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## INSIDE STATE COURTS: IMPROVING THE MARKET FOR STATE TRIAL COURT LAW CLERKS

*Judson R. Peverall* \*

### INTRODUCTION

The power of state trial courts is tremendous. Charged with resolving 95% of the nation's legal cases, state trial judges decide “the law” for thousands of litigants and criminal defendants every year, not to mention countless others impacted or bound by their decisions.<sup>1</sup> Yet for decades state judges and academics have warned of a “crisis in the courts.”<sup>2</sup> Many state courts today remain chronically

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\* Associate Attorney, ThorsenAllen LLP, Richmond, Virginia. J.D., University of Richmond School of Law; A.B., The College of William and Mary. As a former law clerk to the Fifteenth Judicial Circuit of Virginia, the author dedicates this Article to the Honorable Charles S. Sharp, Michael E. Levy, and Victoria A.B. Willis, the judges who helped him begin his legal career and understand the value of the clerkship to the judiciary—in Virginia and beyond.

1. *Legislative Assaults on State Courts*, BRENNAN CTR. FOR JUSTICE (Feb. 11, 2019), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2019> [<https://perma.cc/Y526-2L7D>] (“State courts, where 95 percent of all cases are filed, play a crucial role—yet they are often far more vulnerable to political pressure and interference than the federal courts.”). According to the Bureau of Justice Statistics, state appellate courts rarely reverse most lower court decisions: 12% of an estimated 69,348 criminal appeals to state appeals courts in 2010 resulted in the reversal, remand, or modification of a trial court decision; similarly, in civil cases, a 2001 survey of 1204 general civil trials in which a litigant sought appellate review revealed that the reversal rate was just 17%. See NICOLE L. WATERS, ANNE GALLEGOS, JAMES GREEN & MARTHA ROZSI, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, CRIMINAL APPEALS IN STATE COURTS 1 (2015), <https://www.bjs.gov/content/pub/pdf/casc.pdf> [<https://perma.cc/65V7-KFEG>]; Nicole L. Waters, *Caseload Highlights: Civil Trials on Appeal—Part I*, CT. STAT. PROJECT (Mar. 2007), [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0029/23969/vol14num1civiltrials\\_onappeal1.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0029/23969/vol14num1civiltrials_onappeal1.pdf) [<https://perma.cc/MPQ7-FK2P>].

2. See notes and discussion *infra* section I.B; see, e.g., AM. BAR ASS'N TASK FORCE ON PRES. OF THE JUSTICE SYS., CRISIS IN THE COURTS: DEFINING THE PROBLEM 1 (2011); Ryan Tarinelli, *As NY State Courts Report Budget Cut, Lawyers Fear Delays, Employee Unions Worry Over Jobs*, N.Y. L.J. (Sept. 30, 2020), <https://www.law.com/newyorklawjournal/2020/09/30/as-ny-state-courts-report-budget-cut-lawyers-fear-delays-employee-unions-worry-over-jobs/?slreturn=20201015220110> [<https://perma.cc/6NY2-SDDF>] (quoting Chief Administrative Judge Lawrence Marks as stating “the economic fallout of the coronavirus pandemic has led to enormous pressures on the State budget, including the Judiciary budget” and reporting that New York is slashing the current judiciary budget by 10%).

underfunded, although they rarely ever compose more than 1% of the average state budget (and never more than 2%).<sup>3</sup> State chief judges have decried the waning quality of state courts, arguing that inadequate funding has led to undue court delays, case backlogs, and poorly decided cases, placing state courts “at the tipping point of dysfunction.”<sup>4</sup>

Yet despite nearly four decades of court funding litigation and legislative debate, state court reform efforts remain limited in many states by one sobering and largely neglected fact: local government is in the driver’s seat on funding state trial courts and determining the quality of justice.<sup>5</sup> When court funding is decentralized, and local communities must pay for their own court services, the property and income wealth of the community determines the quality of justice in that particular area. Unsurprisingly, decentralized state court funding systems have tended to benefit only courts in affluent communities, where the highest tax revenue and per capita income base predominate, while courts in poorer locales are often left lacking sufficient funding and resources to operate efficiently.<sup>6</sup> This fact casts a long shadow over the ideal of equal opportunity to justice.

This Article refracts the problem of local state court funding through one vitally important, but until now unstudied, judicial resource: state trial court clerkships.<sup>7</sup> In states that continue to

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3. AM. BAR ASS’N TASK FORCE ON PRES. OF THE JUSTICE SYS., *supra* note 2, at 1.

4. GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, RAND INST. FOR CIVIL JUSTICE, WHO PAYS FOR JUSTICE? PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE 1–2 (2014) (quoting G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 KY. L.J. 785, 785 (2012)).

5. See discussion *infra* section I.C.

6. See *infra* section I.C.3; see, e.g., Thomas D. Horne, *The Judiciary in Virginia: Changes and Challenges in Virginia: One Trial Judge’s Perspective*, 18 RICH. J. L. & PUB. INT. 49, 68 (2014) (“While localized investment in judicial resources has become an indispensable component of our modern judicial system, such investment is largely constrained and contingent upon the local population’s ability to support heavier judicial operating budgets. Many of the circuits with more affluent communities, such as those in Northern Virginia, may experience less difficulty in providing the financial resources necessary to support an understaffed judiciary. However, many of the less affluent or rural communities may experience greater, if not insurmountable hardship in providing additional funding for their local court system.”).

7. This Article refers to a “state trial court clerkship” as the position a law clerk holds in a “state trial court of general jurisdiction.” Many states have both general jurisdiction trial courts and limited jurisdiction trial courts. However, only general jurisdiction trial courts typically handle felony cases, higher-level misdemeanor cases, higher-value civil cases, special case types, such as probate, divorce and other matters of equity, and appeals from limited jurisdiction courts. Courts of general jurisdiction are also where most jury trials occur and where state trial judges are responsible for issuing written opinions. For this

rely on local government to fund state trial courts, many trial judges must operate without the assistance of a law clerk, even though the size and complexity of their caseloads may, in reality, demand at least one. Meanwhile, judges in more affluent communities receive funding from their local legislature to employ one or several law clerks.<sup>8</sup>

The substantial variation in the access to law clerks across a state has a profound impact on judges' ability to perform their work efficiently and effectively.<sup>9</sup> A wealth of scholarship—both in the political science literature and anecdotal accounts of former law clerks—has consistently shown that federal and state judges alike rely on law clerks now more than ever to prepare them for court hearings and even to write most of their opinions.<sup>10</sup> And yet in decentralized states, many trial judges are being deprived of the law

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reason, state trial courts of general jurisdiction are most often compared to federal district courts. Limited jurisdiction trial courts, on the other hand, usually hear less serious or minor cases including, but not limited to, small claims, such as landlord and tenant disputes and debt matters, civil claims of a limited monetary value, traffic cases, and specialized cases, such as juvenile or family matters. Given the case volume of limited jurisdiction trial courts, judges often do not issue formal written opinions. See IJIS INST. COURTS ADVISORY COMM., COURTS 101: AN UNDERSTANDING OF THE COURT SYSTEM 3–4 (2012), <https://www.fjc.gov/sites/default/files/2015/Courts%20101%20An%20Understanding%20of%20the%20Court%20System.pdf> [<https://perma.cc/X83C-8BSG>].

8. See *infra* section II.B.1.

9. See, e.g., NAT'L CTR. FOR STATE COURTS, VIRGINIA JUDICIAL WORKLOAD ASSESSMENT 9, 32 (2017), <https://rga.lis.virginia.gov/Published/2017/HD15/PDF> [<https://perma.cc/2MTG-ERSU>].

10. For personal accounts from former law clerks, see Teresa L. Clark, Dedication, *Judge D. Brook Bartlett—A Legacy of Civility*, 68 UMKC L. REV. 507 (2000); Marci A. Hamilton, Tribute, *Chief Judge Edward R. Becker: A Truly Remarkable Judge*, 149 U. PA. L. REV. 1237 (2001); Thomas Waxter, Jr., *In Memoriam: Harrison L. Winter*, 50 MD. L. REV. 10 (1991); Susan Webber Wright, Tribute, *The Judge from St. Joe*, 52 ARK. L. REV. 308 (1999). For court scholarship on the benefits and necessity of law clerks to modern courts, see TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 56–62, 66–70 (2006) [hereinafter PEPPERS, COURTIERS OF THE MARBLE PALACE]; TODD C. PEPPERS, OF COURTIERS AND PRINCES: STORIES OF LOWER COURT CLERKS AND THEIR JUDGES (forthcoming Jan. 1, 2021); Jonathan Cohen, *In the Shadow of the Law Clerk: Assessing the Roles of Law Clerks in the Judicial Process*, 3 LONG TERM VIEW 99 (1995); John G. Kester, *The Brighter Side of Clerkships*, 36 J. LEGAL EDUC. 140 (1986); Alex Kozinski, *Making the Case for Law Clerks*, 3 LONG TERM VIEW 55 (1995) (interview with Alex Kozinski); Kermit Lipez, *Judges and Their Law Clerks: Some Reflections*, 22 ME. B.J. 112 (2007); Abner J. Mikva, *Judicial Clerkships: A Judge's View*, 36 J. LEGAL EDUC. 150 (1986); Abner J. Mikva, *Maintaining Control of the Judiciary*, 3 LONG TERM VIEW 9 (1995) (interview with Abner J. Mikva); John Oakley, *Defining the Limits of Delegation*, 3 LONG TERM VIEW 85 (1995); Richard A. Posner, "The Rise of the Law Clerk," 3 LONG TERM VIEW 23 (1995) (an excerpt from RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS REFORM 139–59 (1985)); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 777–78 (1983) (suggesting that judges must utilize law clerks to draft opinions to keep pace with the large number of difficult and complex cases).

clerks they need to operate efficiently. Over time, denying courts access to a law clerk can become intractable. Judges that lack a law clerk may not be able to keep pace with their dockets. When that happens, judges are more prone to legal error, delays, and even constitutional rights violations, which ultimately breeds distrust in the legal system.<sup>11</sup>

Without some state centralization of law clerks, this Article argues, the gap in state trial court clerkship markets will remain an inherent feature of state courts. For a century, centralized clerkship markets have existed in the federal courts and, for nearly forty years, in the state appellate courts. Yet only in recent years have states begun to centralize their trial court clerkship markets. These states have importantly shown that the centralization of trial court clerkships can level the clerkship playing field between courts in rich and poor communities, thereby helping previously underperforming courts in disadvantaged locales to achieve more efficient outcomes.<sup>12</sup> These states have also correctly recognized that since the state government draws its revenue from a wide array of tax and revenue sources, reaped from across all regions and economic sectors within the state, the state economy is in a better position to finance equalizing investments than are local economies. With these policy measures as a blueprint for legislative reform in other states, this Article proposes a policy scheme designed to shift funding for law clerks to the state level and to transfer the administration of state clerks to a centralized state agency.

This Article offers two contributions to the existing court scholarship literature. First, it provides the first comprehensive study of state lower court law clerks. For decades court observers have demonstrated an enduring fascination with law clerks and the influence—real or imagined—that they wield over judicial decisions.<sup>13</sup> Yet that fascination has been limited almost exclusively to

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11. See generally *infra* sections I.B and II.C.2.

12. See *infra* section II.C.2–3.

13. For court scholarship studying and critiquing the federal clerkship market, see, e.g., EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998); PEPPERS, *COURTIERS OF THE MARBLE PALACE*, *supra* note 10; BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979); Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793 (2001) (critiquing the federal clerkship market); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 944–45 (1995) (noting that the growth in the federal appellate caseload has led to an increase in the number of federal appellate law clerks and in the amount of work delegated to them); Adam Bonica, Adam

the law clerks in the federal courts—particularly those at the Supreme Court of the United States<sup>14</sup>—and the various state appellate courts. To a certain extent, though, this should come as little surprise given that lawyers, judges, and scholars are naturally interested in institutions of political *power*. Nowhere is such power more pronounced than in the federal courts and the state appellate courts, where judges and their clerks often craft the very legal doctrine and policy that in turn decides the law for countless state and federal actors. Nevertheless, by helping state trial judges process thousands of cases each year, a convincing argument can be made that state trial court law clerks have more day-to-day influence over individual litigants and the cases that impact the daily lives of countless citizens than the dozens of appellate court law clerks. This fact renders the instant study particularly useful to state judges and legislators seeking to reform state courts.

More broadly, however, this Article seeks to expand the political support for state funding of court services—especially in rural regions. For the past three decades, the problem for many rural Americans has been a lack of economic growth, at least in relation to urban metropolitan areas.<sup>15</sup> Consequently, rural counties and towns not only have struggled to fund courts, they have also been prone to mass shortages of lawyers. As detailed by six leading court scholars, “[d]espite the immense need for lawyers in rural America, the number of attorneys practicing in rural areas falls painfully short. While about 20% of our nation’s population lives in rural America, only 2% of our nation’s small law practices are located there.”<sup>16</sup> By making the case for an increased state role in funding

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Chilton, Jacob Goldin, Kyle Rozema & Maya Sen, *Legal Rasputins? Law Clerk Influence on Voting at the U.S. Supreme Court*, 35 J.L. ECON. & ORG. (2019) (finding that “clerks exert a modest but statistically significant effect on how [J]ustices vote”); Mark R. Brown, *Gender Discrimination in the Supreme Court’s Clerkship Selection Process*, 75 OR. L. REV. 359 (1996); J. Daniel Mahoney, *Foreword: Law Clerks: For Better or For Worse?*, 54 BROOK L. REV. 321, 321–22, 339 (1988) (“Law clerks are often responsible for a judge’s first draft.”); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1171 (1994) (noting the delegation of opinion-writing to federal law clerks due to increased demands on judges). For scholarship analyzing the state appellate court clerkship markets, see, e.g., ROGER A. HANSON, CAROL R. FLANGO & RANDALL M. HANSEN, NAT’L CTR. FOR STATE COURTS, *THE WORK OF APPELLATE COURT LEGAL STAFF* (2000); Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24 (2008).

14. See, e.g., PEPPERS, *COURTIERS OF THE MARBLE PALACE*, *supra* note 10; ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006).

15. See *infra* section I.C.2.

16. Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway

trial court law clerks, states guarantee a continuous pipeline of lawyers into rural regions, thereby placing more potential lawyers in poorer areas where inhabitants urgently need quality legal assistance.

In doing so, states also ensure that rural state trial courts and their local legal communities are better able to cope with the ebbs and flows of case filings wrought by national economic crises. The Great Recession unleashed a flurry of legal filings in areas such as mortgage foreclosure, creditors' rights, bankruptcy, and landlord-tenant disputes, which devastated many local trial courts with immense case backlogs and delayed judgments. As of the writing of this Article, the economic crisis wrought by the novel COVID-19 pandemic has thrust upon courts "not only a backlog of previously filed cases they were unable to hear when courthouses were closed to the public but also an increase in new cases filed due to pent up demand."<sup>17</sup> Establishing more law clerks in more state trial courts ultimately provides judges with an incentive to manage and prioritize the steady increase in cases during times of economic turmoil.

This Article has three parts. Part I describes the current access-to-justice gap in terms of court funding and judicial outcomes, and shows that inequality in judicial outcomes has more to do with the capacity of local governments to finance courts than with their willingness to do so. This Part demonstrates that state legislatures have only closed the access-to-justice gap by centralizing court funding at the state level, thereby assuming ultimate responsibility for *both* trial and appellate court funding.

Part II compares and contrasts centralized and decentralized clerkship markets. The federal clerkship market and the fifty-state appellate court clerkship markets have flourished as competitive clerkship markets for many reasons, but one factor that has undoubtedly promoted their growth is their centralization through clerkship funding and administration. In a centralized market, judges are brought together to compete with one another for the best law clerks, since judges know that law clerks help courts run more efficiently by allowing judges more time to focus on the speed and fairness by which their cases are decided. Hence, centralized

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& Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 22 (2018).

17. NAT'L CTR. FOR STATE COURTS, *Filing Trends During the Pandemic*, <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/filing-trends-during-the-pandemic> [<https://perma.cc/7UMN-UMW5>].

clerkship markets appear to be a productive public good. Part II then pivots to the state court arena by providing an empirical analysis of five state trial court clerkship markets: Virginia, Michigan, Colorado, New Jersey, and Minnesota. By contrasting these states against one another, this Part shows that the decentralized markets in Virginia and Michigan suffer from an unequal and, in some cases, inequitable distribution of trial court law clerks, whereas the centralized markets in Colorado, New Jersey, and Minnesota enjoy a higher law-clerk-to-judge ratio and equality of distribution of law clerks irrespective of geographic barriers.

Part III concludes that by transitioning to centralized clerkship markets, states are likely to develop more competitive clerkship markets and increase judicial efficiency. As states such as Colorado, New Jersey and Minnesota have shown, state funding legislation with a proper attention to local particularities—including caseload demand, average case processing time, historical access to funds from local government, and the current ratio of judicial staff for every sitting judge—helps to narrow the access gap to trial court law clerks within states, thereby providing incentives for trial judges to increase their efficiency. By addressing the caseload concerns of trial judges through state funding, state legislators can ensure that the state judiciary as a whole remains efficient, irrespective of arbitrary geographic boundaries.

#### I. GUARANTEEING EQUAL ACCESS TO EFFICIENT COURTS: THE VIRTUES OF CENTRALIZING STATE COURTS

The judiciary derives its legitimacy from the public's perception that all judges do their level best to "do equal right to the poor and to the rich."<sup>18</sup> To live up to this noble creed however, courts must operate *efficiently*. Under Canon 3B(8) of the 1990 Model Code of Judicial Ethics, a judge is required to "dispose of all judicial matters promptly, efficiently and fairly."<sup>19</sup> A 2007 comment clarifies that "[j]udges can be efficient and businesslike while being patient and deliberate."<sup>20</sup>

Section I.A sets the stage for this Article by defining judicial efficiency. Borrowing from the economics and law literature, this

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18. 28 U.S.C. § 453.

19. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 1990).

20. *Id.*



Part explains that courts operate efficiently when they resolve cases impartially and without avoidable delay. Yet as public goods, courts are non-rivalrous and non-excludable, meaning that people in the community expect not to compete with others to secure efficient courts and not to be denied fair and timely justice on the basis of class or geography.<sup>21</sup> Conscientious legislators, then, have not only a duty to study the existing conditions that thwart judicial efficiency; they ought to develop the law in a way that permits and even incentivizes courts to operate efficiently. The decision of legislators to fulfill this duty in turn affects both whether the public views the judiciary as legitimate and whether the government is seen as a just one.

Turning to the state court arena, section I.B describes the “funding crisis” in American state courts and how it is leading to inefficiencies in state courts. It explains that a major component of state court funding is its spatial inequality, with court funding disparities emerging in many states along regional boundaries dividing property and income wealth. These interlocal funding gaps have created resource disparities between state trial courts in property and income wealthy areas, and state trial courts in less affluent locales, a concept commonly referred to as the “access-to-justice gap.” Section I.B concludes by discussing the economic and political implications of underfunded state courts.

Section I.C suggests that, while many causes may be contributing to the underfunding of state courts, what is perpetuating inadequate court funding is *unfair* court funding systems. To understand better what constitutes “fair” court funding, section I.C weighs the advantages and disadvantages of the two major state court funding systems that exist today: “centralized” or “state court funding” and “decentralized” or “local court funding.” Nearly five decades of state court funding litigation and legislative innovation have shown that the traditional approach of local court funding generates benefits only for some state courts, while substantially disadvantaging other courts in communities with lower average property values and income levels. The result has been widespread justice inequality in those locally controlled states.

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21. See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 942–56 (2005).

To be sure, though, local governments are not underfunding their state courts simply because they want to shortchange the justice system. On the contrary, most economically disadvantaged locales are simply *unable* to secure adequate resources from their local economies to fund courts at, or even close to, an adequate level.

Section I.C concludes with a discussion of the state court funding legislation that emerged in the 1970s and 1980s to limit the unequal effects of local court funding. Despite some disadvantages, state court funding legislation has encouraged a more equitable distribution of court resources within states, thereby helping to close the access-to-justice gap between local governments.

### A. *Defining Judicial Efficiency*

An efficient judiciary is essential to stable government, yet the exact meaning of “efficiency” is often misunderstood. Some scholars have used the term efficiency to mean achieving the optimal output—measured by the production of a quality product—for the minimum cost.<sup>22</sup> Still others have used it as a welfare maximization term implying the fairest distribution of resources, taking into account societal goals or preferences such as wealth or happiness.<sup>23</sup> The first account focuses on the optimal production of goods or services, while the second considers the best distribution of resources in society.<sup>24</sup>

While productive efficiency and distributional efficiency differ in terms of their effect, both derive from the same impulse: economic

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22. For a discussion of productive efficiency, see Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 225 (1980).

23. This understanding of efficiency is properly known as “allocative efficiency.” For example, Richard Posner, in his renowned treatise *Economic Analysis of Law*, defines “efficiency” as “a technical term: it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 74 (1972). See also Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980) (analyzing four variants of allocative efficiency: (1) Pareto optimality, (2) Pareto superiority, (3) Kaldor-Hicks efficiency, and (4) Posner’s wealth maximization theory). Except as otherwise specified, this Article will use the term “distributional efficiency” to refer to the allocative efficiency of judicial funding systems, as enacted by legislatures.

