Do we have 18th Century Courts for the 21st Century

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“Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”

James Madison

INTRODUCTION

A symposium on the crisis in state court funding is an important event; a clear acknowledgment that the backbone of our justice system is at risk in ways that reach beyond philosophical divides and partisan politics to squeeze at the very heart of access to justice in America. No aspect of this country’s adjudicatory system has greater reach or more influence on the daily lives of citizens than the state courts. Support for the symposium by the University of Kentucky College of Law, the American Bar Association and the National Center for State Courts is an indication of the potentially devastating consequences that this funding crisis poses to our nation’s social, economic and political fabric. We may be inclined to see this latest crisis as a new development, something wholly unanticipated and therefore without precedence. However, any observer of the last thirty years can attest that the present crisis has been long in coming; that it is another funding crisis in a stream of crises to hit many state courts. This one is

1 Senior Counsel, National Center for State Courts. Formally senior rule of law advisor in Kosovo and state court administrator for the states of Missouri and South Dakota. Special thanks to Thomas Gottschalk, Esq. Mary C. McQueen, Esq. Professor Michael A. Wolff, Barrister Chris Halburd, and Dr. Ingo Keilitz, for their comments and support.

2 The Federalist No. 51 (James Madison).


5 See generally Michael L. Buenger, Of Money and Judicial Independence: Can Inherent Powers
undoubtedly the deepest, longest, and most threatening in generations.\(^6\) But it is not unique; it is not happenstance;\(^7\) it is unprecedented in scale, not familiarity. We may be inclined to blame legislatures and executives for their inattentiveness to the crisis, seeing them as out of touch with the importance of the state judiciary’s role in our constitutional system. In response, we marshal our collective assets – the bench, the bar and other interests – in an effort to persuade policymakers and the public yet again of the importance of our state justice systems.\(^8\)

Still we must candidly acknowledge that the problems facing many state courts are not simply money– driven. They emanate from combinations of stresses such as declining tax revenues,\(^9\) increasing mandatory health care costs,\(^10\) political polarization,\(^11\) contentious judicial elections,\(^12\)

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\(^7\) The budget crisis is not limited to state funded system; it is impacting locally funded courts. See, e.g., A. G. Sulzberger, Facing Cuts, a City Repeals Its Domestic Violence Law, N.Y. TIMES, Oct. 12, 2011, at A11.


\(^12\) See Adam Skaggs et al., The New Politics of Judicial Elections 2009–10 (2011), available at http://brennan.3cdn.net/23b60118e49d39bd_35m6yyon3.pdf. Among the findings are:
the information technology revolution,\textsuperscript{13} globalization,\textsuperscript{14} historical and structural configurations that drive costs,\textsuperscript{15} political resistance (internal and external) to changes that could enable courts to become more adaptable and efficient,\textsuperscript{16} and even a judicial culture that values personal autonomy over institutional coherence.\textsuperscript{17} This crisis is, therefore, not simply one of demands relative to resources; it is rather a crisis of demands and resources, access and responsiveness, adaptability and relevancy. We are at a chicken–or–egg moment. For while solving the funding crisis is beyond the reach of the courts acting alone, this fact does not relieve us of the considerable responsibility to consider whether systems we have become accustomed to

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See, e.g., How Luther Went Viral, ECONOMIST, Dec. 17, 2011, at 93, 96 (noting that social networks have always been transformational but new technologies “enable[] lots of people to signal their preferences en masse to their peers very quickly” thus creating momentum for action).

Not only are we witnessing economic globalization but also globalized competition for justice services. See, e.g., Lionel Leo, Case Management: Drawing from the Singapore Experience, 30 CIV. JUST. Q. 143, 144 (2011) (“Singapore’s courts are widely regarded as being among the most efficient in the world. In its Global Competitiveness Report 2008– 2009, the World Economic Forum puts Singapore first (out of 134 countries) for the efficiency of its legal framework.”); Matt Skinner & Justin Simpkins, Enforcement of Foreign Awards in Australia, 77 ARBITRATION 54, 54 (2011) (discussing how Australia is marketing itself “as a ‘pro– arbitration’ state”).

See, e.g., Nat’l CTR. FOR STATE COURTS, A STUDY OF COURT CONSOLIDATION IN MAHONING COUNTY, OHIO: FINAL REPORT (2011) (recommending consolidation of Mahoning County’s eleven limited jurisdiction courts).


over the course of two centuries are in need of change if access to justice is to remain a core American virtue.

In light of the challenges we now face, I submit that we should undertake a serious rethinking of our state courts along three thematic lines: (1) systemic reorganization to reduce fragmentation, simplify access, and provide greater flexibility and specialization in the use of resources; (2) diversification of dispute resolution processes so that cases move in different directions with a range of resolution options pegged to the issues presented; and (3) rationalization of our governance, leadership, and accountability systems to enhance effective organizational management of complex institutions. These themes are not necessarily new; indeed thinking along these lines has been floating for years largely without taking systemic hold. And my observations are, of necessity, cursory. Notwithstanding these challenges, it is, I submit, the responsibility of the bench and bar to constantly push for systemic improvement, not solely in the interest of satisfying some legislature’s demand for greater efficiency (merely a euphemism today for budget cutting), but more importantly in the interests of enabling state courts to remain accessible, responsive, accountable, adaptable, and relevant for the twenty-first century.

