

Summer 2012

# Building the Federal Judiciary (Literally and Legally): the Monuments of Chief Justices Taft, Warren and Rehnquist

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## Recommended Citation

Resnik, Judith (2012) "Building the Federal Judiciary (Literally and Legally): the Monuments of Chief Justices Taft, Warren and Rehnquist," *Indiana Law Journal*: Vol. 87: Iss. 3, Article 1.

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## The Addison C. Harris Lecture

### **Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist<sup>†</sup>**

JUDITH RESNIK<sup>\*</sup>

#### ABSTRACT

*The “federal courts” took on their now familiar contours over the course of the twentieth century. Three chief justices—William Howard Taft, Earl Warren, and William Rehnquist—played pivotal roles in shaping the institutional, jurisprudential, and physical premises. Taft is well known for promoting a building to house the U.S. Supreme Court and for launching the administrative infrastructure that came to govern the federal courts. Earl Warren’s name has become the shorthand for a jurisprudential shift from state toward federal authority; the Warren Court offered an expansive understanding of the role federal courts could play in enabling access for a host of new claimants seeking an array of rights.*

*William Rehnquist is identified with limiting both rights and access in favor of state court and of executive authority. He has been less well appreciated for his role in changing the institutional capacity of the federal courts. During the Rehnquist era, the budget of the federal courts doubled as staff and facilities expanded, in part by way of the largest federal building program since the New Deal.*

*Over the course of the twentieth century and under the leadership of all three chief justices, the judiciary gained an increasingly robust corporate persona. Judges shifted their sights from “court quarters” to custom-designed courthouses*

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<sup>\*</sup> Arthur Liman Professor of Law, Yale Law School. All rights reserved. Judith Resnik. This Lecture built on and is related to the book *Representing Justice: Inventions, Controversies, and Rights in City-States and Democratic Courtrooms* (2011), co-authored with Dennis Curtis. Thanks are due to Dean Lauren Robel, Dawn Johnsen, and Charlie Geyh, whose hospitality prompted this Lecture, as well as an earlier conference, *Congressional Power in the Shadow of the Rehnquist Court: Strategies for the Future*. My Article from that earlier conference can be found at Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 *IND. L.J.* 223 (2003).

I owe a great debt to remarkable research assistants. Special thanks to Allison Tait, Jason Glick, Ruth Anne French-Hodson, and to Brian Holbrook, Ester Murdukhayeva, and Charles Tyler, to undergraduates Katherine Haas, Rose Malloy, and Dale Lund, to recently graduated students Adam Grogg and Elliot Morrison, and to Marin Levy who did intensive and thoughtful historical research into the many documents related to federal building projects.

I should add that I have been a participant in some activities about which I write. In addition to being an occasional litigator in the federal courts, I have testified before both Congress and committees of the Judicial Conference on issues related to topics addressed here. See, e.g., *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *2010 Courtroom Use: Access to Justice*] (statement of Judith Resnik).

and, during Chief Justice Rehnquist's tenure, obtained billions of dollars to fund new construction. The Administrative Office of the United States Courts came into close contact with two other federal bureaucracies—the General Services Administration and the National Endowment for the Humanities—and developed a program of construction that made massive federal courthouses signature buildings of the federal government.

Changes of the last decades, however, interrupt the narrative of federal judicial growth spiraling ever upward. Flattening rates of filings, vanishing trials, and limitations imposed both by Congress and the Supreme Court on federal court authority make fragile both the monumental aspirations for federal adjudication and the continuing investment of resources in federal judges and in their courts. The cultural capital of the federal courts overshadows that of state and administrative adjudication, but, as federal jurisprudence continues to constrict access, the state courts—with jurists pressing for “Civil Gideon”—are advancing the very agendas that the Warren Court once made “federal” imperatives.

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#### I. TRANSFORMING THE JURISDICTIONAL AND JURISPRUDENTIAL LANDSCAPE

In 1850, the federal government owned about fifty buildings. None were labeled courthouses. Today, several hundred federal courthouses dot the landscape of the United States. Their existence marks both the transformation of the federal government and the commitment of all three branches to the importance of adjudication in this polity.

These many solid (and often stone) structures give an impression of longevity that masks their complex origins and relatively short history, just as the Ionic columns of the U.S. Supreme Court (figure 1) suggest a building style far removed from that in vogue in 1935 when its doors opened. The grandeur of that building forecast the role that the Court it sheltered has come to play in American life.



**Figure 1:** *United States Supreme Court, Washington, D.C. Architect: Cass Gilbert, 1935.*

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

At the time, the structures for the lower courts, like their ambitions, were much more modest. Through the 1960s, federal judges were focused on obtaining what their reports called “court quarters,”<sup>1</sup> rather than on securing financing for the

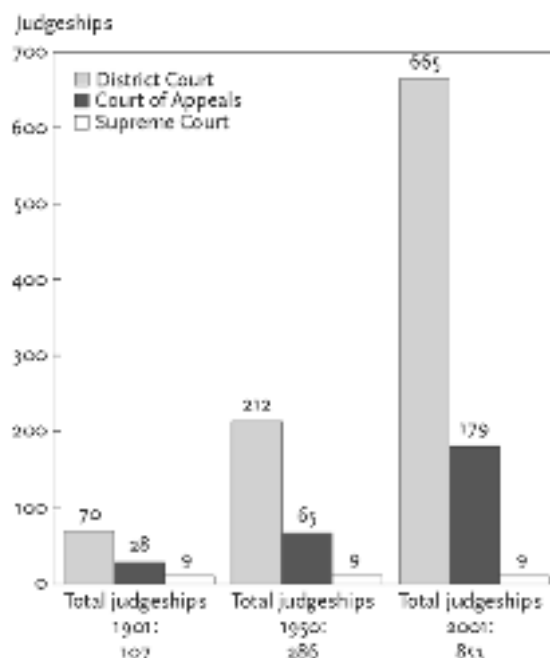
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1. See, e.g., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (Mar. 1961); REPORT OF THE CONFERENCE OF SENIOR CIRCUIT JUDGES 18 (Sept. 1945); see *infra* note 203 and accompanying text.

The Judicial Conference and its predecessor, the Conference of Senior Circuit Judges, produced reports either yearly or biannually. These reports were first published (in 1924) by a law review, then in the Annual Reports of the Attorney General, and

architecturally important buildings that have since come to mark their housing stock. In the 1980s, however, when contemplating the rise in filings, the judiciary's leadership sought relief for what it termed a "housing crisis" and argued for more and better spaces for its expanding workforce and workload.<sup>2</sup>

By then, "the federal courts" had become a vivid part of legal and popular culture. The pervasive assumption was that an unending spiral of growth in the federal caseload needed to be matched by larger footprints for its buildings. That belief was grounded in the century's history. From 1901 to 2001, as shown in the chart entitled *Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001* (figure 2), authorized judgeships grew from about 100 to more than 800 life-tenured positions.



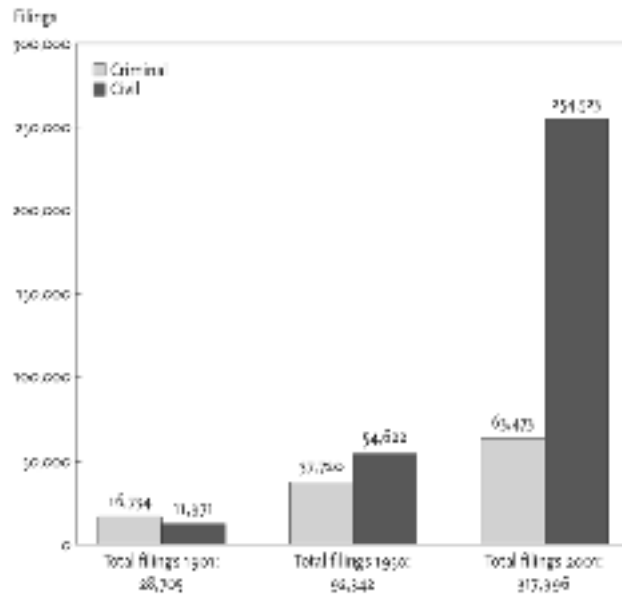
**Figure 2:** *Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001.*

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subsequently as independent documents that, after 1939, were sometimes bound with the Annual Reports of the Administrative Office of the United States Courts, which came into being in 1939. The titles of the Conference reports vary somewhat; in some years the report is denoted the "Annual Report of the Proceedings of the Judicial Conference of the United States," and in other years, the "Report of the Proceedings of the Judicial Conference of the United States." Further, the name of the Conference changed from the Conference of Senior Circuit Judges to the Judicial Conference of the United States. For brevity, I will refer to each Judicial Conference report by the title JUDICIAL CONFERENCE REPORT, the relevant page, and the month and year of publication.

2. See DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 66 (1989); JUDICIAL CONFERENCE REPORT 82–83 (Sept. 1989). Because these Administrative Office reports are also annual publications and also have some name variation, I will cite each as AO ANN. REP., followed by the relevant pages and year of publication.

As detailed in the next chart, *Civil and Criminal Filings in United States District Courts: 1901, 1950, 2001* (figure 3),<sup>3</sup> caseloads followed a similar upward slope, as they climbed from the 1901 figure of under 30,000 civil and criminal cases to more than 300,000 in 2001.



**Figure 3:** *Civil and Criminal Filings in United States District Courts: 1901, 1950, 2001.*

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Thus, in 1995, the first “Long Range Plan” produced by the judiciary’s policy-making body, the Judicial Conference of the United States, was preoccupied with how to handle the presumably ever-spiraling upward demands.<sup>4</sup> That report predicted that by 2010, civil and criminal filings would exceed 600,000.<sup>5</sup>

During the last several years, however, filings have leveled off. In 2010 (as in 1995), some 325,000 to 350,000 civil and criminal cases were begun yearly, outstripped as they have been in the past by bankruptcy petitions that, by 2010, numbered almost 1.5 million. The decade-plus trend is captured by comparing two charts. Figure 4, *Federal Court Filings, 1950–2010*, sketches the last sixty years,

3. These data are derived from caseload statistics compiled by the Office of Judges Program, Statistics Division, Administrative Office of the United States Courts. *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>.

4. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN], available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf> (republished at 166 F.R.D. 49 (1996)). The Judicial Conference there made more than ninety recommendations to Congress. For additional discussion, see *infra* notes 511–16 and accompanying text.

5. LONG RANGE PLAN, *supra* note 4, at 15 tbl.3.

and figure 5, *Federal Court Filings, 1995–2010*, provides a snapshot of the more recent time period.<sup>6</sup> To translate the data into percentage increases, civil and

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6. Comparisons between the projected filings and cases filed were made when the AO reviewed the implementation of the judiciary's future planning. See ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS: STATUS REPORT I–18 (2008). The data in figures 4 and 5 come from various AO volumes, including AO ANN. REP. 138 tbl.C-1 (1950); *id.* at 165 tbl.D-1 (criminal data); AO ANN. REP. 217 tbl.13 (1980) (civil data); *id.* at 269 tbl.40 (criminal data); JUDICIAL CONFERENCE REPORT 4 (Mar. 1986) (both civil and criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 1995, at 33 tbl.C-1 (1995) (civil data); *id.* at 57 tbl.D-1 (criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2000, at 34 tbl.C-1 (2000) (civil data); *id.* at 58 tbl.D-1 (criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2005, at 39 tbl.C-1 (2005) (civil data); *id.* at 63 tbl.D-1 (criminal data); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010, at 43 tbl.C-1 (2010) (civil data); *id.* at 68 tbl.D-1 (criminal data). Slight variations on the numbers reported can be identified by comparing these numbers with those found at *Federal Court Management Statistics (2011)*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx>, and at ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES: MULTI-YEAR STATISTICAL COMPILATIONS ON THE FEDERAL JUDICIARY'S CASELOAD THROUGH FISCAL YEAR 2008 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/alljudicialfactsfigures.pdf>.

Focusing on the years between 2001 and 2009, civil and criminal filings averaged 328,404. *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx> (follow “Federal Judicial Caseload Statistics” for any year; then follow “Judicial Caseload Indicators” hyperlink). The high was 349,076 filings in 2005, and the low was 312,738 filings in 2006. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2006, at 6 (2006) [hereinafter FEDERAL JUDICIAL CASELOAD STATISTICS (2006)], available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2006/front/mar06indicators.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2005, at 6 (2005), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2005/front/mar05toc.pdf>. The average for bankruptcy filings over the same period was 1,362,728; the year-to-year figures were more volatile. *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx> (follow “Federal Judicial Caseload Statistics” for any year; then follow “Judicial Caseload Indicators” hyperlink). The high was 1,794,795 bankruptcy filings in 2006, a reporting period which included the five months between the time when President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, and the time when the law went into effect. FEDERAL JUDICIAL CASELOAD STATISTICS (2006), *supra*, at 6. The low was 695,575 bankruptcy filings in 2007. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2007, at 6 (2007), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2007/front/IndicatorsMar07.pdf>.

Filings in criminal cases increased in 2010 to an “all-time high” of 78,000. *Judiciary Makes Appeal for Fiscal 2011 Funding*, THIRD BRANCH, Nov. 2010, at 2, 3. Bankruptcy

criminal case filings grew about 10% from 1950 to 1965, about 95% from 1965 to 1980, about 50% in the interval from 1980 to 1995, and, since then, the growth has slackened off—to under 25% from 1995 to 2010.<sup>7</sup> Further, while civil filings represented the major source of growth during the big spurt years of the 1960s to the 1980s, criminal filings constitute the primary basis for the more recent increases.<sup>8</sup>

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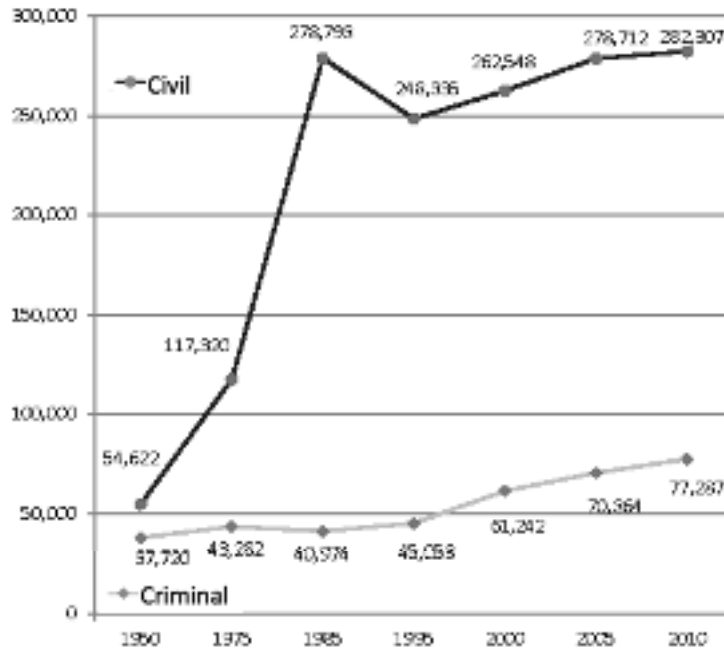
filings also increased—a “staggering 63 percent since June 2008.” *Id.*

7. To be specific, from 1950 to 1965, filings in federal courts increased by 9.39% (23.9% increase in civil filings, and 11.63% decrease in criminal filings). From 1965 to 1980, total filings increased by 95.73% (149.4% increase in civil filings, and 13.24% decrease in criminal filings). From 1980 to 1995, they increased by 48.39% (47.13% increase in civil filings, and 55.78% increase in criminal filings). And from 1995 to 2010, they increased by 22.57% (13.68% increase in civil filings, and 71.55% increase in criminal filings). See ADMIN. OFFICE OF THE U.S. COURTS, 2010 FEDERAL JUDICIAL WORKLOAD STATISTICS tbl.F-2 (2010) [hereinafter FED. WORKLOAD STATS. (2010)]; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 135 tbl.C-1, 195 tbl.D-1 (1995); AO ANN. REP. 370 tbl.C-1, 415 tbl.D-1 (1980); AO ANN. REP. 174 tbl.C-1, 213 tbl.D-1 (1965); AO ANN. REP. 138 tbl.C-1, 165 tbl.D-1 (1950).

8. See FED. WORKLOAD STATS. (2010), *supra* note 7; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (1995); AO ANN. REP. (1980); JUDICIAL CONFERENCE REPORT 46 (Sept. 1965); JUDICIAL CONFERENCE REPORT 3–5 (Sept. 1950). As noted, civil filings rose about 14%, while criminal filings grew about 72%. The map of bankruptcy filings is somewhat more complex because of the changing contours of the bankruptcy statute that has varied eligibility rules and created new judicial officers—bankruptcy judges. From 1950 to 1965, bankruptcy filings grew 440%, from 33,392 to 180,323. From 1965 to 1980, bankruptcy filings increased about 162%, reaching 472,400. In the following two fifteen-year periods, from 1980 to 1995 and from 1995 to 2010, filings increased 82% and 83%, respectively. As of 2010, filings were 1,572,597.

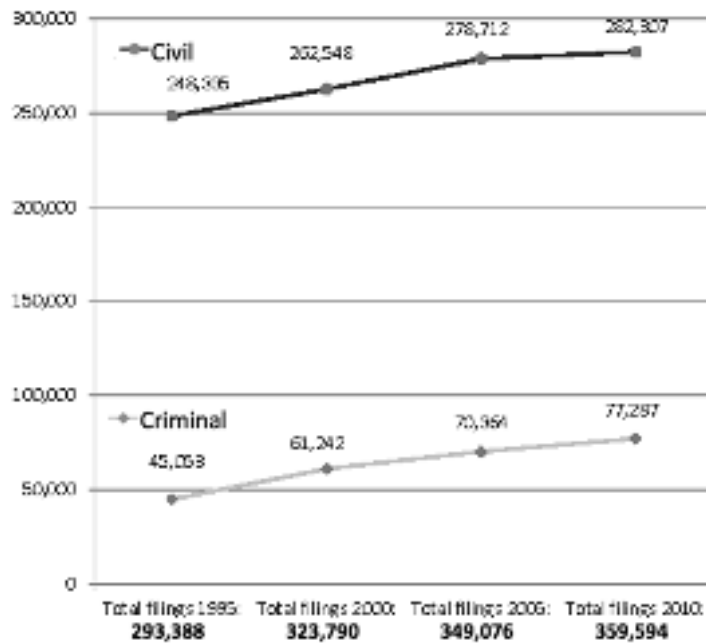
By way of context, state court filings rose about 39% from the 1980s to the 1990s; rose about 9% from the 1990s to 2000; and, in the interval from 2000–2008, rose more than 35%. See NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 45 tbl.1 (2010) [hereinafter STATE CT. CASELOAD STATS. (2008)]; NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2001, at 138 tbl.7 (2001) [hereinafter STATE CT. CASELOAD STATS. (2001)]; NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990, at 108 tbl.7 (1992) [hereinafter STATE CT. CASELOAD STATS. (1990)]; NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1980, at 55 tbl.13 (1984) [hereinafter STATE CT. CASELOAD STATS. (1980)]. The numbers include domestic cases, and in the most recent interval, criminal filings rose at twice the rate of civil filings.





**Figure 4:** Federal Court Filings, 1950–2010.

Copyright © 2010 Judith Resnik. Source: Administrative Office of the U.S. Courts.



**Figure 5:** Federal Court Filings, 1995–2010.

Copyright © 2010 Judith Resnik. Source: Administrative Office of the U.S. Courts.

Various explanations can be proffered for this relative flattening, such as shifts in doctrine and statutes that have narrowed access to the federal courts, the expense of lawyers, and the elaboration of alternative dispute resolution methods, as well as a host of other variables that range from the role played by regulatory oversight and availability of insurance to the ups and downs of the economy. Yet the slower rise in the demand curve interrupts a narrative of ever-expanding federal court activity.

Moreover, during the last fifteen years when the increase in filing rates slowed, a key investor in the federal courts—the U.S. Congress—has imposed new limits on the judiciary’s statutory authority.<sup>9</sup> Further, even as the judiciary has been relatively successful in maintaining its budgetary allotments,<sup>10</sup> members of Congress have questioned the need for new courtrooms and proposed cutting back construction funds.<sup>11</sup> Congress has also been reluctant to add judgeships requested

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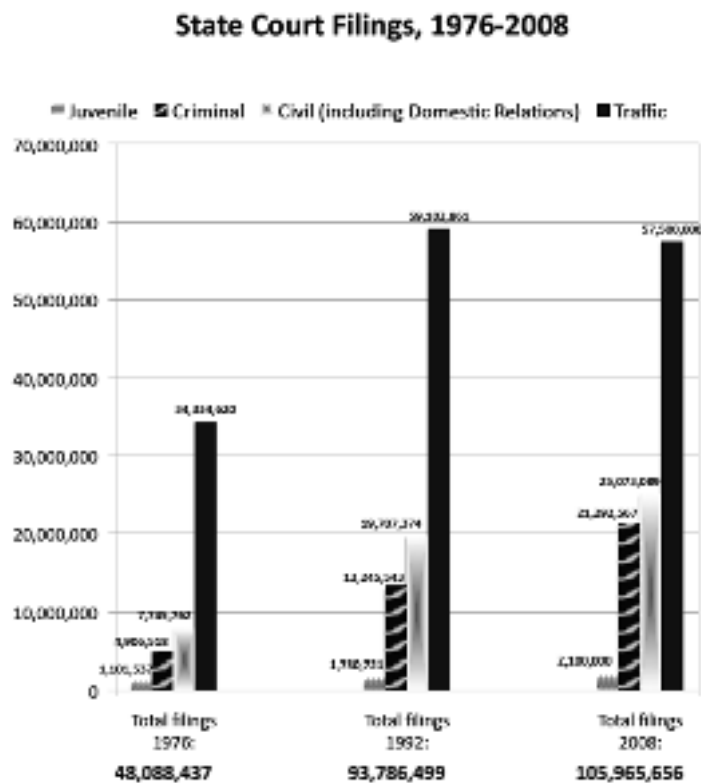
9. See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (codified as amended at 28 U.S.C. § 2241 (2006)), *invalidated in part by* Boumediene v. Bush, 553 U.S. 723 (2008); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 356, 110 Stat. 3009-546, 3009-644 (codified in scattered sections of 8 U.S.C.); Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, § 804, 110 Stat. 1321, 1321-073 (1996) (codified as amended at 28 U.S.C. § 1915 (2006)).

10. Support for operating budgets in both fiscal year 2009 and in fiscal year 2010 was 96% and 98% of the amount sought, respectively. See *Update: Fiscal Year 2009 and 2010 Budgets*, THIRD BRANCH, Apr. 2009, at 4, 4; *Judiciary Makes Case for Fiscal Year 2009 Funding*, U.S. COURTS (Mar. 12, 2008), [http://www.uscourts.gov/News/NewsView/08-03-12/Judiciary\\_Makes\\_Case\\_for\\_Fiscal\\_Year\\_2009\\_Funding.aspx](http://www.uscourts.gov/News/NewsView/08-03-12/Judiciary_Makes_Case_for_Fiscal_Year_2009_Funding.aspx); *Judiciary To Get \$6.9 Billion in FY 2010 Appropriations*, U.S. COURTS (Dec. 15, 2009), [http://www.uscourts.gov/News/NewsView/09-12-15/Judiciary\\_To\\_Get\\_6\\_9\\_Billion\\_In\\_FY\\_2010\\_Appropriations.aspx](http://www.uscourts.gov/News/NewsView/09-12-15/Judiciary_To_Get_6_9_Billion_In_FY_2010_Appropriations.aspx). The 2011 appropriations of \$6.91 billion was 94% of what the federal judiciary had requested. See *Federal Judiciary Funded to End of Fiscal Year*, THIRD BRANCH, Apr. 2011, at 1, 1; *Expanding Caseload Fuels Judiciary Request for Resources in 2011*, U.S. COURTS (Mar. 18, 2010), [http://www.uscourts.gov/News/NewsView/10-03-18/Expanding\\_Caseload\\_Fuels\\_Judiciary\\_Request\\_for\\_Resources\\_in\\_2011.aspx](http://www.uscourts.gov/News/NewsView/10-03-18/Expanding_Caseload_Fuels_Judiciary_Request_for_Resources_in_2011.aspx). Further, the \$6.91 billion for 2011 was “about 1 percent above a FY 2010 hard freeze.” *Federal Judiciary Funded to End of Fiscal Year*, *supra*, at 1. Included was \$82 million for new construction and \$280 million for repairs and renovation. *Id.* at 3. For fiscal year 2012, the judiciary sought \$7.3 billion in appropriations, an increase of \$299 million over the 2011 budget. *Judiciary Warns of Impact of Deep Cuts in 2012*, THIRD BRANCH, Apr. 2011, at 1, 2. Included were salaries, staff, defender services, court security, and rent for space. *Id.*

11. See, e.g., *Eliminating Waste and Managing Space in Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing, and Enforcing Congressionally Authorized Limits on Size and Cost: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2010) [hereinafter *2010 Eliminating Waste and Managing Space in Fed. Courthouses*]; *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *2010 Courtroom Use: Access to Justice*].

and has refused to provide salaries for judges to keep pace with inflation. The fiscal constraints of 2011 impose additional pressures for cutbacks.<sup>12</sup>

In this Harris Lecture, I reflect on the edifice known as the federal courts, whose shape and import have changed radically over the past century. The federal courts loom large even as state systems receive the vast bulk of filings and address a wider array of legal questions. State courts receive almost 100 million cases, including traffic filings.<sup>13</sup> *State Trial Court Filings, 1976–2008* (figure 6) reflects that volume, as does *Comparing the Volume of Filings: State and Federal Courts, 2001* (figure 7),<sup>14</sup> which offers a one-year snapshot to put the federal civil, criminal, and bankruptcy filings in the context of the state court workload.



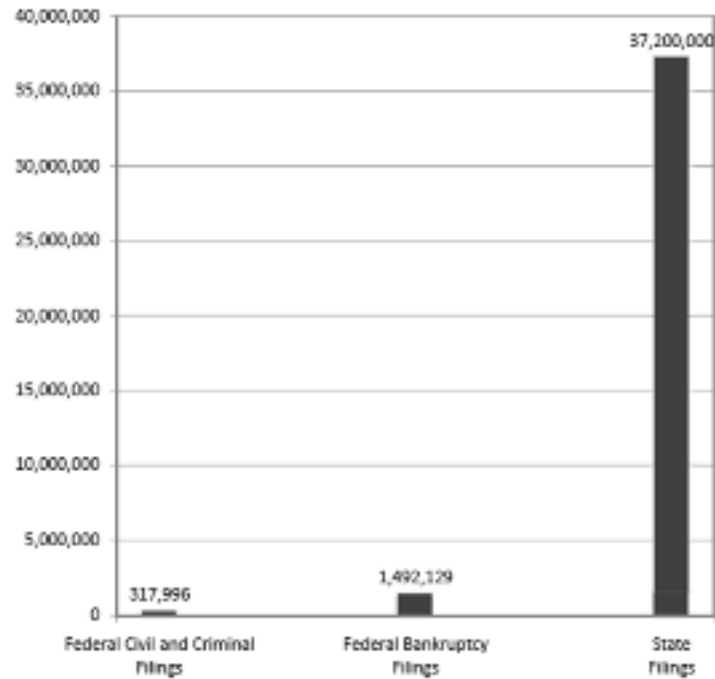
**Figure 6:** *State Trial Court Filings, 1976–2008.*

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12. See, e.g., *Hard Choices and Difficult Issues: The Judiciary Considers Its Financial Future*, THIRD BRANCH, Oct. 2011, at 1.

13. STATE CT. CASELOAD STATS. (2008), *supra* note 8, at 45 tbl.1, 54 tbl.3.

14. Thanks are owed to Ruth Anne French-Hodson and Jason Glick for obtaining and mapping the data and to David Rottman and the National Center for State Courts for providing information and direction. As figure 6, which looks at a time frame beginning in 1976, reflects, state court data collection does not offer the ability to have national figures on filings throughout the twentieth century, and the obvious caveats apply to the materials thereafter—that collection and county vary from jurisdiction to jurisdiction.



**Figure 7:** Comparing the Volume of Filings: State and Federal Courts, 2001.

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Yet the federal courts, with their relatively modest caseloads, dominate legal law and culture. As I will detail below, federal courthouses, like the hundreds of statutes on federal court jurisdiction, are twentieth-century artifacts of interactions among the judiciary's leadership, the legislative and administrative branches, and the private sector. Thus, my discussion underscores the degree of interbranch agreement and of coventuring that the edifice of the federal courts reflects.<sup>15</sup> Three chief justices of the twentieth century—William Howard Taft, Earl Warren, and William Rehnquist—were pivotal in transforming the landscape (literal and figurative) of the federal courts. During their tenures, new doctrines, jurisdictional provisions, infrastructures, procedural practices, and physical spaces reshaped the federal courts.<sup>16</sup>

Chief Justice Taft, who had served as the country's president, has long been appreciated within the legal academy for his administrative vision—memorialized

15. In contrast, scholarship is often focused on the conflicts among the branches. See, e.g., CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006).

16. Several studies of the office of the Chief Justice address its holders—often with a focus on the role in relationship to the other justices and the decisions rendered by the Court. See generally Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 *STETSON L. REV.* 717 (2011).

in his restructuring of the Supreme Court's docket, his orchestrating of the creation of a conference of judges (with the chief justice as its head) as a policy voice for the branch, and his insistent promotion of a building for the Court.<sup>17</sup> Further, while attentive to state governance and deeply committed to the protection of property rights, the Taft Court's jurisprudence accelerated the twentieth century's tilt toward national control, as the Court took upon itself the important role of adjusting the distribution of power between state and federal governments.<sup>18</sup>

Earl Warren is the chief justice associated with the expansion of access to the federal courts and with the elaboration of individual rights through (inter alia) *Brown v. Board of Education*<sup>19</sup> (ordering school desegregation), *Gideon v. Wainwright*<sup>20</sup> (requiring the provision of counsel for state felony defendants), and *Fay v. Noia*<sup>21</sup> (permitting federal habeas corpus review of state court judgments).<sup>22</sup> These pillars of the Warren Court's jurisprudence obliged states and their courts to enforce federal access and equality norms—thus constraining state power and putting what in the 1970s came to be called “federalism” concerns second to federal commitments to individual rights protection.<sup>23</sup>

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17. See generally Robert C. Post, *Mr. Taft Becomes Chief Justice*, 76 U. CIN. L. REV. 761 (2008) [hereinafter Post, *Mr. Taft*]; Kenneth W. Starr, *William Howard Taft: The Chief Justice as Judicial Architect*, 60 U. CIN. L. REV. 963 (1992). The “conventional image” of Taft is “a stubborn defender of the status quo, champion of property rights, apologist for privilege, [and] inveterate critic of social democracy.” ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 13 (1964). Mason linked the “dualism” of Taft as court reformer and as conservative to Taft's view that courts could be instrumental in staving off criticism of the social order. Were courts more efficient, they could meet “legitimate demands for evenhanded justice” as they also could protect private property and “help disarm its most dangerous enemies—socialists, communists, and progressives.” *Id.* at 13–14. Taft's interest in judicial reform prompted him to decline appointment to be an associate justice, for he wanted to preside as the Court's chief. *Id.* at 17.

18. See Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L.J. 1513 (2002) [hereinafter Post, *Federalism in the Taft Court Era*]. Mason also focused on the ways in which Taft's reading of the Commerce Clause provided the foundations for federal regulatory authority to later decades. MASON, *supra* note 17, at 16.

19. *Brown v. Board of Education*, 347 U.S. 483 (1954).

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

21. *Fay v. Noia*, 372 U.S. 391 (1963).

22. This list is far from complete. See generally EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW (Harry N. Schreiber ed., 2007); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007). William Brennan is recognized as central (“Warren's intellectual chief-of-staff”) to contributions associated with Warren. Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 928–29 (1983). Some of Warren's critics disagree with an assessment of his impact. See, e.g., Philip B. Kurland, *Earl Warren, The “Warren Court,” and the Warren Myths*, 67 MICH. L. REV. 353 (1968). Kurland argues that “no evidence” supported Warren's influence beyond the vote “conferred upon him,” and that rather than making the Court, the Court “formed him.” *Id.* at 354.

23. The term “federalism” did not enter the discourse in federal court decisions until 1939, and was then used to describe a political system rather than a justification for constitutional interpretation until the 1970s. See, e.g., *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 378 (1939). A central example of the shift to federalism serving as a rationale for

William Rehnquist, likewise understood as a powerful chief justice, is credited with smoothly running the Supreme Court.<sup>24</sup> Rehnquist's jurisprudence, favoring state court authority and private ordering, turned the Court away from many of the Warren-era precedents.<sup>25</sup> Rehnquist Court decisions, "deregulating the states,"<sup>26</sup> limited federal remedial authority.<sup>27</sup> William Rehnquist is thus recognized, in the words of Linda Greenhouse, as the "Architect of [the] Conservative Court";<sup>28</sup> under his leadership, the Court reduced the jurisdictional footprint of the federal courts. That shift could be understood either to have properly reinstalled an earlier vision of limited authority or to undermine what Norman Spaulding has termed the "countermonuments" of the post-Civil War Reconstruction amendments that insisted on national implementation of equality norms.<sup>29</sup>

Rehnquist was not only a doctrinal "architect" but also an institution builder who, working with Ralph Mecham, the Director of the Administrative Office of the United States Courts (AO),<sup>30</sup> and the group of judges selected for its Executive

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ceding authority to states is Justice Black's reliance on the phrase "Our Federalism" that, when coupled with equity concerns, required federal courts not to enjoin state court criminal proceedings absent extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37, 44 (1971). See generally Judith Resnik, *What's Federalism For?*, in *THE CONSTITUTION IN 2020*, at 269 (Jack M. Balkin & Reva B. Siegel eds., 2009); Judith Resnik, *Federalism(s), Feminism, Families, and the Constitution*, in *WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE* 127 (Sybil A. Schwarzenbach & Patricia Smith eds., 2003).

24. Rehnquist was said to assign opinions evenhandedly and to ensure that all were filed before a term ended. See, e.g., Craig M. Bradley, *Introduction to THE REHNQUIST LEGACY* 1, 1–5 (Craig Bradley ed., 2006). Discussion of Rehnquist's role in dealing with the entire judiciary comes from Russell R. Wheeler, *Chief Justice Rehnquist as Third Branch Leader*, 89 JUDICATURE 116 (2005).

25. See Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, *Warren Court Precedents in the Rehnquist Court*, 24 CONST. COMMENT. 3, 16 (2007).

26. See R. Shep Melnick, *Deregulating the States: The Political Jurisprudence of the Rehnquist Court*, in *INSTITUTIONS AND PUBLIC LAW* 69, 69–95 (Tom Ginsburg & Robert A. Kagan eds., 2005); Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1153–55 (2006). An overview of the television coverage of the Rehnquist years is provided in Jennifer Segal Diascro, *The Legacy of Chief Justice Rehnquist: A View from the Small Screen*, 92 JUDICATURE 106 (2008).

27. See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). Rehnquist also presided over the cutback in the number of decisions issued each year. See David M. O'Brien, *A Diminished Plenary Docket: A Legacy of the Rehnquist Court*, 89 JUDICATURE 134 (2005). During the Burger era, the Court dealt with some 175 cases a year; by Rehnquist's era's end, the number was down to under 80. *Id.* at 134. O'Brien reported that the Warren Court decided about 4.5% of the filings, or 110 cases per term, whereas the Burger Court decided 2–3%, and the Rehnquist Court decided under 1% of the filings, which grew to about 9400 cases. *Id.* at 135.

28. Linda Greenhouse, *Court in Transition: Remembering Rehnquist: William H. Rehnquist, Architect of Conservative Court, Dies at Age 80*, N.Y. TIMES, Sept. 5, 2005, at A16.

29. Spaulding, *supra* note 27, at 2000–26.

30. Mecham, the sixth person to serve as the Director of the AO, was appointed in 1985,

Committee, succeeded in gaining significant budgetary allocations. In 1971, the federal judiciary received \$145 million; by 2005, its budget was \$5.7 billion,<sup>31</sup> rising from under one-tenth to two-tenths of one percent of the federal budget, as during the Rehnquist era staff positions more than doubled from 15,000 to 32,000.<sup>32</sup> Further, the Rehnquist Administration obtained what one newspaper called the “largest public-buildings construction campaign since the New Deal: a 10-year, \$10 billion effort to build more than 50 new Federal courthouses and significantly alter or add to more than 60 others.”<sup>33</sup> The federal judiciary thereby had the “fastest growth in square footage” of building of any sector under the aegis of the General Services Administration (GSA).<sup>34</sup> Between 1996 and 2006, the space dedicated to the courts doubled.<sup>35</sup> While the “bailouts” and “stimulus” packages of the last few years may make those numbers seem smaller, the sums devoted specifically to federal courts outstripped those provided to other federal agencies under the GSA.<sup>36</sup>

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under the tenure of Chief Justice Warren Burger and by a committee on which Associate Justices Byron White and William Rehnquist served. *THE HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SIXTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY* 115 (Cathy A. McCarthy & Tara Treacy eds., 2000) [hereinafter *HISTORY OF THE AO*]. Mecham had been an experienced lobbyist, working as “a Washington representative for the Atlantic Richfield Company” before being appointed to direct the AO. John W. Winkle III, *Interbranch Politics: The Administrative Office of U.S. Courts as Liaison*, 24 *JUST. SYS. J.* 43, 46 (2003).

31. Wheeler, *supra* note 24, at 120.

32. *Id.*

33. Randy Gragg, *Monuments to a Crime-Fearing Age*, *N.Y. TIMES MAG.*, May 28, 1995, at 36, 36. The amount of funds spent and the number of projects have been tallied differently depending on the time spans. For example, during the decade between 1996 to 2006, the judiciary gained “46 new courthouses or annexes at a cost of \$3.4 billion,” with more then underway. *The Future of the Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary’s Rental Obligations: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs. and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 109th Cong. 1 (2006) [hereinafter *2006 Future of the Federal Courthouse Construction Program Hearings*] (statement of Rep. Bill Shuster, Chairman, Subcomm. on Econ. Dev., Pub. Bldgs. and Emergency Mgmt.). From 1985 to 1999, fifty-two court projects “totaling \$3.5 billion” were reported completed—producing a courthouse-building program that was the “largest in U.S. history,” and listed among the “major accomplishments” of the AO. *HISTORY OF THE AO*, *supra* note 30, at 113. As of 2005, the Government Accountability Office described the actual outlays, between 1993 and 2005, to be \$4.5 billion for seventy-eight courthouse projects. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-673, *COURTHOUSE CONSTRUCTION: INFORMATION ON PROJECT COST AND SIZE CHANGES WOULD HELP TO ENHANCE OVERSIGHT* 1 (2005).

34. *2006 Future of the Federal Courthouse Construction Program Hearings*, *supra* note 33, at 269 (statement of David L. Winstead, Comm’r Pub. Bldgs. Serv., U.S. Gen. Servs. Admin.).

35. *Id.*

36. The GSA oversees about 40% of the federal work space and has various limits on its charter; for example, unless requested to provide services, it does not have statutory authority over the Senate or the House of Representatives, the Central Intelligence Agency, the Department of Defense, the U.S. Postal Office, or the Federal Bureau of Prisons. See 40 U.S.C. § 113(d)–(e) (2006).

Institutional analyses of the courts tend to explore the interactions between Congress and the judiciary, the effect of doctrines on behavior, and the role played by political affiliations and world views in court decision making.<sup>37</sup> Attention is paid to judicial preference formation, economic demands for law, and the incentives that foster investment in judicial authority from other branches of government. My discussion enlarges the focus to include the corporate output of the judiciary as well as its adjudicative decisions.

Here, I probe how the federal courts came to capture political, cultural, and economic capital and, despite their relatively small volume of cases, became the dominant image of “the courts” in twentieth-century national discourse. I begin with a brief review of nineteenth-century federal activities, serving as a reminder of how small the federal judiciary once was. Thereafter, I trace the twentieth-century growth in federal adjudicatory authority, interrelated with federal building programs through which the national government turned itself into one of the major real estate owners and managers in the world and by which Congress chose repeatedly to invest in making federal courthouses architecturally significant symbols.

Understanding the interaction of jurisdiction, architecture, and ideas about judicial power entails excavating the work of three agencies that are themselves creatures of the twentieth century: the Judicial Conference of the United States, which gained its own Administrative Office in 1939 and elaborated its structure in 1948 and in 1957; the GSA, brought into being in 1949; and the National Endowment for the Arts (NEA), chartered in the 1960s. These entities cooperated and competed for dollars and authority as they accorded the private sector roles in shaping government buildings. After sketching how the federal judiciary under Chief Justice Rehnquist obtained both funds and control over the design of its buildings, I explore the puzzle of how these aspects of his work (Bill Rehnquist, the Builder-of-Federal-Judicial-Girth, if you will) fits with a more familiar narration of Rehnquist-the-Reluctant, famous for constraining the deployment of federal judicial authority.

This structural account aims not to provide untold insider stories of which jurist persuaded which member of Congress to support a particular court project, nor to detail administrative styles of chief justices as their biographers might. Rather, I am interested in probing the interactions between doctrines and infrastructures, between interpretations of judicial role and the constitutive practices and places of judges, and between ideas of federal adjudication and their materialization—produced and reflected in the differences in the institutions that William Howard Taft, Earl Warren, and William Rehnquist inhabited.<sup>38</sup> Further, I hope not only to inscribe an understanding of the political and cultural impact of their achievements

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37. See generally Tom Ginsburg & Robert A. Kagan, *Institutionalist Approaches to Courts as Political Actors*, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 1, 1–16 (Tom Ginsburg & Robert A. Kagan eds., 2005).

38. This socio-legal account has parallels in work on other court systems. See, e.g., Antoine Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, EUR. POL. SCI. REV. (forthcoming 2012), available at <http://journals.cambridge.org/action/displayFulltext?type=1&pdfType=1&fid=8306567&jid=EPR&volumeId=-1&issueId=-1&aid=8306565>.



but also to open questions about the durability of their diverse aspirations for “the federal courts” and to consider the role state courts are coming to play (in some respects ironically) as heirs to Earl Warren’s legacy.

## II. FROM THE 1830S TO THE 1930S; FROM MARINE HOSPITALS AND CUSTOM HOUSES TO A SKYSCRAPER FEDERAL COURTHOUSE IN NEW YORK AND THE SUPREME COURT BUILDING IN WASHINGTON

As the title of this Lecture suggests, central to the narrative of the building of the federal courts is William Howard Taft, who served from 1909 to 1913 as president before, in 1921, becoming the chief justice of the United States.<sup>39</sup> Many people identify Taft with one particular building, that of the 1935 Supreme Court, which opened a few years after his death.

What may be less familiar is that this was the Supreme Court’s very first building. During the nineteenth century, both Congress and the Executive had dedicated spaces, but it was not until the twentieth century that the Supreme Court got “a room of its own” (*pace* Virginia Woolf). As historians have detailed, the justices first camped in a market hall in New York City.<sup>40</sup> Upon going to Philadelphia in the 1790s, the justices sat inside its City Hall and borrowed the courtroom of that state’s Supreme Court.<sup>41</sup> When the justices moved to Washington, they used a committee room inside the Capitol before taking up residence, in 1810, in the remodeled former chambers of the Senate.<sup>42</sup>

Just as the Supreme Court borrowed and shared quarters before 1935, so did lower federal courts during much of their first 150 years. In the eighteenth century, when justices still rode circuit, they joined district judges holding court in local hotels, homes, or state buildings<sup>43</sup> whose availability depended on “cooperation” from those separate governments.<sup>44</sup> (The federal system was similarly dependent on

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39. Post, *Mr. Taft*, *supra* note 17, at 761–62. Taft retired as Chief Justice on February 3, 1930 and died five weeks later. 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY* 1078–79 (1939).

