



Inventing Democratic Courts: A New and Iconic Supreme Court

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The Supreme Court's building was designed to look old—as if it had been in place since the country's founding, rather than opening in 1935. The work of judges—deciding disputes—also appears as if it were a continuous practice from ancient times. But the point of this lecture and of our book, **Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms**,¹ is to show that important aspects of adjudication that today seem intrinsic are, like this building, artifacts of the twentieth century.

Simply put, in ancient times, judges were loyal servants of the state; audience members were passive spectators watching rituals of power, and only certain persons were eligible to participate as disputants, witnesses, or decision makers. In contrast, judges today are independent actors in complex and critical relationships with the government and the public. Moreover, everyone—women and men of all colors—are entitled to be in every seat in the courtroom, including the bench.

These are the changes that prompted our choice of the phrase “Inventing Democratic Courts” for this essay's title. We use the word “democratic” not in the narrow sense of majoritarian political processes; democracy is more than voting. Indeed, unlike some constitutional scholars who identify unelected judges as a problem in need of special explanation in democratic orders, we argue that adjudication can itself be a democratic practice—that *how* this Court has come to do its work reflects democratic ideals about interactions among disputants and between government and citizenry.

Democratic norms changed adjudication by recognizing all persons as juridical actors who could sue and be sued, and by requiring judges to welcome them all as equally entitled to dignified treatment. Likewise, disputants must treat each other as equals, as reflected in practices such as the contemporary obligations to exchange information (discovery and disclosure) to facilitate participatory parity.² The constitutional mandate that courts operate openly demonstrates to the public the capacity

to have civil and disciplined exchanges despite deep disagreements. Open courts also endow the audience both with the ability to learn and the authority of critique. Court judgments at trial and appellate levels apply and develop norms and regularly spark debate, sometimes prompting new lawmaking by elected officials.

The map of the development of democratic adjudicatory practices could be drawn through discussing many of the Court's decisions—insisting on the independence of judges, the equality of all persons, public access to courts, and fair decision making.³ We add to that analysis by inviting consideration of how the designers of this Court's building—and others before them—used imagery to inculcate norms about what judges should do. By decoding what carvings adorn the courtroom and by placing the history of this building in the context of the changing contours of both constitutional law and the federal court system, much can be learned about the political and social transformations that produced—indeed *invented*—courts as we know them today.

Those innovations are what make the Court's building iconic. When the building opened in 1935, some critics complained that its Grecian portals were out of sync with twentieth-century modernism. We suggest instead that the building be read as Janus-faced. The Court's architecture and imagery looked back to enlist the authority of law-makers long gone. Yet, the building's interior also marked the Court's new legal authority to control its own docket, the Chief Justice's ascendancy as the chief executive of the federal judicial system, and the special role the media would come to play in shaping understandings of the judiciary. The grand entry with its imposing facade forecast the Court's role thereafter—as a national icon—of the country's commitment to “equal justice under law,” words inscribed above the doorway in 1935 but whose meaning derives from the Court's work in the decades that have followed.

Decoding the Walls

The lawyers and the public who enter the Courtroom, like readers of the Court's opinions, focus on the words of the jurists as they pose questions, rather than on the imagery above their heads. Moreover, were one to look up, what emerges are mostly puzzles of legibility. As shown in figure 1, a parade of eighteen upright male carved figures runs along the friezes, each forty-feet long and designed by Adolph Weinman for the South and North Walls.

To identify them, most viewers need to consult the Court's website, which deciphers what Weinman called a procession of the “Lawgivers of ancient and modern times.”⁴ The website instructs that, beginning on the South Wall, ending on the North, and in rough chronological order ranging from 3200 BCE through the eighteenth century, the men depicted are Menes of Egypt; Hammurabi of Babylon; Moses and Solomon from the Hebrew Bible; Lycurgus from Sparta; Solon and Draco from Athens; Confucius from China; Octavian from Rome; Justinian from the Byzantine Empire; Mohammad referencing Islam; Charlemagne of France; King John of England; Louis IX of France; Hugo Grotius, the Dutch scholar of international law; William Blackstone of England; the United States' John Marshall; and Napoleon.⁵

One does not, however, need the website's guidance when looking at two draped figures, shown in figure 2, with scales and with sword, on the West Wall Frieze, above the Justices' Bench. Viewers know immediately that the two figures reference the personification of Justice. Even easier to recognize is the draped, seated female in figure 3, with scales in one hand and sword displayed on the base of a lamppost on the side of the entrance's grand staircase.

The reason for the ready legibility of Justice is, at one level, straightforward. Rulers around the world regularly stick this figure—like a signpost—in front of their courthouses.



North Wall Frieze (top) and South Wall Frieze (bottom), 1934, Adolph Weinman. Figure 1.





Justice and Divine Inspiration, West Wall Frieze, 1934, Adolph Weinman. Figure 2.



Justice, Lamppost base, John Donnelly Studio of New York. Figure 3.



Prudence and Justice, attributed to Artus Quellinus, circa 1655, crowning front tympanum (looking toward Dam Square) of the Town Hall (Royal Palace) of Amsterdam, the Netherlands. Figure 4.

Examples cross oceans and centuries, as one can see from the 1655 Town Hall of Amsterdam (figure 4) where a Justice, as well as the Virtue Prudence, sits on top of the building. Leaping to the twentieth century, the motif can be found in a Justice designed in the 1960s for the front of the Supreme Federal Tribunal in Brasilia (figure 5), a Justice from the 1970s inside the Supreme Court of Japan (figure 6), and another (figure 7) that stands outside a courthouse in Zambia and is

reiterated on a cloth designed by the Zambia Women Judges Association. A recent version (figure 8) comes from Melbourne Australia where, in 2002, builders of a new courthouse put up a six-meter aluminum windswept female form, functioning like a shingle on a busy street corner.

As lawyers know well, Justice imagery is also used regularly in commerce. In addition to being deployed for the sale of books and jewelry, Justices are evoked in jest,



Justice, Alfredo Ceschiatti, 1961, Supreme Federal Tribunal, Three Powers Square, Brasilia, Brazil. Figure 5.



Supreme Court of Japan, Shinichi Okada, 1974, Tokyo, Japan (left); *Justice*, Katsuzou Entsuba, 1974, inside the Supreme Court of Japan (right). Figure 6.



Figure *Lady Justice*, circa 1988, High Court of Zambia, Lusaka, Zambia. Figure 7.



Lady of Justice, William Eicholtz, 2002, Victoria County Court, Melbourne, Australia. Figure 8.

as exemplified here by Lady Justice Lucy (figure 9), placed in front of a Minnesota law school as a tribute to the comic series Peanuts and its creator, Charles Schultz.

Yet a pause is in order to think about the oddity of a chubby child with scales, sword, and blindfold serving as a legible referent to law. Why assume that viewers would think of courts and justice instead of Greek goddesses, warrior princesses, opera singers, or simply be befuddled? Why do viewers recognize the Justice figures in the Supreme Court’s building but, aside from noting variations in clothing, rarely know who is in the line-up of the eighteen men on the South and North Wall friezes?

To sharpen the question, consider a set of four robed women (figure 10) who, during the Renaissance, were known as the Cardinal Virtues. Justice is depicted with scales and sword; Prudence appears again with a mirror



Lady Justice Lucy, Jim and Judy Brooks, 2002, William Mitchell College of Law, St. Paul, Minnesota. Figure 9.



Justice (top left), Cornelis Matsys, circa 1543–1544; *Prudence* (top right), Agostino Veneziano, 1516; *Temperance* (bottom left), Agostino Veneziano, 1517; *Fortitude* (bottom right), Marcantonio Raimondi, circa 1520. Figure 10.

as well as a second face, looking backward; Temperance holds a bridle to symbolize restraint; and Fortitude has a column to denote strength. Today, no cartoonist, merchant, or building designer would add women with mirrors or bridles to make their jokes, sell their wares, or mark their buildings.

Thus, the answer to why we “know” Justice is less straightforward than it first appeared. The reason that Justice imagery is experienced as ordinary comes from repeated efforts to educate us to identify this figure. Instruction has come by way of an amalgam of political, visual, literary, cultural, and commercial activities that cut across imperial conquests, colonialism, monarchies, and democracies. Our claim is not that the figure of Justice is ubiquitous; we do not offer imagery from all social orders, past or present. Moreover, as this glimpse of a trans-temporal and transnational tour suggests, putting a Justice on a courthouse does not necessarily provide the equality and fairness that have, in democracies, become signature traits of adjudication. Yet, as political propaganda, Justice has had a remarkable run.

Return then to the center of the West Wall Frieze, above the Justices in the courtroom, and to figure 3—the depiction of a woman with sheathed sword that, according to the Court’s

website, has her hand “atop the hilt, ready to act should the need arise,” while the “winged figure of Divine Inspiration holds out the Scales of Justice.”⁶ The obvious questions are what histories produced the particular amalgam of a female figure with scales and sword, and why, aside from esoteric inquiries, does it matter? To provide answers, more needs to be excavated about what attributes came to be attached to Justice, which ones stuck, which disappeared, and what the changing images teach about democracy and courts.

We know that sovereigns in Mesopotamia, Egypt, Greece, ancient Israel, and Rome all relied on public performance of their adjudicatory powers.⁷ These events were located in terms of place (such as the “gate of the city”⁸), and they were didactic events, with roles scripted through instructions to disputants, witnesses, and jurists. Rulers, aiming to secure social stability, sought to regularize and to normalize the imposition of violence in the name of the state, as they imposed physical punishment for crimes and leveled civil sanctions such as insisting that one person turn property over to another.⁹

In some of these early enactments, one can find scales displayed, such as in a Mesopotamian line-drawing from about four thousand years ago (figure 11), that depicts a



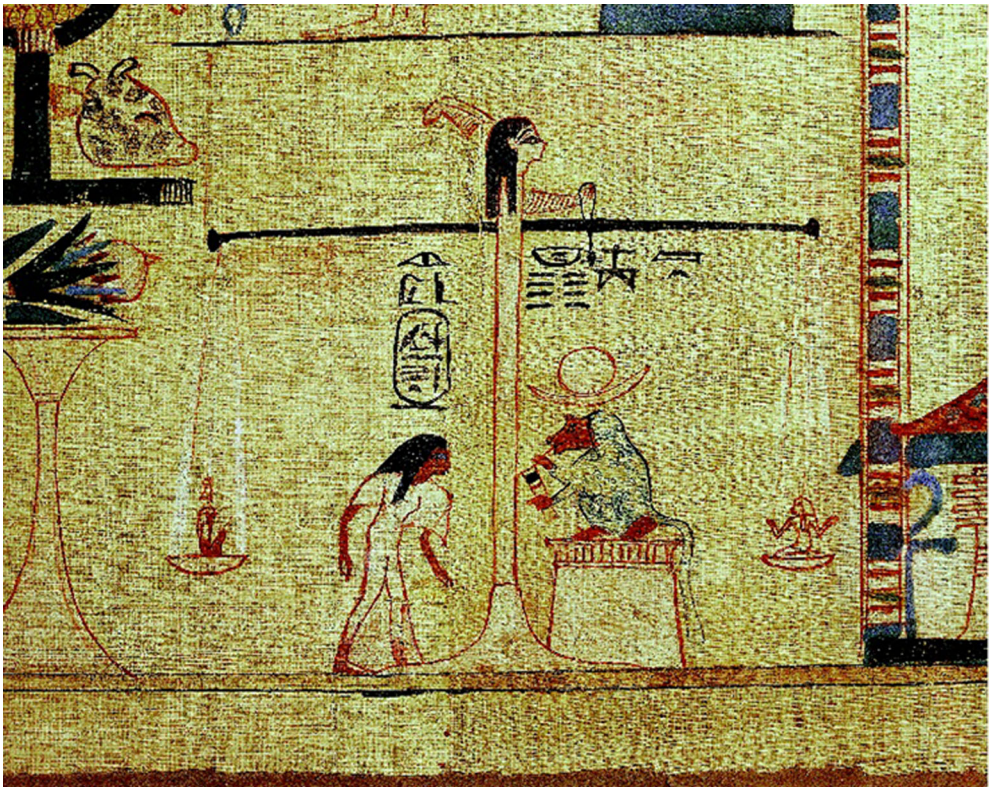
“Mesopotamian Scales,” Akkadian period, circa 2350–2100 BCE. Figure 11.

God known as Shamash, with scales and a rod, responding to two figures seemingly in dispute. Scales appear again in Egyptian portrayals of scenes from what are known as *Books of the Dead*,¹⁰ compendia of illustrated materials that sometimes include a female form, Ma'at, shown either with an ostrich feather tucked into her headband or (as in figure 12), with Ma'at herself forming the scales. Egyptologists instruct that the term encompassed several ideas—"truth, justice, . . . order, balance, and cosmic law," "evenness," and "stability."¹¹ The imagery illustrated that, at death, a person's heart (believed to direct a person's will) was weighed against an ostrich feather to determine that person's afterlife. As figure 12 depicts, a fearsome animal

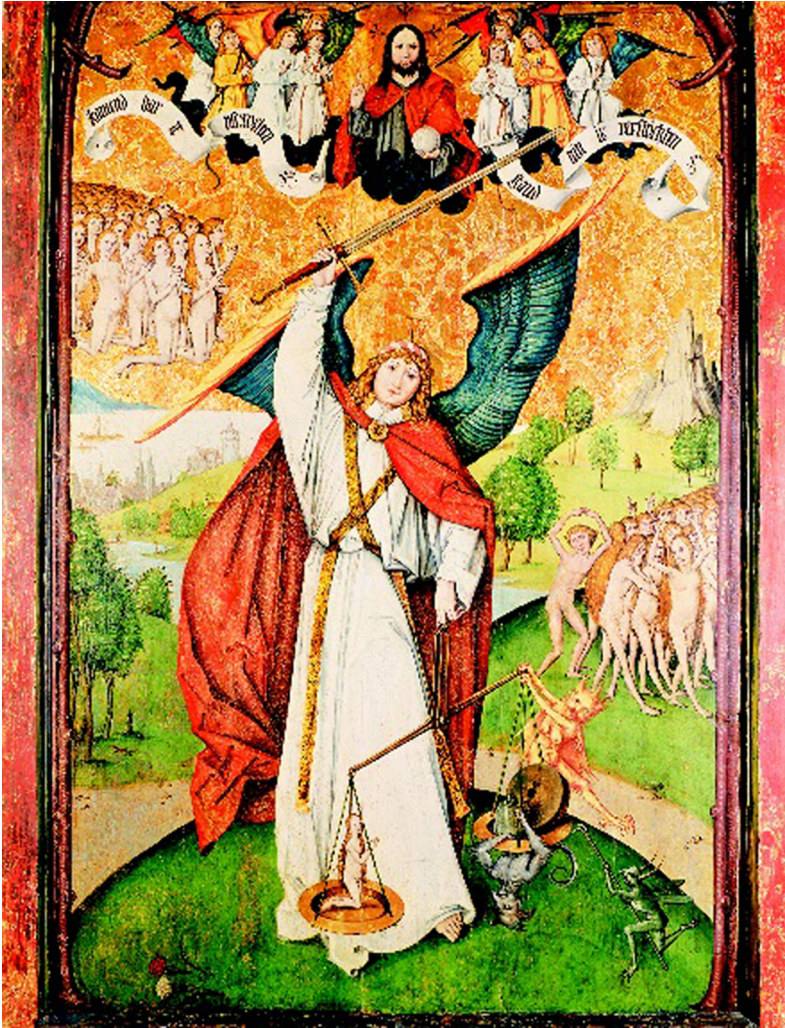
waits below for a heart heavier than the feather.¹²

Ma'at's female form served as a predecessor to a series of Greek and Roman goddesses (Themis, Dikê, and Iustitia), all linked to ruling powers and law-related activities.¹³ By the fifth century, female figures identified as Justice can be found in Christian art.¹⁴ But these stern-gazed women did not come with scales or swords. Some had cornucopia or a bundle of rods symbolizing the state, and all were clear eyed; indeed, Justice was then noted for her "stern . . . gaze."¹⁵

Scales and swords were common objects in Medieval art, but mostly attached to another figure, the oft-winged male St. Michael. His function in the New Testament was



Ma'at, detail from the Papyrus Nodjnet, *Book of the Dead*, circa 1300 BCE. Figure 12.



