

ARTICLE

PARADISE LOST, PARADIGM FOUND: REDEFINING THE JUDICIARY'S IMPERILED ROLE IN CONGRESS

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Long perceived as acting in splendid isolation, the legislative and judicial branches have become increasingly intertwined. The judiciary is becoming more involved in the legislative province of statutory reform, and Congress has inserted itself more frequently into the judicial territory of procedural rulemaking. In this Article, Professor Geyh observes that a new, interactive paradigm has replaced the perceived model of separation and delegation between the branches. As the judiciary and Congress have grown more enmeshed, the judiciary's reputation has suffered, both from a Watergate-vintage mistrust of all things governmental and from a perception that judicial activism is born of self-interest. Rather than seeking to untie the Gordian knot created by increasing judicial-legislative interaction, Professor Geyh advocates taking this interplay to a higher, more systematized level. He proposes the creation of an Interbranch Commission on Law Reform and the Judiciary. Composed primarily of representatives from the judicial, legislative, and executive branches, the Interbranch Commission would review statutory proposals affecting the judiciary as well as procedural rule reforms. Professor Geyh acknowledges that there are no "one-trick pony" solutions to the problems caused by interbranch interaction, but he offers the Interbranch Commission as a novel way of dealing with the new paradigm.

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INTRODUCTION

Watergate and Vietnam took their toll on the institutions of American government. The Vietnam War, wrote Russell Baker, "turned us into a people who know we can't believe anybody anymore, including ourselves."¹ "After Watergate," observed political analyst William Snyder, "many Americans suddenly found themselves capable of believing the worst about their leaders; not just Richard Nixon, but any president, and not just the president, but any public official."² In the years since, public cynicism has deepened as the President and members of Congress have lurched from one mess to the next: Abscam, the Iran-Contra affair, the House check-writing scandal, Whitewater, the Waco raid.

Throughout this assault on the competence and credibility of the first two branches of government, the judiciary has maintained a low profile and escaped relatively unscathed. That, however, may be changing. In the wake of public frustration with the management of the Rodney King and O.J. Simpson trials, commentators have begun to suggest that post-Watergate cynicism is finally catching up with the judiciary.³ Although such a conclusion may be premature and unnecessarily alarmist, there is legitimate cause for concern—not on the basis of public reaction to one or two isolated trials, but in light of a series of recent attacks on the judiciary's credibility arising out of the judiciary's changing extrajudicial role in the legislative and rulemaking processes.

Other commentators have explored the judiciary's place in statutory reform and rulemaking and have identified any number of problems:⁴ judges and legislators do not always communicate enough

¹ John Hart Ely, *War and Responsibility at v* (1993) (quoting Russell Baker).

² *Disillusionment Began Pre-Watergate* (CNN television broadcast, Apr. 23, 1994), available in LEXIS, Nexis Library, CNN File, Transcript No. 311-6.

³ For example, a recent commentator on the O.J. Simpson trial noted that "the fear, of course, is that the court system—long a bulwark of American pride, especially in the post-Watergate, post-Vietnam era—would now come in for the same shellacking that's trashed the presidency and Congress." Michael H. Hodges, *America on Trial*, *Detroit News*, Apr. 15, 1995, at 1C.

⁴ A nice summary of some of these identified failings is included in Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 *Brook. L. Rev.* 761, 762-67 (1993).

on matters of mutual concern,⁵ or sometimes communicate too much;⁶ Congress has asserted too much power over the judiciary in some instances,⁷ whereas the judiciary has asserted too much influence over Congress in others;⁸ the judiciary is making too many national rules too precipitously⁹ but has embarked on a joint venture with Congress to balkanize procedure and thereby end national rulemaking as we know it.¹⁰ Isolated solutions have been offered by some to fix these isolated failings, only to be rejected by others as inadequate to resolve different but no less isolated failings.

Piecemeal reforms are inevitably inadequate because the challenges confronting the judiciary in the statutory and rulemaking arenas are not the result of isolated defects, but arise out of an unappreciated yet fundamental transformation of the judiciary's lawmaking role in the past generation.¹¹ Once this transformation is understood, it becomes clear that a more comprehensive approach is necessary to address adequately the issues surrounding the judiciary's involvement in the statutory and rulemaking processes. It is the purpose of this Article to illuminate and explain this transformation, to describe a new paradigm within which scholars, judges, and legislators should operate, and to propose the composite solutions necessary to acclimate the judiciary to the new model.

Judges have always played an important extrajudicial role in the legislative process by proposing, drafting, testifying on, and lobbying for and against innumerable proposals regulating or affecting federal

⁵ See Robert A. Katzmann, *The Underlying Concerns, in Judges and Legislators: Toward Institutional Comity* 7, 7-15 (Robert A. Katzmann ed., 1988) [hereinafter *Judges and Legislators*] (discussing inability of Congress and judiciary to communicate effectively and consequences thereof).

⁶ See J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 *Loy. L.A. L. Rev.* 851, 862-65 (1995) (arguing against judges becoming too involved in legislative process).

⁷ See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 *N.C. L. Rev.* 795, 837-55 (1991) (criticizing politicization of rulemaking, as evidenced by heightened congressional activity).

⁸ See Christopher E. Smith, *Judicial Self-Interest: Federal Judges and Court Administration* 1-11 (1995) (discussing motivations and capabilities of judiciary to influence legislation).

⁹ See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 *Brook. L. Rev.* 841, 841-42 (1993) (lamenting Supreme Court's abdication of rulemaking oversight); Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 *J. Legal Stud.* 569, 569-72 (1994) (asserting that surprise in rulemaking evidences system failure).

¹⁰ See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 *Ariz. St. L.J.* 1393, 1402-03 (1992) (discussing how judiciary helped Congress increase fragmentation of rulemaking).

¹¹ For purposes of this Article, references to the judiciary's role in "lawmaking" or "law reform" encompass its subsidiary roles in rulemaking and statutory/legislative reform.

court operations. Over the course of the past twenty-five years, however, the judiciary's participation in statutory reform has increased dramatically.¹² In part it has been a matter of necessity, as judges have felt the pinch of crowded dockets and seen no alternative to petitioning Congress with proposed solutions no one else will offer. In part it has been a matter of making virtue of necessity, as judges have been encouraged to communicate their insights and concerns to Congress, on the grounds that interbranch communication makes a valuable contribution to intelligent, conscientious lawmaking.¹³

In rulemaking, likewise, the past twenty-five years have witnessed a startling transformation of the judiciary's role. The Rules Enabling Act of 1934¹⁴ envisioned procedural rulemaking as an essentially technical undertaking best left in the expert hands of judges, and for nearly forty years thereafter, the judiciary exercised effectively exclusive rulemaking power.¹⁵ That ended in 1973, when Congress suspended the proposed Rules of Evidence. Since then, Congress has remained actively involved in procedural rulemaking, frequently amending rules proposed or previously promulgated by the judiciary and thereby heightening appreciably the level of interaction between the first and third branches.¹⁶

This changing role of the judiciary in the legislative and rulemaking processes calls for a paradigmatic shift in our understanding of the relationship between Congress and the courts, a shift in which interaction replaces separation and delegation as the defining feature. Part I of this Article describes and explains the transformation that underlies the need for a new, interactive paradigm of the judge-legislator relationship in statutory reform and rulemaking.

As interaction between the branches has increased, judges, legislators, and outside observers have begun to wonder how far it should go: What are the limits of the judiciary's new, extrajudicial, lawmaking role? It is largely unexplored territory, as discovered by a pair of commentators who recently lamented that "[n]o clear models of the appropriate role of a judge's participation in the legislative process emerge from the scant published materials or from our own inquiries of jurists around the country."¹⁷ Parts II and III seek to fill this void. In Part II, I explore the constitutional, statutory, and ethical con-

¹² See *infra* notes 44-84 and accompanying text.

¹³ See *infra* notes 49-53 and accompanying text.

¹⁴ Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2071 (1994)).

¹⁵ See *infra* notes 100-13 and accompanying text.

¹⁶ See *infra* notes 114-31 and accompanying text.

¹⁷ Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 Minn. L. Rev. 1045, 1085 (1991).

straints on judges' extrajudicial participation in lawmaking. Although these are the most commonly identified constraints, they are ultimately of limited significance in terms of the restrictions they impose on the judiciary's ability to participate in and influence the development of statutes and rules.

Prudential constraints, on the other hand, are another matter, and Part III investigates these. Federal judges lack many of the weapons at the disposal of other lobbyists. Their ability to persuade members of Congress in the legislative process and command the respect of litigants in the adjudicative process is linked to their reputation for competence, credibility, and impartiality. In defining the outer limits of the judiciary's appropriate role under a new, interactive paradigm, then, a key prudential constraint is that the judiciary avoid tactics and interactions that could damage the reputation that fuels its influence.

That is easier said than done. By increasing the level of their interaction with legislators, judges have become a target of what might best be characterized as post-Watergate cynicism. The judiciary's heightened participation in statutory reform has caused some commentators and members of Congress to label the judiciary's motives as self-interested and to counsel against legislative deference to the judiciary's recommendations.¹⁸ In the case of rulemaking, a similar perception that the judiciary cannot be counted upon to promulgate public-serving, as opposed to self-serving, procedural rules has fueled the drive toward greater legislative intervention (and consequently, more judge-legislator interaction).¹⁹

The judiciary is in a precarious position. It has little choice but to remain actively engaged in the statutory and rulemaking processes. To withdraw would be to cede such functions entirely to Congress, which lacks the expertise to regulate court operations competently, and which is often under political pressure to compromise the health and well-being of the judiciary in the service of other priorities. By remaining actively engaged, however, the judiciary risks exacerbating public skepticism that threatens the judiciary's credibility. The judiciary therefore finds itself in a paradox of sorts. It must be a part of the legislative and rulemaking processes because its day-to-day experience with court administration and procedure makes it a uniquely competent and qualified source of information indispensable to intelligent decisionmaking. When the judiciary participates in such processes, however, the information it imparts may be discounted or ignored because the judiciary's day-to-day experience with court ad-

¹⁸ See *infra* notes 209-35 and accompanying text.

¹⁹ See *infra* notes 114-31 and accompanying text.

ministration and procedure makes it a self-interested, and therefore potentially unreliable, source.

If one accepts the essential tenets of the new paradigm—that interbranch interaction is necessary and desirable—the process of reform must begin by developing avenues of escape from the competence-credibility paradox, so that the judiciary can continue to exercise an active and influential role in lawmaking with a minimum of damage to its institutional credibility. The key to unlocking the paradox lies in the judiciary remaining a part of the political fray while appearing to stay above it. In the past, the judiciary has utilized a number of conflict-avoidance devices that have enabled it to contribute to, yet distance itself from, the lawmaking process. These mechanisms may no longer be adequate to the task, however, as increased interaction between the branches has precipitated a proliferation of credibility-threatening interbranch confrontations. In Part IV, I explore these conflict-avoidance mechanisms and how they might be improved. Aided by innovative, if piecemeal, proposals developed by others operating within the old paradigm, I have constructed a multipart reform proposal aimed at restoring and preserving the judiciary's influential lawmaking role in a new, interactive paradigm. Central to the proposal is the creation of an Interbranch Commission on Law Reform and the Judiciary, designed to facilitate meaningful but less confrontational exchanges of information among the branches of government.

I

THE CHANGING ROLE OF THE JUDICIARY IN THE DEVELOPMENT OF STATUTES AND RULES

The extrajudicial role of judges in statutory and rule reform has been two hundred years in the making. To understand why the events of the past generation are properly characterized as calling for the formulation of a new paradigm, we must look to the historical development of the judge-legislator relationship by exploring the judiciary's developing roles, first in statutory reform and then in rule reform.

A. The Judiciary's Role in Statutory Reform

The judiciary's interaction with Congress on matters of statutory reform can be divided into three distinct periods: "unstructured interaction," which began with the first Congress in 1789; "formalized interaction," which began with the creation of the Judicial Conference of the United States in 1922; and "expanded interaction," which began with the establishment of the Federal Judicial Center in 1967.

