Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction

Judith Resnik*

I. EMBOBYING JUSTICE ................................................................. 395
II. CLAIMING JUSTICE BY CHANGING THE  
    LEGAL STATUS OF WOMEN'S SAFETY ........................................... 399
III. BOUNDING JUSTICE BY REFUSING NATIONAL POSSIBILITIES ............ 403
IV. ENGENDERING JURISDICTION AND JURISDICTIONAL HIERARCHIES ....... 407
V. THE GENDER OF JURISDICTION, AND THE JURISDICTION OF GENDER ...... 417

* Arthur Liman Professor of Law, Yale Law School. My thanks to Dennis Curtis, Mary Clark, Deborah Hensler, Vicki Jackson, Linda Kerber, Reva Siegel, Rebekka Bonner, Kim Demarchi, Ariela Dubler, Amina El-Sayad, Laura Fernandez, Lisa Hasday, Joe Landau, Anya McMurray, Melissa Murray, Anna Rich, Daphna Renan, Sarah Russell, and Cori Van Noy for thoughtful engagement with the problems discussed here. Thanks are also due to the wonderful participants who joined the symposium and to the institution which served as its host.

This essay is dedicated to John Frank, whose life practices were to reconstruct equality. As law professor, lawyer, and author, John recognized the abilities of women and men of all colors. Those whom he mentored, including Leon Higginbotham, Mary Schroeder, and Janet Napolitano, give testament to his ability to identify talented and committed professionals. They joined him during his life in pressing for law to do more toward fulfilling the promises of equality.

Copyright © 2002 by Judith Resnik.
Graphic provided courtesy of the Yale Law School.
I. EMBOYING JUSTICE

This image on the opening page of this essay graced the front of the brochure for the Conference Women, Justice, and Authority, held in 2000 at Yale Law School. The woman—robbed, enthroned, and holding scales and sword—is one of many images inscribed on glass panels on windows at the law school. But she did not adorn our brochures because we thought anyone (including people working in the building) would know her as a local reference. Unlike many of the funky, enigmatic figures that dot buildings like the Yale Law School but whose meanings are obscure, this image is easily legible. Indeed, images like her are ubiquitous, appearing in courthouses and newspaper cartoons around the United States. We—from many different countries—have learned to recognize this image as the symbol of Justice because we have been taught to do so by political leaders hoping to link their decisions to justice itself.

The longevity of the link between visual depictions of acts of judgment and female statuary is impressive. That lineage can be traced back to the Egyptian Goddess Maat and then to the Greek Dike and to the Roman Justicia. Well-preserved deployments can be found beginning in Europe in the Middle Ages, and become more frequent after the Reformation. The Cardinal Virtues of Justice, Temperance, Prudence, and Fortitude (sometimes joined by the theological virtues of Faith, Hope, and Charity) replaced Catholic images of Judgment scenes and of saints in public buildings in Northern Europe. Swiss burghers adorned their coats of arms with Justice images, and Venetian Doges put her on the prow of their boat, the Bucintoro, which they used in yearly pageants.

Moving forward in time, an early nineteenth century portrait of Queen Anne of England displays her dressed up as Justice. And, today, Justice images can be found across the United States, from within the halls of the  

1. See Women, Justice, & Authority: A Working Conference, April 28-30, 2000 at 1 (brochure, on file with author). Co-sponsors included the Yale Departments of Political Science, History, and Anthropology; the Whitney Humanities Center; the Yale Center for International and Area Studies; the Arthur Liman Public Interest Program and Orville H. Schell, Jr. Center for International Human Rights at Yale Law School; the Yale Women’s and Gender Studies Program; and the Yale American Studies Program.
2. See also the cover logo of the Yale Journal of Law and Feminism.
4. Id. at 1729-30.
7. Id. at 1751.
9. See Verrio, Queen Anne as Justice (c. 1704) (painting in Hampton Court Palace, England), reproduced in Curtis & Resnik, supra note 3, at 1735.
Department of Justice in Washington, D.C. to the top of New York City’s Hall, from midwestern statehouse rotundas to a 1998 tapestry made for a new federal courthouse in Portland, Oregon. After Attorney General John Ashcroft draped a Justice statue in the Great Hall of Justice to hide its bronze breasts, a spate of cartoons parodied that act. And “Lady Justice” is a regular in catalogues that market products, such as briefcases and jewelry, for lawyers.

Justice did not always stand alone. Her three Renaissance siblings, Temperance, Prudence, and Fortitude (each with their own distinctive attributes) were paired with Justice in thousands of paintings, prints, etchings, and sculptures over the course of a few hundred years. Sometimes, with Faith, Hope, and Charity (also depicted by female figures accompanied with distinctive emblems), they battled the Seven Deadly Vices.

Yet references to these other Virtues have been lost to popular culture. Neither politicians nor retailers would rely on the picture of a woman holding a bridle (symbolizing the virtue of restraint—to wit, Temperance), a woman looking in a mirror (to remind one of Prudence), or a woman leaning on a column with a lion nearby (embodying strength, Fortitude) to convey their messages. Unlike these and a host of other emblematic images which are little known but to art historians, Justicia—Justice—in her varied incarnations remains a stock figure in contemporary buildings and in life. Political leaders continue to use her, purposefully and didactically, to tell stories about who they are and what they do.

In this volume dedicated to Women, Justice, and Authority, we can see the irony of the longstanding association of the female body with Justice.

10. The Art & Architecture Program in the United States provides that a small percentage (typically .50% of a building’s budget) is to be spent on public works of art. See generally 41 C.F.R. § 102.77 (2003). The building of many new courthouses in the federal system has thus prompted several commissions for public art. Some of the artists chosen have relied on justice iconography. For example, Judith Poxson Fawkes created a tapestry with a Justice for the Mark O. Hatfield U.S. Courthouse, in Portland, Oregon. The sculptor Diana Moore has created several installations for U.S. federal courthouses: “Justice,” at the Warren B. Rudman Federal Courthouse Annex, Concord, N.H.; “Head of Justice,” Martin Luther King, Jr. Federal Courthouse, Newark, N.J.; and “Urns of Justice,” Federal Courthouse, Lafayette, LA. Pictures of some of these pieces are available at the United States General Services Administration (GSA) website, http://hydra.gsa.gov, in the GSA Design Awards section.


12. Compendia of the appropriate emblems for the particular figure were available. See, e.g., CESARE RIPA, BAROQUE AND ROCOCO PICTORIAL IMAGERY (Edward A. Maser ed., Dover Publications 1971) (1593). Many of these images have been preserved. A series of frescoes in the Siena Town Hall is an off-cited and much studied example. See N. Rubenstein, Political Ideas in Sienese Art: The Frescoes by Ambrogio Lorenzetti and Taddeo di Bartolo in the Palazzo Pubblico, 21 J. WARBURG & COURTAULD INST. 179 (1958); Marianna Jenkins, The Iconography of the Hall of the Consistory in the Palazzo Pubblico, Siena, 54 ART BULL. 430 (1972); RANDOLPH STARN, AMBROGIO LORENZETTI: THE PALAZZO PUBBLICO, SIENA (1994).