Saint Michael Weighing the Souls at the Last Judgment, Master of the Zurich Carnation, circa 1500, Kunsthau, Zurich, Switzerland. Figure 13.

to lead souls to judgment¹⁶—as a glorious *Saint Michael Weighing a Soul* exemplifies (figure 13). The attributes of St. Michael came to be associated with the Virtue of Justice, as seen in the mid-sixteenth-century print represented in figure 10.

In the Supreme Court’s courtroom, more than a dozen swords are shown, serving as reminders of the force of law. But more recent imagery shifts attention away from law’s violence toward law’s obligation to weigh claims evenly and carefully. Thus, transnational courts of the twentieth century embraced the

motif of scales, reiterated in the logos of the International Criminal Court, the International Tribunal for the Law of the Sea, and the European Court of Justice (figure 14). At what the Department of Defense has labeled “Camp Justice,” the logo used by the Office of Military Commissions mimics justice imagery by showing the eagle turned (like Ma’at) into scales with the words “Freedom through Justice” as the bottom (figure 15).

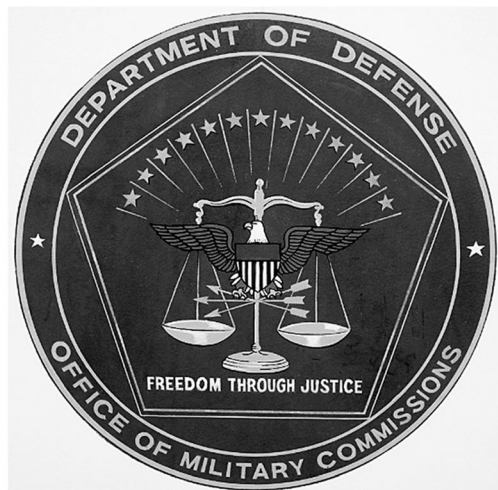
Notice what is *not* seen in the older images: none of the Justices have blindfolds, as contrasted to that portrayed in *The*



Logo of the International Criminal Court, circa 1998 (top); Logo of The International Tribunal for the Law of the Sea, circa 1996 (bottom left); and Logo of the European Court of Justice, circa 1952 (bottom right). Figure 14.

Contemplation of Justice outside the Court (figure 16), and many of the images shown thus far. Thus, other questions emerge—about when and why blindfolds came to be added and what this attribute has to teach about courts and democratic practices.

To excavate the blindfold’s relationship to the iconography of justice requires a return to the late 1500s, when a once-famous volume, *Iconologia* by Cesare Ripa,¹⁷ instructed readers about how to portray a host of Virtues and Vices. For hundreds of years,



Camp Justice, Guantánamo Bay, 2009 (left); Logo, Department of Defense, Office of Military Commissions (right). Figure 15.



Contemplation of Justice, James Earle Fraser, 1935. Figure 16.

Ripa's manual provided a common set of references across a broad geographical span.¹⁸ Among the figures he detailed were seven versions of Justices—one Divine and six different versions of "Worldly Justices."¹⁹

One edition of the book offered four examples of Justices, all draped in robes.²⁰ Three had scales, two swords, and one an orb and a dog. The fourth, called *Justice According to Aulus Gellius*, had no objects in hand and was shown wearing a necklace on which "an eye is portrayed." (See figure 17). Ripa's explanation was that "Plato said that Justice sees all. . . ."²¹

In fact, clear-sighted Justices were everywhere. Another illustration comes from the Vatican's walls where, in the 1520s, Giulio Romano painted a large Justice²² holding scales and an ostrich (figure 18), one of the attributes detailed for Justice in Ripa's **Iconologia**.²³ Why an ostrich? Many explanations have been proffered, including that the bird harkened back to the Egyptian Ma'at, represented by an ostrich feather; or referenced Christian theology of the Immaculate Conception; or acknowledged the Medicis, whose family ring was said to include an ostrich feather; or reflected the bird's alleged capacity to digest anything, as Justice must.²⁴

Clear-sighted Justices were featured because, for some 2,500 hundred years, sight was valorized as an essential prerequisite to judgment. Egyptian sun gods were sources of



Justice According to Aulus Gellius, Cesare Ripa, *Iconologia*, (Padua, Italy: Pietro Paolo Tozzi, 1625 edition). Figure 17.



Justice, Giulio Romano (School of Raphael), 1520, detail in the Sala di Costantino, Vatican Palace, Vatican State. Figure 18.

light and gods of justice.²⁵ Christianity likewise embraced “*sol Iustitiae*” —Christ— as the God of Light, who was to “appear ablaze . . . when He will judge mankind.”²⁶ (A well-known portrayal, circa 1499, by Albert Dürer, gave scales and sword to the wide-eyed and haloed Christ-Justice, perched on a lion.²⁷)

It was not simply that seeing was good. Blindness and blindfolded-ness were bad. Classical and biblical texts repeatedly made that point. The Book of Job states: “When a land falls into the hands of the wicked, he blindfolds its judges.”²⁸ Jesus himself was made sport of by being blindfolded, mocked, and beaten.²⁹ Of course, exceptions exist, such as the sightless seers who dot Greek epics.³⁰ Yet the dominant motif was that blindness was a disability and a hindrance.³¹

That point was vividly made by two familiar fixtures in Medieval Europe, *Ecclesia*

and *Synagoga* (figure 19) shown perched, as they have been since 1230, on the south portal of the Strasbourg Cathedral.³² *Ecclesia*, signifying the New Testament, is regal, ramrod-straight, and sharp-eyed. She looks over at *Synagoga*, the representation of the Old Testament,³³ depicted slumped, her rod broken, and her eyes covered, preventing her from seeing the “light” of Christianity.³⁴ Blindfolded, not blind, was the point; the willful refusal to comprehend the “light of redemption”³⁵ could be remedied by removing the blindfold.³⁶

When did the blindfold get attached to Justice? One of the earlier images of a Justice with covered eyes is *The Fool Blindfolding Justice* (figure 20).³⁷ The woodcut, sometimes attributed to Albert Dürer,³⁸ was one of many illustrations for a book called **The Ship of Fools**,³⁹ written in 1494 by Sebastian Brant, and popular for 250 years thereafter.⁴⁰ The picture accompanied a



Ecclesia (left) and *Synagoga* (right), circa 1230, Cathedral, Strasbourg, France. Figure 19.



The Fool Blindfolding Justice, sometimes attributed to Albrecht Dürer, 1494, a woodcut illustrating Sebastian Brant's *The Ship of Fools*, printed in Basel, Switzerland. Figure 20.

chapter entitled “Quarreling and Going to Court,” which discussed a fool who “thinks that he can blind the truth.”⁴¹ Brant, a noted lawyer trained in canon law, urged jurists to follow the written Roman code rather than German customary law.⁴² Throughout his book, he repeatedly warned against the “folly, blindness, error, and stupidity of all stations and kinds of men.”⁴³

Yet, as the blindfolded Justice in *The Contemplation of Justice* (figure 21) on the Court’s front steps illustrates, the contemporary deployment is not derisive. Hence more explanation is needed about how an attribute, once wholly negative, came to be valorized. One source comes by way of a return to Ripa, who instructed that six of the seven described Justices saw clearly. But Ripa proposed a blindfold for one, also detailed as having an ostrich and a fiery flame by her side and holding scales and sword. A 1611 edition explained:



A detail of the blindfolded Justice from *Contemplation of Justice*, James Earle Fraser, 1935. Figure 21.

She is wearing white because judges should be without the stain of personal interest or of any other passion that might pervert Justice, and this is also why her eyes are bandaged—and thus she cannot see anything that might cause her to judge in a manner that is against reason.⁴⁴

Yet given that Ripa offered six other sets of directions, all of which commended sighted Justices, why did the blindfold—minus the ostrich—make its way into the Court’s building and popular culture?

Insights come from transformations—in technology, political theory, and religion—that prompted reevaluations about the relationship among knowledge, sight, and judgment. The camera obscura gained currency in the sixteenth century,⁴⁵ followed by the invention of the telescope and the microscope, and the development of surgery for cataracts⁴⁶ and interest in the idea of probability.⁴⁷ The world was moving, even if one could not see it. Thus, during the period when religious wars were fought about who was the “true” God, science began to show that eyes could play tricks and that new optical instruments could alter sight. Theorists from various disciplines became quizzical about the nature of knowledge, authority, God, and truth, and the valence of open eyes to denote unencumbered receipt of knowledge shifted. With the rise of epistemological doubt, sight was no longer unproblematic.

Beginning, therefore, in Northern Europe in the 1600s, one finds statues and paintings of Justices, blindfolded. In the centuries since, the blindfold shed its connections to *Synogoga*’s failures to see the light of Christianity and came to be explained as a symbol of law’s incorruptibility, law’s even-handedness, and law’s commitment to rationality. Further, the blindfold gained a reputation as marking another (and new) idea, about judicial independence from the state. Renaissance traditions instructed that judges serve as loyal servants of the state.⁴⁸ In contrast, Montesquieu’s 1748 proposition was that “there is no liberty, if the judiciary power be not separated from the legislative and executive.”⁴⁹ Across the ocean in the years thereafter, state and federal constitutions translated that precept into law by protecting judicial terms of office and their salaries.⁵⁰

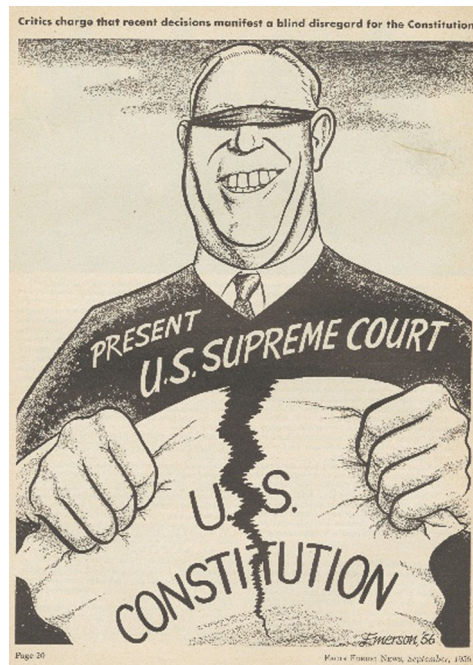
The idea of obscuring one’s own sight to enhance the wisdom of judgments continues to have currency. For example, in 1971, John Rawls argued in his book, **A Theory of Justice**, that the only way fairly to decide “principles of justice” was to be behind “a veil



Lady Justice, Diana K. Moore, 1996, Warren B. Rudman Federal Courthouse, Concord, New Hampshire. Figure 22.

of ignorance.”⁵¹ Veiled, one could develop principles without knowing whether one was “advantaged or disadvantaged” by the rules that one picked, and thus avoid self-interest.⁵² A visual translation of the deliberate act of blindfolding can be found in a 1996 installation at a federal courthouse in Concord, New Hampshire (figure 22). This large Justice is shown putting on her own diaphanous blindfold, which does not completely obscure her eyes.

Yet symbols have multiple and sometimes conflicting connotations—making them polyvocal. At times, the blindfold continues to be deployed satirically, here illustrated by borrowing an image from the Court’s archives—a 1956 cartoon (figure 23) of a blindfolded Chief Justice Earl Warren shown ripping up the Constitution. This cartoon, with its header, “Critics charge that recent decisions manifest a blind disregard for the Constitution,” was published in a short-lived magazine that decried many of the Court’s



“Critics charge that recent decisions manifest a blind disregard for the Constitution,” *5 Facts Forum News* 20 (Sept. 1956), cartoon by Emerson to accompany the story “Supreme Court under Fire.” Figure 23.

rulings, including *Brown v. Board of Education*.⁵³

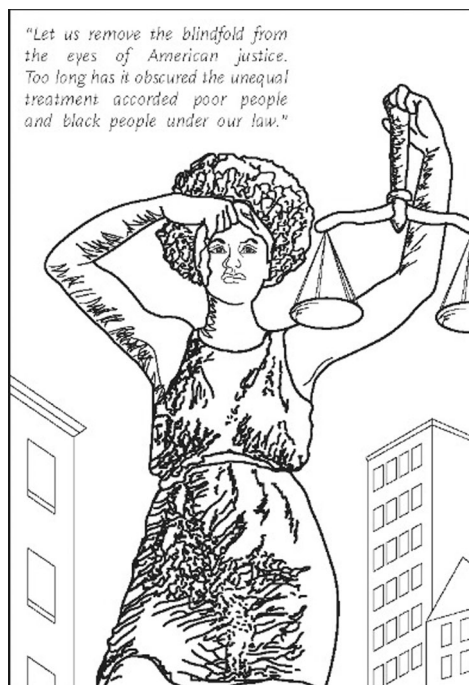
Cartoonists were not alone in criticizing Justice for failing “to see.” Twentieth-century authors and jurists on this and other courts make references to the harm produced by the blindness of decision makers. This point was made eloquently in the well-known poem, “Justice,” by Langston Hughes.

That Justice is a blind goddess
Is a thing to which we black are wise.
Her bandage hides two festering
sores
That once perhaps were eyes.⁵⁴

First published in 1923, this poem became part of Hughes’s 1932 collection, called *Scottsboro Limited*.⁵⁵ The title refers to the convictions of nine black young men (“the Scottsboro Boys”), taken from a freight train, charged in Alabama courts, wrongly found guilty of raping two young white women, and sentenced to death in 1931.⁵⁶ Hughes sparked and joined a chorus of protests, both national and international, about their treatment.

Hughes’s critique of the blindfold was reiterated in the 1970s, when a group of African-American judges came together to form a Judicial Council under the auspices of the National Bar Association, founded in the nineteenth century for the advancement of black lawyers. The logo chosen for the Judicial Council displays a Justice holding scales and taking off her blindfold (figure 24). The accompanying text reads: “Let us remove the blindfold from the eyes of American justice. Too long has it obscured the unequal treatment accorded poor people and black people under our law.”

Such concerns about blindness are also to be found in the case law of the Court. In 1950, for example, in his concurrence in *Cassell v. Texas*, Justice Felix Frankfurter addressed alleged race discrimination in the selection of grand jurors in Dallas County, Texas. He drew a distinction between what he termed the



Logo of the Judicial Council of the National Bar Association, 1971. Figure 24.

“blindness of indifference” and the “blindness of impartiality.”⁵⁷ As Justice Frankfurter explained, under Dallas County’s official rules, a large number of blacks were eligible, but none ever served. Frankfurter identified that fact as evidence of intentional discrimination: “the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute [all-white grand juries] to man’s purpose.”⁵⁸

The debate about the import of sight continues today—encoded in the metaphor about a “color-blind Constitution” and in discussions about the relevance of histories of discrimination based on race to the remedy of affirmative action.⁵⁹ The challenges have deepened because, as art theorist Jonathan Crary explained, we no longer believe in “Renaissance, or *classical*, models of vision” that posited a fixed vantage point that rendered the act of seeing intrinsically objective.⁶⁰ Observations are “embedded in a system of conventions and limitations” that

situate us all to see “within a prescribed set of possibilities.”⁶¹

Contesting the Icons

We turn next to the impact that the idea of all persons as rights-holders has had on the choices made about courthouse displays. To do so requires shifting from considering what Justice (or the law) should “see” to what observers *looking* at portrayals of Justice have expected to find. When sovereign authority was predicated on religious or monarchical power, rulers used didactic images of their own choosing—such as the abstract Virtue Justice, shown as a female, draped or naked.

But when women and men of all colors gained juridical capacity as litigants, witnesses, staff and, eventually, as jurors, lawyers, and judges, decisions about what images ought to adorn courthouses became more complex. No longer only a disembodied goddess serving as a vessel to legitimate authority, a woman presented as Justice

looked like someone—as illustrated by the image chosen (figure 24) in the 1970s by the Judicial Council of the National Bar Association. At several points in the twentieth century, portrayals on courthouse walls of Justice occasioned debates about what kind of woman could serve as the embodiment of iconic virtue and which visages were excluded. The conflicts about what imagery was to have a place of honor in American courts mirrored disputes in courts about what the constitutional guarantees of equality required.

