Abstract: In 1935, when the U.S. Supreme Court’s new building opened and displayed the phrase “Equal Justice Under Law,” racial segregation was commonplace, as were barriers limiting opportunities for men and women of all colors to participate in economic and political life. The justices on the Court and the lawyers appearing before them reflected those facts; almost all were white men. Today, the Supreme Court’s inscription has become its motto, read as if it always referenced an understanding of equality that has become central to the identity and the legitimacy of courts. The judiciary “looks” somewhat different than it did and, in a sense, has become more “representative” of the range of people appearing in courts.

Given the role that courts had played in sustaining discrimination, the impression that courts ought to welcome everyone is a major achievement. Yet, to assess the impact of new judicial demographics requires analysis of other major alterations in U.S. courts—the influx of diverse litigants newly entitled to pursue legal claims; the economic barriers facing many claimants; the emergence of judiciaries as agency-like promoters of agendas; and the displacement of public adjudication through the privatization of dispute resolution. Studies of women as judges focus mostly on their rulings, but probing the “difference that difference makes” requires looking beyond judicial opinions. Courts in the United States have developed structural capacities to propose rules and legislation, create education programs, commission research and task forces, and lobby for resources. When women of all colors and men of color became lawyers and judges, they created affinity organizations and pressed courts to research court-based bias and to revise rules of ethics, doctrine, and practice. Those changes are part of the impact of diversification within the legal profession, as is the backlash against affirmative efforts to reform practices.

Another difference of the last decades is that new rights have brought into court many claimants with limited means. Participatory participation (“equal justice under law”) remains elusive, while the “justice gap” (shorthand for the lack of sufficient
governmental help for under-resourced litigants) is pervasive. Worse yet, in some jurisdictions, courts have served as “revenue centers,” using court-imposed assessments as income. Failure to pay “legal financial obligations” can result in suspension of driver’s licenses, the loss of voting rights, and other sanctions levied disproportionately on people who are poor and of color. Instead of being seen as fonts of fairness, courts are coming to be identified as sites of inequality. In addition, many courts have embraced alternative forms of dispute resolution that make both processes and outcomes less visible to the public. Through doctrine and rules, U.S. courts have shifted their own practices as well as enforced mandates imposed on consumers and employers that push them out of court and out of class or joint actions. In sum, the new faces on the bench ought not to obscure that the project of representation, inclusion, and equality is far from complete. The vivid inequalities in courts are problems for courts because such disparities undermine their ability to be places of justice.

**Keywords:** gender, race, class, court legitimacy, equality, representation, participatory parity, aggregate litigation, subsidies, privatization

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I Incomplete Equality

In this article, I invite readers to think about four interrelated phenomena that are not often but that need to be linked together in discussions of court-based inequality. The first is about how the social movements of the last decades undermined the intelligibility of excluding people by gender and color from serving as lawyers and judges. Even as such efforts remain incomplete, the design
(at a conceptual and practical level) of courts has changed profoundly. Courts now take the obligation to be inclusive as part of their own identity.

“Courts” of course neither speak nor act; judges, lawyers, staff and litigants do, which brings me to a second important shift during the twentieth century—courts as agencies pressing their own vision of what they should do and how, and a proliferation of associations focused on influencing those agendas. The bureaucratic infrastructure of courts grew with their dockets and the range of disputes that came their way. Organizational structures of judges and lawyers—judges’ councils, bar associations, and what we now call “affinity groups” have multiplied over the century. Some are parts of government and others are private entities, often composed of people holding public office. All of these entities are norm entrepreneurs who, in the name of the “administration of justice,” adopt programmatic agendas. Once women and men of color were in numbers sufficient to organize, they created their own associations as well as contributed to extant groups.

These organizations debated legal norms, urged legislative reforms, and proposed innovative procedures. New rules welcomed individuals—sometimes proceeding single-file and other times as part of aggregates such as class actions—into court. The growth in the demand for legal remedies prompted judicial councils and lawyer organizations to fashion new modes of lawyering and to support a proliferation of sites of adjudication.

The result is a third significant shift in how courts do their work. Rules inside courts focused on non-adjudicatory resolutions. Both legislatures and courts devolved adjudication to administrative agencies and authorized outsourcing to private dispute resolution providers.

The fourth major change is the diversification of the people coming into court, including those involuntarily there as defendants in civil and criminal proceedings. Their demographics have long been more diverse than the professionals, yet a burst of law-making during the twentieth century made possible legal relief for broader categories of claimants. Legislatures and courts accorded legal protections to members of families, employees, students, consumers, tenants, recipients of benefits, prisoners, and more. Once law enforcement expanded its net, the numbers on the criminal side of the docket skyrocketed as well. As a result, courts are now populated by millions of people who cannot afford to pay for lawyers, filing costs, or if fines are imposed.¹

Interrogation of the import of the diversification of some of courts’ most powerful actors is welcome and appropriate. But celebrating new commitments to a less discriminatory legal profession ought not to obscure that, even as millions of

¹ See American Academy of Arts and Sciences, Civil Justice for All: A Report and Recommendations from the Making Justice Accessible Initiative (2020).
people with limited wealth have gained formal legal protections, they have little means by which to pursue them. Legislatures and courts have yet to craft sufficiently sustainable methods to help such litigants. In addition, in many jurisdictions, courts do harm by seeking to extract money through high fees and fines; such “court debt” sends many people, disproportionately of color, into poverty.

Furthermore, even as some jurists are grappling with the implications of what “equal justice” means in a profoundly unequal world, they are under attack from social and legal movements that seek to undermine judicial independence, ignore racial and gender injustice, defund government services in general, and cut back on access to courts. Techniques include attacking affirmative action, upping entry fees, and blocking court access through obliging consumers and workers to pursue claims, if at all, by proceeding single-file in private alternative venues rather than in court.

The recent and partial diversification of the bench is one way to perform legal commitments to some forms of equality. Yet at the very time when many jurisdictions are embracing such diversification, the institution of judging as a government service that welcomes all segments of the polity is at risk. Demographic diversity can serve as a distraction from focusing on the vulnerabilities of people of all classes and colors who lack the ability to bring claims to these newly-empowered judges, and it can mask the vulnerability of courts, besieged along with other government institutions committed to responsible public regulation.

Given my ambitions in this article to show how the different vectors of change produced the current challenges, a roadmap to my mix of positive description and normative prescription is in order. My focus is on the last century, but understanding its innovations requires a look backwards in time. Hence, I begin with the reminder of the ancient roots of courts that, in many parts of the world, were marked by a building displaying a statue of a female form, the Virtue Justice. The irony is that a stone woman functioned as a symbol of law and of courts when neither legal rules nor judiciaries were hospitable to women of any color.

I then turn to nineteenth century examples in the United States of the political and social movements that upended such exclusionary practices. I provide an account of some of the white and Black women who became the “firsts” to break entrance barriers to becoming lawyers and judges. The constant reminder is that they were not solo actors but embedded in civic mobilizations and organizations focused on access to voting, owning property, contracting, lawyering, and judging, which were intertwined.

The snapshot I provide of the extensive history of de jure discrimination around the United States comes from a nineteenth century Iowa statute, which stated that “white male” citizens were eligible for membership in the bar. In 1869, in the wake of the U.S. Civil War, male lawyers and judges ignored that text to admit Arabella Babb Mansfield to the bar and thereafter rewrote the statute to
eliminate that barrier. But it took more than a century (in part because of the U.S. Supreme Court’s interpretation of the Fourteenth Amendment) to move beyond such small steps toward equality.

As I recount, continued pressures for equality prompted legislatures and courts to recognize new rights, open courthouse doors, and enable a remarkably diverse array of users to get into court. Now, in the second decade of the twentieth-first century, some 80 million cases (not counting traffic, family, and juvenile issues) are filed each year in state courts, with over 350,000 more coming into the federal system. One should read these numbers as tributes to the democratic aspirations of court systems, which are government-provided services to which millions of people turn. One can also view the entrance of women and men of color as judges as one marker of the transformation of what equality entails, in and outside of courts.

Yet a celebratory account misses many past and current problems. My analysis of the now commonplace activity of “counting” women to record their numbers underscores the narrow path that emerged. Time and again, a few white women were “the firsts” and often “the onlys” on judiciaries. Another wave of mobilization in the later part of the twentieth century underscored the need to take the intersection of race and gender as well as class into account.

Diversification of courts came through another route. As family members, victims of violence, tenants, workers, employees, and prisoners gained legal status during the past century, individuals with little or no income became rights-holders. Some judiciaries responded with efforts aiming to help with subsidies for the unrepresented. Moreover, groups of women and men judges of color persuaded many jurisdictions to assess the fairness of courts’ own processes as part of the commitment to improve the administration of justice.

To understand these many changes and their impact requires an analysis of the institutions that propelled and sustained them. Therefore, I include a brief account of the founding of a series of organizations of lawyers and judges, as courts elaborated their own administrative apparatus, lawyers generated sub-specialties bar associations, and women and men created affinity groups. These organizations routinely took up projects aimed at improving courts’ responses to filings and to the volume of claimants seeking remedies.

I have elsewhere chronicled the creation and work of the Judicial Conference of the U.S. Courts, begun in 1922, which has generated many proposals for legislation and rule revisions. That body sought reforms of the treatment of youthful offenders and of large-scale litigation, and the Conference also opined on the allocation of work between federal and state courts, administrative agencies, and non-state actors and on the need for an expansion of the federal judiciary. Here, I briefly recap some of the federal judiciary’s agendas to provide some context for the work of a more recent organization, the National Association of Women Judges (NAWJ), formed in 1979 in the United States. The very existence of the NAWJ is one marker of the diversification of the judiciary.

As I detail, in conjunction with other organizations, the NAWJ pressed judiciaries to take up how gender affected legal rules and processes. State and federal judiciaries formally launched “task forces” (sometimes called “fairness in the courts”) to study the effects of gender, race, ethnicity, and religion in judiciaries’ processes and rulings. In the 1980s and 1990s, judiciaries and bar associations published more than 60 court-sponsored reports. The findings underscored the relatively small number of women jurists, the limited opportunities for women lawyers, and the problematic treatment of women litigants. Some of those projects were intersectional, in that they focused on the impact of race and sexuality on courts processes and case outcomes.

Just as affirmative efforts to combat inequality in other arenas were sometimes met with opposition, so too were these bias task forces. During recent decades, as social movements hostile to affirmative action, to government regulation, and to judicial innovation became more powerful, they succeeded in some jurisdictions in limiting the reach of such efforts. Gaining currency and becoming entrenched in law are views that courthouse doors opened too wide and that affirmative action has gone too far. The goals of limiting discrimination claimants intersected with efforts to limit access to courts for consumers and employees and to shift the modes of decision making in courts away from publicly accessible processes.

To be sure, during the past decade, some of the constitutional jurisprudence of the U.S. Supreme Court deepened understandings of inequality. Examples include its 2013 decision in United States v. Windsor, which held that a federal statute defining marriage as a commitment only between a man and a woman violated

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Equal Protection, and the subsequent 2015 ruling in *Obergefell v. Hodges*, concluding that states could not deny marriage to same-sex couples. Yet more of the U.S. Supreme Court’s rulings have closed off avenues to courts and narrowed the reach of anti-discrimination laws. For example, the Court has limited class action opportunities by enforcing consumer and employee forms that mandate private, individual arbitrations in lieu of aggregate proceedings in or out of public courts.

This several-century sweep of the changing faces and practices of courts illuminates the fragility of both equality norms and of courts themselves. Not only do violence and poverty continue to organize the lives of so many women and men, but the advent of this new demographic diversity in courts is intertwined with questions about the survival of courts as robust institutions in the twenty-first century.

Courts’ mandate to operate in public endows the audience—the public—with the ability and the authority of critique. Through participatory parity, public processes both teach about democratic practices of norm development and offer the opportunity for popular input to produce changes in legal rights. The redundancy produced by litigants raising parallel claims of rights enables debate about the underlying legal rules. The particular structural obligations of trial level courts can help to produce, redistribute, and curb power in a fashion that is generative in democracies. Courts can, on this account, serve to support democratic competency and to provide a site of democratic practices in which each person is entitled to fair treatment by government authorities. Moreover, the public is empowered to join in debates about rights, processes, and remedies.

Participatory parity is key to the success of this model of courts. As task forces documenting bias in courts remind us, these aspirations are far from realized. During some decades of the twentieth century, judges and legislatures recognized the need for subsidies, at times through constitutional interpretations of due process and equal protection, and at other times by statutory innovations that created mechanisms for funding, fee-shifting, and aggregation. Yet evidence is

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7 See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in Habermas and the Public Sphere 109 (Craig Calhoun ed., 1992).
mounting that courts have not only sufficiently subsidized litigants but that courts routinely impose fees, fines, and assessments that are debilitating. Many localities have looked to courts as “revenue centers” and have increased the fees imposed on participants.\textsuperscript{10} A host of what have come to be called “legal financial obligations” (LFOs) are assessed for a wide array of court-related activities.

The expanding reliance on fees and assessments has affected understandings of what courts represent. Rather than being seen as venues for rights pronouncement and effectuation, courts have gained another institutional persona—as discriminatory extractors of money from the people seeking help from or haled into court. Legal systems charge fees at entrance, for subsequent filings and, in some jurisdictions, when civil defendants file responses (unless those individuals seek court recognition that they are too poor to do so).\textsuperscript{11} Courts assess litigants money for transcripts of proceedings, to register to obtain “free” public defenders, and to use civil and criminal diversion programs, including court-based arbitration.\textsuperscript{12} And, as the U.S. Supreme Court detailed in 2017 in \emph{Nelson v. Colorado},\textsuperscript{13} not all jurisdictions return the assessments associated with criminal proceedings when individuals are acquitted. The result is that court debt can mount for people involved in civil, administrative, and criminal litigation.

The harms of court debt are not experienced equally. The impact is felt most acutely by people with limited resources and by communities of color, either because they seek assistance from the legal system or because they are subjected to over-policing, prosecution, and punishment.\textsuperscript{14} A growing body of empirical evidence documents the racial inequalities when fees are assessed and surcharges are imposed. The debt associated with the legal system undermines individuals,

\textsuperscript{14} The U.S. Department of Justice’s report on Ferguson and the subsequent litigation and settlement provide one of many examples. See C. R. Div., U.S. Dep’t of Just., Investigation of the Ferguson Police Department (2015); see also Monica Bell, \textit{Hidden Laws of the Time of Ferguson}, 132 \textit{Harv. L. Rev.} F. 1 (2018).
families, and communities. Nonpayment in some jurisdictions can be met with driver’s license suspensions (and then more fines for driving without a license or new criminal citations) and the loss of voting rights.

Another facet of the struggle for courts’ identity comes from the devolution of adjudication and its outsourcing to private providers, as well as from the reconfiguration in courts of their procedures to focus on settlement for both civil and criminal cases. Courts were once insistently public-facing, as the emergence of popular sovereignty shifted the “rites” of power of the Renaissance era into “rights” that all people were free to come to court and to listen to what transpired. Many procedural alterations of the latter part of the twentieth century go in the opposite direction. As a result, the occasions for public observation of and involvement in adjudication diminish. In the federal courts of the United States for example, trial rates dropped over the last few decades. By 2019, trials began in only one of a hundred civil cases filed. “Vanishing trials” is also a description of the federal criminal docket, where cases conclude by guilty pleas more than 90% of the time.

Through the privatization of processes inside courts, and the outsourcing, the public loses its opportunities to engage. Gone are what, in the nineteenth century, Jeremy Bentham called “auditors” and the potential for his imagined “Tribunal of Public Opinion” to function. Without third-party access, no one can evaluate the decision-makers and the disputants. Lost are opportunities to assess whether procedures and decision-makers are fair, how resources affect outcomes, whether similarly-situated litigants are treated comparably, and why one would want to get into (or avoid) court.

Instead, a private transaction has been substituted and, unlike public adjudication, control over the meaning of the claims made and the judgments rendered rests with the corporate provider of the service. Just as Michel Foucault mapped how governing powers, eager to maintain control, moved punishment practices from public streets into closed institutions, adjudication itself is at risk of being removed from public purview—rendering the exercise and consequences of public and private power harder to ascertain.

15 See generally Alexes Harris, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016).
17 Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir.) 2020).
Given the high volume of filings, the demand for more services, the influx of women and men of all colors on the bench, and the spate of courthouse building projects creating architecturally important structures, this diminution in the aegis of adjudication is sometimes overlooked. Yet the new courthouses, built with cutting-edge technologies and now welcoming diverse judges, are at risk of being anachronistic. While monumental in ambition and often in physical girth, the durability of courts as active sites of public exchange that enable litigants to participate on an equal footing and debate facts and legal norms before independent judges should not be taken for granted. During the last century, political commitments made courts formally open to all comers. It will take new social movements in the coming decades to enable courts to serve a diverse, cross-class population of participants.

II From Stone to Flesh: Women in Courts

The image reproduced in Figure 1 served as the frontispiece for a book published in 1655 about Dutch civil and criminal practice and law. Depicted is a packed
courtroom, filled with disputants, jurists, and spectators, joined by two dogs in the forefront of the scene. Women are absent, save for a tiny figure at the rear on a pedestal behind the judge’s bench. The statue is of the Virtue Justice, denoted by scales in one hand and an upright sword in the other.

In the same year as that volume’s publication, the Amsterdam Town Hall opened. Figure 2 shows two statues that sit high above the front door of this monumental building. One imposing statue is Prudence with the signature attributes of a mirror, and the other is Justice again shown holding scales and sword. These two were often shown with Fortitude and Temperance. Those four made up a set called the Cardinal Virtues, deployed by governments as markers of their wise exercise of power.

Figure 2: Prudence and Justice, attributed to Artus Quellinus, circa 1655, crowning the front tympanum (looking toward Dam Square) of the Town Hall (Royal Palace), Amsterdam, The Netherlands; photograph provided by the Amsterdam City Archives.

20 For discussions of the history and deployment of this iconography, see Judith Resnik & Dennis Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms 1–17 (2011) [hereinafter Resnik & Curtis, Representing Justice], on which this commentary builds.
While European and other polities regularly personified their claim to virtue through imagery of women, not until the twentieth century did women across classes and colors become regular participants in courts. Women-as-judges not only marks a profound change in the status of women, but also a radical departure in the conception and work of courts.

Transnational social movements during the nineteenth and twentieth centuries helped women to gain formal juridical recognition—to sue and be sued in their names, to hold and transfer property, to enter into contracts, to work in a range of fields and garner equal wages, and to live in households, walk on streets, and hold employment without being subjected to assaults. Although far from realized in practice, these new legal regimes represent the potential for reorganization of social ordering to implement commitments to the equal personhood of all individuals.

When women entered the legal profession and the judiciary, they moved from being solitary “firsts” and token members to being proudly heralded aggregate data points recording a growth in the percentage of judges who were women. Within the last three decades, the presence of women judges (intersecting with other demographic categories) has come to be seen as a desirable attribute of judiciaries, just as their absence on many benches has become a problem in need of explanation. This article is focused on the United States, but it is the apex courts of other countries—including Canada and Israel—that have been at the forefront of inclusion. As articles in this symposium address, more women than men sit on lower-tier courts in many jurisdictions.

To be clear, linking some facets of individual judges’ identity to court legitimacy is not novel. Geographical diversity has long been a staple of courts, as illustrated by the 1870 Constitution of Illinois, which required that the seven

21 Women were not completely absent. For example, the Hebrew Bible identified Deborah as a judge and several women as litigants. See Daphne Barak-Erez, Gender and Access to Justice in Biblical Narratives (manuscript Sept. 2019, on file with the author).

members of that state’s Supreme Court be elected from different parts of the state.\textsuperscript{23}

This practice is not limited to the United States. Reflecting conflicts about the status of Quebec, a Canadian statute mandates that Canada’s Supreme Court include three justices from that province.\textsuperscript{24} Transnational courts regularly draw membership keyed to national borders. The Court of Justice for the European Union is comprised of a justice from each of its member-states,\textsuperscript{25} and international courts routinely draw jurists from different countries.\textsuperscript{26}

In addition to geography, another form of diversity is political affiliation. The U.S. Constitution authorized the President to nominate and the Senate to confirm appointments that permit—when the two bodies are not governed by the same political party—input from across the aisle.\textsuperscript{27} Other jurisdictions likewise distribute appointment powers across sectors of government.\textsuperscript{28} The Constitution of Delaware built in another model by calling for the governor when appointing judges to ensure that no more than a “bare majority” of judges affiliated with one political party serve on each of the three of that state’s highest courts.\textsuperscript{29} A federal appellate court commented that doing so had contributed to an “exemplary” judicial system but nonetheless invalidated that mandate as violating the free speech guarantees of the U.S. Constitution; the U.S. Supreme Court did not reach the merits as it ruled the person challenging the provision had no standing to bring the lawsuit.\textsuperscript{30}

Yet as the 1655 courtroom scene in Figure 1 reflects, the persons in the role of judge or in the courtroom were far from demographically diverse. And until recently, few insisted that such exclusions were a problem for courts. But now, as a

\textsuperscript{23} ILL. CONST. art. VI (1870). As of 2018, three justices are elected for 10 year terms from the First District (Cook County, the most populated), and one from each of the other four districts. Justices are expected to reside in their home districts and to travel to the state capital, Springfield, for oral arguments. The courthouse, built in the early part of the twentieth century, has a floor with bedroom suites where the justices stay during the weeks of oral argument. See Illinois Courts, The History of the Illinois Supreme Court, http://www.illinoiscourts.gov/SupremeCourt/Historical/judicialsystem.asp.

\textsuperscript{24} Supreme Court Act, RSC 1985, c S-26, http://canlii.ca/t/5266h.


\textsuperscript{27} The U.S. Constitution took the route of presidential nomination and Senatorial confirmation. See U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{28} Germany is an example. See Hans-Ernst Böttcher, The Role of the Judiciary in Germany, 5 GERMAN L.J. 1317 (2004).

\textsuperscript{29} The provisions are more detailed. See DEL. CONST. art. IV, § 3.

result of political and social movements pressing courts in democratic market economies to change, an all-white and all-male judiciary is understood as undermining the legitimacy of courts. Courts have come to be obliged to welcome all persons as equals—as litigants, witnesses, jurors, staff, lawyers, and judges.31

But an important question needs to be asked. What’s the theory for a diverse judiciary—whether based on geography, gender, or race? Given the ideology that all judges are to be impartial, why has it mattered where judges come from, what political party they have belonged to, or what they look like? Arguments for demographic inclusivity overlap somewhat with some that have been made about needing geography and political affiliation diversity. All of these kinds of diversity aim to enhance the political legitimacy and acceptability of judicial decisions.

What the new waves of diversification demonstrate is that courts themselves have identities that are not fixed. I chose to put the words “identity” and “legitimacy” in this article’s title to underscore both that the images of who comes to and who works in court and what courts do are not fixed and that the need to have a diversified judiciary has become a new facet of courts’ legitimacy.

