
THE PROGRAMMATIC JUDICIARY: LOBBYING, JUDGING, AND INVALIDATING THE VIOLENCE AGAINST WOMEN ACT

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I. ADJUDICATING AND PLANNING ABOUT RIGHTS

On May 15, 2000, Chief Justice William Rehnquist, writing on behalf of a majority of five, concluded in *United States v. Morrison* that Congress had no power either under the Commerce Clause or the Fourteenth Amendment to enact a civil rights remedy that permitted victims of violence, targeted because of their gender, to bring lawsuits in federal or state courts for

* Arthur Liman Professor of Law, Yale Law School; member of the University of Southern California Law School faculty, 1980–1996. © 2000 Judith Resnik, all rights reserved. My thanks to Dennis Curtis, Reva Siegel, Vicki Jackson, and Sally Goldfarb for the pleasure of thinking with them about these problems, and to Laura Fernandez and Sarah Russell for their insightful research assistance and comments. Upon occasion, I have participated—through research, commentary, testimony, and the like—in some of the events discussed herein. For example, in the early 1990s, I was a member of a task force, considering the effects of gender on courts, and more recently, I was one of six law professors who wrote an amicus brief, filed on behalf of about 100 professors of constitutional law, the federal courts, and jurisprudence, in support of congressional authority to enact the Violence Against Women Act when *United States v. Morrison*, 120 S. Ct. 1740 (2000), was pending before the Supreme Court.

This essay was written on the occasion of the 100th anniversary of the founding of the Law School at the University of Southern California. I was honored to be a member of its faculty for several years, during which time I began my work related to the transformation of the practices of judging, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982), and subsequently, the institutions of judging, see, e.g., Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985). This essay further develops issues explored in a recent chapter of this project, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

Thanks are thus also owed to many colleagues and students at USC, from whom I learned so much. Writing for this symposium is one small way to express my appreciation for the rich intellectual environment and deeply collegial exchanges that are emblematic of the USC Law Faculty and from which I have greatly benefited.

damages against their attackers.¹ The Court thus held unconstitutional one facet of the 1994 Violence Against Women Act (VAWA).²

But May 15, 2000 was *not* the first time that the Chief Justice had spoken out against the civil rights provisions within VAWA. In 1991, as a draft of the statute was first pending, the Chief Justice cited it in his annual “State of the Judiciary” address.³ On that occasion, the “end of [his] fifth year as Chief Justice” and the year in which the “nation celebrated the Bicentennial of the Bill of Rights,” Chief Justice Rehnquist announced that the time had come for reconsideration of the “future role of the federal courts.”⁴ He complained that, despite the hard work and innovative efforts of the judicial branch, the federal judiciary was facing yet “more demanding and more complex tasks.”⁵

These two pronouncements from the Chief Justice—one by means of constitutional adjudication, the other as an individual who is also the chief executive officer of the federal judiciary—serve to illustrate the questions to which this essay is addressed. As I detail in Part II, in the twentieth century the federal judiciary developed an institutional persona, and during the second half of the twentieth century, the judiciary enlarged the subject matters addressed through its collective voice to embrace the questions of whether Congress should create new federal rights. Thus, the role of the federal judiciary during the development of VAWA is of interest not because of the posture of an individual jurist but because of the institutional developments that are illustrated by rehearsing the process of the statute’s enactment and the invalidation of one of its provisions.

1. *United States v. Morrison*, 120 S. Ct. 1740, 1759 (2000).

2. *See* 42 U.S.C. § 13981 (1994). Several other provisions of the statute remain, including the authority to make grants to state, federal, and tribal programs responding to violence within households, 42 U.S.C. §§ 300w-10; 3796gg; 10409 (1994); means to ease interstate enforcement of protection orders; and the creation of federal crimes for those who cross state lines to threaten or harm a spouse or intimate partner protected by a permanent state order or who, “in the course or as a result of” crossing state or Indian country boundaries, commit acts of violence against such partners. 18 U.S.C. §§ 2261–2265 (1994). In the fall of 2000, Congress enacted the “Victims of Trafficking and Violence Protection Act of 2000,” which reauthorized VAWA and provided funding of more than \$3 billion for a five-year period. *See* Pub. L. No. 106-386, § 1001, 114 Stat. 1464 (2000). The funds in VAWA 2000 are double those that were provided in 1994. *See* Marcia Borucki, *More Money Could Mean More Counseling*, CHI. TRIB., Oct. 25, 2000, Woman News, at 1.

3. William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1992, at 1, 3 [hereinafter Rehnquist, *1991 Report*]. Such annual addresses became a formal practice during Warren Burger’s term. *See* William H. Rehnquist, *Chief Justice Recaps 1995 in Year-End Report*, THIRD BRANCH, Jan. 1996, at 1, 1 (describing the practice).

4. Rehnquist, *1991 Report*, *supra* note 3, at 1–2.

5. *Id.* at 1.

Should the institution of the federal courts stay in the (new) business of providing advice to Congress on whether to authorize rights-seeking in federal courts by members of this polity? How does the work of providing such advice contrast with the work of adjudication? What ought the constitutional charter of the Article III judiciary and the professional norms of judging developed around that mandate imply for the modes of discourse that the institution, “the Article III judiciary,” adopts?

The two examples offered thus far, constitutional adjudication and yearly speeches, are not the only avenues available to the Chief Justice by which to affect the shape of the future of the federal judiciary. As its senior corporate officer, he also serves as the Chair of the Judicial Conference of the United States, a congressionally created body formed in 1922 and now comprised of twenty-seven members, including the chief judges of the federal circuit courts as well as selected district judges.⁶ The Judicial Conference is the official policymaking entity for the federal judiciary.

In his 1991 annual address, Chief Justice Rehnquist reported that the Judicial Conference had created a committee on long range planning because of the need to “reexamine the role of the federal courts.”⁷ Discussing mounting caseload pressures, Chief Justice Rehnquist counseled against increasing the number of judges. Rather, “[m]odest curtailment of federal jurisdiction is important; equally important is self-restraint in adding new federal causes of action.”⁸

In addition to listing several statutes as “candidates for possible curtailment” (including diversity jurisdiction, the Federal Employers’ Liability Act, the Jones Act, and habeas corpus), Chief Justice Rehnquist also cited examples of pending legislation as “unnecessarily” expanding federal jurisdiction.⁹ Included on that list was VAWA. “Although supporting the underlying objective . . . to deter violence against women,” he stated that the Judicial Conference was opposed to portions of the bill, including what he characterized as its too-sweeping definitions of crime and its private right of action, which, he predicted, “could involve the federal courts in a whole host of domestic relations disputes.”¹⁰

6. See 28 U.S.C. § 331 (1994).

7. Rehnquist, *1991 Report*, *supra* note 3, at 2. In the same year, the judiciary created an Office of Judicial Impact Statements to provide assessments of the anticipated effects of proposed legislation. See CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS (A. Fletcher Mangum ed., 1995).

8. Rehnquist, *1991 Report*, *supra* note 3, at 3.

9. *Id.*

10. *Id.* (“The Judicial Conference joins the Conference of Chief Justices (composed of the chief justices of the state courts) in opposing [these provisions] of the bill.”) In support of the floodgates claim, the

The Conference's position on VAWA was developed from recommendations by its Ad Hoc Committee on Gender-Based Violence, appointed by the Chief Justice¹¹ and specially created¹² to study the proposed statute which, soon after its introduction, had attracted opposition from the Conference of Chief Justices of the State Courts.¹³ The federal Committee on

Office of Judicial Impact Assessment provided a series of assessments of projected effects. In a 1991 assessment, that office concluded that the "annual cost to the Judiciary . . . would exceed \$62.5 million and 691 work years." *Violence Against Women: Victims of the System, Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 10 (1991) [hereinafter *1991 Violence Against Women Hearing*]. The predication assumed that the civil rights remedy "may generate as many as 53,800 civil tort cases annually," of which "13,450 . . . are anticipated to reach the Federal courts." *Id.* at 15-16.