1. *Unstructured Interaction: 1789-1922*

During the first decade of the Republic, individual Supreme Court justices proposed legislation, assisted congressional committees in developing amendments to the Judiciary Act of 1789, and lobbied for a variety of other legislative reforms.²⁰ Peter Fish, in his definitive history of federal judicial administration, chronicled the efforts of numerous judges and justices who proposed, drafted, testified on, and wrote letters in support of court-related legislation throughout the nineteenth and early twentieth centuries.²¹ Although no longer the exclusive, or even the primary, vehicle for interbranch communication, individual judges, acting on their own initiative, correspond with legislators on matters of statutory and rule reform to the present day.²²

2. *Formalized Interaction: 1922-1966*

In 1922, Congress established the Conference of Senior Circuit Judges, thanks to the lobbying efforts of Chief Justice William Howard Taft.²³ Renamed the Judicial Conference of the United States in 1948,²⁴ the Conference is headed by the Chief Justice and is composed entirely of federal judges, who together serve as the governing body of the federal judiciary.²⁵ The enabling statute provides that the "Chief Justice shall submit to Congress an annual report of the proceedings

²⁰ See Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System*, in *Judges and Legislators*, supra note 5, at 31, 36-42 (discussing interaction between judges, Congress, and President during 1790s); see also Russell R. Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 125-31 (observing that framers intended judiciary to participate in legislative lawmaking).

²¹ See Peter G. Fish, *The Politics of Federal Judicial Administration* 11, 14-17, 24-32 (1973) (detailing judicial efforts in lobbying for congressional reform of judiciary); see also Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 21-22, 36, 76-77, 96-97, 110 (1928) (referring to direct and indirect communications between judges and legislators on matters of court reform).

²² An excellent example is the legislation that divided the former Fifth Circuit into the Fifth and Eleventh Circuits. The tireless efforts of individual judges to influence the passage or defeat of circuit-splitting legislation is carefully chronicled in Deborah J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (1988).

²³ See Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838 (codified as amended at 28 U.S.C. § 331 (1994)); see also Fish, supra note 21, at 30-32 (describing Chief Justice Taft's lobbying efforts).

²⁴ See Act of June 25, 1948, ch. 646, § 331, 62 Stat. 869, 902 (codified as amended at 28 U.S.C. § 331 (1994)).

²⁵ Originally, the Conference included only the Chief Justice and the senior most circuit judge from each circuit. See Act of Sept. 14, 1922, § 2, 42 Stat. at 838. In its current form, the Judicial Conference is composed of the Chief Justice, the chief circuit judges (seniority no longer being dispositive), a district judge from each circuit, and the Chief Judge of the Court of International Trade. See 28 U.S.C. § 331 (1994).

of the Judicial Conference and its recommendations for legislation,"²⁶ and the Conference has, since its inception, included legislative proposals in its annual report.²⁷

In assessing the impact of the Judicial Conference on judge-legislator interaction in the legislative process, however, one finds that the annual report is the tip of the iceberg. Proposals advocated in the annual report are first considered by one or more Judicial Conference committees²⁸ that act upon issues called to their attention by, among others, legislators.²⁹ Legislators solicit comments and testimony from Conference committee members on pending bills that the committee has reviewed both before and after the Conference as a whole has voted on them.³⁰ After the Judicial Conference has voted on reforms

²⁶ 28 U.S.C. § 331. Although it was not until 1948 that Congress amended the statute to require the Conference to present annual recommendations for legislative reform to Congress, such recommendations were made as a matter of custom before then. See Fish, *supra* note 21, at 301.

²⁷ As Judge Elmo Hunter explained it to a congressional committee:

The 1924 Conference focussed Congressional attention on the inadequacy of certain court law libraries. As a result, \$165,000 was appropriated the following year.

....

In later years the Conference brought up such matters as the need for qualified legal secretaries, for funds for incidental expenses of travel, the need for a greater number of law clerks, and for funds to more adequately staff the clerks' offices. All these matters received Congressional attention as a result of Conference efforts.

Judicial Conference of the United States: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 11 (1983) (testimony of Judge Elmo B. Hunter); see also Fish, *supra* note 21, at 65-69 (discussing early Judicial Conference reports).

There are numerous examples of recent court reform legislation that began their journey into law with a Judicial Conference recommendation. See Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st & 2d Sess. 18, 21-22 (1987-1988) [hereinafter *Court Reform and Access Hearings*] (testimony of Judge Elmo B. Hunter) (discussing eliminating Supreme Court's mandatory jurisdiction and amending Rules Enabling Act); H.R. Rep. No. 889, 100th Cong., 2d Sess. 28 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5988 (citing measures repealing "civil priorities" provisions following Judicial Conference criticism).

²⁸ Judicial Conference committees, like congressional committees, are organized along subject matter lines. For a list of the standing committees of the Judicial Conference, see Administration of the Federal Judiciary: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 54-59 app. C (1991) [hereinafter *Federal Judiciary Administration Hearing*] (testimony of Judge Charles Clark). In addition, the Conference creates ad hoc committees, as needed, to address particular problems. See Elmo B. Hunter, *The Judicial Conference and Its Committee on Court Administration* 8-9 (1986).

²⁹ See Hunter, *supra* note 28, at 12.

³⁰ The impact of Judicial Conference testimony on the legislative process clearly can be seen in the numerous bills revised to meet Judicial Conference concerns. See, e.g., H.R. Rep. No. 515, 101st Cong., 2d Sess. 6-7 (1990) (limiting application of Multiparty, Mul-

of particular interest to the judiciary, Conference committee chairs will write, telephone, or visit key legislators to clarify or urge adoption of the Conference's position.³¹

Seventeen years after it established the Judicial Conference, Congress passed the Administrative Office Act of 1939.³² The Act dramatically expanded the points of interaction between the judiciary and Congress, most notably through the creation of the Administrative Office of the United States Courts, which the Act placed within the control of the Judicial Conference.³³ First, the Administrative Office replaced the Department of Justice as the source of the judiciary's administrative support, meaning that henceforth the judiciary would communicate directly with Congress rather than through the executive branch on its budget and related matters.³⁴ Second, the Act required the Administrative Office Director to submit annual reports to Congress concerning the business of the courts.³⁵ Third, and perhaps most important, the Act instructed the Director to "[p]erform such other duties as may be assigned to him by the Supreme Court or the Judicial Conference of the United States."³⁶ Such "other duties" have come to include playing a significant role in the legislative process.³⁷

tiforum Jurisdiction Act of 1990 to suits arising out of single accidents after "Judicial Conference and others . . . expressed concern over application of the consolidation procedures provided for in this bill, to products liability or toxic exposure cases"); H.R. Rep. No. 732, 101st Cong., 2d Sess. 13-14 (1990) (modifying Civil Justice Reform Act of 1990 to make certain case-management criteria advisory because establishing mandatory criteria was "objectionable to the judicial branch, and the Committee [was] unwilling to impose the Congress' view of proper case management upon an unwilling judiciary").

³¹ For example, the House hearing record on the Court Reform and Access to Justice Act of 1988 included six letters from Judicial Conference representatives to the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which were sent after Conference members testified at hearings. See Court Reform and Access Hearings, *supra* note 27, at 901-17.

³² Pub. L. No. 76-299, 53 Stat. 1223 (codified as amended in scattered sections of 28, 48 U.S.C.).

³³ See *id.* Judicial Conference control over the Administrative Office is assured by 28 U.S.C. § 601 (1994), which gives the Chief Justice the power to hire and fire the Administrative Office Director "after consulting with the Judicial Conference."

³⁴ See Michael J. Remington, Circuit Council Reform: A Boat Hook for Judges and Court Administrators, 1981 B.Y.U. L. Rev. 695, 709-10 (discussing congressional objectives met by Administrative Office Act of 1939).

³⁵ See Administrative Office Act of 1939, § 305, 53 Stat. at 1224 (codified as amended at 28 U.S.C. § 332 (1994)). The reporting requirement has been expanded over time so that the Director's report must now address the state of the business of Article III courts, see 28 U.S.C. § 604(a)(3) (1994), bankruptcy courts, see *id.* § 604(a)(13), and magistrate judges, see *id.* § 604(d)(3), the impact of the savings and loan crisis on the courts, see *id.* § 604(a)(24), and the number, nature, and disposition of disciplinary complaints against judges, see *id.* § 604(h)(2).

³⁶ 28 U.S.C. § 604(a)(24).

³⁷ At the urging of the 1952 Judicial Conference, Congress began to solicit the judiciary's views on legislation of interest to the third branch through the auspices of the Admin-

For example, Administrative Office staff drafts legislative text to implement proposals approved by the Judicial Conference and supplies such text to members of Congress for introduction as bills.³⁸ The staff monitors legislation of interest to the Judicial Conference, including but not limited to legislation that it has drafted, and lobbies Congress in support of positions taken by the Judicial Conference.³⁹ Finally, the Administrative Office Director frequently testifies before congressional committees at oversight and legislative hearings.⁴⁰

In addition to creating the Administrative Office, the Administrative Office Act established circuit judicial councils to govern the affairs of the individual judicial circuits.⁴¹ Although not charged with any responsibilities that would place them in direct contact with Congress,⁴² the circuit chief judges, who chair the councils, occasionally

istrative Office. See Special Session Report of Judicial Conference, in Report of the Judicial Conference of the United States 22 app. (1952) (expressing "earnest hope" that Congress would consult Administrative Office on pertinent legislative matters); see also Fish, *supra* note 21, at 207.

³⁸ Indeed, the Administrative Office's statutory drafting services have become so routine that its occasional failure to provide such services has invited criticism from legislators. Robert W. Kastenmeier, then chairman of the House subcommittee with jurisdiction over the federal courts, and Michael J. Remington, then his chief counsel, criticized the Judicial Conference for "sometimes recommend[ing] legislative reforms in its report on its proceedings, but then never submit[ing] draft implementing legislation to Congress." Robert W. Kastenmeier & Michael J. Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, in *Judges and Legislators*, *supra* note 5, at 54, 84. Kastenmeier and Remington complained that when the judiciary delayed presenting its legislative proposals until the last moment, when they could be considered only as amendments to other bills pending on the House floor, the net effect was to undermine the legislative process. See *id.* at 84-85. In other words, the subcommittee depended upon the judiciary to supply it with statutory text for the reforms it recommended; if the judiciary did not do so, the reforms would not receive subcommittee consideration independently.

³⁹ See *id.* at 63 (describing legislative affairs office as "charged with diverse liaison responsibilities, including the formulation of the Judicial Conference's legislative program and the presentation and promotion of the program to Congress"); see also Fish, *supra* note 21, at 208-09 (discussing the "steady stream" of information flowing between Administrative Office staff and Congress).

⁴⁰ See, e.g., *Administration of the Federal Judiciary: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 75-76 (1991) (testimony of L. Ralph Mecham); *District Court Organization: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 62 (1990) [hereinafter *District Court Organization Hearing*] (same).

⁴¹ See Administrative Office Act of 1939, § 306, 53 Stat. at 1224.