One example comes from the 1930s when, in the wake of the Depression, the federal government funded jobs through the Works Projects Administration (WPA), supporting new constructions and artworks around the country.⁶² Hundreds of buildings went up, including a federal courthouse and post office in Aiken, South Carolina.⁶³ An artist from the Northeast won the commission for a large mural, called *Justice as Protector and Avenger*, installed behind a judge’s bench in a courtroom (figure 25).⁶⁴ The central

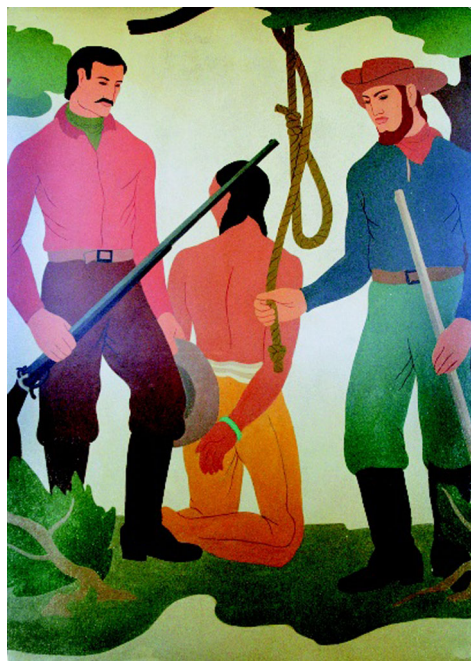


Justice as Protector and Avenger, Stefan Hirsch, 1938, Charles E. Simons, Jr. Federal Courthouse, Aiken, South Carolina. Figure 25.

female figure again references the Renaissance Virtue Justice, even as she also reflects the Mexican muralists with which the artist had studied. The WPA artist explained that his “figure of ‘Justice’” was “without any of the customary . . . symbolic representations (scale, sword, book. . .).”⁶⁵ Rather, the only “allegory” he had permitted himself was “to use the red, white and blue [of the United States flag] for her garments.”⁶⁶

What did others see? A local newspaper objected to the “barefooted mulatto woman wearing bright-hued clothing.”⁶⁷ The federal judge in whose courtroom the mural was displayed called it a “monstrosity”⁶⁸ —a “profanation of the otherwise perfection” of the courthouse, and wanted it removed.⁶⁹ The artist both protested and offered to repaint; he explained that he was “anxious to obliterate this ‘blemish,’ because I had certainly intended nothing of the sort.”⁷⁰ A proposed compromise to “lighten” Justice’s skin color⁷¹ never took place because of the press coverage about what had become a national controversy; the National Association for the Advancement of Colored People and artists objected to the condemnation and to the alteration of the art.⁷² The denouement was to cover the mural with a tan velvet curtain, seen at the edges of the photograph.⁷³

In 1938, a seemingly dark-skinned woman could not pass, uncontested, into the deserving ranks of those who qualified to represent “Justice.”⁷⁴ The draped wall echoed the limited responses of law, for, in that era, people labeled “mulattos” also did not have much protection in courts. Indeed, at the same time that the “mulatto” Justice was draped because she was seen as unsightly, another series of WPA murals were placed on the walls of the Ada County Courthouse in Idaho (figure 26).⁷⁵ A news report later described the scene as an “Indian in buckskin . . . on his knees with his hands bound behind his back . . . flanked by a man holding a rifle and another armed man



Courthouse mural, circa 1939 (photograph taken 2007), Old Ada County Courthouse, Boise, Idaho. Figure 26.

holding the end of a noose dangling from a tree.”⁷⁶

We have found no objections recorded at the time to the display of a lynching. But toward the end of the twentieth century, a judge in Idaho concluded that the imagery was offensive and ordered that it be draped with flags of the state and of the United States.⁷⁷ In 2006, questions were raised about whether to continue to hide the mural or paint it over.⁷⁸ The state legislature, in consultation with Indian tribes, decided instead that the murals should remain on view—framed by official, educational interpretive signs to explain that the picture reflected “the values” of that time.⁷⁹

A parallel set of questions has been raised about depictions of Mohammad, including that in the sequence of lawgivers on the Supreme Court frieze (see figure 1), displaying a line-up of lawgivers that was once a common motif in courthouses and state capitals. Another example comes from eight-foot-tall, half-ton stone statues placed on the roof of a 1902 Manhattan Beaux Arts



The New York State Supreme Court, Appellate Division, First Judicial Department, New York City, 1900. Architect: James Brown Lord. Figure 27.

courthouse designed by James Brown Lord (figure 27).⁸⁰ The theme there was also “World Law”;⁸¹ a statue of Justice is at the top of the pediment, where she holds two torches (fiery flames, per instructions from the Renaissance’s Ripa) above her head. Flanking Justice were lawgivers from Sparta, Athens, Byzantium, England and France, and religious figures—including Moses, Zoroaster, and Muhammad.

In 1955, when the statuary was taken down for cleaning, *The New York Times* ran a story accompanied by a photograph showing Muhammad, garbed in robes, sporting a flowing beard, wearing a turban, holding a book and a scimitar—somewhat similar to the one on the Supreme Court’s frieze (figure 1).⁸² Ambassadors from Egypt, Pakistan, and Indonesia objected that the figurative display was not consistent with Islamic practices. As a result, while the other statues were restored and replaced, the statue of Muhammad was not,⁸³

as can be seen from the empty space in the photograph in figure 28.

The 1935 Supreme Court’s building followed the great lawgivers program of earlier buildings. The Court thus looked nothing like what the changing aesthetics of the 1930s produced, as Art Deco styles moved toward Modernism. As we noted, Adolph Weinman’s grouping included Moses (holding tablets with Hebrew lettering),⁸⁴ Solomon,⁸⁵ and Muhammad, who joined the various emperors, kings, and Chief Justice John Marshall. In today’s terms, one could see the group as multicultural, ecumenically embracing diverse traditions. Yet, in many respects the imagery is also antiquated. The parade of male lawgivers puts no women of authority on display, and the religious imagery has prompted critical comments—some based on the United States Constitution and others stemming from religious attitudes toward pictorial representation.⁸⁶



Statuary on the roof of the New York State Supreme Court, Appellate Division, First Judicial Department, New York City, 1900. Figure 28.

Displays of Ten Commandments⁸⁷ in various public spaces have become a staple of First Amendment law. In such cases, members of the Court have sometimes referenced the Weinman friezes when explaining the distinction between a display impermissibly advancing a religious agenda and one appropriately forwarding a secular purpose. For example, in a 2005 decision holding impermissible a Ten Commandment display on a county court wall, Justice David Souter commented that: “We do not forget, and in this litigation have been frequently reminded, that our own courtroom frieze was deliberately designed . . . to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments . . . in the company of 17 other lawgivers, most of them secular figures.”⁸⁸ The Court concluded that there was “no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion.”⁸⁹ In the same year, when upholding the placement of the Ten Commandments monu-

ment on the grounds of a state park in Texas, Chief Justice William H. Rehnquist also noted that “[w]e need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze.”⁹⁰

The Court’s depiction of Muhammad has also drawn criticism. The Council on American-Islamic Relations requested that the sculpture be altered because, by showing Muhammad with a sword, it reinforced “long-held stereotypes of Muslims as intolerant conquerors.”⁹¹ In his 1997 response, Chief Justice Rehnquist noted that the Virtue Justice was often depicted with a sword, that “a dozen swords appear in the Courtroom friezes alone,” that remodeling would impair “the artistic integrity of the whole,” and that a federal statute specifically protected the Court’s architecture from alteration.⁹²

The sculpted frieze remains unchanged. But the accompanying written materials were revised with the help, as the Chief Justice

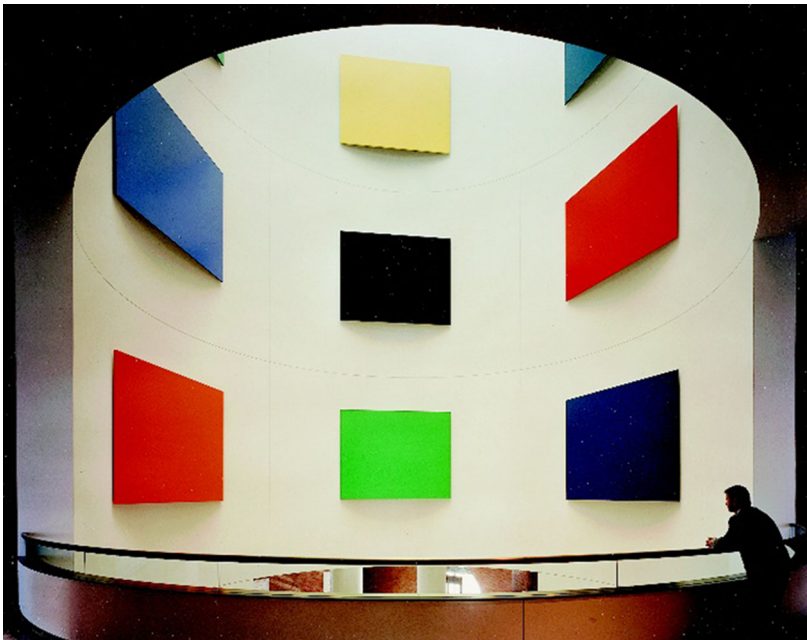
explained, of “numerous Muslim groups.”⁹³ The Supreme Court’s literature now describes the sculpture as “a well-intentioned attempt by the sculptor, Adolph Weinman, to honor Muhammad and it bears no resemblance to Muhammad.”⁹⁴ The website further advises that “Muslims generally have a strong aversion to sculptured or pictured representations of their Prophet.”⁹⁵

What options beyond Virtues and law-givers exist today? A wide variety of installations can be found in more recent federal construction, supported by federal

funds set aside for art-in-architecture and selected through procedures organized by the General Services Administration (GSA). One example of recent decisions comes from a federal courthouse (figure 29), that opened in Boston in 1998.⁹⁶ Justice Stephen Breyer, then the Chief Judge of the First Circuit, joined District Judge Douglas Woodlock in enlisting expert consultants to help design a building to reflect a “conversation across generations” about the central role played by courts in the community.⁹⁷ As Justice Breyer explained, the point was to provide a building



John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect Harry Cobb, 1998. Figure 29.



The Boston Panels, Ellsworth Kelly, 1998, in the John Joseph Moakley United States Courthouse, Boston, Massachusetts. Figure 30.

that “belongs not just to the judges or courts or lawyers but to the public as well.”⁹⁸ The design, by Harry Cobb, features a huge conoidal glass wall in a ten-story building to underscore a “sense of accessibility” and to make visible the entries to the more than two dozen courtrooms within.⁹⁹

The art commission went to Ellsworth Kelly, one of the United States’ most well-known contemporary artists, who created twenty-one aluminum and enamel panels of varying colors (*The Boston Panels*) placed in different locations within the building,¹⁰⁰ including nine horizontal panels in the central rotunda (figure 30). When the Supreme Court was built in the 1930s, federally funded arts programs repeatedly chose representational art over abstraction.¹⁰¹ The Kelly panels are thus innovative, as well as beautiful. Yet, what would have been considered by the WPA to seem avant-garde (and seen as “foreign” or “Russian”) has become, ironically, a conservative response to the complexity of Justice iconography in democracies. Kelly’s monochromes avoid the questions of what a figure of Justice might, could, or does look like.

Democracy thus affects our understanding of what ought to be shown on courthouse walls. Once “we” all became eligible to be participants in all roles in courts, challenges emerge about how to mark a space as truly welcoming of all persons. Arcane references to historic lawgivers and classical Virtues no longer suffice.

Making a New Icon in 1935

We turn then to the Court’s building itself. Many people are surprised to learn that, before 1935, the Court camped out briefly in state buildings and for most of its existence in the Capitol.¹⁰² Yet, in many respects, the 1930s were an appropriate time for the Court to get its first home and “a room of its own.”¹⁰³



United States Custom House, Galveston, Texas. Supervising Architect: Ammi B. Young, 1861; converted for use as a federal courthouse in 1917. Figure 31.

Explanations for why the timing was apt come by placing the Supreme Court’s building into the history of the development of the federal court system. A visual baseline comes from figure 31, a photograph of an 1861 building, constructed by the federal government in Galveston, Texas. A glance at its imposing façade would suggest to today’s viewers that it was a courthouse. But instead, it was the United States Custom House—one of some fifty buildings that the federal government owned outside of Washington, D.C. At that time, *no* building was named “U.S. courthouse,” and none were needed; fewer than forty federal judges were dispersed around the country.¹⁰⁴

All of that changed after the Civil War, as the national government used its buildings and its new laws to protect its victory and enshrine a “federal presence.”¹⁰⁵ Congress enacted a series of new federal jurisdictional statutes including, in 1867, expanded federal habeas corpus jurisdiction, Civil Rights Acts, and in 1875, general federal question jurisdiction.¹⁰⁶ Jurisdiction alone does not bring in cases; lawyers are needed to file them. In 1870, Congress created the Department of Justice, and filings surged. Growing dockets generated demands for more judges, whose numbers increased from about forty in 1850 to some sixty-five in the 1880s.¹⁰⁷

Cases, lawyers, jurisdiction, and judges generated demands for more courthouses. Localities vied for federal funds, and



United States Post Office (United States Court House and Post Office), Denver, Colorado, 1892. Supervising Architects: Mifflin E. Bell and Will. A. Freret. Figure 32.

politicians responded. The federal building stock grew. A good example, figure 32, is an imposing building erected in Denver, Colorado in 1892; its name, the U.S. Post Office and Court House, reveals the changing business of the federal government. In the years thereafter, dozens of these multi-function buildings were constructed.

As for the Supreme Court and its building, the key actor was William Howard Taft, who took office in 1921 as Chief Justice. Taft was not only the intellectual architect of the Court's building but also the engineer of the modern Supreme Court and the entire federal court system.¹⁰⁸ Within a year of becoming Chief Justice, he succeeded in persuading Congress to authorize a major increase in the number of federal judgeships and to give the Chief Justice the power to summon the senior judges of the circuits to

Washington to confer about the “business” of the federal courts.¹⁰⁹ That body (now called the Judicial Conference)—with the Chief Justice at its helm—became the judiciary’s policy-making center, expanded under Chief Justice Earl Warren to include district court judges. The Conference is aided by dozens of committees that oversee issues related to the judiciary’s workforce, which numbers almost 30,000 people.

In 1925, Taft won again in Congress, when it enacted the “Judges Bill”—legislation that enabled the Court to shed most of its mandatory appellate jurisdiction.¹¹⁰ The statute left the Justices free to select cases through certiorari petitions and thereby to prune the docket dramatically. (One scholar called this the birth of the modern Supreme Court, which, due to the discretionary authority that Congress authorized at Taft’s behest, is

able to “set its own agenda.”¹¹¹ Pending cases fell from 1,800 in 1890 to the contemporary levels controlled by the modern Court (which now issues some eighty opinions a year).¹¹² Taft’s other major initiative, a revolution in federal civil procedure, came to fruition after his death in 1930.¹¹³

In 1926, Taft gained authority to obtain land for the Court.¹¹⁴ In 1928, he obtained a charter to build the courthouse supervised by a special commission instead of the Office of the Capitol’s Architect.¹¹⁵ The commission, with Taft as its first chair, selected Cass Gilbert as the architect and, in 1929, Gilbert’s proposal met Taft’s expectations for a courtroom of “impressive proportions and monumental style.”¹¹⁶ In 1930, Congress appropriated funds for a building of “simple dignity.”¹¹⁷ The result (figure 33) in 1935 cost about \$100,000 less than the \$9,740,000 budgeted¹¹⁸ and marked the new power and independence that the Court had achieved under Taft’s leadership.