40. Katherine Fischer Taylor, *First Appearances: The Material Setting and Culture of the Early Supreme Court*, in *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 357, 357, 373–76 (Christopher Tomlins ed., 2005).

41. Robert P. Reeder, *The First Homes of the Supreme Court of the United States*, 76 *PROC. AM. PHIL. SOC’Y* 543, 551–53 (1936). The justices “first assembled on February 1, 1790 in the Merchants Exchange Building” in New York City, which was then the country’s capital. *The Court as an Institution*, SUPREME COURT OF THE U.S. (2011), <http://www.supremecourt.gov/about/institution.pdf>.

42. Taylor, *supra* note 40, at 357. In 1860, the Court moved up one level, as the Senate again gave over cast-off space. *Id.*; see also ROBERT SHNAYERSON, *THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 86–88 (1986).

43. When the Circuit Court for the District first convened, it likely worked in the “room in the Capitol assigned to the Supreme Court.” JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT* 7, 10 (2001). In the 1820s, the District got its own City Hall, which also housed courts, the register of wills, and other municipal offices. *Id.* at 29.

44. PETER GRAHAM FISH, *FEDERAL JUSTICE IN THE MID-ATLANTIC SOUTH: UNITED STATES COURTS FROM MARYLAND TO THE CAROLINAS, 1789–1835*, at 32 (2002).

local jailers from whom it rented space, sometimes on an as-needed, weekly basis.<sup>45</sup>)

The physical environment reflected that the federal judiciary was then small in terms of jurisdiction, staff, and rule making. Ambivalence had surrounded the creation of a national judicial force and, to cushion the potential abrasion, federal courts not only used local buildings but also local litigation practices. Before the 1930s, for example, the federal district court in Virginia largely conformed its rules of practice to those of state courts, just as the federal court in New Jersey relied on New Jersey rules.<sup>46</sup>

#### *A. Constituting the Federal Building Authority*

A lack of buildings specifically for federal judges ought not to be equated with the absence of federal government construction, undertaken by virtue of a power conferred by the Constitution. Article I, Section 8 authorizes Congress “[t]o establish Post Offices and post Roads,” as well as to create a capital city and to acquire land for both civilian and military purposes (“the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”).<sup>47</sup> In the early part of the eighteenth century, the business of building fell under the auspices of the Treasury Department and Customs Services that, like the federal judiciary, were statutory creations of the 1789 Congress.<sup>48</sup> Initially, Congress authorized projects building by building.<sup>49</sup>

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45. *Id.* at 237–38. Rental space was also used for court marshals. For example, an 1853 act authorized funding and provided a budget, that “the marshal shall not incur an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of building” without getting prior authorization from the Secretary of the Interior. Act of Feb. 26, 1853, ch. 80, § 2, 10 Stat. 161, 165.

46. Initially, federal conformity to state practice was “static,” in that federal courts had to follow the practices of states as of 1789 even when states no longer did so in their own courts. This static conformity was replaced after the Civil War with a dynamic conformity, permitting federal courts to follow the rule changes for common law cases that occurred in each of the states in which they sat. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1037–39 (1982). The caveat is that, as of 1822, federal courts sitting in equity began to share common rules, although how similar their practices were is more difficult to ascertain. *See* Kristin A. Collins, “*A Considerable Surgical Operation*”: *Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 273 (2010).

47. U.S. CONST. art. I, § 8, cl. 7, 17, 18. A few opinions have engaged with these provisions. *See, e.g.*, *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525 (1885), discussed in GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY & ROBERT L. FISCHMAN, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 147–52 (6th ed. 2007).

48. The history of federal construction comes from several sources, including LOIS CRAIG, *THE FEDERAL PRESENCE: ARCHITECTURE, POLITICS, AND SYMBOLS IN UNITED STATES GOVERNMENT BUILDING* (1978); ANTOINETTE J. LEE, *ARCHITECTS TO THE NATION: THE RISE AND DECLINE OF THE SUPERVISING ARCHITECT’S OFFICE* 14–29 (2000); BATES LOWRY, *BUILDING A NATIONAL IMAGE: ARCHITECTURAL DRAWINGS FOR THE AMERICAN DEMOCRACY, 1789–1912* (1985) (published in conjunction with an exhibition of the same title); DARRELL HEVENOR SMITH, *THE OFFICE OF THE SUPERVISING ARCHITECT OF THE TREASURY: ITS*

The first federal structures outside of Washington were supported by a 1789 congressional fund for marine hospitals to take care of “men, who, by their labor . . . in peace and war, contribute so largely to the wealth and power of the nation.”<sup>50</sup> (This legislation serves as a reminder that contemporary national health care legislation has roots in federally financed programs from the eighteenth century.<sup>51</sup>) The other major group of federal buildings were for the Customs Office, where transactions related to taxing imports took place.

The importance of customs officers can be seen from the buildings dedicated to them, which were among the largest federal structures of their time.<sup>52</sup> Customs officials not only collected duties on imported goods but also “served as the eyes and ears of the federal government at the local level.”<sup>53</sup> Their portfolio included reporting on conditions of roads and of local industries, as well as serving as agents for marine hospital funds, superintendents of lighthouses, and overseers of new building construction.<sup>54</sup>

As revenues grew and the nation gained a modicum of stability, ambitions for more important edifices followed. Like their European predecessors, the leaders of the new country were self-conscious about their image. Many thought that the virtues of the United States were best expressed through somber classicism acknowledging the country’s debt to “the ancient Greek republic.”<sup>55</sup>

By the 1830s, a specially designated federal employee, Robert Mills, “served more or less officially” in a position he called “architect of the public buildings.”<sup>56</sup> Mills admired Greek symmetry, as Thomas Jefferson had famously deployed in a courthouse he designed in Virginia. Mills was committed to making Jefferson’s ideal of classical architecture the “national style”; when “the full temple form was not used, at least the great colonnade was.”<sup>57</sup> Mills was also a source of some

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HISTORY, ACTIVITIES, AND ORGANIZATION 3 (1923). The Craig volume was part of a project of the NEA, which supported the volume’s publication. As discussed *infra* notes 218–20, the NEA decided to review “the government’s attempts to house its services and activities” because of the view that federal buildings in the 1970s were architecturally dreary. Nancy Hanks, *Foreword* to CRAIG, *supra*, at vii (Hanks served as the chairman of the NEA from 1969 to 1977).

49. *See, e.g.*, Act of Feb. 13, 1807, ch. 14, § 5, 2 Stat. 418, 419. Congress there authorized the Secretary of the Treasury to find a “convenient site, belonging to the United States, in the city of New Orleans, a good and sufficient house, to serve as an office and place of deposit for the collector of the customs” and appropriated \$20,000 for the building. *Id.*

50. *See* LEE, *supra* note 48, at 28 (quoting William M. Meredith, Secretary of the Treasury, describing, in 1849, the rationale for the Act of July 16, 1798, ch. 77, 1 Stat. 605). That act was repealed in 1884. *See* Act of June 26, 1884, ch. 121, § 15, 23 Stat. 53, 57.

51. *See* THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 2–3, 7–11 (1992).

52. CRAIG, *supra* note 48, at 63, 202–03. Smaller facilities were also enlarged, such as the Custom House in Boston and in New York. LOWRY, *supra* note 48, at 48–50, 48 fig.44, 49 fig.45.

53. LEE, *supra* note 48, at 14.

54. *Id.* at 14–29.

55. LOWRY, *supra* note 48, at 38.

56. CRAIG, *supra* note 48, at 56.

57. *Id.* at 50. Craig also noted that the “closer” to Washington, the more federal

centralization of standards, such as requiring that buildings be made with materials more fireproof than not.<sup>58</sup>

By the middle of the nineteenth century, the federal government owned eighteen marine hospitals and twenty-three custom houses, with fifteen more structures underway.<sup>59</sup> Congress used these buildings to support what Lois Craig has called a “federal presence,”<sup>60</sup> as the construction was a sign of a flourishing nation,<sup>61</sup> engaged in various regulatory activities.<sup>62</sup> The buildings around the country joined those dedicated in Washington, D.C. for the legislative and executive branches as exemplars of the federal government.<sup>63</sup>

### B. “Furnishings” for the Federal Judiciary After the Civil War

The word “courthouse” was hardly mentioned in the congressional records authorizing buildings in the pre-Civil War era. Some federal legislation for custom houses made reference to payments for furnishings for judges<sup>64</sup>—thus revealing that a courtroom and chambers were to be tucked somewhere inside. In addition, Congress occasionally provided expressly for building courts and jails in its territories.<sup>65</sup>

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structures “spoke in the classical tongue,” while “frontier customhouses were utilitarian structures.” *Id.* at 51.

58. *Id.* at 56; LEE, *supra* note 48, at 35. See generally FED. JUDICIAL CTR., CONSTRUCTING JUSTICE: THE ARCHITECTURE OF FEDERAL COURTHOUSES 1 [hereinafter CONSTRUCTING JUSTICE] (on file with the author) (a description of the historical photographs exhibited at the Federal Judicial Center).

59. LOWRY, *supra* note 48, at 52; SMITH, *supra* note 48, at 3. In 1841, Congress insisted on some regularization of the decisions to buy land. In order to have the legal authority to purchase and build government structures, Congress imposed the requirement that the Attorney General provide opinions on the “validity of the title.” *Id.*

60. CRAIG, *supra* note 48.

61. LEE, *supra* note 48, at 29–35; see also LOWRY, *supra* note 48.

62. While the nationalization story of the post-Civil War period dominates, national administrative capabilities existed prior to the Civil War, of which the Customs Office was one example; others included the regulatory systems for patents, land claims, and steamboats. See Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1633–43 (2008). Inspection and regulation of steamboats was the federal government’s “first major health and safety regulatory program.” *Id.* at 1581. Between 1830 and 1860, the population of the United States doubled, and federal expenditures more than quadrupled during those same thirty years. See U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1104 (1975).

63. LEE, *supra* note 48, at 29–35.

64. For example, when Act of Mar. 3, 1851, ch. 32, 9 Stat. 598, 609 (1851), appropriated money for a custom house in Savannah, Georgia, it noted that funds were to be used for “furniture and fixtures for the accommodation of the officers of the revenue, as also for the post-office, and United States courts.” See also ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 82 (2d ed. 2002).

65. Illustrative is the designation, in 1832, by Congress of acreage in Little Rock for the “erection of a courthouse and jail” for the Territory of Arkansas. Act of June 15, 1832, ch. 79, 4 Stat. 531, 531 (1832). Provisions were also made in 1839 for funds for a courthouse in Alexandria, Virginia. OFFICE OF COMM’R OF PUB. BLDGS., EXPENDITURE—PUBLIC

The meager references were appropriate when considered against the backdrop of the size of the federal courts of that era. In 1850, some thirty-seven federal trial judges were dispatched to the forty-five district courts in the states,<sup>66</sup> including two to California, which gained statehood that year.<sup>67</sup>

In 1852, the Treasury Department created a unit called the Office of Supervising Architect and centralized decision making about federal buildings. Soon thereafter, government records called specifically for courthouse construction.<sup>68</sup> Chartering the Supervising Architect was both evidence of the development of federal bureaucracy and (as Max Weber has taught us) an example of how once in place, a bureaucracy generates agendas for its own growth.<sup>69</sup> One measure of the Supervising Architect's impact comes from an 1875 congressional provision that no funds be spent on public buildings without approval from the Secretary of the Treasury, "after drawings and specifications together with detailed estimates of the cost thereof, shall have been made by the Supervising Architect."<sup>70</sup>

The violence and dislocation occasioned by the Civil War halted many national initiatives, building included. But winning the Civil War sparked interest in imposing and in showing federal authority. Thus, two creatures of the first

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BUILDINGS, H.R. DOC. NO. 26-32 (1839).

66. One judge presided in each of the following states: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. California, Florida, Louisiana, New York, Pennsylvania, and Virginia each had two judgeships. This count does not include federal judges in the territorial courts, including those in the District of Columbia. See *Chronological History of Authorized Judgeships in the U.S. District Courts*, U.S. COURTS, <http://www.uscourts.gov/judgesandjudgeships/authorizedjudgeships/chronologicalhistoryofauthorizedjudgeshipsindex.aspx> [hereinafter *Chronological History of Authorized Judgeships in the U.S. District Courts*].

67. Act of Sept. 28, 1850, ch. 86, § 2, 9 Stat. 521, 521. A reorganization reduced the number to one in 1866 but returned it to two in 1886. See Act of Aug. 5, 1886, ch. 928, § 1, 24 Stat. 308, 308; Act of July 27, 1866, ch. 280, § 1, 14 Stat. 300, 300. As noted above, five other states (Florida, Louisiana, New York, Pennsylvania, and Virginia) also had two judgeships allotted. *Chronological History of Authorized Judgeships in the U.S. District Courts*, *supra* note 66.

68. For example, in 1855, the Secretary of Interior and postmaster general called for "sites for court houses and post offices" in Philadelphia, New York, and Boston. S. EXEC. DOC. NO. 33-30 (1855).

69. Prior to the Office's creation, federal officials who worked on federal building had various titles, including "Architect of the Department" and "Supervising Architect." LEE, *supra* note 48, at 41. No statutory authority supported the Secretary of Treasury when he first created the Office of Supervising Architect, but legislation in the 1860s and thereafter made mention of the job. SMITH, *supra* note 48, at 6-7. For example, Act of Mar. 14, 1864, ch. 30, § 6, 13 Stat. 22, 27, provided for "one superintending architect, one assistant architect," several clerks, and a messenger.

The first to hold the position, Ammi B. Young, served from 1852 until 1862 as the "chief designer of all federal buildings" that fell within the Treasury Department's control. LEE, *supra* note 48, at 47. Young, credited with designing some seventy buildings, also made ironwork the preferred material to provide fireproofing and permanency. LEE, *supra* note 48, at 59-60; CONSTRUCTING JUSTICE, *supra* note 58, at 1-2.

70. Act of Mar. 3, 1875, ch. 130, 18 Stat. 371, 395; see also SMITH, *supra* note 48, at 7-8.

Congress of 1789—the lower federal courts and the Treasury Department—came into closer contact as Congress repeatedly turned to the federal courts as instruments of federal norm enforcement.<sup>71</sup> In 1867, Congress gave federal courts authority to hear habeas corpus petitions from individuals held in state custody.<sup>72</sup> In 1871, Congress authorized federal courts to hear cases alleging deprivations of civil rights,<sup>73</sup> and in 1875, Congress gave the federal courts what has come to be known as “general federal question jurisdiction” to hear claims (if the amount in controversy sufficed) alleging violation of rights arising under federal law.<sup>74</sup>

To implement such new provisions as well as to enforce federal criminal law, better organization of federally employed lawyers was needed. In 1870, Congress created the Department of Justice to add resources to and a measure of control over the dispersed system that had long existed by virtue of individual presidential

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71. See generally Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 513 (2002) (explaining how “nonjudicial actors . . . empowered the institution of the federal judiciary” (emphasis in the original)). In his view, the result was a judiciary committed to economic nationalism that expressed and extended the views of the reigning political party. *Id.* at 521–22. Alison LaCroix has argued that the focus on courts was continuous with earlier conceptions that identified judicial power and federal court jurisdiction as essential to the nation—as evidenced by the briefly lived Act of 1801 that did create federal question jurisdiction. See Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 345–50, 387–94. The task of administering courts fell in 1849 to the newly created Department of the Interior, charged with management of public lands and parks as well as the fiscal responsibility for the federal court system. *History of the Federal Judiciary: Judicial Administration and Organization*, FED. JUD. CENTER, [http://www.fjc.gov/history/home.nsf/page/admin\\_09.html](http://www.fjc.gov/history/home.nsf/page/admin_09.html).

72. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241–2254 (2006)).

73. See Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2006)).

74. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875) (codified at 28 U.S.C. § 1331 (2006)). As noted above, LaCroix underscored that the 1801 Judiciary Act gave circuit courts jurisdiction of “all cases in law and equity, arising . . . [under] the Constitution . . . [and t]he laws of the United States . . . and [t]reaties made, or which shall be made under their authority.” LaCroix, *supra* note 71, at 372 (quoting the Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89). Because the bill was so quickly repealed and the 1875 legislation has endured, the post-Civil War enactment is credited as the beginning of general federal question jurisdiction. Congress has also thought it appropriate, when viewing the courts as unreliable in carrying out its will, to divest jurisdiction. A well-known example is the case of *Ex Parte McCordle*, in which William McCordle, the editor of the Vicksburg Times, was detained in the 1860s by the occupying military authorities. They objected to his anti-Reconstruction editorials, and he in turn argued that the Military Reconstruction Act was unconstitutional. While his case was pending before the U.S. Supreme Court, Congress withdrew the jurisdictional provision that had provided a route to the Court, and the justices concluded that Congress had the power to do so. See *Ex Parte McCordle*, 74 U.S. 506 (1869); Daniel J. Meltzer, *The Story of Ex parte McCordle: The Power of Congress to Limit the Supreme Court’s Appellate Jurisdiction*, in FEDERAL COURTS STORIES 57 (Vicki C. Jackson & Judith Resnik eds., 2010).

appointments of United States Attorneys for each of the federal districts.<sup>75</sup> The 1870 legislation also centralized most of the court-related work in the Justice Department, which took over the Interior Secretary's "supervisory powers . . . over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States."<sup>76</sup>

To gain efficacy in requesting funds for the courts from Congress, the Justice Department began compiling information about the federal courts. Beginning in 1871, the attorney general provided annual reports to Congress. The Justice Department reported that, in 1876, almost 29,000 cases were pending on the docket; in 1900, the reports indicated that pending cases had risen to about 55,000.<sup>77</sup> Pending cases do not equate with filings; in the beginning of the twentieth century, just under 30,000 new civil and criminal cases were commenced.<sup>78</sup>

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75. Act of June 22, 1870, ch. 150, 16 Stat. 162. The First Judiciary Act had created the Office of Attorney General, to be held by a person "learned in the law," to prosecute suits for the United States and to provide advice on legal questions to the Executive branch. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93. While Congress thus invented an office not mentioned in the Constitution, Congress did not provide either staff for the attorney general or authority over government lawyers, then called "district attorneys" (and now called United States Attorneys) who had the power to represent the United States in the lower federal courts. ANTONIO VASAI, JUSTICE MGMT. DIV., THE FIFTIETH ANNIVERSARY OF THE U.S. DEPARTMENT OF JUSTICE BUILDING: 1934–1984, at 2 (1984); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 566–70. As Bloch noted, the 1789 Act did not expressly grant authority to the president to appoint these lawyers, but the president took it upon himself to do so, arguably relying on the authority to appoint officers under Article II, § 2. Likewise, there was no explicit provision in the Act for a confirmation process but it was "assumed" that the Senate would provide "advice and consent." *Id.* at 568 n.24. Today, statutes provide for presidential nomination and senatorial confirmation. 28 U.S.C. § 503 (2006) (establishing the Office of the Attorney General); *id.* § 541 (establishing the position of United States Attorneys). Both before and after the creation of the Department of Justice in 1870, attorneys general worked in various spaces, such as in offices at the Treasury Department. VASAI, *supra*, at 4. The Department of Justice did not get a building of its own until 1934. *Id.* at 16–17.

76. § 15, 16 Stat. at 164. Congress also gave the Justice Department authority over commissions.

77. David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 98 tbl.4 (1981). Clark also detailed the change in the mix of cases, as the proportions of criminal and civil cases varied over time, as did the ratio of civil filings by private parties to those brought by the government. *Id.* at 88–148.

78. Data on the number of filed cases in 1901 are extrapolated from data on pending and terminated cases. The 1901 data are drawn from a two-volume empirical study by the American Law Institute (ALI). *See* 1 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934) (data on criminal cases); 2 AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 111 (1934) (data on civil cases). The ALI statistics comport with those in the 1900 and 1901 Reports of the Attorney General during the era when the Department of Justice was charged with administration of the federal courts. *See* DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY-GENERAL OF THE UNITED STATES FOR THE YEAR 1900, at 66 ex. A (1900); DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY-

The number of judges increased along with the docket. While several federal districts continued to have a single judge, between 1857 and 1886, thirteen states gained a second authorized federal trial judgeship.<sup>79</sup> All told, by 1886, the federal judicial workforce consisted of sixty-four judges—a tiny part of the expanding federal civilian workforce. In 1861, some 37,000 individuals were employed; by 1891, almost 160,000 were on the federal payroll.<sup>80</sup>

Another technique to make material new federal authority was construction. Recall that, by the 1850s, the federal government owned about fifty buildings. “Between 1866 and 1897 . . . the federal government built nearly three hundred new buildings throughout the Union.”<sup>81</sup> Spaces inside (and sometimes whole buildings) went to courts, used by Congress to make meaningful the North’s victory over the South. Appropriations for buildings rewarded loyal congressmen by giving them “federal presents” (as one commentator put it) for local constituents.<sup>82</sup> “For example, Memphis received a courthouse even though no federal courts were held there.”<sup>83</sup>

In the early 1900s, Congress “opened the floodgates . . . by inventing . . . the ‘omnibus’ public building bill, which replaced for the most part the previous practice of enacting individual bills for each building.”<sup>84</sup> In the 1902 Act alone,

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GENERAL OF THE UNITED STATES FOR THE YEAR 1901, at 64 ex. A (1901). The numbers for civil and criminal filings for 1901 were derived by subtracting the number of cases pending at the end of 1900 from the sum of the cases terminated in and pending at the end of 1901. That method yielded 16,734 criminal cases (the same number reported by Clark, *supra* note 77, at 103 tbl.6) and 11,971 civil cases (or 1302 fewer civil cases than Clark had reported, *id.*).

79. Alabama got its second district judge in 1886. *See* Act of Aug. 2, 1886, ch. 842, 24 Stat. 213. In 1871, Arkansas was given a second judge. *See* Act of Mar. 8, 1871, ch. 106, § 5, 16 Stat. 471, 472. Other states that received second judgeships include California (1886); Georgia (1882); Iowa (1882); Louisiana (1881, returning it to two judgeships); Michigan (1863); Missouri (1857); North Carolina (1872); Tennessee (1878); Texas (1857); Virginia (1871, returning to a two-judgeship provision); and Wisconsin (1870). The District of Columbia also received a second judgeship, in 1870. Illinois and Ohio received a second judgeship in 1855, and New York received a third in 1865. *See Chronological History of Authorized Judgeships in the U.S. District Courts, supra* note 66.

80. CRAIG, *supra* note 48, at 163. She traced the federal employment workforce from an 1816 baseline of 4847 employees to the 1911 group of 395,905 employees. *Id.*

81. LOWRY, *supra* note 48, at 58.

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

83. CRAIG, *supra* note 48, at 163.

84. LOWRY, *supra* note 48, at 80. Some prior bills had authorized that buildings be constructed in several different locations. *See, e.g.,* Act of Aug. 4, 1854, ch. 242, § 2, 10 Stat. 546, 571 (1854) (providing for a “custom-house, post-office, and United States courts” in various cities). Another omnibus construction bill, providing \$45 million in funds, was enacted in 1913. *See* Act of Mar. 4, 1913, Pub. L. No. 62-427, 37 Stat. 739. A third such bill, the Public Buildings Act of 1926, Pub. L. No. 69-281, 44 Stat. 630, authorized construction of several kinds of federal buildings: “courthouses, postoffices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings.” § 1, 44 Stat. at 630. While that list of buildings was similar to those found in bills from the late nineteenth century, the order in which they were listed had changed; the 1926 legislation put courthouses at the front.



Congress authorized more than 150 new buildings. That “wholesale authorization” gave every member of Congress “the possibility of providing his district with a federal building, regardless of need.”<sup>85</sup> Surveys to assess needs in advance of appropriations were not authorized until 1926.<sup>86</sup>

The new judgeship lines created jobs that the president, with senatorial input and approval, could award.<sup>87</sup> Further, the statutory requirement that appointees reside in the districts in which they worked mitigated the perception of control from Washington.<sup>88</sup> Given these pork-barrel opportunities, coupled with local hopes that courthouses were draws for commercial development, towns and cities vied to be the sites for federal construction.<sup>89</sup> Thus, the growth in federal power through federal jurisdictional statutes and federal judgeships produced and justified interest in new funding for more buildings.<sup>90</sup>

### *C. Professionalizing Architects Seeking Public Patronage*

Localities were not the only ones lobbying for funds. “Private architects insistently sought a piece of the public action.”<sup>91</sup> Within a decade of the creation of the Office of Supervising Architect, architects aimed for federal patronage while avoiding government control. In 1867, the American Institute of Architects (AIA), which (despite its name) had functioned more as a local New York society,<sup>92</sup> became national in scope and in ambition.

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85. LOWRY, *supra* note 48, at 80. As for the style of the buildings, many designs adopted the Beaux-Arts style popularized by the Chicago Exposition of 1893. *See id.* at 81–82; CRAIG, *supra* note 48, at 203, 210–15. Some concerns about pork barrel funding led to cutbacks in 1911 in the workforce of the Office of Supervising Architect and to a hiatus between 1913 and 1926 in omnibus funding bills. CRAIG, *supra* note 48, at 239–40.

86. CRAIG, *supra* note 48, at 163.

87. Congress continued to create new judgeships thereafter. One count was that there were 1.3 federal judges per million people at the beginning of the twentieth century and 2.2 judges per million in 1980. *See Clark, supra* note 77, at 69–71 tbl.1.

88. *See* 28 U.S.C. § 134 (2006). This provision has been a requirement since the Judiciary Act of 1789.

89. CONSTRUCTING JUSTICE, *supra* note 58, at 2.

90. As compared to the availability of state court facilities, federal courts were sparse and often at great distance, imposing costs on some litigants that made federal jurisdiction an attractive draw for others. *See* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 244 (1992).

91. CRAIG, *supra* note 48, at 149.

92. LEE, *supra* note 48, at 100. *See generally* MARY N. WOODS, FROM CRAFT TO PROFESSION: THE PRACTICE OF ARCHITECTURE IN NINETEENTH-CENTURY AMERICA 28–36 (1999). As Woods explained, the term “architect” derives from a Greek term meaning “master carpenter” and was once used in reference to various craftspersons. The term did not denote a person with special design authority until the Renaissance in Italy. *Id.* at 5. In early America, the term included various people working on design. The specification of the reference to particular kinds of designers came through the work of organizations like the AIA, which called for training and credentials as qualifications to use the appellation architect. *Id.* at 6–8. Woods cited Louisa Tuthill as one of the first—in 1848—to call on “young men to become professional architects,” and hence to have both a “lucrative and

One objective was helping private architects obtain government contracts.<sup>93</sup> To do so entailed changing laws limiting design to public-sector employees. Accusing the Office of Supervising Architect of producing repetitive buildings (with an “apparent sameness . . . even [if] picturesque”),<sup>94</sup> private architects argued that their more inventive proposals should be funded. Those criticisms, coupled with complaints of corruption and waste by the Office of Supervising Architect,<sup>95</sup> helped to produce the Tarsney Act of 1893, permitting the federal government to employ independent architects selected through competitions.<sup>96</sup> But the statute used discretionary terms, and government officials were not eager to implement it.<sup>97</sup> For some time, the legal victory for private contractors was more on paper than in practice.

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honorable profession.” *Id.* at 8.

93. See, e.g., *Public Architects Committee*, AM. INST. OF ARCHITECTS, <http://network.aia.org/publicarchitectscommittee/home/>; *Notes from a Public Architect Consultant*, AM. INST. OF ARCHITECTS, <http://www.aia.org/practicing/groups/kc/AIAB088893?dvid=&recspec=AIAB088893>. The AIA, founded in 1857, had its counterparts in the Royal Institute of British Architects (begun in 1834) and the French Société Centrale des Architectes (founded in 1840). By the 1870s, the AIA promoted professional education and helped to develop architectural programs in various universities. See *History of the American Institute of Architects*, AM. INST. OF ARCHITECTS, <http://www.aia.org/about/history/AIAB028819>. The AIA lobbied in the last decades of the nineteenth century to confine the Treasury’s architect’s role to “supervising” rather than designing federal construction. The argument made was that the requisite “artistic and administrative” talents were not to be found in the same person and that government design plans were inferior to those of private architects. LEE, *supra* note 48, at 183–84.

94. LEE, *supra* note 48, at 163. The similarity may, for some, have been seen as desirable. “[N]ew federal buildings were consistently well received in America’s Peorias,” where they symbolized “membership in the Union.” CRAIG, *supra* note 48, at 163.

95. CRAIG, *supra* note 48, at 156. The first supervising architect, Ammi B. Young, discussed *infra* note 129, “was dismissed amid charges of extravagance and waste.” *Id.* Another, Alfred Mullett, was “subjected to no less than five investigations,” and according to one review, while he was not corrupt, his subordinates were. *Id.*

96. LEE, *supra* note 48, at 166–67; LOWRY, *supra* note 48, at 77; CONSTRUCTING JUSTICE, *supra* note 58, at 2. Woods credited the success of the Chicago World’s Fair with making plain what “professional architects could accomplish.” WOODS, *supra* note 92, at 42.

97. The statute provided that the Treasury Secretary had the “discretion to obtain plans, drawings, and specifications for the erection of public buildings . . . by competition among architects under such conditions as he may prescribe,” provided that “not less than five architects” be invited for competitions and that the work be done under the “general supervision” of the Office of Supervising Architect. Act of Feb. 20, 1893, ch. 146, 27 Stat. 468, 468–69. The act was first used for a custom house in Norfolk, Virginia. LEE, *supra* note 48, at 201. Members of the Cleveland administration were slow to implement its provisions. LEE, *supra* note 48, at 167–76. In some instances, Congress intervened directly by stipulating procedures when appropriating funds for construction; for example, a bill funding a Chicago post office required that the Secretary of the Treasury “hire a Chicago architect to prepare designs for the building.” LEE, *supra* note 48, at 176. When Lyman Gage, who had been on the board of directors for the Chicago World’s Fair, became Secretary of the Treasury, commissions went to private architects such as Cass Gilbert. WOODS, *supra* note 92, at 42–43. But the legislation was not mandatory, and “[d]uring the fifteen years of the Tarsney Act (1897 to 1912), only thirty-one buildings were designed according to its provisions.” LEE, *supra* note 48, at 208.

In 1912, over the objections of the AIA but in the wake of accusations that competition awards were biased in the AIA's favor at the expense of taxpayers, the Tarsney Act was repealed.<sup>98</sup> In its stead, Congress delegated to its Public Buildings Commission the tasks of recommending processes for decision making on the construction of federal structures.<sup>99</sup> The result was that new commissions went to architects both in the public employ and the private sector.

The rate of building during the pre-World War I era was impressive. By 1912, 1126 federally funded buildings were underway, amounting to a "new building every fourth day in the year."<sup>100</sup> By the 1920s, enough architects were government based to create their own Association of Federal Architects for civil service personnel involved in construction.<sup>101</sup> One way to provide a summary is by way of figure 8, *Federal Judges, Jurisdiction, Caseloads, Lawyers, and Buildings: 1850s-1930s*, which offers highlights of the various institutional shifts enumerated during those years.

<b>Federal Lower Court Judges</b>	
1850:	37
1886:	64
1861:	37,000 federal employees
1891:	160,000 federal employees
<b>New Federal Jurisdictional Grants</b>	
1867:	Habeas Corpus, individuals in state custody
1871:	Civil Rights Act
1875:	Federal Question Jurisdiction
<b>New Lawyers</b>	
1870:	Creation of Department of Justice
<b>Federal Trial Court Caseload</b>	
1876:	29,000
1900:	55,000
1930:	150,000
<b>Federally Built/Owned Buildings</b>	
1850s:	56 buildings
1897:	350+ buildings
1902:	150 more authorized to be built
1912:	1126 new projects underway

**Figure 8:** *Federal Judges, Jurisdiction, Caseloads, and Buildings, 1850s–1930s.*

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98. CRAIG, *supra* note 48, at 203. Smith also reported on the conflicts between private architect and public supervisors when the Tarsney Act was in use. SMITH, *supra* note 48, at 28–29.

99. Public Buildings Act of 1913, Pub. L. No. 62-432, 37 Stat. 866. Congress asked for information about appropriate standards, sizes, and costs. *Id.*

100. CRAIG, *supra* note 48, at 213 (quoting the Secretary of the Treasury in 1916).

101. *Id.* at 298. The group began publication of its magazine, *The Federal Architect*, in 1930. *Id.* The publication and the association "faded away" in 1947. *See id.*

Reviewing those decades entails attending to the institutional players then of relevance. Inside the executive branch, the two agencies of central relevance were the Justice Department, accounting for and provisioning the federal courts, and the Office of Supervising Architect within the Treasury, directing building. Two private organizations of note, the already-mentioned AIA and the American Bar Association (ABA), were regular participants. Founded in 1878, the ABA gave voice to the overlapping interests of the bench and the bar.<sup>102</sup> With professional growth and nationalization of the bar came lobbying. Lawyers sought resources—improved salaries, staff, and spaces—for federal judges,<sup>103</sup> as lawyers also influenced the architecture of courtrooms, in which a “bar” came to separate the special space for professionals (judges, clerks, and lawyers) from the general public.<sup>104</sup> Congress in turn doled out funds, both piecemeal and wholesale for buildings.

What should be apparent to readers in the twenty-first century is what I have not mentioned on this list—the corporate voice of the federal judiciary. Individual judges, linked to politicians, would likely have had sway over funding for specific districts, but the judiciary had little institutional infrastructure to provide a steady presence of its own in Congress. Instead, through the Attorney General, the ABA, and individual connections, federal judges were able to convince the political branches to support their work. A sampling from photographs in the National Archives provides visual testimony to the resulting success.

The United States Court House and Post Office (figure 9), opening in Des Moines, Iowa in 1871, reflects the burgeoning jurisdiction of the federal courts in the post-Civil War decades. Designed by Alfred B. Mullett (described as the “best known of the fifteen men who served as supervising architect of the Treasury

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102. The ABA was founded in 1878 in Saratoga Springs, New York. See RICHARD L. ABEL, *AMERICAN LAWYERS* 45 (1989). The ALI was founded in 1923. John P. Frank, *The American Law Institute, 1923–1998*, 26 *HOFSTRA L. REV.* 615, 615 (1997). See generally Robert W. Gordon, *The American Legal Profession, 1870–2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 73 (Michael Grossberg & Christopher Tomlins eds., 2008).

103. See, e.g., Edward A. Sumner, J. M. Dickinson, Chapin Brown, Charles E. Shepard & John W. Griggs, *Report of the Committee on Compensation to Federal Judiciary*, in *REPORT OF THE THIRTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT MONTREAL, CANADA* 620, 620–21 (1913).

104. MARTHA J. McNAMARA, *FROM TAVERN TO COURTHOUSE: ARCHITECTURE AND RITUAL IN AMERICAN LAW, 1658–1860*, at 55–56 (2004); Michael Kammen, *Temples of Justice: The Iconography of Judgment and American Culture*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 248, 249 (Maeva Marcus ed., 1992). McNamara argued that the proliferation of courts was driven not by the needs of the state but by lawyers who used their monopoly power to generate law-specific buildings (courthouses and jails) that marked the distinction between their profession and other municipal functions. McNAMARA, *supra*, at 1–3. Linda Mulcahy traced the increasingly hierarchical structuring of courthouses as lawyers, judges, and architects separated public and professional arenas. See LINDA MULCAHY, *LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS, AND THE PLACE OF LAW* (2011); Linda Mulcahy, *Architects of Justice: The Politics of Courtroom Design*, 16 *SOC. & LEGAL STUD.* 383 (2007).

Department"<sup>105</sup>), the structure was enlarged in the 1880s. By 1902, requests were being made for more space, and in 1913, Congress allocated funds to do so in its Public Buildings Act.<sup>106</sup>



**Figure 9:** *United States Court House and Post Office, Des Moines, Iowa. Supervising Architect: Alfred B. Mullett. 1871; enlarged 1890, demolished 1968.*

Image reproduced courtesy of the National Archives and Records Administration.

105. LEE, *supra* note 48, at 73. Mullett designed the State, War, and Navy Building in Washington, D.C. and had “near total control over public building design” during much of his service. *Id.* “He is best known for his six immense, richly decorated Second Empire edifices,” combining customhouses, courthouses, and post offices. CRAIG, *supra* note 48, at 155; see also *History of the Federal Judiciary, Historic Federal Courthouses*, FED. JUD. CENTER, <http://www.fjc.gov/history/courthouses.nsf> [hereinafter *History of the Federal Judiciary, Historic Federal Courthouses*] (depicting the Des Moines, Iowa U.S. Courthouse and Post Office in 1871).

106. Public Buildings Act of 1913, Pub. L. No. 62-432, 37 Stat. 866. The Public Buildings Act of 1913 allocated \$350,000 for the second building’s construction; the 1871 structure was demolished in 1968. *U.S. Courthouse, Des Moines, IA*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/444#> [hereinafter *U.S. Courthouse, Des Moines, IA*].

The result, shown in figure 10, was a new Classical Revival style building that opened in 1929 and remains (as renovated and enlarged in 1995)<sup>107</sup> in use by the United States District Court for the Southern District of Iowa. The name chosen in 1929—the U.S. Court House—denoted the growing importance of adjudication, as the building could have had a name denoting that it housed various government services including a post office and offices for administrators from the Departments of Agriculture and Commerce.<sup>108</sup>



**Figure 10:** United States Court House, Des Moines, Iowa. Supervising Architect: James A. Wetmore. 1929.

Image reproduced courtesy of the National Archives and Records Administration.

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107. *U.S. Courthouse, Des Moines, IA*, *supra* note 106.

108. 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.*

An example from the South is the 1908 federal building in Biloxi, Mississippi that was given the name Post Office, Court House, and Custom House. See figure 11. 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 his other structures, “nearly all . . . classical or colonial revival.”<sup>109</sup> The Biloxi building was one of many that sparked complaints of “pork-barreling,” in that new federal construction outpaced the growth in that city’s population and need for services.<sup>110</sup> The limited demand may explain why the 1908 arched and columned building remained in use until 1959, when a new U.S. Post Office and Court House was built and the 1908 building became Biloxi’s City Hall.<sup>111</sup>



**Figure 11:** United States Post Office, Court House, and Custom House, Biloxi, Mississippi. Supervising Architect: James Knox Taylor. 1908.

Image reproduced courtesy of the National Archives and Records Administration.

109. LEE, *supra* note 48, at 209.

110. See LOWRY, *supra* note 48, at 80. Construction of the building was delayed by hurricanes, supply failures, and “incompetent contractors.” CITY OF BILOXI, THE EARLY YEARS, available at <http://biloxi.ms.us/pdf/centennialdisplay.pdf> (an information sheet created to accompany a display celebrating the centennial of this building in June 2008). When the building finally opened in 1908, its dedication was enhanced by “new electric trolleys” that brought people around the city. *Id.*

111. See *id.* In 1978, the building was listed on the National Register of Historic Places, which identified it as one of the best documented in the state. *Id.* In 2003, the court moved to Gulfport where the Judge Dan M. Russell, Jr. Federal Building & U.S. Courthouse opened. Its “abundance of natural light” was described as fostering “a sense of openness between the public building and the surrounding community.” Mike Cummings, “Isn’t This a Spectacular View?”—Federal Courthouse Bathed in Light Sense of Openness Exists Between New Building, Community, SUN HERALD (Biloxi, MS), Nov. 13, 2003, at A1. The damage from Hurricane Katrina required the closure of the courthouse for many months.

Westward expansion was accompanied by courthouse construction. In 1892, an imposing three-story federal building, catalogued by Denver's library as a post office and by the National Archives database as the U.S. Court House and Post Office, opened. See figure 12. Designed by Mifflin E. Bell and Will. A. Freret, both of whom served as supervising architects, the building was crowned with a tower at its top and appointed with columns.<sup>112</sup>



**Figure 12:** United States Post Office at 16th (Sixteenth) and Arapahoe Streets, Denver, Colorado. Supervising Architects: Mifflin E. Bell and Will. A. Freret. 1892.

Image reproduced courtesy of the Denver Public Library, Western History Collection. Photographer: Wm. Henry Jackson, WH-1573.

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112. Both architects are credited as designers of the building; Mifflin E. Bell was supervising architect from 1883 to 1887, and Will A. Freret served briefly, from 1887 to 1889. See LEE, *supra* note 48, at 135–47.



Yet, by 1900, it was considered “outdated,”<sup>113</sup> and shortly thereafter Congress authorized a new building.<sup>114</sup> As the Senate hearings recorded, supporters argued that Denver was the “largest city between the Missouri River and the Pacific coast. It [was] therefore the capital, as it were, of a vast empire.”<sup>115</sup> The Tarsney Act had

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113. *Byron White U.S. Courthouse, Denver, CO*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/927> [hereinafter *Byron White U.S. Courthouse, Denver, CO*]. My thanks to the Hon. John Kane, who enabled me to tour the courthouse, and to the Tenth Circuit Executive’s Office and its staff for providing additional materials on the history of the building. See also THE FEDERAL COURTS OF THE TENTH CIRCUIT: A HISTORY (James K. Logan ed., 1992). According to a 1906 report from the Senate’s Committee on Public Buildings and Grounds, although the first building for a post office and courthouse was authorized under the Act of May 8, 1882, ch. 127, 22 Stat. 61, it was not completed until 1893. S. REP. NO. 59-1433, at 1 (1906). In the interim, the report explained, the:

[C]ity had grown to such an extent that the building was not nearly large enough to accommodate the Federal business. From the beginning it was found impossible to find space in the building for all the Government offices located in Denver, and to-day many of the Federal officials in the city are housed outside the Government building, rendering necessary the payment of a very large rent account every month. . . .

It is estimated that when the original bill was passed, in 1882, Denver had a population of less than 40,000. By 1890 the number had increased to 106,000, and to over 133,000 in 1900, and there had been a corresponding growth in the population of the State of Colorado and the entire Rocky Mountain region contiguous to that city. The result was an expansion of business far in excess of the calculations of the designers of the original building and the failure of the structure from the beginning to meet the demands upon it.

The growth of the . . . country has continued since the occupancy of the present building, in 1893, until now it is conservatively calculated that the city has a population of 175,000.

The consequence is that there is a crowding together in public offices of officials, employees, and papers that should not be permitted, with a consequent congestion of business that is appalling.

*Id.* at 1–2. The report noted that the federal treasury was “taxed to the extent of \$14,375 a year for the rent of public buildings,” and that the 1893 building houses “[t]he post-office, the Railway-Mail Service, the internal-revenue service, the Federal courts, the United States marshal, the clerks of the Federal courts, and the Weather Bureau Service.” *Id.* at 2.

114. *Byron White U.S. Courthouse, Denver, CO*, *supra* note 113; see also TENTH CIRCUIT HISTORICAL SOC’Y, BYRON WHITE UNITED STATES COURTHOUSE [hereinafter TENTH CIRCUIT DENVER COURTHOUSE BROCHURE], available at [http://www.10thcircuithistory.org/pdfs/courthouse/Byron\\_White\\_Courthouse\\_Brochure\\_2009.pdf](http://www.10thcircuithistory.org/pdfs/courthouse/Byron_White_Courthouse_Brochure_2009.pdf). Congress authorized the construction of the building in 1903 but did not allocate funds until 1908. The firm of Tracy, Swartwout, & Litchfield won the commission, and the marble for the building came from the Yule Marble Quarry in Colorado.