A subsequent estimate suggested that the provision of a civil rights remedy would result in "\$44 million and 450 work years." OFFICE OF JUDICIAL IMPACT ASSESSMENT, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL IMPACT STATEMENT: VIOLENCE AGAINST WOMEN ACT OF 1991, S. 15 AS REPORTED 2 (rev. Jan. 8, 1992) (on file with author). A few months later, the conclusion was that, were the statute enacted, it would cost the federal judiciary more than "\$81 million and 922 work years." OFFICE OF JUDICIAL IMPACT ASSESSMENT, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL IMPACT STATEMENT: VIOLENCE AGAINST WOMEN ACT OF 1991, S. 15 AS REPORTED 1 (rev. June 8, 1992) (on file with author). The new Statement also predicted that permitting civil rights remedies "for crimes of violence motivated by the victim's gender, would result in about 13,450 additional civil rights filings" and that such trials "would comprise about 8 percent of all civil trials." *Id.* Proposed criminal penalties were predicted to impose "\$18.8 million and 226 work years." *Id.* at 2. For a more modest estimate from the Congressional Budget Office (of some \$10-\$50 million annually but "probably falling in the lower end of that range, beginning two-to-three years after enactment") see SENATE COMM. ON THE JUDICIARY, S. REP. NO. 103-38, at 71 (1993).

As of the fall of 1999, some fifty cases invoking the civil rights remedy in VAWA had been reported. See *infra* note 23 and accompanying text.

11. Memorandum from L. Ralph Mecham, Director of Administrative Office of the United States Courts, to All Federal Appellate, District, and Magistrate Judges, to All Circuit and District Court Executives, and to All District Court Clerks 1-2 (Aug. 19, 1991) (on file with the author) (memorandum regarding the creation of the Ad Hoc Committee on Gender-Based Violence and the judges appointed to it).

12. As detailed *infra* Part II, the Judicial Conference of the United States has developed a practice of commenting on proposed legislation but often seeks advice from its standing committees, such as the Committee on Federal-State Relations. For major legislative efforts, such as the creation of the magistrates system, the provision of funds for indigent defense, and sentencing reform, specially chartered subcommittees have been set up, often by the Judicial Conference. Creating a special committee for VAWA thus indicated that the Chief Justice saw it as meriting special attention.

13. See *1991 Violence Against Women Hearing*, *supra* note 10, at 314 (statement by Hon. Vincent L. McKusick, President, Conference of Chief Justices). On behalf of the Conference, Chief Justice McKusick argued that if the statute permitted "civil suits against male relatives, particularly against husbands or intimate partners, 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." *Id.* at 315. In a comment reminiscent of some forms of feminist theorizing about the relationship between sex and rape, he continued, "[i]t should also 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-based." *Id.* at 316. For additional discussion of the legislative history, see Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

Gender-Based Violence also recommended opposition,¹⁴ which became official federal judicial policy as reported by the Chief Justice in 1991 and again in 1992,¹⁵ a year in which Democrats gained control of the Executive Branch and Congress. But that position was modified in 1993, in that the Judicial Conference took no position on the proposed civil rights remedy and endorsed another aspect of the bill, encouraging circuits to “conduct studies with respect to gender bias.”¹⁶

The change in the Judicial Conference’s position was prompted, in part, by revisions made to the text of VAWA in light of the judicial objections.¹⁷ While initial drafts had provided for access for all victims of gender-based violence,¹⁸ the section was rewritten, according to its legislative sponsors, to narrow its scope by further specifying the proof required of discrimination. To invoke federal jurisdiction, victims of gender-based violence had to show that the alleged acts of violence were a) substantial enough to be eligible for prosecution as a felony and b) were not just violent but discriminatorily so—that the victim was a victim because the perpetrator was motivated by “animus based on the victim’s gender.”¹⁹ Such a plaintiff could sue in either state or federal court; the federal remedy was “supplemental,” not displacing

14. It did so “reluctantly.” JUDICIAL CONFERENCE AD HOC COMM. ON GENDER-BASED VIOLENCE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 7 (Sept. 1991) (on file with author). These reports are available at libraries of the Administrative Office and of the Federal Judicial Center in Washington, D.C.

15. William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, THIRD BRANCH, Jan. 1993, at 1, 1–3 (“As presented in the last Congress, that proposed remedy would have seriously encumbered the federal courts, impacted adversely on federalism values, and created avoidable interpretation problems because of uncertainties about its scope and reach.”). The Chief Justice also reiterated his concerns about federalism, reminding his audience that, in 1991, he had “advocated a vision of the federal courts as distinctive forums of limited jurisdiction, meant to complement state courts rather than supplant them.” *Id.* at 1. The Report also responded to the 1992 election by reaffirming the judiciary’s “desire to work closely with the other two branches of government in dealing with challenges facing the judiciary.” *Id.* at 2.

16. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28 (1993) [hereinafter 1993 JUDICIAL CONFERENCE REPORT].

17. In addition, the leadership of the ad hoc committee shifted (from the Hon. Thomas Reavely to the Hon. Stanley Marcus), and many individuals (myself included) discussed with federal judges the propriety and wisdom of judicial opposition to a bill providing civil rights for women. See Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 541 (1995) (noting the “trouble” judges can “get into” when they “attempt to have a political discourse” and specifically that their interventions could create misperceptions about judicial attitudes).

18. See 137 CONG. REC. S1302, S1312 (1991). Title III, sections 301(b) and (d) had proposed permitting 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 could have constituted felony offenses, whether or not prosecuted as such. *Id.* at S1312.

19. 42 U.S.C. § 13981(d) (1994). “Nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender . . .” 42 U.S.C. § 13981(e)(1).

state provisions but adding to them by offering an alternative venue. The federal venue was, however, a limited one; certain state law claims arising out of the same facts could not be included.²⁰

Thus, in 1994, after several hearings²¹ and revisions, Congress invoked its powers under both the Commerce Clause and the Fourteenth Amendment and enacted the multi-faceted VAWA statute—providing for state and tribal programs related to violence against women, with money for shelters and educational programs, with provisions aimed at easing the enforcement of restraining orders, with criminal penalties for crossing state lines to harm an intimate partner protected by a valid state protection order, and with a civil rights remedy for those individuals alleging gender-based violence.²² And despite predictions of a deluge of filings, during the first five years of that civil rights remedy's brief life (from 1994 until the fall of 1999), about fifty cases were reported, of which about forty percent involved allegations of violence in commercial or educational settings.²³

20. Under ordinary rules of supplemental jurisdiction, state claims may be appended if they share a "common nucleus of operative facts" with federal claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (announcing the principle and its constitutionality). Congress codified judicial authority to do so. *See* 28 U.S.C. § 1367 (1994) (distinguishing between cases based on diversity and those based on federal question jurisdiction and providing a presumption in favor of supplemental jurisdiction). In contrast, VAWA does not permit the inclusion of claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree" to be appended to VAWA complaints. 42 U.S.C. § 13981(e)(4) (1994).

