

HOUSEKEEPING: THE NATURE AND ALLOCATION OF WORK IN FEDERAL TRIAL COURTS

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Those who would codify the meaning of words fight a losing battle, for words, like the ideas and things they are meant to signify, have a history.

JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* 29 (1988).

I. DEFINING "THE FEDERAL COURTS"

This lecture, entitled "Housekeeping: The Nature and Allocation of Work in the Federal Trial Courts," is the seventy-third in the series named for John Sibley, a distinguished graduate of this law school.¹ As only the second woman to give a Sibley lecture here,² I am pleased that this lecture is published as a part of a symposium on Feminist Jurisprudence. As the title of this talk suggests, my project (of which this is a piece) is to examine the ways in which constructions and understandings of value—of what work and activities are important and what are less important—operate in the allocation of jurisdiction and authority in federal trial courts.

Use of the phrase "the federal courts" requires explanation. The

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¹ Pope Brock, *New U. Ga. Law Professorships Honor John Sibley*, *The Daily News* (Athens, Ga.) Jan. 5, 1986, at 7, col. 1. My thanks to Jill Birch, Director of Alumni Affairs and Development, for providing me with information about Mr. Sibley.

² Ruth Bader Ginsburg being, once again, the first. See generally Deborah H. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 *WOMEN'S RTS. L. REP.* 73 (1989).

topic of "the federal courts" as an object of scholarly inquiry is a relatively recent one. In 1953, Henry Hart and Herbert Wechsler—building on the work of Felix Frankfurter, James Landis, Wilbur Katz, and Harry Schulman³—wrote a book entitled *The Federal Courts and the Federal System*.⁴ That title used the words "the federal courts" to denote a discussion principally focused on the jurisdictional authority of judges who, upon nomination by the President and consent of the Senate, are appointed pursuant to Article III of the Constitution and enjoy life tenure and salaries protected from diminution by Congress.⁵

Today, almost forty years later, the words "the federal courts" and "the federal judiciary" are still commonly used to refer to that set of judges who have life tenure ("Article III judges"), but the equation is imprecise. "The federal courts" are also populated by other "federal judges"—who work within the judicial branch but who are creatures of congressional legislation. This group, loosely (and, arguably, technically inaccurately) denominated "Article I judges,"⁶ is comprised of bankruptcy judges and magistrates, all of

³ FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928); FELIX FRANKFURTER & WILBER G. KATZ, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (1931); FELIX FRANKFURTER & HARRY SCHULMAN, *CASES AND AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (rev. ed. 1937). See generally Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 681-87 (1989); Ahkil Reed Amar, *Law Story* (Book Review), 102 HARV. L. REV. 688 (1989) (reviewing PAUL M. BATOR, PAUL J. MISHKIN, DANIEL J. MELTZER, & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988) [hereinafter HART AND WECHSLER]).

⁴ HART AND WECHSLER, *supra* note 3.

⁵ U.S. CONST. art. III, §§ 1-2.

⁶ I use the phrase "Article I judges" to embrace those judgeships created by Congress but lacking the Article III requirements of life tenure and salary protections. Some argue that, because both magistrates and bankruptcy judges work *within* the judicial branch, as "adjuncts" to or "units" of Article III courts, magistrates and bankruptcy judges are not Article I judges who (under this rubric) consist solely of those who work in agencies or other institutions, such as the military. With such distinctions, some judges may also appropriately be described as "Article II judges." See *United States v. Tiede*, 86 F.R.D. 227 (U.S. Court for Berlin 1979) (trial conducted by United States, under aegis of State Department, of individuals who hijacked a plane and landed in what was then West Berlin). One phrase to capture all these variations would be to call these judges "non-Article III judges." Instead, I will use "Article I" as the generic, which, at least as of this writing, captures much of the Supreme Court jurisprudential approach about the extent to which Congress can create judgeships that lack Article III attributes. See, for example, *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), both of which draw on cases about the constitutionality of Article I courts to analyze the constitutionality of congressional grants of power to bankruptcy courts.

whom lack life tenure and constitutionally protected salaries.

There are 575 Article III trial judges.⁷ There are 477 authorized positions for federal magistrates, of which 307 are full-time jobs. Magistrates are appointed by Article III trial judges and serve for a term of eight years.⁸ There are another 291 authorized full-time bankruptcy judges, who are appointed by Article III appellate judges and who serve for fourteen-year terms.⁹ "Federal adjudication" also occurs in federal agencies, where 1116 administrative law judges conduct hearings, make factual findings, and apply law to fact to render decisions.¹⁰

While the 575 Article III trial judges receive filings in some 235,000 civil cases and 46,000 criminal cases a year,¹¹ federal bankruptcy judges hear some 600,000 petitions a year, and relatively few of those cases are seen by Article III judges.¹² As of 1987, fed-

⁷ 1989 ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 46 [hereinafter 1989 ADMIN. OFFICE REPORT].

⁸ 28 U.S.C. § 631(a), (e) (1988). One hundred sixty-one positions are part-time and nine are "combined" positions that include duties of court clerks and magistrates. 1989 ADMIN. OFFICE REPORT, *supra* note 7, at 47. See CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES (1990) [hereinafter CHRISTOPHER E. SMITH, SUBORDINATE JUDGES].

⁹ 28 U.S.C. §§ 152(a)(1)-(2), 153(a) (1988); 1989 JUDICIARY EQUAL EMPLOYMENT OPPORTUNITY (EEO) PROGRAM ANN. REP. (prelim. ed.) [hereinafter 1989 EEO REPORT]. As of June 1990, 287 positions have been filled. The Equal Employment and Special Projects Office "develops procedures and monitors programs and policies of the Judicial Conference—including providing advice on the operation of affirmative action plans and discrimination complaint procedures in the courts." *Id.*

¹⁰ Of the 1116 Administrative Law Judges, 802 are with the Social Security Administration. OFFICE OF ADMIN. LAW JUDGES, OFFICE OF PERSONNEL MANAGEMENT, STATISTICS (July 20, 1990) (on file with author). For descriptions of efforts to establish administrative law judgeships which are "independent" of particular agencies, see Nahum Litt & Joseph J. Simeone, *An Administrative Law Judge Corps: Its Value and Relation to the Traditional System of Justice*, 11 WHITTIER L. REV. 569 (1989) (describing S. 594, 99th Cong., 2d Sess., 135 CONG. REC. 2710 (1989) (Admin. Law Judges Corps Act)). For discussion of the history and selection of administrative law judges, see Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 FED. ADMIN. L. REV. 109 (1981).

¹¹ 1989 ADMIN. OFFICE REPORT, *supra* note 7, at 11.

¹² For the year ending June 30, 1989, bankruptcy courts received 642,933 petitions. *Id.* at 26-27. During that year, Article III district judges considered 5558 bankruptcy cases, 4117 of which were described as "appeals," while 1441 were cases in which a referral from a district court to a bankruptcy court was withdrawn. *Id.* at 177. In addition, the Ninth Circuit instituted an experiment, authorized by 28 U.S.C. § 158(b) (1988), that created bankruptcy appellate panels ("BAPs") which are three-member panels of bankruptcy judges that heard "appeals" in lieu of district court judges. FEDERAL COURTS STUDY COMM. REPORT 74 (Apr. 2, 1990) [hereinafter FCSC REPORT]. In 1989, 1134 cases were filed before the BAPs of which 475 were referred back to the district courts. Conversation with staff member, Administra-

eral magistrates presided over some 500,000 judicial proceedings; they conducted 134,000 preliminary hearings in felony cases, took references from Article III judges to consider 197,000 civil and criminal pretrial issues, considered 6500 social security "appeals" and 27,000 prisoner filings, and "tried more than 95,000 misdemeanors and 4900 civil cases on consent of the parties."¹³ Federal administrative law judges have a docket greater than that of the Article III judiciary; for example, administrative law judges in the Social Security Administration heard more than 250,000 cases in 1987.¹⁴

In short, "the federal courts" include many "judges" who lack life tenure. At the trial level, non-tenured bankruptcy judges and magistrates outnumber the tenured Article III judges and do a vast amount of adjudicatory work. The growth of federal judicial business and the proliferation of federal judicial institutions—both twentieth-century phenomena¹⁵—prompt questions about "the federal courts," about how to allocate work among the different judges, and about what meaning and value to accord such work. The development of new tiers of trial court decisionmakers and the hierarchies currently being etched into federal trial court structures are the core of my concerns.

In one respect, these are constitutional questions: a spate of Supreme Court cases examine the constitutionality of congressional schemes that create judicial officers who lack the Article III attributes of life tenure and salary guarantee but nonetheless decide fed-

tive Office of the U.S. Courts, Bankr. Division (Aug. 3, 1990). See generally Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 B.Y.U. L. Rev. 545, 546, 554-58. At the circuit level, all the circuits received 1130 appeals in 1989.

¹³ S. REP. NO. 293, 100th Cong., 2d Sess. 7 (1988), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5564, 5565. In 1989, federal magistrates conducted trials in 5354 civil consent cases and handled 117,804 civil matters of which 6721 were social security cases (probably the same category of cases as the "social security appeals" referred to in the 1988 congressional hearings). 1989 ADMIN. OFFICE REPORT, *supra* note 7, at 29-33.

¹⁴ Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. Rev. 461, 481.

¹⁵ See generally WOLF HEYDERBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* 1 (1990) ("quiet revolution" has occurred consisting of changes in "the forms of case disposition," in the "growth in the range, variability, and complexity of demands on federal district courts as well as the addition of a host of new organizational actors, including court managers, computer experts, parajudges, and support staff").

eral cases. I am *not* going to explore the interstices of these cases.¹⁶ I am, instead, interested in the construction of the value of the work of the various sets of judges—what is deemed worthy work for Article III judges, what role is accorded non-Article III judges, and what explanations are offered about the assignments of differently chartered judges.

My interest in the allocation and value of work assignments brings me to the other part of the title of this lecture: “housekeeping.” Although it may surprise those not steeped in discussions of “the federal courts,” the word “housekeeping” is used with fair frequency in the federal courts. In this, the latter part of the twentieth century, the term “housekeeping”—as a description of certain kinds of judicial or legislative decisions—has become quite common, but *when* that label attached has not been the source of inquiry. My purpose here is to chart the changing use over the past two centuries of the term “housekeeping” in “the federal courts.” As is developed below, that deployment is complex; Article III judges sometimes use the term to claim statutes, rules, and practices to be “housekeeping,” sometimes dismiss them as “mere housekeeping,” and sometimes describe them as the opposite of “housekeeping.” Some “housekeeping” is the routine; some of it the unimportant, and some of it work that may be important but to which not too much attention need be paid. Only during the last few decades has the label “housekeeping” come to be used to trivialize—to allege that a given statute/rule/practice is less important than another to which it is compared and to divert attention away from the nature and meaning of the “housekeeping” practice in question—even as that practice, so labeled, may then be followed.

This lecture cannot convey all of the richness of the usage of “housekeeping” nor all its variations. Further, “housekeeping” captures some but not all of the aspects of the hierarchy-in-the-making in the federal trial courts. But juxtaposing the ways in which the word “housekeeping” has been used against the ways in which work is allocated among federal trial court judges underscores the divisions of labor now in development and the value be-

¹⁶ See generally Richard Fallon, *Of Legislative Courts, Administrative Agencies, And Article III*, 101 HARV. L. REV. 915 (1988); Daniel Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291 (1990); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 COLO. L. REV. 581 (1985).

ing assigned to the daily work of interacting with litigants and lawyers. The activities most dependent on interactions (often messy, sometimes contentious, occasionally rewarding) with litigants and lawyers are those undertaken by the trial bench, Article III or Article I. Those activities are the ones to which less political and academic attention is being paid; current proposals would increase the distance of the more elite judges from that work. As "housekeeping" became the province for women during the nineteenth century, and as women's province was devalued, so are the activities of trial court judges increasingly becoming the domain of Article I judges and so is that province being devalued and ignored. Responses to women's devaluation include seeking access to some aspects of the male world that have been blocked, demanding that men do some of the work assigned to women, and arguing for appreciation of the value of work associated with women; the possibility of a parallel reallocation and reevaluation of work between Article I and Article III judges is a topic for another essay. My purpose here is to map the hierarchy and valuations being made and to question their wisdom.

II. AFFIXING THE LABEL "HOUSEKEEPING"

In discussions of federal courts and procedure, a stock term is available (if one chooses to use it) to describe some practice or rule as unimportant, trivial, or not worthy of much attention. One can say: that is a "housekeeping rule." For example, when Justices Black and Douglas dissented in the 1960s from the promulgation of amendments to the Federal Rules of Civil Procedure on the grounds that such rulemaking authority was inappropriately lodged with the Supreme Court, the justices wrote:

We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation ¹⁷

This "housekeeping" is to be distinguished from other activity that is more substantive and consequential. Those of us who have kept

¹⁷ Statement of Justice Black and Justice Douglas on the Promulgation of Amendments to the Federal Rules of Civil Procedure, 374 U.S. 865, 865-66 (1963) (footnote omitted).

house or who have shared the tasks of housekeeping do not necessarily find comfortable the use of the term "housekeeping" to mean an activity of subordinate importance. By looking more closely at how the actual word "housekeeping" has been used over time by Article III judges in the federal courts, one can trace the changes in use. By looking beyond Article III judges to the culture of which they are a part, one can explain, in part, how "housekeeping" could become an adjective of trivialization.

A. *Tracking the Use of the Word "Housekeeping"*

With the miracles of computers and data bases,¹⁸ it is possible to find the cases in which Article III judges used the word "housekeeping" and to learn whether the usage has changed over time. Because the United States Supreme Court issues fewer opinions than the lower federal courts, tracing its use of the word "housekeeping" is somewhat easier than tracing lower Article III judges' use of the word. From its first term until March of 1990, the United States Supreme Court has used the word "housekeeping" in forty-four cases.¹⁹ The first use that we (Rosalie Murphy, Joan Schaffner, and I) could find was in 1826; from then until 1944, the Supreme Court used the word "housekeeping" in only eight cases.²⁰ In each use, the reference was to the literal activity of keeping house.

¹⁸ And with the extraordinary assistance of Rosalie Murphy and Joan Schaffner.

¹⁹ Westlaw has two United States Supreme Court data bases; one is from 1789 to 1944 and the second is from 1945 to the present. The number comes from looking for the word "housekeeping" or "house-keeping" in only the text of the opinion, rather than in either the headnotes or the syllabus which are not written by members of the Court. For Supreme Court cases, our search of the second period spanned from 1945 until March 17, 1990; for the lower courts, the search included cases published and reported on Westlaw as of March 10, 1990.

²⁰ First use: *Shelby v. Guy*, 24 U.S. (11 Wheat.) 361 (1826). See *infra* note 23. In two additional cases, the word "housekeeping" appears in the syllabus of the case, but not in the opinions. See *Harkness & Wife v. Underhill*, 66 U.S. (1 Black) 316 (1861); *Suydam v. Williamson*, 61 U.S. (21 How.) 427 (1857) (both of which use the word in the sense of one who keeps a house).

At a glance, it looks like the Supreme Court used the word "housekeeping" in more cases in the last 45 years than in the rest of its tenure. In an absolute sense, the Court wrote the word "housekeeping" in more cases from 1945-1990 than it had from 1789-1944. However, the length of opinions authored by the Supreme Court have also grown over the last four decades, so the use of any word may well have increased with the increased volume of writings. My interest is not in the frequency of use but in the nature of the use; as a consequence, I have not attempted to gather data to address the frequency-of-use question.

For example, a few cases deal with ownership of land obtained by virtue of congressional acts giving rights to "settlers on public lands"; housekeeping was one indication of living and working—hence of actually being a settler—on the land. As the text of one of the acts put it: "all actual settlers, being house-keepers upon the public lands, shall have the right of pre-emption."²¹ Housekeeping was relevant not only to land ownership but also to other areas of law. Doctrines such as choice of law depended in part upon the residence of an individual; for example, in a personal injury action, proof of residence was argued on the basis that the wife of an injured traveling salesperson had "hired a house and went to house-keeping."²² Housekeeping was also, sadly, relevant to proof of ownership of slaves.²³

In these cases, the United States Supreme Court described both men and women as "housekeepers." Despite the emergence in the nineteenth century of the cult of "domesticity"²⁴ and the gender-specific assignment of indoor home-maintenance work to women, the Supreme Court usage continued in this century to include women and men in the set of human beings who could be "housekeepers." As late as 1942, in a case about the validity of a divorce

²¹ Act of April 5, 1832, ch. 65, 4 Stat. 503, 22d Cong., 1st Sess. (1832). *See also* *Hill v. McCord*, 195 U.S. 395, 401 (1904) (homesteaders had not abandoned land in part because "[t]heir cabin and its housekeeping equipment were superior to those of most homesteaders"); *Orchard v. Alexander*, 157 U.S. 372, 379 (1895) ("false proofs of settlement, occupancy and housekeeping may be set aside"); *O'Brien v. Perry*, 66 U.S. (1 Black) 132, 139 (1861) (explaining that ownership of land depends upon "actual settlement and housekeeping").

²² *Penfield v. Chesapeake, Ohio, and S.W. R.R.*, 134 U.S. 351, 355 (1890).

²³ *See Shelby v. Guy*, 24 U.S. (11 Wheat.) 361, 370 (1826) (describing a slave who went with a couple "upon their going to house-keeping").

