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Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture

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CONSTITUTIONAL ENTITLEMENTS TO AND IN COURTS: REMEDIAL RIGHTS IN AN AGE OF EGALITARIANISM: THE CHILDRESS LECTURE

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* Arthur Liman Professor of Law, Yale Law School. August 2012. This Lecture builds on the book, co-authored with Dennis Curtis and entitled REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011), as well as on a related essay, *Fairness in Numbers: A Comment* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011). The many contributions of Dean Richard J. Childress (*see, e.g.*, Malcolm J. Harkins, III, *Why "The Childress Lecture"?*, 53 ST. LOUIS U. L.J. 961 (2009)) make giving the Childress Lecture a special honor, as is being joined by the panelists at the Symposium, many of whom have essays in this volume and all of whom share commitments to enabling courts to flourish.

My understanding of the function and obligations of courts has been deepened by working with my colleagues Hope Metcalf and Sia Sanneh and our students in Yale Law School's Liman Workshop, and by a remarkable group of engaged assistants—Laura Beavers, Edwina Clarke, Elizabeth David, Samir Deger-Sen, Marissa Doran, Ruth-Anne French-Hodson, Jason Glick, Gloria Gong, Matt Letten, Meghan McCormack, Ester Murdukhayeva, Jane Rosen, Brandon Trice, and Charles Tyler. Longstanding thanks continue to flow to former students Adam Grogg, Elliot Morrison, and Allison Tait. Thanks are also due to Joel Goldstein, who shaped the Symposium, to the students at the *Saint Louis University Law Journal*, and to Denny Curtis, whose insights are repeatedly invoked in discussion of our book.

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I. TAKING COURTS FOR GRANTED: UNPACKING THE "GIVEN"

Figure 1: *LADY OF JUSTICE*, WILLIAM EICHOLTZ, 2002, VICTORIA COUNTY COURT, MELBOURNE, AUSTRALIA.

Photographer: Ken Irwin. Photograph reproduced with the permission of the sculptor and the Liberty Group, owner and manager of the Victoria County Court Facility.

This six-meter aluminum female form hangs on a building, opened in 2002, on a busy street corner in Melbourne, Australia.[1] Why did the designers assume that passers-by would understand the figure as "Justice" and the building as a court of law, rather than see the sculpture as a warrior princess, an opera singer, or find it incomprehensible?

That question reflects one theme in *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*,[2] in which Dennis Curtis and I explored the relationship, over centuries, between courts and democracy. The legibility of this oddly-garbed hulking female figure, with scales, sword, and a blindfold, is a tribute to the political energies of diverse governments that have valorized this shared referent. "Justice" serves as a sign of courts, which provides a service so taken for granted that the novelty of its contemporary import and its social welfarist implications are easily lost.

Representations of the female Virtue Justice date back to the European Renaissance, when such figures were among many Virtues displayed in public buildings. Yet, unlike imagery of her siblings, the Cardinal Virtues Prudence, Temperance, and Fortitude, Justice is a remnant that remains accessible to a diverse audience. We—onlookers—know her because governments of all stripes have deployed her to bolster their legitimacy as they imposed the violence of law—mandating property reallocation and limiting liberty in the name of the state. Imperial conquests and colonialism, democratic governments, professional organizations, commercial entrepreneurs, and media have interacted in the production of political, visual, literary, and social practices that have formed a trans-temporal and transnational set of conventions for courts. While not ubiquitous, Justice has had a remarkable run as political propaganda.

Yet, during the last three centuries, the courts that Justice has come to mark have developed obligations radically disjunctive with the Renaissance traditions from which the icon of Justice emerged. Social movements succeeded in many countries in transforming adjudication into a democratic practice to which all persons—regardless of gender, race, class, and nationality—have access to open

1. Figure 1 is a photograph by Ken Irwin of *Lady of Justice*, created by William Eicholtz in 2002 and set above the front entrance of the Victoria County Court, a building designed by Daryl Jackson of SKM Lyons Architects, and which serves as an intermediate trial court with both civil and criminal jurisdiction. *See* COUNTY COURT VICTORIA, http://www.countycourt.vic.gov.au (last visited May 7, 2012). Thanks to Chief Judge Michael Rozenes of the County Court of Victoria for assistance in obtaining permission to reproduce the image, to the Challenger Financial Services Group and the Liberty Group, and to the sculptor, William Eicholtz, for permitting reproduction of this figure. This image, as well as the others (aside from Figure 10) that are printed in conjunction with this Lecture, are reproduced in relationship to the book REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011) that Dennis Curtis and I co-authored and that formed the basis for aspects of my lecture.

2. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

and public courts in which independent and impartial judges are required to treat disputants with dignity and respect. Egalitarian social movements not only produced new rights *to* courts but also generated new rights *in* courts to reflect new understandings of *whose* courts those institutions were. When rights to adjudication expanded, demand curves soared. Purpose-built structures—courthouses—became a signature marker not only of the work of adjudication but of government more generally.

This Lecture addresses—and expands on—one facet of an argument set forth in *Representing Justice*. Here, my focus is on courts in the United States as a constitutionally-obliged substantive entitlement, a positive and regulated service that the government subsidizes. During the twentieth century, this entitlement became, at a formal level, universal in its availability, as are public education and government benefits such as social security. Further, in the wake of large numbers of indigent litigants (drawn into courts either as criminal defendants or seeking to enter as plaintiffs), governments have come to offer additional, targeted court-related services, such as fee waivers and subsidized lawyers, for certain subsets of disputants.

This government service is deeply embedded in constitutional texts and doctrines, explicitly recognizing obligations to provide courts. Given that this Symposium is hosted by the *Saint Louis University Law Journal*, I use the 1820 Missouri Constitution as a first example.

> 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.[3]

Before I turn to the import of such provisions, a sketch of the components of the larger argument set forth in *Representing Justice* is in order. First, adjudication is proto-democratic in that courts were an early site of constraint on government. Government provision of dispute resolution can be traced from Mesopotamia, Egypt, Palestine, Greece, and Rome[4] to the formation of Medieval European city-states.[5] The content of what was entailed varied dramatically, but the concept of adjudicatory power—that rulers had the power to identify certain behavior as wrongful and to impose sanctions, and that some

3. MO. CONST. of 1820, art. XIII, para. 7. *See infra* notes 284–87 and accompanying text for amendments and current interpretations.

4. *See* Kathryn E. Slanski, *The Law of Hammurabi and Its Audience*, 24 YALE J.L. & HUMAN. 97 (2012); J.G. Manning, *The Representation of Justice in Ancient Egypt*, 24 YALE J.L. & HUMAN. 111 (2012); Adriaan Lanni, *Publicity and the Courts of Classical Athens*, 24 YALE J.L. & HUMAN. 119 (2012).

5. *See* Judith Resnik & Dennis Curtis, *Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUMAN. 19 (2012).

sectors of a population had enforceable rights to property and relationships—spans millennia.

Furthermore, even in eras when judges were obliged to be loyal servants of monarchies and of republican states, judges were bound by rules dictating their treatment of disputants. Instructions such as "hear the other side" date from the fifth century C.E.[6] By publicly resolving disputes and punishing violators, rulers acknowledged through rituals of adjudication that something other than pure power legitimated their authority. Because performance required an audience, adjudication was an avenue for authority to shift away from rulers. Spectators became active observers, able to see and, eventually, to assess and to stand in judgment of a state's provision of dispute resolution services and the laws that were applied.

Second, democracy changed adjudication. Aspects of modern adjudication—obligatory public access, judicial independence, critical appraisals of procedural fairness even if rules comported with ancient customs and usage, and equal access of all persons—are the result of political and social movements of the past three centuries that render today's courts novel. During the Renaissance, the public was invited to watch spectacles of judgment and of punishment. While witnessing power, the public was not presumed to possess the authority to contradict it. Yet unruly crowds were a possibility, serving as one prompt for what Michel Foucault famously charted—the privatization of punishment.[7]

In contrast to the shifting of state punishment into prisons closed to the public, court-based proceedings became obligatorily public. Illustrative is the 1676 Charter of the English Colony of West New Jersey, which provided that "in all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend . . . ."[8] The practice of "publicity," to borrow Jeremy Bentham's term, enabled what Bentham imaginatively called the "Public-Opinion Tribunal"[9] to assess government

6. According to John Kelly, although the concept is credited to St. Augustine, it predated him; a fourth-century manuscript by a Sardinian bishop, Lucifer of Cagliari, argued that God had interrogated Adam and Eve because they could not be "condemned by us unheard." John M. Kelly, *Audi Alteram Partem*, 9 NAT. L.F. 103, 109 & n.36 (1964).

7. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 73–74 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

8. Concessions and Agreements of West New Jersey, ch. XXIII (1677), *reprinted in* SOURCES OF OUR LIBERTIES 184, 188 (Richard L. Perry ed., 1959) [hereinafter Concessions and Agreements of West New Jersey].

9. *See* 9 JEREMY BENTHAM, *Constitutional Code*, *in* THE WORKS OF JEREMY BENTHAM 41 (John Bowring ed., Edinburgh, William Tait 1843). *See generally* FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE *CONSTITUTIONAL CODE* (1983).

actors. As Bentham explained, while presiding at trial, a judge was also on trial.[10]

By the eighteenth century, the new states in North America took this idea to heart. The words "[a]ll courts shall be open,"[11] often coupled (as Missouri's Constitution illustrates) with clauses promising remedies for harms to person's property and person, were reiterated in many state constitutions. From the baseline of the Renaissance, the public's new authority to use courts and to judge judges (and, inferentially, the government) worked a radical transformation. "Rites" turned into "rights," as requirements proliferated to provide "open" and "public" hearings and to respect the independence of judges. The more that spectators were active participants ("auditors," to borrow again from Bentham[12]), the more courts could serve as one of many venues contributing to what twentieth-century theorists termed the "public sphere"—disseminating authoritative information that shaped popular opinion of governments' output.[13]

Courts were not only contributors to the public sphere but were also transformed by new ideas about the position of the judge and by a deepening sense of equality before the law. Instead of subservience to rulers, judges gained their status as independent actors, authorized to stand in judgment of the very power that gave them their jurisdiction.[14] The circle of those eligible to come to court enlarged radically, and the kinds of harms recognized as legally cognizable multiplied.

Yet only in the twentieth century did all persons become able to be in courts in all roles—from litigants, witnesses, jurors, lawyers, and (yet more recently)

10. *See* 6 JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence*, *in* THE WORKS OF JEREMY BENTHAM 355 (John Bowring ed., Edinburgh, William Tait 1843) [hereinafter 6 BENTHAM] ("Of Publicity and Privacy, as Applied to Judicature in General, and to the Evidence in Particular"). *See generally* Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. 1 (2011); Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339.

11. *See, e.g.*, CONN. CONST. of 1818, art. I, § 12. *See generally* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 80–81, 104–05 (2011) [hereinafter Resnik, *Fairness in Numbers*].

12. 6 BENTHAM, *supra* note 10, at 356.

13. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 236–37 (Thomas Burger & Frederick Lawrence trans., MIT Press 1991) (1962); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 359 (William Rehg trans., MIT Press 1996) (1992). The degree to which courts can perform those functions depends on their configuration, in both material and legal senses. For example, putting prisoners in "the dock" and limiting space for the public reflect hierarchies of authority rather than egalitarian values. *See generally* LINDA MULCAHY, LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS AND THE PLACE OF LAW (2011).

14. This development in England is mapped by PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 148−59 (2008).

judges.[15] Formal principles of equal treatment entitled a host of claimants to be heard and treated with dignity, whatever their race, class, ethnicity, and gender. Constitutions and transnational conventions insisted that such hearings be both "public" and "fair," permitting litigants and judges to assess whether a particular process accorded with changing understandings of what the demands of justice entailed. The transnational codification of the 1966 United Nations Covenant on Civil and Political Rights summarizes these new tenets: "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[16]

A measure of the success of the expanded role *for* courts can be seen from the rising number of filings *in* courts. The United States offers one example. The federal courts, which each year handle some 400,000 civil and criminal filings and a million-plus bankruptcy petitions, provide a window into twentieth-century commitments to courts.[17] Fewer than 30,000 cases were brought before the federal courts in 1901; ten times that number were filed by 2001.[18] Yet those

15. Nebraska and Delaware amended their constitutions in 1996 and 1999, respectively, to make the point of gender equality explicit. Each added the words "him or her" to their constitutional guarantees that all courts be open. *See infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies. In 1984, Indiana shifted its nomenclature from rights for "every man" to "every person." *See* IND. CONST. of 1851 art. I, § 12, *amended by* IND. CONST. amend. LXVIII. Rhode Island did so as well in 1986. *See infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies (changing "he" and "his" to "person").

16. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 14, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966). *See generally* THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES (Shimon Shetreet & Christopher Forsyth eds., 2012) [hereinafter JUDICIAL INDEPENDENCE]. In addition to the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, the U.N. in 1985 created the "Basic Principles on the Independence of the Judiciary." Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26–Sep. 6, 1985, *Basic Principles on the Independence of the Judiciary*, at 59, U.N. Doc. A/CONF.121/22/Rev.1. In 1994, the United Nations Commission on Human Rights authorized the post of the Special Rapporteur on the Independence of Judges and Lawyers. *Special Rapporteur on the Independence of Judges and Lawyers*, OFF. HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/EN/issues/Judiciary/ Pages/IDPIndex.aspx (last visited May 9, 2012).

17. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 2–3 (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf [hereinafter 2009 AO REPORT].

18. These data are drawn from Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 6 (2001) [hereinafter 2001 Judicial Caseload Statistics], and from the American Law Institute's 1934 study of the business of the U.S. Courts, American Law Institute, A Study of the Business of the Federal Courts Part I: Criminal Cases 107 (1934), American Law Institute, A Study of the Business of the Federal Courts Part II: Civil Cases 111 (1934). For additional details, see generally Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments*

numbers are minute when viewed against the volume in state courts, where more than forty million civil and criminal cases (traffic, juvenile, and domestic relations cases aside) are filed annually.[19] Figure 2—a chart offering a comparison of the numbers of filings in state and federal courts in 2009—provides a glimpse of the volume.[20] Another marker is that more than two million people are incarcerated[21] and a total of more than seven million under state supervision.[22]

COMPARING THE VOLUME OF FILINGS: STATE AND FEDERAL COURTS, 2009

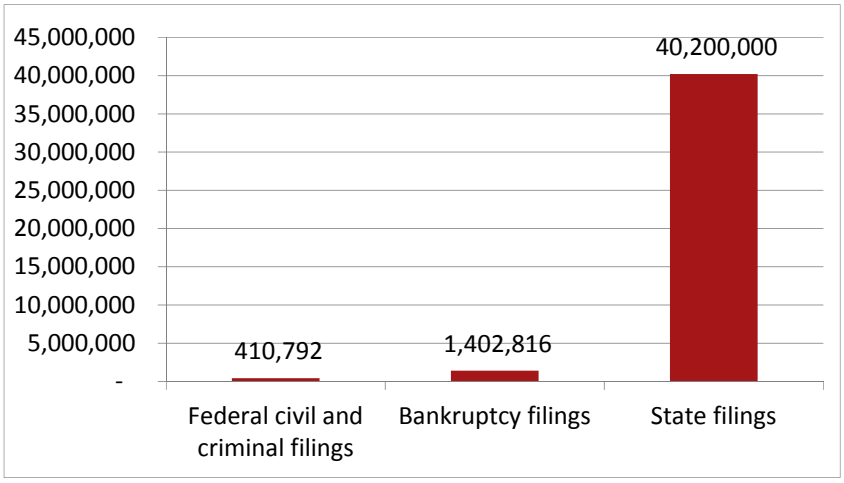

Figure 2

Growing dockets beget judges. Again, the federal system offers a way to track the changes. In the middle of the nineteenth century, fewer than forty

of Chief Justices Taft, Warren, and Rehnquist, 87 IND. L.J. 823 (2012) [hereinafter Resnik, *Building the Federal Judiciary*].

19. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf [hereinafter 2009 STATE COURT CASELOADS].

20. 2009 AO REPORT, *supra* note 17, at 2–3 (federal and bankruptcy statistics); 2009 STATE COURT CASELOADS, *supra* note 19, at 3. The state court data are composite estimates that do not include traffic, juvenile, or domestic relations cases.

21. THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

22. THE PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

federal trial judges sat in courtrooms around the entire United States. By 2001, more than 650 authorized judgeships existed at the trial level. Judges and cases—and money and politicians—beget courthouses. In 1850, virtually no buildings owned by the federal government bore the name "courthouse" on their doors. The occasional federal courtroom was tucked inside federal buildings called custom houses or in spaces borrowed from states or private entities. In contrast, by 2010, more than 550 federal courthouses—so named—had been built.

Figure 3: THE UNITED STATES POST OFFICE, COURT HOUSE, AND CUSTOM HOUSE, BILOXI, MISSISSIPPI

Image reproduced courtesy of the National Archives and Records Administration.

In days of fewer filings, three-story federal courthouses sufficed. One example is the 1908 federal building in Biloxi, Mississippi that was given the name Post Office, Courthouse, and Custom House.[23] By 1929, another new federal building opened for the U.S. District Court for the Southern District of

23. James Knox Taylor, who held the position of Supervising Architect from 1897 until 1912, is credited with the three-story building, whose design has much in common with other of his structures, "[n]early all . . . classical or colonial revival." *See* ANTOINETTE J. LEE, ARCHITECTS TO THE NATION: THE RISE AND DECLINE OF THE SUPERVISING ARCHITECT'S OFFICE 209 (2000).

Iowa.[24] The building could instead have had a title capturing its multiple functions as a post office and federal office building for it also housed administrators from the Departments of Agriculture and Commerce as well as a court.[25] But the name chosen—the U.S. Court House—denoted the growing importance of adjudication.

Figure 4: THE U.S. COURT HOUSE FOR THE SOUTHERN DISTRICT OF IOWA

Image reproduced courtesy of the National Archives and Records Administration.

Today's volume of court filings continues to produce purpose-built, segregated facilities now routinely designated as "courthouses," and their dimensions have likewise grown. The state of Missouri is home to the tallest federal courthouse in the country, the Thomas F. Eagleton Federal Courthouse

24. *U.S. Courthouse, Des Moines, IA: Building Overview*, U.S. GEN. SERVICES ADMIN. http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/444 (last visited May 8, 2012). Renovated and enlarged in 1995, the courthouse remains in use. *Id.*

25. *Id.* The 1929 building joined several other "monumental public buildings" along the riverfront, and their style and placement reflected the City Beautiful Movement efforts to create important civic spaces. *Id.*

(Figure 5), opened in 2000 in St. Louis.[26] Standing 557 feet, it was, when built, also the "largest Federal courthouse in the United States,"[27] with more than one million square feet that cost 200 million dollars to construct.[28] That courthouse provides space for seven hundred employees, of whom (as of 2012), twenty-three were district, magistrate, bankruptcy, senior, or appellate judges.[29]

Courthouse construction marked the changing import and parameters of rights. During the twentieth century, whole new bodies of law emerged, restructuring family life, responding to domestic violence, reshaping employee and consumer protections, and recognizing indigenous and civil rights. Spanning borders, governments came together to create multi-national adjudicatory bodies, from the "Mixed Courts of Egypt" and the Slave Trade Commissions of the nineteenth century to the contemporary regional and international courts, such as the European Court of Justice and the International Criminal Court.

The first point (adjudication was proto-democratic) and the second (democratic norms changed adjudication) are the predicates to a third claim in *Representing Justice*—that the new equality of adjudication has put pressures of various kinds on the work taking place within courthouses. As women and men of all colors gained recognition as rights-holders, entitled to sue and be sued, to

26. *Thomas F. Eagleton U.S. Courthouse*, U.S. GEN. SERVICES ADMIN., http://www.gsa.gov/portal/content/101471 (last visited May 8, 2012) [hereinafter *Thomas F. Eagleton U.S. Courthouse*]; *see also* U.S. GEN. SERVS. ADMIN., THOMAS F. EAGLETON UNITED STATES COURTHOUSE, ST. LOUIS, MISSOURI 12 (2001) [hereinafter GSA EAGLETON COURTHOUSE BOOKLET].

27. GSA EAGLETON COURTHOUSE BOOKLET, *supra* note 26, at 12; *Thomas F. Eagleton U.S. Courthouse*, *supra* note 26. The GSA website specifies that it is the largest single federal courthouse built. The Eagleton Building is the third highest in St. Louis, designed to avoid overshadowing the city's logo, the Gateway Arch.

28. *See* Randy Gragg, *Monuments to a Crime-Fearing Age*, N.Y. TIMES MAG., May 28, 1995, at 36; *City of St. Louis Development Activity: Eagleton Federal Courthouse*, CITY OF ST. LOUIS, http://web.archive.org/web/20070818174938/http://stlcin.missouri.org/devprojects/projInfo.cfm?DevProjectID=47&isComGov=1 (last updated May 19, 2005); *Thomas F. Eagleton U.S. Courthouse*, *supra* note 26. Some states have yet larger courthouses; a 2001 courthouse for the Brooklyn Supreme and Family Courts houses more than eighty courtrooms in more than 1.1 million square feet; that structure is thirty-two stories and 473 feet high. *Brooklyn Supreme and Family Courthouse, New York, United States of America*, DESIGN BUILD NETWORK, http://www.designbuild-network.com/projects/brooklyn-supreme (last visited May 8, 2012).

29. In 2012, the building provided chambers for eight district judges, *Judges of the Court*, U.S. DISTRICT CT. FOR E. DISTRICT MO., http://www.moed.uscourts.gov/judges-court (last visited May 8, 2012), seven magistrate judges, *id.*, four senior judges, *id.*, three bankruptcy judges, *Judge & Courtroom Information*, U.S. BANKR. CT. FOR E. DISTRICT MO., http://www.moeb.uscourts.gov/judge_info.htm (last visited May 8, 2012), and one Eighth Circuit judge, *Eighth Circuit Court of Appeals Judges*, U.S. CT. APPEALS FOR EIGHTH CIRCUIT, http://www.ca8.uscourts.gov/newcoa/judge.htm (last visited May 8, 2012). Twenty-five courtrooms were provided. GSA EAGLETON COURTHOUSE BOOKLET, *supra* note 26, at 12.

testify, and to judge, a female figure of Justice became less an abstraction and more a representation of a person. Controversies erupted about what "she"—Justice—should look like and whether such images captured the didactic messages that democratic courts needed to convey.

Figure 5: THOMAS F. EAGLETON FEDERAL COURTHOUSE

Photographer: The Honorable David D. Noce, U.S. Magistrate Judge for the Eastern District of Missouri. Photograph courtesy of and reproduced with the permission of the photographer.

Pressures of another kind are affecting the public, information-forcing qualities of adjudication. Democracy has not only changed courts but also now challenges them profoundly. Once a government became committed to showing "equal concern for the fate of every person over whom it claims dominion" (to

borrow Ronald Dworkin's description of equality's entailments),[30] courts have new tasks. Yet implementation of equal treatment obligations in courts becomes difficult when individuals have disparate resources—or none at all. What forms of access ought to be subsidized, and what costs imposed on users directly? How should the activities of adjudication be funded?

The response in the United States has been a robust and entrenched commitment of public financing of courts, albeit not at the level to meet all the demands. Moreover, subsidies have been put into place for certain indigent litigants, such as fee waivers for some kinds of litigants, free lawyers for criminal defendants facing incarceration, and procedural mechanisms permitting aggregation of claims through class actions. Courts are therefore a form of positive provisioning not often associated with United States liberal theory,[31] which has generally taken the vast supply of government dispute resolution mechanisms for granted.

On occasion, the constitutional relationship to the court subsidy question comes to the fore. Illustrative is Justice Harlan's explanation in 1971 about why filing fees for poor persons seeking divorce had to be waived as a matter of constitutional right.[32] "Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner."[33] As Justice Harlan's commentary reveals, justice services are welfarist rights that are self-serving from the perspective of the state. While rights to education and health enable individuals to contribute to and participate in social ordering, the historical sweep sketched above makes plain that courts are forms of government support of a special kind, on which the state (as well as individuals) depends. States did not always supply education, nor roads, but states always had mechanisms for enforcing rules of civil and criminal order through courts. States need those resident within to participate in adjudicatory processes, both to maintain peace and security as well as to generate and to reinforce their own authority to do so. Adjudication, whether civil or criminal, both confirms and produces the power to impose and enforce sanctions. Courts in democracies do more, as their egalitarianism constrains and disciplines the state through obligations of third-party access and dignified treatment of disputants that circumscribe state authority.

30. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 2 (2011). His other condition of equality was that government had to respect "fully the responsibility and right of each person to decide . . . how to make something valuable" out of his or her life. *Id.*

31. *See* Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1906–12 (2001) [hereinafter West, *Rights, Capabilities*].

32. Boddie v. Connecticut, 401 U.S. 371, 372–74 (1971).

33. *Id.* at 374.

Justice services therefore offer another paradigm in which to explore the import of constitutional rights and through which to move beyond the categories of positive and negative rights and liberties. Courts partake of both, as they forge and reflect the interconnections of government and its populace through providing frameworks in which individuals and communities shape their relationships. Courts are places in which to document and respond to conflicts and deep disagreement, and, when working well, courts generate collective narratives of identity and obligation. "Connective justice" is a phrase proffered to describe the efforts of ancient Egypt to bridge the worlds of humans and the gods,[34] but those words could be transposed to capture aspirations for courts operating in democratic political systems.

Given the ambitions of contemporary justice services, the political unwillingness to commit all the resources needed to fund the adjudicatory opportunities promised, and contemporary debates about state welfarist efforts, the project of adjudication is filled with tensions. As the ranks of rights-holders expanded and as states enlarged the aegis of their criminal laws, the numbers of those seeking or drawn into courts swelled. Governments responded not only by creating more judgeships, more courthouses, more prisons, and by waiving some access fees or funding lawyers and other services for subsets of claimants, but also by moving some forms of adjudication offsite, to administrative tribunals and to procedures that have come to be known by the acronym ADR—alternative dispute resolution.[35] Inside court, rules encourage or mandate efforts at private accommodations (settlements and plea bargaining).[36] In addition,

34. Manning, *supra* note 4, at 114.

35. As Amalia Kessler explains, conciliatory efforts were part of judges' repertoire long before the twentieth century and hence have "remarkable staying power," even as some of their forms may be problematic for democratic governance. *See* Amalia D. Kessler, *Delineating Between Conciliation and Adjudication: A Comment on Resnik and Curtis's* Representing Justice, 56 ST. LOUIS U. L.J. 1099 (2012) [hereinafter Kessler, *Conciliation and Adjudication*]. Kessler's commendation to look toward aggregation is made complex by recent Supreme Court limitations on that form of adjudication. *See* Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post–*Concepcion *Era*, 56 ST. LOUIS U. L.J. 1203 (2012); David Marcus, *From "Cases" to "Litigation" to "Contract": A Comment on Procedural Legitimacy*, 56 ST. LOUIS U. L.J. 1231 (2012).

36. On the criminal side, see generally GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003), and WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011). The civil litigation trends are reflected in Federal Rule of Civil Procedure 16. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnik, *Managerial Judges*]. The history of earlier eras' use of conciliation is detailed in Kessler, *Conciliation and Adjudication*, *supra* note 35, and in Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423 (2009).

courts promote use of other decision makers, public and private. The resulting fragmentation and privatization of adjudication has profound implications for the democratic character of courts.