Why does it matter for courts to have judges who are not all white and male? The rationales track in some respects the goals of changing other venues—legislatures, corporate boards, and shop floors—to make them less discriminatory. Exclusions came from discrimination and, as Ruth Bader Ginsburg put it, “women belong in all places where decisions are being made.”32 When judiciaries (or other institutions) persist in being descriptively discriminatory, with subsets of humanity absent, they provide evidence of ongoing systems of subordination that limit certain segments from accessing power. Note that using the word “discrimination” identifies the issue as subordination, while naming the problem to be a lack of “diversity” downplays histories of hierarchy.

Another argument about ending exclusionary courts rests on the need for adjudication to be seen to be impartial. Exclusion of people by race or gender undermines the needs to be seen as institutions that are themselves descriptively representative. People need to see that all members of the body politic participate in all the roles available.33

A third proposition, relying on a mix of epistemology and sociology, makes an argument that courts (as well as other institutions) are better in their work if people with diverse backgrounds and different sources of knowledge and experiences are present. The amalgam is assumed (in the context of courts) to produce fairer assessments of the validity of claims and of the requisite remedies.

But what is the relationship between gender, color, knowledge, and experience? Critical theories have long worried about an “essentialism” that shadows these arguments. Many commentators decry binary gendered divides and equations of sets of characteristics with any “essence” of women and of men. Yet, because social structures have long been organized by gender, class, and race, differences correlate with (rather than are essential to) gender and race.34 Obvious examples are that women of all colors make disproportionate contributions to household maintenance and care35 and that jobs gendered as male garner more remuneration than those coded as female.

In addition, courts are also sources of gendered and racialized identities. The intelligibility of gender and race as predictors of roles, life experiences, and attitudes comes in part from the maintenance of all male and all white spaces. Therefore, ending exclusion in judiciaries is important because courts are one of the many venues making meaningful the overlapping categories of gender and race.36

My brief discussion of a large theoretical literature on the sources and import of subordination, discrimination, and exclusion explain why barriers in one domain affect others. The paths that enabled women to become judges were paved by political efforts that enabled women to become property owners, voters, litigants, and lawyers. I sketch some of that history below by accounting for some of
the women who were the “firsts” on the bench and by detailing the organizations formed as diverse groups broke barriers to the legal profession. As I explain, before the 1970s, in some states and eventually the federal government, a few women (mostly white) made their way into the legal profession and then onto the bench.

In more recent decades, “counting women” has become a cottage industry as the fact that some women on the bench came itself to “count.” As the numbers grew, researchers quested to understand what impact women as judges have had (The number of non-white judges has in the United States been so small as to make quantitative research difficult). As I explain in Part IV, an important but under-assessed measure is the collective work of identity-based judge organizations, which have produced dozens of studies about the role of courts in perpetuating bias and the modes to reduce unfairness. But, as I examine thereafter, as those efforts ramped up, backlash against affirmative action and deregulation agendas also emerged.

A Displacing Requirements that Lawyers be “White Male Citizens”

In 1869, shortly after the Civil War, Arabella Babb Mansfield sought admission to the bar of Iowa. The practice of law was—and still is—regulated at the state level. In the 1860s, Iowa’s statute governing lawyers stated that:

Any white male citizen of the United States who is ... an inhabitant of this state and who satisfied any district court of this state that he possesses the requisite learning and ... is of good moral character may by such court be permitted to practice in ... this state ... .

Despite this text, the men who were bar examiners in Iowa concluded not only that Mansfield met these qualifications but also that they would “heartily welcome” her to the bar. They “most cordially” recommended her to the local judge, Frances Springer, for admission.

37 Iowa Code § 1610 (1851).
38 District Court Record, Henry County, Iowa, Book H at 53–55, June Term, 2nd Day, Tuesday, June 15, 1869 [hereinafter Iowa 1869 District Court Record]. George B. Corkhill and Edwin A. VanCise, the examining attorneys, stated that on behalf of the entire committee they felt “justified in recommending to the Court that construction which we deem authorized not only by the language of the law itself, but by the demands and necessities of the present occasion.” Id. at 55.
39 Iowa 1869 District Court Record, supra note 38, at 55. They reported that they took “unusual pleasure” in recommending “Mrs. Mansfield, not only because she is the first lady that has ... applied,” but also because of the skills she exhibited upon examination. Id.
Upon receiving that recommendation, Judge Springer ruled that the statute did not directly create a “denial to the rights of females.” More candidly, he decided that a “restrictive” construction of the words would work “a manifest injustice.” Determining instead to do justice, Judge Springer admitted Mansfield, who became the first woman in the United States to be recorded as a member of the bar.

Arabella Mansfield and Frances Springer were part of a larger social movement. By 1872, the Iowa legislature had rewritten its statute on lawyers to recognize that women and men—of all colors—could become lawyers. The new text stated that:

Any person twenty one years of age who is actually an inhabitant of this state and who satisfied any court of record of this state that he or she possesses the requisite learning … and is of good moral character, may by such court be licensed to practice law in … the state ….

Yet that era is better known in the annals of U.S. constitutional history as marking a very different set of judgments that were profoundly illiberal and eviscerated much of the potential of the then-new Fourteenth Amendment to the


41 Iowa 1869 District Court Record, supra note 38, at 54–55. A contemporary of Mansfield later wrote that Mansfield had reported to her that “the presiding judge said to her very significantly that when any of those restrictive words did a manifest injustice to individuals, the court was justified in construing statutes as extending to others not expressly included in them.” Leila J. Robinson, Women Lawyers in the United States, 2 The Green Bag 10, 21 (1890); see also Federer, supra note 40, at 38–39.

Springer’s approach contrasted with that of the Yale Law School, which had inadvertently admitted a woman, Alice R. Jordan (Blake), to its class. The applicant had used initials to apply to the law school and when admitted—on the assumption that she was a man—refused to accept a rejection and therefore matriculated and graduated. Thereafter, Yale Law School’s dean revised the wording to state that “It is to be understood that the course of instruction above described are open to persons of the male sex only, except where both sexes are specifically included.” Robinson, supra, at 13.

42 This licensure to practice law is to be distinguished from appearing in court. The woman cited as the first to appear is Margaret Brent, whose “name appeared 124 times in the records of Maryland’s courts.” Larry Berkson, Women on the Bench: A Brief History, 65 Judicature 286, 287 (1982). As Mary Beth Norton explained, Brent was illustrative of the capacity for social standing to enable some women to participate in a wide range of activities. See Mary Beth Norton, Separated by Their Sex: Women in Public and Private in the Colonial Atlantic World 2–3 (2011). Norton argued that through segregation, women gained a solidarity, based on sex, which enabled them to protest that isolation. Id. at 180–82.

43 Iowa Code § 2700 (1872).
United States Constitution, which had come into force in 1868. The first section of that amendment states that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.44

In two decisions, the Slaughter-House Cases45 and Bradwell v. Illinois,46 issued back-to-back on April 14 and 15 of 1873, the Court read narrowly the Privileges or Immunities and (less directly) the Equal Protection Clauses.

In the Slaughter-House Cases, the Court rejected claims by African American butchers that Louisiana, by giving a statutory monopoly in 1869 for the meat supply of New Orleans to a corporation of white butchers, had unconstitutionally closed Black butchers out of the profession. Likewise, the Court rejected the claims of a white woman, Myra Bradwell, who argued that the State of Illinois had violated the Fourteenth Amendment when it refused to admit women to its bar.

Bradwell’s case parallels that of Arabella Babb Mansfield in several respects. Like Mansfield, Myra Bradwell had been found by a lower court judge to possess the “good character” and other “requisite qualifications” to become a member of the bar.47 Further, both women were married (to lawyers) and, following English common law traditions, because of that status, their property and contracts rights were limited. Many states in the country had what were called “married women’s property acts” that circumscribed the authority of married women to own property and conduct business.

By 1866, Iowa had ended its prohibitions on married women’s capacities to enter into contracts, own property, and keep their earnings.48 Illinois had likewise lifted the common law restrictions on married women’s ability to own property

44 U.S. Const. amend. XIV, § 1.
45 The Slaughterhouse Cases, 83 U.S. 36 (1873).
46 Bradwell v. Illinois, 83 U.S 130 (1873).
47 Id. at 130.
48 Iowa Code §§ 1447–1453 (1851) (establishing conditions for married women’s separate property ownership); Iowa Code § 1454 (1851) (establishing the independent contractual ability of husbands and wives); Iowa Code ch. 24, § 1 (1866) (codifying “an Act to protect the earnings of Married Women,” allowing married women to retain their earnings). Some of these protections date back to 1846, when Iowa was still a territory. See An Act Concerning the Rights of Married Women, ch. 5, 1846 Iowa Acts 4.
independently and to retain their own earnings, but Illinois had left other incapacities in place. As the 1869 Illinois Supreme Court decision rejecting Myra Bradwell’s request for admission explained:

It may be desirable that the legislature should relieve married women from all their common law disabilities. But to say that it has done so, in the act of 1861, the language of which is carefully guarded, and which makes no allusion to contracts, and does not use that or any equivalent term, would be simple misinterpretation.50

The special relevance of contracts to the practice of law,51 coupled with an assertion that “God designed the sexes to occupy different spheres of action,”52 produced the conclusion that the legislature could not have had “the slightest expectation” that the “privilege” to practice law “would be extended equally to men and women.”53

Bradwell argued to the United States Supreme Court that Illinois’ rejection of her application had abridged the “privileges or immunities” of citizenship, protected by the newly ratified Fourteenth Amendment.54 Had that phrase, borrowed from the English, been read to provide robust protections of rights to contract, own property, and earn a livelihood (a plausible interpretation in that era),55 the Fourteenth Amendment could have been used to undermine a host of state laws imposing disabilities on married (and other) women of all colors, on Black men and, perhaps, on prisoners whom many jurisdictions counted as “civilly dead.”

The U.S. Supreme Court’s decision in Bradwell (relying in part on its ruling in the Slaughter-House Cases) rejected that approach and held that “the right to admission to practice in the courts of a State” was not affected by the Fourteenth Amendment.56 Quotes from the Bradwell concurring opinion capture the ideology

49 Law of April 23, 1861, ch. 69, § 2, 1872 Ill. Comp. Stats., 439 (permitting married women to independently own property); Law of June 19, 1869, ch. 69, § 13, 1872 Ill. Comp. Stats. 439 (allowing married women to retain their own earnings).
51 A “married woman … would be bound neither by her express contracts, nor by those implied contracts, which it is the policy of the law to create between attorney and client.” In re Bradwell, 55 Ill. at 535–36.
52 In re Bradwell, 55 Ill. at 539.
53 Id.
54 Id. at 138. Bradwell, who had moved to Illinois from Vermont, argued that her new home state was not free to prevent her from working as a lawyer—a privilege of her state and federal citizenships. Bradwell, 83 U.S. at 137–38.
56 Bradwell, 83 U.S. at 138.
shared by many of that era: “Man is, or should be, woman’s protector and
defender,” and “a woman had no separate legal existence from her husband.”

The United States Supreme Court continued its crabbed reading of the Four-
teenth Amendment until decades into the second half of the twentieth century. In
1875, for example, Virginia Minor sought to vote in Missouri and argued that the
Constitution’s Privileges or Immunities Clause protected her right, as a citizen, to
do so. The Court rejected her position. While agreeing that she was a citizen of the
United States, the Court held that states were free to determine her suffrage status
because the privileges of federal citizenship did not (at least absent congressional
directives) include the franchise.

As Arabella Babb Mansfield’s case makes plain, several states were ahead of
the federal system in permitting women to enter the legal profession—and to do
much else. Indeed, after Myra Bradwell lost in the state court (and before the U.S.
Supreme Court ruled), she scored a legislative victory by convincing the Illinois
legislature to revise its statutes to specify that no person was to be excluded “from
any occupation, profession, or employment (except military), on account of sex.”
Likewise, during the 1870s and 1880s, several state bars (at times acting on statutes
that, as in Iowa and Illinois, had been rewritten) admitted women to the practice of
law, as did a few federal district courts. The Court did not start until the 1950s to
unravel the subordination it had read the Constitution to countenance.

57 Id. at 141 (Bradley, J., concurring).
58 Minor v. Happersett, 88 U.S. 162, 177–78 (1875). The Court noted that Congress had not
legislated and whether it could constitutionally intervene was an issue that was not before the
Court. Minor, 88 U.S. at 171.
59 An Act to Secure to All Persons Freedom in the Selection of an Occupation, Profession, or
Employment, 1872 Ill. Laws 578, 578 (codified at 48 Ill. Rev’d Stat. 912, §1 (1903)). Enacted on March
22, 1872, the Act became effective July 1, 1872. Thus, the legal profession became open to women
some two years after the Illinois Supreme Court’s decision in In re Bradwell and a year before the
United States Supreme Court’s decision in that case. Bradwell herself did not join the bar, even as
she was a central and powerful legal figure as the editor of a weekly newspaper, the Chicago Legal
News, through which Bradwell provided lawyers with an array of materials, highlighted women’s
activities in the legal profession, and advocated for a myriad of reforms. See generally Jane M.
Friedman, America’s First Woman Lawyer: The Biography of Myra Bradwell (1993); Gwenn Hoerr Jordan,
“Horror of a Woman”: Myra Bradwell, the 14th Amendment, and the Gendered Origins of Sociological
Jurisprudence, 42 Akron L. Rev. 1201, 1210 (2009). The innovations of women lawyers of that era,
including the shaping of criminal defense rights, are analyzed in Barbara Babcock, Woman Lawyer:
60 Berkson, supra note 42, at 288–89.
Women-as-litigants and women-as-lawyers produced the potential for women to be judges, even if the first woman recorded to hold a judicial position was not herself a lawyer. Esther Morris served briefly as a justice of the peace in what was then a federal territory, Wyoming. Before detailing the patterns of the places and of the subset of women selected to be judges, a comment is in order about how knowledge of such patterns exist. Attention needs to be paid to which women “counted” to be counted in academic and political inquiries.

A few African Americans are recorded among the first women to have become lawyers. One was Charlotte E. Ray, admitted to the bar of the District of Columbia in 1872. Famous litigants included Harriet Scott who, along with her husband Dred Scott, insisted on their juridical voice, only to be told by the U.S. Supreme Court that their race precluded them from obtaining legal recognition of their freedom. Others have chronicled nineteenth century Black women challenging race segregation in transportation. Yet, most recorded “firsts” in the literature to date were white women.

One of the early lists comes from Leila Robinson, who in 1890 detailed (person by person and jurisdiction by jurisdiction) the women lawyers about whom she knew. In 1898, some 20 women joined together to form what they called the Women Lawyers’ Club, which in 1911 became the National Association of Women Lawyers (NAWL).

61 Marcy Lynn Karin, *Esther Morris and Her Equality State: From Council Bill 70 to Life on the Bench*, 46 Am. J. Legal Hist. 300, 326 (2004). Morris, an engaged suffragette, was apparently “initially reluctant” to become a judge, as she had neither a legal education nor other formal education, nor had she practiced law. *Id.* at 326.


65 Robinson, *supra* note 41.

Below, I chart women who have been identified over the course of some seven decades as the “firsts” in various parts of the United States.67 This brief overview, cutting across 15 jurisdictions, runs from the appointment in 1870 of Esther Morris (the first “first”) through a sequence of other individuals joining a particular jurisdiction’s bench. This summary ends in 1939 when (as far as known now) the first Black woman was appointed a judge on the state courts.

Table 1: Accounting: Women’s Entry into Judging in the United States, 1870–1939.

<table>
<thead>
<tr>
<th>Year</th>
<th>State</th>
<th>Office</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>1870</td>
<td>Wyoming Territory</td>
<td>Justice of Peace</td>
<td>Esther Morris</td>
</tr>
<tr>
<td>1886</td>
<td>Pennsylvania</td>
<td>Master in Chancery</td>
<td>Carrie Kilgore</td>
</tr>
<tr>
<td>1907</td>
<td>Illinois</td>
<td>Justice of Peace</td>
<td>Catherine McCullock</td>
</tr>
<tr>
<td>1914</td>
<td>Washington</td>
<td>Justice Court</td>
<td>Reah Whitehead</td>
</tr>
<tr>
<td>1915</td>
<td>Missouri</td>
<td>Temporary Probate</td>
<td>Frances Hopkins</td>
</tr>
<tr>
<td>1921</td>
<td>Tennessee</td>
<td>Juvenile Court</td>
<td>Camille Kelley</td>
</tr>
<tr>
<td>1921</td>
<td>Ohio</td>
<td>Common Pleas</td>
<td>Florence E. Allen</td>
</tr>
<tr>
<td>1922</td>
<td>Ohio</td>
<td>Supreme Court</td>
<td>Florence E. Allen</td>
</tr>
<tr>
<td>1928</td>
<td>Vermont</td>
<td>Probate Court</td>
<td>Mary H. Adams</td>
</tr>
<tr>
<td>1931</td>
<td>California</td>
<td>General Jurisdiction</td>
<td>Georgia Bullock</td>
</tr>
<tr>
<td>1934</td>
<td>Hawaii Territory</td>
<td>District Court</td>
<td>Carrie H. Buck</td>
</tr>
<tr>
<td>1934</td>
<td>Federal</td>
<td>Court of Appeals</td>
<td>Florence E. Allen</td>
</tr>
<tr>
<td>1935</td>
<td>Texas</td>
<td>District Court</td>
<td>Sarah T. Hughes</td>
</tr>
<tr>
<td>1935</td>
<td>Utah</td>
<td>City Court</td>
<td>Reva B. Bosone</td>
</tr>
<tr>
<td>1938</td>
<td>Colorado</td>
<td>District Court</td>
<td>Irene S. Ingham</td>
</tr>
<tr>
<td>1939</td>
<td>New York</td>
<td>Domestic Relations Court</td>
<td>Jane Bolin(^a)</td>
</tr>
</tbody>
</table>

\(^a\)First African American female judge.

One of these women, Florence Allen, is known for being the first appointed to more than one court—the Ohio state bench in 1920;68 that state’s Supreme Court in 1932; and in 1934, the first woman to serve on any federal bench (territories aside)

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68 Florence Allen was the first to be “elected, rather than appointed, to a judicial position other than justice of the peace.” Berkson, supra note 42, at 291. Allen was elected on November 2, 1920 and took office January 1, 1921.
in the United States. Jane Bolin’s 1939 appointment to the New York City Family Court as its first Black woman came 70 years after white women were the firsts in various jurisdictions and decades after a few Black men became judges. In 1966, some three decades after the first white woman had become a federal judge and after the first Black woman joined the state court bench, and 16 years after the first Black man became a federal judge, Constance Baker Motley became the first African American woman to be appointed to the federal court.

The pattern of which women became judges follows another pattern, identified by John Markoff, who undertook a worldwide analysis of when and where women gained the right to vote. As he put it, the map showed a movement from “the margin to the center.” Repeatedly, women won voting rights in colonies or in far-flung small states before they gained suffrage in more powerful polities.

69 Many of the women who made it to the bench were multiple-firsts in other senses in that they were often the “only” woman in a host of positions of which judging was but one. Further, women who became judges until recently have had career paths distinctive from men, in large part because many of the routes men took to the judiciary were not open to women. See Mary L. Clark, One Man’s Token is Another Woman’s Breakthrough: The Appointment of the First Women Federal Judges, 49 Villanova L. Rev. 487, 540 (2004) [hereinafter Clark, The Appointment of the First Women Judges].

70 See Blackburne-Rigsby, supra note 67, at 667–68. Macon Bolling Allen is cited as the first Black lawyer and first Black judge, appointed in 1847 as a justice of the peace in Maine. Id. at 652, 663–64. The first Black man elected to a state’s highest court was Jonathan Jasper Wright, who won a seat in 1870 in South Carolina, after Black people, then more than 60% of the population, were enfranchised. Id. at 653, 664.

71 Motley served on the Southern District of New York; the first African American woman, Amalya Kearse, to join the federal appellate court, was appointed in 1979 to the Second Circuit, also headquartered in New York City. Blackburne-Rigsby, supra note 67, at 659–60. Four years earlier, in 1975, another Black woman, Julia Cooper Mack, was appointed to the federal but “local” courts of the District of Columbia. Id. at 659. The first African American man on a federal court, William H. Hastie, was appointed in 1950 by President Truman to the Third Circuit. Id. at 658; see also Clark, The Appointment of the First Women Judges, supra note 69, at 514–19. Motley’s autobiography provides a rich account of her work. Constance Baker Motley, Equal Justice Under Law: An Autobiography (1999).

72 John Markoff, Margins, Centers, and Democracy: The Paradigmatic History of Women’s Suffrage, 29 Signs 85 (2003). Markoff in turn took the phrase from other feminist work and applied it literally as well as metaphorically to map how voting rights for women came more often to those in colonies than in the colonizing power. Id. at 104. Wyoming’s grant of the vote in 1869 preceded the federal voting system rights by 50 years; the Nineteenth Amendment was ratified in 1920. Women got the vote in New Zealand in 1893, making it the first “national state” to provide for women’s suffrage for national elections, id. at 91, decades before Great Britain gave women voting rights equal to men. Women became eligible to vote for the House of Commons in 1918, but with requirements (such as being 30 years of age and either herself qualified to vote locally or married to a man who was) that did not apply to men; “full voting equality” did not arrive until 1928. Id. at 96.
The relationship between women judges and women voters is deeper than a symmetry of geography. Women-as-judges in the United States were artifacts of women-as-voters. Wyoming holds the distinction not only as the place where the first woman presided on the bench, but also as the first place where women gained and retained the vote. In 1869, the legislature enacted a provision “that every woman of the age of 21 years, residing in this Territory, may, at every election … under the laws therefore, cast her vote.” New Jersey had, before 1807, briefly given women the vote but its provision was repealed. In contrast, Wyoming’s legislation survived the 1871 legislature’s repeal because of a governor’s veto.