²⁴ NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977). Cott described a cult of "domesticity" and the rise of the identification of women's work with the home that emerged by the 1830s. Based upon a review of personal diaries of 100 white middle-class and upper middle-class New England women who wrote during the early part of the nineteenth century, Cott's research detailed the creation of what she terms a "canon of domesticity." She traced how the growth of manufacturing and trades moved the society from one in which women and men worked together to provide for a household, to one in which men went "out into the world" to earn money, while women maintained the home as a "haven" or "refuge" from that world. *Id.* at 19-125. *See also* BARBARA LESLIE EPSTEIN, *THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA* 67 (1981); DOLORES HAYDEN, *REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, & FAMILY LIFE* 73-75, 209-10 (1984); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* at parts I & II (1982); DEBORAH RHODE, *JUSTICE AND GENDER* 9-28 (1989) (Ch. 1, "Natural Rights and Natural Roles").

obtained in Nevada, a member of the Court referred to the fact that a couple "set up housekeeping as husband and wife."²⁵

During the last forty-five years, the use of the word "housekeeping" by the United States Supreme Court has changed substantially. In a few cases, the word has retained the earlier use—the designation of some person or group as creating or living in a shared household. For example, two cases involving substantive due process and zoning laws discuss local ordinances that define a "housekeeping unit."²⁶ The scope of the word "housekeeping" has also broadened. Over the past forty-five years, the Court began to speak of housekeeping work that included not only the maintenance of a family's personal home (let me call this the first sense of the word) but also the maintenance of workplaces, factories, and businesses (a second sense). For example, one Supreme Court case refers to provisions in a contract for a gas station franchise—those that relate to the "use and appearance of the station"—as "'housekeeping' provisions."²⁷ Another case relates to a question of the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act when a claim was brought by injured laborers providing "housekeeping and janitorial services" for a terminal.²⁸ In these cases, housekeeping denotes the cleaning and taking care of businesses and public places.²⁹

²⁵ *Williams v. North Carolina*, 317 U.S. 287, 312 (1942) (Jackson, J., dissenting).

²⁶ *Moore v. City of East Cleveland*, 431 U.S. 494, 496 n.2 (1977) (local zoning ordinance that prohibited a grandmother from living with her grandchildren ruled unconstitutional); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974) (disallowing constitutional challenge to local ordinance about unrelated adults sharing housing). See also *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 668 (1981) ("housekeeping, cleaning, maintenance, and related services" were the business activities of an employer challenging a National Labor Relations Board order); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 530 n.3 (1973) (federal regulations define a "household" to exclude "roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons . . .").

²⁷ *FTC v. Texaco*, 393 U.S. 223, 227 (1968) (Stewart, J., dissenting). In the lower federal courts, a few cases involve the maintenance of factories or workplaces and speak of the "housekeeping" of those facilities. See *Korn Indus. v. NLRB*, 389 F.2d 117, 124 (4th Cir. 1967); *Radiator Specialty Co. v. NLRB*, 336 F.2d 495, 499 (4th Cir. 1964); *Marshall Field & Co. v. NLRB*, 135 F.2d 391, 394 (7th Cir. 1943) (Minton, J., dissenting); *Owens-Illinois Glass Co. v. NLRB*, 123 F.2d 670, 682 (6th Cir. 1941), *cert. denied*, 316 U.S. 662 (1942).

²⁸ *Chesapeake & Ohio Ry. v. Schwalb*, 110 S. Ct. 381, 383 (1989).

²⁹ Members of the Supreme Court were not the only people to speak of the maintenance and care of public places as "housekeeping." See DOLORES HAYDEN, *supra* note 24, at 30 (Frances Willard, President of the Women's Christian Temperance Union, had as a slogan "municipal housekeeping"); SHEILA M. ROTHMAN, *WOMAN'S PROPER PLACE: A HISTORY OF*

Between 1945 and the present, the Supreme Court also used the word "housekeeping" in a third way: housekeeping became an adjective to indicate matters internal to an organization. For example, when considering a conflict between federal arbitration provisions and California labor law, the Court discussed whether the Securities and Exchange Commission intended to require "nation-wide uniformity of an exchange's housekeeping affairs."³⁰ Borrowing language from legislative hearings from the mid-1950s, the United States Supreme Court also described the statute that authorizes the heads of federal departments and agencies to make rules for those departments as the federal "housekeeping statute."³¹ This statute regulates what the Supreme Court has called the use and maintenance of "papers pertaining to the day-to-day business of Government."³²

CHANGING IDEALS AND PRACTICES: 1870 TO THE PRESENT 66-74 (1978) (Frances Willard argued for "the home going forth into the world." *Id.* at 67); Marlene Stein Wortman, *Domesticating the Nineteenth-Century American City*, 1979 PROSPECTS 531, 565 ("domestic reformers" succeeded in defining "good municipal" governance as including "good housekeeping"). See also HANNAH ARENDT, *THE HUMAN CONDITION* 42 (1959):

Since the rise of society, since the admission of household and housekeeping activities to the public realm, an irresistible tendency to grow, to devour the older realms of the political and private as well as the more recently established sphere of intimacy, has been one of the outstanding characteristics of the new realm.

For commentary on Arendt's views, see Hanna Pitkin, *Justice: On Relating Private and Public*, 9 POLITICAL THEORY 327 (1981).

³⁰ *Perry v. Thomas*, 482 U.S. 483, 490 (1987). See also *Merrill Lynch v. Ware*, 414 U.S. 117, 136 (1973) (arbitration of claims in the securities industry).

³¹ *Chrysler v. Brown*, 441 U.S. 281, 309 n.39 (1979). 5 U.S.C. § 301 (1988) currently states: The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The statute dates from the immediate post-revolutionary period. See the provision for the custody and papers of the Department of State, then known as the Department of Foreign Affairs. Act of July 27, 1789, ch. 4, 1 Stat. 28 n.(a); Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 ("An Act to provide for the safe-keeping of the Acts, Records and Seals of the United States"). In 1873-74, the 1789 enactment was recodified. See REV. STAT. OF THE UNITED STATES § 161 (1873-74). In 1958, the recodification added the sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 22, 72 Stat. 547 (1958). The 1966 reenactment recodified the statute to its current place, 5 U.S.C. § 301 (1988), and slightly modified the 1955 language.

³² *Chrysler v. Brown*, 441 U.S. 281, 309 n.39 (1979) (such a statute does not include a "substantive grant of legislative power to promulgate rules authorizing the release of trade

Because the "federal housekeeping statute" is an important source of judicial use of the word "housekeeping,"³³ a bit of discussion of legislative usage is in order.³⁴ From one of the hearings about revising the statute in the 1950s comes the following exchange:

Comment: "Custody [of records] is safekeeping, and suppression, I suppose, would be refusal to give them to anyone. We do not do that."

Response: "Custody is housekeeping, is it not?"³⁵

secrets"). See also *United States v. Rodgers*, 466 U.S. 475, 483 n.4 (1984) (for purposes of 18 U.S.C. § 1001 (1988), the federal judiciary may be a "department or agency" "with respect to its housekeeping or administrative functions" but not when conducting judicial proceedings).

³³ See *Chrysler*, 441 U.S. at 309 n.39 ("The law has been called an office 'housekeeping' statute, enacted to help General Washington get his administration underway by spelling out the authority of executive officials to set up offices and file Government documents.").

³⁴ By the middle of this century, the statute had been dubbed—in the legislative history for its reenactment—the federal "housekeeping" statute. See H.R. REP. NO. 1461, 85th Cong., 2d Sess. 7 (1958), reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 3352.

I have not yet found the moment in time when this nickname attached. In the legislative hearings in 1955, the earlier enactment of the statute was described as a "housekeeping statute." See *Availability of Information from Federal Department and Agencies: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 84th Cong., 2d Sess. 12 (1955) (testimony of Harold L. Cross, Freedom Information Counsel for Am. Soc'y of Newspaper Editors, Nov. 7, 1955) [hereinafter *Hearings: Availability of Information*]. In Part 3 of those hearings, on May 8, 1956, the subcommittee chair, John E. Moss, Jr., stated that each member of the panel of attorneys who came to testify were sent a list of questions, including whether "the Federal Government's basic housekeeping statute . . . [is] being tortured into authority to restrict the flow of information." *Id.* at 427. See also Note, *Discovery from the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute*, 69 YALE L.J. 452 (1960).

A few possible earlier references can be found. For example, in 1950, Raoul Berger and Abe Krash referred to statutes that provide for recordkeeping as a "blend of 'housekeeping' statutes" that formed the basis for the Attorney General's assertion of privilege. Raoul Berger & Abe Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451, 1460 n.50 (1950). Another mention of "housekeeping" comes in a 1948 district court decision about whether to permit the federal government to maintain the secrecy of executive records. *Bank Line, Ltd. v. United States*, 76 F. Supp. 801, 803 (S.D.N.Y. 1948) (government interest in the "secrecy of its house-keeping records"). See *infra* note 61 and accompanying text. In the *Bank Line* case, the government based its claim of secrecy on regulations promulgated pursuant to 5 U.S.C. § 22 (1958), the predecessor to 5 U.S.C. § 301 (1988). 76 F. Supp. at 803 n.3. In making its claim for nondisclosure, the government argued that its records were "housekeeping." *Id.* at 803. This is the first reference in case law that I found which links "housekeeping" to the activities authorized by this section.

³⁵ *Hearings: Availability of Information*, *supra* note 34, at 259 (exchange between Robert L. Farrington, General Counsel Dep't of Agric. and Jacob Scher, Special Counsel, Subcomm. on Gov't Information, Nov. 10, 1955).

Another part of the hearings includes discussion of why there was little prior legislative history on this statute. One witness argued that:

There was no *historymaking* debate over Title 5, United States Code, § 22, because it was not a historymaking statute, it was not a historymaking bill, it was not a historymaking proposal. If it had proposed secrecy it would have been historymaking. But it didn't. It was just a *housekeeping* statute, and as such raised none of the great issues that would have aroused Madison, Jefferson, Mason and the rest of the statesmen who put so much trust in popular rights to information.³⁶

These quotes provide an example of the fourth sense of the word "housekeeping," as used in discussions in legislative history and in court opinions. In addition to being the *internal* affairs of government or its daily work, "housekeeping" also became the *less* important affairs of government, the rules and practices (some but not all procedural) to which one need not pay much attention. The Supreme Court picked up this fourth usage at about the same time that the hearings on the 1955 revisions of the "federal housekeeping statute" were underway. Starting at that time and continuing to the present, the Supreme Court has talked about "housekeeping rules,"³⁷ "housekeeping matters,"³⁸ federal "housekeeping measure[s],"³⁹ and the "housekeeping statute."⁴⁰

The first Supreme Court decision that I have found that includes one of these adjectival uses of "housekeeping" is the 1953 decision in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*.⁴¹ In that dispute—between a corporation

³⁶ *Hearings: Availability of Information*, *supra* note 34, at 3359 (statement of J. Russell Wiggins, Executive Editor, Washington Post and Times Herald, representing the Am. Soc'y of Newspaper Editors, Feb. 7, 1958) (emphasis added).

³⁷ See, e.g., *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103 n.6 (1971); *Hanna v. Plumer*, 380 U.S. 460, 473 (1965).

³⁸ *Richardson v. United States*, 468 U.S. 317, 333 n.2 (1984) (Stevens, J., dissenting); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 67 (1966).

³⁹ *Howe v. Smith*, 452 U.S. 473, 482 (1981); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981); *Pernell v. Southall Realty*, 416 U.S. 363, 366 (1974); *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964).

⁴⁰ *Chrysler v. Brown*, 441 U.S. 281, 309 n.39 (1979).

⁴¹ 345 U.S. 247 (1953). This case has not been cited much, and the United States Su-

and its former subsidiary over an accounting—the party that lost an appeal requested but was denied a rehearing en banc. At that point, another legal issue emerged—the meaning of a congressional statute that had authorized appellate courts to sit in groups of three. The Western Pacific Railroad Corporation argued that it had a statutory right to compel each active member of an entire appellate court (and not a division of three judges) to give formal consideration to the request for rehearing.⁴² The Supreme Court held that the litigant had no such statutory right but gave the litigant an opportunity to make an argument for en banc review again.⁴³ The majority opinion, authored by Chief Justice Vinson, described the statute at issue as delineating “certain housekeeping functions of a Court of Appeals—functions which cannot be discharged by a court unless, on its own motion, it convenes itself as a body and acts as a body—such as rule making, appointing clerks and fixing the times when court shall be held.”⁴⁴ Because the statute was about the court’s internal workings, the provision conferred no enforceable rights “to compel each member of the court to give formal consideration” to a request for en banc review.⁴⁵ Litigants could not invoke a statute delineating “housekeeping functions” as a source of right.

Perhaps one of the most famous uses (at least for procedure/federal courts aficionados) comes in the case of *Hanna v. Plumer*,⁴⁶ which addressed the question of whether federal courts in diversity actions were to apply a Federal Rule of Civil Procedure directing

preme Court has not referred to it since 1974. As the facts of the case indicate, the legal issue arose in a world of appellate practice very different from the current one; today, the issue is no longer how many Article III judges are obliged to hear a petition for rehearing, but whether appellate review, as of right, in civil cases will last another fifty years. See Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603 (1985).

⁴² 345 U.S. at 250-51. The statute relied on was 28 U.S.C. § 46(c) which provided that cases “shall be heard . . . by a court . . . of not more than three judges, unless a hearing or rehearing before the court [e]n banc is ordered by a majority of the circuit judges”

⁴³ 345 U.S. at 267-68.

⁴⁴ *Id.* at 256.

⁴⁵ *Id.* at 267. A few months thereafter, Justice Jackson, in dissent, used “housekeeping” to denote something of lesser order; he argued that “many acts of government officials deal only with the housekeeping side of federal activities”—and, therefore, should not be immune from liability under the Federal Tort Claims Act. *Dalehite v. United States*, 346 U.S. 15, 60 (1953) (meaning of “discretionary function or duty” for which the United States is not liable under the Act).

⁴⁶ 380 U.S. 460 (1965).

the manner of service of process, or to apply a parallel state rule. In mandating the use of the federal rules, the Court attempted to distinguish between state "substantive" rules that had to be applied in diversity cases and federal "procedural" rules that, notwithstanding the *Erie* opinion, could nonetheless still govern such cases. As Chief Justice Earl Warren, for the Court, explained:

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.⁴⁷

This usage makes the deployment of "housekeeping" more complex, for with it comes authority to enforce rules and for litigants to rely on such rules. The Court applied its own "housekeeping rules" and thus paid attention to those rules, even as it simultaneously ignored another institution's "housekeeping" rules. In *Hanna*, it is not that the Federal Rules of Civil Procedure are unimportant, for the Court's decision enabled a uniform set of procedural rules to govern federal practice. But these procedural rules were still not the "substance" of the matter; if "substantive," then state rules of decision had to govern.

"Housekeeping" crops up in choice of law discussions other than those involving the Federal Rules of Civil Procedure; again, choice turns on whether rules are "merely 'housekeeping' matters on which state and federal courts may ordinarily differ" or not.⁴⁸ What delineates "housekeeping matters" from others is not always easy to identify. For example, according to the Supreme Court, a federal venue statute that permits changes in the place of litigation from one federal district court to another "should be regarded as a federal judicial housekeeping measure,"⁴⁹ although the common law doctrine of dismissing lawsuits filed in an inconvenient forum ("forum non conveniens") is something more than a "federal

⁴⁷ *Id.* at 473.

⁴⁸ *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 67 (1966). *See also* *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103 n.6 (1971) (state statute of limitations to be applied since "[h]ere we are not dealing with mere 'housekeeping rules' embodied in state law").

⁴⁹ *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964). *See also* *Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1279 (1990) (citing *Van Dusen*); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37 (1988) (citing *Van Dusen*) (venue as "housekeeping").

housekeeping measure.”⁵⁰ Housekeeping—in Article III courts—is not used only to describe activities related to the place of litigation,⁵¹ the law governing the litigation, and the manner in which litigation occurs; contracts can also have a “housekeeping detail.”⁵² And, as noted above, a good deal of what agencies and departments of the Executive branch do—such as the maintenance of records and the promulgation of rules of operation—is also described as “housekeeping.”

In contrast to the *Hanna v. Plumer* line of cases, which simultaneously use the denomination “housekeeping” as a basis for enforcement of one institution’s rules as it ignores the parallel rules of another institution, the Supreme Court has also relied upon the description of rules or statutes termed “housekeeping” as the explanation of why those rules need *not* be followed. Binding rules are not “mere matters of housekeeping convenience,”⁵³ while rules which can be broken by an agency are “simply . . . housekeeping provision[s].”⁵⁴ When a statutory revision is to be ignored, it can be characterized as a “housekeeping change”⁵⁵ or a “housekeeping overhaul”⁵⁶ to which no legal significance can be attached.

⁵⁰ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

⁵¹ For congressional description of the places where federal courts are to be located as “judicial housekeeping,” see *Judicial Housekeeping: Hearing on H.R. 408 and Related Bills Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 3 (1988) (opening statement of Robert W. Kastenmeier, discussing “judicial housekeeping proposals”).

⁵² *United States v. First Nat’l City Bank*, 379 U.S. 378, 409 (1965) (Harlan, J., dissenting) (“policy surrender requirement [in insurance contract] is of the order of an incidental rule of contract . . . ; indeed, it has been characterized as a housekeeping detail”).

⁵³ *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 546 (1970) (Brennan, J., dissenting). See also *United States v. Caceres*, 440 U.S. 741, 760 (1979) (compliance required when “internal agency regulations do not merely facilitate internal agency housekeeping but rather afford significant procedural protections”).