115. S. REP. NO. 59-1433, at 3. The Senate report also cited complaints of a federal judge that the building’s other uses interfered with the court. “The post-office draws a crowd at all hours of the day, and it is the favorite point for newsboys and venders, whose cries constantly disturb the sessions of court.” *Id.* at 5. Tenth Circuit archival materials also described the role played by the Denver Chamber of Commerce and the state’s congressional delegation in securing funds for a building to be in the tradition of monumental structures

by then shifted more work to the private sector and, after funds were appropriated in 1909, Supervising Architect James Knox Taylor picked a private firm for the design. Completed in 1916 and called the Denver United States Post Office and Courthouse (figure 13), the building is four stories high and occupies a city block.



**Figure 13:** *United States Post Office and Courthouse, Denver, Colorado. Architects: Tracy, Swartwout & Litchfield. 1916; renamed in 1994 the Byron R. White United States Courthouse.*

Image reproduced courtesy of the National Archives and Records Administration.

The size, scale, and elegance of the Neo-Classical architecture, a style common to federal buildings of its era, made the 1916 building a major landmark of the federal government. The structure features a three-story portico that is formed by sixteen symmetrical Ionic columns decorated with eagles at their tops. The classical theme celebrating federal power continues in the street-side inscriptions, invoking Cicero (“The law causes wrong or injury to no one”—“*Lex Nemini Iniquum, Nemini Injuriam Facit*”) and the Magna Carta (“To no one shall we deny justice, nor shall we discriminate in its application”—“*Nulli Negabimus, Nulli Differemus, Justitiam*”).<sup>116</sup>

such as the Lincoln Memorial.

116. *Byron White U.S. Courthouse, Denver, CO, supra* note 113. The texts, selected by architect Evarts Tracy, were placed on the friezes. Cicero’s quote faces the Eighteenth Street side while the Magna Carta excerpt sits on the Nineteenth Street side. Inscriptions also appear on benches on the northeast and southwest sides of the building. Reflecting the building’s initial use as a post office as well as a court, the front façade has inscriptions of the names of the cities to Denver’s East and West to “indicate the flow of mail across the country.” Memorandum from Gen. Servs. Admin. (Mar. 23, 2007) (on file with author). Thanks are due to Nicholas Salazar for the Latin translations. The building remains in use.

Further north, a Post Office and Courthouse in Missoula, Montana (figure 14), completed in 1913, shows (again) the imprint of Supervising Architect James Knox Taylor and the success of local politicians who brought a federal building to the city, incorporated only thirty years earlier.<sup>117</sup> The town's newspaper called the "classically inspired" three-story building in a Renaissance Revival style an "ornament to the city."<sup>118</sup> It was indeed a highly ornamented building, with arched entrances and two-story attached columns (pilasters) crowned with ornate Corinthian capitals.<sup>119</sup>

James Knox Taylor is also credited with the U.S. Post Office and Customs House of 1913 in San Diego, California (figure 15). The building sheltered the district court as well as the Immigration and Naturalization Service and the Weather Bureau. Taylor designed a Spanish Colonial Revival building of stucco-brick masonry, adorned by ten, two-story columns and crowned by a red tile roof, that he explained as appropriate for the state's history as well as the "climate and the desires of the people."<sup>120</sup>

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While dedicated (with the exception of one courtroom) for several decades entirely to the U.S. Postal Service, in 1994 the facility was renovated and renamed in honor of Supreme Court Justice Byron R. White, the first person from Colorado to serve on the Court. The courthouse, which houses four appellate and one trial courtroom, is the headquarters for the Court of Appeals for the Tenth Circuit, which includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, and holding sittings in Denver, Wichita, and Oklahoma City. *See* 28 U.S.C. §§ 41, 48 (2006). The building's namesake, Byron White, was appointed by President John Kennedy to the Supreme Court and served from 1962 until 1993, and died in 2002. Some of White's memorabilia are displayed on the first floor. The building's renovation and conversion cost about \$30 million or "\$115 per square foot" resulting in a building valued at \$200 million, which is about \$760 per square foot. *See* Press Release, U.S. Gen. Servs. Admin., GSA's Byron White Courthouse Wins Presidential Design Award (Oct. 30, 1997), available at <http://www.gsa.gov/portal/content/100400>. The district court has its own building that opened in 2002—the Alfred A. Arraj U.S. Courthouse, a ten-story, 325,000 square foot structure consisting of a pavilion and a tower that provides space for fifteen courtrooms. *See* U.S. GEN. SERVS. ADMIN., ALFRED A. ARRAJ U.S. COURTHOUSE: A MODEL OF SUSTAINABILITY, available at <http://www.nrel.gov/docs/fy05osti/38655.pdf>.

117. *Federal Building, U.S. Post Office and Courthouse, Missoula, MT*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/598>.

118. *Id.* (citing the newspaper *The Daily Missoulan*); *see also History of the Federal Judiciary, Historic Federal Courthouses*, *supra* note 105.

119. *Federal Building, U.S. Post Office and Courthouse, Missoula, MT*, *supra* note 117. The building has been expanded several times as it has since provided housing for the Northern Region of the U.S. Forest Service. A second federal court, opened in 1996, was named the Russell E. Smith Courthouse in honor of a local district judge who served there from 1966 until his death in 1990. The older building is no longer used as a court.

120. *Jacob Weinberger U.S. Courthouse, San Diego, CA*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/338> (describing the Jacob Weinberger U.S. Courthouse, in San Diego, California).



**Figure 14:** *Federal Building, United States Post Office and Courthouse, Missoula, Montana. Supervising Architect: James Knox Taylor. 1913.*

Image reproduced courtesy of the National Archives and Records Administration.



**Figure 15:** *United States Post Office and Customs House, San Diego, California. Supervising Architect: James Knox Taylor. 1913; renamed in 1986 the Jacob Weinberger United States Courthouse; renovated 1994.*

Image reproduced courtesy of the National Archives and Records Administration.

In the same year at the opposite side of the country, another major federal Post Office and Courthouse opened in the federal territory of Puerto Rico. See figure 16. One can see its massive structure reinforcing the federal power exercised over that

“unincorporated territory” that today remains in a complex relationship with the United States.<sup>121</sup> The building’s size contrasted with the federal outpost in the far north, where a federal encampment (figure 17) was established for the Alaska federal court in 1914. That building’s modest dimensions contrasted with the 300,000 square miles over which the court had jurisdiction.<sup>122</sup>



**Figure 16:** *United States Post Office and Courthouse, San Juan, Puerto Rico. Supervising Architect: James Knox Taylor. 1914; enlarged 1938–1940; renamed in 1999 the José V. Toledo Federal Building and United States Courthouse.*

Image reproduced courtesy of the National Archives and Records Administration.

121. See EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 81 (2001).

122. See MELODY WEBB, *THE LAST FRONTIER* 198 (1985). Congress first created the district—with a single tribunal—in the Alaska Organic Act of 1884. Ch. 53, § 3, 23 Stat. 24, 24; see also CLAUS-M. NASKE, *A HISTORY OF THE ALASKA FEDERAL DISTRICT COURT SYSTEM, 1884–1959, AND THE CREATION OF THE STATE COURT SYSTEM*, ch. 1 at 1 (1985). In 1884 President Chester Arthur appointed the first district judge, Ward McAllister Jr., along with four commissioners who were to function as “probate judge, justice of the peace, land office registrar, notary public, and much more.” *Id.* at ch. 2 at 5. They were based in Sitka, Alaska. In 1900, revisions created a district court with three divisions, each with a district judge who was to be resident in the district, to hold office for four years, to receive an annual salary of \$5000 a year, and to work under rules of civil procedure provided in that statute. Act of June 6, 1900, ch. 786, §§ 4–10, 31 Stat. 321, 322–26; see also NASKE, *supra*, at app. (Judges, District of Alaska). My thanks to Dana Fabe of the Alaska Supreme Court for help in locating these references.



**Figure 17:** *United States Courthouse and Jail and adjacent Bank of Alaska, Fairbanks, Alaska. Circa 1914; demolished 1932.*

Image reproduced courtesy of the National Archives and Records Administration.

I began this Lecture with a photograph of the U.S. Supreme Court building, designed by Cass Gilbert and opened in 1935. An appropriate bookend for this section is another Cass Gilbert structure, also opened in the mid-1930s. The building, known to many as “Foley Square” and housing the Southern District of New York and the Second Circuit, was the first federal courthouse skyscraper. See figure 18. The building’s 590-foot rise by way of a “version of Saint Mark’s campanile” in Venice<sup>123</sup> is emblematic of the nationwide growth in judgeships and caseloads. By the time this building opened, federal court filings were at about 150,000 cases, a fivefold increase over the numbers in the 1870s.<sup>124</sup>

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123. Gail Fenske, *Cass Gilbert’s Skyscrapers in New York: The Twentieth-Century City and the Urban Picturesque*, in *INVENTING THE SKYLINE: THE ARCHITECTURE OF CASS GILBERT* 229, 275 (Margaret Heilbrun ed., 2000). Gilbert’s tower echoed one added in 1915 by Peabody and Stearns to Boston’s U.S. Custom House, which was built in 1847 and designed by Ammi B. Young. See ROBERT CAMPBELL & PETER WANDERWARKER, *CITYSCAPES OF BOSTON: AN AMERICAN CITY THROUGH TIME* 50–51 (1992).

124. Clark, *supra* note 77, at 98 tbl.4, 114 tbl.10. The original Gilbert structure for the Southern District had sixteen courtrooms. An expanded space, renamed in 2001 the Thurgood Marshall United States Courthouse in honor of Justice Marshall (who had sat as an appellate judge in that courthouse) contains thirty-five. *Thurgood Marshall U.S. Courthouse, New York, NY*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/868>. But by the 1990s, these provisions were seen as inadequate. Thus, the Southern District was given a second nearby building, the Daniel P. Moynihan Courthouse, sometimes called “Pearl Street” in reference to its address but named in honor of New York’s Senator Moynihan, who was a major proponent of improving the quality of federal buildings. See *infra* notes 206–16.



**Figure 18:** *United States Courthouse, New York City, New York. Architect: Cass Gilbert, 1936; renamed in 2001 the Thurgood Marshall United States Courthouse.*

Image reproduced courtesy of the National Archives and Records Administration.

#### *D. Courthouses in Context*

When these examples of federal buildings constructed between the 1870s and the 1930s are set against the backdrop of the pre-Civil War construction efforts, several propositions become clear. First, in terms of national government priorities, courthouses were not part of the first wave of federal construction, nor central to the second; marine hospitals, custom houses, and post offices were. Only during the latter part of the eighteenth century were the words “court house” placed on the portals of important national government buildings.

Second, in terms of aesthetics, buildings ranged from Romanesque fortresses to Greek temples, from various versions of Classical Renaissance to Gothic knockoffs, as the men who held the position of Supervising Architect “scrambled

their historical allusions.”<sup>125</sup> As one commentator put it, the “panoply of federal buildings stretching across the nation” shared only the “common bond . . . that they all owed their parentage to a single office in Washington.”<sup>126</sup>

The chronology and architectural exuberance undergirds a third point, about the change in the kind of services and buildings provided by the national government. Judicial functions were once rarely announced on the front door, but the Customs Office was,<sup>127</sup> even if that name is now relegated to history as that office’s function has been eclipsed by the national taxing authority. Further, as illustrated by the sequence of buildings in Des Moines, Iowa and in Denver, Colorado, many of what had been large-scale and impressive buildings in the nineteenth century were, within relatively short order, seen as obsolete. A few were lost to fires, and some were torn down or recycled for other uses as politicians succeeded in getting resources for replacements or expansions.<sup>128</sup> Moreover, the growth in national services both promoted multifunction buildings and then explained their eclipse. For example, postal and court services outgrew their allotted spaces and spun off into separate facilities, purpose-built and purpose-named.

Fourth, the development of federal housing stock intersects with the professionalization of lawyers and architects and, later, of judges. These specialized service providers helped to shape government entities that in turn needed their expertise. Further, these professions were active participants in conflicts about the respective roles of the public and private sectors in controlling federal building designs. In-house government services expanded during the second half of the nineteenth century. In the 1850s, the Office of Supervising Architect consisted of about ten people in Washington, D.C. (two architects, “one clerk, six draftsmen, and one bookkeeper-draftsman”); by 1913, the Office employed about 350 people, 250 in Washington and another 100 in the field.<sup>129</sup> The growth spurt from ten to 350 is a fortyfold increase in personnel from the 1850s to 1913.<sup>130</sup>

Yet, even as the number of federal employees involved in building projects rose, their control over design declined over time. In the first few decades after the 1850s, when the Office of Supervising Architect came into being, federal employees were in charge of design. Thereafter, AIA efforts succeeded in shifting

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125. CRAIG, *supra* note 48, at 195.

126. LOWRY, *supra* note 48, at 58. Washington maintained enormous control. *See id.* at 59. Craig provided examples, such as a congressional building committee committed to “twelfth-century Normandy for the style” for new federal institutions, with results like the “medieval castle of the Smithsonian,” completed in 1855. CRAIG, *supra* note 48, at 91.

127. Examples of such exceptions during this era include the courthouse and post office built in 1857–1858 in Windsor, Vermont, and courthouses provided for the territories. *See* CRAIG, *supra* note 48, at 105. Craig noted that the Vermont building cost more than \$70,000 and the population of the town, when it was constructed, numbered about 2000. *Id.*

128. Lee mapped changing architectural trends, both in public and private design. For example, while Robert Mills and Alfred Mullet had often relied on classical revival buildings, after the 1870s, taste turned toward Gothic and then Romanesque styles. LEE, *supra* note 48, at 68, 111.

129. CRAIG, *supra* note 48, at 99.

130. In the forty-year interval between 1853 and 1892, the building stock of the Office of Supervising Architect increased “seventeen-fold.” *Id.* at 148.



significant responsibilities to the private sector. Today, courthouse design is outsourced and (as I will argue below), so increasingly are court services.

### III. HOUSING THE FEDERAL JUDICIARY: THE SHIFT FROM “COURT QUARTERS” OF THE 1920S TO COURTHOUSE DESIGN IN THE 1980S

Before turning to late twentieth-century developments, a richer account of the earlier part of the century is needed. As the Gilbert skyscraper for the Southern District of New York makes plain, by the 1930s, courthouses were moving to the fore as monumental statements of government authority. The federal judiciary was rising in prominence, and credit for the infrastructure that helped to generate that visibility goes first to William Howard Taft, who not only pressed for a building for the Supreme Court but who also laid the groundwork for the bureaucratic form of today’s federal courts.

#### *A. From “Paddling One’s Own Canoe” to Collective Action*

In 1922, soon after William Howard Taft became Chief Justice Taft, he complained in a speech to the ABA about the isolation of federal judges, each left “to paddle his own canoe.”<sup>131</sup> Taft’s metaphor made the point that no institutional mechanisms enabled federal judges to function as a collective body.

Scattered around the United States, trial judges used the diverse procedures of the states which they served; a federal judge of the 1920s working in Connecticut relied on different rules of court than did a federal judge in New York, Texas, or California. Dispersed federal judges had relatively little in common. Unlike today, they did not have “*Iqbal*” and “Rule 12” as shared cultural references.<sup>132</sup> Moreover, when judges wanted a clerk, a typewriter, or a travel stipend, they asked the Department of Justice. Further, as the names of buildings shown above suggest, trial-level judges often shared quarters with other federal agencies.

William Howard Taft sought to change the structural relations among federal judges, just as he aspired to put the Supreme Court in control of its own docket.<sup>133</sup>

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131. William Howard Taft, Chief Justice, U.S. Supreme Ct., Possible and Needed Reforms in Administration of Justice in Federal Courts, Address Before Annual Meeting of the American Bar Association (Aug. 10, 1922) [hereinafter Taft, 1922 *Needed Reforms*], in 8 A.B.A. J. 601, 602 (1922). Taft was nominated and confirmed as Chief Justice on the 30th of June, 1921. DAVID H. BURTON, TAFT, HOLMES, AND THE 1920S COURT 113 (1998). Burton saw Taft as a “conservative Progressive” whose interventions worked great changes in the federal judicial structure. *See id.* at 80.

132. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), joined *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to interpret Rule 12 of the Federal Rules of Civil Procedure as permitting a case to be dismissed if a complaint failed to meet a “plausibility standard” in its allegations of fact and law. *See generally* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009); Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337 (2010).

133. *See* Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936. For a history of the shift to the discretion Taft achieved by way of certiorari, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000).

As his biographer, Alpheus Thomas Mason, wrote in the 1960s: “No other Chief Justice, before or since, worked so hard at lobbying.”<sup>134</sup> (That judgment needs to be qualified now because the administrative apparatus, spawned by virtue of Taft’s efforts, augments the lobbying resources of the Office of the Chief Justice and of the judiciary more generally.) Succeeding on many fronts, Taft transformed the function of the Supreme Court, which lost its character as an ordinary appellate court and gained a new charter—to decide matters it deemed to be of national import, thereby making them so.<sup>135</sup> In addition, Taft sought to increase the number of lower federal judges and to gather them under his wing so as to become the chief administrator of the federal judiciary as well as Chief Justice of the Supreme Court. In 1922, Taft persuaded Congress to create twenty-four new lower court judgeships which, given the 126 judgeships that had been authorized as of 1914,<sup>136</sup> grew the workforce by more than 20 percent.

Taft also obtained congressional authorization to convene what was then called the Conference of Senior Circuit Judges, chartered to meet once a year in Washington to advise the chief justice on “the needs of [each] circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.”<sup>137</sup> Taft—and every chief justice that has succeeded him—chaired the Judicial Conference, which has evolved into the corporate policy-making voice for the federal judiciary.<sup>138</sup>

To garner the power to create shared federal rules, Taft worked with lawyers aiming to nationalize their profession. Just as architects had created the AIA in the 1850s and moved it to a national level in the 1860s, attorneys too were shaping professional organizations aimed at national markets. As noted, the ABA was founded in 1878,<sup>139</sup> and its annual conventions became occasions for agenda

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134. MASON, *supra* note 17, at 15. Mason also recounted that the membership of the Judiciary Committee included several Senators whom Taft identified as his opponents, committed to progressive reforms that Taft opposed. *Id.* at 95–100, 121–37.

135. See Starr, *supra* note 17, at 967–69.

136. See Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922–1947*, 31 F.R.D. 307, 322 (1963); *Authorized Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/allauth.pdf>. What Taft did not gain was the power to assign judges as he wanted. See MASON, *supra* note 17, at 100–02.

137. See Act of Sept. 14, 1922, Pub. L. No. 67-298, § 2, 42 Stat. 837, 838 (codified as amended at 28 U.S.C. § 331 (2006)). Taft thus enshrined the “executive principle”—that the judiciary should be in charge of its own “business.” See MASON, *supra* note 17, at 107. In 1937, Congress amended the 1922 Act to include participation by the chief judge of the United States Court of Appeals for the District of Columbia in the Conference of Senior Circuit Judges. Act of June 25, 1948, Pub. L. No. 80-773, § 331, 62 Stat. 869, 902 (codified at 28 U.S.C. § 331 (2006)).

138. See 28 U.S.C. § 331 (2006). See generally Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006).

139. See *supra* note 102. At that founding, some 100 lawyers from twenty-one states gathered in Saratoga Springs, New York. *History*, AM. BAR ASS’N, [www.americanbar.org/utility/about\\_the\\_aba/history.html](http://www.americanbar.org/utility/about_the_aba/history.html).

settings, such as seeking to respond to what Roscoe Pound famously labeled “popular dissatisfaction” with the courts.<sup>140</sup>

In the first decade of the twentieth century, the ABA championed several projects, including new legislation to give federal judges the power to promulgate nationwide rules of procedure. Strong populist opposition prevented enactment until 1934, when Congress passed the Rules Enabling Act, giving the Supreme Court the power to set forth such rules.<sup>141</sup> In 1938, the Court issued its first set—the Federal Rules of Civil Procedure.

The 1938 Rules reflected concerns that the means of getting to justice were overly cumbersome, intricate, technical, and too reliant on the English system’s juridical categorization of causes of action.<sup>142</sup> To lower barriers to entry, the reformers crafted a trans-substantive set of procedures that provided the same governing regime regardless of the kind of lawsuit (contract, tort, patent, federal statutory right) or of the form of relief (damages or injunctions). Further, liberal rules of pleading and joinder permitted different kinds of claims and various parties to be brought together in a single lawsuit, thereby widening the parameters of lawsuits. In addition to relaxing the risk of procedural errors, the Federal Rules reshaped the course of lawsuits by adding a system of information exchange (“discovery”) among parties in advance of trial<sup>143</sup> as well as an occasion (called a “pre-trial”) for lawyers and judges to meet in advance informally to plan for trial.<sup>144</sup>

Rulemakers aspired both to change how lawyers brought cases to courts and how federal judges saw their role. But more than rules are needed to change behavior. By the 1940s, the infrastructure that Taft launched—the Conference of Senior Circuit Judges—had elaborated its own subcommittees and programs to implement new ideas. Energetic and evangelistic judges, committed to revamping

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140. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906); see also Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead)*, 82 IND. L.J. 1193 (2007). Friedman argued that the distress came from distance between the “felt necessities of the time” (to quote Pound) and the law’s lack of responsiveness, as segments of the population were “systematically entrenched loser[s].” *Id.* at 1210–11.

141. See Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2072–2074 (2006)). Its legislative history and the role played by Taft are explored in Stephen B. Burbank’s classic essay, *The Rules Enabling Act of 1934*, *supra* note 46. The 1938 Rules made the major decision to create a unified procedural system for law and equity. In 1822, the Court had prescribed thirty-three equity rules for lower courts, and revised those rules in 1842 with a set of ninety-two. See 42 U.S. (1 How.) xxxix, xxxix–lxx (1842); 20 U.S. (7 Wheat.) v, v–xiii (1822). Neither set was as comprehensive as the Equity Rules of 1912, 226 U.S. 627, and those in turn were superseded by the more comprehensive provisions promulgated in 1938. The influence of equity practice on the 1938 Rules is charted in Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 975–82 (1987).

142. See J. A. JOLOWICZ, ON CIVIL PROCEDURE 24–54 (2000).

143. See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

144. The history of these developments is detailed in Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnik, *Managerial Judges*].

the attitudes and practices of their peers, championed their vision of judging, preached it, and demonstrated it. By the 1960s, they convinced their colleagues to create a “school for judges”<sup>145</sup> to teach new means of being judges—both in terms of daily practices and in their institutional persona vis-à-vis other branches of government.

*B. Ministering to the Federal Courts: The Administrative Office and the Federal Judicial Center*

Through the 1930s, the judiciary relied on the Department of Justice for services.<sup>146</sup> Under the leadership of a succession of chief justices (from Taft to Charles Evans Hughes, Harlan Fiske Stone, Fred Vinson, and Earl Warren),<sup>147</sup> the Conference of Senior Circuit Judges proposed ways for judges to gain more control over those ministering to the judiciary.<sup>148</sup> In 1939, Congress responded by authorizing the judiciary to bring its management in-house through the creation of its own administrative office.<sup>149</sup>

Initially working with a staff of about forty, the AO took over tasks from the Department of Justice as well as from district court clerks around the country. The AO expanded the data collected and submitted proposed budgets to Congress. The AO also oversaw the operations run by clerks and probation officers and dealt with

145. See Warren E. Burger, *School for Judges*, 33 F.R.D. 139 (1964).

146. Until 1891, “the only salaried officers of the federal judiciary” were its judges, and all nonjudge staff members were paid on a fee-for-service basis. HISTORY OF THE AO, *supra* note 30, at 3.

147. Taft died in 1930 and was replaced by Charles Evans Hughes, who served as the chief justice until his retirement in 1941. *Timeline of the Justices*, SUPREME COURT HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/>. He was replaced by Harlan Fiske Stone, who died unexpectedly in 1946. *Id.* Frederick Vinson became chief justice until his death in 1953, and Earl Warren was appointed thereafter. *Id.*

148. HISTORY OF THE AO, *supra* note 30, at 1–4. How to do so was a subject of debate. Many jurists were critical of the Department of Justice, but not all were enthusiastic about a new administrative center in Washington, and some judges urged that clerks of courts be given budgetary authority rather than centralizing the process. During the late 1920s and 1930s, the proponents of a central agency gained sway and went to Congress with a bill to create the AO, with its director appointed by the chief justice. *See id.* at 4–15. The first director was Henry Chandler, who had been a president of the Chicago Bar Association and who worked with Associate Director Elmore Whitehurst for many years. *See generally* Chandler, *supra* note 136.

149. *See* Act of Aug. 7, 1939, Pub. L. No. 76-299, § 302, § 304(2), 53 Stat. 1223, 1223 (codified as amended at 28 U.S.C. §§ 601–612 (2006)). The political configuration that resulted in its enactment is explored in Peter Graham Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POLITICS 599 (1970). Fish argues that struggles over status, including the failed effort in 1937 to expand (or “pack”) the Supreme Court, prompted the Conference of Senior Circuit Judges to want to shore up internal judicial administrative capacities. Additional discussion comes from the HISTORY OF THE AO, *supra* note 30, at 11–16. *See generally* MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RS 21847, ADMINISTRATIVE OFFICE OF THE U.S. COURTS: HISTORY, OPERATIONS, AND CURRENT ISSUES (2004).

issues ranging from office supplies to caseloads.<sup>150</sup> In addition, the AO monitored congressional legislation related to the judiciary. Over time, the AO has become the judiciary's liaison to Congress. The AO both responds to requests for the judiciary's views on pending legislation and at other times works with judges to draft proposed legislation.<sup>151</sup>

A general recodification in 1948 of the federal statutes related to the jurisdiction of the federal courts produced a new name for the Conference of Senior Circuit Judges, which became (and remains) the Judicial Conference of the United States. Initially composed exclusively of appellate judges, the Judicial Conference focused on the "business" of the courts as it made policy for the courts. By statute (then as now), each of the chief judges of the circuits are members of the Judicial Conference of the United States.<sup>152</sup> In the 1950s, Chief Justice Earl Warren opened access to the Judicial Conference for district court judges by persuading the appellate group to include representative district judges, with one elected from each circuit.<sup>153</sup>

In 1967, Warren also helped shape an agreement to enable the judiciary's bureaucratic apparatus to expand by virtue of a newly chartered congressional entity—the Federal Judicial Center (FJC)—charged with education and research for the federal courts.<sup>154</sup> That mission is reflected in several of the courthouse photographs reproduced above, and many more can be found on the FJC's website display, *Historic Federal Courthouses*.<sup>155</sup> The FJC runs what is informally called "baby judge school" to orient new judges. The FJC also convenes specialized educational programs and, at the behest of committees of the Judicial Conference, does targeted research.

When Congress first authorized the senior circuit judges to come to Washington in 1922, the legislature limited their allowance to ten dollars a day.<sup>156</sup> When they

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150. The kind and nature of data collected have drawn concerns from the perspective of researchers seeking to understand various dimensions of the judiciary's work. See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003).

151. See Winkle, *supra* note 30. In 1976, the AO created its Office of Legislative Analysis, which was later renamed the Office of Legislative Affairs. *Id.* at 45.

152. See 28 U.S.C. § 331 (2006).

153. Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476; see also H.R. REP. NO. 85-172 (1957) (explaining that, given that "many of the recommendations of the Conference deal with judicial matters being handled daily in the district courts," those judges should be included because they were a "valuable source of information" on the "problem of court congestion and delay in litigation"). In 1996, Congress amended the provision to create terms of not less than three nor more than five years and to permit senior as well as active judges to serve. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 601, 110 Stat. 3847, 3857.

154. Act of Dec. 20, 1967, Pub. L. No. 90-219, § 101, 81 Stat. 664, 664 (codified as amended at 28 U.S.C. § 620 (2006)).

155. See *History of the Federal Judiciary, Historic Federal Courthouses*, *supra* note 105; see also *Constructing Justice: An Exhibit of Courthouse Photographs at the Federal Judicial Center*, CT. HISTORIAN, Nov. 1995, at 1.

156. Act of Sept. 14, 1922, Pub. L. No. 67-298, § 2, 42 Stat. 837, 838-39. This micromanagement stemmed in part from concerns that the meetings were an excuse for trips

had their annual meeting, the Justice Department provided staff support. In contrast, by the late 1980s, William Rehnquist presided over an administrative apparatus designed for and by the judiciary. The AO directly employed more than 1100 employees providing central resources to the dispersed national judicial workforce of another 29,000, probation officers included.<sup>157</sup> The FJC staff had some 130 members,<sup>158</sup> and by 2010, Congress supported the work of both the AO and the FJC with more than \$110 million annually.<sup>159</sup>

As with the courts, the changing shape (and power) of the judiciary's administrators can be seen in the physical spaces they used. When begun in 1939, the AO shared space in the then-new Supreme Court building.<sup>160</sup> As staff grew to more than 100, employees were dispersed to various buildings in Washington.<sup>161</sup> When the FJC came into being in the late 1960s, its employees worked in The Dolley Madison House (figure 19), a Federal-style structure named for the wife of President James Madison and built in the 1820s by her brother-in-law.<sup>162</sup>

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to Washington. See Norman J. Padelford, *The Federal Judicial Conference*, 26 AM. POL. SCI. REV. 482, 485 (1932).

157. Winkle, *supra* note 30, at 46. As of 2009, the Judicial Branch had more than 33,000 employees. U.S. OFFICE OF PERSONNEL MGMT., FEDERAL EMPLOYMENT STATISTICS: EMPLOYMENT AND TRENDS SEPTEMBER 2009 tbl.2 (2009), available at <http://www.opm.gov/feddata/html/2009/September/table2.asp>. The U.S. Supreme Court employed 483 people. *Id.* Included within "judicial branch" employees are not only staff for judges and clerks of courts but also probation officers. See *Summary of Nonstandard Pay and Benefits by Type of Pay or Benefit*, in U.S. OFFICE OF PERSONNEL MGMT., FEDERAL LAW ENFORCEMENT PAY AND BENEFITS: REPORT TO THE CONGRESS app.C (2004), available at [http://www.opm.gov/oca/leo\\_report04/appendixc.asp](http://www.opm.gov/oca/leo_report04/appendixc.asp). How the governance structure should be organized and whether additional senior staff (akin to a "chancellor") would be appropriate are issues that have been debated over the later part of the twentieth century. See RUSSELL R. WHEELER & GORDON BERMANT, *FEDERAL COURT GOVERNANCE* (1994); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996); Daniel J. Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981).

158. FED. JUDICIAL CTR., ANNUAL REPORT 2010, at 4.

159. In fiscal year 2010, the FJC had a budget of about \$27 million and devoted about 75% of its budget to education. The AO received about \$83 million. See *Judiciary Receives 5.7 Percent Increase in Appropriations for FY 2010*, THIRD BRANCH, Feb. 2010, at 2.

160. HISTORY OF THE AO, *supra* note 30, at 22.

161. By 1942, the AO had a staff of 104 persons, up from 96 the year before. See AO ANN. REP. 3 (1942). Under the tenure of Acting Director William Ellis, most of the staff was moved from the Supreme Court to offices in a GSA building. *Id.* at 44. For background on the early years of the AO, see James M. Collier, *Fiscal Housekeeping in the Federal Courts*, 1 W. POL. Q. 400, 401 (1948). Additional discussions of the administrative apparatus can be found in RUSSELL WHEELER, FED. JUDICIAL CTR., A NEW JUDGE'S INTRODUCTION TO FEDERAL JUDICIAL ADMINISTRATION (2003) and RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM (2005).

162. The drawing of the Dolley Madison House, provided courtesy of the AO, and with the assistance of Steven Salzgeber and Bruce Ragsdale, details a building for which James Madison lent the money for construction. After financial reversals for its builder, who died, Dolley Madison inherited the house. *Survey of Historic Sites and Buildings, Lafayette Square Historic District*, NAT'L PARK SERVICE, <http://www.nps.gov/history/history/>



**Figure 19:** *The Dolley Madison House, Washington, D.C., 1820.*

Image courtesy of the Administrative Office of the United States Courts.

As staff and activities outstripped space, the judiciary sought larger facilities. In 1981, the architect of the Capitol identified a site proximate to the Supreme Court and adjacent to Union Station—which had been designed in 1907 by Daniel Burnham to greet travelers coming to the nation’s capital.<sup>163</sup> In 1984, the Judicial Conference formally sought authority to proceed<sup>164</sup> and, in 1988, obtained permission from Congress to enter into a public-private partnership that produced the Thurgood Marshall Federal Judiciary Building (figure 20), which opened in 1992.

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online\_books/presidents/site6.htm. The Cosmos Club bought the building in 1886, sold it in 1940 to the federal government, and then leased and used it until 1952. During the 1950s and 1960s, the building was used by other federal agencies before, in 1968, becoming the home of the Federal Judicial Center. See U.S. GEN. SERVS. ADMIN., THE DOLLEY MADISON HOUSE (undated brochure, on file with author).

163. When it opened, Union Station claimed to be the largest train station in the world and provided a dramatic gateway to the capital in the classic Beaux-Arts style. See *History of Union Station*, UNIONSTATIONDC.ORG, <http://www.unionstationdc.com//info/infohistory>.

164. A detailed account of the project is provided in GEORGE M. WHITE, FINAL REPORT OF THE ARCHITECT OF THE CAPITOL TO THE COMMISSION FOR THE JUDICIARY OFFICE BUILDING: THE DESIGN AND CONSTRUCTION OF THE THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING (1994).



**Figure 20:** Thurgood Marshall Federal Judiciary Building, Washington, D.C. Architects: Lee/Timchula Architects, 1992.

Image courtesy of the Federal Judicial Center.

AO Director L. Ralph Mecham celebrated the Marshall building for putting “a face on a branch of government that is spread out across the nation, and serves as a strong testament to the important work that is accomplished here.”<sup>165</sup> The “monumental” structure, offering a million square feet, contrasts with the quaint Dolley Madison House as it also reflects the legislative sophistication and the administrative girth of the judiciary. The Marshall Building is also a testament to the decades that preceded its construction, during which the meaning of a “federal case” and the conception of the roles for the federal judiciary changed.

### *C. Putting New Cases into the Federal Courts: The 1930s to the 1980s*

The 1935 Cass Gilbert skyscraper courthouse in New York City (figure 18) ascended stories beyond its predecessors. So too did caseloads and legal rights. Not only did filings increase, but the content of cases changed—driven by dynamic variables including the kinds of legal rights recognized, access to legal services, and government regulatory policies.<sup>166</sup> In the wake of the Depression, many saw federal governance as a necessary and desirable response to political and economic

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165. Press Release, Admin. Office of the U.S. Courts, Federal Judiciary Marks Building Milestone (Oct. 4, 2002).

166. Many social scientists have tried to model litigation, and others have studied the shifts in the dockets of both state and federal courts that point to a rise in cases involving government regulation (criminal cases included) and a homogenization across jurisdictions over time. For example, one study sampled cases filed in three federal appellate courts in different parts of the United States from 1895 through 1975. The researchers concluded that while once those courts’ dockets were “dominated by private economic disputes,” by the 1970s, a large proportion of the caseload involved “government activity . . . essentially noneconomic in character. . . . Policies of the federal government and the problems associated with them now provide the basis for most federal appellate activity.” See Lawrence Baum, Sheldon Goldman & Austin Sarat, *The Evolution of Litigation in the Federal Courts of Appeals, 1895–1975*, 16 *LAW & SOC’Y REV.* 291, 306, 308 (1981–1982).



conditions. Expansion of federal jurisdiction was a mechanism by which to spread and enforce new national legal obligations. In the 1940s, the Civil Rights movement turned to the federal courts and, under the leadership of Earl Warren in the 1960s, judicial interpretations of the Constitution, statutes, and federal rules looked favorably upon court-based processes to enable racial equality and to enhance human dignity. Congress not only supported but also expanded this project as, time and again, it authorized government officials and private parties to bring lawsuits as a means of enforcing federal law.

Earl Warren's tenure marked a commitment to rights assertion spanning both the civil and criminal dockets. *Brown v. Board of Education* remains the landmark that continues to evoke both admiration and debate.<sup>167</sup> Another major holding is *Gideon v. Wainwright*, giving new meaning to the procedural requirement of a "right to counsel"<sup>168</sup> that had, for almost two hundred years, had little substantive import. In that 1963 decision, the Supreme Court required that indigent criminal felony defendants be provided with state-paid lawyers<sup>169</sup> who, as subsequently elaborated, were also to be accorded the requisite resources, including experts, if necessary to mount a defense.<sup>170</sup>

Warren's leadership of the Judicial Conference resulted in renewed interest in the role that federal procedural rules could play in access to justice. In 1960, Chief Justice Warren appointed an ad hoc committee to review how the 1938 Civil Rules were functioning; Dean Acheson was the chair and Professor Benjamin Kaplan of Harvard Law School was the reporter.<sup>171</sup> The group produced a major reworking of the class action rule that facilitated both the enforcement of civil rights injunctions and new capacities for consumers to band together to seek economic recoveries from manufacturers and sellers of goods.<sup>172</sup>

Those rule-based changes were complemented by a statute, proposed by the Judicial Conference, authoring consolidation across federal district courts and producing now commonplace "multidistrict litigation," or MDLs.<sup>173</sup> Such

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167. See MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010).

168. U.S. CONST. amend. VI.

169. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

170. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68 (1985).

171. In 1935, the Supreme Court had appointed an Advisory Committee to draft rules. In 1942, the Court appointed a standing Advisory Committee that was "discharged" in 1956. In 1958, Congress authored the Judicial Conference to advise the Court on rule making. In 1960, Chief Justice Warren appointed several committees for the study of bankruptcy, appellate, admiralty, and civil rules. Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Announcement of the Chief Justice of the U.S. (Apr. 4, 1960) (on file with the author).

172. See FED. R. CIV. P. 23 (1966) (later amended); see also Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

173. See Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as

provisions reshaped the prospects of what litigation might accomplish, as did the growth in the number of lawyers, increasingly diverse in terms of their own demographic profiles, who both fueled and staffed the regulatory state and ferreted out forms of injury imposed on a diverse array of individuals.

The idea that individuals ought to be empowered and equipped in the contest with the state migrated from the criminal side to civil litigation.<sup>174</sup> In 1974, shortly after the tenure of Chief Justice Warren ended, Congress established the Legal Services Corporation that employed lawyers, paid by the government, to represent poor litigants in certain kinds of civil disputes.<sup>175</sup> The Supreme Court also held that states could not impose access fees that served as a barrier to certain kinds of civil litigants.<sup>176</sup> Further, a very small sliver of civil litigants—individuals faced with state efforts to establish or to terminate their status as parents—gained constitutional rights to state-subsidized evidence,<sup>177</sup> state-paid transcripts, and, under certain, narrow conditions, to state-funded lawyers.<sup>178</sup>

Aggregate processing itself became another vehicle for enhancing access to courts. Class actions generate subsidies for litigants by relying on economies of scale to induce lawyers to serve a wider set of claimants.<sup>179</sup> Information technologies revealed patterns of problems experienced by large numbers of individuals—permitting the connection of incidents heretofore perceived as isolated or idiosyncratic events. Phrases like “the asbestos litigation” and “the tobacco litigation” capture the practice of court recognition of an enormous array of

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amended at 28 U.S.C. § 1407 (2006)).

174. Just after Warren Burger assumed the chief justiceship, the Supreme Court borrowed Professor Charles Reich’s insight that statutory entitlements were forms of “property” to be protected from state deprivation by “due process of law.” The Court required that final decision making about government entitlements employ judicial modes of process to ensure fairness. *See* *Goldberg v. Kelly*, 397 U.S. 254 (1970); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

175. *See* Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (2006)).

176. *See* *Boddie v. Connecticut*, 401 U.S. 371 (1971). The limits of that holding were marked in *United States v. Kras*, 409 U.S. 434 (1973), and in *Ortwein v. Schwab*, 410 U.S. 656 (1973). For statutory provisions in the federal system for fee waivers, see 28 U.S.C. § 1915 (2006), amended by Prison Litigation Reform Act, Pub. L. No. 104-134, § 804, 110 Stat. 1321, 1373 (1996).

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

178. *See* *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (transcripts); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (counsel). *Lassiter* was limited in 2011 when the Supreme Court rejected requiring counsel for all civil contemnors facing detention. *See* *Turner v. Rogers*, 131 S. Ct. 2507 (2011). *Turner* holds that the Due Process Clause “does not automatically require the provision of counsel at civil contempt proceedings” for an indigent facing incarceration of up to one year because of an unpaid child support order owed to a child’s custodian, who, the Court noted, was also likely to lack counsel. *Id.* at 2520. But in the absence of counsel, “substitute procedural safeguards” are required to ensure fair decision making. *Id.* at 2518.

179. *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); 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 (2011) [hereinafter Resnik, *Fairness in Numbers*].

parties and of varying forms of injury prompting interrelated judgments. Proceedings with hundreds and thousands of individuals, some in search of institutional reform and some in search of money, became plausible, if not routine. While some of those claims arose from tort or contract, many new litigants entered the federal courts because Congress had welcomed them. The legislature embraced adjudication by authorizing litigants to bring—whether as individuals or as parts of aggregates—a widening array of lawsuits aimed at enforcing civil, environmental, consumers', and workers' rights.

Adjudication's flowering in the United States can be seen through the congressional creation of hundreds of new federal rights and the filing of more cases.<sup>180</sup> As tracked at the outset in figure 3, the docket of the federal courts grew from under 30,000 civil and criminal filings in 1901 to more than 90,000 in 1950 and almost 320,000 in 2001. And, as noted at the outset, filings increased about 95% from 1965 to 1980, and about another 50% from 1980 to 1995. Moreover, the mix changed. In 1901, more criminal than civil cases were filed; by the 1950s, the civil docket had begun to surge; and, by 2001, the number of civil filings (roughly 250,000) was more than four times that of the criminal filings.<sup>181</sup> Rising caseloads produced calls for more judgeships; figure 2 provides a snapshot of a parallel growth in life-tenured judgeships over the twentieth century.<sup>182</sup>

Thus, by the later part of the twentieth century and through the interactions of social movements, economic challenges, judges, lawyers, and politicians, Congress had vested in the federal judiciary a role that now may seem to be inherent in its charter. Independent judges were authorized to respond to claims under a myriad of statutes and understood themselves specially obligated to respond to constitutional arguments made by a diverse set of claimants. The expansion of jurisdictional authority was mirrored by an administrative expansion as Congress endowed the judiciary with new methods to provide for and to articulate its own interests.

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180. Between 1955 and 1960, roughly ninety thousand federal cases were filed each year, dividing roughly as two-thirds civil and one-third criminal. See Clark, *supra* note 77, at 131 tbl.16. Twenty years later, filings had doubled, again with more civil than criminal cases. *Id.* at 143 tbl.20. By century's end, the number of filings rose to about 300,000 civil and about 60,000 criminal cases.

181. The filing data for 1950 and 2001 come from the AO, which, as noted, became the entity collecting statistics after its inception in 1939. The figures for 1901 are drawn from a two-volume empirical study by the ALI, as well as from Clark, *supra* note 77. See 1 AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934) (providing data on criminal cases); 2 AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 111 (1934) (providing data on civil cases). See *supra* note 78 for the extrapolations used. How much time was devoted to the different kinds of cases is a discrete question, answered in administrative terms by a "weighted caseload" measure aiming to capture the distinctions between the many civil filings settled or withdrawn before a federal judge sees a case and the burdens of criminal defendants who must be heard before pleading guilty or being sentenced. The AO began to use "weighted case measures" in 1946 and has several times refined those metrics. See *Explanation of Selected Terms*, U.S. COURTS, <http://www.uscourts.gov/library/fcmstat/cmsexpl03.html>.