21. The legislative record establishes several propositions, some related to the economic impact of violence against women, some substantiating that women are specially likely to be the victims of violence, and some related to the impoverished remedial responses available to women. The following leitmotifs emerge: that women are frequently the targets of crimes; that much violence against women is visited upon them in their homes; that violence organizes women's lives, such that they select times and places of travel and of work to lessen the risk of being subjected to violence; that violence against women, and specifically that subset termed domestic violence, has a major cost to health services and business across the United States; that state officials, from local police officers to prosecutors to judges, often see violence against women as less serious an offense than other forms of violence and that such attitudes have been shaped from centuries in which law first authorized and then tolerated male control of women to whom they were married; and that the residue of both legal and social attitudes about violence against women results in systematically less protection for women victims of violence than for men.

22. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001–40304, 108 Stat. 1796, 1902–42 (codified at various sections of titles 8, 18, and 42 U.S.C.).

23. *See* Brief of Law Professors as Amici Curiae in Support of Petitioners at 13–14 & n.18, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5 & 99-29), available at 1999 WL 1032805. The case that provided the Supreme Court with the occasion to rule on the statute's constitutionality involved a young woman at a college (Virginia Polytechnic Institute) who had alleged that she was raped by two men, one of whom explained that "he 'like[d] to get girls drunk and . . .'" The majority then noted that it had omitted a verbatim quote, used in the record below, that "consist[ed] of boasting, debased remarks about what [one of the defendants said he] would do to women, vulgar remarks that cannot fail to shock and offend." *Morrison*, 120 S. Ct. at 1745–46.

The passage of the legislation did not, however, still the Chief Justice's opposition to it. In 1998, in a speech given at the annual meeting of the American Law Institute, the Chief Justice opined that several recent federal statutes, including VAWA, were inappropriate expansions of federal jurisdiction—that “traditional principles of federalism that have guided this country throughout its existence” meant that such issues should be governed by the states.²⁴ Further, he said, “one senses from the context in which [these bills] were enacted that the question of whether the states are doing an adequate job in this particular area was never seriously asked.”²⁵

The Chief Justice's commentary did not reflect VAWA's actual legislative history, in which “whether the states [were] doing an adequate job” was explored in some detail; moreover, information about state inadequacies came directly from state officials. Indeed, but for “state action”—state chief justices (commissioning task forces to learn about how well their jurisdictions responded to women's claims) and state prosecutors (seeking federal funding for more programs for women victims and welcoming federal avenues of redress for those victims)—the legislation would likely not have been enacted. That state law enforcement and state courts often failed to protect women from violence was established by reliance on state-commissioned reports about their own justice systems.²⁶ Attorneys general from thirty-eight states told Congress that they supported the creation of federal remedies as a useful supplement to—not a displacement of—state remedies. Further, the commitment of state executives to VAWA remained strong six years later, when the constitutionality of the civil rights remedy in the statute was pending before the Supreme Court. In 1999, the National Association of Attorneys

24. William H. Rehnquist, *Remarks at Monday Afternoon Session, in AM. LAW INST., 75TH ANNUAL MEETING: REMARKS AND ADDRESSES*, May 11–14, 1998, at 13, 17–18 [hereinafter Rehnquist, *1998 ALI Remarks*] (also citing bills on juvenile crime, the Anti-Car Theft Act of 1992, the Freedom of Access to Clinic Entrances Act of 1994, the Child Support Recovery Act of 1992, and the Animal Enterprise Protection Act of 1992, as well as “recent arson provisions” as examples of expansion of federal jurisdiction). See also William H. Rehnquist, *Criteria for Federal Jurisdiction Need to Be Preserved in Assessing Proposed Legislation*, ST.-FED. JUD. OBSERVER, Feb. 1999, at 2.

25. Rehnquist, *1998 ALI Remarks*, *supra* note 24, at 18.

26. Twenty-one reports—all official documents issued by state judiciaries—were before Congress. *Morrison*, 120 S. Ct. at 1760 n.7 (Souter, J., dissenting) (listing the reports). Provided was powerful and disheartening documentation of systemic failures to treat women equally. For example, Connecticut's 1991 task force concluded that “women are treated differently from men in the justice system and, because of it, many suffer from unfairness.” CONN. TASK FORCE ON GENDER, JUSTICE AND THE COURTS: REPORT TO THE CHIEF JUSTICE 12 (1991). For analyses of these projects, see generally Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (1996). The first federal circuit to issue a report was the Ninth Circuit, see NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS: FINAL REPORT (1993), reprinted in 67 S. CAL. L. REV. 745 (1994). For discussion of the hesitancy of the federal judiciary to take up such projects, see Judith Resnik, “Naturally” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991).

General supported the reauthorization of VAWA, and thirty-six states joined to file an amicus brief urging the Supreme Court to uphold the civil rights remedy as a valid exercise of Congress's Commerce Clause powers.²⁷ Only one state—Alabama—sought invalidation.²⁸

Ignoring, in his 1998 ALI speech, the information about state support of federal involvement that had laced VAWA's history, the Chief Justice advanced his own theory against federal activity. He argued that his thoughts on federalism comported with the views "enunciated by Abraham Lincoln in the 19th century and by Dwight Eisenhower in the 20th century."²⁹ Two years later, in May of 2000, Chief Justice Rehnquist issued his most powerful indictment of VAWA. Writing for the majority, he held that Congress had unconstitutionally violated such principles of federalism because the creation of the federal civil rights remedy for gender-animated violence breached the distinction between the "truly local" and the "truly national."³⁰

The history of the relationship between the federal judiciary and the Violence Against Women Act is thus embedded in a larger history, of the role of the federal courts as a corporate entity, pressed by an energetic leader, making judgments, advising, and lobbying Congress about what rights to accord and about what visions of federalism should govern. The decade-long discussion of VAWA reached its denouement in the spring of 2000, with the *Morrison* ruling holding one section of the statute unconstitutional.

The Chief Justice's interest in long range planning came to fruition a few years earlier, in 1995, with the promulgation of the *Long Range Plan for the Federal Courts*, a first-ever book issued on behalf of the federal judiciary.³¹ Through that document, the Judicial Conference officially provided ninety-three recommendations to Congress. The central elements sketched in the

27. Brief of the States of Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the Commonwealths of Massachusetts and Puerto Rico, as Amici Curiae in Support of Petitioners' Brief on the Merits, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5 & 99-29), available at 1999 WL 1032809.

28. Brief for the State of Alabama as Amicus Curiae in Support of Respondents, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5 & 99-29), available at 1999 WL 1191432.

29. Rehnquist, *1998 ALI Remarks*, *supra* note 24, at 17.

30. *Morrison*, 120 S. Ct. at 1754.

31. JUDICIAL CONFERENCE OF THE U.S., *LONG RANGE PLAN FOR THE FEDERAL COURTS* (1995), reprinted in 166 F.R.D. 49 (1996) [hereinafter *LONG RANGE PLAN*]. The Conference formally adopted the ninety-three recommendations and the seventy-six "implementation strategies" set forth in the plan but not the language in the accompanying, explanatory texts. L. Ralph Mecham, *Preface to LONG RANGE PLAN*, *supra*, at 51.

1991 annual speech by the Chief Justice—limited growth in the number of life-tenured judges, reduced jurisdiction for the federal courts—are echoed and formalized by specific proposals, including that Congress operate with a presumption against the creation of new federal rights if enforced in federal courts.³²

Below, I exhume historical materials about the evolution of the institutional posture adopted by the federal judiciary towards its own role in crafting federal rights.³³ I examine distinctions drawn between individual as contrasted with institutional commentary from judges; between adjudication as contrasted with institutional advice-giving; and between topics considered to be “judicial administration” as contrasted with topics understood to be “matters of policy.”

