1998

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BOOK REVIEW

Courts, Congress, and the Constitutional Politics of Interbranch Restraint


REVIEWED BY CHARLES GARDNER GEYH*

The extent to which the interdependence of the courts and Congress affects how judges and legislators ought to interact is an issue that—until recently—has been largely ignored. There is, of course, nothing new in the recognition that the first and third branches are interdependent.

Despite the high school civics mantra that our government is comprised of three separate and independent branches, the paradoxical interdependence of these “independent” branches—brought about by a system of checks and balances in which each branch possesses the means to make the others miserable if they get out of line—is widely understood. Thus, we all know that legislators depend on judges to interpret the meaning of statutes and assess their constitutionality, while judges depend on legislators for the resources needed to perform their interpretive functions.

Far less appreciated is the inevitability, let alone the desirability, of less formal interaction between the first and third branches in a constitutional structure that makes each dependent on the other for its well-being. Until very recently, few of the myriad treatises on the role of the United States courts in American government addressed the role of judges and the judiciary in communicating with Congress on legislation regulating the judiciary and other matters.1 To the extent that extrajudicial judge-legislator interaction was discussed at all, it tended to be in the context of questioning whether such communications were consistent with the proscription on advisory opinions and the prevailing paradigm that judges and legislators should proceed separately, in what Justice Cardozo disparagingly called “proud isolation.”2

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1. See Charles Gardner Geyh, Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress, 71 N.Y.U. L. Rev. 1165, 1181 (1996) (surveying thirty treatises on the U.S. courts and their role in the political process, and concluding that “the judiciary’s extrajudicial role in statutory reform was rarely addressed”).

2. See id. at 1182-83; Benjamin Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113, 114 (1921).
Two notable exceptions are *The Business of the Supreme Court*, written by Felix Frankfurter and James Landis in 1928, and Peter Fish's self-described update of Frankfurter and Landis in *The Politics of Federal Judicial Administration*, published in 1973. In their history of the federal judiciary, Frankfurter and Landis documented Congress's chronic failure to provide the lower courts with timely relief from an ever-increasing caseload, despite perpetual importuning from judges and Justices for additional appropriations, more judges, and structural changes in court organization and administration. Fish took up where Frankfurter and Landis left off in 1928, providing a detailed account of the judge-legislator interactions that culminated in numerous pieces of legislation heralding the twentieth-century emergence of the judiciary as a bureaucratic institution.

Although Frankfurter and Landis and Fish described the extrajudicial interaction of judges and legislators, they made no effort to analyze the impact of such interaction on the interdependent relationship between courts and Congress, or to reconcile informal cooperation between judges and legislators with the formal separation of powers. The time was right for a pioneer to explore this uncharted terrain. That pioneer is Robert Katzmann.

In 1986, Professor Katzmann, then a fellow at the Brookings Institution, hosted a groundbreaking colloquium on the relationship between courts and Congress. Papers presented at the colloquium were edited by Professor Katzmann and later published in 1988 by the Brookings Institution, in *Judges and Legislators: Toward Institutional Comity*. It was a remarkable compilation for at least two reasons. First, Katzmann and the contributing authors directly challenged the long prevailing view that the separation of powers and the need to preserve judicial impartiality counseled judges and legislators to remain unfamiliar, if not estranged, by highlighting the interdependent relationship between courts and Congress, and the historical and contemporary importance of extrajudicial interbranch communications to the health of that relationship.

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5. See, e.g., FRANKFURTER & LANDIS, supra note 3, at 80-101 (discussing legislation introduced in the 1870s "renewing in substance, the attempts for reorganization of the judiciary which had been before Congress since the Civil War."). Despite "common consent" that "something had to be done," Frankfurter and Landis observed that "yet again it all ended in futility." Id. at 83. It was only after "[t]he Supreme Court docket got beyond all control" in the late 1880s that sufficient pressure for meaningful reform began to build. Id. at 86. "Bar and bench were again articulate," the authors noted, "[E]ven members of the Supreme Court felt impelled to speak." Id. at 96. Finally, in 1891, Congress provided a "decisive" remedy: legislation establishing the circuit courts of appeals. Id. at 101.
6. See, e.g., FISH, supra note 4, at 30-39, 125-65 (discussing judge and legislator communications preceding passage of legislation establishing the Conference of Senior Circuit Judges, the circuit judicial councils, and the Administrative Office of the United States Courts).
8. Professor Katzmann noted that "courts are reluctant to maintain a greater presence (in Congress) because of the need to avoid prejudgment of issues that might come before them and because of the constitutional barriers against rendering advisory opinions." Robert A. Katzmann, *The Underlying
Second, Katzmann and company made a persuasive case that because judge-legislator communications had been largely ignored, the interbranch relationship had fallen into disrepair, and was in need of immediate attention.9

In the wake of the Katzmann colloquium, new avenues of communication between courts and Congress were constructed, and old ones repaved. Interbranch commissions were created,10 articles written,11 and conferences held.12 An Office of Judicial Impact Assessment was established within the Administrative Office of United States Courts,13 legislators increasingly acknowledged the importance of unrestricted interbranch communication,14 and Professor Katz-
mann himself spearheaded a project designed to improve the transmission of judicial decisions to affected congressional committees.15

Despite this flurry of activity, the interbranch relationship has taken a recent turn for the worse. The majority whip in the United States House of Representatives recently announced that "[a]s part of our conservative efforts against judicial activism, we are going after judges."16 Fewer confirmations, more impeachments and jurisdiction-stripping legislation are under active consideration.17 Judges and legislators continue to snipe at each other over issues of legislative drafting and statutory interpretation.18 With regard to rules of court practice and procedure, Congress has all but abandoned its longstanding deference to judicial self-regulation.19 As to court budget and administration, the judiciary is increasingly viewed less as a co-equal branch of government with common and honorable interests than as a bloated, and often wasteful agency in need of close and skeptical oversight.20 Judges, for their part, have often reacted to these developments defensively, accusing Congress of micromanaging their affairs or threatening their independence, thereby causing further deterioration to the interbranch relationship.21