182. See also *Chronological History of Authorized Judgeships in the U.S. District Courts*, *supra* note 66.

*D. Space, Staff, and Air Conditioning*

From the inception of the judiciary's leadership Conference in the 1920s, that group focused on resources. Acting as the corporate voice of the judiciary, the Judicial Conference repeatedly asked Congress—through the Department of Justice—to create new judgeships for those circuits or districts identified as particularly needy.<sup>183</sup> The Conference also requested law books for chambers, reimbursements for expenses, and more staff.<sup>184</sup> Each year the Proceedings of the Judicial Conference recorded the discussions and requests; beginning in the late 1930s, the AO, which took up the record-keeping that had been done by the Department of Justice, expanded the data collected as it filed annual reports detailing the workload and activities of the courts.

To my own surprise when reviewing these yearly compendia, the term “court house” was not used in the reported proceedings from the 1930s to the 1960s. Indeed, although the AO's enabling statute outlined several tasks including the provision of “accommodations for the use of the courts” and for staff, that mandate was read narrowly. As Henry Chandler, the AO Director in 1941 explained, it was “well known” that the AO was not “equipped to construct or operate buildings”; instead it would “discharge its duty” by obtaining “suitable provision from the agencies.”<sup>185</sup>

What were the relevant agencies then? Recall that Congress had, in 1852, located the Office of Supervising Architect in the Treasury Department. In the wake of the Depression, the federal government launched an ambitious plan (what today we might call a “stimulus package”) that included funds for buildings. As a consequence of these New Deal efforts, the Office of Supervising Architect had to work with the Public Buildings Administration of the Federal Works Agency as well as the Post Office Department, which had independent authority to obtain property.<sup>186</sup> In 1939, the Office of Supervising Architect itself was folded into the Public Buildings Administration,<sup>187</sup> and in 1949, the new umbrella for both became a new entity, the GSA,<sup>188</sup> which continues to oversee federal land purchases,

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183. *See, e.g.*, JUDICIAL CONFERENCE REPORT i (Oct. 1924); JUDICIAL CONFERENCE REPORT 5–6 (Oct. 1927); JUDICIAL CONFERENCE REPORT 4–8 (Oct. 1931).

184. *See, e.g.*, JUDICIAL CONFERENCE REPORT i–ii (Oct. 1924); JUDICIAL CONFERENCE REPORT 5–6 (Oct. 1927); AO ANN. REP. 15–18 (1941).

185. AO ANN. REP. 15–16 (1941).

186. *Id.* at 15–16; HISTORY OF THE AO, *supra* note 30, at 41.

187. *See* Reorganization Plan No. I of 1939, 53 Stat. 1423 (pursuant to Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561). In 1949, Congress enacted the Public Buildings Act, authorizing the site selection and construction of federal buildings. *See* Public Buildings Act of 1949, Pub. L. No. 81-105, 63 Stat. 176 (codified as amended in scattered sections of 40 U.S.C.).

188. Created under President Harry Truman at the end of World War II, the GSA was supposed to centralize the procurement and superintendence of government property. Functions of other agencies were transferred to the GSA, which was run by an “Administrator” appointed by the president. *See* Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified in scattered sections of 40 U.S.C., 41 U.S.C., and 50 U.S.C.). A monograph by the GSA described its 1949 mandate to have been “standardization, direct purchase, mass production, and fiscal savings.” U.S. GEN.

construction, and maintenance. Functioning as the “landlord” for other federal agencies, the GSA has at times been a coventurer with and at other times a critic of the federal judiciary.<sup>189</sup>

During the 1940s and 1950s, the judiciary worked with its sibling agencies to improve its “quarters.” At points, federal judges also protested that the federal government’s building regime was insufficiently attentive to their specific needs. A case in point comes from the saga of how, in the 1950s, the federal courts obtained funds for air conditioning—a topic that may seem an odd object of attention. Yet, this issue became a focal point when the judiciary sought additional judgeship lines from Congress. Some members of the legislature responded by noting that abandoning the practice of closing courts in the summer could open up more days for work. The Judicial Conference, in turn, argued that “extreme heat” interfered with “the efficiency and output of the courts during the hot months of the year.”<sup>190</sup>

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SERVS. ADMIN., GROWTH, EFFICIENCY AND MODERNISM: GSA BUILDINGS OF THE 1950s, 60s, AND 70s 29 (2003) [hereinafter GSA MODERNISM].

A series of other acts added to GSA responsibilities, and the Public Building Act of 1959 gave the GSA more direct control over federal construction. *See* Public Buildings Act of 1959, Pub. L. No. 86-249, 73 Stat. 479 (codified at 40 U.S.C. §§ 581–590, 3301–3315 (2006)). By the 1960s, the GSA was seen as an “iceberg”—in that its direct budget (then of about \$600 million) was dwarfed by the vastly larger sums (then more than \$2.5 billion) the GSA controlled through projects under its aegis. *See* Michael James Luciano, A Study of the Origin and Development of the General Services Administration as Related to Its Present Operational Role, Direction, and Influence 245 (1968) (unpublished Ph.D. dissertation, New York University) (UMI Pub. No. AAT 6907976).

189. Other entities have complained about the GSA. Episodically, concerns from various sectors prompt legislative oversight and sometimes direction. For example, in the 1972 amendments, Congress instructed that the GSA report its “determination and findings supporting” the negotiation of purchase contracts “in writing to the Committees on Public Works of the Senate and House of Representatives,” and that the “maximum number of qualified sources” be solicited for proposals. *See* Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 216, 219 (codified as amended at 40 U.S.C. §§ 3301–3316 (Supp. 2008)).

The 1972 amendments added to the existing reporting rules in the Public Buildings Act of 1959, which required annual reports on recent and continuing constructions and acquisitions as well as “building project surveys as may be requested by resolution” of House or Senate committees. Public Buildings Act of 1959, Pub. L. No. 86-249, 73 Stat. 479, 481. Further, the Public Buildings Act required that the GSA submit formal documents to the Office of Management and Budget (OMB) as well as congressional committees as part of the authorization process. *See* 40 U.S.C. § 3307 (2006); CLAY H. WELLBORN, CONG. RESEARCH SERV., RS 22287, GENERAL SERVICES ADMINISTRATION PROSPECTUS THRESHOLDS FOR OWNED AND LEASED FEDERAL FACILITIES 2–3 (2008). For each construction or acquisition project above a certain cost threshold, GSA must submit a detailed prospectus to congressional committees. 40 U.S.C. § 3307 (2006). Congress allocates funds “only if the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives adopt resolutions approving the purpose for which the appropriation is made.” *Id.* The cost threshold triggering this process cost for new spaces in fiscal year 2009 was \$2.66 million. WELLBORN, *supra*, at 4.

190. JUDICIAL CONFERENCE REPORT 25 (Sept. 1952). Director Henry Chandler explained in 1954: “Court rooms are often so situated that it is necessary to keep the windows closed in

Technology offered a solution. Air conditioning could make keeping facilities open easier, and thereby demonstrate that even adding court days in the summer did not suffice, for demand continued to outstrip need. The Judicial Conference asked its landlord, the Public Buildings Service, to obtain money to air condition certain facilities. In 1952 and again in 1953, the Commissioner of the Public Buildings Services reported back that little prospect existed for funds.<sup>191</sup> But after Earl Warren became the Judicial Conference chair, the Conference appointed its own “Committee on Air Conditioning,” which surveyed needs, went directly to Congress for funds, and succeeded in 1955 in obtaining a direct appropriation of \$1.15 million.<sup>192</sup>

That fact is reflected in a reading of the small print on figure 21, which is a drawing from the AO’s annual report of 1957.<sup>193</sup> The graphic—the “Judicial Dollar”—used the heuristic of a circle representing 100 cents to detail allocations of budgeted funds. As the small print explained, staff salaries (probation included) accounted for 42% of the expenditures; jurors represented 12%; judges’ salaries constituted 23%; and 8% went to “travel, misc. and air conditioning,” which was then a new line item in the budget. Note that, aside from air conditioning, no mention is made of funds directed for the support of “court quarters.”

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order to shut out city noises that would make it hard and next to impossible to hear the proceedings.” JUDICIAL CONFERENCE REPORT 63 (Sept. 1954).

191. JUDICIAL CONFERENCE REPORT 25–26 (Sept. 1952); JUDICIAL CONFERENCE REPORT 16, 28 (Mar. 1953).

192. Letter from R.O. Jennings, Acting Commissioner of Public Buildings, to AO Director Henry Chandler (Sept. 12, 1952), *in* Judicial Conference Meetings Records, National Archives, at Box 58 (Mar. 1952–Sept. 1952) (declining to fund the request for air conditioning given fiscal constraints); Item 30 (1954), *in* Judicial Conference Meetings Records, at Box 67 (Apr. 1954–Apr. 1954) (noting the urgency of the problem and providing a list of requests of buildings to be air conditioned and the names of senators and representatives from those areas); Report, *in* Judicial Conference Meetings Records, at Box 75 (Mar. 1955–Sept. 1955) (reporting some progress, as of June 16, 1955, from the Air Conditioning Committee, chaired by John Parker). The archival materials from the Judicial Conference can be found in the National Archives in Washington, D.C., and are catalogued under Record Group (RG) 116, Administrative Office of the U.S. Courts, and then by “entry” and the number of “containers” (or boxes). *See also* JUDICIAL CONFERENCE REPORT 21–22 (Sept. 1955); JUDICIAL CONFERENCE REPORT 30 (Sept. 1954); AO ANN. REP. 63–64 (1954). Funding continued thereafter. *See* JUDICIAL CONFERENCE REPORT 29–30 (Sept. 1956); AO ANN. REP. 70–72 (1956). Air conditioning becomes a part of the depiction of the use of the “Judicial Dollar” in drawings in 1957. AO ANN. REP. 144 (1957).

193. Figure 21, The Judicial Dollar, is reproduced from the AO ANN. REP. 144 (1957). Thanks to the AO and to Yale University Press, which created the facsimile.



contrast to the life-tenured judges provided by Article III of the Constitution.<sup>195</sup> The success of that effort has altered the constitutional understanding of who can hold aspects of the power associated with Article III judges. In earlier eras, as workloads seemed pressing, the Judicial Conference considered but rejected much by way of delegation to non-Article III judges. But, what once had seemed constitutionally troubling became administratively attractive.

Initially, the role conceived for these new judicial officials was relatively modest. Modeled after English masters, magistrates were to specialize in pretrial discovery and in large cases, with a grab bag of additional duties delegated by life-tenured judges. The assignment of a magistrate to decide a state habeas petition prompted a challenge in the 1970s by a Kentucky prisoner who argued that neither the authorizing statute nor the Constitution permitted a magistrate judge to make the ruling.<sup>196</sup> California, filing an amicus brief in support of the petitioner, agreed that a non-life-tenured judge ought not review state court judges, including the “highest state appellate courts.”<sup>197</sup> The Supreme Court read the statute to provide no power for magistrates to do so.<sup>198</sup>

Congress responded by enlarging the charter to magistrate judges, such that their additional duties grew to range from rendering habeas corpus judgments, subject to district court review, to presiding at civil trials with the consent of the parties—followed by the possibility of direct appeals to circuit courts.<sup>199</sup> The Supreme Court

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195. See Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968). The Act was revised in 1976. See Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified at 28 U.S.C. §§ 631–639 (2006)). The Executive Committee of the Judicial Conference opposed any formal name change, but in the 1990 Civil Justice Reform Act, Congress conferred the title “magistrate judge.” See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5104, 5117 (amending 28 U.S.C. § 631); see also Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002) [hereinafter Resnik, *Inventing the District Courts*].

196. *Wingo v. Wedding*, 418 U.S. 461 (1974). A Kentucky state prisoner, who had pled guilty to murder and was serving a life sentence, filed a petition relying on 28 U.S.C. § 2441. After the Sixth Circuit reversed the dismissal, the district judge assigned the case to a magistrate who held an evidentiary hearing. The district judge then affirmed the magistrate’s proposed factual and legal findings. *Id.* at 461.

197. See Brief of Amicus Curiae in Support of Respondent at 2, *Wingo*, 418 U.S. 461 (1974) (No. 73-846). California argued that the “assignment to United States Magistrates of the duty to conduct evidentiary hearings in habeas corpus matters deprives the parties of the right to be heard before the ultimate trier of fact and therefore constitutes an improper delegation of the exercise of the judicial function in violation of the spirit of Article III.” *Id.*; see also Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979).

198. The Court concluded that the Magistrates Act, which had then authorized magistrates to undertake “preliminary review of application for post-trial relief,” did not permit judges to delegate to magistrates the task of conducting evidentiary hearings in federal habeas corpus cases. *Wingo*, 418 U.S. at 470. The Court did not reach the constitutional objections. *Id.* at 467 n.4.

199. Congressional amendments from 1976 onward have expanded the range of duties of magistrate judges that are expressly authorized. See 1976 Amendments to An Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636 (2006)).



has also interpreted the statutory obligation that Article III judges make a “de novo determination” of certain magistrate judge rulings to mean that new evidentiary hearings are not required in all cases.<sup>200</sup> Further, defense counsel can provide the requisite consent for magistrate judges to preside at a felony voir dire; in civil proceedings, litigant participation without objection constitutes sufficient consent.<sup>201</sup> The more magistrate judges function as judges, the more they too need courtrooms and chambers in which to work.<sup>202</sup>

Yet through and beyond the Warren era, the Judicial Conference continued to seek “buildings containing court quarters” or “court facilities” rather than campaign for more courthouses.<sup>203</sup> While Earl Warren’s tenure marked significant changes in

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The Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643 (codified at 18 U.S.C. § 3401 (2006) and 28 U.S.C. §§ 631, 636 (2006)) permits magistrate judges with the consent of the parties to perform civil trials. While all the circuits have upheld this provision, a few judges, invoking Article III, disagreed. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984) (Posner, J., dissenting); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp.*, 739 F.2d 1313, 1319 (8th Cir. 1984) (Arnold, J., dissenting); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) (Schroeder, J., dissenting). *See generally* Resnik, *Inventing the District Courts*, *supra* note 195, at 630–35.

200. *United States v. Raddatz*, 447 U.S. 667 (1980) (concluding that a district judge could make a “de novo determination” to affirm a magistrate judge’s ruling rejecting a suppression motion). Whether a district judge could reverse without hearing witnesses remained a question, debated in the lower courts. *See, e.g., Geras*, 742 F.2d at 1044 (“A requirement of a new hearing would obviously defeat the purpose of the reference to a magistrate.”). *Contra* *Jordan v. Hargett*, 34 F.3d 310, 313 (5th Cir. 1994) (“If the district judge doubts the credibility determination of the magistrate, only by hearing the testimony himself does he have an adequate basis on which to base his decision.” (citations omitted)).

201. *See Roell v. Withrow*, 538 U.S. 580 (2003); *Gonzalez v. United States*, 553 U.S. 242 (2008). Lower courts have concluded that defense attorneys’ consent to magistrate judges presiding over closing arguments suffices; that magistrate judges can conduct plea allocutions; and that magistrate judges have authority to decide criminal defendants’ motions to represent themselves. *See United States v. Underwood*, 597 F.3d 661 (5th Cir. 2010); *United States v. Schultz*, 565 F.3d 1353 (11th Cir. 2009); *United States v. Gamba*, 541 F.3d 895 (9th Cir. 2008).

202. For example, in 1970, the Administrative Office noted that the creation of this new office meant that more courtrooms and chambers were needed, at a projected cost of \$21 million. *See* AO ANN. REP. 176 (1970). Article III judgeship numbers also continued to rise, and provided another prompt for space. For example, a judgeship bill in the mid-1960s added forty-five additional judgeships. *See* JUDICIAL CONFERENCE REPORT 32 (Sept. 1966).

203. The 1960 Judicial Conference Report discussed the effect of pending legislation regarding remodeling of federal buildings “to provide court quarters therein for the first time.” JUDICIAL CONFERENCE REPORT 28 (Sept. 1960); *see also* AO ANN. REP. 198–99 (1960) (commenting on the completion of nine new federal buildings “containing court quarters,” seventeen under construction, with eight more in a design stage and fifteen more approved by Congress). Thereafter, when Congress chartered seventy-three additional judgeships, more “quarters”—courts and chambers—were needed, *see* AO ANN. REP. 120–21, 197 (1961), and the Conference duly recorded its cooperative work with the GSA to obtain appropriations, JUDICIAL CONFERENCE REPORT 16 (Mar. 1961). Also detailed were needs for “the cost of purchasing furniture and furnishings for judges’ chambers and courtrooms.” JUDICIAL CONFERENCE REPORT 65 (Sept. 1961); *see also* AO ANN. REP. 197 (1961) (noting needs for “items of furniture, carpeting, draperies, etc., out of the regular

access to courts and the juridical staff within, his was not a time when the Conference sought specially designed buildings for the lower federal courts. But other sectors of government turned in the 1960s to the question of federal building in general—and found it wanting.

*E. Reframing “The Federal Presence”: The General Services Administration and the National Endowment for the Arts*

In addition to the institutionalizing and expanding judiciary, two other twentieth-century inventions—the General Services Administration and the National Endowment for the Arts—became central actors in federal building, courthouses included. Most accounts identify the election of President John F. Kennedy in 1960 as bringing attention to the contributions that art and architecture could make to civic life. Concerns about the financial underpinnings of major cultural institutions and about the national government’s own need for more space prompted President Kennedy in 1961 to charter an Ad Hoc Committee on Federal Office Space.<sup>204</sup> He appointed as its chair Arthur Goldberg, then Secretary of Labor who later served on the U.S. Supreme Court before becoming the ambassador to the United Nations.<sup>205</sup> The lead staffer, Daniel Patrick Moynihan (who thereafter served as a Senator from New York)<sup>206</sup> is given credit for the vision represented by the Ad Hoc Committee’s 1962 report,<sup>207</sup> as well as for drafting a one-page set of

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appropriation designated for this purpose” to upgrade when items “had become antiquated”). In 1962, the GSA became responsible for providing all furnishings for court facilities. *See* JUDICIAL CONFERENCE REPORT 65 (Sept. 1961); AO ANN. REP. 161 (1963).

204. *See* H.R. REP. NO. 87-21 (1961); LEE, *supra* note 48, at 290–91.

205. Goldberg, who had served as general counsel for the Congress of Industrial Organizations (the CIO and later the AFL-CIO), became Kennedy’s Secretary of Labor in 1961 and was appointed in 1962 to the Supreme Court. He stepped down in 1965 when President Lyndon Baines Johnson asked him to become the U.S. Ambassador to the United Nations. Goldberg held that role until 1968, and served a decade later as the U.S. Ambassador to the Belgrade Conference on Human Rights in 1978. He died in 1990. *See generally* DAVID L. STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL (1996).

206. Moynihan had been a sociology professor at Harvard, was as an assistant to Arthur Goldberg from 1961 to 1962, and the U.S. Ambassador to India from 1973 to 1974. In 1977, New Yorkers elected Moynihan to the Senate, where he served until 2001. He died in 2003. *See* Nathan Glazer, *Daniel Patrick Moynihan and Federal Architecture*, in *CELEBRATING THE COURTHOUSE: A GUIDE FOR ARCHITECTS, THEIR CLIENTS, AND THE PUBLIC* 224, 224–31 (Steven Flanders ed., 2006) [hereinafter *CELEBRATING THE COURTHOUSE*]; Jeffrey O’Connell & Richard F. Bland, *Moynihan’s Legacy*, *PUB. INT.*, Winter 2001, at 95. *See generally* DANIEL PATRICK MOYNIHAN: THE INTELLECTUAL IN PUBLIC LIFE (Robert Katzmann ed., 2d ed. 2004).

207. *See, e.g.*, 1 U.S. GEN. SERVS. ADMIN., *VISION + VOICE: DESIGN EXCELLENCE IN FEDERAL ARCHITECTURE: BUILDING A LEGACY* 7 (2002) [hereinafter 1 *VISION + VOICE*]. Two more volumes entitled *Vision + Voice* include commentary and reflections from various participants (including architects, members of selection panels, and administrators) in the GSA programs. Published four decades after Moynihan wrote the *Guiding Principles for Federal Architecture*, the set credits his work with changing “the course of public architecture in our nation.” F. Joseph Moravec, *Preface* to 1 *VISION + VOICE, supra*. Volumes II and III, both titled *Changing the Course of Federal Architecture*, were published in 2004.

what it termed “Principles” that remains standard setting in contemporary discussions of federal buildings.<sup>208</sup>

Committee members thought that, in contrast to innovative private-sector buildings, government buildings were often undistinguished and sometimes mediocre.<sup>209</sup> Pressures to economize had, the Committee thought, produced a dreariness representing “the least efficient use of public money.”<sup>210</sup> The Ad Hoc Committee advocated for new federal investment in public architecture to exemplify public values. Shadowed by the Cold War, the 1962 Principles set forth a mantra repeated in the decades to follow. Federal buildings were to “provide visual testimony to the dignity, enterprise, vigor, and stability of the American Government.”<sup>211</sup> The implicit comparison to the Soviet Union, coupled with distaste for cookie-cutter repetition (whether Beaux-Arts or Modern), produced another premise: that implementation of the Guiding Principles should not entail an adoption of a new “official style.”<sup>212</sup> Rather, the “Government should be willing to pay some additional cost to avoid excessive uniformity in design of Federal buildings.”<sup>213</sup>

Consistent with the 1893 Tarsney Act’s unease with government architects, the 1962 Principles proposed that the private sector be the source of “standards” for quality building. “Design must flow from the architectural profession to the Government and not vice versa.”<sup>214</sup> Competitions for design were to be held, “where appropriate,” and the “advice of distinguished architects ought to, as a rule, be sought prior to the award of important design contracts.”<sup>215</sup>

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208. The *Guiding Principles for Federal Architecture* are reproduced in the GSA’s publication, *Vision + Voice*. See *Guiding Principles for Federal Architecture*, in 1 VISION + VOICE, *supra* note 207, at 4–5 [hereinafter *Guiding Principles*]. The introductory four paragraphs of commentary to the three numbered principles overlap in several respects with the Guiding Principles themselves. Further, each of the three principles is set forth in several paragraphs entailing various precepts.

209. In remarks forty years later, Moynihan commented about the need to create “great monuments in architecture” and noted that the Seagram Building, designed by Mies van der Rohe, had opened in the early 1960s, and was one of the “best.” *Daniel Patrick Moynihan*, in 1 VISION + VOICE, *supra* note 207, at 9–10. Another influence on the *Principles* was the publication of Jane Jacobs’s *The Death and Life of Great American Cities* in 1961. John Wetenhall, *Camelot’s Legacy to Public Art: Aesthetic Ideology in the New Frontier*, 48 ART J. 303, 304–05 (1989).

210. *Guiding Principles*, *supra* note 208, at 4. The introductory comments noted that the “belief that good design is optional or in some way separate from the question of the provision of office space itself does not bear scrutiny, and in fact invites the least efficient use of public money.” *Id.*

211. *Id.* As detailed below, in the 1990s, the GSA reiterated this approach by using identical wording about its aspirations for the selection of art. See Memorandum on Revised Art-in-Architecture Procedures from Kenneth R. Kimbrough, Pub. Bldgs. Serv. Comm’r, Gen. Servs. Admin. 2 (Feb. 10, 1995) (on file with the author).

212. *Guiding Principles*, *supra* note 208, at 5; Wetenhall, *supra* note 209, at 304.

213. *Guiding Principles*, *supra* note 208, at 5.

214. *Id.*; see also Wetenhall, *supra* note 209, at 305; GSA MODERNISM, *supra* note 188, at 44.

215. *Guiding Principles*, *supra* note 208, at 5.

Moynihan, “a master of the arts of publicity as well as government,” gave the Ad Hoc Committee’s report an unusual presence for a government document that, although regularly invoked in the decades thereafter, did not gain operational import until the 1990s.<sup>216</sup> While the GSA folded the 1962 Principles into its “Standards for Federal Architecture,” few buildings met their goals because (as GSA publications later described), the chief “concerns” of the GSA remained “efficiency and economy.”<sup>217</sup>

Additional pressures for change came from another initiative founded by President Kennedy and established after his assassination—the NEA.<sup>218</sup> In the 1970s and at the behest of the White House, the NEA charted its own Task Force on Federal Architecture, which criticized the selection of sites for building, the quality of construction, and the lack of concern paid to the diverse needs of those who worked in the buildings.<sup>219</sup> During that decade, attention also turned to the challenges of persons with handicaps, to the need to preserve historic buildings from “renewal” that laid waste to neighborhoods and ignored earlier architectural innovations, and to the loneliness of the streets on which federal buildings had been sited. The 1974 NEA Task Force report concluded that more inviting atmospheres were needed to reduce the “diminished human vitality” of many downtowns.<sup>220</sup>

By bringing together a series of federal statutes, one can track the emergence of additional building principles—on environmental conservation, sociability, accessibility, conservation, and historic preservation. In 1969, Congress enacted the National Environmental Policy Act, requiring federal construction to address the impact of buildings on their surroundings.<sup>221</sup> Soon thereafter, the GSA began to

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216. Glazer, *supra* note 206, at 228–31. When Moynihan became a Senator in 1977, his political acumen insured not only appropriations for expensive buildings but that legislation authorizing various new courthouses (as well as the Marshall Judiciary Building) required design competitions.

217. GSA MODERNISM, *supra* note 188, at 3. Under Lyndon B. Johnson and the “Program for Beautification of Federal Buildings,” the GSA reported an improvement in landscaping. *Id.* at 48.

218. After President Kennedy was assassinated, Congress enacted the National Arts and Cultural Development Act of 1964, Pub. L. No. 88-579, 78 Stat. 905 (codified as amended at 20 U.S.C. §§ 781–788), followed in 1965 by the National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845 (codified as amended at 20 U.S.C. §§ 951–960 (2006)), which created the National Foundation for the Arts (NFA). See NAT’L ENDOWMENT FOR THE ARTS, 1965/2000: A BRIEF CHRONOLOGY OF FEDERAL SUPPORT FOR THE ARTS 9–11 (2000), available at [http://www.nea.gov/about/Chronology/NEA\\_ChronWeb.pdf](http://www.nea.gov/about/Chronology/NEA_ChronWeb.pdf); Wetenhall, *supra* note 209, at 307; Margaret Jane Wyszomirski, *Congress, Presidents, and the Arts: Collaboration and Struggle*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 124–35 (1988).

219. See NAT’L ENDOWMENT FOR THE ARTS, FEDERAL ARCHITECTURE: A FRAMEWORK FOR DEBATE: AN INTERIM REPORT: THE FEDERAL ARCHITECTURE PROJECT (1974).

220. See NAT’L ENDOWMENT FOR THE ARTS, FEDERAL ARCHITECTURE: MULTIPLE-USE FACILITIES: STAFF REPORT FOR THE FEDERAL ARCHITECTURE TASK FORCE 5 (1974) [hereinafter NEA MULTIPLE-USE FACILITIES].

221. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331–4375 (2006)).

focus on “energy conservation” technologies.<sup>222</sup> Over time, terms like “green” and “sustainability” became part of the vocabulary. In 1976, Congress enacted the Public Buildings Cooperative Use Act, referencing the authority given to the GSA to lease federal building space to tenants for “social and commercial uses”—in other words, for restaurants and shops to foster “living buildings.”<sup>223</sup> That legislation also picked up concerns from the 1966 National Historic Preservation Act, requiring that attention be made to “reusing historic and architecturally interesting buildings.”<sup>224</sup>

Concern about physical access can be found in the 1962 Ad Hoc Committee’s Principles,<sup>225</sup> but compliance issues were pervasive. Indeed, courthouse steps were dramatic examples of challenges to be surmounted. Federal legislation in 1968—the (awkwardly named) Architectural Barriers Act of 1968—required that the United States use standards to ensure that “physically handicapped persons will have ready access to, and use of, such buildings.”<sup>226</sup> In 1990, the Americans with Disabilities Act required accessibility of state and private facilities.<sup>227</sup> One marker of such efforts is the 2004 Supreme Court decision in *Tennessee v. Lane*,<sup>228</sup> in which a bare majority concluded that states could be required to pay damages for the physical inaccessibility of their courthouses.

In the 1970s, another criterion, security, came to the fore—affecting aspirations for sociability for workers and visitors, environmental friendliness, preservation, and accessibility. In 1975, a bomb was found in a locker at Grand Central Station in New York City—prompting what in hindsight were very modest measures of

222. GSA MODERNISM, *supra* note 188, at 11.

223. See Pub. L. No. 94-541, 90 Stat. 2505 (1976) (codified as amended at 40 U.S.C. § 3306 (2006)). The Act imposed on the administrator of the Public Buildings Service the obligation to “encourage the location of commercial, cultural, educational, and recreational facilities and activities in public buildings,” 40 U.S.C. § 3306(b)(2), as well as to “acquire and utilize space in suitable buildings of historic, architectural, or cultural significance.” *Id.* § 3306(b)(1).

224. CRAIG, *supra* note 48, at 441. The impact of the shift toward user friendliness can be seen in more recent GSA mission statements, describing itself as:

responsible for providing work environments and all the products and services necessary to make these environments healthy and productive for Federal employees and cost-effective for the American taxpayers. As builder for the Federal civilian Government and steward of many of our nation’s most valued architectural treasures that house Federal employees, GSA is committed to preserving and adding to America’s architectural and artistic legacy.

1 VISION + VOICE, *supra* note 207, at 75.

225. *Guiding Principles*, *supra* note 208, at 5.

226. Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718, 719 (codified at 42 U.S.C. § 4151 (2006)).

227. The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 337 (codified at 42 U.S.C. §§ 12131–12165 (2006)), provides in Title II that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” § 202, 104 Stat. at 337 (codified at 42 U.S.C. § 12132 (2006)).

228. 541 U.S. 509 (2006).

security (such as sign-ins) at federal courthouses. In 1995, the bombing by Timothy McVeigh of a federal building in Oklahoma City killed more than 160 people.<sup>229</sup> Although Daniel Moynihan insisted that “[w]e will not let Timothy McVeigh be our most influential architect,”<sup>230</sup> the GSA and the federal judiciary have since focused a good deal on barriers and fortification.<sup>231</sup> One marker is that the federal judiciary’s budget devoted to security grew by 335%, from \$42 million in 1989 to \$185 million in 1999.<sup>232</sup> Another is that security became the “Objective No. 1” in a late-1990s guide the GSA provided for architects and engineers competing for commissions.<sup>233</sup>

That guide emphasized the importance of physical barriers, surfaces that could withstand “ballistic or blast attack,” control over vehicle access, enclosed parking for federal personnel, screening of persons and parcels, and installation of surveillance devices to monitor movements about buildings.<sup>234</sup> In addition, designers needed to provide “dedicated, separate and restricted corridors” as well as elevators for the exclusive use of judges to provide “safe movement within the building.”<sup>235</sup> The September 11, 2001 attack on the World Trade Center reinforced these requirements.

This Lecture is not the occasion to provide cross-country comparisons, but I do want to note that the issues flagged here—from green courthouse buildings to secured internal flow patterns—are part of a transnational set of practices produced

229. See generally HISTORY OF THE AO, *supra* note 30, at 198–99. The bombing of the Alfred P. Murrah Federal Building also damaged the U.S. Courthouse nearby. “Although the blast caused no permanent structural damage, it shattered more than 160 windows” and rendered several of the building systems dysfunctional. *Id.* at 199.

230. Andrea Oppenheimer Dean, *The Nation’s Biggest Landlord Just Found Style: GSA: Uncle Sam Speaks Up for High Design*, 189 ARCHITECTURAL REC. 62, 62 (2000). In 1999, a conference of several hundred architects and engineers addressed the issues in the context of embassies as well as courthouses and other government buildings. See Benjamin Forgey, *Fear and Loathing in Architecture: Moynihan Opens Debate on Security vs. Openness*, WASH. POST, Dec. 1, 1999, at C1; see also JANE C. LOEFFLER, THE ARCHITECTURE OF DIPLOMACY: BUILDING AMERICA’S EMBASSIES (Mark Lamster ed., 1998); Blair Kamin, *Fortress Architecture: Don’t Let Terrorists Design Our Buildings*, CHI. TRIB., Dec. 5, 1999, at C1.

231. Security concerns dot reports of the Judicial Conference. See, e.g., JUDICIAL CONFERENCE REPORT 88–89 (Sept. 1998) (discussing relocation of day care facilities); JUDICIAL CONFERENCE REPORT 29 (Mar. 2000) (discussing the 1997 Design Guide amendments to require “ballistic-resistant glazing”). The Conference committee that had once been called “space and facilities” put the term “security” first. In 2005, the Conference divided “the Committee on Security and Facilities into two committees: the Committee on Judicial Security, and the Committee on Space and Facilities . . . enabling a separate committee to devote its full attention [to] judicial security.” LORRAINE H. TONG, JUDICIAL SECURITY: RESPONSIBILITIES AND CURRENT ISSUES 12 (2006) (footnote omitted).

232. HISTORY OF THE AO, *supra* note 30, at 200.

233. U.S. GEN. SERVS. ADMIN., THE DESIGN EXCELLENCE PROGRAM GUIDE: BUILDING A LEGACY: ARCHITECT/ENGINEER SELECTION AND DESIGN REVIEW 70–71 (2000) [hereinafter GSA DESIGN EXCELLENCE PROGRAM GUIDE].

234. *Id.* at 70–71.

235. *Id.* at 70–74.

by interactions across boundaries among jurists, lawyers, architects, and politicians.<sup>236</sup> Demands for adjudication, as well as for sustainability, accessibility, and security, have produced court construction projects around the globe. French courthouses, for example, also aspire to make important architectural statements while, like their U.S. counterparts, they also include three dedicated routes (“les trois flux”) to separate judges from the public and defendants from everyone.<sup>237</sup>

#### *F. Courthouse Financing: Paying Rent to the GSA*

One other facet of courthouse building decisions needs to be brought into focus—their cost. In 1878, a member of the House of Representatives’ Committee on Public Buildings and Grounds noted that forty-one proposed bills had come before that body for construction of federal buildings. In support of such proposals, he argued that the government was then “paying about \$1,300,000 annually for rent of public buildings” and that “this enormous rent should be decreased as much as possible” by bringing construction in house—to the federal government.<sup>238</sup> More than a century later, in 2005, the federal judiciary reported paying the GSA more than 20% of its budget (\$900 million) in *rent* for occupying forty million square feet<sup>239</sup>—albeit with some significant amount of that money recycled to the federal judiciary as part of its allocations of funds for new and renovated buildings.

Readers might well be perplexed at the term “rent,” a word now embedded in federal discourse. As detailed above, until the early twentieth century, Congress channeled building funds through site-by-site appropriations. Thereafter, Congress authorized buildings through omnibus bills, as well as individually. Concerns mounted that this approach did not inspire conservation of funds or space. In response, in the early 1970s, Congress reorganized its rules to require agencies to pay “rent” to the GSA for the buildings that they used. Those monies were to

236. See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 193–287 (2011) [hereinafter RESNIK & CURTIS, REPRESENTING JUSTICE].

237. The building program in France is discussed in RESNIK & CURTIS, REPRESENTING JUSTICE, *supra* note 236, at 193–208. See also Judith Resnik, Dennis Curtis & Allison Tait, *Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere*, in LAW, CULTURE, AND VISUAL STUDIES (Richard Sherwin & Anne Wagner eds., forthcoming 2012).

238. H.R. REP. NO. 45-1006, at 2 (1878) (statement of Herman Leon Humphrey). Humphrey, who had served as a county judge in Wisconsin, served as a Republican member of Congress from 1877 to 1883.

239. 2006 *Future of the Federal Courthouse Construction Program Hearings*, *supra* note 33, at 7 (statement of Mark Goldstein, Director, Physical Infrastructure Issues, Gov’t Accountability Office). “With slightly over 20 percent of its budget allocated for rent payments, in December 2004 the Judiciary requested a \$483 million permanent annual exemption from rent payments to GSA.” *Id.* The judiciary paid “more money into the building fund than any agency of Government except for Justice,” which paid only 3% of its budget, while the judiciary paid 22%. *The Judiciary’s Ability to Pay for Current and Future Space Needs: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs. and Emergency Mgmt. of the H. Comm. on Trans. and Infrastructure*, 109th Cong. 20 (2005) (statement of Leonidas Ralph Mecham, Director, Admin. Office of U.S. Courts, and Secretary, Judicial Conference of the United States).

support a Federal Building Fund to finance acquisition, construction, and maintenance and (Congress hoped) to have agencies internalize the costs of whatever space was inhabited.<sup>240</sup> Under the 1972 amendments, the GSA, as owner and landlord, set the rent for its tenants (federal siblings included) in a manner determined by the GSA administrator. The GSA developed a measure of what it termed “commercially equivalent charges” to make agencies focus on the amount or cost of office space they occupy.<sup>241</sup>

Those provisions went into effect in July of 1974.<sup>242</sup> If the response from the judiciary is indicative, the new accounting system had an impact. Within a year, the annual reports of the Judicial Conference, which had before then regularly noted requests for construction and appropriations, began to include data on building costs. Above, in figure 21, the “1957 Judicial Dollar,” I provided a first example of the judiciary’s budget allocations for an aspect of its space—air conditioning for which the Conference had obtained direct appropriations. At the time, no “cents” were allocated to represent the cost of courthouses. In contrast, in 1975, as figure 22 displays, the judiciary reported a separate and distinctively large slice of its pie—twenty-two cents or percent—for “space and facilities (including furniture and furnishings).”<sup>243</sup>

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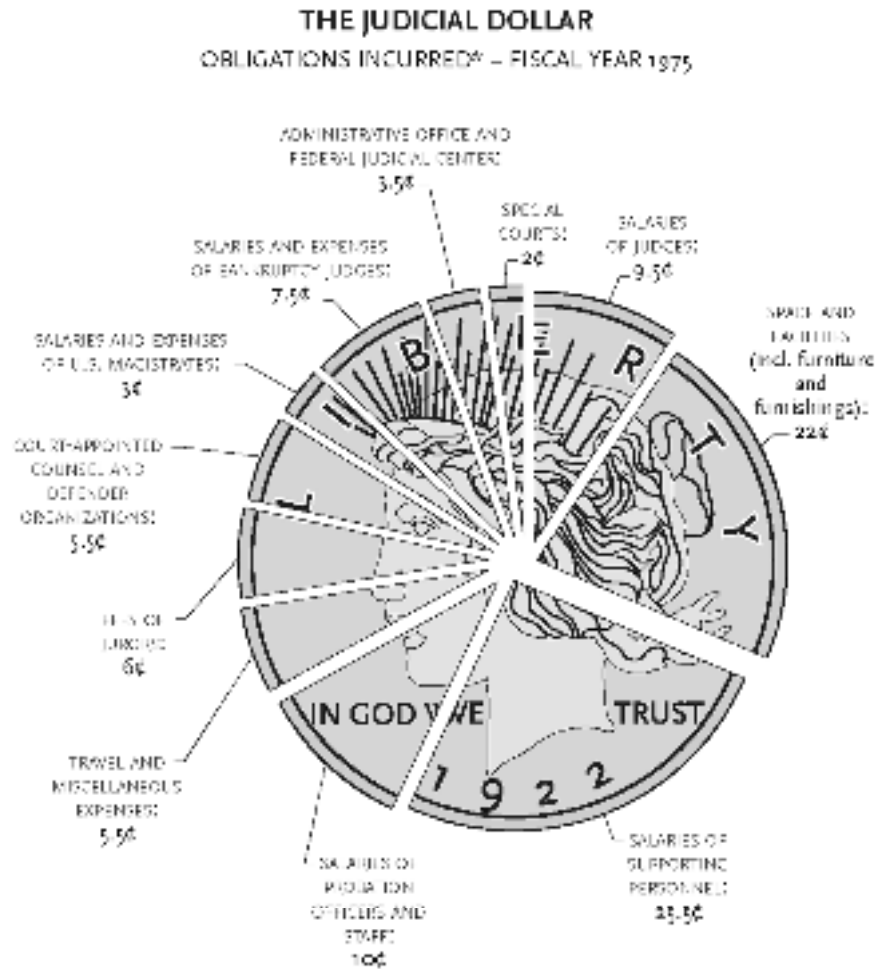
240. See Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 216, 219 (codified as amended at 40 U.S.C. § 586 (2006)) (“[T]he Administrator is authorized and directed to charge anyone furnished services, space . . . or other facilities . . . at rates to be determined by the Administrator.”).

241. 2006 *Future of the Federal Courthouse Construction Program Hearings*, *supra* note 33, at 2 (statement of Rep. Bill Shuster, Chairman, Subcomm. on Economic Development, Public Buildings, and Emergency Management). Because this revenue did not result in the full internalization of all building costs, Congress continued to appropriate funds for new work as well as to rely on contract-lease arrangements using private monies for construction, such as for the Thurgood Marshall Federal Judiciary Building. In an effort to impose control over the GSA as well as its federal “tenants,” Congress required that for projects over a certain value (as of 2008, pegged at \$1.5 million), the GSA needed approval by resolutions from the Senate’s Committee on Environment and Public Works and the House’s Committee on Transportation and Infrastructure. See 40 U.S.C. § 3307(a) (2006); CLAY H. WELLBORN, CONG. RESEARCH SERV., GENERAL SERVICES ADMINISTRATION PROSPECTUS THRESHOLDS FOR OWNED AND LEASED FEDERAL FACILITIES 3–4 (2008).

242. JUDICIAL CONFERENCE REPORT 139–40 (Mar. 1974). The report noted that the federal judiciary wanted more security than GSA’s standards and, hence, had to pay an additional \$13,000 for each officer it added above the GSA level. *Id.* at 140.

243. See AO ANN. REP. 113 (1975). Again thanks are due to the AO and to Yale University Press for the facsimile.





**Figure 22:** *The Judicial Dollar*, 1975 Annual Report of the Director of the Administrative Office of the United States Courts.

Facsimile, Yale University Press.

As long as the AO used this dollar diagram (retired in the mid-1980s), it marked the percentage spent for courthouses.<sup>244</sup> To translate this 22% into real money and space, in 1975, the judiciary reported paying \$46,148,500 in rent for its 400 buildings with their 7.5 million square feet of space. And, seeking to reduce those

244. *E.g.*, AO ANN. REP. 76 (1984) (indicating sixteen cents); AO ANN. REP. 65 (1983) (also indicating sixteen cents); AO ANN. REP. 53 (1982) (indicating seventeen cents of the “judicial dollar” went to space and facilities); AO ANN. REP. 172 (1981) (indicating seventeen cents). By 1985, the image was no longer used in the reports.

costs, the Judicial Conference also released more than 84,000 square feet of “unnneeded space.”<sup>245</sup>

#### IV. RENOVATION, RECONFIGURATION, AND WILLIAM REHNQUIST

Thus far, I have shaped a historical account of two centuries in which the national judicial system came into being—materialized through jurisdictional grants, judgeships, buildings, Supreme Court opinions, and administrative infrastructures. I turn now to consider the last few decades and hence to focus on developments that took place when Warren Burger and William Rehnquist chaired the Judicial Conference. During Rehnquist’s tenure, judges and staff in the federal judiciary secured remarkable commitments from Congress to replace, expand, and renovate hundreds of courthouse facilities.<sup>246</sup>

By 1972, AO staff reported that the appellate courts had thirty-three courtrooms and the trial courts 661, providing a total of 694 courtrooms for use by federal judges.<sup>247</sup> By then, Chief Justice Warren Burger was chairing the Judicial Conference, and his administrative goals, like his jurisprudence, differed from his predecessor Earl Warren. Burger was an advocate of downsizing, in jurisdictional and physical terms.<sup>248</sup> In 1970, he commissioned an Ad Hoc Conference Committee on Court Facilities and Design, which, in 1971, proposed smaller courtrooms.<sup>249</sup> The Judicial Conference concurred: in light of an increase in building costs, new technologies, and needs for “greater security and to simplify court room control,” the Conference recommended that the standard size of courtrooms be “cut back substantially” as long as each courthouse had “one or two large court rooms for special cases.”<sup>250</sup> The less courtroom-centric approach reflected Chief Justice Burger’s commitment to alternative dispute resolution (ADR) programs, such as mediation or arbitration, and more generally his interest in retrenchment after the expansive role for federal adjudication identified with Earl Warren’s chief justiceship.<sup>251</sup>

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245. AO ANN. REP. 128 (1975). Later reports also focus on space utilization, the return of space to the GSA, and the ability to downsize spaces dedicated to personnel such as court reporters. *See, e.g.*, JUDICIAL CONFERENCE REPORT 9–12 (Mar. 1981).