The response to the building has been mixed. One Justice objected to the Court’s “chilly opulence,”¹¹⁹ and another described it

as “almost bombastically pretentious.”¹²⁰ The more general complaint is that the building looks backwards, echoing the Greek Revival style that was common in federal construction during the early years of the Republic.¹²¹ As Paul Spencer Byard put it, Gilbert’s “problem was that the modernists were on to something very important . . . that the world had had enough of pomp and papering over.”¹²²

We suggest instead that the building be read as Janus-faced. The Court’s architecture and imagery indeed looked back, to enlist the authority of lawmakers long gone through reliance on what historians call “invented traditions”—new practices dressed up to seem longstanding.¹²³ And it worked. The building has come to be “treated with almost excess affection . . . as officially old—even though it is not very old.”¹²⁴

Yet the building’s inner workings reflected the degree to which the Court had extricated itself from Congress and achieved its ambition to become the hub of federal judicial authority.¹²⁵ Moreover, as Chief Justice Charles Evan Hughes commented when the cornerstone was laid in 1932, the



United States Supreme Court, Washington, D.C. Architect: Cass Gilbert, 1935. Figure 33.

building was a “monument to the work” of the Constitutional Convention, committed to “government of the people, for the people, by the people”; the building was thus a “symbol of . . . faith” in the Republic.¹²⁶ When viewed against the backdrop of the Depression, the building’s opulence (even if produced within its budget) was also a leap of faith that there would be a stable future.

Further, the design itself was forward-looking. The courtroom space was enlarged to provide more seats for lawyers and the public.¹²⁷ The courthouse also anticipated the central role that media would come to play in framing information about courts—and invited the press in. Taft is credited with suggesting rooms for the press.¹²⁸ The Court’s move to its own building prompted

a sense of a need for a “press contact man.”¹²⁹ In 1935, a new staff position, a “press clerk,” came into being; in 1947, the position was filled by an experienced journalist.¹³⁰

In 1973, under Chief Justice Warren Burger, the role turned into that of Public Information Officer (PIO). The numbers of court PIOs has since grown sufficiently large to produce an organization that meets annually to discuss the task of providing the public and the media with news of the courts.¹³¹ And, since its opening, the Supreme Court building has become a major tourist attraction, which clocks tens of thousands of visitors every year, augmented by millions who do so virtually by the Court’s website.¹³²

Another forward-looking aspect of the Courthouse is the inscription (figure 34)



United States Supreme Court, *The Contemplation of Justice* and the inscription “Equal Justice under Law,” Washington, D.C., 1935. Figure 34.



East Side Pediment and the inscription “Justice the Guardian of Liberty,” U.S. Supreme Court, 1935. Figure 35.

above the front door—“Equal Justice under Law.” Another phrase, “Justice the Guardian of Liberty” (figure 35), chosen by Chief Justice Charles Evans Hughes, appears on the East Pediment; liberty was the theme of the speech that he gave when the building cornerstone was laid.¹³³ Yet the words that have become known as the Court’s motto were not those invoked in the 1932 ceremony when the building began. “Equal Justice Under Law” is the phrase that has made its way into hundreds of federal and state opinions,¹³⁴ and that serves as the “tag line” for the Court in many of its publications.¹³⁵

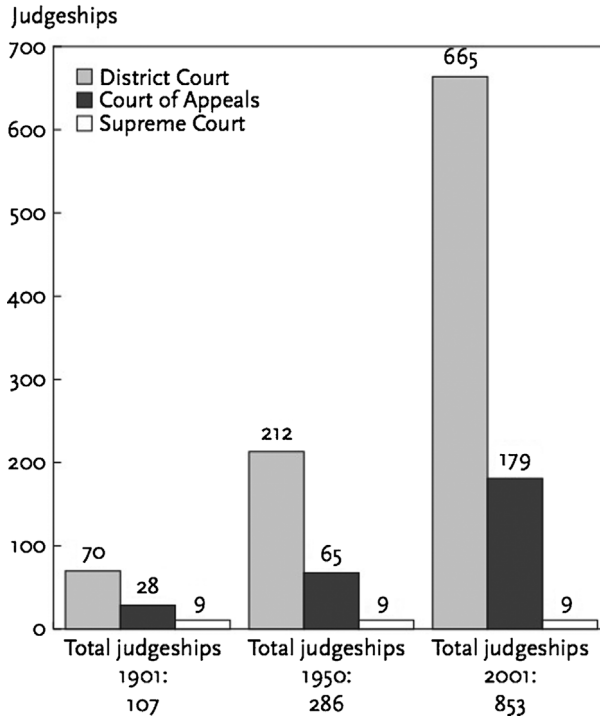
In 1935, “Equal Justice under Law” did not have the import that it has today. This facet of adjudication in democracy—that equal justice renders all persons rights-holders—was not forged until the second half of the twentieth century, and the Courtroom itself has become the icon for that proposition. Prompted by lawyers including Thurgood Marshall and Ruth Bader Ginsburg, the Supreme Court reinterpreted the Fourteenth Amendment to ensure that women and men of all colors were recognized as protected by an array of statutory and constitutional rights. Under state and federal

law, equality norms have come to restructure family life, respond to domestic violence, reshape employee and consumer protections, and protect indigenous and civil rights.

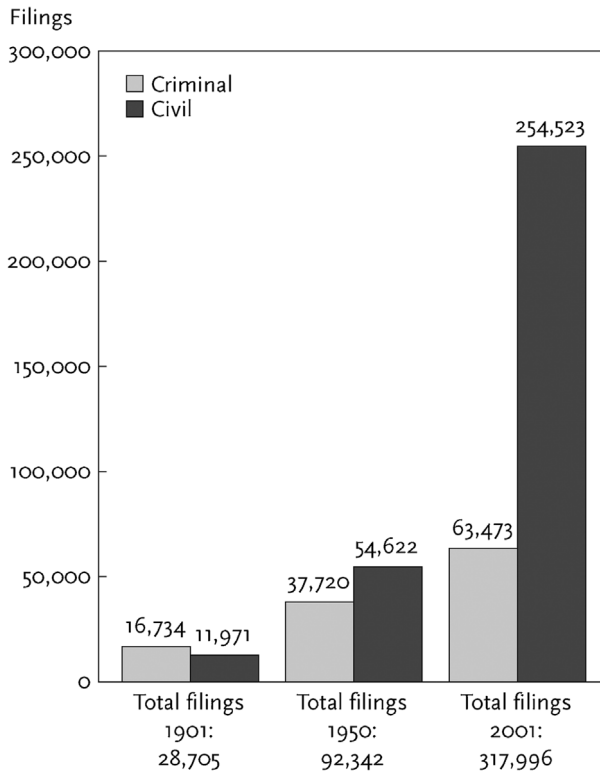
Thus, the building has lived up to its own pretensions. It marked the new hierarchical authority of the Supreme Court and of the Chief Justice, and it forecast the role the Court would come to assume as a national icon. Viewed from abroad as well as from within, the Court has come to stand for the propositions that adjudication is central to the relationships between government and those governed and that women and men of all colors can be in all of the roles that the justice system has to offer.

Twentieth-Century Aspirations and Twenty-First-Century Challenges

Reflections on the contemporary workings of the system that Chief Justice Taft helped to spawn are in order. A snapshot is provided by two charts. One (figure 36) maps the rise in life-tenured judgeships, from some 100 authorized judgeships in 1901 to more than 850 life-tenured positions in 2001.¹³⁶ Another chart (figure 37) tracks the growth in filings from



Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001. Figure 36.



Civil and Criminal Filings in United States District Courts, 1901, 1950, 2001. Figure 37.

under 30,000 cases brought yearly in 1901 to the more than 300,000 filed in 2001.¹³⁷

Once again, buildings provide another way to see the changes. In the mid-1930s, the first federal skyscraper courthouse (designed, as was the Supreme Court, by Cass Gilbert) opened in New York City. (See figure 38). The twenty-first century is represented in this montage by the Thomas Eagleton Courthouse (figure 39) in St. Louis, Missouri; when opening its doors in 2000, it was the tallest federal courthouse in the country.¹³⁸

These buildings make the point that, just as the image of “Justice” was an evolving invention over centuries, so too is the idea that, in lieu of a multi-function “town hall,” another kind of civic building was needed. A “purpose-built” structure designed exclusively for the use of lawyers and judges and litigants gained its name, “courthouse,” to reflect those special



United States Courthouse, New York City, New York. Architect: Cass Gilbert, 1936; renamed in 2001 the Thurgood Marshall United States Courthouse. Figure 38.



Thomas F. Eagleton Federal Courthouse, St. Louis, Missouri, 2000. Architects: Hellmuth, Obata + Kassabaum, Inc. Figure 39.

functions. The hundreds of federal buildings dedicated to the federal courts represent more than the political success of the professionalizing groups of lawyers, judges, and architects who obtained government investments to turn courthouses into signatures of the state. These buildings are tributes to democratic ideals that came to fruition in the twentieth century and that transformed the obligations and the workload of courts.

A brief review of the four pillars of adjudication in democracy is in order. First, long before democracy, judges were bound by rules instructing them to “hear the other side.” But as Felix Frankfurter explained, “hear the other side” became a “command, spoken with the voice of the Due Process Clause,”¹³⁹ which transformed its import. In the years since the Court’s building opened, the Court has been at the forefront of explaining the requirements of “fairness” through a parade of famous judgments.

In the 1940s, the Court’s analysis in *International Shoe v. Washington* of personal jurisdiction rested on an assessment of the fairness of state courts exercising jurisdiction over those outside their boundaries, and that approach was reiterated in 2011 in *J. McIntyre Mach., Ltd. v. Nicastro*.¹⁴⁰ Other landmarks include *Gideon v. Wainwright*’s explanation in 1963 of the right to counsel for felony defendants,¹⁴¹ and *Brady v. Maryland*’s articulation that same year of prosecutors’ obligations to turn over exculpatory materials.¹⁴² Similarly, fairness connects the concerns in 1970 in *Goldberg v. Kelly* about the provisions of a hearing before welfare benefits are terminated with the focus in 2011 in *Turner v. Rogers* on the procedures needed when rendering judgment in civil contempt proceedings.¹⁴³ These commitments to fairness helped to produce the hundreds of federal and state courthouses around the country.

A second facet of the impact of democratic commitments to popular government is the mandate that courts be open. During the Renaissance, the public was invited to watch

spectacles of judgment and of punishment. But the public was not presumed to possess the authority to evaluate, let alone contradict, sovereign power. Over time, however, court proceedings became obligatorily public, as illustrated in the 1676 Charter of the English Colony of West New Jersey, which provided that

in all publick courts of justice for trials of causes, civil or criminal, any person or persons . . . may freely come into and attend. . . . that justice may not be done in a corner or in any covert manner.¹⁴⁴

The practice of “publicity,” to borrow Jeremy Bentham’s term, enabled what Bentham called the “Tribunal of Public Opinion”¹⁴⁵ to assess the work of government actors. As Bentham explained, while presiding at trial, a judge is “under trial.”¹⁴⁶ From the baseline of the Renaissance, the public’s new authority to sit in judgment of judges and, inferentially, of the government, worked a radical transformation. “Rites” (r-i-t-e-s) turned into “rights” (r-i-g-h-t-s)—imposing requirements that governments provide “open and public” hearings and respect the independence of judges.

The new states in North America took this precept to heart, as the words “all courts shall be open,”¹⁴⁷ coupled with clauses promising remedies for harms to persons’ property and person, were reiterated in many of their constitutions. Illustrative is the 1818 Constitution of Connecticut’s requirement that “all courts shall be open.”¹⁴⁸ The federal Constitution’s guarantee of a “public and speedy trial” for criminal defendants, coupled with jury rights, the First Amendment, and the Due Process Clause, have been interpreted to require that both civil and criminal trials, related proceedings, and court records be open.¹⁴⁹ In *Presley v. Georgia*, for example, the Court held unconstitutional the exclusion of the public from a jury voir dire.¹⁵⁰

As spectators have become active participants (“auditors,” in Bentham’s terms),¹⁵¹ courts have become an important venue for the dissemination of information about government.¹⁵² The Courthouse dedicated chairs for the press, and its PIO facilitates this function. The free-standing building also reflects—as Taft had argued it needed to—a third attribute of adjudication in democracies, the independence of judges.¹⁵³ As noted above, this posture is a departure from the tradition of judges as loyal servants of the state. State and federal constitutions make this point—iconically in the United States Constitution’s Article III, which requires that judges hold their offices “during good behavior,” with salaries protected. The fourth facet of democratic adjudication is what the words inscribed in 1935 on the outside of the Supreme Court—“equal justice under law”—have come to mean.

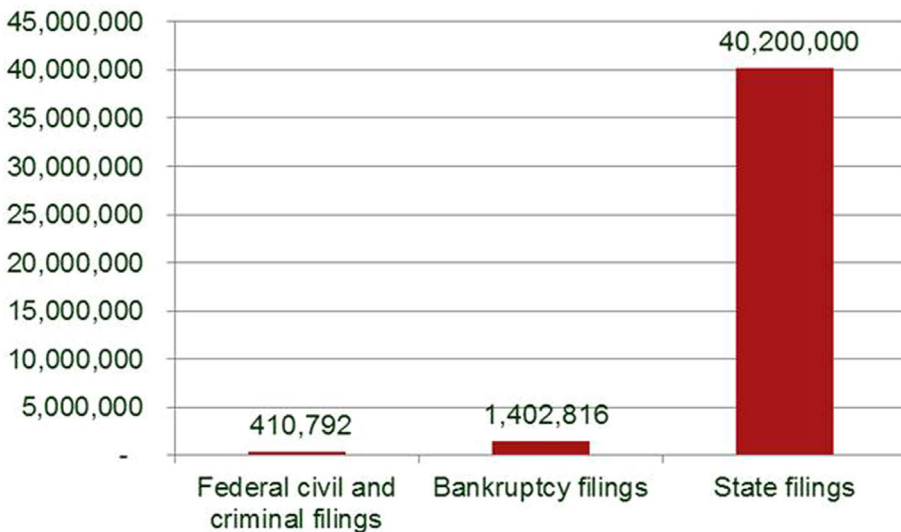
If the buildings are one tribute to these ideas, another is a graph (figure 40) showing the filings in 2009 in both state and federal systems. The tiny bar at the left represents all the civil and criminal cases filed in that year in the federal courts—about 410,000. The next, and slightly larger bar, marks the almost 1.5 million petitions for bankruptcy.¹⁵⁴ The tall

bar counts more than 40 million filings in state courts, and that number does not include traffic and most juvenile and family law proceedings.¹⁵⁵

This chart should be read as a celebration of the success of democratic adjudication. A host of people turn regularly to courts to seek assistance. Build it, and they have come. In short, this Court with all its gleaming marble is not just a fake old building, imitating Greek temples as it looks backwards. The Courthouse has come to mark the project of the twentieth century, which was to welcome all persons into court.

The questions for the twenty-first century are what the imagery within this building and the words on its door will mean. Democracy not only has changed adjudication, it also has challenged it profoundly. The issues are how courts can respond to all those seeking to be heard, and the numbers of needy litigants are staggering. California has 4.3 million people in its court as civil litigants without lawyers.¹⁵⁶ New York has 2.3 million such civil litigants.¹⁵⁷

In response, many judicial leaders have sought to secure better funding for courts, to develop “problem solving” approaches, and to support litigants with initiatives such as that



Comparing the Volume of Filings: State and Federal Courts, 2001. Figure 40.

known as “civil *Gideon*.”¹⁵⁸ Others have argued to limit access to courts and to route people to alternatives, either through devolution to administrative agencies or by outsourcing to private providers for arbitration and mediation.¹⁵⁹ Those alternatives often do not provide open access to the public, nor include mechanisms to protect disputants with fewer resources than opponents.

