SEEING "THE COURTS": MANAGERIAL JUDGES, EMPTY COURTROOMS, CHAOTIC COURTHOUSES, AND JUDICIAL LEGITIMACY FROM THE 1980S TO THE 2020S

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From some perspectives, litigation looks vibrant, with front-page coverage of the U.S. Supreme Court’s reconsideration of its precedents and high-profile civil and criminal lawsuits against government officials. Moreover, since the 1980s, the federal judiciary has had an ambitious building program producing dozens of courthouses designed to exemplify the “solemnity, stability, integrity,

† Arthur Liman Professor of Law, Yale Law School. All rights reserved, 2024. Thanks are due to many—to Abbe Gluck, Myriam Gilles, Andrew Hammond, and David Marcus as co-hosts of this Symposium; to those who spoke and who wrote; and to students at the University of Texas and on The Review of Litigation; they have had the energy and thoughtfulness to bring these volumes into being. Zachary Clopton, Kellen Funk, Jonah Gelbach, Andrew Hammond, David Nachman, Teddy Rave, and Margaret Williams helped me clarify aspects when reading a draft, and workshops at Yale Law School, at Berkeley, and at USC informed my thinking.

As this article reflects, Denny Curtis and I have long thought together about the changing functions of courts. I have delighted in researching with him justice iconography; some of the materials here relate to our book Representing Justice: Invention, Controversy, and Rights in City States and Democratic Courtrooms (Yale Press, 2011), reissued in 2022 by Yale Law School as a free-access e-book. That work was informed by Allison Tait and Brian Soucek, once our students and now law professors. Many other former and current students have enhanced my understanding of the contours of civil litigation. Special thanks are due to Jonathan Petkun who has since become a Duke Law School professor, to Russell Bogue and Shunhe Wang, both graduated, and to Jessica Boutchie, Romina Lilollari, Claire Stobb, Paige Underwood, David Wong, and Henry Wu, joined this year by Jenn Dikler, Remington Hill, and Sarah Shapiro. While I was writing this article, I became part of a group of law professors (including Zachary Clopton, David Engstrom, Andrew Hammond, Jonah Gelbach, Abbe Gluck, Deborah Hensler, Aziz Huq, Merritt McAlister, James Pfander, Sarath Sanga, and Joanna Schwartz) who has sought reframing of data collection by the federal judiciary and thus came to understand more of the challenges under the current federal coding and fee systems.

I was teaching at USC when I wrote Managerial Judges and hence owe debts to colleagues there. RAND had just started its Institute for Civil Justice, which is where I began my friendship with Deborah Hensler and Tom Tyler. My procedure colleagues, Bob Bone and Nancy Marder, informed my work, as did several people
rigor, and fairness” of adjudication. Such edifices underscore courts’ place in narrations of the United States.

Yet the challenges of legitimating government authority, of which judicial actions are a part, have become all the more acute since Managerial Judges was published forty years ago. The world of ordinary litigation is troubled and shrinking, and the disjuncture between judges’ stated goals and their practices has become vivid. Aside from a few aggregations of tens of thousands of cases in “mega” multidistrict litigations (MDLs), filings in the federal courts have flattened and declined to about 240,000 civil cases per year. At both trial and appellate levels, significant percentages of litigants proceed without lawyers; about one-quarter of civil filings and about half of the appeals come from individuals representing themselves. Most circuits have embraced norms of limiting oral arguments and of issuing eighty-five percent of their decisions as non-precedential rulings. Those practices, rendering their work less visible, parallel the lack of transparency of the many managerial decisions at the trial

who later came to Yale—Alan Schwartz, Michael Graetz, Michael Levine, Bob Ellickson, and Brett Dignam. Further, when working in Yale’s clinical program in the late 1970s, I met Bob Cover and Owen Fiss; thereafter, we began the book that was first called Procedure (Foundation Press, 1986) and, after Bob’s death, was revised with Owen Fiss to become Adjudication and Its Alternatives (Foundation Press, 2003). When I returned to Yale in 1997, I was greeted by Harold Koh and Bill Eskridge and graced with students/now colleagues, many of whom are writing in these volumes. Teaching at Yale with Reva Siegel and Vicki Jackson deepened my sense of the roles played by courts in enabling political participation. On both coasts, resourceful and generous law librarians were wonderful colleagues. In addition, a host of judges and lawyers have illuminated my understanding, including those who participated in the Symposium as well as have been guests in my classes: Elizabeth Cabraser, Nancy Gertner, Lee Rosenthal, and Myron Thompson. My understanding of developments outside the United States has been informed by Hazel Genn and Xandra Kramer. I was lucky to have been a law student at NYU and a Hays Fellow with Norman Dorsen and Sylvia Law; I appreciate the contributions to this Symposium by NYU’s now Dean Troy McKenzie, joined by Sam Issacharoff. In the past few years, I have also had the pleasure of writing with NYU Professor and Hays Director Helen Hershkoff.

In the early 1980s, I felt I needed to write Managerial Judges because I saw shifts in practice, law, and culture that merited analyses. Here, I reference some of that history as a reminder to law teachers and students about the many sources of knowledge. Mine came from litigating cases (a shout-out to this “Review of Litigation”) and reading the records of the cases I taught, as well as from analyses by law professors and political theorists. One consequence is that the casebook I co-authored and continue to use includes excerpts of materials produced by litigants, lawyers, lower-court judges, and social scientists.
level, where hours on the bench are down to about 320 per year and fewer than one of 100 civil lawsuits ends with a trial.

All the while, federal courts remain relatively rich in resources and staff as compared to both state and tribal courts and to agencies. Even as filings likewise have fallen, state courts continue to have tens of millions more cases and larger segments of their dockets in which lawyerless litigants are the norm. Many judges are ill-equipped to respond to disputants with limited resources, often in family conflicts or as debtors and tenants who face resourced adversaries. Further, as the focus shifts to web-based resolution mechanisms, little attention is paid to its privatizing features. Providers of online dispute resolution (ODR) have not seen enabling public access as part of the packet of services to promote. Thus, courtroom-based adjudication is becoming increasingly rare.

One possibility is that this form of statecraft is failing and the time has come to abandon its aspirations. Yet, as an heir to a political tradition grounded in the due process ideology of governments obligated to make decisions that are not arbitrary, I am not willing to give up the public service of adjudication and on courts as one of many venues to put into practice commitments of equal treatment. To legitimate decisions, judges need to preside over cases in which litigants are able to provide adequate information.

This article analyzes the federal judiciary’s function as an adjudicatory institution and as an “agency” with its own programmatic agendas. During the last few decades, the federal judiciary has successfully lobbied Congress to create and finance a host of projects, including authorizing judges to centralize cases through multidistrict litigation, to select and appoint adjunct magistrate and bankruptcy judges, and to oversee the design of dozens of new courthouses. Since the 1990s, the federal judiciary has also gathered statistics on and repeatedly raised concerns about the number of self-represented litigants. Yet the judiciary has not generated structural responses, such as a national database on the many district court “pro se” projects and new mechanisms to enlist lawyering and other resources, to enable judges to make principled decisions in those cases. Likewise, while the docket is heavily dependent on the cross-litigant subsidies generated through class actions and MDLs, judges have not crafted methods to mobilize the lawyering resources in those configurations to support litigants within or to shape a robust method of overseeing implementation of the resolutions reached. To date, the federal judiciary has not instituted a mechanism to buffer against allocating adjudicatory resources largely
based on litigants’ economic wherewithal. Moreover, the federal judiciary, entwined with state and tribal court adjudication, has not joined its counterparts in pressing Congress to provide new streams of funding for all kinds of courts and the people using them.

Navigating the political economy of courts producing a crisis of legitimacy requires reorienting the “process due” by revising statutes, doctrine, practices, and rules to respond to an eclectic set of claimants seeking to be heard. “Management” of the people in court does not suffice.

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II. CHANGING JUDICIAL NORMS AND DECLINING DOCKETS:
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I. SEEING THE SOURCES OF CHALLENGES TO JUDICIAL LEGITIMACY

Managerial Judges is an article about federal judicial legitimacy—its sources and sustainability in the late twentieth century. In 1982, through construction of two hypothetical cases, I brought to the fore shifts in the posture that judges were taking in pending lawsuits. In one hypothetical, modeled after a prison conditions case, the judge oversaw implementation (and the lack thereof) of a consent decree produced after adjudication of some aspects of the lawsuit. The other hypothetical posited a judge during the pre-trial phase of a products liability lawsuit; when asked to superintend discovery, the judge pressed the parties for a resolution without adjudication. I contrasted the structural constraints on judicial power during the post-trial phase in a high-profile institutional conflict involving a government entity with the invisibility of a judge negotiating with private parties before trial.

My purpose was to explore the origins and growing valorization of managerial modes in which judges sought to structure the pre-trial phase to encourage (and at times to pressure) parties to settle. I discussed concerns about the forms of knowledge judges had when serving as a kind of super-senior partner to both sides of lawsuit, the discretion rarely subjected to external oversight, and the resulting privatization of process. I explained the need for the exercise of judicial authority to be predicated on the discipline of working before the public and within the boundaries of a record, and for decisions grounded in reasons linking facts to law. I did not argue “against settlement” but against turning judges into settlement negotiators.

In 2022, colleagues suggested using Managerial Judges as a prompt for two conferences and four editions of The Review of Litigation. That frame provides an opportunity for reflection on the changes during the intervening forty years in the “landscape of litigation” (to borrow a phrase from the National Center for State Courts), the normative implications and utilities of yet more managerial modes, the impact of technology, and the problems not addressed then. This article is one way of thanking the many colleagues, students, clients, judges, and staff who have helped me—then, now, and in-between—probe the problems that adjudication

poses for democratic orders reliant on courts as one expression of commitments to fair and egalitarian treatment.

Below I sketch the shifts in the federal docket that were among the reasons judges championed case management. Demand for courts rose as bodies of law emerged protecting families, consumers, civil rights, the environment, and more. I describe the increase in filings from the 1950s through the 1980s, the growing presence of prisoners and other self-represented litigants, and the importance of class actions and multidistrict litigation as sources of lawyering-resources. Assuming that dockets would continue to grow, federal judges successfully lobbied Congress for the creation of auxiliary personnel such as magistrate judges and a new mechanism to consolidate cases pending across the country, the multidistrict litigation statute (MDL). Thereafter, the federal judiciary retooled its own rules and practices to push for dispositions without trials, as Congress enacted legislation supportive of "alternative dispute resolution."

During these decades, the federal judiciary insisted on its distinctive role in providing public adjudication. Beginning in the late 1980s, the leadership sought and obtained billions of dollars to construct and renovate courthouses around the United States to mark the significance of adjudication's dignified deliberative processes in this democracy. That goal permeated the judiciary's 1991 U.S. Courts Design Guide and its 1995 Long Range Plan, which raised the specter of a "nightmarish" world of tens of thousands of filings that would force modifications in key aspects of adjudication, such as cutting back on oral arguments and reasoned decisions.

Instead of finding new modes to supply principled adjudication, judges joined in limiting access to and in changing (in market terms) the "product" to meet demand. To buffer against an expected cascade of filings, the judiciary's 1995 Long Range Plan


urged Congress to have a presumption against expanding routes to federal courts, to rely more on non-Article III adjudicators, and to rethink responses to pro se prisoner filings. In 1996, Congress constrained the authority of prisoners to file habeas petitions and civil rights cases. Thereafter, the Supreme Court undercut all kinds of litigants’ access through a variety of doctrinal routes, including reinterpreting the 1925 Federal Arbitration Act (FAA) to expand its reach and varying requirements for stating a “case” under Article III. For these and other reasons including the high cost of legal services, the Long Range Plan’s 1995 forecast of millions more filings has not materialized; the federal docket in 2020 looks a lot like it did in the 1980s. Thus, one could conclude that the judiciary, supported in part by Congress, succeeded by helping to stem the tide of filings. Yet these actions also contributed to the erosion of adjudication that the judiciary said it aimed to forestall.

This article, along with others in this Symposium, argues that courts are vulnerable—at risk of losing their special status as distinctive opportunities for “equal justice under law.” Recall that managerial judging was justified in the 1980s on the grounds that lawyers needed assistance from judges to structure effective pursuit of remedies. People without lawyers need help too, yet federal rules largely exempt such litigants from that management regime. Instead, a patchwork of practices exists as many district and appellate courts scramble to provide some help to self-represented litigants. In the state courts, ill-equipped judges directly interact with self-represented litigants; in federal courts, many decisions are siphoned off to staff.

One goal of this article is to make visible the current shape and practices of the federal judiciary, alongside aspects of state courts, to analyze the “politics of measurement.” After mapping some of what is known and explaining the limits on that knowledge (including data collection challenges and the paywall for obtaining federal court data), I outline some potential responses predicated on the assumption of wanting to revive adjudication rather than taking it as a failed experiment in statecraft. In the 1960s, Benjamin Kaplan, the reporter for the Advisory Committee on Civil Rules, explained that the “Continuing Work of the Civil Committee” sought to expand opportunities to file and to participate in lawsuits by restructuring

procedures for class actions and other multi-party cases and to endow federal judges with discretion to shape individual cases. This century’s issues are how to allocate judicial resources in the face of the unfair rationing now in place and to make patent decisions both about that rationing and decisions in individual cases. To revitalize courts as spaces in which judges interact productively with diverse litigants before the public, new rules and different agendas need to be developed that take into account the presence of significant numbers of self-represented and of aggregated litigants in the federal courts, the interdependencies of federal, state, and tribal systems, the large percentages of self-represented in courts, and the underfunding of state and tribal courts.

I have long worried about the federal judiciary using its influence to encourage Congress to limit access to courts. Here, I commend deployment of the federal judiciary’s proven lobbying skills to join with state and tribal court judges and seek money from Congress for national support to all these courts and for litigants. Doing so requires building on the federated structure to generate and pool resources and to draw on lawyers, other “navigators” of legal processes, and technology to shape innovative procedures for principled adjudication to the merits of claims presented. Such efforts would contribute to altering the landscape of inequality that spans government services, of which courts are one.

II. JUDICIAL COMMITMENTS FOR FEDERAL COURTHOUSES TO EMBODY “SOLEMNITY, STABILITY, INTEGRITY, RIGOR, AND FAIRNESS”

Contemporary debates about the wisdom, legitimacy, and ethics of U.S. Supreme Court Justices are but one marker that courts remain central elements of governance. Indeed, in some respects, courts are vibrant venues where many judges and lawyers experience the intensity of litigation. Media reports on high-profile lawsuits, whether about the conduct of government officials, pharmaceutical and tech industries, cryptocurrency, universities, the climate, guns, or abortion, are testaments to hopes for disciplined excavation of facts and application of law in public proceedings. In this Part, I discuss how the federal judiciary, insistent on the importance of fair

adjudication, succeeded in garnering billions of dollars during the last several decades for the construction and renovation of courthouses to mark the singular significance of that work.

A. Dockets and New Rights, Up

Efforts to increase federal judicial resources were grounded in concerns about demands placed on the federal courts. As the country and legal rights expanded, dockets grew between 1950 and 1980. That influx prompted requests to revamp spaces, appoint more judges, and alter procedural rules to authorize judicial management and ease access to class actions and other aggregate forms. To understand those concerns, Figure 1 depicts federal district court filings from 1901 through 2001. At the beginning of the twentieth century, fewer than 30,000 cases were filed in the federal courts, and more were criminal than civil. In 1951, more than 90,000 cases were filed in the federal courts. By the end of the century, more than 300,000 cases were brought, and civil filings far outstripped criminal filings.

Figure 1

### 100 Years of Federal District Court Filings: 1901, 1951, and 2001

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901</td>
<td>28,705</td>
</tr>
<tr>
<td>1951</td>
<td>91,430</td>
</tr>
<tr>
<td>2001</td>
<td>313,615</td>
</tr>
</tbody>
</table>

9. Case filings for 1901 were calculated by subtracting the number of cases
That rise in filings was an artifact of political and social movements of the twentieth century that looked to judges as potential allies in generating legal recognition for all people, seeking to enforce an array of new rights. During the first part of the twentieth century, William Howard Taft—who became Chief Justice in 1921 after serving as the country’s president—engineered federal court control over budgets, staff, a building for the Supreme Court, and drafting of federal procedural rules to span the country. A material exemplar of those efforts came to fruition after his death when the Supreme Court’s first “home of its own” (to paraphrase Virginia Woolf) opened in 1935. A grand staircase marks the entry to that imposing structure, whose architecture harkens back to classical temples rather than the modernism of its era. If looking up, entrants can see the words “Equal Justice Under Law” chiseled above. Although the phrase does not appear in the U.S. Constitution, it has since been invoked in hundreds of cases.

In 1935, all persons did not have “equal” opportunities to seek “justice under law.” Only in the decades thereafter did those words come to mean that a diverse population of claimants could request remedies from courts. As is familiar, Brown v. Board of Education in 1954 struck down segregation of schools by race and began to unravel de jure racial

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11. See VIRGINIA WOOLF, A ROOM OF ONE’S OWN (1929); Resnik, Revising “Our Common Intellectual Heritage,” supra note 10, at 1846.

discrimination.\textsuperscript{13} Reed v. Reed in 1971 held unconstitutional an Idaho statute that gave fathers preference over mothers as administrators of their deceased children's estates; Reed was the first decision to recognize that the Fourteenth Amendment's guarantee of equal protection applied to women.\textsuperscript{14} These acknowledgments of the U.S. Constitution's role in framing and then reframing the legal import of race and gender are part of a much larger account of constitutional law in making as well as altering hierarchies within the U.S. social order.\textsuperscript{15}

The Court's judgments intersected with landmark federal legislation (often built on exemplars from states) to protect rights to accommodations, housing, credit, and employment.\textsuperscript{16} Both the Court's rulings and the statutes were the outgrowth of political struggles shaped through the increasingly organized efforts of women and men of all colors. They created new institutions, such as the National Association of Women Judges, "Legal Defense and Education Funds," and caucuses within the organized bar and law school associations that supported a diversity of individuals who had not been welcomed as lawyers, professors, and judges in the past.\textsuperscript{17} All such work required streams of funding; today's "public interest" law firms that cut across the political spectrum are heirs of these innovations.