246. *See* 1 VISION + VOICE, *supra* note 207, at 27.

247. AO ANN. REP. 223 (1972). An updated report the year after identified 705 courtrooms. AO ANN. REP. 262 (1973).

248. *See generally* TINSLEY E. YARBROUGH, THE BURGER COURT: JUSTICES, RULINGS, AND LEGACY 76–83, 232–33 (2000).

249. JUDICIAL CONFERENCE REPORT 3 (Mar. 1971); JUDICIAL CONFERENCE REPORT 63–64 (Oct. 1971).

250. JUDICIAL CONFERENCE REPORT 3 (Mar. 1971). The Conference adopted resolutions calling for various sizes of courtrooms (twenty-eight by forty as a standard, with twelve-foot ceilings, and forty by sixty, with sixteen-foot ceilings, as a larger space). JUDICIAL CONFERENCE REPORT 64 (Oct. 1971). Thereafter, the Conference adopted three sizes, 1120 square feet, 1496 square feet, and 2400 square feet. *See* AO ANN. REP. 138 (1975). By the 1980s, the Conference settled on four sizes of courtrooms, in turn used by the GSA when making its design guide. *See* PUB. BLDG. SERV., GEN. SERVS. ADMIN., UNITED STATES COURTS DESIGN GUIDE, ch. 4, at 1 (1984) [hereinafter 1984 GSA COURTS DESIGN GUIDE].

251. *See* WARREN E. BURGER, YEAR-END REPORT ON THE JUDICIARY 3, 5 (1978),

As for allocation of space, during the 1970s, the Judicial Conference adopted a policy that judges could share courtrooms when possible: courtrooms were needed to be “available on a case assignment basis to any judge. No judge of a multiple judge court should have the exclusive use of any particular courtroom.”<sup>252</sup> That injunction can also be found in a 1979 *GSA Design Guide*, prepared in cooperation with the AO, for the federal courts.<sup>253</sup> At that time, many judges also shared cases—that is, different judges picked up different parts of cases under what was known as a “master calendar system.” The current practice of an individual case management system that assigns a case to a judge from filing to disposition had not yet come to be seen as the more efficient mechanism for judicial administration.

#### A. The “Housing Crisis”

In the late 1980s, Chief Justice Rehnquist and his senior staff departed from Chief Justice Burger’s embrace of downsized courtroom sharing.<sup>254</sup> They took another tack—that each judge ought to have a courtroom of his (and occasionally, her) own. The rise in the number of trial judges (district, magistrate, and after the 1978 and 1984 legislation, bankruptcy judges)<sup>255</sup> coupled with commitments to dedicated and larger spaces provided the basis for serious complaints about the extant housing stock.

The Judicial Conference sought control over both its property and courthouse design. The effort to extricate itself from the GSA by gaining independent real property authority became “a top legislative priority” in 1991.<sup>256</sup> In pursuit of that goal, the Judicial Conference argued that its status as “a separate and independent

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*reprinted in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2011) [hereinafter ANNUAL REPORTS OF THE CHIEF JUSTICE]; WARREN E. BURGER, YEAR-END REPORT ON THE JUDICIARY 3 (1979), *in* ANNUAL REPORTS OF THE CHIEF JUSTICE, *supra*; WARREN E. BURGER, YEAR-END REPORT ON THE JUDICIARY 5 (1980), *in* ANNUAL REPORTS OF THE CHIEF JUSTICE, *supra*; *see also* J. Clifford Wallace, *The Future of the Judiciary: A Proposal*, 27 CAL. W. L. REV. 361, 361–62 (1991) (describing Chief Justice Burger’s request in 1980 that Judge Wallace help map a strategy for long-range planning). For a broader discussion, *see* Resnik & Dilg, *supra* note 138, at 1601–04.

252. JUDICIAL CONFERENCE REPORT 64 (Oct. 1971).

253. *See* PUB. BLDGS. SERV., GEN. SERVS. ADMIN., UNITED STATES COURTS DESIGN GUIDE, ch. 4, at 1 (1979) [hereinafter 1979 GSA COURTS DESIGN GUIDE].

254. Chief Justice Rehnquist departed from Burger’s approach in many respects, including opinion assignments. *See* Linda Greenhouse, *How Not To Be Chief Justice: The Apprenticeship of William H. Rehnquist*, 154 U. PA. L. REV. 1365 (2006).

255. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended in scattered sections of Titles 11 and 28 of the U.S. Code). That Act authorized 324 judgeships, many to be filled by those already holding such positions under the 1978 reforms, Bankruptcy Code of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101–151326 (2006)), that had been struck by the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

256. *See* JUDICIAL CONFERENCE REPORT 43 (Sept. 1991); *see also* JUDICIAL CONFERENCE REPORT 81 (Sept. 1989).

branch of government” required it not be “fully dependent on another branch.”<sup>257</sup> Companion bills were introduced in the Senate and the House. But, despite Senator Moynihan’s support, GSA objections sent the question back to negotiations between the AO and the GSA.<sup>258</sup>

Although legislative efforts failed, the Judicial Conference found another route to increase its authority. In 1987, soon after William Rehnquist became Chief Justice, the Judicial Conference created a standing subcommittee devoted to “space and facilities”<sup>259</sup> that was charged with the oversight of long-term planning, construction priorities, and design standards. Two years later, in 1989, the judiciary proffered the term “Judicial Space Emergency” to capture concerns about its “housing crisis.”<sup>260</sup> As the AO Director Ralph Meham explained: “During the 1980s, when the federal judiciary experienced its greatest caseload growth in history, very few courthouses were built, which resulted in a proliferation of court facilities with varying degrees of deteriorating and overcrowded conditions.”<sup>261</sup> The AO complained of the “years of lack of attention from GSA,”<sup>262</sup> and estimated that (as of 1994) “186 court buildings will be unable to accommodate additional judicial officers within the next five to 10 years.”<sup>263</sup>

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257. JUDICIAL CONFERENCE REPORT 6 (Mar. 1991).

258. See Judicial Space and Facilities Management Improvement Act of 1989, H.R. 4178, 101st Cong. (2d Sess. 1990); see also Judicial Space and Facilities Management Improvement Act of 1990, S. 2837, 101st Cong. (2d Sess. 1990) (introduced by Senator Moynihan to accomplish the same end). In 1992, Robert C. Broomfield, chair of Space and Facilities Committee of Judicial Conference, went before the Senate Subcommittee on Water Resources, Transportation and Infrastructure to seek the legislation, but the GSA opposed the bill. The legislation was never enacted. See *The Renaissance of the Federal Courthouse*, THIRD BRANCH, Dec. 2002, at 1, 2.

259. As discussed, ad hoc committees focused on space that had existed since the 1940s; Chief Justice Rehnquist’s innovation was to establish standing committees. In 1987, two committees were delineated, one a Committee on Space and Facilities and the other a Committee on Court Security (later the Committee on Court and Judicial Security), both of which were reconfigured from a committee that had been called Court Administration. See JUDICIAL CONFERENCE REPORT 59 (Sept. 1987). In September of 1994, the two committees folded into one, the Committee on Security, Space, and Facilities. See JUDICIAL CONFERENCE REPORT 36 (Sept. 1993); JUDICIAL CONFERENCE REPORT 6 (Mar. 1993); JUDICIAL CONFERENCE REPORT 8 (Mar. 1994). In the late 1990s, that Committee was renamed the Committee on Security and Facilities. See JUDICIAL CONFERENCE REPORT 49 (Sept. 1997). In 2005, the Judicial Conference again reconfigured tasks, returning to the two-committee model, one called the Committee on Judicial Security and the other called the Committee on Space and Facilities. See JUDICIAL CONFERENCE REPORT 5 (Sept. 2005). The acute need to focus on security came in part from the “brutal murders of the husband and mother” of a U.S. federal court district judge. JUDICIAL CONFERENCE REPORT 6 (Mar. 2005). The killings occurred “off-site” and hence prompted a need for reconsideration of safety provisions. *Id.*

260. See JUDICIAL CONFERENCE REPORT 82–83 (Sept. 1989).

261. AO ANN. REP. 45 (1994).

262. ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES, *in* ADMIN. OFFICE OF THE U.S. COURTS, UNITED STATES COURTS: SELECTED REPORTS 39 (1993).

263. AO ANN. REP. 46 (1994).

The AO also created its own Space and Facilities Division and recruited former GSA employees to take leadership roles.<sup>264</sup> To document needs, the AO developed “guidelines and worksheets” for judges to explain the problems, district-by-district and courthouse-by-courthouse. Such “long-range facility planning” was, according to the AO, “an essential building block toward the Judiciary’s successfully managing its own space and facilities program.”<sup>265</sup> By 1994, the judiciary “identified approximately 200 of 731 existing court facilities as ‘out of space’” within the coming decade.<sup>266</sup>

### B. Controlling Design

The other “building block” for obtaining authority over construction was the decision to have the judiciary’s Space and Facilities Committee draft its own “Design Guide.” GSA planners had long set forth standards for public buildings<sup>267</sup> and, as noted, during the late 1970s, the GSA developed guidelines for courthouse building by issuing guides in 1979 and 1984 written “in cooperation with the Administrative Office of the United States Courts” for “architects and engineers who design federal courts.”<sup>268</sup> But by the late 1980s, the AO reported “excessive

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264. *The Renaissance of the Federal Courthouse*, *supra* note 258, at 2. P. Gerald Thacker was the first head of the new division, joined by Clarence A. Lee, Jr., who had been a “senior official” of the GSA and who initially came “on loan to the AO” and then joined its staff permanently. *Id.*

265. AO ANN. REP. 66 (1989). By 1995, all of the 94 districts had completed plans, so that for “the first time the judiciary had both a short and long-term view of its facilities requirements.” HISTORY OF THE AO, *supra* note 30, at 196.

266. *Oversight of the Courthouse Construction Program: Hearing Before the Subcomm. on Oversight of Gov’t Mgmt. and the D.C. of the S. Comm. on Governmental Affairs*, 104th Cong. 66 (1995) (prepared statement of J. William Gadsby, Director of Government Business Operations Issues, Gen. Gov’t Div., Gen. Accounting Office).

267. The Office of Supervising Architect created standards during the nineteenth century, and the GSA continued that function as it also regularly revised the standards. *See, e.g.*, U.S. GEN. SERVS. ADMIN., FACILITIES STANDARDS FOR THE PUBLIC BUILDING SERVICE (2003). In addition, federal law requires compliance with various building codes as well as statutes specifying environmental, preservationist, or other concerns. *See, e.g.*, Public Buildings Amendments of 1988, Pub. L. No. 100-678, 102 Stat. 4049 (codified as amended at 40 U.S.C. § 3312 (2006)).

268. Both the 1979 and the 1984 *Guides*, whose texts overlap a good deal, are prefaced by a foreword from GSA Administrator Jay Solomon that noted that they were crafted “in cooperation with” the AO. *See Foreword* to 1984 GSA COURTS DESIGN GUIDE, *supra* note 250; *Foreword* to 1979 GSA COURTS DESIGN GUIDE, *supra* note 253. Both also note that provisions for the U.S. Attorneys and for the U.S. Marshalls were designed with input from those entities. The 1979 *GSA Courts Design Guide* was not, however, “approved . . . in its entirety” by the Judicial Conference. *See To Establish Certain Public Buildings Policies for the Federal Government: Hearings [on H.R. 630] Before the Subcomm. on Public Buildings and Grounds of the H. Comm. on Public Works and Transportation*, 98th Cong. 177 (1983) (statement of James E. Macklin, Jr., Executive Assistant Director, Administrative Office of the United States Courts). In contrast, after circulation in 1982 to the judicial councils in each circuit, the updated 1984 *GSA Design Guide* was formally approved. *See JUDICIAL CONFERENCE REPORT 8* (Mar. 1984). The AO took some ownership of the 1984 Guide; a

delays and costs related to the acquisition and management of space and facilities.”<sup>269</sup> Enlisting the National Academy of Public Administration, the AO explored whether responsibility for “defining requirements, designing, leasing, constructing, managing, and performing other functions related to space and facilities” could be transferred from the GSA to the AO.<sup>270</sup>

The result, first published in 1991 and revised several times thereafter,<sup>271</sup> is the *U.S. Courts Design Guide*, putting judges at the forefront of shaping courts by issuing “policy guidance for the overall planning, programming, and design of federal court facilities throughout the United States and its territories.”<sup>272</sup> As the

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memorandum from AO Director William E. Foley indicated the transmission to the GSA for publication and distribution. William E. Foley, *Memorandum to Chief Judges (of Various Courts)*, in 1984 GSA COURTS DESIGN GUIDE, *supra* note 250. Thereafter, the Judicial Conference also made some modifications to the *Guide*, such as reflecting changes in bankruptcy court jurisdiction and approving new provisions for parking. JUDICIAL CONFERENCE REPORT 59 (Sept. 1986).

269. AO ANN. REP. 53 (1986). By then, the AO had a “branch” devoted to space and facilities and that subgroup had studied the problem as well as developed an inventory of space and proposed budgets for rent. *See id.*

270. *See* AO ANN. REP. 70 (1987); HISTORY OF THE AO, *supra* note 30, at 195. According to the 1988 AO Report, the study “documented the need for the Judiciary to take a more aggressive role in managing its own space.” AO ANN. REP. 75 (1988). Or, as the AO put it in 2000, the Academy “recommended that the judiciary play a greater role in planning for and designing court facilities.” HISTORY OF THE AO, *supra* note 30, at 195. Thereafter the director of the AO and the administrator of the GSA entered into a “Memorandum of Understanding establishing a planning process involving both GSA and the Judiciary, and defining relationships for funding space and facility projects.” AO ANN. REP. 75 (1988). To do so, the Judicial Conference launched a study of space standards and needs. *Id.* By the 1990s, the AO had created a “space management information system.” AO ANN. REP. 24 (1992).

271. *See* SPACE & FACILITIES DIV., ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS DESIGN GUIDE (1991) [hereinafter 1991 U.S. COURTS DESIGN GUIDE]. As its preface explained, the Guide was “developed over a three-year period in a cooperative effort between the Federal Judiciary and a team of experts . . . under the direction of the National Institute of Building Sciences and the Judiciary.” *Id.* at 1. In 1992, the Judicial Conference joined the AIA and the National Center for State Courts as cosponsors of a conference on courthouse design, construction, and operation. *See* JUDICIAL CONFERENCE REPORT 72 (Sept. 1991). A second edition of the Judiciary’s Guide was published in 1993 and then revised in 1994 in the wake of the Americans with Disabilities Act. *See* JUDICIAL CONFERENCE REPORT 98 (Sept. 1995). That version was altered through a 1995 “addendum” prior to the 1997 revisions, which in turn were then supplanted by a 2007 edition. *See* SPACE & FACILITIES COMM., JUDICIAL CONFERENCE OF THE U.S., U.S. COURTS DESIGN GUIDE, Pref., at iii, Acknowledgments, at i–ii (2007) [hereinafter 2007 U.S. COURTS DESIGN GUIDE]. The 2007 edition was thus the fifth edition and by 2008 had already been revised in some respects. Staff of the AO did the drafting, with many references to general building standards and other GSA materials. *See* HISTORY OF THE AO, *supra* note 30, at 195. The discussion in the text draws primarily on the 1997 and 2007 versions, which overlap substantially such that much of the text is repeated verbatim. *See* 2007 U.S. COURTS DESIGN GUIDE, *supra*; SPACE & FACILITIES COMM., ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS DESIGN GUIDE (1997) [hereinafter 1997 U.S. COURTS DESIGN GUIDE]. The 2007 preface by Chief Justice John Roberts detailed the history of the revisions.

272. *See* 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 1, at 1; 1997 U.S. COURTS

2007 *GSA Design Guide*'s introduction explained, one of the "three major objectives" was to provide "relevant information" to the GSA and architectural/engineering teams "to effectively plan, program, and design a functional, aesthetically appropriate, and cost-effective court facility."<sup>273</sup>

The dozen-plus chapters detailed "state-of-the-art design criteria for courthouses."<sup>274</sup> A comparison between the earlier 1979 and 1984 *GSA Design Guides* and the more recent *U.S. Courts Design Guides* clarifies the effect the judiciary has had on federal courthouse buildings. The utilitarian 1979 and 1984 *GSA Design Guides* outlined the federal judicial structure<sup>275</sup> and commended a decentralized process by which a "design team" sorted out what was needed and how to accomplish it.<sup>276</sup> The 1984 *GSA Design Guide*, which, unlike the 1979 version, was formally approved by the Judicial Conference, did put judges a bit more in view. The 1984 discussion included a paragraph commending architects, before design began, to "meet with the chief judge" and other court representatives to gain an understanding of courthouse functions.<sup>277</sup>

What were the GSA "design goals"? "An important characteristic in a court's design is flexibility within its operational space."<sup>278</sup> Moreover, while "expressing the dignity and solemnity of the administration of justice" was one goal, that aspiration was to be balanced by designs aiming to enhance the "efficiency of performance."<sup>279</sup>

In contrast, the 2007 *U.S. Courts Design Guide*, shaped directly by the Judicial Conference, offered "General Design Guidelines" emphasizing the need for courthouses to be expressive and impressive testaments to a national vision:

The architecture of federal courthouses must promote respect for the tradition and purpose of the American judicial process. To this end, a courthouse facility must express solemnity, integrity, rigor, and

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DESIGN GUIDE, *supra* note 271, intro., at 1. The 1991 Guide had these same three objectives, slightly differently worded. See 1991 U.S. COURTS DESIGN GUIDE, *supra* note 271, at 9. The 1991 Guide also provided diagrams to specify the "spatial relationship, accessibility and circulation" (SRAC) for courtrooms and other rooms. See, e.g., *id.* at 16, 26–39, 100–09.

273. 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 1, at 1. The Guide's other audiences were the "federal judges and key judicial personnel who are directly involved in the design of a federal court facility," the Judicial Conference, "through its Committee on Space and Facilities," and the AO. *Id.*

274. 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, intro., at 2. The Guide also cautioned users not to rely the criteria as "space entitlements" or as a means of enlarging spaces beyond those "originally contemplated" in approved projects. *Id.*, intro., at 3; see also 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 1, at 1–2.

275. Chapter 2 of the 1979 and the 1984 *GSA Design Guides* gave its users—architects and engineers—some basic information about the federal judiciary, functioning as a primer about organization, the levels of courts, the auxiliary services such as court reporters, pretrial services, probation, and marshals, and then cataloging the items needed to furnish each of the spaces to be accorded the different users.

276. See 1984 GSA COURTS DESIGN GUIDE, *supra* note 250, ch. 1, at 3–4; 1979 GSA COURTS DESIGN GUIDE, *supra* note 253, ch. 1, at 3–4.

277. 1984 GSA COURTS DESIGN GUIDE, *supra* note 250, ch. 1, at 3–4.

278. *Id.*; 1979 GSA COURTS DESIGN GUIDE, *supra* note 253, ch. 1, at 3–4.

279. 1984 GSA COURTS DESIGN GUIDE, *supra* note 250, ch. 4, at 1.

fairness. The facility must also provide a civic presence and contribute to the architecture of the local community.

Courthouses must be planned and designed to frame, facilitate, and mediate the encounter between the citizen and the justice system. All architectural elements must be proportional and arranged hierarchically to signify orderliness. The materials employed must be consistently applied, be natural and regional in origin, be durable, and invoke a sense of permanence. Colors should be subdued to complement the natural materials used in the design.<sup>280</sup>

In addition to the shifting emphasis in the general goals, the GSA guidelines developed when Warren Burger was chief justice and the Judicial Conference guidelines written when William Rehnquist was chief justice differ in other respects of particular relevance here. First, instead of the premises of the Burger years that courtrooms were to be “available on a case assignment basis to any judge,” and that no judge on multijudge courts had “the exclusive use of any particular courtroom,”<sup>281</sup> the Rehnquist-led Judicial Conference took the position that each judge was to have a courtroom of his or her own.<sup>282</sup> Specifically, “one

280. 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 1. The text of this section changed between the Conference’s first Guide in 1991 and the 2007 version. The 1991 Guide’s “Aesthetic Considerations” stated that:

Federal Court architecture should symbolize the Judiciary as a co-equal branch of Government. Courthouse design should reflect the seriousness of the judicial mandate and the dignity of the judicial system.

The scale of a courthouse should be monumental, and the materials used on its exterior durable. The spirit of the architecture should be impressive and inspiring.

1991 U.S. COURTS DESIGN GUIDE, *supra* note 271, at 71. But in the subsequent 1997 guide, the Conference deleted this in its entirety and replaced it with text nearly the same as in the 2007 Guide. *Compare* 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 9, *with* 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 1. The 1997 and 2007 text lack any reference to monumental scale or the desire to portray “the Judiciary as a co-equal branch of Government.” The 1997 and the 2007 *U.S. Courts Design Guides* discussions are identical with one variation; the opening sentence of the second paragraph. *Compare* 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 9, *with* 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 1. In 1997, that sentence read: “To achieve these goals, massing must be strong and direct with a sense of repose, and the scale of design should reflect a national judicial enterprise.” 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 9. That sentence was deleted in the 2007 Guide and replaced by: “Courthouses must be planned and designed to frame, facilitate, and mediate the encounter between the citizen and the justice system.” 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 1. Thus, the shift in 1997 to the focus on the impact of the architecture on the local community and the desire to convey “integrity” and “fairness” in courthouse form, *see* 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 9, is continued in 2007 with the elimination of references to large “scale” and “strong and direct [massing]” and the replacement with the idea of “the encounter between the citizen and the justice system.” 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 3, at 1.

281. *See* JUDICIAL CONFERENCE REPORT 64 (Oct. 1971).

282. This rule was formulated by 1997; the Judicial Conference adopted the policy that “[w]ith regard to district judges, one courtroom should be provided for each active judge. In



courtroom must be provided for each active judge.<sup>283</sup> That mandate included magistrate and bankruptcy judges and, ideally, those “senior judges” who had formally shifted from “active” status to make another slot available for the constitutional appointment process, as well as extra courtroom spaces for “visiting judges” who augmented a district’s workforce. This policy of a courtroom-per-judge, coupled with more and different kinds of judges (magistrate, bankruptcy, and district) drove demand for more courtrooms and courthouses.

Size and allocation of space are the other two differences of special relevance here. In the 1970s, the proposed square footage was 1120 to 2400 square feet, with suggested 12-foot ceilings. By the 1990s, 2400 square feet and 16-foot ceilings became the standard size for district judges.<sup>284</sup> Moreover, designs insisted on increased isolation and segregation of spaces as judges were given a dedicated path by which to enter from a secured garage into a secured elevator and walk through a secured pathway so as to be kept apart from the public and lawyers.<sup>285</sup> In some buildings, those paths also result in judges rarely seeing each other.

Requiring three circulatory patterns to buffer against the possibility of contact results in bigger buildings; “circulation space often accounts for 30 to 50 percent of the useable space in a building.”<sup>286</sup> The multiple paths and security add significantly to expenses. In 1993, the GSA estimated that courthouses cost “at least \$44 per gross square foot more to build than a comparably sized federal office building,” and thus courts cost about \$116 per gross square foot.<sup>287</sup>

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addition, with regard to senior judges who do not draw caseloads requiring substantial use of courtrooms and to visiting judges, judicial councils should utilize the following factors as well as other appropriate factors in evaluating the number of courtrooms at a facility necessary to permit them to discharge their responsibilities.” JUDICIAL CONFERENCE REPORT 17 (Mar. 1997). Further explanation comes from the 2007 *U.S. Courts Design Guide*:

Recognizing how essential the availability of a courtroom is to the fulfillment of the judge’s responsibility to serve the public by disposing of criminal trials, sentencing, and civil cases in a fair and expeditious manner, and presiding over the wide range of activities that take place in courtrooms requiring the presence of a judicial officer, the Judicial Conference adopts the following policy for determining the number of courtrooms needed at a facility:

With regard to all authorized active judges, one courtroom must be provided.

2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 2, at 8.

283. See 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 4, at 43–44.

284. See, e.g., 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 4, at 7 (appellate courtrooms); *id.* at ch. 4, at 15 (district courtrooms); *id.* at ch. 4, at 24 (magistrate courtrooms); *id.* at ch. 4, at 31 (bankruptcy courtrooms); 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 4, at 40–42; 1991 U.S. COURTS DESIGN GUIDE, *supra* note 271, at 125–26 (with a slightly smaller magistrate courtroom recommendation of 1500 square feet); 1984 GSA COURTS DESIGN GUIDE, *supra* note 250, ch. 4, at 3 (limited-use courtrooms); *id.* at ch. 4, at 7–8 (intermediate courtrooms); *id.* at ch. 4, at 9–10 (standard courtrooms); *id.* at ch. 4, at 11–12 (large courtrooms). All three *Guides* provided for “special proceedings courtrooms” of 3000 square feet, with 18-foot ceilings. 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 4, at 15; 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 4, at 41; 1991 U.S. COURTS DESIGN GUIDE, *supra* note 271, at 126.

285. See 2007 U.S. COURTS DESIGN GUIDE, *supra* note 271, ch. 16, at 4–5.

286. *Id.* at ch. 3, at 5.

287. *More Disciplined Approach Would Reduce Cost and Provide for Better*

### C. Signature Buildings

The judiciary's hopes for more gracious architectural statements of federal authority intersected with shifts in the GSA, also aspiring to provide "design excellence" for its buildings. Modeling procedures after the methods used in the early 1990s when Justice (then Chief Judge) Stephen Breyer and Judge Douglas Woodlock selected Henry N. Cobb to design the Boston Courthouse,<sup>288</sup> the GSA sought to enlist world-renown architects to shape important federal buildings. Congress provided the funds, and federal courthouses became a new signature of the national government. As forecast at the outset, during Rehnquist's tenure as chief justice, plans were made for 150 courthouse constructions or renovations, to be supported by eight to eleven billion dollars. While not all projects came to fruition, the federal judiciary tripled the amount of space it occupied, and courthouse projects in turn represented 80 percent of the federal building program launched by the GSA during the 1990s.<sup>289</sup>

Above, I offered a few details of the buildings of the nineteenth and early twentieth century. Contemporary parallels include the Thomas F. Eagleton Federal Courthouse (figure 23), which opened in 2000 in St. Louis, Missouri.<sup>290</sup> Standing 557 feet high, it became the tallest and the "largest Federal courthouse in the United States,"<sup>291</sup> with more than one million square feet that took \$200 million to

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*Decisionmaking: Testimony Before the Subcomm. on Oversight of Gov't Mgmt. and the D.C. of the S. Comm. on Governmental Affairs*, 104th Cong. 3 (1995) (statement of J. William Gadsby, Director, Gov't Bus. Operations Issues, Gen. Gov't Div.).

288. See Stephen G. Breyer, *Foreword to CELEBRATING THE COURTHOUSE*, *supra* note 206, at 9; Douglas P. Woodlock, *Drawing Meaning from the Heart of the Courthouse*, in *CELEBRATING THE COURTHOUSE*, *supra* note 206, at 155 [hereinafter Woodlock, *Drawing Meaning*]; see also Douglas P. Woodlock, *The "Peculiar Embarrassment": An Architectural History of the Federal Courts in Massachusetts*, 74 MASS. L. REV. 268, 268–78 (1989); Douglas P. Woodlock, Guest Lecture for The Boston Society of Architects, 1994–1995 Lecture Series, *Architecture and the Design of the New Federal Courthouse in Boston* (Jan. 25, 1995) (unpublished manuscript) (on file with author).

289. See Dean, *supra* note 230, at 62.

290. Thanks are due to Magistrate Judge David Noce of the Eastern District of Missouri, who provided me with a tour of the building and the photograph used in figure 23.

291. U.S. GEN. SERVS. ADMIN., THOMAS F. EAGLETON UNITED STATES COURTHOUSE, ST. LOUIS, MISSOURI 12 (2001) [hereinafter *EAGLETON COURTHOUSE BOOKLET*]; see also *Thomas F. Eagleton U.S. Courthouse*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/101471>. The Eagleton Building is the third highest in St. Louis, designed to avoid overshadowing the city's logo, the Gateway Arch. The GSA website specified that the court was the "largest single" federal courthouse built, as contrasted with the Southern District of New York, which has two courthouse buildings within blocks of each other. See *Thomas F. Eagleton U.S. Courthouse*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/101471> (website as of August 7, 2008).

As noted at the outset, state court filings tower over federal court filings and likewise, the St. Louis federal courthouse is not the largest in the country. For example, the largest courthouse in New York State is the 2001 structure for the Brooklyn Supreme and Family Courts, which houses more than eighty courtrooms in more than 1.1 million square feet; that structure is thirty-two stories and 473 feet high. See *Brooklyn Supreme and Family Courthouse, New York*, DESIGN BUILD NETWORK, <http://www.designbuild-network.com/projects/brooklyn-supreme>.

construct.<sup>292</sup> Space devoted to courtrooms was far outstripped by space devoted to staff. The St. Louis Eagleton Courthouse, for example, was designed to house 700 employees who worked in the building, of whom (as of 2011), 21 were district, magistrate, bankruptcy, or appellate judges.<sup>293</sup> This building also illustrates the shift from prior decades, when structures had been denominated a “Federal Building,” or “U.S. Post Office and Court House.” Federal courthouses are now often named in honor of either a member of Congress or a judge from the area.<sup>294</sup> In this instance, the honor went to Thomas F. Eagleton, who served three terms in the Senate before returning to St. Louis in 1987.<sup>295</sup>

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292. See Gragg, *supra* note 33, at 36; *City of St. Louis Development Activity: Eagleton Federal Courthouse*, INTERNET ARCHIVE, <http://web.archive.org/web/20070818174938/http://stlc.in.missouri.org/devprojects/projinfo.cfm?DevProjectID=47&isComGov=1> (accessed through the Internet Archive index).

293. EAGLETON COURTHOUSE BOOKLET, *supra* note 291, at 24. In 2011, eleven district judges, seven magistrate judges, three bankruptcy judges, and one Eighth Circuit judge had chambers in the courthouse. See *Judges of the Court*, E. DISTRICT MO. U.S. DISTRICT COURT, <http://www.moed.uscourts.gov/judges-court>; *Judge & Courtroom Information*, U.S. BANKR. COURT E. DISTRICT MO., [http://www.moeb.uscourts.gov/judge\\_info.htm](http://www.moeb.uscourts.gov/judge_info.htm); *Eighth Circuit Court of Appeals Judges*, CA8.USCOURTS.GOV, <http://www.ca8.uscourts.gov/newcoal/judge.htm>. Twenty-five courtrooms were provided.

294. The authority to name and to rename buildings is provided to the GSA. “The Administrator of General Services may name or otherwise designate any building under the custody and control of the General Services Administration, regardless of whether it was previously named by statute.” 40 U.S.C. § 3102 (2006). It appears that “Congress first recognized an individual by naming a post office through freestanding legislation” in 1967 to honor Charles A. Buckley, who had been a member of the House who had chaired the House Public Works Committee. NYE STEVENS, CONG. RESEARCH SERV., RS21562, NAMING POST OFFICES THROUGH LEGISLATION 2 (2003). In 1999, the 106th Congress named forty-six post offices in honor of either persons of local renown, members of Congress, or other figures. See *id.* In 1999, the Judicial Conference concluded that one ought not, however, name a courthouse after a judge who had left the bench to practice law. See JUDICIAL CONFERENCE REPORT 76 (Sept. 1999). “In order to avoid the potential for perceptions of bias or conflict of interest,” the Conference opposed “naming a courthouse or other federal building” after retired judges practicing law. *Id.* In 2007, the Conference set forth the following conventions: that a facility solely occupied by a court be called the United States Courthouse; that a “multi-tenant” courthouse be denominated “United States Courthouse and Federal Building” or “United States Courthouse and Post Office”; and that if named after a judge, only the proper name be used and not titles such as “Honorable” or “Judge.” JUDICIAL CONFERENCE REPORT 32 (Mar. 2007).

295. See *Thomas Francis Eagleton*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=e000004>.



**Figure 23:** *Thomas F. Eagleton Federal Courthouse, St. Louis, Missouri. Architects: Hellmuth, Obata + Kassabaum Inc., 2000.*

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.

Another example, colloquially known as the Boston Courthouse and shown in figure 24, opened in 1998 and is named in honor of a local Congressman, John Joseph Moakley.<sup>296</sup> The building, an expanse of some 760,000 square feet, houses

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296. Moakley served in the U.S. House of Representatives from 1972 until he died in 2001. He helped to secure federal funds “to implement his vision of Boston with a clean harbor, renewed transportation system, and revitalized waterfront.” U.S. GEN. SERVS. ADMIN., JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE AND HARBORPARK 39 (2003) [hereinafter BOSTON COURTHOUSE BOOKLET]. Henry N. Cobb is one of the founders of the firm of Pei Cobb Freed & Partners Architects LLP, based in New York. *Id.* at 40. My thanks to the Honorable Douglas P. Woodlock, United States District Judge of the District of Massachusetts, for assistance in helping me to understand the history of this building and courthouse construction more generally, and to Henry Cobb for his discussions of his thoughts as the building’s architect.

the federal district court for Massachusetts and serves as the headquarters of the United States Court of Appeals for the First Circuit, embracing Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico. Courtroom space represents under 10% of the footage but the architect brought the exterior brick inside to convey the sense that entering the courtroom marks the important moment of moving from outside to the interior.



**Figure 24:** John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect: Harry Cobb, 1998.

Copyright © 1998 Steve Rosenthal. Photograph reproduced with the permission of the photographer and courtesy of the court.

Indiana is the site of another new federal courthouse building, for the United States District Court for the Northern District of Indiana, which Henry Cobb (joined by Browning Day Mullins Dierdorf) also designed.<sup>297</sup> The 275,000 square foot building (figure 25), completed in 2002, sits on a 6.9-acre parcel in downtown Hammond.<sup>298</sup> Its three major building materials are limestone, glass, and precast architectural concrete.<sup>299</sup> The GSA praised its “carefully proportioned planes,” providing “a play of rectilinear and curved geometric forms.”<sup>300</sup> Its courtrooms have 22-foot ceilings with octagonal clerestory monitors allowing light, and judges have floor-to-ceiling windows in chambers.<sup>301</sup>

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297. *United States Courthouse*, PEI COBB FREED & PARTNERS ARCHITECTS LLP, <http://www.pcf-p.com/a/p/9411/s.html>. During the 1990s, the question of construction of the building produced disputes about the court’s location and efforts to prevent the project from going forward. See Michael Abramowitz, *Wielding Restraint with a Vengeance: 2 Judges’ Objections to Relocation May Kill New Courthouse*, WASH. POST, Sept. 16, 1992, at A19; Mike Magan, *Hammond Federal Courthouse Survives Knockdown*, IND. LAW., May 31, 1995, at 3.

298. U.S. GEN. SERVS. ADMIN., UNITED STATES COURTHOUSE, HAMMOND, INDIANA 4 (2004) [hereinafter HAMMOND BOOKLET].

299. *Id.* at 26. Its central vaulted hall, 43 feet wide and 138 feet long, is 64 feet high; the courthouse includes seven courtrooms, three for district judges, and two for each magistrate and bankruptcy judges, as well as offices for members of Congress. *Id.* at 2–7. In 2004, the building won the GSA Honor Award for Design.

300. *Id.* at 26.

301. *Id.* at 17.



**Figure 25:** Exterior of the United States Courthouse, Hammond, Indiana. Architect: PEI COBB FREED & PARTNERS ARCHITECTS LLP, 2004; Browning Day Mullins Dierdorf Architects LLP.

Copyright © Hedrich Blessing. Photographer: Jon Miller. Image provided by Hedrich Blessing.

Adornments in the lobby include the work of artist Dale Chihuly, whose blown glass sculptures—“glittering constructions of light, color and volume”—interact with the great arches (figure 26) that are forms also central to the Boston Courthouse design.<sup>302</sup> The GSA booklet on the Hammond Courthouse explains that “the arch of the great hall opens this impressive public space to the city, which illuminated at night, stands out on the skyline as a beacon of justice, affirming the dignity and vitality of American democracy.”<sup>303</sup>

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302. *Id.* at 31. The artwork is an artifact of federal building budgets that include a set-aside amount of about one-half of 1% for public art to be commissioned for those sites. See RESNIK & CURTIS, REPRESENTING JUSTICE, *supra* note 236, at 182–92.

303. HAMMOND BOOKLET, *supra* note 298, at 7.



**Figure 26:** Interior of the United States Courthouse, Hammond, Indiana. Architect: PEI COBB FREED & PARTNERS ARCHITECTS LLP, 2004; Browning Day Mullins Dierdorf Architects LLP.

Copyright © Hedrich Blessing. Photographer: Jon Miller. Image provided by Hedrich Blessing.

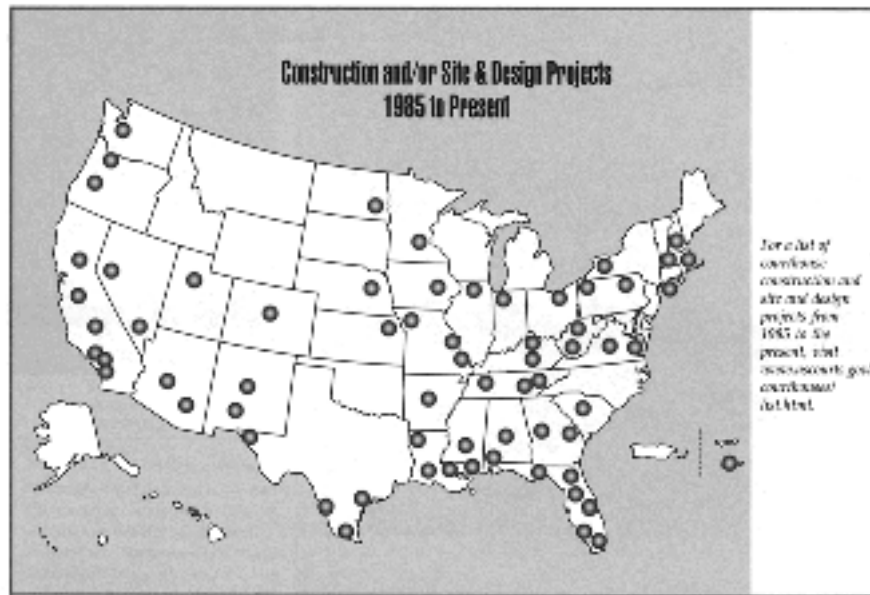
One recap of the undertakings under the Rehnquist era comes by way of looking at a map of “Construction and/or Site & Design Projects” (figure 27), published by the newsletter of the federal judiciary and providing the locations of projects between 1985 and 2002.<sup>304</sup> Another overview (figure 28)<sup>305</sup> comes from the 2009 GSA collage of nine courthouses renovated or built the decade before.

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304. Thanks for help for this facsimile, by Yale University Press, go to Karen Redmond and Linda Stanton from the Public Affairs Office at Administrative Office of the United States Courts. The map accompanied *The Renaissance of the Federal Courthouse*, *supra* note 258.

305. Thanks to the Design Excellence Program, Office of the Chief Architect of the GSA; to Thomas B. Grooms, then Director of GSA’s Design Excellence and the Arts Program; and to Taylor Lednum of the GSA for the compilation of their photographs and that of Frank Ooms. Several of the buildings are discussed in booklets, published by the GSA, detailing the fabrication materials and providing photographs. *See generally* JOHN BRIGHAM, DESIGN EXCELLENCE (2005), [http://works.bepress.com/cgi/viewcontent.cgi?article=1015&context=john\\_brigham](http://works.bepress.com/cgi/viewcontent.cgi?article=1015&context=john_brigham).

Yet the expansive picture painted thus far became more complex in the past fifteen years. Conflicts over rent put the GSA and the AO in direct dispute. As federal budgets were stretched and stressed after 9/11, debates ensued about resources and needs. Congressional oversight halted some projects and downscaled others, and the judiciary and GSA negotiated a new formula for calculating rent. Those issues (detailed below) are better understood after discussion of the shifts in jurisprudence and rule making for which the Rehnquist Court is famous.



**Figure 27:** *Construction and/or Site & Design Projects, 1985 to Present*, graphic in *The Third Branch: Newsletter of the Federal Courts* at 10 (Dec. 2002).

Facsimile, Yale University Press.





**Figure 28:** *United States Courthouse Buildings and Renovations: A Sampling, 1998–2002.* Photographs taken by Taylor Lednum, Thomas Grooms, and Frank Ooms, and provided courtesy of the Design Excellence Program, Office of the Chief Architect, United States General Services Administration. From the top, moving left to right, the courthouses and their architects are John Joseph Moakley U.S. Courthouse (Boston, Massachusetts), designed by Henry Cobb of Pei Cobb Freed & Partners Architects LLP and Jung/Brannen Associates, completed 1998; Alfonse D’Amato U.S. Courthouse (Central Islip, New York), designed by Richard Meier & Partners and The Spector Group, completed 2000; United States Courthouse (Tallahassee, Florida), designed by Reynolds Smith and Hills Inc. and William Morgan Architects, completed 1999; Wayne Lyman Morse United States Courthouse (Eugene, Oregon), designed by Morphosis and DLR Group, completed 2006; William B. Bryant United States Courthouse Annex (Washington, D.C.), designed by Michael Graves & Associates and SmithGroup, completed 2005; Wilkie D. Ferguson United States Federal Courthouse (Miami, Florida), designed by Arquitectonica and Hellmuth, Obata + Kassabaum Inc., completed 2007; Corpus Christi Federal Courthouse (Corpus Christi, Texas), designed by Hartman-Cox Architects, William S. McCord—AIA-Principal/Architect of Record, and WKMC Architects Inc., completed 2001; the Roman L. Hruska U.S. Courthouse (Omaha, Nebraska), designed by Pei Cobb Freed & Partners and DLR Group, completed 2000; and Spottswood W. Robinson III and Robert R. Merhige Jr. Federal Courthouse (Richmond, Virginia), designed by Robert A.M. Stern Architects and HLM Design, completed 2008.