Once again, examples come from the U.S. federal system. In 2008, four times more judges (often termed hearing officers or administrative judges) sat in federal agencies than in federal courts, and these administrative judges rendered tens of thousands of decisions in disputes brought by recipients of government benefits, such as veterans, employees, and immigrants seeking adjustment of their status.[37] In some respects, this evolution has served to increase the domain of adjudication, because agencies have modeled their own decision-making processes after those of courts. Yet this work occurs with judges less insulated from oversight by other branches of government and at sites generally inaccessible to outside onlookers.

In addition to this devolution, a good many conflicts that would otherwise have been eligible for courts are now, by law, outsourced. The U.S. Supreme Court's recent interpretations of the 1925 Federal Arbitration Act have preempted state laws to enforce contracts requiring many consumers and employees to use private providers,[38] such as the Better Business Bureau and the American Arbitration Association, where no rights of access for third parties exist and where few obligations of transparent accounting are imposed.

Parallels can be found abroad. England led the way in the 1950s with its legal aid programs, as it also fashioned forms of administrative or tribunal adjudication to shape various "paths to justice."[39] Yet, in the 1990s, England and Wales reformatted procedural rules to facilitate settlements.[40] Moreover, in the last few decades, England and Wales adopted a user-pay system for civil litigation that aspires for courts to derive their funding through fees garnered for each procedural step.[41] In 2010, the English government mounted a campaign

37. *See* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004).

38. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011), discussed in Resnik, *Fairness in Numbers*, *supra* note 11, in Gilles, *supra* note 35, in Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012), and in Michael A. Wolff, *Is There Life after* Concepcion*?: State Courts, State Law, and the Mandate of Arbitration*, 56 ST. LOUIS U. L.J. 1269 (2012).

39. *See generally* HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999).

40. *See* LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES §§ 1(7), 1(9) (1996). *See generally* Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012) [hereinafter Genn, *What is Civil Justice For?*]; Simon Roberts, *'Listing Concentrates the Mind': The English Civil Court as an Arena for Structured Negotiation*, 29 OXFORD J. LEGAL STUD. 457 (2009).

41. The policy shifts over two centuries that helped reduce fees and has now returned the system to one heavily dependent on user fees is tracked in a 2004 lecture, *The Maintenance of Local*

against what it termed "unnecessary" litigation, as it pushed to close courthouses and proposed significant retrenchment in legal aid.[42] Crossing the channel, Europe has expressed its enthusiasm for ADR through a 2008 directive that all national courts promote mediation of cross-border disputes.[43] Thus, social movements across borders promote reformatting judging away from public acts of adjudication toward more private managerial roles in which judges either meet with lawyers and litigants to press for non-adjudicative conclusions of cases or rules send disputants elsewhere.

Various and diverse arguments are made on behalf of ADR.[44] One account of ADR's development is that it is a second-best response to systemic overload, produced because governments cannot support all those who seek to use their courts (or their roads, health systems, and the like). But another analysis comes from a developing critique of the public process and redistributive impact of courts. Not all celebrate the trajectory that has produced more rights, more claimants knocking at courthouse doors, and more information pouring into the public domain. The intersection of high demand for courts, the burdens of procedures, the costs of lawyers, and the regulatory successes achieved by some plaintiffs have prompted critiques, styling the civil justice system as overburdened, overreaching, and overly adversarial.

Critics argue that courts can generate unwise policies and that the risk of being sued chills productive economic exchanges and useful social interactions. Too easy access, they charge, produces unnecessary social conflict. Alternative forms of resolution, they assert, are more accurate, less expensive, more generative, and more user-friendly. Energetic enthusiasts, sometimes gaining funds from institutions identified with repeat-player defendants, have fueled

Justice, by Lord Justice Thomas, then senior presiding judge of England and Wales. *See* Lord Justice Thomas, Senior Presiding Judge of Eng. & Wales, The Maintenance of Local Justice (Dec. 4, 2004), *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech_lj_thomas_maintenance_local_justice_04122004.pdf [hereinafter Thomas, *The Maintenance of Local Justice*].

42. The recent developments are tracked in Genn, *What is Civil Justice For?*, *supra* note 40, at 412–15; *see also* Lady Brenda Hale, Justice, Supreme Court of the U.K., Sir Henry Hodge Memorial Lecture 2011: Equal Access to Justice in the Big Society 5 (2011), *available at* http://soundoffforjustice.org/wp-content/uploads/downloads/2011/07/Henry-Hodge-lecture-FINAL.pdf.

43. Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, art. 1, 2008 O.J. (L 136) 3, 6.

44. *See, e.g.*, Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

movements to shape avenues outside courts for dispute resolution (becoming known as "DR") and to encourage judges to discourage parties from seeking the proverbial day in court.[45] These approaches entail policies that can be understood as managerial, administrative, and rights-enabling. Alternatively, this shift away from public courts can be read as a political backlash, in that some "repeat players" found the glare of open courts disruptive to business practices and governance policies and successfully "play for rules" by limiting the reach of courts and by constricting access to public adjudication.[46]

With the devolution of adjudication to agencies, the outsourcing to private providers, and the reconfiguration of court-based processes toward settlement for both civil and criminal cases, the occasions for public observation of and involvement in adjudication diminish. In the federal courts of the United States for example, while filings increased, trial rates dropped over the last few decades. By 2010, trials were completed in about one of every hundred federal civil cases pending.[47] The decline gained the moniker of the "vanishing trial."[48]

45. *See generally* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). For a critique of anti-litigation analyses, *see* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

46. This concern was forecast in Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter has also analyzed the interrelationship between the development of the access to justice movement and the initial ADR movement. *See* Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115 (2010).

47. The figure is drawn from ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR, 168 tbl.C-4 (2011) (Cases Terminated, by Nature of Suit and Action Taken), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf. Recorded are 309,361 civil cases pending, and 3,309, or approximately 1.1%, terminated "during or after trial." *Id.* The category of cases terminated "during or after trial" could include cases that settle during trial.

48. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); *see also* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011).

Figure 6: PHOTOGRAPH OF CAMP JUSTICE, GUANTÁNAMO BAY, 2009

Photograph reproduced with the permission of the photographer, Travis Crum (November 2009).

Dramatic evidence of the retreat from courts came from decisions by all branches of the U.S. government responding to the terrorist destruction of the World Trade Center's Twin Towers in September of 2001. Eschewing both the federal and the long-standing military court system, the Department of Defense created a detention camp and a decision-making process at Guantánamo Bay, a United States naval base in Cuba. "Camp Justice" is the makeshift name, reflecting the ad hoc efforts that have pieced together rules of procedure and evidence that mime aspects of adjudication, just as the flags that fly over the sign (Figure 6) with the logo of the Office of Military Commissions (Figure 7) appropriates the iconography of Justice's scales.[49] The eagle in this version

49. The photographs of Camp Justice, reproduced in Figures 6 and 7, were taken in the fall of 2009 by Travis Crum (Yale Law School, 2011), and are provided and reproduced with his permission.

becomes the balance, shown with the shield of red, white, and blue, three arrows, thirteen stars, and the Department's name.

Figure 7: PHOTOGRAPH OF THE DEPARTMENT OF DEFENSE SEAL AT CAMP JUSTICE

Photograph reproduced with the permission of the photographer, Travis Crum (November 2009).

The imagery is (unwittingly or not) revelatory; the effort to dress Guantánamo Bay up as a court aims to bolster its legitimacy. Yet placing a bird of prey with arrows at the center of the balance inside a pentagon reflects just how enclosed those at Guantánamo are. The proceedings are located at a venue to which the public does not have ready access, lawyers face challenges meeting with clients, and at which military personnel designate the individuals who serve as prosecutors and as judges.[50] These detainees are not to be accorded the same equal, public, and dignified treatment that became the rights of ordinary civil and criminal litigants in the twentieth century. The words at the logo's bottom

50. The process failures are the subject of several articles in this Symposium. *See* Janet Alexander, *Military Commissions: A Place Outside the Law's Reach*, 56 ST. LOUIS U. L.J. 1115 (2012); Monica Eppinger, *Military Tribunals: Assessing Actual Practice*, 56 ST. LOUIS U. L.J. 1153 (2012); Eugene R. Fidell, *Charm Offensive in Lilliput: Military Commissions 3.1*, 56 ST. LOUIS U. L.J. 1177 (2012); Jonathan Hafetz, *Reconceptualizing Federal Courts in the War on Terror*, 56 ST. LOUIS U. L.J. 1055 (2012).

likewise underscore the distance; eschewed is the phrase ensconced in 1935 at the top of the Supreme Court—"Equal Justice Under Law"—instead the words are "Freedom through Justice." Although one might be tempted to bracket the rules for alleged terrorists as unique responses to horrific events, a close analysis of other government regulations shows the continuum on which the decision-making regime at Guantánamo Bay sits. Ordinary prisoners confined in the United States, ordinary claimants under various federal laws, and ordinary individuals in administrative agencies also have few opportunities for independent judges to decide claims of right in public.[51]

Amidst the high volume of filings, the demand for more services, and the spate of courthouse building projects creating architecturally important structures, the diminution in the aegis of adjudication and the incursions on courts' authority can be overlooked. But the turn towards alternatives puts the new courthouses, built with cutting-edge technologies, at risk of being anachronistic. Just as nineteenth century governing powers, eager to maintain control, moved punishment practices from public streets into closed prisons,[52] adjudication itself is at risk of being removed from public purview—rendering the exercise and consequences of public and private power harder to ascertain.

Recall that a first claim of *Representing Justice* is that adjudication was proto-democratic; the second was that democracy changed adjudication and the third was that democracy challenges adjudication. A fourth argument in *Representing Justice* is that the movement away from public adjudication is a problem *for* democracies because adjudication has important contributions to make *to* democracy. By democracy, I refer here not to majoritarian political processes nor only to the role of juries in courts but to aspirations for lawmaking through egalitarian methods that foster popular input into the development and the revision of governing norms and that impose robust constraints on both public and private power. In turn, the discussion of courts aims to put in focus not only on the high level courts that garner a great deal of academic attention but also on the quotidian activities of ordinary litigation.

The debate about courts and democracy tends to center on questions of the legitimacy of judicial review, with concern directed at when and why judges ought to dislodge legislative judgments that have a majoritarian pedigree.[53] Courts are posited as the site of contestation about the lawfulness of actions of the executive and the legislature, as mediating (legitimately or not) between interest groups while not themselves part and parcel of social and political forces. In contrast to the angst expressed in the name of democracy by some

51. *See generally* Judith Resnik, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010).

52. FOUCAULT, *supra* note 7, at 8–11.

53. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

constitutional scholars writing about courts, Dennis Curtis and I argue that adjudication is itself a democratic process, which reconfigures power by obliging disputants and judges to treat each other as equals, to provide information to each other, and to offer public justifications for decisions based on the interaction of fact and norm. Courts' mandate to operate in public endows the audience—the public—with the ability and the authority of critique. Through such "participatory parity," public processes both teach about democratic practices of norm development and offer the opportunity for popular input to produce changes in legal rights.[54] The redundancy produced by litigants raising parallel claims of rights enables debate about the underlying legal rules. The particular structural obligations of trial level courts have advantages for producing, redistributing, and curbing power in a fashion that is generative in democracies.

On our account, courts are institutions constituted by and expressing—enacting—political judgments about the allocation of authority and relationships among individuals and institutions, public and private. Courts are thus an amalgam of longstanding needs of states to do violence in the name of law, of more recent centuries of commitments to "rights to remedies," and of new ideas about equality. The constitutive elements—open access, independent judges authorized to sit in judgment of the state and to assess the fairness of their own as well as other decision-making procedures, equal and dignified treatment of all participants—are outgrowths of social movements that transformed the meaning of "personhood," the idea of justice, the entailments of equality, and the obligations of government. Our book, *Representing Justice*, provides a reconstruction of a many-century history of the idea of "courts," and a normative exploration of the utility of courts, so as to make plain the inventiveness and achievements, as well as the fragility and contingency, of the twentieth-century project for which the word "court" has become shorthand.

While monumental in ambition and often in physical girth, the durability of courts as active sites of public exchange before independent jurists ought not to be taken for granted. Like other venerable institutions of the eighteenth century (such as the postal service and the press, which serve in parallel fashion to disseminate information and which support democratic competency[55]), courts are vulnerable. Current obligations of courts to provide services and subsidies are exemplary of the success of egalitarian regulatory policies, just as the efforts to limit these forms of government provisioning reflect widespread efforts to

54. Nancy Fraser invoked the term "participatory parity," when arguing that the idea that the public sphere was unitary missed the many dynamic sites of exchange in democracies. *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992).

55. *See generally* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

restrict government efforts in favor of privatization. The continuation of accessible court services for ordinary disputants seeking state-based dispute resolution assistance is far from assured but requires, as it always has, political commitments to sustaining the services that courts provide to the government and its peoples.

II. COURTS AS OBLIGATORY AND REGULATED CONSTITUTIONAL SERVICES

> "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."
>
> DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES of 1776, § 12

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."
>
> U.S. CONST. amend V (ratified in 1791)

> "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."
>
> ALA. CONST. of 1819, art. I, § 14[56]

> "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."
>
> MO. CONST. of 1820, art. XIII, para. 7[57]

> "All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay."
>
> NEB. CONST. of 1866, art. I, § 9[58]

56. The current Alabama Constitution, ratified in 1901, has an almost identical clause. *See infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies.

57. *See infra* notes 284–87 and accompanying text, discussing amendments and judicial interpretations of this provision, and *infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies.

58. As discussed *infra* notes 275–82 and accompanying text, the current Nebraska Constitution, passed in 1875, and amended in 1996, has a similar clause. *See infra* Appendix I, State Constitutions: Textual Commitments to Rights to Remedies.

The remainder of this Lecture explores the idea that rights to court are positive entitlements, a form of social services universally provided and subsidized by the state. As the epigrams opening this section make plain, my interest is in constitutional commitments *to* courts—made expressly in most state constitutions and implicitly in others, including the federal Constitution. Texts such as Missouri's 1820 Constitution—that "courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character"[59]—demonstrate a deeply-entrenched and widespread constitutional norm that using courts is an ordinary opportunity that governments provide.

Before turning to the excavation of those provisions, a reminder is in order. The words "every person" then did not have the same meaning as they do today. Missouri's 1820 Constitution also protected slave owners by providing that the general assembly had

> [N]o power 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.[60]

Moreover, many rights-to-remedy clauses were inserted out of concern that "renegade legislatures" would impair contract obligations and thereby undermine creditors' capacity to collect debts.[61] Further, in 1946, Missouri's Supreme Court relied on its remedy clause when protecting patterns of segregated housing by holding that racially-restrictive covenants were enforceable, in part to avoid denying court access for enforcement of contractual obligations.[62] Courts were thus once institutions centered on the protection of property and status-conventional relationships.

The idea of courts as *sources* of the recognition of all persons as equal rights-holders and as ready *resources* for the array of humanity is an artifact of both the first and second Reconstruction. Not until well into the twentieth century did the law and practice of the United States fully embrace the proposition that race, gender, and class ought not preclude the use of courts.[63] "Every person"

59. MO. CONST. of 1820, art. XIII, para. 7.

60. MO. CONST. of 1820, art. III, § 26.

61. *See* Kilmer v. Mun, 17 S.W.3d 545, 548 (Mo. 2000) (citing David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 (1992)).

62. Kraemer v. Shelley, 198 S.W.2d 679, 683 (Mo. 1946), (famously) *rev'd on other grounds sub nom.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

63. In addition to doctrine elaborating that proposition, in the 1980s and thereafter, state and federal courts charted "task forces" on gender, race, and ethnic bias in the courts so as to respond

only came to reference all of "us" as a result of twentieth-century aspirations that democratic orders provide "equal justice under law" (to borrow again from the U.S. Supreme Court's 1935 facade). As a consequence, the content of the phrase "every injury to person, property, or character" changed. New forms of harm fell within the rubric of what constituted an injury. Rights to be free from discrimination are an obvious example, and so are the developments of rights for consumers, employees, household members, criminal defendants, and (if "every person" retains its meaning) detainees at Guantánamo Bay.

It is the interaction between the constitutional obligations of earlier eras and developing commitments to equality that turned courts into universal entitlements and pressed them to be, on occasion, redistributive as well. The promises of access and remedies become illusory when courts charge fees that systematically exclude sets of claimants and when the resources of the disputants are widely asymmetrical. But concerns about equal treatment are only one aspect of what animated efforts to ease access. The other is the political dependency of governments on courts. Polities—ancient and modern, autocratic and democratic—rely on courts as one method to maintain peace and security and to sustain commercial stability. Because enforcement of court orders rests largely on voluntary compliance, courts need popular acceptance of the legitimacy of the rulings.[64] The coherence of adjudication comes under strain when litigants are patently unable to participate. The doctrine in U.S. law that a criminal prosecution cannot proceed unless a defendant is able to understand the charges levied and assist in a defense[65] is one acknowledgment of court dependence on participants to function. Another is the development of constitutional doctrine insistent on court fee waivers and other government subsidies through adjustments based on indigency, on resource asymmetries between parties, or the stakes of a proceeding. Further, in rare instances, courts have also mandated legislative support for their own work.[66]

Below I explore the range of services that constitutions in the United States direct courts to offer and how egalitarian movements of the twentieth century changed the self-understanding of those who run and who use courts. I argue that courts provide a model, an *exemplum iustitiae* (borrowing the Renaissance phrase for exemplary lessons about justice[67]), of the ordinariness of government

to such problems. *See generally* Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (1996).

64. *See generally* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010).

65. *See* Jackson v. Indiana, 406 U.S. 715, 718–20 (1972).

66. Christine M. Durham, *Open Courts/Remedies Guarantees and State Court Funding: An Emerging Narrative*, KEN. L.J. (forthcoming 2012).

67. *See* 1 ELIZABETH MCGRATH, RUBENS: SUBJECTS FROM HISTORY 7, 33–35 (13(1) Corpus Rubenianum Ludwig Burchard, 1997). As McGrath explained, "history was principally valued for the lessons it taught," and a tradition of didacticism that lined the "walls of Renaissance palaces

subsidies and of their propriety and feasibility as well as of the challenges and conflicts that such provisioning produces in social orders. In the everyday activities in courts and the battles over what courts, one finds a "progressive realisation"[68] of constitutional commitments to equal justice, redefinitions of the entailments of equality, and counter-efforts to limit redistributive activities and to shift authority toward private and less regulated ordering.

A. Affirmative Provisioning

Constitutional lawyers in the United States often assume that, in contrast to other political orders,[69] the government has few obligations to provide services. The federal Constitution is replete with instructions protecting the citizenry *from* government (the negative rights produced by prohibitions, for example, on "abridging the freedom of speech"[70] and on "unreasonable searches and seizures"[71]) but less by way of textual commitments expressly *obliging* the government to ensure security and safety. Some constitutional scholars and jurists do argue that constitutional references to "promote the general Welfare,"[72] coupled with the Equal Protection and Due Process Clauses, should be read to impose affirmative obligations on the government,[73] but the more general view is that "negative" rather than "positive" liberties abound.[74] Less attention has been paid to the idea that structures of government—set forth in

and town halls" relied on "citation of some deed or saying of the past." *Id.* at 33–34; *see also* Hugo van der Velden, *Cambyses for Example: The Origins and Function of an* Exemplum Iustitiae *in Netherlandish Art of the Fifteenth, Sixteenth and Seventeenth Centuries*, 23 SIMIOLUS: NETH. Q. FOR HIST. ART 5 (1995).

68. *See South Africa v. Grootboom* 2001 (1) SA 46 (CC) at 57 para. 13 (quoting S. AFR. CONST., 1996 ch. 1 § 26(2) (that the goal of the constitutional obligation to provide shelter will be met through "progressive realisation")).

69. *See, e.g.*, SOCIAL RIGHTS IN EUROPE (Gráinne de Búrca & Bruno de Witte eds., 2005); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

70. U.S. CONST. amend. I.

71. U.S. CONST. amend. IV.

72. U.S. CONST. pmbl.

73. For example, Robin West argued that the Fourteenth Amendment's equality and due process guarantees ought to be read to include that the government support the "'positive liberties' of civic participation, meaningful work, and unthreatened intimacy." *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 2–3 (1994); *see also* Stephen Reinhardt, Keynote Address, *The Role of Social Justice in Judging Cases*, 1 U. ST. THOMAS L.J. 18 (2003). Such entitlements would not, however, necessarily result in court-based enforcement. Rather, West called for congressional and state legislative action. West, *Rights, Capabilities*, *supra* note 31.

74. How such categorization relates to Isaiah Berlin's famous delineation of negative and positive freedom and liberties is much debated. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969); JEREMY WALDRON, *Liberal Rights: Two Sides of the Coin*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 1 (1993).

both state and federal constitutions—are themselves a species of positive rights[75] and, moreover, examples undermining the assumption that forms of services deemed "social rights" impose obligations for government-provisioning that political and civil rights do not.[76]

This categorization echoes international conventions and the discourse associated with T.H. Marshall's classic 1950 essay, *Citizenship and Social Class*.[77] Writing after World War II and on the cusp of British support for various social services (legal aid included[78]), Marshall famously delineated what

75. A few scholars have noted that courts (providing a "taxpayer-salaried judge") are a form of entitlement, and argued the utility of subsidizing access to courts as "a highly visible gesture of inclusion." *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 45, 219 (1999). Also detailed are "some numbers" on the costs, with the federal judicial system as their exemplar. *Id.* app. at 234. Courts are the specific focus of a more recent discussion that raised questions about the wisdom of the current subsidies to courts and suggested instead that differential subsidies would protect the "social positives" produced by litigation but reduce the government costs of providing the service. *See* Brendan S. Maher, *The Civil Justicial Subsidy*, 85 IND. L. J. 1527, 1528 (2010).

Robin West's analysis of the positive entitlement to "protection against private violence" could also be linked to state enforcement mechanisms, courts included. *See* West, *Rights, Capabilities*, *supra* note 31, at 1923–24; *see also* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1230–32 (2002) [hereinafter Sklansky, *Quasi-Affirmative Rights*]. Focused on criminal procedure, Sklansky characterizes these rights as "quasi" in that they are artifacts of state efforts to limit liberty. In an earlier essay, Sklansky addressed the "affirmative entitlement to policing" that the state owed its citizens. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1170 (1999); *see also* PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1606–16 (5th ed. 2006) (discussing the "rights of indigents in the criminal justice system" in the context of an analysis of whether the U.S. Constitution affirmatively guarantees any "welfare rights"). In addition, Sandra Fredman's analysis of human rights notes that effective access to courts is a right protected under the European Convention on Human Rights and that, as a result, courts have provided judicial review of failures to do so. SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 77–79 (2008).

76. As Jeremy Waldron detailed, "[m]any first-generation rights (for example, the right to vote) require the positive establishment and maintenance of certain frameworks," and hence impose costs. WALDRON, *supra* note 74, at 24.

77. T.H. Marshall, *Citizenship and Social Class*, was originally published in 1950; citations here are to the edition, T.H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS (1992) [hereinafter T.H. Marshall, *Citizenship and Social Class*].

78. *See* Joan Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223 (1998). England's 1949 Legal Aid Program was remarkably ambitious, initially aiming to be responsive to need. *See* ROSS CRANSTON, HOW LAW WORKS: THE MACHINERY AND IMPACT OF CIVIL JUSTICE 46–47 (2006). *See generally* RICHARD L. ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM (2003). Major revisions came in 1999, in an act ("the Access to Justice Act") that abolished the Legal Aid Board and created a Legal Services

he saw to be the progressive enhancement of three kinds of citizenship entailments—civil rights ("liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice"), political rights ("to participate in the exercise of political power" either as a member of the legislature or as an "elector" of such a body), and "social rights" (such as economic support, education, and housing).[79] The United Nation Conventions that separate "civil and political rights" from socio-economic rights[80] further embedded distinctions among the kinds of rights, even as commentators have come to question the utility and wisdom of this categorization that echoes Cold War divides.[81]

Redistribution obligations are typically associated with Marshall's third category, social rights,[82] which some legal systems presume to be non-justiciable; given the complex allocation issues involved, legislative decision-making can be seen as preferable to adjudication. But non-justiciability has not prevented claims from being understood as rights and moreover, on occasion, courts do find enforceable entitlements in arenas falling under the rubric of "social rights." In the United States, state constitutional guarantees of education are often cited as an instance of a judicially-enforceable social rights entitlement.[83]

Commission to work through decentralized groups charged with identifying local needs, eligible lawyers, and requesting funding. *Id.* at 226–34; CRANSTON, *supra*, at 47–49.

79. T.H. Marshall, *Citizenship and Social Class*, *supra* note 77, at 8. Marshall also argued their interconnectedness (e.g., that compulsory education, a social right, was requisite to civil and political competencies) and moreover the relevance of collective rights (trade unionism being the example) developed out of industrialization. *See id.* at 13–14, 44–49. Further, inequalities in civil rights stemmed from the "lack of social rights . . . ." *Id.* at 21.

The categories that Marshall discussed echoed debates in the United States about the reach of the Fourteenth Amendment, including whether the "privileges and immunities" clause guaranteed federal protection against state-imposed impediments to earning a livelihood. *See, e.g.*, Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

80. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

81. *See* FREDMAN, *supra* note 75, at 227–28.

82. *See, e.g.*, Cécile Fabre, *Social Rights in European Constitutions*, *in* SOCIAL RIGHTS IN EUROPE, *supra* note 69, at 15.

83. In 1973, the U.S. Supreme Court rejected the argument that the Fourteenth Amendment Equal Protection Clause rendered unconstitutional school financing predicated on local property taxes. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). In contrast, dozens of state courts have identified education rights based on specific provisions in state constitutions. *See, e.g.*, Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); *see also* Peter

The obvious Marshallian category for courts is civil rights, for he located the "right to justice" as a part of that description.[84] (Indeed, "the institutions most directly associated with civil rights are the courts of justice."[85]) Given that "the formal recognition of an equal capacity for rights was not enough," Marshall recognized access to courts as in need of welfarist support,[86] akin to those provided for health and education.[87] Courts also come within his discussion of the function of social rights, requisite to sharing "to the full in the social heritage . . . ."[88] Moreover, as I outlined above, courts in democracies provide a venue for development of norms through iterative exchanges that bring litigation within the category of "political" rights. This sense of the political both expands on Marshall's definition (focused on the electoral) and underscores that full formal equality (i.e. women and men in all roles in courts from disputant to juror and judge) came later in the twentieth century than did equality in the franchise. Further, when guarantees of court rights for "every person" came literally to mean *all* people, courts became another example of Marshall's point that enhanced citizenship rights puts pressure on governments to respond to

Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 app. at 185–94 (1995). *See generally* Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003).