24. See Coleman, *Efficiency, Exchange, and Auction*, *supra* note 22, at 225; Coleman, *Efficiency, Utility, and Wealth Maximization*, *supra* note 23, at 512.

efficiency.<sup>25</sup> Judges must produce speedy and fair case resolutions, for the minimum cost. As judicial caseloads increase, so should the average cost input required to achieve efficient case production. The cost in this case is met by the owners (and consumers) of judicial production: the *people* and their government. Unlike a traditional private economy consisting of winners and losers, government neither excludes certain people from efficient courts, nor forces people to compete with others to achieve fair and speedy justice.<sup>26</sup> When all courts within the given system are producing at an efficient level, we say that government is maximizing welfare.

Courts should thus strive for productive efficiency, while legislatures must attend to distributive inefficiencies—the degree to which a certain distribution of resources fails to maximize welfare for a given cost (or wealth). Historically, legal theorists have invoked this idea of efficiency in the law for over eight centuries. The signers of the Magna Carta understood that “justice shall not be sold or denied or delayed.”<sup>27</sup> At the time of the Founding of America, when practically every state declared fundamental the right of the individual to a fair and timely remedy before a court of law,<sup>28</sup> the idea of judicial efficiency informed how Americans conceived of “justice.”<sup>29</sup> And today the right to access efficient courts has extended even to international norms, with the United Nations now

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25. See, e.g., Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FL. ST. U. L. REV. 1259 (2005) (proposing that the productive efficiency of judges “is best understood as a function of the incentives and constraints that particular legal systems place on their judges”).

26. See Frischmann, *supra* note 21, at 942.

27. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 57–58 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. rev. 1956).

28. Denial of justice clauses appeared in the constitutions of Pennsylvania, Maryland, Delaware, North Carolina, Vermont, Massachusetts, and New Hampshire. See DEL. CONST. of 1897, art. 1 § 9; MASS. CONST. of 1780 pt. 1, art. XI; MD. CONST. of 1776, Declaration of Rights, art. XVII; N.H. CONST. of 1784 pt. I, art. XIV; N.C. CONST. of 1776, Declaration of Rights, art. XIII; PA. CONST. of 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania, § 26; VT. CONST. of 1777, ch. I, art. XIII; VA. DECLARATION OF RIGHTS of 1776, § 8. Similar clauses appear in the proposed federal constitutional amendments of New York and Virginia. See RATIFICATION OF THE CONST. BY THE STATE OF N.Y., July 26, 1788; RATIFICATION OF THE CONST. BY THE STATE OF VA., July 26, 1788; see also A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 284–97 (1968) (discussing the influence of the Magna Carta’s provision “To no one will We sell, to none will We deny or delay, right or justice” on early American constitutions and cases). For modern iterations of the same, see Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003) (citing the modern denial of justice clauses—otherwise known as “meaningful access to justice” clauses—as contained in forty state constitutions).

29. See JACK N. RAKOVE, ORIGINAL MEANINGS 291 (1996) (explaining that, at the time

suggesting that the right itself is “essential for the protection and promotion of all other civil, cultural, economic, political and social rights. Without effective and affordable access to justice, persons living in poverty are denied the opportunity to claim their rights or challenge crimes, abuses, or human rights violations committed against them.”<sup>30</sup>

In America today, judges often invoke the concept of judicial efficiency to enforce core individual rights. State courts have recognized that court delays in civil and criminal cases violate the right to equal and “meaningful access” to the courts.<sup>31</sup> The Supreme Court of the United States has likewise said that all courts—no matter where they exist—must administer prompt and fair justice.<sup>32</sup> Inordinate delays in the criminal trial process, even if caused by “saturated dockets and the apparent strain on judicial resources,” necessarily violate the Sixth Amendment right to speedy trial.<sup>33</sup> Outside the ambit of the criminal trial itself, moreover, the

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of the Founding, courts were thought to be governing bodies with rights, which they exercised for and by the people, since “[t]he people as a whole had a right to be ruled by law”). Compare SIR EDWARD COKE, PART II, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 870 (Steve Sheppard ed., 2003) (“Justice must [be] free, because nothing is more iniquitous than saleable justice; full, because justice ought not to limp; and speedy, because delay is in effect a denial.”), and Quotation of William Ewart Gladstone, in PETER’S QUOTATIONS 276 (Laurence J. Peter ed., 1977) (stating famously, “[J]ustice delayed is justice denied”), with *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (declaring “the right of every individual to claim the protection of the laws, whenever he receives an injury,” to be “[t]he very essence of civil liberty”), and THE FEDERALIST NO. 17 (Alexander Hamilton) (“The ordinary administration of criminal and civil justice . . . contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.”).

30. Magdalena Sepúlveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Access to Justice*, 2, U.N. Doc. A/67/278 (Aug. 9, 2012).

31. See Phillips, *supra* note 28, at 1310 n.6, 1345 (explaining that 40 state constitutional provisions guarantee the right to meaningful access to the courts); see, e.g., *State ex rel. Cardinal Glennon Mem’l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 109–10 (Mo. 1979) (ruling that statutorily required pretrial panel review violates right of access to courts by imposing delay before jurisdiction is obtained); *Jiron v. Mahlab*, 659 P.2d 311, 312–14 (N.M. 1983) (finding review panel’s undue delay as applied to plaintiffs violates their right of access to courts).

32. See *Barker v. Wingo*, 407 U.S. 514, 515, 519 (1972).

33. *Burkett v. Fulcomer*, 951 F.2d 1431, 1433 (3d Cir. 1991); see U.S. CONST. amend. VI (guaranteeing the right to a public trial without unnecessary delay); *Barker*, 407 U.S. at 515, 530 (establishing a four-factor test for speedy trial purposes under the Sixth Amendment: (1) the length of delay; (2) the cause of the delay; (3) the defendant’s assertion of his or her right to a speedy trial; and (4) the presence of prejudice resulting from the delay); see also 18 U.S.C. §§ 3161-3174 (codifying the Speedy Trial Act of 1974); *Barker*, 407 U.S. at 532–33 (“[O]bviously the disadvantages for the accused who cannot obtain his [pretrial] release are . . . serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply

Court has interpreted the Due Process Clause to provide the accused protection against excessive delays—either during arraignment, in the post-conviction hearing (between conviction and sentencing), or in the appellate process.<sup>34</sup> Under the Fourth Amendment, the accused is entitled to a judicial determination of probable cause—otherwise known as a *Gerstein* hearing—prior to being detained without bond for more than forty-eight hours, unless the arrest is supported by a warrant or grand jury indictment.<sup>35</sup> On the civil side of things, both the Court and the states have long embraced the trilogy “just, speedy, and inexpensive” case disposition as the cornerstone of civil law.<sup>36</sup> By ensuring that all courts administer fair and timely justice, therefore, this bundle of rights and rules provides the necessary restraint against arbitrary, inefficient government—“the foundation of orderly government.”<sup>37</sup>

Within the past two decades, the law and economics movement has deeply influenced the way academics and lawyers think about the notion of “efficiency in law.”<sup>38</sup> Two dominant theories have de-

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dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.”)

34. *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990). For decisions invoking the due process clause as a safeguard against delays in the post-conviction process, see, e.g., *Smith v. Kansas*, 356 F.2d 654, 655–57 (10th Cir. 1966) (finding that delay of more than a year in the state post-conviction processes presented a colorable claim of unconstitutional restraint); *United States v. Cain*, 734 F. App'x 21, 25 (2d Cir. 2018) (describing the district court's failure to promptly schedule sentencing and admonishing the government that it has a responsibility to remind the court of “the unfinished business before it” when such lapses in time occur). For decisions finding a due process violation based upon inordinate delays in the appellate process, see, e.g., *United States ex rel. Hankins v. Wicker*, 582 F. Supp. 180, 185 (W.D. Pa. 1984) (finding that a thirty-three month delay in the appellate process raises a prima facie question of due process violation), *aff'd mem.*, 782 F.2d 1028 (3d Cir. 1986), *cert. denied*, 479 U.S. 831 (1986).

35. If an individual is detained for more than forty-eight hours without a *Gerstein* hearing, the delay is presumed to be excessive and may be justified only by “a bona fide emergency or other extraordinary circumstance.” *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

36. See FED. R. CIV. P. 1; MICH. CT. R. 1.105; CAL. R. CIV. P. R. 1.5; IND. R. TRIAL P. 1; NEV. R. CIV. P. 1; see also Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288, 288 n.7 (2010) (“The most important rule of all is the last sentence of [Rule] 1 [that litigation is to be ‘just, speedy, and inexpensive.’] . . . It is this command that gives all the other rules life and meaning and timbre in the realist world of the trial court.” (quoting *In re Paris Air Crash of Mar. 3, 1974*, 69 F.R.D. 310, 318 (C.D. Cal. 1975))).

37. *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

38. See, e.g., RONALD DWORKIN, *Is Wealth a Value?*, in A MATTER OF PRINCIPLE 237 (1986); RONALD DWORKIN, *Why Efficiency?*, in A MATTER OF PRINCIPLE, *supra*, at 267; Jules

veloped and continue to be a focus in debates concerning the efficiency of the law.<sup>39</sup> The first is a positive, or descriptive theory of law and economics.<sup>40</sup> “Descriptive . . . [economic theory] is concerned with the principle of economic efficiency as an explanatory tool by which *existing* legal rules and decisions may be rationalized or comprehended.”<sup>41</sup> Richard Posner, perhaps the greatest champion of the positive economic theory, has suggested that judicial behavior aims toward efficient social gains.<sup>42</sup> Judges use precedent, Posner reminds us, because it is more efficient than starting from scratch.<sup>43</sup>

Yet as Posner explains, legal efficiency remains a function of the incentives and constraints that particular legal systems place on judges.<sup>44</sup> For instance, although judges are constrained by the threat of backlog and reversal, they are incentivized to pay careful attention to their docket sizes and the quality of their decisions because of the embarrassment of a reversed decision, and the prospect of career advancement.<sup>45</sup> The incentive to make “good” legal decisions may be furthered by preferences for leisure, which are enhanced through legal resources making the judge’s job easier (provided in briefs, by clerks, etc.).<sup>46</sup> The essence of this view is that

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L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980).

39. Coleman, *supra* note 38, at 221–22.

40. *Id.*

41. *Id.* at 221.

42. See, e.g., POSNER, *supra* note 22, at 4–5; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (arguing that the reason why common law judges view as reasonable certain human conduct, but not the other, is an (unconscious) desire to bring about an efficient level of accidents and safety).

43. Compare William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975) (contending that judges follow precedents to avoid the disutility of being reversed), with Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31 (1994) (explaining that judges adhere to precedent for two reasons: first, precedent triggers more socially desirable behavior from citizens, because social behavior is driven to a large degree by the efficiency of the law; and, second, judges care about their esteem in the legal community, as well as the possibility of promotion to higher benches, and thus will avoid deviating from precedent because they do not want their decisions repudiated), and Douglas Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753 (2000) (assuming that judges suffer a utility loss when their decisions are overturned and gain utility when they are favorably cited by others).

44. Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1259 (2005).

45. See Gilat Levy, *Careerist Judges and the Appeals Process*, 36 RAND J. ECON. 275 (2005).

46. See RICHARD A. POSNER, *HOW JUDGES THINK* 174, 371–75 (2008).

the institutional structure confronting judges and the rules constraining or incentivizing their behavior are geared to produce efficient outcomes.<sup>47</sup>

The second view—normative law and economics—provides fodder for legal reformers. Under this view, the law *ought* to promote efficiency, measured in terms of either wealth maximization or the extent to which fair results are equitably distributed in society.<sup>48</sup> Conscientious legislators and courts can and should evaluate existing rules and develop new ones in terms of their economic efficiency because efficiency constitutes a goal in itself.<sup>49</sup> This view acknowledges that some judges will invariably not think about efficiency in the decision-making process; thus, there ought to be in place a common set of rules and laws that animate judges toward greater efficiency.<sup>50</sup>

The important distinction between the normative and descriptive economic analyses of law is the use of economic analysis to argue for what should be, and the use of economic analysis to explain what is or has been, or to predict what will be. However, whether the theory is normative or descriptive, the overarching organizing principle of the law is the same: *economic efficiency*.<sup>51</sup>

Much of what follows in this Article follows a normative theory of economics and the law. Legislators ought to reform certain laws governing the structure of courts in order to encourage efficiency. But, of course, these normative goals can only be realized by examining what is or has been so that we can foresee what measures legislators are apt to accept as promoting efficiency.<sup>52</sup> Descriptive economics, then, is needed if we seek to achieve the ultimate goal of normative economics.

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47. See Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1551–53 (2003); D. Daniel Sokol, *Rethinking the Efficiency of the Common Law*, 95 NOTRE DAME L. REV. 795 (2019).

48. Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 591–92 (1980).

49. Coleman, *supra* note 38, at 222.

50. See Patricia M. Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, 50 L. & CONTEMP. PROBS. 225, 230 (1987).

51. Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 56 (1992).

52. Said another way, any normative decision such as “should I buy a car?” cannot be sensibly answered without a good descriptive understanding of one’s needs, finances and the advantages and disadvantages of the potential car to be purchased.

### B. *The Access-to-Justice Gap in State Courts*

The previous section has explained that judicial efficiency is a function of the incentives and constraints on judges. This section focuses on one institutional factor that can either incentivize or constrain judicially efficient behavior: the economic *growth* of courts. As a court's caseload demand increases, the court must grow its labor force or increase its output in order to remain efficient—both of which require varying degrees of funding by the legislature. If a court with an expanding docket fails to grow, judges will face an institutional *restraint* on their ability to operate efficiently.

While economic growth defined the United States from the 1990s to the early 2000s, when the population and economy experienced tremendous market expansion that created staggering new wealth, the positive effects of this economic boom did not benefit all sectors of government, including state courts.<sup>53</sup> During this period, many state judiciaries witnessed a decline in economic growth—meaning that the size of the judicial labor force or the outputs of judges failed to keep up with the increase in cases.<sup>54</sup> Consequently, judicial inefficiency came to be the status quo in many states.<sup>55</sup>

In the early 2000s, the American Bar Association (“ABA”) complained that, “[s]tates have variously been forced to halt civil trials, suspend jury trials, eliminate drug treatment courts, condense jurisdictions, force unpaid furloughs on court employees, leave judicial positions unfilled, suspend pay for counsel for the indigent, close courthouses and cut staff, in some cases dramatically.”<sup>56</sup> After the 2008 financial crisis, a RAND Corporation study found

mounting evidence that many state courts have been struggling with increased case-load demands, decreased staffing levels, and frozen to slashed annual operating budgets. Chief justices from across the na-

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53. Erwin Chemerinsky, *Symposium on State Court Funding: Keynote Address*, 100 KY. L.J. 743, 744–45 (2012); Jason Tashea, *Access-to-Justice Gap? It's the Economy*, A.B.A. J. (Dec. 17, 2018), [https://www.abajournal.com/lawscribbler/article/access\\_to\\_justice\\_gap\\_its\\_the\\_economy\\_stupid](https://www.abajournal.com/lawscribbler/article/access_to_justice_gap_its_the_economy_stupid) [<https://perma.cc/LYJ6-SMJR>].

54. Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, DÆDALUS J. AM. ACAD. ARTS & SCI., Summer 2014, at 97.

55. See Chemerinsky, *supra* note 53, at 744–45.

56. FRANCES KAHN ZEMANS, AM. BAR ASS'N, COURT FUNDING 11 (Aug. 2003), [https://www.americanbar.org/content/dam/aba/administrative/judicial\\_independence/courtfunding.pdf](https://www.americanbar.org/content/dam/aba/administrative/judicial_independence/courtfunding.pdf) [<https://perma.cc/249Y-R64R>].



tion have decried the funding cuts that state court systems have suffered, asserting that courts are “at the tipping point of dysfunction,” “on the edge of an abyss,” and “slowly failing.”<sup>57</sup>

After the 2008–2009 recession, civil and criminal cases slightly declined, and yet many state courts still reported significant case backlogs, resulting in substantially delayed case resolutions.<sup>58</sup> As a consequence, criminal defendants charged and convicted in inefficient state courts were and continue to be unnecessarily detained for long periods of time while they await adjudication.<sup>59</sup> In these courts, saturated dockets and the apparent strain on judicial resources has resulted in substantial delays in the adjudication process.<sup>60</sup>

These reports paint a bleak picture of state court funding. To make matters worse, there is a substantial gap in the distribution of adequate court funding within states.<sup>61</sup> Low-income individuals are the biggest consumers of the state court system, because they

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57. MCGOVERN & GREENBERG, *supra* note 4, at 1 (quoting G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 KY. L.J. 785, 785 (2012)).

58. R. LAFOUNTAIN, R. SCHAUFFLER, S. STRICKLAND & K. HOLT, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 10 (2012), [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0024/23838/csp\\_dec.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0024/23838/csp_dec.pdf) [<https://perma.cc/HWB9-XF7P>] (reporting that twenty-five of the forty-four state courts displayed on this chart achieved clearance rates below 100%, indicating that they are likely adding to their pending caseloads). Clearance rates measure the extent to which a court is keeping up with its incoming caseload. *Id.* at 16. The rate is based on the number of outgoing, or processed, cases to the number of incoming cases. *See id.* at 10. A rate of more than 100 means that the court is adding to its pending caseload, while a clearance rate below 100 indicates that the court contains backlogs.

59. AM. BAR ASS'N TASK FORCE ON PRES. OF THE JUSTICE SYS., *supra* note 2, at 1, 3.

60. As the Supreme Court has said, it is the government who is ultimately responsible for delay in the judicial process caused by overcrowded courts and inefficient docket management. *Barker v. Wingo*, 407 U.S. 514, 531 (1972). *See, e.g., United States v. James*, 712 F. App'x 154, 162–63 (3d Cir. 2017) (reiterating that “a crowded docket” and “court congestion” are factors that can weigh against the government in deciding a due process or speedy trial violation); *Burkett v. Fulcomer*, 951 F.2d 1431, 1433 (3d Cir. 1991) (finding that “the saturated dockets and the apparent strain on judicial resources in Blair County, Pennsylvania” resulted in a Sixth Amendment violation); *see also Trowbridge v. Cuomo*, No. 16 Civ. 3455, 2016 U.S. Dist. LEXIS 180080 (S.D.N.Y. Dec. 22, 2016) (holding that multiple criminal defendants had stated a viable cause of action, but lacked standing to sue, when they alleged that the courts failed to provide adequate judicial resources, failed to allocate and manage existing judicial resources properly, and failed to train, supervise, and monitor the staff and judges adequately).

61. *See* ALAN CARLSON, KATE HARRISON & JOHN K. HUDZIK, THE JUSTICE MGMT. INST., ADEQUATE, STABLE, EQUITABLE, AND RESPONSIBLE TRIAL COURT FUNDING: REFRAMING THE STATE VS. LOCAL DEBATE 120 (2008). It is also well-documented that federal courts consistently poach the best and brightest state judges: over nine hundred state judges have moved to federal courts while only fourteen have gone the other way. *See* Jonathan Remy Nash, Symposium, *Judicial Laterals*, 70 VAND. L. REV. 1911, 1927 (2017).

face economically driven legal challenges, such as mortgage foreclosure, wrongful eviction, domestic violence, wage theft, and child custody and support issues.<sup>62</sup> Yet, on average, economically depressed areas tend to receive the worst court funding.<sup>63</sup> Middle-to-high-income communities, on the other hand, typically enjoy plush courthouses and the best court resources, although many individuals in these areas are in state court the least and require fewer public services.<sup>64</sup> The result has been a large access-to-justice gap in state courts: wealthier communities with higher average tax revenue and per capita income levels enjoy greater access to quality justice, while those less affluent communities with more vulnerable populations must deal with substandard justice.<sup>65</sup>

In 2020, the World Justice Project ranked the United States thirtieth out of thirty-seven high-income developed countries in access to civil justice, a revealing measurement of how inaccessible many American courts are to a large segment of the American population.<sup>66</sup> Past studies and more recent state-by-state studies suggest that some state courts are simply not capable of meeting about 80% of the civil legal needs of the poor, and between 40% and 60% of the needs of middle-income individuals.<sup>67</sup>

What is causing this? The ABA and most state judges tell us that inadequate court funding greatly impacts the quality of justice.<sup>68</sup> In 2003, the ABA Standing Committee on Judicial Independence documented the growing funding disparity between courts and other state agencies, such as education and healthcare, which had been the beneficiaries of a “burst of increased spending in the 90s.”<sup>69</sup> Unlike these more popular public institutions, “courts are

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62. Rebecca L. Sandefur, *Access to What?*, DÆDALUS J. AM. ACAD. ARTS & SCI., Winter 2019, at 49.

63. See *id.*; James J. Sandman, *The Role of the Legal Services Corporation in Improving Access to Justice*, DÆDALUS J. AM. ACAD. ARTS & SCI., Winter 2019, at 114 (explaining that local sources of funding for legal aid services are uneven and limited, generally tending to disfavor impoverished populations, one quarter of which experiences six or more civil legal problems, such as housing and family law issues).

64. See Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 226–31 (2010).

65. See Lincoln Caplan, *The Invisible Justice Problem*, DÆDALUS, J. AM. ACAD. ARTS & SCI., Winter 2019, at 22–27.

66. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 154 (2020).

67. DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004).

68. ZEMANS, *supra* note 56, at 2 (“There is significant potential for court funding to affect judicial independence in a variety of ways.”).