⁵⁴ *Sullivan v. United States*, 348 U.S. 170, 173 (1954) (failure to comply with executive order requiring United States Attorneys to obtain Justice Department authorization prior to presenting information on tax violations to a grand jury can not be the basis for voiding a conviction). See also *Howe v. Smith*, 452 U.S. 473, 482 (1981) (the federal statute that obliged the Director of Federal Bureau of Prisons to certify the availability of adequate “treatment facilities” prior to permitting state prisoners to be housed in federal prisons is “simply a housekeeping measure” and does not require that prisoners so transferred be in need of “treatment”).

⁵⁵ *United States v. Bramblett*, 348 U.S. 503, 508 (1955) (“except for housekeeping changes in language which are of no particular significance, . . . there has been no change” in the statute).

⁵⁶ *United States v. Yermian*, 468 U.S. 63, 78 (1984) (Rehnquist, J., dissenting) (“the 1948

Turning from the Supreme Court to the lower federal courts to explore the deployment of the word "housekeeping," one learns that the lower federal courts came first—in using "housekeeping" as a reference to other than the literal activity of maintaining one's home or place of work—but the use of the word "housekeeping" in that way increased greatly after the Supreme Court, members of Congress, and others spread the usage.⁵⁷ In a 1934 federal district court opinion, an Article III trial judge stated that his first step in a multi-party case, "in the way of housekeeping," would be to instruct the clerk to change a caption on a lawsuit that had named fifty defendants to list only the names of the defendants over whom personal jurisdiction had been secured.⁵⁸ From 1934 until the mid-1950s (when the Supreme Court picked up the term housekeeping to refer to issues of internal organization and then to procedural rulemaking, conflict problems, and changes in legislation), lower courts used the word "housekeeping" only occasionally but in many of the ways that the Supreme Court eventually did. In 1945, stockmen in Montgomery Ward stores were described as

revision of the statute—a housekeeping overhaul intended to make no substantive changes"). See also *Pernell v. Southall Realty*, 416 U.S. 363, 366 (1974) (a statutory repeal was a "housekeeping measure" that did not affect the right to jury trials).

⁵⁷ As with the Supreme Court, we searched Westlaw federal data banks for cases in which the word "housekeeping" or "house-keeping" appeared. Research thus far indicates that, from 1789 to 1944, the lower federal courts used the word "housekeeping" in some 65 published cases. This count is by court opinion, not by case, so that the figure may include the same case described by more than one opinion. This number includes all cases reported in the Federal Reporter series. As a result, decisions of territorial courts are included. Such courts have jurisdiction different from Article III courts and thus may increase the number of uses of the word "housekeeping" from what it would be, were only Article III courts in the data base. The District of Columbia courts were a part of the Federal Reporter system until 1972, when that court system was reorganized.

As in the Supreme Court, several opinions from lower Article III judges refer to the act of keeping house—either as relevant to domicile (see, e.g., *McHaney v. Cunningham*, 4 F.2d 725, 726 (W.D. La. 1925); *In re Brannock*, 131 F. 819, 823 (N.D. Iowa 1904); *Kemna v. Brockhaus*, 5 F. 762, 765 (Cir. Ct. Wis. 1881)), or as relevant to what items are exempt assets in bankruptcy proceedings (see, e.g., *In re Thompson*, 23 F. Cas. 1021, 1022 (E.D. Mich. 1876) (No. 13,938); *In re Gregg*, 10 F. Cas. 1186, 1188 (D. Me. 1868) (No. 5796)). A few twentieth-century cases discuss the magazine, *Good Housekeeping*. See, e.g., *Clorox Chem. Co. v. Chlorit Mfg. Corp.*, 25 F. Supp. 702, 704 (E.D.N.Y. 1938).

⁵⁸

The caption is most misleading, and the first step in this proceeding must be, in the way of housekeeping, to instruct the clerk of this court . . . that the caption be changed . . . and this court will not be troubled with a long list of defendants over whom it has not personal jurisdiction.

Miller v. Van Schaick, 6 F. Supp. 633, 634 (S.D.N.Y. 1934).

spending time “in stockkeeping, order filling and housekeeping.”⁵⁹ In 1946, a trial judge described city maintenance, including “such housekeeping jobs as the washing of Fourth Avenue.”⁶⁰ In a 1948 district court case, reference is made to the government’s interest in “the secrecy of its housekeeping records.”⁶¹ A 1954 opinion referred to decisions to reassign a serviceman temporarily as a matter of “Coast Guard housekeeping.”⁶²

Since the middle of the 1950s, the use by the lower federal courts of the term “housekeeping”—in all four of its meanings—has become so frequent that describing all of the contexts becomes overwhelming, as well as tedious and redundant. From 1945 to 1954, the lower federal courts used the word in some 36 cases; during the next decade, the word is found in 109 cases, and from 1965 to 1989, the word appears in some 1266 cases. A substantial number of the times in which the word appears, it is used as an adjective—“housekeeping rule,” “housekeeping statute,” “housekeeping matter,” “housekeeping measure,” and “housekeeping regulation.”⁶³ Suffice it to say that the turning point comes with Supreme Court cases such as *Hanna v. Plumer*, and that, today, one can find the word “housekeeping” in a wide range of settings.⁶⁴

⁵⁹ *Antis v. Montgomery Ward & Co.*, 63 F. Supp. 669, 678 (E.D. Mich. 1945).

⁶⁰ *Reherd v. Manders*, 66 F. Supp. 520, 526 (D. Alaska 1946) (territorial court). *See also* *American Transformer Co. v. United States*, 63 F. Supp. 194, 201 (Ct. Cl. 1945) (inspectors observed “many instances of poor ‘housekeeping’ near the transformers”).

⁶¹ *Bank Line v. United States*, 76 F. Supp. 801, 803 (S.D.N.Y. 1948). *See supra* note 34. *See also* *In re Investigation of World Arrangements*, 13 F.R.D. 280, 287 (D. D.C. 1952) (subpoena limited not to “include documents in the nature of housekeeping documents such as invoices, bills of sale, bills of lading, and routine individual sales”).

⁶² *Remaley v. United States*, 122 F. Supp. 679, 680 (Ct. Cl. 1954).

⁶³ We did not find these phrases in the 1945-1954 data search. Searching from 1955 to 1964, we found these phrases 18 times. From 1965 to 1989, these phrases appear in some 292 cases. We did not weed out instances in which two of these phrases are used in the same case.

⁶⁴ *See, e.g.*, *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 280 (2d Cir. 1967) (potential burden on appellate courts of appealing “housekeeping matters”); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 410 (5th Cir. 1967) (dismissing argument that federal guidelines are “interpretative regulations or ‘housekeeping’ rules”), *cert. denied*, 389 U.S. 1001 (1967); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967) (evidentiary privileges are “not mere ‘housekeeping’ rules”); *Bryan v. Kershaw*, 366 F.2d 497, 503 (5th Cir. 1966) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1939) (Congress has authority to “prescribe housekeeping rules for federal courts”)), *cert. denied*, 386 U.S. 959 (1967); *Equitable Life Assurance Soc. v. United States*, 331 F.2d 29, 33 (1st Cir. 1964) (contract provision was “a mere housekeeping matter to

In the lower courts, as in the Supreme Court, the usage often is intended to suggest that which can be ignored (even as it is relied upon as governing). A host of cases rely upon the term "housekeeping" to convey that the activity in question is of lesser order than whatever else to which that activity is compared. As one court explained in the context of a challenge to the International Trade Administration for failing to provide for notice and comment on a regulation, the parties argued that "this rule has a substantial impact . . . and is not just a housekeeping rule."⁶⁵ In the lower courts, as in the Supreme Court, when something is characterized as "housekeeping," that characterization may be used as justification for applying that rule as necessary for proper administration but not intrusive on other interests, or as justification for why the rule or practice in question need *not* be followed and does not give litigants enforceable rights.⁶⁶

The array of items affixed to the label "housekeeping" is impressive: among the items discussed as possibly within the category

permit the company to tidy up its affairs"); *Texas E. Transmission Corp. v. Federal Power Comm'n*, 306 F.2d 345, 355 (5th Cir. 1962) (use of separate docket numbers for gas customer refund proceedings was "more than good procedural administrative housekeeping. It was substantively indispensable."), *cert. denied*, 375 U.S. 941 (1963); *Haddad v. Border Express, Inc.*, 303 F.2d 134, 136 (1st Cir. 1962) (much of new information relates to "the availability of records and other housekeeping details"); *Lee v. Civil Aeronautics Bd.*, 225 F.2d 950, 951 (D.C. Cir. 1955) (name changes were "for housekeeping purposes").

⁶⁵ *Interredec, Inc. v. United States*, 652 F. Supp. 1550, 1556 (Ct. Int'l Trade 1987).

⁶⁶ The cases are too numerous to list. For cases involving the conflict over the application of state or federal procedural law, see *Katz v. Costa Armatori*, 718 F. Supp. 1508, 1511 (S.D. Fla. 1989) (28 U.S.C. § 1441(b) is a "federal judicial housekeeping measure" and hence is constitutional); *Sneed Shipbuilding, Inc. v. Spanier Marine Corp.*, 125 F.R.D. 438, 483 (E.D. Tex. 1989) (FED. R. Civ. P. 11 is "housekeeping" and thus may displace state law); *Bailey v. Chattem, Inc.*, 838 F. 2d 149, 152 (6th Cir. 1988) (post-judgment interest serves a "salutary housekeeping purpose"), *cert. denied*, 486 U.S. 1059 (1988). For cases describing administrative tasks as "housekeeping," see *Zambrano v. City of Tustin*, 885 F.2d 1473, 1479 (9th Cir. 1989) (local rulemaking power of federal courts limited to rules governing "noncontroversial housekeeping matters," quoting 12 CHARLES WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 312, at 228 (1973)); *Tripodi v. Heckler*, 100 F.R.D. 736, 738 (E.D.N.Y. 1984) (court docket management is "housekeeping").

For cases discussing agency "housekeeping rules," see *City of Fredericksburg v. Federal Energy Regulatory Comm'n*, 876 F.2d 1109, 1112 (4th Cir. 1989) (agency has authority to "relax or modify internal housekeeping regulations"); *United States v. Persico*, 621 F. Supp. 842, 876 (S.D.N.Y. 1985) (declining to dismiss indictments despite violation of Justice Department "housekeeping rule"); *Smith v. Halford*, 570 F. Supp. 1187, 1191 (D. Kan. 1983) ("housekeeping" rule on transfer of prisoners not a statutory entitlement for purposes of the due process clause).

"housekeeping" are claims of executive privilege;⁶⁷ the role of a state agency in charge of the sale of land (it is not "only a housekeeping agency"⁶⁸); the Department of Justice policy on multiple prosecutions of the same person for the same activity alleged to be criminal under state and federal law (the "*Petite* policy has consistently been held to be a mere housekeeping provision"⁶⁹); F.B.I. rules on the use of hypnosis as an investigatory aid;⁷⁰ executive orders requiring evaluations of inflationary impacts of legislation;⁷¹ and congressional power under the fourteenth and fifteenth amendments (it "is no housekeeping power"⁷²).

One other piece of history of the use of the word "housekeeping" is needed—to look beyond written opinions of Article III judges. As mentioned above, Congress has also helped to shape the legal usage of the word "housekeeping." In addition to the hearings in 1955 on the so-called "federal housekeeping statute," Congress held hearings in 1978 and in 1988 called "Judicial Housekeeping"⁷³ in which testimony was taken on proposed legislation dealing with the retirement of judges, court fees, eligibility and fees for federal jury service, size of civil juries, transfer of incarcerated individuals, witness fees, and the transfers of cases from district to district—i.e., matters of the organization and maintenance of the court system. Like the Supreme Court, an array of responses exist to the topics that are put under the umbrella of "housekeeping." Some of these issues have sparked relatively little debate while

⁶⁷ *United States v. Gates*, 35 F.R.D. 524, 529 (D. Colo. 1964); *United States v. Procter & Gamble*, 174 F. Supp. 233, 238 (D. N.J. 1959).

⁶⁸ *Walker v. Felmont Oil Corp.*, 136 F. Supp. 584, 592 (D. Ky. 1955), *vacated*, 240 F.2d 912 (6th Cir. 1957).

⁶⁹ *United States v. Howard*, 590 F.2d 564, 567 (4th Cir. 1979) (federal and state government may prosecute individual for same criminal behavior, if it violates the criminal laws of both "sovereigns"), *cert. denied*, 440 U.S. 976 (1979).

⁷⁰ *United States v. Kimberlin*, 805 F.2d 210, 247 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987).

⁷¹ *Legal Aid Soc. of Alameda County v. Brennan*, 608 F.2d 1319, 1329-30 n.14 (9th Cir. 1979).

⁷² *United States v. Louisiana*, 225 F. Supp. 353, 396 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

⁷³ From 1935 to 1990, two sets of hearings have had that name. See *infra* note 124 and accompanying text (discussing 1988 "judicial housekeeping hearings"). See also, *Judicial Housekeeping: Hearings on H.R. 408 and Related Bills Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978).

others (such as the size of the jury) have been the subject of heated dispute.⁷⁴

Finally, dictionaries document some of the change in use of the word "housekeeping." A history of the general usage of "housekeeping" merits an essay unto itself; I will provide only a cursory glimpse of speakers other than lawyers and judges. According to an 1856 dictionary,⁷⁵ the first definition of housekeeping is "the family state" and a "housekeeper" is "one who occupies a house"; the second definition of housekeeping is "domestic," and the second definition of a housekeeper is "a female who superintends domestic concerns."⁷⁶ Thus, for more than a century, dictionaries in the United States have shared historians' identification of the house as the domain of women, and with it, the creation of "separate spheres" for women and men that in turn has provided a basis for the idealization of "domesticity."⁷⁷

One hundred years later, in the 1960s, Webster's Seventh New Collegiate Dictionary had added a definition for housekeeping. In addition to being "the management of a house and home affairs," housekeeping also occurred outside the home, as "the care and management of property and the provision of equipment and services (as for an industrial organization)."⁷⁸ By 1989, the Oxford English Dictionary offered yet another usage: "those operations of a computer, organization, etc. which make its work possible but do not directly constitute its performance."⁷⁹

⁷⁴ See, e.g., *Williams v. Florida*, 399 U.S. 78 (1970) (upholding the use of the six-member jury in criminal cases); *Colgrove v. Battin*, 413 U.S. 149 (1973) (six-member jury in federal civil litigation); see also Hans Zeisel & Shari Diamond, *Convincing Empirical Evidence on The Six Member Jury*, 41 U. CHI. L. REV. 281, 281-82 (1974) (in *Williams* and *Colgrove* the Supreme Court "was misled in believing" that the size of the jury had no effect on the outcome). Compare with Edward J. Devitt's position, when as Chief Judge of the U.S. District Court in Minnesota he was enthusiastic about changing the size of civil juries. See Devitt, *The Six Man Jury in The Federal Court*, 53 F.R.D. 273 (1971).

⁷⁵ WEBSTER'S DICTIONARY 165 (1856).

⁷⁶ *Id.* See also WEBSTER'S ACADEMIC DICTIONARY 276 (1895); THE CENTURY DICTIONARY: AN ENCYCLOPEDIA OF THE ENGLISH LANGUAGE 2902-03 (William Dwight Whitney ed. 1889). THE CENTURY DICTIONARY has the same primary and secondary meaning and includes a quotation from Charles Dickens' BLEAK HOUSE in which reference is made to "the handsome old face and fine responsible portly figure of the housekeeper." *Id.* (citing BLEAK HOUSE ch. xviii).

⁷⁷ See *supra* note 24.

⁷⁸ WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 403 (1963).

⁷⁹ OXFORD ENGLISH DICTIONARY, VOL. VII 444 (1989). See also WEBSTER'S 1973 NEW COLLEGIATE DICTIONARY 554 (the third definition is: "the routine tasks that have to be done in

B. Understanding the Import of the Label

Over the life of the federal judiciary, its usage of the word "housekeeping" has changed. Initially used to mean the actual activity of maintaining a home, "housekeeping" came to refer to the maintenance and sanitation of businesses, public places, and workplaces as well as a home. Thereafter, the usage broadened from the work of maintenance in the material sense to the more abstract notion that rules by which institutions were run were "housekeeping"; as a consequence, some of the internal affairs of contracts, courts, administrative agencies, and businesses were denoted "housekeeping." Most recently, "housekeeping" has embraced (but is not always equated with) a series of other concepts: that the activity so described is itself an activity of lesser order than the activity to which it is compared, that the "housekeeping" activity is not one of "substance," that the activity is unimportant, or that the activity merits little discussion or attention. The four senses of the word interrelate with the three grammatical structures that routinely occur when it is used. Sometimes, there is a straight attribution: a certain act is "housekeeping." Sometimes, there is a dismissive and distancing negation: a certain act is or is not merely "housekeeping." Sometimes, "housekeeping" is cast in oppositional terms—"housekeeping" is not "historymaking"; "housekeeping rules" are not "substantive rights."

The deployment of "housekeeping" is a complex act, the depth of which cannot be fully explored here. But one context is worth underscoring. "Housekeeping" is often used as a means of trivializing and silencing when a court compares two domains or institutions, each of which has rules: agencies and courts, federal and state courts, appellate and trial courts. A judge names one institution's rule or practice as secondary as compared to another's. Sometimes, with the description "housekeeping" comes permission to ignore a rule or practice; sometimes that description permits a court to enforce such a rule. Thus, the label "housekeeping" may

order for a system to function"). I have been tracing the use of the word in the federal courts; popular culture's more important sources are computer magazines. For example, the OXFORD ENGLISH DICTIONARY VOL. VII quotes as follows: "1956 J. Assoc. Computing Machinery III. 269 Most of the errors . . . turned up in the logical or housekeeping operations . . . 1958 Gotlieb & Hume, High Speed Data Processing, v.80. In programming a problem for a data-processing machine many of the instructions . . . fall into a class called organizational or housekeeping instructions . . ." *Id.* at 444.

be a source of power and occasionally the basis for respecting prerogatives. "Housekeeping" is not, however, often a source of pride.