These are not random developments that have soured the relationship between the branches. Rather, they are animated by the shared view that each branch of government is comprised of essentially self-interested actors who keep each other from usurping control of government only through vigilant exercise of the checks provided for in the Constitution.22

17. See id. See also AN INDEPENDENT JUDICIARY: THE REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 57 (1997) [hereinafter ABA REPORT] (pointing to the 1996 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Prison Litigation Reform Act of 1996 as recent examples of where the Congress has sought to restrict the remedies, if not the subject matter jurisdiction, of the federal courts).
20. See, e.g., ABA REPORT, supra note 17, at 6 (noting that Congress "has begun to monitor all of the judiciary's operations more closely than before," and has "scrutinized the judiciary's perceived budgetary needs more closely, and sometimes skeptically, in the course of overseeing courthouse construction projects, appropriating funds for judicial operations and enacting legislation to increase judicial salaries, create new judgeships and regulate senior judge status.").
21. See id. at 46 ("Judges have not always responded constructively to [statutory] initiatives, sometimes accusing Congress of 'micromanaging' the courts or of threatening judicial independence. That, in turn, has served only to deepen Congress’ resolve to look at the courts even more closely, which may ultimately inure to the detriment of the courts’ institutional independence.").
22. See, e.g., CHRISTOPHER SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION (1995) (advocating need for Congress to be less deferential to the judiciary in light of the judiciary's self-interested behavior); Jonathan R. Macey, Judicial Preferences, Public Choice, and the
From this perspective, judges are less concerned about the public good than they are about personal power, leisure, prestige and income. The quest for power and the desire to impose their own value preferences on others leads them to illegitimate "activist" decisionmaking that wrests control of government from the political branches;\(^\text{23}\) the pursuit of income causes them to clamor unjustifiably for pay increases;\(^\text{24}\) the appetite for leisure prompts them to second-guess legislation that adds to their caseload, and to lobby for additional judges and appropriations;\(^\text{25}\) and the thirst for prestige leads them to insist upon lavish courthouse furnishings and to complain about occupying their time with routine drug cases.\(^\text{26}\) From this perspective, if Congress is to perform its constitutional duty to check the self-interested judicial branch, interbranch combat is a necessary evil.

Re-enter Robert Katzmann with a message for the mongers of war between the branches: give peace a chance. In *Courts and Congress*,\(^\text{27}\) Professor Katzmann re-examines the relationship between the two branches in light of recurrent tensions, and makes a powerful case for interbranch détente as the most effective way to preserve the institutional prerogatives of courts and Congress.

In this essay, I begin by summarizing Professor Katzmann's latest work, in which he seeks to promote a successful relationship between courts and Congress by identifying and perfecting the four "ingredients" essential to fostering interbranch comity. Second, I suggest that if one accepts Professor Katzmann's

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23. After discussing a series of what the authors characterize as "activist decisions," Edwin Meese and Rhett DeHart conclude that "It is not surprising, therefore, that many observers believe that such activist judges have indeed brought about the despotic oligarchy against which Thomas Jefferson warned." Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, in MANDATE FOR LEADERSHIP IV 245, 254 (Stuart M. Butler & Kim R. Holmes eds., 1997).

24. Testimony of John Yoo, Acting Professor of Law, Before the Commission on Separation of Powers & Judicial Independence of the American Bar Association 5-6 (Feb. 21, 1997) (on file with author) (hereinafter Yoo Testimony) (dismissing the arguments of judges that regular cost of living adjustments and increases in judicial salary are needed to preserve a strong and independent judiciary, concluding that "[i]f financial considerations truly undermine the resoluteness of certain judges and their feelings of security, we should ask ourselves whether we really want such individuals on the bench—especially when the salary of a federal circuit judge is $141,700 a year, and that of a federal district judge is $133,600 a year. That is a higher income than that received by almost all Americans. If some judges are unhappy with their pay, I am sure that the President and the Senate can find able lawyers who would be happy to trade jobs.").

25. See, e.g., Neil Lewis, *Survey to Press U.S. Judges on Caseload and Expenses*, N.Y. TIMES, Dec. 17, 1995, at A35 (discussing the judiciary's interest in filling court vacancies and Senator Grassley's plan to circulate questionnaires to judges concerning their work habits in an effort to confirm his suspicion that "judges probably are not working hard enough").

26. See, e.g., *Investigation of the Fed. Courthouse Constr. Program: Majority Staff Report of Senate Comm. on Env't and Pub. Works*, 103d Cong. 1, 31 (1994) (stating that "the increasing role of federal judges in the design and construction of courthouses has resulted in unnecessary expenditures," and that the judiciary's courthouse design guide, "more than anything else, has been used by judges to justify lavish furnishings and costly changes").

27. COURTS AND CONGRESS, supra note 18.
premise that a successful interbranch relationship is a harmonious relationship, there may be additional ingredients requisite to a lasting peace between the branches, that are worthy of inclusion on his list. Third, although I share Professor Katzmann’s premise that a successful interbranch relationship is a restrained one, such a premise should not be posited as a given, in light of the recent proliferation of interbranch skirmishes that some commentators, legislators and judges have openly encouraged. Accordingly, I argue that a case must be made for interbranch restraint, not simply as a matter of mutable public policy, but as a matter of enduring constitutional principle.

In the final analysis, *Courts and Congress* is an extraordinary achievement that ought to be the starting point in the study of interbranch relations for years to come. My proposed additions to and qualifications of Professor Katzmann’s work should therefore be understood not as backhanded criticism, but as the next step toward developing a deeper understanding of an understudied field.

I. KATZMANN ON THE SUCCESSFUL INTERBRANCH RELATIONSHIP: ESSENTIAL INGREDIENTS AND SUGGESTED IMPROVEMENTS

"Governance," Professor Katzmann observes at the outset of *Courts and Congress*, "is premised on each institution’s respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity." The challenge is to encourage shared understanding and comity in the context (if not in the teeth) of a constitutional structure that generates inevitable interbranch friction by making the first and third branches independent of, yet dependent upon, each other. Success, Professor Katzmann posits, depends upon “at least four ingredients”: (1) a “sensible way” to select judges; (2) “proper attention” to the way which courts interpret statutes; (3) a means “to transmit to Congress judicial opinions identifying perceived problems in statutes”; and (4) a process of interbranch communication “to ensure both branches’ institutional well-being and the fair and efficient administration of justice.”