As I detail, during the twentieth century, the management of the federal judiciary shifted from a posture of hesitancy about playing much of an institutional role in suggesting what federal rights Congress should create (or abolish) to the current posture of being a “programmatically judiciary,” regularly advising Congress not to authorize access to the federal courts for certain sets of potential rightsholders. It is the development of a judiciary advancing its own positions on what ought to form the bases for federal civil claims and criminal penalties that captures my attention here.³⁴ Hence, I conclude by considering the relationship between judicial independence (in both its constitutional and sub-constitutional senses)³⁵ and the use of an institutional voice by judicial leaders, claiming authority as representatives of the Article

32. See LONG RANGE PLAN, *supra* note 31 at 83.

RECOMMENDATION 1: Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.

Id.

33. Materials from the Senior Conference of Chief Justices (which then became the Judicial Conference of the United States) as well as documents from the Administrative Office (AO) of the U.S. Courts, 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). The collection includes documents from before and after the creation in 1922 of the Conference of Senior Circuit Judges through the mid-1950s, as well as some items through the early 1960s. Within each of the many file boxes are transcripts, memoranda, reports, notes, and correspondence, not always kept in a uniform manner. I will refer to the National Archive RG 116 materials by the specific item title or description, followed by the entry, the box, and the file (when available).

34. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1020–24 (2000) [hereinafter Resnik, *Transforming the Meaning of Article III*].

35. Constitutional parameters depend on interpretation of Article III, the Due Process Clause, and the doctrine of separation of powers; the subconstitutional, social-political dimensions can be understood in terms of aspirations and choices beyond those strictures.

III judiciary to try to influence Congress as it creates federal rights and sanctions.

This activity, proffered in the name of Article III, undermines the judicial stance of fundamental disinterest, by which I mean lacking its own agenda. Of course, individual judges are situated, and at some level, interested in the events that form the basis for adjudication.³⁶ Moreover, adjudication entails interpretative options, implicating political and social views. But adjudication has, as I will detail, a self-limiting quality. As *United States v. Morrison* vividly illustrates, there are always new cases and always new judges, called upon to revisit the interpretations of their predecessors. In contrast, the effort to inscribe, as an artifact of the federal judiciary, a collective vision about how Congress should deploy the institution of the federal courts has no built-in mechanism for renewal, no obvious boundaries, and no basis in historical practices to provide norms of containment. Deciding to engage in such acts of “political will”³⁷ does harm, most immediately, to the federal judiciary itself.

II. SHIFTING ATTITUDES TOWARDS THE INSTITUTIONAL ROLE

A brief historical overview is in order. The federal judiciary during the early part of the twentieth century was comprised of some 120 judges, dispersed across the United States and lacking internal means of self-governance.³⁸ Administrative services were then supplied by the Department of Justice, which also reported to Congress annually on the state of the federal courts’ docket.³⁹ But, in the early 1920s, in conjunction with many efforts at nationalization, individual judges and bar associations proposed—and Congress created—a coordinating mechanism for the federal judiciary. Congress chartered a judicial body, today called the Judicial Conference of the United States, then comprised exclusively of senior circuit judges, charged with advising the Chief Justice “as to the needs of [each] circuit and as to any

36. See Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

37. A term often invoked to suggest a more formalistic understanding of role division than the one I hold and recently used by the Eleventh Circuit, abjuring judicial power to make such decisions, in *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (11th Cir. 2000) (“[I]t is the duty of the Congress and of the executive branch to exercise political will. . . . It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.”). See discussion *infra* Part III on the necessarily overlapping functions of legislative and adjudicative activities yet arguing that forms of institutional advice-giving outside adjudication offer a distinctive form of politicization, to be avoided when possible.

38. For details, see Resnik, *Transforming the Meaning of Article III*, *supra* note 34, at 937–38, 949–53.

39. The Judiciary obtained its own Administrative Office in 1939; another entity, the Federal Judicial Center, created in 1967, focuses on education and research. *Id.* at 950.

matters in respect of which the administration of justice in the courts of the United States may be improved.”⁴⁰

The members of the Judicial Conference understood that this mandate invited commentary on “congestion in the courts and the remedies for it.”⁴¹ In the Conference’s annual meetings during the 1920s and 1930s, the Chief Justice polled each senior circuit judge about the needs within his circuit; requests to Congress for additional judgeships followed thereafter. But what more should this fledgling organization do? In 1930, then Chief Justice Charles Evans Hughes suggested obtaining a larger mandate, that Congress authorize comment on “laws affecting jurisdiction, evidence, and procedure in the Federal Courts.”⁴² The Conference concurred, proposing in 1930, 1931, and 1932 that its enabling statute be expanded,⁴³ but Congress did not comply. Yet, as illustrated by the Judicial Conference’s opposition to VAWA and its *Long Range Plan*, over the ensuing decades, the Conference gave itself the license it had initially sought from Congress.

The assumption of a more wide-ranging mandate was not immediate. In the 1920s and 1930s, Judicial Conference members thought they should be careful not to issue collective opinions on pending federal legislation creating civil or criminal remedies. They said, repeatedly, that such issues involved “legislative policy” committed to Congress.⁴⁴ In doing so, three sets of distinctions were drawn (sometimes implicitly, sometimes explicitly) about the speaker (an individual judge as contrasted with the institutional voice), about the subject matter (that some topics constituted “legislative policy” as

40. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838 (providing that the Conference “make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges [with their consent] to or from circuits or districts” based on docket needs). In 1948, the Conference of Senior Circuit Judges was renamed the Judicial Conference of the United States. See Act of June 25, 1948, ch. 331, 62 Stat. 902 (codified at 28 U.S.C. § 331 (1994)). The composition of the Conference was revamped in 1957, when district judges, selected from each circuit by both district and appellate judges, were added as members. See Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (codified at 28 U.S.C. § 331).

41. Transcript 304, in *Records Related to Judicial Conference, 1922–1958*, at Box 6 (October 1929–October 1930), Folder 1930 Minutes and Transcript With Index [hereinafter 1930 Transcript]. See also RECOMMENDATIONS OF SENIOR CIRCUIT JUDGES, reprinted in ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1930, at 8 [hereinafter 1930 JUDICIAL CONFERENCE REPORT] (noting that the “conference also took into consideration the appropriate development of its own work” and sought from Congress legislative amendment of its charter to make clear its authority).

42. 1930 Transcript, *supra* note 41, at 322.

43. See 1930 JUDICIAL CONFERENCE REPORT, *supra* note 41, at 6; REPORT OF THE JUDICIAL CONFERENCE, reprinted in ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1931, at 12; REPORT OF THE JUDICIAL CONFERENCE, reprinted in ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1932, at 12.

44. The term is used repeatedly in reports by subcommittees of the Conference and in the Conference’s annual reports.

contrasted with ways to improve “the administration of justice in the courts”), and about the activity (adjudication as contrasted with judicial commentary on pending legislation).

That *individual* judges might contact individual members of Congress to discuss pending legislation was not in doubt in the 1920s. Indeed, justices, such as William Howard Taft who had served as President, were familiar figures on the Hill—actively attempting to shape legislation related to the courts.⁴⁵ That the judiciary’s *institutional* voice could also be invoked was not in doubt, but the statutory authority to comment on the “administration of justice” provided contours that, at the time, appeared to authorize certain discussions and to constrain others. Repeatedly, during the first few decades of the Judicial Conference’s existence, it decided not to use its corporate status to discuss what jurisdiction Congress should confer on or withdraw from the federal courts.