The mix of organizing, lawyering resources, and congressional action enabled different sets of litigants to get into federal courts.\textsuperscript{18} Professor Edward Purcell demonstrated how (in terms of miles, distance, and lawyering expertise) corporations were able to exploit

\begin{itemize}
\item \textsuperscript{13} Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
\item \textsuperscript{17} Judith Resnik, \textit{Representing What, supra} note 15, at 6–7.
\item \textsuperscript{18} \textit{See generally} Theodore Eisenberg & Stephen C. Yeazell, \textit{The Ordinary and the Extraordinary in Institutional Litigation}, 93 HARV. L. REV. 465 (1980).
\end{itemize}
the physical inaccessibility of the few federal courts around the country to their advantage before *Erie Railroad Co. v. Tompkins*; Brandeis crafted the 1938 decision to cut back somewhat on the ability of the resourced to shop for costly venues providing favorable law.\(^{19}\) That year was pivotal for another reason. Before 1938, federal judges looked to the state in which they sat for procedural rules governing cases on the law-side of their docket; for the underlying rules governing liability, federal judges could draw on "general common law." Moreover, before the first set of the Federal Rules of Civil Procedure, the federal litigation world was populated by a narrower range of litigants than it is today. With commercial entities on either side of the 'v,' the status of "plaintiff" and "defendant" was more interchangeable and the roles more fungible. Thus, even if some of the 1938 transsubstantive rules could be read as somewhat more helpful to plaintiffs or defendants as a set, no systematic advantages would likely accrue over time.\(^{20}\)

The landscape changed thereafter. In the same year that *Erie* ruled out general federal common law when the cause of action arose from state law, the Federal Rules of Civil Procedure became effective. Federal judges across the country had the same procedural framework which, as a sociological experience, helped to turn them into a legible cohort—"the federal judiciary"—meeting at judicial conferences and discussing applications of "Rule 8" (pleadings), Rule 26 (discovery), and Rule 65 (injunctions). During the decades that followed, Congress authorized dozens of new causes of action addressing consumer, environmental, labor, and civil rights and thereby empowered an array of litigants to seek remedial efforts including structural injunctions to effectuate institutional reform.\(^{21}\)

In a narrow band of cases, the Supreme Court interpreted the interaction of the Due Process and Equal Protection Clauses to require


fee waivers and subsidies in lawsuits related to family dissolution and parental status, and the Court opened courthouse doors to prisoners seeking habeas corpus relief and challenging conditions of confinement. Justice Harlan, writing for the Court, explained its requirement that Connecticut waive fees for people seeking to divorce. The point was to protect the legitimacy of government as well as individual claims of right.

Without this guarantee that one may not be deprived of his rights . . . without due process of law, the State’s monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

As Professor Helen Hershkoff and I have argued, due process is thus “Janus-faced”: looking to protect individuals and, by doing so, to shore up government authority. Congress endorsed the effort to equip individuals with limited resources to use legal remedies; in 1974, it launched the Legal Services Corporation (LSC) and, two years thereafter, authorized fee shifting to support plaintiffs succeeding in vindicating their civil rights.

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24. Hershkoff & Resnik, Constraining and Licensing Arbitrariness, supra note 22, at 621.

By the 1960s, when the Supreme Court appointed a committee to revisit the 1938 Federal Rules of Civil Procedure, “plaintiffs” often referred to groups such as school children, consumers, or tort victims; “defendants” regularly denoted governments and corporations. The rule drafters recognized the challenges of claimants with limited resources and revised the class action rule to enable diverse aggregates to seek injunctive and monetary relief. The point was to make it economically feasible for lawyers to take on consumer complaints (one of their examples was electrical company overcharges) and to make it legally possible for judges to enforce school desegregation decrees after sets of school children had graduated. Professor Kaplan, at the center of that drafting, explained:

[[the entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.]]

In short, a mix of social movements, technologies, politics, lawyers, constitutional law, statutes, and revised rules gave federal judges new and more work. Given that influx, the Judicial Conference of the United States, the policy-making body of the federal courts, called for more Article III judgeships, other kinds of judges, rule revisions, and more courthouses. Congress responded and, by century’s end, the words “Equal Justice Under Law” had become the tagline for the U.S. Supreme Court—read as if it had always denoted that all persons were eligible to bring claims.  


28. The Court’s website explained that these words “express the ultimate responsibility of the Supreme Court,” which aim to protect for “the American people
B. From "Court Quarters" to Iconic Courthouses

Before the 1950s, the few federal judges around the United States had a relatively small caseload and modest needs. In several cities, federal judges shared “court quarters” (their term) with U.S. post offices.29 As caseloads grew, the Judicial Conference pressed for change.30 One focus was on adding judges; episodically, Congress authorized more life-tenured judges.31 Doing so required political


30. The Judicial Conference of the United States (JCUS) is another artifact of Chief Justice Taft’s reorganization of the federal judiciary; he convinced Congress to launch its predecessor, called the Conference of Senior Circuit Judges, in 1922. See Resnik, Trial as Error, supra note 10, at 937–43.

coalitions as life-tenured appointments gave presidents opportunities to select individuals who shared an Administration’s views and could entrench those legal interpretations.32

One route around those politics was to manufacture federal judges outside the selection process set forth in Article III. Federal judges and members of Congress did so by crafting two kinds of non-Article III judges to work inside Article III courts. In 1968, Congress provided for district court judges to appoint magistrate judges to serve for eight-year renewable terms so as to assist life-tenured judges by taking on assigned tasks, including rendering judgments subject to review or on consent of the parties.33 Soon thereafter, Congress created “bankruptcy judges” to be appointed by appellate courts to serve fourteen-year renewable terms.34 Both sets of statutory adjunct


judges were to be housed in federal courthouses so as to contribute to managing cases and lawyers. (By 2022, the authorized magistrate and bankruptcy judges numbered more than 900, while Congress had authorized about 850 lines for federal district court and appellate judgeships.35) Another route to docket management and control was the ability to consolidate pending cases raising similar issues, often against a single defendant. In 1968 and again at the behest of the federal judiciary, Congress enacted the multidistrict litigation (MDL) statute, permitting a panel of federal judges to designate a set of cases to be transferred to one district court judge to superintend discovery and other pre-trial activities.36

That influx of cases, judges, and staff generated a need for more space. The federal judiciary sought not only new but also better places in which to work. During the decades after the 1982 publication of Managerial Judges, federal dollars poured into courthouse construction. Under William Rehnquist, who assumed the chief justiceship in 1986, a federal courthouse-building program gained momentum. The judiciary’s senior staff set out to expand the number of facilities that would stand as testaments to federal courts’ centrality to the country.

C. The Federal Judiciary’s Design Guide: Mediating Encounters “Between the Citizen and the Justice System” to Contribute to “the Vibrancy of our Democracy”

Building more courthouses required coordination between the federal judiciary’s Administrative Office (AO), chartered in 1939, and the General Services Administration (GSA), created in 1949 to run federal buildings and called by one commentator the “nation’s biggest landlord.”37 A third federal agency, the National Endowment for the Arts (NEA), created in the 1960s to foster American artistry, became

an advocate for improving the quality of architectural designs for federal buildings.

To garner support for an expansion, the AO proffered the term "Judicial Space Emergency" in the late 1980s for its "housing crisis" that, it argued, had not been sufficiently addressed by the GSA. The press reported that courtrooms were inadequate, staff had no place to work, and old courthouses were "nightmares for the federal marshals in charge of security, mainly because existing circulation forced the public, judges, and defendants to traverse the same corridors and use the same restrooms." (In more recent years, violent attacks on federal and state court judges and their families underscored the need for safety in courthouses and elsewhere.)

In the late 1970s, the GSA, working with the judiciary, had developed its own "Design Guide" for courts. A decade later, Chief Justice Rehnquist chartered a standing subcommittee of the Judicial Conference of the United States (JCUS) to devote attention to "space and facilities" and to oversee long-term planning, construction priorities, and design standards. First published in 1991 and revised several times thereafter, the U.S. Courts Design Guide outlined

40. Dean, supra note 37, at 63.
“state-of-the-art design criteria for courthouses.”

What did these federal judges want courthouses to express? To borrow from Linda Mulcahy and Emma Rowden’s analysis of courthouse building in England and Wales, these judges had a “jurisprudence of design.”

On this side of the Atlantic, the aspiration was that

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

Courthouses should be planned and designed to frame, facilitate, and mediate the encounter between the citizen and the justice system. All architectural elements should be proportional and arranged hierarchically to signify orderliness. The materials employed should be consistently applied, natural and regional in origin, and durable, and should invoke a sense of permanence.

The Design Guide specified courtroom requirements and layouts. In the 1980s, working with the GSA, the Judicial Conference had settled on courtrooms ranging from 1,120 to 2,400 square feet, with ceilings generally set at twelve feet. In contrast, the judiciary’s new guidelines called for 2,400 square feet as the standard size and for ceilings at sixteen feet to “contribute to the order and decorum of the


45. See MULCAHY & ROWDEN, supra note 4, at 10. They noted the importance of input from users. Insofar as published materials reflect, the U.S. Courts Design Guide was based on the views of the federal judiciary and its staff.

46. Aside from replacing the word “must” with the word “should,” the same words can be found in the 1997 Design Guide at 3–9, and appeared in its revised versions. The “should” replaced “must” in 2021. ADMIN. OFF. OF THE U.S. CTS., U.S. COURTS DESIGN GUIDE 3-2 (2021); see also Gerald Thacker, Federal Courthouse, WHOLE BLDG. DESIGN GUIDE (Nov. 8, 2021), https://www.wbdg.org/building-types/federal-courthouse-1.


proceedings." A 2000 estimate projected the average cost per courtroom at about $1.5 million. Most furnishings in federal courthouses were affixed to the floor, and finishes were to "reflect the seriousness and promote the dignity of court proceedings." The public space for observers was toward the back, with seating ranging from forty to eighty depending on whether the room was a trial or appellate court. When Chief Justice Rehnquist’s predecessor, Warren Burger, had chaired the judiciary, the presumptions were that courtrooms were to be made “available on a case assignment basis to any judge” and that no judge on multi-judge courts had “the exclusive use of any particular courtroom.” In contrast, the judiciary’s design guide provided a different standard. The original and 2007 revised U.S. Courts Design Guide required that all “active judges” have a courtroom dedicated to their individual use. Constant availability was explained as

essential...to the fulfillment of the judge’s responsibility to serve the public by disposing of criminal trials, sentencing, and civil cases in a fair and expeditious manner and presiding over the wide range of activities that take place in courtrooms requiring the presence of a judicial officer... Some judges explained that part of the rationale was that an immediately available courtroom provided more impetus for parties to settle.

If measured in girth and dollars, the judiciary’s thirty years of building has been successful. In 1991, the judiciary had secured $868

50. Id. at 4-5. En banc and multiparty courtrooms were to have eighteen-foot ceilings. Id. at 4-6.
51. U.S. GEN. ACCT. OFF., GAO-02-341, COURTHOUSE CONSTRUCTION: INFORMATION ON COURTROOM SHARING 3 n.3 (2002). That monograph explained that “a May 2000 study by Ernst and Young—Independent Assessment of the Judiciary’s Space and Facilities Program—[estimated] the cost of constructing a courtroom” at that number. In 2020 dollars, that cost would be about $2.23 million for federal courtrooms ranging from 1,120 to 2,400 square feet. CPI Inflation Calculator, BUREAU OF LAB., https://www.bls.gov/data/inflation_calculator.html. In terms of furnishing, chairs for lawyers are movable, while judge, juror, and audience seating is “fixed.” ADMIN. OFF. OF THE U.S. CTS., U.S. COURTS DESIGN GUIDE (2021) at 12-5.
million in new construction funds.\textsuperscript{55} In the decade that followed, plans were made for 160 courthouses or renovations, to be supported by $8 billion.\textsuperscript{56} As a result, the federal judiciary tripled the amount of space it occupied by 2006.\textsuperscript{57} Federal courthouses constituted the federal government’s largest construction project from 1995 to 2005.\textsuperscript{58} Forty-five projects, planned between 2002 and 2006, were budgeted to require $2.6 billion.\textsuperscript{59} Jumping forward a decade, in 2016, another round of construction (for eight new courthouses) and renovations in several existing facilities was budgeted at more than $947 million.\textsuperscript{60} In fiscal years 2016 and 2018, the General Services Administration received approximately $1.4 billion for courthouse construction and an additional $100 million in fiscal year 2023.\textsuperscript{61}

By 2008, the economy’s downturn pushed Congress to seek to reduce funding. The Judicial Conference began then to consider courtroom-sharing for senior district court judges (a status that freed up lines for new appointees) and for magistrate judges\textsuperscript{62} and closing


\textsuperscript{58} Id.


some courthouses to diminish its footprint and pay less "rent" to its GSA. In 2013, the judiciary "adopted a three percent national space reduction target," and in 2020, reported it had "removed" some "1.2 million useable square feet of space" which had avoided some "$36 million in annual rent." Moreover, the judiciary developed a ""No Net New' policy" so that any increase in square footage within a circuit was to be "offset by an equivalent reduction in square footage within the same fiscal year." In 2021, seeking funding for "priority" buildings, the federal judiciary reported that thirteen funded projects were underway and that the judicial space footprint was down by another 27,000 square feet.

The 2021 version of the U.S. Courts Design Guide reflected that cost-saving measures had become "standard throughout the Judiciary." Stressing that available courtrooms remained "essential to the fulfillment of the judge’s responsibility to serve the public" because they permitted people to watch trials, sentencing, and "the wide range of activities that take place in courtrooms," the Guide committed to continuing individual courtrooms for district judges. Likewise, on the assumption that "the primary function of appellate courtrooms" was "the presentation of oral arguments by counsel to appellate judges," the 2021 Guide did not address multi-purpose use


64. Id.


68. See id. at 2-10.

69. Id.

70. Id. at 4-8.
of circuit courthouses. But because courtroom sharing at the trial level was “a necessary model for future court operations,”71 two senior district judges (but no more) were to share one courtroom, as were magistrate and bankruptcy judges.72

Part of the judiciary’s ability to garner support for its vision of courthouses stemmed from GSA efforts to improve the quality of federal buildings in general. Distress about federal architecture dated back to the 1960s, when President Kennedy chartered an “Ad Hoc Committee on Government Office Space.” The lead staffer (later Senator) Daniel Moynihan is credited with that Committee’s 1962 report and its one-page set of “guiding principles.”73 Drafted in the shadow of the Cold War, the 1962 goals called for federal buildings to “provide visual testimony to the dignity, enterprise, vigor, and stability of the American Government.”74 The implicit comparison to the Soviet Union, coupled with distaste for the anonymity of Modern-style architecture and for repetition (whether Beaux-Arts or Modern) produced another premise: that no “official style” be adopted.75 Further, reflecting both a commitment to entrepreneurism and the well-orchestrated efforts of the American Institute of Architects (AIA), the Ad Hoc Committee embraced the private sector: “Design must flow from the architectural profession to the Government and not vice versa.”76

Yet few government structures built before the 1990s met the Ad Hoc Committee’s aims because, according to GSA publications, the chief “concerns” remained “efficiency and economy”77 and architectural choices favored “safe,” uncontroversial buildings.78

71. Id. at 2-11.
72. Id. at 2-10. Three judges were to share a courtroom if an odd number of magistrate or bankruptcy judges were in a facility; in addition, a criminal-duty courtroom was to be available for magistrate judges and an emergency-matter courtroom was to be available for bankruptcy judges.
74. Id. at 4.
75. Id. at 5.
76. Id.
78. Id. at 93.
After the NEA’s “Task Force on Federal Architecture”\textsuperscript{79} criticized the lack of a distinctive “federal presence” and congressional inquiries raised questions about spending,\textsuperscript{80} the GSA retooled its processes. One model came from the innovations of federal jurists Stephen Breyer and Douglas Woodlock, who had in the 1990s planned the federal courthouse in Boston, designed by Harry Cobb and adorned with monumental monochrome panels by Ellsworth Kelly. Soon thereafter, the GSA developed its “Design Excellence Program” to attract prize-winning architects to federal projects.

The federal courts were a major beneficiary of the GSA’s agenda. The courts’ newsletter, \textit{The Third Branch}, described the results as a “Renaissance” for federal courthouses that had often been “box-like structures.”\textsuperscript{81} The GSA reported that it had succeeded in providing

the American public with government office buildings and courthouses that are not only pleasing and functional, but that also enrich the cultural, social, and commercial resources of the communities where they are located. Such public statements of American culture are meaningful contributors to the vibrancy of our democracy.\textsuperscript{82}

\textit{D. The Boston Courthouse: “Measure and Balance”}

Designers of the federal courthouse in Boston aimed to translate into brick and glass their invitation to the public to have first-hand access to adjudication’s processes. As I noted, Stephen Breyer, who was then Chief Judge of the Court of Appeals for the First Circuit before becoming an Associate Justice on the United States Supreme Court, and Douglas Woodlock, a district court judge, guided the project to house the Court of Appeals for the First Circuit and the federal trial courts in Boston. Both men had written about the import of public


\textsuperscript{81} See \textit{The Renaissance of the Federal Courthouse}, 34 \textit{Third Branch} 1, 1 (2002). That article described a few of the 1950s buildings as “box-like structures.”

buildings and aimed for a courthouse to be a beacon for the public.\textsuperscript{83} Working with Cobb, they wanted the Boston building to echo a one-room courthouse described to have been “the center of its community” in the 1730s in Virginia.\textsuperscript{84}

The result, opened in 1998 in Boston at a cost of about $163 million, is a ten-story, 760,000-square-foot building with twenty-seven courtrooms.\textsuperscript{85} A huge conoidal section of glass forms one wall of the courthouse that, in Cobb’s words, marked the building as “open and accessible to all” as well as distinct and separate from “everyday life of the street.”\textsuperscript{86} The atrium permits views of seven stories.\textsuperscript{87} Since 1998,


\textsuperscript{86} Cobb Lecture, supra note 84. The building received some criticism as a “strange . . . blend of International-style/pastiche architecture[] . . . [with] touches of art nouveau, futuristic, and tech-brute ornamentation.” See Ann Wilson Lloyd, Three Trials for Ellsworth Kelly, ART NEW ENGLAND, Feb.–Mar. 1999, at 32. The “almost solid brick wall it presents to the city on its landward side” also prompted criticism (“a major disappointment”), mitigated by the point that the courthouse was meant to become part of a district crowded with other buildings. See Robert Campbell, A Mixed Verdict on New US Courthouse, Bos. Globe, Sept. 7, 1998, at A1.