I. The Need for Leaders

Before discussing the three themes outlined above, I want to offer the following observation, which I believe says a great deal about the condition of our state court systems. I propose that a stealth factor in the funding crises that have racked state courts over the last thirty years is the declining care, respect and prestige we assign to these diverse and complex adjudicatory systems. Walk in many courthouses in this country and the empirical proof is stark: overcrowded courtrooms, files sitting everywhere for lack of space, collapsing ceilings, courthouses crumbling from disrepair, and antiquated technology infrastructures. These are just the outward signs. Yet for many citizens courts are courts and judges are judges that largely operate in the shadows until something controversial arises. The idea that we have a multifaceted and multi-dimensional judicial system in the United States is a technocratic concept for lawyers and judges otherwise lost on the general public.19


The lack of knowledge about our state judicial systems is exasperating even in the halls of statehouses. Terms such as “judicial activism” are exploited for political purposes largely without concern for the rationale of controversial decisions.\textsuperscript{20} Judicial elections increasingly look like raw political combat rather than substantive, deliberative and civil debates.\textsuperscript{21} And given widespread ignorance over concepts such as separation of powers, judicial independence, and the differing constitutional structures of courts,\textsuperscript{22} the budget is reemerging as a tool for political posturing.\textsuperscript{23} The long– term consequences of these developments are lost on many, who tend to suffer a profound case of illiteracy as it concerns the diversity in structures, purposes and foundations of our justice systems.\textsuperscript{24}

This illiteracy is not, however, confined to the general public or to a few politicians. There is scant attention given in professional education to the
diversity that underlies American legal culture and its judicial systems, a fact reflected in our law schools and to a lesser extent our professional associations. The legal education system is largely premised on a common denominator for understanding judicial power: law school textbooks and courses explain American legal culture monolithically, framed principally by the study of federal constitutional law and federal courts. In comparison to the federal judiciary, the study of state courts garners little attention. It is akin to the crazy uncle that shows up unannounced for a holiday feast: you have to feed him but are not very inclined to carry on much of a conversation. A cursory examination of American law schools’ curricula reveals that one is more likely to find a course on contemporary legal issues in Africa, Chinese law and legal institutions, or European Union law, as to find a course on state constitutional law or state court jurisprudence.

The demand that law schools develop students who can practice nationally and internationally ignores the fact that most will practice locally before state courts. As a result, we turn out law students grounded in a limited perspective on American legal culture and courts, with an incomplete understanding of or appreciation for what happens every day just down

25 With regard to early state constitutions, Lawrence Friedman has observed, “[a]n observer with nothing in front of him but the texts of these state constitutions could learn a great deal about state politics, state laws, and about social life in America.” LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 120 (2d ed. 1985).

26 The ABA has a Standing Committee on Federal Judicial Improvements and a Standing Committee on the Federal Judiciary. There is no standing committee on state courts, relevant matters generally being handled through the judicial division or the Standing Committee on Judicial Independence.

27 For examples of the federally focused curricula in many law schools, see generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2006); KATHLEEN M. SULLIVAN & GERALD GUNThER, CONSTITUTIONAL LAW (17th ed. 2010); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000).

28 See infra note 35.


the street at the local courthouse. Meanwhile, the backbone of the justice system is calcifying.

Why is this relevant to a discussion on a state court funding crisis? For this reason: it is from law students that we draw our future judges, bar members and leaders, corporate counsel, and many of our administrators, legislators, government officials, and system advocates. Law schools seed the state justice systems with the very people responsible for institutional leadership and vision. But we do little to prepare them to understand the diversity of these systems, their underlying structures, or even the sources of their normative powers. State judiciaries are organic to our understanding of government – throughout our history they have been elemental in forming the very basis of our dispute resolution system, both in terms of its jurisdictional nature and our very notions of justice. Long before there was a federal judiciary, there were colonial and state courts setting the very foundations of our ideas of justice across a scantly populated, highly diverse, politically disaggregated nation. Most students, however, emerge from law school with a myopic view of courts, scarcely

33 See, e.g., ALASKA CONST. art. IV, § 1 (“The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature.”); CAL. CONST. art. VI, § 1 (“The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record.”); KY. CONST. § 109 (“The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court.”).

Many state constitutional reforms of the so-called Progressive Era were intended to curb legislative power. See Rachel M. Janutis, The Struggle over Tort Reform and the Overlooked Legacy of the Progressives, 39 Akron L. Rev. 943, 956–58 (2006); see also G. Alan Tarr, Understanding State Constitutions 99–100 (Princeton Univ. Press ed. 1998) (discussing the influence of the Populist movement on nineteenth century state constitutions).


35 In contrast to state judicial power, federal judicial power is limited. See, e.g., Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) (citing Cary v. Curtis, 44 U.S. 236, 245 (1845)) (“[J]udicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.”); see also Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) (“It is a fundamental precept that federal courts are courts of limited jurisdiction.”).

36 See, e.g., Mayo v. Wilson, 1 N.H. 53, 58 (N.H. 1817) (stating that citizens are subject only to the law); Barker v. People, 3 Cow. 686, 704 (N.Y. 1824) (stating that no person shall be deprived of life, liberty or property without due process of law); Moore v. Bradley, 3 N.C. 313, 314 (N.C. 1801) (per curiam) (“No freeman shall be disseized of his freehold” but by due process of law and judgment of a competent court); Executors of Cruden v. Neale, 2 N.C. 338 (N.C. 1796) (stating that no one may be deprived of rights except under the law).
aware of the diversity and unique purposes rooted in our state judicial systems.