Proposals to abolish diversity jurisdiction in the 1930s provide an example. Recall that the federal courts were assumed by many political actors to be supportive of corporate interests and hostile to labor.⁴⁶ Efforts to restrict diversity access to the federal courts within that context were aimed at defeating the ability of corporate defendants to remove cases from state to federal courts. In 1932, with a bill pending to abolish diversity jurisdiction,⁴⁷ the members of the Conference discussed whether to take a stance. Chief Justice Hughes commented that, were the Conference to provide an official opinion (in support of keeping diversity jurisdiction), the Conference would be in a “very vulnerable position.”⁴⁸ For judges to “undertake to defend their own jurisdiction . . . [would] weaken their position, their prestige, their independence, if they appeared to be campaigning in their own interests.”⁴⁹ Jurisdiction was thus something in which judges had an “interest”—here, to

45. See Robert Post, *Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft*, 1998 J. SUP. CT. HIST. 50, 57 (describing that Taft believed the Conference was not the “exclusive voice of the judiciary,” that, as Chief Justice, he “functioned as an independent lobbyist for a legislative agenda,” and that he did not “hesitate to draft his colleagues on the Court to assist in his lobbying efforts”).

46. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* 64–95 (2000) [hereinafter PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION*]. See generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* (1992).

47. *Limiting Jurisdiction of Federal Courts, Hearings on S. 937, S. 939, and S. 3243 Before Subcomm. of the Senate Comm. on the Judiciary*, 72nd Cong. (1932). An earlier proposal (S. 3151) had proposed abolishing both federal question and diversity jurisdiction and was vigorously opposed by William Howard Taft. See Post, *supra* note 45, at 61–62.

48. Transcript 241–42, *Records Related to Judicial Conference Meetings, 1922–1958*, at Box 8.

49. *Id.* at 243.

keep certain cases within their reach—and hence something about which the institution of judges should not take a stand.

But return to the distinctions between individual action and collective action and between adjudication and policy promotion. Chief Justice Hughes thought that, while an institutional position should not be proffered, judges could (as they had in the past) attempt to work individually, either to enlist assistance from bar associations or to meet with members of Congress.⁵⁰ That individual judges did so comes from insightful documentation from Edward Purcell, who details how Justice Louis Brandeis, working with then Professor Felix Frankfurter, actively promoted legislative efforts to limit diversity jurisdiction.⁵¹ Moreover, such justices had more than one way to influence Congress. Adjudicatory interpretations could both narrow the statutory meaning of the qualifications for diversity jurisdiction and the constitutional authority that federal judges possessed pursuant to diversity jurisdiction. After Justice Brandeis' legislative efforts to have Congress curtail diversity jurisdiction were unavailing, his ruling in *Erie Railroad Co. v. Tompkins* limited litigants' strategic use of diversity by precluding federal courts from creating federal common law to decide the merits of such cases.⁵²

Consider further the administration/policy line, relied upon by members of the Conference sometimes to silence and other times to license its institutional voice. The record of what Conference members thought fell on which side of the line belies the clarity of that distinction. In its 1929 report, the Conference announced that “[t]he federal system for the punishment of violations of the Federal criminal statutes offers an opportunity to the Federal courts to lead in the matter of this reform.”⁵³ Thus the Judicial Conference offered its views on sentencing legislation—apparently relying on the notion that sentencing was within the judicial domain rather than a matter of “policy” for Congress to decide. True to its 1929 promise of leadership, the Conference actively promoted specific reforms, including what became the 1950 Federal Youth Corrections Act that provided for indeterminate

50. *Id.* at 237A. *See also* Post, *supra* note 45, at 59–60 (describing Taft's “program of mobilizing the bar”).

51. *See* PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 46, at 77–85. *See also* Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J. SUP. CT. HIST., 79, 81–83 (describing how a Brandeis opinion “with its meticulous discussion of the Act's constitutional infirmities, provided illuminating advice on how the statute ought to be redrafted,” and how a redrafted version was upheld in an opinion written by Justice Brandeis); *id.* at 94–96 (discussing Brandeis' role in supporting federal unemployment compensation legislation); Post, *supra* note 45, at 76 n.136.

52. 304 U.S. 64 (1938). *See also* PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 46, at 95–114.

53. RECOMMENDATIONS OF CONFERENCE OF SENIOR JUDGES, *reprinted in* ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1929, at 7.

sentences, rehabilitative programs, and the possibility of expunction of records for juveniles convicted within the federal system.⁵⁴

Sentencing has not, however, proved to be a category about which the propriety of judicial commentary has remained unquestioned. While the Conference felt for decades that sentencing belonged within the domain of judicial administration, more recently Chief Justice Rehnquist has challenged that assumption—without reference to the historical practices of Judicial Conference engagement with sentencing. During the 1990s, in the context of federal judicial distress at mandatory sentences and at lengthy sentences promoted by restrictive federal sentencing guidelines, Chief Justice Rehnquist stated that:

Whether the scheme of federal sentencing should emphasize deterrence as opposed to punishment, what is an appropriate sentence for a particular offense . . . are questions upon which a judge's view should carry no more weight than the view of any other citizen. In such cases I do not believe that the Judicial Conference, or other judicial organizations, should take an official position.⁵⁵

Further, while there was “no formal inhibition on judges publicly stating their own personal opinions about matters of policy within the domain of Congress, . . . the fact that their position as a judge may give added weight to their statements should counsel caution in doing so.”⁵⁶ In contrast, but without explanation of how the category was distinguishable, the Chief Justice stated that:

[The] considerable sentiment in the federal judiciary . . . against further expansion of federal jurisdiction into areas which have been previously the province of state courts enforcing state laws [was appropriate]. . . . Congress, of course, is the ultimate arbiter of these questions within constitutional limits, but the future shape and contours of the federal courts is surely a legitimate subject for judicial input to Congress.⁵⁷

54. 18 U.S.C. §§ 5005–06, 5010–26 (1950), *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 218(a), 98 Stat. 2027 (codified as amended in scattered sections of 18 U.S.C.); 18 U.S.C. §§ 5007–09 (1950), *repealed by* Pub. L. No. 94-233, § 5, 90 Stat. 231 (1976). For the proposal of the Conference, see ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18–19 (1946).

55. William H. Rehnquist, *Chief Justice Rehnquist Reflects on 1994 in Year-End Report*, THIRD BRANCH, Jan. 1995, at 1, 3.

56. *Id.* at 3.

57. *Id.* at 3–4.

III. CONSTITUTING THE IDENTITY OF THE ARTICLE III JUDICIARY

This brief overview provides two descriptive insights. First, judges have long been engaged in shaping legislation affecting the jurisdiction of the federal courts. The shift, in the twentieth century, involved the rise of institutional (as contrasted with individual) involvement. Second, through adjudication, judges have had a major impact on federal jurisdiction. Further, individual justices may well have had their own “long range plans,” aimed at shifting bodies of constitutional doctrine, statutory interpretation, and common law meanings over time. Adjudication is sufficiently open-ended as to allow opportunities for individual concerns and interests to play a significant role.

Comparison therefore is possible between adjudicatory rulings and advice-giving efforts, either by individual judges or by institutional means, to alter the parameters of federal court access. What difference, if any, is made by the *mode* of judicial commentary—adjudication (the *Morrison* ruling, in VAWA, as an example) as contrasted with collective discussion (the Judicial Conference positions about the enactment of VAWA, diversity, and sentencing policies or its *Long Range Plan* on the future of the federal courts)?