Esther Morris, the first woman judge, was a direct (albeit ironic) beneficiary of this provision. When the Wyoming statute was enacted, a justice of the peace who was a staunch opponent of women’s suffrage resigned in protest—thereby producing a temporary vacancy. The federal district judge in Wyoming proposed that Morris apply; she was elected in 1870 by a two-to-one vote of the local county commissioners. Likewise, Florence Allen, the first woman to win a seat on a court via a general election, obtained her position in 1920 immediately after women in the United States became eligible, by virtue of a federal constitutional amendment, to vote. Endorsed by many women’s organizations in Cleveland, Ohio, Allen won

74 The New Jersey Constitution of 1776 used gender neutral language (“all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, … shall be entitled to vote”), and women property-owners voted in some elections before an 1807 statute restricted the vote to “free, white, male citizens.” See Jan Ellen Lewis, Rethinking Women’s Suffrage in New Jersey, 1790–1807, 63 Rutgers L. Rev. 1017, 1017, 1020–22 (2011); see also Marc Kruman, Between Liberty and Authority: State Constitution Making in Revolutionary America 50, 102–06 (1997); Judith Apter Klinghoffer & Lois Elks, “The Petticoat Electors”: Women’s Suffrage in New Jersey, 1776–1807, 12 J. Early Republic 12 (1992); Markoff, supra note 72, at 88.
75 In 1871, the Wyoming Territory House of Representatives repealed the statute. House Journal, Territory of Wyoming, 2d Sess. 47–49 (1871). Governor Campbell’s message, when vetoing the repeal, argued that the conscience of women was “more discriminating and sensitive than that of men,” and according to newspaper reports, that a legislature did not have the power “to disfranchise its own constituents.” Women Suffrage in Wyoming—Gov. Campbell’s Veto, N.Y. Times, Dec. 21, 1871 (unpaginated copy). The effort to override the veto “failed in one branch of the Legislature.” Id.; see also The Message of Governor J. Al Campbell, with his Excellency’s objections to House Bill No. 4, House Journal, Territory of Wyoming, 2d Sess. 112–18 (1871).
76 Karin, supra note 61, at 320. Morris, then age 57, took office in 1870, and presided in court, including over trials, for more than eight months. Id. at 322–31. At the time, the justice of the peace had more authority than is associated with that role in the United States today and included criminal and civil cases, and Morris was recorded as involved in 70 judicial proceedings. Id. at 331–32. Morris filled a term and upon its expiration, neither party nominated her to continue. Id. at 333. The justice of the peace who had resigned in protest over women’s voting returned to office. Id.
“by the largest popular vote ever given to a candidate for the bench in that county.”

The relationship between women judges and women voters underscores the interdependency of rights with economic and political possibilities. As Virginia Woolf commented in *A Room of One’s Own*, as between the vote and 500 pounds a year, she would take the money. Along with voting rights, Wyoming gave women equality in estates if a partner died without a will; authorized widows to have custody of minor children; precluded mortgages against homesteads from binding wives without their consent; and granted married women the rights to keep their earnings, to acquire separate property, and to be paid equally to men when employed by the territory as teachers. Women’s suffrage nationwide and women’s entry to the bar and bench intersected with the decades in which women’s economic, educational, and professional opportunities expanded.

An accounting of an enlarging arena of options for mostly white women is not, however, simply a cheerful story of growing commitments to egalitarian precepts. The details of how women won the vote in Wyoming in 1869—just a few years after the end of the Civil War—provide an example. Some proponents were committed to women’s rights, while others were part of bitter political party disputes and thought that enfranchising new voters would help them to win elections. Further, some were racists, who saw adding white women voters as a means of “offsetting the African-American vote” and of making plain that “white women deserved” the vote before dark-skinned men.

Conflicts over power among white and Black women and men played out repeatedly in the decades before and in the centuries thereafter. Concerns raised about Florence Allen, heralded for all of her “firsts,” provide an example. When


78 Virginia Woolf, *A Room of One’s Own* 37 (Harcourt 1957) (1929). Class is central in this account. As Woolf explained:

> The news of my legacy reached me one night about the same time that the act was passed that gave votes to women. A solicitor’s letter fell into the post-box and when I opened it I found that she had left me five hundred pounds a year for ever. Of the two—the vote and the money—the money, I own, seemed infinitely more important.

79 Karin, *supra* note 61, at 318.

80 These cross-currents are yet other reasons to be skeptical of the T.H. Marshall categories that delineate political, civil, and social rights. See T.H. Marshall, *Citizenship and Social Class* (1950).


82 Id. at 316.

83 Id. at 317.

84 See *African American Women and the Vote: 1837–1965*, supra note 64.
Allen was nominated to the federal appellate court, the NAACP opposed her confirmation. It focused on Allen’s joining an opinion by the Ohio Supreme Court which had rejected the effort by Doris Weaver, whom it described as a “colored girl,” to be admitted to Ohio State’s School of Home Economics and to live in a six-person residence as part of the course of study.  

C A Narrow Band of Women and of Rights

In the United States, the question of “diversity” has come to the fore in the context of affirmative action to enable people of color to participate in various institutions of education and governance. “Gender,” while aspiring to reference all persons (women, men, nonbinary), tends to center on whether women of all colors likewise have access to all roles in this social order. Less in focus in some accounts is class, even as the interaction between demographic identity and class need to be part of intersectional analyses.

The women whom I have flagged were token participants in a system that was overwhelmingly populated by white middle and upper class men. The term “token” describes, but ought not be read to diminish, the import of their work. These women succeeded by interrupting the order of their day. Their exercise of authority enlarged the popular and political imagination of what women could do. Again, Virginia Woolf captures the point: “Anything may happen when womanhood has ceased to be a protected occupation, I thought, opening the door.”

Many accounts of the discrimination that the first women on the bench faced document Woolf’s point that women judges were feared as totems (“anything may happen”), who forecasted (as it turned out correctly) that a whole clan would emerge.

Yet diversity within that clan was decades away. A vivid demonstration of the gap between white and dark-skinned women gaining positions of authority comes by way of shifting the focus from women sitting on the bench to the places—courthouses—in which they did their work. In the 1930s, in the wake of the

85 See Clark, The Appointment of the First Women Judges, supra note 69, at 487. In the case, State ex rel Weaver v. Bd. of Trustees of Ohio State Univ., 185 N.E. 197 (Ohio 1933), the university had argued that it had never been its policy “to require different races or nationalities to reside together as part of a single family.” Id. at 197. The court upheld the university’s provision of separate facilities. Fifteen years later, the U.S. Supreme Court held unconstitutional separate law schools in Sweatt v. Painter, 339 U.S. 629 (1950), and thereafter, separate lower schools in Brown v. Board of Education, 347 U.S. 483 (1954).
86 See Blackburne-Rigsby, supra note 67, at 663.
87 Woolf, supra note 78, at 41.
Depression, the federal government funded jobs through what it called the WPA—the Works Progress Administration (WPA), which commissioned new construction and art. Hundreds of buildings went up, including a new federal courthouse and post office in Aiken, South Carolina.88 One commission went to an artist in the Northeast89 who painted what is shown in Figure 3—a large mural, called *Justice as Protector and Avenger*90—which was installed behind a judge’s bench in a courtroom.

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**Figure 3:** *Justice as Protector and Avenger*, Stefan Hirsch, 1938, Charles E. Simons, Jr. Federal Courthouse, Aiken, South Carolina. Image courtesy of the Fine Arts Collection, United States General Services Administration.

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90 Stefan Hirsch, *Justice as Protector and Avenger* (1938) at U.S. Courthouse and Post Office, Aiken, S.C. This image was brought to my attention by Susan Harrison, formerly of the Art-in-Architecture Program; further, Kathryn Erickson and Erin Clay of the Collection of Fine Arts of the General Services Administration (GSA) helped in identifying the relevant materials. The Aiken building was subsequently named the Charles E. Simons Jr. Federal Courthouse after Judge Simons, who had served as the Chief Judge for the District of South Carolina from 1980 to 1986.
The central female figure is another reference to the Renaissance Virtue Justice—familiar because she is still used in courthouses around the world.91 The WPA artist explained that his “figure of ‘Justice’” was “without any of the customary … symbolic representations (scale, sword, book …)” He said that the only “allegory” he had permitted himself was “to use the red, white and blue (of the United States flag) for her garments.”92

What did others see? A local newspaper objected to this “barefooted mulatto woman wearing bright-hued clothing.”93 The federal judge assigned to the courtroom called it a “monstrosity”—a “profanation of the otherwise perfection” of the courthouse.94 The artist protested. He argued that truly impartial observers would not think “that the figure’s face … appears to have negroid traits. I should not only be willing but anxious to obliterate this ‘blemish’, because I had certainly intended nothing of the sort.”95 A “compromise” was proposed—to “lighten Justice’s skin color.”96 But other groups, including the National Association for the Advancement of Colored People (NAACP), objected. The denouement was a tan velvet curtain to cover her—which can be seen by returning to Figure 3 and looking at the edges.

91 Interpretative materials written in the 1990s by staff at the General Services Administration (the agency now charged with overseeing federal buildings), described this Justice as raising a “nurturing right hand to those who live righteously,” while her left hand “repels miscreants with a condemning gesture.” The scenes under the heading “Protector” include rolling hills, cows near a barn or house, children playing, a woman holding a baby, and a lamb and plow at the bottom of the frame. In contrast, under the label “Avenger,” Hirsch portrayed crimes—a house burning, a man holding open a door to a prison cell through which another man (garbed in prison stripes) appears either to be entering or leaving, while another man is crouching where a woman’s body lies, with a shotgun below. Images of Justice, Gen. Servs. Admin. (Mar. 25, 2004), http://www.gsa.gov/graphics/pbs/Justice_as_Protector.pdf.
92 Letter from Stefan Hirsch to Forbes Watson (May 18, 1938), Stefan Hirsch & Elsa Rogo Papers, supra note 89.
95 Letter from Stefan Hirsch to Edward B. Rowan, Superintendent, Section of Painting & Sculpture, U.S. Treasury Department (Oct. 7, 1938), Stefan Hirsch & Elsa Rogo Papers, supra note 89.
96 GSA Archives, Public Building Services, Fine Arts Collection, FA 477 Stefan Hirsch [hereinafter GSA Archives].
At the same time that the “mulatto” Justice was covered because she was seen as an impermissible representation, another series of WPA murals were placed on the walls of the Ada County Courthouse in Idaho. As a news report described Figure 4, portrayed was an “Indian in buckskin … on his knees with his hands bound behind his back … flanked by a man holding a rifle and another armed man holding the end of a noose dangling from a tree.”

No objections were recorded at the time to this display of a lynching in a courthouse. Toward the end of the twentieth century, however, a judge in Idaho concluded that this imagery was offensive. The judge ordered the mural draped—covered with flags of the state and of the United States. In 2006, the question was raised about whether to continue to hide the mural or to paint it over. The state legislature, in consultation with Indian tribes, decided that the murals should

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97 The photographer Paul Hosefros provided the photograph for Figure 4.
remain on view, framed by educational “official interpretive signs” explaining the picture reflected “the values” held at that time.  

To summarize, conflicts about who could practice law and about what could or could not be shown on courthouse walls mirrored conflicts about what rights people had in court. In the late 1800s, even as a few women made their way into the legal professions, a host of women seeking rights in courts—as well as women aspiring to vote, to work, to go to law school, and to do much else—made little headway. In the 1930s, the image of a “mulatto” woman could not serve, unchallenged, to represent Justice, and people labeled “mulattos” often lacked legal protection. Indians did not become citizens of the United States until 1924, and like other darker-skinned persons, were routinely subjected to violence.

I have shown the list of “firsts” to mirror the images reproduced; they document how courts were sites of inequality and subordination. The few women admitted were testaments to exclusion. That posture was not inadvertent but deliberate, often recorded in statutes, and unselfconsciously asserted in practice. Courts were one of many representations of the racial, gender, and class hierarchies of the past centuries.

D Reconfiguring Expectations about What Courts Look Like and What They Do

The idea of courts as significant sources of new rights stems from interactions of the international human rights, workers’ rights, and feminist movements with their domestic counterparts. My account of the role of voters in getting women onto benches needs to be placed into the context of the changing world of courts in the second half of the twentieth century.

Again, benchmarks are helpful, and one is provided by the opening in 1935 of the U.S. Supreme Court building that gave the Court a home “of its own” for the first time in its history. High above the front steps were engraved the words “Equal Justice Under Law.” The words did not then (as they do now) appear in any case

101 John Miller, *Indian Leaders View Murals of Lynching*, CASPER-STAR TRIB. (Jan. 19, 2007). Thereafter, the University of Idaho Law School took over the building, and this image was covered with a shade. Yet the many scenes left uncovered include scenes of conflict and conquest that prompted renewed debate—ongoing worldwide—about displays of subordination.
102 See An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, Pub. L. 68–175, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b) (2012)).
law, nor did they come directly from the U.S. Constitution. Rather, they were chosen because the words fit the space allotted.103

Etched on the other side of the building is the phrase “Justice the Guardian of Liberty.” That phrase came closer to the constitutional jurisprudence of the 1930s, as “liberty”—of contract and from regulation—was a leitmotif of the era. Indeed, in the 1932 speech given by Chief Justice Charles Evans Hughes at the ceremony laying the cornerstone of the courthouse, he called the new building “a testimonial to an imperishable ideal of liberty under law.”104 He made no mention of aspirations for equality.

Yet today “Equal Justice Under Law” is the tag line for the U.S. Supreme Court, whose twentieth century persona has been shaped by two decisions that have become central markers in U.S. constitutional history—Brown v. Board of Education in 1954105 and Reed v. Reed in 1971.106 Brown struck down segregation of schools by race; Reed held unconstitutional an Idaho statute that gave fathers preference over mothers as administrators of their deceased children’s estates. Brown began to unravel de jure racial discrimination, and Reed was the first decision to recognize that the Fourteenth Amendment’s guarantee of equal protection applied to women.107 These acknowledgments of the U.S. Constitution’s role in framing and then in reframing race and gender are part of a much larger account of the role of constitutional law in making and in altering hierarchies of work and authority.108

106 Reed v. Reed, 404 U.S. 71 (1971). A twenty-first century counterpart is United States v. Windsor, 570 U.S. 744 (2013), even as its insistence on the dignity to be accorded couples in same-sex marriages came during a term when the Court undercut efforts to protect equality in voting rights and limited the ability to undertake affirmative actions to redress discrimination. See Reva B. Siegel, The Supreme Court, 2012 Term—Foreword: Equality Divided, 127 HARV. L. REV. 1 (2013) [hereinafter Siegel, Equality Divided].
107 As may be familiar, Brown was litigated by Thurgood Marshall, who later became the first African American to sit on the Supreme Court. Brief for Appellants, Brown v. Bd. of Educ., 347 U.S. 483 (1954). The appellant’s brief in Reed was written in part by Ruth Bader Ginsburg, who became the second woman to serve on that Court. Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971). As Reva Siegel has mapped the history, the Court could also have drawn on the Nineteenth Amendment as a font of women’s equality beyond voting. See Reva Siegel, She the People: The Nineteenth Amendment, Sex, Equality, Federalism, and the Family, 115 HARV. L. REV. 945 (2002).
The Court’s judgments intersected with landmark federal legislation (often built on exemplars from states) to protect equal rights in accommodations, credit, housing, salaries, and employment.109 Both the court rulings and the statutes were the outgrowth of political struggles, shaped through the increasingly organized efforts of women and men of all colors who created new institutions to press for reforms.110

“Second Wave feminism” contributed to the Civil Rights Act of 1964111 and to a host of federal and state statutes directed at equal treatment of women and men. Public and private bureaucracies began to document changes in recruitment efforts, chartered “diversity” committees, launched programs that sought to reduce sexual harassment, and offered body counts, detailing the number of women in various positions.112

This shifting orientation can be seen in the numbers of women making their way into the legal profession before and after the 1960s. The first women whom I have described opened no floodgates. Between 1910 and 1970, women went from being 1–3% of those counted as lawyers.113 Likewise, women were under 2% of the

110 The role of women’s organizations in enabling women on the bench has been important in many jurisdictions. See Mary Jane Mossman, Becoming the First Judge in Ontario: Women Lawyers, Gender, and the Politics of Judicial Appointment, in GENDER AND JUDGING 51, 60–63 (Ulrike Schultz & Gisela Shaw eds., 2013).
111 Civil Rights Act of 1964, tit. VII, § 703(a), 78 Stat. 241, 255–56 (codified at 42 U.S.C. § 2000e-2(a)(1) (2012)) (“It shall be an unlawful employment practice for an employer … to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin … ”).
112 See generally Frank Dobbin, INVENTING EQUAL OPPORTUNITY (2009).
113 Berkson, supra note 42, at 289. In 1910, the percentage was 1%; by 1930, 2.1%, and by 1970, 2.8%. Id. These small percentages need to be placed in the context of a rising number of lawyers during those decades, from ~122,000 in 1910 to ~139,000 in 1930 to 327,000 in 1970. Thus, ~1220 women were lawyers in 1910, and ~9100 in 1970. The rate of increase grew rapidly thereafter. Within a decade (by 1980), 13% (some 59,000) of lawyers were women. Id. And, as of 2005, women were 30% of a total of 1.1 million lawyers in the United States. Total National Lawyer Counts, Am. Bar. Ass’n, http://www.americanbar.org/content/dam/aba/administrative/market_research/total_national_lawyer_counts_1878_2013.authcheckdam.pdf; Lawyer Demographics, Am. Bar. Ass’n, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf.

Data on other forms of intersections and identities are more difficult to obtain. The ABA reported, “Between 2000 and 2010, the percentage of all American lawyers who are African American grew marginally from 4.2% to 4.8%; similarly, the share of Hispanic lawyers grew from 3.4% to 3.7%.” Id.
judges in the lower federal courts.\textsuperscript{114} As noted, in 1934, the first woman, Florence Allen, was appointed to sit on a federal court. Not until 15 years later, in 1949, did another white woman gain a seat on the federal trial bench.\textsuperscript{115}

Moreover, before 1970, none of the nominees proposed for the U.S. Supreme Court were questioned about their views on women’s rights,\textsuperscript{116} and not until the defeat of Robert Bork’s nomination in 1987 did nominees’ answers on “the woman question” become a regular part of nomination hearings.\textsuperscript{117} The Bork nomination marked that a new qualification for a Supreme Court justice had been put into place. Nominees needed to acknowledge publicly that the Equal Protection Clause applied to women. What impact such expressions have had is another question, as nominees discussed these issues in very general terms and several have, since their confirmation, limited the meaning of equal protection and have read statutory rights restrictively.\textsuperscript{118} Further, despite allegations of mistreatment of individual women by two Supreme Court nominees, both were confirmed.\textsuperscript{119}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{114} Clark, The Appointment of the First Women Judges, supra note 69, at 493.
\item \textsuperscript{115} Berkson, supra note 42, at 292.
\item \textsuperscript{116} See Judith Resnik, Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure, 26 CARDOZO L. REV. 579, 632–34 (2005). Patsy Mink, one of the few female members of Congress at the time, criticized the nomination of Harrold Carswell because of his role in finding lawful the refusal to employ pregnant women as teachers of pre-school children. Thereafter, questioning of nominees about their views on women’s rights became a part of the exchanges. Id.
\item \textsuperscript{117} In 1977, as Solicitor General, Robert Bork filed an amicus brief against redressing sex-based inequalities because such discrimination was a question that was “political” rather than “constitutional,” given that “women are not a political minority.” Ruth Bader Ginsburg, Women at the Bar—A Generation of Change, Nov. 2, 1978, 80 Mo. L. REV. 665 (2011) (citation omitted). Some of the questioning at the 1986 hearing on his nomination focused on decisions in which Judge Bork had seemed to minimize the harms of a workplace policy requiring that women be sterilized if they wanted some jobs and described a sexual harassment claim as involving “sexual escapades.” See Judith Resnik, Changing Criteria for Judging Judges, 84 NW U. L. REV. 889, 894–95 (1990); Resnik, Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure, supra note 116 at 632–34.
\end{enumerate}
\end{footnotesize}
But just as politics pushed women onto the Senate floor as a subject of discussion in nominations, it helped propel more nominees. Presidents Carter, Clinton, and to a much lesser extent Bush (who had different commitments while sharing an eagerness to gain women’s votes) turned (at widely varying rates) to women for judgeships. The big uptake in numbers came under the Carter Administration, which appointed 40 more women to the federal courts and, of the 37 Black judges appointed, seven were women. Between 1980 and 1992, during the administrations of President Reagan and the first George Bush, no Black women were appointed to federal courts aside from the District of Columbia local courts. In contrast, President Clinton appointed 61 Blacks and 106 women; three of the appellate appointments were Black women. Under the second President Bush, 23 Blacks and 71 women, including two Black women on appellate courts, gained positions. During President Obama’s first four years in office, 41% of his appointees to the federal bench were women. A 2013 evaluation of “Obama’s First Term Judiciary” described substantial improvements in the numbers of “nontraditional judicial nominees.” In 2019, the U.S. Supreme Court included three women (Justices Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor) and one African American man (Justice Clarence Thomas); after Justice Ginsburg’s death, President Trump nominated, and the Senate confirmed, Amy Coney Barrett; her proponents trumpeted that she was a woman and the mother of several children.

As the chart below (Table 2) details, in 2019, women were not only a third of the nine U.S. Supreme Court justices, but also about a third of the federal appellate and

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120 Berkson, supra note 42, at 292; Blackburne-Rigsby, supra note 67, at 660; see also Mary L. Clark, Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other “Human Rights” Record, 11 J. GENDER, SOC. POL’Y & L. 1131 (2003) [hereinafter Clark, Groundbreaking Appointments].
121 Blackburne-Rigsby, supra note 67, at 660–61.
122 Id. at 661–62. See also Clark, Groundbreaking Appointments, supra note 120, at 1149.
123 Id. at 662.
125 See Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, Obama’s First Term Judiciary: Picking Judges in the Minefield of Obstructionism, 97 JUDICATURE 7, 31–35 (2013) [hereinafter Goldman, Slotnick & Schiavoni, Diversity on the Bench]; and discussing self-identified gay and lesbian jurists and some “double diverse” nominees. Id. at 31–35.
trial level judges.126 State courts provided parallel numbers; women were 36% of the judges on the highest courts and a third of the trial judges.127

Table 2: Accounting: Women on U.S. Courts, circa 2019.6

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Total women</th>
<th>Percent women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal – Supreme Court</td>
<td>3</td>
<td>33</td>
</tr>
<tr>
<td>Federal – Courts of Appeals (active, excluding senior status)</td>
<td>61</td>
<td>34</td>
</tr>
<tr>
<td>Federal – District (active, excluding senior status)</td>
<td>195</td>
<td>33</td>
</tr>
<tr>
<td>Federal – All (active, excluding senior status)</td>
<td>261</td>
<td>33</td>
</tr>
<tr>
<td>State – General Jurisdiction</td>
<td>3788</td>
<td>33</td>
</tr>
<tr>
<td>State – Limited/Special Jurisdiction</td>
<td>1767</td>
<td>36</td>
</tr>
<tr>
<td>State – Intermediate</td>
<td>377</td>
<td>39</td>
</tr>
<tr>
<td>State – Final Appellate</td>
<td>124</td>
<td>36</td>
</tr>
<tr>
<td>State – All</td>
<td>6056</td>
<td>34</td>
</tr>
</tbody>
</table>

6The federal judge numbers are compiled through searching biographical information on the Federal Judicial Center’s database. According to the database, there are 781 active (sitting, non-senior status) judges as of November 21, 2019. There are nine active Supreme Court justices, 179 active court of appeals judges, 586 active district court judges, and seven active judges on other federal courts (specifically, the Court of International Trade). These total numbers of active, non-senior status judges sitting at each of these levels are what we used as the denominators for calculating percentages. The rest of the numbers were compiled by filtering to female at each level. These numbers were compiled on November 21, 2019. Federal Judicial Center, Biographical Directory of Article III Federal Judges 1789–Present, https://www.fjc.gov/history/judges/search/advanced-search.