Thus, I submit that the long term solution to the current funding crisis is not simply appropriating more dollars. It is producing cadres of leaders, officers of the courts, who value the role of state courts as unique institutions of American government. Failing to do so, the state courts may increasingly be seen as second-rate actors on the stage of the American judicial system with second-rate funding to go along, merely lurching from crisis to crisis. It will be impossible to innovate or modernize anything for the twenty-first century if the courts are burdened by pervasive public ignorance and professional inattention. Innovation is the key, particularly in light of global developments in the justice sector. There are state court systems in this country that are delaying cases, shuttering courtrooms, increasing fees, reducing hours, furloughing staff, and shrinking access to court programs. Surely this should be of immediate and long-term


concern for all of us, for these developments have been long in coming and are largely the result of inattention to an impending crisis of funding and relevancy.

II. SIMPLIFICATION AND SYSTEMIC COHERENCY

Court reform today is a weighty global issue.44 Throughout the world effective and independent judiciaries are seen as a core indicator of good governance, social stability, and economic well-being.45 Although empirically debated,46 nations with truly effective and independent judicial systems seem to enjoy more robust economic growth, better civil order, and less corruption than those that lack such systems.47 Consequently, policymakers have expended large sums of money to promote reform in countries where weak judicial systems are seen as major impediments to stability, progress, and the rule of law.48 Much emphasis in rule of law programming has been on protecting private property and contract rights as levers solving courts (drug courts, mental health courts) and has had to reduce enrollments in almost all such programs.

44 See generally Martin Shapiro, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981) (discussing an overview of court systems and providing a comparison of common law, civil law, Chinese, and Islamic legal traditions); Brian Z. Tamanaha, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) (discussing the rule of law from Ancient Greece and Rome, through the Medieval period, through the rise of liberalism, to the modern day rule of law on both the national and international levels); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder eds. 1995) (discussing “judicialization” in the world’s political systems).


this effort. The World Bank, the International Monetary Fund, the U.S. Agency for International Development (USAID), the American Bar Association (ABA), the National Center for State Courts (NCSC), and others are actively engaged in reform efforts across the globe. While not all efforts at judicial reform have been seen as rousing successes, the importance of an effective and functioning judicial system to the economic, social and political well-being of a nation appears self-evident.

But if we turned the lens of reform on the United States, we might find that we fall short of what we preach. While we advocate for improved access, transparency, effectiveness and simplicity overseas, many of our courts continue to labor under paradigms devised in the 18th and 19th century, made more complicated in the 20th century, only to produce unintelligible structures for the 21st century. American courts were constructed to serve local needs, not necessarily to promote organizational solidity or jurisdictional coherency. They were designed when the dominant considerations were attention to local politics and how far someone could

56 See, e.g., Carlos Santiso, Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability in Democratization and the Judiciary: The Accountability Function of Courts in New Democracies 161, 172–73 (Siri Gloppen et al. eds., 2004) (noting serious questions have arisen over the judiciary’s misuse of financial autonomy to pay high salaries and build luxurious courthouses); Brent T. White, Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia, 4 E. Asia L. Rev. 209, 216–17 (2009).
57 See Friedman, supra note 25, at 18 (noting that for much of American history, “[t]he basic courts were governing courts; they did not merely settle disputes. And local rule was rule by the local powers”).
58 See Paul D. Carrington, Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court, 50 Ala. L. Rev. 397, 397–98 (1999); Michael R. Dimino, Sr., The Worst Way of Selecting Judges – Except All the Others that Have Been Tried, 32 N. Ky. L. Rev. 267, 267–69 (2005); Charles Gardner Geyh, Why Judicial Elections Stink, 64 Ohio St. L.J. 43, 43
ride on horseback in a day. Consequently, Roscoe Pound’s critique of the American justice system remains valid today: in many states the system is complex, costly, and slow. While computer systems allow for internet access, and problem-solving courts bring new approaches to dispute resolution, the fact remains that some of our citizens have better access to justice than others not simply in terms of tracking a case on the internet but more importantly in ease of entry into the system and the resources that are brought to bear to solve problems.

One area that has resisted change in recent years is systematically simplifying the structure of our state judiciaries and adapting their administration to meet emerging trends. Yet that is where we need to move. Take for example New York, where in 2007 then Chief Judge Judith Kaye commissioned a study on the structure of the state court system. After months of study, the commission concluded the following:

New York State has the most archaic and bizarrely convoluted court structure in the country. Antiquated provisions in our state Constitution create a confusing amalgam of trial courts: an inefficient and wasteful system that causes harm and heartache to all manner of litigants, and costs businesses, municipalities and taxpayers in excess of half a billion dollars per year.

Other states have long ago streamlined their court systems to make them efficient, attractive to business and sensitive to the needs of litigants. New York, on the other hand, continues to operate a blizzard of overlapping courts: Supreme Courts, County Courts, Family Courts, Surrogate’s Courts, a Court of Claims, New York City Criminal and Civil Courts, District Courts, City Courts, and Town and Village Justice Courts.

New York has eleven separate trial courts; by contrast, California, a state that has twice our population, has only one.

The New York City Bar Association agreed with the findings calling for significant reform. Legislation was introduced to collapse the myriads of
trial courts into a more rational system that would eliminate the “confusing amalgam.” Yet efforts to address these concerns have gone nowhere.