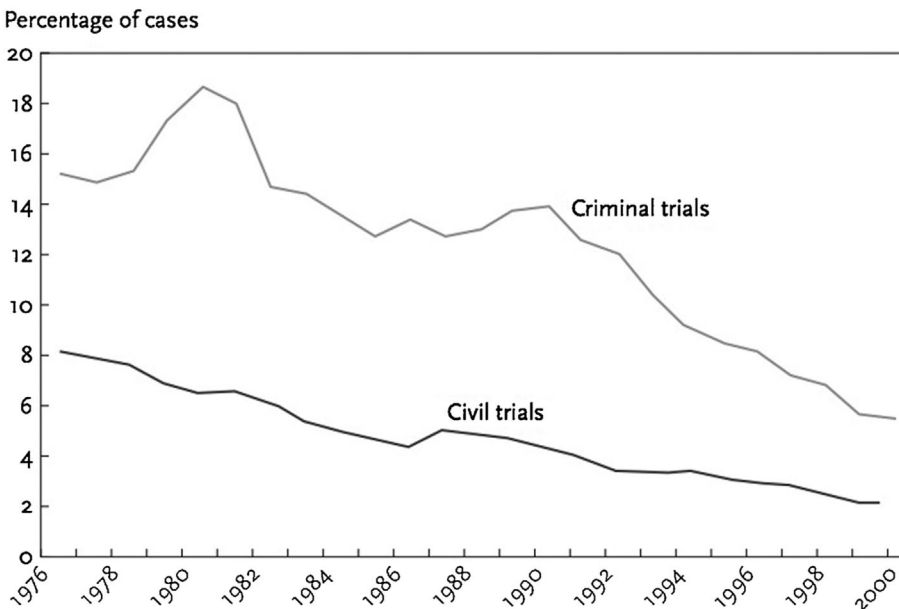
The many impressive courthouses across the country seem invulnerable. But, in this era of fiscal constraints, the judiciary has not been immune from pressures on budgets. In 2009, New Hampshire suspended civil jury trials for some time, and Maine ordered that its clerks’ offices closed at noon a day a week. The federal judiciary is likewise faced with the difficult task of cost containment, resulting in concerns about the ability to provide critical litigation services.¹⁶⁰

Absent reversal of the current trends, the charts of the twentieth century—with bar graphs of judgeships, courthouses, and filings all rising over the decades—are not likely to be paralleled in the twenty-first century. Indeed, in the first decade of the new century, filings in the federal courts leveled off, and the

percentage of cases tried had declined significantly,¹⁶¹ as can be seen in a chart (figure 41), borrowed from the Honorable Patrick Higginbotham of the Fifth Circuit. The declining rate of civil and criminal trials during the last decades of the twentieth century has continued; as of 2010, of 100 civil cases filed in the federal courts, fewer than 2 started a trial.

This movement away from public adjudication is a problem *for* democracies because adjudication has important contributions to make *to* democracy. Open courts teach the lessons of democracy—that the government owes duties of respect and dignity to all disputants, entitled to be treated as equals by both the judiciary and their adversaries. Decisions rendered in courts are sources of public debate that regularly spark discussions about what legal rules should be and prompt calls for reforms.

How, then, looking forward, might one think about the imagery of justice? We have answered that question in part by providing an amalgam of charts and pictures of buildings—to capture the breadth of the system that democratic justice generates. An implicit



Civil and Criminal Trial Rates: United States Federal Courts, 1976–2000. Figure 41.



Cook County Courthouse, Grand Marais, Minnesota. Architects: Kelly and Lignell, 1912. Figure 42.

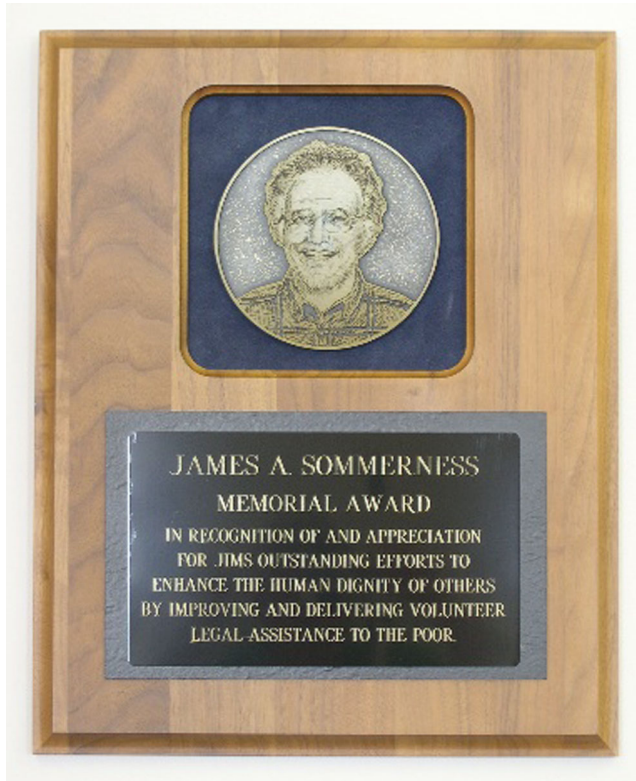
proposition merits being stated explicitly: Outsourcing adjudication to private venues undercuts the ability to see the impact and to debate the content of legal rules. The sword—enforcement of judgments—remains, but the capacity to judge the judges declines when the publicity afforded by open courthouse doors is lacking.

In addition to turning to charts and buildings as the new icons of justice, other emblems are being shaped in response to the new demands of democratic adjudication. A closing example comes from another Beaux Art building, dating from 1912 (figure 42) in Grand Marais, Minnesota. We happened upon the building on our way to speak at a judicial conference of the Eighth Circuit. Because of the iconic role played by the Supreme Court's design, we assumed the building was a court (although it could also have been a bank or an insurance company). We asked a person in a front office, whom we later learned was a probation officer, if the court had any iconography—any images. He promptly showed us the courtroom, and pointed to a memorial plaque (figure 43) for a man who

had then recently died and had been a public defender. Next to it (figure 44) was a framed and well-worn corduroy jacket in which the lawyer had regularly appeared in court.

While housed in a courthouse hundreds of miles from Washington, D.C. and in a county of about 5,000 people, this object is an artifact of the Court's work. The display in Grand Marais is not only a tribute to one man's "efforts to enhance the human dignity of others by improving and delivering volunteer legal assistance to the poor" but also to the law of this Court, insistent in *Gideon v. Wainwright* on rights to counsel for the indigent. The framed jacket and the explanatory plaque exemplify the new icons of justice developing to mark obligations in democracies to support both courts and their users. A catalogue of the imagery that should be associated with the Supreme Court thus moves beyond what can be seen inside and on the façade.

We conclude, with a return to where we began—the Court's building which, now "officially old,"¹⁶² seems as if were always in place, just as many equality rights now



James A. Sommerness Memorial Award, Cook County Courthouse, Grand Marais, Minnesota. Figures 43 and 44.

seem so natural as to have been there forever. Yet a question exists about the wisdom of assimilating the invention of democratic courts into the landscape through such old-fashioned-looking structures. The risk is that it deflects attention from the remarkable and recent project that produced this stone structure—the social and political movements of the twentieth century that insisted on government subsidies not just to build courts but to make them welcoming to an array of users.

Federal courthouses once shared quarters with post offices, and both institutions have been housed in grand structures meant to last. Indeed, during the 1940s and 1950s, post offices were so busy that, in some buildings, federal judges were required to find space elsewhere to accommodate the demand for mail services. Yet the federal postal system, which Congress obliges to provide universal services,¹⁶³ is now facing competition from private providers as it closes facilities around the country, advertises some of its marvelous buildings for sale, and faces critics calling for radical reductions in government support. Courthouses may well follow suit.

Thus, the words “Equal Justice under Law” above the front steps should be reread as instructions on the new work required, if the commitments embodied in the futuristic Court’s building will be sustained—to give access to independent judges required to hear both sides of disputes and to accord equal and dignified treatment of claimants before a public empowered to respond.

*All rights reserved, Judith Resnik and Dennis Curtis, 2013. This essay builds on our lecture for the Supreme Court Historical Society’s Annual Meeting in June of 2012 and, in turn, on our book, *Representing Justice: Invention, Controversy and Rights in City States and Democratic Courtrooms*, published by Yale University Press in 2011. Our thanks to Justice Breyer, Justice Ginsburg, and Gregory Joseph for the warm welcomes; to Clare Cushman for editorial guidance; to the Supreme

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ENDNOTES

¹ JUDITH RESNIK AND DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

² See generally Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109–142 (Craig Calhoun ed., 1992).

³ See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Reed v. Reed*, 404 U.S. 71 (1971); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

⁴ See Adolph Alexander Weinman, file memo, Project files, box 463, folder 4 in Cass Gilbert Collection, PR 021 Department of Prints, Photographs, and Architectural Collections, New York Historical Society [hereinafter Gilbert Papers]. Weinman had considerable authority over the design, although the Supreme Court Building Commission, chaired by the Chief Justices (Taft, and then Charles Evan Hughes) on occasion made minor suggestions or alterations. See Cass Gilbert, Jr., *The United States Supreme Court Building*, 72 ARCHITECTURE 301 (Dec. 1935); Letter from Gilbert to Weinman (Apr. 5, 1934), in Adolph A. Weinman Papers, Archives of American Art, Smithsonian Institution [hereinafter Weinman Papers].

⁵ *Courtroom Friezes: North and South Walls, Information Sheet*, OFFICE OF THE CURATOR, SUPREME COURT OF THE U.S. (May 8, 2003), <http://www.supremecourt.gov/about/north&southwalls.pdf> [hereinafter *North & South Wall Information Sheet*]; *Courtroom Friezes: East and West Walls, Information Sheet*, OFFICE OF THE CURATOR, SUPREME COURT OF THE U.S. (Oct. 1, 2010), <http://www.supremecourt.gov/about/east&westwalls.pdf> [hereinafter *East & West Walls Information Sheets*].

⁶ *figures of Justice*, OFFICE OF THE CURATOR, SUPREME COURT OF THE U.S. (May 22, 2003), <http://www.supremecourt.gov/about/figuresofjustice.pdf>; *East & West Walls Information Sheets*.

⁷ See, e.g., Kathryn E. Slanski, *The Law of Hammarabi and Its Audience*, 24 YALE J.L. & HUMAN. 97 (2012); J.G. Manning, *The Representation of Justice in Ancient Egypt*, 24 YALE J.L. & HUMAN. 111 (2012); Adriaan Lanni, *Publicity and the Courts of Classical Athens*, 24 YALE J.L. & HUMAN. 119 (2012); Bruce W. Frier, *Finding*

a *Place for Law in the High Roman Empire*, in *SPACES OF JUSTICE IN THE ROMAN WORLD* (F. de Angelis ed., 2009); Beth A. Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 *YALE J.L. & HUMAN.* 125 (2005).

⁸ Slanski, *supra* note 7, at 99.

⁹ A now-classic account is Robert M. Cover's *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

¹⁰ The title *Book of the Dead* is a "term coined in the nineteenth century for a body of texts known to the Ancient Egyptians as the Spells for Going Forth by Day." GERALDINE PINCH, *EGYPTIAN MYTHOLOGY: A GUIDE TO THE GODS, GODDESSES, AND TRADITIONS OF ANCIENT EGYPT* 26 (2002). See also *Introduction to the Ancient Egyptian Book of the Dead* 11–12 (Carol Andrews ed., Raymond O. Faulkner trans., 1972).

¹¹ PINCH, *supra* note 10, at 159; ERIK HORNUNG, *IDEA INTO IMAGE: ESSAYS ON ANCIENT EGYPTIAN THOUGHT* 139, 140–161 (Elizabeth Bredeck trans., 1992); JOYCE TYLDESLEY, *JUDGEMENT OF THE PHARAOH: CRIME & PUNISHMENT IN ANCIENT EGYPT* 18 (2000).

¹² A translation of the "judgment" in Spell 30b and depicted in figure 12, comes from *THE EGYPTIAN BOOK OF THE DEAD, THE BOOK OF GOING FORTH BY DAY, BEING THE PAPYRUS OF ANI, ROYAL SCRIBE OF THE DIVINE OFFERINGS OF ALL THE GODS, WRITTEN AND ILLUSTRATED CIRCA 1250 BCE at text accompanying Plate 3* (Raymond O. Faulkner & Dr. Ogden Goelet Jr. trans., 1994).

O my heart of my different ages! Do not stand up as a witness against me, do not be opposed to me in the tribunal, do not be hostile to me in the presence of the Keeper of the Balance . . . Do not tell lies about me in the presence of the god; . . .

Thus say Thoth, judge of truth, . . . Hear this word of very truth. I have judged the heart of the deceased, and his soul stands as a witness for him. His deeds are righteous in the great balance, and no sin has been found in him.

¹³ See HELEN NORTH, *FROM MYTH TO ICON: REFLECTIONS OF GREEK ETHICAL DOCTRINE IN LITERATURE AND ART* (1979); JANE ELLEN HARRISON, *EPILOGOMENA TO THE STUDY OF GREEK RELIGIONS AND THEMIS: A STUDY OF THE SOCIAL ORIGINS OF GREEK RELIGION* (1962); EMMA STAFFORD, *WORSHIPPING VIRTUES: PERSONIFICATION AND THE DIVINE IN ANCIENT GREECE* (2000); Dougal Blyth & Tom Stevenson, *Personification in Greek Literature and Art*, in *UNDER THE AEGIS: THE VIRTUES* (1997).

The gendered association of female to Virtue and male to Vice is the subject of many analyses. See, e.g., MARINA WARNER, *MONUMENTS AND MAIDENS: THE ALLEGORY OF THE FEMALE FORM* 155 (1985); Henry Kraus, *Eve and Mary: Conflicting Images of Medieval Woman*, in *FEMINISM AND ART HISTORY: QUESTIONING THE LITANY* 77, 81 (Norma Broude & Mary D. Garrard eds., 1982).

¹⁴ See ADOLF KATZENELLENBOGEN, *ALLEGORIES OF THE VIRTUES AND VICES IN MEDIEVAL ART* 28 (Alan J. P. Crick trans., 1964).

¹⁵ NORTH, *supra* note 13, at 178 n. 3.

¹⁶ See Mary Phillips Perry, *On the Psychostasis in Christian Art—Part I and Part II*, 22 *BURLINGTON MAGAZINE* 208 (Jan. 1913).

¹⁷ Cesare Ripa, whose original name was Giovanni Campani, was born in Perugia around 1560. Although Ripa is known for its illustrations, the first edition of Ripa's *Iconologia* was published without pictures in Rome in 1593, and scholars do not believe that Ripa had direct involvement in the drawings used in subsequent editions. See Stefano Pierguidi, *Giovanni Guerra and the Illustrations of Ripa's Iconologia*, 61 *J. WARBURG & COURTAULD INST.* 158, 167, 174–75 (1998). The first illustrated "Ripa" was published in 1603, followed by more than forty editions in eight languages, many of which were selective renditions or extrapolations.

In our discussions, we rely on CESARE RIPA, *ICONOLOGIA* (Padua, Ital.: Pietro Paolo Tozzi, 1611; New York, NY: Garland Publishing, 1976) [hereinafter RIPA, PADUA–1611]; CESARE RIPA, *ICONOLOGIA*, vols. 1 & 2 (Padua, Ital.: Pietro Paolo Tozzi, 1618; Torino, Ital: Fògola Editore in Torino, 1988) [hereinafter RIPA, PADUA–1618]; CESARE RIPA, *ICONOLOGIE* (I. Baudoin, ed., Paris, Fran.: Chez Mathieu Guillemot, 1644) [hereinafter FRENCH RIPA–1644]; CESARE RIPA, *ICONOLOGIA* (Amsterdam, Neth: Dirck Pietersz Pers, 1644) [hereinafter DUTCH RIPA–1644]; CESARE RIPA, *BAROQUE AND ROCCO PICTORIAL IMAGERY, THE 1758–68 HERTLE EDITION OF RIPA'S ICONOLOGIA* (EDWARD A. MASER EDITION ED. 1971); CESARE RIPA, *ICONOLOGY LONDON 1779* IN TWO VOLUMES BY GEORGE RICHARDSON (1976). Translations of the French and Italian are by Allison Tait.

Another important source for Renaissance imagery is Andreas Alciatus (or Andrea Alciato or Alciun or Alcati), who was a professor of Roman law and whose emblem treatise (collecting moralizing short poems, epigrams, and illustrations) was first published in 1531 and thereafter in some 150 editions. See 1–2 ANDREAS ALCIATUS, *THE LATIN EMBLEMS: INDEX EMBLEMATICUS* (Peter M. Daly ed., 1985) (unpaginated edition with numbered emblems).