More details on the sources of these numbers are in the accompanying footnotes. These numbers were current as of November of 2019.


Another marker of the degree to which counting demographics has become a cross-jurisdictional norm is the “Gender Diversity Index” that is provided as part of an annual compendium, marketed by a firm called Forster-Long, about the more than 20,000 judges who are part of the chronical called “The American Bench: Judges of the Nation.” Excerpts from that chart are reproduced below in Figure 5.

The tiny lines map the percentage increases or decreases (jurisdiction by jurisdiction) between 2019 and 2020 in the number of women and men on the bench (albeit not with intersections of race and ethnicity). This chart is one indication of expectations that judiciaries will have numbers to put into the binary columns of “female” and “male.”

Accounting for the membership of judiciaries is to look at only a small segment of the legal profession. A 2018 publication by the National Association for Law Placement tallied women of all colors to be 23.4% of law firm partners and the subset of women of color to be 3.19% of all partners. In that year, about 30% of general counsels of Fortune 500 companies were women. In law schools, 35% of

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128 Forster-Long, LLC, Gender Diversity Survey 1, 11 (database updated 2020), http://bench.forster-long.com/static/docs/GenderDiversity_Bystate.pdf [hereinafter Forster-Long’s Gender Diversity Survey]. That company has been publishing its “American Bar” volume since 1918 and, beginning in 1977, included judges in its surveys. As of 2019, it offered biographical materials on more than 20,000 judges. The chart, begun by 2005, had been called a “Gender Ratio Report.”


Deans were women, and 39% of the 26,058 faculty members were women.\footnote{That information distinguishes between full-time faculty and non-full-time faculty, but not by tenure and tenure track or by race and intersectionality. \textit{See also Ass'n AM. LAW SCHOOLS, Legal Education at a Glance: 2018, https://www.aals.org/wp-content/uploads/2019/02/1901LegalEducationAtaGlance.pdf. A large number of women populate the contract faculty, who lack the benefits and status of full faculty. See Marina Angel, \textit{The Glass Ceiling for Law & Ethics of Human Rights} 2021; 15(1): 1–91.}} In terms of salaries, a 2019 study by the National Association of Women Lawyers and

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
 & Female & & & Male & & & \\
\hline
\multicolumn{7}{|c|}{Total} \\
\hline
\multicolumn{7}{|c|}{2019 Edition} \\
\hline
\multicolumn{3}{|c|}{2020 Edition} & \% & \multicolumn{3}{|c|}{2019 Edition} & \% \\
\hline
\multicolumn{7}{|c|}{Federal Courts} \\
\hline
U.S. Supreme Court & 3 & 0 & 0 & 0 & 6 & 0 & 0 \\
U.S. Courts of Appeals & 84 & 87 & 7 & 7 & 232 & 229 & 3 & 1% & 326 & 316 & 90 & 3% \\
U.S. District Courts & 12 & 12 & 1 & 1 & 21 & 20 & 1 & 1 & 24 & 20 & 0 & 0 \\
U.S. Bankruptcy Courts & 1 & 1 & 0 & 0 & 1 & 1 & 1 & 1 & 2 & 3 & 1 & 90 \\
\hline
\multicolumn{7}{|c|}{Other Federal Courts} \\
\hline
Federal Courts Total & 142 & 143 & 4 & 4 & 324 & 323 & 2 & 1% & 448 & 446 & 1 & 0% \\
\hline
\multicolumn{7}{|c|}{Alaska} \\
\hline
U.S. District Courts & 12 & 12 & 0 & 0 & 26 & 26 & 0 & 0 & 38 & 38 & 0 & 0 \\
U.S. Bankruptcy Courts & 3 & 0 & 0 & 0 & 0 & 0 & 0 & 0 & 3 & 0 & 0 & 0 \\
Final Appellate Court & 2 & 2 & 0 & 0 & 7 & 7 & 0 & 0 & 9 & 9 & 0 & 0 \\
Intermediate Appellate Court & 3 & 3 & 0 & 0 & 17 & 17 & 0 & 0 & 20 & 20 & 0 & 0 \\
General State Courts & 31 & 31 & 0 & 0 & 112 & 111 & 1 & 1% & 143 & 142 & 1 & 1% \\
Limited and Special State Courts & 42 & 54 & 11 & 16 & 260 & 266 & 0 & 0 & 274 & 172 & 1 & 2% \\
Alaska Total & 94 & 105 & 11 & 12 & 284 & 274 & 10 & 4% & 370 & 379 & 1 & 0% \\
\hline
\multicolumn{7}{|c|}{Arizona} \\
\hline
U.S. District Courts & 12 & 12 & 0 & 0 & 22 & 22 & 0 & 0 & 34 & 34 & 0 & 0 \\
U.S. Bankruptcy Courts & 3 & 0 & 0 & 0 & 6 & 6 & 0 & 0 & 9 & 9 & 0 & 0 \\
Final Appellate Court & 2 & 2 & 0 & 0 & 7 & 7 & 0 & 0 & 9 & 9 & 0 & 0 \\
Intermediate Appellate Court & 4 & 4 & 0 & 0 & 14 & 14 & 0 & 0 & 18 & 18 & 0 & 0 \\
General State Courts & 54 & 70 & 9 & 9 & 126 & 121 & 5 & 4% & 180 & 181 & 1 & 0% \\
Arizona Total & 85 & 109 & 9 & 9 & 176 & 171 & 4 & 2% & 260 & 264 & 4 & 2% \\
\hline
\multicolumn{7}{|c|}{Arkansas} \\
\hline
U.S. District Courts & 6 & 6 & 0 & 0 & 13 & 14 & 0 & 0 & 19 & 19 & 0 & 0 \\
U.S. Bankruptcy Courts & 2 & 0 & 0 & 0 & 6 & 6 & 0 & 0 & 6 & 6 & 0 & 0 \\
Final Appellate Court & 2 & 2 & 0 & 0 & 6 & 6 & 0 & 0 & 6 & 6 & 0 & 0 \\
Intermediate Appellate Court & 4 & 4 & 0 & 0 & 14 & 14 & 0 & 0 & 18 & 18 & 0 & 0 \\
General State Courts & 56 & 70 & 9 & 9 & 126 & 121 & 5 & 4% & 180 & 181 & 1 & 0% \\
Arkansas Total & 58 & 84 & 9 & 9 & 148 & 139 & 2 & 1% & 200 & 201 & 1 & 0% \\
\hline
\multicolumn{7}{|c|}{Counties} \\
\hline
Wicklow County Courts & 11 & 12 & 1 & 1 & 31 & 32 & 0 & 0 & 32 & 33 & 0 & 0 \\
\hline
\multicolumn{7}{|c|}{Wyoming} \\
\hline
U.S. District Courts & 1 & 1 & 0 & 0 & 4 & 4 & 0 & 0 & 5 & 5 & 0 & 0 \\
U.S. Bankruptcy Courts & 1 & 1 & 0 & 0 & 5 & 5 & 0 & 0 & 5 & 5 & 0 & 0 \\
Final Appellate Court & 2 & 2 & 0 & 0 & 7 & 7 & 0 & 0 & 9 & 9 & 0 & 0 \\
Intermediate Appellate Court & 3 & 3 & 0 & 0 & 17 & 17 & 0 & 0 & 20 & 20 & 0 & 0 \\
General State Courts & 65 & 65 & 1 & 1 & 182 & 182 & 1 & 1% & 247 & 247 & 1 & 1% \\
Wyoming Total & 65 & 65 & 1 & 1 & 182 & 182 & 1 & 1% & 247 & 247 & 1 & 1% \\
\hline
\multicolumn{7}{|c|}{Totals} \\
\hline
U.S. Supreme Court & 3 & 3 & 0 & 0 & 6 & 6 & 0 & 0 & 9 & 9 & 0 & 0 \\
U.S. Courts of Appeals & 94 & 97 & 7 & 7 & 232 & 229 & 3 & 1% & 326 & 316 & 90 & 3% \\
U.S. District Courts & 504 & 503 & 2 & 2 & 1,014 & 1,013 & 1 & 1% & 1,927 & 1,931 & 4 & 2% \\
U.S. Bankruptcy Courts & 112 & 112 & 3 & 3 & 210 & 210 & 3 & 3% & 322 & 322 & 0 & 0 \\
Other Federal Courts & 30 & 30 & 0 & 0 & 64 & 64 & 0 & 0 & 64 & 64 & 0 & 0 \\
State Final Appellate Courts & 124 & 125 & 1 & 1 & 223 & 218 & 8 & 4% & 347 & 340 & 7 & 2% \\
State Intermediate Appellate Courts & 377 & 381 & 14 & 14 & 591 & 586 & 5 & 1% & 868 & 859 & 8 & 1% \\
State General Jurisdiction Courts & 3,738 & 3,973 & 195 & 195 & 7,799 & 7,614 & 145 & 2% & 11,547 & 11,587 & 60 & 0% \\
State Limited and Special Courts & 1,761 & 1,811 & 104 & 104 & 3,149 & 3,029 & 120 & 4% & 4,916 & 4,899 & 17 & 0% \\
Grand Total & 6,504 & 7,185 & 331 & 331 & 13,509 & 13,099 & 275 & 2% & 26,112 & 25,113 & 98 & 0% \\
\hline
\end{tabular}
\caption{Excerpt from Forster-Long's gender diversity survey, 2020 versus 2019, by state, all court jurisdictions. © 2020 Forster-Long, LLC THE AMERICAN BENCH: judges of the Nation.}
\end{table}
the American Bar Association found that men who were equity partners were paid 27% more than women equity partners.132

The rules of legal workplaces have also come under scrutiny. Although many mandates in the United States either do not apply to judiciaries or are difficult to enforce against judiciaries,133 courts are employers of tens of thousands of people, and pressures to treat people equally mounted over the decades. In the 1980s, the federal judiciary began to compile annual reports, later published under the header of “Judiciary Fair Employment Practices.”134 The 2004 Report explained


132 Am. Bar Ass’n Comm’n on Women in the Prof., supra note 126, at 6.

134 The Administrative Office of the United States Courts both developed such plans and used to provide an annual report (once named “Equal Employment” and later “Fair Employment” Practices) to detail the numbers of persons employed and efforts made to diversify the workforce, in terms of both judicial officers and staff. For example, a 1994 report stated that the “highest percentage of women judicial officers (21.1%) is in the grouping of full-time magistrate judges,” a non-life tenured position. Administrative Office of the U.S. Courts, Annual Report on the Judiciary Equal Employment Opportunity Program for the Twelve-Month Period ended September 30, 1994 at 2 (preliminary edition, 1994). Further, the “percentage of women [in life-tenured judgeships] increased 2.7% between 1992 and 1994.” Id. at 3. Some information on the intersections of race, gender, and ethnicity appeared in Table 1. The 2004 Report, describing itself as the “twenty-fourth annual report on Judiciary workforce demographics” also did not provide crosstabs. That report described the creation of a “Diversity Group” committed to “the creation and maintenance in our court system of diversity.” Administrative Office of the U.S. Courts, The Judiciary Fair Employment Practices Annual Report (October 1, 2003 through September 30, 2004), Executive Summary at 3 [hereinafter 2004 Judiciary Fair Employment Practices Annual Report]. Cross-tabbed data appeared at Table 2a, at 35.
that a “community’s belief that a court dispenses justice is heightened when the court reflects the community’s racial, ethnic, and gender diversity.”

In 2017, allegations by former law clerks of sexual harassment by a federal appellate judge focused attention on whether judges were taking responsibility for such behaviors. The policy-making body of the federal courts is the U.S. Judicial Conference, chaired by the Chief Justice. The Conference responded by forming an ad hoc Federal Judiciary Workplace Conduct Working Group to study the issues. The Chief Justice devoted part of his annual State of the Judiciary speech to the importance of equal treatment of the courts’ workforce. After taking public testimony on suggested reforms, the Conference amended its Code of Conduct for U.S. Judges and the Rules for Judicial- conduct and Judicial- Disability Proceedings to put into place measures aimed against discrimination.

The attention paid to women on the bench is not unique to the United States. Parallels can be found in national and transnational courts. For example, in the U.K., the 2004 appointment of the first woman, Brenda Hale, to that country’s judicial bench is significant in terms of gender diversity. The 2004 and 2012 reports of the Judicial Fair Employment Practices Annual Report highlighted the importance of women and minority judges on the U.S. judiciary.

135 2004 JUDICIARY FAIR EMPLOYMENT PRACTICES ANNUAL REPORT, supra note 134, at 3 (quoting the Committee on Judicial Resource’s Diversity Group). That report detailed data that the federal judiciary was “less diverse in terms of gender” than the “Census workforce,” id. at 12, and that minority judges “increased at a much lower rate than females.” Id. at 10. The 2012 report commented that its findings included “a steady increase in the number of female judicial officers and non-Article III minority judges,” but a “continuing trend of less diversity among non-Article III judges than Article III judges over a five year period.” 2012 JUDICIARY FAIR EMPLOYMENT PRACTICES REPORT, supra note 133, at 1. Cross-tabbed data appear at 17, Appendix 3.


137 See REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 1–2 (June 1, 2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.


House of Lords was much heralded, as was her becoming the first woman in 2017 to be president of what had by then become the U.K.’s Supreme Court. In Belgium, concern about the lack of appointments of women on its constitutional court prompted enactment of a 2018 provision requiring that the court “shall be composed of judges from different genders, … of at least one third of judges from each sex.” Further, until “the Court is composed of at least one third of judges from each sex … , the King shall nominate a judge from the under-represented sex when the preceding two nominations have not increased the number of judges from that sex.”


142 Special Law Modifying the Law of 6 January 1989 on the Constitutional Court (Belgium) Article 12 para 5. One commentator explained that if women remain unrepresented on the Court (as they currently are, representing only around 16 percent of the Court), and the next two appointees are men, the third appointment will have to be a woman … Introducing quotas … is not in itself revolutionary [for Belgium] … The composition of the Belgian Constitutional Court has, from its creation, required linguistic and “professional” quotas: six judges should be Dutch-speaking, three of whom should be former MPs, and six judges who should be French-speaking, again, three of whom should be former MPs … [Further], the Act on the Constitutional Court has stated since 2003 that “the Court shall be composed of judges of both sexes.” [But] … only four women—all former MPs—have been appointed to the Constitutional bench since its creation in 1984. Moreover, up until January 2014, the Court has never counted more than one woman at a time among the twelve judges sitting on the bench … [Proponents] have argued for diversity for three main reasons. First, it would reinforce the democratic character of the courts. Second, it would allow for a better protection of sex-specific interests. And finally, it would improve the quality of justice by bringing more flexibility and more creativity on the bench … ” See Adelaide Remiche, Belgian Parliament Introduces Sex Quota in Constitutional Court, Oxford Human Rights Hub (2014), http://ohrh.law.ox.ac.uk/belgian-parliament-introduces-sex-quota-in-constitutional-court/ (last visited Mar. 25, 2021). See also CHRISTOPHER McCREADY & BRENDAN O’LEARY, COURTS AND CONSOIATIONS: HUMAN RIGHTS VERSUS POWER-SHARING 47–67 (2013).

143 News reports indicated that the King has not implemented the provision. See FEDERALE OVERHEIDSDEENST KANSELIJ VAN DE EERSTE MINISTER (2018), http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=18-07-30&numac=2018203859.

In 2004, the Parliamentary Assembly of the Council of Europe (PACE) adopted the first of a series of resolutions calling for “gender balance” for the European Court of Human Rights (ECtHR) and for single-sex lists of proposed candidates when that court had fewer than 40% of either gender. After the ECtHR gave an advisory opinion questioning that mandate, the rule was modified to request explanations when proposed nominees do not include the “under-represented” (read women) sex.144 As of 2015, 18 of the 47 judges of that court (or 38%) were women.145 And in that year, the United Nations launched its “GQUAL Campaign for Gender Parity in International Representation.”146

In sum, women’s presence on the bench has become a facet of courts’ presentations of themselves to the world. Terms such as diversity and non-traditional judges reflects that race, ethnicity, and sex/gender identities are now invoked in support of judiciaries’ legitimacy.

Even as law and politics made women and other categories of the “under-represented” relevant to selection of judiciaries, the relatively slow process of doing so must also be underscored. For example, a 2019 U.S. analysis identified 24 states with supreme courts that were all-white; 13 states in which a person of color had never served on their highest courts; and 17 states in which one woman served on their supreme courts.147

145 Armin von Bogdandy & Christoph Krenn, On the Democratic Legitimacy of Europe’s Judges, in SELECTING EUROPE’S JUDGES, supra note 144, at 163, 171–72. Somewhat more recent data and calls for more action can be found in Yvonne Galligan, Renate Haupfliese, Lisa Irvine, Katja Korolkova, Monika Natter, Ulrike Schultz, & Salley Wheeler, Mapping the Representation of Women and Men in Legal Professions Across the EU, PE 596.804 (Aug. 2017). This study for the JURI Committee, Policy Department for Citizens’ Rights and Constitutional Affairs, was commissioned by the European Parliament’s Committee on Legal and Parliamentary Affairs.
Yet to talk about the changing compositions of the judges sitting on courts without discussing shifts in the work they did and the people they addressed misses important aspects of the face of the judiciary. Courts need to be seen not only by reference to those sitting at the tops of their hierarchies but also by accounting for other participants, from disputants and their lawyers to the public benefitting from the dispute resolution services that courts provide.

III Courts, Class, and Collective Action

A New Users in Need of Subsidies

My argument is that the shift in norms about the purposes of judicial selection has to be analyzed in the context of broader changes in the expectations and the practices of judges and courts. The template for judging that is commonplace in democratic polities today stems from the Enlightenment. Before then, judges were required to be loyal to the governments that appointed them; members of the audience were passive spectators watching rituals of power; and a limited set of persons were eligible to participate as disputants, witnesses, or decision makers. In contrast, today, judges are supposed to function as independent actors in complex and critical relationships with the governments that employ them and with the public.148 At a formal level, the public has a right of access to watch court proceedings.149 What the second half of the twentieth century added is that, at a formal level, everyone—women and men of all colors—is entitled to be in every seat in the courtroom, including on the bench.

Moreover, courts have become services that governments must provide to individuals. Because courts are a longstanding feature of political orders (democratic or not), their provisioning (like that of the related services of policing and prisons) often goes undiscussed.150 But the new diversity of users has brought to

148 For a mapping of these transitions worldwide, see RESNIK & CURTIS, REPRESENTING JUSTICE, supra note 20.
149 See Judith Resnik, The Functions of Publicity and of Privatization in Courts and their Replacements (from Jeremy Bentham to #MeToo and Google Spain, in The Role of Courts in a Democratic Society 177 (Burkhard Hess & Ana Koprivica eds., 2019).
150 See generally Judith Resnik, Courts and Social Rights/Courts as Social Rights, in Economic and Social Rights 259 (Katharine Young ed., 2018).
the fore questions about how to meet demands for services and whether and how to enable cross-class participation. Legitimacy (variously explained) is the leitmotif of the need to diversify the bench. Legitimacy for courts is also at stake as they respond to people with limited resources as they seek help or are involuntarily brought into courts.

Public investments in courts have grown with the expansion of their mandates. For example, between 1971 and 2005, the budget for the federal judiciary grew from under one-tenth of a percent of the federal budget to two-tenths; in 1971, the federal judiciary was allotted $145 million and, by 2005, $5.7 billion dollars. During that interval, staff doubled from about 15,000 to more than 32,000, working in some 550 facilities across the country. Given the relatively small caseload of the federal judiciary (about 350,000 civil and criminal cases annually, and some million bankruptcy filings), that commitment of resources is one testament to the political capital of this branch of government.

State courts receive more than 80 million cases filed annually. Most states devote 2% to 3% of their budgets to courts, but demand outstrips supply. In the wake of the 2008 recession, six states closed courthouses one day a week; nine sent judges on unpaid furloughs. Mobilization to obtain or restore funds has had some success, as judiciaries enlisted the bar and business communities in arguments that courts were vital facets of economic and political life. Courts also turned to users and increased assessments on participants. For example, California and Illinois both charge defendants, required to answer civil complaints, the same fee (a few hundred dollars) that is imposed on plaintiffs who are filing cases. A study of the charges California counties leveled against families of juveniles taken into custody identified tens of millions of dollars in fees, some collected and others pushing households into debt and bankruptcy.

151 The complexity of determining what funds go to courts comes in part from different services coming within court budgets in various jurisdictions. Some states allocate resources for criminal justice services—such as probation officials and public defenders through court budgets—and other jurisdictions are not “unified,” in that counties separately support courts. See generally National Center for State Courts, Budget Resource Center (2013), www.ncsc.org/information-and-resources/budget-resource-center.aspx.


The problems of imposing user fees are not new. In the nineteenth century, Jeremy Bentham inveighed against “law-taxes” (a “tax upon distress”\textsuperscript{154}) as well as against “Judge and Company” and the common law more generally.\textsuperscript{155} A part of Bentham’s proposed solution was to create an “Equal Justice Fund,” to be supported by “the fines imposed on wrongdoers” as well as by government and by charities.\textsuperscript{156} Bentham wanted to subsidize legal assistance, the transport of witnesses, and the costs of producing other evidence. Bentham also suggested that judges be available “every hour on every day of the year,” and that courts be put on a “budget” to produce one day trials and immediate decisions.\textsuperscript{157}

Bentham’s recommendations echo in contemporary arguments for subsidies from the public and private sectors, for simplifying procedures, and for new technologies such as online dispute resolution. Yet adjudication’s adversarial structure poses complex questions. Some litigants are criminal or civil defendants facing the state (whose litigation costs are paid by taxpayers), while other disputes involve private parties, albeit often with vastly different access to resources. Asymmetries and questions of what to subsidize abound.

California’s courts reported 4.3 million people in civil litigation without the assistance of lawyers in 2009,\textsuperscript{158} and a year later, New York counted 2.3 million

\textsuperscript{154} Jeremy Bentham, A Protest Against Law-Taxes: Showing the Peculiar Mischievousness of All Such Impositions as Add to the Expense of Appeal to Justice (printed in 1793, first published in 1793), in \textit{The Works of Jeremy Bentham} 573, 582 (John Bowring ed., Edinburgh, Scot.: William Tait, 1843). Bentham argued that what he termed “factitious” barriers to access through fees and taxes were not required, for “natural checks” included the “pain of disappointment of losing,” the time entailed, and the inevitable other expenses of pursuit—rendering extra assessments both an over-deterrent of those who could not afford them and an under-deterrent for those who could. \textit{Id.} at 577–78.