13. See KATZENELLENBOGEN, supra note 5, at 31-36.

European traditions depicted Justice as a woman but did not permit women to be judges. For centuries, the United States followed suit. Further, around the world, justice systems tolerated injuries done to the female body. Unpleasant and horrific images of real women—scared, scarred, injured, killed—remind us of the distance at which law has kept women's safety. A significant source of justification for legal indifference came from the concept of jurisdiction. Women's bodies were placed within the domain of households, headed by males, who if white, had jurisdiction over both the women and children therein.

Today, most legal systems condemn such violence, but they have also failed to prevent its frequent occurrence. Such violence is often conceived to be the result of personal interactions rather than of systemic constructions of the roles of women and men in the social order. As a recent monograph from the research arm of UNICEF explains, although illegal, violence against women is often "sanctioned under the garb of cultural practices and norms."\(^{15}\) Within the United States, the problem of violence against women has often been subsumed under the headings of family or criminal law—domains of governance that some assume to be the province of states. But, just as the contemporary legibility of the image of Justice illustrates how we can be taught to make associations, the presumed naturalness of these jurisdictional divides are also artifacts of education. We have been taught to connect a particular level of governance with authority over certain kinds of status relationships and forms of injury.\(^{16}\)

Look again at the image of the oddly robed woman with scales and sword and focus on how peculiar is its contemporary ability to invoke associations to democratic justice systems. Why do we look at a robed woman with scales and sword and think "Justice" or "Law"—and not Opera, Greek Statues, or Warrior Princesses?

In the commentary below, I focus on comparable peculiarities that disconnect patterns of violence targeted at women from national intervention. Advocates of women's equality sought to reorient the discussion of violence by insisting on the stature of the right to be free from violence. They sought to make the physical safety and dignity of women an element of national citizenship rights. But they were told that it was jurisdictionally improper in this federation to seek such recognition. For intervention, they were told to


\(^{16}\) See, e.g., SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998) (discussing New Deal programs and how national authorities retained more control over programs conceived to serve workers, presumed to be white men, while states were given more authority over programs aimed at women of all colors and black men); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001).
seek aid from local, "domestic" authorities, not from Congress. Just as the
association of a certain statue with Justice is generated through politics, so the
plausibility of jurisdictional divides has been naturalized and now serves to
constrain national powers to respond to women's inequality.

I write about the engendering of state/federal jurisdictional divides not
because I believe that mobilizing national legal mechanisms is the only or
necessarily the most effective method by which to change status relationships.
Indeed, in the United States, local officials have many times been ahead of the
national government in generating rights of personhood. Moreover, local
commitments are always essential to implementation of legal norms. But
national action is also needed. Political decisions at that level both
memorialize and inscribe justice by deeming certain forms of injury to be so
fundamental that they are constitutive of national identity. Today, it would be
"un-American" to prohibit marriages among individuals with differing racial
identities. But that national normative commitment is less than fifty years
old. Moreover, it took persistent national pressures and the Civil War to
enable African-Americans to be able to marry each other.

Below, I detail efforts to enshrine women's physical safety as a similar
national right, in this instance exemplified by creating a "Civil Rights
Remedy" authorizing lawsuits in federal courts against those who physically
harmed plaintiffs because of their gender. The history of the creation and
demise of the Civil Rights Remedy in the Violence Against Women Act
(VAWA) of 1994 is important to recount and to analyze both because
obtaining the national agreement necessary for passage was difficult and
because that accomplishment survived for only a short time. A bare majority of
the Supreme Court held it unconstitutional—as a breach of jurisdiction.
Having underscored the energy spent by political leaders to ensure Justicia's
ongoing saliency over several centuries and continents, I turn our collective
gaze to local and national histories of other, assumed-to-be-natural allocations
and attributes of social order, both within families and within the United States.

17. The refusal to enforce federal fugitive slave laws is one famous historical example. See Robert
M. Cover, Justice Accused: Antislavery and the Judicial Process (1975). Recognition of
same-sex marriage is a contemporary one. See 1999 Vt. Acts & Resolves 91 § 2 (providing "eligible
same-sex couples the opportunity to obtain the same benefits and protections afforded by Vermont law
between one man and one woman for federal statutes and regulations); id. § 2(a) (codified at 28 U.S.C. §
1738C) (eliminating the requirement that states provide full faith and credit to decisions of other states
that treat same-sex relationships as marriages).
19. Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of African American
Marriages, 11 Yale J. L. & Human. 251 (1999). See also Katherine M. Franke, Women Imagining
Justice, supra this volume.
As I discuss, systems of jurisdiction do not serve only to sustain women’s subordination. They also rely—as does the gender/sex system—on essentializing assumptions, on a claimed naturalness of the divisions inscribed. But much of what is assumed to be natural in jurisdiction, like much of what is assumed to be distinctive between women and men, does not find its source in nature. Rather, people and politics create jurisdiction, and they also shape the import of gender differences. Moreover, in this polity, the state/federal division has its own gender coding. “Women’s issues” are equated with family life, which in turn is associated with state authority. Commercial matters and public life, still seen as male-dominated, are understood to be under national governance. Supreme Court decisions (such as that refusing congressional power over violence against women) both reflect and reinforce such assumptions. But, the maintenance of jurisdictional distinctions that constrain national powers to reduce the inequality of women and men will (I hope) soon be understood as peculiar artifacts of an earlier age—just as images of hulking women with broken columns, pitchers, and mirrors have retreated from view.

II. CLAIMING JUSTICE BY CHANGING THE LEGAL STATUS OF WOMEN’S SAFETY

Many of us in the United States are currently involved in a struggle to develop national rules of governance to enable women to function with some measure of equality. The work takes different forms, as we debate the meaning and promise of equality. One project, shaped by innovative efforts of many people over the last several decades, seeks to alter the reach of the term “civil rights” to include reference to the safety of women, whatever their color. During the second Reconstruction of the 1960s, the federal courts and Congress played a dominant role in defining various aspects of daily life—the ability to go to local schools, to vote, to shop or to eat in local stores and restaurants, and to sleep at hotels of one’s choosing—as national rights that could not be limited by one’s race.23

Advocates of equality saw the potential for parallel work on gender.24 Under the leadership of Ruth Bader Ginsburg, they built a sequence of Supreme Court decisions that recognized women as national rightholders


24. The interaction is complex between claims of gender and claims of racial equality, in terms of the overlap and distinctions as social movements and in law. See, e.g., Judith Resnik, Asking About Gender in Courts, 21 SIGNS 952 (1996) (discussing projects, some framed as about “gender” and others as about “race and ethnicity,” aimed at reducing bias in the courts); Serena Mayeri, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045 (2001) (looking at how legal arguments have drawn analogies between discrimination based on race and that based on gender).
under the Fourteenth Amendment. Subsequently, in the debates in the 1980s about the propriety of the nomination of Robert Bork to serve on the United States Supreme Court, women's groups criticized Judge Bork for his view that the Fourteenth Amendment's guarantee of equal protection did not apply to women. While many factors led to the defeat of his nomination, one was his refusal to recognize women's equality as a principle of United States constitutional law. Thereafter, those aspiring to hold national offices saw the political utility of claiming concern for women's rights, albeit with very different understandings of its meaning.