\textsuperscript{87} See Keith N. Morgan, John Joseph Moakley Federal Courthouse and Harbor Park, SOC‘Y ARCHITECTURAL HISTORIANS (last visited Feb. 25, 2024), https://sah-archipedia.org/buildings/MA-01-SB5. When writing Representing Justice, we were given permission by Steve Rosenthal to reproduce his photographs (figs. 2, 3, and 4) in that book and related works, of which this essay is one. Our use was also facilitated by the artist, Ellsworth Kelly, staff at the Boston Courthouse and at the GSA, and Judge Woodlock.
the courthouse, named after U.S. Representative John Joseph Moakley, has hosted many public lectures and civic education programs.88

Figure 2

John Joseph Moakley United States Courthouse, Boston, Massachusetts

The centerpieces are the courtrooms, delineated with arches over their entryway and repeated in their interiors. As Judge Woodlock explained, the "most prominent geometric feature . . . is repetition of encompassing circles" that underscores that courtroom activities are a "shared community undertaking."89 Each side of the courtroom is marked by arches of equal size behind where the judge, the jury, and the public sit—to make plain that all are "equally ennobled."90

88. See United States Courthouse, Boston, Massachusetts: Courts and Community (undated), GSA Art-in-Architecture Archives 283 Ellsworth Kelly. An initiative, Discovering Justice, was begun by the Boston Bar Association, which developed, along with courthouse staff support, Boston's Federal Court Public Education Program. It includes various curricula, including some aimed at young children and others that have older children involved in mock trials at which judges preside. See Children Discovering Justice, BOS. L. TRIB., Apr. 2, 2001, at 9; Mock Trials, BOS. L. TRIB., Apr. 2, 2001, at 9. The Discovering Justice Project focuses on using the Moakley Courthouse as a shared civic educational space; it hosts speakers and book talks at the courthouse. Discovering Justice Courthouse Events, DISCOVERING JUST., https://discoveringjustice.org/programs/218oakley-courthouse-events.
89. Woodlock, Communities and Courthouses, supra note 83, at 279–80.
90. Id. at 280.
The patterns above the arches referenced those in a state courthouse, and the layout and glass was to denote that "all courts shall be open," a phrase in many state constitutions and understood to be a part of U.S. constitutional and common law. The configuration sought to enable dignified encounters in which people were treated on a par with their adversaries—whether an individual, a corporation, or the government itself. In addition to the four arches representing equality (as Judge Woodlock explained), the judges and architect lowered the height of the courtroom bench and dedicated ample space for the audience.

The art commission went, as noted, to Ellsworth Kelly, a celebrated U.S. artist who died in 2019. Kelly created The Boston Panels, twenty-one aluminum and enamel panels of varying colors (some shown in Figure 4 below), and installed in seven locations within...
the building to function as a single work of art.93 Kelly explained that *The Boston Panels* were governed "by measure and balance."94 Judge Woodlock saw *The Boston Panels* as an "invitation to future litigants, lawyers, jurors, and judges to inscribe their own meanings on the walls of the courthouse."95 Professor Brian Soucek identified Kelly’s insistent visuality as a counterpoint to judge-centric imagery. Centered on the delight of "seeing," the art valorized the authority of the viewer and was hence apt for a courthouse, constitutionally committed to the "civic virtue" of welcoming the public.96

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93. See WILLIAM CAINÉ, U.S. GEN. SERVS. ADMIN., THE BOSTON PANELS: ELLSWORTH KELLY; GEN. SERVS. ADMIN., UNITED STATES COURTHOUSE, BOSTON, MASSACHUSETTS, THE ARTWORK. As that brochure explained, the reviewing panel, which included architect Cobb, Justice Breyer, Judge Woodlock, and nine others affiliated with art, law, or the locality, received more than 380 submissions and selected Kelly from a set of six finalists.

94. *Id.*

95. Woodlock, Communities and Courthouses, supra note 83, at 283–84.

I learned more about the Panels because, as reflected in the 1982 Managerial Judges article, my interest in courthouse imagery is longstanding; I wrote there about the iconography of justice as a source of normative instruction for judges. A few years later, Professor Dennis Curtis and I co-authored an essay, Images of Justice, in memory and honor of our colleague and friend Robert M. Cover. That article also invoked the Renaissance Virtue of Justice, depicted with scales, a sword, and, on occasion since the Enlightenment, a blindfold. We unfolded more of the history of its deployment as a sign that a building or a book was related to law. In 1997, Judges Woodlock and Breyer reached out to ask us to speak at the Boston Courthouse’s opening ceremonies. Having seen the many clunky iterations of the appropriation of European iconography, they decided that the federal


dollars set aside for art-in-architecture would not be devoted to such depictions and sought out Ellsworth Kelly.

We were delighted that our commentary had any role in producing an invitation to Kelly to create his magnificent panels. (Amidst the various articles I have written, I had not thought that *Images of Justices* would have a material impact.) When Kelly spoke at that opening, he said he was “happy” to see his work on the wall. His choice of words stuck with me because in the professional spaces in which I work, the word “happy” is not regularly invoked; here, I too can acknowledge how happy—and honored—I am that *Managerial Judges* has proved useful over time. The reason to discuss the design of the Boston Courthouse, however, is that it offers a specific example of the disjuncture, as explained below, between the judiciary’s efforts to embody adjudication’s virtues and its revamping of rules and practices.

II. **Changing Judicial Norms and Declining Dockets: Limits on Precedential Opinions and Oral Arguments, Lawyerless Litigants, Constraints on Incarcerated Filers, and Dependency on Large-Scale Aggregations**

A. *Redefining the “Judicial” to Be “Management” Throughout the Federal Judiciary*

As other contributors to this Symposium make plain, a lot has changed since the 1980s when *Managerial Judges* was published. These shifts do not make it easy for the public to see the *U.S. Design Guide*’s vision of adjudication as a practice entailing “solemnity, integrity, rigor, and fairness.” In terms of my two 1982 hypothetical cases, the essays by Professors Aaron Littman and Alexander Reinert pick up on the analysis of prison-condition litigation and discuss the impact of statutory and procedural changes. Congressional enactment in 1996 of the “Prison Litigation Reform Act” had, as Reinert explains, “substantive ends,” which were to limit prisoners’ use of the federal courts.99 Indeed, an earlier version of that legislation, entitled the Stop Turning Out Prisoners Act (STOP), made clear the aim to limit prisoners’ filings and to end the injunctive and consent decrees

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then in place. Some lower court judges concluded thereafter that the PLRA violated Article III by intruding on judicial independence through altering final equity decrees, but the Supreme Court upheld its provisions permitting termination of permanent injunctions, absent findings of ongoing constitutional violations. Those hurdles "managed" to block many prisoners' lawsuits, such as those that would have paralleled the prison conditions case I described in Managerial Judges.

The data provided by Professor Littman illuminates the impact of lawyers in surmounting such barriers. He analyzes 342,000 prisoner civil rights cases terminated between 2008 and 2020 and finds that ninety-three percent were litigated pro se. He documents a two-track system: unrepresented prisoners, whose handwritten filings can be hard to parse, were subjected to expedited processing; those litigants generally lost. In contrast, in the rare instances when lawyers were appointed, prisoners' claims received "serious consideration." More challenges are found in the data from Professor Reinert, who chronicles individual judges' "standing orders" that added burdens such as different and more detailed pleading rules for pro se litigants and appear to discourage parties from seeking help from magistrate judges to whom many tasks have shifted. A 2016 analysis by Professor Katherine MacFarlane identified delegation to staff attorneys and clerks, whom she termed "shadow judges." In her view, the degree to which decision-making about prisoners' claims had shifted to staff was unconstitutional.

The other hypothetical I posited in 1982 involved a products liability lawsuit. As Professors Elizabeth Burch and Abbe Gluck explore in their analysis of the rise of MDLs, that case would now "tag

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103. Id. at 49–51.


106. Id.
along” or be swept in with hundreds of others.107 Once in an MDL, as Professor Theodore Rave discusses in this Symposium, management is the point. While theoretically, the statutory requirement that trials are to be remanded to the original district separates judicial involvement in settlement negotiations from adjudication, in practice remands are rare.108

Management in the appellate courts comes into focus in several other contributions. Professor Merritt McAlister details how federal judges have, by redefining judicial norms, managed themselves “out of the federal appellate process” and away “from the ordinary work of the federal appellate courts.”109 As she has also documented, about two-thirds of appeals were argued in the early 1980s; by 2011, about one-quarter, and by 2020, under twenty percent.110 Through reduction of oral arguments, issuance of non-precedential decisions in some eighty-five percent of cases, and delegation of work to staff, federal appellate judges do little judging except in “extraordinary” cases in which oral argument is followed by a reasoned judgment.111

Judge Diane Wood and Professor Zachary Clopton provide a parallel picture. Even as “[o]ral argument is a central feature of appellate practice in the United States,” they write, “most federal appeals do not include oral argument[.]”112 They also analyze appellate practices that police access to appellate review, promote settlement without judges’ involvement, and put many decisions in the hands of staff.113 Professor Marin Levy ponders the ability of appellate judges to manage their own challenges working together,114 while

110. Merritt E. McAlister, Rebuilding the Federal Circuit Courts, 116 NW. U. L. REV. 1137, 1153 (2022). The 2020 numbers of arguments may have been lower because of COVID; more recent data are comparable. The use of Zoom during COVID provided an example of using the Internet to ease the logistics and lessen the price of oral argument, albeit at the cost of doing web-based rather than in-person interactions.
111. McAlister, supra note 109, at 180.
113. Id. at 89–99, 102–04, 107–09.
Professor Brooke Coleman underscores that the federal judiciary has managed to put itself at the center of rulemaking, and she argues the lack of wisdom that results. On the other hand, some of the commentators in these volumes see generativity in management. Professors Sam Issacharoff and Troy McKenzie posit that judges can mediate the tensions between rules and discretion and, in part through new technologies such as artificial intelligence (AI), help to generate bespoke procedures that fit subsets of cases. Recently introduced federal rules on social-security litigation are one of their examples of a shift from transsubstantive rules to tailored processes. What they do not address is how many of these innovations can be harnessed to permit third-party knowledge of what transpires.

That lack of transparency has become a pervasive problem ranging from the Supreme Court’s “shadow docket” to the district courts. Just as judicial management on appeal has made decision-making increasingly inaccessible to the public, management at the trial level has done so as well. In the original version of Rule 16, promulgated in 1938 and creating an opportunity for judges to meet before trial with lawyers, the word pre-trial was hyphenated, as I have done in here. In contrast, in the 1983 revisions, the hyphen was deleted. The point was to make “pretrial” and the concomitant “management” (a word added then to Rule 16’s title) an activity unto itself to encourage ending lawsuits without trials.

In the 1983 revision, the predicate assumption was that, to the extent judges encouraged litigants to explore settlement through a panoply of alternative dispute resolution (ADR) methods, they did so by turning to “extrajudicial” means. Thus, Rule 16 licensed judges to discuss “the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”121 Within the decade, however, alternative dispute resolution became part of the judicial portfolio rather than external to it.122 The 1993 version of Rule 16 does not use the word “extrajudicial”: it provides that “settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule” could all be considered.123

B. Dockets, Trending Up and Then Down

The call for a managerial role was born from admiration for the assumed “efficiencies” of businesses, from concerns about the antiquated modes of government of which courts were a subset, from exasperation with lawyers in discovery disputes, and from worries about meeting the demand for adjudication.124 Judges who described themselves as “proselytizing”125 about the need for management
understood that federal court caseloads were rising and assumed they would spiral *up* endlessly. To see the basis for that view and then its undermining (in part because of Supreme Court doctrine, statutes such as the PLRA, and court rules), I provide details in the graph below, tracking federal filings from 1950 to 2022.

One line marks the courts’ criminal docket, which is controlled by federal prosecutors and is somewhat stable. The other line records the uptick of civil filings in the 1980s and then the plateauing and flattening.

**Figure 5**

**Federal District Court Filings, 1950–2022**

Given my focus on the district courts, I have not mapped bankruptcy filings that are largely the purview of bankruptcy judges. At some points during the last decades, more than a million bankruptcy petitions were filed in a year. Those numbers have

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*his investigation of state use of pre-trial procedures, as a “crusader” and noted that “[e]ver since [Laws’s return], he and a group of the nation’s foremost judges and attorneys have been preaching their gospel to bar associations all over the country.” See Frederic Sondern, Jr., *Uncle Sam Modernizes His Justice*, READERS’ DIG., Aug. 1948, at 45. I provide more of this history in Judith Resnik, *Trial as Error*, supra note 10, at 945–49.

declined in part because of congressional changes in eligibility and, more recently, aid packages to mitigate the economic impact of COVID. In 2022, petitions were below 400,000, which means that, holding a few very large MDLs aside discussed below, more people came to federal court via bankruptcy in a year than filed civil lawsuits.\textsuperscript{127}

Sitting atop and floating above the two lines in Figure 5 are three “x” marks, denoting one mega-MDL which, if included, would have created the impression of a steep increase in civil filings in 2020, 2021, and 2022. That litigation, \textit{Combat Arms 3M Earplug Litigation (CAE\textsuperscript{2})}, alleged that faulty earplugs provided by the 3M Corporation to the U.S. military resulted in impaired hearing for U.S. soldiers. In April of 2019, the Judicial Panel on Multidistrict Litigation consolidated some 700 lawsuits in the Northern District of Florida. Thereafter, the presiding judge issued an order facilitating “direct
filing" that enabled an easy route for individuals or counsel to seek inclusion.\textsuperscript{128}

\textit{Res ipsa loquitur.} The reason the AO excluded the individual Earplug filings from the trend line is that they would distort it. Thus, as Chief Justice Roberts explained in his year-end report for that year and thereafter in 2021 and 2022, the AO’s analysis of filings trends did not include the Earplug Litigation.\textsuperscript{129} Most other individual filings

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129. 2022 \textsc{Year-End Report on the Federal Judiciary} 6 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf; 2021 \textsc{Year-End Report on the Federal Judiciary} 8 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf. In 2020, 2021, and 2022, the Chief Justice’s Year-End Reports noted, when discussing filing trends, that new filings in the 3M Combat Arms Earplug Products Liability Litigation (MDL No. 2885) were not included. For example, for the year 2022, the Chief Justice’s report stated:

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


Civil case filings in the U.S. district courts increased 58 percent, going up by 172,704 cases to 470,581. Civil filings per authorized judgeship rose from 440 in 2019 to 695 in 2020. This growth occurred because of more than 200,000 multidistrict litigation (MDL) cases directly filed in a single district alleging that the 3M Company sold its Combat Arms earplugs to the U.S. military without disclosing defects that reduced hearing protection. Excluding these cases, civil filings would have fallen 10 percent this year, mainly in response to the effects of the COVID-19 pandemic.

that become part of MDLs are routinely included.\textsuperscript{130} As depicted below, in 2022, the trial-level civil filings of 240,000 cases were down almost eight percent from a prior decline in 2021.\textsuperscript{131} As the AO reported, federal appellate filings also fell, down from a recent low of about 45,000 cases to hover around 42,000 cases.\textsuperscript{132} Thus, in Figure 6 below, I map district court filings from 2018 to 2022 and again exclude the 3M Earplug MDL.

Civil case filings in the U.S. district courts declined 27 percent, decreasing by 126,014 cases to 344,567. Civil filings per authorized judgeship dropped from 695 in 2020 to 509 in 2021. Last year, civil filings had risen 58 percent because of more than 200,000 multidistrict litigation (MDL) cases directly filed in a single district that asserted that the 3M Company sold its Combat Arms earplugs to the U.S. military without disclosing defects that reduced hearing protection; this year, that district received more than 80,000 of those MDL cases. Excluding these cases, civil filings would have fallen 3 percent this year, mainly because of the effects of the COVID-19 pandemic.

\textit{U.S. District Courts – Judicial Business} 2021, U.S. Cts., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021. As the above quote illustrates, the Chief Justice and the AO, which is the source of data for the Chief Justice’s reports, provided two counts of new filings—one that included the MDL filings and one that did not—and also calculated the percent change in new filings from the previous year using each of these figures. See \textit{2022 YEAR-END REPORT ON THE FEDERAL JUDICIARY}, supra, at 6. The year runs through the twelve-month period ending on September 30. See id. at 5.

\textsuperscript{130} At some points, the AO also excluded the large MDLs involving asbestos and vaginal mesh from the count of civil district court filings.


The Earplug filings provide a lesson about the utility of aggregation: but for the capacity to "tag along," thousands of individuals would not have had the resources to file lawsuits and fund the experts needed to establish liability. This ready access has also drawn criticism as it permits potentially less-viable legal claims to enter the system.133 Another nuance is that cases related to pending MDLs might not be filed in federal courts; they may be in state courts or held at bay by lawyers (as yet another kind of "shadow docket"), awaiting settlements into which the prospective cases could also be swept.134 More generally, while the Earplug litigation looms larger than other MDLs, whose size varies from a few hundred to tens of thousands of cases, MDLs are central components of the federal courts' docket. Below, in Figure 7, I make that presence visible through charting pending cases and within that total, the percentage of MDLs.