\textsuperscript{158} This figure was cited in support of the Sargent Shriver Civil Counsel Act, which created a pilot program for poor litigants to obtain counsel. \textit{See Assemb. B. No. 590, 2009–2010 Leg., Reg. Sess.} (Cal. 2009).
civil litigants without lawyers—including almost all tenants in eviction cases, debtors in consumer credit cases, and 95% of parents in child support matters.\textsuperscript{159}

To borrow Ronald Dworkin’s description of equality’s entailments,\textsuperscript{160} if governments seek to have their courts reflect “equal concern for the fate of every person over which it claims dominion,” then many litigants merit assistance. Mechanisms for subsidies include waiving fees paid to courts (such as for filings and documents) and to third parties (including bail bondspersons, lawyers, experts, investigators, mediators and arbitrators, and probation officers) and changing the rules on ex post charges such as fines and restitution.

One response would be to treat poverty as a special (in U.S. constitutional parlance “suspect”) classification and apply federal equal protection guarantees to require governments to help to bring about a modicum of what the English call “equality of arms.” An effort in the 1970s to establish that proposition in the context of school financing failed.\textsuperscript{161} Yet some claims of unconstitutional wealth-based distinctions in courts have generated positive rights to state-funded lawyers, experts, and fee waivers. Through reliance on the Sixth Amendment, the Petitioning Clause, and the alchemy of the Due Process and Equal Protection Clauses, judges have required state funding in a few contexts.

Much of the discussion in the case law (sketched below) focuses on the needs of the disputants. But the subtext (and occasionally the text) is about the legitimacy of courts. When people cannot participate, courts have no capacity to render decisions in the face of competing claims of right. Illustrative is Justice Harlan’s explanation in 1971 about why filing fees for poor persons seeking divorce had to be waived as a matter of constitutional right.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner.\textsuperscript{162}


\textsuperscript{160} Ronald Dworkin, Justice for Hedgehogs 2 (2011). His other condition of equality was that government had to respect “fully the responsibility and right” of each person to decide how to “make something valuable” out of his or her life. Id.


As a result, poverty has had special purchase (pun intended) in courts.

Fairness for sets of similarly situated litigants is one concern. Illustrative is a 1956 decision describing the problem when some criminal defendants could afford to pay for transcripts requisite to appeal or lawyers to represent them while others could not. The ringing pronouncement in an opinion requiring state subsidies was that: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

Asymmetries between opponents came to the fore in the 1963 decision of Gideon v. Wainwright, which read the Sixth Amendment “right to counsel” to require that states pay lawyers for indigent criminal defendants facing prosecutions for felonies.

Disparities between prosecution and defense have driven other subsidies. The Supreme Court has relied on the Due Process Clause as the basis of constitutional obligations to give indigent criminal defendants resources such as experts and translators. Courts’ dependency on parties has been central: “Society wins not only when the guilty are convicted but when criminal trials are fair.”

The problems of people of limited means in civil litigation have also prompted constitutional rulings requiring equipage for a small subset of civil litigants. In the early 1970s, a class of “welfare recipients residing in Connecticut” argued that the lack of a statute authorizing a fee-waiver provision for that state’s charges of $60 for filing and service violated the federal constitution by precluding them from being able to get divorced. In 1971, as noted above, in Boddie v. Connecticut, Justice Harlan agreed; he wrote for the Court that the combination of “the basic position of the marriage relationship in this society’s hierarchy of values and the state monopolization” of lawful dissolution required, as a matter of due process, that fees be waived when indigent people wanted to dissolve their marriages.

163 See Griffin v. Illinois, 351 U.S. 12, 19 (1956). In 1963, the Court held that, although the Constitution did not require appeal as a matter of fair process, states had to subsidize appellate lawyers for indigent criminal defendants if appeals were generally available. Douglas v. California, 372 U.S. 353, 357 (1963) (announced the same day as Gideon).


165 Argersinger v. Hamlin, 407 U.S. 25 (1972). Subsequent decisions concluded that the right attached when courts were to sentence criminal defendants to imprisonment, whether the crime was classified as a felony or a misdemeanor. See Scott v. Illinois, 440 U.S. 367, 373 (1979).


167 See Brady v. Maryland, 373 U.S. 83, 87 (1963). This decision concluded that due process required governments to turn over exculpatory, material information to all criminal defendants—whether rich or poor.

Cutting off access is not only a problem when divorce is the question. As Justice Brennan argued, *Boddie* presented a “classic problem of equal protection” on top of due process; the state’s legal monopoly required access for all attempting to “vindicate any … right arising under federal or state law.” But the Court has not been persuaded to insist on fee waivers for other poor civil litigants, such as those who face bankruptcy or the denial of benefits.

Family-based status claims have, however, been the basis for other constitutionally required subsidies, albeit in an uneven pattern that reflects gendered household hierarchies and privileges. An indigent man defending against a paternity claim brought by a private party won state-funded testing. Chief Justice Burger explained in 1981, the “requirement of ‘fundamental fairness’ expressed by the Due Process Clause” would not otherwise be “satisfied.” Yet in the same year, the Court concluded that state efforts to terminate the parental rights of an indigent woman did not create a per se right to counsel; only if a sufficient showing was made in an individual case was counsel to be provided. In 2011, the Court also circumscribed constitutional obligations to provide free counsel by concluding that the Due Process Clause did not require a lawyer for an indigent man facing detention (in that instance for a year) as a civil contemnor for failure to pay child support to the family of the child’s mother. The Court did say, however, that procedures had to be fundamentally “fair,” that equipping people with lawyers was one route to do so, and that other options included assistance from court personnel, including judges.

Moreover, the Court has insisted on rights to state-paid transcripts if needed for appeals of terminations of parental rights. After Melissa Lumpkin Brooks (M.L.B. as she is known in the annals of the Supreme Court) was divorced, her husband asked the Mississippi courts to terminate her rights as a mother so that his new wife could adopt the two young children. Brooks lost at trial and sought

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169 *Id.* at 388.
170 *Id.* at 387.
171 See United States v. Kras, 409 U.S. 434, 446–50 (1973) (rejecting subsidies for bankruptcy filings); Ortewin v. Schwab, 410 U.S. 656 (1973) (holding that an appellate filing fee of $25 applied to indigents seeking to appeal an adverse welfare decision, was not violative of the due process or equal protection clauses of the Fourteenth Amendment). But see Lindsey v. Normet, 405 U.S. 56 (1972), which struck down an Oregon statute that required tenants who appealed their eviction to post a bond of double the rent that would accrue during the appellate process.
174 Turner v. Rogers, 564 U.S. 431 (2011). The Court reserved the question of right to counsel if the opponent were the state.
175 Turner v. Rogers, 564 U.S. at 435–444.
to argue on appeal that the burden of proof—clear and convincing evidence that she had neglected or abandoned her children—had not been met. But Brooks could not afford to pay the $2352.36 for the transcript of the trial, and Mississippi law had no provision for waiving any fees on appeal. The State countered that Brooks’ three day hearing was all the process that was due, that Brooks could prove no intent by Mississippi to discriminate, and that requiring a state to “subsidize” Brooks’ civil appeal would create a “new” and unfounded constitutional right.

Writing for six members of the Court, Justice Ginsburg disagreed. Eschewing resort to what she called “easy slogans or pigeonhole analysis” (and thereby skirting the barriers that doctrine in some cases had imposed), the Court concluded that an amalgam of equal protection and due process required the state to provide funds for the transcript on appeal. Equal protection, she wrote, related “to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs.” Due process spoke to the “essential fairness of the state-ordered proceedings.” The Court held that the fundamental nature of the right to parent, coupled with the absolutism of the termination order that was supposed to be predicated on clear and convincing evidence, could not leave poor litigants without appellate review. On remand, Brooks’ visitation rights were restored. Yet the scope of this right is narrow, focused on terminations of parental rights, which are a small fraction of the family matters before any court. As Justice Ginsburg’s decision recounted, between the years of 1980 and 1996, only 16 such appeals made their way to the Mississippi Supreme Court.

177 M.L.B. v. S.L.J., 519 U.S. 102, 109 (1996). In that case, the total amount Brooks would have to pay was $2352.36: $1900 for transcript (950 pages at $2 per page); $438 for other documents in the record (219 pages at $2 per page); $4.36 for binder, and $10 for mailing. See Petition for Certiorari at 4, M.L.B. v. S.L.J., 519 U.S. 102, 1995 WL 17013674 (1996).
178 The Mississippi Supreme Court rejected the request for a waiver on the grounds that “the right to proceed in forma pauperis in civil cases exists only at the trial level.” Id. at 4. See Robert B. McDuff, MLB v. SLJ and the Right of Poor People to go to Court, 18 MISS.C.L.REV. 5 (1997); Rick Moore, MLB v. SLJ: Extension of in forma pauperis appeals to the Civil Arena in Termination of Parental Rights Cases, 18 MISS. C. L. REV. 19 (1998).
181 M.L.B., 519 U.S. at 120.
182 M.L.B., 519 U.S. at 120.
183 M.L.B., 519 U.S. at 107.
The alchemy of equal protection and due process has also buffered individuals who faced incarceration because of their inability to pay fines. In *Williams v. Illinois*, Chief Justice Warren Burger wrote that the state could not extend a person’s time of incarceration “beyond the maximum duration fixed by statute” based solely on the fact that a defendant was “financially unable to pay a fine.”\(^1\) In a subsequent decision, the Court concluded that once a state decided that an “appropriate and adequate penalty” for a crime was a fine or restitution, it could not “imprison a person solely” because of the inability to pay.\(^2\) Rather, imprisonment could only take place after determining a willful refusal to pay and that “alternative measures are not adequate to meet the State’s interest in punishment and deterrence.”\(^3\) The import of this decision is the subject of contemporary litigation about its impact on the relationship of poverty to decisions to grant bail and to suspension of drivers’ licenses and voting rights. Some state and federal courts have required judges to take into account ability to pay, while other rulings have concluded that the only trigger for constitutional protection is the risk of incarceration.\(^4\)

My brief account of U.S. constitutional law provides a small piece of a larger picture of the problems that poverty poses for the courts, of research on court-imposed debt, and on the many legislative and other initiatives aiming to mitigate the unfairness.\(^5\) As I have already discussed, an account of *principles* is

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3. *Id.* at 672.
4. *O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1135 (S.D. Tex. 2017), aff’d in part and rev’d in part, 892 F.3d 147 (5th Cir. 2018). A settlement was entered thereafter. See No. H-16-1414 (S.D. Tex. Nov. 21, 2019), https://www.courthousenews.com/wp-content/uploads/2019/11/Order-approving-Harris-County-bail-settlement.pdf. As for sanctions other than detention, some federal courts have read the Constitution not to insulate individuals against the suspension of drivers' licenses (which can disable individuals' capacity to work as well as to take care of themselves, their families, and their health) or against conditioning voting on the full repayment of fines. See, e.g., *Fowler v. Benson* (24 F.3d 247 (6th Cir. 2019)).
not a description of actual practices. “Gideon’s promise” (referencing the 1960s U.S. Supreme Court decision requiring state-paid lawyers for defendants facing prison terms) is far from fulfilled; a series of lawsuits have challenged public defender offices for failing to provide staff adequate to represent defendants.191

Moreover, as I explained at the outset, criminal defendants regularly face assessments,192 including reimbursement for the “free” criminal defense lawyer as well as for “services” such as drug testing and ankle monitoring.193 Civil litigants likewise face daunting billing from courts. As famously documented in the Department of Justice’s 2015 account of the failures of the municipal court in Ferguson, Missouri,194 rather than “administering justice or protecting the rights of the accused,” that local court’s goal was “maximizing revenue” through “constitutionally deficient” procedures that had a racially biased impact.195 The results across the country have been endless cycles of debt and a resurgence of “debtors’ prisons,” populated by individuals held in contempt for failure to comply with court payment orders.196

Research, litigation, and new statutes and practices are aiming to mitigate those costs again. Responses include a movement called “Civil Gideon” to add


192 Examples of such costs come from Nelson v. Colorado, 137 S. Ct. 1249 (Apr. 19, 2017), holding that a failure to reimburse exonerated prisoners for costs and fees imposed on them violated due process.


195 Id. at 42, 68–69. See also Consent Decree, United States v. Ferguson, No. 4:16-CV-00180 (2016).

196 See ALICIA BANNON, MITALI NAGRECHA, & REBEKAH DILLER, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010).
millions of dollars to fund lawyers representing poor individuals in cases relating to health, housing, and family life,\textsuperscript{197} as well as to provide individuals with resources for self-representation. Efforts are also underway to lower the price of process and to provide new methods (such as “drug courts” or “mental health courts”) of responding to a population of claimants with a host of needs. Furthermore, some initiatives aim to end or limit the imposition of fines and fees,\textsuperscript{198} including halting the assessment of fees on the families of children held in detention and providing forgiveness of prior, unpaid debt.\textsuperscript{199} The many legislative, rule, and policy reforms interact with litigation that has an uneven track record, as it has yet to require sufficient assistance or to prevent disabling litigants with limited wealth who need or who are brought into courts.

\textbf{B Interests Grouping}

To think of judges as working only as adjudicators is to miss that U.S. courts have also become their own administrative agencies that superintend a sprawling non-judicial staff, generate policies and rules, and require significant budgets for this panoply of activities. Courts also need legislative support. How do courts decide what they seek to do when they “administer justice”?

Answers come through the collectivization and in some sense the corporatization of judiciaries, which both lobby and are lobbied by interest groups. Judiciaries and other law-based groups regularly use their collective voices to shape initiatives affecting courts’ operations, their rules of procedure, and the


\textsuperscript{198} A clearinghouse on these activities is the Fines and Fees Justice Center, at \textit{https://finesandfeesjusticecenter.org/}.

\textsuperscript{199} The reforms in California are chronicled in Selbin, \textit{supra} note 153.
rights of litigants. Some of that work is encouraged by legislatures, authorizing judicial policy-making to report on the needs. The leadership of courts addresses issues such as salaries and budgets; workload; workplace rules, case management and alternative dispute resolution; indigent criminal defendants; sentencing; prisoners; and the challenges of unrepresented litigants. Judiciaries both set agendas around such issues and also respond to repeat-player litigants, such as federal and state governments, the Chamber of Commerce, other corporate organizations, and groups identified by the demographics of their members.

As in much else in the United States, federalism is part of the template of organizational life for many professionals; local, state, and national entities interact. For example, state bar associations predated the national effort as lawyers in 1878 gathered in upstate New York to found the American Bar Association (ABA). In 1899, a much smaller number of women lawyers created their organization, the National Association of Women Lawyers (NAWL). These entities have come to overlap, as the NAWL remains active, and in 1987, the ABA established its own Commission on Women in the Profession.

To be clear, until the 1950s, the ABA was an all-white, virtually all-male club. In 1912, the ABA expelled its one Black member, William Lewis, who was a lawyer with the U.S. Department of Justice. Two white women gained admission in 1918. In 1943, the ABA membership approved a resolution that admission was “not dependent upon race, creed, or color” but did not add a Black member, James Watson, a New

200 The Judicial Conference of the United States, 28 U.S.C. § 331, first created in 1948, is one example. See Resnik, Trial as Error, supra note 3. The predecessor to the Conference first convened in 1922 when Congress authorized what was then the Conference of Senior Circuit Judges.
202 When it began, the goals were “(1) to promote the welfare and interest of women lawyers; (2) to maintain the honor and integrity of the profession of the law; (3) to aid in the enactment of legislation for the common good and the administration of justice and (4) to do all things necessary to promote and advance the purpose of the Association.” 75 YEAR HISTORY OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS, supra note 66, at 23–24 (by-laws, Article II). The 2019 mission statement explains that The National Association of Women Lawyers is a legal professional organization dedicated to providing “leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law.” About NAWL, NAT’L ASS’N OF WOMEN LAWYERS, https://www.nawl.org/p/cm/ld/fid=9 (last visited Dec. 2, 2019).
York City Municipal County Judge, until 1950. Not until 1971 did the ABA welcome as an “affiliated” organization the National Bar Association, a group of Black lawyers begun in 1925 in part to respond to their exclusion from the ABA and modeling itself after state-based organizations such as the Iowa Colored Bar Association.

The ABA and the National Bar Association are two of many lawyer-based groups spawned during the twentieth century. Thirty-two law schools came together in 1900 to form the American Association of Law Schools (AALS), whose membership as of 2019 included 179 law schools. In 1923, the American Law Institute (ALI), which became famous for its “Restatements,” came into being.

In addition, some private entities of lawyers and judges are comprised of public actors, coming from different jurisdictions to form translocal collectives. For example, the Conference of Chief Justices of the State Courts, which dates from 1949, brings together the heads of all the state courts, just as a national association of mayors, of governors, and of many other state officials do. The state court justices are assisted by the National Center for State Courts (NCSC), founded in 1971 to enable state judiciaries to coordinate and to share information and programs.

These translocal organizations of government actors (which I term “TOGAs,” to distinguish them from NGOs, or nongovernmental organizations, and “SIGs” or special interest groups) gain their political capital from the identity of their members as government officials. Through such networks, they influence policies at many levels of government. The chart below provides a snapshot of several formed before the mid-twentieth century (Table 3).

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203 ABA Timeline, available at https://www.americanbar.org/about_the_aba/timeline/. In 1972, Leon Jaworski noted that Thurgood Marshall, while the Solicitor General of the United States, was one of the first “Negro delegates” to sit in the ABA House of Delegates. Jaworski, President’s Page, 58 ABA J. 3 (Jan. 1972).


William Howard Taft characterized federal judges as individuals “paddling their own canoes.” Taft successfully lobbied Congress to create an institutional infrastructure for the federal judiciary. In 1922, Congress chartered the Conference of Senior Circuit Judges. In 1948, it was renamed the Judicial Conference of the United States, which has spawned dozens of committees and special projects as it speaks as the representative of more than 850 life-tenured judges, a similar number of non-life-tenured federal magistrate and bankruptcy judges, and about 30,000 staff.

With that corporate voice, the federal judiciary had undertaken many projects. For example, federal judges became concerned in the 1940s about “the general subject of punishment for crime.” The Judicial Conference called for the “passage of an indeterminate sentencing law for the Federal courts.” Thereafter, the Conference created a committee, whose report it endorsed by proposing that sentencing be “left to the trial courts” without appellate or legislative oversight, that Congress authorize more indeterminate sentencing to promote rehabilitation, that a parole system be developed in coordination with the judiciary, and that distinctive consideration be accorded to youthful offenders. In the decades

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<tr>
<th>Organization</th>
<th>Year founded</th>
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<tbody>
<tr>
<td>American Bar Association</td>
<td>1878</td>
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<tr>
<td>National Association of Women Lawyers (Women Lawyers’ Club)</td>
<td>1899</td>
</tr>
<tr>
<td>American Association of Law Schools</td>
<td>1900</td>
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<tr>
<td>Conference of Senior Circuit Judges (federal)</td>
<td>1922</td>
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<td>American Law Institute</td>
<td>1923</td>
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<td>National Bar Association (organization of African American lawyers)</td>
<td>1925</td>
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<tr>
<td>Conference of Chief Justices of State Courts</td>
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C Corporate Voices and Identity-Based Organizations

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212 Foreword, Report to the Judicial Conference of the Committee on Punishment for Crime (June 1942).
213 Id. at 1–3; Report of the Judicial Conference 7–9 (Sept. 1942). Also noted was that the committee was chartered after some judges objected to the 1940 proposal. The 1942 Conference session authorized a variety of subcommittees, commissioned to “study the entire subject of procedure on
thereafter, the Judicial Conference embarked on many other initiatives, such as pressing in the 1960s for a federal public defender to provide lawyers for indigent defendants214 and urging Congress in the 1990s to have a presumption against creating new federal rights enforceable in federal court.215

In addition to speaking to other branches, courts’ corporate infrastructures routinely run educational programs. These activities are—like the norms of equality for courts—relatively recent. In the early 1950s, when individuals in the federal judiciary proposed judicial education programs, the proposition of “teaching judges” was derided as unnecessary; one federal official said that “the idea of a ‘school for judges’ would lend itself to ridicule.”216 Yet by 1968, a special entity inside the judiciary—the Federal Judicial Center—was founded to provide research on and to run seminars for the federal judiciary, including what is colloquially known as “Baby Judges School.” By the late-twentieth century, a robust, multi-million-dollar market in programs for judges—promoted by private and public providers—had been put into place. Once again, the content is full of points of view about what judges should do.

Judges have, in short, gained new capacities to be norm entrepreneurs. Atop decision-making as adjudicators, judiciaries shape their own rules of procedure and other projects—all explained as improving the “administration of justice.” Deciding what to put on the agenda of judiciaries and the stances to take requires making normative judgments about what law and courts should do. Illustrative are issues such as whether sentences should be fixed terms or indeterminate, how to allocate power between legislatures and courts, and what markers delineate the authority of state and federal systems. After women and men of all colors succeeded in limiting some of the discrimination within the legal profession, their organizations also took up the questions of what constitutes administering courts so as to provide “equal justice under law.” The results have been efforts aiming to

applications for habeas corpus,” and to study laws on imprisonment for failures to pay fines, and on the treatment for “insane persons,” id. at 17.


216 See Letter from Will Shafroth to Alfred P. Murrah (March 22, 1954) in Records Relating to Judicial Conference Committees, 1941–1957, Box 9, Folder Pre-trial Committee. The development and institutionalization of judicial education is discussed in Resnik, Trial as Error, supra note 3, at 943–49.
lessen (if not end) the inequalities that law not only tolerated but for centuries inscribed.

The surge in women-based legal organizations began in the 1970s. The number of women entering law school helped to propel classes, research, and faculty hiring. In 1970, students created an annual event called the National Conference on Women & Law that continued for two decades thereafter. In that same year, a few professors (including Ruth Bader Ginsburg and Herma Hill Kay) formed the Section on Women in Legal Education within the American Association of Law Schools. Then Professor, and later Justice, Ginsburg was also instrumental in the founding (again in 1970) of the Women’s Rights Law Reporter, which continues to be based at Rutgers Law School. Law students at other law schools launched publications, some of which were short-lived and others sustained, albeit often with changes to capture the shift from “women’s” rights to gender, sexuality, and intersectionality.

Specialized “Legal Defense and Education Funds” – known by their acronyms – focused on rights of specific groups. In the 1940s, the National Association for the Advancement of Colored People (NAACP) created one such group, followed by the Mexican American Legal Defense and Education Fund (MALDEF), the


In 2006, students formed the “Ms. JD” organization, a “nonprofit, nonpartisan organization dedicated to the success of aspiring and early career women lawyers.” Its goals include providing a “forum for dialogue and networking among women lawyers and law students.” The need for its work is predicated on the continuing lack of women’s full representation in all echelons of the profession. Ms. JD also houses a student network entitled National Women Law Students’ Organization (NWLSO). See About, Ms. JD, https://ms-jd.org/about.
Table 4: Law School-Based Journals Engaging Gender, 1976–2020.