Several articles address state constitutions as sources of rights beyond education. *See, e.g.*, Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989); Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459 (2010). Many credit Justice Brennan with launching the focus on state courts, in part as an antidote to the U.S. Supreme Court's retrenchment under Chief Justice Warren Burger's leadership. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

84. T.H. Marshall, *Citizenship and Social Class*, *supra* note 77, at 8.

85. *Id.* Marshall also distinguished "the right to justice" from the other civil rights of personal liberty, free speech, and property and contract competencies on the grounds that rights to justice protected the others through "the right to defend and assert all one's rights on terms of equality with others and by due process of law." *Id.*

86. *Id.* at 24. He thought political rights were relatively inexpensive to distribute ("it costs little or nothing to register a vote") and that payment to legislators, coupled with access to funds through parties and campaign contribution regulation diminished problems of inequality in politics. *Id.* at 22–23. But "litigation, unlike voting, is very expensive." *Id.* at 23. Further, because litigation was also a "contest," support of one litigant but not another produced another form of unfairness in that a "measure of class-abatement" could "in some cases, create a form of class privilege." *Id.* at 31. Universal support, coupled with price regulation, was one response, but not without difficulties. *Id.*

87. *Id.* at 47. The development of legal aid in England as part of a network of social services is detailed by Richard I. Morgan, *The Introduction of Civil Legal Aid in England and Wales, 1914–1949*, 5 TWENTIETH CENTURY BRIT. HIST. 38 (1994).

88. T.H. Marshall, *Citizenship and Social Class*, *supra* note 77, at 8.

economic inequality through forms of subsidies.[89] Constitutional commitments to courts thus encompass all three of the Marshallian kinds of rights, provide examples of occasional judicial enforcement of such rights, and underscore the redistributive entailments of each genre as well as the intersections of the "social," the "political," and the "civil."

Below, I detail the degree to which constitutions require the provision of and regulate court services. Such positive law, coupled with natural and common law traditions, generates what Jeremy Waldron has termed "waves of duty," instantiating rights over time and with variation rather than through a single act.[90] I examine facets of court services that are judicially enforceable, and I sketch how courts responded to new entrants ("everyone") by elaborating constitutional obligations to be open to all; to waive fees for some and to equip certain indigent litigants with counsel or experts; to reconfigure their own processes; to limit legislative retraction on certain kinds of remedies, and, on rare occasion, to order the political branches to comply with the mandate to support the courts themselves.[91]

Three additional, prefatory comments are in order. First, the discussion below of some constitutional case law should not obscure the centrality of legislatures in the creation and support of courts. While often posited as critics of courts, legislatures have been—and will continue to be—the primary sources for supporting court functions. Second, this analysis is court-centric but falls within a larger examination of American legal history that details longstanding and diverse commitments to various forms of government regulation and provisioning.[92] The density over centuries of government regulation at local, state, and national levels undermines the construction of a national identity predicated on hostility to formal legal ordering.

Third, this positive legal account, sketching constitutional stipulations for courts and government implementation, is the product of a series of normative justifications for courts and regulation more generally. Several theories of courts' utilities and values sustain the project of courts and the law that surrounds them. Now-classic explanations for adjudication's contributions come from Frank Michelman, who explained that access to litigation gives individuals opportunities for participation, for efficacy, and for dignified

89. *Id.* at 45–47. *See generally* Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee its People the Equality Before the Law the Social Contract Demands?* 37 FORDHAM URB. L.J. 157 (2010).

90. Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 509–12 (1989).

91. *See infra* Parts II.B–III.C. As Sklansky noted in the context of constitutional criminal procedure, courts have done less than they might to materialize (or as he puts it, to "honor") some guarantees. *See* Sklansky, *Quasi-Affirmative Rights*, *supra* note 75, at 1287–90.

92. *See, e.g.*, WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

treatment from the state.[93] Jerry Mashaw noted another value, that decision-making by governments needed to treat similarly-situated claimants equally.[94] Both Justices Brennan and Powell invoked another value—accuracy—as they linked forms of process to outcomes that accorded with facts and law,[95] and a law and economics literature debates the efficiencies that result and prompt investments into judiciaries.[96] The argument that Dennis Curtis and I proffer in *Representing Justice* puts forth an additional, distinct value, focused on the relationship and interactions among disputants, governments, and third parties in adjudication. Litigation contributes to democracy through its public processes in which the government is required to demonstrate its commitments to equal and dignified treatment, to commit itself to forms of self-restraint and explanation, and to reveal its exercise of authority in the face of conflicting claims of right. The argument is not that litigation (or other forms of democratic practices) generates optimal rules but rather that the iterative participatory practices in courts are one method of giving practical expression to democratic values.

B. Specifying Services

Dozens of state and federal provisions (both constitutional and statutory) require governments to provide judges, who are obliged to perform in accordance with variously-detailed requirements. The obvious (and taken for granted) specifications include selection of judges, the number of justices required for decisions, tenure in office and other mechanisms for protecting independence,[97] and the parameters of jurisdiction. In addition, constitutions provide directions to judges, specify some procedures for criminal defendants and civil plaintiffs, and build in roles for jurors, witnesses, and the public.

93. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L. J. 1153, 1172–77 [hereinafter Michelman, *Part I*].

94. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52–54 (1976). For Mashaw, these values that animate a theory of due process do not necessarily result in the public format of adjudicatory procedures, whereas for Michelman, these values support fee waivers for indigent litigants to enable effective access to courts, but not to require necessarily free lawyers for all indigent civil litigants. *Compare* Mashaw, *supra*, at 57–59, *with* Michelman, *Part I*, *supra* note 93, at 1172–77.

95. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (Justice Brennan); Mathews v. Eldridge, 424 U.S. 319 (1976) (Justice Powell).

96. Classic commentary includes J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG. 259 (1997), and William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

97. Article III is often the standard bearer, but the Maryland Declaration of Rights and the Massachusetts Constitution offered earlier guarantees of judicial independence. MD. CONST. of 1776, pt. 1, art. XXX; MASS. CONST. of 1780, art. XXIX.

For example, the early constitutions of both Idaho and Illinois called on their judges to "report" to the legislature or governor on "defects and omissions" in the laws.[98] Massachusetts, New Hampshire, and Rhode Island instruct justices to reply when their governors or legislatures ask for their opinions.[99] Some state constitutions direct their Supreme Courts to write or to publish opinions, to make them freely available, to let anyone publish them, and to explain reasons for dissent. For example, 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."[100] West Virginia directed judges in its 1872 Constitution to "prepare a syllabus of the points

98. 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 in place. *See* IDAHO CONST. of 1890, art. V, § 25 (same as of 2012). The current version of the Illinois requirement is that the Illinois Supreme Court "shall report" to the general assembly, in writing, "improvements in the administration of justice." ILL. CONST. of 1970, art. VI, § 17 (in effect 2012). This instruction, which did not appear in the Illinois Constitutions of 1818 or of 1848, was put into the 1870 Constitution in a form akin to that of Idaho—that all judges of inferior courts "report in writing" each year, to the supreme court, who would report 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.

99. This mandate, dating from each state's first constitution, continued, and is found variously placed in these states' current constitutions. *See* MASS. CONST. of 1780, pt. 2, ch. 3, art. II ("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 Judicial Court, upon important questions of law, and upon solemn occasions.") (substantially the same as of 2012); N.H. CONST. of 1784, pt. 2, art. 74 ("Each branch of the legislature, as well as the president and council, shall have authority to require the opinions of the justices of the superior court upon important questions of law, and upon solemn occasions.") (substantially the same as of 2012); R.I. CONST. of 1986**,** 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 in substantially the same form from R.I. CONST. of 1842, art. X, § 3, replacing its 1663 charter).

100. KY. CONST. of 1792, art. V, § 4. The section continues,

> And the said court shall have power, on the determination of any such case, to award the legal costs against either party or to divide the same among the different parties, as to them shall seem just and right. And the said court shall have full power to take such steps as they may judge proper, to perpetuate testimony in all cases concerning such titles: *Provided*, That a jury shall always be empaneled for the finding of such facts as are not agreed by the parties; unless the parties or their attorneys, shall waive their right of trial by jury, and refer the matter of fact to the decision of the court: *Provided also*, That the Legislature may, whenever they may judge it expedient, pass an act or acts to regulate the mode of proceedings in such cases, or to take away entirely the original jurisdiction hereby given to the said court in such cases.

Id. (superseded by the KY. CONST. of 1891 and no such provision appears in the version in place as of 2012).

adjudicated" in those cases with written opinions.[101] Arizona, California, and Michigan insisted that opinions "shall be free for publication by any person."[102] Moreover, both Illinois's current Constitution, adopted in 1970, and Kentucky's current Constitution, adopted in 1891, require that courts create rules for "expeditious and inexpensive appeals."[103] Utah's Constitution guarantees the right of appeal itself.[104]

Turning to disputants, the epigrams with which this section opens illustrate that state constitutions endow civil litigants with entitlements to use courts. "Right-to-remedy" clauses are traced to the Magna Carta,[105] as it was invoked

101. 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 at article eight, section four. W. VA. CONST. art. VIII, § 4.

102. ARIZ. CONST. of 1910, art. VI, § 16 ("Provisions for the speedy publication of the opinions of the supreme court shall be made by law, and they shall be free for publication by any person.") (the current provision, which is substantially similar, is at ARIZ. CONST. art. VI, § 8); CAL. CONST. of 1849, art. VI, § 12 ("The Legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient; and all laws and judicial decisions shall be free for publication by any person.") (superseded by the California Constitution of 1879, which had a similar provision at art. 6, § 16; following a 1966 amendment, article six, section fourteen now reads, "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."); 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 current Michigan Constitution also provides: "Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each 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 "Provision shall be made by Law for publishing Reports of all causes, argued and determined in the Court of Appeals and in the intermediate courts of appeal, which the judges thereof, respectively, shall designate as proper for publication." MD. CONST. of 1867, art. IV, pt. 2, § 16 (current as of 2102). In addition, New Jersey's 1844 Constitution required judges to provide "reasons" "in writing," N.J. CONST. of 1844, art. VI, § II, para. 5, but neither New Jersey's original 1776 Constitution nor its current Constitution, in place since 1947, contain a similar provision.

103. ILL. CONST. of 1970, art. VI, § 16 (current as of 2012) (similar provision did not appear in the previous 1870 Constitution); KY. CONST. of 1891, § 115 (applies to both civil and criminal cases, and includes "as a matter of right at least one appeal to another court, except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law") (current as of 2012) (this provision did not exist in the original 1891 Kentucky Constitution, but was added in 1975).

104. UTAH CONST. art. I, § 12.

105. 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

and extrapolated by Lord Coke and by Blackstone[106] and filtered through natural and common law customs. New Americans were heirs to an English tradition

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." MAGNA CHARTA, ch. 29 (1225), *translated and reprinted in* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 1, 45 (London, E. & R. Brooke 1797). Chapter 40 of King John's 1215 Magna Carta reads: "To none will we sell, to none will we deny, to none will we delay right or justice." MAGNA CHARTA, ch. 40 (1215), *reprinted in* BOYD C. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND 228, 239 (1900).

106. An account of the development is provided Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1319–24 (2003), and in William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 357–63 (1997). Koch focused on the state constitutional drafters' use of Lord Coke's explanation of Chapter 29, with its promise that "[t]o no one will we sell, to no one will we deny, or delay right or justice," Koch, *supra*, at 356 (quoting chapter twenty-nine of the Magna Carta), to which Lord Coke added:

> This is spoken in the person of the king, who in judgement of law, in all his courts of justice is present, and repeating these words, *nulli vendemus, etc.*
>
> And therefore, every subject of this realme, for injury done to him in *bonis, terris, vel persona*, by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.
>
> Hereby it appeareth, that justice must have three qualities, it must be *libra, quia nehil iniquius venali justitia; plena, quia justitia non debit claudicare; et celeris, quia dilation est quaedam negatio;* and then it is both justice and right.

Koch, *supra*, at 359–60 (quoting 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, A PROEME TO THE SECOND PART OF THE INSTITUTES *55–56 (London, E. & R. Brooke 1797)).

"Much of this language survives intact as the remedies guarantees of some state constitutions." Phillips, *supra*, at 1321. "The constitutions in six of the original thirteen states contained 'open courts' or 'right to remedy' provisions derived from Chapter 40 of King John's Magna Carta and Chapter 29 of the 1225 Magna Carta." Koch, *supra*, at 367. "Four of these states paraphrased Lord Coke's explanation of Chapter 29." *Id.*

As Koch recounts, Blackstone likewise insisted on the importance of Magna Carta to English liberties, and identified as one of three central rights "that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." Koch, *supra*, at 362–63 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *141). Blackstone continues:

> The emphatical words of *magna carta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these: nulli vendemus, nulli negabimus, aut differemus restum vel justitiam: "and therefore every subject," continues the same learned author, "for injury done to him in bonis, in terris, vel persona, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay."

Id. (quoting 1 BLACKSTONE, *supra*, at *141).

in which judges owed a duty to law itself, and to decide disputes "in accord with the law of the land."[107] That tradition imposed constraints on the exercise of both public and private power. Yet such entitlements to courts and to judicial remedies did not include then—nor need they now—judicial authority to overturn legislation.[108] Whether individuals can enforce these rights in courts is a discrete question to which many jurisdictions respond negatively.[109] Parliamentary supremacy was understood then as ordinary, and remains a form of constitutionalism today.

The epigrams also make plain that constitutions in North America built on "custom and usage" when making court services constitutional obligations. As quoted at the outset of this section, 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."[110] The first constitutions of Maryland (1776) and Massachusetts (1780), and the second of New Hampshire (1784), had similar iterations.[111] Pennsylvania's 1776 version instructed that all "courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay,"[112] and North Carolina's 1776 provision limited remedies to those "restrained of [their] liberty."[113]

107. *See, e.g.*, HAMBURGER, *supra* note 14, at 17–18, 103–06. And as Hamburger accounts, judges therefore found at times that "some of the king's acts [were] contrary to the king's own law." *Id.* at 113; *see also* Richard A. Epstein, The Natural Law Influences on the First Generation of American Constitutional Law: Reflections on Philip Hamburger's *Law and Judicial Duty* (Jan. 19, 2012) (unpublished manuscript) (on file with author).

108. *See* Epstein, *supra* note 107, at 31.

109. *See id.* at 30–32.

110. DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES of 1776, § 12; *see also* 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, 944 (2002) (suggesting that Maryland's Declaration served as a model for Delaware).

111. *See infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies.

112. PA. CONST. of 1776, pt. 2, § 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. I, § 11 (current in 2012).

113. N.C. CONST. of 1776, pt. 1, art. 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." N.C. CONST. of 1868, art. I, § 35. North Carolina's current Constitution, adopted in 1970, includes both the narrow and broader provisions, in nearly identical form to those in the 1868 Constitution. N.C. CONST. art. I, §§ 18, 21 (current in 2012).

Of the original thirteen colonies, states including due process language were Connecticut, Delaware, Massachusetts, Maryland, North Carolina, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia. CONN. CONST. of 1818, art. I, § 9 ("[N]or be deprived

In contrast, the United States' 1776 Constitution did not include such a clause. During ratification, Virginia, North Carolina, and Rhode Island all suggested the addition of a right-to-remedy clause and proffered language reminiscent of the provisions quoted above.[114] The proposals were not adopted, nor did such terms, when again proffered for inclusion, become a part of the 1791 Bill of Rights.[115]

Yet one could read the 1789 creation of the federal court system that inscribed a Supreme Court and gave Congress authority to "from time to time

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."); MD. CONST. of 1851, art. 21 ("That no freeman ought to be . . . deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land . . . ."); MASS. CONST. of 1780, pt. 1, art. XII ("[N]o subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."); N.H. CONST. of 1784, pt. I, 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, § 7 ("[N]or be deprived of life, liberty, or property, without due process of law . . . ."); N.C. CONST. of 1776, pt. 1, art. XII ("That no freeman ought to be . . . deprived of his life, liberty, or property, but by the law of the land."); PA. CONST. of 1776, pt. 1, 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."); 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."); VA. CONST. of 1776, pt. 1, § 8 ("that no man be deprived of his liberty, except by the law of the land or the judgment of his peers"). Those without any such provisions were Georgia and New Jersey. One of the earliest uses of the phrase "due process" comes in a 1354 statute protecting against loss of property or life "without being brought in Answer by due Process of the Law." 28 Edw. 3, c. 3 (1354) (Eng.).

114. North Carolina and Virginia proposed that the amendment read:

> That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely without sale, 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, 379 (Washington, Dep't of State 1894).

Rhode Island's proposed amendment stated:

> That every freeman ought to obtain right and justice, freely and without sale, completely and without denial, promptly and without delay, and that all establishments or regulations contravening these rights, are oppressive and unjust.

Id. at 313. On September 8, 1789, the Senate rejected an amendment based on Virginia and North Carolina's proposals. *See* 1 ANNALS OF CONG. 76 (1789) (Joseph Gales ed., 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 (Philadelphia, Lea & Blanchard 1843).

115. *See* Koch, *supra* note 106, at 372–75.

ordain and establish" inferior courts,[116] coupled with the limitation on congressional power to suspend the writ of habeas corpus[117] and the reference in the Supremacy Clause that federal law "bound" judges in every state,[118] to reflect the assumption of access rights for common law remedies. Philip Hamburger's analysis about "inexplicit ideals" may provide an explanation—that although the content of "the ideals of law and judicial duty were never a matter of consensus, they were sufficiently conventional that they did not ordinarily have to be explained."[119]

The federal Bill of Rights provides further support for a pervasive understanding of functioning and (by then obligatory) public courts systems, including the fledging federal one. The Fifth and Sixth Amendments not only detail rights for criminal defendants (including the right to public trials) but also that "private property" cannot be taken without "just compensation."[120] And in 1791, the federal Constitution embedded the phrase "due process of law" into constitutional discourse.[121] Moreover, the Seventh Amendment "preserved" the rights to jury trials in "[s]uits at common law," and limited the reexamination of jury fact-finding.[122] Even the Eleventh Amendment's divesture of some form of authority over claims against states[123] could be read as an implicit endorsement of judicial power otherwise extending to civil litigants coming within the federal jurisdictional parameters.

In addition, the First Amendment protects the "right of the people . . . to petition the Government for a redress of grievances."[124] In the North American

116. U.S. CONST. art. III, § 1.

117. U.S. CONST. art. I, § 9, cl. 2. For further discussion of the suspension clause and its limitation upon Congress, see Trevor W. Morrison, Hamdi*'s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006) and Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009).

118. U.S. CONST. art. VI, cl. 2. Hamburger argued that it was "taken for granted" that state judges had to decide in accord with state law and that the Constitution was needed to clarify that state judges had a "federal role" requiring them to decide in accord with federal law. HAMBURGER, *supra* note 14, at 596–97.

119. HAMBURGER, *supra* note 14, at 575–77.

120. U.S. CONST. amends. V–VI.

121. U.S. CONST. amend. V. Due process was referenced along with other rights, such as the prohibition of the deprivation of private property without "just compensation." *Id.* The lineage of the phrase "due process" is explained by Charles A. Miller in *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* 18 NOMOS: DUE PROCESS 3 (J. Roland Pennock & John W. Chapman eds., 1977). Hans Linde argued that due process provisions ought not to be equated with open court/remedy clauses. *See* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 136–38 (1970).

122. U.S. CONST. amend. VII.

123. U.S. CONST. amend. XI.

124. U.S. CONST. amend. I. The use of the term "government" instead of the word "legislature" (as proposed by James Madison in the June 8, 1789 draft, 1 ANNALS OF CONG. 434 (1789) (Joseph

colonies, petitioning included the filing of grievances that today would be understood as lawsuits, as legislatures exercised a mix of powers, including adjudicating claims involving both public and private parties.[125] In the mid-twentieth century, the right to petition came to be understood as protecting access to all branches of government, courts included.[126] Federal rights to remedies also stem from twentieth-century interpretations of the Due Process Clause that recognized legal claims as a species of property that constrained government's ability to extinguish them.[127] Although debate is had among the justices about whether government has affirmative obligations to facilitate access to courts,[128] modern federal constitutional court doctrines identify the First Amendment's petition rights as well as the Fifth, Sixth, and Fourteenth Amendment as sources of court access for both litigants and their audience—the public.

Gales ed., 1834)), has been advanced as support for the reading that the Clause referenced all branches of government.

125. *See* Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144–46 (1986); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17, 27–29 (1993). For example, in 1770, the Connecticut General Assembly acted on "150 causes, in law and equity, brought by petitioners." Higginson, *supra*, at 146. Private disputes included the lawfulness of a deed, debt actions, and estate conflicts. *Id.* Moreover, people who were otherwise disenfranchised and might have lacked juridical authority in courts, such as "women, felons, Indians, and, in some cases, slaves," brought petitions. *Id.* at 153. The lack of nineteenth century doctrinal development of the law of petitioning is generally attributed to the conflict over the use of petitions in abolition; Congress rebuffed petitions during that era—making plain that the text of a right to petition was not, for many decades, understood as equal to the right to be heard or have responses, including judgments. *Id.* at 163–65.

126. During the twentieth century, the U.S. Supreme Court invoked this First Amendment right as protecting litigation, in the context of identifying the NAACP's right to litigate as a "form of political expression." NAACP v. Button, 371 U.S. 415, 429–30 (1963); *see also* Bhd. of R.R. Trainman v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964). The Court reiterated that access to courts fell under the protection of the Petition Clause in the context of prisoners, as well as other civil litigants in their pursuit of remedies, both in courts and in other branches of government. *See, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The contribution that litigation makes was recognized in 2011 in *Borough of Duryea v. Guarnieri* when the Court described litigation as protected by the Petition Clause for facilitating "informed public participation that is a cornerstone of democratic society." Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2500 (2011). The ruling, however, narrowed the grounds on which public employees can bring Petition Clause claims based on alleged retaliation. *Id.* at 2501.

127. *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269 (2008); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

128. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Lewis v. Casey, 518 U.S. 343 (1996), discussed *infra* notes 203–05 and accompanying text.

Returning to the founding era, early constitutions gave civil as well as criminal litigants rights to jury trials and protected jury fact-finding itself.[129]

129. *See* Friedman, *supra* note 110, at 960–67, 992–93. Of the first thirteen states, eleven drafted and ratified state constitutions between 1776 and 1780. Connecticut and Rhode Island relied on their colonial charters until 1818 and 1842, respectively, when each state drafted its first constitutions. CONN. CHARTER of 1662; CHARTER OF R.I. & PROVIDENCE PLANTATIONS of 1663. Ten of the eleven states who adopted constitutions implicitly or expressly provided for a trial by jury. For example, the phrase in Article Twenty-five of Delaware's 1776 Constitution, that the "*common law of England,* as well as so much of the statute law as has been heretofore adopted in practice in this State, *shall remain in force," has been interpreted as an implicit adoption of common law rights to trial by jury) DEL. CONST. of 1776, art. 25;* see also DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES of 1776, § *13 (*"That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people."); GA. CONST. of 1777, art. LXI ("trial by jury to remain inviolate forever."); GA. CONST. of 1777, arts. XL–XLIII (regarding jury's fact-finding authority and the powers of the special jury); MD. CONST. of 1776, pt. 1, art. III ("That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury . . . ."); MD. CONST. of 1776, pt. 1, art. XIX ("That, in all criminal prosecutions, every man hath a right to . . . a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."); MASS. CONST. of 1780, pt. 1, art. XII ("the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury"); MASS. CONST. of 1780, pt. 1, art. XV ("In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."); N.J. CONST. of 1776, art. XXII ("the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."); N.Y. CONST. of 1777, art. XLI ("trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever."); N.C. CONST. of 1776, pt. 1, art. 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."); N.C. CONST. of 1776, pt. 1, art. XIV ("That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."); PA. CONST. of 1776, art. IX ("That in all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty . . . ."); PA. CONST. of 1776, art. XI ("That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."); S.C. CONST. of 1776, art. XVIII ("the judges of the courts of law shall cause jury-lists to be made, and juries to be summoned, as near as may be, according to the directions of the acts of the general assembly in such cases provided."); VA. CONST. of 1776, § 8 ("That in all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty . . . ."); VA. CONST. of 1776, § 11 ("That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.").

New Hampshire did not provide for a jury right in its initial 1776 Constitution but did so in its second constitution. N.H. CONST. of 1784, pt. I, art. XV ("no subject shall be arrested, imprisoned, despoiled, or 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

As Appendix Three details, criminal defendants had a variety of additional specified protections, such as rights to disclosure of charges, representation, confrontation, speedy trials, and jurors pulled specifically from their vicinity.[130] In addition, several constitutions rejected the English common law prohibition on counsel for felony defendants and concluded that counsel could be present.[131]

peers or the law of the land."). While neither Connecticut nor Rhode Island included an express right to trial by jury in their colonial charters, both included general language about the application of English common law to the territories, which was taken to include the right to trial by jury. CONN. CHARTER of 1662 (providing authority to "Make, Ordain, and Establish all manner of wholesome, and reasonable Laws, Statutes, Ordinances, Directions, and Instructions, not Contrary to the Laws of this Realm of *England*"); CHARTER OF R.I. & PROVIDENCE PLANTATIONS of 1663 (providing for the same legal rights and protections "as other our liege people of this our realme of England"). Both states include the right in their first state constitutions. CONN. CONST. of 1818, art. I, § 7 ("In all prosecutions or indictments for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and the facts, under the direction of the court."); CONN. CONST. of 1818, art. I, § 9 ("In all criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury."); CONN. CONST. of 1818, art. I, § 21 ("The right of trial by jury shall remain inviolate."); R.I. CONST. of 1842, art. I., § 10 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."); R.I. CONST. of 1842, art. I., § 15 ("The right of trial by jury shall remain inviolate."); *see also* R.I. CONST. of 1842, art. X, § 3 (imposing duty on judges to instruct juries on the law). Vermont, which was admitted as the fourteenth state in 1791, wrote its first constitution in 1777 and included the right to a trial by jury. VT. CONST. of 1777, ch. 1, art. X ("That, in all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial, by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty . . . ."); VT. CONST. of 1777, ch. 1, art. XIII ("That, in controversies respecting property, and in suits between man and man, the parties have a right to a trial by jury; which ought to be held sacred."); VT. CONST. of 1777, ch. 2, § XXII ("Trials shall be by jury; and it is recommended to the legislature of this State to provide by law, against every corruption or partiality in the choice, and return, or appointment, of juries.").

130. A summary of the various rights identified is provided *infra* Appendix 3, State Constitutions: Criminal Defendants' Rights in the Thirteen Original States.

131. *See* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 109 (1951); *see also* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 21, 25 (1955); DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 3–66 (1992). A formal account of the early constitutional provisions follows, along with a caveat about the distinction between texts and practices before or after adoption. *See, e.g.*, Alan Rogers, *"A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780–1980*, 41 AM. J. LEGAL HIST. 440 (1997).

Four of the thirteen original colonies—Maryland, Massachusetts, New Jersey, and New York—guaranteed defendants a right to counsel when enacting their first independent governing statements. Provisions varied somewhat, either by the nature of the offense or the capacities of the prosecutor. Maryland's Constitution provided: "[I]n all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him . . . ." MD. CONST. of 1776, pt. 1, art. XIX. Similarly, Massachusetts provided:

> No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish

(The distinct question of whether those unable to pay for their own lawyers should receive state subsidies is discussed below). Some constitutions offer yet more detail. For example, in the little-read Treason Clause of Article III of the U.S. Constitution, convictions require either the "Testimony of two Witnesses" or "Confession in open Court."[132]

evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election.

MASS. CONST. of 1780, pt. 1, art. XII. In contrast, New York's Constitution of 1777 granted counsel for impeachment or misdemeanors "as in civil actions." N.Y. CONST. of 1777, art. XXXIV. New Jersey guaranteed "all criminals" the same "counsel, as their prosecutors are or shall be entitled to." N.J. CONST. of 1776, art. XVI.