One point of comparison is the relative power of the two modes of discourse. Adjudication has a sweep of sometimes startling proportions that enables life-tenured individual federal judges a powerful means by which to turn their views into the law of the land. Opining outside of adjudication, in contrast, has no necessary bite. Between the late 1950s and the 1990s, the Judicial Conference had many times opposed legislation that, despite its commentary, became law.⁵⁸ In 1995, the Judicial Conference codified its efforts to create a presumption against new federal rights and crimes through the *Long Range Plan*, again arguing against “federalization.” But Congress was not thereby required to alter its pattern of sometimes conferring new jurisdiction on the federal courts.

However, 1995 was also the year when five members of the Supreme Court held, in *Lopez v. United States*,⁵⁹ that one such enactment was an unconstitutional exercise of Commerce Clause powers. Since then, a series of decisions have revised the constitutional boundaries not only of the

58. See, e.g., 1993 JUDICIAL CONFERENCE REPORT, *supra* note 16, at 13 (“[T]he Judicial Conference agreed to renew efforts to . . . [r]everse the trend of federal prosecution of what historically have been regarded as state crimes . . .”).

59. 514 U.S. 549 (1995).

Commerce Clause but also of the Tenth, Eleventh, and Fourteenth Amendments.⁶⁰ Federalization has been cabined, but by constitutional fiat rather than by persuasion.⁶¹ (The evident congruity between the constitutional rulings and the *Long Range Plan* is a point to which I return below.)

Yet, however powerful adjudication may seem at the moment, it is constrained by its own peculiar format. Federal judges decide cases, upholding or striking down legislation because of the particular merits of individual statutes and specific facts. While coalitions of Supreme Court justices can shape the Court's docket to some extent, the pressure to take up issues is not completely confinable from within.⁶² Each new case poses variations that may splinter coalitions and thereby constrain the ability of individual justices to enshrine enduring views. As this last decade has reminded us all, twentieth century constitutional history is replete with examples of seemingly settled principles becoming unsettled—as new fact patterns and new statutory regimes interact with the changing composition of a bench, itself shaped by political processes of appointment and by the social context for which rulings are required. The pattern woven by a series of decisions can be revisited, as presumably settled understandings are reworked through sequential adjudicative iterations.

Using adjudication to do long range planning is thus both labor intensive and repetitive, which is to say that, lacking control over what cases are filed, judges cannot prevent reconsideration of whatever judgments are reached. One-on-one negotiations, potentially unraveled as new members join a court, limit the capacity to implement plans and up the stakes of having too many

60. See *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 621 (2000); *United States v. Morrison*, 120 S. Ct. 1740 (2000).

61. The “jurisdictional nexus” that forms the basis for many federal crimes may well be the next to go. See *Jones v. United States*, 120 S. Ct. 1904, 1907–08 (2000) (determining that an owner-occupied residence not used for commercial purpose did not qualify as a “property used in interstate or foreign commerce” within the meaning of the federal arson statute). Thereafter, the Court vacated in light of this opinion two conflicting circuit opinions in which the question was whether the burning of churches could be reached by the federal arson statute. See *United States v. Rea*, 169 F.3d 1111 (8th Cir. 1999), *vacated by* 120 S. Ct. 2193 (2000); *United States v. Johnson*, 194 F.3d 657 (5th Cir. 1999), *vacated by* 120 S. Ct. 2193 (2000).

62. Consider also constraints and agenda setting in the lower courts. While individual trial judges can attempt through adjudication to implement their programs, they are limited by what cases are assigned to them and by appellate review, both of which cabin the ability of judges to craft and then implement long-term programs about the role of the federal courts. Similarly, judges who are members of appellate courts cannot themselves implement their individual views without the requisite case as a vehicle and convincing at least one (if on the courts of appeals) or four (if on the Supreme Court) others.

overarching goals. Precedents are chipped away and reconfigured, sometimes ostensibly within the boundaries of governing rules and other times requiring admission that *stare decisis* has (predictably and desirably) given way to other values.

Given the intensive investment of labor required and the potentially limited and fleeting returns, many appellate judges and justices appear to adopt (perhaps as a default position) a posture towards judging in which long-term programs are regularly compromised to obtain a necessary majority to decide a given case (the famous rule of five). Careful readers of judicial opinions (to wit, legal academics) make their living by criticizing such judges for lacking sufficient theoretical and practical consistency. Some of those who aspire to be judges see both the potential power and its confines—sometimes prompting them to seek other lines of potentially more efficacious work.

Contrast the constraints imposed upon the individual judge (however positioned and opinionated, efficacious or inefficacious he or she may be) with those limiting the institution, “*the* Article III” judiciary, and consider the desirability of it too being positioned and opinionated, with published views (a “plan”) about the shape of rights that the federal legislature should recognize as belonging to United States citizens. To undertake such analysis requires an understanding of the means by which and the occasions on which federal judicial policy is constructed.

Five aspects are relevant. First, the Chief Justice has, through institutional design, enormous influence. In his role as Chief, he selects membership in Judicial Conference Committees, which in turn propose policy to the governing board of twenty-seven judges (themselves not appointed by the Chief).⁶³ Second, the Judicial Conference, standing as the representative of the now more than 1,100 life-tenured and 850 non-life-tenured judges within the federal judiciary, makes official policy.⁶⁴ Of the Conference’s twenty-seven members who vote on policy, half are appellate judges who sit by virtue of being chief judges, a position achieved through seniority.⁶⁵ While earlier in the century, the Judicial Conference worried about its ability

63. Sitting are the chief judges of each judicial circuit as well as the chief judges of the Court of International Trade and a district judge from each judicial circuit. District judges are “chosen by the circuit and district judges of the circuit” and serve for a term of three to five years. 28 U.S.C. § 331 (1994).

64. In contrast, the Chief Justice’s annual speeches, while given on behalf of the judiciary, are not official policy of the judiciary.

65. See 28 U.S.C. § 45 (a)(1) (1994) (providing that chief judges are those who, in “regular active service” are “senior in commission” to judges sixty-four or younger, have served at least one year or more, and not previously as circuit chief judges). Such service ends at age 70. See 28 U.S.C. § 45 (3)(C) (1994).

to speak on behalf of judges and had an internal policy of polling individual judges and sometimes circuits before determining many positions,⁶⁶ its current practice is not to insist on solicitations of individual judges' views as a predicate to speaking on their behalf.⁶⁷

Third, over the years, the federal judiciary has developed an etiquette of quieting dissent. Official policy is stated, conveyed to Congress or others through designated speakers, and those who disagree are told that it is inappropriate to do so publicly. Thus, through structuring modes of generating policy, members of the Article III judiciary have crafted mechanisms that damp down dissent and limit occasions for reconsideration.

Fourth, consider how business comes before the Conference. Unlike the inevitable flow of cases, requiring legal rulings to be revisited, official policy need not be reconsidered absent the consent of the governing board. The fluidity of case-by-case decisionmaking is replaced by institutional structures, making the power of agenda setting more salient. Further, when issues come up, the Conference often relies on its own presumption of *stare decisis*; earlier positions are routinely noted whenever a topic is revisited. Once views have become "policy" of the Judicial Conference and a long range plan has been formulated, debated, and adopted, revisiting the issue is not forced, as in adjudication, by "the next case."