During the 1970s, 1980s, and 1990s, many people were also at work—in local, national, and global venues—on the problems of violence against women. Violence organized women's daily lives by disabling them from walking freely down streets, working a host of jobs, and feeling safe at home. Centuries of practices and legal rules had enshrined household violence as either tolerable or an interpersonal problem (based on idiosyncratic interactions among two particular individuals) about which law could do little. Equality advocates therefore aimed at moving the image of violence against women from the local crime scene to the national stage, so as to mark violence against women as a systemic expression of women's inequality and subordination.

In the late 1980s and 1990s, women's rights advocates thought that national legislation would be useful to supplement local resources and remedies. The model of civil rights legislation seemed ready-made, durable, reiterable. A vocabulary for discussion—already robust and potentially capacious—appeared appropriate to invoke. Catharine MacKinnon, Victoria Nourse, Pam Coukas, Lynn Hecht Schafran, and many others (myself included) participated in helping to shape legislative efforts on behalf of one such effort, the Violence Against Women Act (VAWA), first introduced in 1991 and enacted by Congress in 1994. The legislation had many facets, some addressing funding of state-based programs against violence, others facilitating the interstate enforcement of protection orders, and yet others providing access to federal courts to enforce both civil and criminal remedies. One provision,

---


26 See Nomination of Robert H. Bork to be Associate Justice of the United States Supreme Court: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (1987).


which attracted a great deal of attention, bore the title "Civil Rights Remedy" and, as initially written, permitted victims of crime who had been targeted because of gender to bring civil actions in federal court against assailants. Eligible plaintiffs included those who had been harmed by crimes including "rape, sexual assault, sexual abuse, abusive sexual contact, or any other crime of violence committed because of gender or on the basis of gender."

In many ways, the proposed statute could be understood as both an artifact of and an effort to implement the Nineteenth Amendment, which in the early 1920s had given women the right to vote. But for women voters, women employees, women Senate staffers, law students, lawyers, and judges, VAWA would neither have been proposed nor enacted. And, reflective of the changing circumstances of women as political actors, women’s rights advocates found support for that statute’s passage in state governments. State judiciaries had taken the lead in bringing problems of “gender bias” to awareness through commissioning official task forces to undertake studies and to file reports. Dozens of projects provided data about the hurdles that women, seeking safety, faced because of skeptical police officers, prosecutors, judges, and jurors. Attorneys General from more than forty jurisdictions joined in arguing that national assistance—money, programmatic support, and complementary federal judicial remedies, both civil and criminal—was needed. On the other hand, some civil liberties groups worried that the increased sanctions against violence would fall most heavily on men of color and that the benefits would flow more towards women with economic resources than to those in poorer and more vulnerable communities.

31. 42 U.S.C. § 13981 (“[I]t is the purpose of this part to protect the civil rights of victims of gender motivated violence . . .”) (1994).
32. See 137 CONG. REC. S1302, 1312 (1991). Title III, §§ 301(b) and (d), had proposed federal lawsuits for violations of the right “to be free from crimes of violence motivated by the victim’s gender,” defined as “any crime of violence . . . including rape, sexual assault, sexual abuse, abusive sexual contact, or any other crime of violence committed because of gender or on the basis of gender” that would have constituted felony offenses, whether prosecuted or not.
33. Id.
A disturbing aspect of the history of the Civil Rights Remedy in VAWA is the identity of some of its most vehement opponents: state and federal judges. These groups are not often associated with active lobbying efforts aimed at pending legislation. But when VAWA was pending, official spokespersons for state and federal judges advised Congress not to create a broad federal remedy that would enable women victims of violence to bring suits in federal court. The chair of the Conference of Chief Justices of the State Courts filed a statement arguing that, were federal jurisdiction available, women would manipulate claims to bring ordinary divorce litigation into federal court. In 1991, the Chief Justice of the United States Supreme Court and the federal judiciary’s policymaking body (the Judicial Conference of the United States) registered opposition to VAWA. As the Chief Justice explained, “[a]lthough supporting the underlying objective . . . to deter violence against women,” the Judicial Conference opposed the Civil Rights Remedy because its definitions were “so sweeping, that the legislation could involve the federal courts in a host of domestic relations disputes.” Further, the federal judiciary relied on estimates that, were federal jurisdiction available, the courts would be flooded with more than 50,000 projected filings, and more than 13,000 cases reaching the federal courts. Champions of this remedy therefore attempted to persuade groups of judges to retreat from their strident opposition. After members of a special committee of the United States Judicial Conference met with proponents of the legislation, the federal judiciary shifted from its express

---


39. See Violence Against Women: Victims of the System, Hearings on S. 15 Before the S. Comm. on the Judiciary, 102d Cong. 314-17 (1991) [hereinafter 1991 Violence Against Women Hearing] (statement of Hon. Vincent L. McKusick, President, Conference of Chief Justices). The statement claimed: “it can be anticipated that this right will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is.” Further, “It should be noted that the very nature of marriage as a sexual union raises the possibility that every form of violence can be interpreted as gender-motivated.” Id.


opposition to the Civil Rights Remedy to official silence, and recorded its support for other features of the bill, such as educational programs.\footnote{See 1993 Report of the Proceedings of the Judicial Conference of the United States 28.}

In 1994, a compromise statute was passed—providing millions of dollars in funding for state and tribal programs related to violence against women, money for shelters and educational programs, means to enforce restraining orders, criminal penalties for crossing state lines to harm “an intimate partner” already protected by a valid state domestic relations order,\footnote{18 U.S.C. § 2262 (2003).} and its “Civil Rights Remedy” for those individuals who were victims of violence. In response to the judicial critics, the 1994 version of the Civil Rights Remedy was written to protect persons from “crimes of violence motivated by gender,” in turn defined as acts “committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”\footnote{42 U.S.C. § 13981(d) and (d)(1) (1994).} The revised statute borrowed language familiar from the struggles over the meaning of the right to be free from racial discrimination. The word “animus,” found in civil rights remedies pursued under post-Civil War statutes,\footnote{See Griffin v. Breckenridge, 403 U.S. 101, 101-02 (1971) (holding that 42 U.S.C. § 1983(5) remedies are only available for actions arising from “invidiously discriminatory animus”).} was added to invoke both the traditions and the limitations that had become encrusted about it. According to the statute’s sponsors, the new text narrowed the purview of the federal civil rights remedy so that not all violence against women but only an unspecified subset—proven to be motivated by “animus based on the victim’s gender”—would find its way into federal court.\footnote{See Nourse, supra note 28, at 28-32; S. Rep. No. 103-138, at 64 (1993) (describing the animus requirement as requiring a plaintiff to show that a defendant had a “specific intent or purpose, based on the victim’s gender, to injure the victim”). See generally J. Rebekka S. Bonner, Note, Reconceptualizing VAWA’s “Animus” for Rape in States’ Emerging Post-VAWA Civil Rights Legislation, 111 Yale L.J. 1417, 1419 n.10, 1422-27 (2002) (describing the narrowing purpose behind VAWA’s “animus” language).} Further, the statute barred using the Civil Rights Remedy as a basis to bring other claims.\footnote{42 U.S.C. § 13981(e)(4) (1994).} As enacted, the statute authorized federal judges to draw distinctions among the kinds of violence and to find federal civil rights causes of action only for those in which the victim could demonstrate that such violence was based on animus, motivated by gender bias.