New York is not alone in having a “confusing amalgam” of courts. The Texas court system has been described as “complicated, inefficient, and poorly structured to handle modern litigation.” Since their creation in the late 1800s, the Texas courts have “been expanded periodically on a purely ad hoc basis” resulting in a “system [that] is replete with anomalies and peculiarities.” Today Texas has one supreme court and one court of criminal appeals, fourteen courts of appeal, 436 district courts, thirteen criminal district courts, 254 constitutional county courts, eighteen probate courts, 227 county court at law, 1,414 municipal courts, and 821 justice courts. Similarly, the Ohio judiciary is comprised of one supreme court, twelve district courts of appeals sitting as eighty– eight county appellate courts, eighty– eight courts of common pleas, 128 municipal courts, thirty– eight county courts, 335 mayor courts, and one court of claims. Mahoning County, Ohio alone is served by twelve limited jurisdiction

64 See Special Comm’n on the Future of the N.Y. State Courts, Justice Most Local: The Future of Town and Village Courts in New York State 10 (2008), available at http://www.nyslocalgov.org/pdf/Justice_Most_Local.pdf (acknowledging problems with Justice Courts and that while eliminating them would be ideal, a comprehensive reform would likely meet with the same political fate of previous reform efforts of the last 100 years); see also Robert J. Sheran & Douglas K. Amdahl, Minnesota Judicial System: Twenty–Five Years Of Radical Change, 26 Hamline L. Rev. 219, 227 (2003) (acknowledging the challenges of moving from a highly fragmented system to a more unified system).
66 Id.; see Citizen’s Commission on the Texas Judicial System Report and Recommendations 3 (1993), available at http://www.courts.state.tx.us/tjc/publications/cc_tjs.pdf (“Texas has no uniform judicial framework to guarantee the just, prompt and efficient disposition of a litigant’s complaint. The framers of our current Constitution deliberately designed a system to ‘localize justice,’ establishing a multiplicity of largely autonomous, conveniently located courts across the state. With the passage of time, the organization of the courts has become more, not less cumbersome.”); Dean Frank Newton, The Trouble with Texas Courts, 51 S. Tex. L. Rev. 947, 947 (2010) (“[T]he Texas court system faces two distinct challenges: accepting and applying known ‘best practices’ and maintaining relevance in a changing world.”); Carl Reynolds, Texas Courts 2030—Strategic Trends & Responses, 51 S. Tex. L. Rev. 951, 953 (2010) (“Texas judicial system is complicated, inefficient, and poorly structured . . . .”).
68 See Ohio Const. art IV, § 3 (“The court shall hold sessions in each county of the district as the necessity arises.”).
courts and one general jurisdiction court, each its own administrative cost center.\textsuperscript{70} In contrast, California, Minnesota and Utah have one supreme court, one court of appeals, and one trial court.\textsuperscript{71} A citizen going to court in these states is not confronted by a “confusing amalgam” of structures, they simply go to court.

I do not mean to suggest that all state courts must look the same or that structural adaptations are unnecessary to address parochial needs. This is a large and diverse nation. Nor do I mean to suggest that just because a court system looks streamlined on paper that it operates as such in practice. Hierarchical and internal bureaucratic processes can be as problematic to access and efficiency as structural impediments. But I do suggest the following three points. First, many state court structures evolved in an ad hoc fashion over time with little regard to organizational cohesion, jurisdictional coherency, or systemic agility.\textsuperscript{72} Today many overarching court structures reflect historical thinking producing jurisdictional and administrative fragmentation,\textsuperscript{73} not thinking based on a systemic business model concentrating on affordability, timeliness, simplicity, accessibility, and organizational cohesion. The fact that some courts are state funded and others are locally funded is really beside the point. Rather, the issue is this: are courts organizationally and jurisdictionally structured to promote access to justice or to preserve ad hoc historic anomalies and internal autonomy? No one today would seriously design a modern court system around a model that is a multi-layered, administratively duplicative, organizationally fragmented, confusing amalgam.\textsuperscript{74} Such a system with

\textsuperscript{70} See A Study of Court Consolidation in Mahoning County, Ohio: Final Report, supra note 15.


\textsuperscript{72} Compare Ohio Const. of 1851, art. IV, with Ohio Const. art. IV (showing that the original 1851 court structure is the foundation of the current system with only minor changes). For a discussion on the evolution of the Maine judicial system, see Leigh I. Saufley, Funding Justice: The Budget of the Maine Judicial Branch—We Did Get There from Here, 62 Me. L. Rev. 671 (2010). For example, §16 of article V of the Missouri Constitution still requires an associate circuit judge in each county of the state, regardless of caseload.

\textsuperscript{73} Fragmentation is not simply a jurisdiction problem but also extends to the administration of the courts. See Judith S. Kaye, Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run, 48 Hastings L.J. 851, 854 (1997); Reynolds, supra note 66, at 954–55.

\textsuperscript{74} See Carolyn D. Schwarz, Note, Unified Family Courts: A Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems, 42 Fam. Ct. Rev. 304, 304 (2004) (arguing that fragmentation is pervasive throughout the U.S. and although it wreaks havoc on all parties, victims of domestic violence are especially affected).
its duplicative cost centers would sap resources that might otherwise be directed to litigant needs.

Second, state courts today face a complex qualitative and quantitative litigation environment. Intellectual property, business disputes, environmental concerns, the emergence of specialized needs, and other complex matters fill the dockets of state courts. Suits stemming from the recent financial crisis demonstrate that quantitative complexity can present its own significant challenges. The increase in qualitative and quantitative complexity will require state courts to increasingly balance three fundamental themes: (1) responding to specialization of practice; (2) ensuring reasonable geographical access; and (3) confronting the need to achieve rational economies of scale. These three themes do not necessarily complement one another; indeed in many circumstances they may conflict as, for example, demands for specialization result in a proliferation of so-called “boutique” courts contrary to interests in economies of scale and a simpler jurisdictional system.