134. Professor Rave pointed out to me that, along with Professor Lynn Baker, he has a project to map this form of a "shadow docket."
As the discussions by Professors Burch, Gluck, and Rave make plain, management is at the core of multidistrict litigation. Indeed, the origins of both case management and MDLs came from judges’ experiences with antitrust and other “big cases” (as they were then called) in which judges saw the need for economies of scale and for control over lawyers and their discovery practices. When reframing Rule 16 in the 1980s, federal judges applied those ideas across the

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board and hence, the discretion that Professors Burch and Gluck find troubling is, as Professor Rave explains, not unique to MDLs, albeit more visible.\textsuperscript{137} Professors Burch and Gluck also worry about how MDLs divest litigants of control over litigation.\textsuperscript{138} Yet, as I have argued elsewhere, judges have means of reorienting the “process due” to require more from lawyers in aggregations, and as Professor Robert Bone and others have explained, tradeoffs exist between direct individual participation and enabling access to courts.\textsuperscript{139}

What Figure 7 should make clear is that federal judges are \textit{dependent} on the ability to aggregate as a staple of their dockets. Were aggregation via MDL or otherwise unavailable, filings and pending cases would be much lower and, as explained below, individuals without lawyers would play a role larger than they do.\textsuperscript{140}

\textbf{C. Lawyerless Litigants, Differently “Managed”}

Many people do not have the resources to retain lawyers, who serve as gatekeepers, advising individuals about the potential to prevail and helping them to navigate the process.\textsuperscript{141} How courts ought to respond to self-represented litigants has become a question nationwide. In this section, I track federal judicial concerns about self-represented litigants (and prisoners specifically) and link those challenges to parallel issues in state courts, and I detail decisions over decades producing statistical compilations, episodic research reports, new staff positions, many programs in district and appellate courts, and local rules.

State-side, access to justice (A2J)—or more aptly, the \textit{lack thereof}—is a constant topic, as are the precarious streams of funding for state courts; the over-reliance on “user” fees through charges for filing and transcripts; as well as the surcharges, fines, and assessments requested from tens of thousands of people with little or no “ability to

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140. The AO does not publish information on how many filings in MDLs are by people without lawyers.
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pay.”142 As detailed by the Fines and Fees Justice Center, the Brennan Center at NYU, the Vera Institute, and others, such assessments function as regressive taxes that have a disparate impact on people of color.143 One study found that in some 600 cities and towns, money from fees and fines funded, on average, about ten percent of localities’ services; included were a few jurisdictions in which such income was above fifty percent of the revenues and a few below two percent.144

Many legal institutions are focused on these issues, as people with limited resources enter the legal system as plaintiffs or defendants. In 2016 and again in 2023, the Department of Justice issued “guidance” to help judges understand their constitutional and statutory obligations to ensure that people without resources are not blocked from courts.145 The American Academy of Arts and Sciences

144. See COURTNEY SANDERS & MICHAEL LECHMAN, CTR. ON BUDGET AND POL’Y PRIORITIES, STEP ONE TO AN ANTIRACIST STATE REVENUE POLICY: ELIMINATE CRIMINAL JUSTICE FEES AND REFORM FINES 5 (2021), https://www.cbpp.org/sites/default/files/9-17-21sfp.pdf (citing Mike Maciag, Addicted to Fines, GOVERNING (Aug. 19, 2019), https://www.governing.com/archive/gov-addicted-to-fines.html). That study reported that fines and fees exceed twenty percent of government revenues (the “threshold set by Missouri in its post-Ferguson reforms”) in some 284 localities and eighty reported fines and fees constituted more than fifty percent. In terms of the spread, in 2017, fines and fees in one locality (Morrison, Colorado) constituted 45.3% of general revenues, and in another (Reeves, Louisiana), fines and fees constituted 84.4%. By contrast, in Boston, Massachusetts, in 2018 fines and fees constituted 1.9% of general revenues and in Palm Beach, Florida, 1.4%. See Mike Maciag, Addicted to Fines: A Special Report, GOVERNING (Aug. 16, 2019), https://www.governing.com/archive/fine-fee-revenues-special-report.html.
(AAAS) and the American Law Institute (ALI) have projects underway that focus on what the ALI has called adjudication in “high-volume, high-stakes, low-dollar-value civil claims,” such as debt collection, evictions, home foreclosure, and child support. The questions include whether and how to reconfigure rules, deploy technology, and train personnel to enable even-handed and principled decision-making, and whether doing so would suffice.

To be clear, the category of the self-represented is not limited to people at or near the federal poverty lines. Lawyers’ hourly fees make hiring counsel prohibitively expensive for people with a range of income streams. Windows into experiences of being in court without lawyers come from Anna Carpenter, Colleen Shanahan, Jessica Steinberg, and Alyx Mark, who have documented encounters between judges and self-represented litigants in “lawyerless courts.” The lawsuits are always high-stakes, in that they involve “safety, intimate relationships, housing, and financial security.”

Through surveys and courtroom observations, Carpenter, Shanahan, Steinberg, and Marx paint a bleak picture: procedural rules and professional training have not equipped judges to adapt their methods to people without legal knowledge. Based on analyses of hundreds of cases, Carpenter and Shanahan have concluded that judges do not have the skills to recognize and address the legal needs of self-represented litigants, and that the consequences of this gap are profound.

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149. Id. at 512.

150. The four authors also authored an Essay in the June 2022 Symposium Issue of the Columbia Law Review: Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, The Institutional Mismatch of State Civil Courts, 122
of hearings in three jurisdictions, they recounted harrowing exchanges between frustrated judges and litigants, some of whom are ill-tempered and most unable to communicate with each other.\footnote{151}

While in some jurisdictions, judicial ethical rules have been modified to clarify that judges may make “reasonable accommodations” for self-represented individuals,\footnote{152} judges in proceedings without lawyers resemble the managerial judges I wrote about in 1982 and remain at work today. Both sets of jurists have enormous discretion, with few rules guiding their behavior and no oversight.\footnote{153} Pamela Bookman and Colleen Shanahan provide another overview (\textit{A Tale of Two Civil Procedures}) of the disjuncture between the procedure for people with resources and the handling of cases for those without.\footnote{154} A reason that I use the term “chaotic” in the title of this article is because of these and other descriptions of the sad and unproductive interactions between litigants and judges. Nonetheless, judges issue rulings.

The volume of cases and percentages of self-represented individuals are high in state courts. A few jurisdictions have generated statutory and, on occasion, constitutional “civil Gideon” rights, requiring courts to appoint lawyers for certain kinds of cases, such as housing, family dissolution, and health care.\footnote{155} Had the principle—announced in the 1970s in \textit{Boddie v. Connecticut}\footnote{156}—of the need for access been expanded to require a federal constitutional right to counsel in civil litigation, as many had urged, implementation would have been daunting, and the legal community would have been put to

\footnotesize{COLUM. L. REV. 1471 (2022). The symposium, “The Other 98\%: Racial, Gender, and Economic Injustice in State Civil Courts,” aimed, as these authors described, to examine “our most common civil courts as sites for understanding law, legal institutions, and how people experience civil justice.” Anna E. Carpenter, Alyx Mark, Colleen F. Shanahan & Jessica K. Steinberg, \textit{Foreword: The Field of State Civil Courts}, 122 COLUM. L. REV. 1165, 1165 (2022).

\footnote{151} Carpenter, Shanahan, Steinberg & Mark, \textit{supra} note 148, at 545–46. A parallel was provided by Justice Blackmun in his dissent in \textit{Lassiter v. Department of Social Services}, 452 U.S. 18, 35 (1981), when he quoted the transcript in which a short-tempered trial judge asked questions of Abby Gail Lassiter. \textit{Id.} at 54–55, 55 n.23.

\footnote{152} Carpenter, Shanahan, Steinberg & Mark, \textit{supra} note 148, at 513.

\footnote{153} \textit{Id.} at 514.


\footnote{156} 401 U.S. 371 (1971).}
work to develop sorting mechanisms to identify meritorious claims and pressed to simplify its processes or find paths outside of courts to provide remedies. As of now, no comprehensive infusion of lawyer or lawyer-like resources exist, and judges are left to determine means to legitimate the decisions they make on cases with lawyerless claimants. As this burgeoning literature details, unbridled discretion and inadequate consideration of lawsuits brought by self-represented litigants are commonplace in federal, as well as in the state, courts.

Because little has been written about why and when the federal judiciary began to track self-represented litigants, below I provide a window into this example of the "politics of measurement" through some numbers and the judicial reports and academic analyses of the "pro se problem." A caveat is in order about the limits of this account, which relies on how the federal courts gather and report information. One problem is coding, done initially by any lawyer or individual when filing a lawsuit and attaching a "civil cover sheet." Cataloguing and coding thereafter shifts to federal court clerks across the country, with each district or circuit working from guidelines provided by the AO. (The most recent publicly available guidance date from 1999 and both "lump" and "split" categories in ways not intuitive for litigators.) Moreover, current federal data compilations are often snapshots rather than "dynamic" recordings that would capture changes over time in the structure of a lawsuit. For example, available data do not report whether a lawyer was appointed after a self-represented individual filed or a lawyer withdrew from a case after filing. I need add that the data problems in pro se filings are one of


158. Bookman and Shanahan described federal courts as populated with lawyers, as seventy percent of cases having both sides represented, and thirty percent with one side unrepresented. Bookman & Shanahan, supra note 154, at 1186. Because the dismal lack of lawyers or other forms of assistance in state courts is their baseline, the federal court picture looked better. Yet, as I discuss, once delving into the self-represented in the federal courts, the needs are likewise acute.

159. SCOTT, supra note 6, at 27.

many documented over decades by scholars seeking to obtain and analyze cases in the federal courts.\textsuperscript{161}

One approach would be to obtain and recode data, which requires resources to pay for information because, under current rules, federal court filings on the system called PACER (Public Access to Electronic Records) are behind a paywall, with exemptions for certain categories of users, such as federal public defenders.\textsuperscript{162} While the Judicial Conference has described plans in the future to create an open system, and members of Congress have proposed Open Court Acts to improve search functions and make records public,\textsuperscript{163} as of now, commercial legal publishers or other resource-entities purchase information, and some sell licenses to users. Academic researchers have been able, with university research-funds, to obtain federal civil caseload data and offer empirical analyses of what would, otherwise, not be known.\textsuperscript{164} In the fall of 2023, a new data base became public—the Systematic Content Analysis of Legal Events Open Knowledge Network (SCALES), aspiring to leap frog the roadblocks by building an “open knowledge network” by “extracting data from court records, cleaning disambiguated entities, and enabling the automated identification of litigation events.”\textsuperscript{165} Supported by a National Science

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{163} See, e.g., Open Courts Act of 2021, H.R. 5844, 117th Cong. (2021).
\item \textsuperscript{164} See, e.g., Jonah B. Gelbach, \textit{Material Facts in the Debate over Twombly and Iqbal}, 68 \textsc{Stan. L. Rev.} 369 (2016).
\end{enumerate}
\end{footnotesize}
Foundation grant of tens of thousands of dollars, SCALES obtained docket sheets (not the full case files) from 2016 and 2017 and coded hundreds of thousands of civil cases. (An estimate of the cost for one year of obtaining the underlying documents is about $5 million.)

My discussion in this article relies instead on how the federal judiciary reports about itself; I build new charts, drawn from AO and FJC tables. As reflected in Figure 8, in 2005 (when the AO first published tables on this data), 76,314 individuals, comprising about thirty percent of the civil docket then, came to federal court without lawyers.166 Since 2005, between twenty-five and thirty percent of civil filings are from individuals without lawyers.

Figure 8

Self-Represented Civil Filings in the U.S. District Courts, 2005–2022167


167. U.S. District Courts—Civil Pro Se and Non-Pro Se Filings, by District,
In Figure 8, I have been linear and focused at the unit of case filed; other analyses look at the set together. For example, between 1999 and 2018, researchers tallied 1.5 million cases (twenty-eight percent of all cases) in which at least one party was self-represented.\textsuperscript{168} In terms of the composition, about two-thirds were prisoners.\textsuperscript{169} As of 2022, the AO identified 42,799 prisoner filings, or about fifty-eight percent, of 74,314 total pro se cases.\textsuperscript{170} In terms of demographics, studies of self-represented individuals have concluded they are more likely to be members of "racial and ethnic minorities, in particular African Americans."\textsuperscript{171} Innovative (and energetic) research by Professors Roger Michalski and Andrew Hammond looked at 2.5 million federal filings over a decade and concluded that, with some exceptions (such as those coming from more rural areas with fewer lawyer resources), pro se litigants were "a surprisingly representative sample of the general public."\textsuperscript{172}

Figure 9 maps the percentages of people without lawyers seeking review in the federal circuits; from 1993 to 2022, between thirty-four and fifty-two percent of appellants were lawyerless. As the figure also reflects, in the first such table of "Pro Se Appeals Commenced and Terminated, by Circuit" published in 1993,\textsuperscript{173} the


AO identified 17,043 individuals (about a third of the 50,224 appellants) as self-represented.  

Figure 9

**Self-Represented Federal Appellate Filings, 1993–2022**

Documenting the percentage of self-represented individuals in the federal courts is a relatively recent practice; the AO tables begin in 2005 at the trial level and 1993 on appeal. In contrast, gathering statistics on filings in general dates back to the late nineteenth century when the judiciary was staffed by the Department of Justice. Data

174. **JUDICIAL BUSINESS OF THE UNITED STATES COURTS, supra** note 173, at AI-44. (Fast forward to the last few years, and as Professors Merritt McAlister, Abbe Gluck, and others have written, the practice of non-publication by appellate courts has expanded over the decades; some eighty-five percent of the opinions rendered come without authority to use them as precedent in that circuit, and unrepresented individuals are over-represented in that set. Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 Mich. L. Rev. 533 (2020); Brown, Ford, Kubie, Marquez, Ostdiek & Gluck, Is Unpublished Unequal?, supra note 161.

collection expanded after 1939 when Congress chartered the AO. As I have discussed elsewhere, the political economy of data collection is its relationship to judicial budgetary goals—to support creation and allocations of judgeships, courthouses, and staff. Likewise, interest in obtaining data on self-represented litigants came in part because judges were looking for resources to deal with them.

In general, judges have also sought not to be those front-line resources. That view can be found in the 1983 revisions to Rule 16. Perhaps assuming that judicial management should be reserved for higher value cases and/or that judges lacked skills to be helpful, Rule 16 authorized federal district courts to exempt categories of cases from its management regime. As the Civil Rules' Advisory Committee explained, in some cases, "the burdens of scheduling orders exceed the administrative efficiencies that would be gained." The Advisory Committee's examples included "social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions." Many courts took up those options in their local rules. For example, the District of Massachusetts lists—as "inappropriate actions" for Rule 16 planning—lawsuits involving contract claims for recovery of overpayment and enforcement of judgment, defaulted student loans, and overpayment of veterans benefits; property claims for condemnation, foreclosure, rent lease and ejectment, and asbestos tort product liability; prisoner petitions seeking to vacate sentences or petitions for habeas corpus, civil rights, and prison conditions; forfeiture/penalty cases for drug-related seizure; appeals and withdrawals of bankruptcy claims; social security cases; and more.

176. Resnik, Trial as Error, supra note 10, at 960, 983.
177. FED. R. CIV. P. 16(b) advisory committee's note to 1983 amendment.
178. Id.
179. D. MASS. R. 16.2. Likewise, the District of Connecticut's Local Rule 16 states:

This Rule does not require the entry of such a tailored scheduling order in the following categories of cases: self-represented prisoner cases; habeas corpus proceedings; appeals from decisions of administrative agencies, including social security disability appeals; recovery of defaulted student loans, recovery of overpayment of veterans' benefits, forfeiture actions, petitions to quash Internal Revenue Service summons, appeals from Bankruptcy Court orders, proceedings to compel arbitration or to confirm or set aside arbitration awards and Freedom of Information Act cases.
Concerns about the self-represented intensified thereafter. In the early 1990s, as the federal judiciary looked toward the twenty-first century, two committees offered guidance. The Federal Courts Study Committee (FCSC) in 1990 and the Committee on Long Range Planning in 1995 issued lengthy reports addressing a host of issues, including the self-represented, and specifically, prisoners as litigants. The FCSC noted that pro se litigation was an “important means of access to the courts” that also “impose[d] special demands” meriting investigation. That year, the Judicial Conference directed the AO to “regularly collect and report data concerning pro se litigation” which resulted in yearly accountings that, as noted, began for appellate filings in 1993 and have been published in tabular form since 1995. Around the same time, the Federal Judicial Center (FJC) issued a report about self-represented individuals bringing cases in ten districts with the largest numbers of filings between 1989 and 1995. The researchers found that about a fifth of civil filings were by people without lawyers, two-thirds of whom were incarcerated, and that the percentage of pro se filers had risen from fifteen percent in

D. Conn. L. Civ. R. 16(b). Other local rules are parallel. In the Midwest, the Northern District of Illinois exempts cases involving recovery of overpayments and student loan cases; mortgage foreclosure cases; prisoner petitions; U.S. forfeiture/penalty cases; bankruptcy appeals and transfers; deportation reviews; collections of delinquent contributions under ERISA; social security reviews; tax suits and IRS third party suits; customer challenges; and cases brought under the Agricultural Acts, Economic Stabilization Act, Energy Allocation Act, Freedom of Information Act, Appeal of Fee Determination Under Equal Access to Justice Act, or NARA Title II. N.D. Ill. R. 16.1.1(b). In the Central District of California, the exemptions from Rule 16 conferences include habeas corpus petitions; actions for judicial review of decisions by the Commissioner of Social Security; any cases in which the plaintiff is self-represented, in custody, and is not an attorney; cases removed from small claims court; appeals from the bankruptcy court; extradition cases; actions to enforce or quash an administrative summons or a subpoena; and actions by the United States to collect on a federal student loan. C.D. Cal. R. 16-12.

180. Fed. Cts. Study Comm., Report of the Federal Courts Study Committee 113 (1990); Long Range Plan, supra note 5. As an opening note to the Table of Contents explained, JCUS “approved the recommendations and implementation strategies...to guide future administrative action and policy development” but not the commentary. Id. at iii.


1991 to twenty-four percent in 1994. The researchers noted that dispositions in cases of non-prisoner self-represented litigants were in a time period "shorter than...in represented cases in the same categories." While delineating the modes of disposition, that report did not analyze the merits of the decisions made.