III. BOUNDING JUSTICE BY REFUSING NATIONAL POSSIBILITIES

As enacted, VAWA was unmistakably a compromise on many fronts and in some respects a victory of a very traditional sort. Its provisions for significant funding to state and local police and prosecutorial authorities had attracted pork-barrel proponents, and its focus on crime made it politically
popular. Bipartisan supporters on both local and national levels had signed on. Academics interested in what is termed political economy could well use VAWA’s structure as a basis for analyzing how monetary incentives and anti-crime agendas shape coalitions to bring about legislative change.

The wisdom of that compromise—and of the underlying effort to create federal court enforcement through a civil rights remedy and criminal sanctions—has been debated. Some commentators argued that its model was too exclusive, providing relief only for those with the resources to make their way into federal court.48 Others regretted that it was shaped as a lawsuit against assailants and not against states themselves.49 Yet others, worried that men of color would be disproportionately pursued under the criminal provisions of the legislation, saw it as unresponsive to a range of women fearing violence but also fearing unfair treatment by local authorities.50 Moreover, an analysis of the media discussion of the enactment details how its cumbersome term—“gender-motivated” violence—did not flow readily into popular parlance; much of the public discussion of the legislation focused on it as a provision about “rape” rather than about “civil rights.”51

For those who worried either about having done too little or chosen the wrong route, the six-year litigating life of the Civil Rights Remedy does not provide much solace. Despite judges’ fears of a flood of cases, only about fifty published decisions on the Civil Rights Remedy were reported in the federal courts during the statute’s short life (from 1994 until the spring of 2000).52 Of those cases, about forty-five percent involved allegations of violence in commercial or educational settings.53 Further, in several of these reported decisions, the claim of violations of VAWA was coupled with claims of violations of Title VII54—suggesting that a few lawyers working on discrimination in employment and in education had relied on VAWA to

48. See, e.g., Rivera, supra note 37, at 498-502.
49. A proposed revision, suggested after the Court struck the civil rights remedy in VAWA, would have given a broader mandate. See Violence Against Women Civil Rights Restoration Act, H.R. 429, 107th Cong., 1st Sess. (2001) (providing a cause of action when offenses have a connection to interstate commerce, and also providing that the Attorney General would have the discretion to bring lawsuits against states or localities if patterns of discrimination existed in investigating and prosecuting gender-related crimes).
50. See Nourse, supra note 28, at 6 n.23, 34 (describing the American Civil Liberties Union’s opposition to the Civil Rights Remedy).
52. See Brief of Law Professors as Amici Curiae in Support of Petitioners at 13-15, Morrison (Nos. 99-5, 99-29) 1999 WL 1032805 [hereinafter Law Professors’ Brief] (describing some of these cases and the data developed as of the fall of 2000). I was one of several law professors who wrote that brief. Other data searches found additional cases. See Jennifer Wriggins, Domestic Violence Torts, 75 S. CAL. L. REV. 121 (2001).
53. Law Professors’ Brief, supra note 52, at 13. Those data were developed by law students at Georgetown and Yale, working with Vicki Jackson, Reva Siegel, and myself.
supplement other claims. The small number and the kind of claims did not fulfill proponents' hopes that the Civil Rights Remedy would provide access to federal courts for those otherwise unable to make their way there.

But despite the many compromises that limited the reach of the legislation, the symbolic aspects proved of great moment—suggesting that its contributions cannot only be calculated on the basis of the number of cases filed or won. The Civil Rights Remedy in VAWA attracted a great deal of attention, indicating that its advocates had breached some boundary that resulted in deep and emotional opposition. Reflective of the shift in attitudes towards women's rights in general, critics of VAWA did not question the concept that women had rights to safety. Instead, critics of VAWA shaped their attack on jurisdictional grounds, that Congress had wrongly invaded the province of the states in violation of principles of federalism. Challengers argued that Congress lacked the power to name violence against women as about equality and commercial capacity and lacked the power to classify the harm as a "civil right" that federal judges could enforce. While many trial courts rebuffed such attacks, in 2002, a five-person majority of the United States Supreme Court agreed with the challengers and held that Congress had no authority under either its Article I Commerce Clause powers or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to confer such a right.

That decision, United States v. Morrison, is one of a series of Supreme Court rulings, all 5-4, that, beginning in the 1990s, have narrowed congressional authority. Morrison is part of a national debate about power, played out in United States constitutional terms through the concepts of "separation of powers" (allocations between the branches of the federal government and specifically here between the Court and Congress) and

---

55. See Russell, supra note 51.
56. See Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 896 (4th Cir. 1999) (en banc) ("The present controversy is a highly charged one.... Section 13981 scales the last redoubt of state government—the regulation of domestic relations.") (Wilkinson, C.J., concurring).
"federalism" (allocations between state and federal systems).\(^6\) As the majority in *Morrison* explained, "The Constitution requires a distinction between what is truly national and what is truly local."\(^6\) What is "truly national" was not violence against women, which we were told, had insufficient relationship to the economy to support legislation by Congress under its Commerce Clause powers and insufficient relationship to state action to support legislation through the Equal Protection Clause. Under this formulation, violence against women is deemed a feature of private life, not public action and not commerce. Violence against women is seen as a regrettable, if under-regulated, feature of family life but not a problem central to the national juridical agenda.

The response of unconstitutionality has teeth (or legs?) because the argument for limiting powers of government is linked to claims of personal liberty and autonomy. Thus, persons describing themselves as feminists reported being "torn" about the decision; while concerned about domestic violence, they also feared large, impersonal government.\(^6\) Such claims echo old battles, not of the Seven Virtues against the Seven Vices, but rather of competing virtues against each other. Here, ostensibly, liberty is pitted against equality on that grounds that, if Congress is recognized as having power to redress this form of inequality, Congress could use those same powers to limit other forms of personal expression.\(^6\)

But, as Reva Siegel and Sally Goldfarb have powerfully documented, the liberty of some persons has been valued over others. Judges used family "privacy" as a justification for declining to protect women’s physical safety from their husbands.\(^6\) Further, if the liberty of people—and particularly of women—were today paramount, few of the contemporary restrictions on the lives of women and men receiving federal benefits under the 1996 welfare act

---


\(^{62}\) *Morrison*, 529 U.S. at 617-18.


\(^{64}\) Opposition to federal public accommodations provisions took a similar shape. National rights to use hotels and restaurants and to rent housing were seen as intrusive on personal choices of association. See, e.g., *Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States, Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong. 2397 (May, June, July, and Aug. 1963) (Statement of Hon. C.C. Aycock, Lieutenant Governor of Louisiana) (objecting to the "[c]entral government . . . dictat[ing] to the individual citizen the persons with whom he must associate or the manner in which he must use his property or what individuals he can or cannot serve at his place of business"). Moreover, opponents argued, were public accommodation laws to be enacted, laws might also address one’s "private club" and from there, one’s dining room and then one’s bedroom. See *Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. at 436 (statement of George Wallace, then governor of Alabama) at 349-50 (statement of Sam H. Hicks, businessman from Missouri), and at 420 (statement of Ross Barnett, Governor of Mississippi). See generally Leslie Carrothers, *The Public Accomodations Laws of 1964: Arguments, Issues, and Attitudes in a Legal Debate* (1968).

pass muster. But a long history of federal superintendence of impoverished recipients of federal benefits makes the exercise of federal powers over beneficiaries seem less "unnatural" than the exercise of federal powers to question the power of men over women. Federal protection of women's physical safety was in fact an inventive expression of a newer understanding: that women's personal safety is a form of freedom which governments ought to protect. However cribbed in practice, the Civil Rights Remedy in VAWA had great symbolic import as a pronouncement by the national legislature committing high-powered national actors (federal prosecutors and judges) to spend their time recognizing women as protected from physical intrusion aimed at them because they were women.