<table>
<thead>
<tr>
<th>Journal</th>
<th>Founded</th>
<th>Years published</th>
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</thead>
<tbody>
<tr>
<td>Women and Law (Hofstra)</td>
<td>1978</td>
<td>1978</td>
</tr>
<tr>
<td>Yale Journal of Law and Feminism</td>
<td>1989</td>
<td>1989–^a</td>
</tr>
<tr>
<td>William and Mary Journal of Women and the Law</td>
<td>1994</td>
<td>1994–^a</td>
</tr>
<tr>
<td>Journal of Gender, Race, and Justice (University of Iowa College of Law)</td>
<td>1997</td>
<td>1997–^a</td>
</tr>
<tr>
<td>Georgetown Journal of Gender and the Law</td>
<td>1999</td>
<td>1999–^a</td>
</tr>
<tr>
<td>University of Maryland Law Journal of Race, Religion, Gender and Class (renamed in 2005; formerly Margins)</td>
<td>2001</td>
<td>2001–^a</td>
</tr>
<tr>
<td>Journal of Race, Gender, and Poverty (Southern University Law Center)</td>
<td>2009</td>
<td>2009–^a</td>
</tr>
<tr>
<td>DePaul Journal of Women, Gender and the Law</td>
<td>2011</td>
<td>2011</td>
</tr>
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</table>

^aAs of the spring of 2021, the journals were continuing.
Puerto Rican Legal Defense and Education Fund (PRLDEF, now called LatinoJustice/PRLDEF), the Asian American Legal Defense and Education Fund (AALDEF), and the National Organization for Women’s Legal Defense and Education Fund (NOW LDEF).

In 1971, some 130 Black judges met in Atlanta, Georgia, at the National Bar Association; these judges formed an “autonomous unit” which was their own Judicial Council, dedicated to the “eradication of racial and class bias from every aspect of the judicial and law enforcement processes.” That group explained that “the quality of justice in America has always been and is now directly related to the color of one’s skin as well as the size of one’s pocket book.” Given that courts were a source of some of the unfairness, these judges sought to mitigate those harms.

A group of women launched the National Association of Women Judges (NAWJ) in 1979, the year in which the United Nations General Assembly approved the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In 1991, the NAWJ helped to create the International Association of Women Judges (IAWJ), working with national-level chapters in many countries. As of 2019, IAWJ recorded more than 6000 members in about one hundred

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226 Hon. George W. Crockett, Jr., quoted by Ware, supra note 225, at 372.

227 In December 2019, the website described its objective as “the eradication of racial and class bias from every aspect of the judicial and law enforcement process.” Its page also featured a quote from Judge Joseph C. Howard, Sr. describing the need to “keep the confidence and support of all segments of society,” and to make meaningful progress toward making ‘Equal Justice Under Law’ a reality for all. National Bar Association Judicial Council, Our History & Mission, https://nbajudicialcouncil.org/about-us/our-history/ (last visited Dec. 2, 2019).

In 1988, the National Consortium on Racial and Ethnic Bias in the Courts (supported by the National Center for State Courts) began and, in 2002, it renamed itself the National Consortium on Racial and Ethnic Fairness in the Courts.

A host of other legal issue/identity organizations exist. Some are framed by subspecialties, such as lawyers working on behalf of corporations. One example is the American Corporate Counsel Association (begun in 1982 and renamed the Association of Corporate Counsel so as to reflect its global presence), which aims to enhance the status of in-house lawyers and to influence policies. In 1997, a related group—Minority Corporate Counsel Association—came into being to press for demographic diversity in that segment of the legal profession. Again, a chart provides a snapshot of a few of the many organizations chartered in the last century (Table 5).

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231 In 1982, the American Corporate Counsel Association (ACCA) was created to address the “specific interests of in-house counsel,” and its membership soon numbered 2400. In 2003, the name was changed to the Association of Corporate Counsel (ACC) to reflect “the increasingly global interests and the needs of our ever-growing membership” As of December 2019, ACC counted 45,000 members in over 60 global chapters. See About ACC, Ass’n of Corp. Counsel, http://www.acc.com (last visited Dec. 2, 2019). Included among its goals of representing in-house counsel is to “promote diversity and inclusiveness within ACC and the in-house community as a whole.” Id. See generally Constance E. Bagley & Mark D. Roellig, The Transformation of General Counsel: Setting the Strategic Legal Agenda (Jan. 8, 2013), available at http://ssrn.com/abstract=2201246; Mary C. Daly, The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel, 46 Emory L.J. 1057 (1997).

232 The Minority Corporate Counsel Association, Inc. (MCCA) was formed to focus on “the hiring, retention, and promotion of diverse lawyers in law departments and law firms.” MCCA describes its approach to diversity as “inclusive,” and addresses “issues of race/ethnicity, gender, sexual orientation, disability status and generational differences.” See About MCCA, Minority Corp. Counsel Ass’n, http://www.mcca.com (last visited Dec. 2, 2019). MCCA has pressed for law firms to “institutionalize” a role for a “diversity professional,” and has supported the formation of the

<table>
<thead>
<tr>
<th>Organization</th>
<th>Year founded</th>
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<tbody>
<tr>
<td>NAACP Legal Defense and Education Fund (LDF)</td>
<td>1940</td>
</tr>
<tr>
<td>Mexican American Legal Defense and Education Fund</td>
<td>1968</td>
</tr>
<tr>
<td>National Conference on Women &amp; Law (organized by law school students)</td>
<td>1970</td>
</tr>
<tr>
<td>Section on Women in Legal Education (American Association of Law Schools)</td>
<td>1970</td>
</tr>
<tr>
<td>Women’s Rights Law Reporter (Rutgers Law female students and professors)</td>
<td>1971</td>
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<tr>
<td>National Center for State Courts</td>
<td>1971</td>
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<tr>
<td>Judicial Council of the National Bar Association</td>
<td>1971</td>
</tr>
<tr>
<td>LatinoJustice/Puerto Rican Legal Defense and Education Fund</td>
<td>1972</td>
</tr>
<tr>
<td>Asian American Legal Defense and Education Fund</td>
<td>1974</td>
</tr>
<tr>
<td>National Association of Women Judges</td>
<td>1979</td>
</tr>
<tr>
<td>NOW-Legal Defense and Education Fund (NOW-LDEF)</td>
<td>1980</td>
</tr>
<tr>
<td>The Federalist Society for Law and Public Policy Studies</td>
<td>1982</td>
</tr>
<tr>
<td>Federal Judges Association</td>
<td>1982</td>
</tr>
<tr>
<td>Association of Corporate Counsel</td>
<td>1982</td>
</tr>
<tr>
<td>National Consortium on Racial and Ethnic Bias in the Courts</td>
<td>1988</td>
</tr>
<tr>
<td>International Association of Women Judges</td>
<td>1991</td>
</tr>
<tr>
<td>Minority Corporate Counsel Association</td>
<td>1997</td>
</tr>
</tbody>
</table>

Just as the affinity groups were formed in part because of their exclusion from associations such as the ABA, other groups formed to promote different agenda, all invoking their visions of the “public interest.” In the 1980s, the “law and economics” movement bloomed inside law schools, and the Federalist Society formed with the aim to “provide a counterweight” to the “liberal” public interest agenda.233 One focus has been on the need to pay more attention to commitments to the liberty which they read the U.S. Constitution to protect, and another on the harms which


233 The Federalist Society for Law and Public Policy Studies was founded in 1982 to further the “principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.” *Our Purpose, The Federalist Soc’y for Law & Pub. Policy*, http://www.fedsoc.org/about-us/ (last visited Mar. 25, 2021). See also Steven Teles, *The Rise of the Conservative Legal Movement* 139, 108–45 (2008).
they understood regulation imposed on the economy. Proposals to reconsider modes of procedure and limit access to courts became commonplace. In addition, some organizations registered objections to affirmative action. For example, in an effort to align with language used by some of the founders of the United States, the Federalist Society raised questions about whether attention to demographic differences and gender/race-based biases created “factions” in civil society.

IV Metrics of Impact

The question, what is the “difference that difference makes” has been asked in many contexts, from health care to education and business. In the context of courts, a good deal of the research aims to tease out the impact of individual judges as adjudicators. Below, I detail some of the findings of such studies. Yet, as I have discussed, norms of judging come from the mix of adjudication, the institutions speaking on behalf of judges, private organizations seeking to affect courts, and the political culture that frames courts. Therefore, I also assess some of the innovative collective action of the NAWJ, IAWJ, and the National Consortium on Race and Ethnicity, the backlash against it, and other efforts to reconfigure the identity of courts. Thereafter, I turn to other participants in court processes, the centrality of class, and the political movements aiming to push away many of these new entrants out of courts.


A Gender and Judgments

A good many studies seek to consider decisions of specific women judges and to undertake empirical studies aggregating data on opinions rendered by sets of women judges. The challenges of doing empirical work on judicial decision-making are substantial. Unlike some countries such as France, where large numbers of women hold certain judicial positions, relatively few women are judges in the United States. Not only is the “n”—the number of women—in data sets often small, but women sit in different jurisdictions, at different levels of courts and, if on panels (aside from some state and federal Supreme Courts), do not sit on fixed panels but are joined by different colleagues. Studying women and men of color is all the more difficult, as some courts lack any and others have very small numbers.

Moreover, the women who are judges have come through different political channels to obtain their posts. Some jurisdictions elect judges, and others appoint judges through a range of mechanisms from merit selection commissions to taps on the shoulder. As for party affiliations, in the federal system, Democratic presidents have appointed more women to the federal courts between 1980 and 2019 than have Republican presidents. Further, the kinds of cases that judges

238 Anne Boigeol detailed that as of 2009, women were 61% of all judges in France, and 74% of those judges were in the early part of their careers. Anne Boigeol, Feminisation of the French “Magistrature”: Gender and Judging in a Feminised Context, in GENDER AND JUDGING, supra note 110, at 126–27. The numbers were lower at higher levels; for example, at the Cour de cassation, 34% of the judges were women. Further, very few women were the “heads of court,” id. at 129–30. Boigeol reported that French women judges were not in an association akin to that in some common law jurisdictions or the International Association of Women Judges, that gender was seen as a “private” issue, and that the ideology of universalism supported that approach. Id. at 136–41. The relationship of the French constitutional commitment to parité in electoral processes and attitudes towards judgeships was not explored.
239 In one study of federal trial-level judges presiding in cases involving race and sex discrimination, one researcher found not a “single black female judge” in a data set that examined cases filed by the Equal Employment Opportunities Commission (EEOC) on behalf of three Black women. See Christina L. Boyd, Representation on the Courts? The Effects of Trial Judges’ Sex and Race, 69 Political Research Q. 788, 795 (2016) [hereinafter Boyd, Representation on the Courts?].
240 For example, during his eight years, President Barack Obama appointed more than “90 minority and 100 female federal” trial level judges or 62% of his appointments, “the highest percentage of diverse judges appointed by a U.S. President.” Boyd, Representation on the Courts? supra note 239, at 788 (2016). As of the spring of 2019, 92% of the appointees of President Donald Trump were white and 76% were male. See Stacy Hawkins, Trump’s Dangerous Judicial Legacy, 67 U.S.L.A. L. Rev. Disc. 20, 30 (2019).
hear vary, in terms of the causes of action and the number of parties.\textsuperscript{241} In addition, the governing procedures and substantive law change, and the litigants are differently-resourced with widely variable capacities to invest in the production of facts and arguments.\textsuperscript{242}

Given the breadth of the dockets, the subsets of cases that empiricists select raise other questions. Some arenas are gender-coded (such as sex discrimination), but as many feminist scholars (myself included) have argued, lawsuits involving contracts, property, and jurisdiction have gendered impacts.\textsuperscript{243} Thereafter, assessing whether particular rulings should be categorized as substantive representation because they are “good” for women requires judgments about which outcomes help women, or a subset thereof, and how gender fluidity affects that assessment.

One example of how concerns in one part of the world that are gendered are not so readily perceived as gendered in others comes from a 2004 study by Raghabendra Chattopadhyay and Esther Duflo. They looked at the impact of “political reservations” that, since the 1990s, required that a third of the heads of Village Councils in India be set aside for women.\textsuperscript{244} Based on data from decisions made in 265 Village Councils in West Bengal and Rajasthan, the researchers reported that while the focus varied somewhat from West Bengal to Rajasthan, local leaders invested “more in infrastructure that is directly relevant to the needs of their own genders.”\textsuperscript{245} Women, who often had to portage water, focused on drinking water or roads,\textsuperscript{246} which in the United States are not concerns generally identified as “women’s issues.” Another example is the debates about the impact of sexual harassment law in which self-identified

\textsuperscript{241} The potential for more sophisticated work comes from access to more searchable data in the federal system. See Lee Epstein, \textit{Some Thoughts on the Study of Judicial Behavior}, 57 WM. & MARY L. REV. 2017 (2016).

\textsuperscript{242} For example, one study concluded that judges who saw themselves as feminist would (with hypotheticals as the data source) render judgments differently. See Beverly B. Cook, \textit{Will Women Judges Make a Difference in Women’s Legal Rights? A Prediction from Attitudes and Simulated Behaviour}, in \textit{WOMEN, POWER AND POLITICAL SYSTEMS} 216 (Margherita Rendel ed., 1981).


\textsuperscript{244} Raghabendra Chattopadhyay & Esther Duflo, \textit{Women as Policy Makers: Evidence from a Randomized Policy Experiment in India}, 72 ECONOMETRICA 1409 (2004).

\textsuperscript{245} Id. at 1409.

\textsuperscript{246} Id. at 1421. The effect was not uniform in both sites, as in West Bengal, women were more concerned about water and roads, while in Rajasthan, the focus was more on roads. Id. at 1411.
feminists disagree about when law is gender-regarding and equality-affirming.247
And, even were these hurdles surmounted, the impact identified as gendered may well be transient, a confluence of a particular set of people and legal precepts during a brief period of time in a group of cases the researchers decided to evaluate. Thus, one overview of U.S. empirical work as of 2012 on women judges concluded that the studies did not support a robust claim of difference.248

Yet the novelty of women on the bench continues to prompt interest, even as researchers struggle with the “question of how best to isolate sex effects, if in fact they exist.”249 A leading inquiry looked at decisions rendered by women judges—either sitting individually or on panels—on the federal appellate courts. The researchers distinguished between “individual effects” (decisions made by a woman or a man) and “panel effects” (decisions by groups of three).250 Reviewing 13 kinds of cases, this study concluded that a woman-effect was “rare,” occurring in only one area, sex discrimination litigation in employment.251 The “probability of a judge deciding in favor of the party alleging discrimination” decreased by about 10 percentage points when the judge was a man; moreover, when women served with men, men were “significantly more likely to rule in favor of the rights litigant.”252

247 Those disagreements can be seen in several of the chapters in DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva B. Siegel eds., 2012).
248 See Kenney, supra note 33, at 28–43; 172–76. Further, she provided details of each rather than a meta-analysis, given the variety in the nature and kind of studies; see also Bregje Dijksterhuis, Women Judges in the Netherlands, in GENDER AND JUDGING, supra note 110, at 281 (finding no evidence of women’s providing another “voice” in family law cases in the Netherlands.) In contrast, an overview of the impact of gender in the Ivory Coast and Italy reported that women judges provided a more interdisciplinary approach in family cases. See Maria Rita Bartolomei, Gender and Judging in Traditional and Modern Societies: A Comparison of Two Case Studies (Ivory Coast and Italy), supra note 110, at 283, 299–301.
250 See Boyd, Epstein, & Martin, supra note 249, at 392.
251 Id. at 406.
252 Id. at 389, 401–06. They found that, in sex discrimination cases, female judges voted in favor of plaintiff 10 times more often than did men at the individual level, id. at 401. For panels, the researchers found that the likelihood of male judges voting for a female plaintiff increases by 12–14% if women judges also serve on the panel. Id. at 406.

Another data review of all civil cases in the federal system during about a decade identified that
A 2019 innovative effort sought to learn about cohort effects on federal appellate court decision-making in cases involving certification of class actions. Building on ideas about the impact of a “critical mass,” this research found decisions varying based on the party of the President appointing judges and by gender and race. When Democratic presidents had nominated all three of the judges on a panel, the rate of approval of certification doubled as compared with when Republican presidents had nominated all three of the judges rendering decisions. In the 67 cases when two women sat on a panel, certification was also more likely. In addition, research on the federal trial courts has also produced studies reporting that gender matters, such as one finding women judges affecting the rate and timing of settlements and another concluding that the gender and race of judges affected decisions on motions in a subset of sex and race discrimination cases.

The question of the durability of these various findings rests in part on the interaction between the changing composition on the bench, the changing law in a variety of arenas, and the changing and increasingly limited work of judges. In addition to Presidents looking for different qualities in the people they appoint to the federal bench, the U.S. Supreme Court has, through interpretations of constitutional law, statutes, and rules, imposed barriers to bringing claims in many kinds of cases. Women and men of color were more likely to comply with obligations to decide motions within six months than their white male colleagues. Jonathan Petkun, Can (and Should) Judges Be Shamed? Evidence from the “Six-Month List” (working paper, 2019) (available at https://jbpetkun.github.io/pages/working_papers/CJRA_working_draft_20190524.pdf).

254 Id. at 234, 254–258. Burbank and Farhang looked at 3200 votes on certification in 1100 decisions between 1967 and 2017. Id. at 234.
255 Id. at 266. They found that when two women were on a panel, certification was more likely. Id. at 260–261. However, 68% of the women and 78% of the African Americans in the data set were nominated by Democratic presidents, and too few of the cases involved two women nominated by Republican presidents to analyze. Decisions involving two women appointed by Democratic presidents were not different from those in which the two women came from different parties. Of the 67 cases with two women, 52 individual women were involved in nine different circuits. Email of Dec. 2, 2019 from Sean Farhang. On file with the author.
256 See Christina L. Boyd, She’ll Settle It, 1 J. L. & COURTS 193 (2013). Relying on data dealing with the termination of cases in the federal courts, Boyd determined that cases assigned to women judges settled somewhat more often and more quickly than did cases assigned to men; Boyd posited that women’s managerial and leadership styles contributed to those results. In a study of cases filed by the EEOC and alleging sex and/or race discrimination in employment, Boyd concluded that women trial judges are about 15% more likely to decide dispositive motions in favor of the plaintiff and that Black trial judges are about 39% more likely to “decide race discrimination cases” in favor of plaintiffs. See Boyd, Representation on the Courts? supra note 239, at 795.
of cases. For example, the Court has enforced requirements imposed by service providers and employers that preclude collective action and imposed more exacting requirements for certification of class actions when such cases can still be brought.257

B Launching Task Forces to Interrogate Bias in Courts

Above I noted that the Federalist Society had objected to task forces focused on bias in courts. The concern that doing so was unusual was, in one respect, not based on knowledge of what projects judiciaries had launched during the twentieth century. The Judicial Conference of the United States has undertaken many studies, including to address the structure of federal sentencing laws and the shape of federal courts’ jurisdiction. However, because gender/race initiatives were innovative, the Federalist Society could accurately point out that courts had not, before the 1980s, focused on their own potential structural biases. The conflict about which projects judiciaries should take up is a facet of the struggle over the identity and legitimacy of courts. And, the very existence of such task forces is one marker of the “difference that difference makes,” just as the efforts to limit their use is a marker of backlash against affirmative action.

The origins of gender/race bias tasks are intertwined with the struggle for gender equality and the creation of affinity-based organizations of jurists. In the 1960s, as women challenged sex stereotyping in employment or education, they encountered some judges who held views of women’s “proper place,” similar to those of the defendants sued for sex discrimination. Further, women judges—even as they had obtained ranks of power—found themselves demeaned, either by their colleagues or by litigants who appeared before them. What became plain was that getting women into court as rights-seekers and onto the bench as judges was not the same as being treated as equals in courts.

Collective action through class actions lawsuits was one response, and collective efforts to change ideas about the obligations of judiciaries was another. The NAWJ responded not only by aiming for a larger number of judges but also by proposing research projects to combat gender bias in courts and in law, new procedures to protect victims of violence, and more services for women prisoners.

Before detailing these efforts, a caveat is in order that returns me to the issue of essentialism. To equate the NAWJ’s agenda with “women” in general is a mistake. The number of women judges involved has been small. Records on NAWJ membership date back to 1995, when 1700 were members; as of 2012, membership was at 1250, and as of 2019, 1200. In contrast, more than 7000 women (not including administrative judges) sat in the state and federal courts. Even as the NAWJ has linked the phrase “women judges” with the need to expand equality rights, the number of women judges formally affiliating remains small.

The NAWJ began aspects of work on bias at its founding. About a hundred women gathered at the 1979 founding of the NAWJ; they described themselves as part of the “crest of Second Wave Feminism.” Two California judges were the “founding mothers”—Joan Dempsey Klein, an intermediate appellate judge, and Vaino Spencer, a trial judge; Klein had begun the California Women Lawyers Association, and Spencer had founded the Black Women Lawyers Association. Their newly-formed NAWJ not only linked women judges of all colors but also offered another kind of diversity by cutting across jurisdictional lines to include state and federal judges and by undermining judicial hierarchies through welcoming women in the administrative judiciary as well as in all levels of courts.

The mission statement explained that the NAWJ aimed 1) “to increase the number of women judges so that the judiciary more appropriately reflects the role of women in a democratic society;” 2) “to discuss legal, educational, social and ethical problems mutually encountered by women judges and to formulate solutions;” 3) “to address other important issues particularly affecting women judges;” and 4) “to promote the administration of justice.” The point was to reduce the burdens of tokenism by adding women to the bench and by ending the isolation of those already serving through a “psychological sisterhood.” To do so, NAWJ’s third president, Gladys Kessler, argued for “affirmative action”—the recruitment of

258 Email to Judith Resnik from the NAWJ membership coordinator, Sept. 2013. On file with the author.
259 NAWJ 25, supra note 229.
261 NAWJ 25, supra note 229, at 8.
263 Providing an account of the first conference, Lynn Rossman detailed how alone and besieged some of the women judges felt. Rossman, supra note 260, at 1243–51. One of first NAWJ resolutions called for the President to appoint a woman to the U.S. Supreme Court. Id. at 1253–54, n. 71 on Supreme Court.
women to put themselves forth to be judges and concerted work to get women
selected through either election or appointment.265

The NAWJ’s call for more women judges was grounded in familiar arguments
in feminism about sameness and difference. One claim was that gender ought not
to matter because all persons were supposed to be equal; exclusion of women from
the bench was therefore evidence of descriptive discrimination.266 This approach
implicitly (and sometimes explicitly) argued the equivalence of women and men
and that women’s absence was attributable to discrimination on the basis of sex.