Judges identified prisoners as problematic civil litigants long before the 1990s; the difficulties reflect, in part, the challenges for adjudicators in a system dependent on resourced parties for information. Before 1948, when federal prisoners challenged their sentences or convictions, habeas petitions were brought in the district in which they were confined. Given the small number of federal prisons, a few districts received the cases, while records were generally located in the courts of conviction. Thus, information about the merits was elsewhere and prisoners were lawyerless. As the federal government prosecuted more crimes and imprisoned more people, federal judges complained about the concentration of filings and what some deemed an "abuse" of habeas corpus. At their behest, Congress revised its habeas statutes and created "2255s," directing federal prisoners to return to the court in which they were sentenced for any post-conviction "motions." After the Supreme Court in the 1960s lowered the barriers for state prisoners to seek federal habeas relief for alleged violations of constitutional law and clarified that they were also eligible to pursue Section 1983 claims against corrections staff "acting under color of state law," the numbers of detained individuals turning to the federal courts rose. The cases ranged from excessive force and arbitrary isolation and revocation of good-time credits to systemic challenges alleging a lack of health care, sanitation, and safety. Hence, from the 1940s on, federal judges have

184. Id. at 5–6, 8.
185. Id. at 5.
189. See Resnik, The Puzzles of Prisoners and Rights, supra note 188.
experienced prisoners’ filings as burdensome, and they—a long with other lawyerless litigations—are, in that they need support. Yet, even as courts have generated different procedures for that subset, they have not, as detailed below, created a rule-based system to ensure principled adjudication of the merits.

The 1995 *Long Range Plan* devoted a section to "Pro Se Litigation," which was a "great stress on the resources of the federal courts." While noting that statistics were limited, the *Plan* recounted that "prisoner petition filings [had] increased in 71 of 94 districts between 1994 and 1995" and constituted about a quarter of the total civil filings; pro se filings in the appellate courts were then nearing forty percent. The commentary reported that some cases received "too much attention" through the layering of decisions by law clerks, magistrate judges, and district court judges, while others got "too little" because of the volume. The *Long Range Plan* discussed the challenges from the perspective of judges, who had to screen requests to file in forma pauperis, of which the "great majority" were prisoners bringing civil rights claims. Among the *Long Range Plan*’s many recommendations (formally adopted by the Judicial Conference, which did not endorse the accompanying commentary), "Recommendation 33" sought "[s]teps . . . to confront the growing demands pro se litigation places on the federal courts." The subrecommendations included calls for a "broad-based study, with participation from within and outside the courts," for exploration of "[a]lternative avenues for pro se prisoner litigation," "workable standards for addressing the substantive and procedural problems" presented, and more "effective use of pro se law clerks."

The stated goals were to learn if resources were sufficient and how to "provide better information to pro se litigants" as well as counsel when possible. The commentary described some prisoner-petitioners as "unschooled in law" and some "in need of mental health counseling," while others had "legitimate claims of assaults or medical

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190. Professor Littman described judges as finding the claims "annoying." Littman, *supra* note 102, at 51.
191. *LONG RANGE PLAN*, *supra* note 5, at 63.
192. *Id.* at 63 n.14.
193. *Id.*
194. *Id.* at 65.
195. *Id.* at 64.
196. *LONG RANGE PLAN*, *supra* note 5, at 63.
197. *Id.* at 64–66.
198. *Id.* at 64.
needs that should be addressed immediately."199 Yet others were filing to “travel outside the prison for a court hearing.”200 The commentary noted that part of the problems stemmed from the states, where lengthier sentences had produced overcrowded prisons and suggested that, when feasible, states could do more to respond to allegations of mistreatment.201 Moreover, the Plan noted that legislation was “pending that, if enacted, would alter significantly the handling of prisoner litigation in the federal courts.”202 The reference was to what became the Prison Litigation Reform Act which, as Professors Reinert and Littman have explained in this Symposium, imposed significant barriers to filings.

The Long Range Plan addressed people with limited resources more generally in its last chapter, “The Federal Courts and Society.”203 The commentary acknowledged that “many members of society will continue to lack the means to afford legal representation,” a reality with which the federal courts had to “deal.”204 Describing the importance of treating all “as valued customers of the courts,” the discussion called for judicial proceedings to be “comprehensible, physically accessible, and affordable to ordinary users.”205 The commentary reiterated that a “customer service” orientation might well require enabling court personnel to help move “disputes toward resolution.”206 The comments called for eliminating the “appearance of bias” (referencing studies of bias in federal and state courts and the Judicial Conference’s 1995 encouragement of such studies207), for understanding the “diverse cultural backgrounds” of participants, for ensuring physically accessible services, and for making interpreters

199. Id.
200. Id. at 65.
201. LONG RANGE PLAN, supra note 5, at 65.
202. Id. at 64 n.15.
203. Id. at 111.
204. Id.
205. Id. at 112.
206. LONG RANGE PLAN, supra note 5, at 122 (quoting JUSTICE IN THE BALANCE 2020, COMM’N ON FUTURE CAL. CTS. §§ 11.10a and 11.10b, at 180–81 (1993)).
more available. Nonetheless, the Long Range Plan endorsed imposing "reasonable filing fees" including "user fees" that could be adjusted. Mention was also made of promoting more pro bono programs—including within law schools—and tracking pro se cases to learn about repeat filers and resource expenditures.

The drumbeat about the particular burdens imposed by prisoners continued. In 1997, the Bureau of Justice Statistics (an arm of the Department of Justice) issued a report on "Prisoner Petitions in the Federal Courts, 1980–96" that highlighted the numbers (up from about 23,000 to 68,000), rates per 1,000 prisoners, and the limited successes (under two percent) on the merits. A year before, the FJC published a Special Issue on Pro Se Litigation: New Legislation, New Challenges. A series of essays addressed the work that Congress had imposed on the judiciary, as it had revised the habeas and PLRA statutes to require a labyrinth of requirements on prisoners that required judges to parse findings to see if they surmounted procedural bars. The PLRA also imposed complex accounting on federal clerks' offices by limiting, with some exceptions, fee waivers for prisoners filing civil actions challenging conditions of confinement.

In addition to the annual AO tables, the FJC published two reports addressing courts' responses to pro se litigants. A 2011 monograph on "assistance to pro se litigants in the U.S. District Courts" recounted results from a survey of sixty-one chief judges of district courts and staff from ninety district courts; all asked about the services for and the challenges involved with two categories of pro se litigants, prisoners and non-prisoner pro se litigants. Most districts had a handbook to provide some translation of legal procedures; some

208. Long Range Plan, supra note 5, at 112–16.
209. Id. at 116–17.
210. Id. at 121.
212. Rauma & Sutelan, supra note 183.
214. See 28 U.S.C. § 1915 (a)(2), (b). The caveat was that if a prisoner has "no assets and no means by which to pay the initial partial filing fee[,]" access cannot be denied, as "in no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment." 28 U.S.C. § 1915(b)(4).
offered free time on computers and spaces in which to do research.216 Further, most districts described themselves as helping “non-prisoner pro se litigants” find lawyers and, at times, enabling counsel to be appointed and expenses defrayed by using lawyers’ dues and other special funds.217

Clerks also raised questions about their role; as court employees, they were unsure how much they ought to provide assistance.218 In addition, some clerks identified specific problems faced by prisoners: policies and practices of state departments of corrections and of the federal Bureau of Prisons often limited prisoners’ access to computers or forms.219 Staff also reported the difficulties associated with a lack of access to electronic filing.220 Furthermore, some described encounters with “angry or upset pro se litigants.”221 A need for more specialized staff was part of the report’s findings.222 (By 2022, the judiciary’s budget had more than 470 lines for positions described as “Pro Se and death penalty” clerks;223 how those posts were allocated was unclear.) As for the judges, almost two-thirds described submissions difficult to comprehend and lacking knowledge about relevant legal decisions and their impact.224 Judges noted that non-prisoner pro se litigants were demanding and, at times, appeared “mentally unstable,” and that prisoners, lacking freedom, were in great need of counsel.225

More issues emerged when the federal courts embraced electronic filings; the questions were whether this modality would benefit or harm self-represented litigants, and specifically prisoners. The denouement of debates among rule-drafters came in 2018 in a set of amendments in civil, criminal, appellate, and bankruptcy proceedings that permitted self-represented litigants to file electronically “only if allowed by court order or local rule” that

216. Id. at 10.
217. Id. at vi, 5.
218. Id. at 20.
219. Id. at 19.
220. STIENSTRA, BATAILLON & CANTONE supra note 215, at 19.
221. Id. at 14.
222. Id. at 37.
224. STIENSTRA, BATAILLON & CANTONE, supra note 215, at vii, 21–23.
225. Id. at vii.
included "reasonable exceptions." As the Civil Rules Advisory Committee explained, it was not "possible to rely on the assumption that pro se litigants" would be able to benefit from "the advantages of electronic filings." The hope was that local rules could take "care" to ensure that mode did not "impede access to the court." To learn about implementation, the FJC published a survey in 2022 of seventy-eight clerks from appellate, district and bankruptcy courts. That report distinguished between "submissions" of materials and "filed" docketed materials and outlined the different practices, circuit-by-circuit and in the districts, about access to electronic systems for self-represented people. That lack of uniformity put the issue back on the Civil Rules Committee's 2022 agenda to reconsider the presumption against e-filing; after puzzling again about how to lessen difficulties for both filers and court clerks, the Committee made no changes.

Additional insights into federal district court responses to pro se filers comes from scholars, some of whom were inspired by Richard Posner, who served as the Chief Judge of the Seventh Circuit and became a vocal critic of court decisions on pro se claims before he resigned in 2017. One study by Mitchell Levy sought to understand the impact of the services provided by courts identified in the FJC 2011 study, as well as of a special program developed in the Eastern

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226. "A person not represented by an attorney: (i) may file electronically only if allowed by court order or by local rule; and (ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions." FED. R. CIV. P. 5(d)(3)(B); see also FED. R. APP. P. 25(a)(2)(B) and advisory committee's note to 2018 amendment; FED. R. BANKR. P. 5005(a)(2)(B) and advisory committee's note to 2018 amendment.

227. FED. R. CIV. P. 5(d)(3) advisory committee's note to 2018 Amendment.

228. Id.

229. TIM REAGAN, CARLY GRIFFIN & ROY GERMANO, FED. JUD. CENT., FEDERAL COURTS' ELECTRONIC FILING BY PRO SE LITIGANTS (2022). Among the courts of appeals, five generally allowed pro se litigants to use electronic filing, seven required permission, and one forbade it. Id. at 4.


District of New York.\textsuperscript{232} Levy sampled non-prisoner pro se cases in the AO’s “Integrated Data Base Civil Documentation.”\textsuperscript{233} He concluded that when both parties were represented, the win–loss ratio was roughly even; when a plaintiff was not represented, the plaintiffs in the sample won four percent of the time.\textsuperscript{234} When defendants were not represented, they lost eighty-six percent of the time, while represented defendants “nearly always” prevailed.\textsuperscript{235} Levy then reported that outcomes did not vary regardless of the programs provided in district courts, while it was possible that the services enhanced litigants’ experiences of the process.\textsuperscript{236} Thereafter, Professor Susannah Camic Tahk dug into outcomes when she assessed more than 560 decisions in which pro se litigants had succeeded.\textsuperscript{237} She concluded that success depended in large measure on using precedents from other cases brought by lawyers and termed those precedents “distributive” in that they transferred some lawyer “resources . . . into the hands of” people without attorneys.\textsuperscript{238} Those findings comport with Professor Rebecca Sandefur’s analysis and many others who identify lawyers as an important variable in success or, as Professor Littman put it, “serious consideration.”\textsuperscript{239}

Another window into the federal courts’ responses to self-represented individuals is to look at how the federal courts respond to requests to file without prepayment of fees, a process Congress has long authorized. (My assumption is an overlap exists between people who file pro se and those who ask for fee waivers.\textsuperscript{240}) Variation in e-filing rules for pro se litigants can likewise be found in the treatment of “in forma pauperis” (IFP) petitioners. Professor Hammond

\textsuperscript{233} Id. at 1835–36.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 1834–38.
\textsuperscript{236} Id. at 1855, 1862.
\textsuperscript{237} Tahk, \textit{supra} note 168, at 745.
\textsuperscript{238} Id. at 750–51.
\textsuperscript{240} The current published AO data provides information on pro se filings but not intersected with data on self-representation. See Table B-9, \textit{U.S. Courts of Appeals—Pro Se and Non-Pro Se Cases Commenced and Terminated, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2022, U.S. CTS.} (2022), \textit{https://www.uscourts.gov/data-table-numbers/b-9}.
documented a lack of uniformity across the districts in terms of standards and practices on granting IFP requests. The task of doing so gained more complexity in 1996 when, in the PLRA, Congress limited prisoners’ ability to obtain full IFP waivers for civil cases other than habeas petitions. Instead, prisoners now must pay with funds taken out in installments from their prison bank accounts. That statute has generated a few published decisions about which assets, such as veterans benefits, can be used to pay federal court fees and whether fee collection should not drain completely a prisoner’s commissary account. (I know of no public database recording how clerks and prison officials communicate and decide about the funds to tax or of the transaction costs and deterrent effects of this process.) Furthermore, under what became known as a “three-strikes provision,” the PLRA banned prisoners from filing new claims if three prior cases had been dismissed. In 2020, the Supreme Court held


242. See Anna Vancleave, Prison Banking, CALIF. L. REV. (forthcoming 2024). This overview explains the history of holding funds of prisoners and proposes abolition of “banks” internal to prisons or regulation.

243. See Hawes v. Stephens, 964 F.3d 412 (5th Cir. 2020); Whitaker v. Dempsey, No. 23-1086, 2023 WL 6568053 (7th Cir. Oct. 10, 2023). In 2023, the Second Circuit reversed a district court for abusing its discretion when it required an individual to pay the $402 filing fee as a predicate to a lawsuit challenging his healthcare. The individual had some $600 in his account, but given that funds were also needed for commissary and other costs, the court concluded that he met the Section 1915(a) standard for a fee waiver. Rosa v. Doe, No. 21-2628(L), 2023 U.S. App. LEXIS 30785, at *11, *19–20 (2d Cir. Nov. 20, 2023).

244. See John Boston, The Prison Litigation Reform Act, in A JAILHOUSE LAWYER’S MANUAL 357–60 (12th ed. 2020); Joanna R. Lampe, CONG. RSCH. SERV., LSB10408, THREE STRIKES, YOU’RE OUT: SUPREME COURT TO CONSIDER LIMIT ON PRISONER LITIGATION (2020). Section 804(a)(3) of the Prison Litigation Reform Act (PLRA) amended 28 U.S.C. § 1915 to state that “if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee.” Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). Section 804(a)(3) also set forth a schedule for prisoners to pay the filing fees. Id. Section 804(c)(3) of the PLRA amended 28 U.S.C. § 1915(f) to state that “[i]f the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.” Id. Section 804(d) of the PLRA also amended 28 U.S.C. § 1915 to prohibit a prisoner from bringing “a civil action or appeal[ing] a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” Id. Recent case law debates the
that all dismissals counted, whether with or without prejudice, albeit not if a judge had granted leave to amend a complaint.\textsuperscript{245}

I have sketched the materials provided by the federal judiciary on self-represented litigants, a bit of doctrine, and some of the scholarly research to document the significant presence in the federal courts of such individuals, the legal questions raised, and the difficulty of ferreting out information and analyses of this relatively "(un)changing" percentage of the federal docket.\textsuperscript{246} Given the "antagonism" to pro se prisoners identified by Professors MacFarlane, Reinert, and Littman, as well as efforts to limit prisoner filings, doctrine narrowing habeas remedies, procedural barriers in local rules,\textsuperscript{247} and a "gender gap" in that two thirds of the self-represented who are not prisoners are men,\textsuperscript{248} the stability of the numbers seeking federal court assistance can be seen as a testament to Justice Harlan’s hoped-for legitimacy; people believe that courts will respond to them. Alternatively, and anecdotally, another reading is that people who have many kinds of challenges in life look to courts for remedies that the legal system cannot provide, and that such individuals are a major source of pro se filings. But without freely available and well-coded data, we know too little about this significant percentage of federal court filers.

Likewise, more information would help identify the impact of lawyers. Disposition data—such as Professor Littman’s ninety-three percent of prisoner cases ending with little consideration—could be interpreted to support the view that most cases lack merit. But Professor Littman’s data, like that of other researchers, underscores that when lawyers are present to investigate facts and make legal arguments, cases receive serious consideration.\textsuperscript{249} One view is that

\textsuperscript{245} See 28 U.S.C. § 1915(g); Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723–24 & n.4 (2020). In addition, Section 1915(g) created an exception if a person is "under imminent danger of serious physical injury." See McFadden v. Noeth, 827 F. App’x 20 (2d Cir. 2020) (not for publication).

\textsuperscript{246} Gough & Poppe, supra note 168, at 567, 573.


\textsuperscript{249} Parallel findings about immigration come from Lindsay Nash, Universal Representation, 87 FORDHAM L. REV. 503, 504 (2018); and Robert A. Katzmann,
lawyers can figure out meritorious claims and the other is that with lawyers, claims that appear to lack merit gain legal and factual footings.

The proposition that lawyers are essential to ferreting out the value of claims can be found in the decisions of some federal judges who, upon receipt of a stream of filings from particular prisons, determined they could not responsibly decide the cases without lawyers. As Judge William Wayne Justice, sitting in the federal courts in Texas, explained in his essay on the “origins” of a 1970s major conditions lawsuit against that state’s prison system (Ruiz v. Estelle), he had served as a U.S. Attorney as well as a defense lawyer and knew that, be they state officials or prisoners, not all litigants were truthful. Further, he had seen that other judges sometimes held hearings in prisoners’ cases in which state officials’ testimony routinely defeated claims of prisoners who had limited access to information and education.250 After Judge Justice became a district court judge, he received many complaints alleging brutality and arbitrary punishment in the Texas prisons.251

He wrote that he had three options. First, he could have “continued to hear large number of prisoner petitions . . . with full knowledge that such petitions were destined to fail.” Second, if he tried himself “to right the balance,” he would violate “the integrity of the court.”252 He pursued the third course, which was to consolidate individual petitions and reach out to distinguished lawyers to represent the class as well as enlist the U.S. Department of Justice to intervene.253 (During the pendency of the case, Congress enacted the Civil Rights of Institutionalized Persons Act that authorized the Department to pursue remedies in general on behalf of detained populations.254) As Judge Justice explained, he did so because he needed to render decisions predicated on “proofs and reasoned arguments”—terms he borrowed from a famous article by Professor

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251. Id. at 4–5.
252. Id. at 11.
253. Id. at 6, 11.
Lon Fuller distinguishing adjudication from other kinds of decision-making.\(^{255}\)

Judge Justice’s decisions resulted in three decades of litigation that aimed to lessen some of the violence, arbitrariness, and density in the Texas prison system.\(^{256}\) Other federal judges have likewise found lawyers to represent prisoners challenging forms of punishment in prison (such as whipping) and conditions of confinement.\(^{257}\) Comparable responses can be found in local district and circuit programs enlisting lawyers for all kinds of self-represented litigants. Yet, despite concerns dating back decades, no new national rulemaking—paralleling the revisions of Rule 16—has put a mechanism in place to enable the court system to know who is coming to court and to equip itself and litigants with information requisite to dispositions predicated on facts and law.