These challenges, nevertheless, open opportunities to innovate by addressing the themes in combinations to improve access to justice substantively and geographically while meeting demands for more efficiency and cost savings. While we may opine that “one size doesn’t fit all,” our dispute resolution systems tend precisely to do that from beginning to end given its emphasis on generalization. Certain complex cases might be better served by assignment to unified specialty dockets within a few courts, in effect creating “judicial centers of excellence” where judges and court staffs have particularized training and expertise.


77 The notion of specialization that concentrated certain case types is neither new nor radical. See Parke–Davis & Co. v. H.K. Mulford Co., 189 F. 95, 115 (S.D.N.Y. 1911) (“The [German] court summons technical judges to whom technical questions are submitted and who can intelligently pass upon the issues without blindly groping among testimony upon matters wholly out of their ken. How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.”); Edward V. Di Lello, Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level, 93 Colum. L. Rev. 473, 493–507 (1993) (proposing creation of a system of expert magistrate judges to try cases involving technical
may demand that concerns for geographical access be the predominant consideration in case assignment. What is called for in the end is developing more agile systemic approaches and techniques to improve access, case management and resolution in order to deliver just results with minimal processing time and inconvenience to the parties, given the substantive nature of each dispute. We must recognize the need for differentiated systems of access (not just case management), and coherent systems of court administrative and support processes tailored to efficiently identify the key contested issues in a case leading to their prompt resolution through a variety of techniques. Just as the world is becoming at once more diverse and integrated, so too must our state justice systems if they are to remain effective and relevant.

Finally, as courts confront this more complex adjudication environment, it is important to resist the temptation to create more layers of independent jurisdictional systems and their attending cost centers. Rather, efforts should be focused on flattening structures to promote interdependency between courts, both specialized and general, within a simplified jurisdictional and administrative configuration. Citizens should not be forced to guess where a court’s jurisdiction lies. Rationalizing and aligning confusing, contradictory and overlapping points of entry into the system and sharing best practices across the system can simplify access, reduce administrative redundancies, leverage resources and promote innovation through shared knowledge. Over the last thirty years private industry has spent considerable time and effort in pursuit of similar objectives. In contrast, many public institutions, including many courts, remain thirty years behind the curve and frequently resistant to it. The goal should not be to homogenize justice; it is to simplify access to justice and the resources dedicated to the business of justice.

The costs of running courts are not driven by the personnel and operations expenditures evidenced in the budgetary line items. These

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issues); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 Nw. U. L. Rev. 745, 784 (1981) (suggesting that in factually complex cases a specialist option would be a useful alternative to a generalist court). In the 1970s, Judge Henry Friendly noted:

> Courts . . . deal today with . . . electronics, chemistry, biochemistry, pharmacology, optics, harmonics and nuclear physics, which are quite beyond the ability of the usual judge to understand without the expenditure of an inordinate amount of educational effort by counsel and of attempted self-education by the judge, and in many instances, even with it.


78 See, e.g., Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 Va. L. Rev. 1267, 1267 (2005).

79 Unfortunately, state legislatures tend to look at improvements solely from the standpoint of savings not from the standpoint of redirecting resources to improve access to justice. As such, they discourage systemic improvements because there is little incentive to restructure if the courts are left with less resources and still less access.
expenditures merely reflect functional demands and structural choices that have been made over time. The true cost– drivers of a court system emanate fundamentally from jurisdictional, administrative and case managements constructs that form its heart. In addressing the discrepancy between funding, access and service, it is important to examine whether our foundational structures are in need of innovation and reform. The challenge is not simply accepting the impact of a rapidly changing world but anticipating how changes in quality and quantity will require courts to readapt the structural concepts that have undergirded the system for 200 years.80

III. THE COURTHOUSE AS TRIAGE CENTER,
THE COURTROOM AS OPERATING ROOM

In 1976 Professor Frank Sander proposed the concept of the “comprehensive justice center” that offered litigants a number of dispute resolution processes ranging from mediation to arbitration to litigation and beyond.81 The idea of the “multi– door courthouse” has been adopted by judicial systems around the world. The Subordinate Courts of Singapore,82 the family courts of Australia,83 the High Court of Justice for Lagos84 all operate to one degree or the other on the “multi– door courthouse” concept.85 In many courts of the United States the “multi– door concept

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85 For a discussion on the differences in dispute resolution approaches between the United States and Latin America, see generally Mariana Hernández Crespo, A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law through Citizen Participation, 10 Cardozo J. Conflict Resol., 91 (2008).
has become quasi-institutionalized, though woefully underfunded. The multi-door courthouse concept has not been without its critics. Some have described the movement as a byproduct of society’s attempt to suppress or conceal uncomfortable conflicts. Others assert that the movement has contributed greatly to a de facto closing of the courthouse or at the very least has erected barriers to entry by replacing thoughtful adjudication with mere dispute processing. Notwithstanding these criticisms, there is little question that the public is demanding approaches to dispute resolution that are not purely binary in nature. There is no other explanation for the rapid emergence of the private dispute resolution industry in the United States and internationally.

Over the years the idea of the multi-door courthouse has generally been reduced to a choice between various forms of mediation or litigation. Intake centers, tracking mechanisms, case evaluation and other components necessary to fully realize the concept have not been developed at a level that diversifies our approaches to dispute resolution. As a result, others have stepped in creating, in the words of one observer, a situation where:


87 See David A. Hoffman, Certifying ADR Providers, Boston B.J., Apr. 1996, at 22 (noting that budget shortfalls have been a major impediment to expanding programs); Gladys Kessler & Linda J. Finkelstein, The Evolution of a Multi-Door Courthouse, 37 Cath. U. L. Rev. 577, 585 (1988) (discussing the need for permanent funding since initial sources and fee-based approaches are unreliable).