When Article III judges use "housekeeping" in this fourth way, they do so by relating and locating a given claim within a hierarchy of activities, rules, or institutions. The ability to so locate "housekeeping" comes in part from changes in the courts. For example, the statute that authorized the promulgation in 1938 of the nationwide Federal Rules of Civil Procedure—coupled with doctrinal changes about when to apply state law in diversity cases litigated in federal court—prompted the development of law that depended upon classifying state and federal rules as of one nature or another ("substance" or "procedure"). The emergence of this use of "housekeeping" comes also in the context of courts and agencies developing rules for their own management and describing their own practices. The emergence of this usage also depends upon the identification of the literal work of keeping homes—"housekeeping"—as work that is done by women. Part of the reason why one can so readily read "housekeeping" to mean something of secondary importance is that housekeeping has a gender—that gender is female, and it is we (women) who are the "second sex."⁸⁰

Given this potential for understanding "housekeeping" as an activity of lesser import, the labeling of rules or issues as "housekeeping" may reflect a shared cultural sense of the value of a particular activity or it may be an effort to transform that activity into one to which attention should not be paid. Take, for example, the deployment of the label "housekeeping" by members of the Supreme Court. In one case, pretrial detainees and convicted misdemeanants successfully challenged—as a denial of equal protection—a state's refusal to enable them to obtain absentee ballots.⁸¹ The dissenters protested: this ruling "unwisely elevat[ed] and project[ed] constitutional pronouncements onto an area—and into distant and obscure corners of that area—that . . . should be a

⁸⁰ SIMONE DE BEAUVOIR, *THE SECOND SEX* (1953). Housekeeping is not only relegated to women, it is often relegated by women of one race or class to women of another race and lower class. See, e.g., JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 21-59 (1985) (history of "domestic service").

⁸¹ *O'Brien v. Skinner*, 414 U.S. 524 (1974). Under state law, those jailed were not precluded from voting.

domain reserved for the State's own housekeeping."⁸² Federal courts, the argument went, should not look at such claims, which were "minor and collateral and not of great, let alone constitutional, import."⁸³ In another case, in which the majority decided that the trial court was not required to release the Nixon tapes to the media before criminal appeals on Watergate had concluded, a dissenter complained that the Supreme Court was intruding on the district court's "own housekeeping practices"⁸⁴—and thus should not intervene.

Given the deployment of the word "housekeeping" in the four contexts that I have sketched, I would like the word "housekeeping" to be seen by the reader as a signal to begin a series of questions: What is the claim of value being made here? Where did that valuation come from? Do I share that appraisal? Do I want to reject the use of the word "housekeeping," or do I want to alter the import that such labeling has? These questions parallel those raised by contemporary historians who have come to question the dichotomy drawn between "historymaking" and "housekeeping"⁸⁵ and to dispute the idea that daily activities of women and men are not the stuff of "history."⁸⁶ Indeed an entire field of historical research is devoted to recovery of the history of those who were not "statesmen" but whose lives and views shaped their countries' cultures.⁸⁷

⁸² 414 U.S. 524, 535 (Blackmun, J., dissenting, joined by Rehnquist, J.).

⁸³ *Id.* at 536.

⁸⁴ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 615 (1978) (Stevens, J., dissenting).

⁸⁵ Recall the words of the witness in the 1955 hearings on the federal "housekeeping" statute: "[the statute] was not a historymaking bill. . . . It was just a housekeeping statute, and as such raised none of the great issues that would have aroused Madison, Jefferson, Mason and the rest of the statesmen." Statement of J. Russell Wiggins, *supra* note 36.

⁸⁶ See, e.g., 4 *A HISTORY OF PRIVATE LIFE: FROM THE FIRES OF REVOLUTION TO THE GREAT WAR* (Michelle Perrot ed., Arthur Goldhammer trans. 1990); Judith Allen, *Evidence and Silence: Feminism and the Limits of History* in *FEMINIST CHALLENGES: SOCIAL AND POLITICAL THEORY* (Carole Patemen & Elizabeth Gross eds. 1986) [hereinafter *FEMINIST CHALLENGES: SOCIAL AND POLITICAL THEORY*]; *What is Women's History?*, 35 *HIST. TODAY* 38 (1985) (commentaries by Olwen Hufton, James F. McMillan, Natalie Zemon Davis, Sally Humphreys, Angela V. John, Linda Gordon, Jane Rendall, Anna Davin).

⁸⁷ See, e.g., Francois Furet, *Beyond the Annales*, 55 *J. Mod. Hist.* 389 (1983); Matthew Ramsey, *Review Essay: History of a Profession, Annales Style: The Work of Jacques Leonard*, 17 *J. Soc. Hist.* 319 (1983). While congenial in many respects to feminist concerns, this approach is not intrinsically feminist. See Susan Mosher Stuard, *The Annales School and Feminist History: Opening Dialogue with the American Stepchild*, 7 *SIGNS* 135 (1981).

The witness who argued before Congress in 1955 that government recordkeeping was merely "housekeeping" (and therefore not of interest to the "greats" like Thomas Jefferson) was wrong on the facts as well as on the interpretation of those facts. It is not only that "housekeeping" is a part of "history," it is also that the "great men" of "history" have used strategies of trivialization to attempt to obscure exercises of power. Thomas Jefferson cared a good deal about government papers and their use, as documented by his efforts to protect his records from disclosure during the trial of Aaron Burr. Jefferson argued that the government had two kinds of activities: on the "public side" was its work on "grants of land, patents for inventions, certain commissions, proclamations, & other papers patent in their nature. To the other [private side] belong mere executive proceedings."⁸⁸ That quote from Jefferson's letter, written in response to requests for documents by the United States Attorney for the District of Virginia in the Aaron Burr treason trial,⁸⁹ resulted in one of the famous "historical" conflicts between John Marshall and Thomas Jefferson.⁹⁰ In the twentieth century, when discussing executive privilege, Wigmore's treatise on evidence referred to the Jefferson letter, and Wigmore's reference was in turn relied upon in 1948 by then District Judge Simon Rifkin, describing the federal government's effort to quash a subpoena because of the need to undertake a "housekeeping investigation" in private.⁹¹ One can thus trace Jefferson's "private"/"public" distinction to the contemporary label "housekeeping" and to the debates about internal affairs of government, the maintenance of records, and access to those records.⁹² From this lineage comes another opportunity to question whether such "housekeeping"

⁸⁸ Letter from Thomas Jefferson to George Hay, U.S. Attorney for Dist. of Va. (June 17, 1807), reprinted in 10 WORKS OF THOMAS JEFFERSON 401 (Paul Leicester Ford ed. 1905).

⁸⁹ According to Raoul Berger and Abe Krash, Jefferson "produced all the documents demanded except one." Raoul Berger & Abe Krash, *supra* note 34, at 1457.

⁹⁰ *Id.* at 1456-60.

⁹¹ The Wigmore reference to this letter is cited in *Bank Line, Ltd. v. United States*, 76 F. Supp. 801, 803 n.5 (S.D.N.Y. 1948). Wigmore quotes Jefferson as stating that, "[w]ith respect to papers, there is certainly a public and a private side to our offices." 8 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2379, at 799-800 (3rd ed. 1940).

⁹² Cf. Paul Hardin, III, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); Thomas C. Hennings, Jr., *Constitutional Law: The People's Right to Know*, 45 A.B.A. J. 667 (July 1959) (the revision of the "so-called federal 'housekeeping' statute"—that clarified it did not provide executive permission to withhold information—"laid to rest an insidious secrecy practice").

should be equated with the less important tasks to which less attention need be paid—as well as a host of questions about the public/private distinction that a discussion of “housekeeping” necessarily invokes.⁹³

Often deployed to be trivializing, “housekeeping” includes under its rubric a range of matters, the nature of which is deeply contested. Thus, the study of the term “housekeeping” returns constantly to the questions of what value is attributed to the activity so described. That inquiry, in turn, takes me to the allocation of work in the federal trial courts.

III. HIERARCHIES OF JUDGES AND OF JUDICIAL WORK

In the eighteenth century, during the first years of the federal court system, two sets of Article III judges worked at the task of adjudication. Supreme Court Justices manned the highest court; they sat together with lower court judges on the “circuit courts,” which had both original and appellate jurisdiction,⁹⁴ and lower court judges sat alone on the “district courts.”⁹⁵ Two hundred years later, many more people bear the title “judge,” and role delineations have occurred among Supreme Court Justices, other appellate judges, Article III trial judges, bankruptcy judges, and magistrates.⁹⁶ The lines between appellate and trial judges have clarified, as common-law doctrines delineate the role of the judges who review work of the trial level court.⁹⁷ However, the respective

⁹³ As does the history of the word “economics” which is often assumed to relate to the “public”/market activities but which has etymological origins linking it to “the management of a household.” See OXFORD ENGLISH DICTIONARY 58 (2d ed. 1989).

⁹⁴ Act of Sept. 24, 1789, to Establish the Judicial Courts of the United States, 1st Cong., 1st Sess., ch. 20, 1 Stat. 73, 73-75, 78-79.

⁹⁵ *Id.* at 73-74. A third group of judges—“territorial judges”—emerged by virtue of Congressional governance of the District of Columbia and acquisition of “territories.” See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For discussion of territorial courts, see Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. (forthcoming 1990).

⁹⁶ A slight overstatement, in that occasionally, “by designation,” a judge/justice from one level court may sit on another. See, e.g., 28 U.S.C. § 291(b) (1988) (circuit judges designated to district courts); 28 U.S.C. § 292 (1988) (district judges designated to sit on appellate courts). Moreover, in a few instances, appellate courts have “original,” rather than appellate, jurisdiction. See, e.g., 29 U.S.C. § 160(e) (1988) (NLRB to petition court of appeals “for the enforcement of” an order); 28 U.S.C. § 2321(a) (1988) (“proceeding to enjoin or suspend . . . a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals”).

⁹⁷ See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990) (appellate courts can

roles of the three sets of judges who sit at the trial level are not so clear.

Article III trial judges, magistrates, and bankruptcy judges all have responsibility for pretrial management of cases, for factfinding in certain instances, and for writing opinions under some circumstances. Some of what each set of judges does can be "final" if the time for review expires without challenge by a litigant adversely affected.⁹⁸ The question that has emerged, with greater frequency over the past few years, is the extent to which there exists a preserve of trial level activities over which Article III judges have exclusive dominion. The question comes in different forms. One version, arising in case law, asks what authority Congress has given by statute to magistrates and to bankruptcy judges and whether such statutes are constitutional. Can magistrates conduct voir dire?⁹⁹ Can bankruptcy judges hold jury trials?¹⁰⁰ Must Article III

only reverse Rule 11 decisions upon a finding of abuse of discretion); *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (the meaning of "clear error"). *But see Clemons v. Mississippi*, 110 S. Ct. 1441 (1990) (exemplifying the confusion between jury decisionmaking and appellate review).

⁹⁸ For example, certain pretrial decisions made by magistrates—excluding injunctions, summary judgments, and other dispositive decisions—are reviewed if challenged under the standard of whether a magistrate's order is "clearly erroneous" or "contrary to law." 28 U.S.C. § 636(b)(1)(A) (1988). When magistrates conduct hearings and submit proposed findings of fact and recommendations, a judge must make a "de novo determination" of those portions of the report to which objection is made within the ten day period. 28 U.S.C. § 636(b)(1)(C) (1988). In practice, "[t]he judge may officially be the final decision maker, but magistrates usually undertake the close review of the briefs and arguments and then make the important determinations." CHRISTOPHER E. SMITH, *SUBORDINATE JUDGES*, *supra* note 8, at 151-52.

When a bankruptcy judge submits proposed findings of fact and conclusions of law after a hearing on a matter that is not a "core" proceeding, the district judge reviews "de novo those matters to which any party has timely and specifically objected," before entering a final order or judgment. 28 U.S.C. § 157(c)(1) (1988). In core proceedings, "[t]he district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges." 28 U.S.C. § 158(a) (1988). In lieu of district judges, bankruptcy appellate panels may also hear appeals. 28 U.S.C. § 158(b) (1988).

⁹⁹ This question arises in a variety of contexts. *See, e.g., Gomez v. United States*, 109 S. Ct. 2237 (1989) (voir dire is not an "additional" statutory "duty" given by Congress to magistrates; constitutional question of whether Congress can give such authority to magistrates not decided); *United States v. France*, 886 F.2d 223, 228 (9th Cir. 1989) (*Gomez* applies retroactively to all cases that were not final when it was decided; France's failure to object to magistrate selection of the jury was not a waiver because a "solid wall of circuit authority" made such a challenge at the time futile), *cert. granted*, 110 S. Ct. 2203 (1990); *United States v. Musacchia*, 900 F.2d 493 (2d Cir. 1990) (precluding a challenge when the magistrate conducted voir dire and the defendant remained silent); *United States v. Martinez*

judges hear witnesses already heard by magistrates when those decisions are challenged?¹⁰¹ Can litigants consent to civil trials conducted by magistrates?¹⁰² Another version of the question builds upon legal interpretations to argue, as a matter of policy, that Article I judges should be assigned certain tasks, Article III judges other tasks.

Yet a third way to think about this issue is to return to "housekeeping." The divisions drawn between Article III and Article I judges bear some resemblance to the linguistic deployment of housekeeping, with its distancing, dismissive, and oppositional structures. The category "housekeeping" underscores questions about the divisions drawn between Article I and Article III judges. Are some kinds of adjudicatory work considered "housekeeping" (either in the sense of being work to which less attention need be paid or work of less importance) and given to lower echelon judges? Should certain kinds of work be segregated and left to a particular set of judges? These questions (although not often expressed in "housekeeping" terms¹⁰³) are very much the questions

Torres, 912 F.2d 1552 (1st Cir. 1990) (following *United States v. France*; *Gomez* applies even though defendant made no objection to jury selection by magistrate); *Virgin Islands v. Williams*, 892 F.2d 305 (3d Cir. 1989) (defendant's failure to object to federal magistrate conducting voir dire precludes challenge); *United States v. Wey*, 895 F.2d 429 (7th Cir. 1990) (objection waived when defendant's lawyer agreed to magistrate selection of jury); *In re United States* (*United States v. Sayeedi*), 903 F.2d 88 (2d Cir. 1990) (precluding magistrate from presiding when government objected and despite defendant's willingness to permit a magistrate to preside at jury selection); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363 (7th Cir. 1990) (magistrate lacks authority to conduct civil voir dire). See also *United States v. Sawyers*, 902 F.2d 1217 (6th Cir. 1990) (upholding magistrate's power to give an *Allen* charge; relying on the *Gomez* decision and the defendant's silence).

¹⁰⁰ *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990), *cert. granted*, 110 S. Ct. 3269 (1990); *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989).

¹⁰¹ *United States v. Raddatz*, 447 U.S. 667, 675 (1980). In *Raddatz*, the Court held that an Article III judge was not required "to actually conduct a new hearing" when accepting magistrate's decision (that relied upon evaluations of witnesses' credibility) to suppress evidence; it was "unlikely" that Article III trial judge could "reject a magistrate's proposed findings on credibility when those findings are dispositive" without rehearing witnesses. *Id.* at 681 n.7 (emphasis in original).

¹⁰² *Pacemaker Diagnostic Clinic of Am., Inc. v. Istromedex, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984). See also *Colorado Bldg. and Constr. Trades Council v. Andersen Constr. Co.*, 879 F.2d 809 (10th Cir. 1990) (absent parties' consent and delegation by district judge, magistrate lacks power to enter post-judgment final order).

¹⁰³ But occasionally are. See *infra* note 124 and accompanying text (reference to *Judicial Housekeeping: Hearing on H.R. 408 and Related Bills Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th

asked as courts and commentators have discussed "the federal courts" over the past two decades. Starting in this century, concern about increasing filings in the federal courts prompted commentators to assess the scope of federal jurisdiction and to propose alterations.¹⁰⁴ This is not the place to chronicle all of the proposals made; rather, I will highlight recent discussion that focuses on *which* federal trial judges do what tasks in which categories of cases arising under federal law.

A. Contemporary Aspirations for the Article III Judiciary

Much of the contemporary conversation about federal court jurisdiction is focused upon the number of cases filed in the federal system. The dockets of both trial and appellate courts have grown dramatically during this century; growing caseloads in turn bring attention to the capacity of the federal judiciary to respond.¹⁰⁵ A good deal of commentary is couched in terms of concern that the Article III judiciary, while currently "small," is in danger of becoming "too large" and, therefore, that some work reassignments are required. (The conception of the "size" of the federal courts is itself an intriguing one. What aspects of a court system make it "small" or "large"—the number of cases pending? the number of judges and other employees? the number of courthouses and the amount of physical space? the number of reported decisions? the size of its budget? While all of these are possible measures, the discussion of the "size" of the federal judiciary is dominated by the number of Article III judges that it has.)

As of 1988, the Article III courts had 168 authorized appellate judgeships and 575 authorized trial judgeships.¹⁰⁶ By way of comparison, 769 state court judges sit on intermediate appellate courts; some 6204 state court judges sit on courts that have appellate and

Cong., 2nd Sess. (1988)).

¹⁰⁴ See, e.g., FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928).

¹⁰⁵ See TERENCE DUNGWORTH & NICHOLAS M. PACE, *STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS* (1990) vi-vii (caseload growth); viii (despite growth in filings of civil cases by "private" parties, the "average time to disposition for private civil cases was about the same in 1986 as it was in 1971"); viii-ix (the percentage of cases terminated without any reported court action remained relatively constant at 40% in 1986 as compared to 1971, yet the rate of cases tried as a percentage of termination declined).