Opportunities to do so abound because the Judicial Conference has more than two dozen committees working, as reflected in the 2020 Strategic Plan for the Federal Judiciary, to implement the judiciary’s “core values” of the rule of law, equal justice, judicial independence.

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diversity and respect, accountability, excellence, and service. Further, that Strategic Plan identified “enhancing access to justice and the judicial process” as an issue for the courts, which needed to be “fair, impartial, and accessible to all, regardless of wealth or status.” Suggested responses were increased use of MDL coordination, more ADR, more flexibility, and developing “best practices for handling claims of pro se litigants in civil and bankruptcy cases.” That 2020 report did not specify what such practices should entail.

IV. COURTROOMS EMPTYING AS CASELOADS FALL AND ADR RISES

What happens for those litigants who make their way into court? The AO describes some cases as ending “with no court action.” As defined in the AO’s 1999 coding instructions for clerks, that set included cases terminated before defendants answer if an “action was withdrawn by the plaintiff or settled by the parties with no participation by a judge or magistrate judge,” as well as those “disposed of with no action by either a judge or magistrate judge after an answer was filed.” That guide also noted that the code included “all prisoner petitions and other actions which are withdrawn or otherwise disposed of without activity by a judge or magistrate judge before issue is joined.” Presumably, under this definition, staff screening that could result in rejecting prisoner filings would be deemed “no court action.” As of 2022, more than a fifth of all civil federal cases were coded as ending with “no court action.”

259. id. at 21.
260. id. at 21–22.
261. id. at 22.
263. Id. AO staff told us that as of the spring of 2023, revisions to the code book were underway. Another analysis comes from Marc Galanter & Angela M. Frozena, describing “no court action” cases as those that “were filed and then settled or withdrawn without any action or hearing by the court.” Marc Galanter & Angela M. Frozena, A Grin Without a Cat: The Continuing Decline and Displacement of Trials in American Courts, DAEDALUS, Summer 2014, at 121.
265. In the twelve-month period ending on September 30, 2022, twenty-two percent of the pending 258,428 civil cases were terminated with “no court action.”
At the other end is a trial; fewer than one in one hundred civil cases ends in a judge or jury trial. By returning to the District of Massachusetts as an example, I map the decline over the last few decades in the number of trials. In 1998, when the Boston courthouse opened, a total of 195 trials (142 civil and 53 criminal) took place before federal district court judges in that district, which includes judges sitting in Springfield and in Worcester. Using the assumption that trials were evenly distributed among the three courthouses, about eight trials would have been held in each courtroom in the District of Massachusetts, of which the Boston Courthouse had eighteen dedicated to district court judges. In 2022, that district had 125


266. See Table T-I, U.S. District Courts Civil and Criminal Trials, by District, During the Twelve-Month Period Ended September 30, 1998, U.S. CTS., https://www.uscourts.gov/sites/default/files/statistics_import_dir/t01sep98.pdf. Trials may not have been held at the same rate across the district.

trials, of which 50 were civil and 75 were criminal proceedings. Again assuming equal distribution, the number of trials went down to about five per district-judge courtroom in 2022.

Of course, trials are not the only proceeding for which courtrooms are used. Defendants who plead guilty must do so in open court, judges must sentence in public, and oral arguments and hearings in civil cases take place in courtrooms. Moreover, some federal judges do much of their managerial activity in courtrooms. Efforts to track usage came in the late 1990s, when one General Accounting Office Study found that federal courtrooms had their ‘lights on’ (defined as parts of days) about half of the working week. Additional analysis of the time that federal judges spend in courtrooms comes from the Honorable William Young, a district judge sitting in the Boston Courthouse. Relying on AO data and materials from colleagues, Judge Young found that the numbers of hours on the bench had declined


271. GEN. ACCT. OFF., GAO/GGD-97-39, COURTHOUSE CONSTRUCTION: BETTER COURTROOM USE DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING 2–3 (1997); see also GEN. ACCT. OFF., GAO-01-70, COURTHOUSE CONSTRUCTION: SUFFICIENT DATA AND ANALYSIS WOULD HELP RESOLVE THE COURTROOM-SHARING ISSUE 8, 18 (2000); GEN. ACCT. OFF., GAO-10-417, FEDERAL COURTHOUSE CONSTRUCTION: BETTER PLANNING, OVERSIGHT, AND COURTROOM SHARING NEEDED TO ADDRESS FUTURE COSTS 34 (2010). The 1997 GAO study defined courtroom usage as “any activity” (including but not limited to trials) for any portion of the day. The study studied sixty-five courtrooms in seven locations and concluded that courtrooms were in use about fifty-four percent of the days when courthouses were open. GEN. ACCT. OFF., GAO/GGD-97-39, supra, at 8–10. A study of four other locations reported similar results. See GEN. ACCT. OFF., GAO/GGD-97-59R, COURTHOUSE CONSTRUCTION: INFORMATION ON THE USE OF COURTROOMS AT SELECTED LOCATIONS 2, App. 1 at 6, Table I.1 (1997). Thereafter, the judiciary developed a different measure of use — “latent use” — to capture proceedings that were scheduled but cancelled. FEDERAL JUDICIAL CENTER, THE USE OF COURTROOMS IN U.S. DISTRICT COURTS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (July 18, 2008).
from 2009,\textsuperscript{272} as of 2022, judges spent about 320 hours a year “on the bench,” of which about half were “on trial.” (The dip in 2020 and 2021 came during the first years of COVID.)

Figure 10

**Federal District Court Judges on the Bench and in Trial:**
**Hours in Courtrooms, 2009–2022\textsuperscript{273}**

![Graph showing bench and trial hours for Federal District Court judges from 2009 to 2022.]

Two decades earlier, the Honorable D. Brock Hornby, who was the chief judge for the federal district court in Maine, had reflected on the transformation underway in the judicial role. He called a judge on the bench an “endangered species, [being] replaced by a person in business attire at an office desk surrounded by electronic assistants.”\textsuperscript{274} Thus, “reality T.V.” needed to portray judges in “an office setting without the robe, using a computer and court administrative staff to


\textsuperscript{273} This chart is reproduced with permission from Judge William G. Young. The information on “bench hours” and “trial hours” come through monthly reports by clerks to the AO; they measured time spent in the courtroom and time spent on trials. Judge Young collected the information as part of his ongoing data collection in light of his earlier work. He approved use of this depiction, configured from his materials. *See also* Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PA. ST. L. REV. 243, 260 (2013).

monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference).”

The reasons for less time spent on the bench are many, and causal claims about litigation are freighted by the “noisy” variables in play. Sources of a shift away from courtrooms include the high prices of legal services, the complexity of pursuing lawsuits, barriers to class actions, Supreme Court doctrine limiting causes of action, and procedural rules insistently counseling against adjudication. The contemporary contours of the judicial management regime can be seen from the local rules for the District of Massachusetts, which explain:

At every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances. Assistance may include a reference of the case to another judicial officer for settlement purposes. Whenever a settlement conference is held, a representative of each party who has settlement authority must attend in person or be available by telephone, with permission of the judicial officer presiding over the settlement conference.

These rules echo the federal courts’ website, which also advises against litigation. Figure 11 provides the text and then a facsimile of what can be found in 2023 at “About the Federal Courts,” which links to “Civil Cases.” The federal judiciary there explains that:

To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute. The courts encourage the use of mediation, arbitration, and other forms of alternative dispute resolution, designed to produce a resolution of a dispute without the need for trial or other court proceedings. As a result, litigants often agree to a ‘settlement.’ Absent a settlement, the court will schedule a trial. In a wide variety of civil cases, either side is entitled under the Constitution to request a jury

275. Id.
trial. If the parties waive their right to a jury, then a judge without a jury will hear the case.\textsuperscript{277}

Figure 11

\textbf{United States Courts Website: Civil Cases, 2023}

\begin{itemize}
  \item \textbf{Civil Cases}
  \begin{itemize}
    \item A federal civil case involves a legal dispute between two or more parties. A civil action begins when a party to a dispute files a complaint, and pays a filing fee required by statute. A plaintiff who is unable to pay the fee may file a request to proceed in forma pauperis. If the request is granted, the fee is waived.
  \end{itemize}
  \item \textbf{The Process}...
    \begin{itemize}
      \item \textbf{Case Preparation}...
      \item \textbf{Settling Differences}
        \begin{itemize}
          \item To avoid the expense and delay of having a trial, judges encourage the parties to try to reach an agreement resolving their dispute. The courts encourage the use of mediation, arbitration, and other forms of alternative dispute resolution, designed to produce a resolution of a dispute without the need for trial or other court proceedings. As a result, litigants often agree to a "settlement." Above a settlement, the court will schedule a trial. In a wide variety of civil cases, either side is entitled under the Constitution to request a jury trial. If the parties waive their right to a jury, then a judge without a jury will hear the case.
        \end{itemize}
      \item \textbf{Trial Process}...
      \item \textbf{Closing}...
    \end{itemize}
  \end{itemize}

\end{itemize}

Screenshot of webpage Oct. 3, 2023\textsuperscript{278}

In terms of what results, understanding the nuances of dispositions is difficult because of the lack of specificity in coding instructions and the diversity of staff entering data—the lumping and splitting problems I referenced earlier. Relying on public information built from the AO and provided by the FJC, Figure 12 groups together dispositions in 2022. As it details, more than two-thirds of civil cases were described as ending by dismissal or settlement. About a tenth concluded through a motion before trial or other dispositive judgment, and another comparable amount were either dismissed for lack of prosecution, transferred to another district, or remanded to an agency

\textsuperscript{278} Id.
or state court. About half of one percent concluded by jury or bench trial.279

Figure 12

Dispositions in Civil Cases in U.S. District Courts, 2022280

<table>
<thead>
<tr>
<th>Case Disposition (N=308,326)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed (other)</td>
<td>32.01</td>
</tr>
<tr>
<td>Settled</td>
<td>19.88</td>
</tr>
<tr>
<td>Voluntarily dismissed</td>
<td>17.58</td>
</tr>
<tr>
<td>Motion before trial</td>
<td>8.47</td>
</tr>
<tr>
<td>Other judgment</td>
<td>3.38</td>
</tr>
<tr>
<td>Statistical closing</td>
<td>2.66</td>
</tr>
<tr>
<td>Dismissed for want of prosecution</td>
<td>2.53</td>
</tr>
<tr>
<td>Transferred to another district</td>
<td>2.36</td>
</tr>
<tr>
<td>Remanded to U.S. agency</td>
<td>2.24</td>
</tr>
<tr>
<td>Remanded to state court</td>
<td>1.67</td>
</tr>
<tr>
<td>Appeal affirmed (magistrate judge)</td>
<td>1.63</td>
</tr>
<tr>
<td>Appeal denied (magistrate judge)</td>
<td>1.44</td>
</tr>
<tr>
<td>Default judgment</td>
<td>1.26</td>
</tr>
<tr>
<td>Dismissed for lack of jurisdiction</td>
<td>1.06</td>
</tr>
<tr>
<td>MDL transfer</td>
<td>0.65</td>
</tr>
<tr>
<td>Consent judgment</td>
<td>0.52</td>
</tr>
<tr>
<td>Jury verdict</td>
<td>0.40</td>
</tr>
<tr>
<td>Court trial</td>
<td>0.14</td>
</tr>
<tr>
<td>Stayed pending bankruptcy</td>
<td>0.05</td>
</tr>
<tr>
<td>Award of arbitrator</td>
<td>0.04</td>
</tr>
<tr>
<td>Directed verdict</td>
<td>0.04</td>
</tr>
</tbody>
</table>

280. Civil Cases Fiscal Year 2022, FED. JUD. CTR. (2022),
Gaining data nationwide about *state* court litigants, their resources, the kinds of cases filed, and their modes of disposition is difficult; accurate aggregate analysis requires shared definitions and comparable modes of data collection. As of 2019, the National Center for State Courts recorded 83.2 million new cases, of which about twenty percent were criminal cases not related to traffic violations and another twenty percent were general civil lawsuits (not including family issues). Even as state courts have much higher levels of cases and public proceedings than federal courts do, they also have recorded declines in trials and other forms of adjudication, atop funding challenges that, in some jurisdictions, have meant cutting back hours of operation. Moreover, potential tort claimants have, in recent decades, been discouraged by anti-adjudication provisions in many statutes that impose caps on damages and other limitations.

State-by-state analyses provide one window, and many reports resemble the pictures painted in 2022 by the authors of *Lawyerless Courts*. For example, California recorded 4.3 million people in civil litigation without the assistance of lawyers in 2004. A year later, New York counted 2.3 million civil litigants without lawyers—including almost all tenants in eviction cases, debtors in consumer credit cases, and ninety-five percent of parents in child support matters. To glimpse the broader picture, the National Center for State Courts gathered data about almost a million cases filed in ten

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https://www.fjc.gov/research/idb/civil-cases-filed-terminated-and-pending-sy-1988-present. The disposition data in Figure 12 comes from the Federal Judicial Center’s Integrated Database (IDB). The IDB has a larger set of categories that do not include the AO term of “no court action,” while some of the IBD categories likely include cases coded as “no court action” in the AO data. In a spring 2023 conversation, AO staff explained that they no longer rely on the *Civil Statistical Reporting Guide* and do not have new definitions publicly available.


major urban counties in the United States. As Figure 13 summarizes, the data showed that, as of 2012, the largest set of cases were small-scale commercial disputes in which creditors use courts to collect debt.

Figure 13

Types of Cases Filed in 10 Major Urban State Counties, 2012

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>N=925,344</td>
<td>64</td>
</tr>
<tr>
<td>Contracts</td>
<td></td>
</tr>
<tr>
<td>Debt Collection</td>
<td>37</td>
</tr>
<tr>
<td>Landlord/Tenant</td>
<td>29</td>
</tr>
<tr>
<td>Foreclosure</td>
<td>17</td>
</tr>
<tr>
<td>Other</td>
<td>17</td>
</tr>
<tr>
<td>Small Claims</td>
<td>16</td>
</tr>
<tr>
<td>Other Civil</td>
<td>9</td>
</tr>
<tr>
<td>Tort</td>
<td>7</td>
</tr>
<tr>
<td>Automobile</td>
<td>40</td>
</tr>
<tr>
<td>Personal Injury/Property Damage</td>
<td>20</td>
</tr>
<tr>
<td>Medical Malpractice</td>
<td>3</td>
</tr>
<tr>
<td>Product Liability</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>35</td>
</tr>
<tr>
<td>Unknown</td>
<td>3</td>
</tr>
<tr>
<td>Real Property</td>
<td>1</td>
</tr>
</tbody>
</table>

As Figure 14 details, most cases analyzed were lawyerless on at least one side, disproportionately the defendant’s, and in about six percent of the cases, parties were lawyerless on both sides.

285. HANNAFORD-AGOR, GRAVES & MILLER, supra note 3, at 18–19. Data was drawn from Maricopa (AZ), Santa Clara (CA), Miami-Dade (FL), Oahu (HI), Cook (IL), Marion (IN), Bergen (NJ), Cuyahoga (OH), Allegheny (PA), Harris (TX) counties.
Figure 14

Lawyerless Litigants in Cases
in 10 Major Urban State Counties, 2012

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>N=649,811</td>
<td></td>
</tr>
<tr>
<td>Defendants</td>
<td>74</td>
</tr>
<tr>
<td>Plaintiffs</td>
<td>8</td>
</tr>
<tr>
<td>Both</td>
<td>6</td>
</tr>
</tbody>
</table>

As to dispositions, Figure 15 provides a summary. Most cases were recorded as ending without trial, summary judgment, or binding arbitration.

Figure 15

Dispositions in Civil Cases in 10 Major Urban State Counties, 2012

<table>
<thead>
<tr>
<th>Dispositions</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>N=925,344</td>
<td></td>
</tr>
<tr>
<td>Dismissed</td>
<td>35</td>
</tr>
<tr>
<td>Judgment Unspecified</td>
<td>26</td>
</tr>
<tr>
<td>Default Judgment</td>
<td>20</td>
</tr>
<tr>
<td>Settled</td>
<td>10</td>
</tr>
<tr>
<td>Trial</td>
<td>4</td>
</tr>
<tr>
<td>Summary Judgment</td>
<td>1</td>
</tr>
<tr>
<td>Other Disposition</td>
<td>1</td>
</tr>
<tr>
<td>Unknown</td>
<td>4</td>
</tr>
</tbody>
</table>

Another set of questions revolve around categories of potential claimants who are not in court and whose absence alters the mix of pending cases and limits understanding about the extent of alleged legal violations. In addition to prisoners cut off by the 1996 PLRA, consumers, employees, and some tort plaintiffs have been blocked from federal and state courts by the Court’s reinterpretation of the

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286. Id. at 32.
287. Id. at 20–21.
1925 FAA, as well as the Supreme Court’s readings of Article III’s “case or controversy.” The reminder is that, before the 1980s, the Court had not read the FAA to permit providers of goods and services to push consumers into arbitration programs. In a famous 1953 decision involving a broker who had sought to enforce a clause on arbitration against a customer claiming a violation of federal securities statutes, the Court explained its concerns with unequal bargaining power as well as with unregulated and potentially unfair processes.

In more recent decades, however, a majority have not only permitted manufacturers and employers to yoke their customers and employees to arbitration but also to preclude the use of class actions. In 2011, the Court held that state courts must enforce arbitration clauses that ban class actions in courts or arbitration. In 2018, the Court ruled that employees could be required, as a condition of continued employment, to waive all rights to collective action (whether in courts or arbitration) and proceed, if at all, in private and single file in the venue chosen by their opposing employer. When explaining its new readings, the Court praised arbitration as a speedy and effective alternative to courts. Yet the mass production of arbitration clauses has not resulted in a massive number of arbitrations. Instead, the number of documented consumer arbitrations is startlingly small.