Katzmann then devotes the remainder of the work to a discussion of each of these four “key ingredients.” In his discussion of the first ingredient—judicial selection—Katzmann chronicles the twentieth-century evolution of the appointments process, in which Senate confirmation hearings have become routine; Senate scrutiny has intensified; media coverage has expanded; and interest groups have begun seeking to influence senate confirmation votes indirectly through appeals to the general public. One “common thread” throughout the period, Professor Katzmann observes, is that senators have inquired into nominees’ judicial, political and legal philosophies, and nominees have drawn lines, albeit at different places, as to the questions they will answer. This is as it

28. *Id.* at 1.
29. *Id.* at 4.
30. *Id.* at 19.
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should be, he concludes. Senators have the responsibility to satisfy themselves that a nominee will be a good judge, which justifies inquiries into the nominee's values, assumptions, temperament, intellect, and related matters. By the same token, would-be judges have the duty not to prejudge cases that they may have to decide, and properly decline to answer questions that call on them to do so. Katzmann concedes that occasional excesses are inevitable, in which senators hinge their votes on the results of single-issue litmus tests the nominee refuses to take, and offers "no panaceas," concluding that "much depends upon the willingness of political leaders to encourage a spirit of comity." He ends his discussion of judicial selection with a series of simple recommendations—some shared by the Miller Center Commission on the Selection of Federal Judges—to streamline the appointments process for lower court judges. Among other proposals, he advocates reducing redundancies in background investigations, accelerating deadlines for identifying and confirming nominees, and eliminating hearings in noncontroversial cases.

His treatment of the second ingredient—statutory interpretation—begins with an incisive summary and critique of the stunning range of competing interpretive approaches that have fought for supremacy in the last decade: William Eskridge and Cass Sunstein's calls for revitalizing canons of construction; Hart and Sack's public interest theory; Frank Easterbrook, Richard Epstein and Jonathan Macey's disparate versions of public choice theory; positive political theory as developed by an eclectic array of scholars in different disciplines; Justice Scalia's textualist theory; and the "contextualist approach"—the name Professor Katzmann assigns to the dominant approach employed by judges and legislators. Consistent with his goal of promoting interbranch détente, he ultimately sides with the contextualists, rejecting theories that disparage legislators or judges as nakedly self-interested, or that eschew legislative history as hopelessly unreliable. It is the contextualists, after all, who respect Congress enough to acknowledge that legislative history can provide a context in which to understand statutory meaning, at the same time as they respect the judiciary enough to acknowledge that judges have an independent role to play in the interpretive process and should not blindly follow what is sometimes unreliable legislative history.

Quoting Judge Abner Mikva, Katzmann concludes that "the enemy is not legislative records—only bad legislative records." He thus offers three proposals to improve the communication of statutory meaning from Congress to

31. See id. at 38-39.
32. See id. at 39-40.
33. Id. at 45.
35. See COURTS AND CONGRESS, supra note 18, at 36-43.
36. Id. at 49-64.
37. See id. at 62-64.
38. Id. at 64.
courts: (1) improve legislative drafting by using guidebooks and checklists for
members of Congress and their staffs, and by enacting "default" positions, such
as a fall-back statute of limitations, that take effect when Congress neglects to
address a given issue in legislation it passes; (2) make legislative history more
reliable by having committee members sign committee reports, and floor manag-
ers designate particular floor statements or colloquies as authoritative; and (3)
devote greater attention to eliminating ambiguities through statutory
revision.

The third ingredient Professor Katzmann identifies—a means to transmit to
Congress judicial decisions identifying potential problems in statutes—is not so
much an independent ingredient as a combination of ingredients two (proper
statutory interpretation), and four (effective interbranch communication). Here
Professor Katzmann describes an ongoing "experiment" he is conducting, in
which circuit court opinions interpreting federal statutes are transmitted to the
legislative committee with jurisdiction over the statute at issue. Congress is thus
kept informed of how its statutes are being interpreted and is given an early
opportunity to fill gaps or clarify ambiguities.

Professor Katzmann’s discussion of the fourth ingredient—effective inter-
branch communication—offers a primer on the propriety of judge-legislator
interaction in its varied forms. Consistent with preceding chapters, there are no
strident conclusions here, no shalls or shall nots. He advocates a “presumption
in favor of expanding contact under appropriate conditions,” which will “pro-
mot[e] not only the good faith upon which governance depends, but also the
effective workings of government the Founders envisioned.” He does not,
however, believe that specific guidelines can or should be developed to define
what “appropriate conditions” for interbranch contact are, because the propriety
and prudence of any given communication will depend on a range of variables,
such as the form of the communication, the substance of the message communi-
cated, the circumstances surrounding the communication, the intentions and
expertise of the speaker, and how the communication is likely to be received by
its audience. Katzmann thus recommends that the branches expand avenues of
interbranch contact cautiously, weighing and monitoring the costs and benefits
of different types of communication on an ongoing, ad hoc basis.

Katzmann is a scholar who dares to be moderate. He uses no crisis rhetoric,
makes no radical proposals, and takes no potshots at public officials. He resists
such attention-grabbing gimmicks because they are antithetical to the essential
thrust of his message: that the complex business of governing remains a noble
calling ably pursued in the main by public-spirited women and men, who
usually do the right thing when they are adequately informed. He thus offers a
desperately needed counterpoint to the cynical public choice vision of gover-

39. See id. at 64-68.
40. Id. at 69-81.
41. Id. at 106.
42. Id. at 89-92.
nance that has often dominated academic thinking and public opinion in the aftermath of Vietnam and Watergate.

For those who write in the field, the value of Courts and Congress as a whole exceeds the sum of its already valuable parts. Judicial appointments, statutory interpretation, and interbranch communication are subjects that have traditionally received separate, disconnected treatment. By combining them as chapters in a single volume, Professor Katzmann encourages the reader to start thinking about the relationship between courts and Congress on a grander scale, in light of the recurrent theme cutting across the chapters: that the first and third branches ought to minimize friction between them and regulate each other in a spirit of comity.