¹⁰⁶ 1989 ADMIN. OFFICE REPORT, *supra* note 7, at 46.

original jurisdiction,¹⁰⁷ while another 12,929 state court judges are purely trial judges.¹⁰⁸ The characterization of the Article III judiciary as “small” could depend upon comparison between the combined size of the state judiciaries (19,902)—responding to the adjudicative needs in the United States—with the size of the Article III judiciary (of some 743 judges, or 3.5% of the combined federal-state judicial population). Under that framework, Article III judges who are concerned about the “size” of their judiciary would be assured of their status in a very “small” (“minuscule” might be a better description) judiciary and as likely to remain so—absent phenomenal increases in their ranks by legislation that would have to come (currently) from a Democratic Congress and that would enable a Republican President to appoint hundreds of judges.¹⁰⁹

Thus, one possible response to contemporary concern about the increased number of cases pending in the federal courts is to increase the number of judges to preside over those cases. Many commentators, however, counsel against expansion of Article III courts.¹¹⁰ Over the past decade, they have repeated a set of arguments about the number of Article III judges and the nature of their work. For example, in the mid-1970s, when he was Solicitor General, Robert Bork argued that the Article III judiciary needed to be kept “small.” As he explained:

Large numbers dilute prestige, a major attraction of a career on the bench, and make it harder to recruit first-rate lawyers. Large numbers damage collegiality, lessen esprit, and diminish the possibility of interaction throughout the judicial corps.¹¹¹

¹⁰⁷ NATIONAL CENTER FOR STATE COURTS, STATE COURT ORGANIZATION 1987 at 20-71 (1988). These figures are derived by reviewing data listed state by state.

¹⁰⁸ *Id.* This figure is derived by compiling the number of judgeships listed for courts described as having only original jurisdiction in each of the states.

¹⁰⁹ Currently pending before Congress is a bill, the Judicial Improvements Act of 1990, S. 2648, 101st Cong., 2d Sess. (1990) (the “Biden Bill”), that provides for case management and the creation of 77 new judgeships (in the Senate version).

¹¹⁰ See generally, Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 69-74.

¹¹¹ Robert Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 234 (address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, The Pound Conference, held in St. Paul, Minnesota, Apr. 7-9, 1976). See also DEPT. OF JUSTICE COMM. ON REVISION OF THE FED. JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 6-7 (1977) (committee chaired by Robert Bork and whose

In lieu of expanding the number of judges, Bork suggested contracting the reach of Article III jurisdiction. In addition to suggesting the abolition of diversity, Bork argued that cases involving social security, food stamps, federal employers' liability, consumer products, and some aspects of the Clean Air Act should be sent away from Article III judges.¹¹² In his words, welfare "programs may have great social importance but the issues presented are in large measure legal trivia."¹¹³ Just as some courts have dismissed activities as "housekeeping," Bork dismissed the work of ruling on claims arising from these statutes. In Bork's view, these cases can be decided by "someone far less qualified than a judge."¹¹⁴

Although the terms are somewhat different, the rhetoric less blunt, and the analysis far more complete, Richard Posner has reached many conclusions similar to those of Robert Bork about appropriate responses to the perceived federal court overload. For example, in his book, *The Federal Courts: Crisis and Reform*,¹¹⁵ Posner also urged that more of the adjudication of social security cases be moved to agencies,¹¹⁶ that federal employer liability claims be sent to administrative decisionmakers, and that the

members included Scott Crampton, Ronald Gainer, Thomas Kauper, Rex Lee, Stanley Pottinger, Antonin Scalia, Peter Taft, Richard Thornburgh, and Michael Uhlmann, concluded that

[s]well[ing] the size of the federal judiciary indefinitely would damage collegiality, an essential element in the collective evolution of sound legal principles, and diminish the possibility of personal interaction throughout the judiciary. . . . Large numbers dilute the great prestige . . . and, given the low compensation that we provide for federal judges, that dilution will make it increasingly more difficult to attract first-rate men and women.)

(on file with author) [hereinafter *THE NEEDS OF THE FEDERAL COURTS*].

¹¹² At the time, Bork described his efforts as an "embryonic project." Robert Bork, *supra* note 111, at 231.

¹¹³ *Id.* at 237. See also *THE NEEDS OF THE FEDERAL COURTS*, *supra* note 111, at 8-9 (Article III adjudication not needed for "relatively unsophisticated, repetitious factual issues. . . . [R]epetitious factual disputes [that] rarely give rise to important legal questions [include] claims arising under the Social Security Act, the Federal Employers Liability Act, the Consumer Products Safety Act, and the Truth-in-Lending Act.")

¹¹⁴ Robert Bork, *supra* note 111, at 238-39. Bork also thought that many of these cases could be "handled informally, without counsel, unless the claimant desired an attorney. . . . [While] [s]ome cases might require rigorous procedural and evidentiary rules as well as the assistance of counsel, . . . that degree of rigor could perhaps be dispensed with, for example, in the ordinary Social Security disability case." *Id.* at 239.

¹¹⁵ RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

¹¹⁶ *Id.* at 160-61 (in "the case of social security disability benefits, maybe it [Article III appellate review] could be eliminated altogether").

numbers of Article III judges should not be greatly increased.¹¹⁷

Justice Antonin Scalia has also commented on cases appropriate for Article III adjudication. Recently, Justice Scalia reminisced about his vision, when he was graduating from law school in 1960, of the federal judiciary.

The federal courts, as I knew them then, were forums for the "big case"—major commercial litigation under the diversity jurisdiction, and federal actions under such laws regulating interstate commerce as the Sherman Act, the Securities Exchange Act, and the National Labor Relations Act. They [the Article III courts] were not the place where one would find many routine tort and employment disputes. They had FELA [Federal Employer Liability Act] and Jones Act cases, to be sure—but those seemed to be the exception proving the rule, a touch of the mundane in a docket that was at least substantially exotic. . . . In short, there was, in 1960, real meaning to the phrase "Don't make a federal case out of it."¹¹⁸

Substantial divergences exist between Justice Scalia's memories about what he (as a third-year law student) thought was in the federal courts and what actually *was* in the federal courts. Marc Galanter has responded in detail in an article about "The Federal Courts Since the Good Old Days."¹¹⁹ While Justice Scalia correctly noted that case filings have increased dramatically (civil filings rose from 51,063 cases in 1960 to 254,249 cases in 1986) and that both tort and contract cases contributed to that increase,¹²⁰ Justice Scalia erred in describing tort cases in 1960 as "the exception . . . , a touch of the mundane." In fact, torts were the largest category of

¹¹⁷ *Id.* at 95-102, 129. See also Richard Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) ("The federal courts were created to be small. . . . The natural limits of expansion were not reached until very recently.").

¹¹⁸ Address by Justice Antonin Scalia to the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), *reprinted in* 34 FED. B. NEWS & J. 252 (1987).

¹¹⁹ Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921.

¹²⁰ *Id.* at 924. According to Galanter, "six categories of cases account for over four-fifths of the increase[—]civil rights cases, prisoner petitions, social security cases, recovery cases, other contract cases, and tort cases." *Id.*

kind of case in the federal civil docket in 1960—making up 38% of the filings then, as compared to the 17% of the filings that they constituted in 1986.¹²¹

The central question, however, is not whether Justice Scalia's rosy reminiscence is clouded. Whatever the caseload, 1960 or 1990, the question is: what does one wish for "the federal courts"? The answer from the commentary of Robert Bork, Richard Posner, and Antonin Scalia seems to be that the Article III judiciary must be small in number and do "important" work, and that important work is by definition not the work of adjudicating "routine" tort cases, not the work of deciding individual cases challenging government decisions under certain federal regulatory statutes. The sense, stated most bluntly by Robert Bork, is that those cases are somehow beneath the dignity of the Article III judiciary. Recall Bork's phrase: "someone less qualified than a judge" can decide claims of wrongfully withheld social security benefits.

The themes of specialness and smallness as hallmarks of Article III judges were reiterated in a recent report written by a congressionally chartered group, "the Federal Courts Study Committee"¹²² (FCSC), whose task was to "examine problems and issues currently facing the courts of the United States," to "develop a long-range plan for the future of the Federal judiciary," and to report, some fifteen months later, to Congress and others about how to implement the proposals.¹²³ When Congress debated legislation to au-

¹²¹ *Id.* at 927. The kind of tort cases filed has changed: in 1960, 55.6% of the tort diversity filings were motor vehicle personal injury cases; in 1986, car cases were 23.1% of the diversity tort total. *Id.* at 937. In contrast, product liability filings have increased, from 10.2% of tort filings in 1975 to 31.5% in 1985. *Id.* Further, as Galanter explains, in 1960, as today, many commentators reported a "crisis in the courts." *Id.* at 927.

¹²² Federal Courts Study Act, Pub. L. No. 100-702, § 102(a) (1988) (codified as amended at 28 U.S.C. § 331 note).

¹²³ *Id.* at § 102(b). As provided by the legislation, the Chief Justice of the United States appointed 15 individuals to the Study Committee. Chaired by the Honorable Joseph Weis of the United States Court of Appeals for the Third Circuit, the membership included Judge Richard Posner of the Seventh Circuit, Judge Jose Cabranes of the Federal District Court in Connecticut, Judge Levin Campbell of the First Circuit, Robert Kastenmeier, of the House of Representatives' Judiciary Committee, and former Solicitor General, Rex Lee, now president of Brigham Young University. Judges Posner, Cabranes, and Campbell all chaired subcommittees of the FCSC. Other committee members included J. Vincent Aprile, Esq. (General Counsel, Kentucky State Dept. of Public Advocacy); Chief Justice Keith M. Callow (of the Washington Supreme Court); Edward S.G. Dennis, Jr., Esq. (Assistant Attorney General, Criminal Division, U.S. Department of Justice); Senator Charles E. Grassley (Iowa; member, U.S. Senate Judiciary Committee); Morris Harrell, Esq. (former president of the

thorize such a study, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee held hearings—called “Judicial Housekeeping.”¹²⁴ Thus, once again, the complex deployment of the word “housekeeping”—this time to reassure courtwatchers that no “political” agendas were to be advanced by the creation of a study committee. As the Federal Courts Study Committee itself later explained the mandate, it was to avoid “substantive concerns” and instead direct itself to “institutional arrangements.”¹²⁵

In many ways, this “housekeeping” work is a stunning achievement. Fifteen people together for under fifteen months—writing a book about a vast number of topics, all related to federal courts. As the press release for the FCSC Report describes: “A blue-ribbon panel of members of Congress, judges, and lawyers . . . has proposed over one hundred changes in the administration and operation of the federal court system.”¹²⁶ As a collaborative effort, the Report is not animated by a single set of theoretical assumptions, and for this discussion, only one aspect of the Report’s work

American Bar Association and member of a Dallas, Texas law firm); Senator Howell Heflin (Alabama; member, U.S. Senate Judiciary Committee); Judge Judith N. Keep (U.S. District Judge, S.D. California); Representative Carlos J. Moorhead (California; member, U.S. House of Representatives Judiciary Committee); Diana Gribbon Motz, Esq. (member of Baltimore, Maryland law firm). FCSC REPORT, *supra* note 12, at iii. The Federal Courts Study Committee divided into subgroups, and those subgroups in turn convened advisory groups to consider questions of workload, division of responsibility between state and federal courts, federal courts and agencies, and the like. I served on the advisory panel to the subcommittee (on the role and relationships of federal courts to other branches of government and judicial entities) that was chaired by Richard Posner.

¹²⁴ See *Judicial Housekeeping: Hearings on H.R. 408 and Related Bills Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988). These hearings included H.R. 1929, a bill to establish a Federal Courts Study Commission, and H.R. 3227, a bill to establish a Federal Courts Study Commission on Judicial Administration. *Id.* at 12-29. For the related Senate hearings, see *Federal Courts Study Act: Hearings on S. 951 Before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987).

¹²⁵ FCSC REPORT, *supra* note 12, at 3. The Study Committee issued a Tentative Report in December of 1989. See generally FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT (Dec. 22, 1989) (on file with author) [hereinafter FCSC TENTATIVE RECOMMENDATIONS]. During January, hearings were held in nine cities around the country on the report. Some 270 witnesses (myself included) testified. Revisions were then made, and, on April 2, 1990, the Committee filed its final report.

¹²⁶ FEDERAL COURTS STUDY COMM., NEWS RELEASE 1 (April 2, 1990) (on file with author). In addition, the project sparked a vast research effort. See *Federal Courts Symposium*, 1990 B.Y.U. L. REV. 1; FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMM. REPORTS (July 1, 1990) [hereinafter FCSC WORKING PAPERS].

is relevant: its assessment of the allocation of work between Article III judges and non-Article III federal adjudicators.

The FCSC Report began by emphasizing the specialness of the Article III judiciary: "the federal judiciary is composed most importantly of Article III judges."¹²⁷ The Report (echoing the comments of Robert Bork and Richard Posner) argued that the Article III judiciary had to be very small. Specifically, the FCSC Report cited the suggestion that "1,000 [judges] is the practical ceiling" for the federal judiciary; the Report observed that "we may be approaching the limits of the natural growth of the federal courts."¹²⁸

In some respects, the Report suggests that smallness itself is the quality central, almost definitional, to the Article III judiciary. What assumptions underlie this view? One aspect of the argument relies on description: Article III judges are special because they are few in numbers; because there are few Article III judges, they are special. But there is more than circularity, for the argument includes the claim that the process by which Article III judges are selected—presidential nomination and senate confirmation—is currently successful but depends upon the executive and legislative branches having a relatively small number of candidates, and that persons so nominated are subjected to relatively extensive and somewhat public scrutiny by the American Bar Association and the Department of Justice. (The implicit assumption is that either because of other constraints upon magistrates and bankruptcy judges or because of the work that these judges do, the executive and legislative branches need not pay such attention to them.¹²⁹) In addition, the Report assumes that highly qualified lawyers who are willing to be considered for the Article III judiciary are only so willing because they know that very few other people can hold that

¹²⁷ FCSC REPORT, *supra* note 12, at 69.

¹²⁸ *Id.* at 8. These views match those of Richard Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, *supra* note 117.

¹²⁹ For a description of the demographics of those selected by Article III trial judges to be magistrates, see Christopher E. Smith, *Who are the U.S. Magistrates?* 71 JUDICATURE 143 (1987). According to the Committee on the Administration of the Magistrates System of the Judicial Conference of the United States, Article III trial judges should continue to have appointment power for magistrates; it "is essential to leave appointment authority with the district judges, whose enlightened self-interest should prompt them to select candidates of the highest caliber." Report of the Committee on the Administration of the Federal Magistrates System of the Federal Courts Study Committee at 5, collected in FCSC WORKING PAPERS, *supra* note 126, Vol. 2, Section IV.

position and thus, if selected, that they will be relatively visible and prestigious actors.¹³⁰ In the words of the Report:

a judge who felt like simply a tiny cog in a vast wheel that would turn at the same speed whatever the judge did would not approach the judicial task with the requisite sense that power must be exercised responsibly—especially when that judge, by reason of having life tenure, lacked the usual incentives to perform assigned tasks energetically and responsibly.¹³¹

To keep the Article III judiciary small, the FCSC Report proposed reallocating some of the work, currently formally assigned to the Article III judiciary, to other institutions.¹³² The suggestions of most relevance to this discussion relate to the allocation of authority between Article III and Article I judges. The Report proposed that, in a variety of civil federal statutory schemes, more of the first-line adjudicatory work—factfinding and sometimes the first level of appellate review—be shifted away from Article III judges to others.¹³³ For example, building on earlier proposals to exclude

¹³⁰ See FCSC REPORT, *supra* note 12, at 7. Another aspect (relevant in part to state/federal relations) of the argument for a "small" Article III judiciary comes from a view that federal authority is itself supposed to be limited, and thus federal courts should be limited in size; on the occasions when federal judicial intervention occurs, it "is more likely" to be "acceptable" to the public if "the federal judiciary is perceived as a small and special corps . . . rather than as a faceless, omnipresent bureaucracy." *Id.* at 8.

¹³¹ *Id.* at 7. In the December 22nd Tentative Report, the explanations about *why* the Article III judiciary should stay small centered around concern that expansion would result in "unqualified candidates," diminish "collegiality," "accountability," and "job satisfaction," and result in increased legal uncertainty. FCSC TENTATIVE RECOMMENDATIONS, *supra* note 125, at 7-8.

¹³² For example, the Report recommended the near abolition of diversity jurisdiction, reserving federal jurisdiction for "certain complex cases," such as "product liability litigation . . . involving scattered events or parties and substantial claims by numerous defendants," thereby removing most cases that arise under state law (including contract and non-large scale tort claims). FCSC REPORT, *supra* note 12, at 39-40. The Report also recommended the retention of diversity jurisdiction for "[s]uits in which aliens are parties" and in interpleader. *Id.* As an alternative to the above restrictions, the Report recommended that in-state plaintiffs be precluded from claiming diversity jurisdiction, that the definition of diverse citizenship and the nature of damages be altered, and that the amount-in-controversy requirement be increased. *Id.* at 42. For a discussion of how the Article III appellate judiciary has itself devised ways to reallocate its work and avoid some of what it perceives as less interesting, see Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3.