⁴² For a list of the statutes identifying the judicial councils' many responsibilities, see Charles Gardner Geyh, *Means of Judicial Discipline Other than Those Prescribed by the Judicial Discipline Statute*, 28 U.S.C. Section 372(c), in 1 Research Papers of the National Commission on Judicial Discipline & Removal 713 app. B (National Comm'n on Judicial Discipline & Removal ed., 1993).

communicate with legislators directly on matters within a given circuit's particular interest or expertise.⁴³

3. *Expanded Interaction: 1967-Present*

Over the course of the preceding two phases, the judiciary remained actively engaged in the formulation and implementation of legislation. Throughout that period, however, individual judges and legislators sought an even more interactive relationship between Congress and the judiciary. Constitutional convention delegates entertained several proposals to formalize an extrajudicial role for members of the third branch.⁴⁴ Chief among them was James Madison's proposal for a council of revision, to be comprised of the President and a number of federal judges, that would have the "authority to examine every act of the National Legislature before it shall operate."⁴⁵

In 1921, then-Judge Benjamin Cardozo echoed complaints lodged by British and American scholars over the course of the preceding century, that the "[l]egislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them."⁴⁶ Judge Cardozo proposed creating a Ministry of Justice, comprised of at least five members—including a judge—that would monitor statutory law and recommend reforms on a continuing basis.⁴⁷ The Cardozo proposal has been resurrected in modified form several times since, with and without a judicial participation component, and has been implemented successfully on the state level.⁴⁸

In the latter third of this century, many judges, legislators, and other commentators have taken up where Justice Cardozo left off, re-

⁴³ See Fish, *supra* note 21, at 207 n.34 (noting that "legislation establishing new places of holding court went to circuit councils"). For a more recent example, see District Court Organization Hearing, *supra* note 40, at 361 (letter from Alfred T. Goodwin, Chief Judge, Ninth Circuit Court of Appeals, to Representative Robert W. Kastenmeier (discussing legislation to split Ninth Circuit)).

⁴⁴ For an excellent summary of such proposals and the debate surrounding them, see Wheeler, *supra* note 20, at 125-31.

⁴⁵ 1 Max Farrand, *The Records of the Federal Convention* 21 (rev. ed. 1937).

⁴⁶ Benjamin N. Cardozo, *A Ministry of Justice*, 35 *Harv. L. Rev.* 113, 114 (1921).

⁴⁷ See *id.* at 124-25.

⁴⁸ For examples of resurrections of the Cardozo proposal, see Henry J. Friendly, *The Gap in Law Making—Judges Who Can't and Legislators Who Won't*, 63 *Colum. L. Rev.* 787, 802-07 (1963); Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 *S. Cal. L. Rev.* 995, 1011-17 (1987); Arthur J. Keefe, *Twenty-Nine Distinct Damnations of the Federal Practice—and a National Ministry of Justice*, 7 *Vand. L. Rev.* 636, 636-38 (1954). The successful implementation of the Cardozo proposal is discussed in Larry Kramer, "The One-Eyed are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources, *Law & Contemp. Probs.*, Summer 1991, at 73, 92-93.

newing pleas for increased interaction between the branches.⁴⁹ The catalyst: dramatic increases in the demands placed on the judiciary by the legislative branch, which has systematically expanded the courts' federal question jurisdiction in search of solutions to the nation's social problems, and by the executive branch, which made the federal courts a battlefield for prosecuting the so-called "wars" on drugs and street crime.⁵⁰ Some of those advocating more judge-legislator communication therefore have focused on the need to sensitize legislators to the impact of their actions on an overburdened judiciary.⁵¹ Others have dwelled upon the special expertise that judges can lend legislators on the complexities of court improvement.⁵² Still others have

⁴⁹ See Federal Judiciary Administration Hearing, *supra* note 28, at 106 (statement of Subcommittee Chairman William J. Hughes) ("I do not subscribe to this old theory that there should not be that communication to maintain the independence of the judiciary. I think, if anything, we need to increase that communication so that we understand one another's problems."). See generally Abrahamson & Hughes, *supra* note 17, at 1048-50 (considering proposals to improve institutional structures affecting legislative-judicial relations); Building Bridges Instead of Walls: Fostering Communication Between Judges and Legislators, 75 *Judicature* 167 *passim* (1991) [hereinafter Building Bridges] (transcript of panel discussion of American Judicature Society (Aug. 10, 1991)) (assessing current state of legislative-judicial relations and exploring ways to improve interbranch communications); Mark W. Cannon & Warren I. Cikins, Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation, 38 *Wash. & Lee L. Rev.* 1, 19-20 (1981) (reflecting on success of Williamsburg Conferences attended by leaders of three branches of federal government); Frank M. Coffin, Communication Among the Three Branches: Can the Bar Serve as Catalyst?, 75 *Judicature* 125 (1991) (asserting that the bar can serve as catalyst for opening new lines of communication among branches, ensuring continued effective administration of justice); Robert A. Katzmann, Introduction, in *Judges and Legislators*, *supra* note 5, at 1, 1-6 (discussing inclusion of judicial-congressional affairs in long-term agenda of U.S. Judicial Conference Committee on the Judicial Branch); Kramer, *supra* note 48, at 78-81 (discussing causes and effects of inadequate planning to ensure efficient use of judicial resources).

⁵⁰ See Robert W. Kastenmeier & Charles Gardner Geyh, The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature, 73 *Marq. L. Rev.* 535, 543-46 (1990) (discussing impact of drug prosecutions on court congestion); see also Emily Field Van Tassel, Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992, 142 *U. Pa. L. Rev.* 333, 340 (1993) (discussing impact of increases in federal courts' jurisdiction on growth of judiciary).

⁵¹ See Frank M. Coffin, The Federalist Number 86: On Relations Between the Judiciary and Congress, in *Judges and Legislators*, *supra* note 5, at 21, 22 ("The judiciary and Congress not only do not communicate with each other on their most basic concerns; they do not know how they may properly do so. Legislators enact laws without considering either their burden on courts or how they might be interpreted."); Robert A. Katzmann, Summary of Proceedings, in *Judges and Legislators*, *supra* note 5, at 162, 163 (quoting Justice Scalia's observation that "Congress may not 'know the extent of the difficulties that it's imposing on the federal courts'"); Robert A. Katzmann & Russell R. Wheeler, Project Seeks to Improve Communications Between Courts and Legislatures, 75 *Judicature* 45, 45 (1991) ("Congress may pass laws without adequate thought about their effect on the judicial workload, or fail to address issues that the courts must then confront . . .").

⁵² See Barrow & Walker, *supra* note 22, at 249 ("[P]olicy formulation begins with the identification of a problem needing correction or a condition requiring improvement. The

suggested the need for judges to acquire a greater appreciation for the constraints within which Congress operates in the judicial reform arena.⁵³

These more recent calls for heightened interbranch communication have yielded significant results in the federal system. Whereas the first two phases in the development of the judiciary's role in the legislative process were triggered by single, specific events—the ratification of the U.S. Constitution and the creation of the Judicial Conference, respectively⁵⁴—the third phase was not. As described below, it was the product of a confluence of initiatives within the public and private sectors, beginning with the establishment of the Federal Judicial Center.

a. Statutory Initiatives. Congress established the Federal Judicial Center in 1967, at the instigation of the Judicial Conference.⁵⁵ The Center was created primarily to augment the judiciary's research capabilities and to provide judicial education.⁵⁶ In pursuing these objectives, the Center created a new conduit for interbranch communication. It published materials on legislative reform proposals that reached not only judges but legislators as well;⁵⁷ and it served as a

primary responsibility for identifying such situations lies with members of the judicial branch, as federal judges clearly are in the best position to detect institutional problems that warrant attention.”); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 Ohio St. L.J. 279, 279 (1991) (“The complexities of the law-making and law-interpreting tasks in the third century of this republic cry out for systematic dialogue between those who make and those who interpret legislation.”).

⁵³ As Katzmann notes:

Assessing the third branch's perceptions of Congress, Ralph Mecham of the Administrative Office of the U.S. Courts commented that “the difficulty is that many members of the judiciary don't understand some of the key issues. They're not aware of some of the nuances.” Steven Ross, the general counsel to the Clerk of the House of Representatives, who represents the chamber in court, stated that there is “an incredible degree of ignorance as to how the legislative branch operates”

See Katzmann, *supra* note 51, at 163.

⁵⁴ See *supra* notes 20-43 and accompanying text.

⁵⁵ See Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, *Law & Contemp. Probs.*, Summer 1988, at 31, 38-41 (outlining establishment of Federal Judicial Center).

⁵⁶ See *id.* at 41-43. In addition, Congress directed the Center to investigate ways in which automatic data processing could be utilized by the courts. See *id.*

⁵⁷ See, e.g., Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. 10 (1983-1984) [hereinafter *Rules Enabling Act Hearings*] (testimony of Judge Edward T. Gignoux) (providing subcommittee with copy of Federal Judicial Center publication on Rules Enabling Act for use in drafting amendments to Rules Enabling Act).

think tank, of sorts, for the judiciary, which made its director a logical witness in legislative hearings on bills affecting the judiciary.⁵⁸

Congress also created several court reform commissions of finite duration, one objective of which has been to exploit the judiciary's expertise in order to improve legislation affecting the courts. In 1972, for example, Congress formed the Commission on Revision of the Federal Court Appellate System.⁵⁹ The Commission, composed of judges and legislators, was created to explore the issue of circuit realignment, with a particular focus on the Fifth Circuit.⁶⁰

In 1988, Congress established the Federal Courts Study Committee, commissioning it to "examine problems and issues currently facing the courts of the United States" and to make recommendations.⁶¹ The Committee, whose members were selected by the Chief Justice, included five federal judges and four members of Congress.⁶²

In 1991, Congress created the National Commission on Judicial Discipline and Removal to "investigate and study the problems and issues involved in the tenure (including discipline and removal) of an Article III judge," to "evaluate the advisability of proposing alternatives to current arrangements with respect to such problems," and to submit a report to each branch of government.⁶³ The Commission, whose members were selected by the President, the Chief Justice, the Speaker of the House, and the President Pro Tempore of the Senate, included two federal judges and three members of Congress.⁶⁴

b. Intrajudicial Initiatives. For its part, the judiciary either supported or acquiesced in the foregoing congressional initiatives. In ad-

⁵⁸ See, e.g., *Judicial Independence: Discipline and Conduct: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 86-103 (1989) (testimony of John C. Godbold, Director, Federal Judicial Center) (discussing judicial discipline legislation).

⁵⁹ See Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (codified as amended at 28 U.S.C. § 41 (1994)).

⁶⁰ See Roman L. Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 *Ariz. St. L.J.* 579, 579-82 (discussing creation of Commission on Revision of the Federal Court Appellate System to address issues of circuit realignment in Fifth and Ninth Circuits). See generally Barrow & Walker, *supra* note 22, at 153-83 (discussing history of Commission).

⁶¹ *Federal Courts Study Act*, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (codified as amended at 28 U.S.C. § 331 (1994)).

⁶² See *Federal Courts Study Comm., Report of the Federal Courts Study Committee 193-96* (Apr. 2, 1990) [hereinafter *Study Committee Report*].

⁶³ *Judicial Discipline and Removal Reform Act of 1990*, Pub. L. No. 101-650, § 410, 104 Stat. 5122, 5124-25 (codified in scattered sections of 5, 28 U.S.C.).

⁶⁴ See *Report of the National Commission on Judicial Discipline and Removal: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 10-11 (1993) (discussing selection process of 13-member commission).

dition, the Administrative Office established the Office of Legislative and Public Affairs in 1976, thereby creating a permanent staff-level conduit between Congress and the judiciary.⁶⁵ A group of several hundred federal judges formed the Federal Judges Association in 1981, a private organization dedicated to lobbying Congress on matters relating to judicial salaries, benefits, and administration.⁶⁶ In 1991, the Judicial Conference created the Office of Judicial Impact Assessment (OJIA) within the Administrative Office (at the suggestion of the Federal Courts Study Committee) to assess the impact of proposed federal legislation on the courts for the benefit of members of Congress considering such legislation.⁶⁷

c. *Private Sector Initiatives.* The private sector also initiated a number of efforts to expand interbranch exchanges of ideas on matters of legislative reform. In 1978, the Brookings Institution began to sponsor annual conferences attended by representatives of all three branches of government for the explicit purpose of improving communications between the judiciary and Congress.⁶⁸ In 1985, Brookings Institution Fellow Robert Katzmann and Judge Frank Coffin founded the Governance Institute at the invitation of the Judicial Conference Committee on the Judicial Branch to "examine past, present and future relations between Congress and the judiciary with the objective of improving interbranch understanding."⁶⁹ Among the Institute's projects⁷⁰ was one that brought several key judges, justices, and members of Congress together for an all-day conference on the judge-legislator relationship, culminating in the most significant collection of articles on the subject to date;⁷¹ another resulted in an experimental effort to better inform members of Congress and their staffs about significant court decisions interpreting legislative enactments.⁷² Aetna Corporation and Yale University likewise have brought judges, legislators, and academics together in biannual conferences addressing

⁶⁵ See Interview with David Sellers, Public Affairs Officer, Administrative Office of the U.S. Courts (Aug. 16, 1996).