69. AM. BAR ASS’N TASK FORCE ON PRES. OF THE JUSTICE SYS., *supra* note 2, at 2.

not ‘sexy’ in the eyes of the public. They have few allies and fewer advocates in budgeting. Elected officials do not get much credit for funding courts.”<sup>70</sup> Moreover, a surprising majority of the public believes that state courts are, for the most part, well-funded.<sup>71</sup>

Yet research has consistently shown that by underfunding state courts, legislatures exact certain economic and political costs on the state. Underfunded courts tend to operate inefficiently and, thus, are more prone to delays.<sup>72</sup> According to economists, court delays cost the nation \$52.5 billion dollars in lost investment income, because “[w]hen justice is delayed, it lengthens the amount of time that litigants must hold funds out of the economy rather than spending or investing those funds in the ordinary course of business.”<sup>73</sup>

Court delays also have a significant impact on basic individual rights enforcement and public safety. A Georgia capital defendant was unnecessarily deprived his right to speedy trial after his criminal trial was delayed for five years because the state could not pay for a public defender to represent the defendant.<sup>74</sup> On the opposite side of the spectrum, a suspected dangerous criminal was released from custody in Washington state due to speedy trial concerns, “only to rape a woman and then kill a pedestrian in the ensuing high-speed chase.”<sup>75</sup>

Crucially, the underfunding of state courts diminishes public respect for the rule of law. Since the eighteenth century, American courthouses have stood as public symbols of the government’s ability to provide for the general welfare.<sup>76</sup> Adequately funded and

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70. GORDON M. GRILLER, NAT’L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS: THE QUIET BATTLE FOR PROBLEM-SOLVING COURTS* 62 (2011), <http://ncsc.entdm.oclc.org/digital/collection/spcts/id/227> [<http://perma.cc/7VFK-SKX6>].

71. *FUNDING JUSTICE: STRATEGIES AND MESSAGES FOR RESTORING COURT FUNDING* 4 (2012), <https://www.brennancenter.org/sites/default/files/Funding%20Justice%20Strategies%20and%20Messages%20for%20Restoring%20Court%20Funding.pdf> [<https://perma.cc/NWT9-G5VH>].

72. *Id.* at 5.

73. *TIPS Toolkit for Fair Court Funding*, A.B.A. (June 1, 2016), [https://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/court\\_funding1/](https://www.americanbar.org/groups/tort_trial_insurance_practice/court_funding1/) [<http://perma.cc/TZA9-2UNP>]; see NELS PEARSALL, BO SHIPPEN & ROY WEINSTEIN, *ECONOMIC IMPACT OF REDUCED JUDICIARY FUNDING AND RESULTING DELAYS IN STATE CIVIL LITIGATION* (2012).

74. PETER T. GROSSI, JON L. MILLS & KONSTANTINA VAGENAS, NAT’L CTR. FOR STATE COURTS, *CRISIS IN THE COURTS: RECONNAISSANCE AND RECOMMENDATIONS* 83 (2012), <https://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/1-2-Crisis-in-the-Courts.aspx> [<https://perma.cc/9RHE-CNQR>].

75. *Id.*

76. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 16–17

well-maintained courts induce people to infer that legal rules and institutions are meaningful and that most individuals adhere to the social contract.<sup>77</sup> Underfunded courts, on the other hand, lead people to believe that the government, and thus citizens as a collective, have abandoned their commitment to follow the rules.<sup>78</sup> For instance, when judges lack the adequate resources to tackle their dockets and the work becomes too heavy for them to handle, the additional stress caused by the press of cases leads to hastier, less informed judgments.<sup>79</sup> Citizens on the receiving end of this infer that government is not doing its job and the rule of law is not working for them. Citizens consequently conclude that they are justified in placing less value on law-abiding behavior.<sup>80</sup>

### C. Incremental Pathways to “Fair” Court Funding

State trial court finance in the United States was traditionally controlled by each state’s local governments, which, until recently, accounted for the lion’s share of trial court spending in every state.<sup>81</sup> Local governments were chosen for this task largely because they were able to tailor local courts to local preferences.<sup>82</sup>

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(1991) (describing how eighteenth century American courts—from the red robes judges and counsel wore to the gold-framed portraits of Charles II and James II that hung in courtrooms—were designed “to overawe” and to invoke the same degree of respect from the people that the House of Commons and House of Lords conveyed).

77. Cf. Brent T. White, Simone M. Sepe & Saura Masconale, *Urban Decay, Austerity, and the Rule of Law*, 64 EMORY L.J. 1, 6–7 (2014) (arguing that the strength of the rule of law in a given community can be predicted by that government’s ability (or inability) to provide public services).

78. Cf. *id.* at 7.

79. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554–55 (1969); Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 403–04 (2013). Experimental studies in psychology show that stress, such as clogged dockets or a lack of staffing, regulates the propensity for risk-taking and may cause decision-makers to rely on pre-existing preferences and biases. See, e.g., Anthony Porcelli & Mauricio Delgado, *Acute Stress Modulates Risk Taking in Financial Decision Making*, 20 PSYCHOL. SCI. 278, 278–83 (2009); Katrin Starcke & Matthias Brand, *Decision Making Under Stress: A Selective Review*, 36 NEUROSCIENCE & BIOBEHAVIORAL REV. 1228, 1229–44 (2012); Mara Mather, Marissa A. Gorlick & Nichole R. Lighthall, *To Brake or Accelerate When the Light Turns Yellow? Stress Reduces Older Adults’ Risk Taking in a Driving Game*, 20 PSYCHOL. SCI. 174, 174–76 (2009).

80. See James J. Kelly, *“All Good Things Flow . . .”: Rule of Law, Public Goods, and the Divided American Metropolis*, 64 EMORY L.J. ONLINE 2017, 2027–32 (2014) (compiling research on the signaling effects of inadequately funded public goods).

81. See *infra* section I.C.1.

82. See *infra* section I.C.1.

Recent decades, however, have produced calls for a greater state role in the administration and funding of state courts.<sup>83</sup> Today, these calls for centralization have developed and found fruition in roughly one-half of the fifty states, with many centralized states now touting increased funding equality across trial courts.<sup>84</sup> To understand more fully how court centralization came to be favored over decentralization, this section addresses the various arguments for and against local and state control of courts.

### 1. The Traditional Approach: Local Control of Courts

From the beginning, the hallmark of state courts has been decentralized, local control over trial courts and a limited state role. The first state courts in America derived their legitimacy not from a holy sovereign, but from the people themselves—from the court of local public opinion.<sup>85</sup> By participating in public jury trials, the people could be assured that procedural rights were respected and that justice was afforded equally.<sup>86</sup> Public attendance had to be practical, so the states built courthouses at the county seat.<sup>87</sup>

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83. See *infra* section I.C.2.

84. See *infra* section I.C.3.

85. See, e.g., *In re Oliver*, 333 U.S. 257, 266 n.14, 270 n.21 (1948) (“In 1649, a few years after the Long Parliament abolished the Court of Star Chamber, an accused charged with high treason before a Special Commission of Oyer and Terminer claimed the right to public trial and apparently was given such a trial. ‘By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted’ . . . The English common law courts which succeeded to the jurisdiction of the ecclesiastical courts have renounced all claim to hold secret sessions in cases formerly within the ecclesiastical jurisdiction, even in civil suits.” (citations omitted)).

86. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564–70 (1980) (discussing the history and role of open trials in protecting against abuses); Douglas A. Berman, *Making the Framers’ Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 893 (2010) (“In short, the Framers were eager to create a permanent role for juries in the very framework of America’s new system of government. The Constitution’s text was intended to make certain that the citizenry could and would serve as an essential check on the exercise of the powers of government officials in criminal cases.”); Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 210–11 (2002) (“The Framers recognized that the vote would not be enough to restrain government officials. Accordingly, the Constitution also gives the People, in their respective roles as jurors and militia members, crucial responsibility for administering justice and protecting national security.”); Kenneth W. Starr, Speech, *Luncheon Speaker*, 24 PEPP. L. REV. 829, 832 (1997) (“From the pamphleteers of the Revolution to the Antifederalists and to Tocqueville, I think we can clearly identify roles for the jury going beyond the functional, practical need for achieving hopefully a just outcome in a particular case. We can thus view the jury as a check on official power, a way of bringing the public into the judicial branch and educating the jury, the people, about the law and the values of the rule of law.”).

87. See, e.g., CARL R. LOUNSBURY, *THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY* 3 (2005).

This state-local design, which flourished for most of the country's early history, delegated to local governments substantial autonomy in the organization and operation of state trial courts.<sup>88</sup> Courts competed with other local institutions, such as schools and public works, for the revenues of local property taxes. State legislatures generally paid little attention to the operations of state trial courts until the mid-twentieth century when the movement toward court centralization took foothold in a majority of states.<sup>89</sup>

In recent years, a powerful current in federal doctrine has breathed new life into the autonomy of local governments by granting cities, towns, and counties substantial latitude to conduct matters of traditional local concern, such as education and zoning. This doctrinal evolution has sharpened the principle of local autonomy, in some cases weighing local power over federal statutory or constitutional concerns.<sup>90</sup>

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88. See Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1013, 1016 (2004) ("A state supreme court [was] generally the only court funded entirely from the state treasury . . . [S]tate legislatures paid little attention to the administrative structure of the courts or the associated costs of running them because very few courts were funded directly from the state treasury.").

89. See *infra* section I.C.3.

90. In recent decades, the Supreme Court has given credence to the Jeffersonian belief in local autonomy. Traditional legal theory reasoned that the people delegated all their sovereignty to the states, and thus that localities held only that authority explicitly granted them by their state governments. This principle is better known as the Dillon Rule of local government. See JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 95–96 (1872). Dillon's treatise was the first major treatise on American municipal law. However, recent Supreme Court cases have breathed new life into the sovereignty of local governments, evincing a consistent pattern of deference to local government decision-making. See M. David Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C. L. REV. 763, 789 (1980) (documenting a consistent pattern of Supreme Court deference to local government decision-making); Carol F. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U. L. REV. 1, 51–68 (1982) (documenting emergence of a concept of community autonomy); see, e.g., *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (holding federal courts had no authority to enjoin allegedly unconstitutional police conduct since principles of federalism precluded intervention in delicate local policy matters best left to local authorities, where plaintiffs alleged brutality by the Philadelphia police); *Warth v. Seldin*, 422 U.S. 490, 502–04, 514–16 (1975) (holding that neither residents, nonresidents nor organizations have standing to sue under the fourteenth amendment for remedy of exclusionary zoning, since local governments are vested with zoning powers to design comprehensive land use plans which will serve the health, safety, morals and welfare of the community); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40, 55 (1973) (holding that Texas school financing system, based largely on local property tax funding, satisfies the "rational basis" test of fourteenth amendment equal protection clause). In these cases, involving schools, zoning or other local political or programmatic choices, the Court has limited the power of the federal government by arguing that the locality has sole authority to make the challenged policy decisions.

Since its inception, local control over state trial courts has been praised for its ability to reap several benefits. First, some argue that local government is best suited to respond to local interests and needs.<sup>91</sup> According to this argument, since the cost of funding courts is not fixed within a state—but is instead variable between cities and counties depending on the needs and preferences of the local population—local government best knows the needs and preferences of its constituency.<sup>92</sup> For this reason, localities should be vested with the power to fund local courts in a manner specifically designed to respond to local needs and preferences for public spending.<sup>93</sup> Hence, decentralized court funding schemes, extant today in half the states, are touted as a means to tailor court staffing and funding based upon local priorities for how local resources should be spent—in a way that state government normally cannot.<sup>94</sup>

Policymakers may also defend decentralized court funding over state funding on institutional grounds. Of all the levels of the judiciary, state trial judges are generally the most susceptible to local public opinion. Not only do state trial judges frequently entertain disputes between local officials, which would otherwise be dismissed in federal courts,<sup>95</sup> but, unlike federal judges, state trial judges must appeal to either local lawyers or the local public pop-

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91. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 84–85 (1990).

92. *Id.*

93. See MCGOVERN & GREENBERG, *supra* note 4, at xii.

94. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956) (arguing that local control over public goods is fair and efficient, because if individuals are mobile among communities, individuals will move to the locale that best expresses their choice for public goods).

95. Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 461 (2010).

ulation to be appointed, elected, or retained. An overwhelming majority of state trial judges appear on a ballot for a partisan,<sup>96</sup> non-partisan,<sup>97</sup> or retention election.<sup>98</sup> In contrast, judges serve life terms in only three states.<sup>99</sup> Retention elections, common in many states, specifically allow local voters, or members of the local bar, to decide whether the trial judge should remain on the bench.<sup>100</sup> Hence, since the same body of local citizens that appoints, elects and retains judges should arguably also retain a *choice* over how much is spent on judges and courts, local government may be viewed as the best arsenal for funding state trial courts.<sup>101</sup> Only in this way can local trial judges be held truly accountable to the court of local public opinion.<sup>102</sup>

## 2. Disrupting Local Court Funding: Court Funding Litigation

Although local court funding undoubtedly generates some benefits, it also tolerates substantial interlocal disparities in accessing

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96. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015) <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> (“Partisan elections are used in 11 states to select judges to state trial courts.”) [<https://perma.cc/7M4C-EA8W>]. The Jacksonian era of the 1820s and 1830s produced populist calls for judicial accountability and independence, inaugurating a movement to select judges via partisan judicial elections. See Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 193 (1993).

97. *Judicial Selection: Significant Figures*, *supra* note 96 (“Nonpartisan elections are used to select judges to trial courts in 21 states . . .”).

98. *Id.* In these states, a nonpartisan commission of local lawyers and non-lawyers that evaluates candidates for judgeships and makes a recommendation to the governor or legislature. *Id.*

99. *Id.* In nine states, judges are appointed by the governor. Judges serve life terms in three of these states. In the other six, judges can be reappointed to additional terms by the governor. In the District of Columbia, the President appoints judges to the D.C. Court of Appeals. *Id.*

100. Claire S.H. Lim & James M. Snyder, Jr., *Elections and the Quality of Public Officials: Evidence from the U.S. State Courts* 7, (Nat’l Bureau of Econ. Research, Working Paper No. 18355, 2012) BER Working Paper Series (2012), <https://www.nber.org/papers/w18355.pdf> [<https://perma.cc/GZ8T-DEP2>].

101. See Tiebout, *supra* note 94, at 424.

102. An assumption in this line of reasoning is that society generally gives more preference to the public accountability of judges than their individual accountability. Hence, policymakers should advance local court funding measures as a means to constrain local trial judges to local preferences for behavior. This preference for public accountability over individual accountability lies at the heart of the court funding debate. For proponents of state court funding and administrative centralization, individual accountability is preferred over public accountability because judges should not need to lobby local constituents for judicial spending—but instead must be independently just in their judgment. Raising public funds for the efficient administration of the courts, in other words, is a distinctly legislative task, which is not generally thrust upon the judiciary.



quality justice. The reality of decentralized court funding has meant that many communities are left controlling only inadequate resources, leaving many parties to the justice system with sub-standard opportunities to access efficient courts.<sup>103</sup>

Across the country, court funding disputes have erupted between state trial judges and their local legislatures after the localities threatened to fiscally undermine the integrity of their trial court system by either slashing or freezing judicial budgets.<sup>104</sup> De-

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103. See, e.g., TRIAL COURT FUNDING WORKGROUP, REPORT TO THE JUDICIAL COUNCIL OF CALIFORNIA AND THE GOVERNOR EDMUND G. BROWN, JR., (Apr. 2013), <https://www.courts.ca.gov/documents/TCFWG-Final-Report-20130418.pdf> [<https://perma.cc/9TGG-PSMS>] (explaining the growing concern—in California and in other states—that judicial funding disparities between counties have created gaps in the quality of justice available from trial courts across a state).

104. See, e.g., *In re Alamance Cty. Court Facilities*, 405 S.E.2d 125, 126–37 (N.C. 1991) (holding that court has inherent power to order local officials, charged with statutory and constitutional duty to maintain an efficient court system, to provide adequate funds for court facilities, when local officials had denied the judiciary the resources it needed to remain independent and efficient); *Gary City Court v. City of Gary*, 489 N.E.2d 511, 512–13 (Ind. 1986) (holding that lower court has power to compel local officials to provide court funding that is necessary to maintain the court at a degree of efficiency to discharge its duties, but the funding must be for neither extravagant nor arbitrary expenses; presiding court must meet with the appropriate fiscal authorities before issuing a mandate order and must give due consideration to any adverse effect which the order would have on specific fiscal and other interests of the unit from which funds would come); *O'Coins, Inc. v. Treasurer of Worcester*, 287 N.E.2d 608, 612 (Mass. 1972) (“We hold . . . that among the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required goods or services by appropriate means, including arranging himself for their purchase and ordering the responsible executive official to make payment.”); *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 194–98 (Pa. 1971) (observing that the Philadelphia Court of Common Pleas may compel the mayor and city council of Philadelphia to provide funds necessary for its own efficient and effective operation, but also, where funds are disallowed by the city council, to compel other branches to provide them); *Comm’rs Court of Lubbock Cty. v. Martin*, 471 S.W.2d 100, 110 (Tex. Civ. App. 1971) (observing in obitum dictum that “We have no doubt that a district judge has the implied power to appoint probation personnel and set their compensation in the event such action is essential to the continuing effective administration of the business of the court”); *Woods v. State*, 119 N.E.2d 558, 561 (Ind. 1954) (“The efficient administration of justice, which is the duty of the courts, cannot be made to depend upon the discretion or whim of the county council or any other administrative or executive officer of county government. If the jury quarters of the Vanderburgh Circuit Court need remodeling to protect the integrity of its juries, it is the court’s right as well as its duty to see that this is done, and the court has ample power and authority to enforce the payment of any costs reasonably and necessarily incurred in accomplishing this purpose.”); *Stowell v. Bd. of Supervisors for Jackson Cty.*, 23 N.W. 557, 558 (Mich. 1885) (holding that in criminal cases the power of the court to keep prisoner in custody binds the county to pay for the maintenance); *Cty. Comm’rs of Allegany Cty. v. Cty. Comm’rs of Howard Cty.*, 57 Md. 393, 395 (Md. 1882) (holding county from which prisoner came is required to pay costs related to the jury).

prived of basic court services, trial judges have invoked their inherent power<sup>105</sup> to compel their recalcitrant local legislatures to allocate adequate funds for the efficient and independent administration of justice.<sup>106</sup>

These cases reveal much about the connection between state court decentralization and underfunding. Most striking is the fact that the majority of court funding litigation has arisen between state trial judges and *local* legislatures, in comparison to cases against state governments.<sup>107</sup> Though there are likely many causes

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105. Most judges know the inherent power doctrine according to its traditional function: as a device for maintaining order in the courtroom, either by punishing contempt of court or removing photographers from the courtroom. Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1000–02, 1001–02 nn.69–74 (2004) (collecting cases); see also *Wayman v. Southard*, 23 U.S. 1, 18 (1825) (“Every Court has, like every other public political body, the power necessary and proper to provide for the orderly conduct of its business.”).

106. Buttressing the inherent power doctrine, judicial power has long been understood as transcending the explicit, exclusive powers granted to the judiciary, occasionally reaching into the area of overlap between the judiciary and the legislature. In Federalist 48, Madison explains that the executive, legislative, and judiciary, ought to “be so far connected and blended as to give to each a constitutional control over the others.” THE FEDERALIST NO. 48 (James Madison). Overlap of powers is especially necessary in a representative democracy, Madison says, to check the “impetuous vortex” of legislative power in a republican government. *Id.* Not only can the legislature exploit its rule-making authority to circumscribe the discretion of the judiciary or override particular decisions to which it objected, it could also use its power of the purse to make the judiciary bend to its will or thwart the administration of justice. Since the legislature is by far the “more extensive, and less susceptible of precise limits,” than either the judiciary or the executive, checking the “indirect” “encroachments which [the legislature] makes on the co-ordinate departments” is the central task of republic government. *Id.* See also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 22 (1833) (explaining that a “constant check . . . preserv[ing] the mutual relations of [one branch] with the other. . . can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for”); THE FEDERALIST NO. 51 (James Madison) (arguing that the taxing and spending power of the legislature inevitably makes the judiciary dependent on the legislature, which gives facility to encroachments of the judiciary and to counteract this measure of power, the judiciary should be “as little dependent as possible” on the legislature “for the emoluments annexed to” the courts. “Were the executive magistrate, or the judges, *not* independent of the legislature in [terms of their funding], their independence in every other, would be merely nominal. . . .” (emphasis added)); THE FEDERALIST NO. 78 (Alexander Hamilton) (“The complete independence of the courts of justice is peculiarly essential in a limited constitution . . . Without this, all the reservations of particular rights or privileges would amount to nothing.”). On the fundamental risk of interbranch conflict in a system of separated powers, see Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2127 (2002).

107. See NAT’L CTR. FOR STATE COURTS, THE USE OF INHERENT POWERS TO OBTAIN COURT FUNDING 1–3, 12–16 (2010), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0016/18151/inherent-powers-to-obtain-court-funding.pdf](https://www.ncsc.org/_data/assets/pdf_file/0016/18151/inherent-powers-to-obtain-court-funding.pdf) [<https://perma.cc/8BC3-EA6Q>] (reporting that research strongly suggests that judges from states with locally funded trial court systems are more likely to consider compelling their funding authorities to provide adequate funds for the judiciary than judges are from states that have state funded trial court systems);

for this trend, it is undoubtedly perpetuated by the policy decision to fund courts *locally*. Many local economies generally tend to have less fiscal capacity than the state economy and thus are more likely to be an inadequate funding source.<sup>108</sup> Indeed, state economies receive the bulk of their general revenue from a small handful of “superstar” local economies—typically more established metropolitan regions or university towns.<sup>109</sup> Unlike these superstars, less populated rural locales are often less economically developed than their wealthier counterparts that fuel the state economy. For rural local governments—which comprise 97% of America’s landmass and one-fifth of the population<sup>110</sup>—their local economies are too often insufficient to fund public services, like state courts, at an adequate level.<sup>111</sup>

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CARL BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 144–45 (1975) (noting that court funding disputes generally have been between state-level judges and local governments).