¹³³ These proposals build on Supreme Court cases approving delegation of factfinding to

social security cases from Article III jurisdiction,¹³⁴ the FCSC Report called (over dissents from some Committee members¹³⁵) for the creation of a special court of disability appeals, to be staffed by Article I judges,¹³⁶ with Article III review only of "constitutional claims" and "pure questions of law."¹³⁷ In addition, the Report proposed administrative decisionmaking for cases under the Federal Employer Liability Act and the Jones Act, Article I status for tax court trial (but not appellate) judges, Article I decisionmaking in federal tort claims when the matter in controversy is under \$10,000, and increased powers for bankruptcy judges and magistrates.¹³⁸ Using the dollar amount-in-controversy as a yardstick, the FCSC Report also used the economic value of the federal rights at stake as one way to distinguish between business sent to Article III and Article I courts.¹³⁹ The Report proposed that some "small"—in terms of dollars—federal claims be sent elsewhere: that a small claims court be created for claims under the Federal Torts Claims Act that fall below \$10,000;¹⁴⁰ that, with the parties' consent, the Equal Employment Opportunities Commission (EEOC) provide binding arbitration in wrongful discharge cases, because the "stakes" do not, from the employer's vantage, merit

non-Article III judges with review by Article III judges. *Crowell v. Benson*, 285 U.S. 22 (1932), began the use of this line in the administrative context; in *Crowell*, "jurisdictional facts" had to be reviewed *de novo* by an Article III court. *Id.* at 62-65. More recent cases have permitted greater Article I authority over factfinding. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568 (1985).

¹³⁴ H.R. 4647, 99th Cong., 2d Sess. (1986); Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U.L. REV. 1, 3 (1987) (three bills, two submitted, one in draft, with sponsorship from the Reagan administration, to "remove all or almost all Social Security appeals" from Article III courts).

¹³⁵ The chair, Joseph Weis, Senator Grassley, Mr. Dennis, and Mr. Harrell dissented. FCSC REPORT, *supra* note 12, at 58-59.

¹³⁶ *Id.* at 55.

¹³⁷ *Id.*

¹³⁸ *Id.* at 62-64, 69-72, 81-83, 76, 79-81.

¹³⁹ In addition to the amount-in-controversy in diversity jurisdiction, see 28 U.S.C. § 1332(a) (1988), the delineation between the criminal jurisdiction of magistrates and of Article III judges is by the length of the sentence. Magistrates have jurisdiction to try misdemeanors but not felonies—but Article III judges can "upon the court's own motion, or for good cause shown, upon petition by . . . the Government" try the case. Such petitions "should note the novelty, importance, or complexity of the case . . ." 18 U.S.C. § 3401(a), (f), (g) (West's Supp., 1989). See also FED. R. CRIM. P. 58 (as revised, to be effective absent congressional action in December of 1990).

¹⁴⁰ FCSC REPORT, *supra* note 12, at 81.

litigation.¹⁴¹

The FCSC Report, like the writings of the commentators from which some of these suggestions are drawn, thus provides a window into contemporary aspirations expressed for the Article III judiciary. To summarize, the claims made are that, for people to want to be Article III judges, one must promise them elite status; given life tenure, to insure responsible judging, one must insure prestige, visibility, and a small, elite peer group.¹⁴² In addition, proponents of these views assume that "law" can be distinguished from "fact"; that judges could be instructed to decide only questions of either "fact" or "law"; and that an elite cadre of judges is best deployed to work at the "higher" echelons—defined either as doing factfinding in cases involving many parties, many claims, large amounts of money, or "significant" issues, or as working as an appellate body to review the rulings of underlings who decide facts.¹⁴³

Factfinding, the complex and messy activity of interacting with litigants, witnesses, and lawyers, listening to different versions of events, attempting construction and reconstruction of those events, and ultimately creating narratives, is second order work ("house-keeping") under this vision.¹⁴⁴ Further, the people who are to do that work are not the focus of much discussion; the problems of recruitment, status, and capacity of Article I judges are given less attention.¹⁴⁵ Thus, like the housewife who is an "invisible

¹⁴¹ *Id.* at 60. See also the suggestion to limit removal of cases under the Employee Retirement Income Security Act (ERISA) that are under \$10,000 from federal to state court. *Id.* at 43-44. Another aspect of the explanation of why "small" value cases should not be before Article III judges is the claim that Article III adjudication is more expensive for the litigants than other adjudication, that parties with resources attempt to take strategic advantage by filing in Article III courts. See the discussion of ERISA removal, *id.* at 43-44.

¹⁴² Exactly how one insures responsible judging by magistrates, bankruptcy judges, and administrative law judges is not a subject addressed by the Report; the assumptions might be that their lack of life tenure and review by Article III judges are sufficient, but one would want to know more about retention, retirement, dismissal rates, and reversal rates before having confidence that *de facto* tenure is not prevalent.

¹⁴³ FCSC REPORT, *supra* note 12, at 55-58, 69-70.

¹⁴⁴ Suggesting the triumph of "economic man" over "literary woman." See Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1988); Robin West, *Law, Literature, and the Celebration of Authority*, 83 NW. U.L. REV. 977 (1989).

¹⁴⁵ For example, the Federal Courts Study Committee sent questionnaires to survey Article III judges but did not undertake to make formal inquiries of magistrates or bankruptcy judges. Letter from FCSC to Article III Judges (June 26, 1990) (on file with author). However, the Committee did receive submissions from the Division of Magistrates of the Admin-

worker,"¹⁴⁶ the magistrate and bankruptcy judge are an assumed, but not very visible, presence.¹⁴⁷

The analogies between housewives and lower echelon judges are not too far from the surface of the discussion. At the hearing held in San Diego in January of 1990 on the Tentative Report of the Federal Courts Study Committee, a federal judge offered two comments. First, he recommended giving federal magistrates a different name. Call them, he suggested, "magistrate judges." The judge argued that the reason to change the name was to improve the lot of magistrates and to recognize their enormous contribution to the federal judiciary.¹⁴⁸ Notice that the judge did *not* propose making magistrates Article III judges. What the federal trial judge wanted was to change their name, not their actual status; he argued that the name change would more fairly reflect their work (which it would) and give litigants who wanted "a judge" some comfort (albeit possibly based upon confusion). The proposal to adopt the name of the more powerful party is one familiar to women in this country; if they marry, they are expected to adopt the names of men. Name changing can have a range of purposes and meanings. For some women, the change in name (and the appellation "Mrs.") may mark an apparent improvement in status but may also ob-

istrative Office of the U.S. Courts, the Committee on the Administration of the Federal Magistrates System, and the National Council of the United States Magistrates. See FCSC WORKING PAPERS, *supra* note 126, Vol. 2, section IVA. For discussion of bankruptcy issues, see FCSC WORKING PAPERS, *supra* note 126, Vol. 1, at 354-71.

¹⁴⁶ DOLORES HAYDEN, *supra* note 24, at 111. See also Micaela Di Leonardo, *The Female World of Cards and Holidays: Women, Families, and the Work of Kinship*, 12 SIGNS 440 (1987) (work of kinship crosses the boundaries between the domestic and labor perspectives on women's work).

¹⁴⁷ Until recently, data collected on judicial work has not included the time spent by magistrates. See Richard Mandelbaum, *Measuring the Work of Magistrates*, 4 INSIDE LITIGATION 1 (Feb. 1990) ("weighted caseload data collection" to include magistrates' work in the future). According to Christopher E. Smith, when federal magistrates attempted to have their opinions published in the federal reporting system, "district judges manifested their concerns about differentiating their status from that of magistrates by vigorously opposing and effectively blocking any effort to publish magistrates' opinions." CHRISTOPHER E. SMITH, SUBORDINATE JUDGES, *supra* note 8, at 161. Another aspect of magistrates' work that generates more public visibility is that of setting bail. *Id.* at 166-68.

¹⁴⁸ Notes on the FCSC hearing, San Diego, Calif. (Jan. 29, 1990) (on file with author). A name change was also recommended to the FCSC by the National Council of United States Magistrates. See FCSC WORKING PAPERS, *supra* note 126, Vol. 2, Section IVA, at 3-4; Letter of September 6, 1990 from Donald Abram, President of the Council to the Honorable Robert W. Kastenmeier, 1 (on file with author).

scure commitments to oneself and may lessen one's allegiance with others who have not obtained similar status. Will a name change for magistrates work similarly—to mark an apparent improvement in status but not to address the underlying evaluation of that group as secondary?

The suggestion about a name change is one of the proposals of the Federal Courts Study Committee that has since been translated into legislation; the August 1, 1990 House version of the 1990 Civil Justice Reform Act included proposals to rename magistrates "Assistant United States Judges."¹⁴⁹ After opposition to that change was voiced by the Department of Justice, the Judicial Conference, and the American Bar Association, the proposed bill was revised.¹⁵⁰ As reported out of the Judiciary Committee on September 18, 1990 and passed by the House on September 27, 1990, the legislation provided that a magistrate be called a "United States Magistrate Judge."¹⁵¹ According to the legislative history for this section, adding the word "judge" is appropriate because:

"Judge" is an appellation commonly assigned to non-article III adjudicators in the federal court system. . . . Moreover, . . . magistrates are commonly addressed as "judge" in their courtrooms The provision . . . is designed to reflect more accurately the responsibilities and duties of the office. It is not intended to affect the substantive authority or jurisdiction of . . . magistrates.¹⁵²

The trial judge who proposed the name changes had another suggestion; he urged an increase in the number of magistrates. We need, he said, one magistrate for every two federal district Article III judges. What role might an increased number of magistrates play? As explained by a recent case in the Third Circuit, the "Federal Magistrates Act is intended to relieve the district courts of certain ministerial and subordinate duties that often distract the

¹⁴⁹ See H.R. 5381, A Bill to Implement Certain Proposals of the Federal Courts Study Committee, and For Other Purposes, 101st Cong., 2d Sess. § 206 (1990) (change of name of United States Magistrates to "assistant United States district judge.")

¹⁵⁰ Conversation with staff of the House Judiciary Committee (September 1990).

¹⁵¹ See H.R. 5381, 101st Cong., 1st Sess. § 204 (Sept. 24, 1990) (Change of Name of United States Magistrates).

¹⁵² H.R. REP. NO. 101-734, 101st Cong., 2d Sess. 31 (1990) (Federal Courts Study Committee Implementation Act of 1990).

courts from matters that require their immediate and undivided attention.”¹⁵³ As envisioned by the FCSC Report, magistrates should not be “autonomous” actors but, while their powers could be enhanced, they should remain “auxiliary officers” of Article III judges—to be “supportive and flexible.”¹⁵⁴ Sounds, in other words, like “women’s work.” As historian Nancy Cott writes, what distinguished the work of women from that of men in the formation of gendered divisions of labor during the early part of the nineteenth century was the assumption that women’s work had a “constant orientation toward the needs of others, especially men.”¹⁵⁵ Obscured are the interdependencies of and the variations in the work of both women and men and of the work of both magistrates and Article III judges.¹⁵⁶ What is clear is the value attributed to the work of the auxiliary officer as compared with the value attributed to the tasks of the Article III judge.

B. Judicial Essentialism

The debate about what work and prerogatives belong uniquely to Article III judges is reminiscent of other conversations, in law and elsewhere, about unique and intrinsic qualities of institutions and genders. In case law about Article III, the phrase “essential attributes of judicial power” is used to denote those activities that neither the Executive nor the Congress can divest from the constitutionally-created federal court system.¹⁵⁷ In the law of the tenth amendment, “essential attributes of state sovereignty” are claimed to be state activities that cannot be regulated by Congress.¹⁵⁸ In

¹⁵³ *Government of the Virgin Islands v. Williams*, 892 F.2d 305, 311 (3d Cir. 1989) (client, upon consultation with attorney, may consent to magistrate conducting voir dire; the court distinguished *Gomez v. United States*, 109 S. Ct. 2237 (1989), in which defendant had objected to magistrate conducting voir dire), *cert. denied*, 110 S. Ct. 2211 (1990).

¹⁵⁴ FCSC REPORT, *supra* note 12, at 79.

¹⁵⁵ NANCY F. COTT, *supra* note 24, at 22.

¹⁵⁶ See Anna Yeatman, *Women, Domestic Life and Sociology*, in FEMINIST CHALLENGES: SOCIAL AND POLITICAL THEORY, *supra* note 86, at 157, 159 (“[W]hen the public aspect of social existence is accorded privileged status . . . its relationship of mutual dependence to the domestic aspect is obscured. This has the effect of making the public domain falsely appear as self-sustaining . . .”).

¹⁵⁷ *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (“essential attributes of the judicial power”); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (“essential attributes of judicial power”).

¹⁵⁸ *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528,

discussions of feminism, the term "essentialism" has different aspects; one claim is about an alleged "essential" nature of women that precedes experience,¹⁵⁹ while another is a criticism addressed to some feminists who tend to describe some aspects of "Woman" as unchanging across race, class, and culture.¹⁶⁰

The debate about essentialism in feminism is helpful here; its exploration of what might be meant by claims that gender has essential, enduring, natural aspects can be used as a model for a similar debate about what might be meant by claims that Article III courts have essential, enduring aspects. For example, an essentialist claim about Article III judges could be that—either because of life tenure and salary protection (a structural argument based on "judicial independence") and/or presidential nomination and senate confirmation (another kind of structural argument based upon a particular kind of selection process)—those judges are different than judges without these attributes. Given that difference, existing prior to and apart from the work that they engage in, certain qualities could be ascribed to Article III judges. (The parallel here for gender is a claim that biology alone—independent of culture, social construction, division of work, and the like—sets women and men apart.¹⁶¹) Note that an alternative conception for judges would be that it is not their "essence" as creatures of Article III, but rather the work that they do on the cases allocated to them (an argument based upon division of labor¹⁶²) that distinguishes them

547 (1985) (quoting *Wirtz*, 392 U.S. at 205).

¹⁵⁹ See, e.g., *Bradwell v. State*, 83 U.S. (16 Wall) 130, 141-42 (1872) ("[N]ature, herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."). For contemporary commentary, see Nancy Fraser & Linda J. Nicholson, *Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism* in *FEMINISM/POSTMODERNISM* (Linda J. Nicholson ed. 1990); R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS* 54-62 (1987) ("categorical theory" as contrasted with "practice-based theory"); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 37-38 (1990) (relying upon "experiential, not essential differences").

¹⁶⁰ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing essentialism is dangerous because it ignores such factors as race, class, and sexual orientation); Deborah L. Rhode, *Theoretical Perspectives on Sexual Difference*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 2-7 (Deborah Rhode ed. 1990) [hereinafter *SEXUAL DIFFERENCE*].

¹⁶¹ See, e.g., Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 646-50 (1990); Susan H. Williams, *Feminism's Search for the Feminine: Essentialism, Utopianism, and Community*, 75 CORNELL L. REV. 700 (1990).

¹⁶² DOROTHY E. SMITH, *THE EVERYDAY WORLD AS PROBLEMATIC* 105-45 (1987) ("stand-

from Article I judges.

As in other essentialist arguments, empirical information is relevant.¹⁶³ For example, formally, Article III judges are uniquely insulated by virtue of life tenure and salary protections. But in the last few years, a few of these judges have been impeached and have charged political motivations for their investigations.¹⁶⁴ One would have to know the rate at which magistrates and bankruptcy judges have been fired or not reappointed, or have had their salaries reduced, to be confident about the claim that Article III judges alone are safeguarded from supervision.¹⁶⁵ One would also like to know the rates of withdrawals of cases and reversals of decisions by magistrates and bankruptcy judges and the corresponding numbers on reversals of Article III trial judges by appellate judges. Similarly, the claim about selection requires some probing: while some United States Supreme Court nominations are subjected to intensive scrutiny, others are not, and lower court nominations are

point" theorists who explain women's differences from men as based upon the nature of the work that each sex has been assigned); EVERETT C. HUGHES, *Social Role and the Division of Labor*, in *THE SOCIOLOGICAL EYE: SELECTED PAPERS* 304-10 (1971) [hereinafter *THE SOCIOLOGICAL EYE*].

¹⁶³ See, e.g., ELEANOR MACCOBY & CAROL JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974); Barrie Thorne, *Children and Gender: Constructions and Difference*, in *SEXUAL DIFFERENCE*, *supra* note 160, at 100-13.

¹⁶⁴ Former Judge Alcee L. Hastings of Florida claimed he was the "victim of political and racial persecution, especially by his fellow judges who simply don't like him." John P. MacKenzie, *The Virtue of Impeachment*, N.Y. Times, July 28, 1988, at A26, col. 1. Former Judge Harry Claiborne of Nevada asserted that "he is the innocent victim of Government persecution." *Close the Book on Judge Claiborne*, N.Y. Times, September 30, 1986, at A34, col. 1. Former Judge Walter L. Nixon of Mississippi stated that "the case against him was based on false testimony procured by prosecutorial abuses." Ruth Marcus, *Impeaching Judges a Long, Trying Process; Some Lawmakers Say System Wastes Congress' Time and is Unfair to the Accused*, Wash. Post, Apr. 7, 1989, at A21. Judge Robert Aguilar of California, recently convicted after a retrial, may face impeachment proceedings; he claimed that an FBI agent built "a false case against [the Judge] because of his [the agent's] dislike of the liberal judge's rulings" (Pamela A. MacLean, UPI, February 8, 1990).