⁶⁶ See Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* 160-61 (1988) (discussing formation of Federal Judges Association).

⁶⁷ See *infra* notes 315-41 and accompanying text.

⁶⁸ See Cannon & Cikins, *supra* note 49, at 8-9 (discussing conception and implementation of first Brookings Conference).

⁶⁹ Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 *Geo. L.J.* 653, 656 (1992).

⁷⁰ See *id.* at 657 n.14 (listing Governance Institute projects).

⁷¹ See *Judges and Legislators*, *supra* note 5.

⁷² See Katzmann, *supra* note 69, at 665-67 (discussing development of system in which complete opinions without comment were sent to congressional leaders).

a range of issues of mutual interest, including court reform legislation.⁷³

Given the numerous points of interaction between Congress and the judiciary that operated for two centuries, one might regard the recent trend toward expanding the interaction as merely a difference in degree. It is, however, more than that. Despite the fact that the judiciary has been involved in the lawmaking process ever since Congress created the federal courts in 1789,⁷⁴ the *perception* is otherwise. The traditional relationship is described as being at "arms'-length,"⁷⁵ and driven by an "old theory" that "to maintain the independence of the judiciary," there "should not be . . . communication."⁷⁶ Many of the recent calls for improved communication between the branches proceed from the assumption that meaningful communications usually have not occurred.⁷⁷

Such a misperception is understandable. Although the branches interacted and cooperated throughout the first two phases of their relationship, the subject went largely undiscussed in secondary literature on the federal judiciary. A survey of nearly thirty treatises on the United States courts and their role in the political process, treatises written at or before the point at which phase three of the judge-legislator relationship began, reveals that the judiciary's extrajudicial role in statutory reform rarely was addressed.⁷⁸

⁷³ See George L. Priest & Judyth W. Pendell, Foreword, *Law & Contemp. Probs.*, Summer 1991, at 1, 2-3 (introducing articles presented at jointly sponsored conference).

⁷⁴ See *supra* notes 20-43 and accompanying text.

⁷⁵ Marcus & Van Tassel, *supra* note 20, at 33.

⁷⁶ Federal Judiciary Administration Hearing, *supra* note 28, at 106 (statement of Subcommittee Chairman William J. Hughes).

⁷⁷ See Coffin, *supra* note 51, at 22 ("The judiciary and Congress not only do not communicate with each other on their most basic concerns; they do not know how they may properly do so."); Tacha, *supra* note 52, at 279 ("In this day of instant communication . . . one of the ultimate ironies is that members of the judiciary and Congress often fail to communicate about issues of mutual concern.").

⁷⁸ The list of treatises reviewed includes: Simeon E. Baldwin, *The American Judiciary* (1905) (no discussion); Raoul Berger, *Congress v. The Supreme Court* (1969) (no discussion); Louis B. Boudin, *Government by Judiciary* (1932) (no discussion); Charles W. Bunn, *Jurisdiction and Practice of the Courts of the United States* (1949) (no discussion); Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921) (no discussion); Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, at 354 (1963) (brief discussion of 1948 statutory revision directing Chief Justice to submit annual report to Congress); James E. Clayton, *The Making of Justice: The Supreme Court in Action* (1964) (no discussion); Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (1932) (no discussion); Charles Grove Haines & Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics, 1835-1864* (1957) (no discussion); Charles Grove Haines & Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics, 1789-1835* (1944) (no discussion); Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System 79-80* (1953) (brief discussion of letters from justices to presidents as advisory opinions); Charles Evans Hughes,

One explanation for the omission may be that interbranch interaction was difficult to square with the prevailing paradigm that ours is a government of separated powers, within which courts and Congress pursue their respective missions in isolation. To the extent that courts were not supposed to interact with and render assistance to Congress, books defining and describing the role of the courts (as opposed to books describing the lives of the judges or justices) logically excluded the topic as *ultra vires*.⁷⁹ That may help to explain why, on those few occasions when such works did discuss the judiciary's participation in statutory reform, it was in the nature of an aside,⁸⁰ or for the limited

The Supreme Court of the United States: Its Foundation, Methods and Achievements—An Interpretation 30-31 (1928) (brief discussion of letter from Justice Johnson to President Monroe concerning roadways legislation); James Willard Hurst, *The Growth of American Law: The Lawmakers* 120 (1950) (brief discussion of justices' role in lobbying for 1925 judicial reform legislation); Robert H. Jackson, *The Supreme Court in the American System of Government* (1955) (no discussion); Alpheus Thomas Mason, *The Supreme Court from Taft to Warren* (1958) (no discussion); Wallace Mendelson, *The Supreme Court: Law and Discretion* (1967) (no discussion); W.H. Muller, *Early History of the Federal Supreme Court* 26-28 (1922) (brief discussion of circuit court letter in opposition to 1791 Act); Walter F. Murphy, *Elements of Judicial Strategy* (1964) (no discussion); Jack W. Peltason, *Federal Courts in the Political Process* (1955) (no discussion); Fred Rodell, *Nine Men: A Political History of the Supreme Court from 1790 to 1955* (1955) (no discussion); John R. Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures* (1960) (no discussion); Glendon A. Schubert, *The Judicial Mind: The Attitudes and Ideologies of the Supreme Court Justices, 1946-1963* (1965) (no discussion); Martin Shapiro, *Law and Politics in the Supreme Court* (1965) (no discussion); Carl Brent Swisher, *The Supreme Court in Modern Role* (1958) (no discussion); Charles Warren, *Congress, The Constitution, and the Supreme Court* (1925) (no discussion); Charles Warren, *The Supreme Court in United States History* (1922) [hereinafter Warren, *Supreme Court in U.S. History*] (brief discussion of Justice Johnson's letter to President Monroe concerning roadways legislation).

The lone exception, which includes repeated references to judge-legislator communications in the context of a book dedicated to the study of court reform legislation, is Frankfurter & Landis, *supra* note 21, *passim*. This work, however, goes no further than to describe correspondence, without coming to terms with the role the courts played in the legislative process.

⁷⁹ For example, Alpheus Thomas Mason's book on the Supreme Court includes a 30-page chapter on Chief Justice Taft that confines itself to a discussion of his and his Court's jurisprudence. See Mason, *supra* note 78, at 39-69. On the other hand, Mason's biography of Taft was not so constrained and devoted chapters to Taft's role as "judicial reformer," "lobbyist," and "presidential adviser." Alpheus Thomas Mason, *William Howard Taft: Chief Justice* 88-156 (1965). In other words, the activities of judges and the judiciary relating to statutory reform was known but was not included within the scope of the judiciary's defined role.

⁸⁰ See, e.g., Chandler, *supra* note 78, at 354 (brief allusion to legislation validating Judicial Conference's role in recommending legislative reform); Hurst, *supra* note 78, at 120 (stating that, in 1925, "[t]he Court itself took the initiative" when three associate justices drafted and when Chief Justice Taft "lent the weight of his office and prestige to advancing" legislation reducing mandatory appellate jurisdiction of Supreme Court); 1 Warren, *Supreme Court in U.S. History*, *supra* note 78, at 596-97 (reproducing Justice Johnson's letter to President Monroe concerning roadways legislation).

purpose of calling the propriety of such conduct into question in the context of a brief discussion of advisory opinions.⁸¹

In the third phase of the judge-legislator relationship, however, that has changed as an increasing number of treatises on the United States courts have begun to discuss the role of the judiciary in Congress,⁸² and those that do not are sometimes criticized for the omission.⁸³ As the judiciary's historic role in the legislative process is being acknowledged more widely, and its current role is being expanded and actively encouraged, the time has come for a new paradigm of the judiciary's role in statutory reform. We are now at the point where interbranch interaction, which has been an informal, often overlooked, "exception" to the prevailing "rule" of strict separation and isolation, must swallow the rule and leave us with a new, interactive model of government. What we see emerging is a paradigmatic shift in our understanding of the legislative process as it affects the courts, from one in which separation principles are central and cooperation and interaction are informal tempering influences, to one in which cooperation and interaction are central and separation principles temper the outer limits of permissible cooperation.⁸⁴

⁸¹ See, e.g., Hart & Wechsler, *supra* note 78, at 79-80 (identifying letters written by Justices Jay, Johnson, Hughes, and Taney to sitting presidents, and in one instance to member of Congress, on various legislative proposals as examples of arguably improper advisory opinions); Hughes, *supra* note 78, at 30-31 (discussing letter from Justice Johnson to President Monroe concerning constitutionality of piece of legislation while noting that "nothing of the sort could happen today"); see also Baldwin, *supra* note 78, at 32-33 (applauding Supreme Court's refusal to render advisory opinion on treaties with France at President Washington's request and observing that "[n]o further request of this kind has since been made by any of the political departments to a court of the United States").

⁸² See, e.g., Fish, *supra* note 21, *passim*; Fisher, *supra* note 66, at 153-61 (1988) (discussing political activities of judges); Richard Hodder-Williams, *The Politics of the U.S. Supreme Court* 21, 49, 57-60 (1980) (describing attempts by Supreme Court justices to influence Congress); Judges and Legislators, *supra* note 5, *passim*; David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 84-97 (1986) (discussing role of justices in presidential politics and congressional lobbying); Smith, *supra* note 8, *passim*.

⁸³ See Kastenmeier & Remington, *supra* note 38, at 77 (criticizing "otherwise excellent" report of Council on the Role of Courts for "inexplicably neglect[ing] even to mention the congressional role").

⁸⁴ Professor Jeffrey Stempel criticizes the tendency of many writers to identify new paradigms prematurely. See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 *Brook. L. Rev.* 659, 702 (1993). In his excellent study of adjudicatory procedure and litigation reform, he concludes that two longstanding "open courts" and "litigation reform" paradigms are crumbling, but that no new paradigms have yet emerged to take their place. *Id.* at 727-37. My conclusions are different because the focus of my study is different. I have looked at the nature of the relationship between judges and legislators in statutory reform and rulemaking and found that the judiciary's role has transformed so fundamentally as to warrant a new paradigm. Professor Stempel has looked at what I regard as the early ripple effects of this transformation on litigation reform processes and has concluded that those

B. *The Judiciary's Role in Procedural Rule Reform*

Commentators have devoted considerably greater attention to the judiciary's role in the rulemaking process than they have to its niche in the legislative process.⁸⁵ I see no point in restating these analyses in detail or launching a futile attempt to improve upon them. Rather, I will use the excellent work that has been done in the rulemaking arena to highlight the parallels between the developing roles of the judiciary in the rulemaking and legislative processes.

The history of the judiciary's role in rulemaking, like the history of its role in the legislative process, falls into three phases covering similar time periods. The conclusion is likewise similar: In rulemaking, as in statutory reform, the recent transformation of the judiciary's role calls for a new model of the interbranch relationship, one in which interaction replaces separation as the central and defining feature.

1. *Legislative Dominance: 1789-1934*

Professor Stephen Burbank, in his groundbreaking history of the Rules Enabling Act of 1934, detailed the chaotic course of procedural law prior to the Act's passage.⁸⁶ In 1792, Congress authorized the Supreme Court to promulgate procedural rules governing federal court actions in equity and law,⁸⁷ a power Congress never withdrew in equity actions and did not withdraw in actions at law until 1872.⁸⁸ It was, nevertheless, a power the Supreme Court rarely exercised.⁸⁹

Although the federal judiciary exhibited little reluctance to shape the progress of substantive law through common law decisionmaking,⁹⁰ it left the development of procedural law reform largely to Con-

processes remain in such a state of flux that it is not yet possible to predict what the new paradigms of those processes will look like.