108. See Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828, 1830–31, 1833, 1837–39 (2017).

109. This can be explained by the fact that general purpose revenue accounts for 40.8% of total state spending. See NAT’L ASSOC. OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 1 (2019), [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO\\_Fall\\_2019\\_Fiscal\\_Survey\\_of\\_States\\_S.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO_Fall_2019_Fiscal_Survey_of_States_S.pdf) [<https://perma.cc/FK8V-XS88>]. Of the general revenue, state income tax accounts for 45.4%, sales tax and use tax for 31.1%, and corporate tax for 6.2%. *Id.* at 43. Forty-one states have a broad-based state income tax structure, with thirty-three states imposing a higher tax percentage on the income of higher-earning individuals, or a progressive income tax. *Id.* at 44; STATE INDIVIDUAL INCOME TAXES, FED’N OF TAX ADM’RS (2020), [https://www.taxadmin.org/assets/docs/Research/Rates/ind\\_inc.pdf](https://www.taxadmin.org/assets/docs/Research/Rates/ind_inc.pdf) [<https://perma.cc/EGZ8-QJRK>]. Thus, since the majority of higher-income individuals are concentrated in major cities, university towns, or suburbs, the bulk of the state’s general tax revenue naturally flows from these higher earning locales. These “super star” areas also generate, on average, a higher volume of sales transactions, which increases the sales tax revenue of the state, and contain more universities and colleges from which states can exact user fees. See also José A. Azar, Iona Marinescu, Marshall I. Steinbaum & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 13–16 (Nat’l Bureau of Econ. Research, Working Paper No. 24395, 2018), <https://www.nber.org/papers/w24395> [<https://perma.cc/S296-PQFW>]s (finding that the majority of U.S. labor markets are highly concentrated at the local level).

110. OLUGBENGA AJILORE & ZOE WILLINGHAM, CTR. FOR AM. PROGRESS, REDEFINING RURAL AMERICA 1 (2019), [https://cdn.americanprogress.org/content/uploads/2019/07/17050340/redefining-rural-america-\\_brief1.pdf](https://cdn.americanprogress.org/content/uploads/2019/07/17050340/redefining-rural-america-_brief1.pdf) [<https://perma.cc/27AP-CFSU>].

111. See Mildred E. Warner, *Local Government Financial Capacity and the Growing Importance of State Aid*, RURAL DEV. PERSP., Apr. 1999, at 27–28, 32; RICHARD J. REEDER, U.S. DEP’T OF AGRIC., TARGETING AID TO DISTRESSED RURAL AREAS: INDICATORS OF FISCAL AND COMMUNITY WELL-BEING, at v, 1–6 (1990) (“most rural areas have relatively low fiscal capacities compared with urban areas . . . the rural-urban gap in fiscal capacity, as measured by per capita income, has persisted for many years and is unlikely to disappear in the foreseeable future.”).

What explains this? Economists tell us that while the recent shift toward foreign trade and business concentration has clearly benefited most major cities and even suburban counties—in a way that has strengthened and helped sustain state governments—it has often occurred at the price of reducing labor markets in rural counties and towns.<sup>112</sup> Rural areas, such as single-industry towns with high concentrations of blue-collar workers,<sup>113</sup> have witnessed a *decrease* in labor and income as business and employment have steadily moved toward cities. This reduction in the overall economic strength of rural America has suppressed housing prices and business activity, which in turn has decreased property values and economic markets in these regions.<sup>114</sup> The end result for rural America is a harsh reality: diminished property taxes and general revenue at the local level constrains the ability of many local governments to provide adequate funding for court services.<sup>115</sup>

In decentralized states, therefore, it is not uncommon to discover disparities in the quality of court services between depressed agricultural and manufacturing counties and nearby counties containing a state university or a major financial institution.<sup>116</sup> Chief Justice Ronald M. George, in his 2001 State of the Judiciary address to the California Legislature, described these disparities:

[California's decentralized court] system, with funding bifurcated between the counties and the state, bred uncertainty for the courts and

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112. Leo Feler & Mine Z. Senses, *Trade Shocks and the Provision of Local Public Goods*, AM. ECON. J., Nov. 2017, at 103–04; John McLaren & Shushanik Hakobyan, *Looking for Local Labor Market Effects of NAFTA 6* (Nat'l Bureau of Econ. Research, Working Paper No. 16535, 2010); see also Jerome Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Mississippi Valley State University Policy Forum: Encouraging Economic Development in High-Poverty Rural Communities (Feb. 12, 2019) (transcript available at the Federal Reserve website), <https://www.federalreserve.gov/newsevents/speech/files/powell20190212a.pdf> [<https://perma.cc/D44J-FGFN>] (“Poverty remains a challenge in many rural communities. Indeed, 70 percent of the 473 ‘persistent poverty’ counties in the United States are rural. Unemployment and mortality rates remain high in these communities. Along with lower incomes and wealth, the rate of business start-ups in these areas is lower.”).

113. McLaren & Hakobyan, *supra* note 112, at 23.

114. Feler & Senses, *supra* note 112, at 107.

115. *Id.* at 101–03. See also Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmary: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1, 34–35, 47 (2010) (arguing that because county governments in Montana are financed principally by local property tax revenue, individual counties have vastly different capacities to provide services, leaving those who live in sparsely populated, relatively undeveloped and property-poor counties the least served by local government, while wealthy, more populous counties, which typically have economies with more diversified, property tax bases, are more substantial, and a correspondingly greater capacity to deliver services).

116. See, e.g., Pruitt, *supra* note 115, at 2, 69–74.

discouraged a sense of commitment by either funding partner. Disparities in the quality of justice dispensed across the state were common and erratic. Local courts were on the verge of closing, with staff cut-backs and unfunded payrolls, facilities in a state of dangerous disrepair, services to the public drastically curtailed, and, ultimately, the entire administration of justice at risk.<sup>117</sup>

These words aptly depict the clear disadvantages inhering in decentralized court funding. The benefits accrue primarily to a handful of select, affluent communities, which possess the necessary resources to grow their judicial workforce and output production as caseload demands increase.<sup>118</sup> Meanwhile, courts in poorer communities, where local economies are inadequate to fund local courts, remain grossly disadvantaged.<sup>119</sup>

So, if court funding litigation has helped expose the inequality inhering in local court funding, we must then ask ourselves whether it is equally as beneficial for *remedying* the problem of unequal access to justice within a state? Several reasons counsel against the use of litigation as an effective policy tool to reform state court funding. First, even if a judge believes that the inherent power doctrine does not usurp the appropriation power of the legislature, the vast majority of trial judges would be reticent to invoke the doctrine out of fear that the political question of funding may jeopardize their reappointment prospects.<sup>120</sup> The practical use of court funding litigation has thus been limited to a few brave

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117. Claudia Ortega, *The Long Journey to State Funding*, CAL. CTS. REV., Winter 2009, at 7.

118. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990). According to Briffault, “[i]nterlocal differences in wealth are often enormous. Within a particular state the disparity in assessed valuation per capita between the wealthiest and poorest school district may be on the order of 100 to 1; even if the extremes are ignored, and the school districts at the 90th and 10th percentiles of taxable wealth per capita are compared, the differences are still often as much as 3 or 4 to 1. These wealth differences regularly occur in districts located only a few miles apart in the same metropolitan area.” *Id.* at 19–20.

119. See CARLSON ET AL., *supra* note 61, at 14–15.

120. ALBERT B. LOGAN, JUDICIAL RESEARCH FOUND., INC., STRUGGLE FOR EQUAL JUSTICE 22 (1969) (“[F]ew lower court judges have the desire or the courage to order other local officials to provide necessary funds, although a few have done so. Political reasons related to job tenure account for reticence upon the part of most.”). See, e.g., *Grimsley v. Twiggs County*, 292 S.E.2d 675, 677 (Ga. 1982) (“The inherent power of the court must be carefully preserved, but also cautiously used.”).

judges willing to battle local legislatures over necessary court funding.<sup>121</sup> Even if some state trial judges prevail in court funding litigation, in other words, nothing suggests that the access-to-justice gap within states will automatically close.

Second, because court funding litigation has historically operated at the local level, courts have avoided a direct confrontation with their state legislature—the branch of government most able to redistribute and equalize funding between districts.<sup>122</sup> Indeed, not only do state legislatures possess the superior authority to direct and apportion spending for the public benefit, but a growing literature has stressed the limits of courts' capacity to declare, implement, and monitor policy change.<sup>123</sup> Instead of encouraging broader systemic changes to the state judiciary, state court funding litigation has ended up rendering only isolated benefits for a select few courts.<sup>124</sup> This limitation of court funding litigation renders it a rather blunt policy instrument for state court reform.<sup>125</sup>

### 3. State Policy Reform: The Court Centralization Movement

Once court funding litigation was recognized as inadequate to address the unequal access to efficient courts created by local court funding, court reformers gradually refocused their attention to their state legislatures. Drawing upon early twentieth century Progressive Era legal theory committed to simplicity, unification, business-like methods, and the use of efficiency experts,<sup>126</sup> state policymakers initiated in the 1970s and 1980s a three-stage court unification project that sought to integrate trial and appellate courts as one state judiciary.<sup>127</sup> Together, these three phases—

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121. LOGAN, *supra* note 120, at 22.

122. Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 248–49 (1993) (arguing that inherent power may damage future prospects for additional funding at the state level by “reduc[ing] the likelihood of public debate on the issue of the adequacy of court funding”).

123. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 3 (1991).

124. See William Scott Ferguson, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975, 975–76 (1972).

125. *Id.* at 977–79. Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 150 (1994) (“[W]hen unitary financing and lump-sum budgeting replace a fragmented process of line-item appropriations, the doctrine of inherent powers outlives its usefulness.”).

126. See FREDERICK W. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* 7–8 (1911).

127. See Harry O. Lawson, *State Court System Unification*, 31 AM. U. L. REV. 273, 274

structural, administrative, and budgetary unification—helped to close the access-to-justice gap that had long existed between trial courts in wealthy and poorer jurisdictions.

In the first phase, the states would need to simplify the way appellate and trial courts were structured.<sup>128</sup> Until the twentieth century, state trial courts consisted of numerous, highly specific trial courts whose subject matter jurisdiction was often inconsistent and overlapped between the various trial courts.<sup>129</sup> Early twentieth century progressives, such as Roscoe Pound, the American Judicature Society, and the American Bar Association, sought to reduce the waste and inefficiency arising from trial court duplication. They called upon states to reduce the number of trial courts to one county court for the “special convenience of each county,” a district court for “trials of all kinds,” and a supreme court to handle all appellate matters.<sup>130</sup> Court reformers later offered two further

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(1982).

128. See Roscoe Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. AM. JUDICATURE SOC'Y 225, 225–33 (1940). Pound also insisted that Congress must also centralize the federal courts, which until the first half of the twentieth century had consisted of decentralized district court rules and staffing procedures. *Id.* at 230, 234. I consider in Part II a segment of this centralization effort in the federal courts: the federal clerkship unification movement. See *infra* Part II.

129. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 221–22 (1927) (“The defects and inadequacies of the federal judicial organization had their counterpart in the states. The states, like the United States, vested their judicial power in a multitude of independent and local judges with overlapping and ambiguous jurisdictions.”); Roscoe Pound, *Organization of Courts*, 11 J. AM. JUDICATURE SOC'Y 69, 69, 75–78 (1927).

130. Am. Judicature Soc'y, *Model Judiciary Article: Introduction*, 3 J. AM. JUDICATURE SOC'Y 132 (1920). See also Am. Judicature Soc'y, *The State-Wide Judicature Act*, 1 J. AM. JUDICATURE SOC'Y 101, 101, 106, 111 (1917). The American Bar Association first championed state court unification in 1909 as a method to rectify the confusion created by localism in the various state court systems. See *id.* (observing that the 1909 ABA report is where “the conception of the unified state court system first received adequate expression”); see also FRANKFURTER & LANDIS, *supra* note 129, at 223 (praising the 1909 ABA report as having “given the lead to all contemporary movements for judicial reform”). The ABA appointed the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. See *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 34 ANN. REP. A.B.A. 448, 448 (1911). American legal scholar Roscoe Pound, who had delivered just one year earlier his seminal address to the ABA critiquing the decentralization of American courts, served on the committee. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 395–417 (1906); see also Pound, *Organization of Courts*, *supra* note 129, at 78 (acknowledging that Pound was the drafter of the 1909 ABA report). See R. Stanley Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 JUDICATURE 316, 316–17 (1973) (explaining that “the sensitivities of many judges and complacent lawyers in [Pound’s] audience were stung by these allegations,” which ultimately led members of the ABA to defeat a resolution to print 4000 copies of Pound’s 1906 speech).

models for unification: a three-tiered approach, which consolidated trial court matters into a single general district court, over which lied an intermediate appellate court and a court of last resort;<sup>131</sup> and a four-tiered approach, which left intact the specific and general jurisdiction trial courts, over which presided an intermediate appellate court and a supreme court.<sup>132</sup>

The second phase called for the centralization of court administration.<sup>133</sup> Progressives faulted the state governments for the plethora of local court procedures and jurisdictional rules within just one state.<sup>134</sup> Without a central court authority to oversee the judicial clerical force and trial court management practices, reformers argued, state courts would continue to operate inconsistently from one another in the way cases were heard and decided.<sup>135</sup> To streamline court processing throughout the state, the second phase underscored the need for central authorities that would determine uniform court procedures and staffing requirements. “By 1977, forty-six states had state court administrators, many of them possessed of significant administrative authority. By 1998, every state . . . [was] represented in [the Conference of State Court Administrators]. . . .”<sup>136</sup>

The heart of court centralization, however, lied in the final phase: state court funding.<sup>137</sup> While the first and second phases were structural and procedural in nature, as the ABA Committee of Judicial Administration explained in 1974, centralizing “the financial operations of the courts”<sup>138</sup> marked an ambitious step in the centralization project, because it meant shifting trial court funding from the various local governments to the state legislature.<sup>139</sup> With a unified state court budget, states could establish

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131. See Am. Bar Ass’n Comm’n on Standards of Judicial Admin., *Standards Relating to Court Organization* (1974).

132. See Advisory Comm. on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System* 34 (1971).

133. See *The State-Wide Judicature Act*, *supra* note 130, at 101.

134. See *id.* at 101–02.

135. See Pound, *supra* note 129, at 230–31.

136. ROBERT W. TOBIN, *CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM* 156 (1999).

137. See AM. BAR ASS’N COMM’N ON STANDARDS OF JUDICIAL ADMIN., *supra* note 131, §§ 1.10, 1.50 and official comments.

138. See *id.* § 1.10.

139. See *id.* §§ 1.10, 1.50 and official comments.



state-wide policy goals aimed toward equitably distributing resources across all courts in the system.<sup>140</sup> In 2013, the Department of Justice reported that “[a]t least 50% of trial courts received their primary funding for the salaries of court administrators, research attorneys, court reporters, and judges from state funding sources.”<sup>141</sup>

While opponents have claimed state court funding ignores local needs and preferences and potentially reduces revenue for local governments, centralized states have shown that state court funding in fact does the opposite.<sup>142</sup> In New Jersey, for example, one of the first states to shift to a unified court structure and, finally in 1995, to centralized court funding, the state as a whole witnessed “greater equity of staff resources and salaries and benefits across the trial courts.”<sup>143</sup> State court funding in New Jersey further “led to greater uniformity of programs and business practices and a sense of one judiciary in the state.”<sup>144</sup> A similar result was obtained in Minnesota. Before the shift to state court funding, there was a wide disparity between local judicial budgets in terms of the relative need met: “85.1 percent to 114.4 percent.”<sup>145</sup> However, after just the first year of state funding, “no district was allocated less than 96.5 percent of need. Eight of the 10 districts improved their percentage of need, and the two districts exceeding 100 percent of need were capped.”<sup>146</sup> Likewise, in California, trial judges lauded state court unification for its ability to increase the “fungibility of judicial resources” across trial courts, enhance the public’s overall “access to the Courts,” “increase[] administrative and judicial efficiency and innovation,” and “eliminate[] delay in both the civil and

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140. *Id.* § 1.10; *see also* CHRISTINE M. DURHAM & DANIEL J. BECKER, PERSPECTIVES ON STATE COURT LEADERSHIP: A CASE FOR COURT GOVERNANCE PRINCIPLES 2 (2012).

141. *See* RON MALEGA & THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, STATE COURT ORGANIZATION, 2011, at 8 (2013).

142. *See* TOBIN, *supra* note 136, at 66.

143. CARLSON ET AL., *supra* note 61, at 27.

144. *Id.* Like any reform measure, the New Jersey centralization approach did exhibit some weaknesses. Specifically, state funding may have inhibited the flexibility and innovation of some trial courts to tackle unique local caseload and litigant characteristics, or design approaches to handling cases. *Id.* at 56.

145. *See* Sue Dosel, *Transition and Transformation: The Minnesota State Funding Project*, 22 CT. MANAGER 18, 23 (2007).

146. *Id.*; *see also* NAT’L CTR. FOR STATE COURTS, A CASE STUDY: REENGINEERING MINNESOTA’S COURTS 19 (2012) (finding that the Minnesota Judiciary met its goals of “(1) reducing jury operating costs, (2) increasing staff efficiency, and (3) improving service for jurors.”).

criminal caseloads.”<sup>147</sup> Together, these states have shown that, rather than ignoring local needs and preferences, state court funding in fact *empowers* courts in otherwise stagnant and economically depressed communities where, without local wealth adequate to local needs, local autonomy was previously but an empty shell.<sup>148</sup>

Recognizing these successes, court observers have long praised state court funding as a means to equalize funding across trial courts.<sup>149</sup> A consensus of national and state policy experts now favors either exclusive or predominate state funding of courts as the best means to close the access-to-justice gap.<sup>150</sup> Researchers for the Justice Management Institute, for instance, found that in the states that shifted to primary state funding, there were significant and successful efforts to achieve equal funding levels across state trial courts.<sup>151</sup> Empirical data shows that centralized state court funding also increases the visibility of judicial funding, thereby expanding legislative accountability for state court finance.<sup>152</sup> Given

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147. *Letters from the Courts: What the Courts Said After Unification*, CAL. CTS. REV., Winter 2009, at 24 (excerpts of letters from C. Robert Jameson, Presiding Judge, Superior Court of Orange County, and Richard C. Turrone, Presiding Judge, Superior Court of Santa Clara County).

148. *See generally* Liscow, *supra* note 108, at 1828 (noting that “[h]aving the state or federal government pay for services promotes equality across rich and poor areas” which outweighs perceived trade-offs in local tailoring by cities and counties).

149. *See, e.g.*, Larry C. Berkson, *The Emerging Ideal of Court Unification*, 60 JUDICATURE 372, 382 (1977); CRIMINAL JUSTICE POLICY PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 12 (2016) [hereinafter CONFRONTING CRIMINAL JUSTICE DEBT] (“To avoid creating incentives for courts and localities to fund themselves based on criminal justice debt, the judicial system should be fully funded by the state.”). *See generally* John R. Brooks, II, *Fiscal Federalism as Risk-Sharing: The Insurance Role of Redistributive Taxation*, 68 TAX L. REV. 89, 110 (2014) (“The standard view in the literature is that redistribution . . . should be exclusively allocated to the most central level of government—at the federal level, in the United States—with subnational governments focusing more on allocation of public goods and raising revenue from flatter and more stable taxes, such as a real property tax.”). *See generally* Liscow, *supra* note 108 (arguing that centralized state control promotes economic efficiency and funding equity between rich and poor districts).

150. *See* MICHAEL D. GREENBERG & SAMANTHA CHERNEY, DISCOUNT JUSTICE: STATE COURT BELT-TIGHTENING IN AN ERA OF FISCAL AUSTERITY 7 (2017), [https://www.rand.org/content/dam/rand/pubs/conf\\_proceedings/CF300/CF343/RAND\\_CF343.pdf](https://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF343/RAND_CF343.pdf) [<https://perma.cc/7BUN-2RZ8>]; STATE OF MICH., TRIAL COURT FUNDING COMMISSION FINAL REPORT 8–9 (2019) [hereinafter MICHIGAN TRIAL COURT FUNDING REPORT], [https://www.michigan.gov/documents/treasury/TCFC\\_Final\\_Report\\_9-6-2019\\_667167\\_7.pdf](https://www.michigan.gov/documents/treasury/TCFC_Final_Report_9-6-2019_667167_7.pdf) [<https://perma.cc/BLT5-EQ37>] (reporting that 46% of stakeholders favored weighted state funding—where the state provides basic services, such as e-filing, document management, and technology, and local government maintains operational control—and 39% favored total state court funding; only 6% believed trial courts should be either mostly or fully funded by local government).

151. CARLSON ET AL., *supra* note 61, at 1–3.

152. *Id.*

the robust equalizing effects of state court funding, it is unsurprising that unified state courts consistently receive above average public satisfaction ratings.<sup>153</sup>

If too many state trial courts today are underfunded it is not because their local governments are unwilling to fund the justice system; rather, it is because their local economies simply lack sufficient wealth capacity to fund state trial courts at an adequate level. As courts in wealthier counties and cities outpace those courts in poorer regions of the state, the redistributive role played by the state legislature has become critical to closing the access-to-justice gap between localities.<sup>154</sup> Indeed, in those states that have adopted wholesale centralized state funding measures, the gap in the quality of justice has substantially narrowed, removing walls in low-income communities to efficient justice.