¹⁶⁵ See CHRISTOPHER E. SMITH, *SUBORDINATE JUDGES*, *supra* note 8, at 181 ("Magistrates indicated no fears about salaries being reduced or tenure being affected because of court decisions adversely affecting the interests of the legislative and executive branches"—in part because an Article III judge also signs off on many decisions; the "real limitation upon magistrates' independence is not the other branches of government, but the district judges who wield such power over the magistrates' task assignments." *Id.* at 182). See also Frank H. Easterbrook, *"Success" and the Judicial Power*, 65 IND. L. REV. 277, 279 (1990) (administrative law judges "are chosen by civil service methods—and they serve for life!") (emphasis in original).

processed with relatively little public comment.¹⁶⁶ What are the characteristics of people who make it by the nominations process and how do they compare with those selected, by Article III judges, to be magistrates and bankruptcy judges?¹⁶⁷ One might respond that such empiricism is not of much help, because it is the perception of invulnerability and elite status (held by Article III judges) and the fear of vulnerability and knowledge of second class citizenship (held by magistrates and bankruptcy judges) that affect and engender each group's understanding of their role and their capacity to discharge judicial tasks.¹⁶⁸

But, if that argument is correct, then one would assume that the nature of the work of the different kinds of judges reflected the different confidence levels in their capacity to judge. The problem is, however, that at the trial level, the tasks for all judges have expanded over the past few decades—to embrace settlement efforts, pretrial management, and litigant supervision, as well as factfinding and adjudication.¹⁶⁹ At the same time, the formal differentiation among trial judges (Article III district judges, magistrates, and bankruptcy judges) has eroded. At many levels, all three sets of judges do all of the activities—settlement, pretrial management, litigant supervision, factfinding, adjudication—now understood to comprise the work of the trial bench.¹⁷⁰ Moreover,

¹⁶⁶ Since 1980, 472 individuals have been nominated to the federal bench, 410 by President Reagan and 62 by President Bush. Of those nominated, 440 were confirmed by the Senate, and 3 were rejected (Robert Bork, Bernard Siegan, Jefferson Sessions III). Twenty-nine nominations (such as that of Douglas Ginsberg) were withdrawn or the confirmation period lapsed. Conversation with Staff Member, the Alliance for Justice (Aug. 7, 1990).

¹⁶⁷ As of 1986, almost 60% of magistrates had been "[f]ederal court personnel [which] includes former law clerks, assistant U.S. attorneys, U.S. attorneys, federal defenders, clerks of court, bankruptcy judges, and federal probation officers." Christopher E. Smith, *Who are the U.S. Magistrates?*, *supra* note 129, at 147 (1987). Smith thus concluded that "former court personnel are in an advantageous position by virtue of the judge's familiarity with them." *Id.* (also giving descriptions of age, gender, and race, as well as educational and legal backgrounds of magistrates). For description of the process by which administrative law judges are selected and the role played by the Veterans Preference Act, see Jeffrey S. Lubbers, *supra* note 10, at 113-19.

¹⁶⁸ *But see* Thomas E. Carlson, *supra* note 12, at 558-59 (majority of lawyers surveyed believed that bankruptcy appellate panels made better decisions than did Article III trial judges).

¹⁶⁹ See Laura Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. L. & SOC. CHANGE 575 (1986).

¹⁷⁰ For a discussion of magistrates' work, see CARROLL SERON, *THE ROLES OF MAGISTRATES: NINE CASE STUDIES* (1985); CARROLL SERON, *THE ROLES OF MAGISTRATES IN FEDERAL DIS-*

proposed legislation to implement certain of the FCSC proposals would have increased the overlap of activities. Under the August 1, 1990 House version of the bill, magistrates were to be authorized to impose contempt under certain circumstances;¹⁷¹ litigants' consent to decisionmaking by bankruptcy judges would have been assumed;¹⁷² and appellate courts would have been authorized to create "bankruptcy appellate panels" (comprised of three bankruptcy judges) to hear (upon parties' consent) appeals from decisions of bankruptcy judges.¹⁷³ Under a recent version of the Senate bill to improve the "civil justice system," both magistrates and Article III trial judges are to be authorized to supervise pretrial proceedings.¹⁷⁴ While Article III trial judges and magistrates do not currently have identical jobs, the general trend since the creation of the magistrate system in 1968 has been in the direction of greater overlap—in terms of the jurisdictional authority and the nature of the work permitted to magistrates.¹⁷⁵ The animating assumptions behind this trend are that, as a matter of constitutional law, litigant consent and the possibility of Article III involvement at either

TRICT COURTS (1983); Carroll Seron, *The Professional Project of Parajudges: The Case of U.S. Magistrates*, 22 L. & Soc'y REV. 557 (1988). On the work of bankruptcy judges, see Jeffrey T. Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 AM. BANKR. L.J. 109, 135-96 (1989); Michael A. Hiltzik, *Court Cases Soar; Bankruptcy: A System Under Stress*, L.A. Times, Jul. 26, 1987 at 1, col. 1. For a discussion of Article III trial judges, see Robert Peckham, *The Federal Judge as a Case Manager: The New Role of Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); *New Curriculum Unveiled to Orient Judges*, 22 THIRD BRANCH 9 (July 1990) (importance of case management).

¹⁷¹ H.R. 5381 (August 1, 1990 version), 101st Cong., 2d Sess. §§ 206, 207 (1990). These proposals are drawn from recommendations made by the Committee on the Administration of the Federal Magistrates System (of the Judicial Conference) to the FCSC. See FCSC WORKING PAPERS, *supra* note 126, Vol. 2, § IV ("Magistrates Issues").

¹⁷² H.R. 5381 (August 1, 1990 version), 101st Cong., 2d Sess. § 114 (1990).

¹⁷³ *Id.* at § 115. Currently, the Court of Appeals for the Ninth Circuit has the only functioning bankruptcy appellate panel. See FCSC REPORT, *supra* note 12, at 74; Thomas E. Carlson, *supra* note 12, at 557.

¹⁷⁴ The Judicial Improvements Act of 1990, S. 2648, 101st Cong., 2d Sess. § 473(a)(3) (1990) (the "Biden Bill"), currently pending, provides for "early and ongoing control of the pretrial process through involvement of a judicial officer". See also H.R. 3898, 101st Cong., 1st Sess. (1990) (Civil Justice Reform Act of 1990). Note that an earlier version of that legislation had provided that Article III judges—"and not a magistrate"—conduct mandatory pretrial conferences. See S. 2027, 101st Cong., 2d Sess. (1990).

¹⁷⁵ See Richard Mandelbaum, *U.S. Magistrates: Part of the Problem or a Key to the Solution?*, 4 INSIDE LITIGATION 1 (Feb. 1990).

the trial or appellate stages respond to objections to non-Article III adjudication,¹⁷⁶ and that, as a matter of policy, the tasks so delegated do not require whatever special qualities Article III judges have.

The central differences that remain are that Article III trial judges are fewer in number than non-Article III judges, are claimed to be superior to non-Article III judges, are currently given more power, and are paid more for their work.¹⁷⁷ (In this way, some of the status of Article III judges depends, in part, upon the existence of non-Article III judges, just as being “manly” may depend upon distancing oneself from “womanly” traits.) Because Article III judges are thus perceived to be high-value workers, whatever work is exclusively theirs is, in turn, understood to be the most “important” work. The work that is sent elsewhere (“down”) is already conceived to be or becomes designated as the drudgery, the “routine,” the “housekeeping.”

IV. VALUATIONS OF JUDGING AND OF “HOUSEKEEPING”

If the deployment of the word “housekeeping” and the allocation of work were not sufficient to underscore the parallels between gender construction and the valuation of trial court judges, the words used to describe the procedure by which adjudication occurs

¹⁷⁶ See Richard Fallon, *supra* note 16, at 974-91. One current statement is that Congress cannot, constitutionally, give Article I courts the “plenary powers of Article III courts.” See *In re United Mo. Bank of Kansas City*, 901 F.2d 1449, 1452 (8th Cir. 1990) (bankruptcy judge has no statutory authority to conduct jury trials).

¹⁷⁷ Magistrates and bankruptcy judges may earn 92% (\$88,872) of what Article III trial judges earn (\$96,600); the Judicial Conference establishes the salary “subject to the statutory ceiling;” under a standing resolution, pay raises for bankruptcy judges result in pay raises for most full-time magistrates. Some full-time magistrates, however, are paid less than others. FCSC WORKING PAPERS, *supra* note 126, Vol. 2, § IV, at 6; see also Living Justices and Judges as of 07-01-90 (data from the Committee on the Administration of the Federal Magistrates System) (on file with author). One interesting wrinkle is that, because bankruptcy judges and magistrates do not have life tenure, their retirement plans vest differently than do Article III judges. Compare 28 U.S.C. § 377(a) (1988) with 28 U.S.C. § 371 (1988).

Full-time magistrates are each assigned one secretary, one courtroom deputy, and one law clerk; Article III trial judges are assigned one secretary, two law clerks, and one court clerk. Conversation with staff members of the Magistrates Division of the Administrative Office of the U.S. Courts (June 25, 1990). Magistrates’ offices may also be less comfortable than those of Article III judges. See Christopher E. Smith, *The Development of a Judicial Office: United States Magistrates and the Struggle for Status*, 14 J. LEGAL PROF 175, 191-92 (1989).

bring "home" the point. Charles Clark, dean of Yale Law School, judge on the Court of Appeals for the Second Circuit, and a major participant in the drafting of the 1938 Federal Rules of Civil Procedure, spoke of his enterprise—the framing of rules of procedure—as follows:

A handmaid, no matter how devoted, seems never averse to becoming mistress of a household should opportunity offer. Just so do rules of procedure tend to assume a too obtrusive place in the attentions of judges and lawyers—unless, indeed, they are continually restricted to their proper and subordinate role.¹⁷⁸

Clark asked: "What concrete steps may be taken to keep procedure in its modest position as handmaid?"¹⁷⁹ and then answered that question by claiming the "necessity of procedure" to equity, fairness, and impartiality. As he explained:

Regular habits are necessary in all daily tasks. A household becomes indeed disorganized if its head overturns even the settled round of daily meals. The process of adjudication requires such settled habits the more that litigants may not be prejudiced by deviation therefrom, and that impartiality in fact, and in appearance to the parties and the public, shall be maintained.¹⁸⁰

Clark thus portrayed procedure and the structure of adjudication as Woman, as both trivial and all important. Having first equated his reform with the modest role of "handmaid," Clark ended his essay (published the year that the federal national procedural rules were to take effect) by claiming that the new federal rules would not only "operate throughout the entire establishment of national courts, but may well serve to exorcise a complex procedure from the state courts as well."¹⁸¹ From "handmaid" to "impe-

¹⁷⁸ Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297 (1938), reprinted in *PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF CHARLES E. CLARK* 69 (Charles Alan Wright & Harry M. Reasoner eds. 1965) [hereinafter *PROCEDURE—THE HANDMAID*].

¹⁷⁹ *PROCEDURE—THE HANDMAID*, *supra* note 178, at 70.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 84. Clark was somewhat accurate in his prediction that federal rules would be used in the states: some half of the states adopted rules based upon them. See John B. Oakely & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986). On the other hand, not all per-

rialist" in one short essay. Nancy Cott wrote a description of nineteenth-century images of women: "To be idealized, yet rejected by men—the object of yearning, and yet of scorn—was the fate of the home-as-workplace. Women's work (indeed women's very character, viewed as essentially conditioned by the home) shared in that simultaneous glorification and devaluation."¹⁸² As the twentieth century ends, "housekeeping" and "handmaid" remain words used in law to denote lesser order activities.¹⁸³

The recent commentary and proposals on federal court jurisdiction and the use of the words "housekeeping" and "handmaid" are part of a larger struggle of the value of work and the meaning of words which is, in turn, at the core of feminist concerns.¹⁸⁴ The questions posed are not unique to Article I and Article III courts, to the allocation of jurisdiction, and to procedure; these questions underlie arguments about comparable worth;¹⁸⁵ about professionalization and the ranking of occupations;¹⁸⁶ about sex segregation in

ceive those rules as providing a simplified system. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

¹⁸² NANCY F. COTT, *supra* note 24, at 62. See also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (persistence of ideology of women's sphere as the home even as women have entered the marketplace).

¹⁸³ See, in addition to the cases cited *supra* notes 48-56 and 63-72, the reference to Clark and, perhaps ironically, to Margaret Atwood's *THE HANDMAID'S TALE* (1986) in the title used by David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS. 111, 121 (1988) ("As the handmaiden to substantive law, procedure shares" the substantive legal goal of post-Realist thought "that the purpose of . . . civil law is to empower the self[;] [s]tarted as a largely technical handmaiden to the work of mainstream reformers, the sociology of civil procedure is moving toward a full-blown critical practice . . . [which] would be the true handmaiden's revenge." *Id.* at 134). See also James F. Ponsoldt, *Balancing Government Efficiency and the Protection of Individual Liberties: An Analysis of the Conflict between Executive Branch "Housekeeping" Regulations and Criminal Defendants' Rights to a Constitutionally Fair Trial*, 19 HARV. C.R.-C.L. L. REV. 349 (1984) (about federal "housekeeping statute").

¹⁸⁴ See BETTINA APTHEKER, *TAPESTRIES OF LIFE: WOMEN'S WORK, WOMEN'S CONSCIOUSNESS, AND THE MEANING OF DAILY EXPERIENCE* (1989); BARBARA HERRNSTEIN SMITH, *CONTINGENCIES OF VALUE* (1988).

¹⁸⁵ See Roslyn L. Feldberg, *Comparable Worth: Toward Theory and Practice in the United States*, 10 SIGNS 311, 324 (1984) ("the debate is about social values and priorities underlying the wage hierarchy"); Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 SIGNS 137, 168 (1976) ("the maintenance of job segregation by sex is a key root of women's status"). See generally Symposium: *Approaching Pay Equity through Comparable Worth*, 45 J. SOC. ISSUES 1 (1989).

¹⁸⁶ EVERETT C. HUGHES, *The Humble and the Proud: the Comparative Study of Occupations*, in *THE SOCIOLOGICAL EYE*, *supra* note 162, at 417. See also CHRISTINE B. HARRINGTON & JANET RIFKIN, *THE GENDER ORGANIZATION OF MEDIATION: IMPLICATIONS FOR THE FEMINIZA-*

the workplace;¹⁸⁷ and about the evaluation of scientific inquiry.¹⁸⁸

Two kinds of relationships between trial judges' work and women's household work are relevant; the first relies upon a set of feminist theories loosely grouped as "cultural feminism"—which refers to feminists who appreciate women's engagement with and nurturance of other human beings and who celebrate "women's culture" for its interrelatedness.¹⁸⁹ Cultural feminists might point to the nature of some of the tasks that "less important" judges are assigned and note that the content of the work often requires talking with and dealing with lawyers and (occasionally) litigants and witnesses. Some of that work might require intensive interpersonal dealings, and some of the people with whom the work is done may themselves not be of high social or economic status. Given this "people-orientation," cultural feminists might argue for an identification of first-tier judging with skills traditionally associated with women and argue for reclaiming the value of that work.¹⁹⁰ Another conception (sometimes denominated "radical feminism" and sometimes posed in opposition to cultural feminism) is wary of claims about "women's ways," which may instead be the ways of the powerless and subordinated.¹⁹¹ "Power," "domination," "energy," and "ability"¹⁹² are central to the analysis; lower court judges' work

TION OF LEGAL PRACTICE 44 (Institute for Legal Studies Working Paper No. 4, Feb. 1989) ("new fields of legal work [such as mediation] . . . and new institutions to handle cases, often labeled 'routine cases' and even called 'garbage cases' . . . become gendered.").

¹⁸⁷ See Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

¹⁸⁸ SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 58-81 (1988) (construction of certain activities in doing scientific research as more important than others).

¹⁸⁹ See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Note that some commentators, such as Alice Echols, *The New Feminism of Yin and Yang* in POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Snitow, Christine Stansell, & Sharon Thompson eds. 1983), argue that cultural feminists are also essentialists, but while Gilligan claims a distinct voice for women, she is not clear about the sources; she relies a good deal on the relationship between children and their mothers. CAROL GILLIGAN, *supra*, at 7-23.

¹⁹⁰ One caveat here: many cultural feminists have also been in the forefront of the critique of adjudication itself as premised upon a male model of hierarchy. See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 J.L. & INEQUALITY 21 (1984).

¹⁹¹ See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987).

¹⁹² NANCY C.M. HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* 210-26 (1983).

may be identified with women because lower court judges, like women, are at the bottom of a hierarchy.

"Housekeeping" relates to both of these approaches, for that work has been identified as work of nurturing, as work of lesser importance, and as work that belongs particularly to women. But "housekeeping" need not be understood only in pejorative terms nor exclusively as the domain of women. Retrieving—without romanticizing—the importance of "humble"¹⁹³ activities, acknowledging the power in the work of maintenance and of the organization of daily structures, and reallocating obligations for caretaking are challenges for feminism. "[I]f the women's movement has taught us anything, it is that we must all share the housework but must also get the chance to gaze at the stars."¹⁹⁴ The federal courts offer one opportunity for taking on those challenges.

Indeed feminist theory, with its focus upon gender, may be particularly helpful in this context. Both judges and women are often put in situations in which they are asked to respond to the needs of others, and both groups face a similar problem: that their work does not receive much attention absent extraordinary circumstances; that their presence is assumed, but not much provided for. The question—faced by women in households and by judges in courts across the country—is how to have enough resources and energy to respond to unending needs.¹⁹⁵

One feminist response to the problems of underattention and undervaluation is "naming";¹⁹⁶ the provision of detailed descrip-

¹⁹³ See generally SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989); *FEMINIST CHALLENGES: SOCIAL AND POLITICAL THEORY*, *supra* note 86.

¹⁹⁴ Elaine Showalter, *Introduction: The Feminist Critical Revolution*, in *THE NEW FEMINIST CRITICISM: ESSAYS ON WOMEN, LITERATURE, AND THEORY* 3, 16 (Elaine Showalter ed. 1985).

¹⁹⁵ As one federal district judge, in response to a questionnaire sent by the FCSC, put it: "There are simply too many civil cases to push through the system, too many motions, and far, far too many criminal cases, for any human being to be satisfied that he or she is dispensing justice, rather than pushing cases and papers out the door." (on file with author).