⁸⁵ Among the many articles that evaluate the rulemaking process, and the judiciary's role in that process, some of the very best include: Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067 (1989); Marcus, *supra* note 4; Mullenix, *supra* note 7; Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905 (1976).

⁸⁶ See Burbank, *supra* note 85, at 1035-98.

⁸⁷ See Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276; see also Burbank, *supra* note 85, at 1039-40.

⁸⁸ See Conformity Act of 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197; see also Burbank, *supra* note 85, at 1040 & n.105.

⁸⁹ See Burbank, *supra* note 85, at 1039-40.

⁹⁰ See, e.g., *Swift v. Tyson*, 41 U.S. (1 Pet.) 1, 17-18 (1842) (overruling state common law with federal common law).

gress. The best Congress could do was the Process Act of 1792⁹¹ and the Conformity Act of 1872.⁹² Under these acts, the federal courts were authorized (in the case of the Process Act) or required (in the case of actions at common law under the Conformity Act) to follow procedural law of the state in which the court sat.⁹³

Neither act succeeded in its goal of eliminating inconsistencies between state and federal procedural law within any given state.⁹⁴ Despite this track record of legislative failure, the ultimate transfer of rulemaking power from Congress to the courts did not occur quickly or easily.⁹⁵ Roscoe Pound offered a four-fold explanation for Congress's longstanding, hard-dying dominance: First, legislative control of procedure took hold "at a time when the legislative department did not doubt its competence to every sort of task";⁹⁶ second, the legal profession had not assumed responsibility for molding procedural (as opposed to substantive) law, relegating the task to the legislature;⁹⁷ third, American courts were reluctant to fill the void and craft procedural law, without an adequate model to follow;⁹⁸ and fourth, legal education (which to that point often meant apprenticeship) had over-emphasized local procedure to the point of leading practitioners to assume that procedure was "the main department of the law . . . [which] must be left to legislation."⁹⁹

2. *Judicial Dominance: 1934-1973*

The campaign to create a uniform body of procedural law governing litigation in the federal courts came at a time of growing support for uniform laws generally.¹⁰⁰ Roscoe Pound, a leader of the rule reform movement, argued that a rational scheme of uniform proce-

⁹¹ § 2, 1 Stat. at 276.

⁹² §§ 5-6, 17 Stat. at 197.

⁹³ See Burbank, *supra* note 85, at 1037-40. For a discussion of the development of procedural law in the context of admiralty and equity proceedings, as distinct from common law, see *id.* at 1037 n.90.

⁹⁴ See *id.* at 1040-41 (describing lack of uniformity between federal and state court procedural law following Act of 1872).

⁹⁵ See *id.* at 1043-98 (outlining quest for uniform federal procedure in nineteenth century). Delays in the enactment of the Rules Enabling Act were attributable in no small part to Senator Thomas Walsh, who worried that legislative delegation of rulemaking power constituted an abdication of Congress's proper role. See Fish, *supra* note 21, at 22-23 (noting Walsh's additional concern that procedural reform would inconvenience small-town lawyers).

⁹⁶ Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 600 (1926).

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ *Id.* at 601.

¹⁰⁰ See Burbank, *supra* note 85, at 1043 (discussing quest for uniform civil procedure in nineteenth century).

dural law could best be achieved if the legislature transferred rulemaking responsibility to the judiciary:¹⁰¹

[T]he difficulty of procuring legislative action with reference to even the most crying needs of judicial procedure is notorious. Legislatures today are so busy . . . that it is idle to expect [them] to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. . . . When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges what the project is about. . . . When rules of procedure are made by judges, they will grow out of experience, not the ax-grinding desires of particular lawmakers.¹⁰²

The procedural law reform campaign culminated in passage of the Rules Enabling Act of 1934,¹⁰³ which was followed by forty years of judicial rulemaking uninterrupted by congressional interference.¹⁰⁴ The Act facilitated judicial rulemaking dominance by giving the Supreme Court the power to promulgate procedural rules,¹⁰⁵ by making such rules effective six months after promulgation absent congressional intercession,¹⁰⁶ and by providing that Court-promulgated rules would supersede prior, inconsistent legislation.¹⁰⁷

In 1956, the Supreme Court inexplicably discharged the Rules Advisory Committee that the Court had established and kept in place since 1935.¹⁰⁸ Two years thereafter, Congress (with the Supreme Court's approval) directed the Judicial Conference to assume the role of the defunct Rules Advisory Committee and reserved to the Court the power to adopt, modify, or reject Conference-generated rules.¹⁰⁹ The Judicial Conference, in turn, created a rules advisory committee

¹⁰¹ Dean Pound's 1906 address to the American Bar Association (ABA), "The Causes of Popular Dissatisfaction with the Administration of Justice," prompted the ABA to constitute a committee (including Pound) to investigate the problems Pound identified. *Id.* at 1045-46. Three years later, the committee issued a report which included a section on procedure that condemned "legislative tinkering" and hailed Supreme Court rulemaking. *Id.* at 1046.

¹⁰² Pound, *supra* note 96, at 602.

¹⁰³ Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2071 (1994)).

¹⁰⁴ See Burbank, *supra* note 85, at 1018 (reporting that long-enduring pattern of congressional acquiescence in adoption of federal rules was broken in response to proposed Federal Rules of Evidence in 1973 and has not been reestablished).

¹⁰⁵ See *id.* at 1024.

¹⁰⁶ See Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2071 (1994)).

¹⁰⁷ See *id.*

¹⁰⁸ See Order Discharging the Advisory Committee, 352 U.S. 803 (1956); see also 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1006 (1987).

¹⁰⁹ See Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (1994)); see also 4 Wright & Miller, *supra* note 108, § 1007.

that responds to rule reform proposals in much the same way as other Conference committees respond to legislative reform proposals.¹¹⁰

Neither the original Act nor its subsequent amendments prohibited congressional tinkering with procedural rules. That such tinkering did not occur has been variously attributed to judicial respect for the substance-procedure dichotomy,¹¹¹ congressional deference to the rulemaking expertise of the judiciary,¹¹² and congressional disinterest.¹¹³

3. *Heightened Interaction: 1973-Present*

In 1973, Chief Justice Warren Burger transmitted the proposed Rules of Evidence to Congress. Congress responded by suspending the proposed rules¹¹⁴ and enacting the Federal Rules of Evidence two years later,¹¹⁵ thus ending the era of uncontested judicial dominion over procedural rulemaking.

The Rules of Evidence imbroglio created the first real opportunity for the two branches to explore where the judiciary's power to make "procedural" rules ended, and where Congress's exclusive power to make "substantive" law began.¹¹⁶ The exploration did not occur in a vacuum. To the contrary, the Senate Judiciary Committee Report accompanying the Rules of Evidence bill described a process

¹¹⁰ See Annual Report of the Proceedings of the Judicial Conference of the U.S. 6-7 (1958). For a description of the Rules Committee Process, see Carrington, *supra* note 85, at 2119-24.

¹¹¹ See Burbank, *supra* note 85, at 1131-37 (summarizing arguments of other scholars to effect that rulemakers have recently abandoned their longstanding respect for limitations of Rules Enabling Act).

¹¹² See, e.g., Weinstein, *supra* note 85, at 927-30 (noting how Congress had delegated its rulemaking power almost entirely to courts since 1930s, leaving Congress in role of monitor).

¹¹³ See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 *Stan. L. Rev.* 673, 675 (1975) (noting traditional congressional indifference to rulemaking proposals); Mullenix, *supra* note 7, at 799 (noting widespread ennui regarding judicial rulemaking process).

¹¹⁴ See Act to Promote the Separation of Powers by Suspending Rules of Evidence, Pub. L. No. 93-12, 87 Stat. 9 (1973) (repealed 1988) [hereinafter *Separation of Powers Act*].

¹¹⁵ See Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

¹¹⁶ Whether rules of evidence, particularly rules governing admissibility, modified a "substantive right" and were thus outside the purview of the judiciary's rulemaking authority had been a question debated by judges and scholars alike. See Burbank, *supra* note 85, at 1137-43 (contending that principal source of difficulty has been failure to mark distinction between rules regulating taking and obtaining evidence (procedural) and rules regulating admissibility of evidence (substantive)). That the substance-procedure distinction was at the forefront of Congress's mind is reflected in the act suspending the proposed rules. Congress deferred the effective date of the rules with explicit reference to Justice Douglas's dissent from the Court's decision to approve the proposed rules; Douglas had objected on the grounds that the rules were substantive in nature. *Separation of Powers Act*, Pub. L. No. 93-12, 87 Stat. 9.

awash in a sea of lobbyists.¹¹⁷ Apart from problems that particular interest groups had with specific provisions of the proposed rules, a primary concern, as described by Professor Paul Carrington, was "that the Evidence rules as promulgated by the Court were too substantive, that is too laden with political consequences, to be suitable for enactment by an unelected court."¹¹⁸

The Rules of Evidence episode highlighted the relevance of procedural law to the vindication of substantive rights in a way that attracted and held the attention of individuals and organizations that litigate in the federal courts.¹¹⁹ Congress responded to this newfound public interest with twenty-four public laws between 1973 and 1984 modifying or suspending procedural rules.¹²⁰

Legislators with committee jurisdiction over federal court procedure were not sanguine about Congress routinely substituting its political judgments for the expert assessments of the Judicial Conference.¹²¹ In an attempt to revitalize the judiciary's rulemaking role, Congress amended the Rules Enabling Act in 1988 to encourage

¹¹⁷ The Report stated that:

From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges In addition, the husband-wife privilege drew fire The partial doctor-patient privilege seemed to satisfy no one, either doctors or patients; and even the attorney-client privilege as drafted came in for its share of criticism because of its failure to define representative of the client, a critical issue for corporations and organizations. Much controversy also attended the failure to include a newsman's privilege.

S. Rep. No. 1277, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7053.

¹¹⁸ Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 300 (1994); see also S. Rep. No. 1277, at 6, reprinted in 1974 U.S.C.C.A.N. at 7053 (explaining Senate Judiciary Committee's rejection of Court-proposed evidence rules with reference to commentators who "questioned the wisdom of promulgating rules of privilege under the Rules Enabling Act, on the ground that in their view, the codification of the law of privilege should be left to the regular legislative process").

¹¹⁹ See Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 62 *Judicature* 280, 285 (1979) ("Recognition of the potential effect of rules has spurred interest by other groups previously unaware of, or uninterested in, the rule-making process.").

¹²⁰ See H.R. Rep. No. 422, 99th Cong., 1st Sess. 8 n.20 (1985) (citing public laws modifying procedural rules).

¹²¹ The House Judiciary Committee's discomfort with legislative intervention into the procedural rulemaking arena is made plain in the Committee Report accompanying the 1988 Rules Enabling Act amendments, in which the Committee declared that the Rules Enabling Act process "worked well for many years New rules and amendments to existing rules routinely took effect without any congressional intervention. In recent years, however, Congress has taken a greater interest in new rules and amendments promulgated under the Rules Enabling Acts." H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5987-88. Hence, the need for reform.

greater public participation in the Judicial Conference's rulemaking proceedings and thereby decrease the public's need for recourse to Congress.¹²² The accompanying legislative history also sought to clarify the point at which the judiciary's authority to regulate "procedure" ended, and Congress's exclusive authority to regulate "substance" began, in an effort to avoid future misunderstandings and the need for frequent congressional intervention in the rulemaking process.¹²³

The attempt failed.¹²⁴ In 1990, Congress passed the Civil Justice

¹²² Chief Judge Jack B. Weinstein wrote the House Judiciary Committee that the bill's "requirement for open discussions" would be a "great improvement" because it "should reduce the necessity of congressional intervention through legislation." Rules Enabling Act Hearings, *supra* note 57, at 196 (letter from Chief Judge Jack B. Weinstein to Subcommittee Chairman Robert W. Kastenmeier). The House Judiciary Committee appears to have agreed. "Clearly, federal court rules touch important values," the Committee report declared. H.R. Rep. No. 422, at 16. "Interest groups concerned with those values have not had enough input into the current system, and as a consequence they have sought to influence the Congress to reject proposed rules." *Id.*; see also H.R. Rep. No. 889, at 29-30, reprinted in 1988 U.S.C.A.N. at 5989-91 (accompanying bill that ultimately adopted and incorporated previous report by reference). The Committee concluded that "[o]penness coupled with notice will encourage participation by a broad segment of the community and avoid potential misunderstandings and will ultimately assist the Congressional review process." H.R. Rep. No. 422, at 26. On this point the Committee report inserted a footnote reference to a letter from Alan B. Morrison, Director of the Public Citizen Litigation Group, to Judge Edward T. Gignoux, which stated that "the reason why it was necessary for Congress to step in and delay the effect of Rule 4 had much less to do with the substance of the new Rule, than with the perception that the process had not fairly considered the views of all interested persons." Rules Enabling Act Hearings, *supra* note 57, at 183 (letter from Alan B. Morrison, Director of the Public Citizen Litigation Group, to Judge Edward T. Gignoux (Aug. 20, 1982)). In other words, by opening the rulemaking process up to interested groups, Congress hoped to reduce the need for legislative interference.