*D. Reshaping Practices: Privatizing Adjudication*

1. More Courtrooms, More Judges, and Fewer Trials

As charted at the outset, during much of the twentieth century, the trend line—in the vectors of the number of judges (constitutional and, since 1968, statutory), the number of rights, the number of cases in the system, and the number of courthouses—was upward. That confluence was reflected in courthouse designs emphasizing the centrality of courtrooms. Illustrative are GSA comments about the 1998 Boston Courthouse, where the courtroom’s importance was signaled by “elliptical brick recesses with half domes—a derivation of the Greek and Rome exedra—[to] define the entrances that lead to vestibules, which in turn lead to the courtrooms.”<sup>306</sup> Further, as can be seen from the photograph of an interior (figure 29) laid out for district judges, the motif of arches reappears to outline each of the four walls, detailed by stenciled patterns taken from another historic courthouse to reference continuity over time.<sup>307</sup> The judge’s bench is “elevated by only three steps to enable the judge to easily participate in rather than be set apart from the proceedings.”<sup>308</sup>



**Figure 29:** Courtroom, John Joseph Moakley United States Courthouse.

Photographer and Copyright © 1998 Steve Rosenthal. Reproduced with permission of the photographer and the court.

Yet, when that courthouse opened in 1998, fewer than 200 civil and criminal trials were held that year in the District of Massachusetts,<sup>309</sup> or about seven or eight

306. BOSTON COURTHOUSE BOOKLET, *supra* note 296, at 8.

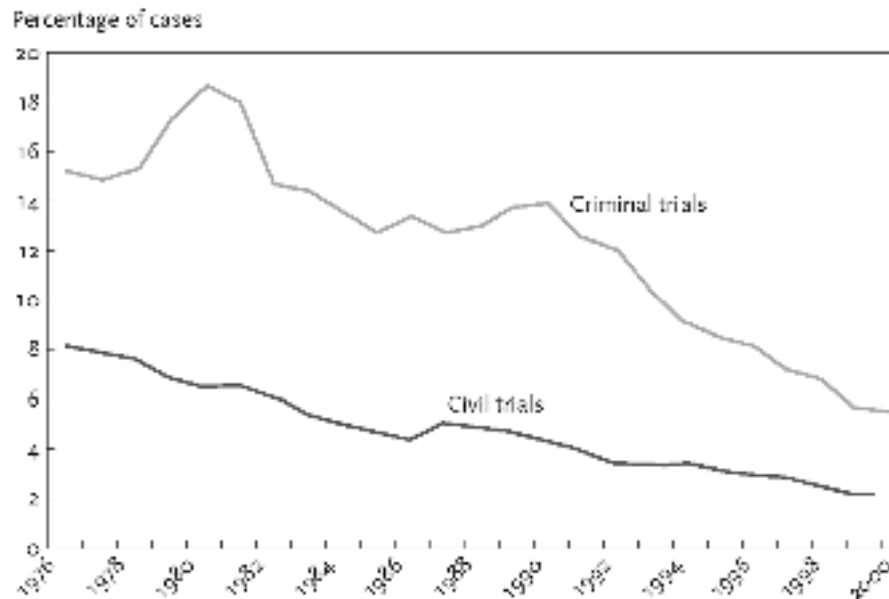
307. *Id.* at 28–29.

308. *Id.* at 8.

309. In 1998, when that courthouse opened, a total of 142 civil and forty-eight criminal trials took place in the federal trial courts in Massachusetts. See ADMIN. OFFICE OF THE U.S.

per courtroom. Data from 2011 in St. Louis, where the Eagleton Courthouse (figure 23) stands tall, are parallel. Trials per district judge numbered ten, down from nineteen when the Eagleton Courthouse opened in 2000.<sup>310</sup>

Trial rates in Boston and St. Louis are not anomalous. The chart, *Civil and Criminal Trial Rates, United States Federal Courts, 1976–2000* (figure 30), summarizing information about the last quarter of the twentieth century,<sup>311</sup> maps that trend of declining rates. In 1980, trials began in about 18% of criminal cases; by 2000, the figure was under 10%. Civil cases declined from about 8% in the 1970s to under 4% by 2000.



**Figure 30:** *Civil and Criminal Trial Rates, United States Federal Courts, 1976–2000.*

Copyright © 2002 The Honorable Patrick E. Higginbotham, United States Court of Appeals for the Fifth Circuit, and used with his permission.

This image is part of a now familiar story, and one that Marc Galanter named “the Vanishing Trial.”<sup>312</sup> He spearheaded a research project (supported by the

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COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1998 ANNUAL REPORT OF THE DIRECTOR 178 tbl.C-7 (1999).

310. U.S. DISTRICT COURT—JUDICIAL CASELOAD PROFILE, <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2000.pl> (select “Missouri Eastern”; select “generate”); U.S. DISTRICT COURT—JUDICIAL CASELOAD PROFILE, <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2011Jun.pl> (select “Missouri Eastern”; select “generate”). In the twelve-month period ending September 30, 2010, a total of 56 civil trials and 43 criminal trials were completed. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 182 tbl.C-7 (2011). Again, magistrate judges have courtrooms, but the trials they conducted are not likely reflected in the district court data.

311. Thanks to the Honorable Patrick Higginbotham for permitting use of the chart shown in figure 30.

312. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters*

Litigation Section of the American Bar Association) that mapped decades of change. Galanter noted that in 1962, 5802 civil trials took place; forty years later in 2002, with many more cases filed, 4569 civil trials were held around the United States.<sup>313</sup> In percentage terms, the decline was from 11.5% to 2% in civil trials commenced during that time period. Galanter characterized the drop as both “recent and steep.”<sup>314</sup> Further, while minor variations exist in terms of the kind of case, the percentages of cases going to trial (and the absolute numbers of trials) have declined. State courts reported parallel data, albeit harder to come by given variation in information collections.<sup>315</sup> In short, by 2002, and continuing through 2010, in the U.S. federal courts, a trial started in fewer than 2 of 100 civil cases filed,<sup>316</sup> and approximately 10 to 11 of the criminal cases filed.<sup>317</sup>

Of course, trials are not the only activities based in courtrooms. Motions are argued there, and public pleas and sentencing proceedings are required facets of the criminal process. Yet as judges promoted courthouse construction that posited courtrooms as the centerpiece of their work, they also joined in the development of doctrine, practices, and cultures that came to look upon trials as suspect—as time consuming, expensive, and not as productive as other ways of resolving disputes. Moreover, and returning to the role of William Rehnquist, the United States Supreme Court has, through its constitutional and statutory interpretation, been central in limiting access to courts.

## 2. Moving into Chambers and ADR Suites for Management and Settlement

The judicial repertoire has long reached beyond the activity of presiding at trials. But the Federal Rules of Civil Procedure of the 1930s, as amended in the 1960s, the 1980s, and thereafter, and federal criminal practice increasingly focused on settlements. Beginning in the 1980s, the rules pressed judges to serve as

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*in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) [hereinafter Galanter, *Vanishing Trial*]; see also Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005).

313. Galanter, *Vanishing Trial*, *supra* note 312, at 461.

314. *Id.*

315. See *id.* at 506–13; Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).

316. Data from 2009 and 2010 make plain the relatively small numbers of cases beginning trials; the rates were 1.2% in 2009 and 1.1% in 2010. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 165 tbl.C-4 (2010); 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).

317. Criminal trial rates are extrapolated from data published by the Administrative Office of the U.S. Courts. In 2009, 76,655 criminal cases were commenced, and 8051 trials were completed, for a trial rate of approximately 10.5%. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 178 tbl.C-7, 201 tbl.D (2010). In 2010, 78,428 criminal cases were commenced, and 8445 trials were completed, for a trial rate of approximately 10.8%. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 181 tbl.C-7, 204 tbl.D (2011). Given the requirements of the Speedy Trial Act, using the assumption of filing and trial within the same year is plausible.

multitaskers, sometimes managers of lawyers and of cases, sometimes mediators, and sometimes referral sources sending people outside of courts to alternative fora. By 1998, for example, the local rules for federal courts in Massachusetts instructed that at “every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances.”<sup>318</sup>

That effort was part of a general embrace of ADR, promoted by local and national rules<sup>319</sup> and by federal legislation.<sup>320</sup> This is not the occasion on which to rehearse the many reasons proponents advanced for the shift, but instead to record its impact through the words of one jurist, Brock Hornby, who has served in several leadership positions within the Judicial Conference. Judge Hornby described judges in civil cases as working in

an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress . . . . For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.<sup>321</sup>

For a few years, form followed function. The federal judiciary’s *Design Guides* called for “alternative dispute resolution suites”—spaces designed for mediation, arbitration, or settlement conferences rather than courtrooms laid out for trials.<sup>322</sup> Amendments were formally made in 1994 to incorporate that change but revisions to the *U.S. Courts Design Guide*—crafted in 2007 in response to pressures to cut back space requirements—deleted those provisions. Courtrooms thus continue to be the central feature of federal courthouses. Specifications detailed the necessary appointments and furniture, even as courtrooms are a small percentage of a courthouse’s square footage and the site of only a fraction of judges’ daily work.

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318. See LR, D. Mass. 16.4(b) (1990); see also LR, D. Mass. 16.4(a) (1990) (“The judicial officer shall encourage the resolution of disputes by settlement or other alternative dispute resolution programs.”).

319. See FED. R. CIV. P. 16; Resnik, *Managerial Judges*, supra note 144; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) [hereinafter Resnik, *Trial as Error*]; see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).

320. See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998) (codified as amended at 28 U.S.C. §§ 651–658 (2006)); Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C. §§ 571–583 (2006)).

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

322. JUDICIAL CONFERENCE REPORT 98 (Sept. 1995).

### 3. Empowering Outsourced Adjudicators and Constraining Court-Based Judges

Initiatives to shift towards court-based ADR are often associated with Chief Justice Burger who, as noted above, sought doctrinal cutbacks of rights gained when Earl Warren was the Chief Justice. Burger's agendas of constricting federal courts' roles in favor of both ADR and state court authority were mirrored in his interest in cutting down the size of federal courtrooms.

In contrast, even as Chief Justice Rehnquist supported increasing staffing levels of courts and efforts to obtain resources for courthouse construction, he used his jurisprudence and his bully pulpit to limit federal judicial power. Often referencing the rubric of federalism, Chief Justice Rehnquist helped to craft doctrines that ceded authority to state courts,<sup>323</sup> thereby narrowing access to the federal courts for various groups, such as civil rights plaintiffs<sup>324</sup> and habeas corpus petitioners.<sup>325</sup>

To do so, Rehnquist-era case law declined to imply causes of action from statutes and the Constitution.<sup>326</sup> In addition, the Rehnquist Court imposed limits on congressional power to rely on the Commerce Clause. Chief Justice Rehnquist wrote the five-person decision in *United States v. Lopez*, holding that Congress had exceeded its authority when creating the federal crime of possession of guns within a certain distance from schools,<sup>327</sup> and he wrote the five-person majority in *United States v. Morrison*, ruling that Congress lacked authority under either the Commerce Clause or the Fourteenth Amendment to enact the civil rights remedy in the Violence Against Women Act (VAWA) providing a federal civil action for victims of violence predicated on gender-based animus.<sup>328</sup> In addition, the Rehnquist Court imposed constraints on the common law remedial powers of federal judges.<sup>329</sup>

Moreover, the tone set by Chief Justice Rehnquist as chief spokesperson for the federal courts fit his doctrinal approach. He repeatedly used his annual "State of the Judiciary" addresses to counsel against expansion of federal jurisdiction. Both before and after the enactment in 1994 of VAWA's civil rights remedy, for example, the Chief Justice invoked the statute as an example of the overuse of

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323. See generally Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); see also Chemerinsky, *supra* note 26.

324. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

325. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977). See generally Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) [hereinafter Resnik, *Constricting Remedies*].

326. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *United States v. Stanley*, 483 U.S. 669 (1987).

327. 514 U.S. 549 (1995).

328. 529 U.S. 598 (2000); see Judith Resnik, *Drafting, Lobbying, and Litigating VAWA: National, Local, and Transnational Interventions on Behalf of Women's Equality*, 11 GEO. J. GENDER & L. 557, 563–68 (2010); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000) [hereinafter Resnik, *Programmatic Judiciary*].

329. See Resnik, *Constricting Remedies*, *supra* note 325, at 231–56.

federal remedies.<sup>330</sup> Further, during his tenure chairing the Judicial Conference, it pressed Congress to cut back on federal jurisdiction. In the 1995 *Long Range Plan*, the Judicial Conference opposed “federaliz[ing]” crime.<sup>331</sup> As for civil cases, the Conference recommended that Congress ought to have a presumption against creating new federal rights, if enforced in federal court.<sup>332</sup> More generally, the Judicial Conference’s *Long Range Plan* urged Congress to rely, when possible, on state courts and federal agencies in lieu of the federal courts.<sup>333</sup>

The attitudes found in Rehnquist’s jurisprudence and policy making are recounted by many scholars; the flavor of much of the commentary comes from one overview entitled “The Court Against the Courts: Hostility to Litigation as an Organizing Principle of the Rehnquist Court’s Jurisprudence.”<sup>334</sup> Below, I focus on two areas of doctrine the Rehnquist Court developed concerning access to courts—the enforcement of mandatory arbitration contracts proffered by manufacturers, sellers, and employers to consumers, and the limitations placed on civil rights claimants seeking remedies from states. Through varying substantive paths and different legal analysis, fewer litigants had direct access to the federal courts. Some were sent to state courts, others to federal agencies or to private dispute resolution, and yet others left without legal redress.

#### a. Mandating Arbitration

Figure 31 reproduces the cell phone contract that was provided to me in 2002.<sup>335</sup> As the text indicates, it requires that I waive all rights to court, to class action treatment, and to aggregate treatment of my claims in arbitration. Instead, I am

330. William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1992, at 1, 3; see also Resnik, *Programmatic Judiciary*, *supra* note 328, at 271–74.

331. LONG RANGE PLAN, *supra* note 4, at 22.

332. *Id.* at 28–29.

333. *Id.* at 134 (“[T]he Judicial Conference could consider seeking more extensive reductions in federal court jurisdiction to fulfill the mission of the federal courts, [including] . . . (b) Eliminate or substantially curtail the jurisdiction of the district court in those categories of cases that may be appropriately resolved in federal administrative or state forums.”); see also *id.* at 135 (“In addition to restoration of a minimum amount-in-controversy requirement for federal question cases, federal court jurisdiction could be curtailed in cases appropriately resolved in Article I tribunals, administrative agencies, or state courts. Examples of such case categories include social security benefit claims, contract claims, benefit claims under ERISA welfare plans, forfeiture proceedings, and cases primarily involving state law issues . . .”).

334. Siegel, *supra* note 26.

335. The excerpts in figure 31 come from a contract that we had with the service then providing us with cell phones. See *Customer Agreement*, VERIZON WIRELESS, <http://www.verizonwireless.com/customer-agreement.shtml>. These materials exemplify this genre of contract; other providers had similar contracts. See, e.g., *Terms & Conditions*, SPRINT, [http://shop2.sprint.com/en/legal/legal\\_terms\\_privacy\\_popup.shtml](http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml). Thanks to Professor Peter Jaszi for advice on copyright and reproduction rights and to Verizon’s vice president and associate general counsel, Sarah B. Deutsch, who in 2006 confirmed the propriety of the publication of a portion of the contract for this particular use.

required to use a private dispute resolution procedure selected by the company. That proceeding is not court-based; indeed, no member of the public has a right to attend.<sup>336</sup> Data on the categories of claims, the issues raised, the responses, outcomes, participants, and the costs are not readily available, aside from a few states that oblige reporting about certain forms of arbitration.<sup>337</sup>

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336. See *Wireless Industry Arbitration Rules*, AM. ARBITRATION ASS'N (2009), <http://www.adr.org/sp.asp?id=22010> (providing in Rule 24 that “[t]he arbitrator shall ensure the privacy of the hearings”). The Better Business Bureau’s “Arbitration Rule 12” permits outside observers to attend as long as there is “room and no objection” from either the parties or the arbitrator. BETTER BUS. BUREAU, RULES OF ARBITRATION [BINDING] 14 (2010), available at <http://www.bbb.org/us/Dispute-Resolution-Services/Binding-Arbitration>; see also *id.* (Rule 13 states: “Unless there is approval of all parties and the arbitrator, no one is permitted to bring cameras, lights, recording devices or any other equipment into the hearing.”).

337. See CAL. CIV. PROC. CODE § 1281.96 (West 2011). After this 2002 enactment, the American Arbitration Association complied by providing quarterly reports including nationwide data. See also MD. CODE ANN., COM. LAW § 14-3903 (West 2011); ME. REV. STAT. ANN. tit. 10, § 1394 (2010); D.C. CODE § 16-4430 (2008). Providers do not, however, provide comprehensive data. See CAL. DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE 5 (2004), available at [http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf). Further, aside from such statutes,

no government agency . . . collects statistics on the number of employees covered by employer-promulgated arbitration programs or the outcomes of arbitration cases filed under these programs. What research has been done is based on data made available to individual researchers by arbitration service providers, most notably the American Arbitration Association (AAA) and the Financial Industry Regulatory Authority (FINRA).

Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, DISP. RESOL. J., Aug.–Oct. 2009, at 6–7. Public records as well as contracts offered to purchasers have given researchers other windows into arbitration use. See, e.g., Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008).



## Your Cellular Service Agreement

Please read carefully  
before filing in a safe place.

**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 . . . .

*Figure 31: Example of cellular phone contract, 2002.*

**INDEPENDENT ARBITRATION**

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

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

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

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

*Figure 31 (continued): Example of cellular phone contract, 2002.*

As is familiar, voluntary arbitration has a long history, both in and outside the United States.<sup>338</sup> Yet, during the nineteenth century and some of the twentieth, courts protected their own jurisdiction by concluding that “public policy” did not permit the enforcement of ex ante arbitration agreements over the objection of one side.<sup>339</sup> A shift came through legislation; in 1925, Congress enacted the United

338. See 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); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

339. See generally IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 19–20 (1992).

States Arbitration Act, which recognized certain kinds of arbitration contracts as enforceable obligations.<sup>340</sup> That statute (now known as the “Federal Arbitration Act,” or FAA) was focused on commercial contracts rather than the consumer agreements illustrated by my cell phone contract. Indeed, in 1925, congressional power over intrastate consumer as well as over employment transactions was not obvious.

The reach of the FAA was, until the 1980s, limited. The issue of its applicability to consumer contracts was reached in *Wilko v. Swan*, a decision rendered in 1953, just two months after Warren became Chief Justice.<sup>341</sup> A securities customer sued a brokerage firm for allegedly violating the 1933 federal securities laws by making false representations about a merger. The question was the enforceability of a form agreement that suits would be stayed, at the behest of either party, in favor of arbitration.

The Court refused to enforce the contract, in part because the adhesive agreement was based on one party’s superior bargaining power. When rejecting a reading of federal statutes to require enforcement of adjudication-precluding clauses, the Court discussed the differences between buyers’ court-based rights under federal securities laws and arbitration.<sup>342</sup> Then, arbitration was seen as too flexible, too informal, and too unreviewable. Writing for the Court, Justice Reed described the problems to be that arbitrators’ awards “may be made without explanation of their reasons and without a complete record of their proceedings,” and hence, that one could not examine “arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact.’”<sup>343</sup> In contrast, the majority praised adjudication for its regulatory role in monitoring adherence to congressional mandates protecting purchasers of stock.<sup>344</sup>

But thereafter, the Court revised its views on arbitration and its interpretation of federal statutes. First under Chief Justice Burger and then under Chief Justice Rehnquist, the Supreme Court reread federal statutes to require enforcement of arbitration contracts.<sup>345</sup> Whether invoking rights under state or federal law, as long

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340. See United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2006)).

341. 346 U.S. 427 (1953). Warren became chief justice on October 5, 1953; the decision was issued on December 7, 1953.

342. *Id.* at 433–38. The holding was premised on the interpretation that the arbitration constituted a “condition, stipulation, or provision binding any person acquiring any security to waive compliance” with the 1933 Act, which Congress has prevented parties to do. *Id.* at 430 (citing 15 U.S.C. § 77n (2006)).

343. *Id.* at 436. That decision was overruled in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). See also Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 223 (1995).

344. Justice Jackson concurred, and Justice Frankfurter, joined by Justice Minton, dissented, arguing that no evidence had been presented that “the arbitral system as practiced in the City of New York” would not afford the rights to which the purchaser was entitled, as contrasted with the “tortuous course of litigation, especially in the City of New York.” *Wilko*, 346 U.S. at 439–40.

345. See, e.g., *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Rodriguez de Quijas*, 490 U.S. 477; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473

as the mandatory arbitration provided what the Court deemed to be an adequate alternative mechanism for protecting such rights, the Burger and Rehnquist Courts insisted on enforcing contracts putting dispute resolution outside of courthouses and away from open and public hearings.

Since 1985, a good many cases have litigated the parameters of the FAA's obligations to arbitrate, the clarity and content of contract terms mandating arbitration,<sup>346</sup> the relevant parties required to provide consent,<sup>347</sup> and the impact of the costs entailed.<sup>348</sup> After a series of decisions holding that consumer contracts were within the FAA, the Court ruled (five to four) in 2001 that employees who signed contracts requiring arbitration were likewise bound, even when waivers appeared in job application forms<sup>349</sup> and even when claiming state law rights to be free from discrimination.<sup>350</sup> In addition, when parties disagreed about how to interpret contractual provisions about whether arbitration was required, the Supreme Court has generally held that such issues were to be decided, at least initially, by arbitrators and not judges.<sup>351</sup> And, in many of these decisions, the

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U.S. 614, 640 (1985); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89–92 (2000). The developments are detailed in Resnik, *Fairness in Numbers*, *supra* note 179, at 113–18. As a consequence, a wide range of claims are kept out of federal court. *See, e.g.*, *Guyden v. Aetna Inc.*, 544 F.3d 376, 384 (2d Cir. 2008) (holding that claims under the Sarbanes-Oxley Act's whistleblower protection provisions are subject to arbitration and concluding that "the loss of a public forum in which to air allegations of fraud does not undermine the statutory purpose of a whistleblower protection provision").

346. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (upholding mandatory arbitration clause in an employment contract); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act applies to contracts executed under state law and thus, applies to franchisee contracts). *Compare* PUBLIC CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>, with Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006).

347. For example, in 2009, the Court concluded (five to four) that employees under a collective bargaining agreement lost their individual rights to go to court for age discrimination claims, even though they had not personally signed the agreement. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1472–73 (2009).

348. *See, e.g.*, *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 92.

349. *See* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 282–83 (2002).

350. *See* *Circuit City Stores, Inc.*, 532 U.S. at 119. On remand, the Ninth Circuit concluded that, under California law, the contract was not enforceable because it was a contract of adhesion. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002). *See generally* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

351. The point was sharply made in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), where the Supreme Court heard an appeal of the Florida Supreme Court's decision that an arbitration provision was unenforceable because the underlying contract had a provision that, under Florida law, was invalid and nonseverable. *See* *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862–64 (Fla. 2005). The Supreme Court of the United States disagreed; it ruled that federal law required that the issue of the contract's enforcement be presented in arbitration. *Buckeye Check Cashing, Inc.*, 546 U.S. at 445–49. Further, even when state law would send an issue to an administrative forum, federal law superseded state rules and required arbitration. *See* *Preston v. Ferrer*, 552 U.S. 346, 349–50

Court has read the FAA to preempt state court rulings on court access and state-based contract rights to be free from adhesive or unconscionable provisions.<sup>352</sup>

b. Constitutional Limits by Way of the Commerce Clause and the Eleventh and the Fourteenth Amendments

Another line of cases resulted in a different method by which to constrict judicial authority—Rehnquist-era interpretations of the Eleventh and Fourteenth Amendments.<sup>353</sup> As Dawn Johnsen has documented, the Rehnquist Court’s achievements were embedded in decades of efforts to use judicial appointments and government litigation to reshape constitutional assumptions. One focus was the interpretation of the Eleventh Amendment as a brake on litigation against states.<sup>354</sup> That provision is the subject of a complex body of jurisprudence, as the import of its words—“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”<sup>355</sup>—has divided the Court.

In 1996, in *Seminole Tribe of Florida v. Florida*, the Court addressed the question of whether an Indian tribe could, under the Indian Gaming Regulatory Act (IGRA), sue a state for failure to negotiate in good faith.<sup>356</sup> Under prior law, states had no role in regulating tribal gaming, which was understood as exclusively under the control of either the tribes or Congress as their overseer.<sup>357</sup> Enacted pursuant to

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(2008). In 2010, the Court held (again five to four) that a challenge to the enforceability of an entire agreement, which the Ninth Circuit had held unconscionable because of the lack of meaningful consent, was for the arbitrator to decide. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). However, in *Granite Rock Co. v. Int’l Bhd. of Teamsters*, which involved a labor contract, the Court held that the district court, and not the arbitrator, was to decide whether a collective bargaining agreement with a no-strike provision had been “validly formed during the strike period.” 130 S. Ct. 2847, 2853 (2010).

Another line of cases addresses the question of aggregate procedures. In *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003), the Supreme Court concluded that the question of whether an arbitration contract precluded a class arbitration was an issue to be determined initially by an arbitrator rather than a judge. In the 2010 *Stolt-Nielsen* decision, the Court held arbitrators could not permit a class arbitration if a contract did not expressly authorize it. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). In the spring of 2011, the Court held that a state law provision, concluding that preclusion of class arbitrations violated the prohibition on adhesive contracts, was preempted by the FAA. *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

352. *See, e.g., Circuit City Stores, Inc.*, 532 U.S. at 105; *Buckeye Check Cashing, Inc.*, 546 U.S. at 440; *AT&T Mobility*, 131 S. Ct. at 1740.

353. Elsewhere I have examined constraining interpretations of judicial equitable powers. *See Resnik, Constricting Remedies, supra* note 325, at 231–71.

354. *See Dawn E. Johnsen, Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003).

355. U.S. CONST. amend. XI.

356. *See Indian Gaming Regulatory Act*, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2006)).

357. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

congressional authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,”<sup>358</sup> IGRA altered that approach by authorizing states to play a role as it also required them to enter into negotiations with Indian tribes about certain kinds of gaming activities.<sup>359</sup>

Writing for the five-member majority, Chief Justice Rehnquist held that “Article I cannot be used to circumvent” what he termed a “constitutional” limitation imposed by the Eleventh Amendment.<sup>360</sup> As a consequence, Congress lacked the power to subject states to actions predicated on federal laws enacted under its Commerce Clause authority. *Seminole Tribe* overturned *Pennsylvania v. Union Gas Co.*, which seven years before had concluded that Congress could—in its superfund legislation passed under its Commerce Clause authority—subject states to suit as part of clean-up efforts.<sup>361</sup> Moreover, in the 1970s, then-Justice Rehnquist had concluded in *Fitzpatrick v. Bitzer*<sup>362</sup> that Congress could rely on its Fourteenth Amendment authority to subject states to claims under Title VII.

But in *Seminole Tribe*, the Chief Justice distinguished *Fitzpatrick* as predicated on efforts to implement the Fourteenth Amendment’s Equal Protection guarantees. His majority also concluded that while injunction actions against state executive officials might proceed through the fiction of *Ex parte Young*,<sup>363</sup> the statute at issue had not provided that route and would not be interpreted to do so.<sup>364</sup> As William Marshall detailed, in the 1970s when Rehnquist had joined the Court, “state immunity was a fading doctrine.”<sup>365</sup> Under Rehnquist’s “stewardship,” however, it gained a vitality that is “a testament to his skills as a judicial craftsman and tactician.”<sup>366</sup>

Moreover, the Chief Justice’s commitment to the Fourteenth Amendment has not provided plaintiffs with a safe haven for obtaining relief. The Rehnquist Court also took up oversight of the constitutionality of congressional reliance on that part of the Constitution as a basis for federal rights. The Court elaborated a test that congressional remedial action pursuant to the Fourteenth Amendment must be related and “proportionate” to the injuries documented before it. Under this approach, the Court struck federal statutes authorizing money damages against states, for example under certain parts of the Americans with Disabilities Act (ADA).<sup>367</sup>

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Congressional powers over tribes are themselves a complex set of constitutional questions. See Phillip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

358. U.S. CONST. art. I, § 8, cl. 3.

359. 25 U.S.C. § 2710(d) (2006).

360. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). See generally Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State, and Tribal: The Story of Seminole Tribe of Florida v. Florida*, in *FEDERAL COURTS STORIES*, *supra* note 74, at 329–57.

361. See 491 U.S. 1 (1989).

362. 427 U.S. 445, 456 (1976).

363. 209 U.S. 123 (1908).

364. *Seminole Tribe*, 517 U.S. at 74.

365. William P. Marshall, *The Battle over State Immunity*, in *THE REHNQUIST LEGACY*, *supra* note 24, at 240, 264.

366. *Id.*

367. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (2001); see also *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72–78 (2000); *City of Boerne v. Flores*, 521

As noted above, accessibility to courthouses and other public buildings became a concern during the last several decades. In 1990, Congress mandated in the ADA that state and private facilities be accessible so that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>368</sup> But problems of compliance were pervasive and examples came from inside state courthouses. For example, in public hearings convened in the late 1990s at the behest of Chief Justice Ronald George of the Supreme Court of California, some 60% of the speakers reported on physical barriers to and in courts.<sup>369</sup> California’s specially chartered task force detailed the many courts that could only be entered by way of staircases and recommended significant changes.<sup>370</sup>

The Supreme Court took up an aspect of the ADA’s reach in *Tennessee v. Lane*. The underlying facts of the case at bar (a term sadly apt) involved George Lane, wheelchair-bound because he was a paraplegic. Lane had “crawled up two flights of stairs to get to the courtroom” where he was to answer to criminal charges.<sup>371</sup> In 2004, a bare majority—that did not include Chief Justice Rehnquist—upheld the provision of the ADA permitting individuals such as Lane to seek monetary damages from states for failing to accommodate disabled persons’ use of courts.<sup>372</sup> For the majority, Justice Stevens detailed the record before Congress on exclusion of individuals with disabilities from state courthouses and the importance of affording individuals court-based rights. As the opinion explained, “affirmative obligations” flowed because the “right of access to the courts” was such a foundational constitutional value.<sup>373</sup>

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U.S. 507 (1997). *See generally* Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved on Docket*, N.Y. TIMES, July 2, 2002, at A1 (discussing the thirty years of Rehnquist’s service and that he had accomplished a good many of his goals, including expanding the doctrine of sovereign immunity).

368. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 202, 104 Stat. 327, 337 (1990) (codified at 42 U.S.C. §§ 12131–12165 (2006)).

369. JUDICIAL COUNCIL OF CAL., PUBLIC HEARINGS REPORT: ACCESS FOR PERSONS WITH DISABILITIES 2-1 (1996).

370. *See id.* at 5-71, 5-73. The Task Force recommended that a “substantial improvement in physical access” be a priority, along with changing the signage, providing transportation, and educating staff to make accommodations for disabilities. JUDICIAL COUNCIL OF CAL., SUMMARY OF SURVEY AND PUBLIC HEARING REPORTS OF THE ACCESS FOR PERSONS WITH DISABILITIES SUBCOMMITTEE OF THE CALIFORNIA JUDICIAL COUNCIL’S ACCESS AND FAIRNESS ADVISORY COMMITTEE 18 (1997).

371. 541 U.S. 509, 513–14 (2004).

372. *Id.* at 531–34.

373. *Id.* at 532 & n.20. Justice Souter, joined by Justice Ginsburg, concurred, as they also noted how courts had perpetuated discrimination based on handicap. *Id.* at 534 (Souter, J., concurring). After the decision was issued, one lawyer, herself “in a power wheelchair,” lamented that the ruling had not addressed impaired access to a range of state services. *See* Harriet McBryde Johnson, *Stairway to Justice*, N.Y. TIMES MAG., May 30, 2004, at 11. Accompanying her essay was a photograph by Ziggy Zaluzny of an individual in a wheelchair attempting to scale a high and long staircase to an indeterminate site.

For many decades, long flights of stairs made statements about the grandeur and power of the law. . . . By design, they were humbling, even disempowering.

The year before *Lane* was decided, Chief Justice Rehnquist had authored the majority opinion in *Nevada Department of Human Resources v. Hibbs*, upholding congressional power to enact the Family and Medical Leave Act with its authorization of damage actions against states.<sup>374</sup> But in *Tennessee v. Lane*, Chief Justice Rehnquist dissented, arguing that Congress could not authorize individual damage suits for state failures to make accessible their courthouses.<sup>375</sup> His dissent found the record before Congress inadequate to support a finding that “disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.”<sup>376</sup> Noting that Lane had been given a hearing on the “first-floor library” as an accommodation, Chief Justice Rehnquist characterized the information before Congress as “anecdotal evidence and conclusory statements”; the “mere existence of an architecturally ‘inaccessible’ courthouse . . . does not state a constitutional violation. . . . We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance.”<sup>377</sup>

He knew from whence he spoke, for the courthouse in which he sat imposed obstacles for those seeking to walk up its main stairway. When *Tennessee v. Lane* was argued before the U.S. Supreme Court, several newspapers focused on the grand steps of that building rather than the side entrance that has no stairs. The photographs showed demonstrators climbing, on their hands and knees, the stairs of the building that William Howard Taft had brought into being.<sup>378</sup>

#### V. THE UNDERUTILIZED FEDERAL COURTS

At the outset, I provided charts graphing the rise in the number of authorized judgeships and in filings during the twentieth century (figures 2 and 3), and thereafter sketched the changing legal rules and statutes governing the federal courts. The numbers fit other facts. According to the AO, between 1974 and 1998, Congress enacted some 474 provisions that expanded “the workload and

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Ramps, elevators and appropriate use of government spaces have the opposite effect. For people with disabilities, it is impossible to conceptualize equal protection of the law without them.

*Id.*

374. 538 U.S. 721, 724–25 (2003). Pending as of 2011 is a question of the authority of Congress to do so under another provision of that Act. See *Coleman v. Md. Court of Appeals*, 626 F.3d 187 (4th Cir. 2010), *cert. granted sub nom.* *Coleman v. Court of Appeals of Md.*, 131 S. Ct. 3059 (2011).

375. *Lane*, 541 U.S. at 538 (Rehnquist, C.J., dissenting). Analysis of the tension between *Hibbs* and *Lane* is provided in Linda Greenhouse, *Foreword: The Third Rehnquist Court*, in *THE REHNQUIST LEGACY*, *supra* note 24, at xiii, xix–xx. In *Lane*, Justice Scalia and Justice Thomas each explained their further disagreements with the majority in separate dissents. See *Lane*, 541 U.S. at 554 (Scalia, J., dissenting); *id.* at 565 (Thomas, J., dissenting).

376. *Id.* at 543–44 (Rehnquist, C.J., dissenting).

377. *Id.* at 543 n.4, 546–47 (emphasis in original).

378. See Linda Greenhouse, *Dispute Heard on States’ Duties Under Disabilities Act*, *N.Y. TIMES*, Jan. 14, 2004, at A16. The article was accompanied by a photograph of the protestors on their hands and knees.



jurisdiction of the federal courts.”<sup>379</sup> As of 2003, 1366 courtrooms were available for district court judges,<sup>380</sup> with others for magistrate and senior judges—in total, about 1800 to 2000 courtrooms. From the 400 facilities in the 1960s, the judiciary had, by 2008, housing in some 800 locations.<sup>381</sup>

Yet two additional charts, focused on the years between 1995 and 2010 (figures 4 and 5), demonstrated the flattening of filing rates, reflecting the contraction of litigation rights produced by many variables, of which procedural rules and doctrine are but one part. As federal budgets came under pressure, as federal judicial culture entrenched skepticism about the wisdom of a ready welcome to the federal courts, and as filings slowed, questions came to the fore about the need to expand courtroom housing stock.

*A. Congressional Investigations of Courtroom Usage:  
Conflicts over A-Courtroom-Per-Judge*

Expensive courthouse building budgets coupled with vanishing trials attracted the attention of members of Congress. Estimates were that new courtrooms cost about \$1.5 million, and the question arose about how often judges used them. During the 1990s, “courtroom sharing” became a particular point of contestation, as members of Congress probed the judiciary’s insistence that a dedicated courtroom be provided for each judge as well as for judges who had taken senior status to open up vacancies.<sup>382</sup>

Focused on what it called “courtroom utilization,” Congress commissioned studies from the General Accountability Office (GAO) and the Congressional Budget Office (CBO), which found underutilization of federal courtrooms.<sup>383</sup> A

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379. See Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998) (on file with author). Tracking of such statutes began in the 1970s and was updated periodically.

380. Fredric L. Lederer, *The Courtroom in the Age of Technology*, in CELEBRATING THE COURTHOUSE, *supra* note 206, at 189.

381. 2006 *Future of the Federal Courthouse Construction Program Hearings*, *supra* note 33, at 179 (statement of Hon. Jane R. Roth, Chair, Judicial Conference Comm. on Space and Facilities).

382. For example, the Judicial Conference objected to a proposed bill, the General Services Administration Improvement Act of 1997, H.R. 2751, 105th Cong. (1st Sess. 1997), that would have required that the judiciary or GSA submit data on courtroom use, courtroom sharing, and the design guide. See JUDICIAL CONFERENCE REPORT 30 (Mar. 1998). On the other hand, the Judicial Conference registered its support for a bill pending in 1997, H.R. 623, 105th Cong. (1st Sess. 1997), because it would provide a “more realistic and favorable treatment of capital investments in the federal budget to the benefit of the judiciary.” JUDICIAL CONFERENCE REPORT 31 (Mar. 1998).

383. See, e.g., 2006 *Future of the Federal Courthouse Construction Program Hearings*, *supra* note 33; U.S. GEN. ACCOUNTING OFFICE, COURTHOUSE CONSTRUCTION: SUFFICIENT DATA AND ANALYSIS WOULD HELP RESOLVE THE COURTROOM-SHARING ISSUE 8, 19 (2000) [hereinafter GAO COURTHOUSE CONSTRUCTION (2000)]; see also U.S. GEN. ACCOUNTING OFFICE, COURTHOUSE CONSTRUCTION: IMPROVED 5-YEAR PLAN COULD PROMOTE MORE INFORMED DECISIONMAKING (1996). A note on nomenclature is in order: The GAO, once called the General Accounting Office, is now the General Accountability Office.

1997 study defined courtroom usage as “any activity” (including but not limited to trials) for any portion of a day<sup>384</sup>—a measure later noted to be generous in counting “lights-on” when courtrooms were in use for a small part of the day.<sup>385</sup> With that metric, the GAO reported a 54% usage rate of available days in the sixty-five courtrooms at the seven locations studied in 1995.<sup>386</sup>

The judiciary responded by underscoring the need for courtrooms for arguments on motions, sentencing, and some pretrial conferences, as well as the complexity of scheduling. Judges regularly reported that courtroom availability was an important factor in bringing cases to conclusion. The point was even made in case law; in 1997, the Third Circuit reversed a conviction because a judge in the Virgin Islands had refused to grant a continuance based on the lack of courtroom space to accommodate a delay.<sup>387</sup>

To document the need for individual courtrooms, the Judicial Conference employed the firm of Ernst & Young to conduct its own study.<sup>388</sup> That report concluded that courtroom sharing would not be feasible in small districts and would impose serious scheduling problems in larger ones. That analysis prompted criticism from the GAO, which described the report as predicated on a flawed mathematical formula (lacking “data, rationale, or analytical basis”).<sup>389</sup> Yet another

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384. See U.S. GEN. ACCOUNTING OFFICE, COURTHOUSE CONSTRUCTION: BETTER COURTROOM USE DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING 8–10 (1997) [hereinafter GAO COURTHOUSE CONSTRUCTION (1997)].

385. GAO COURTHOUSE CONSTRUCTION (2000), *supra* note 383, at 8, 18 (disagreeing with an analysis by Ernst & Young and noting that the “lights-on measure overstated the number of hours judges actually spent in the courtrooms” and that the GAO’s measure was “actually a measure of workdays when there was any use at all, even if the events lasted for less than an hour”).

386. GAO COURTHOUSE CONSTRUCTION (1997), *supra* note 384, at 9–10. The report also noted that in all but two locations, “courtrooms were used more often for nontrial purposes than they were for trials.” *Id.* at 11. To determine the nature of the activity, the researchers reviewed the calendars and minute order books of court clerks. *Id.* at 39. In a related letter from Bernard L. Unger, the director of the Government Business Operations Issues for the GSA, the GSA detailed the use of courts for “nontrial use only—2 hours or less.” See U.S. GEN. ACCOUNTING OFFICE, COURTHOUSE CONSTRUCTION: INFORMATION ON THE USE OF DISTRICT COURTROOMS AT SELECTED LOCATIONS 9 (1997).

387. *Virgin Islands v. Charleswell*, 115 F.3d 171 (3d Cir. 1997). The appellate court noted that the “unfortunate circumstances of this case illustrate the serious drawbacks of a courthouse planning philosophy that encourages sharing of courtrooms by a number of judges to promote efficiency in space utilization. . . . When a courtroom is not available as the need arises, the result is a loss of efficiency in other phases of judicial administration. . . . [E]xperience teaches that the brick and mortar construction expense of building larger facilities may be less expensive in the long run than the other costs associated with delay in processing cases. The results of coping with an insufficient number of courtrooms demonstrates that the old adage of ‘penny wise and pound foolish’ is particularly apt.” *Id.* at 175.

388. AO ANN. REP. 28 (1999).

389. GAO COURTHOUSE CONSTRUCTION (2000), *supra* note 383, at 8, 16. Ernst & Young had designated districts with fewer than five courtrooms in one category and looked at places with six to ten courtrooms in another. The GAO commented that 91% of the courthouses fall within the category of five or fewer courtrooms. But “about 40 percent of all current, active

study, from the CBO, modeled the effects of a reduction in courtroom space based on trial rates as of 1995; the CBO concluded that some delays would occur but that, depending on the assumptions, even with fewer courtrooms, no one would be using them between about 20% to 40% of the time.<sup>390</sup>

Congressional inquiries were complemented by concerns from the Executive. To the chagrin of the judiciary, on more than one occasion the Executive Branch did not forward judicial requests to Congress for buildings.<sup>391</sup> By 1997, while maintaining its commitment to dedicated courtrooms, the Judicial Conference announced a “space cost containment plan” through which it would explore whether courtroom sharing was feasible.<sup>392</sup> At issue was whether circuits or districts might ask senior or visiting judges to share courtrooms.<sup>393</sup>

In the fiscal year 2001 budget request, the Executive Branch requested funding for seven courthouse construction projects—on a budget assuming two courtrooms for every three judges.<sup>394</sup> The Judicial Conference objected that the proposal was a “direct contradiction” of the judiciary’s policy, “developed after analysis of two major studies on courtroom utilization and case management” that had recognized “the indispensable need for a courtroom to fulfill the essential judicial responsibilities.”<sup>395</sup> The Conference “strongly condemned the unilateral efforts” of the Office of Management and Budget (OMB) to “impose a courtroom sharing policy on the judicial branch, as an unwarranted and inappropriate intrusion into the constitutionally mandated independence of the judiciary.”<sup>396</sup>

The judiciary also tried to ward off proposed legislation obliging it to submit detailed plans to Congress for building projects of a certain value.<sup>397</sup> Instead, the Conference decided to present its housing needs directly by way of a “formal narrative statement” intended “to educate key legislative and executive branch decision makers.”<sup>398</sup> Making that case, the judiciary returned to the late 1980s theme of a housing crisis and described a “judicial space emergency” as impairing “the ability of each court to execute its responsibilities . . . by the unavailability of space.”<sup>399</sup> The Judicial Conference identified certain courts (such as those with

district judges are located in the remaining 9 percent of the courthouses.” *Id.* at 19.