Thereafter, six states adopted right-to-counsel provisions in two successive waves, the first immediately following the Revolutionary War and the second following the Civil War. New Hampshire, Delaware, and Pennsylvania added a right-to-counsel provision in 1784, 1792, and 1790, respectively. DEL. CONST. of 1792, art. I, § *7;* N.H. CONST. of 1784, pt. I, art. XV; PA. CONST. of 1790, art. IX, § 9. These states followed the model of Maryland and Massachusetts, lumping the right to counsel with other procedural protections, most of which echoed rights guaranteed in the newly established federal Constitution. *See* U.S. CONST. amend. VI; DEL. CONST. of 1792, art. I, § *7;* N.H. CONST. of 1784, pt. I, art. XV; PA. CONST. of 1790, art. IX, § 9. Connecticut and Rhode Island adopted right-to-counsel provisions in their first state constitutions, enacted to replace the charters under which they had operated. CONN. CONST. of 1818, art. I, § 9; R.I. CONST. of 1842, art. I, § 10. Georgia, North Carolina, and South Carolina adopted similar provisions during Reconstruction. GA. CONST. of 1798, art. III, § 8; N.C. CONST. of 1868, art. I, § 11; S.C. CONST. of 1868, art. I, § 13. Although Virginia adopted a similar provision that protected many of these same procedural rights in 1864, no mention then (or now) is made in the text of a right to counsel. *See* VA. CONST. of 1971, art. I, § 8 ("That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.") (current as of 2012); VA. CONST. of 1864, art. I, § 8 ("That, in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.").

In sum, of the thirteen colonies originally forming the United States, four (Maryland, Massachusetts, New Jersey, and New York) adopted a right to counsel with their first independent governments, eight had added the right by the end of the nineteenth century, and one (Virginia) did not, and does not, have a guarantee of a right to counsel in its state constitution. *See* 50 STATE STATUTORY SURVEYS: CRIMINAL LAWS: CRIMINAL PROCEDURE: RIGHT TO APPOINTED COUNSEL (2011) 0030 SURVEYS 22 (Westlaw).

132. U.S. CONST. art. III, § 3, cl. 1.

Rights of the public are also specified. Remedy clauses were often in tandem with the words, "all courts shall be open."[133] Those words, found in the Delaware Constitution of 1792,[134] were reproduced in several other states,[135] and as of 2012, twenty-seven state constitutions require that "all courts shall be open" or that justice shall be "openly" administered,[136] while a few others call for "public" courts,[137] prohibit "secret" proceedings,[138] or otherwise protect attendance through jury trial (guaranteed in all the original states' constitutions)[139] and, in two instances, coupled with protection of the press.[140]

Amendments to constitutions in the late twentieth century identified another set of entitled participants—"victims"—who gained express status in the texts

133. 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, § XXIII ("All courts shall be open, and justice shall be impartially administered, without corruption or unnecessary delay; all their officers shall be paid an adequate, but moderate, compensation for their services; 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.").

134. DEL. CONST. of 1792, art. I, § 9. But how much access this provision protects has been debated, and Delaware courts have declined to provide access to various records, such as those related to divorces or jury lists, under its provisions. *See* Gannet Co. v. State, 571 A.2d 735, 736–37 (Del. 1989); C v. C, 320 A.2d 717, 728 (Del. 1974); *see also In re* Trust for Gore, No. 1165-VCN, 2010 WL 5644675, at *3 (Del. Ch. Jan. 6, 2011).

135. *See infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies, and Appendix 2, State Constitutions without Express Remedy Clauses and with Due Process or Open/Public Courts Provisions.

136. 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 6-91 to 6-92 app. 6 (4th ed. 2006). The number included varies depending on which language is in focus. *See, e.g.*, Koch, *supra* note 106, at 435 & n.599 (identifying twenty-two states with such provisions).

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

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

139. *See, e.g.*, N.C. CONST. of 1776, pt. 1, art. 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."); *see also infra* Appendix 3, State Constitutions: Criminal Defendants' Rights in the Thirteen Original States.

140. *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 forever inviolably preserved."). The original Declarations of Rights of Delaware, Maryland, and Virginia all included protection of the liberty of the press, DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES of 1776, § 23; MD. CONST. of 1776, pt. 1, art. XXXVIII; VA. CONST. of 1776, § 12, and similar provisions remain in place today, DEL. CONST. of 1897, art. I, § 5 (current in 2012); MD. CONST. of 1867, Declaration of Rights, art. 40 (current in 2012); VA. CONST. of 1971, pt. 1, art. 40; VA. CONST. art. I, § 12 (current in 2012).

of thirty-three state constitutions.[141] For example, the 1974 Louisiana Constitution provides that any "person who is a victim of crime shall be treated with fairness, dignity, and respect" and given rights to information and participation.[142] More generally, such provisions accord crime victims with rights of notification of hearings and trial dates, of presence and an opportunity to be heard at certain proceedings, of submission of written victim impact statements at sentencing, and of restitution.[143] Statutes in many jurisdictions

141. *See* ALA. CONST. art. I, § 6.01 (added in 1994, current in 2012); ALASKA CONST. art. I, § 24 (added in 1994, current in 2012); ARIZ. CONST. art. II, § 2.1 (added in 1990, current in 2012); CAL. CONST. art. I, § 28 (added in 1982, amended in 2008, current in 2012); COLO. CONST. art. II, § 16a (added in 1992, current in 2012); CONN. CONST. art. XXIX (added in 1996, current in 2012); FLA. CONST. art. I, § 16(b) (added in 1988, current in 2012); IDAHO CONST. art. I, § 22 (added in 1994, current in 2012); ILL. CONST. art. I, § 8.1 (added in 1992, current in 2012); IND. CONST. art. I, § 13(b) (added in 1996, current in 2012); KAN. CONST. art. XV, § 15 (added in 1992, current in 2012); LA. CONST. art. I, § 25 (added in 1998, current in 2012); MD., pt. 1, art. XLVII (added in 1994, current in 2012); MICH. CONST. art. I, § 24 (added in 1988, current in 2012); MISS. CONST. art. III, § 26-A (added in 1998, current in 2012); MO. CONST. art. I, § 32 (added in 1992, current in 2012); MONT. CONST. art. II, § 28 (added in 1998, current in 2012); NEB. CONST. art. I, § 28 (added in 1996, current in 2012); NEV. CONST. art. I, § 8 (added in 1996, current in 2012); N.J. CONST. art. I, para. 22 (added in 1991, current in 2012); N.M. CONST. art. II, § 24 (added in 1992, current in 2012); N.C. CONST. art. I, § 37 (added in 1995, current in 2012); OHIO CONST. art. I, § 10a (added in 1994, current in 2012); OKLA. CONST. art. II, § 34 (added in 1996, current in 2012); OR. CONST. art. I, §§ 42, 43 (the original version of § 42 was ratified in 1996, but was subsequently declared unconstitutional by the Oregon Supreme Court in *Armatta v. Kitzhaber*, 959 P.2d 49, 71–72 (Or. 1998); the current version of § 42 was ratified in 1999 and § 43 was added in 2008); R.I. CONST. art. I, § 23 (added in 1986, current in 2012); S.C. CONST. art. I, § 24 (added in 1998, current in 2012); TENN. CONST. art. I, § 35 (added in 1998, current in 2012); TEX. CONST. art. I, § 30 (added in 1989, current in 2012); UTAH CONST. art. I, § 28 (added in 1994, current in 2012); VA. CONST. art. I, §8-A (added in 1996, current in 2012); WASH. CONST. art. I, § 35 (added in 1989, current in 2012); WIS. CONST. art. I, § 9m (added in 1993, current in 2012).

142. LA. CONST. art I, § 25. This provision was added in 1997, and is current in 2012.

143. *See, e.g.*, ILL. CONST. art. I, § 8.1; LA. CONST. art I, § 25.

implement these rights,[144] and a few reported cases reflect victims' enforcement of such protections.[145]

In sum, courts are not only constitutionally-stipulated branches of government; they are also regulated environments that endow various participants with entitlements that necessitate some government funding. Furthermore, this skim of constitutional provisions is but a small fraction of the legislative and court-made rules that structure interactions among participants inside courthouses and that invite disputants to bring claims to courthouses. Twentieth-century egalitarian norms come on top of these pre-existing commitments to and reliance on courts. Below, I examine strands of federal constitutional law that delineated new duties on courts to subsidize litigants and take criminal defendants' poverty into account, including by reshaping penalties imposing monetary fines. I then turn to state court analyses to sketch occasions on which judges insisted on funding for their activities and, at times, held unlawful legislative limits on access rights.

144. For example, several jurisdictions authorize victims to participate in criminal proceedings. *See, e.g.*, 18 U.S.C. § 3711(d)(3) (2006) ("The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus."); *see also* CAL. CONST. art. I, § 28; TEX. CONST. art. I, § 30; 18 U.S.C. § 3771(a)–(b)(1); ARIZ. REV. STAT. ANN. § 13-4437 (2010); FLA. STAT. §§ 960.001(1)(a)(5), 960.001(7) (2011); IND. CODE § 35-40-2-1 (Supp. 2002); UTAH CODE ANN. § 77-38-11(1) (LexisNexis 2008). *See generally* ROBERT C. DAVIS, JAMES M. ANDERSON, JULIE WHITMAN & SUSAN HOWLEY, SECURING RIGHTS FOR VICTIMS: A PROCESS EVALUATION OF THE NATIONAL CRIME VICTIM LAW INSTITUTE'S VICTIMS' RIGHTS CLINICS 52–71 (2009). Many states, including Idaho, Kansas, and South Carolina, specify that crime victims' provisions do not permit reopening of final convictions nor provide causes of action. *See, e.g.*, IDAHO CONST. art. I, § 22; KAN. CONST. art. XV, § 15(b)–(c); S.C. CONST. art I, § 24(B)–(C).

145. *See, e.g.*, State *ex rel.* Hance v. Ariz. Bd. of Pardons & Paroles, 875 P.2d 824 (Ariz. 1993) (setting aside a parole release date for an offender because state officials had failed to notify the victim of rights to request notice and be present at the hearing); People v. Stringham, 253 Cal. Rptr. 484 (Cal. Ct. App. 1988) (upholding a trial judge's decision to set aside a plea bargain to which the victim objected); Myers v. Daley, 521 N.E.2d 98 (Ill. App. Ct. 1987) (awarding costs to a crime victim who brought suit to compel a prosecutor to provide information). *But see* State v. Means, 926 A.2d 328 (N.J. 2007) (holding that failure to notify the victim is insufficient grounds to vacate a plea agreement). California's provision, added by a ballot initiative in 2008, Proposition 9, authorizes "[a] victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, [to] enforce the rights enumerated [in the constitutional provision] . . . in any trial or appellate court with jurisdiction over the case as a matter of right," but explicitly bars a cause of action for damages against the state. CAL. CONST. art. I, § 28(c). Likewise, most states that have victims' rights provisions also preclude civil damage actions for alleged violations. KAN. CONST. art. XV, § 15(b). Arizona is an exception. *See* ARIZ. REV. STAT. ANN. § 13-4437(B) (2010).

III. WHOSE RIGHT TO WHAT REMEDIES? DEMOCRATIC EGALITARIANISM, JUDICIAL REVIEW, AND THE SUBSTANCE OF PROCEDURAL DUE PROCESS

A. Subsidizing Litigants in Response to Economic and Information Asymmetries

A lack of resources, both individual and institutional, to pursue and to entertain claims of right is not a new problem. Requests of fees for services—by judges, clerks, and sheriffs—have a long tradition.[146] Historians trace back some form of modifications for the poor to Henry I of England who, in the twelfth century, permitted impoverished litigants to "pledge their faith" (rather than immediately to pay) the required court fees.[147] Yet, in the eighteenth century, many fees were still imposed, rendering "the value of proceedings *in forma pauperis* . . . little or nothing when the [provisions] were repealed in 1883."[148]

In 1793, Jeremy Bentham (who had a host of complaints against the common law and its judges and lawyers[149]) inveighed against a "law tax," which he termed a "tax upon distress."[150] A part of Bentham's proposed solution was

146. *See* Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U. L. REV. 21, 27 (1967). Judges received salaries as well as fees, and when fee payments for judges were abolished in 1826, salaries were increased. *Id.* In the 1920s, the U.S. Supreme Court held that judges could not, as a matter of due process, receive funds from fines levied. *See* Tumey v. Ohio, 273 U.S. 510, 514–15, 531–32 (1927). The costs of running for judgeships raise related problems. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

147. John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 361 (1923). In 1495, during the reign of Henry VII, England enacted an *in forma pauperis* act. *Id.* at 363, 370. Its application was, however, highly discretionary. *Id.* at 374.

148. *Id.* at 377.

149. 6 BENTHAM, *supra* note 10, at 22–24.

150. 2 JEREMY BENTHAM, *A Protest Against Law-Taxes: Showing the Peculiar Mischievousness of All Such Impositions as Add to the Expense of Appeal to Justice*, *in* THE WORKS OF JEREMY BENTHAM 573, 582 (John Bowring ed., Edinburgh, William Tait 1843) [hereinafter Bentham, *A Protest Against Law-Taxes*]. Bentham argued that what he termed "factitious" barriers to access through fees and taxes were not required, for "natural checks" included the "pain of disappointment" of losing, the time entailed, and the inevitable other expenses of pursuit—rendering extra assessments both an over-deterrent of those who could not afford them and an under-deterrent for those who could. *Id.* at 578. Bentham has not been the only one to call for abolition of initiation fees in either England or the United States. A series of reports in England followed in Bentham's wake, debating whether courts should be self-supporting through user fees or funded by taxpayers. *See* Thomas, *The Maintenance of Local Justice*, *supra* note 41.

In the United States, the fee issue gained scrutiny, as discussed *infra*, in the 1960s. Fee abolition or reduction proposals can be found in AM. BAR FOUND., PUBLIC PROVISION FOR COSTS AND EXPENSES OF CIVIL LITIGATION 4 (1966) [hereinafter ABF PUBLIC PROVISION 1966]; Thomas E. Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968); Michelman, *Part I*, *supra* note 93; Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights–Part II*, 1974 DUKE L.J. 527 [hereinafter Michelman, *Part II*].

to create an "Equal Justice Fund" that would be supported by "the fines imposed on wrongdoers" as well as by government and by charities.[151] Bentham wanted to subsidize "not only the costs of legal assistance but also the costs of transporting witnesses" and of producing other evidence.[152] Moreover, to lower the expenses of litigation, Bentham suggested that a judge be available "every hour on every day of the year," and that courts be put on a "budget" to produce one-day trials and immediate decisions.[153]

In the United States, many jurisdictions made provisions to proceed "in forma pauperis." In New York, for example, a statute of 1788 gave the chancellor discretion to waive fees for "every . . . poor person."[154] Further, sometimes jurisdictions insisted that lawyers provide free services, for example to capital defendants.[155] During the nineteenth century, state courts made accommodations for contingency fees, again as a way for some litigants to get into court.[156]

The challenges of impoverished litigants came to the fore in the U.S. courts during the twentieth century, as the ranks of rights-holders swelled. Legislatures—creating civil causes of action and criminal sanctions—were central to the upsurge in poor litigants. On the civil side, state and federal legislatures crafted new statutory rights, ranging from consumer protection to

When Bentham wrote, in 1795, fees attendant to courts were substantial. He reported that to complete an action at law required the plaintiff to spend at least £24 and that the average plaintiff costs for civil suits was £48, which he described as three and six times (respectively) the average annual expenditure of an Englishman or woman at the time. *See* Bentham, *A Protest Against Law-Taxes*, *supra*, at 575 n.*. In American 2005 dollars, those figures would be approximately $2,165 and $4,330. Conversion computed using the calculator available at *Currency Converter*, NAT'L ARCHIVES, http://www.nationalarchives.gov.uk/currency/default0. asp#mid (last visited Aug. 27, 2012), and by multiplying by the dollar/euro exchange rate.

151. *See* PHILIP SCHOFIELD, UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM 310 (2006); *see also* ROSEN, *supra* note 9, at 154.

152. ROSEN, *supra* note 9, at 153–54.

153. Thomas P. Peardon, *Bentham's Ideal Republic*, 17 CANADIAN J. ECON. & POL. SCI. 184, 196 (1951). Bentham's goals included enabling all persons, on foot, to be able to reach a local judicial officer and return home, within a day. ROSEN, *supra* note 9, at 149.

154. Act of Feb. 27, 1788, ch. 46, 1788 N.Y. Laws 99.

155. *See, e.g.*, Rogers, *supra* note 131, at 440; *see also* Maguire, *supra* note 147, at 384–89. *See generally* James A. Brundage, *Legal Aid for the Poor and the Professionalization of Law in the Middle Ages*, 9 J. LEGAL HIST. 169 (1988) (considering the rise of legal aid in the Middle Ages and the role the Christian Church played in requiring such aid).

156. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998). Karsten identified the method of judicial selection as one source of the law that enabled plaintiffs access to court. *See id.* at 247–48. State adoption of judicial elections produced judges, he argued, that had "moral and religious perspectives" supportive of claimants. *Id.* Therefore, those jurists sanctioned the use of contingency fee contracts that enabled lawyers to advance filing, jury, and other fees and hence subsidize their clients' access.

the environment, from family life to employment. (Court-based constitutional rights are a smaller slice of the civil docket.) On the criminal side, the dramatic rise in prosecutions in the last third of the twentieth century produced a vast number of defendants, almost all of whom were indigent.

Legal rules shifted in an effort to accommodate the surge in claimants hailing from the lower and middle income ranges. The contingency fee system provided no relief for civil litigants in family disputes or with modest economic claims. Contingent fees were (and are) prohibited in criminal cases. Similarly, legal aid societies served but a small subset of claimants.[157] Some relief came by way of channeling claimants to small claims courts and workers' compensation regimes that charged low or no fees.[158]

Yet access to courts remained an issue that generated questions about whether the state should waive fees, provide subsidies for one side of a case faced with a powerful opponent (typically the state), require fee-shifting from the loser to the winner, and find other means to support individuals not otherwise able to bring cases.[159] Knowing what litigation cost was (and is) itself a challenge, and in the 1960s, the American Bar Foundation surveyed 450 state court judges to learn more about "official charges" imposed by courts, requisite "auxiliary charges" such as fees for service, and lawyers' fees and costs.[160] That study concluded that court costs and fees were both "substantial" and in some instances constituted a "substantial deterrent" to poor individuals and proposed a model statute as well as consideration of abolition of fees.[161] Legislative initiatives—such as the creation of the Legal Services Corporation in 1974[162]—

157. *See* REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES (1919); *see also* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11 (2003).

158. Silverstein, *supra* note 146, at 23–24, 32–33; *see also* George E. Brand, *The Impact of the Increased Cost of Litigation*, 35 J. AM. JUDICATURE SOC'Y 102 (1951); *Legislation: Small Claims Courts*, 34 COLUM. L. REV. 932 (1934).

159. *See, e.g.*, Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717 (2010).

160. *See* ABF PUBLIC PROVISION 1966, *supra* note 150, at 2. For example, a filing fee in 1966 of twelve dollars would, in 2011 dollars, cost $83.20. *See id.*; *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1774 to Present*, MEASURINGWORTH.COM, http://www.measuringworth.com/uscompare/ (last visited Aug. 28, 2012) (converting 1966 fee to 2011 value). And, as of 2011, the federal government imposed a fee of $350 for the filing of a civil complaint. *See* 28 U.S.C. § 1914 (2006). For information on the states, see NAT'L CTR. FOR STATE COURTS, CIVIL FILING FEES IN STATE TRIAL COURTS, APRIL 2012 (2012), *available at* http://www.ncsc.org/information-and-resources/budget-resource-center/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Civil%20Filing%20Fees%20April%202012.ashx.

161. *See* ABF PUBLIC PROVISION 1966, *supra* note 150, at 2–6.

162. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996–2996*l* (2006).

intersected with explorations of constitutional claims that the U.S. Constitution demanded opening up courts. During the 1960s and 1970s, commentators and litigators focused on federal court litigation to enshrine constitutional rights of access and to mitigate the problems of poverty.[163] State right-to-remedy clauses were not much discussed; instead, rights were extrapolated from the Sixth Amendment,[164] the Petitioning Clause,[165] and the Due Process[166] and Equal Protection Clauses.[167] The factors on which claims were advanced included the stakes of a court's decision, asymmetrical access of disputants to resources or to information, and the needs of society to provide fair and equal treatment to litigants who were similarly situated, save for their resources.

In a series of decisions, the U.S. Supreme Court issued judgments requiring fee waivers or subsidized lawyers or experts for specified populations, often identified by a mix of means-testing and the subject matter in dispute.[168] The doctrines that resulted were hailed by some commentators as central to the functioning of courts in egalitarian constitutional democracies,[169] and criticized by others as illicit judicial extrapolation of substantive due process rights.[170]

A classic example is the 1963 decision of *Gideon v. Wainwright*,[171] which read the Sixth Amendment "right to counsel" to require that states provide lawyers for indigent criminal defendants facing prosecutors seeking felony convictions.[172] Federal constitutional law also relied on the Due Process Clause

163. *See, e.g.*, Lester Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595, 597, 624–28 (1973) (advocating that the bar be seen as a public utility and so regulated); Michelman, *Part I*, *supra* note 93.

164. U.S. CONST. amend. VI.

165. U.S. CONST. amend. I.

166. U.S. CONST. amends. V, XIV, § 1.

167. U.S. CONST. amend. XIV, § 1.

168. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (requiring an indigent defendant who demonstrates "his sanity at the time of the offense is to be a significant factor at trial" be provided a competent psychiatrist); Gideon v. Wainwright, 372 U.S. 335 (1963) (mandating counsel be provided for indigent criminal defendants).

169. *See, e.g.*, JONATHAN LIPPMAN, STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 4–5 (2011), *available at* http://www.courts.state.ny.us/CTAPPS/news/SOJ-2011.pdf [hereinafter LIPPMAN, 2011 STATE OF THE JUDICIARY].

170. *See generally* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

171. Gideon v. Wainwright, 372 U.S. 335 (1963).

172. *Id.* at 344–45. The development of criminal defendants' rights (to witnesses, to see the indictment, as well as to counsel) and their relationship to private and state prosecutorial powers in England, are sketched in HELLER, *supra* note 131, at 3–12. The provisions for counsel in capital cases in Massachusetts traced to 1780, and the obligation initially rested with the state, and then moved "to the bar, to the court, and, finally, to the defendant." *See* Rogers, *supra* note 131, at 441, 465. Rogers attributed the decline in a high standard of such lawyering to the "democratization of the procedure for appointing counsel in 1911 and the Supreme Judicial Court's insistence from 1923" on that, instead of high quality, a defendant had to prove ineffective assistance. *Id.*

as the basis of constitutional obligations to give indigent criminal defendants other resources, such as experts and translators necessary to mount a defense.[173] That idea is not completely confined to the criminal context. Indigent men defending lawsuits by private parties alleging that they had fathered children gained the constitutional right to state-funded testing to rebut that claim.[174] As Chief Justice Burger explained for a unanimous Court in 1981, the "requirement of 'fundamental fairness' expressed by the Due Process Clause" would not otherwise be "satisfied."[175]

In addition to income inequalities, concerns about power asymmetries have driven efforts to rectify differing abilities to obtain information. Courts have

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In the federal system, Section 35 of the First Judiciary Act of 1789 permitted litigants to "plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts . . . ." Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92. In the Act of April 30, 1790, Congress provided that "every person so accused and indicted for [treason or other capital crime], shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall . . . immediately upon his request assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours . . . ." Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118. This statute was modeled after the English Treason Act of 1695, and a Massachusetts statute of 1777. The federal statute expanded the scope from treason to all capital crimes, and incorporated the provision for appointed counsel, albeit individuals who were generally not compensated.

The current federal statute attempts to ensure quality through requiring the appointment of two lawyers. *See* 18 U.S.C. § 3005 (2006) ("Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours.").

Between 1791 and 1938, when the Court decided *Johnson v. Zerbst*, 304 U.S. 458 (1938), "the right conferred on the accused by the Sixth Amendment . . . was generally understood as meaning" an entitlement to retain counsel in the federal courts and not the right to appointment of counsel for those unable to afford a lawyer. *See* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955); Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. Q. REV. 1, 7–8 (1944). Thereafter, judges had the "duty" to inquire and to appoint counsel for indigent defendants in federal courts. Holtzoff, *supra*, at 9. In 1944, the federal criminal rules codified the practice. *Id.* at 16–19 (discussing FED. R. CRIM. P. 46, Assignment of Counsel, discussing the burden of volunteering on lawyers, and advocating for the creation of a public defender office). Again, compensation was a distinct question, and appointed lawyers were not guaranteed payment until the enactment in 1964 of the Criminal Justice Act. *See* David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 751 n.69 (1980).

173. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 83 (1985). *But see Dist. Attorney's Office v. Osborne,* 129 S. Ct. 2308, 2319–20, 2323 (2009) (holding that due process did not oblige Alaska to provide a DNA test to a convicted defendant alleging innocence).

174. Little v. Streater, 452 U.S. 1 (1981).

175. *Id.* at 16. (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981)); *see also id.* at 9 (describing the "constitutional duty" a man had to support a child he fathered).

concluded that governments must, as a matter of due process, provide exculpatory, material information to all criminal defendants—whether rich or poor.[176] The underlying rationale is courts' dependency on litigants to generate knowledge sufficient to legitimate judgment. In the words of the 1963 decision of *Brady v. Maryland*, mandating that exchange: "Society wins not only when the guilty are convicted but when criminal trials are fair . . . ."[177] That lack of access to information may also undermine the legitimacy of civil judgments has prompted the development of a host of sub-constitutional discovery rights in both civil and criminal cases.

Asymmetrical power and high stakes have also been the predicate for civil litigants in certain family conflicts to be accorded equipage rights based on the Due Process Clause, sometimes interacting with equal protection analyses. In 1981, the U.S. Supreme Court considered the right to counsel in the context of a person faced with termination of her right to be a child's parent.[178] The Court fashioned a presumption against counsel in civil cases; while a person facing the loss of that status had no per se right to counsel, if a sufficient showing was made in an individual case, due process required that counsel be provided.[179] Rights to state-paid transcripts, if needed for appeals of terminations of parental rights, followed in 1996.[180] Moreover, state courts have relied on their own constitutions to find counsel-rights in other circumstances, such as child custody determinations and civil contempt detentions.[181]

Another line of cases focused on the constitutionality of criminal fines that could result in individuals spending longer periods of time in jail for failure to pay.[182] In *Williams v. Illinois*, Chief Justice Warren Burger wrote for the Court that the state could not extend a person's time of incarceration "beyond the maximum duration fixed by statute" based solely on the fact that a defendant was "financially unable to pay a fine."[183] Thereafter, the Court concluded that

176. Brady v. Maryland, 373 U.S. 83 (1963). Enforcement is, however, limited. *See* Connick v. Thompson, 131 S. Ct. 1350 (2011).

177. *Brady*, 373 U.S. at 87.

178. *Lassiter*, 452 U.S. at 20–21.

179. *Id.* at 31–33. *But see* Turner v. Rogers, 131 S. Ct. 2507 (2011), discussed *infra* notes 208–09 and accompanying text.

180. *See* M. L. B. v. S. L. J., 519 U.S. 102 (1996).