¹²³ See H.R. Rep. No. 422, at 20-22. For a discussion of the House Judiciary Committee Report's exegesis on the substance-procedure distinction, see Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012, 1030-36.

¹²⁴ See Mullenix, *supra* note 7, at 799-801. Professor Mullenix and I differ in our perceptions of the role played by the 1988 Rules Enabling Act amendments. In her 1991 article, Professor Mullenix predicted that "[t]he professional torpor in the civil rulemaking process is now about to change," thanks to the 1988 amendments, *id.* at 799; that by opening the rulemaking process to lobbyists, the amendments "will politicize the rulemaking process as never before," *id.* at 801, to the inevitable end of "plac[ing] procedural reform in Congress's hands," *id.* at 802.

In my mind, she was predicting the past and lavishing too much credit or blame on the 1988 amendments. First, the Judicial Conference had opened its rulemaking process up to the public years previously, so that the 1988 amendments did little more than codify existing practice. See H.R. Rep. No. 889, at 27, reprinted in 1988 U.S.C.A.N. at 5987-88. Second, she undercuts her hypothesis by illustrating the hazards of congressional rule revision with a string of examples predating the 1988 amendments, demonstrating that the trend toward politicization of the rulemaking process was in full swing by the time that the amendments were adopted. See Mullenix, *supra* note 7, at 844-51. The 1988 amendments may have amounted to little more than a futile attempt to stop the unstoppable trend toward greater congressional involvement in rulemaking that had begun 15 years earlier.

Reform Act of 1990,¹²⁵ which regulated the means by which district courts developed procedures for managing their civil litigation dockets, and did so over the Judicial Conference's objection that the issue was better left to judicial rulemaking under the Rules Enabling Act.¹²⁶ In 1993, members of Congress launched an effort to suspend proposed amendments to Civil Procedure Rule 26, an effort that failed not because Congress favored the rule or was reluctant to second-guess the judiciary but because Congress could not reach agreement on the text of a substitute proposal before time ran out and the rule became effective.¹²⁷ In 1994, Congress amended the Federal Rules of Evidence by adding Rules 413 through 415.¹²⁸ And in 1995, legislation explicitly amending Rule 11, and implicitly amending Civil Rules 68 and 23, became law following a congressional override of President Clinton's veto.¹²⁹

It may have been naive for Congress to hope that simply giving interest groups greater access to Judicial Conference rulemaking proceedings would diminish the desire of those groups to seek legislative redress. When Congress delegated primary rulemaking responsibility to the Supreme Court in 1934, it did so on the premise that rules of procedure do not implicate substantive rights to such an extent as to require legislative policymakers to write them. Since 1973, however, that premise has ceased to be a given. As the Reporter to the Judicial Conference's Advisory Committee on Civil Rules explained in a memo to the Committee:

"Those few who observe judicial rulemaking are far more likely today to see social and economic consequences in what the Committee does than were earlier generations of observers. The sub-

At a minimum, however, we agree that the amendments did nothing to reduce congressional intercession in the rulemaking process.

¹²⁵ Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (1994)).

¹²⁶ See The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 221 (1990) [hereinafter *Civil Justice Reform Act Hearings*] (statement of Chief Judge Aubrey E. Robinson, Jr.).

¹²⁷ See Randall Samborn, *Rules for Discovery Uncertain*, Nat'l L.J., Dec. 20, 1993, at 1 (reporting that legislation to override disclosure rules was approved in House but not in Senate in light of lingering concerns over certain provisions of legislation as drafted).

¹²⁸ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 2135. Even more remarkable is that Congress suspended the effective date of the rules it enacted for 150 days in order to permit Judicial Conference review, thereby effectively turning the Rules Enabling Act (which calls for a seven-month suspension of Supreme Court-approved rules, pending congressional review) on its head. See 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5411 (Supp. 1996).

¹²⁹ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C.).

stance-procedure line was never clear, and was never constant in its application to different contexts; but it also may be that its meaning has changed over the years, with more matters being perceived to be substantive than may once have been true."¹³⁰

If procedural rules are thought to modify substantive rights, and substantive rights are thought to be within the exclusive province of Congress to modify, no amount of access to the judicial rulemaking process is going to convince an interested party or her elected representative that Congress should not intercede.¹³¹ Whereas in statutory reform it is the judiciary's involvement that has increased, in rule reform it is Congress that has become a more active player. In both cases, however, the effect is the same: a transformation of the interbranch relationship from one typified by separation and delegation to one of interaction and occasionally, as discussed in Part III, confrontation.

II

CONSTITUTIONAL, STATUTORY, AND ETHICAL CONSTRAINTS ON JUDGE-LEGISLATOR INTERACTION IN THE DEVELOPMENT OF STATUTES AND RULES

As separation and delegation have given way to interaction and shared responsibility as the defining features of the judge-legislator relationship in statutory reform and rulemaking, some judges, legislators, and academicians have become increasingly concerned with the scope and limits of the judiciary's new lawmaking role. They have worried aloud that the Constitution, various federal statutes, and the Code of Conduct for United States Judges bar a range of extrajudicial lawmaking activity within the ambit of the interactive paradigm. As I hope to show, these concerns are largely unfounded but are well worth addressing because uncertainty surrounding their validity has impeded the orderly growth of interbranch interaction in the new paradigm.

¹³⁰ Mullenix, *supra* note 7, at 835-36 (quoting Reporter, Memorandum to Civil Rules Committee re Questions About the Rulemaking Process (Oct. 18, 1989)).

¹³¹ See, e.g., Rules Enabling Act Hearings, *supra* note 57, at 149 (statement of Professor Burt Neuborne) ("[I]f in fact there is really a genuine and perhaps insoluble uncertainty as to what constitutes a substantive rule and what constitutes a procedural rule, the only practical way out may be for Congress to enact the Federal rules as though they were a statute.").

A. *The Legislative Process*

1. *Constitutional Constraints*

The separation of powers is often identified as an impediment to interbranch cooperation in legislative reform.¹³² An illustration of the separation-of-powers concern in action occurred in 1991, when the Judicial Conference followed the lead of its Ad Hoc Committee on Asbestos Litigation and recommended that Congress consider legislation to address the onslaught of asbestos lawsuits.¹³³ The recommendation was consciously nonspecific. As Judge Thomas M. Reavley, Committee Chairman, explained: "[t]he committee finally decided to limit [its] recommendations to matters of principle and general procedures without taking stands on policy or substantive law."¹³⁴ Judge Reavley elaborated to *The New York Times* that the Committee had "a file of draft legislation, but we were advised that we were risking an impropriety by recommending specific legislation."¹³⁵ "The issue came down to one of separation of powers," *The Times* reported Reavley as saying, "and whether judges ought to recommend legislation that, if adopted, they would inevitably have to interpret."¹³⁶

The judiciary's willingness to recommend legislative reform but not to say what it has in mind is a clear manifestation of the continued uncertainty that surrounds the constitutional limitations upon legislative-judicial interaction. Such uncertainty is unwarranted and unnecessary. Bluntly put, the Constitution poses no impediment to the heightened legislative-judicial cooperation contemplated by a new, more interactive paradigm.

As central as the separation of powers may be to the structure of our government, it is not an explicit part of the Constitution. Rather, it is implied in the organization and language of the first three articles,

¹³² As J. Clark Kelso argues:

Judicial lobbying is risky business. It tends to blur the distinction between the legislative and executive branches, which are constitutionally involved in enacting and enforcing positive law, and the judicial branch, which is constitutionally involved only in interpreting, applying, and reviewing positive law. This blurring of constitutional functions can undermine separation of powers

....

Kelso, *supra* note 6, at 862; see also Abrahamson & Hughes, *supra* note 17, at 1087 & nn.124-25 (noting separation-of-powers concerns of judges and commentators over direct contact between judges and legislators).

¹³³ See Judicial Conference Seeks Reform of Asbestos Litigation, *The Third Branch* (Admin. Office of the U.S. Courts), Apr. 1991, at 1, 1.

¹³⁴ Judge Thomas M. Reavley: Studying the Asbestos Litigation Explosion, *The Third Branch* (Admin. Office of the U.S. Courts), Apr. 1991, at 10, 11.

¹³⁵ Stephen Labaton, Judges Struggle to Control a Caseload Crisis, *N.Y. Times*, Mar. 10, 1991, at E4.

¹³⁶ *Id.*

which vest *all* legislative powers in Congress,¹³⁷ *the* executive power in the President,¹³⁸ and *the* judicial power in the courts.¹³⁹ The absence of a separation-of-powers clause is by no means accidental; James Madison made it quite clear that such language was omitted to protect against unhealthy isolation of the branches.¹⁴⁰

When judges propose, draft, testify on, and lobby for or against legislative reform, they do not usurp a legislative power that the Constitution vests in Congress alone. To the contrary, they exercise no "power" at all. Even so, one could still argue that they exceed the boundaries of "judicial" power, to which Article III courts are confined. Superficially, at least, a judge who testifies as to the meaning of proposed legislation might seem to be offering an advisory opinion in contravention of Article III's "cases" or "controversies" limitation. Upon closer examination, however, such an argument is undercut by the constitutional text, history, and common sense.

The Constitution vests judicial power not in the judges themselves, but in the "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹⁴¹ Had the intent been to confer Article III power upon "Judges, both of the supreme and inferior Courts," the document could have used that phrase, as it does in the adjacent good behavior clause.¹⁴² The judicial power and its limits thus apply to the courts as institutions and not to the judges as individuals. It is only when judges are sitting *qua* "court," exercising Article III powers, that they are limited to deciding cases or controversies. Extrajudicial law reform activities under-

¹³⁷ See U.S. Const. art. I, § 1.

¹³⁸ See *id.* art. II, § 1.

¹³⁹ See *id.* art. III, § 1.

¹⁴⁰ In *The Federalist* No. 47, Madison reviewed state constitutions and concluded that in practice "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct," despite the text of those Constitutions calling for "the emphatical and, in some instances, the unqualified" separation of powers. *The Federalist* No. 47, at 304 (James Madison) (Clinton Rossiter ed., 1961). The states' deviation from their constitutional text was, in Madison's view, justified because separation-of-powers principles do not "require that the legislative, executive, and judiciary departments should be wholly unconnected with each other." *Id.* No. 48, at 303 (James Madison). To the contrary, "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." *Id.* For a general discussion of how the powers of the first and third branches of the federal government are separate yet blended, see Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 *Temp. L. Rev.* 1041, 1051-54 (1995).

¹⁴¹ U.S. Const. art. III, § 1.

¹⁴² *Id.*

taken by judges acting as administrators or individuals are simply unaffected by the limits Article III places on courts.