## II. THE AMERICAN CLERKSHIP MARKETS

If court centralization is to be preferred over decentralized, local court control—as this Article and other scholarship has suggested<sup>155</sup>—it is because centralization plays an important redistributive role in society by equalizing court funding and valuable court resources across courts in a way that guarantees an equal opportunity for courts to administer efficient justice. Section II.B hammers down on this argument by exploring the centralization of clerkship markets in the federal courts and state appellate courts.

Until the early twentieth century, clerkship markets were highly decentralized, with many federal judges and state appellate judges paying for law clerks out of pocket.<sup>156</sup> Yet as court filings

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153. David B. Rottman & William E. Hewitt, NAT'L CTR. FOR STATE COURTS, *Trial Court Structure and Performance: A Contemporary Reappraisal* 50–55 (1996), <https://nscs.contentdm.oclc.org/digital/collection/ctadmin/id/3/> [<https://perma.cc/KWS6-F6BQ>].

154. See generally Warner, *supra* note 111, at 27, 32.

155. See Brooks, *supra* note 149, at 110 (“The standard view in the literature is that redistribution . . . should be exclusively allocated to the most central level of government—at the federal level, in the United States—with subnational governments focusing more on allocation of public goods and raising revenue from flatter and more stable taxes, such as a real property tax.”); Liscow, *supra* note 108, at 1828 (arguing that centralized state control promotes economic efficiency and funding equity between rich and poor districts); CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 149, at 12 (arguing that centralized state funding of courts incentivizes courts not to rely exclusively upon criminal fines and fees for courthouse expenses).

156. See *infra* notes 189–94 and accompanying discussion.

quickly surged in the early years of the twentieth century, Congress and the state legislatures responded by passing spending legislation guaranteeing every federal judge and state appellate court judge at least one law clerk.<sup>157</sup> Today, these centralization efforts have equalized the distribution of law clerks across courts, thereby enabling judges to cope with the expansion of their caseloads through the use of clerk-written draft opinions and legal research.<sup>158</sup>

But, as we shall see in section II.B, the movement toward centralized clerkship markets has not taken root in many state trial courts. Instead, states have created rather narrow, decentralized clerkship markets, which depend upon local funds for their support.<sup>159</sup> In these states, the demand for state trial court law clerks has been limited to those courts sitting in more affluent communities, where funding for law clerks is available. Courts in disadvantaged areas, in contrast, may have a need for law clerks but cannot hire them due to a lack of local funds.<sup>160</sup> As this Part concludes, a handful of states have led the way in reforming their clerkship markets by either passing state legislation guaranteeing funding for state trial court law clerks, or appropriating money in the form of grants to assist in funding law clerk salaries.<sup>161</sup>

Before we turn to a discussion of the clerkship markets, however, a brief explanation of why policymakers may prefer investing in law clerks over other measures is in order. In a word, the clerkship is the judiciary's time-honored response to the gradual growth of cases. In his classic biography of the Supreme Court, John Frank remarked that, "As the work load increases, the methods must be streamlined or else the work output will go down."<sup>162</sup> This Article joins others that have argued that the clerkship is the judiciary's time-tested response to the growth of trial and appellate caseloads throughout the country.<sup>163</sup>

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157. See *infra* notes 183–90 and accompanying discussion.

158. See *infra* note 193 and accompanying discussion.

159. See *infra* note 234 and accompanying discussion.

160. *Id.*

161. See *infra* section II.C.

162. JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 113 (1958).

163. See, e.g., Cohen, *supra* note 10; Kester, *supra* note 10; Kozinski, *supra* note 10; Lippez, *supra* note 10; Mikva, *Judicial Clerkships: A Judge's View*, *supra* note 10; Mikva, *Maintaining Control of the Judiciary*, *supra* note 10; Oakley, *supra* note 10; Posner, *supra* note 10.

One camp of scholars and judges, however, might quickly argue that this overstates the benefits of law clerks. A handful of court observers and former law clerks have suggested that judges have vested too much faith in the work of young, inexperienced law school graduates,<sup>164</sup> with insider stories of ambitious law clerks manipulating their malleable judges.<sup>165</sup> For these challengers of the clerkship institution, although law clerks may indeed increase the efficiency of courts, they wield an inappropriate level of influence over judicial outcomes and sometimes distort the “pure” and unbiased view of judges.<sup>166</sup> Under this argument, legislatures are better off investing in other efficiency measures, such as expanding the number of sitting judges.<sup>167</sup>

While this Article lauds adding more judges in principle, as a means to reduce the average caseload of sitting judges, hiring more judges, *alone*, has never been shown to render *current* judges quicker or less prone to legal error.<sup>168</sup> This may explain why policy

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164. See, e.g., Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 138 (2014). (“Clerks in the cohort category 26 to 30 represented 71% of respondents. The prevalence of this age category suggests that the vast majority of law clerks have just graduated from law school. Judges’ apparent fascination with new law graduates has created a hiring frenzy amongst law students, which neither law schools nor the judiciary appears able to remedy.”).

165. See, e.g., LAZARUS, *supra* note 13, at 6 (arguing that the Supreme Court is “a Court where Justices yield great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses and the institution they ostensibly serve”); Tom C. Clark, Assoc. Justice of the U.S. Supreme Court, Internal Operation of the United States Supreme Court, Address at the Eleventh Conference of the Inter-American Bar Association (Apr. 15, 1959), in 43 J. AM. JUDICATURE SOC. 45, 48 (1959) (“A suspicion has grown at the bar that the law clerks . . . constitute a kind of junior court which decides the fate of the certiorari petitions. This idea of the law clerk’s influence gave rise to a lawyer’s waggish statement that the Senate no longer need bother about confirmation of Justices but ought to confirm the appointment of law clerks.” (quoting Justice Robert Jackson)); John G. Kester, *The Law Clerk Explosion*, 9 LITIG., Spring 1983, at 20 (explaining that the clerkship is not per se improper but that the overreliance on clerks has become excessive); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 3 LONG TERM VIEW 94 (1995) (stating that opinions that are written by law clerks and unedited by judges are inappropriate and lead to a lack of respect of judges); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Law Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 20 (2007) (explaining that citation to unpublished opinions should not be allowed because an unpublished opinion was likely written by a law clerk and should not be precedent); Wilkinson, *supra* note 13, at 1171 (stating that growth in the court system has meant more opinions are written by clerks).

166. Cohen, *supra* note 10, at 102.

167. William L. Reynolds & William M. Richman, *The New Certiorari Courts*, 80 JUDICATURE 206, 206 (1997).

168. See JOHN GOERDT, CHRIS LOMVARDIAS, GEOFF GALLAS & BARRY MAHONEY, NAT’L CTR. FOR STATE COURTS, EXAMINING COURT DELAY: THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS, 1987, at 26–30, 71–75 (1989); BARRY MAHONEY, ALEXANDER B. AIKMAN, PAMELA CASEY, VICTOR E. FLANGO, GEOFF GALLAS, THOMAS A. HENDERSON, JEANNE A. ITO,

attempts to expand the judiciary have largely failed in both Congress and the state legislatures.<sup>169</sup> From a purely budgetary standpoint, moreover, the case for adding judges seems to be substantially undercut by the fact that judicial salaries are expensive—indeed, the cost of one judge’s salary could potentially pay the salary of two or even three law clerks.<sup>170</sup>

Moreover, the general claim that legislatures should not invest in law clerks ignores the modern reality that judges today simply cannot author all or even most of their opinions without some additional help, given both the volume and complexity of contemporary judicial caseloads.<sup>171</sup> As the next section shows, judges like William Douglas, Learned Hand, and Richard Posner, long reputed to have written all their own opinions, now form a minority of modern judges.<sup>172</sup> Modern docket constraints simply require most trial and appellate judges to rely on the clerk-written draft opinion.

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DAVID C. STEELMAN & STEVEN WELLER, NAT’L CTR. FOR STATE COURTS, CHANGING TIMES IN TRIAL COURTS 46 (1988); MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 23–26 (1983); MALCOLM M. FEELEY, *The Effects of Heavy Caseloads, in AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR* 110, 116–18 (Sheldon Goldman & Austin Sarat eds., 1978); Bruce Green, *The Price of Judicial Economy in the U.S.*, 7 OÑATI SOCIO-LEGAL SERIES 790, 794 (2017), <http://opo.iisj.net/index.php/osls/article/viewFile/851/1026> [<https://perma.cc/47ZX-Y2BV>]; see also Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70, 70–73 (1993) (explaining the adverse effects a growing judiciary has on the equality of justice).

169. See, e.g., MALEGA & COHEN, *supra* note 141 (reporting that although the number of state trial court judges increased 11% from 1980 to 2011, the ratio of judges per 100,000 United States residents declined 23%, from 13.2% in 1980 to 10.2% in 2011, given that the United States population increased 37%, and arrests in the United States increased 19%); *Testimony of Alicia Bannon*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/sites/default/files/analysis/Federal%20Judgeship%20Act%20Testimony.pdf> [<https://perma.cc/F8S8-GGN9>] (observing that Congress last significantly extended the size of the federal judiciary in 1990, a measure that created eighty-two new district court judgeships).

170. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 321–22 (1960) (arguing that law clerks are “a time-cheap road to stimulus and to useful leads,” that “so increases the judge’s working capacity as to far outweigh the time-drain of breaking in a novice every year”).

171. Cohen, *supra* note 10, at 99, 101–02, 105; Kester, *supra* note 10, at 141–42; Kozinski, *supra* note 10, at 57–58; Lipez, *supra* note 10, at 115–16; Mikva, *Judicial Clerkships: A Judge’s View*, *supra* note 10, at 151; Mikva, *Maintaining Control of the Judiciary*, *supra* note 10, at 12; Oakley, *supra* note 10, at 85–88, 90; Posner, *supra* note 10, at 23–24.

172. Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care?)*, 32 FLA. ST. U. L. REV. 1077, 1094 (2005). Justice Douglas and Judge Hand, in particular, are well known for their fierce sense of independence—both personally and professionally. In his recently acclaimed book *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices*, Noah Feldman explains that Justice Douglas wrote his own opinions—often in record time (sometimes within thirty minutes). NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 431 (2010). Yet Douglas went farther than simply not relying on his law clerks. “According to others who clerked alongside [Douglas’s law clerks] in different chambers, Douglas’s clerks

The argument for not investing in law clerks appears even weaker if we think about the intuitive benefits of the judge-law clerk relationship.<sup>173</sup> A law clerk provides a *second* pair of “neutral eyes” on each case.<sup>174</sup> Rather than doing all the work in isolation, the judge can distribute the work down to his or her law clerk, thereby allowing him or herself more time to think through the reasoning and holding of the case. This in turn lets the judge continue producing “good” legal decisions even as caseloads increase.<sup>175</sup> Additionally, law clerks often bring heightened interest to more run-of-the-mill cases, which instills a “spark of vibrancy” in the opinion-drafting process that judges may not otherwise possess in isolation.<sup>176</sup> Hence, while it may be true that some judges rely on their law clerks too much, enabling them to wield undue influence over the judicial process, most judges use their law clerks to *enhance* the decision-making process, making the court’s opinions both more thorough and more precise for the benefit of the public.

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lived in some combination of fear and loneliness. He would ‘fire’ them regularly, until they learned to ignore him and show up for work the next day.” *Id.* at 430. Judge Hand had a similar forceful sense of independence, Gerald Gunther, Hand’s former law clerk, tells us: “No clerk for [Learned] Hand ever wrote a single word, either in producing research memoranda or in drafting opinions. Instead, the Hand-law clerk relationship was one of extraordinary intellectual intimacy: it consisted entirely of face-to-face contacts, not any written work.” Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, from the Perspective of Learned Hand’s Days*, 60 BROOK. L. REV. 505, 510 (1994). And like Douglas, Judge Hand could also emotionally distance himself from his law clerks. In one instance, Gunther explains, Judge Hand became so enraged at Gunther’s candor in criticizing Hand’s draft opinion that Hand “picked up a small paperweight on his desk and threw it in [Gunther’s] general direction, missing [him] by only a narrow margin.” GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 620 (1994).

173. See Avery et al., *supra* note 13, at 804, 813.

174. See Swanson & Wasby, *supra* note 13, at 34 (summarizing the observations of state court judges, that they could not rely on lawyers to provide adequate legal summaries: “neutral eyes’ are needed because ‘lawyers can put spin on stuff,’ and clerks are ‘responsible for checking . . . so the parties aren’t misrepresenting facts . . . they make sure the propositions of law cited by the attorneys stand for what they say they stand for”).

175. See generally RICHARD A. POSNER, *HOW JUDGES THINK* 174, 371–75 (2008) (discussing the “force[s] tending to stabilize judicial decision making” to produce “good” legal decisions).

176. See LLEWELLYN, *supra* note 170, at 322; Cohen, *supra* note 10, at 104.

A. *The Centralization of Law Clerks in the Federal Courts and State Appellate Courts: A Logical Response to Increased Caseload Demands*

The tradition of law clerks in American courts started in 1875, when Horace Gray, then Chief Justice of the Massachusetts Supreme Judicial Court, began hiring at his own expense recent Harvard Law School graduates as legal assistants.<sup>177</sup> After spending many years as an associate justice, Justice Gray assumed an increased workload as chief justice. Remarkably, Justice Gray was tasked with writing 25% of the court's opinions and presiding over many of the trials then in the court's ambit.<sup>178</sup> In order to ease the pressure of his caseload, therefore, Justice Gray hired clerks from an elite pool of recent Harvard Law School graduates, which Justice Gray's half-brother, Professor John Chipman Gray, hand selected from honor graduates.<sup>179</sup>

When Justice Gray later ascended to the Supreme Court of the United States in 1882, he brought with him his practice of employing clerks as sounding boards, draftsmen, and editors for the Court's opinions.<sup>180</sup> Justice Gray's introduction of the law clerk into the federal judiciary timely corresponded with an increased workload for the Supreme Court.<sup>181</sup> Seeking to eliminate delays on the Court, Congress heeded Justice Gray's practice by passing the first federal legislation covering the cost of stenographic clerks for each sitting Justice.<sup>182</sup>

Still, Justice Gray's exact formulation of the law clerk as a legal protégé was not immediately received by his colleagues on the Court. From the late nineteenth to the early twentieth century, the

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177. See Samuel Williston, *Horace Gray*, in 8 GREAT AMERICAN LAWYERS 137, 157–60 (William Draper Lewis ed., 1909); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 301, 301 n.5 (1961).

178. JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTION OF LAW CLERKS IN AMERICAN COURTS 11 (1980).

179. Williston, *supra* note 177, at 87.

180. *Id.* at 157–59; see also *Fredonia Broad. Corp. v. RCA Corp.*, 569 F.2d 251, 255–56 (5th Cir. 1978).

181. See CHARLES L. ZELDEN, THE JUDICIAL BRANCH OF FEDERAL GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 21–23 (2007); Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1132 (1973) (explaining that between 1850 and 1870 the Court began to experience a serious demand on the time and resources of its members, and was inundated in 1875, when it was churning out two hundred opinions a year).

182. Act of Aug. 4, 1886, ch. 902, 24 Stat. 254.



majority of the Justices hired clerks solely for note taking, phone and mail communications, and transcribing.<sup>183</sup> The mainstay of these early clerks typically never drafted opinions in cases or discussed the merits of cases with their justice.<sup>184</sup>

This all changed when Oliver Wendel Holmes, also a former Chief Justice of the Massachusetts Supreme Court, succeeded Gray on the Supreme Court in 1902. Justice Holmes revived Justice Gray's practice of hiring Harvard Law School honors graduates as law clerks, not as mere stenographers.<sup>185</sup> In 1919, Congress institutionalized Justice Gray's method of hiring law clerks as legal protégés, by allocating funds for each justice to hire both a "law clerk[]" and a "stenographic clerk[]." <sup>186</sup>

Over the succeeding decades, Congress responded to the "constant upward trend in the total volume"<sup>187</sup> of cases by establishing a centralized clerkship system for the federal appellate courts and district courts. First, to handle still-expanding caseloads on the Supreme Court, Congress increased the number of law clerks assigned to each Justice from one to two, and, finally, the current four permitted today.<sup>188</sup> Then, in 1930, Congress authorized federal circuit courts of appeals judges to hire at least one law clerk<sup>189</sup>

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183. PEPPERS, *supra* note 10, at 56–63, 66–70; *see also* William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1759–60, 1760, n.39 (2009). For further historical accounts of law clerks in American courts, *see* Newland, *supra* note 177, at 302–03; Baier, *supra* note 181, at 1129–32; OAKLEY & THOMPSON, *supra* note 178, at 10–17.

184. Nelson et al., *supra* note 183, at 1759–60.

185. *See* I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J.L. & HUMAN. 119, 124–25 (1999); Newland, *supra* note 177, at 306.

186. The Act of Mar. 1, 1919, Pub. L. No. 65-314, 40 Stat. 1264, provided for nine "stenographic clerks," at a salary of up to \$2000 annually. The Act of July 19, 1919, Pub. L. No. 66-21, 41 Stat. 209, provided for nine "law clerks," at a salary of up to \$3600.

187. AM. LAW INST. STUDY OF THE DIVISION OF JURISDICTION BETWEEN THE STATE AND FEDERAL COURTS ix (1969). The American Law Institute began its study of the allocation of jurisdiction between state and federal courts in 1960, after Chief Justice Warren expressed this concern. *See id.* Judge Friendly wrote his influential book calling for reform to control the "tidal wave" of federal court litigation in 1973. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 4 (1973). Chief Justice Burger identified the need for caseload relief early in his tenure and pressed this theme throughout his term as head of the federal judiciary. *See* Warren Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A. J., 1049, 1049 (1972).

188. WARD & WEIDEN, *supra* note 14, at 36, 45 (explaining that in 1941 Congress doubled the number of clerks per Justice to two and, then in 1974 increased that number to a total of four); Newland, *supra* note 177, at 303–04 (showing that the Court in the 1940s witnessed a tremendous upsurge in *in forma pauperis* petitions).

189. *See* Act of June 17, 1930, Pub. L. No. 71-373, 46 Stat. 774.

and eventually increased that number to two and then to three.<sup>190</sup> Finally, during the 1930s and 1940s, Congress granted a law clerk to every federal district court.<sup>191</sup> Until then, only one illustrious federal district judge, Learned Hand, had hired law clerks, but at his own expense.<sup>192</sup>

By the 1970s, the clerkship had spread to every state appellate court, with the exception of only five less-busy state high courts.<sup>193</sup> However, as state courts continued to see an upsurge in judicial caseloads in the 1980s and 1990s, even those five states saw fit to appropriate funds for appellate law clerks.<sup>194</sup> Meanwhile, other state appellate courts doubled the number of clerks they employed, and by 2000, all state high courts used in-chambers clerks, with a mean of 2.18 in-chambers law clerk staff per judge.<sup>195</sup>

#### B. *The Effects of Centralized Clerkship Markets: Expanding the Duties of Modern Law Clerks*

Thus far this Part has examined—from a funding standpoint—the extent to which Congress and the states have centralized the clerkship as an institution. This section explores the *effect* of centrally guaranteeing law clerks. Once the clerkship was centralized,

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190. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139 (1999).

191. See Act of Feb. 17, 1936, Pub. L. No. 74-449, 49 Stat. 1140. During the first fiscal year after the passage of the Act, Congress did not grant each district court judge a law clerk, but rather allocated a total of thirty-five district court law clerks for each federal circuit. *Id.* It was not until 1948 that Congress funded each federal district court judge to hire at least one law clerk, if the chief judge deemed it necessary. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 921 (codified as amended at 28 U.S.C. § 752 (2012)). Finally, in 1959, Congress amended the statute to permit district judges to appoint their own law clerks, without the oversight of the chief circuit court judge. Act of Sept. 1, 1959, Pub. L. No. 86-221, 73 Stat. 452 (codified as amended at 28 U.S.C. § 752 (2012)). In section II.B, I explain that this early federal district court practice provides states with a useful model as they start to centrally fund trial court law clerks.

192. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 118 (2d ed. 2011) (explaining that as early as 1910 district court judge Learned Hand began employing a stenographic clerk who performed some of the duties of the modern-day law clerk). However, given that Hand paid his law clerks out-of-pocket, it is doubtful that a majority of other district court judges followed this practice.

193. Baier, *supra* note 181, at 1133–34.

194. See HANSON ET AL., *supra* note 13, at 71–141; LYNN LANGSTON & THOMAS H. COHEN, *BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION, 1987–2004*, at 1–2 (2007).

195. HANSON ET AL., *supra* note 13, at 161; see also LANGSTON & COHEN, *supra* note 194, at 2 (“About 700 *additional* law clerks were employed in intermediate appellate courts in 2004, an increase of 55% from 1987. In courts of last resort, the number of law clerks increased by 27%.” (emphasis added)).

federal court and state appellate court judges realized that they could more efficiently handle their dockets by distributing a greater portion of the judicial caseload to their law clerks. Consequently, the history of the clerkship over the twentieth century tells a tale of increased law clerk responsibility, with judges relying on them more and more as an integral part of the judicial process.