181. For cases holding that counsel is required in child custody determinations, see, for example, *In re* K.L.J., 813 P.2d 276 (Alaska 1991); *In re Jay R.*, 197 Cal. Rptr. 672 (Cal. Ct. App. 1983); *O.A.H. v. R.L.A.*, 712 So. 2d 4 (Fla. Dist. Ct. App. 1998); and *In re application to adopt H.B.S.C.*, 12 P.3d 916 (Kan. Ct. App. 2000). For cases holding that counsel is required in certain civil contempt/detention proceedings, see, for example, *Parcus v. Parcus*, 615 So. 2d 75 (Ala. Civ. App. 1992); *Black v. Div. of Child Support Enforcement*, 686 A.2d 164 (Del. 1996); and *May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997).

182. *See* Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 32–33 (1926); *see also, e.g.*, Bearden v. Georgia, 461 U.S. 660 (1983); Williams v. Illinois, 399 U.S. 235 (1970).

183. *Williams*, 399 U.S. at 243.

once a state decided that an "appropriate and adequate penalty" for a crime was a fine or restitution, it could not "imprison a person solely because" of inability to pay.[184] Rather, imprisonment can only take place after determining a willful refusal to pay and that "alternative measures are not adequate to meet the State's interest in punishment and deterrence."[185]

The variegated constitutional case law documents both the development of aspirations to provide equal treatment for disparately-situated disputants and the difficulty of doing so.[186] The results are eclectic and uneven, including a few constitutionally-mandated subsidies for criminal and civil litigation, and a host of legislative efforts to implement those obligations as well as, in some instances, to provide more.[187] A widespread consensus is that states have yet to fund *Gideon*'s mandate to provide adequate legal services for criminal defendants.[188] Further, states have begun to impose additional fees, fines, and special assessments (as states seek to augment limited budgets) that have resulted in a resurgence of "debtors' prisons," populated by individuals held in contempt for failure to comply with court payment orders.[189]

Asymmetrical access across sets of litigants reveals another quandary for courts' legitimacy and rights to remedies. The differential resources and capacities of similarly- situated litigants can result in "like" cases not being treated "alike." Constitutional adjudication on intra-litigant equity initially focused on criminal defendants. For example, in 1956, the Court concluded that unfairness resulted if some defendants could afford to pay for transcripts for appeals and for lawyers while others could not, or if some could afford appellate

184. *Bearden*, 461 U.S. at 667–68.

185. *Id.* at 672.

186. *See generally* THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka eds., 2010); Geoffrey Davies, *Can Dispute Resolution Be Made Generally Available?*, 12 OTAGO L. REV. 305 (2010); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010).

187. *See, e.g.*, Criminal Justice Act, 18 U.S.C. § 3006A (2006); Legal Services Corporation Act, 42 U.S.C. § 2996 (2006); Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE tit. 8, ch. 2.1 (West 2012) (creating a pilot program for poor litigants to obtain counsel).

188. AM. BAR ASSOC., *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 8 (2004) ("Throughout the [2003 Standing Committee on Legal Aid and Indigent Defendants] hearings, witnesses from each of the twenty-two states examined reported grave inadequacies in the available funds and resources for indigent defense."), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

189. *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507 (2011), discussed *infra* notes 208–09; *see also* AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 5 (2010); ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4–5 (2010).

counsel and others could not.[190] In the 1970s, in *Bounds v. Smith*, the Court recognized that prisoners' rights to "petition for redress" required prisons to provide access to lawyers or resources such as law libraries.[191] In addition, various forms of aggregation—from class actions to statutory regimes such as the Fair Labor Standards Act—enable groups of litigants to share the costs of pursuing remedies and to obtain relief across a set of similarly-situated individuals.[192]

Rules and statutes permitting aggregation reflect efforts to deal with those hoping to get into court, rather than those (such as Clarence Gideon) who have been commanded to appear. While a "hodge-podge" of state statutes sometimes permitted filing "*in forma pauperis*" and hence, without prepaying fees, many limitations existed.[193] In response, some states concluded that courts had the inherent power to waive fees. In addition, the U.S. Supreme Court identified a constitutional obligation, in a small slice of cases, to waive fees for those too poor to pay.[194] The central federal ruling, *Boddie v. Connecticut*, responded to

190. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). In 1963, the Court held that, although the Constitution did not require appeal as a matter of fair process, states had to subsidize appellate lawyers for indigent criminal defendants if appeals were generally available. Douglas v. California, 372 U.S. 353, 356–57 (1963) (announced the same day as *Gideon*).

191. Bounds v. Smith, 430 U.S. 817 (1977). As discussed *infra* notes 203–05 and accompanying text, *Lewis v. Casey*, 518 U.S. 343 (1996), limited the application of *Bounds*, which had required prison officials to permit either access to legal assistance or law libraries for prisoners. Moreover, Congress can impose significant restrictions on access opportunities. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

192. Many statutory regimes reflect efforts to make decisions fair across a set of individuals proceeding single file. Sentencing guidelines are one such example, and the implementation reflects the complexity of determining when persons are enough alike to be treated the same. Congress and the courts have struggled with mandates that judges punish similarly those persons whose crimes and backgrounds are comparable and justify the differentiations ("departures") made. *See* 18 U.S.C. § 3553 (2006); United States v. Booker, 543 U.S. 220, 233–34 (2005); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. K (2010). *See generally* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and Lawyers' Powers*, 79 GEO. WASH. L. REV. 628 (2011).

193. Maguire, *supra* note 147, at 385–86. As he noted, in 1923, the federal statute applied only to "citizens" with an additional provision for "*all* seaman, irrespective of nationality." *Id.* at 386. As of the 1960s, the federal government and twenty-one states had "provisions for poor persons to file suit without payment of fees in courts of general jurisdiction." *See* ABF PUBLIC PROVISION 1966, *supra* note 150, at 3. "The report characterized the provisions as 'fragmentary, inadequate, and inconsistent from state to state.'" *Id.*

194. *See generally* Michelman, *Part I*, *supra* note 93 (discussing the Supreme Court's access fee decisions in *Boddie v. Connecticut*, *United States v. Kras*, and *Ortwein v. Schwab*); Michelman, *Part II*, *supra* note 150. Michelman argued that all exclusionary filing fees were unconstitutional burdens on what he termed "effective" access rights to courts. Michelman, *Part I*, *supra* note 93, at 1161–68. The parallels between effective access to courts and to voting that he drew (*see*

a class of "welfare recipients residing in the State of Connecticut" who argued that state-imposed fees of sixty dollars for filing and service, coupled with no mechanism to waive that requirement, precluded them from filing for divorce.[195] In 1971, Justice Harlan wrote for the Court that the combination of "the basic position of the marriage relationship in this society's hierarchy of values and the . . . state monopolization" of lawful dissolution resulted in a due process obligation by the state to provide access.[196]

The concurring opinions filed in *Boddie* illuminate the constitutional complexities of elaborating what forms of access are compelled, and the subsequent retreat from obligations of prisons to provide legal assistance delineates the resistance that some justices have expressed to affirmative rights of assistance. In *Boddie*, Justice Douglas argued that the majority's reliance on the Due Process Clause was unwise, as too "subjective."[197] Instead, he read the Equal Protection Clause's prohibition of "invidious discrimination . . . based on . . . *poverty*" to require subsidizing access.[198] Justice Brennan agreed that *Boddie* presented a "classic problem of equal protection"[199] on top of due process; the state's legal monopoly required access for all attempting to "vindicate any . . . right arising under federal or state law."[200] (Two years later

Michelman, *Part II*, *supra* note 150, at 534–40) were evident in two decisions in 2011, when the same five-person majority rejected claims that economic barriers to litigation and to politics required regulation. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011). In *Arizona Free Enterprise*, the Court held that states lacked "a compelling state interest in 'leveling the playing field'" and that a public election financing law violated free speech rights. *Id.* at 2825–26.

195. Boddie v. Connecticut, 401 U.S. 371 (1971). Unlike the practice challenged in Connecticut in *Boddie*, many jurisdictions had provisions for fee waivers, such that individuals could file *in forma pauperis* ("IFP"). The federal statute, first enacted in 1892, applied (as noted above) only to citizens. *See* Act of July 20, 1892, ch. 209, 27 Stat. 252. The standards for permitting such filing, in the context of appeals, was the topic of *Coppedge v. United States*, 369 U.S. 438 (1962). Chief Justice Warren required that leave to appeal be granted without unduly exacting standards that would undermine "equality of consideration for all litigants." *Id.* at 447. Subsequently, the Court authorized screening to assess facts under congressional revisions of the "IFP" statute that permits more dismissals based on a review of the papers. *See* 28 U.S.C. § 1915(d), (e)(2) (2006); Neitzke v. Williams, 490 U.S. 319 (1989).

196. *Boddie*, 401 U.S. at 374. See *infra* notes 262–66 and accompanying text for discussion of fee waivers under state law. In May of 2012, a trial judge in British Columbia issued a parallel decision, holding unconstitutional the provincial government's failure to provide fee waivers in a system, imposed in 1998, of much higher fees—including $500 a day for trial days after the third day, and $800 a day for trial days after the tenth. *See* Vilardell v. Dunham, 2012 BCSC 748 (Can.).

197. *Boddie*, 401 U.S. at 384–85. (Douglas, J., concurring) (raising the specter of *Lochner v. New York*, 198 U.S. 45 (1905)).

198. *Id.* at 386.

199. *Id.*at 388 (Brennan, J., concurring).

200. *Id.* at 387. The sole dissenter, Justice Black, thought the Court had invaded state prerogatives. *Id.* at 393–94 (Black, J., dissenting). Yet, in dissenting from the denial of certiorari in *Meltzer v. C. Buck LeCraw & Co.*, 166 S.E.2d 88 (Ga. 1969), Justice Black argued that the

in the context of equalizing access to quality schooling for children, the Court rejected poverty as a suspect classification for purposes of the federal equal protection guarantee.[201])

The breadth of Brennan's approach, coupled with limited resources, has not garnered wide judicial support, even in the case of other poor civil litigants seeking fee waivers.[202] Furthermore, in 1996, in *Lewis v. Casey*, the Court rejected imposing expectations on prison officials to assist prisoners in accessing courts and described instead a right to be free from "officials . . . actively interfering with inmates' attempts to prepare legal documents."[203] Justice Thomas's concurrence went further, questioning the basis of a federal constitutional right of access and of any affirmative obligations imposed ("our transcript and fee cases did *not* establish a freestanding right of access to the courts, meaningful or otherwise,"[204] and the states had no obligations "to finance and support prisoner litigation."[205]). Furthermore, in 2002, the Court (with Justice Souter writing the opinion) described the prior law as recognizing access rights only as "ancillary to the underlying claim" rather than as freestanding.[206]

Thus, despite several calls for abolishing fees or mandating waivers,[207] as well as for providing other forms of equipage (such as lawyers) for impoverished civil litigants, the U.S. Supreme Court has to date identified only a narrow band (largely in family conflicts) eligible for constitutional entitlements to government subsidies to use courts. Moreover, by 2011, in *Turner v. Rogers*, the Supreme Court concluded that the Due Process Clause did not require a lawyer for an indigent person facing detention (in that instance for a year) as a civil contemnor for failure to pay child support to a private opponent.[208] The Court reserved the question of right to counsel if the opponent were the state.[209]

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rationale of *Boddie* required that no person be denied access "because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney." Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 595–56 (1971) (Black, J., dissenting).

201. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18, 28 (1973).

202. *See, e.g.*, United States v. Kras, 409 U.S. 434 (1973) (rejecting a constitutional challenge to the lack of fee waivers for bankruptcy petitions); Ortwein v. Schwab, 410 U.S. 656 (1973) (rejecting a constitutional challenge to an appellate filing fee of twenty-five dollars applied to indigents seeking to appeal an adverse welfare decisions).

203. Lewis v. Casey, 518 U.S. 343, 350 (1996).

204. *Id.* at 365, 369 (Thomas, J., concurring).

205. *Id.* at 384–85 (Thomas, J., concurring).

206. Christopher v. Harbury, 536 U.S. 403, 415 (2002). The majority put the prison-litigation line of cases into a set of "systemic official action" that frustrated access, and the fee and transcript cases as also putting up impediments to claims that otherwise would have been brought. *Id.* at 413–14.

207. *See, e.g.*, Michelman, *Part I*, *supra* note 93, at 1165; Michelman, *Part II*, *supra* note 150, at 530–31; Willging, *supra* note 150, at 300–02.

208. Turner v. Rogers, 131 S. Ct. 2507 (2011).

209. *Id.* at 2520.

In the same term, in two cases implicating due process concerns but turning on statutes and rules, the Court limited the ability to rely on lawyers providing services to a group as a way to mitigate the challenges of small-value claims or well-heeled opponents. In *A.T.&T Mobility LLC v. Concepcion*, the Court enforced consumer cell-phone provisions that prohibited purchasers for bringing class claims in either courts or arbitration—and thereby made unavailable the aggregation of small-value claims as a means of reducing access barriers.[210] Similarly, in *Wal-Mart Stores, Inc. v. Dukes*, the Court imposed more stringent requirements on class actions, and again made more difficult the pooling of resources by groups sharing lawyers.[211]

But the question of the relationship of due process to litigation is not limited to equipage of litigants. Another facet probes the quality of the decision-making process itself and imposes a layer of constitutional regulation over court (and administrative) adjudication. For example, although *Turner v. Rogers* did not require lawyers for all civil contemnors opposing private plaintiffs, the Court did hold that, in the absence of a lawyer, "fundamental fairness" required that a judge make findings that a potential contemnor had the ability to comply with the court order and was willfully disobedient.[212] The *Turner* assessment is part of a series of "fair hearing" cases in which the Court has concluded that, when individuals are at risk of losing certain forms of property and liberty (such as statutory entitlements to government benefits, jobs, or licenses[213]), process is due. Depending on the context, constitutionally fair decision-making entails various attributes, including opportunities to be heard,[214] in-person hearings in certain circumstances,[215] specific allocations of burdens of proof,[216] reasons for the decisions rendered by impartial decision-makers,[217] oversight of whether evidence supports a criminal verdict and of the quality of eyewitness identification,[218] and review of the award of punitive damages.[219]

210. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744–45, 1753 (2011).

211. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550–52 (2011). *See generally* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

212. *See Turner*, 131 S. Ct. at 2512, 2520.

213. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734–37, 751–55 (1964).

214. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Mathews v. Eldridge, 424 U.S. 319 (1976); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

215. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

216. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982).

217. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009); *Goldberg*, 397 U.S. at 271.

218. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307 (1979); Manson v. Brathwaite, 432 U.S. 98 (1977). But constitutional oversight of evidentiary rules is constrained. *See* Perry v. New Hampshire, 132 S. Ct. 716 (2012).

219. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346 (2007); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).

In short, the U.S. Supreme Court has developed distinct lines of constitutional analyses that—depending on the context—mandate subsidies to address resource asymmetries between adversaries, shape processes to reduce intra-litigant disparities, facilitate access to courts, and regulate decision-making procedures. Underlying the doctrinal mélange of fairness and equal protection are different normative theories, themselves doing work in more than one arena. Some of the inquiry into the quality of procedure, for example, is justified through utilitarian concerns for accuracy, as well as by interests in guarding against non-arbitrary treatment by the government. Given that the linguistic lineage of rights to remedies and due process traces back to traditions around the Magna Carta, non-arbitrary treatment has a historical pedigree independent of democracy.[220]

But democratic values have come to provide new understandings of the purposes of non-arbitrary treatment, sounding today in terms of dignity, equality, and in the sovereignty of the people. Similarly, the demand for subsidizing and equalizing opportunities to participate, like the insistence on publicity, comes in service of democratic values that recognize the contribution of and need for diverse voices and participants being heard in social orders and that aspire (per Dworkin) to treat all with equal respect. But the support for litigants to use courts does not stem from efforts focused solely on individual need. The state (in the personage of the judge) is a self-interested actor. Undergirding the attention to individuals and concerns about the fairness of outcomes in particular cases is a pervasive concern that courts, as structures of governance themselves, need the participatory parity of litigants to legitimate the judgments rendered. "Connective justice" becomes an apt phrase to cover the interdependencies expressed through court action.

B. Resources for Courts—Provided and (on Rare Occasions) Compelled

Turn from mandates to courts about litigant subsidies and the procedures offered to direct funding for courts. Federal and state governments take for granted their obligations to support courts. That point is not surprising, given that judiciaries do a great deal of work *for* legislatures by enforcing criminal and civil laws.

Federal budgetary allotments (which can be specified more readily than the allocations in each of the states) show continual legislative investments in adjudication.[221] For example, between 1971 and 2005, the U.S. judiciary budget

220. Koch, *supra* note 106, at 367; Miller, *supra* note 121, at 4.

221. Article III of the U.S. Constitution protects judges from the diminution of their salaries but does not directly protect court budgets. *See* Russell R. Wheeler, *Chief Justice Rehnquist as Third Branch Leader*, 89 JUDICATURE 116, 120 tbl.1 (2005); Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993; Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657 (1999).

grew from under one-tenth of a percent of the federal budget to two-tenths;[222] in 1971, the federal judiciary was allotted $145 million and, by 2005, $5.7 billion dollars.[223] During that interval, staff doubled from about 15,000 to more than 32,000.[224] Further, as other government agencies have had cuts in funding in the last two years, the federal judiciary has been able to maintain its fiscal allocations (about seven billion dollars, in 2011), even if not successful in obtaining salary increases for judges.[225]

State legislatures have likewise consistently funded their judicial systems, although given the mix of state and local sources of funding, identifying the total amount invested is difficult. (Estimates are that most states devote from about one to almost four percent of their budgets to courts.[226]) State courts provide vastly more services and do so with relatively less resources (when measured by judges' salaries, caseload, and support staff) than does the federal bench.[227] Court leaders are thus acutely conscious of the high demand for the services provided, and a sequence of reports written under the auspices of the American Bar Association have warned that courts are at risk because of a lack of resources.[228] Moreover, the contemporary landscape is awash with grave concerns about the ability of governments to meet fiscal obligations of all kinds.

222. Wheeler, *supra* note 221, at 120 & tbl.1.

223. *Id.*

224. *Id.* at 120.

225. For fiscal year 2012, "the Judiciary received $6.97 billion, about a 1 percent increase above the fiscal year 2011 enacted level, and $206 million above the House bill and $36 million above the Senate bill funding levels." *FY2012 Funding Approved*, THIRD BRANCH (Admin. Office of the U.S. Courts, Office of Pub. Affairs, Wash., D.C.), Dec. 2011, at 1, 1, 7, *available at* http://www.uscourts.gov/News/TheThirdBranch/TTBViewer.aspx?doc=/uscourts/news/ttb/archive/2011-12%20Dec.pdf.

226. William T. (Bill) Robinson, III, *Rising to Historic Challenge: Funding for State Courts, Preserving Justice*, JUDGES' J., Winter 2012, at 8, 9. The complexity of determining what funds go to courts comes in part from different services coming within court budgets in various jurisdictions. Some states allocate resources for criminal justice services—such as probation officials and public defenders through court budgets—and other jurisdictions have county as well as state-wide funding for courts. *See generally COSCA Budget Survey Responses*, NAT'L CENTER FOR ST. CTS. (Nov. 3, 2011), http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/budget_survey_121811.ashx (compiling states' cost-saving measures, detailing their funding sources, and outlining their justice services).

227. Robinson, *supra* note 226, at 10 (noting that approximately ninety-five percent of cases are filed in state courts); *see also* Margaret H. Marshall, Chief Justice, Mass. Supreme Judicial Court, Address at the New York Bar Association's Benjamin N. Cardozo Lecture: At the Tipping Point: State Courts and the Balance of Power 3, 7–12 (Nov. 10, 2009), *available at* http://www.abcny.org/pdf/Cardozo_post_final.pdf [hereinafter M. Marshall, *Cardozo Lecture*].

228. *See* CRISIS IN THE COURTS: DEFINING THE PROBLEM (A Report to the American Bar Association, Aug. 8-9, 2011), *available at* http://www.americanbar.org/content/dam/aba/images/public_education/pub-ed-lawday_abaresolution_crisiscourtsdec2011.pdf; AM. BAR ASS'N, FUNDING THE JUSTICE SYSTEM: A CALL TO ACTION: A Report to the American Bar Association (Aug. 1992).

Efforts by state courts to diversify services are matched by evidence of retrenchment in services. In 2009, New Hampshire, lacking funds, episodically suspended civil jury trials.[229] Forty states cut funding for courts in 2010, and some states reported a ten percent decline in their budgets.[230] Six states closed courthouses a day a week; and nine sent judges on unpaid furloughs.[231] By July 2011, California budget cuts resulted in a proposed layoff of forty percent of staff and the closing of many courtrooms in the San Francisco Superior Court.[232] The court's presiding judge described the "civil justice system in San Francisco [as] collapsing."[233] Moreover, in 2009, California tallied 4.3 million people in civil litigation without the assistance of lawyers.[234] In 2010, 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.[235] Furthermore, a national assessment used the phrase "geography as destiny" for one of its findings—that legal services for those *in* need are not distributed *by* need but by place; while civil legal assistance had succeeded in responding to a diverse set of groups and their needs, coordination was poor, and individuals faced great challenges in gaining access to what was available.[236]

The responses to these data include calls for financial assistance from the federal government[237] as well as many state-based initiatives to expand as well as to reconfigure court and legal services. One focus is on the rights of civil litigants to have lawyers; a national "Civil *Gideon*" effort, championed by bench and bar leaders, aims to guarantee counsel rights for certain categories of

229. James Podgers, *Witnesses Describe State and Local Courts Reeling from Budget Cutbacks*, ABA J. (Mar. 1, 2011), http://www.abajournal.com/magazine/article/beggaring_justice_witnesses_describe_state_and_local_courts_reeling_aba/.

230. Robinson, *supra* note 226, at 9.

231. *Id.*

232. *California: Huge Cuts for Court*, N.Y. TIMES, July 19, 2011, at A15 (quoting Judge Katherine Feinstein).

233. *Id. See generally* Robinson, *supra* note 226, at 9–10.

234. This figure was cited in support of the Sargent Shriver Civil Counsel Act, creating a pilot program for poor litigants to obtain counsel. *See* Act of Oct. 11, 2009, ch. 457, § 1(b), 2009 Cal. Stat. 2498, 2499.

235. LIPPMAN, 2011 STATE OF THE JUDICIARY, *supra* note 169, at 4; see also TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010) [hereinafter TASK FORCE REPORT*]*, *available at* http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf.

236. *See* REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT, at v, ix, (American Bar Foundation, Oct. 7, 2011), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf.

237. *See* M. Marshall, *Cardozo Lecture*, *supra* note 227, at 11–13.

impoverished litigants.[238] As Chief Judge Jonathan Lippman of New York put it,

> efforts and more around the country reinforce the idea that legal representation in cases involving the basic necessities of life is fundamental to the delivery of justice. Equal justice for all under the law is inextricably linked to court funding levels. However, increasing court funding without ensuring access to justice is a hollow victory. The state courts must have the resources they need, not just as an end in itself, but to support their constitutional and ethical role as the protector of the legal rights of all Americans. Every person, regardless of means, is entitled to their day in court.
>
> The rule of law—the very bedrock of our society—loses its meaning when the protection of our laws is available only to those who can afford it. We might as well close the courthouse doors if we are not able to provide equal justice for all—our very reason for being. This is the fundamental challenge facing the justice system today.[239]

Another trajectory is to augment assistance for self-represented litigants,[240] and a third is to reformulate methods of dispute resolution to be less expensive, more attractive, and, in some instances, less lawyer dependent. During the last few decades, for example, state courts have expanded their repertoire through the "problem-solving courts" that include drug courts, re-entry courts, juvenile courts, mental health courts, and business courts.[241]

These developments reflect not only contemporary difficulties stemming from the high number of criminal prosecutions and the many rights-holders who

238. Evocative of Justice Brennan's *Boddie* analysis, the American Bar Association resolved that counsel should be provided "as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody . . . ." AM. BAR ASS'N, ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (2010); *see also* AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 64 (3d ed. 1992) (also noting that counsel rights should apply to "extradition, mental competency, post-conviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature"); Jonathan Lippman, Chief Judge, N.Y. Court of Appeals, Remarks at 2010 Law Day Ceremony, Law in the 21st Century: Enduring Traditions, Emerging Challenges 3–4 (May 3, 2010), *available at* http://www.nycourts.gov/whatsnew/pdf/Law Day 2010.pdf.

239. Jonathan Lippman, Speech at the Midyear Meeting of the National Association of Women Judges at Harvard Law School, Courts in Times of Fiscal Crisis—Who Needs Courts? 10–11 (Mar. 9, 2012) (on file with the author) [hereinafter Lippman, Courts in Times of Fiscal Crisis]. *See generally* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), http://dev.lawhelp.org/documents/501631LSC-justicegap.pdf.

240. *See* Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607, 617 (2010).

241. *See* ROBERT V. WOLF, CALIFORNIA'S COLLABORATIVE JUSTICE COURTS: BUILDING A PROBLEM-SOLVING JUDICIARY 2 (2005).

cannot afford to pay all that litigation entails. Court leaders have also become concerned that litigants *with* resources may choose to turn to alternative private providers whom they pay directly for their services.[242] Further, current legal doctrine puts some would-be plaintiffs into alternative dispute resolution mechanisms (such as mandatory arbitration), whether desired or not. Because courts have—by law and practice—let go of their monopoly over services and opened entry to other institutions, courts have become competitors for high-end investors with private providers.[243]

Having provided a glimpse at the diversification of services courts now struggle to "scale-up" to reach more claimants, a word is in order about a small line of cases that recognize court authority (often as a matter of inherent powers and other times under the rubric of separation of powers) to compel provision of resources when legislatures fail to do so.[244] Recent and high-visibility examples include a lawsuit by the Chief Judge of the State of New York for increases in judicial salaries[245] and rulings by state courts that resources for state public defenders are inadequate.[246] In addition, an odd-lot set of judgments insist that courts can, as a matter of "self-preservation" (to borrow a term from a 1930

242. *See* Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 262 (1996).

243. Bryant Garth identified this risk in the 1990s, as he analyzed court promotion of ADR. *See* Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 945–49 (1993).

244. *See, e.g.*, Cnty. of Barnstable v. Commonwealth (*Barnstable II*), 661 N.E.2d 47 (Mass. 1996); Cnty. of Barnstable v. Commonwealth (*Barnstable I*), 572 N.E.2d 548 (Mass. 1991); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971); *see also* Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979 (2003–04); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993). The court in *Commonwealth ex rel. Carroll v. Tate* posited that the judiciary "*must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government." *Commonwealth ex rel. Carroll*, 274 A.2d at 197. Analysis of the bases in state constitutions for courts to function as well as the difficulties of judges ordering that their co-branches of government fund courts is provided in Durham, *supra* note 66.

245. *See* Chief Judge of N.Y. v. Governor of N.Y., 887 N.Y.S.2d 772, 773–74 (N.Y. Sup. Ct. 2009). In the early 1990s, then Chief Judge Sol Wachtler sued New York State Governor Mario Cuomo for the failure to provide budgetary funds as requested by the judiciary. The litigation and its denouement are detailed in Jackson, *supra* note 244, at 217–18, 249.

246. *See, e.g.*, State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870 (Mo. 2009); Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010).