Following Professor Katzmann’s lead yields two additional thoughts that occupy the balance of this essay. First, if a peaceful and productive relationship between courts and Congress is the dish we want to serve, more than four ingredients may be required (a possibility that Professor Katzmann acknowledges)—so many more, that characterizing the relationship in terms of a recipe comprised of “ingredients” may not fully capture the complexity of that relationship, or position us to recommend adequate reforms. Second, in light of recent interbranch altercations initiated and supported by some legislators, judges and commentors, it may be unsafe to assume that interbranch harmony is a universally accepted goal; hence, there is a need to develop more fully a principled basis for defending an interbranch relationship founded upon mutual understanding and deference.

II. COMPLICATING THE SUCCESSFUL INTERBRANCH RELATIONSHIP: SOME ADDED INGREDIENTS

The more time one spends thinking about the essentials of a healthy and successful interbranch relationship, the more “ingredients” one can identify. A fifth ingredient for good interbranch governance that might be added to the list of four that Professor Katzmann discusses is an effective mechanism for judicial discipline and removal. If the process by which judges are selected is an essential component of the interbranch relationship, so too is the process by which they are sanctioned and removed. The recent rediscovery of the impeachment threat as a means for Congress to influence judicial decisionmaking and the controversy that it engendered, underscores the relevance of judicial removal and discipline to courts-Congress relations.

A sixth ingredient to consider is a satisfactory process for regulating court practice and procedure. The regulation of court jurisdiction, appropriations and administration, which Professor Katzmann discusses in his chapter on interbranch communication, is a matter of statutory reform, which casts the judiciary and Congress in the respective roles of lobbyist and decisionmaker. Practice and

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43. Professor Katzmann speaks in terms of “at least” four ingredients necessary for good interbranch governance. Id. at 4.

44. See supra notes 16-17 and accompanying text.
procedure, in contrast, more specifically, procedural rulemaking, is a codified
process that acknowledges the unique expertise of judges on the subject of court
procedure by casting the courts in a joint decisionmaking role with Congress,
which gives rise to a different interbranch dynamic with different stress points
deserving of separate treatment.45

A seventh ingredient for a successful relationship between courts and Con-
gress is a process for effective interbranch communication between them and
the executive branch. Many of the concerns central to the judiciary in its
relationship with Congress can be profoundly affected by the President and
executive branch agencies. Thus (as Professor Katzmann notes), an effective
process for selecting judges turns in no small part on the President, who must
appreciate the need to make timely nominations to fill vacancies.46 An orderly
process for the interpretation of statutes may be undermined by an executive
branch unwilling to acquiesce to the statutory interpretations of lower courts
with which it disagrees.47 Further, efforts to find solutions to the judiciary's
caseload burdens or budgetary needs through effective judicial-legislative com-
munications may be frustrated by dramatic increases criminal prosecutions.48 In
short, a constructive relationship between the interdependent first and third
branches depends upon preserving an equally constructive relationship with the
equally interdependent second branch.

An eighth ingredient for good interbranch governance is an acceptable level
of public support for the judiciary. Members of Congress may be reticent to
approach the judiciary in the spirit of restraint and comity Professor Katzmann
advocates when their constituents are dissatisfied with and distrustful of the
court system.49 With public confidence in the courts at low ebb,50 an amicable
interbranch relationship may depend on restoring public faith in the courts
through improved communication and education.

45. See generally Geyh, supra note 1 (comparing and contrasting the judiciary's extrajudicial roles
in the legislative and rulemaking processes).
46. COURTS AND CONGRESS, supra note 18, at 37-38.
47. See, e.g., Dan Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 MINN.
L. REV. 1339 (1991) (describing the nonacquiescence of executive branch agencies in circuit court
interpretations of statutes, and the impact of nonacquiescence on interbranch relations).
48. See Tracy Thompson, Stop Complaining, Stephens Tells Judges; Federal Jurists Bristle When
U.S. Attorney Suggests They Don't Work Very Hard, WASH. POST, June 8, 1991, at B1 (reporting on
altercation between U.S. Attorney and federal judges over Justice Department diversion of drug cases
into federal courts).
49. Thus, for example, Senate Majority Leader Trent Lott characterized "federal judges that try to
run our schools, try to run our lives, try to make laws instead of interpret laws," as "some of the most
unpopular people in America." Senator Lott justified a closer, more skeptical examination of judicial
nominees and judgeship needs in light of public suspicion, concluding that "when I go home, nobody
says, 'Oh, please, give us some more federal judges.' A lot of them say, 'These people are out of control
and they are going beyond what the Constitution intended.' " Briefing With Senator Trent Lott, FED.
50. See ABA REPORT, supra note 17, at 59-61 (citing polling data for the proposition that "[p]ublic
confidence in the judiciary—at both the federal and state level—is perceived by many to be in a
dangerous state of decline").
A ninth ingredient is the maintenance of a constructive working relationship by the judiciary and Congress with court interest groups. Several of the most significant altercations between courts and Congress that have occurred in recent years were precipitated by private groups who use or otherwise have an interest in the courts. Thus, for example, fireworks between judges and legislators over the Civil Justice Reform Act of 1990 were sparked by a report prepared by the private organization Foundation for Change, in conjunction with the Brookings Institution;\(^5\) recurrent squabbles between courts and Congress as to who retains primary rulemaking authority have been attributed to court user groups that have petitioned Congress for rule changes after their efforts to influence the Judicial Conference have failed;\(^5\)\(^2\) and interbranch friction over the appointment or impeachment of “activist” judges has been catalyzed, or at least exacerbated, by private groups such as the Free Congress Foundation.\(^5\)\(^3\)

There are undoubtedly other “ingredients” as well,\(^5\)\(^4\) and Professor Katzmann should not be expected to have listed them all. To the contrary, I am unconvinced that a complete list can be assembled. The courts-Congress relationship is ultimately less like a cake comprised of a fixed number of ingredients in specified amounts, than a complex ecosystem with innumerable and changing components, in which changes in one part of the system will precipitate changes in other parts, and eventually the system as a whole. Thus, for example, disagreement between the branches over issues of statutory or constitutional construction (ingredient two), can lead to accusations of “judicial activism” by legislators and disgruntled court interest groups (ingredient nine) that sour the interbranch relationship and impair effective interbranch communication (ingredient four), catalyze congressional efforts to weed out “activist” judges in the confirmation process (ingredient one), cause the President to alter his relations with Congress as it affects judicial nominations (ingredient seven) and encourage some members of Congress to bring the impeachment process to bear against “activist” jurists (ingredient five), all to the detriment of public confidence in the courts (ingredient eight).