At the same time, the NAWJ leadership also asserted that women would be
different than male judges. A judiciary “made up of … varied groups should result
in the application of a more representative, realistic, and cosmopolitan set of
attitudes to the all-important process of interpreting and applying the law of the
land.”267 Further, as co-founder Vaino Spencer explained, women judges, as
“direct victims of discrimination … [were] bound to be more concerned and
conscious of the need to relate to all people.”268

These claims are embedded in strands of feminist theory about sameness and
difference. One view is that women who become judges are the same as men, and
their ascent to the judiciary is evidence of a nondiscriminatory selection process
that in turn legitimated courts as egalitarian institutions. Another view is that
women bring a distinctive vantage point that could alter the outcomes and hence
offer another source of legitimacy for courts as incorporating diverse—and
potentially competing—ideas about the obligations of justice.269

The egalitarian strand sits easily within liberal discourse, albeit occasioning
deep divides about whether liberalism requires formal or substantive equality and,
as I have documented, has yet to include sufficient focus on the inclusion of
substantial numbers of women of all colors.270 The emphasis that women are also
different has been the subject of a large critical literature271 worried about
essentializing and homogenizing women, as if all women had the same “different experiences,” producing epistemological insights distinct from men.272

Another critique of twentieth century feminism is its insularity; in some respects, the NAWJ’s purposes could be read as self-serving, in that professionally elite judges sought to enhance their own stature by gaining more female peers.273 Yet such an account misses much of the discussion at NAWJ’s founding and ignores what the NAWJ went on to do. As Joan Dempsey Klein, the NAWJ’s first president, commented at the outset, NAWJ’s stated purposes were not the “whole story.”274 The ultimate goal was “the elimination of sexual discrimination in the law.”275 Because, Klein explained, women held a “second-class citizenship” and efforts were underway to roll back the gains achieved, NAWJ’s distinctive vantage point would likely be needed for a long time.276

NAWJ’s agendas mix efforts at formal equality with commitments to substantive equality that entailed more and new rights. While some states had Equal Rights Amendments (ERA) in their own constitutions, the federal constitution did not. Further, the United States Supreme Court had, until the 1970s, rejected reading the Equal Protection Clause to govern women’s rights. In 1972, Congress endorsed such a constitutional amendment and, pursuant to the provisions governing constitutional amendments, sent it to the states for ratification within a seven year period. The text, “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” came with enforcement powers for Congress.277

272 A distinct question is whether the women selected for judgeships are so like the men selected that their distinct genders are less relevant than some of the women not serving as judges.
273 Klein, Women Judges Join Together, supra note 262, at 12. Klein stated that women judges were “a distinct minority,” a status that created “significant difficulties.” Id. at 12. These judges felt “the same sense of urgency” as did “other special interest groups.” Id. Her examples included the American Bar Association, the NAACP, and labor and civil rights groups. Id. As is evident, “special interest groups” was then not a pejorative description.
274 Rossman, supra note 260, at 1244 (quoting Klein’s statement at the press conference at the first NAWJ meeting’s end). In Klein’s view “male judges do not view sex discrimination as they view race discrimination.” Id. at 1244.
275 Rossman, supra note 260, at 1244 (quoting Klein).
276 NAWJ 25, supra note 229, at 19.
The federal ERA was, however, in 1979 at risk of expiring without a sufficient number of ratifications.278

One of the first acts of the NAWJ was to call for the ERA’s ratification.279 Given the valence of judges as separate from politics, the NAWJ explained that its position was not related to a “political issue” because the ERA was one of the “basic human rights.”280 The NAWJ approved two other resolutions at its founding conference, one calling for a woman to be appointed to the United States Supreme Court and the other requiring that judges not be members of clubs discriminating on the grounds of sex, race, or ethnicity.281

Within a year, the NAWJ joined the National Organization for Women’s Legal Defense and Education Fund (begun in 1970) in seeking to persuade judiciaries to undertake research on the effects of gender in their courts.282 NOW-LDEF had by then created a National Judicial Education Program, aiming to shift judges’ understandings about equality. As founders Norma Wikler and Lynn Hecht Schafran explained, when they provided examples of gender bias to judges, the judges recognized that bias could exist, but not in their own jurisdictions.283

To respond, these educators shaped empirical projects, jurisdiction by jurisdiction, so that cases or research from judges’ own jurisdictions were presented.284

278 Thirty-eight states had to ratify the ERA before the deadline of June 30, 1982, and Nebraska, Tennessee, and Idaho were then involved in efforts to rescind the prior ratification. Rossman, supra note 260, at n. 39 and 1245 (The amendment later failed to garner the requisite number of state legislative ratifications; a new ERA has regularly been introduced in Congress and, as of this writing, is coming closer to enactment. On March 5, 2013, Senator Robert Menendez introduced the ERA again, as S.J. Res. 10, 113th Cong. (2013). For literature on what the passage of an ERA could entail, see Julie Suk, An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home, 28 Yale J. L. & Feminism 381 (2017).


280 Id. at 1245 (quoting Klein’s press statement).

281 Id. at 1246. The NAWJ supported three resolutions in total at that first conference, one on ERA, one on discrimination in private clubs, and one on women on the U.S. Supreme Court. NAWJ 25, supra note 229, at 11.

282 NAWJ formed a National Gender Bias Task Force Committee, which produced manuals and supported these efforts. Morrison, supra note 265, at 307.


284 Lynn Hecht Schafran, A Brief History of NJEP, in NAWJ 25, supra note 229; Morrison, supra note 265, at 306–07; see also Judith Resnik, Asking about Gender in Courts, 21 Signs 952 (1996) [hereinafter Resnik, Asking about Gender].
Working “in cooperation with the NAWJ,” the Program aimed to “eliminate gender based stereotypes, myths and biases in the American judiciary.”\footnote{Morrison, \textit{supra} note 265, at 306; NAWJ 25, \textit{supra} note 229, at 14–15. A first such program was held at the National Judicial College in Reno, Nevada, where some women judges had attended sessions before and encountered biased comments and against which female employees had filed employment discrimination claims. NAWJ 25, \textit{supra} note 229, at 18.} Task force topics ranged from inquiries into biases against women as litigants, lawyers, and judges to the challenges faced by women witnesses, sometimes belittled when detailing the violence that they had encountered or ignored when pressing their economic needs. Methods included quantitative surveys of lawyers and judges, focus groups, hearings, and review of case law and statutes.

The NAWJ is a translocal organization of government actors. Its leadership persuaded individual state courts and some federal circuits to take up the equality concerns. As in the case of voting rights, a pattern of the movement “from margin to center” can be seen; several states were at the forefront before federal courts became involved. New Jersey was the first state court to launch a “Task Force on Gender Bias in the Courts,” as its Chief Justice Robert Wilentz commissioned that work.\footnote{First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts—June 1984, 9 \textit{Women’s Rts. L. Rep.} 129 (1986). When Deborah Poritz was Chief Justice of the state, it was also the first to charter a task force focused on bias based on sexual orientation. \textit{Final Report of the Task Force on Sexual Orientation Issues, New Jersey Judiciary} (2001), http://www.judiciary.state.nj.us/pressrel/2001/taskforce.htm.} In 1988, the Conference of Chief Justices of the State Courts adopted a resolution calling for the study of gender, racial, and ethnic bias. \footnote{Conference of Chief Justices, \textit{Resolution XVIII: Task Force on Gender Bias and Minority Concerns}, 26 \textit{CT. Rev.} 5 (Fall 1989); Lynn Hecht Schafran, \textit{Gender Bias in the Courts: An Emerging Focus for Judicial Reform}, 21 \textit{Ariz. St. L.J.} 237 (1989).} In 1993, the Conference issued another resolution, supporting implementation of the proposals made by such task forces.\footnote{See Judith Resnik, \textit{Gender in the Courts: The Task Force Reports}, in \textit{The Woman Advocate: Excelling in the 90s}, at 3–38 (Jean Maclean Snyder & Andrea Barmash Greene eds., 1995).} As the twentieth century was ending, more than 25 jurisdictions had constituted or studied issues of gender and race through formally-constituted task forces.\footnote{Resnik, \textit{Asking about Gender, supra} note 284. See also National Center for State Courts, \textit{Gender and Racial Fairness}, https://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/State-Links.aspx?cat=Gender%20Fairness%20Task%20Forces%20and%20Reports (last visited Dec. 2, 2019) (by subscription).}

The federal courts came later to the project,\footnote{See Vicki C. Jackson, \textit{What Judges Can Learn from Gender Bias Task Force Studies}, 81 \textit{Judicature} 15 (1997); Resnik, “\textit{Naturally} Without Gender, \textit{supra} note 36.} but eventually about half the circuits commissioned reports, after the Judicial Conference of the United States
called in 1992 for studies of gender bias.\textsuperscript{291} By 2006, some 60 jurisdictions had produced official reports discussing the treatment of women and men of all colors in state and federal courts. And, by 2019, the State of Washington had launched a new project focused on the intersections of gender, class, and race.\textsuperscript{292}

The findings of many jurisdictions overlapped. For example, from states as varied as California, Georgia, Kentucky, Maryland, and Minnesota, one learned that women seeking redress for violence termed “domestic” were often blamed for provoking attacks or their experiences were trivialized or disbelieved. The conclusion from New Jersey’s mid-1980s report, serving here as a placeholder for many others, explained:

... stereotyped myths, beliefs, and biases were found to sometimes affect judicial decision-making ... in domestic violence, juvenile justice, matrimonial law, and sentencing.

The Task Force reported that there was “strong evidence” of differential treatment of women and men in courts and chambers.\textsuperscript{293}

Through its work with NOW-LDEF’s Judicial Education Program and by joining with thousands of volunteers, the NAWJ helped to revise the meta-narrative of courts by dislodging an impression of a neutral forum and by conceptualizing the role gender played in courts. The accumulated materials showed that gender bias was not the result of idiosyncratic exchanges in a few cases but a systemic problem inscribing and limiting the roles and rights for women and for men.\textsuperscript{294} When held against the baseline ideology of courts as disinterested and dispassionate venues, the bias task forces were remarkable endeavors in which women and men recommitted to aspirations for “fairness” by demonstrating that courts had not shed their discriminatory practices.

A related initiative came from the Judicial Council of the National Bar Association—the group of African American judges formed in the early 1970s—which likewise was insistent on the need to focus on how courts contribute to injustice. Its goals included “the eradication of racial and class bias from every aspect of the

\begin{footnotes}
\footnote{\textsuperscript{292} That project is chaired by the Hon. Sheryl McCloud of the Supreme Court of Washington, https://www.courts.wa.gov/.}
\footnote{\textsuperscript{293} \textit{First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts—June 1984}, supra note 286.}
\footnote{\textsuperscript{294} For analysis of the themes, see Resnik, \textit{Asking about Gender}, supra note 284.}
\end{footnotes}
judicial and law enforcement process.” Further, the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts supported studies targeted at those issues; at times, efforts on gender and on race/ethnicity overlapped, with a focus on the intersections of gender and race. Yet doing so was made difficult by a paucity of data, reflecting the relatively few persons of color on judicial benches.

Neither the NAWJ, the National Bar Association, nor the National Consortium had substantial resources, in terms of funds or large numbers of members. Yet the impact—at least for a period of time—was impressive, and as detailed above, invoked the ire of critics such as the Federalist Society. State and federal judiciaries embraced the concept of making inquiries, and the judicially-chartered groups created a significant body of work on “bias,” even as it was often termed “fairness.” Indeed, these efforts garnered endorsements from extant organizations that had, historically, been exclusively the domain of white men—the Conference of Chief Justices of the State Courts, the affiliated Conference of State Court Administrators, and the Judicial Conference of the United States. The results included thousands of pages of documentation, new ethics and disciplinary rules, how-to manuals, programs, conferences, and occasional decisions, such as the reversal of a verdict based on the gender-biased behavior of the presiding jurist toward the


296 See Resnik, *Asking about Gender*, supra note 284, at 973–75.


298 By the time of endorsement and in years thereafter, these networks were overlapping. Several active members of the NAWJ, including Dana Fabe who served as NAWJ president, were also active members of Conference of Chief Justices of State Courts. *The Hon. Dana A. Fabe, Am. L. Inst.*, https://www.ali.org/members/member/209168/ (last visited Mar. 25, 2021).


300 See, e.g., Lynn Hecht Schafran & Norma Juliet Wikler, *Gender Fairness in the Courts: Action in the New Millennium*, State Justice Inst. (2001), http://womenlaw.stanford.edu/pdf/genderfairnessstrategiesproject.pdf. The volume was part of the Gender Fairness Strategies Project, and was co-sponsored by NAWJ, the National Judicial College, National Center for State Courts, ABA Commission on Women in the Profession, and National Judicial Education Program of NOW-LDEF.
plaintiff, a young woman seeking damages for sexual harassment by her employer.\textsuperscript{301}

In addition to bias in courts, the NAWJ focused on the bias faced by women whose injuries were not recognized by law. Doing so entailed active support of the Violence Against Women Act (VAWA),\textsuperscript{302} enacted by Congress in 1994. VAWA was a multi-pronged statute aspiring to shift behavior in many locations—police, prosecution, courts, households, the streets, workplaces, college campuses, and Indian reservations.\textsuperscript{303} VAWA included encouragement for gender bias studies and provided funds to be distributed by an Office on Violence Against Women in the federal Department of Justice to state-based programs (“STOP”—Services, Training, Officers, Prosecutors).\textsuperscript{304} Law enforcement, prosecution, and victims’ services were to receive at least 25% of the sums appropriated.\textsuperscript{305}

\textsuperscript{301} Catchpole v. Brannon, 42 Cal. Rptr. 2d 440 (1995).


\textsuperscript{304} Specifically, Congress appropriated, and has reappropriated thereafter, funds for states under a Technical Assistance Program and three granting programs: “STOP” (Services, Training, Officers, Prosecutors); Sexual Assault Services Program (SASP); and the Grants to State Sexual Assault and Domestic Violence Coalitions Program. In fiscal year 2011, the Office of Violence Against Women in the Department of Justice administered the granting of more than 830 awards, totaling more than $450 million. See Office on Violence Against Women, Biennial Report to Congress on the Effectiveness of Grant Programs under the Violence Against Women Act, U.S. Dep’t of Justice 9 (2012), available at http://www.ovw.usdoj.gov/docs/2012-biennial-report-to-congress.pdf. The STOP program provided a “base award of $600,000” to each state, followed by additional grants related to population. States therefore award subgrants. Office on Violence Against Women, S-T-O-P Program Report, U.S. Dep’t of Justice 6 (2012), available at http://www.ovw.usdoj.gov/docs/stop-report-2012.pdf.

A particularly contentious aspect of what became law in 1994 was a new civil rights remedy, which provided victims of gendered violence with a cause of action to seek damages in federal court as well as in state court. 306 While supported by some 40 state attorneys general, opponents included the (male) leadership of the state and federal judiciaries—the same groups that had issued resolutions in favor of gender bias task forces.

The NAWJ was not the only judicial organization taking positions on this legislation. Exemplifying the normative content of views about the “administration of justice,” state and federal justices expressed concern about VAWA, which some viewed as authorizing too many potential claimants to seek remedies in court. In the early 1990s, the Chief Justice of Maine testified before Congress on behalf of the Chief Justices of the State Courts; he argued that if VAWA’s civil rights remedy was enacted, women in divorces might include allegations of violence as leverage, by shifting the venue from state to federal court. 307 Another outspoken critic was the Chief Justice of the United States Supreme Court, William Rehnquist, who registered concerns about bringing these new lawsuits in federal court. 308 As chair of the Judicial Conference, he appointed an ad-hoc committee to study the bill, and that group initially opposed VAWA’s civil rights remedy.

Thereafter, members of the NAWJ urged the U.S. Judicial Conference to reconsider its position. They worked on rewording the civil rights remedy to narrow its reach and, along with others, succeeded in persuading the Judicial Conference to withdraw its opposition, take no position on that facet of the bill, and support other provisions. 309

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307 McKusick commented: “If, as appears to be the case, Section 301 (c) permits suits against male relatives, particularly against husbands … 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 …” Violence Against Women: Victims of the System, Hearing on S. 15 Before the Senate Comm. on the Judiciary, 102d Cong. 10 (1991) 314 (statement by Hon. Vincent L. McKusick). See A Symposium Celebrating the Fifteenth Anniversary of the Violence Against Women Act and Honoring its Champion, Vice President Joe Biden, 11 GEO. J. GENDER & L. 511 (2010).
Should judges individually or collectively say anything about legislation protecting victims of gendered violence? Or of racial bias? Or about access to courts for tort and contract claimants? Sanctions such as the death penalty? Does it matter if they speak as representatives of a private group of judges or of a state or federal judicial system? Is addressing problems of access (opining for or against it) different from making rules to enable or disable class litigation that will (or will not) help people pool resources to get into courts? Or to be for or against indeterminate sentences?

The descriptive account I have given is that many U.S. judicial bodies have spoken out, on occasion, on all these issues. Normatively (as I have explained at length elsewhere\textsuperscript{310}), I believe it important to distinguish between individual judges and private organizations comprised of judges (such as the NAWJ and the Conference of Chief Justices of State Courts) and the public judicial councils (such as the Judicial Conference of the United States). Court systems ought to be formally agnostic about who comes before them, while private organizations of judges are not constrained in seeking to shape ideas about who should have access to courts for what kinds of injuries. Hence, official government judicial bodies ought not take positions about proposals for new substantive civil causes of action, criminalization, and the sanctions to impose. Of course, court procedures also have normative content that impact the pursuit of rights, and again official public bodies of judges need to be self-conscious about their role even as they need to participate (without unilateral control) in shaping the rules that govern their daily practices.

One reason for the official judicial bodies to stay silent on substantive legal rights is because the issues may (as they did in the example of VAWA) return in cases brought to their courts. After Congress enacted the legislation, a defendant in one of the federal lawsuits brought under VAWA argued that Congress had no authority to authorize victims of gender-motivated violence to bring claims to federal court. Chief Justice Rehnquist wrote the five-person majority decision in \textit{United States v. Morrison} that, in 2000, held unconstitutional this one facet of VAWA, and gave victims access to federal courts. The majority held that the Congress lacked the power under either the Commerce Clause or the Fourteenth Amendment to enact this provision.\textsuperscript{311}

Return then to the agenda-setting efforts of the NAWJ. In addition to endorsing the ERA and VAWA and helping to shape gender bias task forces, in 1991, NAWJ formed the Women in Prison Committee, focused on the myriad problems faced by

\textsuperscript{310} See Resnik, \textit{Constricting Remedies}, supra note 3; Resnik, \textit{Trial as Error}, supra note 3.

incarcerated women. In the mid-1990s, NAWJ issued statements that considerations for judges when sentencing prisoners ought to take into account a person’s status as a “primary or custodial parent” or as pregnant. NAWJ’s prison committee sponsored and joined workshops for incarcerated women about their parental rights. This committee also facilitated reading groups; coordinated methods for mothers and children to read the same books and correspond about them; provided career counseling; found clothes for women interviewing for jobs and, in 2013, sought to stop the closure of the sole major federal prison for women in the Northeast. In 2016, the NAWJ approved a resolution calling for “improvements in the conditions of women in prison”—including that they should be able to hug their children when they came to visit.

Having focused on the gender-focused NAWJ efforts, I need to underscore that, in many respects, the content of its meetings overlapped with what other judicial organizations addressed. The topics included access to courts; employment discrimination; domestic violence; trafficking; sexual harassment; feminist

312 NAWJ 25, supra note 229, at 49. Some members of the organization questioned whether the issue was within the organization’s jurisdiction. See Brenda P. Murray, We Have Met the Enemy and He Is Us, or Mover Over, Sisyphus, 51 Judges’ Journal 16 (2012).


314 Murray, supra note 312 at 16–17.


316 NAWJ website/Resolutions. The NAWJ urged “correctional authorities to implement positive policies and to cancel measures that limit phone calls and visitation days and prohibit inmates from touching minor children during visits” (approved Oct. 8, 2016).

317 On Oct 11, 1991, NAWJ passed an “emergency Resolution” calling on U.S. senators to recognize sexual harassment as a “pervasive problem” and to reflect that when considering the nomination, then pending, of Clarence Thomas to the U.S. Supreme Court. NAWJ 25, supra note 229, at 44. The following year, the NAWJ welcomed Anita Hill as a keynote speaker at their annual conference. NAWJ 25, id. at 46–47. Since the #MeToo Movement, NAWJ has engaged in education sessions and more programs on sexual harassment, see, e.g., National Association of Women Judges, #WeToo in the Legal Workplace (Mar. 21, 2019), https://www.nawj.org/uploads/files/monthly_update/referenced_docs/april_2019/ca_wetoo_program.pdf.
jurisprudence; immigration and the criminal justice system; the treatment of juveniles and of families; intersectionality; alternative dispute resolution; science, technology and the courts; the growing importance of the international and transnational legal arenas; and the conflicts about what U.S. constitutional law did and could mean. A revised 2019 NAWJ mission statement summarized the aims to be to “promote the judicial role of protecting the rights of individuals under the rule of law through strong, committed, diverse judicial leadership; fairness and equality in the courts; and equal access to justice.”

As this brief overview makes plain, the NAWJ followed a pattern of many judge-based organizations that have long taken on roles beyond case-by-case decision-making. What distinguished the NAWJ was its concern that contemporary legal understandings of equality were insufficient. Another difference was the focus on direct services. Many judicial organizations have made proposals related to incarcerated individuals. The NAWJ encouraged its membership to hold meetings with women prisoners to help them in writing resumes and applying for jobs, to join book clubs, and to encourage programs for incarcerated mothers to be able to read to their children.

No account of U.S. judicial norm entrepreneurship of the twentieth century would be complete without discussion of the attention paid to transnational exchanges. Like many U.S. judicial organizations, the NAWJ’s work has a global vector. Members of the NAWJ helped in 1991 to found IAWJ. Like its U.S. counterpart, the IAWJ defines itself as aiming to “pioneer judicial education programs to advance human rights, uproot gender bias from judicial systems, and

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318 In 1998, NAWJ’s by-laws were amended to create a Racial, Cultural and Sexual Orientation Discrimination Committee and the organization held programs called “The Color of Justice.” NAWJ 25, supra note 229, at 61.
319 In 1988, NAWJ affirmed a resolution calling for the United States to ratify CEDAW. NAWJ 25, supra note 229, at 35. The NAWJ also appointed a judge to serve as an “International Director.” Further, its 1989 conference was attended by 54 judges from 30 other countries. Id. at 38. In 1992, NAWJ’s annual conference “Transcending Borders” also was the site at which IAWJ, begun in 1991, had its inaugural conference, with 80 women from 32 countries in attendance. Id. at 47.
promote women’s access to courts” through developing “a global network of women judges” that fosters “judicial leadership and … judicial independence.”

The IAWJ, with some 6000 members, helped to spawn more than 55 national women judges associations. The logo from one, the Zambia Association of Women Judges, shown in Figure 6, offers another vision of the garb for the iconic Justice Virtue, draped and with a brightly colored kente cloth as the backdrop.