390. CONG. BUDGET OFFICE, *THE ONE-COURTROOM, ONE-JUDGE POLICY: A PRELIMINARY REVIEW* 12 (2000).

391. In 1997, for example, the Office of Management and Budget did not include proposed funds for court construction. *See* JUDICIAL CONFERENCE REPORT 89 (Sept. 1998).

392. JUDICIAL CONFERENCE REPORT 17 (Mar. 1997).

393. *See, e.g.*, GAO *COURTHOUSE CONSTRUCTION* (2000), *supra* note 383, at 57 app. (underscoring the “value of unfettered access to a courtroom and its importance to the fair and efficient administration of justice”).

394. JUDICIAL CONFERENCE REPORT 30 (Mar. 2000).

395. *Id.* For further protests, see JUDICIAL CONFERENCE REPORT 64–67 (Sept. 2000).

396. JUDICIAL CONFERENCE REPORT 30–31 (Mar. 2000).

397. JUDICIAL CONFERENCE REPORT 71 (Sept./Oct. 2001).

398. JUDICIAL CONFERENCE REPORT 32 (Mar. 2001).

399. *The General Services Administration’s Fiscal Year 2005 Capital Investment and Leasing Program: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 108th Cong. 35 (2004) (statement of Judge Jane R. Roth, Chair, Judicial Conference Comm. on Security and Facilities). Judge Roth had sounded a similar theme in previous years. As she explained, projects for the then-pending “Five-Year Plan are urgently needed . . . and delays only

heavy immigration dockets derivative of efforts to close the Southwest border) as having such emergencies and requiring funds in light of “intolerable security and operational problems.”<sup>400</sup>

The other two branches pushed back. The Judicial Conference then imposed its own internal two-year moratorium on planning for upgraded projects in order to reevaluate the “underlying assumptions” in light of “constrained budgetary environments.”<sup>401</sup> In 2004, the Conference called on chief circuit judges to cancel space requests wherever possible.<sup>402</sup> (In 2006, some exemptions from that moratorium were authorized.<sup>403</sup>) In an effort to take the theory of internalizing the costs of buildings from the national to the circuit level, the Conference also imposed a “rent budget cap” per circuit.<sup>404</sup>

In 2005, at the request of the chair of the House subcommittee focused on federal building, the FJC undertook yet another study of courtroom utilization.<sup>405</sup> To answer the “ultimate question” of whether judges could “share courtrooms without compromising the administration of justice,”<sup>406</sup> the FJC looked at 422 courtrooms in twenty-three districts. When evaluating those facilities, the FJC added to the metric of “actual courtroom use” the concept of “latent use,” a term

exacerbate operational problems.” *Courthouse Construction Delays Hurt Judiciary*, THIRD BRANCH, June 2001, at 2, 2.

In 2006, the Conference set forth a definition of a “space emergency” as a building that is “severely damaged or . . . has an excessive caseload that impacts its space. The Committee on Space and Facilities will examine each emergency situation on a case-by-case basis to determine whether to recommend” that the project be declared an emergency. JUDICIAL CONFERENCE REPORT 27–28 (Mar. 2006).

400. JUDICIAL CONFERENCE REPORT 37 (Sept. 2003). The effort was to “convey critical housing needs” in Southern California and Texas. The courts designated as in need of priority funding were those in Los Angeles, California; El Paso, Texas; San Diego, California; and Las Cruces, New Mexico. *Id.*

401. JUDICIAL CONFERENCE REPORT 34–35 (Sept. 2004).

402. *Id.* at 36.

403. JUDICIAL CONFERENCE REPORT 6 (Sept. 2006).

404. *Id.* at 10; *see also A Changed Judiciary Still Needs To Save*, THIRD BRANCH, Aug. 2008, at 1 (explaining that “each circuit judicial council now has an allocated rent budget, and must decide which projects it can afford”).

405. Two FJC documents reported the outcomes. *See* JAMES C. DUFF, SEC’Y OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE USAGE OF FEDERAL DISTRICT COURT COURTROOMS (2008) [hereinafter 2008 AO USAGE REPORT] (Duff later served as the Director of the Administrative Office); FED. JUDICIAL CTR., THE USE OF COURTROOMS IN U.S. DISTRICT COURTS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION & CASE MANAGEMENT app. 1 (2008) [hereinafter 2008 FJC COURTROOM USE STUDY] (reproducing the November 4, 2005 letter from Rep. Bill Shuster, Chairman of the Subcommittee on Economic Development, Public Buildings and Emergency Management of the House Committee on Transportation and Infrastructure, to the Hon. Jane R. Roth in her capacity as chair of the Judicial Conference Committee on Security and Facilities). As that report outlined, Representative Shuster had asked that the study document, based on a statistical sampling, how often courts were “actually in use” with people there for official functions, that the study be designed with “input from the Government Accountability Office,” and that it incorporate “other factors the judiciary deemed necessary.” *Id.* at 7.

406. 2008 FJC COURTROOM USE STUDY, *supra* note 405, at app. 4, at 9.

coined to denote time scheduled in a courtroom but subsequently cancelled.<sup>407</sup> Availability rather than actual use was relevant because “a firm trial date and availability of a courtroom ‘often’ prompt parties to settle or plead.”<sup>408</sup> Further, the FJC distinguished among judicial users, separately assessing how much time active, senior, and magistrate judges spent in courtrooms.<sup>409</sup>

The FJC reported widespread enthusiasm for dedicated courtrooms from the judges surveyed as well as from lawyers.<sup>410</sup> Moreover, the 2008 study found a higher rate of use (69% of work days for district judges) than had earlier studies.<sup>411</sup> On any given day, “50% to 74% of the courtrooms were in use . . . for either actual or scheduled events.”<sup>412</sup> On the other hand, in the courts where judges shared courtrooms, there “were no days on which a courtroom was not available.”<sup>413</sup> While the study was underway, the relevant House subcommittee passed a resolution that directed a revision of the *U.S. Courts Design Guide* to provide, in new court construction, “for one courtroom for every two senior judges.”<sup>414</sup>

407. *Id.* at app. 4, at 1. In a questionnaire distributed to District Judges and Magistrate Judges, the FJC explained that “[a]ctual courtroom use is fairly straightforward . . . . Some have suggested, however, that the *availability* of a courtroom serves important functions, even when the courtroom is not actively being used. This is known as *latent use*.” *Id.* at app. 10, at 13 (emphasis in original).

The FJC used a variety of sources of information, including the questionnaire sent to all judges, a questionnaire to attorneys, and direct data collection in thirteen districts in two “waves” of two different three-month periods. *Id.* at app. 4, at 3. A total of twenty-three districts were analyzed. *Id.* at app. 4, at 4. Appendix 7 of the *2008 FJC Courtroom Use Study* detailed the kinds of proceedings coded, ranging from case proceedings conducted by a judge to ceremonies, education, set-up or short adjournments, maintenance, and unoccupied and usable or not. *Id.* at app. 7, at 1–3. The survey questionnaire went to more than 1500 judges; more than 1000 replied, yielding a response rate of 68%. *Id.* at app. 10, at 1.

Courtrooms were, on average, in “actual courtroom use” for 2.9 hours a day if a judge was an active judge, *id.* at 18, and 4.1 hours if “scheduled time” (or latent use) was included, *id.* at 37. Judges spent a great deal of time in chambers, often in conferences. *Id.* at 27. In those districts where senior and active judges shared courtrooms, the actual use time was somewhat lower, as was the scheduled time. *Id.* at 47.

408. *Id.* at 42 (stating that 81% of judges believed that this latent use “often” prompted settlement).

409. *Id.* at app. 8.

410. *Id.* at 53–54, 60–61; 2008 AO USAGE REPORT, *supra* note 405, at 8.

411. 2008 FJC COURTROOM USE STUDY, *supra* note 405, at 20–21.

412. *Id.* at 48.

413. *Id.*

414. When approving additional appropriations for courthouse construction in San Diego, California, the House Transportation and Infrastructure Committee resolved that within “one year of the date of approval of this Resolution, the Judicial Conference of the United States shall amend the U.S. Courts Design Guide to require that each U.S. Courthouse construction project provide one courtroom for every two senior judges.” 152 CONG. REC. 15,552 (2006). Also mandated were more process and oversight for departures. *See id.*; *see also* JUDICIAL CONFERENCE REPORT 11 (Mar. 2007) (stating that although the resolution stated that the *Guide* was to be altered within a year, the Conference reported in 2007 that its subcommittees and the AO were working with the House Committee on the issue).

In the summer of 2008, the federal judiciary's newsletter highlighted efforts undertaken to economize. Crediting Chief Justice Rehnquist with identifying the need for cost containment,<sup>415</sup> the story began: "Over five years ago, the federal Judiciary looked into the future and saw its rent projected to top \$1.2 billion by 2009. . . . Massive layoffs of staff seemed inevitable."<sup>416</sup> Instead, as the 2008 newsletter continued, changes in "planning assumptions" had helped to protect the judiciary. The Conference committed itself to some courtroom sharing for senior judges and magistrate judges, exploration of "opportunities" for courtroom sharing for active district judges on large (ten or more) multijudge courts, and studying "courtroom allocation policies" for bankruptcy judges.<sup>417</sup>

As then-AO Director James Duff (who had replaced Ralph Meacham) explained, those provisions struck "the appropriate balance between the Judiciary's fundamental responsibility of ensuring the fair and efficient administration of justice and the general governmental responsibility to be good stewards of the taxpayers' money."<sup>418</sup> But as the judiciary retreated somewhat from its "one-courtroom-per-judge" stance, what it got in return was a new way in which to calculate the money it paid to the GSA in rent. The revised fee assessments were estimated to save the courts some \$140 million over the coming two decades.<sup>419</sup>

#### *B. The Politics of Buildings, Rights, and Salaries*

This review of the decades from the 1950s through the beginning of the twenty-first century demonstrates the judiciary's success in obtaining congressional commitments of jurisdiction and facilities. Along the way, Congress imposed a modest degree of supervision on the judiciary's building plans. Some projects were

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415. *A Changed Judiciary Still Needs to Save*, THIRD BRANCH, Aug. 2008, at 1, 1.

416. *Id.*

417. 2008 AO USAGE REPORT, *supra* note 405, at 10–11. That Report also noted that, while the Judicial Conference had no "formal position" on magistrate judge assignments, it had applied the "one-for-one policy" to them. *Id.* at 10. One concern raised by a former chief judge of a circuit about the new approach is that magistrate and bankruptcy judges may have the most intense need for ready access to courtrooms. *See* Letter from Gerald Bard Tjoflat, Circuit Judge, United States Court of Appeals, Eleventh Judicial Circuit, to Judith Resnik 6 (Jan. 25, 2010) [hereinafter Tjoflat 2010 Letter] (on file with author).

418. 2008 AO USAGE REPORT, *supra* note 405, at 1.

419. According to MOA GSA/AO, Feb. 19, 2008, the different methods yielded a rent reduction from \$47.73 to \$39.36 per square foot. *See* Office of Real Property Asset Management, ROI Pricing (Sept. 2006) at 4 (appended to MOA). The estimate in 2008 was that the revised method of accounting would, over twenty years, save the judiciary more than \$140 million. Interview with Ross Eisenman, Assistant Director of the Office of Facilities and Security (Dec. 2008); *see also A Changed Judiciary Still Needs to Save*, THIRD BRANCH Aug. 2008, at 1, 2 (stating that the modified rent mechanism also provided "the Judiciary with certainty about the amount of rent it will pay for a 20-year period").

cut back,<sup>420</sup> and the Judicial Conference stepped up its own monitoring of what had been decentralized and delegated decision making.<sup>421</sup>

When restating its aspirations in 2006, the judiciary espoused “core values” for space and facilities that sounded somewhat more utilitarian than the call in the earlier *U.S. Courts Design Guide* for “solemnity, stability, integrity, rigor, and fairness.”<sup>422</sup> The revised goals were “availability, function, adequacy, sufficiency, cost, and structural security.”<sup>423</sup> By 2008, the judiciary acceded to reducing space demands by requiring senior judges to share courtrooms and by considering a return to the 1970s presumption under Warren Burger that, in large districts, judges could share courtrooms. Yet the judiciary’s leadership also took up what Chief Justice Rehnquist had sought in 1989—“independent real property authority” to get out from under the GSA.<sup>424</sup>

Even as some projects were scaled back, a new cycle of building proposals came into shape for fiscal years 2008–2012,<sup>425</sup> accompanied again by interbranch conflicts. In 2009, the judiciary was designated to “receive 80 percent of the \$300 million provided for the construction of federal buildings in the recent stimulus legislation package,” with an additional “several hundred million dollars” slated for modernization of some “100 court facilities.”<sup>426</sup> But by 2010, the GAO was once again criticizing courthouse investments; its study prompted the headline: “Building Oversize Federal Courts Wastes Millions.”<sup>427</sup> The GAO’s review of

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420. See, e.g., Joseph P. Fried, *A Bigger Home for the Federal Courts in Brooklyn*, N.Y. TIMES, Sept. 30, 1999, at B8 (detailing the cutbacks in the project, down from eighteen floors to fifteen, from 300 feet to 252 feet, and from twenty-four courtrooms to seventeen).

421. The House had required the judiciary to “provide a specific list of each departure” from the parameters if costs would be raised, along with a “justification and estimated cost” for such departures. The resolution further required GSA to submit a recommendation to the relevant committees as to whether to approve departures from the *Design Guide*. 152 CONG. REC. 15,552 (2006); JUDICIAL CONFERENCE REPORT 27, 32 (Mar. 2007). As the Judicial Conference noted, what constituted an “exception” was not always agreed upon by the GSA and the AO. *Id.* at 31.

422. 1997 U.S. COURTS DESIGN GUIDE, *supra* note 271, at 3-9.

423. JUDICIAL CONFERENCE REPORT 24 (Mar. 2006).

424. *Id.* at 25–26. In 2005, the Conference had started to draft a plan to do so. JUDICIAL CONFERENCE REPORT 40 (Sept. 2005). In 1990, a bill to do so had been introduced to create that separation. Judicial Space and Facilities Management Improvement Act of 1989, H.R. 4178, 101st Cong. (2d Sess. 1990). GSA objected, and the sponsoring congressman urged the two agencies to develop a compromise. See Judicial Space and Facilities Management Improvement Act of 1990, S. 2837, 101st Cong. (2d Sess. 1990) (introduced by Senator Moynihan to accomplish the same end). The Post Office’s authority to determine and provide for its building needs is set forth in 39 U.S.C. § 404(a)(3) (2006).

425. JUDICIAL CONFERENCE REPORT 37 (Sept. 2007). Thirteen projects were then approved. *Id.* Ten space requests were approved in March of 2007. JUDICIAL CONFERENCE REPORT 31 (Mar. 2007).

426. *Judiciary’s Projects Part of Stimulus Package*, THIRD BRANCH, Apr. 2009, at 7, 7. The funding came from the American Recovery and Reinvestment Act of 2009. *Id.*

427. Matthew Cella, *Building Oversize Federal Courts Wastes Millions: Maintenance Adds to Costs*, WASH. TIMES (May 25, 2010), <http://www.washingtontimes.com/news/2010/may/25/federal-building-oversize-courts-wastes-millions/>.

thirty-three projects completed since 2000 tallied 3.56 million square feet of “extra” space<sup>428</sup> due to the lack of courtroom sharing and overestimates of the number of judges to be appointed.<sup>429</sup> Eleanor Holmes Norton, the Democratic Representative from the District of Columbia, blamed the GSA for attending more to its users than to “the American Taxpayer,” as she argued against permissive approaches to design.<sup>430</sup> Hank Johnson, her colleague in the House and a Democrat representing a district in Georgia, disagreed; he convened another hearing a few months later that focused instead on the need for more and more secure federal courthouses.<sup>431</sup>

The AO and the GSA offered an interrelated defense in their shared quest for first-rate federal architecture.<sup>432</sup> The Commissioner of the GSA, Robert Peck, and the Chair of the Judicial Conference Committee on Space and Facilities, Michael Ponsor, disputed the methodology, accuracy, presentation, and conclusions of the GAO study.<sup>433</sup> They argued that, given the politics involved in the creation of new judgeships and the amount of time needed for construction, projections had been reasonable.<sup>434</sup> Further, they focused on the importance of “safe” and “adequate space” for users, so as to “ensure the effective and efficient delivery of justice.”<sup>435</sup>

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428. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-753T, FEDERAL COURTHOUSE CONSTRUCTION: PRELIMINARY RESULTS SHOW BETTER PLANNING, OVERSIGHT, AND COURTROOM SHARING COULD HELP CONTROL FUTURE COSTS 6 (2010) [hereinafter 2010 COURTHOUSE CONSTRUCTION REPORT]. The report noted that twenty-seven of the thirty-three courts analyzed exceeded “their congressionally authorized size” and fifteen did so by ten or more percent. *Id.* at 8–9 (also noting that six were smaller than authorized).

The buildings that the GAO considered included the Eagleton Courthouse in St. Louis, where the GAO reported that “the building common and other space . . . is 77 percent larger than planned, and the courthouse has an efficiency of 56 percent.” *Id.* at 14. That building had “two empty elevator shafts,” not in use. *Id.* The GAO also noted that the Eastern District of Missouri, where that courthouse was situated, had 3182 filings in 1994 and had 3241 filings in 2008. *Id.* at 20.

429. *Id.* at 18 fig.4. Specifically, the GAO estimated that some 946,000 square feet of extra space was attributable to the failure to adopt a courtroom-sharing policy, while an additional 887,000 square feet was attributable to judicial overestimates of authorized judgeships. *Id.*

430. 2010 *Eliminating Waste and Managing Space in Fed. Courthouses*, *supra* note 11, at 58–62 (statement of Hon. Eleanor Holmes Norton, Chair, Subcomm. on Econ. Dev't, Pub. Bldgs., and Emergency Mgmt.); *see also* Cella, *supra* note 427 (quoting Norton).

431. *See* 2010 *Courtroom Use: Access to Justice*, *supra* note 11.

432. *Id.* at 29–43 (statement of Judge Michael A. Ponsor, Chair, Comm. on Space and Facilities); *id.* at 44–49 (statement of Robert A. Peck, Comm'r, Pub. Bldgs. Serv., U.S. Gen. Servs. Admin.); 2010 *Eliminating Waste and Managing Space in Fed. Courthouses*, *supra* note 11, at 116 (statement of Robert A. Peck, Comm'r, Pub. Bldgs. Serv., U.S. Gen. Servs. Admin.); *id.* at 123 (statement of Judge Michael A. Ponsor, Chair, Judicial Conference of the U.S. Comm. on Space and Facilities).

433. *See* *Judiciary Counters GAO's Courthouse Assessment*, THIRD BRANCH, June 2010, at 1, 1–2.

434. 2010 *Eliminating Waste and Managing Space in Fed. Courthouses*, *supra* note 11, at 117 (statement of Robert A. Peck, Comm'r, Pub. Bldgs. Serv., U.S. Gen. Servs. Admin.); *id.* at 123 (statement of Judge Michael A. Ponsor, Chair, Judicial Conference of the U.S. Comm. on Space and Facilities).

435. *Participants in Judicial Process Entitled to Safe Facility with Adequate Space*,



In the fall of 2010, the judiciary put into its 2011 fiscal funding request to Congress a “special plea for inclusion of \$92 million for the Los Angeles courthouse project,” its “top space priority” that was “much-needed” for “one of the busiest courts in the country.”<sup>436</sup>

When introducing this Lecture, I pointed to a tension between the reluctance of Chief Justice Rehnquist in his jurisprudence and speeches to license federal court power and the expansion, during his tenure, of federal administrative power measured in terms of staff, research, rule making, and courthouses. One explanation of that divergence comes from an understanding of how differently situated within the court infrastructure Rehnquist was as compared to Chief Justice Taft. Even as Taft campaigned for a standing judicial conference, he enjoyed the freedom of being unencumbered by other judges with bureaucratic authority, and he was relatively free to pursue his own agendas. In contrast, Rehnquist sat at the pinnacle of a structure that enabled a variety of jurists and administrators leadership roles by which to affect “the judiciary’s” goals. Scholars of Rehnquist describe him as a delegator, moving business rapidly and promoting larger roles for various committees, the members of which he appointed.<sup>437</sup> As some lower court judges have argued, while Rehnquist was supportive of their efforts, it was they who labored (with love) for various districts to obtain funds for—and to make special—the courthouses they succeeded in planning.<sup>438</sup>

Underscoring the role played by lower court judges in pressing for expanded facilities serves also as a reminder of the jurisprudential divisions within “the federal courts.” As Vicki Jackson has pointed out, during the Rehnquist Chief Justiceship, the Court overturned rulings by lower court judges who had welcomed claimants and shaped remedies in response.<sup>439</sup> Many lower court judges—including some who were spearheading building projects—had both an acute understanding of the needs of litigants and a more robust conception of federal court authority than did Rehnquist. Their efforts at building mirrored their jurisprudential commitments to adjudication as an important public act, and to courts as service providers. Some members of the Supreme Court shared that approach. Justice Stevens’ majority opinion in *Tennessee v. Lane* made the point about courts being

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THIRD BRANCH, Oct. 2010, at 1, 5 (quoting the Hon. Michael Ponsor).

436. *Judiciary Makes Appeal on Fiscal Year 2011 Funding*, THIRD BRANCH, Nov. 2010, at 2, 3.

437. Wheeler, *supra* note 24, at 117–18. Wheeler also noted that many appointed were also named judges when the Republican Party was in charge. Wheeler argued the utility of such appointments from a pragmatic political point of view, as the committees’ tasks were often to seek resources from Congress. *Id.*

438. An example of the details provided by judges of special needs comes from *2010 Courtroom Use: Access to Justice*, *supra* note 11, at 49–53 (statement of Robert James Conrad, Jr., Chief U.S. District J., W.D.N.C.) (discussing the facilities of the U.S. District Court for the Western District of North Carolina, housed with various other federal offices in a building originally constructed in 1915 to house the Charlotte Post Office, and the problems of crowded facilities and poor security); Tjoflat 2010 Letter, *supra* note 417, at 4; see also *Participants in Judicial Process Entitled to Safe Facility with Adequate Space*, *supra* note 435, at 2.

439. See Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2452–55 (1998).

available in the context of individuals with disabilities.<sup>440</sup> Justice Breyer's comment about the goals for the Boston Courthouse made a parallel claim:

A court, unlike a government agency, deals not with the public en masse but with the individual citizen who appears before it. . . . In this modern age, when people fear government's dehumanizing tendencies, it is particularly important to emphasize that the judicial branch of government treats each citizen before it not as a member of a group but as a separate human being with a right to call upon the court's considerable resources to resolve his or her specific dispute with whatever effort that may take.<sup>441</sup>

Chief Justice Rehnquist chaired the Judicial Conference and, working with AO Director Ralph Meacham, created committees that forwarded some of his interest in limiting access to the federal courts (such as the charter to an ad hoc committee examining the Violence Against Women Act). But Rehnquist was also a part of a bureaucracy able to generate agendas. Judges from around the country sought his support for building improvements. Widespread concerns stemming from nonsecure federal facilities and the demands of the criminal docket, coupled with politicians open to constituent desires for local federal buildings, garnered funds for construction—even as individual judges bore the brunt of heated attacks, nominations and new judgeship lines were held up by partisan strategic interaction, and litigation was decried as a field day for unscrupulous trial lawyers.

Thus, just as it is important to disaggregate the judiciary when identifying administrative agendas and jurisprudential approaches, it is also important to disaggregate the different kinds of political successes judges have been able to achieve. To the ongoing frustration of the judiciary's leadership, support for buildings has not been complemented by raises in pay. Throughout the twentieth century, federal judges repeatedly complained that their remuneration was too low. Focusing on the same thirty years that spawned the remarkable tripling of its facilities, judges' "real" dollar income declined.<sup>442</sup> By the early part of the twenty-first century, a special commission chaired by Paul Volcker, the former head of the Federal Reserve, documented the economic loss in judicial pay.<sup>443</sup> Yet numerous appeals by Chief Justice Rehnquist<sup>444</sup> were not successful, as Congress repeatedly refused to provide raises and sometimes withheld cost-of-living increases.

At the end of Chief Justice Rehnquist's tenure, life-tenured appellate judges earned about \$170,000 a year and district judges about \$160,000 a year.<sup>445</sup> While

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440. *Tennessee v. Lane*, 541 U.S. 509, 533 (2004); *see also supra* notes 371–78.

441. Breyer, *supra* note 288, at 11; *see also* Woodlock, *Drawing Meaning*, *supra* note 288, at 155–57.

442. NAT'L COMM'N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 23 (2003). Federal judicial salaries lost 24% of their purchasing power between 1969 and 2003. *Id.* at 22.

443. *Id.* at v.

444. *See* AO ANN. REP. 2 (2002); AO ANN. REP. 6 (2003).

445. In 2005, federal appellate judges earned \$171,800, and district court judges earned \$162,100. *Judicial Salaries: U.S. Court of Appeals Judges*, FED. JUD. CENTER,

better compensated than many state judges, federal judges saw their former law clerks, hired as associates by law firms, making more money. To capture the problem, the judiciary switched its nomenclature from seeking “pay raises” to pressing for “salary restoration.”<sup>446</sup>

Following in Chief Justice Rehnquist’s footsteps, in January of 2006, Chief Justice Roberts devoted a good part of his first year-end annual address to buildings and salaries. He complained that escalating rents for courthouses were a “drain” on judicial resources, needed for other activities “for the courts to fulfill their vital mission.”<sup>447</sup> Chief Justice Roberts’s second year-end address was devoted entirely to “the failure to raise judicial pay.”<sup>448</sup> Chief Justice Roberts argued that the payment levels “threaten[ed] to undermine the strength and independence of the federal judiciary.”<sup>449</sup> The following year, Chief Justice Roberts committed to continuing “Chief Justice Rehnquist’s twenty-year pursuit of equitable salaries for federal judges.”<sup>450</sup> Yet, by 2010, as the country became focused on debt and fiscal

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[http://www.fjc.gov/history/home.nsf/page/js\\_2.html](http://www.fjc.gov/history/home.nsf/page/js_2.html); *Judicial Salaries: U.S. District Court Judges*, FED. JUD. CENTER, [http://www.fjc.gov/history/home.nsf/page/js\\_3.html](http://www.fjc.gov/history/home.nsf/page/js_3.html).

446. AO ANN. REP. 4–5 (2007).

447. JOHN ROBERTS, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2006).

448. JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1–3 (2007) (discussing that federal district judges are now paid “about half” of what deans and senior law professors make (emphasis omitted)).

449. *Id.* at 1; see also *Federal Judicial Compensation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 7, 66 (2007), available at <http://judiciary.house.gov/hearings/printers/110th/34757.pdf> (testimony of Supreme Court Justices Stephen Breyer and Samuel Alito). See generally James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1 (2008).

Parallel concerns came from state courts. In 2008 the chief judge of the New York state system filed a lawsuit against the Speaker of the New York State Assembly and the governor; the lawsuit argued that the failure to raise judges’ salaries since 1999 constituted a violation of separation of powers. A motion to dismiss was denied. *Maron v. Silver*, 925 N.E.2d 899 (N.Y. 2010). In December of 2010, the New York State Legislature passed a bill establishing an independent commission with authority to set judicial salaries, a move expected to result in increased pay. William Glaberson, *Judges May Get First Raises in Years After Legislature Backs Panel to Set Their Pay*, N.Y. TIMES, Dec. 1, 2010, at A27.

450. JOHN ROBERTS, 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2008). That speech focused on the importance of judicial integrity (and the new procedures for bringing complaints against federal judges) and on interbranch communications. *Id.* The 2008 report addressed how the “dedicated men and women in the Judiciary” were seeking to “control the costs of administering justice.” JOHN ROBERTS, 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2009). Examples included limits on growth in space and in personnel, technological efficiency, and limiting the budget of the Supreme Court itself, whose building was also under renovation. Further, although he was “tired of saying it,” he again made the “plea” for better compensation. *Id.* at 7. In January of 2009, the chief justice limited his report to a page, focusing on “what is essential: The courts are operating soundly.” JOHN ROBERTS, 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2010). Linda Greenhouse reported that this decision to be largely silent was, as the chief justice himself noted, a break with the tradition begun in 1970 by Chief Justice Warren Burger. Linda Greenhouse, *Calling John Roberts*, N.Y. TIMES OPINIONATOR (Oct. 21, 2010, 9:44 PM), <http://opinionator.blogs.nytimes.com/2010/10/21/calling-john-roberts/>.

austerity became the byword, Chief Justice Roberts reported instead on how the judiciary could, through strategic planning, join in searching for cost savings and efficiency.<sup>451</sup> But the concerns about judicial budgets needs to be put into the context of the budgetary successes achieved. Even with economic retrenchment, the federal judiciary has over the last decade expanded and maintained its budgetary allocations.

The judiciary's capacity to obtain additional resources during the past three decades could be read as a remarkable victory for the judiciary, which developed the political acumen to obtain funds on many fronts. Alternatively, one could look at the interbranch disputes detailed above as more bureaucratic than ideological. While agency turf battles laced the decades, Congress and the executive have repeatedly equipped the federal court system and instantiated the national identity through court facilities.

The history I have traced thus provides a counternarrative to the doctrinal focus on constitutional interpretations, such as the Commerce Clause and Eleventh and Fourteenth Amendments decisions sketched above, in which the Court overrides Congress. This context puts those debates at the margin of the larger agreement to vest enormous authority and resources in federal courts. As one long-time observer and former chief judge of a circuit explained, in "the end, . . . the authorization for courthouse construction has been the product of compromises between the Judiciary, GSA, and Congress, salted with considerable amounts of lobbying (of Congress) by the judges and others in the local community."<sup>452</sup>

## VI. JUDICIAL POWERS: INDIVIDUAL AND INSTITUTIONAL, FEDERAL AND STATE

### *A. The Complex Legacies of Taft, Warren, and Rehnquist: Large Images and Small Volume*

The history that I have excavated makes plain that, as the national government gained resources and ambitions, Congress repeatedly authorized buildings to serve as icons of federal authority. What has changed—but only in the last century—is the function of the buildings designated for that symbolism. Custom Houses and the U.S. Post Offices once provided the "federal presence," as illustrated by the 1861 U.S. Custom House in Galveston, Texas, shown in figure 32.

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451. JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2–6 (2011). In addition, the chief justice called for Congress to fill vacancies. *Id.* at 7; *see also* Greenhouse, *supra* note 450.

452. Tjoflat 2010 Letter, *supra* note 417, at 5–6.



**Figure 32:** *United States Custom House, Galveston, Texas. Supervising Architect: Ammi B. Young, 1861; converted for use as a federal courthouse in 1917.*

Image reproduced courtesy of the National Archives and Records Administration.

As the national judicial power expanded under Chief Justices Taft and Warren, the cultural and political import of courts grew such that, by the Rehnquist era, the demand curve for federal adjudication seemed unrelenting and more buildings the obvious response. Given that government spending could be (and is) also devoted to prisons, border stations, and other facilities, devotees of the rule of law should take pride in the political commitment made to the federal judiciary that its jurisdiction, judges, staff, and buildings represent. Appreciation of the saliency of that investment comes in part through underscoring its disproportionality, for the federal courts are both a tiny fraction of the federal footprint and of the judicial services offered in the United States.

The inventory of federal buildings, upwards of 400,000 facilities, ranges from visitor centers and fish hatcheries to space labs.<sup>453</sup> Today's 800 federal court facilities are but a small subset, measured either by the number of facilities or their square feet. To be specific, by 2006, the GSA oversaw "40 percent of Federal workspace, adding up to over 342 million square feet" (about half owned and half leased), resulting in what the GSA describes as its supervision of the "largest office real estate portfolio in the world."<sup>454</sup>

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453. CRAIG, *supra* note 48, at 440. As of then, another 50,000 buildings were leased in the United States, and many more installations were outside the country. By 1974, "[d]irect federal public works spending . . . was about \$5 billion annually." *Id.*

454. GSA MODERNISM, *supra* note 188, at 16. By 2008, the government footprint had grown to 342 million square feet of owned or leased space, housing the more than one million federal employees. Forty-nine percent of that space was leased from the private

Similarly, however one charts the workload of the federal courts, it is dwarfed by other adjudicatory institutions now operating (thanks in part to Taft and Warren) in the shadow of the federal courts. The number of judges residing in federal courthouses is around 2000, including the constitutional Article III judiciary and the statutory magistrate and bankruptcy judges, as well as those who have taken senior status. In contrast, the federal agencies house some 5000 administrative law judges and hearing officers. State courts are the homes of more than 30,000 judges working in tens of thousands of buildings.<sup>455</sup>

Turn from the number of jurists to claimants. At the outset, I charted federal filing rates of about 325,000–350,000 civil and criminal cases over the last several years, with more than a million bankruptcy petitions.<sup>456</sup> Caseloads per district court judgeship average between 350–500 cases annually.<sup>457</sup> In contrast, each year the Social Security Administration receives more than a half-million claimants contesting benefits,<sup>458</sup> and as of 2008, the 238 immigration judges averaged more than 1200 cases each year.<sup>459</sup>

Consider the volume of evidentiary hearings by comparing a snapshot from 2001. In that year, some 100,000 evidentiary proceedings—in which district, magistrate, or bankruptcy judges received testimony of any kind (on motions as well as trials)—took place before federal judges sitting inside the hundreds of federal courthouses around the United States.<sup>460</sup> In contrast, an estimated 700,000 evidentiary proceedings took place in the four federal agencies with the higher volume of adjudication.<sup>461</sup>

Yet all of the federal adjudication—in courts and in agencies—is but a small fraction of activities in the state courts, as shown at the outset in figure 6, where the almost forty million cases filed in state courts in 2001 towered over the federal

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sector. WELLBORN, *supra* note 189, at 1–2.

455. NAT'L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 37 (2010).

456. In 2010, bankruptcy petitions rose to almost 1.6 million. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 292 tbl.F (2011).

457. As of 2010, weighted filings were on average 490 per judge, of which 372 were civil filings. *See id.* at 26–28.

458. *See* SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN tbl.2.F8 (2010), available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2010/2f8-2f11.html>.

459. Marcia Coyle, *Immigration Judges Seek Article I Status; Driving Force Behind Movement to Get Out from Under DOJ Is the Need to Ensure Independent Decision-Making*, NAT'L L.J., Aug. 10, 2009, at 13; *see also* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

460. The sources for this calculation are detailed in Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004) [hereinafter Resnik, *Migrating*]; *see also* Natalie Ram & Bertrall Ross, *Analyzing Federal Administrative Adjudication* (June 6, 2006) (unpublished paper) (on file with author).

461. Resnik, *Migrating*, *supra* note 460, at 800 fig.2. Those agencies were the Social Security Administration, the Veterans Administration, the Equal Employment Opportunity Commission, and the Immigration Court. For details of these data, *see id.* at 798–811.

filings, bankruptcy included. State court chief justices and administrators report acute problems dealing with this volume.<sup>462</sup> California alone has more than 450 buildings with trial facilities,<sup>463</sup> and 4.3 million people were tallied in 2009 as pursuing their rights in those courts without lawyers.<sup>464</sup> That state's Supreme Court handles about 10,000 cases yearly, and justices consider about 250 matters each week.<sup>465</sup> In New York, 2.3 million litigants appeared in 2010 without a lawyer; that number includes almost all tenants facing evictions, most consumer credit debtors, and 95% of parents in child support matters.<sup>466</sup> As of 2009, some 42,000 people were entering Massachusetts's courts daily, as budgets necessitated staff cuts of about 10%.<sup>467</sup>

Keeping their doors open is a problem for state courts. In New Hampshire in 2009, civil jury trials were suspended because of a lack of funds. In Maine, clerks' offices closed at noon on Wednesdays because of costs. In 2009, Margaret Marshall, then-chief justice of the Massachusetts courts system, warned that state courts were at risk; like other important institutions, they were not "too big to fail" and hence also needed federal support as did other industries and infrastructure services.<sup>468</sup>

Placing federal courthouse construction in the contexts of other national construction and of other sites of adjudication opens up different ways to reason about the political decisions to feature federal courthouses as the nation's signature structures. A first is appreciation of how the confluence of twentieth-century activities, in which Taft, Warren, and Rehnquist were central, succeeded in inscribing the idea of federal law and adjudication as foundational to national

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462. See Am. Judicature Soc'y, Editorial, *An Impending Crisis in State Court Funding*, 92 JUDICATURE 52 (2008).

463. See Ray McDevitt, *Introduction to COURTHOUSES OF CALIFORNIA: AN ILLUSTRATED HISTORY*, at xvii (Ray McDevitt ed., 2001).

464. This information comes from materials submitted in support of the provision of legal services to some indigent civil litigants. See *infra* note 549 and accompanying text. See Assemb. B. No. 590, 2009–2010 Reg. Sess. (Cal. 2009). See generally 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).

465. Brief for California Attorneys for Criminal Justice & the California Academy of Appellate Lawyers as Amici Curiae in Support of Respondent at 3, *Harrington v. Richter*, 131 S. Ct. 770 (2011) (No. 09-587); see also *Harrington*, 131 S. Ct. at 784.

466. JONATHAN LIPPMAN, STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 4 (2011), available at <http://www.courts.state.ny.us/CTAPPS/news/SOJ-2011.pdf>; see also S. Res. 6368, Assemb. Res. 1621, 2010 Assemb., Reg. Sess. (N.Y. 2010) (applauding the Chief Judge's efforts and requesting annual reports of findings, work, and recommendations of the Task Force to Expand Access to Civil Legal Services in New York).

467. Margaret H. Marshall, Chief Justice, Supreme Judicial Court, Commonwealth of Mass., Testimony Before Joint Committee on Ways and Means 1–2 (Mar. 1, 2010), available at <http://www.mass.gov/courts/fy2011-marshall-testimony.pdf>. That number did not include staff or jurors. *Id.*

468. See Margaret H. Marshall, Chief Justice, Supreme Judicial Court, Commonwealth of Mass., The Benjamin N. Cardozo Lecture, New York City Bar Ass'n, At the Tipping Point: State Courts and the Balance of Power (Nov. 10, 2009), available at [http://www.abcnyc.org/pdf/Cardozo\\_post\\_final.pdf](http://www.abcnyc.org/pdf/Cardozo_post_final.pdf).

identity and well-being.<sup>469</sup> New and renovated courthouses thus demonstrated the prestige and power of the federal judiciary, richer on various measures (fewer cases, more staff, larger facilities, and often better salaries and pensions) than its state counterparts. The federal government's presence is marked by courthouse buildings—rather than legislative offices in each district or executive agency facilities for services such as social security. The decision to build on a large scale pays tribute to the peculiar contours of courts, which serve as the local outposts of the one branch of the federal government that is required to respond to all individuals who file claims.

Spectacular buildings were facilitated by congressional earmarking of certain funds for specific projects. Court construction helped to enhance the stature of members in Congress in their home districts, and appreciation for this instrumental facet of courthouse construction helps to solve the puzzle about why, as noted, the federal government has been willing to support buildings while judicial salaries declined in “real” dollar value as the buildings rose. Building contracts bring work to an area and, in an era of naming federal buildings after politicians, recognition to the individuals responsible for securing those contracts. West Virginia has more than one “Robert C. Byrd Federal Building & U.S. Courthouse,”<sup>470</sup> and the relatively small state of Arkansas, with a population of 2.91 million, has eight federal courthouses.<sup>471</sup>

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469. As architects involved in courthouse construction put it, federal courthouses provided “[v]isible expression of this third branch of government as separate from the legislative and executive branches.” Jordan Gruzen, Cathy Daskalakis & Peter Krasnow, *The Geometry of a Courthouse Design*, in CELEBRATING THE COURTHOUSE, *supra* note 206, at 83, 83; *see also* GEYH, *supra* note 15.

470. *West Virginia Federal Buildings*, U.S. GEN. SERVS. ADMIN., <http://www.gsa.gov/portal/content/105014> (listing Robert C. Byrd Federal Building & U.S. Courthouses in both Beckley and Charleston, West Virginia). The Beckley facility opened in 1999. *Robert C. Byrd United States Courthouse and Federal Building*, ROBERT A.M. STERN ARCHITECTS, <http://www.ramsa.com/project.aspx?id=17>. The Charleston facility opened in 1998. George Hohmann, *Byrd Gave Resources to His State Until the End; Every Region of W. Va. Was Aided by Funds that the Senator Had Secured*, CHARLESTON DAILY MAIL, June 29, 2010, at P6A.

471. The population of Arkansas in 2010 was 2,915,918. *State & Country Quick Facts: Arkansas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/05000.html>. Arkansas's federal courthouses are located at (1) the U.S. Post Office and Courthouse in El Dorado; (2) the John Paul Hammerschmidt Federal Building in Fayetteville; (3) the Judge Isaac C. Parker Federal Building in Fort Smith (built in 1937, and formerly known as the Fort Smith U.S. Post Office and Courthouse, *Judge Isaac C. Parker Federal Building and Courthouse*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/101661>); (4) the U.S. Post Office and Courthouse in Hot Springs; (5) the Federal Building in Jonesboro; (6) the Richard Sheppard Arnold U.S. Courthouse in Little Rock (originally built in 1881 and formerly known as the Little Rock Old Post Office and Courthouse, *Little Rock Old Post Office and Courthouse*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/101142>); (7) the George Howard, Jr. Federal Building and U.S. Courthouse in Pine Bluff (built in 1966 and recently renamed in honor of the late U.S. District Judge George Howard Jr., the first African American to serve as a federal judge in Arkansas and to serve as a justice on the Arkansas Supreme Court, *George Howard, Jr. Federal Building and U.S. Courthouse*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/101746>); and



But because other federal buildings can also be a source of revenue for localities, more than the political economy of members of Congress is needed to explain why federal courthouses became the designer buildings of the federal government during the Rehnquist era. The cultural capital of adjudication was reflected and shaped by the three chief justices on which I have focused, who deployed remarkable administrative, strategic, and pragmatic skills as they contributed to building the identity of the federal courts, even as the three did not share views about why and how lower court judges should be deployed. And, of course, Taft, Warren, and Rehnquist were each the beneficiaries of their own eras, for their aspirations intersected with a confluence of political, economic, and social trends that helped these men entrench their visions.<sup>472</sup>

William Howard Taft's "temple," disdained by some of his Supreme Court colleagues for its "chilly opulence" and its bombastic pretensions,<sup>473</sup> has come to provide a national icon, supporting what psychologists might call a "schema," marking the centrality of the federal courts to the country's function. Despite what architectural critic Paul Spencer Byard explained to have been Cass Gilbert's problem—"that modernists were on to something very important . . . that the world had had enough of pomp and papering over"<sup>474</sup>—the building soon became "officially old" and admired.<sup>475</sup> Although the Supreme Court itself sits to hear oral arguments but a few days a month for only some months of the year, its building is a major tourist destination. Before 9/11, more than 850,000 visitors came each year; by 2007, the number was at about 300,000 plus more than twelve million hits to its internet site.<sup>476</sup>

Taft's brilliance helped to turn the Court into the object of national attention. Before the 1920s, the Supreme Court, like state courts, dealt with a large number of appeals. Through obtaining license from Congress for the Court to pick its cases, the Court was able to distinguish itself from these other appellate review bodies. Once the Court gained control over case selection, it also gained the ability to complete the work it set out to do. By Warren's time, the Court rarely held cases over for another term; Burger and then Rehnquist solidified that practice by insisting that all opinions be filed before the Court recessed for the summer. Thus the Court continues to perform its own competence; it is the one branch of the

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(8) the U.S. Courthouse and Post Office Building in Texarkana. *See generally* *Court Locator*, U.S. COURTS, [http://www.uscourts.gov/court\\_locator/CourtLocatorSearch.aspx?city&zip&state=AR](http://www.uscourts.gov/court_locator/CourtLocatorSearch.aspx?city&zip&state=AR) (listing federal court facilities by state).