California decision) order specific payments of small sums due individuals such as employees and to require repairs of its facilities.[247]

This brief account is aimed as a reminder of another aspect of the taken-for-grantedness of court services, even as their availability may be outstripped by demand. Efforts to force funding through litigation are relatively scarce, not only because of various doctrinal impediments (such as justiciability) but more importantly because legislatures regularly supply significant resources to their coordinate branches, on which they depend. Courts are a central method by which states secure their own peace and security and stabilize commercial activities. The struggle is not over *whether* but rather *how much* a state can afford, and how *to allocate* investments in a portfolio of services, ranging from criminal prosecution, defense, and detention to family conflicts, traffic cases, and general civil litigation.

C. Reading Rights to Remedies

I have argued that governmental reliance on courts, coupled with constitutional recognition of their centrality through open-courts and right-to-remedy clauses atop interpretations of due process, equal protection, petition, jury, and other constitutional rights, have generated and sustained government support over centuries for courts. During the second half of the twentieth century, legislatures and courts expanded the bases for calling on courts, the services provided, and subsidized subsets of users.

In this section, I explore the degree to which open-courts and right-to-remedy clauses have been read to create judicially-enforceable claims. An obvious touchstone is *Marbury v. Madison*; although the U.S. Constitution has no express remedial texts, the Court's interpretation included the iconic statement in that a person "who considers himself injured, has a right to resort to the laws of his country for a remedy."[248] That idea laces case law in state courts, many of which rely on the express terms of their constitutions, as the epigrams that opened this section illustrate. All told, forty-one states have

247. *See* Millholen v. Riley, 293 P. 69, 70, 71 (1930); *see also* Ted Z. Robertson & Christa Brown, *The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioning*, 20 ST. MARY'S L.J. 863 (1989).

248. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803). *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993). Theories of due process entitlements to judicial review are augmented by specific clauses of the Constitution, such as those protecting against the takings of property and the suspension of the writ of habeas corpus. U.S. CONST. amend. V; U.S. CONST. art. I, § 9, cl. 2. Further, the Supreme Court has also recognized the right to litigate a claim as a form of property not to be extinguished without procedural protections. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

express guarantees, detailed in Appendix 1.[249] Depending on the formulation, these provisions could be read to protect discrete rights, such as access *to* courts for disputants and third-party observers, as well as funding *for* courts, and as constraints on new legislation limiting pursuit of remedies *in* court.[250] Constitutional statements—that rights must be decided according to the "Law of the Land"[251] or by "due course of law"[252]—can be equated with substantive "due process" limitations on government action, as well as with entitlements to procedural opportunities to contest a judgment. Terms directed at the administration of justice without "sale" or "delay"[253] could also be read, akin to the "speedy trial" provisions for criminal defendants, to impose time frames on when justice needs to be provided, to protect against bribery, excessive costs or assessments, or even as obligations to waive fees.

249. *See infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies. One count, by Koch, *supra* note 106, at 434, identified thirty-eight such provisions. As categorized by Friesen and Phillips, forty states have express constitutional rights-to-remedies clauses. FRIESEN, *supra* note 136, at 6-91 to 6-92 app. 6 (2006), and 2011 Supp, at 132; Phillips, *supra* note 106, at 1310 & n.6. I would add Michigan to those lists as its 1963 Constitution provides that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney," MICH. CONST. 1963, art. I, § 13, which is similar to Georgia's 1983 Constitution: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." GA. CONST. of 1983, art. I, § 1, para. 12. Further, as Appendix 1 details, the remedies/access clauses have occasionally been amended, sometimes to make the language inclusive and in other times to clarify the mandate (from "ought" to "shall" for example as in amendments to the Missouri Constitution), and in other instances to respond to a particular legislative or court decisions. *See infra* Appendix 1, State Constitutions: Textual Commitments to Rights to Remedies (detailing such changes).

As Appendix 2 (State Constitutions without Express Remedies Clauses and with Due Process or Open/Public Courts Provisions), *infra* details, the remaining nine states have texts referencing other court-based rights, and some but not all of their courts have interpreted their provisions to provide enforceable rights of access to courts. As a New York court in 1902 explained: "In view of the great purposes of government, and the understanding of the framers of our constitutional system, there can be no doubt [of the] . . . guaranty to every member of this state free access to the courts, and a full opportunity to have a judicial determination of all controversies which might involve his rights, whether such rights were the outgrowth of contracts or of violated duty." Williams v. Vill. of Port Chester, 76 N.Y.S. 631, 634 (App. Div. 1902).

250. *See, e.g.*, Cent. Appraisal Dist. of Rockwell Cnty. v. Lall, 924 S.W.2d 686, 689 (Tex. 1996) (identifying Texas's open courts provision to block "unreasonable financial barriers" imposed by legislatures). The court held that Texas's requirement that taxpayers pay portions of the tax admittedly due before contesting disputed portions was permissible, but requiring prepayment of disputed assessments violated the "opens courts guarantee." *Id.* at 690–91.

251. U.S. CONST. art. VI, cl. 2.

252. *See, e.g.*, TEX. CONST. art. I, § 13.

253. *See, e.g.*, TENN. CONST. art. I, § 17. The term sale appears in twenty-seven constitutions; the term "delay" appears in thirty-six constitutions. FRIESEN, *supra* note 136, at 6-92 app. 6. As Maguire pointed out, the reference to "sale," dating from the Magna Carta, likely did not mean no fees but rather required they be set at a "reasonable level." Maguire, *supra* note 147, at 364–65.

These analytic distinctions, the longevity of the constitutional statements, and the scope of legislative elaboration of causes of action, remedies, and of courts have prompted a vast number of decisions over two hundred years. Lines of cases, using shorthand such as the "Remedy by Due Course of Law" Clause or the "Justice Without Purchase" Clause,[254] address specific facets of the provisions, and a number of law review articles have likewise puzzled about their history and contemporary import.[255] Here I sketch the contours.

First, a few state courts have held that legislative support of their services is obligatory, even as the implications of such pronouncements are wide-ranging. The legal bases have generally been a mix of separation of powers and courts' inherent authority.[256] A very few of these cases also rest their judgments on state open courts/remedies clauses. The Texas Supreme Court put it simply—that the state's open-court clause required that "courts must actually be open and operating."[257] Likewise, an Alabama decision explained that courts had a "constitutional duty . . . [to] be available for the delivery of justice . . . . Absent adequate and reasonable judicial resources, the people of our State are denied their constitutional rights."[258]

254. *See, e.g.*, Allen v. Emp't Dep't, 57 P.3d 903, 903 (Or. Ct. App. 2002).

255. *See, e.g.*, FRIESEN, *supra* note 136, ch. 6 (considering the history and contemporary meaning of access-to-courts and right-to-remedy clauses); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001); Koch, *supra* note 106; Linde, *supra* note 121, at 136–38; Phillips, *supra* note 106; Schuman, *supra* note 61. As Schuman, explained, several articles hone in on particular state constitutions. Schuman, *supra* note 61, at 1203 n.40. Further, some commentators delineate certain protections as "substantive" or "procedural," as they also delineate the types of state court approaches, in terms of levels of scrutiny of legislative action and modes of reasoning. *Id.* at 1202–05. This literature has not focused on the word "everyone" in the clauses and the import of changing definitions of who falls within those parameters.

256. *See, e.g.*, Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) (holding that the Judiciary "*must possess* the inherent power to determine and compel payment" of money necessary to carry out its constitutional duties because it is a co-equal and independent branch, which must protect itself from the impairment of its duties).

257. *See* Cent. Appraisal Dist. of Rockwell Cnty. v. Lall, 924 S.W.2d 686 (Tex. 1996).

258. *See* Folsom v. Wynn, 631 So. 2d 890 (Ala. 1993). The court held the governor's cuts of the judiciary budget unconstitutional. *Id.* at 895–96, 902. The court relied not only on Alabama's provision on open courts and remedies, ALA. CONST. art. I, § 13, on which enforcement of other state and federal constitutional rights also depended, but also on another constitutional obligation, added in 1973 as part of a major reform of the court system, that the legislature provide "adequate and reasonable financing" to courts, ALA. CONST. amend. 328, § 6.10. *Folsom*, 631 So. 2d at 893–902.

A North Carolina opinion involving the adequacy of court facilities also relied on that state's open courts/remedy clause. A superior court judge challenged the state's failure to provide adequate county court facilities. *In re* Alamance Cnty. Court Facilities, 405 S.E.2d 125 (N.C. 1991). The Supreme Court of North Carolina noted the array of duties dependent on the capacity to do the work (such as statutory obligations to preserve documents, to protect the secrecy of grand

Second, a substantial body of law understands open or public court provisions, coupled with First Amendment, due process, rights to jury trials, and common law practices, to ensure that the public (and the press) can observe court proceedings.[259] Jeremy Bentham's call for "publicity" in courts is now read to be entrenched in both federal and state constitutions. The general rule is that neither the Constitution nor the common law tolerates blanket closures of criminal or civil proceedings.[260] In addition to preliminary hearings and trials, many courts have insisted that the voir dire in jury selection and court documents are presumptively open, and that the burden rests on the state to explain any closures.[261]

Third, state courts have reached widely different conclusions (sometimes within the same jurisdiction in different eras) about whether litigants can rely on open courts/remedy clauses as support for, or as a shield against, limitations on access and on the kinds of cases that can be pursued. One series of decisions related to filing fees, assessments, and taxes that parse charges, their amounts, and their purposes. For example, in 1917, the California Supreme Court concluded that courts had the inherent capacity to waive fees so that poor people could bring cases.[262] Further, judges have decided that some forms of charges were illicit "taxes" that violated either "open court" or "no sale" provisions.[263]

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jury proceedings, and to establish courtrooms and judicial facilities) as well as the state Constitution's open courts provision. *Id.* at 127. In *Noble County Council v. State ex rel. Fifer*, the issue was an obligation of a county council to pay a probation officer hired by a court. Noble Cnty. Council v. State *ex rel.* Fifer, 125 N.E.2d 709 (Ind. 1955). The Supreme Court of Indiana invoked both the open court provision and the requirement for public criminal trial as obliging support for adequate staffing. *Id.* at 713–14; *see also* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 204 (Pa. 1971) (Roberts, J., concurring and dissenting) (commenting that "the clear mandate of Article 1, Section 11 of the Pennsylvania Constitution . . . provides: '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 . . . .' It is evident that these fundamental guarantees could not be honored if the Judiciary were without reasonably adequate resources.").

259. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 7–15 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569–80 (1980). *See generally* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

260. *See, e.g.*, *Richmond Newspapers, Inc.*, 448 U.S. 555.

261. *See, e.g.*, Presley v. Georgia, 130 S. Ct. 721, 722, 724–25 (2010) (reversing a conviction because a "lone courtroom observer" was excluded from *voir dire*); *see also* Doe v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 280 P.3d 377 (Or. 2012). State constitutional interpretations of the scope of public access rights varies somewhat. *See* Koch, *supra* note 106, at 446.

262. *See* Martin v. Superior Court, 168 P. 135, 137–38 (Cal. 1917); *see also* Isrin v. Superior Court, 403 P.2d 728, 736 (Cal. 1965).

263. *See, e.g.*, Flood v. State *ex rel.* Homeland Co., 117 So. 385, 386–87 (Fla. 1928) (concluding that imposing a ten dollar fee to be used for county purposes was a "tax" that violated the state's open court clause); State *ex rel.* Davidson v. Gorman, 41 N.W. 948, 949 (Minn. 1889)

As a 1910 Missouri court explained when banning a three-dollar surcharge imposed by one county, compelling litigants to "purchase justice" was illegal because "the constitution[] . . . provides [that justice] shall not be sold."[264] Some decisions turn on whether filing fees go to court-related services and are therefore licit, or instead to "fund general welfare programs," rendering them unconstitutional.[265] Fees that are court-focused have generally been upheld, especially when judges have the discretion to waive them in particular cases.[266]

(holding that probate charges keyed to the value of the estate were unconstitutional, as taxes rather than "reasonable . . . fees or costs"). In 2010, the Florida Supreme Court concluded that court fees used for general revenues were permissible because the legislature appropriated more funds to courts than those the courts took in through fees. *See* Crist v. Ervin, 56 So. 3d 745 (Fla. 2010).

One high-profile example of fees as barriers comes from Texas. For a time, Texas required that an appellant post a supersedeas bond in an amount related to the judgment won below. Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 5 (1987) (citing then-current TEX. R. CIV. P. 364). Large judgments can result in pressures to settle or not to appeal. *See id.* at 7. Current Texas law no longer requires bonds as a condition for perfecting an appeal but does so for a stay of the execution of a judgment. TEX. R. APP. P. 24.1–.2, 25.1. Texas rules provide that alternate security may be used in appropriate circumstances; judgment debtors must only post a supersedeas bond in the amount of compensatory (and not punitive) damages, interest and costs; this amount must not exceed the lesser of fifty percent of the judgment debtor's current net worth or 25 million dollars; and that the trial court may reduce the amount of supersedeas upon a showing of substantial economic harm. TEX. R. APP. P. 24.1, 24.2(a)–(b). Some decisions have suggested that the earlier mandatory supersedeas requirement, absent proper accommodations for those who are unable to post, was unconstitutional. *See, e.g.*, State v. Flag-Redfern Oil Co., 852 S.W.2d 480, 481–82, 484–85 (Tex. 1993) (holding that a requirement that state mineral lessees pay disputed royalties before seeking judicial review of an audit by the General Land Office violated the open courts provision); *see also* Elaine A. Carlson, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments on Appeal After House Bill 4*, 46 S. TEX. L. REV. 1035, 1079 (2005).

264. Hays v. C. C. & H. Mining & Milling Co., 126 S.W. 1051, 1054 (Mo. 1910) (holding that a 1901 act imposing a three dollar extra fee to file in Jasper County was unconstitutional as a "tax" before its courts would be "opened" and violated the right that justice be "administered . . . without sale, denial or delay").

265. LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986). *See, e.g.*, Harrison v. Monroe Cnty., 716 S.W.2d 263 (Mo. 1986) (prohibiting fees if not "reasonably related to the expense of the administration of justice"); *LeCroy*, 713 S.W.2d at 341 (citing cases in Illinois, Florida, Missouri, and Minnesota to support its holding that "filing fees that go to fund general welfare programs, and not court-related services, are unconstitutional"). The court in *LeCroy v. Hanlon* held that "filing fees that go to state general revenues—in other words taxes on the right to litigate that pay for other programs besides the judiciary—are unreasonable impositions on the state constitutional right of access to the courts." *LeCroy*, 713 S.W.2d at 342. *But see* Marshall v. Holland, 270 S.W. 609 (Ark. 1925) (upholding filing fees that included sums for general revenues). What activities are "court-related" is another question. Illinois courts have concluded that a five-dollar assessment on divorce filers to use for domestic-violence shelters was not permissible but a one-dollar assessment to go to a nonprofit dispute resolution center was. *Compare* Wenger v. Finley, 541 N.E.2d 1220 (Ill. App. Ct. 1989), *with* Crocker v. Finley, 459 N.E.2d 1346 (Ill. 1984).

266. *See, e.g.*, Allen v. Emp't Dep't, 57 P.3d 903 (Or. Ct. App. 2002); *see also* Bailey v. Frush, 5 Or. 136, 137–38 (Or. 1873). In contemporary discussions, some jurists argue that courts should

Fiscal stresses are placing new pressures on courts to fund their own work and "related services" or state programs more generally. Objecting to that trend, a 2011 "policy paper" for the Conference of State Court Administrators insisted that courts ought not to be used by states as "revenue centers."[267] Less mention is made of the fact that courts gain a good deal of their revenue from "non-contentious" matters, such as probate in state systems and bankruptcy filings in the federal system that produce a steady stream of income for courts.[268] For example, more than a million bankruptcy petitions are filed annually in the federal courts, and the filing fee for one subset—those seeking a discharge under Chapters 11—was as of November of 2012, $1167.[269]

Another genre of claims stems from legislative limitations placed on specific subsets of substantive claims, often enacted as part of administrative or alternative dispute resolution efforts or as "tort reform." While some administrative schemes mitigate the costs of litigation, they may be accompanied by parallel caps on the recoveries.[270] Waves of litigation thus challenge enactment of statutes that authorize the enforcement of arbitration contracts, Workers' Compensation, the repeal of certain common law causes of action, or the imposition, for certain kinds of plaintiffs, of restrictive statutes of limitations and caps on damages.[271]

Depending on the state, a particular right-to-remedy clause has been read as aspirational only and therefore as not providing litigants with a cause of action or defense to new rules imposed by either the legislature or the judiciary.[272] In contrast, other courts have read their state clauses to limit legislative changes to rights extant (sometimes characterized as "vested") before that state's constitution, or to limit legislative alterations of common law rights, or to prevent the imposition of barriers to courts without a "*quid pro quo*"—the

be supported by general revenues rather than court-based fees. *See, e.g.*, Lippman, Courts in Times of Fiscal Crisis, *supra* note 239, at 5.

267. CARL REYNOLDS & JEFF HALL, 2011–2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS (2011), *available at* http://cosca.ncsc.dni.us/WhitePapers/CourtsAreNotRevenue Centers-Final.pdf.

268. The degree to which localities rely on such filings in England and Wales is noted by Lord Justice Thomas. Thomas, *The Maintenance of Local Justice*, *supra* note 41, at 23.

269. *See* Temporary Bankruptcy Judgeships Extension Act of 2012, Pub. L. No. 112-121, § 3(a), 126 Stat. 346, 348 (to be codified at 28 U.S.C. § 1930(a)(3)). Judges may waive fees but only if the filer's income is 150 percent or less of federal poverty guidelines. 28 U.S.C. § 1930(f) (2006).

270. As Silverstein noted, some administrative systems such as workers' compensation did not impose filing fees, while courts did. Silverstein, *supra* note 146, at 24.

271. Phillips, *supra* note 106, at 1326–37, summarized these iterations. He identified the earliest state court opinions, one upholding a legislative abolition of a common-law claim in Massachusetts in 1814, and the other rejecting a limitation in Tennessee in 1821. *Id.* at 1326.

272. *See* Phillips, *supra* note 106, at 1338–39; Schuman, *supra* note 61, at 1205–06.

creation of an alternative remedy, often in an administrative forum.[273] While some commentators have sought to rationalize the case law, others see "inexplicable" disparities of outcomes, incapable of being correlated to the text or history of particular state provisions.[274]

An example of a robust invocation of the right-to-remedy clause comes from Nebraska. That state's supreme court has twice—in 1889 and in 1991—refused to enforce contracts calling for arbitration in lieu of litigation.[275] As explained more than a century ago, in 1902, to enforce contracts to arbitrate would "open a leak in the dike of constitutional guaranties which might some day carry all away."[276] Many decades later, in 1987, Nebraska's legislature enacted a version of the Uniform Arbitration Act whose words track parts of the Federal Arbitration Act, albeit with more constraints (such as that contracts be "entered into voluntarily and willingly") and more exemptions (such as those arising under the state's Fair Employment Practice Act). In 1991, the Nebraska Supreme Court held that the Act violated the state constitution's open court/rights-to-remedy clause.[277]

In response, various businesses, the state's Chamber of Commerce, and others proposed amending the constitution to authorize such legislation. Although opposed by a group including trial lawyers,[278] Nebraska's Constitution changed in 1996. Added to the mandates that courts be open and "every person . . . shall have a remedy" was the proviso that the legislature could "provide for the enforcement of mediation, binding arbitration agreements, and

273. Phillips, *supra* note 106, at 1335–39; *see also* FRIESEN, *supra* note 136, at 6-9 to 6-11; 2011 Supp. at 105–32; Schuman, *supra* note 61, at 1206–17. Friesen also noted that state courts have also relied on other parts of their constitutions (such as rights to jury trials and due process) when evaluating legislative limitations on common law rights. FRIESEN, *supra* note 136, at 6-3, and at 2011 Supp. at 105 (discussing the few constitutions that also forbid "legislative abrogation and diminution of traditional damage remedies").

274. Phillips, *supra* note 106, at 1314. Phillips argued, however, that state courts ought to provide enforcement of a "narrow but potent protection" against legislative encroachment of basic rights, and that the primary rights Blackstone considered absolute—"personal security, personal liberty, and property"—provided guidance on which rights were appropriately within that "narrow" band. *Id.* at 1344–45.

275. State v. Neb. Ass'n of Pub. Emps., 477 N.W.2d 577 (Neb. 1991); German-Am. Ins. Co. v. Etherton, 41 N.W. 406 (Neb. 1889).

276. Phx. Ins. Co. v. Zlotky, 92 N.W. 736 (Neb. 1902).

277. Resnik, *Fairness in Numbers*, *supra* note 11, at 130. Several state courts have addressed the issue of arbitration; many have not found mandatory arbitration provisions to be violative of open court rights. *See, e.g.*, Firelock Inc. v. Dist. Court, 776 P.2d 1090, 1100 (Colo. 1989); FRIESEN, *supra* note 136, at 6-76 to 6-83. A few have, however, found limits on judicial review of arbitration awards to run afoul of constitutional remedy rights. *See, e.g.*, Nationwide Mut. Fire Ins. Co. v Pinnacle Med., Inc., 753 So. 2d 55 (Fla. 2000).

278. *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 (Neb.), May 12, 1996, at 4B.

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."[279] (How the United States Supreme Court's broad interpretation of the Federal Arbitration Act[280] affects the state's judgments has been the subject of some Nebraska decisions,[281] and the state-federal interaction is the topic of Professor Wolff's essay in this Symposium.[282])

Several other state courts have also concluded that open court/right to remedies clauses generate judicially enforceable entitlements. The test in Texas, for example, is that legislatures cannot "abrogate well-established common law causes of action unless the reason" to do so "outweighs the litigants' constitutional right of redress."[283] Missouri provides another example, with case law developed based on its constitutional provision (set forth in 1820 and amended in 1875 and in 1945), mandating that courts provide "certain remedy afforded for every injury to person, property or character."[284]

As then-Judge Wolff explained the state's approach, a statute "may modify or abolish a cause of action that had been recognized by common law or by statute" as long as doing so is not "arbitrary or unreasonable."[285] Under that test,

279. 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). Montana's remedy clause was amended in 1972, in response to a state court decision finding that a third party had no liability to an independent contractor injured and compensated through workers' compensation. *See* Aschraft v. Mont. Power Co., 480 P.2d 812 (Mont. 1971), *superseded by constitutional amendment*, MONT. CONST. art. II, § 16 (amended 1972). In 1965, Utah ruled its state's arbitration violative of its open courts clause. *See* Barnhart v. Civil Serv. Emps. Ins. Co., 398 P.2d 873 (Utah 1965). Thereafter, the legislature amended the Act to make it prospective, and the Court upheld the provision. *See* Lindon City v. Eng'rs Constr. Co., 636 P.2d 1070 (Utah 1981). *See also* Simon v. St. Elizabeth Med. Ctr., 355 N.E.2d 903 (Ohio Ct. Com. Pl. 1976) (invalidating as violating jury rights, equal protection, and court access rights, the Ohio Medical Malpractice Act's mandate to use compulsory arbitration).

280. *See, e.g.*, Compucredit Corp. v. Greenwood, 132 S. Ct. 665 (2012); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

281. *See, e.g.*, Aramark Unif. & Career Apparel, Inc. v. Hunan, Inc., 757 N.W.2d 205 (Neb. 2008); Cornhusker Int'l Trucks, Inc. v. Thomas Built Buses, Inc., 637 N.W.2d 876 (Neb. 2002).

282. *See generally* Wolff, *supra* note 38.

283. *See, e.g.*, Cent. Appraisal Dist. of Rockwell Cnty. v. Lall, 924 S.W.2d 686 (Tex. 1996).

284. MO. CONST. art. I, § 14. Note that Missouri's 1820 constitutional formulation was that courts "ought to be open," MO. CONST. of 1820, art. XIII, para. 7 ("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 in 1875 the text shifted from "ought to be open" to "shall be open," MO. CONST. of 1875, art. II, § 10. In 1945, the wording shifted from the exhortative 1820 language, "ought to be administered without sale, denial, or delay," MO. CONST. of 1820, art. XIII, para. 7, and 1875 language, "should be administered without sale, denial or delay," MO. CONST. of 1875, art. II, § 10, to the mandatory "shall be administered without sale, denial or delay," MO. CONST. art. I, § 14 (ratified in 1945, current in 2012).

285. Kilmer v. Mun, 17 S.W.3d 545, 550 (Mo. 2000) (en banc).

the court struck a statute conditioning a tort action against a dram shop on the seller's conviction for providing liquor to the intoxicated person who caused the injury. The court held that the vagaries of prosecutorial decisions rendered the constraint arbitrary.[286] But many limits have been sustained; for example, the court upheld legislation requiring that a person owing child support and seeking modification first post a bond (sometimes involving thousands of dollars) for the sums not yet paid.[287]

Return then to view the historical arc from the 1676 Charter of the English Colony of West New Jersey (invoked at the outset—that "in all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend"[288]) to the dozens of remedy provisions of state constitutions, and the due process, petitioning, and other clauses of state and federal constitutions. Over the course of three centuries, positive entitlements to a particular, individualized, government service—protection of property and person—became entrenched. As individuals of all races, genders, and classes gained juridical personhood, those entitlements also served to generate subsidies (both for courts and their users) to protect adjudication's intelligibility and legitimacy. Efforts to respond to inequality, such as insisting that states waive fees to court in certain instances paralleled the end of poll taxes for voting, as the democratic project came to be inclusive.

As also noted at the outset, courts were one of several venues in which questions of equality emerged. Given that the U.S. Supreme Court rejected the application of the Equal Protection Clause to the poor, as a category, the Court nonetheless carved out access to courts as an arena in which equality concerns, interacting with due process interpretations, had purchase. Closing courthouse doors to impoverished segments of the population is a harm that would be felt by and undermine the state's ability to do its own work. The government, like individuals, relies on decisions conforming to the "law of the land." Thus, the Court used due process ideology to delineate a discrete arena in which poverty was to be ameliorated by the state. The result was to make courts a more inclusive democratic venue. Paralleling the insistence that states waive fees for those seeking divorce were injunctions that states not impose poll taxes for voting. Litigating and voting are both personal rights and structural necessities,

286. *Id.* at 545–46, 552 & n.21. However, the Court also noted that the legislature, which had created this kind of cause of action, could also abolish it altogether. *Id.* at 554. Moreover, the legislature was not obliged to substitute an alternative. *See* Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 906 (Mo. 1992) (en banc) (rejecting the "'reasonable substitute' holdings" of the Texas and Florida Supreme Courts as "arbitrarily and unnecessarily limit[ing] the legitimate lawmaking role of the legislative branch" and holding that the "common law is in force in Missouri only to the extent that it has not been subsequently changed by the legislature or judicial decision").

287. Weigand v. Edwards, 296 S.W.3d 453 (Mo. 2009) (en banc).

288. Concessions and Agreements of West New Jersey, *supra* note 8, at ch. XXIII.

and both are forms of political participation that help to anchor the stability of democratic states.

IV. THE SUCCESSES AND CHALLENGES OF CONSTITUTIONAL SUBSTANTIVE ENTITLEMENTS: AN *EXEMPLUM IUSTITIAE*

Eight lessons can be drawn from this account of state and federal commitments to courts. First, the United States, at both national and state levels, is obliged as a matter of constitutional law to provide some forms of services to individuals to obtain remedies in open court for some kind of harms. Second, these commitments have been materialized and expanded over the course of three centuries, and most of the credit for doing so—in terms of expanding the kinds of harms legally cognizable as well as the resources to pursue them in court—goes to legislatures.