The IAWJ has hosted both regional and transnational conferences. The organization received grants to run seminars (“Towards a Jurisprudence of Equality”) in several African and South American countries, as well as funding

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322 Who We Are, INT’L ASS’N OF WOMEN JUDGES, http://www.iawj.org/who-we-are.html. As of 2019, the IAWJ counted almost 6000 members coming from more than 100 countries. Id.
323 This picture is a facsimile, made by Yale University Press, of cloth that was given to me and that has a repeat pattern of this image.
for “global leadership of women” trainings in South Asia and West Africa, and other programs on “sextortion.” The IAWJ has its own outreach. It has NGO status at the United Nations and has assisted academics in a collaboration, “Diffusing Equality: International Influences on Women’s Appointment to High Courts,” which aimed to create a global database of women’s appointments between 1970 and 2010 in 168 countries to assess how norms that press for women as jurists are developed and spread.

One can glean from this work that the struggle for courts’ identity exists all over the world. Some judges worried that were they to be seen as working in the name of women, they might stymie their careers. An account of the establishment of the Canadian Judges Association in 1994 underscored the importance of forming identity-based groups in a way that are not exclusive. When some women from Canada created its national group, they reported encountering opposition to what was perceived to be a “separate entity from our male colleagues.” The resulting Canadian chapter of the IAWJ adopted by-laws in 1995 that are clear all persons are welcome as members.

C Affirmative Action and Backlash

The creation of task forces on fairness came from concerns about the legitimacy of judicial power. Critiques of those task forces also argue about legitimacy as object to courts’ focus on the demography of the participants. A vivid example emerged in the mid-1990s when a federal appellate judge derided the federal circuit for the

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326 In 2009, the IAWJ gained recognition as a Special Consultant to the Economic and Social Council of the United Nations (ECOSSOC). Pacht, supra note 321, at 15.
327 The grant, to four professors (Maria Escobar-Lemmon, Valerie Hoekstra, Alice Kang, and Miki Kittilson) in the United States, was awarded by the National Science Foundation. Award Abstract #1323949, Nat’l Sci. Found., http://nsf.gov/awardsearch/showAward?AWD_ID=1323949 (update/on web after 2013?).
328 Brenda Murray, chief judge of the SEC and president of the NAWJ in 1992, commented that she was not “sure those of today have the courage that some of [the members] had in the very, very beginning.” NAWJ 25, supra note 229, at 50.
330 Id.
331 Id.
District of Columbia for launching a Task Force on Gender, Race, and Ethnic Bias.\footnote{Silberman, The D.C. Circuit Task Force on Gender, Race and Ethnic Bias: Political Correctness Rebuffed, supra note 235, at 15.} He explained:

We were to be influenced—perhaps bludgeoned is more correct—to accept a profound change in outlook that would ultimately be expected to affect our substantive decisions ... [I]t is nothing less than frightening that a powerful ideological movement with hard political overtones could have come so close in its efforts to intimidate the federal judiciary ... This misconceived effort should never have been launched in any circuit. It should be opposed everywhere.\footnote{Id. at 22.}

This judge leveled many objections including that such efforts were “far removed from the normal business of judges.”\footnote{Id. at 15.} Further, he argued that no attention should be paid to selection “in accordance with ‘diversity’ criteria,”\footnote{Id. at 15.} and no inquiries ought to be made of lawyers and judges. Doing so “was a profound attack on judicial independence.”\footnote{Id. In an effort to substantiate his critique, he obtained analysis of the work from a Harvard professor, who provided “a devastating attack on Task Force methodology.” Id. at 16; see Stephen Thernstrom, Critical Observations on the Draft Final Report of the Special Committee on Race and Ethnicity in the D.C. Task Force on Gender, Race, and Ethnic Bias, 1995 PUB. INT. L. REP. 119 (1995).} Other judges on his court joined in statements of “disassociation.”\footnote{Id.} They helped to propel members of the U.S. Senate to criticize the work on the floor of the Senate and to launch an investigation by the General Accounting (now Accountability) Office. The judge later claimed success; he argued that he had contributed to ending the “turmoil” and therefore a “bullet” had been dodged.\footnote{Id.} Yet the underlying problem, he argued, was that academics and lawyers pressing these efforts believed that “sex and race proportional representation (sometimes referred to as diversity and sometimes referred to as affirmative action) was a moral imperative.”\footnote{Id. at 17.}

As explained, this judge was not correct in calling task forces “far afield” from normal business; federal and state judiciaries have commissioned legions of studies and convened working groups on an array of topics. But he was right that bias task forces were part of a project of affirmative action, which had been taken up by an array of institutions. From the 1960s through close to the century’s end, affirmative action was seen as a desirable and, in some contexts, a relatively ordinary response to histories of subordination. Task forces were one example of
why thinking about how race and gender could identify dynamics and enable the attention paid to mitigate some of those harms.\footnote{340}

Indeed, when the federal courts themselves were challenged for discriminating in employment, the Judicial Conference responded in 1979 by creating its own “affirmative action plan.” That effort’s changing names—in 1986 to an “Equal Opportunity Plan,” and then to an “Employment Fairness Plan”\footnote{341}—reflected the move away from affirmative action, and the absence of dissemination of more recent data is yet another marker of that shift.

But in more recent decades, opponents of this remedy succeeded in reconceptualizing it as an extraordinary act in need of extensive explanation.\footnote{342} Federal courts have held that forms of affirmative action—including in the context of judicial selection—were unlawful. An example comes from a federal trial judge

\footnote{340}{See generally Ofra Bloch, Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher, 20 U. PA. J. CONST. L. 1145 (2018); Reva Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 YALE. L.J. 1278 (2011).}

\footnote{341}{In 1979, the Judicial Conference of the United States, which is the federal judiciary’s policy-making body, resolved to require “an analysis and evaluation” of the implementation of the federal Equal Employment Opportunity Program, which focused both on the hiring of courts’ staff and “judicial officers,” including life-tenured and statutory judges. See Equal Employment Opportunity, in Report of the Proceedings of the Judicial Conference of the United States, Sept. 19, 20, 1979 at 58. The Conference reported it did so in response to a “Petition Seeking the Adoption of Equal Employment Opportunity Plans by the Federal Judiciary,” filed by “twelve organizations representing minorities,” and based on a “survey by the Southern Regional Council” that asserted that “both women and blacks” were denied equal employment opportunity by the “federal courts in the South.” The Judicial Conference therefore directed its administrators to prepare “a model affirmative action plan” for each federal court to adopt. Id. In 1980, the Conference required each federal court to submit annual implementation reports “of its affirmative action plan.” Report of the Proceedings of the Judicial Conference of the United States, March 5–6, 1980, at 5. In 1986, the model plan was renamed the “Equal Employment Opportunity Plan.” The report noted it reflected that the judiciary followed the Executive in prohibiting age discrimination and that not all reports need to be “reprinted in a costly annual volume.” Report of the Proceedings of the Judicial Conference of the United States, Sept. 18, 19, 1986 at 57–58. By 2006, the data were compiled under the rubric of “Fair Employment Practices.” Report of the Proceedings of the Judicial Conference of the United States, Sept. 19, 2006, at 28.}

\footnote{342}{The arc of that change is mapped in Siegel, Equality Divided, supra note 106. This response makes efforts—such as pressing for parity for women and men on the bench or elsewhere—unlikely in the United States. Compare Kate Malleson, Gender Quotes for the Judiciary in England and Wales, in GENDER AND JUDGING, supra note 110, at 481–499. See also Ruth Rubio-Marin, A New European Parity-Democracy Sex Equality Model and Why It Won’t Fly in the United States, 60 AM. J. CONST. LAW 99 (2012).}
who ruled unconstitutional a Florida statute on the selection of judges. As a result of that state’s work on gender, race, and ethnic bias in the courts, the Florida legislature had revised its selection process. Florida had a nine—person Judicial Nominating Commission, with three members selected by the Florida Bar, and three by the courts; those six were then in turn to pick three more commissioners. The statute required that in each set of three, one “must be a member of a racial or ethnic minority or a woman.”

Drafters of this statute had not focused on what feminist theory and practice considers central: intersectionality; to use the phrase “minority or a woman” is to ignore the many women who are both. Yet when I tried to learn about the impact of the statute during its brief existence, I was told that panels composed pursuant to its rules nominated more women and men of all colors than had been the case before. Whatever its long-range impact might have been, in 1995, a federal district judge struck down the statute as violating the Equal Protection rights of a white man who had sought to be chosen by the Florida Bar to sit on a Judicial Nominating Commission and argued that his non-selection was based on his sex and race.

The decision is one way to provide an abbreviated account of how, as of this writing, U.S. equal protection law came to treat remedial race and gender-based classifications as constitutionally suspect. In 1995, the federal trial judge concluded that the state had failed to prove a compelling state interest (he noted that, at most, some “correlation” existed between the lack of minorities involved in selection and the lack of minorities sitting), and no “direct findings of racial bias” sustained proof of past discrimination. Further, while reflecting the “good intentions of the legislature,” the statute was not “narrowly tailored to achieve its intended goal.” The judge objected to treating “women and minorities as fungible groups” and to what he termed the “absolute quota” (although the statute appeared to set a floor, not a ceiling) that, he held, had no nexus to the statutory


344 Fla. Stat. section 43.29, amended Oct. 1, 1991. The current statute retains language that advocates for diversity on the bar commission that appoints judges: “In making an appointment, the Governor shall seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered. The Governor shall also consider the adequacy of representation of each county within the judicial circuit.” Fla. Stat. section 43.291, added June 19, 2001.

345 Mallory v. Harkness, 895 F. Supp. 1556, 1558 (S.D. Fla., 1995), aff’d on the award of attorney’s fees, 109 F.3d 771 (Table) (11th Cir. 1997).


347 Id.
remedy.\textsuperscript{348} Less “intrusive measures,” such as calling for consideration of diversity and outreach, existed—making a specific, unending provision unacceptable.\textsuperscript{349}

That lower court jurist relied on Supreme Court law that has since become even less hospitable to affirmative action. The Court addressed the issue in 2013 in \textit{Fisher v. University of Texas}, in which a “Caucasian applicant” denied admission to the state university alleged that the university had illegally used race as a part of its process when considering individuals to admit.\textsuperscript{350} The lower court had deferred to the University of Texas, which had explained that it used race as one of many factors because of what it understood to be a constitutionally-sanctioned interest in a diverse student body.\textsuperscript{351} The Supreme Court sent the case back to the lower courts with instructions to reconsider the deference that had been paid to the University’s explanation of the plan’s legitimacy and necessity.

As Justice Kennedy explained in 2013 for the Court:

Judicial review must begin from the position that “any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.” \textellipsis A university is not permitted to define diversity as “some specified percentage of a particular group merely because of its race or ethnic origin.” \textellipsis Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.\textsuperscript{352}

Justice Thomas would have gone further and held “that a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”\textsuperscript{353} On remand, the Fifth Circuit once again upheld the University of Texas at Austin’s admissions policy, which the Supreme Court affirmed in 2016.\textsuperscript{354} \textit{Fisher} is one of several challenges, organized and funded by organizations that seek to persuade judges and legislatures to rule affirmative action illegal.\textsuperscript{355}

\begin{itemize}
\item \textsuperscript{348} \textit{Mallory}, 895 F. Supp. at 1561.
\item \textsuperscript{349} \textit{Mallory}, 895 F. Supp. at 1561–63.
\item \textsuperscript{350} \textit{Fisher v. U. of Texas at Austin}, 133 S. Ct. 2411 (2013).
\item \textsuperscript{351} \textit{Fisher}, 133 S. Ct. at 2416–2417. The University detailed that using only a “Top Ten Percent Law” to select students from high schools had not produced a freshman class with as many African American and Hispanic members as the University thought necessary to generate a diverse environment. \textit{Id}.
\item \textsuperscript{352} \textit{Fisher}, 133 S. Ct. at 2421.
\item \textsuperscript{353} \textit{Fisher}, 133 S. Ct. at 2422 (Thomas, J., concurring).
\item \textsuperscript{354} \textit{Fisher v. University of Texas}, 136 S. Ct. 2198 (2016) (\textit{Fisher II}).
\end{itemize}
D Reconfiguring Courts’ Identity through Privatization and Outsourcing

The identity of courts comes from their jurisdiction, personnel, litigants, projects, and practices. Another arena of conflict, therefore, is who gets into court and what procedures judges use.

The wave of door-opening statutes and court rulings of the 1960s and 1970s were complemented by rules and statutes to facilitate access. More recent efforts aim to cabin access and to oppose judiciaries for rulings perceived to be against their interests. For example, the U.S. Chamber of Commerce promoted an anti-regulatory regime designed to circumscribe the role for courts in overseeing commercial transactions and in responding to claims of illegality brought by employees and consumers.356 Another organization, the American Tort Reform Foundation, which began in 1986, issues annual reports on what it terms “judicial hellholes,” referencing individual judges or jurisdictions that the Foundation perceives to be favorable to plaintiffs seeking remedies for injuries.357

My invocation to the Chamber of Commerce and the American Tort Reform Foundation reflects that the growth in and debate among lawyer-judge organizations is part of a more general conflict about the “rights revolution” of the twentieth century and the role of courts. Proponents of affirmative action in admissions or employment, remedies for violence against women, the Civil Gideon movement, and task forces about bias in courts insist on state provisioning to interrupt patterns of inequality and subordination. Opponents argue that doing so undermines both liberty and the economy and that to focus on racial and gender identity is to reify them.


These debates have taken place in many arenas. In courts, conflicts over affirmative action intersected with rising caseloads and new technologies. During some decades, when the numbers of claimants grew, governments commissioned more judgeships, supported new construction of courthouses and, at times, shaped new procedures for the unrepresented and made provisions for fee waivers. Judges and lawyers also proposed different procedures in courts and more venues for adjudication, such as devolution to administrative tribunals and outsourcing to private providers. The acronyms ADR (alternative dispute resolution) and ODR (online dispute resolution) capture some of these shifts.

Various arguments are made on behalf of such innovations. One account is that it is a response to systemic overload and a frankly second-best solution, as governments cannot support all those who seek to use their courts (or their roads, health systems, and the like). But another is that ADR and ODR are better than courts—more accurate, less expensive, more generative, and user-friendly. Settlement and negotiation efforts were once categorized as “extra-judicial” activities but, by the 1990s, had become part of what judges did. By 2019, many court rules encouraged or mandated litigants to make efforts at private accommodations (settlements and plea-bargaining) as well as to use private providers.

This diffusion and the resulting fragmentation and privatization of adjudication have profound implications for the democratic character of courts. Legitimacy has stemmed from judiciaries that enable claimants to seek help publicly in a manner that provides accountability for judges, who are obliged to make much of what they do public. Yet in recent decades, a majority of the U.S. Supreme Court has licensed a significant retreat from that model through its interpretation of a 1925 statute, the Federal Arbitration Act (FAA). When pressed in the 1920s by bar and business associations, the legislation was explained as enabling businesses to decide to opt out of court; the FAA required federal courts to enforce contracts to use private arbitrators rather than courts.

The model was business-to-business. Thus, concerned about unequal bargaining power and the flexibility of arbitration, the Supreme Court limited the

ability of providers of goods and services to yoke their customers to arbitration.\footnote{See Wilko v. Swan, 346 U.S. 427 (1953).} That approach governed until the 1980s when the Supreme Court began its reinter-
pretation of the 1925 statute. The Court has since permitted employers and manufacturers to mandate that employees and consumers use arbitration. In 2011, the Court held that arbitration clauses can also ban class or other collective actions, in courts or arbitration. In 2018, the Court ruled that employees could be required, as a condition of continued employment, to waive all rights to collective action (whether in courts or arbitration) and proceed, if at all, in private and single-file in the venue chosen by their opposing employer.\footnote{Lewis v. Epic Systems Corporation, 138 S. Ct. 1612 (2018).}

A part of the explanation proffered was that arbitration was a speedy and effective alternative to courts. Yet the mass production of arbitration clauses has not resulted in a massive number of arbitrations. Instead, the number of documented consumer arbitrations is startlingly small. Arbitrations involving wireless service providers is the example I have chosen because the Supreme Court addressed the ban on class arbitrations in that context in its 2011 decision involving AT&T Mobility.\footnote{See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011).} According to information from the American Arbitration Association, which is designated by AT&T to administer its arbitrations and which complies with state reporting mandates, 134 individual claims (about 27 a year) were filed against AT&T between 2009 and 2014.\footnote{Details of the data collection and analysis can be found in Resnik, Diffusing Disputes, supra note 360. Updated analysis in Resnik, A2J/A2K, supra note 152.} During that time period, the estimated number of AT&T wireless customers rose from 85 million a year to 120 million people, and lawsuits filed by the federal government charged the company with a range of legal breaches, including systematic overcharging for extra services and insufficient payments of refunds when customers complained.

More recent analyses provide similar findings, yet companies writing arbitration mandates sometimes add non-disclosure requirements.\footnote{Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge (with Stephanie Garlock & Annie J. Wang), 24 LEWIS & CLARK L. REV. 611 (2020).} As I explain elsewhere, some aggregators lawyers and others have entered the market to file many arbitration claims against companies. The silencing provisions seek to suppress such filings.

Recall the sketch of the constitutional law that addresses fee waivers in courts. With the exception of the California, which has a statute mandating that consumer arbitration providers waive fees, private dispute resolution does not have legal obligations to waive fees. Furthermore, the public has no right to attend, and absent statutes to impose disclosure requirements or targeted (and sometimes
funded) research, the public has no way to learn the outcomes of the few arbitrations that take place.

The promotion by the Supreme Court of barriers to entering both state and federal court is part of the social and political movement that aims to limit the reach of courts and succeeds in part through putting people committed to those views on the courts. Doing so aborts questions of the need to equip users, as the private processes have not (yet) been obliged to accord fee waivers or subsidies. Moreover, the public has nothing to see and hence whatever critiques or praise that might flow is silenced.

This anti-adjudication posture is becoming part of the identity of the federal courts, which are increasingly seen as inhospitable to certain sets of rights claimants. The struggle over the privatization of procedure *in* court and court mandates to use private providers *in lieu of* court is part of the struggle over what “the administration of justice” entails.

**V Vulnerable Institutions**

The demands for equality have affected courts in many ways. In this article, I have focused on four markers of change. One is that the people occupying the role of judge are no longer only white men. The second is the entry of large numbers of people who gained formal recognition as entitled to law’s protection but who lack resources to pursue claims and can, when brought into court, be assessed fees and fines that they have no ability to pay. A third is the restructuring of judiciaries that provided means for setting agendas and proposing reforms. The fourth is the transformation in the processes of judging and its outsourcing to other venues.

By way of a brief conclusion, I summarize some of the lessons to be drawn from the contemporary proud display of a more diverse bench. One is straightforward: the new demography of the bench embodies the proposition that people of all genders and races can hold rights and exercise authority. Another is that changing demographics mark more than a broadening of access to the power held by judges. The insistent accounting of gender and race reflects a normative shift in metrics of legitimacy for courts. Judiciaries now seek to derive their own identity and authority from expressed commitments to the egalitarianism made material through the bodies on the bench.

But what is the relationship between demographic diversity and judicial legitimacy? Some theorists of representation take the presence of diverse peoples on a bench as evidence that systems of subordination have been limited. Others make empirical claims that the processes of judging and outcomes are better because of the entrance of the previously excluded. Despite concerns about essentialism and about blurring correlation and causation, a growing literature is
preoccupied with studying whether women judges function differently than their male counterparts in terms of case outcomes or processes. Yet the small sample size and the multiple variables make substantiation of that impact tenuous.

I have argued that evidence of the “difference that difference makes” comes from a less studied aspect of judicial work—the projects, rules, and practices that judiciaries craft in their corporate capacity. Identity-based organizations—such as the National Association of Women Judges—pressed court systems to research how gender, race, and ethnic biases affect their functioning. Dozens of court-authorized reports found problems of “fairness,” and some changes in rules and practices followed. Legal rules that discounted women’s testimony changed, and ethical canons were revised to preclude judges from belonging to clubs that excluded people based on gender, race, religion, or ethnicity.

The opposition to such efforts underscores the ongoing struggle over judicial identity and legitimacy. When theorizing the work of judges and arguing for substantive equality, Ronald Dworkin described it as a Herculean task. He imagined a singularly competent judge, sometimes aided by another, Hermes, with infinite time, integrity, and great insight. I have also invoked images through the female form called the Virtue Justice. Yet, I have argued that rather than look for one heroic gendered figure, we need to train our eye on collective action.

Moreover, the attention paid to the demography of judges on courts needs to be coupled with interrogating the needs of participants in courts. Even as the presence of women and men of all colors as judges represents new ideas about equality, the materialization is radically incomplete. Most people trying to use courts are limited in the means and resources to do so, burdened by court debt, or blocked from access by private sector actors that mandate single-file use of privatized systems. The limited economic wherewithal of so many participants haunts the fairness of courts.

The account of diversity in courts is, as I have detailed, part of the account of efforts to end discrimination outside of courts, just as conflicts about stopping such interventions in court are linked to the debates about similar measures in other arenas of the social order. At issue is whether governments have positive obligations to provide services and protections through, in this context, subsidizing courts and their users, finding ways to curb identity-biased violence, and shaping programs to welcome women and men of all colors in all roles within judiciaries. The ongoing debates are about what “equal justice under law” substantively entails and about whether reliance on courts to contribute to such equality will continue. The identity and legitimacy of courts is hanging not only on the coherence of the image of a balance but also on political conceptions of the function of governments.

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My understanding of equality’s frontiers has been enriched by the jurisprudence of Ruth Bader Ginsburg, who was one of the founders of the Section on Women and Legal Education of the American Association of Law Schools as well as the founder of the ACLU Women’s Rights Project. I have also had the good fortune to know and learn from four other pioneering women, Barbara Babcock, Herma Hill Kay, Deborah Rhode, and Pat Wald, who likewise insisted that law and legal education attend to the challenges of equality and who lived to see the impact of their insights and efforts. I have participated in some of the organizations and activities discussed and learned a great deal from doing so. I am a Managerial Trustee of the International Association of Women Judges, and I served as a co-chair of the Judicial-Academic Network of the National Association of Women Judges. I also joined other law professors in submitting a brief in support of the constitutionality of the civil rights remedy of the Violence Against Women Act. Further, as an appointed member in the 1990s of the Ninth Circuit Gender Bias Task Force, I helped frame its work, often in coordination with Lynn Hecht Schafran, who has been central to such undertakings in many jurisdictions. I have also been part of projects of the American Academy of Arts and Sciences on the inaccessibility of civil justice systems, and work of the Arthur Liman Center for Public Interest Law, in conjunction with U.C. Berkeley’s Policy Advocacy Clinic and the Fines and Fees Justice Center, on economic inequality and the courts.
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