IV. ENGENDERING JURISDICTION AND JURISDICTIONAL HIERARCHIES

In centuries past, some jurists expressly said that women's bodies were not much protected by law. But by the end of the twentieth century, lawmakers in democracies had largely rejected that idea. Rather, opposition to the Civil Rights Remedy of VAWA was predicated on the view that, while violence against women was bad, it was unnatural for responses to such violence to be located within the rubric of civil rights through federal legislation and federal adjudication. Opponents placed violence against women as fitting within—and perhaps cutting across—other legal categories: torts, criminal law, family law. Further (went the argument), tort law, criminal law, and family law were categories that belonged to state, not federal, governance. In short, the debate about the Civil Rights Remedy was on the substance of its jurisdictional propriety, which in turn had symbolic resonance.

Let me make plain the stakes. For many, discussions of jurisdiction suggest unappealing forays into technically arcane delineations. But in the United States, state and federal court jurisdiction is drenched in politics. During the first two centuries of its existence, jurisdictional divides between states and the federal government were the means of enabling slavery. During the twentieth century, access to the federal courts became one route by which

67. See Resnik, Categorical Federalism, supra note 61, at 639-42.
68. Siegel, supra note 65, at 2122-29 (detailing the historical common law right of husbands to engage in marital "chastisement").
69. See Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 843 (4th Cir. 1999) (en banc) ("Section 13981 also sharply curtails the States' responsibility for regulating the relationships between family members by abrogating interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses . . . .").
African-Americans escaped hostile state legal regimes. Over the last half century, the phrase "don't make a federal case out of it" entered popular parlance and illustrates some of what turns on access to the federal courts. "A federal case" means an important case, giving litigants the ability to bring claims before federal judges, seen in some eras as hospitable to rightseekers.

Moreover, in this federation, the jurisdictional divide between state and federal courts is gender-coded, infused with associations that identify women with families, define women's legal issues as problems of families and violence, and locate disputes about such issues within the jurisdiction of state courts. While some readers may hesitate before sharing the assumption of jurisdiction as gendered, most will be comfortable with a parallel claim: that jurisdictions have hierarchies, and that, in this country, federal jurisdiction is assumed to be a mark of a matter's import. Therefore, to refuse to permit something to become a federal case is to relegate it to a somewhat lesser stature, as about local—as contrasted with national—legal requirements.

For those not steeped in the nuances of the constitutional law of the federal courts, a basic proposition bears reiterating. Federal courts are courts of limited jurisdiction, rather than courts with a general charter to entertain any and all sorts of claims. Article III of the Constitution lists several kinds of cases to which "the judicial power" shall extend and, by implication, constrains congressional authority to provide grants of jurisdiction beyond those parameters. However, within the set of permitted cases are those "arising under" federal law. As long as Congress passes statutes that it has the constitutional power to enact by virtue of Article I or of other constitutional provisions, federal courts can have the power to hear the cases flowing from such statutes. Therefore, while Congress may not have unlimited options, its power over interstate commerce and its power to enforce the Fourteenth Amendment are substantial. Those powers could, if legislators and judges so desired, be understood as sufficient to sustain the jurisdiction of federal courts to recognize women and men as holding the right to be free from violence that undermines their ability to walk, work, or live as equals.

On more than a dozen occasions over the last forty years, members of Congress have tried to do so. They have proposed legislation to establish civil or criminal causes of action that would have deployed federal judges to enforce

70. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 981 (2000) (detailing the history and usage of the phrase). See also Eric Partridge, A Dictionary of Catch Phrases 52 (1977) (defining the phrase's colloquial American meaning as "Don't exaggerate the importance of something. Don't exaggerate the seriousness of my action... "); Martin Guggenheim, State Intervention in the Family: Don't Make a Federal Case Out of It, 45 Ohio St. L.J. 399 (1984) (detailing how procedural doctrines bar access to federal court).

71. That institutions come with such a valence is explored by Joan Acker. See, e.g., Joan Acker, Class, Gender, and the Relations of Distribution, 13 Signs 473 (1988); Joan Acker, Hierarchies, Jobs, and Bodies: A Theory of Gendered Organizations, 4 Gender & Soc'y 139 (1990).


73. Id.
provisions responsive to the disruptions, both economic and physical, stemming from the dissolution of families. The bills took different shapes, sometimes aimed at facilitating support orders by the registration of state judgments in federal courts, sometimes proposing criminal sanctions, and sometimes creating new civil remedies. For example, in the Child Support Recovery Act of 1992, Congress endorsed the use of federal courts in criminal proceedings against “deadbeat dads.”

Plainly, the Civil Rights Remedy in VAWA also represented congressional views that such jurisdictional grants were proper. But not all federal judges—and most significantly five members of the Supreme Court—agreed.

My interest is in how federal jurisdiction came to be understood as inappropriate for redressing violence against women. Why was it plausible for the majority ruling in *Morrison* to rely on images of the “truly national” and the “truly local” and to place VAWA’s Civil Rights Remedy on the wrong side of that line? The underlying facts of the *Morrison* litigation had nothing to do with families or even local crime. A young woman at college, assaulted by fellow students, filed a federal VAWA claim after the college reneged on its sanctions against the students.

She alleged that one assailant had bragged that he liked to get women drunk and then to rape them. Her case seemed to fit the problems proffered by VAWA’s supporters, who had provided Congress with evidence of the effects of violence on women’s work and education, as well as on their safety at home. The risk of violence formed a barrier to women’s free engagement in a range of commercial activities. Proponents had also supplied detailed studies of how states failed to guarantee women victims of violence equal protection of the law.

---


76. More graphic descriptions are provided in the district court opinion. See *Bronska v. Va. Polytechnic Inst.*, 935 F. Supp. 779, 784 (W.D. Va. 1999) (quoting the allegations that one of the assailants said “I like to get girls drunk and fuck the shit out of them.”).


In the 1960s, the Supreme Court concluded that congressional power over interstate commerce included enacting legislation to lower “barriers” to commerce. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (upholding the constitutionality of the Civil Rights Act of 1964 as applied to desegregation of motels on that ground: “Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”). Victoria Nourse, who worked on VAWA as a member of Senator Joseph Biden’s staff, has argued that the evidence of violence against women serving as a barrier to women’s participation in commercial activity, as developed in the legislative record of VAWA, was stronger than the records before the Supreme Court in decisions such as *Heart of Atlanta Motel*. See Victoria Nourse, Toward A New Anatomy of Constitutional Structure 40-45 (2002) (unpublished manuscript, on file with author).