¹⁸ See ERNST GOMBRICH, *SYMBOLIC IMAGES: STUDIES IN THE ART OF THE RENAISSANCE* (1978); Ernst Gombrich, *Icones Symbolicae: The Visual Image in Neo-Platonic Thought*, 11 *J. WARBURG & COURTAULD INST.* 163, 183 (1948); ERWIN PANOFKY, *MEANING IN VISUAL ARTS* (1955); EMILE MÂLE, *L'ART RELIGIEUX DU 12E SIECLE EN FRANCE (RELIGIOUS ART OF THE 12TH CENTURY IN FRANCE)* (4th ed. 1940); JANE APTEKAR, *ICONS OF JUSTICE: ICONOGRAPHY AND THEMATIC IMAGERY IN BOOK V OF THE FAERIE QUEENE* (1969).

¹⁹ Ripa's seven justices were Justice ("Giustitia"), Justice According to Aulus Gellius ("Giustitia . . . che riferisce

Aulo Gellio”), Principled (or Strict) Justice (“Giustitia retta”), Rigorous Justice (“Giustitia rigorosa”), Justice of Pausanias in the Eliaci (“Giustitia di Pausania ne gl’Eliaci”), and Justice on the medals of Hadrian, Antoninus Pius, and Alexander (“Giustitia delle Medaglie d’Adriano, d’Antonio Pio, & d’Alessandro”). Discussion of the clear-eyed appearance of all but one comes from Erwin Panofsky, *Blind Cupid*, in *STUDIES IN ICONOLOGY: HUMANISTIC THEMES IN THE ART OF THE RENAISSANCE* 109, n. 48 (1962) [hereinafter Panofsky, *Blind Cupid*]. See also RESNIK & CURTIS, REPRESENTING JUSTICE, at 43–44, 69–70.

²⁰ FRENCH RIPA–1644, *supra* note 17. This image can be found in Judith Resnik, Dennis Curtis, Allison Tait & Mike Widener, *The Remarkable Run of a Political Icon: Justice as a Sign of the Law* (2011), <http://library.law.yale.edu/exhibits/justice-sign-law>.

²¹ RIPA, PADUA–1611, *supra* note 17, at 201–204; Theodore Ziolkowski, *The Figure of Justice in Western Art and Literature*, 75 *INMUNKWAHAK: J. OF HUM.* 187, 199 (1996). Gellius was a Latin grammarian of the second century CE who authored *Noctes atticae* (*Attic Nights*). Ripa instructed that the Justice according to Aulus Gellius be shown as:

A woman who is a beautiful virgin, crowned and dressed in gold who, with honesty and discipline, shows herself worthy of reverence, with eyes of the most acute vision and a necklace around her throat that is decorated with an eye.

Plato said that Justice sees all and that from ancient times priests were called seers of all things. From whence Apuleius swore by the eye of the Sun and Justice together to show that one is as insightful as the other . . . [and they are] qualities that ministers of Justice must have, because they must also be able to discover truth and, in the manner of virgins, must be exempt from passion, not . . . corrupted by flattery, gifts, or anything else . . . To indicate Justice and intellectual integrity the ancients used a jug, a basin, a column—as is verified on old marble sepulchers and by diverse antiquities, such that Alciatus said: A good judge must be pure of soul and clean of hands, if he wishes to punish crime and avenge injury.

²² Giulio Romano, who lived from 1499 to 1546 and was Raphael’s student, was born in Rome. See Frederick Hartt, *Raphael and Giulio Romano: With Notes on the Raphael School*, 26 *ART BULL.* 67, 80 (1944) [hereinafter Hartt, *Raphael and Romano*]; FREDERICK HARTT, GIULIO ROMANO (1958). The Justice appears in the Sala di Constantino (Room of Constantine), where the murals relate to Constantine and depict his baptism, his address to his troops, a battle, and the “triumph of Christianity.” *Id.* at 48.

²³ RIPA, PADUA–1611, *supra* note 17, at 203; RIPA, PADUA–1618, *supra* note 17, at 188.

²⁴ Discussions of the relationship between the ostrich and Justice imagery can be found in PINCH, *supra* note 10, at 159–160; Liana de Girolami Cheney, *Giorgio Vasari’s Astraea: A Symbol of Justice*, 19 *VISUAL RESOURCES* 283, 290 (2003); Francis Ames-Lewis, *Early Medicean Devices*, 42 *J. WARBURG & COURTAULD INST.* 122, 127 (1979); Millard Meiss, *Ovum Struthionis*, in *STUDIES IN ART AND LITERATURE FOR BELLE DA COSTA GREENE* 95 (Dorothy Miner ed., 1945).

²⁵ Egyptian ideology conceived of the “solar eye,” or “Eye of Ra,” and spoke of Ra as the “creator sun god.” See PINCH, *supra* note 10, at 19, 68–69.

²⁶ ERWIN PANOFSKY, *THE LIFE AND ART OF ALBRECHT DÜRER* 78 (1943) (quoting the 1480 *Reptertorium morale* by Petrus Berchrius).

²⁷ See *THE COMPLETE ENGRAVINGS, ETCHINGS AND DRYPOINTS OF ALBRECHT DÜRER* 52, No. 25, *Sol Justitiae*, or *The Judge* (Walter L. Strauss ed., 1972).

²⁸ *Job* 9:24, *NEW INTERNATIONAL TRANSLATION BIBLE* (2011). In older translations available online, including the King James, Geneva, Rheims Douai, and others, the translation was “covereth the face.”

²⁹ *Mark* 14:65, *NEW INTERNATIONAL TRANSLATION BIBLE* (2011). “Then some began to spit at him; they blindfolded him, and struck him with their fists. . . .” In earlier translations the phrase “cover his face” was used in lieu of the word blindfold. See also *Luke* 22:64 (“They blindfolded him and demanded, Prophecy! Who hit you?”).

³⁰ See MOSHE BARASCH, *BLINDNESS: THE HISTORY OF A MENTAL IMAGE IN WESTERN THOUGHT* 28–29 (2001); WILLIAM R. PAULSON, *ENLIGHTENMENT, ROMANTICISM, AND THE BLIND IN FRANCE* 1–9 (1987).

³¹ BARASCH, *supra* note 30, at 83.

³² The two are “perhaps the most celebrated exemplars of their genre.” See Nina Rowe, *Idealization and Subjection at the South Portal of Strasbourg Cathedral*, in *BEYOND THE YELLOW BADGE: ANTI-JUDAISM AND ANTISEMITISM IN MEDIEVAL AND EARLY MODERN VISUAL CULTURE* 179 (Mitchell B. Merback ed., 2008).

³³ MICHAEL CAMILLE, *THE GOTHIC IDOL: IDEOLOGY AND IMAGE-MAKING IN MEDIEVAL ART* 178 (1991). The name has various spellings, including Synagogue and Sinagogue. Depictions of Synagoga reflected the spread of anti-Semitism. See Sara Lipton, *The Root of All Evil: Jews, Money and Metaphor in the Bible Moralisee*, 1 *MEDIEVAL ENCOUNTERS* 301–22 (1995); HEINZ SCHRECKENBERG, *THE JEWS IN CHRISTIAN ART: AN ILLUSTRATED HISTORY* 14–16 (1996).

³⁴ WOLFGANG S. SEIFERTH, *SYNAGOGUE AND CHURCH IN THE MIDDLE AGES: TWO SYMBOLS IN ART AND LITERATURE* 29–32 (Lee Chadeayne & Paul Gottwald trans., 1970).

³⁵ BARASCH, *supra* note 30, at 83. In another famous image, Giotto depicted Synagoga turning her head left toward darkness and away from the “light that is Christ in the Gospel of John.” Laurine Mack Bongiorno, *The Theme of the Old and the New Law in the Arena Chapel*, 50 ART BULL. 11, 13–14 (1968).

³⁶ See Nina Rowe, *Synagoga Tumbles, a Rider Triumphs: Clerical Viewers and the Fürstenportal of Bamberg Cathedral*, 45 GESTA 15, 26 (2006).

³⁷ Several commentators identify this image as the first to add a blindfold to Justice. See, for example, WOLFGANG PLEISTER & WOLFGANG SCHILD, RECHT UND GERECHTIGKEIT IM SPIEGEL DER EUROPÄISCHEN KUNST (LAW AND JUSTICE REFLECTED IN EUROPEAN ART) 206–207, Fig. 340 (1988); OTTO RUDOLF KISSEL, DIE JUSTITIA: REFLEXIONEN ÜBER EIN SYMBOL UND SEINE DARSTELLUNG IN DER BILDENDEN KUNST (JUSTICE: REFLECTIONS ON A SYMBOL AND ITS REPRESENTATION IN THE PLASTIC ARTS) 38–55 (1984).

³⁸ The illustrations were not signed, and their quality varies.

³⁹ See SEBASTIAN BRANT, THE SHIP OF FOOLS, TRANSLATED INTO RHYMING COUPLETS WITH INTRODUCTION AND COMMENTARY BY EDWIN H. ZEYDEL (Edwin H. Zeydel trans., 1944) [hereinafter ZEYDEL’S BRANT].

⁴⁰ See JOHN VAN CLEVE, SEBASTIAN BRANT’S *THE SHIP OF FOOLS* IN CRITICAL PERSPECTIVE, 1800–1991 at 85 (1993). A first edition in Latin was published in 1497, a Dutch-Flemish edition in 1500, and one in English in 1509. ZEYDEL’S BRANT, *supra* note 40, at 24–31. While few modern readers “would suspect that the work was favorably compared by its contemporaries to Homer’s *Odyssey*,” seventy editions were once in circulation. See, e.g., THEODORE ZIOLKOWSKI, MIRROR OF JUSTICE: LITERARY REFLECTIONS OF LEGAL CRISES 98–99, 106 (1997) [hereinafter ZIOLKOWSKI, MIRROR OF JUSTICE].

⁴¹ ZEYDEL’S BRANT, *supra* note 39, at 236–237.

⁴² Brant was “an active and respected legal advisor.” See Kathleen Wilson-Chevalier, *Sebastian Brant: The Key to Understanding Luca Penni’s “Justice and the Seven Deadly Sins,”* 78 ART BULL. 238 (1996). An “imperial loyalist,” Brant left Basel in 1501 when the city joined the Swiss Confederation. ZIOLKOWSKI, MIRROR OF JUSTICE, *supra* note 40, at 100.

⁴³ ZEYDEL’S BRANT, *supra* note 39, at 57. In another chapter, the author commented: “Blind justice is and dead indeed.” *Id.* at 169.

⁴⁴ This passage can be found in both the 1611 Ripa (at 203) and the 1618 Ripa (at 188) editions from Padua under the description of Justice (“Giustitia”).

⁴⁵ Debate exists about when the camera obscura came into being, how it was used, which artists had access to devices falling within that nomenclature, and its import. See Michael John Gorman, *Art, Optics and History: New Light on the Hockney Thesis*, 36 LEONARDO 295, 296 (2003); JONATHAN CRARY, TECHNIQUES OF THE OBSERVER: ON

VISION AND MODERNITY IN THE NINETEENTH CENTURY 26–53 (1990) [hereinafter CRARY, TECHNIQUES OF THE OBSERVER].

⁴⁶ MARJOLEIN DEGENAAR, MOLYNEUX’S PROBLEM: THREE CENTURIES OF DISCUSSION ON THE PERCEPTION OF FORMS 18 (Michael J. Collins trans., 1996); MICHAEL J. MORGAN, MOLYNEUX’S QUESTION: VISION, TOUCH, AND THE PHILOSOPHY OF PERCEPTION (1977).

⁴⁷ IAN HACKING, THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION AND STATISTICAL INFERENCE 9–12 (1975).

⁴⁸ One oft-displayed and admired scene was *The Judgment of Cambyses*, derived from the *Historiae*, written by Herodotus around 440 BCE. Herodotus described the rule of King Cambyses, said to have lived some 525 years before the Common Era. Learning that a judge Sisamnes was corrupt, Cambyses ordered him flayed alive. Thereafter, Cambyses appointed Otaanes, the son of Sisamnes, to serve as a jurist and forced the son to preside on a seat made from the skin of his father.

From the thirteenth century onward, versions of this story can be found in European compilations of classical stories. By the sixteenth and seventeenth centuries, the theme was regularly portrayed in European town halls. A particularly vivid example is the *Judgment of Cambyses*, by the Flemish artist Gerard David, that was commissioned in the late fifteenth century for the City Hall of Bruges. Reproductions and additional discussion can be found in Judith Resnik and Dennis Curtis, *Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUMAN. 19, 38–39 (2012) and in REPRESENTING JUSTICE, *supra* note 1, at 39–42 and color plates 10–11.

⁴⁹ I BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 173 (1748, trans. Thomas Nugent, reprinted 2001).

⁵⁰ Several commentators have discussed the relationship of imagery to changing judicial norms. See, e.g., Robert Jacob, *La justice, ses demeures et ses symboles: Perspective historique (Justice, Its Buildings and Symbols: A Historic Perspective)*, ARCHICRÉE 1995; Robert Jacob, *The Historical Development of Courthouse Architecture*, 14 ZODIAC 30; Antoine Garapon, *Rituel et symbolisme judiciaires (The Symbolism of the Courtroom)*, ARCHICRÉE 1995 at 54; Antoine Garapon, *Imaginer le palais de justice du XXIème siècle 1 (Imagining the Courthouse of the 21st Century)* (manuscript).

⁵¹ JOHN RAWLS, A THEORY OF JUSTICE 136–137 (1971).

⁵² RAWLS, *supra* note 51, at 12. Rawls’s imagery of the veil is frequently deployed in the legal academy. See, e.g., Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

⁵³ Emerson, 5 FACTS FORUM NEWS 20 (Sept. 1956), accompanying the article “Supreme Court under Fire.”

⁵⁴ Langston Hughes, *Justice*, in THE COLLECTED POEMS OF LANGSTON HUGHES (Arnold Rampersad, ed. & David

Roessel, associate ed., 1994). The poem © 1994 by the Estate of Langston Hughes was used in our book with the permission of Alfred A. Knopf, a division of Random House Inc., and Harold Ober Associates (as required by Random House under grant 271977 (February 2012)). The poem appears on page 34 of that collection.

⁵⁵ The poem first appeared in the *Amsterdam News* on April 25, 1923. See HANS OSTROM, A LANGSTON HUGHES ENCYCLOPEDIA 195 (2002). Eight years later, in *Scottsboro Limited*, the poem was published with three others: *Scottsboro, Christ in Alabama*, and *The Town of Scottsboro*. See JOSEPH McLAREN, LANGSTON HUGHES: FOLK DRAMATIST IN THE PROTEST TRADITION, 1921–1943 at 33–40 (1997). Hughes republished *Justice* in 1938 in a book of poems entitled *A New Song*. There, however, the phrase “we black” in the second line of the poem became “we poor.” See LANGSTON HUGHES, THE COLLECTED WORKS OF LANGSTON HUGHES, VOL. 1: THE POEMS, 1921–1940 at 133 (Arnold Rampersad ed., 2001).

⁵⁶ DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 3–48, 166 (1979). Many accounts of the events and the protests that surrounded the Scottsboro trial have been written. See, e.g., Hugh T. Murray Jr., *Changing America and the Changing Image of Scottsboro*, 38 *PHYLON* 82 (1977). Hughes’s involvement is tracked in Michael Thurston, *Black Christ, Red Flag: Langston Hughes on Scottsboro*, 22:3 *COLLEGE LITERATURE* 30, 32–33 (1995).

⁵⁷ 339 U.S. 282, 293 (1950) (Frankfurter, J., concurring, joined by Justices Burton and Minton).

⁵⁸ 339 U.S. at 293.

⁵⁹ John Marshall Harlan used the term “color-blind” in 1896 when he dissented, objecting to the Supreme Court’s approval of segregated railway cars. See *Plessy v. Ferguson*. 163 U.S. 537, 559 (1896) (Harlan, J. dissenting). The term has since been invoked, albeit with its import contested, many times, as exemplified by exchanges among Chief Justice John G. Roberts, Jr., Justice Clarence Thomas, and Justice Stephen Breyer in *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 n.14, 748, 772, 780–82, 788, 801 n.6, 830, 861 (2007).

⁶⁰ CRARY, TECHNIQUES OF THE OBSERVER, *supra* note 45, at 3 (emphasis in original), and at 137.