52. See Geyh, supra note 1, at 1211-14.
54. Two additional possibilities come to mind: an effective intrabranch command structure within the first and third branches, to minimize “unauthorized,” or at least ill-advised interactions between judges and legislatures that can generate unnecessary friction; and a mechanism for communication between the state and federal systems to address the federalism concerns that can drive a wedge between courts and Congress, for example, when Congress seeks to federalize causes of action traditionally litigated in the state courts.
Likening the points of interaction between courts and Congress to an ecosystem may also aid in illuminating the path to reform. As illustrated in the preceding paragraph, subtle changes in one component of the courts-Congress relationship may have a ripple effect throughout other components of that relationship. What this suggests, however, is that piecemeal reforms seeking to remedy isolated components of the courts-Congress relationship—be it the appointments process, the process of statutory interpretation, or interbranch communication—will inevitably yield disappointing or unintended results to the extent that they are not considered in the context of the relationship as a whole.

In addition, then, to the particular reforms that Professor Katzmann proposes, I would suggest that we begin to explore ways in which such reforms can be considered in broader context. The private sector has recently initiated two such efforts. First, The American Judicature Society has recently established a Center for Judicial Independence to explore a range of issues affecting the health and well-being of an independent judiciary. Second, Citizens for Independent Courts—a bipartisan coalition of organizations and individuals spearheaded by the Twentieth Century Fund—has undertaken a major campaign in opposition to recent attacks on judges and the judiciary. Issues within the scope of the coalition effort include: the appointments and impeachments processes, jurisdiction-stripping legislation, judicial criticism, and congressional micromanagement of court operations. With respect to the public sector, one possibility that I have advocated elsewhere, is to establish a permanent, Interbranch Commission on Law Reform and the Judiciary, comprised of representatives from all three branches of government, that would assist Congress by evaluating a wide variety of legislative proposals and other reforms affecting the federal courts.

The common focus of these private and public sector efforts is to create fora in which the relationship between courts and Congress can be evaluated systematically—consistent with the characterization of that relationship in terms of a complex system.

Quibbles as to the pithiest metaphor for the judge-legislator relationship should not detract from what Professor Katzmann has achieved in Courts and Congress, which is to take a crucial first step in the direction of describing a delicate, complicated and heretofore neglected interrelationship. The four components of the interrelationship that he highlights may not be the only components, but they are certainly the most important. Moreover, as discussed below, cataloguing the comprehensive array of factors relevant to effective courts-Congress interaction is ultimately less critical than developing a better understanding of and justification for the themes unifying those factors.

57. Id.
58. See Geyh, supra note 1, at 1234-40.
III. SIMPLIFYING THE SUCCESSFUL INTERBRANCH RELATIONSHIP:
THE SEARCH FOR AND DEFENSE OF UNIFYING THEMES

Each of the nine ingredients or components of a successful interbranch relationship that Professor Katzmann and I have listed share a common assumption that a successful relationship is a restrained relationship. Accordingly, the list identifies the points at which interbranch interaction occurs and the people who are in a position to affect the nature of that interaction, to the end of maximizing interbranch comity and minimizing interbranch friction. This unifying theme—that interbranch restraint, comity, and mutual understanding are pivotal to the success of courts-Congress relations, and should be pursued by all participants in and at all stages of interbranch governance—may seem so benign as to require no defense, and Professor Katzmann offers none to speak of, except to say that it is what the Framers intended.\footnote{See \textit{COURTS AND CONGRESS}, supra note 18, at 1: The Founders envisioned that constructive tension among those governmental institutions would not only preserve liberty but would also promote the public good. No branch was to encroach upon the prerogatives of the others, yet in some sense each was dependent upon the others for its sustenance and vitality. And that interdependence would contribute to an informed and deliberative process. Governance, then, is premised on each institution's respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity.}

As previously discussed, however, a competing vision of the interbranch relationship has recently re-emerged, which its proponents likewise believe is what the Framers intended—a vision premised upon the assumption that courts and Congress are nakedly self-interested institutions that can be controlled only through vigorous exercise of whatever interbranch checks the Constitution tolerates.\footnote{See supra notes 16-25 and accompanying text.} For those who adhere to this view, it makes no sense to say that Congress should—in the name of comity and respect for the judiciary's institutional and decisional independence—refrain from doing what the Constitution empowers it to do.\footnote{See \textit{ABA REPORT}, supra note 17, at 28 (quoting Thomas Jipping of the Free Congress Foundation, as testifying that “establishing, creating, abolishing judgeships, reallocation of judicial resources, the kinds of things the Constitution gives Congress the authority to do” should not be characterized as threats to judicial independence because then, “perfectly legitimate things that coordinate branches of government may legitimately do under the Constitution are then defined to be a threat to what another coordinate branch does, and that creates a kind of internal conflict that I don't think makes any sense.”); \textit{see also} Yoo Testimony, supra note 24, at 6 (“One other proposal bandied about is . . . to oppose congressional 'micromanagement' of the federal Judiciary. It is at times hard for me to understand exactly what this problem is and what should be done about it. Certainly, as a Constitutional matter, there are few limits on Congress's ability to regulate the federal courts.”).}

Those who share Professor Katzmann's vision of the interbranch relationship must be prepared to take up where he leaves off. They must defend a relationship premised on the politics of comity and restraint, premises that stand in opposition to those grounded in the politics of conflict and mutual distrust.