78. Justice Souter’s dissent in *Morrison* listed the studies of gender bias that Congress considered when enacting VAWA. *Morrison*, 529 U.S. at 631 n.7 (Souter, J., dissenting).
Given this background, what gave federal jurists the ability to place violence against women within the rubric of local crime control and family life? How could they rely on the idea that federal court jurisdiction was somehow naturally, essentially, inappropriate for this form of litigation? How were these assumptions about jurisdictional boundaries formed? The answers come from the interactions between Congress, courts, the academy, and political movements, linking certain kinds of claims with federal and state governance. Over the course of the twentieth century, both Congress and the federal judiciary identified “the federal courts” as the national stage on which to place civil rights. In the 1950s, Brown v. Board of Education stamped the federal judiciary as an institution committed to equality. Thereafter, during the 1960s, Congress deepened that impression by creating a series of civil rights remedies enforceable in federal courts. At the same time, Congress also authorized jurisdiction for a host of other statutory claims, some involving securities, antitrust, and environmental rights, others about labor and patent law, some focused on criminal sanctions.

Federal dockets increased, and federal judges responded by finding ways to increase their numbers, add assistants, and reformulate procedures. Over time, federal judges began to develop their own conceptions of what cases ought to be committed to their courts and to tell Congress not to send certain kinds of cases their way. Time and again, members of the federal judiciary have marshalled their resources and, through a small leadership body called the Judicial Conference of the United States, used the name of the Article III judiciary to oppose congressional efforts to create new federal rights aimed at safeguarding women physically and economically. While they have not always succeeded, they have stifled efforts to innovate and to confer rights on women to challenge status hierarchies.

To be specific, in 1957, when considering proposed legislation to register orders requiring parents (virtually always fathers) who had left one state to avoid supporting children or former spouses in another, members of a committee of the federal judiciary commented that, although “convinced that there [was] need for some legislation,” it would be “unnecessary” and “unwise” to provide for “enforcement” in federal courts. Nine times between 1957 and 1992, the Judicial Conference advised Congress not to enact bills to provide for federal court assistance in the enforcement of support orders across state lines.

Three times between 1981 and 1996, the Judicial Conference recorded

79. See generally Judith Resnik, “Uncle Sam Modernizes His Justice”: Inventing the District Courts of the Twentieth Century for the District of Columbia and the Nation, 90 GEO. L.J. 607 (2002); Resnik, Trial as Error, supra note 70.
concerns about proposals related to federal jurisdiction over disputes stemming from child custody orders. \textsuperscript{82} In 1986, faced with the proposed ratification by Congress of an international treaty—the Hague Convention on Civil Aspects of International Child Abduction—the federal judiciary opposed the bill to the extent that it provided for state and federal courts to have concurrent jurisdiction over the same cases. The Conference objected.

In 1977, the Parental Kidnapping Prevention Act of 1977, H.R. 223, 95th Cong., 1st Sess. (1977), had been introduced by members of Congress who described their effort as reflecting the “natural, moral, social, and Federal right to be supported” by one’s parents. The bill, H.R. 6196, 95th Cong., 1st Sess. (1977), had been introduced by members of Congress who described their effort as reflecting the “natural, moral, social, and Federal right to be supported” by one’s parents. In light of national patterns of migration, some dependent children had been “left behind.” Because states lacked the ability to enforce support rights, proponents sought to create a federal means of enforcing state support efforts and to include a substantive federal right as well.

In 1981, a bill was introduced to grant jurisdiction to the district courts to enforce any custody order of a state court against a parent, who in contravention of such order, took a child to another state. \textsuperscript{82} The bill embodied a matter of policy for Congressional determination, the Committee concluded that Section 2 of Article III of the Constitution may not support such a grant of jurisdiction to a Federal court; historically jurisdiction in domestic relations cases as been reserved to state courts. Further, the bill is unclear as to questions of venue, what law is to be applied, and the nature of the relief to be granted. The conference in March of 1978 took no position (p. 11) on the merits of a similar bill, but authorized the communication of the Conference's views to the Congress. The Conference therefore approved transmission of the Committee’s views on HR 223 to Congress. See 1981 \textit{REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES} 65.

In 1989, after the Supreme Court had interpreted a federal statute involving kidnapping not to create a private right of action in federal court, the A.B.A. considered suggestions to seek legislation to create such a right expressly. See Thompson v. Thompson, 484 U.S. 174 (1988) (holding that the Parental Kidnapping Prevention Act of 1980 does not provide a federal cause of action). The Judicial Conference objected. See 1989 \textit{REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES} 64 (“The Judicial Conference opposed the overruling of Thompson . . . . Such legislation would constitute an unnecessary expansion of federal jurisdiction into areas in which federal courts have no expertise and would result in unnecessary federal-state conflicts.”).

In 1995, a proposal, the Child Custody Reform Act of 1995, S. 632, 104th Congress, 1st Sess., was made to amend the Parental Kidnapping Prevention Act (PKPA), 28 USC § 1738A, to establish “uniform standards for resolving child custody jurisdiction between states.” The bill would have continued jurisdiction of the state court that made initial custody decisions, established an enhanced locator system to track proceedings, and expressed the “sense of the Senate” that local governments continued jurisdiction of the state court that made initial custody decisions, established an enhanced locator system to track proceedings, and expressed the “sense of the Senate” that local governments

The Judicial Conference warned against this proposal:

Although neither the PKPA nor the legislation currently implicates the federal courts, efforts are being made to amend the bill or other legislative proposals to create federal jurisdiction in this area. The Judicial Conference previously opposed similar legislation, noting that it “would constitute an unnecessary expansion of federal jurisdiction into areas in which federal courts have no expertise and could result in unnecessary federal-state conflicts” (see 1989 Judicial Conference Report at 64). At this session, the Conference, on recommendation of the Committee, reaffirmed its position opposing legislation to create a federal cause of action to resolve conflicts between states on the issue of jurisdiction over child custody disputes. The Conference also emphasized confidence in the state courts’ ability to resolve such disputes and supported the effort of the Conference of Chief Justices to address the problem of conflict on interstate child custody disputes.

jurisdiction over litigation under the convention. Further, as noted, in 1991 the judiciary initially objected to early drafts of VAWA. The judiciary has also counseled against other statutes related to issues identified with violence against women and children.

Earlier in the century, as the federal judiciary was becoming more organized and developing its corporate voice, some of its members worried about their institutional role as judges. They cautioned against taking positions on its own jurisdictional boundaries. For example, in the early 1930s, one member of the Judicial Conference commented: “to express ourselves on contemplated legislation to grant or to withdraw jurisdiction from the Federal Courts—... it seems to me to be rather presumptive on our part, if we undertake it officially.”