I honed in on arbitrations involving wireless services because the Supreme Court addressed the ban on class arbitrations in that context in its 2011 decision involving AT&T Mobility. According to information from the American Arbitration Association (AAA), which has been designated by AT&T to administer its arbitrations and which complies with state-reporting mandates, 134 individual claims

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292. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); see also American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013).


294. See Concepcion, 563 U.S. at 345–46.

295. See id. at 351–52.
(about twenty-seven per year) were filed against AT&T between 2009 and 2014.\textsuperscript{296} During that time period, the estimated number of AT&T wireless customers rose from 85 million to 120 million people, and lawsuits filed by the federal government charged the company (and other major providers) with a range of legal breaches, including systematic overcharging for extra services and insufficient payments of refunds when customers complained.\textsuperscript{297} More recent analyses provide similar findings, as many companies continue to impose arbitration mandates, and several have added non-disclosure requirements—that individuals who did pursue claims are not to divulge what happened.\textsuperscript{298} 

In the last few years, the Court has been somewhat more restrained in interpreting the reach of FAA mandates. In 2019, in \textit{New Prime v. Oliveira}, the Court held that independent contractors engaged in foreign or interstate commerce could go to court pursuant to the FAA's exemption for contracts involving employees engaged in foreign or interstate commerce.\textsuperscript{299} In 2022, in \textit{Southwest v. Saxon}, the Court concluded that airline workers involved in loading and unloading cargo from airplanes fit that textual exemption as well.\textsuperscript{300} That same year, in \textit{Morgan v. Sundance}, the Court ruled judges were not to push arbitration by fashioning special rules when deciding whether a party had waived an obligation to arbitrate.\textsuperscript{301} Moreover, for the first time since the 1925 enactment, Congress amended the FAA by adding that "no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case . . . filed under Federal, Tribal or


\textsuperscript{297} Resnik, \textit{A2J/A2K}, supra note 296, at 650, 655.

\textsuperscript{298} Resnik, Garlock & Wang, supra note 296.

\textsuperscript{299} New Prime v. Oliveira, 139 S. Ct. 532, 536 (2019).

\textsuperscript{300} Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022).

\textsuperscript{301} Morgan v. Sundance, 596 U.S. 411, 413–14 (2022); see also Myriam Gilles, \textit{Arbitration's Unraveling}, U. PA. L. REV. (forthcoming 2024).
state law and relate[d] to the sexual assault dispute or the sexual harassment dispute.”

In addition to making arguments in court, entrepreneurial claimants have attempted to limit the impact of the Court’s FAA rulings by innovating within arbitration proceedings. As I explain elsewhere and Professor Maria Glover has documented in detail, some “bundlers”—be they lawyers or not—have filed many individual arbitration claims against specific companies whose arbitration mandates included obligations for the companies to pay some of the costs. In some instances, those companies sought to avoid their own mandates but were rejected by federal judges who pushed them back into the arbitration regime they had championed. Bundling individual claims has had an impact but cannot replace class actions, where representatives can step forward publicly on behalf of many others who may not know they have been harmed.

Another important factor in the litigation landscape is Congress. As Professors Stephen Burbank and Sean Farhang have analyzed, before the current decades, some analysts assumed that Democrats were the sources of creating private rights of action, while Republicans opposed opening courthouse doors. Professors Burbank and Farhang collected a random sample of bills introduced to create new private causes of action with attorney fees; on many occasions, Republicans as well as Democrats sought to welcome private lawsuits. Professors Burbank and Farhang interpreted those proposed statutes as evidence that Republicans distrusted policies of Democratic presidents and wanted private parties to enforce their agendas protecting guns and stopping abortion and immigration. While both Republicans and Democrats were instrumental in proposing new federal claims, Professors Burbank and Farhang

306. Id. at 660.
307. Id. at 686–87.
reported that Republicans aimed to insulate business regulation while expanding access to courts for regulation of behavior favored by "social conservatives."  

That study joins others in documenting that, across the political spectrum, federal courts are understood to be important resources for implementing national norms. The need to ration and allocate judges’ time prompted the 1980s embrace of management, but that rationale lessens as caseloads flatten and fall. Moreover, given the economic hurdles to litigation, rules counseling against it, and legal barriers to filing, judges have a narrower mix of disputes and areas of law to elaborate—if and when they render decisions.

V. AVERTING "NIGHTMARES": VULNERABLE JUDGES AND COURTS IN NEED OF JOINT FEDERAL-STATE INITIATIVES AND REORIENTATION OF THE PROCESS "DUE"

The word "nightmare" comes from the judiciary’s 1995 Long Range Plan for the Federal Courts, replete with charts depicting trend lines pointing up to underscore the “[h]uge burdens . . . placed on the federal courts.”  

The Long Range Plan proffered a “nightmarish” scenario that imagined 2020 as a year in which more than a million cases would be filed in the federal district courts and more than 330,000 in the appellate courts.  

To ward off skyrocketing federal court filings, the Plan called on Congress to have a presumption against creating new causes of action that would expand federal jurisdiction.

Those projections should give pause about forecasting the future; in 2022, appellate filings were fewer than 42,000 and district court filings were about 240,000, less than the 50,000 appeals heard in 1995 and far below the projected “nightmare” of 330,000. The fact that filings are hundreds of thousands short of what had been posited could be read as a mark of success, in that the Judicial Conference’s recommendations, along with much else, have staved off many potential filers. But the 1995 Long Range Plan had other goals. It described adjudication, the raison d’être of the federal courts, as requiring judges to attend to the “individual circumstances of

308. Id.
309. LONG RANGE PLAN, supra note 5, at 9.
310. Id. at 18, tbl. 7.
311. Id. at 8.
312. Id. at 18.
litigants” and give them “ample opportunity to be heard.”313 For appeals, the Long Range Plan aimed to preserve “the hallmarks of a sound appellate review system” in which judges “do much of their own work,” “decide cases with sufficient thought,” and write opinions.314 The Plan’s point was to avoid “a system of discretionary appellate review, of oral argument in only the exceptional case, and of staff personnel playing a dominant role in deciding the majority of cases or at least identifying the cases that get the full attention of the judges.”315

Today, much of what the Long Range Plan considered as a dire “alternative future” now exists. Using the year 1995 when the Plan was issued as a baseline, some 11,000 cases (one-fifth of the total 50,000 appeals) were terminated after oral argument. In 2022, with fewer than 42,000 appeals, oral arguments took place in 5,500 cases or thirteen percent of all appeals.316 Thus, the 1995 fear that only ten percent of merit terminations on appeal would occur after oral argument is close to the current reality.317 At the trial level, the Long Range Plan made several recommendations calling for effective use of case management and making available more “alternative dispute resolution techniques.”318 The commentary described a role for private forums but that the federal courts ought not to “shed their obligation to provide public forums for disputes that need the qualities that federal courts have traditionally provided, including at a minimum a neutral and competent decision-maker and the protection of weaker parties’ access to information and power to negotiate a dispute.”319 Hence, court-supervised ADR was likely needed, and doing so could require funds to compensate court-based neutrals and staff.320 But, as

313. Id. at 7–8.
314. LONG RANGE PLAN, supra note 5, at 20.
315. Id.
317. LONG RANGE PLAN, supra note 5, at 129.
318. See id. at 67–71.
319. Id. at 71.
320. Id.
I learned when trying to research local ADR rules, very few courts describe funding for court neutrals or oversight of ADR providers.\footnote{Resnik, Contingency of Openness in Courts, supra note 122, at 1653–68. A rare example of a local ruling providing such funds came from the Eastern District of Pennsylvania, which was one of the few district courts with a court-annexed arbitration program. Its local rule states that such arbitrators were to be paid between $175 and $250 per hour (depending on whether a person served on a panel or individually) and that fees were to “be paid by or pursuant to the order of the director of the Administrative Office of the United States Courts.” E.D. PA. LOCAL R. CIV. P. 53.2(2) (May 8, 2023). Arbitrators were “chosen through a random selection process by the clerk of the court from among the lawyers who have been certified as arbitrators.” E.D. PA. LOCAL R. CIV. P. 53.2(4)(B) (May 8, 2023). When three-arbitrator panels are designated, the clerk of the court was to ensure—to the extent practicable—“one arbitrator whose practice is primarily representing plaintiffs, one whose practice is primarily representing defendants, and a third panel member whose practice does not fit either category.” Id.}

Managerial judging has thus been part of the privatization of procedure in court, just as court mandates to use private providers in lieu of courts push off-screen decision-makers’ assessments of liability and the remedies provided, if any. My review of hundreds of local rules identified few in-court Rule 16 and ADR rules structuring in opportunities for the public to observe judges and litigants or to learn about the outcomes.\footnote{Resnik, The Contingency of Openness in Courts, supra note 122, at 1654–68. The congressional statute promoting ADR calls for information generated through ADR mediation and settlement processes to be confidential; that provision aims to insulate bargaining and non-binding evaluations; it does not address making public court-annexed arbitration or the results of ADR procedures. See Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–58 (1998). Section 652(d) provides: “[E]ach district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.” The few cases reported on the confidentiality provision include one dismissal for widely circulating information related to a potential settlement. See Hand v. Walnut Valley Sailing Club, No. 10-1296-SAC, 2011 U.S. Dist. LEXIS 80465, at *18 (D. Kan. July 20, 2011), aff’d, 475 F. App’x 277 (10th Cir. 2012). Further, the statute was held not to be the basis for closing off access to court-docketed settlements. See Platypus Wear, Inc. v. U.S. Fid. & Guar. Co., No. 09CV2839, 2010 U.S. Dist. LEXIS 113147 (S.D. Cal. Oct. 25, 2010).}

Likewise, the FAA doctrine I have recounted outsources resolution of federal and state statutory as well as common law claims to arbitrations that are generally closed to the public, and few paths to obtain judicial review are available.\footnote{Resnik, The Contingency of Openness in Courts, supra note 122, at 1654–68. The congressional statute promoting ADR calls for information generated through ADR mediation and settlement processes to be confidential; that provision aims to insulate bargaining and non-binding evaluations; it does not address making public court-annexed arbitration or the results of ADR procedures. See Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–58 (1998). Section 652(d) provides: “[E]ach district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.” The few cases reported on the confidentiality provision include one dismissal for widely circulating information related to a potential settlement. See Hand v. Walnut Valley Sailing Club, No. 10-1296-SAC, 2011 U.S. Dist. LEXIS 80465, at *18 (D. Kan. July 20, 2011), aff’d, 475 F. App’x 277 (10th Cir. 2012). Further, the statute was held not to be the basis for closing off access to court-docketed settlements. See Platypus Wear, Inc. v. U.S. Fid. & Guar. Co., No. 09CV2839, 2010 U.S. Dist. LEXIS 113147 (S.D. Cal. Oct. 25, 2010).} As Professor Hammond analyzes in this Symposium, the consequence is the
dimming of public interactions informed by democratic norms of equality. 324 Instead of preserving adjudication, the new procedures of the last forty years have contributed to a world in which high-end litigants get a form of that decision-making unavailable to others, and much of judicial work goes unseen and unrecorded.

Thus, rather than celebrating how all branches of government contributed to transforming courts from exclusionary institutions into beacons of inclusion and then addressing how to begin to make good on promises of “equal justice for all,” much of the effort in the federal system has been to limit use. A lesson that I draw from these last forty years is that volume control is neither a wise nor sufficient endpoint for courts. The more judges become just another dispute resolver and the forms of decision-making blur, the less obvious the need for robust taxpayer support for their work. Instead of anti-adjudication rhetoric and rules exempting judges from finding paths to assist less-resourced litigants, responses to caseload demands ought to be aimed at equipping litigants and courts with resources. Economic inequality and access to courts are not only issues in state courts, they are also central challenges in and for the federal courts. Before concluding, I flag a few of the many ways to move forward—again on the assumption of wanting courts to be a functioning public service.

First, while the federal judiciary has identified pro se filings as a problem to manage, it has not delved into analyses of the people and their claims or formulated system-wide law, rules, and programs so as to have adequate information to do what it must—which, including when dismissing cases, entails adjudication. Instead of ad hoc responses, a series of concrete steps could be taken. Guidance should be drawn from the Supreme Court’s 2011 decision in Turner v. Rogers and other due process decisions. 325 At issue in Turner was whether South Carolina could put a man lacking counsel in jail for almost a year for contempt of a court order requiring that he pay child support. One possibility was that the lawsuit would parallel Gideon v. Wainwright and announce a right to counsel for certain civil claimants. Indeed, a few federal courts have relied on the statute authorizing filings in forma pauperis to enlist counsel when individuals lack competency to litigate and therefore cannot supply information adequate for decision-making. 326 Instead, in Turner, the five-Justice

326. Tahk, supra note 168, at 789; Sarah B. Schnorrenberg, Mandating Justice: Naranjo v. Thompson as a Solution for Unequal Access to Representation,
majority held that the Constitution did not require the state to provide a lawyer when a private party sought child support from another private party. But due process did require fair process; a few-minute encounter with a state judge lacking relevant information did not suffice. Thus, South Carolina needed to either equip such individuals with lawyers, or devise other methods to enable a judge to decide based on adequate inquiry into a person's ability and willingness to pay. Three decades earlier, in Little v. Streater, Chief Justice Burger for the Court likewise relied on due process when concluding that if a person could not afford a medical test to establish or rebut paternity, the state must fund it.

In addition to such subsidies, the constitutional law on fair decision-making imposes other obligations on courts. In Wal-Mart v. Dukes, the Court insisted that unnamed class members seeking monetary remedies for alleged unlawful employment discrimination had to be given an opportunity to opt out of a class action that would bind them. The Court also held that WalMart could not be required to make payments to individual class members for back wages without an opportunity to rebut each individual's claim of discriminatory treatment. The leitmotif of these decisions and many others is that judges have to find mechanisms to ensure meaningful opportunities for litigants to be heard when ruling on liberty and property interests and that courts need information sufficient to render judgment. As Justice Harlan underscored in Boddie, the point was not only to respect individual interests but to support the legitimacy of court systems. And even as the number of self-represented individuals is daunting, the response from the Turner Court and many commentators is that some but not all answers lie in adding lawyers. Turner noted that courts could provide more guidance and forms; dozens of courts have

50 COLUM. HUM. RTS. L. REV. 260, 266 (2019); see also, e.g., Pruitt v. Mote, 503 F.3d 647, 649 (7th Cir. 2007); Pennewell v. Parish, 923 F.3d 486, 490 (7th Cir. 2019); Thomas v. Wardell, 951 F.3d 854, 859 (7th Cir. 2020); Eagan v. Dempsey, 987 F.3d 667, 682 (7th Cir. 2021); Watts v. Kidman, 42 F.4th 755, 758 (7th Cir. 2022).


330. Id. at 366.

331. See supra note 23 and accompanying text.
relied on staff and other trained individuals ("navigators" in some jurisdictions), as well as through assisted uses of technology to provide resources for self-represented individuals.\(^{332}\) Moreover, since Turner was decided, short-term (one day/one case) representation by lawyers has become established in some states.

Another avenue is for Congress to revisit the burdens it placed on courts as well as prisoners, in the PRLA and habeas statutes, and repeal the complex taxing of fees and the barriers to rendering decisions on the merits.\(^{333}\) In the interim, courts should work with "repeat player" defendants, such as the prison systems that people without lawyers name as defendants.\(^{334}\) As both the Long Range Plan and subsequent research noted, neither federal nor state correctional departments facilitate prisoners' access to forms and information.\(^{335}\) To date, the Judicial Conference has not called on each circuit to reach out to directors of corrections within their jurisdiction to regularize paths for incarcerated people to gather information and bring claims. (One such effort was begun when the Ninth Circuit twice convened circuit-wide "summits" inviting court and corrections staff to learn about their respective challenges so as to improve the process and outcomes, including understanding the difficulties encountered by prisoners seeking to exhaust administrative remedies as required for some claims.\(^{336}\))

\(^{332}\) See Sandefur, Access to What?, supra note 157, at 49, 52, in which Sandefur describes services that benefit pro se individuals.

\(^{333}\) Doing so would be a form of "simplification" of process called for by Richard Zorza, a pioneer in access for the self-represented. See Richard Zorza, Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation, 61 DRAKE L. REV. 845, 845, 847 (2013).

\(^{334}\) For more information on the repeat player and his advantages, see Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95, 97–103 (1974).

\(^{335}\) See LONG RANGE PLAN, supra note 5, at 64.

\(^{336}\) In the fall of 2015, the Federal Judicial Center, the Association of State Correctional Administrators, the National Association of Attorneys General, and the Federal Bureau of Prisons participated in a "Prisoner Litigation Summit" that brought them together "to discuss issues concerning prisoners, the courts, and correctional institutions in the [Ninth] Circuit." Fiscal Year 2016 Judiciary Meetings and Conferences That Cost More Than $100,000, U.S. Cts. 1 (Jan. 24, 2017), https://www.uscourts.gov/sites/default/files/fy_2016_conferences_that_cost_more_than_100000_2017_01_24_draft_0.pdf. This gathering discussed "system issues" such as class actions and remedial litigation and identified "collaborative ways to improve prisoner litigation and outcomes." Id. at 8. That meeting was sponsored by the Ninth Circuit and Association of State Correctional Administrators, and the California Department of Corrections funded about 150 officials to attend. Id.; see also U.S. Courts for the Ninth Circuit, News Release: Corrections Summit Brings
In addition, the federal judiciary’s website could become a useful tool for providing a compendium of the many pro se programs in various district and appellate courts that aim to find volunteer counsel or, as in the Northern District of Illinois, require taking some cases to be a member of that court’s bar.\textsuperscript{337} As discussed, the FJC publication of practices ("best" or not) dates back to 2011,\textsuperscript{338} with a 2022 update on rules related to electronic filings. National guidance through rulemaking is also in order, both in terms of IFP filers and pro se litigants, to require that each court have institutional screening mechanisms in which lawyers provide short-term representation to enable principled assessment of claims and therefore ensure that neither judges nor staff reject litigants based on inadequate knowledge. To be clear, some of the people seeking relief have no right to it, and others (incarcerated and not) may have challenges that limit their ability to appreciate that litigation will not be successful. Dealing with these challenges is what the legal profession has to do and, in the federal system, generating those resources is not heroic because, unlike in the states, the self-represented filers in a year are in manageable numbers dispersed around the country.