The assignment is more difficult than it may first appear. The Constitution
nowhere declares that the first and third branches should "play well with others," and no court decision requires it. Notwithstanding the absence of a constitutional edict, the interbranch relationship is steeped in a rich tradition of mutual deference and respect. Congress has never impeached and removed a judge from office for making an unpopular decision.\textsuperscript{62} It has cooperated with the judiciary in establishing an independent judicial branch, by creating the Judicial Conference of the United States, the Administrative Office of the United States Courts, and the Federal Judicial Center, and by delegating to the courts the power to promulgate its own rules of practice and procedure.\textsuperscript{63} It has rarely altered federal court jurisdiction or adjusted court size as a means to manipulate judicial decisionmaking.\textsuperscript{64}

The easiest explanation for this tradition is simply that the branches have restrained themselves because they have realized that it is good public policy to do so. If, however, arguments for and against interbranch restraint are confined to the public policy arena, changing perceptions of wise policy can quickly give way to fundamental changes in the traditionally restrained interbranch relationship.

Thus, for example, Professor John Yoo, former Chief Counsel to the Senate Judiciary Committee, has argued that because interbranch restraint is solely a matter of public policy and not constitutional necessity, Congress is free to change course whenever it chooses:

\begin{quote}
Congress enjoys a broad discretion to structure the federal courts as it sees fit. In fact, Congress has been quite generous in affording the federal courts the broad policy-making role that they currently possess—but it should be kept in mind that it is up to Congress as a final matter to decide how many federal courts and judges the nation will have, and what jurisdiction they will exercise.\textsuperscript{65}
\end{quote}

In Yoo's view, if Congress changes its mind tomorrow and decides that it is a good idea to micromanage the courts, strip their jurisdiction, adjust their remedial authority, eliminate judgeships, or return control of the judiciary's budget to the executive department, then "that is its right."\textsuperscript{66} In a similar vein, then-Congressman Gerald Ford, and more recently House Majority Whip Thomas DeLay have argued that Congress's traditional reticence to impeach and remove judges for unpopular decisions is neither here nor there because Congress is within its rights to define "high crimes and misdemeanors" however it

\textsuperscript{62} See \textsc{William Rehnquist}, \textit{Grand Inquests} 114 (1992) ("The acquittal of Samuel Chase by the Senate had a profound affect on the American Judiciary. . . . [B]y assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body.").
\textsuperscript{63} See Geyh, \textit{supra} note 1, at 1172-78, 1185-87.
\textsuperscript{64} See \textsc{ABA Report}, \textit{supra} note 17, at 46 (quoting Dean Peter Shane).
\textsuperscript{65} Yoo Testimony, \textit{supra} note 24, at 6-7.
\textsuperscript{66} Id. at 7.
chooses, and to change that definition whenever public policy warrants.67

In short, if we characterize decisions of this sort as presenting questions of public policy only, there is nothing irresponsible, let alone unconstitutional, about Congress aborting its longstanding commitment to interbranch deference and an independent, self-regulating judicial branch. As long as Congress respects Article III restrictions on judicial tenure, salary, and the exercise of judicial power (as construed by the courts), it is Congress’s right and duty to change public policy freely to meet changing needs.

All of which begs the question: do congressional decisions of this sort only present questions of public policy? I think not. When Congress interprets and exercises its power to confirm judicial nominees, to impeach federal judges, or to establish (and, with the help of the necessary and proper clause, regulate) the lower federal courts, Congress is not merely making public policy; it is implementing constitutional policy, if not law as well. Implementing constitutional policy involves more than determining whether a proposed piece of legislation or other measure will yield intended benefits; it also involves determining whether the proposed action is consistent with the Constitution and the governmental structure it embraces.

Even when Congress is engaged in conventional (as opposed to constitutional) policymaking, it will assess whether a proposed enactment is constitutional, if only to avoid wasting its time processing legislation that the courts will later invalidate.68 In such situations, however, it is the courts that are the constitutional interpreters of primary and final resort, for it is their prior opinions that Congress often looks to for guidance during the legislative process, and it is the courts that ultimately decide whether Congress got it right.69 When Congress is engaged in constitutional policymaking, on the other hand, Congress—not the judiciary—assumes the primary, and sometimes the exclusive interpretive role.

When the constitutional questions at issue are “political” ones, as is presum-

67. 116 Cong. Rec. 11,913 (April 15, 1970) (statement of Representative Gerald Ford) (“[A]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses [the Senate] considers to be sufficiently serious to require removal.”); Morning Edition Transcript # 97092615-210 (National Public Radio, Sept. 26, 1997) (quoting Tom DeLay as saying that “When is impeachment a legitimate tool? Can Congress impeach a public official for non-criminal acts? I think the answer is yes. Anyone can be impeached that has the majority of the House and... [can be] removed from office with two-thirds vote from the Senate.”).

68. For an exchange of views on how well Congress interprets the Constitution in situations where the courts remain the interpreters of primary and final resort, see Abner Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. Rev. 587 (1983); Louis Fisher, Constitutional Interpretation by Members of Congress, 63 N.C. L. Rev. 707 (1985).

69. This is not to denigrate the importance of Congress’s interpretive role in this context, nor is it to deny that Congress’s role is, in some sense, independent of the courts’ role. Id. My point is simply to say that in such situations, the buck ultimately stops with the Court, not Congress, for which reason the focus of attention within and without Congress understandably remains on the judiciary’s constitutional interpretation.
ably the case with the definition of “high crimes and misdemeanors,” or the grounds upon which the Senate may legitimately withhold its “consent” to a presidential nominee, Congress is the exclusive interpreter.\textsuperscript{70} When it comes to legislation establishing and regulating the lower federal courts, the judiciary retains an interpretive role to ensure that the terms of Article III have not been violated, but as Professor Yoo rightly notes, Congress has “broad discretion to structure the federal courts as it sees fit.”\textsuperscript{71}

When Congress enacts legislation establishing and regulating the federal courts, in what Gerhard Casper calls “framework legislation,”\textsuperscript{72} it is fulfilling its primary—though not exclusive—responsibility to interpret and implement Article III. In essence, the “broad discretion” that the Constitution delegates to Congress to oversee the federal courts, makes questions concerning court size, jurisdiction, administration and structure, functionally quasi-political in nature. Although the Supreme Court will rule on the constitutionality of the congressional actions in question (as it will not with questions explicitly denominated as “political”), in doing so it has repeatedly and emphatically deferred to Congress’s plenary power to regulate lower court operations.\textsuperscript{73} Accordingly, constitutional issues such as whether it would be consistent with the Framers’ vision of separated, interdependent, powers in a federal system of government to establish federal trial or circuit courts, to “pack” the Supreme Court, to establish a bureaucratically centralized Administrative Office of the United States Courts, or to delegate rulemaking responsibility to the judiciary, are ones largely within Congress’s discretion to answer.