Through the decades, some judges have viewed commentary on pending new statutory causes of action as ill-advised. But, as illustrated by federal judicial opposition to family support and anti-violence provisions, other judges, concerned about the volume and believing that Congress was crafting too many and some of the “wrong kind” of federal rights, pressed the Judicial Conference to take positions against the specific proposals detailed above. They

83. 1986 REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12. The purpose of the legislation, according to one of its sponsors, Jack Brooks of Texas, was to deter the “removal of children from the United States to foreign countries in order to obstruct parental rights.” Included was a new federal felony for “violation of state parental kidnapping statutes.” Sponsors argued that state prosecutors lacked funds to extradite violators. The act, to enable pursuit and extradition by federal officials, was passed, and in 1988, the term “kidnapping” in international extradition treaties was extended to apply to parental kidnapping. See Extradition Treaties Interpretation Act of 1988, Pub. L. No. 105-323, 112 Stat. 3033.

84. See 1991 REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 57 (“The Conference agrees with the State Chief Justices that the current broad definition of crime (applicable, for example, to misdemeanors and other minor threats against persons and property) creates a right that will be invoked as a bargaining tool within the context of divorce negotiations and add another major complicating factor to an environment which is often acrimonious as it is.”).

85. For example, the Conference objected to the Pornography Victims Compensation Act. See 1990 REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (stating that, “insofar as it would provide a right of action for victims of violent crime against producers and distributors of sexually explicit materials in certain circumstances” in federal court, ... the “subject matter of the legislation falls within the traditional scope of state law, and there is no need for actions in the federal courts to vindicate federal interests or policies”).

86. See 1932 Transcript 237A, in Records Related to Judicial Conference Meetings, 1922-1958, at Box 8 (Judge Alscher). Materials from the Senior Conference of Chief Justices (which then became the Judicial Conference of the United States) can be found at the National Archives in Washington, D.C. These materials are catalogued under Record Group (RG) 116, Administrative Office of the U.S. Courts, and then by “entry” and the number of “containers” (or boxes). Within each of the many file boxes are transcripts, memoranda, reports, notes, and correspondence, not always kept in a uniform manner. “Records Related to Judicial Conference Meetings, 1922-1958” is the title of Entry 4, a collection of 83 boxes.

87. The history is rich and complex, as, over the eighty years of existence, the Conference took different approaches toward commenting on proposals to create new federal rights. See Resnik, Constricting Remedies, supra note 38; Resnik, Trial as Error, supra note 70. By 1995, under the leadership of the current Chief Justice, the Judicial Conference approved a Long Range Plan, urging Congress to create presumptions against new federal rights if enforced in federal courts. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995), reproduced in 166 F.R.D. 49, 88-89 (1996) [hereinafter LONG RANGE PLAN] (Recommendation 6).
produced a solid wall of opposition to legislation providing federal court enforcement of interstate family obligations and to legislation relating to the physical safety of children and of women inside households and within or fleeing from dissolving families.

Through deliberate and largely successful efforts to dissuade Congress from providing jurisdiction, federal courts did not decide such cases. From the descriptive, the prescriptive emerged: that federal courts ought not decide such cases. That view gained constitutional stature in *Morrison*—enshrining the proposition as a constitutional prohibition.

Federal judges also expressed a sense of their distance from women’s lives in families in other ways. During the 1960s and 1970s, as women’s rights activists brought claims of unequal treatment to courts, they found some of the pain of discrimination in those very places—the courts. In 1980, two fledgling organizations, the National Association of Women Judges and the National Organization of Women Legal Defense and Education Fund created a new project: The National Judicial Education Project to Promote Equality of Women and Men in the Courts. Its purpose was to educate judges about their own stereotypes.

“Gender bias in the courts” became the shorthand, as gender bias task forces were launched in dozens of states. In the late 1980s, some women and men thought it time to start parallel efforts in the federal courts. Formal requests were made to an official commission, the Federal Courts Study Committee, that Congress chartered to map the future of the federal courts. That Committee, comprised of jurists and lawyers, issued a report in 1990, which amidst a myriad of recommendations, rejected the request to support federal task force work akin to that ongoing in the states. As the Report explained, “studies in many state systems reflect the presence of bias—particularly gender bias—in state judicial proceedings.” Yet, “we have confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum.” While educational programs were useful and vigilance was important, more was not needed—because of the “nature” of federal law.

Between the 1950s and 1990s, however, the judiciary was more selective. As for civil rights, the Conference did not oppose all such legislative efforts. For example, despite some concerns about workload, the judiciary did not object to the 1964 Civil Rights Act. See 1963 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 74.

88. See Schafran, supra note 35.


How could "the nature of federal law" reduce problems of gender bias? One possibility is that federal law and federal judges are deeply egalitarian, thereby avoiding the perils of bias. But the struggles about race discrimination, played out today in terms of color blindness and a refusal to confront systemic discriminatory practices within the criminal justice system, make that reading implausible. Rather, something presumed to be essential in the content of state, as contrasted with federal, jurisdiction was the implicit predicate for the 1990 Federal Courts Study Committee's conclusion.

Therefore, more excavation and translation is needed. Return to the commentary: "studies in many state systems reflect the presence of bias—particularly gender bias—in state judicial proceedings." But, "we have confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum." How does one translate "gender bias" here? While the term "gender" embraces the social meaning of the roles of both women and men, in this context, gender bias is equated with bias against women. Consider then how state law could have problems about fair treatment of women but federal courts would not. To sustain that thesis, one needs a theory of identity for the different court systems and for the different ways that women and men would engage with them.

Where are women as litigants in courts? Potentially, they could be plaintiffs or defendants in civil or criminal cases. However, rather than classified as workers, politicians, criminals, or citizens, women are frequently viewed through their relationships and categorized by their status as wives, mothers, daughters. If conflated with roles within families, the principal legal problems of women can be assumed to stem from family life. (Recall the argument that some judges made in the early 1990s against the Civil Rights Remedy in VAWA: that women would use claims of violence strategically to obtain federal jurisdiction over divorce and child custody disputes.) The legal problems of families, in turn, came to be understood as appropriately issues that state judges—not federal judges—decided. That understanding grew, as I detailed above, because of efforts by federal judges to avoid dealing with failing families. Thus, the federal courts gained the veneer of focusing on national issues, defined as including commerce and equality but excluding family life. We can then return to the text of the Federal Courts Study.

---

91. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting an individual's claim of discrimination in the decision to sentence him to death, despite statistical evidence that defendants convicted of killing white victims were four times more likely to be sentenced to death than were defendants found guilty of killing African-Americans).
92. FCSC REPORT, supra note 90, at 169.
93. During the 1980s, many feminists turned to the word "gender" as a means of underscoring that distinctions between men and women could not only be understood as an artifact of nature—"sex"—but were also social constructions. See JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY (1988); TORIL MOI, SEXUAL/TEXTUAL POLITICS: FEMINIST LITERARY THEORY (1985).
94. Supra note 39.
Reconstructing Equality

Committee and understand its tacit assumptions: while problems of gender bias were extant in state courts, federal courts were not likely to share them because of the differing composition of the *dockets* of the two sets of courts.

I have just provided two means—lobbying efforts over forty years and a major report on federal jurisdiction—by which groups of federal judges and lawyers expressed their views about what fit within the federal framework and why certain kinds of "women's issues" fell outside it. I cannot leave this discussion with the impression that these judges' discomfort with undertaking lawmaking related to women in and outside of families in fact insulated federal judges from doing so.