Thus, and third, courts should be understood as institutions that have been remarkably successful in attracting huge amounts of public funds and of private investments. How much is hard to know. In many jurisdictions, court budgets include funds for services such as probation and public defenders. Moreover, some courts receive funding from local, as contrasted with state, sources. Thus, while the National Center for State Courts has a database of court budgets, the difficulties of delineating spending sources and the diverse services that budget allocations cover make a full and accurate accounting of the billions of public dollars difficult.[289] Yet more opaque are the amount of moneys invested by private litigants—investing their own resources to generate judge-made law as well as into systemic changes, from rulemaking and legislation to contributions aimed at getting specific individuals on (or off) the bench by way of appointment or election. Calculating the sums spent on auxiliary institutions that courts have spawned—the related industries of lawyers, administrators, notaries, probation, forensic experts, and other information services—is likewise difficult.[290]

The utility of those investments raises yet other issues. Just as tracking how much is spent in and around courts is difficult, so too is deciding whether to commodify and how to identify and to measure the outputs of court—from the participatory processes to the impact of the judgments rendered on the disputants to their influence on or use by third parties. A few states have used econometrics to approximate the utilities produced by their court systems—such as the ability

289. *See COSCA Budget Survey Responses*, *supra* note 226.

290. One estimate is that U.S. law firms earned fifty-one billion dollars in gross profits in 2003, and that focus is far from the total output of the "Legal Services Industry" (LSI). *See* NEIL RICKMAN & JAMES M. ANDERSON, INNOVATIONS IN THE PROVISION OF LEGAL SERVICES IN THE UNITED STATES: AN OVERVIEW FOR POLICYMAKERS 5 (RAND, 2011), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2011/RAND_OP354.pdf.

of businesses to know that they can collect debts and enforce contracts.[291] Critics in turn claim that court-based activities harm productivity outside of court and waste resources in court, resulting in a loss of revenues.

Fourth, the contemporary pressures on courts come in part from the remarkable surge in criminal filings and in part from courts' own successes as attractive venues for civil litigants. In many respects, courts are only starting to grapple with the challenges raised by economically disparate claimants in criminal and civil cases. Given the fiscal retrenchment of government services more broadly, the turn to a focus on budgets, lawyer-less litigants, and alternative mechanisms for dispute resolution aim to respond to the complex and ambitious project of applying twentieth-century egalitarian norms to eighteenth-century statements of rights to remedies, drafted in an era when members of the propertied classes were the prototype litigants and governments' criminal justice systems were nascent. One could thus characterize the last decades of new programs and investments as a "progressive realisation" of these ambitious social services—here borrowing again the terms used by the South African Constitution.[292]

Fifth, one set of responses, the promotion of alterative dispute fora, produces a new set of problems for courts, faced now with the divesture of work that was once uniquely within their purview. Court-mandated use of private providers, for example, enables such providers to attract cases otherwise eligible for adjudication. If high-end users opt out on the civil side, the public court system becomes the repository of the problems of the poor and its widespread legislative support, predicated in part on the universal nature of judicial services, may become more vulnerable. Court leaders now speak of the importance of making the "business case" for why legislatures should fund courts.[293] Evidence of the need for concern comes from the federal system. In lieu of the twentieth-century

291. *See* TASK FORCE REPORT, *supra* note 235, at 13–14; WASH. ECON. GRP., INC., THE ECONOMIC IMPACTS OF DELAYS IN CIVIL TRIALS IN FLORIDA'S COURTS DUE TO UNDER-FUNDING OF COURT SYSTEM 7–10 (2009).

292. S. AFR. CONST., 1996 ch. 1 § 26(2).

293. *See, e.g.*, JUSTICE FOR ALL, SAVING JUSTICE: WHERE NEXT FOR LEGAL AID? VIEWS FROM THE RESPONSES TO THE MINISTRY OF JUSTICE GREEN PAPER CONSULTATION REFORM OF LEGAL AID IN ENGLAND AND WALES 5 (2011), *available at* http://www.justice-for-all.org.uk/dyn/1323258153870/Saving-justice.pdf (referencing the "business case" research by Citizens Advice to estimate the cost-benefit ratio for key civil categories of legal aid advice); *see also* Hon. Margaret H. Marshall, Remarks at the Kentucky Law Journal Symposium on State Courts: Putting it All Together: Or What Can We Do Now (Sept. 24, 2011) (referring to Chief Justice Minton as "the CEO of one of Massachusetts' most successful, global companies") (on file with author); Hon. Tani Cantil-Sakauye, First Annual Address to the State Bar of California (Sept. 17, 2011) ("[A]nd we have done our part . . . with shrinking resources, trying to provide the same level of service. . . . We have tried technological business models.") (on file with author); Hon. Sue Bell Cobb, State of the Judiciary Address, Alabama (Jan. 26, 2010) ("Courts must undertake fundamental change such as . . . redesigning business processes . . . .") (on file with author).

spiral of more civil filings and more demands for the public services of judges, a flattening demand curve appeared during the first decade of the twenty-first.[294]

Sixth, bringing courts into the framework of positive and negative state duties undermines that delineation as it also suggests the need for other analytic categories. The provision of courts makes plain that positive rights are not "foreign" to the U.S. experience as is sometimes posited.[295] In lieu of attention focused either on individual positive entitlements or prohibitions on state actions, theories of rights need to take account of the history of courts, which demonstrates that some rights both impose obligations on states as they recognize and enable individuals and entities to pursue their own interests and to participate in public norm development. These communal rights expose and mediate conflicts through the generation of state-based and state-funded institutions.

Once the depth of the traditions of and normative utilities for state-provisioning are acknowledged, the political and judicial questions that emerge are about what forms of services ought to be provided and what forms of subsidies are needed. One way to read the many decisions, through litigation and legislation, on court access and substantive rights is as a massive and sprawling multi-century debate, across and within jurisdictions, about how to allocate, to ration, and to reconfigure services. At times, courts have found aspects of these issues justiciable and become as adjudicators co-venturers in an ongoing discursive exchange about their own availability. More often, chief justices enter the discussion not by way of adjudication but through their function as CEOs of their court systems to advocate in their own jurisdictions for support. But as the preemption rule that emerged from the AT&T litigation on mandatory arbitration illustrates, the U.S. Supreme Court has limited the room provided to states and thereby cut off experimentation in sorting out how courts are to attract resources, what sort of cases should be given what kinds of process, and how to manage judicial services.[296]

Seventh, debates about the scope of government obligations to subsidize court use, about protecting access rights, and about what constitutes "fair" hearings are part of a larger and intense conflict in the United States (and elsewhere) about regulation and privatization. When federal and state constitutions are read to oblige redistributive efforts to facilitate use of courts, public regulatory opportunities are enhanced. While T.H. Marshall foresaw in

294. *See* ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS, at I-18 (2008), *available at* http://199.107.22.105/library/Implementation_the_Long_Range_Plan.pdf; *see also* Resnik, *Building the Federal Judiciary*, *supra* note 18, at 827–31.

295. To borrow from Moliere, we have been "speaking prose" all along. MOLIÈRE, LE BOURGEOIS GENTILHOMME 41 (Curtis Hidden Page trans., G. P. Putnam's Sons 1908) (1670).

296. *See generally* Resnik, *Fairness in Numbers*, *supra* note 11.

1949 the challenges entailed when social, political, and civil rights come together to expand the relationship and obligations between citizenships and their polities, he thought that "economic inequalities" would be difficult to sustain in the face of the "enrichment of the status of citizenship,"[297] and that government support was the natural response. Instead, economic inequalities in the United States have grown, dramatically. Courts are one arena in which the state has persistently sought to mitigate those inequalities, and often done so under the banner of due process, embroidered with equality concerns. Courts serve to turn "everyone" into rights-holders by redistributing power and affording each person status.

But as the refusal to accord detainees at Guantánamo Bay equal litigation rights illustrates, the political commitment to that form of status can fray. Barring some from full participatory rights in courts marks them as outsiders.[298] Likewise, the practice of funding courts from general revenues is coming under siege, as courts raise fees and impose new charges. A person seeking modification of a child support order in Alabama has to pay a fee of $248, without adjustments that would make this "tax on distress" (to borrow from Bentham) progressive.[299] Funds to support some of California's efforts to create "Civil *Gideon*" legal services come from increased fees for various court services, such as enforcing judgments and certifying a copy of a document.[300] In the federal system, the reauthorization of judgeships in bankruptcy came at the price of increased fees for those using that system.[301] England and Wales have gone further and embraced "full-cost pricing," such that, for a certain kind of case, "a fee payable for a hearing" could be more than 1,000 pounds.[302]

297. T.H. Marshall, *Citizenship and Social Class*, *supra* note 77, at 45.

298. Outside status is an interaction between identity and class. *See* Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 NEW LEFT REV. 68, 70–74 (1995). Fraser argued that people "subject to both cultural injustice and economic injustice need both recognition and redistribution." *Id.* at 74. Courts in turn are mechanisms for redistribution of both status and economic capacity.

299. *See* ALA. CODE § 12-19-71(a)(7) (2012).

300. *See* CAL. GOV'T CODE § 68651 (West 2009); CAL. GOV'T CODE § 70626(e) (West 2009).

301. Temporary Bankruptcy Judgeships Extension Act of 2012, Pub. L. No. 112-121, § 3(a), 126 Stat. 346, 348 (to be codified at 28 U.S.C. § 1930(a)(3)) (increasing the fee for filing under Chapter 11 from $1000 to $1167). As noted, waivers, under limited circumstances, are available. *See* 28 U.S.C § 1930(f)(1); *see also* CONG. BUDGET OFFICE, COST ESTIMATE: S. 1821 TEMPORARY BANKRUPTCY JUDGESHIPS EXTENSION ACT OF 2011 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/s1821.pdf.

302. *See* The Civil Proceedings Fees (Amendment) Order, 2011, S.I. 586 (L.2) (U.K.), *available at* http://www.legislation.gov.uk/uksi/2011/586/pdfs/uksi_20110586_en.pdf. The current system interacts with what is called fee "remissions," that provide for waivers for those who genuinely cannot afford to pay fees. *See* MINISTRY OF JUSTICE, EXPLANATORY MEMORANDUM TO THE CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2011, at 11 (2011) [hereinafter 2011 MINISTRY OF JUSTICE MEMORANDUM], *available at* http://www.legisla

Figure 8: COURTROOM INTERIOR, JOHN JOSEPH MOAKLEY FEDERAL, BOSTON, MASSACHUSETTS, 1998

My eighth and final point flows from the others; courts have a distinctive claim for public support as well as for public regulation because governments

tion.gov.uk/uksi/2011/587/pdfs/uksiem_20110587_en.pdf; HER MAJESTY'S COURTS SERV. (HMCS), COURT FEES: DO YOU HAVE TO PAY THEM? (2011), *available at* http://www.mensaid.com/documents/fl/ex160a.pdf. The government reported that, in 2009 and 2010, court fees raised about £479 million and covered eighty-two percent of the full cost of running the civil and family courts and probate service (which cost £619 million a year in total). The effort to recoup "full-costs" aims to support a variety of court expenses, including facilities and judicial salaries, through fees. *See* 2011 MINISTRY OF JUSTICE MEMORANDUM, *supra*, at 6; *see also*, HM TREASURY, MANAGING PUBLIC MONEY, ch. 6 (2007), *available at* http://www.hm-treasury.gov.uk/d/mpm_whole.pdf (explaining that "[t]he norm is to charge [publically provided services] at full cost"); RUPERT M. JACKSON, REVIEW OF CIVIL LITIGATION COSTS (2009), *available at* http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/Jacksonfinalreport140110.pdf (broadly surveying the costs of civil litigation in England and Wales). Criticism can be found in FRANCIS PLOWDEN, REVIEW OF COURT FEES IN CHILD CARE PROCEEDINGS (2009), *available at* http://dera.ioe.ac.uk/1044/1/court-fees-child-care-proceedings.pdf (describing the increases in fees paid by local government authorities in child care proceedings in England and Wales), and in Genn, *What is Civil Justice For?*, *supra* note 40.

need the infrastructure that courts provide, and democracies need the opportunities for the multi-party interactions that adjudication entails. Courts offer links between individuals and government, and hence have a special claim on resources. Diminution of opportunities to use open courts impoverishes the status of individuals and diminishes the effectiveness of government. I opened this Lecture with reflection on what didactic images of Justice and courthouses can teach. By way of closing, it is appropriate to return to a few, final pictures. Courtrooms are the signature feature of courts, and a carefully designed example is shown in Figure 8. This picture comes from the 1998 federal courthouse in Boston. As a judge central to that building project explained, "[t]he most prominent geometric feature . . . is the repetition of encompassing circles" that underscores that courtroom activities are a "shared community undertaking;"[303] each side of the courtroom is marked by arches of equal size behind the judge, the jury, and the public to make plain that all are "equally ennobled."[304]

Such courtrooms are artifacts of the entitlement that "all courts shall be open," producing a government-sponsored occasion to impose, albeit fleetingly, the dignity reflected in the status held by a juridical person, competent to sue or be sued, able to prompt an answer from and entitled to be treated on a par with one's adversary—whether that be an individual, a corporation, or the government itself. The odd etiquette of the courtroom disciplines both disputants and the state, as all are required to respond respectfully to claims. The public enactment documents how government officials treat individuals and enables debate about compliance with those goals as well as about the content of the governing legal norms.

No such options can be derived from the next image, my own cell phone contract (figure 9), provided several years ago.[305] The materials require waiver of rights to court and to class actions, whether in court or in arbitration. Claims may only be brought against the service provider individually and exclusively through a private arbitration process—in this instance, run by the American Arbitration Association—designated by that provider.[306] As noted, in *AT&T Mobility LLC v. Concepcion*, a bare majority of the United State Supreme Court held that federal arbitration law makes such provisions enforceable, despite state court conclusions that such one-sided provisions are unconscionable.[307]

303. Douglas P. Woodlock, *Communities and the Courthouses They Deserve. And Vice Versa.*, 24 YALE J.L. & HUMAN. 271, 279–80 (2012).

304. *Id.* at 280.

305. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1134–35 fig.12 (2006).

306. *Id.* This contract is typical of those provided. *See* Resnik, *Fairness in Numbers*, *supra* note 11, at 119.

307. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). Several other states had, like California, found that kind of provision unenforceable. *See* Resnik, *Fairness in Numbers, supra* note 11, at 129 & n.309.

The poor visual quality of this document contrasts with the intensely communitarian and self-conscious design of the Boston courtroom. The fine print of the cell phone document makes the point perfectly, for we, readers, are not really invited to read it, or to think about it, or to try to negotiate it. Indeed, its unreadability is economical, for the provision is a "take it or leave it" clause, avoided only by not buying that phone service. Calling this document a "contract" is thus a misnomer, for it is neither bargained for nor subject to bargaining.[308]

YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN. IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT .... IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). ... YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL AFTER WE MAKE THE CHANGE YOU REQUESTED. OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE....

308. Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 132, 143 (1970); Resnik, *Fairness in Numbers*, *supra* note 11, at 118, 128.

Figure 9: CELLULAR PHONE CONTRACT

INDEPENDENT ARBITRATION

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

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

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

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

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

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

Rather, these provisions are the manifestation of the power of a sector of providers, able (now that the Supreme Court has found enforceable such limits on rights to remedies[309]) to insist that purchasers of cell phones individually use the private "court" systems chosen by the sellers or, alternatively, hope for action from their state attorney generals or the Federal Trade Commission. The other option is to "lump it" and seek no redress.

The cell phone document encodes what is fundamentally wrong with the form of an alternative it imposes. The provider obliges consumers to use confidential dispute resolution services that obliterate the chance for an audience

309. *See Concepcion*, 131 S. Ct. at 1753.

to learn about what transpired. Further, by precluding class actions, the system has cut out ex ante mechanisms for redistributing resources.[310] Gone are Jeremy Bentham's "auditors"[311] and the potential for his imagined Tribunal of Public Opinion to function, for no one can evaluate the exchanges between the decision-makers and the disputants. Lost are opportunities to assess whether procedures and decision-makers are fair, how resources affect outcomes, whether similarly-situated litigants are treated comparably, and why one would want to get into (or avoid) court. Instead, a private transaction has been substituted and, unlike public adjudication, control over the meaning of the claims made and the judgments rendered rests with the corporate provider of the service.

The artistry of the photographer William Clift in *Reflection, Old St. Louis County Courthouse* (Figure 10) provides the coda.[312] The domed courthouse, seen in the glass of the modern building in which it is mirrored, is where the trial of Dred and Harriet Scott took place; their names stand now for the horrors of slavery and the failures of law.[313] Although a Missouri jury had, in the 1850s, ordered the Scotts free, the state Supreme Court and the U.S. Supreme Court concluded that they were legally slaves.[314] T.H. Marshall had insisted on access to courts as central to civil rights.[315] Chief Justice Taney's opinion for the Supreme Court held that the Constitution put slaves ("beings of an inferior

310. The cell phone provider promised—in a unilateral provision that could be withdrawn—to pay a $7500 minimum recovery and twice the amount of the claimant's attorney's fees to consumers who win more than was offered at settlement. *Id.* at 1744. Further, the dispute resolution service, the American Arbitration Association, caps fees at $125 for arbitrations of $10,000 or less. AM. ARB. ASS'N, CONSUMER-RELATED DISPUTES SUPPLEMENTARY PROCEDURES 8 (2011), *available at* http://www.adr.org/aaa/ShowPDF?url=/cs/groups/governmentandconsumer/documents/document/mdaw/mda4/~edisp/adrstg_015806.pdf. But given that many claims are less than that amount—the Concepcions alleged a thirty-dollar overcharge—few will pursue the remedy absent aggregation of claims. *See Concepcion*, 131 S. Ct. at 1760 (Breyer, J., dissenting).

311. 6 BENTHAM, *supra* note 10, at 356.

312. William Clift, *Reflection, Old St. Louis County Courthouse*, taken in 1976 in conjunction with the Seagram Court House Project, is provided and reproduced with his permission. *See* COURT HOUSE: A PHOTOGRAPHIC DOCUMENT 31, 251 (Richard Pare ed., 1978).

313. *See* DONALD F. DOSCH, THE OLD COURTHOUSE: AMERICANS BUILD A FORUM ON THE FRONTIER 103–06 (Dan Murphy ed., 1979). The building, opening in 1828, was used as both a state and federal courthouse. *St. Louis Old Courthouse, St. Louis*, WORLDSITEGUIDES.COM, http://www.worldsiteguides.com/north-america/us/st-louis/st-louis-old-courthouse/ (last visited May 26, 2012). It was enlarged thereafter with wings that shifted the former federal style building to that of a Greek Revival structure by the 1840s, and was remodeled again in the 1850s. *Old Courthouse Architecture*, NAT'L PARK SERVICE, http://www.nps.gov/jeff/planyourvisit/old-courthouse-architecture.htm (last visited May 26, 2012); *Setting the Stage*, NAT'L PARK SERVICE, http://www.nps.gov/nr/twhp/wwwlps/lessons/9stlouis/9setting.htm (last visited May 26, 2012).

314. DOSCH, *supra* note 313, at 106–07.

315. *See* T.H. Marshall, *Citizenship and Social Class*, *supra* note 77, at 8.

order") outside citizenship, lacking juridical voice even to challenge the state holding.[316]

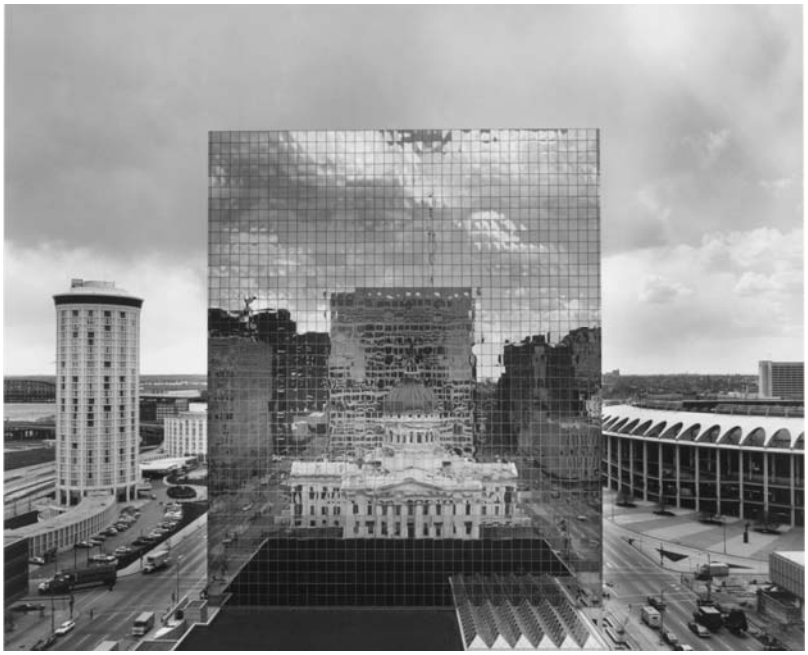

Figure 10: WILLIAM CLIFT, *REFLECTION, OLD ST. LOUIS COUNTY COURTHOUSE*, ST. LOUIS, MISSOURI, 1976

Photographer: William Clift, provided and reproduced with the permission of the photographer.

The Old St. Louis Courthouse was also the site of Virginia Minor's litigation seeking, in 1872, to vote as a citizen of the United States.[317] In 1874, in *Minor v. Happersett*, she argued that the Privileges and Immunities clause of the (then recent) Fourteenth Amendment endowed her, as a woman, with new rights.[318] The Supreme Court of the United States denied her equality. Minor was (unlike the Scotts) recognized as a citizen of the United States but not entitled to vote, an opportunity that, the Court held, depended on state law.[319]

316. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857). The Court also struck provisions of the Missouri Compromise that declared it a free territory, *id.* at 452, and held that the Fifth Amendment protected the rights of slaveholders in the "property" that was their slaves, *id.* at 450–51. *See also* DOSCH, *supra* note 313, at 107; LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER 317–18 (2009).

317. DOSCH, *supra* note 313, at 99.

318. Minor v. Happersett, 88 U.S. 162, 165 (1874).

319. *Id.* at 165, 178; DOSCH, *supra* note 313, at 99–100.

The Old Courthouse stands as a testament to injustices promulgated in the name of constitutions, both state and federal. Its display underscores that I make no claim that courts are intrinsically committed to the justice of equality. Polities make their courts just, or not. But courts operating under democratic precepts offer the potential to redistribute resources and power from government to individual, from one side of a case to another, and from disputants and decision-makers to the audience. Through participatory parity, public processes can teach about practices of norm development and offer the opportunity for popular input to produce changes in legal rights.

When issues are engaged in open court processes, we—those outside the immediate dispute—have a role in understanding, legitimating, delegitimating, and interpreting what law means, what justice entails, what the predicates of its practices are, and whether the resulting violence is acceptable or intolerable. Such "democratic iterations"[320] provide dense sets of interactions that can, over time, function as mechanisms to limit the scope of rulers' powers and to change normative precepts. Exemplary of those changes are the repudiations of *Dred Scott* and of *Minor v. Happersett*—undone by the Civil War, constitutional amendments thereafter, and political and social movements (of which the litigations were a part) that embrace a profoundly different conception of personhood and of justice. And of course, democratic engagement does not inevitably yield results that could be termed progressive. Like other sites of democratic ordering, popular will can be propelled in a variety of directions.

The authority of the audience and the potential for dispute resolution to be redistributive are at stake as courts and legislatures debate the permissible boundaries of the privatization of courts. Recall that Foucault mapped how, when the "great spectacle of punishment ran the risk of being rejected by the very people to whom it was addressed," the state developed prisons to assert coercion removed from public view.[321] Adjudication is now following a parallel path, putting at risk the modern phenomenon of "rights" of access to court for "everyone," newly empowered to seek accountings from previously impervious actors. Public and private disciplinary powers—from the U.S. government at Guantánamo Bay to cell phone providers mandating confidential arbitrations—increasingly rely on practices that do not admit of a need to show their processes in order to justify the exercise of authority.

William Clift's late twentieth-century photograph of the Old St. Louis Courthouse records that trajectory. "In the 1930s, the courthouse was abandoned in favor of a new Civil Courts Building and then rescued for renovation as a national monument—formally confirmed in 1940 under

320. *See* Seyla Benhabib, *Democratic Iterations: The Local, the National, and the Global*, *in* ANOTHER COSMOPOLITANISM 45, 45 (Robert Post ed., 2006).

321. FOUCAULT, *supra* note 7, at 63, 74.

President Franklin Roosevelt."[322] The building now functions as a museum, which is what may be the twenty-first century fate of other monumental courthouses. Moreover, what Clift shows is the Old Courthouse reflected in another structure—known in the 1970s as the Equitable Life Building.[323] The third building, larger than and behind the reflected image of the courthouse, is in turn the current regional headquarters of the American Arbitration Association, one of the private providers of dispute resolution services. Sandwiched between two office buildings, the Old Courthouse is subsumed by the corporate structures that surround it.

322. *See* DOSCH, *supra* note 313, at 111.

323. *Id.* at 92–93. That building, designed by Hellmuth, Obata & Kassabaum and built in 1971, was renovated in the 1990s and purchased by the Herzt Investment Group in 2007 from the AXA Equitable Life Insurance Company. *Id.* at 93 n.339; *see also* Lisa R. Brown, *Equitable Building Under Contract, Millennium Center Sold*, ST. LOUIS BUS. J., Jan. 5–11, 2007, at 45A.

