges seen as supportive of remedies for litigants. California elections in the 1980s became a famous example. Chief Justice Rose Bird and a few of her colleagues lost their retention elections not only because of their questioning the lawfulness of the death penalty, but also because of their commitment to remedies for tort victims.[242] As the Brennan Center has documented, since then, such investments in the elections of state court judges have soared.[243]

Moreover, the American Tort Reform Foundation, founded in 1997 with its "primary purpose" being to educate "the general public about how the civil justice system operates," publishes a yearly monograph it entitles *Judicial Hellholes*, meaning plaintiffs prevailed.[244] The report "shines its brightest spotlight" on a few jurisdictions each year that, as described in the 2023 and 2024 reports, permitted "litigation tourism" producing verdicts on behalf of plaintiffs in various kinds of cases.[245]

These efforts are generally *not* indigenous expressions of local conditions in individual states but are part of a nationwide battle. As I write, the nomenclature of "red" and "blue" states has become

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240 *See* Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. Pa. L. Rev. 1793, 1802–03 (2014); Resnik, *Contingency of Openness*, *supra* note 111, at 1634.

241 *See* Engstrom, Engstrom, Gelbach, Peters & Schaffer-Neitz, *Secrecy by Stipulation*, *supra* note 86; Engstrom, Engstrom, Gelbach, Peters & Wen, *Shedding Light on Secret Settlements*, *supra* note 86.

242 *See* Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 Cap. U. L. Rev. 523, 523–25 (2002); Douglas Keith, *The Politics of Judicial Elections 2021–2022*, Brennan Ctr. for Just. (Jan. 29, 2024), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022 [https://perma.cc/JT4H-UJD4].

243 During the 2021–2022 election cycle, "candidates, interest groups, and political parties spent $100.8 million on state supreme court elections." For Kentucky, Montana, North Carolina, and Ohio, 2021–2022 was the most expensive in their history. Keith, *supra* note 242.

244 Am. Tort Reform Found., Judicial Hellholes 2022/23, at i (2022), https://www.judicialhellholes.org/reports/2022-2023/2022-2023-executive-summary [https://perma.cc/47GJ-TBEW]; Am. Tort Reform Found., Judicial Hellholes 2023/24, at i (2023), https://www.judicialhellholes.org/wp-content/uploads/2023/12/ATRA_JH23_FINAL-1.pdf [https://perma.cc/8DFA-JGNJ].

245 Am. Tort Reform Found., Judicial Hellholes 2022/23, *supra* note 244, at 1; Am. Tort Reform Found., Judicial Hellholes 2023/24, *supra* note 244, at 1.

commonplace. Those two bands of color are reminders that states are at risk of losing their individualized identities—swamped by trans-local actors rallying for a politics that, at times, blurs state lines in pursuit of forms of national dictates (such as on guns) and at other times insists on state autonomy (such as on reproduction and immigration). These organized campaigns are far from the first in the country's history, and agendas have varied over time and place. As Barry Friedman described, in the early part of the twentieth century, a litigation campaign aimed to limit regulation of railroad rates,[246] and *Brown v. Board of Education* was famously part of a national civil rights movement. As illustrated by the Brennan Center's research, *Judicial Hellholes*, and my discussion of state court filings, during the twenty-first century, well-funded organizations have poured funds into altering outcomes in state judicial elections, demonizing litigation, imposing prescreening panels before permitting malpractice lawsuits, and capping tort damages.

Fifth, in addition to efforts to collapse distinctions among states, the narratives of federalism need to be revisited to thicken the account of states by taking into account collaboration of state actors across jurisdictions. Unlike federalism theorists who posit states as *solo* actors expressing policy preferences that produce opportunities for individuals and businesses to exit jurisdictions that are a mismatch for their goals, I have argued that states often function collectively.[247] State actors not only use formal compacts but also negotiate sub-compact agreements and coordinate through private organizations such as the NCSC, the Uniform Law Commission, and the U.S. Conference of Mayors. I termed those entities "TOGAs"—trans-local organizations of government actors; while not themselves public, TOGAs gain political capital from their members being government officials. Hence, unlike what political scientists call "SIGs" (special interest groups) and "PIGs" (private interest groups), these organizations include government structures within this federation. Often, these subject-matter or role-based entities have sought to enhance the functioning of their own kinds of work—such as running state prisons, state courts, and state environmental and tax agencies.

Some of these entities were formed in the early part of the twentieth century to ward off federal regulation and have since evolved into coordinated efforts to obtain federal funds, disseminate

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246 *See* Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* Federal Courts Stories 247, 253–59 (Vicki C. Jackson & Judith Resnik eds., 2010).

247 *See, e.g.*, Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 Ariz. L. Rev. 709, 711 (2008).

information, and shape national policies. They have developed into networks that crisscross states and which generate diagonal, as well as horizontal and vertical, relationships. They are not univocal over time; policy preferences shift and, at times, the variety of TOGAs do not all agree about which federal laws to support and which to oppose. While all invoking the term "federalism," they disagree about whether federal laws are what I term "state-regarding." By mapping their splits, I have underscored different views of what "state interests" are. As I have documented, in many cases in which the Court uses federalism as a justification, states qua states through their attorneys general and a variety of TOGAs are on both sides—each arguing that their position advances aims of federalism(s).[248]

Above, I sketched efforts to curb courts and regulation more generally. Other trans-local networks aim to obtain more remedies from courts and, likewise, at times succeed. And again, courts are seen as potential resources from an array of vantage points. In recent years, national efforts to alter federal and state law through courts have aimed (often successfully) to limit affirmative action, rights to reproductive freedom, and yet expand access to guns.[249]

Sixth and finally, while I have identified the need to reframe legal education to bring state courts and their litigants into focus and to alter congressional budget practices so as to obtain federal resources for state-court processes, I am not making an argument for an essentialist approach to the categories of "state" and "federal."[250] Schooled in critical theory's leeriness of a claimed essence based on gender and race, I offer the reminder that neither state nor federal courts (and the governments that authorize them) have an "essence" that transcends social structure, politics, and time. As I have discussed, courts excluded individuals and their claims of right that many jurists have now come to embrace. Federal courts were once the haven of corporate elites, and many argue that, after an era of efforts to enhance egalitarian opportunities, the federal judiciary is returning to a stance protective of business. Some

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[248] *See* Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, 55 NOMOS 363, 375–80 (2014). *See generally* Judith Resnik, *Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail*, 57 NOMOS 79 (2017).

[249] *See, e.g.*, Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. 449 (2022); Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795 (2023); *see also* Reva B. Siegel, Commentary, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth Century Criminalization*, 60 HOUS. L. REV. 901, 920–29 (2023).

[250] *See, e.g.*, Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 619–25 (2001); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

states, in contrast, have moved to the forefront of protection of rights of a variety of kinds.

Political commitments are required to enlist courts, state and federal, in efforts to generate equal treatment of litigants under legal regimes enabling the respect and dignity of individuals and in search of justice. Today's questions are whether those aspirations do and will exist, in and out of courts, and hence what meaning will be made of founding propositions that "all persons" have rights to remedies in open courts. Those questions return me to where I began—with "our common intellectual heritage." In this time in which hostility to legal processes has been embraced by some segments of the polity, state and federal judiciaries need to understand their shared and interdependent obligations in the contemporary struggle to sustain the identity of courts as institutions aiming to make good on promises of public and equal justice under law.