Early Justices on the Supreme Court shared this common sense reading of Article III. Emily Field Van Tassel and Maeva Marcus found that in the last decade of the eighteenth century, judges distinguished between advice offered in their *institutional* capacities—which they regarded as improper advisory opinions—and advice or other assistance rendered in their *individual* capacities—which they considered to present no constitutional difficulties.¹⁴³ Indeed, individual Justices actively lobbied legislators on a host of issues in the first decade of the federal judiciary's existence.¹⁴⁴

In other words, Article III forecloses courts from issuing opinions with the force and effect of law on the wisdom or legality of legislation outside the context of live cases or controversies. It has no bearing upon judges acting as individuals or representatives of the Judicial Conference who render advice and assistance to Congress without exercising Article III powers.¹⁴⁵

2. *Statutory Constraints*

In addition to the Constitution, there are at least three federal statutes that arguably circumscribe the judiciary's extrajudicial role in

¹⁴³ See Marcus & Van Tassel, *supra* note 20, at 41-42. For example, in response to a formal, written request from President Washington to all members of the Supreme Court soliciting their views on the interpretation of treaties and other matters, the Justices declined to answer on separation-of-powers grounds. See Letter from John Jay, James Wilson, John Blair, James Iredell, and William Paterson to George Washington (Aug. 8, 1793), on file in National Archives Record Group No. 59, cited in Marcus & Van Tassel, *supra* note 20, at 42 n.34. As Marcus and Van Tassel noted:

This type of request must be distinguished from simply asking advice from the justices, on a personal basis, on a great variety of matters of state. President Washington, for example, availed himself of the knowledge and good judgment of Chief Justice John Jay on many occasions. That this occasion was different in kind was obvious to all involved.

Marcus & Van Tassel, *supra* note 20, at 41 n.30.

¹⁴⁴ See Marcus & Van Tassel, *supra* note 20, at 36-42; Tacha, *supra* note 52, at 286-89.

¹⁴⁵ One might well wonder how my position squares with that of judicial nominees who, in Senate confirmation hearings, have invoked the separation of powers in support of their refusal to answer questions as to how they would rule in particular cases. Senators pose such questions, in part, with the intent of manipulating outcomes of future cases by making the nominee's prospective ruling on a given issue relevant to her confirmation. Judicial nominees legitimately refuse to answer such questions on separation-of-powers grounds because the Senate could usurp an essential judicial function if it was able to limit the pool of judges to those who will say that the law is what the Senate thinks it is. Judicial participation in the legislative process does not pose a comparable problem because the judge's point of view is solicited not for the purpose of intruding on the judiciary's province but to aid in the development of sensible legislation.

statutory reform.¹⁴⁶ Upon closer scrutiny, however, it becomes clear that they do no such thing.

a. *The Organic Statute of the Judicial Conference.* The statute creating the Judicial Conference provides that "[t]he Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation."¹⁴⁷ In March 1984, Senators East, Symms, and Denton sent a letter to the Comptroller General arguing that in light of this statute, the Chief Justice alone was authorized to make legislative recommendations to Congress.¹⁴⁸ The Comptroller General disagreed: "Based on a review of the provisions of the entire statute and its legislative history, we find nothing to support such a rigid interpretation."¹⁴⁹ Rather, the Comptroller read the statute to say only that the Chief Justice must report to Congress annually with any Conference recommendations for legislation—not that the Chief is foreclosed from assigning other members of the Conference to communicate with Congress at other times or that other members of the judiciary are precluded from contacting Congress on their own.¹⁵⁰

b. *The Statutory Prohibition on Lobbying with Appropriated Moneys.* A more serious potential statutory impediment to heightened judge-legislator interaction is legislation intended to limit the authority of government employees to lobby Congress with appropriated funds:

No part of the money appropriated by any enactment of Congress shall . . . be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose . . . any legislation . . . but this shall not prevent officers or employees of the United States . . . from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.¹⁵¹

¹⁴⁶ See *infra* notes 147-60 and accompanying text.

¹⁴⁷ 28 U.S.C. § 331; see *supra* notes 23-27 and accompanying text.

¹⁴⁸ See Letter on Behalf of Comptroller General of the United States to Senator Jeremiah Denton 8 (Sept. 26, 1984) [hereinafter *Comptroller Letter*] (on file with author) (referencing and responding to letter from Senators East, Symms, and Denton).

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 8-10.

¹⁵¹ 18 U.S.C. § 1913 (1994).

The Judicial Conference takes this statute quite seriously—perhaps too seriously—and professes never to speak to Congress (outside of its annual report) unless requested to do so by a member. As Judge Elmo Hunter, speaking on behalf of the Judicial Conference, explained to Senator DeConcini: “We do not ask you or tell you or advise you how to pass on bills unless you invite our comments. We are very careful. My committee simply will not respond concerning legislation unless the invitation originates with one or the other of the bodies of the Congress.”¹⁵²

Hinging the Judicial Conference’s participation in the legislative process upon a real or imagined “invitation” from Congress is utterly unnecessary. The statute includes an explicit exception permitting appropriated moneys to be used for communications made “through the proper or official channels.”¹⁵³

More nettlesome, perhaps, is whether the statute forbids judges who do not represent the Judicial Conference from using appropriated monies to communicate with Congress in the absence of an invitation to do so. The senators who queried the Comptroller General as to whether judge-legislator communications were inconsistent with the Judicial Conference’s enabling statute also inquired as to whether such communications ran afoul of the antilobbying statute if federal funds were utilized.¹⁵⁴

The Comptroller General answered with an unequivocal no, on the grounds that such communications fall within the “official channels” exception because individual judges have no direct superior and are “arguably” their own “agency spokespersons.”¹⁵⁵ The only restriction the statute imposes upon a judge’s communications with Congress, then, is that if she uses the resources of her office to make such communications, she must limit herself to issues relating to “the effi-

¹⁵² Judicial Conference and Councils in the Sunshine Act, S. 2045: Hearings Before the Subcomm. on Improvements in Judicial Machinery, U.S. Senate Comm. on the Judiciary, 96th Cong., 2d Sess. 19 (1980). When the judiciary’s interest in legislative reform is keen, “invitation” receives a liberal construction. For example, in response to Senator DeConcini’s inquiry as to why the Judicial Conference registered its opposition to judicial discipline legislation despite the fact that the Senate “did not ask [it] to do that,” Judge Hunter explained that at the most recent of the annual Brookings Institution Conferences, he “thought that [he] heard an invitation to advise the Congress at any time of any pressing need or problem of the judiciary.” *Id.* at 20. In the absence of a standing invitation to communicate on any and all matters of interest to the judiciary, judicial branch personnel will privately solicit written “invitations” from legislators seeking the judiciary’s views on particular matters. See Kastenmeier & Remington, *supra* note 38, at 84.

¹⁵³ 18 U.S.C. § 1913.

¹⁵⁴ See Comptroller Letter, *supra* note 148, at 1.

¹⁵⁵ *Id.* at 1, 3-4.

cient conduct of the public business,"¹⁵⁶ meaning issues that "would have an impact on the judiciary."¹⁵⁷ Given that judges' unique expertise is limited to matters relevant to the judiciary and that the goal of the new interactive paradigm is to facilitate congressional access to this unique expertise,¹⁵⁸ the constraints the statute imposes on the use of public funds for communications irrelevant to the judiciary are of no particular consequence.

c. Appropriations Restrictions. Annual appropriations acts, including those applicable to the judiciary, often proscribe the use of appropriated funds for "publicity or propaganda purposes."¹⁵⁹ Although one could conceivably interpret this clause so broadly as to bar all legislative lobbying, the Comptroller General has declined to do so:

In our view, Congress did not intend, by enactment of [such] measures . . . to prohibit government officials, including Federal judges, from expressing their views on pending legislation. Rather, the . . . prohibition applies primarily to expenditures for grass roots lobbying campaigns involving appeals addressed to members of the public suggesting that they contact their elected representatives to indicate support of or opposition to pending legislation, or to urge their representatives to vote in a particular manner.¹⁶⁰

In other words, the appropriations restriction proscribes the use of appropriated funds for "grass roots lobbying" but imposes no meaningful limits on interbranch communication.

3. *Ethical Constraints*

The cacophony of commentary on the ethical limits of a federal judge's participation in the legislative process has vacillated between bold, contradictory edicts that judges are duty bound to avoid the legislature or to assist it actively, on the one hand, and timid, unhelpful suggestions that "it all depends," on the other.¹⁶¹ Despite this divergence of views, it seems to me that the ethical limits of a judge's participation in legislative reform, as spelled out in the Code of Conduct

¹⁵⁶ 18 U.S.C. § 1913.

¹⁵⁷ Comptroller Letter, *supra* note 148, at 4.

¹⁵⁸ See *supra* notes 49-84 and accompanying text.

¹⁵⁹ See, e.g., Departments of Commerce, Justice and State, the Judiciary, and Related Agency Appropriations Act, Pub. L. No. 103-317, § 601, 108 Stat. 1773, 1773 (1994); see also Comptroller Letter, *supra* note 148, at 4 (noting that propaganda restrictions have been included in "various appropriation acts" since 1950s).

¹⁶⁰ Comptroller Letter, *supra* note 148, at 5.

¹⁶¹ See *infra* notes 167, 169, 172-74, 193-95 and accompanying text for a discussion of relevant commentary.

for United States Judges,¹⁶² are relatively clear, and the real disagreement concerns the prudential or practical—not ethical—limits of a judge's participation in legislative reform.

The state of the "law" setting the ethical limits of a federal judge's participation in the legislative process is governed by the Judicial Conference's Code of Conduct for United States Judges.¹⁶³ Canon 2(A) articulates the general—to the point of being unhelpful—proposition that "[a] judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹⁶⁴ Canon 3(A)(6) provides that "[a] judge should avoid public comment on the merits of a pending or impending action," a provision which may apply in some instances.¹⁶⁵ Canon 4, in turn, offers more specific guidance:

A judge . . . may engage in the following law-related activities, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge:

. . . .

B. A judge may appear at a public hearing before, or otherwise consult with, an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area. A judge acting *pro se* may also appear before or consult with such officials or bodies in a matter involving the judge or the judge's interest.¹⁶⁶

Few quarrel with the view that the Code permits judges to participate freely in the development of legislation relating to the legal system and the administration of justice, insofar as such legislation directly affects the judiciary and its operations.¹⁶⁷ Judges' "special ex-

¹⁶² See 2 Guide to Judicial Policies & Procedure ch. 1, Canon 4(B) (Conference Comm. on Codes of Conduct, Administrative Office of U.S. Courts 1994).

¹⁶³ See *id.*

¹⁶⁴ 2 *id.* Canon 2(A).

¹⁶⁵ 2 *id.* Canon 3(A)(6).

¹⁶⁶ 2 *id.* Canon 4(A)-(B).

¹⁶⁷ See Advisory Comm. on Judicial Activities, Judicial Conference of U.S., Advisory Op. 50 (1977), in 2 Guide to Judicial Policies & Procedure, *supra* note 162, at IV-119 [hereinafter Advisory Op. 50] (suggesting restrictions on judicial appearances before legislative bodies on matters concerning law but not administration of justice); E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 75-76 (1973) (opining that judges "should be allowed to consult" with legislative bodies on matters of judicial administration); Kelso, *supra* note 6, at 863 ("Judges are directly affected by legislation regarding the administration of justice, and it is imperative that judges have the opportunity to comment upon such legislation."); Robert B. McKay, The Judiciary and Nonjudicial Activities, 35 Law & Contemp. Probs. 9, 21 (1970) ("No one is better qualified to speak on law reform and questions of improvement in judicial administration than judges. . . . [N]o barrier should be raised

pertise" on these issues is indisputable, and the circumstances are rare in which their prior testimony on such matters will call their impartiality into question in a later case.¹⁶⁸

The consensus breaks down when it comes to whether a judge may participate in the development of "the law," when the law in question does not affect the judiciary or its operations directly.¹⁶⁹ Suppose, for example, that a congressional committee solicited the testimony of a federal judge on a bill to legalize marijuana in light of the judge's extensive experience on the bench with drug possession and distribution cases.¹⁷⁰ If the judge supports the legislation, could her testimony "cast doubt" on her capacity to decide future marijuana cases impartially, within the meaning of Canon 4? Is her expertise "special" enough to permit her to testify as a judge, rather than as a private citizen?