Fifth, when making policy, the leadership of the judiciary often distinguishes adjudication from policymaking. While judges in specific cases adjudicate constitutional requirements, the Judicial Conference's job is to provide counsel—not to preview constitutional rulings.⁶⁸ Exemplary are the ninety-three recommendations in the *Long Range Plan*, cast not as

66. This procedure emerged after debate within the Conference of Senior Circuit Judges about its ability to make policies affecting district judges, who had no representation on it. The polling process was known, internally, as the "Phillips Plan," named after circuit court judge Orie Phillips, who had chaired a committee appointed to study the issue. Resnik, *Transforming the Meaning of Article III*, *supra* note 34, at 964–65 & n.150. The issue of district judge membership was also a subject of debate, and, as noted, they were added as members in 1957. *See supra* note 40.

67. On occasion, surveys and polls are taken, and opinions of judges not on the Conference have affected decisionmaking. For example, when the Advisory Committee on the Federal Rules of Civil Procedure was considering proposing returning the size of a civil jury to twelve, information from district judges was gathered and their opposition prevented that proposal from taking effect. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 134–146 (1997).

68. In contrast, judicial leaders during earlier eras sometimes offered constitutional evaluations. *E.g.*, Post, *supra* note 45, at 63 (describing Taft's opinion on the constitutionality of vesting patent jurisdiction in an Article I court).

constitutionally mandated but as animated by wise policy choices.⁶⁹ Social and political judgments, not legal requirements, are the terms of the discussion. Yet, to the extent that the substantive arguments about a given issue—for example, constraining federal court jurisdiction or the propriety of creating federal judicial officials (such as magistrate judges) who lack life tenure—are founded on beliefs about either the United States’ federalism or the boundaries of Article III, constitutional understandings inform such social policy conclusions. In other words, the two activities cannot function as discrete domains of discourse; one’s understanding of constitutional parameters informs one’s policy judgments, and such policy judgments in turn inflect one’s appreciation for constitutional capacities.

My point is not about impermissible decisionmaking by judges; I am not suggesting that judges are changing, in a self-conscious manner, their thinking on the meaning of the Constitution so as to have their rulings conform to any policies of the Judicial Conference. Rather, judicial understandings of what is plausibly constitutional are affected by background norms, and the Judicial Conference, in turn, is a producer of such norms. For example, as the Judicial Conference came to understand both the pressures to produce more adjudication and congressional hesitation to create more Article III judgeships, the Conference committees began to shift their understanding of what tasks might be delegated to non-Article III judges. What magistrate judges do now is far from what 1930s and 1940s life-tenure judges thought was within the realm of the delegable.⁷⁰

So then consider the kind of judgment calls made by the Conference, as it decides which causes of action to encourage Congress to enact, when to be silent, and when to voice opposition. The topics range from whether claimants contesting social security administration decisions should have access to Article III judges to what crimes should be defined as federal. In choosing among competing rights-seekers, the Conference proffers its own views about the merits of enabling access for certain members of the United States polity to the federal courts for certain forms of alleged wrongdoing. For example, the federal judiciary supported enlarging federal criminal jurisdiction when individuals made threats to federal officials, including judges.⁷¹ In contrast, the federal judiciary did not see the merits of federal

69. “[N]o single ‘constitutionally correct’ role exists for the federal courts.” *Long Range Plan*, *supra* note 31, at 66 (discussing the “mission” of the courts). The commentary continued that questions of allocation between state and federal courts are “determined by political, legal, economic, social and pragmatic factors.” *Id.*

70. See Resnik, *Transforming the Meaning of Article III*, *supra* note 34, at 983–92.

71. See ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 94 (1981) (supporting earlier proposed legislation “to make it a crime

criminal sanctions when individuals failed, for an extended period of time, to pay child support to a child living in a different state.⁷² Consider also the example of the 1964 Civil Rights Act. Deference to Congress was chosen as the appropriate response when bills that became that act were pending.⁷³ In contrast, the 1991 VAWA civil rights provisions were met initially with opposition from the Judicial Conference, which argued that Congress should not vest rights-seeking status in women victims of violence. In an effort to stave off judicial opposition, Congress redrafted, and the Conference backed away from expressing opposition. Hence, a group of life-term appointees developed its institutional platform and then entered into the process of deal-making about what shape the rights should take,⁷⁴ and then some number of them ruled about the legality of that judgment. In short, the last forty years of Judicial Conference reports offer many examples of policymaking—acts of “political will” that judges routinely as adjudicators claim to be beyond their ken.

But if one knows that adjudication inevitably involves acts of political will, even as they are abjured, what is problematic about the judiciary offering, openly, political judgments on how to ration the scarce national resource (as the Chief Justice has put it⁷⁵) of the federal courts? Congress and the Executive remain free to take into account or to discount the judiciary’s nonadjudicative pronouncements, and individual judges remain free to form (if not encouraged institutionally to express) their own judgments. The Article III judiciary’s *Long Range Plan* may not actually guide decision-making in any venue or in all instances and, unlike adjudication, can (legally) be completely ignored.

But the utility of commitments stated by the Article III judiciary goes beyond whatever persuasive power it might have to other branches: Such

for a person to threaten with bodily harm or seek to intimidate officers and employees of the United States Courts” and specifically “to threaten or assault members of the family of a judge or of other court personnel”).

72. See Child Support Recovery Act of 1992 (CSRA), Pub. L. No. 102-521, § 2(a), 106 Stat. 3403 (codified at 18 U.S.C. § 228 (1994)). When pending, the Judicial Conference opposed its enactment. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 57 (1992). After enactment, and like VAWA, the Chief Justice continued to criticize the CSRA. See Rehnquist, 1998 *ALI Remarks*, *supra* note 24, at 17. In the fall of 2000, the Sixth Circuit held CSRA unconstitutional. See *United States v. Faase*, 227 F.3d 660, 672 (6th Cir. 2000).

73. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 74 (1963).

74. See 1993 JUDICIAL CONFERENCE REPORT, *supra* note 16, at 28 (describing the “dialogue . . . undertaken with the sponsors of the proposed” Act).

75. William H. Rehnquist, *Chief Justice’s 1993 Year-End Report Highlights Cost-Saving Measures*, THIRD BRANCH, Jan. 1994, at 1.

commitments become a vehicle for education and acculturation *within* the judiciary itself. The act of policymaking by the judiciary is an act of redefining the identity of the Third Branch. As new judges are appointed and become a part of the judiciary, its institutional platform becomes a constitutive element of what they understand the federal judiciary to be about. These ideas become presumptively natural aspects of judicial identity, to be internalized by individual judges and to undergird their attitudes towards rights and remedies as they rule, case by case.

To the extent these norms do become background assumptions, they infuse the province of individual judgment by being understood not as a series of judgments about contested social policies but as common sense (because there are too many cases, there should be fewer federal rights) that every judge “knows.” When the judicial organization of which one is a part has specified goals, plans, and projects, and when those goals, plans, and projects are intertwined with the act of adjudicating the validity of congressional creation of rights and remedies, the act of judging loses one source of its isolation, its situatedness in the specific and constraining facts of given cases, statutory texts, and regulatory minutiae.

The harm that flows from the judiciary adopting a program about what rights should form the subject matter of its docket is thus a harm especially *to* the judiciary. A programmatic judiciary is inconsistent with the judiciary’s constitutional charter to have a distinctive character, providing individual judges significant power but requiring them to do their best to determine the merits of each case through norms of disinterest about the subject matter of the cases to be so decided. Disinterestedness as I am using it here depends not simply on the lack of judicial connection with particular parties, events, or the lack of a material interest,⁷⁶ but on a deeper political posture of having no institutional agenda to be forwarded or impeded by outcomes in particular cases. The judiciary should not proffer a collectively held vision of what the “future role of the federal courts” should include—to which rulings about access, rights, and remedies could contribute.⁷⁷

Thus, the institution constituted by Article III should not itself hold or put forth opinions about what rights Congress should create—both because of the internal influence such stances can exert on the individual act of adjudication and because of the risk that such stances pose to the legitimacy of whatever decisions are reached. When rulings on the meaning of

76. See, e.g., 28 U.S.C. § 455 (1994) (providing grounds for disqualification and describing relationships between judges, parties, and the subject matter of litigation).