Further, judges need to understand their task as building affiliations between courts and litigants with and without resources. Individual liberty is a central value of U.S. constitutional law and, in the context of litigation, liberty could suggest the right to autonomous decisions to pursue legal claims, resulting in opportunities for a "day in court." But the data about today’s courts undermine an assumption that many people enjoy that form of liberty. People across a wide swath of the income spectrum are effectively priced out of litigation, which has become a kind of luxury good. Thus, if enabling pursuit of legal claims remains an aspiration in the American polity, aggregation is an essential mode of providing cross-litigant subsidies. Therefore, in addition to supporting self-represented litigants through enlisting lawyers, judges should be enthusiasts of aggregation and become involved in overseeing in public the results.


337. The clerk’s office used a random selection of lawyers equal to the estimated number of pro bono assignments to be made each quarter. N. Dist. Ill. LR 83.35 (b)(2).

Hence, I have argued that the 1950s decision in *Mullane v. Central Hanover Bank & Trust Company* is a resource. The Supreme Court, approving what has been called “jurisdiction by necessity,” licensed state courts to determine the rights of all claimants (including those not physically present in the state) when lawsuits had a nexus with the forum and adequate notice was provided.\(^{339}\) In this century, courts should likewise recognize the necessity of judges exercising jurisdiction to oversee aggregation. Rule 23 made judges pivotal at the time of certification of a class and at its settlement. In the decades since that 1966 revision, the existence of a third phase—post-settlement—has become prominent, as reflected in my description in *Managerial Judges* of a hypothetical prison case. Many class actions entail relief that extends after settlement; disagreements may emerge between plaintiffs and defendants or among plaintiffs thereafter about interpretation and implementation. Even if, as Professor David Shapiro suggested, the class is best understood as “an entity” (rather than as an aggregation of individuals) before resolution,\(^{340}\) the question of disaggregation or realignment of subgroups needs to be asked during the remedial phase to learn whether once homogenous and adequately represented interests diverge—as well as to monitor compliance, respond to conflicts, and assess distributional equities.

And, just as the 1966 Rule drafters turned to notice as a means of doing “something” to connect litigants with courts, notice can again be put to work during aggregation’s third phase to provide the “publicity” (to borrow from Jeremy Bentham) that makes connections possible and that forces the practices of courts, lawyers, and auxiliary personnel before the public.\(^{341}\) Here, technology could make contributions, such as interactive websites to expand outreach.\(^{342}\) Moreover, whether discord emerges or not, court oversight is needed post-judgment to ensure distributional and public access to the processes and outcomes. An elaboration of this third phase of


aggregate litigation responds to the pragmatic needs that have always driven aggregation’s design. The law of class actions and other aggregate actions needs to generate connectiveness for absent litigants throughout the phases of class actions and thereby underscore the interdependencies of litigants and their court systems to a thriving body politic.

Another critical issue is the financing of courts. Simply put, the federal courts are rich compared to state courts. While the federal judiciary’s caseloads have flattened, its budget has not. The federal judiciary’s expenditures were $133 million in 1970 ($989 million in 2022 dollars); $567 million in 1980 ($4.2 billion in 2022 dollars); $966 million in 1985 ($7.2 billion in 2022 dollars); $1.99 billion in 1991 ($14.8 billion in 2022 dollars); and $8.7 billion in 2022.\footnote{343} During these years, the federal judiciary’s staff grew from 6,647 people in 1970 to 13,207 in 1980; 17,542 in 1985;\footnote{344} 22,490 in 1991,\footnote{345} and 30,000 in 2022.\footnote{346} I map these changes in Figures 16 and 17, below. In terms of resources for research, data collection, and education, funding for the AO in 2022 was $98 million and $30 million for the FJC.\footnote{347} The federal judiciary’s funding comes primarily from general tax revenues rather than from litigants; filing and PACER fees are less than four percent of the annual budget for all of the functions of the judicial “branch,” which includes courts and related units such as the AO, the FJC, and Probation.\footnote{348} If analyzing


\footnote{344} Admin. Off. of the U.S. Cts., The History of the Administrative Office of the United States Courts: Sixty Years of Service to the Federal Judiciary 95, 103 (Cathy A. McCarthy & Tara Treacy eds., 2000).


\footnote{348} Clarity on the source of this number is in order, and thanks is due to AO staff who helpfully highlighted the distinction between the federal courts and the
the dollars for the courts alone, about five percent of that budget comes from fees.349


349. The accounting process merits explanation. The judicial branch uses some of the fees it collects to offset future appropriations from Congress. See 28 U.S.C. § 1931 (providing that a portion of the filing fee shall be deposited to a special fund in the treasury to “offset funds appropriated for the operation and maintenance of the courts of the United States”). The judiciary’s budget does not define fees. After consultation with AO staff, we learned that the statutory setoffs come largely from filing and PACER fees which are what the judiciary refers to as “user fees” in its materials. See LONG RANGE PLAN, supra note 5, at 95; Frequently Asked Questions, PACER, https://pacer.uscourts.gov/help/faqs/pricing. Given that bankruptcy filings number more than civil filings in recent years, bankruptcy fees were about fifty-five percent of the total filing fee collection in FY 2021.

Figure 16


<table>
<thead>
<tr>
<th>Year</th>
<th>Dollars Allocated, in millions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>75</td>
</tr>
<tr>
<td>1970</td>
<td>133</td>
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<tr>
<td>1975</td>
<td>284</td>
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<td>1985</td>
<td>966</td>
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<tr>
<td>1990</td>
<td>1,646</td>
</tr>
<tr>
<td>1995</td>
<td>2,903</td>
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<tr>
<td>2000</td>
<td>4,057</td>
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<tr>
<td>2005</td>
<td>5,547</td>
</tr>
<tr>
<td>2010</td>
<td>7,181</td>
</tr>
<tr>
<td>2015</td>
<td>7,137</td>
</tr>
<tr>
<td>2020</td>
<td>8,251</td>
</tr>
</tbody>
</table>

Figure 17

Federal Judiciary Staff, 1970–2019

<table>
<thead>
<tr>
<th>Year</th>
<th>Judiciary Staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>6,647</td>
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<tr>
<td>1980</td>
<td>13,986</td>
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<td>1990</td>
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<td>2000</td>
<td>31,641</td>
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<tr>
<td>2010</td>
<td>35,494</td>
</tr>
<tr>
<td>2019</td>
<td>30,477</td>
</tr>
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</table>


In contrast, Congress has appropriated little taxpayer money to state courts, which in addition to being primary sites for litigation are also central to enforcement of federal law. A 2022 analysis counted some 300 federal statutes in which Congress imposed obligations related to a wide array of topics (including conservation, banking, financing, child welfare, crime, and national defense) on state courts. That report is itself an artifact of federal investments in research on the state courts, as it was written with support from the State Justice Institute (SJI), created in 1984 after six years of lobbying efforts spearheaded by the Conference of Chief Justices of the State Courts. Congress chartered SJI (a “private nonprofit corporation”), to be run by an unpaid Board of Directors selected by the President through nominations from the state chief justices, to improve “judicial administration in State courts.” SJI directs “a national program of assistance designed to assure each person ready access to a fair and effective system of justice.” Its methods include grant-making and “coordination and cooperation with the Federal judiciary in areas of mutual concern.” In addition to the 2022 report on state courts’ many mandates from Congress, SJI supported “futures planning” when the twenty-first century approached, studies of domestic


violence, drug courts, services for translation and for self-represented litigants, and more.\textsuperscript{355}

Yet, funding has not matched the ambitions of providing training, research, technical assistance, and networking to the state and local courts that handle some ninety-eight percent of the country’s litigation. When first founded, SJI\textsuperscript{356} received $8 million in funding ($21.7 million in 2022 dollars);\textsuperscript{357} funding dipped to as low as $2.25 million in 2004 ($3.6 million in 2022 dollars)\textsuperscript{358} and rose to $13.55 million ($24.65 million in 2022 dollars) for four consecutive years from 1992 to 1995.\textsuperscript{359} Congress provided SJI with more than $10 million dollars each year from 1988 to 1995;\textsuperscript{360} the current funding has hovered around $7 million.\textsuperscript{361} Figure 18, below, captures almost

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{355} State Just. Inst., supra note 354, at 7–37.
\item \textsuperscript{356} Nat’l Ctr. for State Cts. & State Just. Inst., supra note 281, at 6.
\end{enumerate}
\end{footnotesize}
forty years over in which Congress gave about $257 million to SJI, and during the course of its existence, SJI has given away most of those appropriations in outgoing grants totaling more than $190 million. One point of comparison in terms of streams of federal funding is the U.S. Supreme Court; its budget for one year, 2022, was $112 million, and for 2024, the Court requested $150 million.


Figure 18

Congressional Allocations to State Justice Institute,
Sampling at Intervals, 1986–2023

<table>
<thead>
<tr>
<th>Year</th>
<th>Judiciary Staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>8,000</td>
</tr>
<tr>
<td>1990</td>
<td>8,000</td>
</tr>
<tr>
<td>1995</td>
<td>13,550</td>
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<td>6,850</td>
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<td>2005</td>
<td>2,613</td>
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<td>2010</td>
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<tr>
<td>2015</td>
<td>5,121</td>
</tr>
<tr>
<td>2020</td>
<td>6,555</td>
</tr>
<tr>
<td>2023</td>
<td>7,640</td>
</tr>
</tbody>
</table>

Total (every year): $256,737,000

As a growing literature documents, when budgets in states and localities are crunched, they turn to users—litigants—for income

through fees, special assessments, and fines.\textsuperscript{365} The notorious example of exploitative, racially discriminatory use of fees was in Ferguson, Missouri, where police and judges worked together to generate general


revenue funding through tickets and fines that disproportionately targeted people of color.\textsuperscript{366} As discussed, many localities have used fees and fines for revenue streams.\textsuperscript{367} My hope is that federal judges, with their impressive track record in Congress, could join their state and tribal counterparts in pushing for more national funding of state and tribal courts and in building on the model of financing in the federal system. This form of “judicial federalism” (to borrow a term used differently in the 1995 \textit{Long Range Plan}) should aim to work with SJI as well as the Conference of Chief Justices of State Courts and the National Center for State Courts (both of which are private nonprofit organizations) to develop an agenda for structured, long-term income. One option, building on a suggestion from Professor Michael Graetz, is to create a national trust fund for courts;\textsuperscript{368} other routes are sharing and pooling resources. To borrow terms from Professor Hammond’s analyses of local rules in the federal courts that sometimes provide “subsidies” and other times impose “taxes” on pro

\textsuperscript{366} After an investigation, a settlement was reached. \textsc{Dep’T of Just. Civil Rights Div.}, \textit{Investigation of the Ferguson Police Department} 1, 2–5 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; Settlement Consent Decree at 1–2, United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016); see also Off. of Pub. Affs., \textit{Justice Department and City of Ferguson, Missouri, Resolve Lawsuit with Agreement to Reform Ferguson Police Department and Municipal Court to Ensure Constitutional Policing}, \textsc{Dep’T of Just.} (Mar. 17, 2016), https://www.justice.gov/opa/pr/justice-department-and-city-ferguson-missouri-resolve-lawsuit-agreement-reform-ferguson. More generally, a wide array of user fees states implement can constitute what researchers have termed “poverty penalties” that accrue because, with limited resources, localities impose late fees, payment plan fees, and interest. Alicia Bannon, Mitali Nagrecha & Rebekah Diller, \textit{Criminal Justice Debt: A Barrier to Reentry}, \textsc{Brennan Ctr. for Just.} 1, 1 (Oct. 4, 2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_CriminalJustice-Debt-%20A-Barrier-Reentry.pdf. Fines and fees are so ubiquitous “that there is a growing public perception that the criminal justice system is one whose primary role is that of bill collection.” \textsc{Subramanian, Fielding, Eisen, Stroud & King, supra} note 143, at 11. In some states, the use of criminal and civil court fees is increasing. See Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, \textit{The Steep Costs of Criminal Justice Fees and Fines}, \textsc{Brennan Ctr. for Just.} 1, 6–7 (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines.

\textsuperscript{367} See \textsc{Sanders & Leachman, supra} note 144, at 5.

\textsuperscript{368} Michael J. Graetz, \textit{Tusting the Courts: Redressing the State Court Funding Crisis}, 143 \textit{Daedalus} 96, 101 (2014).
se filers, the goals should be to subsidize litigants more and tax them less and to right the balance of resources for the state systems.

Part of that joint project has to focus on technology, which has taken center stage. Indeed, some promise that online dispute resolution (ODR) will be the key to “100% access.”\textsuperscript{370} AI and web-based resolution centers may well become critical methods of dispute resolution.\textsuperscript{371} Yet while several jurisdictions have embraced new technologies, few have studied the distributional impact of these modalities and, as I noted, almost none build in roles for third parties (the public) to observe.\textsuperscript{372} As Professor Tanina Rostain has cautioned, “techno-optimism” is not yet in order.\textsuperscript{373} Hence the same questions I have raised about the support for self-represented litigants, for aggregation, for substantive adjudication, and for public access to both processes and outcomes have to be addressed in the context of new modalities that are here and en route.

VI. "DIVERGENT PHILOSOPHIES OF LAW AND GOVERNMENT"

To close this account of the last forty years, I return to an exchange that emerged when I was finishing \textit{Managerial Judges}, which was my first law review article. During the summer and early fall of 1982, a deadline loomed. The \textit{Harvard Law Review} took seriously that the printed volume had to be on the desk of the dean on the tenth of each month—in this case December 10. Yet, as the date approached, I heard from the law review students that an urgent problem had emerged that needed to be fixed before the article could go to press.

\begin{itemize}
\item \textsuperscript{371} LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 328 (David Freeman Engstrom ed., 2023).
\item \textsuperscript{372} Resnik, \textit{The Functions of Publicity and of Privatization}, supra note 341.
\item \textsuperscript{373} Tanina Rostain, \textit{Techno-Optimism & Access to the Legal System}, 148 DAEDALUS 93, 94 (2019).
\end{itemize}
The students told me that I needed to add another footnote. The context was that, as I have discussed, I had provided two hypotheticals built on real cases. In footnotes (specifically 56 and 57), I cited examples of real cases from which I had stylized my hypotheticals. At that juncture, the article had 297 footnotes. But the students told me I needed another. They proposed that when introducing the two hypotheticals, I add:

The use of hypotheticals has a long and distinguished tradition in the law. See Lon Fuller, The Case of the Speluncean Explorers, 62 HARV. L. REV. 616 (1949).

I demurred. They said I needed it. We went back and forth, and I finally wrote a memo to the President of the Harvard Law Review about my objections.

I explained first that we who teach law use "hypos" all the time, and no cite was needed to my own and everyone else's classroom discussions. Second, if one had to substantiate the "long and distinguished tradition of using hypotheticals," one example was not sufficient; dozens would be needed. Third, who cares if my article was a first, rather than part of a long tradition? If I had innovated in an intelligible way, doing so would be fine, and if others innovated before (thank you Lon Fuller) that too would be fine but irrelevant, unless I was trying to engage with him. Fourth, if some form of authorization was needed, the fact that Professor Fuller used a hypothetical ought not count as authority, just as no one should now cite to me. Neither of our uses make hypotheticals more or less licit. I should add that, while I did not mention it to the students, I was also aware that in his canonical article, Professor Fuller did not cite anyone to give himself permission to write. He had no footnotes at all. After many memos and a few late-night calls, I prevailed. Managerial Judges has 297 footnotes, not 298.

What lessons do I draw now from the footnotes that are there, the one I refused to permit to be added, and now, from Lon Fuller? As those 297 footnotes reflect, I believe in citing the people who informed my thinking, including an eclectic set of judges' journals, judicial conference proceedings, and lots more—akin to this article with about 100 more footnotes. I applaud documenting the grounds for empirical, legal, philosophical, or other claims. Indeed, footnotes have never been more important as we try to carry on serious scholarship in a time

374. Resnik, Managerial Judges, supra note 1, at 386–91.
when the academy is under siege. In this fraught and worrisome world, the papers for this Symposium are examples of thinking hard about what courts should do and be. The articles are rich with empirical information, acutely aware of the need for more and different data to explore the normative challenges of generating legitimate exercises of government power in courts and their alternatives.

These volumes make plain that we live in a world where claimants are often lawyerless and some jurisdictions have little by way of resources to respond. The question is (for those wanting courts to endure) how to construct new ideas about the process due while staving off efforts (whether in the name of efficiency or originalism) that erode commitments to public proceedings in which judges respond to people in conflict with others and the state. For this inquiry, another article by Professor Fuller that I mentioned when discussing Judge William Wayne Justice is relevant. Judge Justice invoked Fuller’s account of the limits of adjudication to explain the decision to enlist lawyers for the Texas prisoners petitioning his court for relief; without lawyers, Judge Justice would not have the information requisite to making a reasoned, judicial judgment about their claims. In addition to that Fuller article, Professor Fuller’s 1949 *Speluncean* essay also bears on my discussion here. Fuller explained that the hypothetical opinions he had “constructed” were “for the sole purpose of bringing into a common focus certain divergent philosophies of law and government.”375 This Symposium and the legion of materials cited do just that—illuminate divergent understandings of what law, government, and specifically what judges can and should do in service of democratic values of equal treatment.

Given that Fuller wisely linked “law and government” and the precarious times in which I write, one final footnote is in order. It goes to Richard Rorty, who in 1998 warned that “something will crack” if political movements (his particular concern was people identified on the left) did not pay attention to the economic dislocations of less-skilled workers whose employment and streams of income were being diminished by globalization.376 My discussion of self-represented litigants provides a parallel example from the perspective of courts. If committed to having governments that serve people in transparent

ways and to judicial processes as one component, the impressive architecture of federal courthouses does not suffice. Judges will have to become part of a response to honor aspirations for and beliefs in fair government treatment of all persons across the economic spectrum. "Management" does not carry that message.