Congress, then, has the primary and sometimes exclusive responsibility to interpret and implement the Constitution as it relates to the composition, structure and operation of the federal courts. To say that Congress has the “right” to reject judicial nominees or to impeach federal judges for any reason at all, or to structure the courts as it sees fit simply because no court will stand

\textsuperscript{70} See, e.g., Michael Gerhardt, Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon, 144 DUKE L.J. 231 (1994) (defending nonreviewability of impeachments decisions as political questions); Mark V. Tushnet, Principles, Politics, and Constitutional Law, 88 MICH. L. REV. 49 (1989) (arguing that the appointments clause is best characterized as giving rise to political questions).

\textsuperscript{71} Yoo Testimony, supra note 24, at 6-7.


\textsuperscript{73} Willy v. Coastal Corp., 503 U.S. 131, 137 (1992) (“Article I, § 8, cl. 9 authorizes Congress to establish the lower federal courts. From almost the founding days of the country it has been firmly established that Congress acting pursuant to its authority to make all laws necessary and proper to their establishment may also enact laws regulating the conduct of those courts”); Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1940) (“Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the Statutes or Constitution”); The Bank of the United States v. Halstead, 23 U.S. 51, 53 (1825) (“It cannot certainly be contended, with the least color of plausibility, that Congress does not possess the uncontrolled power to legislate with respect to the form and effect of executions issued upon judgments recovered in the courts of the United States.”).
in the way may therefore technically be true but is utterly irresponsible. It is akin to saying that the Supreme Court has the "right" to interpret the Constitution in completely preposterous ways for no better reason than because it can.

When the Framers of the United States Constitution delegated to Congress the task of implementing the constitutional structure, they clearly did not regard that delegation as a license to behave irresponsibly. The delegates to the constitutional convention left gaps in the governmental framework, none larger than that relating to establishment of inferior courts. The gap was a conscious one, created by the convention's inability to reach agreement as to the need for and desirability of federal trial courts. The resulting compromise delegated to Congress the responsibility to establish (and, by implication, regulate, disestablish, or not establish at all) the lower federal courts. The point of giving Congress such power was not to counteract judicial ambition by making the survival of the third branch dependent upon the whim and caprice of the first. The point was to entrust to Congress the task of perfecting the constitutional framework.

Consistent with the Framers' desires, Congress has traditionally taken its role as interpreter and implementer of the Constitution quite seriously. In the debates preceding passage of the Judiciary Act of 1789, support for establishing federal trial courts was grounded in the argument that they were indispensable to fulfilling the Framers' vision of the judiciary's role in the fledgling, tripartite government. Legislation to establish a circuit court of appeals system a century later was likewise defended by sponsors in terms of its consistency with the Framers' intentions to delegate to Congress the responsibility for ensuring that the judicial branch would endure. Similarly, members of Congress justified 1934 legislation delegating to the judiciary primary responsibility for

75. See id. at 72-73.
76. See id. at 72.
77. Explanations for the clause in the ratification debates thus focused on the need for flexibility in molding the contours of the federal judiciary to meet changing needs. See id. at 77.
78. See 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1386 (Linda Grant DePauw ed., 1992) (quoting Representative Gerry as saying that "We are to administer this Constitution and therefore we are bound to establish these courts"); id. at 1368 (quoting Representative Benson that "It is not left to the election of the legislature of the United States whether to adopt or not, a judicial system like the one before us; the words of the constitution are plain and full and must be carried into operation"); id. at 1359 (quoting Representative Madison that "In the new Constitution a regular system is provided. The legislative power is made effective for its objects; the executive is co-extensive with the legislature, and it is equally proper that this should be the case with the judiciary.").
79. 21 CONG. REC. 3403-04 (1891) (statement of Representative Culbertson) ("The prophetic wisdom of the illustrious statesmen who framed the constitution is nowhere more clearly shown than in the organic provisions upon which the Federal judicial system should be constructed by Congress . . . . Congress . . . has the authority to advance the judicial system of the United States . . . and it is the unquestioned duty of Congress to provide the necessary courts and judicial force to meet the increased demands of the country upon the judiciary. The framers of the Constitution did not construct it for their day and time, but for all time.").
procedural rulemaking, and 1939 legislation transferring financial control of the judiciary from the Justice Department to an Administrative Office of United States Courts, in terms of separation of powers principles and the sponsors' desire to restructure the relationship between Congress and the courts so as to preserve and protect the "true balance" between them.\textsuperscript{80}

Members of Congress have likewise used their constitutional interpretations as a form of precedent to influence, if not control, subsequent interpretations. Thus, the Senate's 1805 decision not to remove Justice Samuel Chase from office for an unpopular, high-handed decision, on the grounds that such behavior did not rise to the level of a high crime or misdemeanor, has been cited as precedent in subsequent impeachment proceedings for similar propositions. In congressional hearings culminating in rejection of President Franklin Roosevelt's "court packing plan," opponents argued that while packing the Court with new Roosevelt appointees as a means to manipulate future Court decisions may technically be constitutional, such manipulation ran counter to longstanding congressional precedent, and hence violated the spirit of judicial independence imbedded in the Constitution.\textsuperscript{81} And in the course of Senate confirmation proceedings on the Supreme Court nomination of Judge Robert Bork, Judiciary Committee Chairman Joseph Biden and Senator Orrin Hatch debated the propriety of rejecting nominees because of their "political philosophy," and did so with explicit and elaborate reference to both the Founders' intentions and

\textsuperscript{80} With respect to the Rules Enabling Act, one committee report supporting the bill complained that "the trouble with the procedure of the courts is due to the fact that coordination between these two departments of government has been destroyed by exclusive legislative control." S. REP. No. 69-1174 (1926). Another added that the Act was "a belated recognition of the true balance between the legislative and judicial departments; a tardy correction of a situation that would not be tolerated in the reverse." S. REP. No. 70-440, at 9 (1928) (minority views).