APPENDIX 1

STATE CONSTITUTIONS: TEXTUAL COMMITMENTS TO RIGHTS TO REMEDIES					
State	**Declaration / Constitution when first enacted**	**Text**	**Current const.**	**Current text**	**Date Current Text Enacted**
Alabama	Const. of 1819, art. I, § 14 (1st Const.)	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.	Const. of 1901, art. I, § 13 (current through 2010)	Same (That all courts shall be open; and that every person for any injury done him in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.)	1819
Arizona	Const. of 1912, art. II, § 11 (1st Const.)	Justice in all cases shall be administered openly, and without unnecessary delay.	Const. of 1912, art. II, § 11 (current through 2011)	Same	1912
Arkansas	Const. of 1868, art. I, § 10 (3rd Const.)	Every person is entitled to a certain remedy in the laws for all injuries or	Const. of 1874, art. II, § 13 (current	Same (Every person is entitled to a certain remedy in the	1868

		wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay; conformably to the laws.	through 2011)	laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely and without denial; promptly and without delay; conformably to the laws.)	
Colorado	Const. of 1876, art. II, § 6 (1st Const.)	That courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and that right and justice should be administered without sale, denial, or delay.	Const. of 1876, art. II, § 6 (current through 2010)	Same	1876
Connecticut	Const. of 1818, art. I, § 12 (1st Const.)	All courts shall be open, and every person, for an injury done to him in his person,	Const. of 1965, art. I, § 10 (current	Same (All courts shall be open, and every person, for an injury done to him	1818

		property, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.	through 2011)	in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.)	
Delaware	Const. of 1792, art. I, § 9 (2nd Const.)	All court[s] shall be open; and every man, for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense;	Const. of 1897, art. I, § 9 (as amended in 1977 and 1999, current through 2010)	All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense.	1999
Florida	Const. of 1839, art. I,	That all courts shall be open, and every	Const. of 1968, art. I, §	The courts shall be open to every	1968

	§ 9 (1st Const.)	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.	21 (current through 2010)	person for redress of any injury, and justice shall be administered without sale, denial or delay.	
Georgia	Const. of 1877, art. I, § 1, ¶ 4 (7th Const.)	No person shall be deprived of the right to prosecute or defend his own cause in any of the Courts of this State, in person, by attorney, or both.	Const. of 1983, art. I, § 1, ¶ 12 (current through 2011)	No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.	1983
Idaho	Const. of 1890, art. I, § 18 (1st Const.)	Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale,	Const. of 1890, art. I, § 18 (current through 2011)	Same	1890

		denial, delay, or prejudice.			
Illinois	Const. of 1818, art. VIII, § 12 (1st Const.)	Every person within this State ought to find a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.	Const. of 1970, art. I, § 12 (current through 2012)	Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.	1970
Indiana	Const. of 1816, art. I, § 11 (1st Const.)	[A]ll Courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation shall have remedy by the due course of law; and right and justice administered	Const. of 1851, art. 1, § 12 (as amended in 1984, current through 2011)	All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered	1984

		without denial or delay.		freely, and without purchase; completely, and without denial; speedily, and without delay.	
Kansas	Const. of 1859, Bill of Rights, § 18 (1st Const.)	All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.	Const. of 1859, Bill of Rights, § 18 (current through 2011)	Same	1859
Kentucky	Const. of 1792, art. XII, § 13 (1st Const.)	[A]ll courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice administered, without sale, denial, or delay.	Const. of 1891, Bill of Rights, § 14 (current through 2011)	Same (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.)	1792
Louisiana	Const. of 1864, tit. VII, art. 110 (5th Const.)	All courts shall be open; and every person, for any injury	Const. of 1974, art. I, § 22	All courts shall be open, and every person shall	1974

		done him, in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without denial or unreasonable delay.	(current through 2012)	have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.	
Maine	Const. of 1819, art. I, § 19 (1st Const.)	Every person, for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.	Const. of 1819, art. I, § 19 (as amended in 1988, current through 2011)	Every person, for a[n] injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.	1988
Maryland	Const. of 1776, Decl. of Rights,	That every freeman, for any injury done	Const. of 1867, Decl. of	That every man, for any injury done to	1864

	art. 17 (1st Const.)	him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and [r]ight freely without sale, fully without any denial, and speedily without delay, according to the law [of] the land.	Rights, art. 19 (current through 2011) (same as Const. of 1864)	him in person or property ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to [the] Law of the Land.	
Massachusetts	Const. of 1780, pt. I, art. XI (1st Const.)	Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and	Const. of 1780, pt. I, art. XI (current through 2011)	Same	1780

		without delay; conformably to the laws.			
Michigan	Const. of 1850, art. VI, § 24 (2nd Const.)	Any suitor in any court of this State shall have the right to prosecute or defend his suit, either in his own proper person, or by an attorney or agent of his choice.	Const. of 1963, art. I, § 13 (current through 2010)	A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.	1963
Minnesota	Const. of 1857, art. I, § 8 (1st Const.)	Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without denial, promptly and without delay, conformable to the laws.	Const. of 1974, art. I, § 8 (current through 2011)	Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.	1974
Mississippi	Const. of 1817, art. I, § 14 (1st Const.)	[A]ll courts shall be open, and every person, for an	Const. of 1890, art. III, § 24	Same (All courts shall be open; and every person	1817

		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.	(current through 2011)	for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay.)	
Missouri	Const. of 1820, art. XIII, § 7 (1st Const.)	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.	Const. of 1945, art. I, § 14 (current through 2011) (same as Const. of 1875, art. II, § 10)	That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.	1875
Montana	Const. of 1889, art.	Courts of justice shall be open to every	Const. of 1973, art. II, §	Courts of justice shall be open to	1973

	III, § 6 (1st Const.)	person, and a speedy remedy afforded for every injury of person, property or character; and that right and justice shall be administered without sale, denial or delay.	16 (current through 2010)	every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.	

Nebraska	Const. of 1866, art. I, § 9 (1st Const.)	All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay.	Const. of 1875, art. I, § 13 (as amended 1996, current through 2011)	All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may 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	1996

				the revocation of any contract.	
New Hampshire	Const. of 1784, pt. I, art. 14 (2nd Const.)	Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries [h]e may receive in his person, property or character, to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.	Const. of 1784, pt. I, art. 14 (current through 2011)	Same	1784
North Carolina	Const. of 1868, art. I, § 35 (2nd Const.)	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,	Const. of 1971, art. I, § 18 (current through 2011)	All courts shall be open; 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 shall be administered	1971

		denial, or delay.		without favor, denial, or delay.	
North Dakota	Const. of 1889, art. I, § 22 (1st Const.)	All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.	Const. of 1981, art. I, § 9 (current through 2011)	Same	1889
Ohio	Const. of 1802, art. VIII, § 7 (1st Const.)	[A]ll courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice	Const. of 1851, art. I, § 16 (as amended in 1913, current through 2011)	All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice	1913

		administered without denial or delay.		administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.	
Oklahoma	Const. of 1907, art. II, § 6 (1st Const.)	The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.	Const. of 1907, art. II, § 6 (current through 2011)	Same	1907
Oregon	Const. of 1857, art. I, § 10 (1st Const.)	No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man	Oregon Const. of 1857, art. I, § 10 (current through 2010)	Same	1857

		shall have remedy by due course of law for injury done him in his person, property, or reputation.			
Pennsylvania	Const. of 1776, art. II, § 26 (1st Const.)	All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay	Const. of 1969, art. I, § 11 (current through 2012) (same as Const. of 1790, art. IX, § 11)	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.	1790
Rhode Island	Const. of 1843, art. I, § 5 (1st Const.)	Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely	Const. of 1986, art. I, § 5 (current through 2011)	Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to	1986

		and without purchase, completely and without denial; promptly and without delay; conformably to the laws.		obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.	
South Carolina	Const. of 1868, art. I, § 15 (6th Const.)	All courts shall be public, and every person, for any injury that he may receive in his lands, goods, person or reputation, shall have remedy by due course of law and justice administered without unnecessary delay.	Const. of 1895, art. I, § 9 (as amended in 1971, current through 2011)	All cou[r]ts shall be public, and every person shall have speedy remedy therein for wrongs sustained.	1971
South Dakota	Const. of 1889, art. VI, § 20 (1st Const.)	All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice	Const. of 1889, art. VI, § 20 (current through 2011)	Same	1889

		administered without denial or delay.			
Tennessee	Const. of 1796, art. XI, § 17 (1st Const.)	That 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. Suits may be brought against the State in such manner, and in such Courts as the Legislature may by law direct, provided the right of bringing Suit be limited to the Citizens of this State.	Const. of 1870, art. I, § 17 (current through 2011) (same as Const. of 1834, art. I, § 17)	That 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. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.	1834
Texas	Const. of 1845, art. I, § 11 (1st Const.)	All courts shall be open; and every person, for an injury done him in his lands, goods, person, or reputation, shall have	Const. of 1876, art. I, § 13 (current through 2011)	Same (All courts shall be open, and every person for an injury done him in his lands, goods, person, or	1845

		remedy by due course of law.		reputation, shall have remedy by due course of law.)	
Utah	Const. of 1895, art. I, § 11 (1st Const.)	All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.	Const. of 1895, art. I, § 11 (current through 2011)	Same	1895

Vermont	Const. of 1786, ch. I, art. IV (2nd Const.)	Every person within this Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character: he ought to obtain right and justice freely, and without being obliged to purchase it— completely and without any denial, promptly and without delay; conformably to the laws.	Const. of 1793, ch. I, art. IV (as amended in 1991, current through 2010)	Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; co[n]formably to the laws.	1991

Washington	Const. of 1889, art. I, § 10 (1st Const.)	Justice in all cases shall be administered openly, and without unnecessary delay.	Const. of 1889, art. I, § 10 (current through 2011)	Same	1889
West Virginia	Const. of 1872, art. III, § 17 (2nd Const.)	The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.	Const. of 1872, art. III, § 17 (current through 2011)	Same	1872
Wisconsin	Const. of 1848, art. I, § 9 (1st Const.)	Every person is entitled to a certain remedy in the laws, for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain right and justice freely, and without being obliged to purchase it, completely, and without denial,	Const. of 1848, art. I, § 9 (current through 2012)	Same	1848

		promptly, and without delay, conformably to the laws.			
Wyoming	Const. of 1889, art. I, § 8 (1st Const.)	All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the State in such manner and in such courts as the legislature may by law direct.	Const. of 1889, art. I, § 8 (current through 2011)	Same	1889

With the exception of Georgia, Massachusetts, Missouri, Nebraska, Oregon, Tennessee, Vermont, and Wisconsin, information comes from John Joseph Wallis, NBER/MARYLAND STATE CONSTITUTIONS PROJECT, www.stateconstitutions.umd.edu (last visited May 14, 2012). Mistakes in that database have been indicated by bracketing the incorrect language. For states not included in Wallis's database, information comes from: *Georgia Constitution Web Page*, GEORGIAINFO, http://georgiainfo.galileo.usg.edu/gacontoc.htm (last visited May 14, 2012); MASS. CONST. of 1780, *available at* http://www.nhinet.org/ccs/docs/ma-1780.htm; MASS. CONST., *available at* http://www.malegislature.gov/laws/constitution.; MO. CONST. of 1820, *available at* http://clio.missouristate.edu/ftmiller/localhistory/docs/moconst1820.htm; MO. CONST., *available at* http://www.sos.mo.gov/pubs/missouri_constitution.pdf.; NEB. CONST. of 1866, *available at* http://ia700406.us.archive.org/28/items/constitutionofst00innebr/constitutionofst00innebr.pdf; *Nebraska State Constitution [of 1875] Article I-13*, NEB. LEGISLATURE, http://nebraskalegislature.gov/laws/articles.php?article=I-13 (last visited May 14, 2012); *see also* ROBERT D. MIEWALD & PETER J. LONGO, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE 44 (1993); OR. CONST. of 1857, *available at* http://bluebook.state.or.us/state/constitution/orig/const.htm; OR. CONST., *available at*

http://bluebook.state.or.us/state/constitution/const2010.pdf.; TENN. CONST., *available at* http://www.capitol.tn.gov/about/docs/TN-Constitution.pdf; TENN. CONST. of 1796, *available at* http://www.tn.gov/tsla/founding_docs/33633_Transcript.pdf.; VT. CONST. of 1777, *available at* http://vermont-archives.org/govhistory/constitut/con77.htm; VT. CONST. of 1786, *available at* http://vermont-archives.org/govhistory/constitut/con86.htm; VT. CONST. of 1793, *available at* http://vermont-archives.org/govhistory/constitut/con93.htm; VT. CONST., *available at* http://www.leg.state.vt.us/statutes/const2.htm.; WIS. CONST. of 1848, *available at* http://www.wisconsinhistory.org/turningpoints/search.asp?id=1627.

APPENDIX 2

STATE CONSTITUTIONS WITHOUT EXPRESS REMEDIES CLAUSES AND WITH DUE PROCESS OR OPEN/PUBLIC COURTS PROVISIONS					
State	**Declaration/ Constitution when first enacted**	**Text**	**Current const.**	**Current text**	**Date Current Text Enacted**
Alaska	Const. of 1959, art. I, § 1 (Inherent rights) (1st Const.)	This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.	Const. of 1959, art. I, § 1 (current through 2011)	Same	1959
	Const. of 1959, art. I, § 7 (Due process) (1st Const.)	No person shall be deprived of life, liberty, or property, without due process of law. The right of all	Const. of 1959, art. I, § 7 (current through 2011)	Same	1959

		persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.			
	Const. of 1959, art. I, § 10 (Treason) (1st Const.)	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*. (emphasis added)	Const. of 1959, art. I, § 10 (current through 2011)	Same	1959
	Const. of 1959, art. I, § 11 (Criminal Prosecutions) (1st Const.)	In all criminal prosecutions, the accused shall have the right to a speedy and *public trial* **. . . .** (emphasis added)	Const. of 1959, art. I, § 11 (current through 2011)	Same	1959
California	Const. of 1879, art. I, § 7 (Jury trial right) (2nd Const.)	A trial by jury may be waived in all criminal cases, not amounting to felony, by the consent of both parties, expressed in *open Court*, and in civil actions by the	Const. of 1879, art. I, § 16 (as amended in 1998) (current through 2012)	A jury may be waived in a criminal cause by the consent of both parties expressed in *open court* by the defendant and the defendant's counsel. . . .	1998

		consent of the parties, signified in such manner as may be prescribed by law. In civil actions, and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in *open Court*. (emphasis added)		In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in *open court*. In civil causes other than causes within the appellate jurisdiction of the court of appeal the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in *open court*. . . . In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in *open court*. (emphasis added)	
	Const. of 1849, art. I, § 8 (Due	No person shall . . . be deprived of	Const. of 1879, art. I, §	A person may not be deprived of	1979

	process) (1st Const.)	life, liberty, or property without due process of law	7, ¶ a (as amended in 1974 and 1979) (current through 2012)	life, liberty, or property without due process of law or denied equal protection of the laws	
	Const. of 1849, art. I, § 10 (Right to petition) (1st Const.)	The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.	Const. of 1879, art. I, § 3, ¶ a (as amended in 2004) (current through 2012)	The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.	2004
	Const. of 1879, art. I, § 13 (Speedy public trial) (2nd Const.)	In criminal prosecutions, in any Court whatever, the party accused shall have the right to a speedy and *public trial* . . . . (emphasis added)	Const. of 1879, art. I, § 15 (as amended in 1974) (current through 2012)	The defendant in a criminal cause has the right to a speedy *public trial* . . . . (emphasis added)	1974
	Const. of 1849, art. I, § 20 (Treason) (1st Const.)	No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in	Const. of 1879, art. I, § 18 (as amended in 1974) (current through 2012)	A person may not be convicted of treason except on the evidence of two witnesses to the same overt act or	1974

		open court. (emphasis added)		by confession in *open court*. (emphasis added)	
Hawaii	Const. of 1959, art. I, § 4 (Due Process) (1st Const.)	No person shall be deprived of life, liberty or property without due process of law, no[r] be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.	Const. of 1978, art. I, § 5 (current through 2011)	Same (No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.)	1959
	Const. of 1959, art. I, § 6 (Rights of citizens) (1st Const.)	No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.	Const. of 1978, art. I, § 8 (current through 2011)	Same	1959
	Const. of 1959, art. I, §	In all criminal prosecutions, the accused	Const. of 1978, art. I, §	Same in relevant part	1959

	11 (Rights of the accused) (1st Const.)	shall enjoy the right to a speedy and *public trial* by an impartial jury of the district wherein the crime shall have been committed . . . . (emphasis added)	14 (current through 2011)		
Iowa	Const. of 1857, art. I, § 9 (Due process) (2nd Const.)	[N]o person shall be deprived of life, liberty, or property, without due process of law.	Const. of 1857, art. I, § 9 (current through 2010)	Same	1857
	Const. of 1857, art. I, § 10 (Speedy public trial) (2nd Const.)	In all criminal prosecutions, and in cases involving the life or liberty of [a]n individual, the accused shall have a right to a speedy and *public trial* by an impartial jury . . . . (emphasis added)	Const. of 1857, art. I, § 10 (current through 2010)	Same	1857
	Const. of 1846, art. I, § 16 (Treason) (1st Const)	No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act, or confession in	Const. of 1857, art. I, § 16 (current through 2010)	Same	1846

		open court. (emphasis added)			
Nevada	Const. of 1864, art. I, § 8 (Due process) (1st Const.)	No person shall be . . . deprived of life, liberty, or property, without due process of law	Const. of 1864, art. I, § 8, cl. 5 (current through 2010)	Same in relevant part	1864
	Const. of 1864, art. I, § 19 (Treason) (1st Const.)	And 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*. (emphasis added)	Const. of 1864, art. I, § 19 (current through 2010)	Same	1864
New Jersey	Const. of 1844, art. I, § 1 (Natural and unalienable rights) (2nd Const.)	All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.	Const. of 1947, art. I, § 1 (current through 2011)	All persons are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining	1947

				safety and happiness.	
	Const. of 1844, art. I, § 8 (Speedy public trial) (2nd Const.)	In all criminal prosecutions the accused shall have the right to a speedy and *public trial* by an impartial jury . . . . (emphasis added)	Const. of 1947, art. I, § 10 (current through 2011)	Same	1844
	Const. of 1844, art. I, § 14 (Treason) (2nd Const.)	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*. (emphasis added)	Const. of 1947, art. I, § 17 (current through 2011)	Same	1844
New Mexico	Const. of 1911, art. II, § 4 (Inalienable rights) (1st Const.)	All persons are born equally free, and have certain natural, inherent, and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of seeking and obtaining	Const. of 1911, art. II, § 4 (current through 2011)	Same	1911

		safety and happiness.			
	Const. of 1911, art. II, § 14 (Speedy public trial) (1st Const.)	In all criminal prosecutions the accused shall have the right to . . . a speedy *public trial* by an impartial jury of the county or district in which the offense is alleged to have been committed. (emphasis added)	Const. of 1911, art. II, § 14 (as amended in 1924, 1980, and 1994) (current through 2011)	Same in relevant part	1911
	Const. of 1911, art. II, § 16 (Treason) (1st Const.)	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*. (emphasis added)	Const. of 1911, art. II, § 16 (current through 2011)	Same	1911
	Const. of 1911, art. XX, § 20 (Waiver of indictment) (1st Const.)	Any person held by a committing magistrate to await the action of the grand jury on a charge of felony or other infamous crime, may in *open court*	Const. of 1911, art. XX, § 20 (current through 2011)	Same	1911

		with the consent of the court and the district attorney to be entered upon the record, waive[] indictment and plead to an information in the form of an indictment filed by the district attorney . . . . (emphasis added)			
New York	Const. of 1777, art. XIII (Rights and privileges) (1st Const.)	And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the	Const. of 1938, art. I, § 1 (as amended in 1959) (current through 2011)	No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his [or her] peers, except that the legislature may provide that there shall be no	1959

		law of the land, or the judgment of his peers.		primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general [l]aw.	
	Const. of 1938, art. I, § 2 (Waiver of jury trial) (5th Const.)	A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, [by a] written	Const. of 1938, art. I, § 2 (current through 2011)	Same	1938

		instrument signed by the defendant in person in *open court* before and with the approval of a judge or justice of a court having jurisdiction to try the offense. (emphasis added)			
	Const. of 1938, art. I, § 6 (Waiver of indictment) (5th Const.)	No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and	Const. of 1938, art. I, § 6 (as amended in 1973) (current through	No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprison-ment, with the consent of the district attorney, may	1973

		be confronted with the witnesses against him.		waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in *open court* in the presence of his counsel. (emphasis added)	
Virginia	Const. of 1776, Bill of Rights, § 8 (Speedy trial; due process) (1st Const.)	[I]n all capital or criminal prosecutions a man hath a right . . . to a speedy trial . . . [N]o man [shall] be deprived of his liberty, except by the law of the land or the judgment of his peers.	Const. of 1971, art. I, § 8 (current through 2011)	Trial right: [I]n criminal prosecutions a man hath a right . . . to a speedy and public trial . . . . Due process: He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers	Public trial: 1971 Due process: 1971
	Const. of 1902, art. I, §	[N]o person shall be deprived of his	Const. of 1971, art. I, §	[N]o person shall be deprived of	1971

	11 (Due process) (5th. Const.)	property without due process of law	11 (current through 2011)	his life, liberty, or property without due process of law	

Historical information in this chart on Alaska, California (except for most recent version), Hawaii, Iowa, Nevada, New Jersey, New Mexico, and New York comes from John Joseph Wallis, NBER/MARYLAND STATE CONSTITUTIONS PROJECT, www.stateconstitutions.umd.edu (last visited May 14, 2012). Corrections to that database are indicated by bracketing incorrect language. For California's most recent constitution with dates of amendment, see CAL. CONST., *available at* http://leginfo.legislature.ca.gov/faces/codes. xhtml. For Virginia, information comes from: VA. CONST. of 1776, *available at* http://www.nhinet.org/ccs/docs/va-1776.htm; VA. CONST. of 1902, *available at* http://hdl.handle.net/2027/uva.x030202240; VA. CONST., *available at* http://legis.state.va.us/Laws/search/Constitution.htm.

APPENDIX 3

STATE CONSTITUTIONS: CRIMINAL DEFENDANTS' RIGHTS IN THE THIRTEEN ORIGINAL STATES					
State	**Declaration/ Constitution when first enacted**	**Text**	**Current const.**	**Current text**	**Date Current Text Enacted**
Connecticut	Const. of 1818, art. I, § 9 (2nd Const.)	In all criminal prosecutions, the accused shall have the right to be heard by himself and by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favor; and in all prosecutions, by indictment or information, a speedy public trial by an impartial jury. He shall not be compelled to give evidence against himself, nor be deprived of	Const. of 1965, art. I, § 8 (as amended in 1996) (current through 2011)	Same, with addition of victims' rights paragraph in 1996 (In all Criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in	Relevant text: 1818 With victims' rights paragraph: 1996

		life, liberty, or property, but by the course of law. And no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or indictment of a grand jury; except in the land or naval forces, or in the militia when in actual service in time of war or public danger.		capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprison-ment, unless upon probable cause shown at a hearing in	

				accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.)	
Delaware	Const. of 1792, art. I, § 7 (2nd Const.)	In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to be plainly and fully informed of the nature and cause of the accusation against him, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself, his friends, or counsel, for obtaining witnesses in his favor, and a	Const. of 1897, art. I, § 7 (as amended in 1999) (current through 2011)	In all criminal prosecutions, the accused hath a right to be heard by himself or herself and his or her counsel, to be plainly and fully informed of the nature and cause of the accusation against him or her, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself or herself, his or her friends or	1999

		speedy and public trial by an impartial jury; he shall not be compelled to give evidence against himself, nor shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land.		counsel, for obtaining witnesses in his or her favor, and a speedy and public trial by an impartial jury; he or she shall not be compelled to give evidence against himself or herself, nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land.	
Georgia	Const. of 1798, art. III, § 8 (3rd Const.)	Within five years after the adoption of this constitution, the body of our laws, civil and criminal, shall be revised, digested, and arranged under proper heads, and promulgated in such manner as the legislature may direct; and no person shall	Const. of 1983, art. I, § 1, ¶ 14 (current through 2011)	Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel; shall be furnished with a copy of the accusation or indictment and, on demand, with a list of the	1983

		be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both.		witnesses on whose testimony such charge is founded; shall have compulsory process to obtain the testimony of that person's own witnesses; and shall be confronted with the witnesses testifying against such person.	
Maryland	Const. of 1776, Decl. of Rights, art. 19 (1st Const.)	[I]n all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process	Const. of 1867, Decl. of Rights, art. 21 (current through 2011)	Same	1776

		for his witnesses; to examine the witnesses, for and against him, on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.			
Massachusetts	Const. of 1780, pt. I, art. XII (1st Const.)	No subject shall be held to answer for any crimes or [] offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face,	Const. of 1780, pt. I, art. XII (current through 2011)	Same	1780

		and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or 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. And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.			

New Hampshire	Const. of 1784, art. I, § 15 (2nd Const.)	No subject shall be held to answer for any crime, or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, and counsel. And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the	Const. of 1784, art. I, § 15 (as amended in 1966 (counsel at state expense) and 1984 (standard of proof for commit ment of crimi-nally insane)) (current through 2011)	No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities,	1984

		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.		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; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or	

				offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.	
New Jersey	Const. of 1776, art. 16 (1st Const.)	[A]ll criminals shall be admitted [] the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.	Const. of 1947, art. I, § 10 (current through 2011) (same as Const. of 1844, art. I, § 8.)	In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed [o]f the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and	1844

				to have the assistance of counsel in his defense.	
New York	Const. of 1777, art. 34 (1st Const.)	[I]n every trial on impeachment, or indictment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions.	Const. of 1938, art. I, § 6 (as amended in 1949, 1959, 1973, and 2001) (current through 2011)	No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprison-ment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced	2001

				by written instrument signed by the defendant in open court in the presence of his [or her] counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him [or her]. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he [or she] be compelled in any criminal case to be a witness	

				against himself [or herself] . . . . No person shall be deprived of life, liberty or property without due process of law.	
North Carolina	Const. of 1868, art. I, § 11 (2nd Const.)	In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defence, and not be compelled to give evidence against himself	Const. of 1971, art. I § 23 (current through 2011) (same as 1946 amendment to Const. of 1868, art. I, § 11)	In all criminal prosecutions, every person charged with a crime has the right to be informed of the accusation and [to] confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.	1946

Pennsylvania	Const. of 1790, art. IX, § 9 (2nd Const.)	That in all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; that he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.	Const. of 1969, art. I, § 9 (as amended in 1984 and 1995) (current through 2012)	In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property,	1995

				unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself. . . .	
Rhode Island	Const. of 1843, art. I, § 10 (1st Const.)	In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for	Const. of 1986, art. I, § 10 (current through 2011)	In all criminal prosecutions, accused persons shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against them, to have	1986

		obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.		compulsory process for obtaining them in their favor, to have the assistance of counsel in their defense, and shall be at liberty to speak for themselves; nor shall they be deprived of life, liberty, or property, unless by the judgment of their peers, or the law of the land.	
South Carolina	Const. of 1868, art. I, § 13 (6th Const.)	No person shall be held to answer for any crime or offence until the same is fully, fairly, plainly, substantially and formally described to him; or be compelled to accuse or furnish evidence against himself; and every person shall have a right to	Const. of 1895, art. I, § 14 (as amended in 1971) (current through 2011)	The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the	1971

		produce all proofs that may be favorable to him, to meet the witnesses against him face to face, to have a speedy and public trial by a[n] impartial jury, and to be fully heard in his defence by himself or by his counsel, or by both, as he may elect.		witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.	
Virginia	Const. of 1776, Bill of Rights § 8 (1st Const.)	That in all capital or criminal prosecutions a man bath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous	Const. of 1971, art. I, § 8 (current through 2011)	That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage,	1971

		consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.		without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense. Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record	

				having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class. In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the Commonweal th's attorney and of the court entered of record, be tried by a smaller number of jurors, or	

				waive a jury. In case of such waiver or plea of guilty, the court shall try the case.	

Historical information in this chart on Connecticut, Delaware, Maryland, New Hampshire (except for amendments), New Jersey, New York (except for amendments), North Carolina, Pennsylvania, Rhode Island, and South Carolina comes from John Joseph Wallis, NBER/MARYLAND STATE CONSTITUTIONS PROJECT, www.stateconstitutions.umd.edu (last visited May 15, 2012). For states not included in Wallis's database, information comes from *Georgia Constitution Web Page*, GEORGIAINFO, http://georgiainfo.galileo.usg.edu/gacontoc.htm (last visited May 15, 2012); MASS. CONST. of 1780, *available at* http://www.nhinet.org/ccs/docs/ma-1780.htm; MASS. CONST., *available at* http://www.malegislature.gov/laws/constitution; SUSAN E. MARSHALL, THE NEW HAMPSHIRE STATE CONSTITUTION: A REFERENCE GUIDE 65 (2004); N.Y. CONST., *available at* http://www.dos.ny.gov/info/constitution.htm.; VA. CONST. of 1776, *available at* http://www.nhinet.org/ccs/docs/va-1776.htm; VA. CONST., *available at* http://legis.state.va.us/Laws/search/Constitution.htm.