Two empirical points undermine that impression. First, although statements that family law "belongs" to the states are often made, federal statutory regimes govern many facets of family life. United States tax law defines household heads. United States benefits law (welfare, social security) and bankruptcy law detail family relations and obligation of support.\(^9\) United States pension law governs marital property rights in pensions, which for certain classes are the largest asset when and if they divorce. And, if daily headlines about Elian Gonzalez did not make this point clear,\(^9\) United States law defines families for purposes of immigration and asylum.\(^9\) Further, when Congress affects economic relations between current and/or former marital partners through social security, Railway Retirement benefits, and employee benefit plans, the Supreme Court has often found state law—including community property law—preempted by the force of federal economic policies relating to flows of income to workers and their spouses.\(^9\) Moreover, the Supreme Court itself is a font of federal family law, developed in cases raising questions about the constitutionality of state laws on marriage, adoption, and visitation of children.\(^9\) And, of course, women are litigants in many cases outside their role as actors within families.\(^9\)

This description also provides a normative insight: there is no alchemy-of-equality simply by consigning an arena of law to federal or to state actors. The substance of the policies—on welfare, tax law, or immigration—may or may

---

not further equality, depending upon the commitments of a given legal and political regime. Those commitments do not inhere in definitions of “state” and “national” but spring from the work of those who seek equality and justice and who strive to make political systems adopt such commitments.

Second, despite protestations that federal courts did not need to undertake studies of the effects of gender in their courts, several circuits did take on such projects. About half the federal circuits had projects on gender, as well as on race, religion, and ethnicity in the courts. And subsequently, the Judicial Conference endorsed such work. Those task forces in turn found that women who were lawyers and judges working within the federal courts did not find their gender irrelevant. Rather, significant proportions of women reported that in different fashions, gender mattered, often to their detriment, as workers within the courts. Some reported that bias also harmed women litigants. In contrast, the percentages of men reporting disadvantage from their gender were much smaller.

Return then to the question about how and why the Civil Rights Remedy of VAWA was seen as a breach of jurisdictional etiquette. Nature does not make jurisdiction, but people do. Understanding violence against women as outside the purview of federal law stems from active efforts by judges, in conjunction with other political actors, to keep the concept of federal statutory rights and the work of federal judges from developing national norms of physical safety as part of the dignitary rights of women and men in the United States. Return also to the symbolic as well as the substantive harm that flowed from that rejection. The phrase “don’t make a federal case out of it” makes the point that “the federal” is the mountain, not the molehill.

101. The toleration of gender discrimination in immigration provides one example. See Nguyen v. INS, 533 U.S. 53 (2001) (upholding a statutory classification varying the time when a child, born abroad, can apply for citizenship based on whether the child’s mother or the child’s father was a United States citizen).


103. LONG RANGE PLAN, supra note 87, 166 F.R.D. at 172-74 (Recommendations 78 and 79) (directing federal courts to investigate and eliminate gender bias and noting that the Ninth Circuit Gender Bias task force “sets a high standard, one that other courts would do well to emulate”).

104. See, e.g., THE EFFECTS OF GENDER, supra note 102, at 949-53.


106. See, e.g., THE EFFECTS OF GENDER, supra note 102, at 950.
V. THE GENDER OF JURISDICTION, AND THE JURISDICTION OF GENDER

By way of conclusion, let me underscore five themes. First, jurisdiction has gender. Whenever power is being allocated between state and federal courts, one must ask not only how women are treated but how the allocation affects our understanding of the problems that belong to women and to men. By drawing jurisdictional lines, polities may also be drawing gender lines. We must probe both the jurisdiction in gender, and the gender in jurisdiction.107

Second, I counsel against assuming that any particular jurisdiction is necessarily a safe harbor for women’s equality. Equality is not an artifact of the level of a court or of a government body but of who has power within it and what their commitments are. Therefore, I am opposed to what I have termed “categorical federalism,”108 to rigid equation of any particular level of governance with a particular set of problems or a particular view of them. Laws are not unidimensional but often affect many aspects of a person’s life. Opponents of VAWA who wanted to label it a statute about families and about crime were right to understand that it did implicate family life and street crime. But they were wrong to see the provision in only those terms. VAWA was also about the relationships among violence, commerce, and equal citizenship. But proponents of equal citizenship ought not to assume that national or transnational legislation could ever suffice to alter the material conditions of women’s lives. They need to look to state as well as national and international efforts to forward those goals.109

My third point is to enlarge the frame beyond the arguments that jurisdictions can become gendered and that jurisdictional divides are one of the many mechanisms by which women and men are distinguished. Gender systems are themselves forms of jurisdiction. At its core, the sex/gender system is a system of boundaries. Many of the successes that have advanced women’s equality have come by reframing understandings of the range of possibilities of both women and men, by redrawing some boundaries, and by erasing others. To do so has required detaching assumptions of the naturalness of differences between women and men and replacing those assumptions with appreciation for the breadth of capacities that all persons possess.

Feminism has long known that it had much to fix. That women had to come to terms with the political construction of the family has long been obvious. That women had to focus on violence has also been readily evident. What I hope to have shown is that feminism must also take on the conceptual underpinnings of this federation. We need to understand the assignment of

108. Resnik, Categorical Federalism, supra note 61.
109. After Morrison, many local efforts have been undertaken to create state or municipal prohibitions against gender-motivated violence. See Resnik, Categorical Federalism, supra note 61, at 643 n.101; Russell, supra note 51, at 81-92; Bonner, supra note 46, at 1419-20.
roles to state, local, and national institutions and to demonstrate the way in which gender and patriarchal assumptions infuse understandings of the categories of federalism and of the very meaning of the powers permitted to the national government. Thus, and fourth, in addition to projects related to women's work, to violence, and to families, feminists must add questions of federalism to the list of structures and practices requiring refurbishing.\textsuperscript{110}

I began this essay by asking readers to look at a picture. I underscored the peculiarity of its contemporary capacity to suggest Justice. I hope that, by the end of this essay, readers also can see the peculiarity of the response of some jurists, who, when called upon to take into account the inequality produced by violence against women, responded by talking about the "truly local" and concluded that the problem was outside the province of federal law. And I also hope to have illuminated the analytic similarity between essentializing jurisdiction and essentializing gender.

One final return to Renaissance imagery is thus in order. Recall that, in those many pictures, Justice often had company—Temperance, Prudence, and Fortitude—friends, companions, and colleagues, who shared in the work of producing a wise and good social order. Although lost to popular discourse, that collective still has didactic power. To work successfully to create women's equality depends upon collaboration—among women, between women and men, and across levels of government. My impatience and impudence makes me somewhat skeptical about embracing Temperance or Prudence. But plainly at least Fortitude is required to bring about the kinds of transformations needed to undergird a deep and substantive equality, articulated and enforced—locally, nationally, and transnationally—for women. The conference's title was \textit{Women, Justice and Authority}, and we displayed but a single icon, Justicia, on the brochure. But, when in search of the authority for women to have justice, one lonely woman's figure is insufficient.

\footnote{110. As several have done. See METTLER, \textit{supra} note 16; Siegel, \textit{supra} note 34; Resnik, "Naturally" \textit{Without Gender}, \textit{supra} note 90.}
WRITING FEMINIST JUSTICE