While court scholars have categorized the duties of law clerks into both administrative and substantive roles,<sup>196</sup> two primary roles of law clerks have emerged in the literature as instrumental to maintaining the efficiency of courts: (1) conducting substantive research to prepare judges for court hearings; and (2) drafting the court's opinions.<sup>197</sup>

### 1. Conducting Substantive Research to Prepare Judges for Court Hearings

The first role of a law clerk is to prepare judges for court hearings. Before the court issues its written opinion, the lawyers on either side will typically appear at least once before the court in an "oral hearing" to present their arguments on the salient issues in the case. Yet, since time and energy is a limited resource, appellate and trial judges will allocate more of their time preparing for complex and open-ended decisions than for minor, clear-cut cases.<sup>198</sup> These are cases where judges have an opportunity to advance the law, because either "the rule of law is certain, and the application alone doubtful," or the applicable rule itself has yet to be decided by a higher court.<sup>199</sup> Hence, judges must classify cases into different "tracks" as substantively different, with the hearings in each

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196. For a comprehensive study of the duties of federal district court law clerks, see Todd C. Peppers, Michael W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 635–36 (2008).

197. *Id.* at 636; see, e.g., Alain L. Sanders, *Putting a Thumbprint on History*, TIME, Aug. 6, 1990, at 75 ("[Clerks'] duties, which last a year, may range anywhere from technical researcher to ghostwriter to personal confidant.").

198. See Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013) (arguing that we should recognize judicial attention for what it is—a scarce resource); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 (2005) (depicting the federal appellate courts as "bifurcat[ed]" with "two separate and unequal tracks"); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 58 (suggesting that Article III judges focus on "elite cases" and not those involving "ordinary citizens").

199. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164 (Quid Pro Law

case requiring varying levels of time and intellectual investment from judges. The more demanding the case, the more likely the judge will rely upon his or her law clerk to do the heavy lifting in the case, including reading the briefs, researching the state of the law, and evaluating in written form the parties' arguments to prepare for oral argument.<sup>200</sup>

In appellate and trial courts alike, law clerks prepare judges for oral arguments by drafting a "bench brief" that articulates the clerk's substantive research in the case and his or her recommendation as to how the court should rule.<sup>201</sup> Appellate law clerks focus their time drafting a single, comprehensive bench brief in each case, while trial court law clerks draft multiple bench briefs in any one case.<sup>202</sup> This is because, unlike appellate court judges, federal district court judges and state trial court judges must often rule multiple times in a case, on a myriad of different motions, many of which require a high degree of fact finding.<sup>203</sup> In either case, however, appellate and trial court judges must rely on their law clerks to evaluate the parties' arguments, comb the relevant legal terrain, and recommend a correct outcome in the case—all of which appears in the clerk's final "bench brief."<sup>204</sup>

After each hearing is completed and the judge is prepared to issue an opinion, the clerk's technical research on each case invariably works its way into the court's opinion.<sup>205</sup> Each judge remains

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Books 2010) (1921).

200. Swanson & Wasby, *supra* note 13, at 33–34 (quoting several judges as observing that the clerks' most important work was research on the record and law of a case, which the clerk included in a bench memorandum, "making it easier to decide the case," and quoting one specific state judge as stating, "You really rely on them for fact-gathering when you have a long, complex situation with factual data"); Donald W. Molloy, *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*, 82 L. & CONTEMP. PROBS., May 2019, at 141 ("Because of the volume of work, several judges rely on the law clerk's work and may not read briefs filed by counsel, instead being informed by bench memos, law clerk discussions, and the law clerk's draft orders.").

201. Swanson & Wasby, *supra* note 13, at 26 (reporting that in-chambers state supreme court law clerks spend between 20 and 36% of their time preparing pre-hearing memoranda, or "bench memos").

202. See Molloy, *supra* note 200, at 136.

203. *Id.*

204. *Id.* at 135 ("[T]he Herculean task of reading and deciding at the district court is almost impossible without the aid of law clerks.").

205. Swanson & Wasby, *supra* note 13, at 31 (explaining that state appellate clerk memoranda and in-chambers oral discussion exert a "significant," or at the least a moderate, influence on the court's decision-making process); see also HANSON ET AL., *supra* note 13, at 40, 47 (reporting the average percentage of time devoted to opinion preparation by various

perfectly capable of saying “no” to a clerk’s conclusions in a case.<sup>206</sup> Yet, it is not always the clerk’s conclusions that matter, but the clerk’s research and analysis. “[I]f a clerk affects the judge’s view of the outcome,” one state supreme court justice explains, “it’s not because of their recommendation, but their research and review of the record,” which is generally the only “central independent research document done on each case.”<sup>207</sup>

Consider the Court’s opinion in *Brown v. Board of Education*. The empirical research behind footnote eleven, arguably one of the most important footnotes to the Court’s equal educational opportunity doctrine,<sup>208</sup> was “entirely the product of a Warren law clerk.”<sup>209</sup> Likewise, the Court’s historical analysis in *Brown*—that nothing in the legislative history of the Fourteenth Amendment supported an intent to end school segregation—grew out of research conducted by Justice Frankfurter’s law clerk, Alexander Bickel.<sup>210</sup> Justice Warren remained the architect of the *Brown* decision despite the work of these law clerks, and yet at the same time the research conducted by each of these clerks on the Court at the time clearly made a lasting impact on the case’s rationale.<sup>211</sup>

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legal staff in appellate courts).

206. See Baker, *supra* note 13, at 945 (noting that, even when judges concede that they have delegated some of the responsibilities of opinion writing to clerks, “[t]hey explain that the core function—the actual deciding—still resides with the judge”); see also William H. Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD REP., Dec. 13, 1957, reprinted on Dec. 9, 2008, <https://usnews.com/opinion/articles/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence> [https://perma.cc/W26Q-6QNC] (observing that judges should not “consciously abandon [their] own views . . . in the law because a stripling clerk just graduated from law school tells him to”); Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 SETON HALL CIR. REV. 19, 58 (2008) (explaining that a judge always remains free to leave the clerk’s conclusions and recommendations “in the dust”).

207. Swanson & Wasby, *supra* note 13, at 33 (quoting an anonymous state high court justice).

208. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (referencing a list of social science sources purporting to support the Court’s finding that school segregation caused children psychological harm); see Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 296 (2005) (arguing that footnote eleven was responsible for “the empiricization of the equal educational opportunity doctrine”).

209. BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 19 (1988).

210. See *infra* note 214 (discussing the impact of Bickel’s research on the decision in *Brown*).

211. Almost from the moment *Brown* was issued, social scientists have criticized the Court’s reliance on Dr. Kenneth Clark’s faulty psychological evidence in footnote eleven, while legal scholars such as Michael Heise have lauded the footnote for empiricizing the equal education opportunity doctrine. See Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientists’ Role*, 5 VILL. L. REV. 224, 224–25 (1960) (supporting the use of

## 2. Opinion Drafting

When the judge is ready to issue an opinion in a case, the judge may elect to do one of three things: write the opinion him or herself, ask the law clerk to draft part or various parts of the opinion, or have the law clerk draft the entire opinion. Of these three options, most twenty-first century judges, unlike their earlier predecessors, often invoke the second or third option.<sup>212</sup> Scholar Bernard Schwartz writes in his discussion of the Burger Court that, “[t]he Justices normally outline the way they want opinions drafted. But the drafting clerk is left with a great deal of discretion on the details of the opinion, particularly the specific reasoning and research supporting the decision.”<sup>213</sup>

To be sure, most of the earliest American law clerks were not opinion writers as modern courts have come to know them. Rather, they were commonly referred to as “stenographic clerks,” or legal

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social science evidence in desegregation cases); Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1310 (2002) (“By drawing upon empirical social science evidence to inform a core tenet of the Court’s understanding of equal education, the Warren Court established one of its enduring—if under-appreciated—legacies: the increased empiricization of the equal educational opportunity doctrine.”). For critical social science commentary, see Stuart W. Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 420, 420–21 (1979) (evaluating the validity of sources cited in *Brown* in light of subsequent research); Harold B. Gerard, *School Desegregation: The Social Science Role*, 38 AM. PSYCHOL. 869, 869–70 (1983) (criticizing the science cited in *Brown*); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 69 (1961) (criticizing Kenneth Clark’s article). For legal scholarly commentary criticizing footnote eleven, see Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 803–14 (2002) (describing the continuing debate over footnote eleven). For scholarly commentary criticizing the Court’s conclusion that nothing in the legislative history of the Fourteenth Amendment intended an end to segregation, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 984–85 (1995) (basing an originalist defense of *Brown* on the congressional debates and records leading up to the passage of the Civil Rights Act of 1875 and concluding, based on the post-1868 evidence, that the Fourteenth Amendment was intended to prohibit segregation in public schools).

212. SCHWARTZ, *supra* note 209, at 19.

213. *Id.*; see also David Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 JUDICATURE 236, 236 (1986) (“The functions of law clerks vary tremendously. A few judges use them as research assistants only. For other judges they may perform a screening function: summarizing the contents of papers filed by the parties in the manner of an honest broker. Still others—and these are clearly the majority—use law clerks as preliminary drafters of opinions or orders. The amount of direction supplied to a clerk drafting an opinion varies enormously from judge to judge.”); Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1100 (2004) (“The only guarantee one can have that judges are not rubber-stamping their law clerks’ work product is each judge’s sense of personal responsibility.”).

secretaries, and generally did nothing more than note taking, phone and mail communications, and transcribing.<sup>214</sup> In this early period of the clerkship, judges often dictated their opinions orally to their law clerks, and the law clerk then type-wrote the court's opinion, but rarely decided the language or rationale in judicial opinions.<sup>215</sup>

Yet, as the average judicial caseload grew during the last half of the twentieth century, the law clerk was retransformed into the opinion draftsman that Horace Gray had originally envisioned. Beginning in the 1940s and continuing to the present, more and more judges began mapping out the holding of a case to a law clerk, while leaving the bulk of the language and rationale of the opinion to the drafting clerk's imagination.<sup>216</sup> Justices like Pierce Butler, James Byrnes, Frank Murphy and Felix Frankfurter,<sup>217</sup> for instance, were some of the first Justices to have their clerks draft "almost all of [their] [J]ustice's written work."<sup>218</sup> Indeed, Justice Frankfurter's opinion in *Abel v. United States* and his dissents in *Baker v. Carr* and *Elkins v. United States*, are said to be "almost entirely the clerk's work."<sup>219</sup> Chief Justice Burger, who publicly denied the use

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214. PEPPERS, *supra* note 10, at 56–62, 66–70; *see also* Nelson et al., *supra* note 183, at 1759–60, 1759–60 nn.37–38. For further historical accounts of law clerks in American courts, *see* Baier, *supra* note 181, at 1129–30; Newland, *supra* note 177, at 302–03; OAKLEY & THOMPSON, *supra* note 178, at 14–15.

215. *See* PEPPERS, *supra* note 10, at 56–62, 66–70.

216. *See* RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 148 (1990) ("[M]ost judicial opinions are written by the judges' law clerks rather than by the judges themselves."); Baker, *supra* note 13, at 944–45 (noting that growth in caseload has led to an increase in the number of law clerks and in the amount of work delegated to them); Mahoney, *supra* note 13, at 321–22, 339 ("Law clerks are often responsible for a judge's first draft."); Wald, *supra* note 10, at 777–78 (suggesting that judges must utilize law clerks to draft opinions to keep pace with the large number of difficult and complex cases); Wilkinson, *supra* note 13, at 1171 (noting the delegation of opinion-writing to clerks due to increased demands on judges).

217. During the 1952 Term, Frankfurter assigned one of his clerks, Alexander Bickel, to read the entire legislative history of the Fourteenth Amendment and to prepare a memorandum on whether the Amendment was intended to render unconstitutional *de jure* segregation. FELDMAN, *supra* note 172, at 378–79. Bickel concluded that nothing in the legislative history of the Amendment suggested an original intent to end segregation. *Id.* at 379. Bickel's research was clearly influential on the Court's opinion in *Brown*, which adopted Bickel's conclusion in toto. *See id.* at 378–79. The memo was later published as Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

218. MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991*, at 58 (1997).

219. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 340–413 (1983). According to Karl Llewellyn, Frankfurter's "greatest contribution to our law," was his effort to turn the judicial clerkship "into what shows high possibility of becoming a pervasive American legal institution." LLEWELLYN, *supra* note 170,

of law clerks, had “law clerks wr[i]te his opinions, . . . and everyone knew it.”<sup>220</sup> Justice Rehnquist, too, had his clerks “do the first draft of almost all cases,” and sometimes he left those drafts “relatively unchanged.”<sup>221</sup>

The federal courts of appeals and district courts have been no exception to this trend toward clerk-written opinions. A study conducted in 1976 found that judges on the Ninth Circuit wrote most of their own opinions, while a study conducted in 2013, in contrast, found that 95% of all surveyed federal judges assign the drafting of opinions to law clerks.<sup>222</sup> At the federal district court level, where clerks must work under tighter time constraints and larger dockets than their appellate counterparts, clerk-written draft opinions and orders have become instrumental to the trial process.<sup>223</sup> Indeed, according to a 2008 study, 97% of federal district court judges assigned their law clerks the responsibility of drafting the legal opinions which disposed of a civil or criminal dispute, through either a motion to dismiss or a motion for summary judgment.<sup>224</sup>

Like their federal counterparts, state appellate law clerks have also gradually assumed a greater role in the opinion-drafting process.<sup>225</sup> In some states, appellate court law clerks spend as much as 68% of their time drafting opinions.<sup>226</sup> According to one state supreme court justice, law clerks exert such tremendous influence over the appellate opinion-writing process because they tend to “find things in cases that lawyers missed,” which “completely changes the course of the case.”<sup>227</sup>

Scholars and judges have underscored at least two reasons why American courts have increasingly relied on law clerks to draft judicial opinions. The first reason is the inherent value of the clerk-

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at 321.

220. TUSHNET, *supra* note 218, at 58.

221. *Id.*; see also Bonica et al., *supra* note 13, at 32 (finding that “clerks exert a modest but statistically significant effect on how Justices vote”).

222. OAKLEY & THOMPSON, *supra* note 178, at 91–96, 326 (1980); Todd C. Peppers, Michael W. Giles & Bridget Tainer-Parkins, *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in “Appellate Triage”*, 98 MARQ. L. REV. 313, 316 (2014); see also Richard J. Cardamone, *How an Expanding Caseload Impacts Federal Appellate Procedures*, 65 BROOK. L. REV. 281, 288–89 (1999) (revealing that his standard practice is to have a clerk “prepare[] the initial draft of [an] opinion”).

223. Peppers et al., *supra* note 196, at 623–25.

224. *Id.* at 635–36.

225. See HANSON ET AL., *supra* note 13, at 39–40.

226. *Id.* at 40.

227. Swanson & Wasby, *supra* note 13, at 24, 34.



written opinion to the common law system.<sup>228</sup> In recent decades, as the average judicial workload has steadily risen, and the number of sitting judges has remained flat,<sup>229</sup> the clerk-written opinion has allowed both appellate courts and trial judges to continue churning out opinions for the benefit of other judges and lawyers.<sup>230</sup> Indeed, without law clerks most appellate courts today could not draft nearly the number of opinions that they need to in order to instruct lower courts on matters of legal doctrine and policy.<sup>231</sup> Nor could trial courts produce the volume of opinions that other lower courts and appeals courts rely on as persuasive authority when doctrinal questions are left unanswered by current law.<sup>232</sup> Without law clerks to draft written opinions, in other words, common law judges would be left with fewer written cases and, thus, with less clear standards to rule on cases.<sup>233</sup>

Other judges have praised the clerk-written draft opinion as benefiting not only judges and lawyers, but, perhaps more importantly, the public at large. “As Americans of each succeeding generation are rightly told,” three Justices poignantly observed in *Planned Parenthood v. Casey*, the judiciary “cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy. . . .”<sup>234</sup> Americans cling to the well-reasoned opinion, because, living in a society where individually accountable judges play a prominent role in lawmaking, they need to know that adjudication is something more than the naked

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228. See Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 5–7, 20–21 (2009).

229. See TRAC, SYRACUSE U., *As Workloads Rise in Federal Courts, Judge Counts Remain Flat* (Oct. 14, 2014), <https://trac.syr.edu/tracreports/judge/364/> [<https://perma.cc/FX5E-M9Z3>]; TRAC, SYRACUSE U., *Some Federal Judges Handle Inordinate Caseloads* (Mar. 14, 2018), <https://trac.syr.edu/tracreports/judge/501/> [<https://perma.cc/63TM-VY22>].

230. See Aldisert et al., *supra* note 228, at 5–7, 20–21.

231. See Levy, *supra* note 79, at 403–04, 406 (considering how to apply the concepts of inputs and outputs to the work of the federal appellate courts and positing judicial attention as the input and a combination of error correction and law development as the output).

232. See, e.g., *Ortega v. Plexco*, 793 F. Supp. 298, 300 (D.N.M. 1991) (observing that “[a] federal court may look to a state trial court’s opinion as evidence of what the state court would do if faced with a particular question,” but “the federal court is not bound by the state trial court’s decision”); *Rippstein v. Provo*, 929 F.2d 576, 578 (10th Cir. 1991) (finding that a state trial court opinion constituted evidence of what state courts would do under the circumstances of the case); *Md. Cas. Co. v. Burley*, 345 F.2d 138, 139–40 (4th Cir. 1965) (holding a Virginia trial court decision not binding, but nevertheless following it).

233. See Aldisert et al., *supra* note 228, at 5–7, 20–21.

234. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

exercise of power.<sup>235</sup> Law clerks strengthen the ability of judges to provide good reasons for their decisions, which in turn reinforces the public's perception of the judicial decision-making process as legitimate.<sup>236</sup>

### C. *The State Trial Court Clerkship Markets*

One benefit of a centralized market is that it brings together many buyers and sellers at the same time, and encourages competition between buyers and sellers. That situation changes in a decentralized market. Roughly half the state governments today have decentralized trial court clerkship markets and, consequently, the market for law clerks has remained rather narrow: the number of prospective buyers (judges who consume clerks' services) is limited to a small group of state trial courts that fall in communities with medium to high average income levels or property values, or a combination of both.<sup>237</sup> This leaves the sellers (law students) with very limited selling options in many states.

This section explores five states which collectively reflect the range of clerkship funding approaches across the country. The first two states, Virginia and Michigan, have decentralized trial court clerkship markets, whereby trial court law clerks are funded exclusively through local government. These two states are then contrasted with Minnesota, Colorado, and New Jersey, which have centralized trial court clerkship programs at the state level.

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235. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 123–44 (1983) (arguing that, because of American practice of judicial review of legislation, Americans worry more than others about judicial self-aggrandizement and search for jurisprudential theories that identify appropriate judicial activism and illegitimate judicial activism); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 282–83, 285–86 (1973) (arguing that, in the wake of totalitarian Europe, American lawyers came to stress process values as they sought to show that American law was not merely the naked exercise of power); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (“the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom.”).

236. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 163 (1990) (“One important element in feeling that procedures are fair is a belief on the part of those involved that they had an opportunity to take part in the decision-making process. This includes having an opportunity to present their arguments, being listened to, and having their views considered by the authorities. Those who feel that they have had a hand in the decision are typically much more accepting of its outcome, irrespective of what the outcome is.”).

237. See MALEGA & COHEN, *supra* note 141, at 8.

Additional selection criteria included population, geography, and wealth, with a preference for states that have comparable mixes of urban and rural courts and comparable degrees of wealth. Virginia is a medium-sized state with a large rural landscape, several major urban centers, a moderately large population, and a high gross domestic product (“GDP”).<sup>238</sup> Michigan is a moderately large state, with a few urban centers, a predominately rural landscape, a large population, and a large GDP.<sup>239</sup> Minnesota is a medium-sized state, with a predominately rural landscape, several urban centers, a medium-sized population, and a moderate GDP.<sup>240</sup> Colorado is a large, predominately rural state, with a medium-sized population and a moderate GDP.<sup>241</sup> New Jersey is the smallest state in the study, with a mix of urban and rural landscape, a large population, and a large GDP.<sup>242</sup>

### 1. The Decentralized Trial Court Clerkship Markets: Virginia and Michigan

Our first example of a decentralized state trial court clerkship market is Virginia. The state is divided into thirty-one judicial circuits which hear felony cases, serious misdemeanors, high-value civil cases, suits in equity, and appeals from lower courts of limited jurisdiction and various administrative agencies.<sup>243</sup> According to a

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238. According to the 2010 Census, Virginia’s population was 8,001,024. U.S. CENSUS BUREAU, 2010 CENSUS: VIRGINIA PROFILE (2011), [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_Virginia.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Virginia.pdf) [<https://perma.cc/S8WR-7YYF>]. Virginia’s GDP was \$554.21B in 2019. Erin Duffin, *U.S. Gross Domestic Product, by State 2019*, STATISTA (Apr. 23, 2020) [hereinafter *U.S. GDP*], <https://www.statista.com/statistics/248023/us-gross-domestic-product-gdp-by-state/> [<https://perma.cc/YJ4D-P4CA>].

239. According to the 2010 Census, Michigan’s population was 9,883,640. U.S. CENSUS BUREAU, 2010 CENSUS: MICHIGAN PROFILE (2011), [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_Michigan.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Michigan.pdf) [<https://perma.cc/75ZA-K4KW>]. Michigan’s GDP was \$541.55B in 2019. *U.S. GDP*, *supra* note 238.

240. According to the 2010 Census, Minnesota’s population was 5,303,925. U.S. CENSUS BUREAU, 2010 CENSUS: MINNESOTA PROFILE (2011), [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_Minnesota.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Minnesota.pdf) [<https://perma.cc/9SYD-YJYZ>]. Minnesota’s GDP was \$380.85B in 2019. *U.S. GDP*, *supra* note 238.