77. See Rehnquist, *1991 Report*, *supra* note 3, at 2.

Congress' power to confer jurisdiction (e.g., *Morrison* and *Lopez*) can be compared to the federal judiciary's official *Long Range Plan*, each opinion can be checked to see how it fits with the judiciary's institutional agenda. Judges could then be seen as yet another special interest group, arguing from a particular perspective about what shape national policy should take. Yet they are an interest group with a decided edge: after Congress speaks, members of the judiciary decide the legality of whatever has been passed. The campaign to limit access to the federal courts can thereby be taken from policy statements to the constitutional level, as indeed it has been.

Conscientious judges would demur that they are long schooled at separating their personal convictions from the merits of a case. Judicial rhetoric specifically adopts such a posture through opinions in which judges state that their own personal views of the merits do not dictate their ruling on the outcome. But the collective policy vision and the *Long Range Plan* are not seen as personal views, to be set aside from "the judicial" and left behind when engaging in the act of judging. The policies are written as documents of "the judicial," as means of specifying and inscribing what the identity of the federal judiciary is. Through such means, they serve to implant attitudes, such as that being a member of the federal judiciary is to know that additional rights-giving by Congress is suspect. That view, however, is no "neutral principle" but an artifact of human judgments—that have divided the polity for the last two centuries—about how to shape federated governance in the United States.⁷⁸

Conscientious judges might well then counter that they are specially situated, uniquely aware of the burdens that Congress imposes on the federal courts and of the inadequacy of the resources by which to respond. Assuming both burden and resource inadequacy, what is the source of the judiciary's authority to decide which sets of potential federal rightsholders deserve priority in the queue? What animates the institution's exercise of its "political will" to make such judgment calls, and to decide, for example, that Y2K claimants should—or should not—receive federal court attention? That efforts to reclaim children kidnapped abroad should—or should not—be brought in federal courts? That the death penalty should—or should not—be abolished?

Implicit in my objection is the question of scope. One position would be that federal judges take no collective stances, while another approach would permit some commentary but attempt to contain the discussion by limiting the

78. On construction of the "federal" identity, see Resnik, *Transforming the Meaning of Article III*, *supra* note 34, at 967–92.

topics discussed. In light of the two thousand judges and thirty thousand staff, the hundreds of courthouses and thousands of claimants, it is improbable to suggest that all institutional comments be stilled. The federal judiciary must function as a bureaucracy, coordinating the activities of thousands of people.

The issue is to figure out what kind of bureaucracy to be, and my claim is that, given Article III, the judiciary ought to be committed to developing as distinctive a bureaucratic persona as it has developed norms of adjudication that mark its processes as discrete from (albeit sometimes overlapping with) either the core functions of either the Executive or Congress. Over the last two centuries, the federal judiciary has been an odd, offbeat institution, with specific mores, different forms of dress and address, simultaneously specially powerful and constrained. So too should it, as it develops into an agency, conceive of itself as differently situated, as a bureaucracy of a very special and admittedly peculiar kind. My suggestion is for bureaucratic forms that echo adjudication, including adjudication's distinguished tradition of welcoming published dissents. Cacophony, noisy disagreements, rather than a unified voice, should be the sound of the judicial bureaucracy.

Hence, I choose the second option, which is to offer some presumptive boundaries around categories of comment as a means of developing norms to limit the range of self-interested positions taken by the judiciary. I do not object to the federal judiciary, in its corporate persona, reporting about its capacity to respond to its workload, including specifying that it believes itself overloaded, underpaid, and/or that it needs more resources to do the work assigned. I also welcome judicial commentary, including through its corporate voice, about the functioning of the courts, the needs for staffing, the role of lawyers and the problems of those unable to afford to use courts, the means of processing cases, the degree to which courts are able to ensure equal treatment, and the challenges of new technologies.

Let me add that, while such corporate reports are useful, the judiciary ought to encourage non-corporate-like dissent—which is to say that if groups of judges believe that comments issued by the Conference do not reflect their own views, the Conference should facilitate the public airing of contrary views, even as such debate may diminish the effectiveness of judicial efforts to persuade Congress of the correctness of a position. In other words, the collective vision should be as deliberately wobbly as adjudication is open to—and relies upon—dissents.

In contrast, the collective voice ought to be stilled so as to be agnostic about *which* claimants ought to be before the federal courts or sent by Congress to state, Indian, or administrative courts or without rights

whatsoever. The special insights that judges may have from their role as judges need not be lost to public debate; Congress can create commissions on which individual judges sit to offer advice.⁷⁹ Ad hoc groups of judges may also come together to debate the merits of a particular piece of legislation, and individual members of the judiciary—including its chief justice—can as individuals (informed by their professional roles) testify before Congress and in other fora about the needs and roles of the federal judiciary, including its substantive charter.⁸⁰

Thus, what constitutes a matter related to “judicial administration” rather than “legislative policy” has a sponginess reminiscent of distinctions drawn between “procedure” and “substance.” The views of judges—individual and institutional—on matters ranging from whether to increase the number of judgeships, to create subordinate levels of judges, to alter rules of procedure and evidence, or to reshape sentencing or jurisdictional grants can all be seen as having substantive effects. I propose to create a presumption of a boundary, not cast as “administrative” versus “policy” (all of it is “policy”), but serving to provide an institutional hesitancy to comment on what rights should exist (often, but not only, translated in terms of when Congress should create causes of action).

Given the degree to which both adjudication and advice-giving implicates “political will,” the activity of advice-giving needs to develop a normative culture of limits that parallels that of adjudication. Because of the degree to which such advice-giving is so plainly a form of politicized and unbounded judgment, the judiciary ought to err on the side of silence—in service of preserving the domain of adjudication. In contrast, and while I disagree with the majority’s substantive interpretations of the Commerce Clause, the Fourteenth Amendment, and federalism in *United States v. Morrison*, I do not object to such pronouncements. But object I do to the federal judiciary, in the name of Article III of the Constitution, telling members of Congress about whether to create the very rights that later become the subject of such constitutional adjudication.

79. Several examples, from the Prohibition Era to the present, of this form of input exist. See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) (report commissioned by Congress and authored by a committee including but not limited to federal judges).

80. Questions of how to use such a role without undermining one’s ability to function as an adjudicator if an issue about which one has commented comes up will, of course, always require attention. But concern for an issue does not, as Judge Leon Higginbotham so eloquently reminded us, necessarily result in preclusion from functioning as a judge. See *Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs*, 388 F. Supp. 155 (E.D. Pa. 1974) (rejecting a motion to disqualify him from presiding in a case involving civil rights allegations against a union because of his own involvement as an African-American in efforts to achieve racial equality).

Return then to the Chief Justice's 1998 comments about VAWA, as its constitutionality was making its way through the federal courts. It is simultaneously poignant and disturbing that, when inveighing against VAWA, the Chief Justice invoked Abraham Lincoln and Dwight Eisenhower. Poignantly, rather than seeking to obtain authority by tracing his ideas' lineage through Supreme Court justices, he appeared unselfconsciously to draw a parallel between himself and former presidents. Disturbingly, his comparison provides a window into the shift in role that is in fact occurring, as the Article III judiciary increases its own license—through an amalgam of adjudication and administration—to shape the rights of members of this polity.