¹⁹⁶ See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105 (1989) (consciousness raising and feminist methodology); ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence* (1980), in *BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979-1985* 23 (1986); Marie Withers Osmond & Barrie Thorne, *Feminist Theories: The Social Construction of Gender in Families and Society*, in *SOURCEBOOK OF FAMILY THEORIES AND METHODS: A CONTEXTUAL APPROACH* (Pauline Boss, William Doherty, Ralph LaRossa, Walter Schumm & Suzanne Steinmetz eds. forthcoming) (pp. 3-4 of manuscript on file with author).

tions of the "lesser" work helps to illuminate the range of skills involved, the need for talented individuals to do the work, the power of the activity, and the obligation of those who benefit from such work to acknowledge, share in, and appreciate it. Take, for example, "housekeeping"—the specific work of keeping a house. Some would simply encapsulate that activity as a mixture of routine drudgery and caretaking and hope to leave it to others or assume some of the tasks begrudgingly. That vision is too narrow; for example, in the nineteenth century, housekeeping included "making cloth and clothing . . . knitting gloves and stockings, baking, brewing, preserving food, churning butter, gardening, nursing the sick, making candles or soap, washing, ironing, scouring, quilting with neighbors, and . . . entertaining visitors."¹⁹⁷ While some of the tasks have changed, the list of activities that would today be called "housekeeping" (in the sense of involvement with one's home) includes the providing of clothes; the obtaining and preparation of food; the provision of care for children, for the ill, for elders; the creation and maintenance of a home, its cleaning, and upkeep; and the preparation for holiday celebrations. Sadly, in the twentieth century, feminist historians had to document and explain that these tasks were "work." Alice Kessler-Harris entitled a book *Women Have Always Worked*;¹⁹⁸ Ann Oakley called her book *Woman's Work: The Housewife, Past and Present*,¹⁹⁹ while David Katzman and Phyllis Palmer focused specifically on the work of home maintenance by those in "domestic service" and the "class, race, and ethnic" stratification of that work in the twentieth century.²⁰⁰

"Naming" some of the presumably "lesser" order work of the federal courts may be similarly illuminating. Article III judges send a disproportionate number of "prisoner petitions" and "social security" cases to magistrates.²⁰¹ (Despite reported distress at the

¹⁹⁷ NANCY F. COTT, *supra* note 24, at 41.

¹⁹⁸ ALICE KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED* (1981).

¹⁹⁹ ANN OAKLEY, *WOMAN'S WORK: THE HOUSEWIFE, PAST AND PRESENT* (1976).

²⁰⁰ DAVID M. KATZMAN, *SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA* (1978); Phyllis Palmer, *Housework and Domestic Labor: Racial and Technological Change*, in *MY TROUBLES ARE GOING TO HAVE TROUBLE WITH ME: EVERYDAY TRIALS AND TRIUMPHS OF WOMEN WORKERS* 80 (Karen Brodtkin Sacks & Dorothy Remy eds. 1984).

²⁰¹ "[I]n 1988 magistrates disposed of 34,308 civil 'proceedings and cases,' and of those, 25,611 (75%) were prisoner petitions involving either civil rights, or habeas corpus, which represents 69% of all prisoner petitions terminated that year. Another 7,312 (21%) were

volume of drug prosecutions and the burden of the sentencing guidelines, Article III judges have not yet conceived of a means to shift that work within their courts to others, but many do advocate relocating those cases to state courts.²⁰²) Both prisoner petitions and social security cases are often filed *pro se*—without lawyers who can provide extensive supporting documentation and legal argument and who can facilitate communication between litigant and judge.²⁰³ In “prisoner petitions,” prisoners claim either that they are unconstitutionally incarcerated and should be freed or retried, or that they are housed in conditions that violate their constitutional rights. Deciding some of these cases requires learning about gruesome crimes and asking oneself about fidelity to principles like “due process” of law and “right to counsel.” Although documentary information may be scarce or poorly presented and factual disputes are claimed, evidentiary hearings are a rarity.²⁰⁴ Most of

social security cases, or over half of the total number of social security cases terminated that year.” Lauren K. Robel, *supra* note 132, at 3 (footnotes omitted). Use of magistrates in particular categories of cases is of concern to the Division of Magistrates and the Committee on the Administration of the Federal Magistrates System; that group argued that “a heavy concentration of these types of cases tends to create a specialist position contrary to the generalist concept underlying the magistrate system.” FCSC WORKING PAPERS, *supra* note 126, Vol. 2, § IV (“Magistrates Issues”). However, the assignments of magistrates vary from district to district and judge to judge. See John P. Mayer, Results of Questionnaires on Use of Magistrates in the United States District Court for the Eastern District of Michigan (June 26, 1990) (on file with author).

²⁰² See, e.g., FCSC REPORT, *supra* note 12, at 35-38.

²⁰³ The growing *pro se* docket—at both trial and appellate levels—is a subject of increasing concern to judges. See letters from Gilbert Merritt, Chief Judge of the Sixth Circuit, to Judith Resnik (on file with author). In the Sixth Circuit alone, *pro se* appellate filings numbers in 1989 were 1440 out of about 4400, or 32.7%. *Id.* As of June, 1990, *pro se* filings were 38.5% of the monthly appellate filings. Statistical Report of the Sixth Circuit as of June 30, 1990, Table 4a (on file with author). In a year, that court decides from 900-1100 *pro se* cases, the majority of which involve prisoners’ claims; *pro se* cases consume most of the work time of staff attorneys.

²⁰⁴ Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 166-67 (“trial”—i.e., factfinding hearings—occurred in 1988 in 1.11% of the habeas corpus petitions, in contrast to a trial rate of 5.03% in other “civil cases”). Given the relative infrequency of trial in these cases, one might then assume that Article III judges are delegating them so as to preserve their time for hearing witnesses in other cases. The difficulty with that assumption is that Article III appellate judges also delegate, disproportionately, prisoner and social security appeals to staff attorneys. See Lauren K. Robel, *The Privatization Continuum: Views from the Bench* (June 1990) (manuscript on file with author) (oral arguments occur less frequently, opinions are published less frequently, and central staff are given more authority in social security and prisoner cases than in other cases). A final possibility is that the legal issues in prisoner and social security cases are less com-

the decisions are made "on the papers."²⁰⁵

Other cases frequently sent to magistrates involve social security claims. Those are the cases in which one argument made is that the government has wrongly terminated benefits for individuals claiming to be disabled. The claimant argues the existence of a physical or mental disability that interferes with the capacity to work; the government disputes it, and the judge must assess whether the evidence was sufficient to terminate benefits.²⁰⁶ In addition to understanding applicable regulations, described by one author as "highly technical and complex,"²⁰⁷ the decisionmaker must also evaluate medical evidence and information about vocational skills and then assess the credibility of witnesses. The vast bulk of these cases are decided by administrative law judges;²⁰⁸ claimants can then seek review in "the federal courts" at both the trial and appellate levels. In the mid-1980s, administrative decisionmaking was challenged as illegal under the governing statutes,²⁰⁹ and federal courts received a relatively large number of social security "appeals." After federal courts ruled in a series of

plex than in other areas of law. My own experience attempting to teach the "law" of habeas corpus to third-year law students undermines that assumption; that topic involves an intricate set of legal rulings that are difficult to explain. The multilayered doctrines have been the source of a number of Supreme Court cases in the last decade and now require every trial level judge to follow a multi-step decision-tree to determine whether he or she has jurisdiction to consider the merits of habeas cases. *See, e.g., Saffle v. Parks*, 110 S. Ct. 1257 (1990); *Butler v. McKellar*, 110 S. Ct. 1212 (1990).

²⁰⁵ "The magistrates have an interest in seeing prisoners' cases dismissed, not simply for their functional role as gatekeepers and filterers, but in a personal sense because it permits them to avoid holding conferences and hearings with a class of potentially difficult and hostile litigants." CHRISTOPHER E. SMITH, SUBORDINATE JUDGES, *supra* note 8, at 177.

²⁰⁶ A detailed description of the process is described in Richard E. Levy, *supra* note 14, at 468-76. One major issue is an individual's "residual functioning capacity." *See* 20 C.F.R. §§ 404.945, 404.1545, 404.1567 (1988). Christopher E. Smith reports that "[s]ome magistrates have said that any [s]ocial [s]ecurity decision can be upheld because there is nearly always medical evidence supporting both parties upon which a decision could be based either way." CHRISTOPHER E. SMITH, SUBORDINATE JUDGES, *supra* note 8, at 177.

²⁰⁷ Richard E. Levy, *supra* note 14, at 467.

²⁰⁸ In 1988, Administrative Law Judges conducted hearings in 290,393 cases. *Id.* at 481. (Table 2, Administrative Caseload).

²⁰⁹ The Social Security Administration "vastly expanded the number of impairments that were regarded as non-severe, disregarded the relationship between a particular impairment and a claimant's prior work, and refused to consider the combined effects of impairments that were regarded individually as non-severe." Richard Levy, *supra* note 14, at 491 (footnotes omitted).

cases,²¹⁰ both administrative and statutory changes occurred, and filings diminished.²¹¹

In many of the disability cases filed, the questions involve finding "facts" about the relationship between an individual's described experience of pain and her or his capacity to obtain gainful employment.²¹² Without the benefits, many people, already financially vulnerable, could become even poorer. Not only are these cases often filed by litigants who lack lawyers but the claims made are themselves exceedingly difficult to articulate. "Physical pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned."²¹³

In short, many cases sent to magistrates involve dependency—dependency in the sense that the individuals are already dependent upon the state and either claim to be or may soon be in more desperate straits, and dependency in the sense that these litigants are dependent more on the trial judge for assistance, interpretation, and patience than are those who are able to afford ample lawyering. Further, these cases may also generate strong reactions from decisionmakers. A decisionmaker may well feel powerless—powerless to affect an individual's pain or to interpret rules in a manner that responds to, let alone alleviates, suffering. In some cases, a decisionmaker may feel overwhelmed or angered—that prisoners convicted of harming others attempt to enlist judicial resources, that a long queue of complainants wait, and that some complaints seem minor, if not manufactured, and take time from other cases. In a few instances, a decisionmaker may feel

²¹⁰ See Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response To Estreicher and Revesz*, 99 YALE L.J. 801 (1990).

²¹¹ In 1987, 12,628 disability cases—constituting 5.3% of the civil caseload—were filed in federal trial courts; 982 appeals, or 3.2%, were filed in the courts of appeals. Richard E. Levy, *supra* note 14, at 507 n.254.

²¹² See, e.g., 42 U.S.C. § 423(d)(2)(A) (worker must demonstrate "physical or mental impairment . . . of such severity that" she or he is "unable to do . . . previous work" and that such inability renders the worker unable, "considering . . . age, education, and work experience, [to] engage in any other kind of substantial gainful work which exists in the national economy"). For a period of time in the 1980s, the Social Security Administration took the position that a claimant's "subjective" descriptions of pain were "irrelevant." See Richard E. Levy, *supra* note 14, at 493 (footnote omitted).

²¹³ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 4 (1985).

joyous—that an agency of the United States government is prevented from wrongfully withholding benefits to individuals desperately in need, that an individual exploiting a system is stopped, that a person wrongfully incarcerated is freed. In all instances, the decisionmaker holds the power to create a record, to state the events that would thereafter be given the status of “fact.” With “naming” comes more appreciation of the nature of the demands placed upon the judge assigned to such work and of the powers held.²¹⁴

A second feminist response to problems of valuation is to point to the knowledge that can be gained from actually undertaking the activities assigned to women in this society. For example, Sara Ruddick argues that being a “mother” (a socially-based, rather than a biologically-based category) involves a complex set of tasks in which one is both very powerful (vis-a-vis an utterly dependent infant) and powerless (to protect a child from forces such as war and illness).²¹⁵ Ruddick seeks to bring “maternal thinking” to bear on political discourse so as to incorporate into “public” decision-making the attitudes and practices acquired during the activity of caretaking. If one shares respect for knowledge gained from practice and vantage point, as do pragmatists and standpoint theorists,²¹⁶ then specialization and segregation of certain kinds of work—be it caring for children or deciding prisoner petitions—is troublesome; the knowledge gained from that activity may well inform other, less “obviously” related work.²¹⁷ Decisionmakers who

²¹⁴ Cf. EVELYN NAKANO GLENN, *The Meaning of Demeaning Work*, in ISSEI, NISEI, WAR BRIDE 165-89 (1986) (the “dirty work” in occupations and the ways in which domestic workers, whose jobs are assumed to involve principally “dirty work,” create hierarchies of tasks).

²¹⁵ SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989); Sara Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342 (1980).

²¹⁶ See generally *Symposium on the Renaissance of Pragmatism in American Legal Theory*, 63 S. CAL. L. REV. (forthcoming 1990). See also Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 45-50 (1987); NANCY C.M. HARTSOCK, *supra* note 192, at 234-47.

²¹⁷ See, e.g., Susan Glaspell, *A Jury of Her Peers*, first published in EVERY WEEK (March 15, 1917), reprinted in ROBERT M. COVER, OWEN M. FISS, & JUDITH RESNIK, *PROCEDURE* 1168-85 (1988); Annette Kolodny, *A Map for Rereading: Gender and the Interpretation of Literary Texts*, in THE NEW FEMINIST CRITICISM: WOMEN, LITERATURE, THEORY 46, 55-58 (Elaine Showalter ed. 1985) (the women in Glaspell’s short story “recognize the profoundly sex-linked world of meaning which they inhabit; to discover how specialized is their ability to read that world is to discover anew their own shared isolation within it”). See also SUSAN MOLLER OKIN, *supra* note 193, at 126, 179; Martha Minow, *supra* note 216, at 79-82.

have no exposure to certain kinds of cases may be impoverished when deciding either questions of law or other questions presented in the "important" cases reserved for elite judges.²¹⁸ Decisionmakers who have only exposure to the "routine" work may seek only to escape from that burden.²¹⁹

Taking care of people is not much valued in this society. Feeling bad about the state of society and its problems is uncomfortable. Dealing with unclear and conflicting claims about "what happened" is frustrating. Adjudicating legal claims presented without lawyers' professional help is particularly burdensome. One could thus describe all of that work as the "routine," the factfinding in individual instances, the painful realities of lives of many in the United States.²²⁰ One might then search for a docket rich with the "exotic" —or live in a world of appeals, in which no actual needy, anxious, engaging, manipulative, or charming litigant has ever to be confronted. Yet the world of appeals also has its routines, its pains, its chores. Appellate judges must act in concert, must enlist others in agreement before they can render decisions. Appellate judges are bound and limited by records; they cannot (or should not) alter the facts as set forth by those below, and they must rely on those below to implement (rather than to subvert) their rulings. Trial judges are removed from the impact of their rulings but sometimes a bit of information trickles back; appellate judges are all the more removed from the experiences (sometimes rewarding, sometimes depressing) of seeing their rulings translated into events in individuals' lives. Yet the limits and tedium of appellate work are not often detailed in the effort to reserve that work for an elite cadre of judges.

Neither the federal courts nor the Federal Courts Study Committee invented the idea that some work is to be avoided if possible, that some cases are of "lesser order" than others.²²¹ The ques-

²¹⁸ See, for example, the recommendation of the FCSC Report that Article III courts only consider "constitutional claims and questions of law." FCSC REPORT, *supra* note 12, at 55-56.

²¹⁹ See CHRISTOPHER E. SMITH, SUBORDINATE JUDGES, *supra* note 8, at 177-78 (magistrate specialization, as the "primary judges" for prisoner and social security claimants, may produce "bored, stultified, and ineffective" judges).

²²⁰ According to Christopher E. Smith: "The general impression conveyed by most magistrates is that Social Security and prisoner cases are routine and burdensome, but unavoidable." *Id.* at 175.

²²¹ See, e.g., DAVID M. KATZMAN, *supra* note 200, at 278 ("Whether the work was per-

tion is whether one wants to endorse the hierarchies currently under construction or argue for others (or, more radically and at least thus far empirically unsuccessfully, for the abolition of hierarchy). A good deal of legal academic education reinforces the hierarchy set forth above; many law professors focus on appellate decisionmaking and the abstract principles of law, thus both giving visibility to and reiterating the value of those activities.²²² The work that appears to affect a larger number of individuals (precedent-setting opinions, in this context) is described and valued more than the work of relating to the circumstances of fewer people (factfinding in individual cases). It is, I believe, the feminist enterprise (and difficult task) of identifying, understanding, reassessing, and reallocating "housekeeping"—the daily, sometimes powerful, poignant, and compelling, sometimes repetitive and non-engaging, activities that nourish oneself and others. That reassessment is critical to thinking about how to allocate work among all judges—be they denominated "Article III" or "Article I"—sitting on trial and appellate courts.²²³

formed by paid labor or by housewives themselves, the low status and stigma [of domestic service] remained unchanged."); Tony Mauro, *The Sad Case of the Ignored Case*, Legal Times of Wash., Mar. 19, 1990, at 9 (United States Supreme Court decision in *Sullivan v. Zebley*, 110 S. Ct. 885 (1990), involving the Social Security Administration's unlawfully stringent test for the provision of benefits for disabled children "fairly shimmers with significance" but was ignored by the press).

²²² For discussion of the question of the canon in legal education, see Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1942-1948 (1990).

²²³ As Joan Wallach Scott writes, "The history of feminist thought is a history of the refusal of the hierarchical construction of the relationship between male and female in its specific contexts and an attempt to reverse or displace its operations." *GENDER AND THE POLITICS OF HISTORY* 41 (1988).