With respect to the Administrative Office Act, hearings on the bill reflected the legislators' intentions to perfect the framers' desire for an independent judiciary:

Senator Mahoney: The administrative office of the judiciary would be, in effect the budget office for the whole judicial system, and would make its report direct to Congress, which thereupon would reject or approve the recommendations?

Attorney General Cummings: Absolutely . . .

Senator Hatch: It takes it out of the hands of the Justice Department and places it in the hands of the administrative office.

Senator Mahoney: This upon the theory that the courts are an independent branch of government, and should be.

Senator Norris: Yes.


\textsuperscript{81} See, e.g., Reorganization of the Fed. Judiciary: Hearings on S. 1392 Before the Comm. on the Judiciary of the U.S. Senate, 75th Cong. 760-67 (1937) (statement of Erwin Griswold) (arguing that there are no "precedents" for Congress influencing judicial decisionmaking through manipulation of court size and that "there is an importance in traditional restraints," that the government ought to respect, regardless of whether the plan is technically constitutional); id. at 539, 546 (statement of Raymond Moley) (arguing that the court packing proposal is unprecedented and not in keeping with the traditions of interbranch restraint, which the branches ought to respect as a matter of constitutional principle).
"precedents" established in subsequent confirmation proceedings.\textsuperscript{82}

Returning to the case for interbranch restraint, the spirit of deference and comity that has dominated the relationship between courts and Congress over time, is more than good public policy. It is constitutional policy embedded in longstanding congressional precedent. Moreover, such precedent is not just a preliminary interpretation that the courts are free to countermand; it is the final word on questions that the Constitution delegates to Congress to decide.

Constitutional precedent can, of course, be overturned. Congress possesses the constitutional authority to "overturn" its commitment to interbranch restraint tomorrow, just as the Supreme Court possesses the authority to overturn \textit{Brown v. Board of Education}.\textsuperscript{83} Yet in both cases, because we are talking about overturning constitutional precedent, there are additional concerns associated with reversing course that are inapplicable to simple changes in public policy.

For one, abrupt changes in Congress's interpretation and implementation of an otherwise unchanged Constitution undermine the legitimacy of Congress as a constitutional interpreter. Thus, when legislators threaten to depart from long-established, congressionally-developed constitutional norms—for example by initiating impeachment proceedings against judges who render unpopular decisions or by sand-bagging the confirmations of "activist" lower court nominees—such departures are inevitably attributed to illegitimate, partisan gamesmanship.

Second, such changes disrupt the settled expectations of the judiciary, which structures its affairs in reliance upon a comparatively stable set of precedents that Congress establishes over time. Thus, when Congress shows signs of departing from its longstanding deferential posture and commitment to an independent, self-regulating judicial branch, by second-guessing the judiciary's resource requirements, judgeship needs, caseload burden, courthouse construction plans, internally generated rules of practice and procedure, and so forth, it destabilizes the rulemaking process, the judiciary's role in legislation affecting the courts, and the relationship between judges and legislators.

This is not to suggest that concern for Congress's legitimacy as a constitutional policymaker or the judiciary's settled expectations demand slavish obedience to congressionally generated constitutional precedent. It does suggest, however, that before departing from longstanding precedent, Congress ought to balance the need for and benefits of doing so against the costs to its own legitimacy and to the stability of both the judiciary and the courts-Congress relationship.

Congress has long taken its role as interpreter and implementer of the Constitution seriously. The time has come to openly acknowledge that it does so. The time has come to develop a general theory of congressional constitutionalism, to structure and stabilize congressional constitutional precedent. When


\textsuperscript{83} 344 U.S. 141 (1952).
Congress's role in this regard is more fully understood and appreciated, it should become apparent that the spirit of comity, restraint and interbranch deference Professor Katzmann advocates, is more than good policy that Congress is free to take or leave at the drop of a hat. It is a matter of constitutional principle established by longstanding congressional precedent that ought to be as much a part of our constitutional understanding as the landmark cases of the United States Supreme Court. In closing, I can not improve upon the long forgotten testimony of Raymond Moley, the editor of Newsweek and a professor of Public Law at Columbia University, who appeared before the Senate Judiciary Committee over sixty years ago, in opposition to President Roosevelt's court packing plan:

[A] deliberate attempt by one branch of the Government to weaken another branch has very few parallels in our history. And none of them is creditable . . . .

That way has always been open to the purposes of any dominant Executive and congressional majority. But the very fact that it has not been employed, except in one or two cases of which we are not very proud, has established an inhibition upon the use of this method—an inhibition based upon custom and tradition. In other words, a custom has been established that fundamental changes should not be so attained—a custom of the Constitution, or a doctrine of political stare decisis, if you will, which is as binding upon public officials as a written provision of the Constitution itself. . . . The maintenance of the custom of the Constitution is essential to the preservation of a stable Government under which people are able to plan their lives and direct their actions. It is true that the custom of the Constitution changes, but it changes slowly and its existence is an indispensable element in a democratic government.84

CONCLUSION

In Courts and Congress, Professor Katzmann reaffirms his pre-eminence in the field of interbranch governmental relations. His prescription for promoting cooperative and productive interaction between judges and legislators offers a powerful antidote to the prevailing cynicism that has dominated much of academic and public opinion. There remains more to be done. The essential elements of a harmonious relationship between courts and Congress warrant further study, and the premise that friction between the branches ought to be minimized is one that calls for a more fully developed constitutional foundation. But that should not diminish appreciation for Courts and Congress; to the contrary, it deserves recognition as a milestone in courts-Congress scholarship that will serve as the starting point for related work years into the future.