The courts face a burgeoning industry in alternative dispute resolution, including private judging, that threatens to siphon off many civil cases, including those of litigants wealthy enough to afford it and who find the possibility of avoiding public regulation or scrutiny attractive. In the public policy world . . . adjudication in public courts for the resolution of disputes is passé; the focus is on its alternatives.91

Consequently, we must concede that although disputes must be resolved justly, not every dispute requires the same level of resources. Not every person that walks into a hospital is automatically assumed to need a doctor. Medical cases are evaluated; procedures appropriate to the nature of the case are triggered; resources corresponding to the severity of the injury are allocated. In the end the operating theater becomes that forum where the most seriously injured are treated with the best tools available by specifically trained individuals in the most expeditious manner. The fact that a patient may want to see a doctor does not mean that it must be offered to them in the first instance when other treatment options and personnel may be equally effective.

There are, admittedly, vast differences between the justice system and medical system. But, there is something to be said for examining how other systems deliver services not simply more efficiently but also more effectively. Both the justice system and the medical system are structured to deal with problems ranging from the simple to the complex, the mundane to the critical. Yet one system has adopted hugely flexible and innovative approaches to resolving problems and ensuring that cases are sent to the most appropriate process for resolution. Access to the courtroom – in effect the courthouse operating theater – should be the last resort after other avenues have been exhausted. The right to due process is the right to a just and effective process that is due, driven by the considerations of each case. State courts cannot continue to operate on an eighteenth or nineteenth century model when the twenty-first century is increasingly demanding sophisticated specialization, dynamic processes, and refined resource allocation. Everyone has a right to his or her day in court. The question for the twenty-first century is does this mean a place or an appropriate process?

IV. INSTITUTIONAL GOVERNANCE AND ACCOUNTABILITY

Two hallmarks of American judicial culture are the pervasiveness with which the concepts of (1) judicial independence and (2) tradition weave their way through everything including organizational leadership. From the decisional process to institutional governance, independence bolstered a strong tradition of individual autonomy and seniority producing an organization and cultural paradigm of court governance that is “loosely

coupled,” 92 a term state court leaders see as highly descriptive.93 The autonomous attitude within many courts is supported, in large measure, by judicial selection processes that place a premium on loyalty to the local electorate more than loyalty to institutional cohesion.94 Accordingly, two competing and complementary behaviors are taking place in most state court organizations: (1) the prerogative of individual judges versus the collective interests of the courts;95 and (2) local court autonomy versus the overarching organization and management of a complex public system.

As Mary McQueen, President of the National Center for State Courts has observed, court governance may be the “next frontier” to tackle in improving our state judicial systems.96 For courts, like universities and hospitals, present complex leadership and organizational dynamics far different from those seen in the private sector or even other government


93 See Mary C. McQueen, Governance – the Final Frontier, in Perspectives on State Court Leadership (forthcoming 2012).

94 The United States has a long tradition of judicial elections. In explaining this phenomenon, Lawrence Friedman noted:

The elective principle, thus, was one way to solve the problem of judicial power. Judges were supposed to be impartial and neutral, mere servants of the law . . . .

In a common law system, the judges invent or modify many of the working legal rules. Judges clearly exercised power. They were part of the system of checks and balances; but who was going to check and balance them? One obvious answer was: the voters.


95 Fragmentation in the leadership and administration of a judicial system can permit judges within individual courthouses to thwart implementation of changes that they do not support. See Malcolm M. Feeley, Court Reform on Trial: Why Simple Solutions Fail 198 (1983).

96 See McQueen, supra note 93. McQueen notes the following with regard to court governance:

Whether judges have heard the term “loosely coupled” or not, they can appreciate and recognize its dynamics in their daily work. Loosely coupled organizations are defined as systems 1) with a federated governance structure consisting of individuals and groups possessing a high degree of autonomy for daily work; 2) where dual demands between accountability and autonomy create tensions; 3) with unpredictable, misunderstood or changeable relationships (linkages) between and among individuals and leadership; 4) that require increasingly complex and knowledge extensive decision–making; and 5) demonstrating weak support for organizational integration and high support for professional specialization. State courts align with all five.

Id.
operations. Leadership of the courts is an area ripe for considerable rethinking in the twenty-first century, primarily for two reasons.

First, most state constitutions vest leadership authority over the courts directly in the state judiciary generally using one of two models: (1) supreme courts; or (2) judicial councils. Consequently, courts as institutions cannot avoid addressing the emerging leadership challenges. The tradition-bound and autonomy-bound culture that has historically defined courts is confronting new developments that increasingly challenge notions of individual autonomy, at least at levels previously enjoyed. Sophisticated technologies are driving interconnectedness of individuals supported by evolving notions of “social networks” in an increasingly “borderless” world. Organizational realignments are driving the demand to “flatten” managerial hierarchies, promote interdependency of effort and governance, and give greater attention to leadership ability.

Second, we have to acknowledge that today’s state courts are no longer a collection of small autonomous operations that exist largely off the radar of policymakers and the public. State courts have evolved into large complex public institutions defined by growing sets of interdependencies. Over the last fifty years there has been a tremendous amount of budgetary consolidation at the state level and during this same period the


98 The organization and governance of state courts have been variously described by a range of models from constellation (a loose association of courts which form a system only in the most general of terms) to confederation (a relatively consolidated court structure and a central authority which exercises limited power) to federation (a court structure that is relatively complex where units are bound together at the state level by a strong, central authority) to union (a fully consolidated and centralized system of courts with a single, coherent source of authority). See Thomas A. Henderson et al., U.S. Dep’t of Justice, The Significance of Judicial Structure: The Effect of Unification on Trial Court Operations 35–51 (1984).