⁶¹ CRARY, TECHNIQUES OF THE OBSERVER, *supra* note 45, at 5–6.

⁶² See generally JONATHAN HARRIS, FEDERAL ART AND NATIONAL CULTURE: THE POLITICS OF IDENTITY IN NEW DEAL AMERICA (1995); MARLENE PARK & GERALD E. MARKOWITZ, DEMOCRATIC VISTAS: POST OFFICES AND PUBLIC ART IN THE NEW DEAL (1984).

⁶³ This discussion is drawn from RESNIK & CURTIS, REPRESENTING JUSTICE, *supra* note 1, at 110–113 and notes 68–101 at 457–459. Quoted materials can be found in the books and articles cited therein, including the archived Stefan Hirsch and Elsa Rogo Papers, 1926–1985 (Boxes

1–3 and 11) [hereinafter Hirsch and Rogo Papers] in the Archives of American Art, Smithsonian Institution, <http://www.aaa.si.edu/collections/stefan-hirsch-and-elsa-rogo-papers-6044>, as well as materials from the Collection of Fine Arts of the General Services Administration (GSA), under GSA Archives, Public Building Services, Fine Arts Collection, 477, Stefan Hirsch [hereinafter GSA Archives/FA 477, Hirsch description]. Obvious typographical errors have been corrected.

⁶⁴ The Aiken building in which the mural was installed has since been named the Charles E. Simons Jr. Federal Courthouse after Judge Simons, Chief Judge for the District of South Carolina from 1980 to 1986.

⁶⁵ Stefan Hirsch Letter to Forbes Watson (May 18, 1938) [hereinafter Hirsch Letter to Watson], Hirsch papers; PARK & MARKOWITZ, *supra* note 62, at 61.

⁶⁶ Hirsch Letter to Watson, *supra* note 65. Hirsch added that he hoped his use of the colors of the flag was not “too obvious.” *Id.* The officials administering the Section of Painting & Sculpture responded approvingly, and noted the appeal, particularly of the contrast of “the plough with the gun.” See Letter from Edward B. Rowan to Stefan Hirsch (July 28, 1938).

Interpretative materials written in the 1990s by staff at the GSA, charged with overseeing federal building, described the Justice as raising a “nurturing right hand to those who live righteously,” while her left hand “repels miscreants with a condemning gesture.” The scenes under the heading “Protector” include rolling hills, cows near a barn or house, children playing, a woman holding a baby, and a lamp and plow at the bottom of the frame. In contrast, under the label “Avenger,” Hirsch portrayed crimes—a house burns, a man holds open a door to a prison cell through which a man (garbed in prison stripes) appears either to be entering or leaving, while another man is crouching where a woman’s body lies, with a shotgun below. The quoted text comes from the GSA exhibit brochure, “Images of Justice,” a traveling exhibit drawing on several images from the Fine Arts program that were on tour in 2007–2008 in various courthouses in the United States. The text is also available in the GSA Archives/FAA 477, Hirsch [hereinafter GSA/FA Justice as Protector and Avenger Display].

⁶⁷ PARK & MARKOWITZ, *supra* note 62, at 61, 190, n. 30 (quoting Elsa Rogo papers). KARAL ANN MARLING, WALL-TO-WALL AMERICA: A CULTURAL HISTORY OF POST OFFICE MURALS IN THE GREAT DEPRESSION 64–65 (1982), quoted a newspaper as reporting that spectators objected that Justice “resembled a ‘mulatto.’”

⁶⁸ PARK & MARKOWITZ, *supra* note 62, at 61.

⁶⁹ Matthew Boedy, *Controversy Shadows Mural*, AUGUSTA CHRONICLE, Aug. 26, 2001, at C2, in GSA Archives/FA 477.

⁷⁰ Letter from Hirsch to Rowan (Oct. 7, 1938), Hirsch and Rogo Papers, *supra* note 63. On November 3, 1938,

Rowan replied and attached a letter dated October 16, 1938, from a person connected to the Federal Arts Project who had seen the mural and reported that “the flesh tones of the central figure do not suggest a mulatto woman.” In March of 1939, Hirsch reiterated his willingness to “go down there and make whatever corrections seem reasonable” if those not influenced by the judge reported seeing a person of color. However, “I shall not change the bare feet b[e]cause they are entirely defensible—from Southern or Northern point of view—in a [g]oddess like figure. I shall not change the ‘bright-hued clothing’ since the colors are those of the flag of the United States. But [if there were] forthcoming any concrete and explicit criticism of the features of the face, I am ready to do something about it . . .” Letter from Hirsch to Rowan (March 4, 1939).

⁷¹ GSA/FA Justice as Protector and Avenger Display, *supra* note 67.

⁷² MARLING, *supra* note 67, at 69 (quoting a letter to Treasury Secretary Morgenthau, Feb. 24, 1939). The trial judge wrote to *Art Digest* that he would have no further comments in that he knew “nothing about art” and had received more publicity that he had desired from his comments objecting to the “‘contemporary art’ installed without my knowledge in the United States court room at Aiken.” *A Judicious Answer*, 10 *ART DIGEST* 10 (1938).

⁷³ MARLING, *supra* note 67, at 71. See also Boedy, *supra* note 70, at C2.

⁷⁴ Other examples—such as a Justice perceived to look like the “ruthless spirit of confiscation” and relegated to a corner in a courthouse in Newark, New Jersey—are provided in RESNIK & CURTIS, *REPRESENTING JUSTICE*, *supra* note 2, at 108–110.

⁷⁵ See RESNIK & CURTIS, *REPRESENTING JUSTICE*, *supra* note 2, at 116–117, and notes at 123–129.

⁷⁶ John Miller, *Idaho Murals of Lynching Cause Debate*, *N.Y. TIMES*, Apr. 16, 2006. Additional information is drawn from John Miller, *Criticized Murals Hang in Courthouse*, *CASPER STAR TRIBUNE*, May 15, 2005 [hereinafter Miller, *Criticized Murals*]; John Miller, *Murals of Lynching Divide Officials*, *DENVER POST*, Apr. 13, 2006; Boise, “ID WPA Art,” WPA Murals, <http://www.wpamurals.com/boise.htm>; and Diana Cammarota “Courthouse Murals,” *BOISE CITY REVIEW* (2011).

⁷⁷ Martin (sometimes referenced as Martin Fletcher and other times as Fletcher Martin) apparently withdrew from the project, and Ivan Bartlett was the “final designer.” Miller, *Criticized Murals*. Whether Martin or Bartlett created the lynching scene is not clear. See Boise, “ID WPA Art,” WPA Murals, <http://www.wpamurals.com/boise.htm>.

⁷⁸ The Idaho State Legislature was using the building as a temporary residence while its own building was being renovated. John Miller, *Idaho’s Lynching Murals to Get Explanations*, *INDIAN COUNTRY TODAY*, Oct. 19, 2007.

⁷⁹ John Miller, *Indian Leaders View Murals of Lynching*, *CASPER-STAR TRIBUNE* (Jan. 19, 2007); Miller, *Idaho’s Lynching Murals*, *supra* note 76.

⁸⁰ The building was the “first ‘white’ building completed in New York after the World’s Columbian Exposition of 1893 in Chicago” and provides an “unusually fine” example of Beaux-Arts classicism. See Paul Spencer Byard, *Reading the Architecture of Today’s Courthouse*, in *CELEBRATING THE COURTHOUSE: A GUIDE FOR ARCHITECTS, THEIR CLIENTS, AND THE PUBLIC* 133, 136–137 (Steven Flander, ed., 2006) [hereinafter *CELEBRATING THE COURTHOUSE*]. The Madison Avenue Courthouse now houses the Appellate Division, First Department, of the New York State Supreme Court.

⁸¹ One could interpret the narrative of the Court’s friezes to begin with the depiction on the west wall of the struggle between Good and Evil and ends with the creation of the American system of government. In addition to Weinman’s historical scenes, John Donnelly Jr. created “great bronze doors,” weighing more than six tons apiece, to display eight panels on “the development of the law from classical antiquity through the founding of the American Republic.” *The Supreme Court: Residences of the Court Past and Present, Part III*, 3 *SUPREME COURT HIST. SOC’Y Q.* at 9 (1981) [hereinafter *Supreme Court Residences*].

⁸² Ira Henry Freeman, *Mohammed Quits Pedestal Here on Moslem Plea after 50 Years*, *N.Y. TIMES*, Apr. 9, 1955, at 1, 18.

⁸³ Freeman, *supra* note 82, at 18. The other statues were resurfaced in Alabama Madre marble. HENRY HOPE REED, JR., *SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, COURTHOUSE HISTORY AND GUIDE* (unpaginated) (1957).

⁸⁴ Legible excerpts are edited versions of the Sixth through the Tenth Commandments; Moses’s beard obscures some of the text. See Tony Mauro, *The Supreme Court’s Own Commandments*, *LEGAL TIMES*, Mar. 7, 2005.

⁸⁵ The Judgment of Solomon was regularly featured in town halls in Renaissance Europe, including the Town Hall of Amsterdam. See RESNIK & CURTIS, *REPRESENTING JUSTICE*, *supra* note 1, at 56–57 and figure 44.

⁸⁶ The gap between the time when monuments are created and the views of later generations has spawned many controversies. See SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* (1998).

⁸⁷ The texts of Ten Commandments differ depending on whether one looks at the Hebrew Bible or the New Testament. Variations are listed in Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORD. L. REV.* 1477, 1483 (2005).

⁸⁸ *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 874 (2005).

⁸⁹ *Id.* at 874. In a footnote, the majority also commented that it had been reminded by the dissent that “Moses and the Commandments adorns this Court’s east

pediment. . . . But as with the courtroom frieze, Moses is found in the company of other figures, not only great but secular.” *Id.* at 874 n.23. See also *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 652–53 (1989) (Brennan, J., concurring in part and dissenting in part, and joined by Justices Marshall and Stevens). Justice Brennan alluded to the Weinman Frieze as he explained that “a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does the ‘permanent erection of a large Latin cross on the roof of city hall.’ . . . Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom . . .” *Id.* (Citations omitted.)

⁹⁰ *Van Orden v. Perry*, 545 U.S. 677, 688 (2005). The Chief Justice also commented that “representations of the Ten Commandments adorn the metal gates lining the north and south sides . . . as well as the doors leading into the Courtroom. Moses also sits on the exterior east façade of the building holding the Ten Commandments tablets.” *Id.* at 688. Justice Souter’s dissent distinguished the Court’s frieze because the figures were a mixed assemblage of lawgivers and “Moses enjoys no especial prominence.” *Id.* at 740 (Souter, J., dissenting).

⁹¹ Council on American Islamic Relations, *A Decade of Growth, CAIR Tenth Anniversary Report, 1994–2004 at 21–23* (2004) [hereinafter *CAIR Tenth Anniversary Report*]; Tamara Jones and Michael O’Sullivan, *Supreme Court Frieze Brings Objection*, N.Y. TIMES, March 8, 1997, at A1; Joan Biskupic, *Lawgivers: From Two Friezes, Great figures of Legal History Gaze upon the Supreme Court Bench*, WASH. POST, March 11, 1998, at H1.

⁹² Letter from Chief Justice William H. Rehnquist to Nihad Awad and Ibrahim Hooper of the Council on American–Islamic Relations (Mar. 11, 1997) (provided by the Public Information Office of the United States Supreme Court) [hereinafter Rehnquist Mar. 11, 1997 Letter]; Chief Justice Rehnquist also stated that the sculpture of Muhammad was “intended only to recognize him, among many lawgivers, as an important figure in the history of law.” Rehnquist Letter; see also *CAIR Tenth Anniversary Report*, *supra* note 91, at 22; 40 U.S.C. § 6133 (2012) (Property in the Supreme Court Building and Grounds). (“It is unlawful to step or climb on, remove, or in any way injure any statue, seat, wall, fountain, or other

erection or architectural feature, or any tree, shrub, plant, or turf, in the Supreme Court Building or grounds.”) The Court’s imagery was also the subject of discussion in 2006, in the wake of protests over cartoons published in Denmark that were seen as blasphemous renditions of the prophet. See *Mohammed Sculpture at Top US Supreme Court Draws Mild Rebuke from US Muslim Leaders*, AGENCE FRANCE PRESSE, Feb. 7, 2006, <http://www.freerepublic.com/focus/f-news/1573853/posts>.

⁹³ Rehnquist Mar. 11, 1997 Letter, *supra* note 92.

⁹⁴ *North & South Wall Information Sheet*, *supra* note 5.

⁹⁵ *North & South Wall Information Sheet*, *supra* note 5.

⁹⁶ Douglas P. Woodlock, *Drawing Meaning from the Heart of the Courthouse*, [hereinafter *Heart of the Courthouse*] in CELEBRATING THE COURTHOUSE, *supra* note 80, at 155–167; see also Douglas P., Woodlock, *The “Peculiar Embarrassment”: An Architectural History of the Federal Courts in Massachusetts*, MASS. L. REV. 268–278 (Winter 1989); Henry N. Cobb, *The Shape of Justice: Law and Architecture*, Third Lecture in the New York Court of Appeals Lecture Series, Nov. 16, 2006 (monograph published by the Historical Society of the Courts of New York and the Court of Appeals in the State of New York, 2007) [hereinafter Cobb Lecture]; Stephen G. Breyer, *Foreword* to CELEBRATING THE COURTHOUSE, *supra* note 80, at 9–12.

⁹⁷ Woodlock, *Heart of the Courthouse*, *supra* note 96, at 165. The process developed by Justice Breyer and Judge Woodlock became a model used thereafter for other federal building.

⁹⁸ Breyer, *Foreword* to CELEBRATING THE COURTHOUSE, *supra* note 96, at 11.

⁹⁹ Henry N. Cobb, in VISION + VOICE: DESIGN EXCELLENCE IN FEDERAL ARCHITECTURE, BUILDING A LEGACY 34 (2002); Cobb Lecture, *supra* note 96.

¹⁰⁰ See General Services Administration, *The Boston Panels*, Ellsworth Kelly, U.S. Courthouse; General Services Administration, U.S. Courthouse, Boston, MA, The Artwork; GSA Art-in-Architecture Archives 283 Ellsworth Kelly (hereinafter GSA/AA 283 Kelly). See also Brian Soucek, *Not Representing Justice: Ellsworth Kelley’s Abstraction in the Boston Courthouse*, 24 YALE J.L. & HUMAN. 287 (2012).

¹⁰¹ HARRIS, *supra* note 62, at 65.

¹⁰² Robert P. Reeder, *The First Homes of the Supreme Court of the United States*, 76 PROCEEDINGS OF THE AM. PHIL. SOC’Y 543 (1936); Kathleen Fischer Taylor, *First Appearances: The Material Setting and Culture of the Early Supreme Court*, in THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 357–381 (Christopher Tomlins ed., 2005).

¹⁰³ To paraphrase Virginia Wolff’s classic commentary on women’s needs for safety, security and space. VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* (Harcourt 1957) (1929).

¹⁰⁴ See Judith Resnik, *Building the Federal Courts (Literally and Metaphorically): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 INDIANA L.J. 823, 842 (2012).

¹⁰⁵ LOIS CRAIG, *THE FEDERAL PRESENCE: ARCHITECTURE, POLITICS, AND SYMBOLS IN UNITED STATES GOVERNMENT BUILDING* (1978).

¹⁰⁶ See Habeas Corpus Act of 1876, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241–2254 (2006)); Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2006)); Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, 470 (1875) (codified at 28 U.S.C. § 1331 (2006)).

¹⁰⁷ Act of June 22, 1870, ch. 150, 16 Stat. 162. Beginning in 1871, the Attorney General provided annual reports to Congress. The Justice Department reported that, in 1876, almost 29,000 cases were pending on the docket; in 1900, the reports indicated that pending cases had risen to about 55,000. David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal Courts in the Twentieth Century*, 44 S. CAL. L. REV. 65, 98 tbl. 4 (1981); see also *Chronological History of Authorized Judgeships in the U.S. District Courts*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/AuthorizedJudgeships/ChronologicalHistoryOfAuthorizedJudgeshipsIndex.aspx>.