241. According to the 2010 Census, Colorado’s population was 5,029,196. U.S. CENSUS BUREAU, 2010 CENSUS: COLORADO PROFILE (2011), [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_Colorado.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Colorado.pdf) [<https://perma.cc/2CS3-R2TE>]. Colorado’s GDP was \$390.28B in 2019. *U.S. GDP*, *supra* note 238.

242. According to the 2010 Census, New Jersey’s population was 8,791,894. U.S. CENSUS BUREAU, 2010 CENSUS: NEW JERSEY PROFILE (2011), [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_New\\_JerseyJ.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_New_JerseyJ.pdf) [<https://perma.cc/PB2Q-LR3H>]. New Jersey’s GDP was \$644.84B in 2019. *U.S. GDP*, *supra* note 238.

243. OFFICE OF THE EXEC. SEC’Y, SUPREME COURT OF VA., THE IMPACT OF LAW CLERKS IN VIRGINIA CIRCUIT COURTS: A STUDY REQUESTED BY THE SENATE COMMITTEE ON RULES 2

2018 Senate Joint Resolution studying the number of circuit court law clerks within the state, twenty-two of the thirty-one judicial circuits are served by at least one law clerk, with a total of seventy-six circuit court law clerks employed in the state.<sup>244</sup> In each judicial circuit served by law clerks, the salary of each law clerk is borne by the local government.<sup>245</sup>

The majority of circuit court law clerks in Virginia are overwhelmingly concentrated in the state's eastern and northern circuits, where the state capitol in Richmond sits, the naval shipyards of Eastern Virginia lie, and the populous urban centers of Northern Virginia form the beltway around Washington D.C.<sup>246</sup> In four of these circuits, the judge to law clerk ratio is one-to-one.<sup>247</sup> Exceptions to this geographical trend are Roanoke, Salem, and Charlottesville, which form the metropolitan centers of the western portion of the state. The five circuit court judges that collectively sit in Roanoke City, Roanoke County, and Salem each share three law clerks.<sup>248</sup> In Charlottesville, which sits in Albemarle County, the two respective circuit court judges hire their own law clerk.<sup>249</sup>

The more rural and less populous the county becomes in Virginia, the higher the law-clerk-to-judge ratio becomes. For instance, the ratio can range from four-to-one to six-to-one in geographically isolated counties.<sup>250</sup> Unsurprisingly, the nine judicial circuits in Virginia without access to law clerks are geographically larger and more rural than the twenty-two circuits with law clerks.<sup>251</sup> Thirty-four judges sit in these nine circuits.<sup>252</sup>

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(2018) [hereinafter IMPACT OF LAW CLERKS] (on file with author).

244. *Id.*

245. *Id.* at 3; *Circuit Courts*, VA.'S JUD. SYS. (Aug. 27, 2020), <https://www.courts.state.va.us/courts/circuit/home.html> [<https://perma.cc/JZL3-TG7J>].

246. See generally *2020–2021 Judicial Clerkships Handbook*, U. RICH. SCH. L., [https://law.richmond.edu/career/\\_pdf/Clerkship-Handbook.pdf](https://law.richmond.edu/career/_pdf/Clerkship-Handbook.pdf) [<https://perma.cc/MZ39-98MH>]; *Nuts & Bolts of Applying for Judicial Clerkships*, U. RICH. SCH. L., [https://law.richmond.edu/career/\\_pdf/NutsBoltsPDFversion.pdf](https://law.richmond.edu/career/_pdf/NutsBoltsPDFversion.pdf) [<https://perma.cc/2F8K-FDA5>].

247. IMPACT OF LAW CLERKS, *supra* note 243, at 2.

248. Telephone interview with Dawn Plymale, judicial assistant to the Hon. James Swanson (Sept. 9, 2020) (remarking that three law clerks are shared—on a rotating basis—amongst five circuit court judges, who collectively sit in Roanoke City, Roanoke County and Salem City).

249. Telephone interview with the Hon. Jon R. Zug, Clerk of Court, Albemarle Circuit Court (Sept. 9, 2020).

250. IMPACT OF LAW CLERKS, *supra* note 243, at 2 n.1.

251. *Id.* at 4.

252. *Id.*

[T]he chief judges of the nine circuits were unanimous in wanting to have access to law clerk assistance within their judicial circuit. Eight of the nine chief judges without law clerks believed that providing law clerks for those judicial circuits without them should be a funding priority for the court system.<sup>253</sup>

When asked how many law clerks they could use in their respective circuits, the chief judges of these circuits produced responses varying from one to six.<sup>254</sup>

Michigan presents a similar case study. All counties in the state are responsible for funding trial court law clerks, except one locale—Detroit—which by statute is guaranteed state funding for its law clerks.<sup>255</sup> In 2011, the state commissioned an extensive legislative survey that determined the number of law clerks employed by each county in the state and assessed whether that number was adequate to meet each court's caseload demands.<sup>256</sup> The study found that the number of trial court law clerks varies greatly among the various trial courts.<sup>257</sup> In some Michigan counties, courts enjoy a surplus of law clerks beyond their actual need, while in other counties, courts have a shortage of law clerks to meet their caseload needs.<sup>258</sup>

Michigan's poorest counties, measured by per capita income, consistently lack access to law clerks or have very high law-clerk-to-judge ratios. Table 1 presents an overview of survey data on Michigan trial courts, plotting the law-clerk-to-judge ratio by county and that county's per capita wealth. Those counties in the bottom half of the state's per capita income ranking either did not fund trial court law clerks or had substantially higher law-clerk-to-judge ratios than the more affluent counties in the state. In poorer counties, it was not uncommon to find one or two judges presiding over a circuit encompassing one or several large, rural

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253. *Id.* at 5.

254. *Id.* at 6.

255. Fifty-seven judges sit in Wayne County, which embraces the state capitol, Detroit, and the county has a one-to-one law-clerk-to-judge ratio. Telephone Interview with Joanna Tolvard, Court Administrator, 3d Judicial Circuit of Mich. (June 17, 2020). The entire cost of law clerks for the county is take up by the state. *See* MICH. COMP. LAWS § 600.1471.

256. NAT'L CTR. FOR STATE COURTS, MICHIGAN JUDICIAL WORKLOAD ASSESSMENT, FINAL REPORT 1, 11 (2011). The state's trial courts consist of a multiple general jurisdiction courts, including circuit, district and probate courts, and several specialty courts, such as the Court of Claims, the Michigan Tax Tribunal and other administrative law tribunals.

257. *Id.*

258. *Id.* at app. 6.

counties.<sup>259</sup> When interviewed, judges without access to a law clerk stated that while their locality was unable to fund a trial court law clerk, they nevertheless needed and would use a law clerk if they were provided one.<sup>260</sup>

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259. To illustrate, despite having a relatively large rural population of over 120,000 inhabitants combined, Montcalm County and Ionia County, which form Michigan's Eighth Circuit, have relatively high poverty rates (respectively 17.5% and 13.1%) and moderately low median household incomes (respectively \$44,651 and \$51,980). DATA USA, COMPARISON: MONTCALM COUNTY, MI & IONIA COUNTY, MI (Aug. 23, 2020), <https://datausa.io/profile/geo/montcalm-county-mi?compare=ionia-county-mi> [https://perma.cc/VQ2Y-M5FN].

260. Telephone interview with Susan Mitchem, Judicial Assistant, 32d Judicial Circuit of Mich. (June 17, 2020) (explaining that Judge Pope certainly needs and would use a law clerk); Telephone interview with Madison Black, Judicial Assistant, 15th Judicial Circuit of Mich. (June 17, 2020) (stating that Judge O'Grady "would love [a law clerk], but the county cannot fund them.").

TABLE 1: MICHIGAN'S LAW-CLERK-TO-JUDGE RATIO  
BY COUNTY AND INCOME WEALTH

Michigan Counties	Law-Clerk-to-Judge Ratio <sup>261</sup>	Per Capita Income (Out of 83 counties) <sup>262</sup>
Clinton	0:2 (2 judges)	7
Keweenaw	0:1 (1 judge)	11
Macomb	1:1 (14 judges)	12
Kent	1:2 (14 judges)	13
Ottawa	2:5 (5 judges)	15
Monroe	2:3 (3 judges)	17
Berrien	1:2 (4 judges)	20
Barry	1:2 (2 judges)	23
Shiawassee	1:1 (1 judge)	30
Lenawee	1:2 (2 judges)	32
Jackson	1:1 (5 judges)	33

261. Telephone Interview with Amy Gorham, Court Administrator, 8th Judicial Circuit of Mich. (June 17, 2020) (Ionia & Montcalm Counties); Telephone Interview with Julie Sines, Court Administrator, 27th Judicial Circuit of Mich. (June 17, 2020) (Newaygo & Oceana Counties); Telephone Interview with Flora Grundy, Court Administrator, 28th Judicial Circuit of Mich. (June 16, 2020) (Missaukee & Wexford Counties); Telephone Interview with Cherrie Ester, Court Administrator, 29th Judicial Circuit of Mich. (June 17, 2020) (Clinton & Gratiot Counties); Telephone Interview with Susan Mitchem, Judicial Assistant, 32d Judicial Circuit of Mich. (June 17, 2020) (Gogebic & Ontonagon Counties); Telephone Interview with Madison Black, Judicial Assistant, 15th Judicial Circuit of Mich. (June 17, 2020) (Branch County); Telephone Interview with Julie Carlson, County Clerk, 12th Judicial Circuit of Mich. (June 19, 2020) (Baraga, Houghton, & Keweenaw Counties); Telephone Interview with Autumn Ward, Judicial Assistant, 14th Judicial Circuit of Mich. (June 17, 2020) (Muskegon County); Telephone Interview with Sara White, Judicial Assistant, 16th Judicial Circuit of Mich. (June 17, 2020) (Macomb County); Telephone Interview with Renee Kuipper, Clerk Administrator, 20th Judicial Circuit of Mich. (June 17, 2020) (Ottawa County); Telephone Interview with Renee Pegg, Judicial Secretary, 17th Judicial District of Mich. (June 19, 2020) (Kent County); Telephone Interview with Ashley McBrian, Judicial Assistant, 5th Judicial District of Mich. (June 17, 2020) (Barry County); Telephone Interview with Theresa Bunch, Court Administrator, 4th Judicial District of Mich. (June 17, 2020) (Jackson County); Telephone Interview with Joanna Tolvard, Court Administrator, 3d Judicial Circuit of Mich. (June 17, 2020) (Wayne County); Telephone Interview with Sheila Beckmann, Circuit Court Clerk Manager, 2d Judicial Circuit of Mich. (June 17, 2020) (Berrien County); Telephone Interview with Gregory Gietzen, Law Clerk, 35th Judicial Circuit of Mich. (June 17, 2020) (Shiawassee County); Telephone Interview with Cari Elmore, Trial Court Administrator, 36th Judicial Circuit of Mich. (June 17, 2020) (Van Buren County); Telephone Interview with the Hon. Mark S. Braunlich, Presiding Judge, Domestic Relations Section, 38th Judicial Circuit of Mich. (June 17, 2020) (Monroe County); Telephone Interview with Becky Adams, Court Administrator, 39th Judicial Circuit of Mich. (June 17, 2020) (Lenawee County).

262. To provide county rankings, I compiled the per capita income of all eighty-three Michigan counties through the U.S. CENSUS BUREAU, 2010 CENSUS DATA (Aug. 24, 2020), <https://census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/493L-72V7>].

Van Buren	1:2 (2 judges)	36
Wayne (Detroit)	1:1 (57 judges)	42
Gogebic	0:1 (1 judge)	56
Branch	0:1 (1 judge)	57
Muskegon	1:4 (4 judges)	58
Newaygo	0:2 (2 judges)	59
Ontonagon	0:1 (1 judge)	63
Oceana	0:2 (2 judges)	71
Houghton	0:1 (1 judge)	73
Missaukee	0:1 (1 judge)	74
Wexford	0:1 (1 judge)	75
Gratiot	0:2 (2 judges)	78
Baraga	0:1 (1 judge)	82

In the more affluent Michigan counties, however, a vastly different picture emerges. Table 1 shows that those courts in the top half of the state's per capita income ranking scored best in terms of law-clerk-to-judge ratio. Counties such as Macomb, Jackson, and Shiawassee enjoy one-to-one law-clerk-to-judge ratios. Other counties are not far behind, with a range of one-to-two to two-to-five across the top wealthiest counties in the state.

The decentralized trial court clerkship markets in Virginia and Michigan embody the inherent inequality in traditional notions of local court governance.<sup>263</sup> Like other court functions in these states, the ability of trial courts to hire a law clerk depends upon the economic strength of the locality in which the court sits. Spatial inequality in the distribution of trial court law clerks consequently has become the norm in these states. Irrespective of the caseload demands and resource needs of state trial courts, judges presiding over less affluent, rural counties often must go without the assistance of a law clerk or must share a law clerk with four to five other busy trial court judges. Meanwhile, courts in wealthier locales are often armed with large pools of law clerks from which to choose. These two competing forces—the high demand and supply for law clerks in wealthy areas and the dearth of law clerk demand in poorer areas—cast doubt over the ability of courts in these states

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263. See MICHIGAN TRIAL COURT FUNDING REPORT, *supra* note 150, at 4 (observing that “inadequate funding” has resulted from “excessive dependence on local government funding”); see also Horne, *supra* note 6, at 68 (“There are great disparities between jurisdictions with large operating budgets and those jurisdictions with more modest operating budgets.”).



to live up to their constitutional mission in administering faithfully and efficiently the laws of the state and the nation.

## 2. The Centralized State Trial Court Clerkship Markets: Minnesota, Colorado, and New Jersey

While decentralized clerkship markets narrowly benefit only a few wealthy counties and cities within a state, centralized clerkship markets tend to *expand* the market of law clerks. Trial courts in less advantaged corners of the state receive funds from the state to hire trial court law clerks, thereby increasing the market's overall demand for law clerks (i.e., the judges who use them). In this respect, the transfer of law clerk funding from the local level to the state level achieves a more equitable distribution of law clerks for a constitutional state function. Three states aptly demonstrate this fact.

First, Minnesota. Under the state's centralized state clerkship program, *every* trial court judge is guaranteed state funding for one law clerk.<sup>264</sup> The centralized clerkship market in Minnesota emerged in 2006<sup>265</sup> as part of a broader court centralization effort by the state establishing state funded "judge units," consisting of a judge, law clerk, and court reporter.<sup>266</sup> A driving force behind the decision of the Minnesota legislature to centralize the trial court clerkship market was the public outcry of state chief judges. Beginning as early as 2001, chief judges began arguing that it was becoming increasingly difficult to recruit qualified law clerks in rural areas due to low pay or a lack of funds from localities.<sup>267</sup> And all Minnesota trial courts, irrespective of their geographical location, had been experiencing significantly more case filings per judge and fewer judges per capita.<sup>268</sup> Ensuring that all trial judges had access to a law clerk was thus essential to Minnesota's mission to provide equal access to efficient justice throughout the state.

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264. MINN. STAT. §§ 480.181, 484.545.

265. *See* Act effective July 1, 2006, ch. 260, 2006 Minn. Laws 1, 61–62 (codified as amended at MINN. STAT. § 480.181 (2006)).

266. The centralization of clerkship markets in Minnesota was the product of two decades of policy debate over the idea of court centralization. *See* STATE GOV'T AFFAIRS, 1992–93 PROPOSED BIENNIAL BUDGET, NO. 910212, at 42–48, 55–57; *see also* Act effective July 1, 2008, ch. 299, 2008 Minn. Laws 13.

267. OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., PROGRAM EVALUATION REPORT: DISTRICT COURTS, LEGIS. 82-01-02, Reg. Sess., at 27–28, 104–07 (Minn. 2001).

268. *Id.* at 17–24.

Second, Colorado. Like Minnesota, Colorado has established a centralized clerkship market.<sup>269</sup> Under the 2020 judicial budget, each district court judge is assigned one law clerk.<sup>270</sup> That system has improved the law-clerk-to-judge ratio from one-to-two to one-to-one.<sup>271</sup> The Colorado centralized clerkship market also benefits from uniformity in practice. Colorado district court judges post their clerkship positions through an online portal, which mirrors in many respects the OSCAR system used by the federal courts.<sup>272</sup> The Colorado State Judicial Branch requires applicants for trial court clerkships to submit a Colorado Judicial Department Employment Application.<sup>273</sup>

Third and finally, New Jersey. The New Jersey Superior Courts are the trial courts of general jurisdiction. Each judgeship consists of a law clerk, secretary, and court clerk.<sup>274</sup> Since the inception of New Jersey's centralized trial court clerkship system in 1997,<sup>275</sup> when all judicial costs in the state were transferred from the local level to the state level, the New Jersey clerkship market has become well-entrenched in the broader legal market.<sup>276</sup> Today, “[m]any New Jersey law firms accept applications only from judicial clerks [and] [o]ther law firms interview and offer summer associate positions to J.D. candidates . . . conditioned on completion

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269. See, e.g., JOINT BUDGET COMMITTEE, STAFF BUDGET BRIEFING FY 2018–2019, at 91 (2017), [https://leg.colorado.gov/sites/default/files/fy2018-19\\_judbrf.pdf](https://leg.colorado.gov/sites/default/files/fy2018-19_judbrf.pdf) [https://perma.cc/P6MA-C7SF].

270. COLO. JUDICIAL BRANCH, 2020 BUDGET REQUEST 14 (Nov. 1, 2018) [hereinafter 2020 BUDGET REQUEST]; JOINT BUDGET COMMITTEE, STATE OF COLO., STAFF BUDGET BRIEFING FY 2020-21 113 (Dec. 3, 2019), [http://www.leg.colorado.gov/sites/default/files/fy2020-21\\_judbrf.pdf](http://www.leg.colorado.gov/sites/default/files/fy2020-21_judbrf.pdf) [https://perma.cc/Q5DK-HX64].

271. Doug Smeath, *Law Clerks a Precious Commodity for Utah Judges*, DESERET NEWS (May 30, 2004), <https://www.deseret.com/2004/5/30/19831812/law-clerks-a-precious-commodity-for-utah-judges> [https://perma.cc/RR7Y-CJ62]; see 2020 BUDGET REQUEST, *supra* note 270.

272. *Careers*, COLO. JUDICIAL BRANCH (Aug. 23, 2020), <https://www.courts.state.co.us/Careers/Index.cfm> [https://perma.cc/72CC-T8RH]; *Mosaic*, COLO. COURTS, <https://www.its.courts.state.co.us/mosaic/login> [https://perma.cc/9MSE-EGLL].

273. *Career FAQs*, COLO. JUDICIAL BRANCH (Aug. 23, 2020), <https://www.courts.state.co.us/Careers/FAQs.cfm> [https://perma.cc/2DKE-T2EM].

274. CARLSON ET AL., *supra* note 61, at 41, 58; N.J. OFFICE OF LEGISLATIVE SERVS., ANALYSIS OF THE NEW JERSEY BUDGET: THE JUDICIARY 5 (2017), [https://www.njleg.state.nj.us/legislativepub/budget\\_2018/JUD\\_analysis\\_2018.pdf](https://www.njleg.state.nj.us/legislativepub/budget_2018/JUD_analysis_2018.pdf) [https://perma.cc/NW8X-UG49].

275. N.J. CONST. art. VI, § VIII.

276. *Id.*; *New Jersey State Trial Court Clerkship Application Guide 2019–2020 (Camden Campus)*, RUTGERS L. SCH. (Aug. 23, 2020), <https://law.rutgers.edu/sites/law/files/State%20Trial%20Clerkship%20Application%20Guide%20Updated%20Spring%202019.pdf> [https://perma.cc/4BGR-EH49].

of a judicial clerkship.”<sup>277</sup> Like Colorado, New Jersey has centralized the trial court clerkship hiring process, whereby each clerkship applicant submits his or her application through the New Jersey unified law clerk recruitment system.<sup>278</sup>

### 3. State Court Grant Programs for Locally Funded Trial Court Law Clerks: Pennsylvania

In 2017, Pennsylvania adopted a unique, middle-road approach to the funding of trial court law clerks.<sup>279</sup> Instead of classifying trial court law clerks as state employees and centrally funding them through the state budget, the state has erected a state grant program, whereby localities decide whether to hire trial court law clerks and what they are paid, and the state reimburses each county for law clerk spending at a rate of \$20 per hour.<sup>280</sup> Although the law clerk grant program remains too young to infer any positive correlation between state grants and the quality and consistency of trial court clerkships, it is worth noting that Pennsylvania boasts one of the highest concentrations of state law clerks amongst the fifty states for both non-metropolitan areas and metropolitan areas.<sup>281</sup>

## IV. THE CASE FOR REFORMING THE STATE TRIAL COURT LAW CLERK MARKET: TOWARD A GREATER STATE ROLE

For American state trial courts, there has been a longstanding attachment to local government and a historical suspicion of centralized state power.<sup>282</sup> State judges and policymakers have perceived that because local authorities are closer to the people, they are thus more responsive to local needs and preferences for funding and resourcing courts.<sup>283</sup> Until recently, centralized state power of local trial courts struck many as undemocratic—the unfortunate

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277. FORDHAM UNIV. SCH. OF LAW, STATE COURT CLERKSHIPS IN THE TRI-STATE AREA: SUPPLEMENT TO THE JUDICIAL CLERKSHIP HANDBOOK 19 (2014).