99 E.g., Ky. Const. § 110(5)(b); Mo. Const. art. V, § 4; Mont. Const. art. VII, § 2; Wis. Const. art. VII, § 4(3).

100 Cal. Const. art. VI, § 6; Utah Const. art. VIII, § 12.

101 For an excellent discussion on judicial leadership principles, see generally Durham & Becker, supra note 17.

102 See, e.g., Jeanne Charn, Service And Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School, 10 Clinical L. Rev. 75, 92 n.53 (2003) (citing Larry Hirschhorn & Katherine Farquhar, Productivity, Technology and the Decline of the Autonomous Professional, 2 Off.: Tech. & People 265 (1985)) (discussing legal aids and “processes that are integrating professionals more closely into the work and priorities of organizations” and concluding that “professionals may lose some autonomy” but gain “effectiveness and responsiveness”).

103 There are various funding models for state courts. California is an example of a purely state funded system. The more prevalent model is a distributive model in which costs are divided between the state and local governments. North Carolina and South Dakota, for example, operate a centralized budget model in which the state bears operational and person-
programmatic reach of state courts has expanded exponentially. Today’s courts frequently operate with state budgets of hundreds of millions of dollars or more. Our lexicon is filled with programmatic terms such as problem-solving courts, restorative justice, social impact, and performance measuring. Our administrative structures are complex.

nel costs with facilities remaining the responsibility of local governments. In other states, like Missouri, the state covers most personnel costs with operational costs covered by local government. In states such as Ohio, the state provides salary supplements to judges and staff but the bulk of the system is locally funded. Budget Resource Center, supra note 4. As a result of the move to greater state funding, judicial budgets have grown over time although they remain minute components of overall state spending. One reason it is so difficult to reduce state court spending is because (1) state courts often operate on the margins of state spending, (2) the judiciary is required to maintain operations in every county, and (3) the bulk of state court expenditures relate to personnel costs leaving little room to absorb cuts out of operations. See Laura K. Abel, Evidence-Based Access to Justice, 13 U. Pa. J.L. & Soc. Change 295, 295–96 (2010) (examining how state courts and civil legal aid programs are using a variety of means to expand access); Wayne D. Brazil, Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns, 14 OHIO ST. J. ON DISP. RESOL. 715, 720 (1999) (“[T]he reach and diversity of state court ADR programs makes the job of comparing the different models . . . difficult.”); Daniel M. Filler & Austin E. Smith, The New Rehabilitation, 91 IOWA L. REV. 951, 954 (2006) (discussing specialty courts in addressing juvenile delinquency); Judith S. Kaye & Susan K. Knipps, Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach, 27 W. ST. U. L. REV. 1, 2 (2000) (discussing emerging domestic violence thinking).

Part of the expanding programmatic reach of state courts is the leveraging of social service programs to promote case outcomes. See Connie J. A. Beck et al., Collaboration between Judges and Social Science Researchers in Family Law, 47 FAM. CT. REV. 451, 451, 464 (2009) (discussing the similarities and differences between the law and social sciences and concluding that it is essential that social scientists and judges continue to work together to solve their differences and increase mutually beneficial knowledge).

For example, the California judicial budget is approximately $3.6 billion, the New York judicial budget is approximately $2.53 billion, the New Jersey judicial budget is approximately $841 million, and the Texas judicial budget is approximately $646.5 million. Budget Resource Center, supra note 4.

In terms of overall state spending these sums are marginally significant. California spends almost two billion dollars on Medicaid alone. California: Medicaid Spending, Kaiser Fam. Found., http://www.statehealthfacts.org/profileind.jsp?cat=4&sub=47&rgn=6 (last visited Apr. 5, 2012). However, court spending is not insignificant in terms of real dollars.

Examples of problem-solving courts include: mental health courts; drug courts; domestic violence courts; juvenile justice courts; sex offense courts; community courts; truancy courts; veterans courts; and homeless courts. It is important to clarify a point about problem-solving courts. Although the term “problem-solving courts” has become something of a catch phrase, e.g., “drug courts,” they are in most cases specialized dockets within an existing court structure that use specialized approaches to meet litigants’ special needs.

systems designed to handle everything from budgets, to personnel, to sophisticated technology systems,\textsuperscript{108} to courthouse design and construction, to social service providers. Therefore, state courts are no longer simply a loosely connected series of autonomous adjudicatory entities. They are big businesses with complex requirements subject to greater institutional scrutiny than perhaps at any time in their history.

To be clear, this is not a call for a particular judicial governance model that is centric in structure. Different methods of judicial selection, budgeting, staffing, jurisdiction, and culture caution against promoting a single model for state court governance. But the changes that have occurred over the last fifty years do mean that individual actions cannot be segregated from institutional consequence, and institutional performance is subject to greater public scrutiny and measurement.\textsuperscript{109} Historic methods of judicial leadership selection premised upon seniority\textsuperscript{110} or rotation\textsuperscript{111} do not ensure that the best potential leaders become the actual leaders. Hierarchy–based leadership systems that are non–collaborative may not be attentive to broad institutional interests and thus stifle local programmatic innovation and creativity. Complex bureaucratic systems with multiple layers of management may consume resources better directed to the delivery of justice. Local parochialism that spurns institutional cohesion and accountability can undercut the standing of the state courts as an institution of government, making the judiciary look more like an assortment of independent actors rather than a group of people dedicated

\textsuperscript{108} It is important to note that the judicial systems of other nations are using technology to ease access to justice. In Singapore the courts have a digital transcription system, E–Signages, electronic hearings, electronic queue management system, information kiosks, internet videophone services, internet wireless hotspots, “Justiceonline” system, and mobile technology facility services. Technology, SUPREME CT. SING., http://app.supremecourt.gov.sg/default.aspx?pgID=361 (last visited Apr. 5, 2012). Turkey’s National Judicial Informatics System not only ties together courts, public prosecutors and law enforcement, it was designed in cooperation with the nation’s cell phone industry to provide near real time SMS updates on case information. General Information, UYAP– NAT’L JUD. INFORMATICS SYS., http://www.e–justice.gov.tr/presentation/generalinformation.html (last visited Apr. 5, 2012).