472. *See generally* Bruce Ackerman, *The Living Constitution, Lecture Two: The Civil Rights Revolution*, 120 HARV. L. REV. 1737, 1757–93 (2007).

473. Geoffrey Blodgett, *The Politics of Public Architecture*, in CASS GILBERT, *LIFE AND WORK: ARCHITECT OF THE PUBLIC DOMAIN* 62, 72 (Barbara S. Christen & Steven Flanders eds., 2001).

474. Paul Spencer Byard, *Representing American Justice: The United States Supreme Court*, in CASS GILBERT, *LIFE AND WORK: ARCHITECT OF THE PUBLIC DOMAIN*, *supra* note 473, at 272, 283.

475. *Id.* at 287.

476. *Financial Services and General Government Appropriations for 2008: Hearings Before the Subcomm. on Fin. Servs. and Gen. Gov't of the H. Comm. on Appropriations*, 110th Cong. 18 (2007) (statement of Justice Anthony Kennedy).

federal government in which individuals or entities petitioning for a response are guaranteed answers (usually certiorari denied) every time a response is requested.

The Court's power to pick and decide cases makes it attractively functional and has permitted it—and others—to identify its workload as uniquely “important.” As that impression took root, so did the cultural capital of the federal courts. Illustrative is the phrase, “don't make a federal case” out of it, which entered the lexicon in the 1940s and 1950s as an admonishment not to turn a minor injury into a major affront<sup>477</sup> and as evidence of the aura ascribed to the federal courts more generally.

Earl Warren's aspirations for using the Supreme Court portals—and the doors of the lower federal courts—to respond to claims of injustice solidified an understanding of the centrality of federal adjudication, even as some objected to the remedies imposed. The Warren Court has been accused of being “lawless” as well as praised for providing a “sorely needed moral dimension to American government,”<sup>478</sup> and for the solicitude paid to the roles of states.<sup>479</sup> But whether seen as invasive or temperate, the Warren Court's insistence on speaking to the questions of segregation, voters' rights, criminal defendants, and the scope of the First Amendment shaped an appreciation for the role federal courts can play.<sup>480</sup>

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477. One commentator located that phrase in comic exchanges of the 1940s. See Barry Popik, “*Make a Federal Case (Out of It)*,” BARRYPOPIK.COM (Dec. 28, 2008), [http://www.barrypopik.com/index.php/new\\_york\\_city/entry/make\\_a\\_federal\\_case\\_out\\_of\\_it/](http://www.barrypopik.com/index.php/new_york_city/entry/make_a_federal_case_out_of_it/). Thanks to Fred Shapiro for pointing me to this source. Others have dated it from 1950. A review of decisions reported in commercial databases identified the phrase in opinions as of the 1960s. For example, a judge in Florida commented that a “person who suffers a major upset over a minor grievance is admonished not to ‘make a federal case out of it.’” See *Reynolds v. State*, 224 So. 2d 769, 769 (Fla. Dist. Ct. App. 1969) (upholding a prisoner's claim of access to Florida's post-conviction process to review a conviction allegedly obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963)); see also Resnik, *Trial as Error*, *supra* note 319, at 972–82 (discussing the ways in which the federal judicial leadership sought to shape identity through distinctions that elaborated the importance of federal, as contrasted with state, cases).

478. Vince Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 621 (1970). Blasi saw the Court's contribution as providing inspiration to young lawyers about what their work could achieve. See *id.* at 621–23.

479. See, e.g., Vicki C. Jackson, *The Early Hours of the Post-World War II Model of Constitutional Federalism: The Warren Court and the World*, in EARL WARREN AND THE WARREN COURT, *supra* note 22, at 137, 181–82.

480. Earl Warren's tenure as chief spokesperson entails more complexity, for his was also the era when the Judicial Conference first articulated opposition to congressional jurisdictional grants. See Resnik, *Trial as Error*, *supra* note 319, at 976–80. For example, in 1954, the Conference reviewed a proposal to put unfair labor practice cases directly into federal courts. See JUDICIAL CONFERENCE REPORT 8 (Sept. 1959). That proposal was met with the comment that to do so would overburden the federal docket by enlarging “the jurisdiction of the district courts to embrace litigation of controversies of a type and character which the district courts are not organized or equipped to adjudicate and for which there appears [to be] no historical precedent.” *Id.* at 8; see also Resnik, *Trial as Error*, *supra* note 319, at 976–77. That position pioneered several other instances in which the Conference objected to legislative expansion of its jurisdiction. But the Conference's responses varied depending on the proposed legislation. For example, in the 1960s, when Congress proposed

While no construction campaign is associated with Warren, his hallmark is the figurative opening of the legal doors of the federal courts.<sup>481</sup>

A biographer of Warren credits him with shaping exchanges at the Supreme Court's weekly case conferences to engender efficient discussions.<sup>482</sup> Rehnquist is well known for his style of court management, described as limiting discussion to complete the docket on schedule. Yet Rehnquist ought also to be understood as having opened courthouse doors, in the literal sense. Even when skeptical of, if not hostile to, the reach of federal court authority, Rehnquist supported those with whom he worked in securing the significant physical presence of the courts.

Morton Horowitz has described the great contribution of the Warren Court as rediscovering the "inseparable connection between political culture and political equality," and thereby "transforming the cultural premises of American liberalism."<sup>483</sup> As has become clear in the last decade, the infusion of the country with constitutional awareness cannot be equated with liberalism, for "constitutional conservatism" has come to the fore.<sup>484</sup> Whether seeking progressive or conservative policies, popular discourse is replete with the connection between courts, the Constitution, and the polity.<sup>485</sup> From across the political spectrum, advocates embrace constitutionalism, and that discourse has prompted many constitutional scholars to seek to understand the nature of the "faith," "loyalty," and "fidelity" inspired.<sup>486</sup>

What I turn to below is how the Warren Court—and the social movements that produced it—transformed not only the political imagination of the polity but also the "cultural premises" of what a court itself entails. Many features of adjudication, assumed today to be intrinsic facets of courts, have been relatively recently acquired.

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new civil rights legislation, the Judicial Conference deferred to Congress, for such "questions of policy" were for Congress to decide. Resnik, *Trial as Error*, *supra* note 319, at 978 & nn.211–12 (citing 1964 archival records of the Judicial Conference). A similar discussion accompanied questions about many other topics, such as the jurisdictional authority of a proposed Court of Veterans' Appeal, also described as "public policy . . . [for] Congress to decide." JUDICIAL CONFERENCE REPORT 73 (Sept. 1963).

481. See Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

482. See SCHWARTZ, *supra* note 194, at 142–50.

483. Morton J. Horowitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 456 (1988).

484. Lincoln Caplan, *Exploring the Meaning of 'Constitutional Conservatism'*, N.Y. TIMES, Dec. 2, 2010, at A36; see also REPUBLICANS IN CONG., A PLEDGE TO AMERICA: A NEW GOVERNING AGENDA BUILT ON THE PRIORITIES OF OUR NATION, THE PRINCIPLES WE STAND FOR & AMERICA'S FOUNDING VALUES 33 (2010), available at <http://pledge.gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf>; SARAH PALIN, AMERICA BY HEART: REFLECTIONS ON FAMILY, FAITH, AND FLAG 259 (2010).

485. See, e.g., Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

486. See Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

*B. Revitalizing Public Spaces: Adjudication's Democratic Possibilities*

Having focused on the grandeur of some new courthouses, I turn to reflect on the monumentality of the idea that they have come to stand for: that all can be rights holders. Public and open courts—to which all persons have access to bring claims before independent judges—represent a great and a recent understanding of the meaning of sovereignty in democratic governments.<sup>487</sup>

Women and men of all colors only gained full juridical voice in the last century. The radical reconception of all persons as rights holders has driven up the volume of disputes. Potential defendants are likewise repositioned, as private stakeholders and governments are reconceived as subject to litigation to hold them to their promises—in contracts, statutes, regulations, and constitutional or transnational conventions of human equality and dignity. The result has been an avalanche of claims, ranging from veterans seeking benefits within administrative tribunals to victims of crimes against humanity seeking acknowledgment in domestic as well as in international courts for wrongdoing of horrific dimensions. What is often underappreciated is the degree to which those filings represent private as well as public investments in law production by courts. Litigants invest resources by employing attorneys and thereby turn courts into lively sources of law production.<sup>488</sup>

Federal courthouse buildings—even if now underutilized—could be seen as pledges to maintain what can be conceived as the four pillars (again borrowing building metaphors) of modern adjudication—-independent judges, public courts, fairness in procedural opportunities, and equal access for all. Open courts are not only a product *of* democracy, they also make significant contributions *to* democracy—providing lessons about citizen access and about government obligations of fair treatment, made plain when judges must publicly explain their exercise of power.<sup>489</sup>

Courts can themselves be a site of democratic practices. Public courts are one of many venues to understand, as well as to contest, societal norms. Courts model the democratic precepts of equal treatment and subject the state itself to democratic constraints. The obligations of judges to protect disputants' rights and the requirements imposed on litigants (the government included) to treat their opponents as equals are democratic practices of reciprocal respect. By imposing processes that dignify individuals as equals before the law, litigation either makes good on democracy's promises or reveals failures to conform to those ideological precepts.

Moreover, rights of audience divest the litigants and the government of exclusive control over conflicts and their resolution. Empowered, participatory audiences can therefore see and then debate what legal parameters ought to govern.

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487. See Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. 1 (2011).

488. See Gillian K. Hadfield, *The Levers of Legal Design: Institutional Determinants of the Quality of Law*, 36 J. COMP. ECON. 43 (2008).

489. This argument is elaborated in RESNIK & CURTIS, REPRESENTING JUSTICE, *supra* note 236, at 288–305.

Open court proceedings enable people to watch, debate, develop, and contest the exercise of both public and private power.

But the idea of courts as vibrant contributors to public debates needs to be tempered by the data on their underutilization. Above, I focused on flattening federal filings, stemming from a mix of new doctrinal and procedural barriers, undue expense, and preferences or pressures for other forms of dispute resolution.<sup>490</sup> In a similar vein, obtaining a robust audience for courts also requires structural attention. Despite legal obligations of openness (stemming from a mix of criminal defendants' rights to a speedy and public trial and civil litigants rights to juries, the contours of the First Amendment, and principles of due process), many judges report their courtrooms to be lonely spaces. Those experiences fit analyses that, through the 1930s, courts functioned as local gathering places, but those activities have shifted to other locales, including specialized buildings for the diverse services government offers and virtual exchanges via newer technologies.<sup>491</sup>

In contrast to the popularity of media shows about courts, real judges often find themselves without an audience. Indeed, while in 2009, the Supreme Court reaffirmed the principle that when courtrooms are in use, everyone has a right to attend, it did so on facts that make the point. The Court overturned a state judge closure of a jury voir dire because the trial judge had failed to provide sufficient explanation for the blanket closure.<sup>492</sup> The state court judge had said that the courtroom could not accommodate everyone—that “42 jurors [were] coming up,” insufficient “space” existed for the public “to sit in the audience” in light of the “very small courtrooms,” and the public mingling with jurors might have become “grounds for a mistrial . . . because of a tainted jury panel.”<sup>493</sup> In contrast, the defendant argued that the four rows of seats could have held fifty-eight people; further, the dissenting jurist on the Georgia Supreme Court, which upheld the closure, noted that the trial judge could simply have seated fewer prospective jurors at a time.<sup>494</sup> The United States Supreme Court agreed that the trial judge had not sufficiently probed alternatives to court-closing. Yet “the public” that was excluded by the trial judge was, according to the Court, a “lone courtroom observer”<sup>495</sup>—a relative of the defendant.

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490. Efforts to reorganize procedure in order to be responsive to the burdens of the current system are set forth in Stephen B. Burbank & Stephen Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011).

491. See, e.g., VICTOR C. GILBERTSON, MINNESOTA COURTHOUSES, at xvi (2005).

492. *Presley v. Georgia*, 130 S. Ct. 721, 724–25 (2010).

493. *Presley v. State*, 674 S.E.2d 909, 910 (Ga. 2009) (quoting the trial court), *rev'd*, 130 S. Ct. 721 (2010).

494. *Id.* at 910; *id.* at 912 (Sears, C.J., dissenting) (“A room that is so small that it cannot accommodate the public is a room that is too small to accommodate a constitutional criminal trial.”).

495. *Presley*, 130 S. Ct. at 722. In contrast, the Georgia Supreme Court reported that no “testimony was offered at the hearing on the motion for new trial regarding how many observers were in the courtroom at the time of the trial court’s announcement regarding voir dire.” *Presley v. State*, 674 S.E.2d at 911 n.1.

The court system is not the only branch of government in need of participants. United States data on elections reflect that half or more of those eligible do not vote in many elections, even as candidates invest heavily in media to gain attention. Thus, to constitute courts as lively spaces of democratic interaction requires targeted efforts. In the nineteenth century, Jeremy Bentham, committed to “publicity” in courts, advocated for providing economic incentives for attendance.<sup>496</sup> In 2009, the Honorable Vaughn Walker, presiding over a trial about the legality of an amendment to the California Constitution prohibiting same-sex marriage, suggested permitting broadcasts to other courthouses to which interested members of the public could go.<sup>497</sup> Rather than have documentation of underutilization of federal courthouses serve as a justification for cutting back construction, that information should be used as a sign of the need to revitalize the spaces. To do so requires finding ways to bring litigants in and making what transpires there available to a broad audience.

### C. *The Fragility of Stone*

In the decades since the Warren Court, many of its precedents have been dismantled. The Warren Court’s case law may appear, on first glance, to be more vulnerable than the buildings associated with Taft and Rehnquist. But the history of the federal building projects that I have mapped ought to serve as a warning against too ready an assumption of the invulnerability of the material accomplishments of all three chief justices.

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496. JEREMY BENTHAM, *Constitutional Code*, in 9 THE WORKS OF JEREMY BENTHAM 27, 489–94, 535–56 (John Bowring ed., Edinburgh, William Tait 1843); see also FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE 153–55 (1983); PHILIP SCHOFIELD, UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM 310 (2006).

497. In 2009, the Ninth Circuit authorized the use of cameras in certain cases, at the discretion of the district court. A district judge relied on that provision to permit the televising to other federal courthouses of a trial addressing the legality of an amendment to California’s constitution outlawing same-sex marriage. In a five-to-four decision, however, the U.S. Supreme Court intervened to prohibit that transmission. See *Hollingsworth v. Perry*, 130 S. Ct. 705, 715 (2010) (overturning limited effort to enable broadcast to other sites because of procedural failures). Thereafter, the Judicial Conference authorized a project for some broadcasting. See Press Release, Judicial Conference of the United States, Judiciary Approves Pilot Project for Cameras in District Courts (Sept. 14, 2010), [http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary\\_Approves\\_Pilot\\_Project\\_for\\_Cameras\\_in\\_District\\_Courts.aspx](http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx). In the fall of 2011, the district court ordered that the digital recording of the trial be unsealed and released to the public, a ruling which the Ninth Circuit reversed as an abuse of discretion, on the “narrow” ground that the judge presiding at trial had, following the Supreme Court’s ruling in *Hollingsworth*, “on several occasions unequivocally promised [the parties] that the recording of the trial would be used only in chambers and not publicly broadcast.” *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012); see *Perry v. Schwarzenegger*, No. C 09-02292 JW, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011). The Ninth Circuit emphasized that it did not reach the issue of “whether the First Amendment right of public access to judicial records applies to civil proceedings.” *Perry v. Brown*, 667 F.3d at 1088.

Recall that custom houses marked the presence of the national government during the eighteenth century. Some of those elegant buildings remain, now recycled for use, including for use as courts and museums.<sup>498</sup> The post office became a dominant and highly visible mode of federal authority, offering a local presence and, during the New Deal, a site for investment in art and architecture.

More recently, however, the stability of national, subsidized postal services has been called into question. In March of 2009, press reports ran stories that the United States Postal Service was tottering.<sup>499</sup> In that year, 13,000 fewer post offices existed than had in 1951, with more closings underway.<sup>500</sup> As the system continued to lose money (with \$2.8 billion cited as the amount lost in 2008),<sup>501</sup> some commentators called for the dissolution of the Postal Service as an obsolete institution, to be replaced by the Internet and private providers.<sup>502</sup> And, of course,

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498. For example, the Alexander Hamilton U.S. Custom House at Bowling Green in downtown New York currently hosts the Smithsonian National Museum of the American Indian, a United States Bankruptcy Court, and a Department of Transportation office. *Alexander Hamilton U.S. Custom House, New York, NY*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/category/25431/actionParameter/exploreByBuilding/buildingId/644>. Following extensive restoration in the 1960s, the Custom House in New Bedford, Massachusetts “became part of the New Bedford Whaling National Historical Park in 1996.” *U.S. Custom House, New Bedford, MA*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/ext/html/site/hb/method/post/actionParameter/searchCriteriaForm/buildingId/410/category/25431>.

499. See, e.g., Randolph E. Schmid, *Postal Chief Says Post Office Running Out of Money*, HUFFINGTON POST (Mar. 25, 2009), [http://www.huffingtonpost.com/2009/03/25/post-office-funding-nee\\_n\\_179077.htm](http://www.huffingtonpost.com/2009/03/25/post-office-funding-nee_n_179077.htm) (noting that the Postal Service “stopped construction of new facilities” and “began selling unused facilities”); see also *The Financial State of the U.S. Postal Service: Hearing Before the Subcomm. on Fed. Workforce, Postal Serv., & the D.C. of the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. 15 (2009) [hereinafter *2009 Financial Stability of Post Offices Hearing*] (statement of John E. Potter, Postmaster General) (noting that “[s]ince 1988, there has been a steady erosion of First-Class Mail . . . as . . . correspondence shift[s] from the mail to electronic communications”).

500. *2009 Financial Stability of Post Offices Hearing*, *supra* note 499, at 108–10 (testimony of Dale Goff, President, National Association of Postmasters of the United States), available at <http://www.napus.org/wp-content/uploads/2010/08/325Statement.pdf>. While mail volume peaked at 213 billion pieces in 2006, it declined to 180 billion in 2009, a “staggering decline of 15 percent.” *Id.* at 48 (statement of Carolyn Gallagher, Chairman, Board of Governors, U.S. Postal Service), available at <http://about.usps.com/news/testimony/2009/pr09-bog0325.htm>.

501. See Press Release, United States Postal Service, Economy-Driven Mail Volume Decline Contributes to Postal Service \$2.8 Billion Year-End Loss (Nov. 13, 2008); see also *2009 Financial Stability of Post Offices Hearing*, *supra* note 499. The Postal Service losses have continued to mount. The Postal Service reported \$5.7 billion in losses through the first three quarters of FY 2011. Press Release, U.S. Postal Serv., U.S. Postal Service Loss Continues in Third Quarter (Aug. 5, 2011), [http://about.usps.com/news/national-releases/2011/pr11\\_094.htm](http://about.usps.com/news/national-releases/2011/pr11_094.htm).

502. Discussion of this viewpoint can be found in JOHN T. TIERNEY, *THE U.S. POSTAL SERVICE: STATUS AND PROSPECTS OF A PUBLIC ENTERPRISE* 212–18 (1988).

one can elaborate the patterns of privatization and transformation of other institutions, such as the police, prisons, libraries, and parks.<sup>503</sup>

The contemporary defense of the post office as a public institution rests on arguments that ready communication through public services binds the nation and local communities while servicing the needs of the economy.<sup>504</sup> The 1958 Postal Policy Act made such a claim: the Postal Service was “to unite more closely the American people, to promote the general welfare, and to advance the national economy.”<sup>505</sup> Yet by the 1970s, Congress had limited the cross subsidies that made the exchange of newspapers inexpensive,<sup>506</sup> thereby lessening the degree to which the public fisc subsidized a universal service facilitating wide ranging exchanges.<sup>507</sup> At the century’s turn, concerns were expressed that the Postal Service had already been transformed, favoring “junk mailers and big media over political opinion journals.”<sup>508</sup>

The question is whether the fragility of the postal services forecasts what awaits courts. Evidence of deep concern about the solvency of courts can be found throughout the state systems. As noted above, in the fall of 2009, Chief Justice Margaret Marshall of Massachusetts warned that state courts were at risk of a “slow and painful demise” unless, like other institutions also perceived to be “too big to fail,” federal assistance was to be made available.<sup>509</sup> Federal courts are, as detailed, richer but so, once, were post offices. Herein is the reminder that, while the granite and marble may remain, the purposes to which the stones are put can be changed.

#### *D. Federal Retrenchment and the Warren Court’s Revival in State Courts*

My conclusion for this Lecture comes from three interrelated artifacts of 2010, reiterating this Lecture’s interest in the judiciary’s corporate voice, its jurisprudence, its material practices, and its relationship to initiatives in the state courts. First, in the fall of 2010, an Ad Hoc Advisory Committee on Judiciary Planning proposed, and the Judicial Conference approved, a new “*Strategic Plan*”

503. See, e.g., Robert Darnton, *Google & the Future of Books*, N.Y. REV. BOOKS, Feb. 12, 2009, at 9.

504. See *The U.S. Postal Service: 101: Hearing Before the Subcomm. on Fed. Workforce, Postal Serv., & the D.C. of the H. Comm. on Oversight & Gov’t Reform*, 110th Cong. 232 (2007) (testimony of Charles W. Mapa, President, Nat’l League of Postmasters). Mapa focused on the harm to rural communities. See *id.*; see also OREN BEN-DOR, *CONSTITUTIONAL LIMITS AND THE PUBLIC SPHERE: A CRITICAL STUDY OF BENTHAM’S CONSTITUTIONALISM* 193–98, 237–38 (2000).

505. Postal Policy Act of 1958, Pub. L. No. 85-426, 72 Stat. 134, 134.

506. See Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified as amended at 39 U.S.C. (2006)).

507. See Richard R. John, *Post Office*, in 2 *ENCYCLOPEDIA OF THE NEW AMERICAN NATION: THE EMERGENCE OF THE UNITED STATES, 1754–1829*, at 575, 576 (Paul Finkelman ed., 2006); Richard B. Kielbowicz, *Preserving Universal Postal Service as a Communication Safety Net: A Policy History and Proposal*, 30 *SETON HALL LEGIS. J.* 383, 404–11 (2006).

508. Richard R. John, *Mail Matters*, *NATION*, Feb. 23, 2009, at 23, 23.

509. Marshall, *supra* note 468, at 12, 16.



for the federal judiciary.<sup>510</sup> Fifteen years earlier, the Rehnquist Judicial Conference had produced its 1995 *Long Range Plan*. The work had entailed a good deal of public discussion, an expansive committee structure, appointments across a political and professional spectrum, and the circulation of a draft report replete with data.<sup>511</sup> In contrast, the 2010 Ad Hoc Committee consisted largely of district judges,<sup>512</sup> who put forth a document without soliciting public comment in advance or attracting public attention during or after the completion of its project.<sup>513</sup>

The 144-page 1995 *Long Range Plan* had begun with a series of warnings about a possible “scenario” of a “bleak” future—that the federal courts were in “jeopardy” due to the “[h]uge burdens” placed upon them (in part because of undue “federalization”)<sup>514</sup> of caseloads spiraling out of control with the specter of more than a million cases filed annually.<sup>515</sup> Perceiving the problem to include the filing of too many federal cases and congressional interest in generating more kinds of federal claims, the *Long Range Plan* had counseled Congress against adding new causes of action to the federal docket.<sup>516</sup>

In contrast, the 2010 *Strategic Plan* is a slim, eighteen-page report that began instead by looking at how the “future may provide tremendous opportunities for improving the delivery of justice.”<sup>517</sup> Given that the federal judiciary was “noteworthy for its accessibility, timeliness, and efficiency,” the goals were to “preserve” its successes while bringing about “positive change” in the “delivery of

510. *The Judiciary’s New Strategic Plan Encourages Collaborative Approach to Issues Facing the Federal Courts*, THIRD BRANCH, Nov. 2010, at 10, 10–11. That successor document was not a “rescission of the recommendations and strategies” of the 1995 *Long Range Plan* but superseded some aspects of it as an instrument to guide future policy making. *Id.* at 10–12 (quoting Judge Charles Breyer, who chaired the Ad Hoc Advisory Committee on Judiciary Planning). The *Plan* itself, an eighteen page document, can be found at JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (2010) [hereinafter 2010 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY]. The effect on the 1995 *Long Range Plan* as not an “across-the-board rescission of the individual policies articulated” can be found in the *Plan*. *Id.* at 18.

511. See LONG RANGE PLAN, *supra* note 4, at vii, 1–3, 165–74 (describing the many committees that participated and the planning process).

512. The chair, District Judge Charles R. Breyer, was joined by ten other district judges, one district clerk, one appellate judge from the Federal Circuit, and three administrators, two of whom were circuit executives and the other the Director of the Administrative Office of the U.S. Courts. 2010 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, *supra* note 510, at Acknowledgement.

513. A review of various databases finds no mention in newspapers or legal journals of the ongoing effort. Reports of its existence come from the Judicial Conference, *see, e.g.*, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2009); from the director of the AO, in a brief mention, AO ANN. REP. 38 (2008); and, in November of 2010, from the newsletter of the federal courts, *The Judiciary’s New Strategic Plan Encourages Collaborative Approach to Issues Facing the Federal Courts*, THIRD BRANCH, Nov. 2010, at 10, 10–12.

514. LONG RANGE PLAN, *supra* note 4, at 6, 8–10, 18.

515. *Id.* at 18.

516. *Id.* at 23, 28–29 (recommendations one and six).

517. 2010 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, *supra* note 510, at 3.

justice,” “effective” resource management, interbranch relations, and public confidence.<sup>518</sup>

The 2010 *Strategic Plan* reiterated the need to “secure resources” for the judiciary to “accomplish its mission.”<sup>519</sup> The lack of new judgeships, the lack of salary raises, and the forty-dollar per day pay for jurors were noted.<sup>520</sup> The rest of the document was focused on management of judicial resources, staff and workload, morale, retention, and technology. Reflecting the anxieties of its era and responding to specific acts of violence against judges and their families, the Judicial Conference’s 2010 “Strategy 1.2” was more “protection of judges, court staff and the public at court facilities.”<sup>521</sup>

The topic entitled “Enhancing Access to the Judicial Process” is addressed largely in terms of “rules, processes and procedures” that met “the needs of lawyers and litigants.”<sup>522</sup> Commentary noted that despite the provision of “settlement conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision,” “some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging.”<sup>523</sup> Time and expense were the problems, and clearer and more flexible rules, under judicial superintendence, the answer.<sup>524</sup> The goals were to ensure that “those who participate” were treated with “dignity and respect” and provided with a process that was comprehensible.<sup>525</sup>

Public trust was also essential, and the mechanisms proposed were public education as well as commitments to high ethical standards and dissemination of decisions to the public.<sup>526</sup> The attention paid to access as part of the *Strategic Plan*’s initial discussion of equal justice translated into better case management, resources for criminal defense lawyers, and the like.<sup>527</sup> Not on the list of goals were methods to improve the ability of those not currently in the courts to make their way to them.

A second marker comes by way of turning from the judiciary’s corporate voice to its adjudication. The lack of attention in the *2010 Strategic Plan* to finding new paths to the federal courts is mirrored by decisions of the Roberts Court limiting access. A new list of cases now stand for the propositions that causes of action are

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518. *Id.* This statement followed a list of “core values”—rule of law, equal justice, judicial independence, accountability, excellence, and service. *Id.* at 2.

519. *Id.* at 7 (Strategy 1.3).

520. *Id.*

521. *Id.* at 6. The issue of security received increased attention after a federal district court judge’s husband and mother were murdered by a former litigant. The judge testified before Congress on the need to improve security for judges. *Protecting the Judiciary at Home and in the Courthouse: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6–13 (2005) (statement of Joan Humphrey Lefkow, United States District Judge, Northern District of Illinois, Chicago, Illinois).

522. 2010 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, *supra* note 510, at 12–14.

523. *Id.* at 13.

524. *Id.*

525. *Id.* at 14.

526. *Id.* at 16–17.

527. *Id.* at 5–6. “Accessibility of court processes” was detailed as part of “equal justice.” *Id.* at 2.

not to be implied from statutes, that pleadings are to be tested for “plausibility,” that state actors enjoy broad immunities from suit, that state habeas petitioners have larger hurdles to federal court review, and that the preemptive reach of the FAA is broader.<sup>528</sup> Another example of door-closing is a “small” case—in dollar terms—that has yet to garner the attention it deserves. The question, on which the circuits had split,<sup>529</sup> was how to interpret the Equal Access to Justice Act (EAJA) of 1980, providing that a “prevailing party” can recoup fees from the United States government if the government’s position was not “substantially justified.”<sup>530</sup>

Catherine Ratliff represented Social Security claimant Ruby Willow Kills Ree, who succeeded in obtaining benefits and then sought a fee award of \$2112.60, as authorized under the EAJA.<sup>531</sup> (In fiscal year 2006, the average amount paid for successful attorney’s work was \$3573.47.<sup>532</sup>) However, and at variance with practices of prior administrations, the federal government sought to have the funds paid directly to the party, Ms. Kills Ree, so as to use the litigant’s fee owed to her attorney as partial payment of her unrelated federal debt.<sup>533</sup> While the district court did so, the Eighth Circuit concluded that the statute had plainly been enacted to encourage lawyers to take cases by providing fee awards to lawyers<sup>534</sup> and therefore required the lawyer to get the \$2112 owed.<sup>535</sup>

Writing for the Court, Justice Thomas resolved the split in favor of the literal interpretation that meant that the lawyer did not receive compensation for her work.<sup>536</sup> Justice Sotomayor, joined by Justices Stevens and Ginsburg, concurred that, while the text was plain, Congress was unlikely to have intended EAJA fees to be subjected to offsets.<sup>537</sup> The concurrence explained that the government had offered “no compelling response” as to why the statute ought to be interpreted to make “it more difficult for the neediest litigants to find attorneys to represent them in cases against” the United States.<sup>538</sup>

528. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Connick v. Thompson*, 131 S. Ct. 1350 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011). See generally Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010).

529. See, e.g., *Reeves v. Astrue*, 526 F.3d 732 (11th Cir. 2008); *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007).

530. 28 U.S.C. § 2412(d)(1)(A) (2006).

531. Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2325 (codified as amended at 28 U.S.C. § 2412 (2006)); *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010).

532. Respondent’s Brief at 4, *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010) (No. 08-1322) (noting that the SSA paid 5481 awards in that year).

533. *Id.* at 1–2. The federal statute invoked by the government was one directing that each federal agency “shall try to collect” monetary claims owed to the government. 31 U.S.C. § 3711(a) (2006); see Brief for the Petitioner at 2, *Astrue v. Ratliff*, 130 S. Ct. 2521 (No. 08-1322).

534. *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), *rev’d*, 130 S. Ct. 2521 (2010).

535. *Id.* at 802.

536. *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010).

537. *Id.* at 2529–30 (Sotomayor, J., concurring).

538. *Id.* at 2532 (Sotomayor, J., concurring).

A third event of 2010 returns to the relevance of physical space. I opened this Lecture with a vista of the 1935 Supreme Court; pictures of it in 2010 provide the bookend. Then, the United States Supreme Court announced that it was closing its front door.<sup>539</sup> The Court meant that literally. In lieu of entering by way of the grand staircase on the western plaza, visitors are routed to a side entrance for weapons screening. I went to the Court soon thereafter, and that trip is recorded in Figures 33 and 34. Shown are the bollards (figure 33) protecting the steps from vehicles but permitting pedestrians to pass through. Figure 34 provides a glimpse of the small sign pointing to each side as the “entrance” to the court.



**Figure 33:** *United States Supreme Court Plaza, Washington D.C.*

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539. Press Release, Supreme Court of the United States, Supreme Court Visitor Entrance (May 3, 2010), [http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr\\_05-03-10.html](http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_05-03-10.html). The Supreme Court provides information on the building including the plaza, steps, and statues on their website. U.S. Supreme Court, *The Court Building*, <http://www.supremecourt.gov/about/courtbuilding.aspx>.



**Figure 34:** *United States Supreme Court Staircase, Washington D.C.*

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In their objection to closing the Supreme Court's main entrance, Justices Stephen Breyer and Ruth Bader Ginsburg noted that people approaching it were greeted by the words "Equal Justice Under Law," inscribed to represent "the ideal that anyone in this country may obtain meaningful justice through application to

this Court.”<sup>540</sup> Under the new rule, people can exit by using the grand steps, with those words to their backs.

The steps, like the buildings, the chief justices, and federal law are polyphonic symbols—to which multiple and sometimes contradictory meanings can attach as vantages and contexts change. The set of forty-four marble steps, metaphorically signifying the openness of courts, has also served as a marker of inaccessibility. The steps challenge those who find walking up them difficult, as the Court’s decision in *Tennessee v. Lane* discussed. Thus, these two photographs evoke both aspirations for open access and the need to rethink the format of courts to reconfigure them to make room for those previously excluded. Absent support systems—from ramps to rules, doctrine, and practices—neither courts nor their users can flourish. While the *2010 Strategic Plan* and *Astrue v. Ratliff*’s reading of the Equal Access to Justice Act case have not (yet) prompted a good deal of public discussion, closing off the Court’s steps did. News coverage was coupled with objections from more than twenty members of Congress who called on the Court to reverse course,<sup>541</sup> arguing that “even in the face of threats from enemies, it is of critical and symbolic importance that the United States demonstrates to the world that its most sacred institutions will continue to be open for business to all who seek justice.”<sup>542</sup>

That proposed resolution serves as a reminder that Congress could, were the political will available, remove various barriers. A response to underusage of federal facilities could be to find ways of enhancing access to help bring litigants back into courts.<sup>543</sup> Ready examples include revising the Court’s interpretations of

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540. *Statement Concerning the Supreme Court’s Front Entrance, Memorandum of Justice Breyer*, 2009 J. SUP. CT. U.S. 807, 831 (joined by Justice Ginsburg).

541. See H.R. Con. Res. 314, 111th Cong. (2010) (introduced by Rep. Anna Eshoo, a Democrat from California).

542. *Id.* ¶ 2.

543. When testifying at a hearing on this issue, I suggested the creation of district-by-district committees, akin to those deployed under the Civil Justice Reform Act (CJRA) of 1990. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–82 (2006)); see also JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION: REPORT OF A TASK FORCE (1989). Each chief judge of a district could be asked to appoint a committee that included a diverse set of courtroom users. Relevant participants would include lawyers from different segments of the bar (for example, the United States Attorneys’ offices, federal public defenders, and civil litigators specializing in different kinds of cases) as well as court staff, representatives from relevant administrative agencies, from state courts, and members of the public. In terms of the scope of inquiry, these local “courtroom usage committees” should consider the number and kind of courtrooms available, including appellate as well as trial level courtrooms, the degree of sharing already under way, and any unique circumstances of particular courthouses. Further, if a district sits where a federal administrative agency conducts hearings (such as proceedings before immigration judges, social security judges, and the like), consideration should be directed to whether any of those proceedings could use courtroom space, if available. *2010 Courtroom Use: Access to Justice*, *supra* note 11, at 85 (statement of Judith Resnik).

Such “courtroom usage committees” should be asked to review the circumstances of each district so as to provide proposals based on the varying needs of districts about a) how

the EAJA, the habeas statutes, and the FAA. Indeed, proposals to reverse the Court's application of the FAA to consumer and to employment arbitration have been pending for several years, and after a 2011 decision preempting state law invalidation of a clause banning class arbitrations, members of Congress proposed to do so again.<sup>544</sup> Constitutional interpretations are, of course, less easily susceptible to legislative override, but over time, social movements can erode or consolidate the import of the decisions.

While thus far, the federal courts and Congress are not pursuing efforts to lower barriers, state court jurists have come to the fore as advocates for the right to counsel for poor claimants dealing with fundamental needs, such as shelter and family relations.<sup>545</sup> Just as the federal courts were imbued with legal and cultural capital during the last century, the twenty-first century may mark the reemergence of the state courts as a fount of national legal agenda setting.<sup>546</sup> Doctrine is one area, with same-sex marriage as one of several issues bringing visibility to the state courts.<sup>547</sup> Another is the effort, nicknamed "Civil *Gideon*," to invoke Earl Warren's

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to increase courtroom usage, b) whether to share courtrooms, and if so, with what sets of adjudicators, and c) whether courtrooms could be used by relevant local federal agency adjudicators or whether state court users would be appropriate. Another model of reform that should serve as a guide comes from the history of bankruptcy courts. Before the 1980s, the bankruptcy system did not have the stature that it has gained by virtue of congressional authorization for bankruptcy judges, who moved before the public in courtrooms around the country. A similar intervention for immigration hearings could help to improve dramatically the problems that have beset those proceedings, benefitting the administration of justice and alleviating some of the burdens that these cases now impose on the appellate courts. *Id.* at 72.

544. See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).

545. See William Glaberson, *Top New York Judge Urges Greater Legal Rights for the Poor*, N.Y. TIMES, May 4, 2010, at A21; see also AM. BAR ASS'N, TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES (2006) (approved by the House of Delegates on August 7, 2006).

546. Justice Brennan famously argued that attention ought to be paid to state court adjudication, as did Justice Hans Linde. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). For more recent literature focused on these issues, see Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010).

547. See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd on other grounds sub nom.* Perry v. Brown, No. 10-16696, 2012 WL 372713 (9th Cir. Feb. 7, 2012); Perry v. Brown, 265 P.3d 499 (Cal. 2011); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State, 744 A.2d 864 (Vt. 1999); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23.

landmark decision interpreting the Sixth Amendment to require lawyers for indigent defendants facing felony convictions.<sup>548</sup>

With the support of leaders of state judiciaries on both coasts, state court justices have supported efforts to expand rights of counsel for civil litigants. Through the efforts of California's then-Chief Justice Ronald M. George and California's Judicial Council, California enacted laws—the Sargent Shriver Civil Counsel Act—for pilot projects based in selected courts to provide appointed counsel for “low-income parties in civil matters involving critical issues affecting basic human needs.”<sup>549</sup>

Jonathan Lippman, the Chief Judge of the State of New York, has likewise expressed his support for developing rights to counsel in civil cases and, in November 2010, set aside budgets for it. Under his leadership, the New York state legislature adopted a joint resolution that the “fair administration of justice requires that every person who must use the courts have access to adequate legal representation.”<sup>550</sup> Moreover, he has addressed the “disturbing disconnect between the promise of *Gideon* and the reality of our criminal justice system,” and charged the Indigent Legal Services Office, whose Board he chaired, with undertaking to fulfill the “moral obligation [that] every participant in the criminal justice system” deserves adequate defense services.<sup>551</sup> Lippman explained that the “very reason [that courts] exist” is to provide equal justice to all, and that mandate entails providing representation to the “poor and the indigent.”<sup>552</sup> And just as the professional bar once supported the federal court efforts to gain authority and resources, today's American Bar Association has been a strong advocate of these state-based efforts.<sup>553</sup> In contrast, the 2011 Supreme Court's decision in *Turner v.*

548. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

549. Legislative Digest to Assemb. B. 590, 2010 Leg., Reg. Sess. at 1 (Cal. 2009). The law specifies support for “low-income persons who require legal services in civil matters involving housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child.” Assemb. B. 590, 2010 Leg., Reg. Sess. § 68651(b)(1) (Cal. 2009). Child custody cases were among those to be given the “highest priorit[y].” *Id.*

550. See Assemb. Res. 1621, 2010 Assemb., Reg. Sess. (N.Y. 2010); JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 4 (2011), available at <http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf>. Specifically, in 2010, Lippman proposed a \$100 million increase in state financing for lawyers helping the poor in civil cases. William Glaberson, *Judge's Budget Will Seek Big Expansion of Legal Aid to the Poor in Civil Cases*, N.Y. TIMES, Nov. 29, 2010, at A21; see also John Eligon, *In Hearings, A Campaign for Legal Aid in Civil Cases*, N.Y. TIMES, Sept. 29, 2010, at A25; William Glaberson, *Top New York Judge Urges Greater Legal Rights for the Poor*, N.Y. TIMES, May 4, 2010, at A21.

551. Jonathan Lippman, Chief Judge of the State of New York, Law Day Address (May 2, 2011), [http://newsandinsight.thomsonreuters.com/uploadedFiles/New\\_York/News/2011/05\\_-\\_May/Lippman%20Text%20May%202011.pdf](http://newsandinsight.thomsonreuters.com/uploadedFiles/New_York/News/2011/05_-_May/Lippman%20Text%20May%202011.pdf).

552. LIPPMAN, *supra* note 550, at 5.

553. See AM. BAR ASS'N, TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES (2006); see also Carolyn B. Lamm, *Finding New Ways to Help*, A.B.A. J., Oct. 2009, at 9; Brief of the American Bar Ass'n as Amicus Curiae in Support of



*Rogers* refused to require counsel for a civil contemnor facing charges leveled by a child's parent of failure to provide child support.<sup>554</sup> Yet the challenge of funding both courts and their users has become a topic around the world.<sup>555</sup>

This Lecture has provided a history of changing norms, practices, buildings, and constitutional interpretations, spawned by social movements mixing with economic forces and the professions of lawyers, judges, and architects. The twentieth-century narrative was not inevitable but a product of social and political will. The first decade of the twenty-first century has been one of closing doors, literally and legally. What visions of courts and their buildings will prevail in the decades to come remains to be seen.

I have sketched normative arguments about why courts are a special service critical to democratic orders. What has also become plain is that the "courts" meriting attention are no longer only those sited in courthouses (grand or modest) but also in administrative agencies, and that the courthouses in most dramatic need are those in the states. As Earl Warren is emblematic of a commitment to opening up courts, it is perhaps now fitting that the one building that web searches identify as named after Earl Warren is a state court facility in San Francisco in which the Supreme Court of California and one of that state's appellate divisions sits, along with the administrators of that court system. The monumental idea of courts as open venues is today a site of conflict—tottering in the federal courts as some state jurists seek its restoration.

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Appellee Siv Jonsson, Office of Pub. Advocacy v. Alaska Court Sys., No. S-12999 (Ala. Nov. 19, 2008) (arguing for the appointment of counsel for indigent litigants in adversarial child custody proceedings). See generally Symposium, *Access to Justice: It's Not for Everyone*, 42 LOY. L.A. L. REV. 859 (2009). Some federal judges have also championed these issues. See, e.g., Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998).

554. *Turner v. Rogers*, 131 S. Ct. 2507 (2011); see Resnik, *Fairness in Numbers*, *supra* note 179, at 154–61.

555. See, e.g., HAZEL GENN, *JUDGING CIVIL JUSTICE: THE HAMLYN LECTURES 2008* (2009); THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka eds., 2010); EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *ACCESS TO JUSTICE IN EUROPE: AN OVERVIEW OF CHALLENGES AND OPPORTUNITIES* (2010), available at [http://www.pdfdownload.org/pdf2html/view\\_online.php?url=http%3A%2F%2Ffra.europa.eu%2FfraWebsite%2Fattachme%2Freport-access-to-justice\\_EN.pdf](http://www.pdfdownload.org/pdf2html/view_online.php?url=http%3A%2F%2Ffra.europa.eu%2FfraWebsite%2Fattachme%2Freport-access-to-justice_EN.pdf).