278. RUTGERS L. SCH., *supra* note 276.

279. Act of Oct. 30, 2017, Pub. L. No. 802-49, 2017 Pa. Laws 42 (codified as amended at 42 PA. CONS. STAT. § 1906.1).

280. 42 PA. CONS. STAT. § 1906.1

281. *Occupational Employment Statistics*, U.S. BUREAU OF LABOR STATISTICS (2018), <https://www.bls.gov/oes/2018/may/oes231012.htm> [<https://perma.cc/7CVR-GFJQ>].

282. *See supra* sections I.C.1–3.

283. *See supra* notes 90–91 and accompanying discussion.

result of a mistaken emulation of “hyper-liberal” and even autocratic states.<sup>284</sup>

These two attitudes are especially potent when conversations turn to state trial court clerkships. Historically, states granted localities almost exclusive control over the hiring of trial court law clerks. In a number of states still today, this tradition of decentralized trial court clerkship markets has remained an enduring feature of state court governance.<sup>285</sup> Within the past three decades, however, the tradition of decentralized funding of state trial court clerkships has come under close fire, with policymakers rebuking localized court control as inherently unequal and unfair to state judges, especially in rural locales.<sup>286</sup> A gradual trend toward more centralized state involvement in the state clerkship process has taken root in a growing number of states, with state policy leaders now favoring efforts to equalize trial court law clerks.<sup>287</sup>

Nonetheless, the resilience of the localist tradition in state trial court clerkships should not be overestimated. Simply assuming that centralized control over the clerkship is the more “modern” approach, and thus preferable over local control, will not contribute to its success. Each side of the debate on state trial court clerkships has its tradition and its deeply held values. When attempting to

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284. See generally Don Hazen & Steven Rosenfeld, *The Other Right-Wing Tidal Wave Sweeping America: Federal and State Preemption of Local Progressive Laws*, SALON (Feb. 28, 2017, 2:59 AM), [https://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-statepreemption-of-local-progressive-laws\\_partner/](https://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-statepreemption-of-local-progressive-laws_partner/) [https://perma.cc/UX76-G4SD] (quoting Mark Pertschuk, of Grassroots Change and Preemption Watch: “Take a place like Texas where we’ve done a lot of work, and 10 years ago, most legislators, especially Republican legislators, would never have dreamed of preempting local authority because there is a deep tradition of local control . . . One out of 100 Republicans that have addressed this issue [honestly] have made a nod to the fact that this is a blatant violation of conservative values. Mostly, it’s pure politics.”); Mathew Ryan, *Conservative Value Abandoned by Conservative Legislatures*, HARV. CIV. RTS.-CIV. LIBERTIES L. REV.: AMICUS BLOG (Oct. 26, 2015), <http://harvardcrcl.org/conservative-value-abandoned-by-conservative-legislatures/> [https://perma.cc/AK47-34GL] (“Conservative lawmakers often promote the virtues of local control. And in many cases, I agree with them. Local control can promote democratic accountability, allow for flexible policy amongst diverse communities, breed laboratories of innovation, and disperse power. All of these justifications seem like a perfectly good reason to allow for municipalities to pass minimum wage laws—and other policies—without state capitals telling these cities how to plan their lives. Either that, or conservatives ‘abandon the American Revolution,’ and admit they only support local control when it fits their politics.”).

285. See *supra* section II.C.1.

286. See MICHIGAN TRIAL COURT FUNDING REPORT, *supra* note 150, at 4; Ortega, *supra* note 117, at 7; *supra* section I.C.2.

287. See *supra* section II.C.2–3.

pass major new legislation on a polarizing issue such as government spending, conscientious legislators must find a way to hear the story of their opponents. Finding and appreciating shared values of judicial efficiency, equality, and fairness is as noble a goal as any other for advancing fiscal equity in state courts.

With judicial efficiency as our guidepost, this Part discusses recent calls to centralize clerkship markets in Virginia and the various policy arguments for reforming the state role of the trial court clerkship process.

A. *Recent Calls for Action: Virginia's Decade-Long Debate over Centralized Trial Court Clerkships*

In the 2019 session of the Virginia General Assembly, the legislature amended its summary judgment statute.<sup>288</sup> In doing so, legislators allowed the admission of more evidence, such as affidavits and depositions, at the summary judgment stage than Virginia courts had historically permitted.<sup>289</sup> A minority of legislators, however, recognized the change in the summary judgment statute as an opportunity for more policymaking. In their mind, the statute required the guarantee of at least one law clerk to every circuit court judge.

The addition of new forms of admissible evidence in summary judgment proceedings, an increasingly common device in modern civil litigation, increases the workload on circuit court judges. In complex business cases, trial courts across Virginia will need to read and analyze potentially hundreds of pages of affidavits and depositional testimony to determine whether a genuine issue of material fact exists in the case.<sup>290</sup> Given these additional constraints on Virginia trial courts, several Virginia legislators—most notably Northern Virginia Senator Scott Surovell—encouraged members of the General Assembly not to enact these changes to

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288. Act of Feb. 21, 2019, ch. 128, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 8.01-420 (Cum. Supp. 2020)).

289. See Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1733–35 (1995) (collecting statutes from the state and federal jurisdictions).

290. The summary judgment standard was amended to read: “discovery depositions under Rule 4:5 and affidavits may be used in support of or opposition to a motion for summary judgment in any action when the only parties to the action are *business entities* and the amount at issue is \$50,000 or more.” VA. CODE ANN. § 8.01-420 (Cum. Supp. 2020) (emphasis added).

the summary judgment statute until the state guaranteed at least one law clerk for each circuit court judge.<sup>291</sup>

Though unsuccessful, the attempt to create a centralized trial court clerkship market in Virginia was motivated by the very same policy concerns over increased caseload demands on trial judges that encouraged the centralization of clerkship markets in the federal courts and in the state appellate courts.<sup>292</sup> In years to come, trial judges in Virginia and across the country will likely see an increase in summary judgment proceedings, thereby adding to the caseload demands on courts.<sup>293</sup> For this reason, states such as Virginia and others with decentralized clerkship markets should reconsider their approach to funding state trial court law clerks.

### B. *The Virtues of Centralizing Trial Court Clerkship Markets*

Three virtues are inherent within centralized clerkship markets: states (1) create more job opportunities for young lawyers in a competitive employment market; (2) ensure that rural trial courts are able to resolve cases efficiently in times of economic crisis; and (3) lend more prestige and respect to state trial court clerkships and encourage more empirical research and policy debate on ways to improve state courts.

#### 1. By Expanding the Trial Court Clerkship Market, States Create More Job Opportunities for Young Lawyers in a Competitive Employment Market

Over the past two decades judicial clerkships have grown increasingly competitive.<sup>294</sup> As the number of applicants for both

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291. Senator Surovell's proposed amendment to Senate Bill 1486, which modified the summary judgment statute, would have read: "That the provisions of this act shall not become effective unless an appropriation providing for a law clerk for every circuit court judge is included in a general appropriation act passed in 2019 by the General Assembly that becomes law." See S. Amend. 2, S.B. 1486, VA.'S LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?191+amd+SB1486ASR> [<https://perma.cc/ZY7W-G23Q>].

292. See *supra* section II.A.

293. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 566–68 (2012) (arguing that modern pre-trial innovations substituting discovery for trial and encouraging greater use of depositions and affidavits to dispose of cases has enabled almost all civil cases to be settled or dismissed without trial).

294. See Ruggero J. Aldisert, Ryan C. Kirkpatrick & James R. Stevens III, *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835, 837 (2006) (stating that the number of clerkship applicants has risen "astronomically"); Ed Finkel, *Crunching Clerks: Funding Cuts and a Tougher Job Market Tighten the Competition*, A.B.A. J.,

state and federal clerkships has risen, the number of available clerkships has remained relatively flat.<sup>295</sup> Consequently, “[g]raduating law students who might have landed federal court clerkships a few years ago now end up in state courts.”<sup>296</sup> By creating more clerkship opportunities across a state, state governments draw in more sellers (i.e., prospective law clerks) to the state employment market, thereby strengthening both the state judicial labor force and otherwise depressed rural economies.

While federal clerkships undoubtedly offer unbridled prestige in the employment market, state clerkships often pose the same benefits for lawyers who seek to lay down roots within a state or establish connections with a local bar. The relationship a law clerk eventually builds with his or her judge is like none other and often extends for a lifetime beyond the initial clerkship experience.<sup>297</sup> The decision of where and for whom to clerk often has a lifelong impact on the young lawyer’s future career and choice of where to live. Elaborating on this point, former United States Court of Appeals judge Alex Kozinski wrote:

[T]he clerkship decision [is not] without consequence for the student. While some clerks eventually become judges themselves, for the vast majority the year they serve will be the sum and substance of their experience as court insiders. The degree to which a particular judge takes her clerks into her confidence, consults with them in making decisions, lets them observe the workings of the court, is generous with her time and seriously considers their advice—all of these will make a vast difference in the type of experience a particular clerk will

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Feb. 2010, at 19 (finding that there are many more applicants for fewer clerkship openings); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant’s Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765, 768 (1993); see also Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 208–12 (1994) (explaining how competition in hiring has forced judges’ hands and resulted in irrationally early interview and offer dates); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 154–55 (1990) (describing the current law clerk market as one of “fervent competition” in which “out of the 400 clerk applications a judge may receive, a few dozen will become the focus of the competition” and noting that “[e]arly identification of these ‘precious few’ is sought and received . . . usually before the interview season even begins”).

295. Laurie A. Lewis, *Clerkship-Ready: First-Year Law Faculty are Uniquely Poised to Mentor Stellar Students for Elbow Employment with Judges*, 12 APPALACHIAN J.L. 1, 2 (2012).

296. *Id.*

297. See Wald, *supra* note 294, at 153 (“The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair.”).

have. . . . A young lawyer's choice of a clerkship can have a significant impact on his further career development.<sup>298</sup>

This is no less true at the state level. Law clerks in state trial courts work hand-in-hand with judges in communicating with local and state lawyers, resolving state and local disputes, and learning about recent developments in state law. They often become intimately connected with not only the personal and professional lives of their local trial judges, but they also come to know the mood and decorum of local legal culture.

When law clerks take positions in certain locales, their exposure to the local legal community allows them to stay for years to come in the locality in which they clerked. This has tremendous benefits for rural counties and cities, where nearly 20% of Americans live, but just 2% of small law practices exist.<sup>299</sup>

Those still practicing law in small towns are often nearing retirement age, without anyone to take over their practices. And without an attorney nearby, rural residents may have to drive 100 miles or more to take care of routine matters like child custody, estate planning and taxes. For people of limited means, a long drive is a logistical hardship, requiring gas, a day away from work and sometimes an overnight stay.<sup>300</sup>

In our globalized world, more and more new attorneys are moving to larger cities where the youthful vibrance of urban culture and employment opportunities seem to abound.<sup>301</sup> Yet for some new lawyers, the prospect of working in a small town or city behooves their personality and career goals. By creating state-funded clerkship positions across the state, state governments ensure a consistent pipeline of newly minted lawyers into these regions.

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298. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1709 (1991).

299. Wendy Davis, *No Country for Rural Lawyers: Small-Town Attorneys Still Find It Hard to Thrive*, A.B.A. J. (Feb. 1, 2020), <https://www.abajournal.com/magazine/article/no-country-for-rural-lawyers> [<https://perma.cc/X8YM-NM4X>].

300. Lorelei Laird, *In Rural America, There Are Job Opportunities and a Need for Lawyers*, A.B.A. J. (Oct. 1, 2014), [https://www.abajournal.com/magazine/article/too\\_many\\_lawyers\\_not\\_here\\_in\\_rural\\_america\\_lawyers\\_are\\_few\\_and\\_far\\_between](https://www.abajournal.com/magazine/article/too_many_lawyers_not_here_in_rural_america_lawyers_are_few_and_far_between) [<https://perma.cc/8L6H-KXS9>].

301. *See id.*



## 2. By Expanding the Trial Court Clerkship Market, States Ensure That Rural Trial Courts Can Operate Efficiently in Times of Economic Crisis

Sections I.B and I.C explained how the access-to-justice gap within states has led to the underperformance and inefficiency of courts—especially in rural America. Local governments in rural areas often lack the tax base and general revenue to fund their local courts at an adequate level.<sup>302</sup> This problem is particularly pronounced during times of economic crisis, such as the Great Recession of 2007 and 2008 and the recent COVID-19 pandemic, because already depressed local governments and economies have less ability to recoup from the crisis than their more advantaged urban and suburban centers.<sup>303</sup> The efficiency of courts in these economically depressed areas may therefore lag behind courts in more economically affluent regions of the state.<sup>304</sup>

Yet simply because local governments lack the economic capacity to fund an adequate number of law clerks does not mean the judiciary should suffer as a consequence. The state owes both judges and the people whom they serve a duty to provide the necessary and adequate resources courts need to operate efficiently. As this article has shown, law clerks are inescapably part of a well-regulated, efficient judiciary. Hence when courts have an evident need for additional assistance and are otherwise working beyond their maximum capacity, the state should allocate funds for those courts to hire the necessary number of law clerks.

States such as Minnesota, Colorado and New Jersey have shown that states can equitably redistribute resources for law clerks across poor and wealthy jurisdictions. In these states, judges are less prone to inefficiency. One court scholar recently analyzed what effect the centralization of court services, including research staff, has upon judicial efficiency, which the study measured as case disposition time. The answer was that “failing to centralize [court] support services . . . results in a lack of efficiency.”<sup>305</sup> In other

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302. See *supra* notes 109–16 and accompanying text.

303. Feler & Senses, *supra* note 112, at 101–03.

304. See *supra* section I.B.

305. WILLIAM RAFFERTY, INST. FOR COURT MGMT., JUDICIAL UNIFICATION AND ITS IMPACT ON EFFICIENCY 7–8, 57 (2016); see also Liscow, *supra* note 108, at 1830–31.

words, the more centralized trial court support services was, the faster cases tended to be resolved.

Two reasons likely account for any increased efficiency in these states. One reason for the greater efficiency may be that a consistent, predictable, and proportional flow of law clerks for all trial courts allows judges to focus on justice, not revenue.<sup>306</sup> As law clerks shoulder more of the research and writing duties of courts, judges naturally have more time to deliberate on the findings and holdings of their respective cases. A second reason for the greater efficiency in these centralized clerkship systems may be that young, energetic law clerks, who are generally motivated to excellence at this early stage in their professional career, tend to speed up the judicial decision-making process. An additional pair of eyes on every case will generally mean that trial courts need to spend less time deliberating on cases to draw correct conclusions.

As explained below, states can use one of two methods to guarantee law clerks for trial judges. States can either grant an equal number of law clerks for each judge or use a caseload formula to determine an adequate, or “fair,” number of law clerks for each trial court. Under either method, trial judges that historically operated without the assistance of a law clerk—but clearly need at least one to prevent case backlog and more reversed decisions—can continue resolving cases efficiently even as their local economies may struggle during economic downturns.

### 3. Centralized State Clerkship Markets Place State Trial Court Clerkships on the Same Playing Field as Other Clerkships and Encourage Research and Policy Debate on Ways to Improve State Courts

The third benefit of centralized clerkship markets is the enhancement of the state trial court clerkship as an institution. When clerkship markets are decentralized, the notoriety and prestige of a state trial court clerkship remains connected to the locality, not to the state. The more centralized the branch of government—whether it be the state or the federal government—the more power, wealth, and influence governmental actors wield.

By giving the trial court clerkship statewide recognition, states implicitly encourage research and debate on ways to improve the

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306. See MICHIGAN TRIAL COURT FUNDING REPORT, *supra* note 150, at 8.

clerkship institution. Scholars have focused their attention almost exclusively on centralized clerkship markets, most notably the federal clerkship market and the various state appellate court clerkship markets.<sup>307</sup> This is because when clerkship markets are centralized, empirical data related to those markets tends to be more readily accessible to the general public and court observers.

Furthermore, a centralized clerkship market tends to result in unified professionalism courses for law clerks that ultimately improve the quality of the state judiciary. In South Carolina, for instance, the state's centralized clerkship market has allowed state officials to coordinate legal training conferences for newly hired trial court law clerks.<sup>308</sup> These state-wide programs teach young law clerks the canons of judicial conduct—which often apply with equal force to judicial law clerks—as well as the basic mechanics of judicial opinion writing and analysis.

Finally, the centralization of state law clerks can help spawn broader policy debates on consolidating other state court functions. In Florida, a state constitutional discussion began with an argument to consolidate the costs of the public defender system and evolved to a broader argument to consolidate funding for the judicial branch and court system.<sup>309</sup> After much debate, the Florida legislature passed successful legislation centralizing the funding of its state court system.<sup>310</sup> The same may hold true for centralization debates over state clerkships. States that consider shifting funding from the local level to the state level will undoubtedly encounter thorny policy questions about the role of state government in redistributing resources throughout society and guaranteeing equal access to efficient courts for citizens of the state.

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307. See *supra* notes 10, 13.

308. S.C. JUDICIAL DEP'T, ANNUAL ACCOUNTABILITY REPORT 72 (2010) ("In accordance with the value of teamwork, Court Services, working with other members of the Judicial Department, planned and coordinated the annual Judicial Conference and the New Circuit Court Law Clerks Seminar, which included 250 participants.").

309. See MICHAEL D. GREENBERG & SAMANTHA CHERNEY, DISCOUNT JUSTICE: STATE COURT BELT-TIGHTENING IN AN ERA OF FISCAL AUSTERITY 7 (2017).

310. See CARLSON ET AL., *supra* note 61, at 57–60.

C. *A Statutory Scheme for Distributing Trial Court Law Clerks Within a State Based on Critical Caseload Needs*

Section II.C explored the various ways states have funded their centralized clerkship markets. States such as Minnesota and New Jersey have adopted an equality approach to the clerkship, whereby the state guarantees across the board one law clerk for each sitting trial judge. This approach has also prevailed in the federal courts and in each of the state appellate courts.<sup>311</sup>

However, for states such as Virginia and Michigan, the equality approach may be a tough sell to fiscally conservative members of the legislature. A second model for centralizing state clerkship markets that may appeal to legislators' sense of fairness and their desire to cut costs is to assign an *equitable* number of law clerks to each sitting judge based upon the size and complexity of his or her caseload demand.

This "equity approach" recognizes that an *equal* number of law clerks for every state trial court may not guarantee that all trial courts will perform efficiently. For instance, an equal number of law clerks for each judge may be wasteful if a trial court's docket simply does not require additional help. The policy challenge for state legislators is how to distribute court resources in a way that each court receives what it needs to resolve cases efficiently.

Congress embraced the equity approach when it first began funding law clerks to serve in the federal district courts.<sup>312</sup> Under this approach, each chief circuit court judge was responsible for determining whether the district court had a "critical caseload need," which was measured by the number of incoming cases, the number of judges, average disposition time, and current availability of staff resources.<sup>313</sup> If there was a critical caseload need, then the chief circuit court judge could assign to the district court judge a number of law clerks that was reasonable to meet the caseload

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311. *See supra* section II.A.

312. *See* Act of Feb. 17, 1936, Pub. L. No. 74-449, 49 Stat. 1140. During the first fiscal year after the passage of the Act, Congress did not grant each district court judge a law clerk, but rather allocated a total of thirty-five district court law clerks for each federal circuit. *Id.* The chief judge of each circuit then determined to which district courts the law clerks should be distributed based upon the caseload constraints of each district court. *Id.*

313. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 921 (codified as amended at 28 U.S.C. § 752).

demands of the court.<sup>314</sup> The same logic can apply in the state court arena.

Ensuring an equitable market of state trial court law clerks can increase the visible performance of judges. The public perception is that backlogs and unfair judgments have more to do with antiquated procedures and related inefficiencies in the courts.<sup>315</sup> Thus, “there is a strong need for state court systems to show that they are pursuing increased efficiency and cost-effectiveness in the way they operate,” because the public tends to reward visible results from judges that actually improve the efficiency of state courts.<sup>316</sup> Once the public realizes that state trial judges have a behind-the-curtain legal assistant, and experience tangible benefits from this approach in the form of higher quality opinions and faster case resolution, state politicians will favor greater funding for courts. This is because the public will prefer not to go backward. People who experience higher quality services rarely ever wish to return to lower quality services; it is only those who never experience higher quality services that do not know the value of quality service.

#### CONCLUSION

This Article has refracted the problem of local court funding through the state trial court clerkship market. It has made the original claim that states relying on local government to fund state trial courts create an unequal market between the “haves and have nots.” This Article has shown that in decentralized states such as Virginia and Michigan, trial judges sitting in less affluent locales often must operate without the assistance of a law clerk even though the size and complexity of their caseloads may, in reality, demand at least one. Meanwhile, judges in more affluent communities generally receive funding from their local legislature to employ one or even several law clerks.<sup>317</sup> The gap across states in the access judges have to quality law clerks in turn has serious implications for the efficiency of state judiciaries and job opportunities for young lawyers.

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314. *Id.*

315. *See* GREENBERG & CHERNEY, *supra* note 309, at 9.

316. *Id.*

317. *See supra* Introduction.

Arbitrary geographical lines need not, and indeed should not, determine the quality of justice one receives. The core function of the judiciary is the faithful and efficient enforcement of the laws—for *all* who appear in a court of law, both for rich and poor persons alike. Centralized clerkship markets recognize this truth. By recognizing the state as the chief guarantor for redistributing resources within society, states such as Minnesota, Colorado, and New Jersey have demonstrated that even judges in traditionally poorer locales can and should receive the resources they need to operate efficiently. In the coming years, as more states such as Virginia consider the shift toward a centralized clerkship market, hopefully the latter will pay heed to both the meaning of efficient justice and the value of the clerkship to both our courts and the people whom they serve.