\textsuperscript{109} Several state courts individually or systemically have adopted performance measures to promote public trust and confidence in the effective administration of justice. See, e.g., Utah Courts Performance Measures, Utah St. Cts., http://www.utcourts.gov/courtools/ (last visited Apr. 5, 2012).

\textsuperscript{110} See, e.g., KAN. CONST. art. 3, § 2 (“[T]he justice who is senior in continuous term of service shall be chief justice . . . .”); 28 U.S.C. § 45 (2006) (“The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission . . . .”); 42 Pa. CONS. STAT. ANN. § 302(a) (West 2001) (“The Chief Justice of Pennsylvania shall be Chair and the Justice of the Supreme Court with most seniority on the Council shall be Vice–Chair.”); Nev. SUP. CT. R. 7 (“The Chief Justice is the Justice whose current commission is senior in the date of its issuance . . . .”).

\textsuperscript{111} See, e.g., ALA. R. JUD. ADMIN. 6 (“In counties with more than one district judge, the presiding circuit judge, with the advice and consent of a majority of circuit judges in the circuit, shall appoint a presiding district judge to serve a term of one (1) year.”).
to a common mission. Therefore, future state judicial governance must be defined by greater attention to two critical principles: (1) collegiality, cohesion, coherency, and interdependence within the institution, and (2) acceptance of greater institutional scrutiny from outside the institution. This will require attention to improving institutional leadership and institutional performance, developing performance measures beyond case processing, and utilizing evidence-based approaches to justify existing and new programs. Improving governance and administrative systems is not something the legislature can or should fix. It is fundamentally the responsibility of the bench and the bar.

Conclusion

Since many state courts draw their organic powers directly from the state constitution, they can exercise their powers with greater institutional autonomy than their federal counterparts, as accountable to the democratic

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112 See R. Dale Lefever, Nat’l Ctr. for State Courts, The Integration of Judicial Independence and Judicial Administration: The Role of Collegiality in Court Governance in Future Trends in State Courts 66, 69–72 (2010), available at http://vis-res.com/pdf/Trends2010.pdf (discussing the role of collegiality in the trial court “self-governance” model based on relationships); see also Durham & Becker, supra note 17, at 5–6 (recommending meaningful input from all court levels into the decision making process, the establishment of clear, well-understood and well-respected roles and responsibilities among governing entity, presiding judge, court administrators, boards of judges and court committees, the establishment of a system that speaks with a single voice, and the establishment of positive institutional relationships that foster trust among other branches and constituencies).


processes (for good and ill) as they are to the coordinate branches of government. This autonomy affords state judiciaries the opportunity and responsibility to branch out, to be innovative in addressing the public's evolving legal needs. Such adaptability and freedom has historically led to great innovations, including the nation's truly first specialized docket – the juvenile court system.\textsuperscript{117} If states are the laboratories of democracy,\textsuperscript{118} then state courts are the laboratories of American judicial power. But this innovative freedom comes with a catch. It is fundamentally the responsibility of the courts and the legal profession – of law schools, judges, administrators, and the bar – to leverage this unique position and capacity to provide the vision necessary to promote a culture of constant innovation at the very core of the system.

In the end, the fiscal crisis confronting state courts is not simply a crisis of money nor is it a crisis that money alone can solve. To confront it as such is to ignore the larger forces at play. Our state judiciaries are in a state of crisis for a range of reasons defined by the bookends of professional inattention and declining public support, as well as the potential for growing functional irrelevancy and institutional ineffectiveness. Believing that state justice systems can weather the current storm without deeply considering the things that brought us to this point and embracing the need for innovative change is to ignore both threat and opportunity. We cannot rely on eighteenth and nineteenth century models in the twenty-first century where change is happening at the speed of light and our very understanding of organizations and institutions is evolving rapidly. Relying on a vision of the courts that really no longer exists and that fails to account for the need for still greater coherence, innovation, effectiveness, and accountability undercuts our ability to meet the public's demand and garner their support. The result is reduced relevance and unequal access to justice.

\textsuperscript{117} In 1899 Illinois passed the Juvenile Court Act effectively creating the nation’s first juvenile court. Matthew Thomas Wagman, \textit{Innocence Lost in the Wake of Green: The Trend is Clear—If You Are Old Enough to Do the Crime, Then You Are Old Enough to Do the Time}, 49 CATH. U. L. REV. 643, 643 (2000) (citing Amicus Curiae Brief of the American Civil Liberties Union of North Carolina Legal Foundation in Support of Appellant at 3, State v. Green, 502 S.E.2d 819 (N.C. 1998) (No. 519A96) (providing a brief history of the juvenile justice system and explaining its purposes)).

\textsuperscript{118} Justice Louis Brandeis popularized the concept of “laboratories of democracy” in his dissenting opinion in \textit{New State Ice Co. v. Liebhmann}, 285 U.S. 262, 311 (1932), noting that “[i]t is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”