¹⁰⁸ See Catherine Hetos Skefos, *The Supreme Court Gets a Home*, in YEARBOOK 1976 OF THE SUPREME COURT HISTORICAL SOCIETY 19, 25, 26 (1976). Skefos reported that Taft found the “twelve rooms for offices and records . . . scarcely adequate” for the Court’s work. *Id.* at 19. See also Robert C. Post, *Mr. Taft Becomes Chief Justice*, 76 U. CIN. L. REV. 761 (2008).

¹⁰⁹ See Act of Sept. 14, 1922, ch. 306, section 2, 42 Stat. 837, 838 (creating a Conference of Senior Circuit Judges) (codified as amended at 28 U.S.C. § 331 (2012)). See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937–43 (2000).

¹¹⁰ See Judiciary Act of 1925, Pub. L. No. 68–415, 45 Stat. 936.

¹¹¹ Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1644, 1710 (2000); see also Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012).

¹¹² Hartnett, *supra* note 111, at 1650; LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* tbl 2-2 & 2-8 (3d ed. 2003); see also Chief Justice John G. Roberts, *2012 Year End Report on The Federal Judiciary* 13 (Dec. 31, 2012), <http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf> [herein after Chief Justice Roberts, 2012 Year End Report].

¹¹³ When serving as President, Taft had been an incessant advocate for “a change in judicial procedure, and continued that effort when on the Court. See, e.g., William Howard Taft, *The Annual Message of the President*, transmitted to Congress, Dec. 7, 1909 (1914). See generally Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

¹¹⁴ An Act to provide for the construction of certain public buildings and for other purposes, Act of May 25, 1926, 44 Stat. 630, 631. That appropriations bill included authorization for the Secretary of the Treasury to “acquire a site for a building for the Supreme Court of the United States.”

¹¹⁵ See Act of Dec. 21, 1928 (“An Act to provide for submissions to the Congress of preliminary plans and estimates of costs for the construction of a building for the Supreme Court of the United States”), Pub. L. No. 70–644, 45 Stat. 1066. See *Supreme Court Residences*, *supra* note 81, at 7. When President, Taft had appointed Gilbert in 1910 as a charter member of the federal Commission on Fine Arts; when Chief Justice, Taft selected Gilbert to design the courthouse and worked with him on the plans. Skefos, *supra* note 108, at 32; Geoffrey Blodgett, *The Politics of Public Architecture*, in CASS GILBERT, *LIFE AND WORK: ARCHITECT OF THE PUBLIC DOMAIN 62–72* (Barbara S. Christen & Steven Flanders eds., 2001); see also Margaret Heilbrun, *Preface to Inventing the Skyline: The Architecture of Cass Gilbert*, at xviii (Margaret Heilbrun ed., 2004).

¹¹⁶ See Cass Gilbert, *Description of the Design for the United States Supreme Court Building*, Washington, D.C., May 15, 1929, submitted to the 71st Congress, 1st Sess., and included in *The Final Report of the Supreme Court Building Commission in Connection with the Construction, Equipping, and Furnishing of the United States Supreme Court Building*, S. Doc. No. 88 at 39–40 (76th Cong., 1st Sess., June 22, 1939).

¹¹⁷ Skefos, *supra* note 108, at 23 (quoting the Report and Recommendation of the Committee on Public Buildings and Grounds of the House).

¹¹⁸ See Letter of Submittal of The Final Report of the Supreme Court Building Commission in Connection with the Construction, Equipping, and Furnishing of the United States Supreme Court Building, Doc. No. 88 at v–vi (76th Cong., 1st Sess., June 22, 1939).

¹¹⁹ See Blodgett, *supra* note 115, at 72.

¹²⁰ FRED J. MAROON & SUZY MAROON, *THE SUPREME COURT OF THE UNITED STATES* 39 (1996) (quoting Associate Justice Harlan Fiske Stone). More recent commentators have argued that the adoption of a classical form associated

with the South was incongruous, for the “traditional temple was least expressive of what courts in America were doing.” John Brigham, *Exploring the Attic: Courts and Communities in Material Life*, in *COURTS, TRIBUNALS AND NEW APPROACHES TO JUSTICE* 134 (Oliver Mendelsohn & Laurence Maher eds., 1994).

¹²¹ Brigham, *supra* note 120, at 131.

¹²² Paul Spencer Byard, *Representing American Justice: The United States Supreme Court*, in *CASS GILBERT, LIFE AND WORK*, *supra* note 115, at 272, 283 [hereinafter Byard, *Representing American Justice*].

¹²³ *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terence Ranger eds., 1983).

¹²⁴ Byard, *Representing American Justice*, *supra* note 122, at 287. On a more practical note, the building has become old enough to have needed significant renovations, costing more than ten times the original budgeted amount for construction. See Joan Biskupic, *Renovation Is Building's First Since Its Opening in 1935*, *USA TODAY*, Dec. 12, 2006, at A5. Included was a two-story underground annex that made room for the Court's police, “a function that was virtually non-existent when the building opened in 1935.” Press Release, *The Architect of the Capitol, Contractor Selected for Phase II of Supreme Court Modernization Project*, April 28, 2004, http://www.supremecourt.gov/publicinfo/modernization/press_releases/Contract_Selection_Phase_II_4_28-04.pdf. See *The Supreme Court Building Modernization Project*, SUPREME COURT PUBLIC INFORMATION OFFICE, <http://www.supremecourt.gov/publicinfo/modernization/home.aspx> (last visited Mar. 16, 2013); *The Supreme Court Building Modernization Project, Project Fact Sheet*, SUPREME COURT PUBLIC INFORMATION OFFICE, <http://www.supremecourt.gov/publicinfo/modernization/facsheet2010.pdf>.

¹²⁵ See LINDA GREENHOUSE, *THE U.S. SUPREME COURT: A VERY SHORT INTRODUCTION* (2012).

¹²⁶ “The Republic endures and this is the symbol of its faith.” Charles Evans Hughes, *Address of Chief Justice Hughes*, in *Corner Stone of New United States Supreme Court Building Laid*, 18 A.B.A. J. 723, 728–29, (1932). The President of the American Bar Association, Guy A. Thompson, spoke about monuments built in other countries to wars and battles, as he argued that the building of the courthouse was a “monument to Justice,” a “temple,” a “shrine,” and “memorial of bloodless battles . . . upon whose issues hung our liberties, the integrity of our federal system, its harmony and balance, and our social and economic destiny.” *Id.* at 723. John H. Davis spoke “on behalf of the Bar of the Supreme Court,” and also invoked “men’s liberties” as central goals of law. *Id.* at 724–25.

¹²⁷ In 1932, when laying the cornerstone, Chief Justice Hughes commented that the line of visitors “in the corridor . . . evidenced the present inability to meet

reasonable demands for public audience.” He also described insufficient spaces for lawyers, staff, the library, and recordkeeping. Hughes, *supra* note 126, at 728.

¹²⁸ Maxwell Bloomfield, *The Architecture of the Supreme Court*, in *OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 53 (Kermit L. Hall ed., 2005).

¹²⁹ See Peter Fish, *Public Information Office*, in *OXFORD COMPANION TO THE SUPREME COURT*, *supra* note 129, at 802–03. In December of 1935, the Court appointed a “press clerk” (Nelson Potter) to assist the coordination with the media.

¹³⁰ In 1947, Banning Whittington, who had been at United Press International (UPI), took on the role and when he retired in 1973, the position was renamed “Public Information Officer,” a position that remains in place. See Fish, *Public Information Office*, *supra* note 129, at 802–03. A call for improved information from the Court and improved reporting by the press was sounded in 1964. See Chester A. Newland, *Press Coverage of the United States Supreme Court*, 17 W. POL. Q. 15 (1964). By 1982, the press room had expanded to enable carrels for major news organizations and broadcast booths and, by 2008, nineteen news organizations had desks. See Linda Greenhouse, *Press Room*, in *OXFORD COMPANION TO THE SUPREME COURT*, *supra* note 128, at 773–74; see also Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059 (1998).

¹³¹ The mission of the Conference of Court Public Information Officers (CCPIO), founded in the early 1990s, is to “serve as liaisons between the judiciary and the public.” See *About*, CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS, <http://ccpio.org/>.

¹³² See Financial Services and General Government Appropriations for 2008, Hearings before a Subcommittee of the Committee on Appropriations, U.S. House of Representatives, 110th Cong., 1st Sess. (2007) at 18 (Testimony of Justice Anthony Kennedy).

¹³³ Cass Gilbert is said to have proposed the phrase “Equal Justice is the Foundation of Liberty,” that Chief Justice Hughes replaced with “Justice the Guardian of Liberty.” *East Pediment Information Sheet*, OFFICE OF THE CURATOR, SUPREME COURT OF THE UNITED STATES (May 22, 2003), <http://www.supremecourt.gov/about/eastpediment.pdf>; see also Maxwell Bloomfield, *Architecture of the Supreme Court Building*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, 51–54 (Kermit L. Hall ed., 2005).

Chief Justice Hughes’s 1932 speech, given when the cornerstone was put into place, emphasized the importance of “limited government powers and of individual liberty” and did not speak about equality. The Chief Justice ended his remarks by describing the “building [as] a testimonial to an imperishable ideal of liberty under law.” Hughes, *supra* note 126, at 729.

¹³⁴ See, for example, *Roper v. Simmons*, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting); *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (Stevens, J., for the Court); *Boddie v. Connecticut*, 401 U.S. 371, 388 (1971) (Brennan, J., concurring); *Lane v. Brown*, 372 U.S. 477, 487 (1963) (Stewart, J., for the Court); *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (Warren, C.J., for the Court). As of 2012, Lexis/Nexis data searches reported more than 350 decisions in which state and federal lower courts invoked the phrase “equal justice under law.”

¹³⁵ Illustrative is the brochure provided to visitors; it begins ““Equal Justice under Law”—These words, written above the main entrance of the Supreme Court Building, express the ultimate responsibility of the Supreme Court.” *The Supreme Court of the United States* (as revised 3/08 and with inserts).

¹³⁶ *Chronological History of Authorized Judgeships in the U.S. District Courts*, U.S. COURTS, *supra* note 107.

¹³⁷ These data are drawn from *Judicial Business of the United States Courts: 2009 Annual Report of the Director*, ADMIN. OFFICE OF THE U.S. COURTS 2–3 (2010), <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx> (federal and bankruptcy statistics); NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011). The state court data are composite estimates that do not include traffic, juvenile, or domestic relations cases.

¹³⁸ THOMAS F. EAGLETON UNITED STATES COURTHOUSE, ST. LOUIS, MISSOURI 18 (Washington, D.C.: GSA, 2001) at 12.

¹³⁹ See *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting). Justice Frankfurter objected to a California provision that vested in a prison warden the sole power to whether a prisoner was mentally competent to be executed.

¹⁴⁰ *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *J. McIntyre Mach., Ltd. v. Nicaastro*, 131 S. Ct. 2780 (2011).

¹⁴¹ 372 U.S. 335 (1963).

¹⁴² 373 U.S. 83 (1963).

¹⁴³ *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Turner v. Rogers*, 131 S. Ct. 2507 (2011). See generally Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 80–81, 104–105 (2011).

¹⁴⁴ Charter or Fundamental Laws of West New Jersey, Agreed Upon, ch. XXIII (1676), reprinted in SOURCES OF OUR LIBERTIES 188 (Richard L. Perry ed., 1959).

¹⁴⁵ See JEREMY BENTHAM, *Constitutional Code* (1843) in 9 THE WORKS OF JEREMY BENTHAM 41 (John Bowring ed., 1843); FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE CONSTITUTIONAL CODE 26–27 (1983).

¹⁴⁶ See JEREMY BENTHAM, Rationale of Judicial Evidence (1827), in 6 THE WORKS OF JEREMY BENTHAM 355 (“Of Publicity and Privacy, as Applied to Judicature in General, and to the Evidence in Particular”) (John Bowring ed., 1843) [hereinafter 6 BENTHAM].

¹⁴⁷ See generally Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 (2012).

¹⁴⁸ Conn. Const. of 1818, art. I. § 10.

¹⁴⁹ See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

¹⁵⁰ 558 U.S. 209 (2010).

¹⁵¹ 6 BENTHAM, *supra* note 146, at 356.

¹⁵² Political and legal theorists underscore the contributions that debates in the public sphere have for democratic politics. See ROBERT POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., 1991); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 97–98 (William Rehg trans., 1996).

¹⁵³ When arguing for a separate building, Chief Justice Taft focused on the Court’s work beyond the courtroom that it had; the Supreme Court needed to have a “place for our consultations,” for “our records,” and for the lawyers who appeared before the court. Taft insisted that a structure exclusively devoted to the Supreme Court was needed to mark its “independent existence” and rejected the idea of sharing space with the Department of Justice, which then provided administrative assistance to the federal courts. Noting that Department of Justice cases “comprise[d] about two-fifths” of the Court’s docket, the Chief Justice argued the need to “hold ourselves independent of the Department of Justice;” “to be tied up with them would be a good deal worse than to be tied up with the Senate.” Hearings before the Committee on Public Buildings and Grounds, U.S. House of Rep. 70th Cong. 1st Session, on H.R. 13665 (and others), May 16 and May 18, 1928, at 3, 4, 7 (Statement of Hon. William Howard Taft, Chief Justice, Supreme Court of the United States) [hereinafter Taft May 1928 Testimony]. In contrast, while supporting the effort to obtain new and larger space, Associate Justice Willis Van Devanter reported that not all members of the Court wanted new quarters but hoped instead for “larger accommodations” within the Senate building. *Id.* at 12, 13 (Statement of the Hon. Willis Van Devanter, Associate Justice, Supreme Court of the United States).

¹⁵⁴ These data are drawn from *Judicial Business of the United States Courts: 2009 Annual Report*, *supra* note 138, at 2–3 (federal and bankruptcy statistics).

¹⁵⁵ These data, drawn from NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), are composite estimates that do not include traffic, juvenile, or domestic relations cases.

¹⁵⁶ This figure was cited in support of the Sargent Shriver Civil Counsel Act, creating a pilot program for poor litigants to obtain counsel. See Act of Oct. 11, 2009, ch. 457, § 1(b), 2009 Cal. Stat. 2498, 2499.

¹⁵⁷ Jonathan Lippman, *State of the Judiciary 2011: Pursuing Justice* 4 (2011), <http://www.courts.state.ny.us/CTAPPS/news/SOJ-2011.pdf>; see also *Report to the Chief Judge of the State of New York*, TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y. 1 (2010), <http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.

¹⁵⁸ The American Bar Association resolved that counsel should be provided “as a matter of right at public expense to low-income persons in adversarial proceedings where basic human needs—such as shelter, sustenance, safety, health or child custody—are at stake.” AM. BAR ASSOC., ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (2010); see also AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 64 (3d ed. 1992) (also noting that counsel rights should apply to “extradition, mental competency, post-conviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in

nature”); Jonathan Lippman, Chief Judge, N.Y. Court of Appeals, Remarks at 2010 Law Day Ceremony, Law in the 21st Century: Enduring Traditions, Emerging Challenges 3–4 (May 3, 2010), <http://www.nycourts.gov/whatsnew/pdf/Law Day 2010.pdf>.

¹⁵⁹ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

¹⁶⁰ See Chief Justice Roberts, 2012 Year End Report, *supra* note 112, at 9.

¹⁶¹ See ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS: STATUS REPORT I-18 (2008); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459 (2004). Data on 2012 comes from Chief Justice Roberts, 2012 Year End Report, *supra* note 113. Civil filings fell four percent, and filings for criminal defendants fell nine percent, resulting in 278,442 civil cases, and 94,121 criminal filings. *Id.* at 14. Bankruptcy petitions declined fourteen percent to 1,261,140 filings. *Id.* at 15.

¹⁶² Byard, *Representing American Justice*, *supra* note 122, at 287.

¹⁶³ See James I. Campbell, Jr., *Universal Service Obligation: History and Development of Laws Relating to the Provision of Universal Postal Services*, in STUDY ON UNIVERSAL POSTAL SERVICE AND THE POSTAL MONOPOLY app. B at 21 (GEORGE MASON SCH. OF PUB. POLICY, 2008); 39 U.S.C. §§ 101, 403 (2012).

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