The Judicial Conference Committee on Codes of Conduct renders advisory interpretations of the Code in response to inquiries from federal judges.¹⁷¹ The Committee has opined that Canon 4(B) should be construed narrowly, and that a judge should appear before a legis-

against judicial participation in such activities beyond assurance that the obligations of judicial office are met."); Diarmuid F. O'Scannlain, *What Role Should Judges Play in the ABA?: The Appellate Judges Conference Position*, *Judges' J.*, Spring 1992, at 9, 13 (reporting on conclusions of ABA Commission on Judicial Participation in American Bar Association and noting that Commission was unconcerned about extent to which judges were associated with ABA positions on judicial administration legislation, because "it does not matter that the public may attribute them to judicial members of the ABA"); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *Geo. J. Legal Ethics* 589, 623-24 (1989) (noting that it is generally appropriate for judges to comment on court administration or legislation that affects their court); see also Chief Justice William H. Rehnquist, 1994 Year-End Report on the Federal Judiciary 5-9 (Dec. 30, 1994) (declaring it "obviously appropriate" for judiciary to communicate with Congress on such issues as wages, hours, and working conditions within judiciary; procedural matters affecting courts; impact of legislation on courts; and expansion of federal jurisdiction).

¹⁶⁸ As with all rules, there are exceptions. For example, legislation expanding or contracting diversity jurisdiction has an obvious impact on the federal courts and their operation, and Canon 4 poses no bar to a judge testifying to that impact. See *infra* note 179 and accompanying text. At the same time, one can concoct a scenario in which a judge's crusade to abolish diversity jurisdiction leads her to neglect her judicial duties and to testify before Congress that she will reject all diversity claims filed in her court. Canon 4 authorizes a judge to engage in law-related activities "subject to the proper performance of judicial duties," and only "if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge." Such conditions are obviously violated by the judge in this hypothetical. See 2 *Guide to Judicial Policies & Procedure*, *supra* note 162, Canon 4, at I-22.

¹⁶⁹ See Kelso, *supra* note 6, at 863 (expressing concern over judges' active involvement in development of legislation that does not regulate judiciary); Ross, *supra* note 167, at 614-15 (same).

¹⁷⁰ I am assuming that the focus of the judge's testimony is not on the impact of drug legalization on docket congestion.

¹⁷¹ See 2 *Guide to Judicial Policies & Procedure*, *supra* note 162, at I-iii.

lative body concerning "the law" only if the issue "merit[s] the attention and comment of a judge as a judge, and not merely as an individual."¹⁷² This opinion was rendered prior to the 1992 amendments to Canon 4, which added language permitting a judge to appear pro se on matters of personal interest without regard to whether the judge possesses special expertise.¹⁷³ In the case of our hypothetical judge asked to testify on a bill to legalize marijuana possession, then, she could appear pro se, regardless of whether she possessed expertise "special" enough to permit her to testify in an official capacity. As Chief Justice Rehnquist observed in his 1994 Year-End Report:

[W]hat is an appropriate sentence for a particular offense, and similar matters, are questions upon which a judge's view should carry no more weight than the view of any other citizen. In such cases I do not believe that the Judicial Conference . . . should take an official position. . . . There is certainly no formal inhibition on [individual] judges publicly stating their own personal opinions about matters of policy within the domain of Congress, but the fact that their position as a judge may give added weight to their statements should counsel caution in doing so.¹⁷⁴

Chief Justice Rehnquist's lingering concern about the weight that Congress or the public may give a judge's statements raises the question of whether a judge who testifies on a proposed law violates Canon 4's proscription of quasi-judicial activities that "cast reasonable doubt on the capacity to decide impartially any issue" relating to that law.¹⁷⁵ At least one decision rendered by a chief judge under the Judicial Conduct and Disability Act of 1980¹⁷⁶ suggests that, in the case of

¹⁷² Advisory Op. 50, *supra* note 167, at IV-122.

¹⁷³ The earlier version of Canon 4(B) provided in its entirety that "[a judge] may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and a judge may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice."

Id. at IV-119 (quoting earlier version of Canon 4(B)).

¹⁷⁴ Rehnquist, *supra* note 167, at 8. I confess to being puzzled by Chief Justice Rehnquist's observation that a federal judge is in no better position than the average citizen to comment on the appropriate sentence for a particular offense. The notion that a judge acquires no special expertise by passing sentence on hundreds of offenders, and is therefore no better situated than a garage mechanic to assess whether a particular punishment fits a particular crime, strikes me as questionable. Judge Schwarzer makes the better argument that judges are well positioned to opine as experts on sentencing issues. See *infra* notes 274-75 and accompanying text.

¹⁷⁵ 2 Guide to Judicial Policies & Procedure, *supra* note 162, Canon 4, at I-22.

¹⁷⁶ 28 U.S.C. § 372 (1994). As previously noted, the primary vehicle for interpretation of the Code of Conduct for United States Judges is through advisory interpretations rendered by the Judicial Conference Committee on Codes of Conduct. See *supra* text accompanying note 171. The Code is also used, however, to establish standards of conduct in

the judge who testifies in support of legislation to legalize marijuana, the answer is no. In a synopsis of disciplinary actions processed under that Act, Professor Richard Marcus reported on a complaint filed by a public interest group against a district judge for giving "a public speech . . . calling for the legalization of drug use."¹⁷⁷ According to Marcus, the group argued "that the judge's speech cast doubt on his capacity to preside over any drug case."¹⁷⁸ The chief judge dismissed the complaint, reasoning by analogy that "a judge's advocacy of the abolition of diversity jurisdiction would not render the judge unfit to hear cases in federal court on grounds of diversity."¹⁷⁹

The chief judge's conclusion, if not his rationale, is essentially sound. The language in Canon 4 prohibiting law-related activities that "cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge"¹⁸⁰ is substantially similar to that in the judicial disqualification statute which requires a judge's recusal in "any proceeding in which his impartiality might reasonably be questioned."¹⁸¹ The similarity is not accidental. The Reporter's notes accompanying an almost identical Canon 4 provision in the 1972 American Bar Association's Code of Judicial Conduct, explain that "[a] judge's obligation of office is to be available to fulfill his judicial duties; he must avoid quasi-judicial activities that are likely to lead to his disqualification."¹⁸² In other words, a judge has engaged in conduct casting doubt on her ability to decide an issue impartially within the meaning of Canon 4 if such conduct is likely to lead to disqualification.¹⁸³

disciplinary actions under the Judicial Conduct and Disability Act. See 2 Guide to Judicial Policies & Procedure, *supra* note 162, Canon 1 commentary at I-1. Hence, decisions rendered under the Act—such as the one discussed here—supplement the interpretive guidance offered by the Committee on Codes of Conduct.

¹⁷⁷ Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375, 405 (1993).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 2 Guide to Judicial Policies & Procedure, *supra* note 162, Canon 4, at I-22.

¹⁸¹ 28 U.S.C. § 455 (1994).

¹⁸² Thode, *supra* note 167, at 74. Canon 4 of the 1972 ABA Code of Judicial Conduct provided that "[a] judge . . . may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him." *Id.* at 18. Canon 4(B), in turn, provided that "[a judge may] appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, or the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice." *Id.*

¹⁸³ See Tacha, *supra* note 52, at 294-95 (discussing Canon 4 of ABA revised Model Code of 1990 in terms of need for abstention).

In *Liteky v. United States*,¹⁸⁴ the Supreme Court, speaking through Justice Scalia, opined that “[p]artiality” does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate.¹⁸⁵ Favoritism is wrongful or inappropriate, and likely to require disqualification, only if it is “undeserved, or . . . rests upon knowledge that the [judge] ought not to possess . . . or . . . is excessive in degree.”¹⁸⁶ Put another way, a judge who forms an opinion of a litigant over the course of judicial proceedings or who develops a view of the law as a result of her experience on the bench has not compromised her impartiality.¹⁸⁷ To the contrary, she has done her duty as a judge.¹⁸⁸ The traditional rule has thus been that only extrajudicial bias constitutes grounds for disqualification.¹⁸⁹

As the Supreme Court recognized in *Liteky*, however, such a rule is overly simplistic.¹⁹⁰ Inappropriate bias can be exhibited in the course of judicial proceedings where “even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.”¹⁹¹ By the same token, not all extrajudicial “bias” is inappropriate; the fact that a judge’s thinking is influenced by her “view of the law acquired in scholarly reading,” for example, is not a basis for recusal.¹⁹²

When a judge states—in dicta—that a statute may be invalid or should be interpreted a particular way, the judge is not required to disqualify herself in a later case from deciding the issue squarely, on the grounds that her earlier statements cast doubt on her impartiality. Recusal is unnecessary, not because the “favoritism” reflected in such dicta had its genesis in the courtroom—it could as easily have been a result of outside reading—but because that kind of “favoritism” is neither wrongful nor inappropriate. The question, then, is whether

¹⁸⁴ 114 S. Ct. 1147 (1994).

¹⁸⁵ *Id.* at 1156.

¹⁸⁶ *Id.* at 1155.

¹⁸⁷ See *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943) (“Impartiality is not gullibility. Disinterestedness does not mean child-like innocence.”).

¹⁸⁸ See *Liteky*, 114 S. Ct. at 1155 (“The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings . . .”).

¹⁸⁹ See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243, 295-96 (1993).

¹⁹⁰ See *Liteky*, 114 S. Ct. at 1156 (noting that extrajudicial source is neither necessary nor sufficient to constitute grounds for recusal).

¹⁹¹ *Id.* at 1155; see also Geyh, *supra* note 189, at 296-302 (describing two series of cases concerning judges “whose biases were not necessarily extrajudicial in origin, but were sufficiently extreme to cause the appellate courts to ignore the general rule excluding such evidence from consideration”).

¹⁹² *Liteky*, 114 S. Ct. at 1157.

"good" favoritism manifested in dicta somehow becomes "bad" favoritism when the identical remarks are offered in a different forum.

Some commentators have argued that the forum *does* make a difference—that the judge who leaves her chambers and travels to a congressional hearing room to help draft a law or argue its merits appears to have abandoned her impartiality and embarked on a personal crusade.¹⁹³ In so concluding, however, these commentators fail to appreciate the need for a new, interactive paradigm and the impact such a paradigm would have. They see no systemic need for judge-legislator interaction on matters of law (except insofar as the law affects the judiciary and its operations directly) and do not acknowledge a judge's corresponding duty to assist the legislature in improving the law.¹⁹⁴ If they did, they would be compelled to reach a different conclusion, one that has been reached by other commentators: Because a judge *ought* to assist in improving the law by communicating with legislators, the presumption should be that she is doing her duty when she does so and not that she is undertaking a personal crusade that calls her impartiality into question.¹⁹⁵

Consistent with the view that there is nothing inherently suspicious about judges participating in the legislative process, Canon 4 requires only that judges avoid comments to the effect that their views on particular legislative proposals are so strongly held that they could not decide cases arising under that legislation fairly.¹⁹⁶ This is not to

¹⁹³ See, e.g., Kelso, *supra* note 6, at 863 ("Simply put, legislative drafting and lobbying is the wrong place for judges to exercise their rights of expression in an effort to improve the law A judge who wishes to contribute to legal development has to choose the proper forum, such as a law review article or a speech before a bar group."); see also Ross, *supra* note 167, at 615 (arguing that public commentary by judges creates dangerous "public perception that judges base their decisions upon their own predilections rather than upon logic, precedent, or the facts").

¹⁹⁴ See Kelso, *supra* note 6, at 864-65 ("Judges who want to be legislators should resign their judicial office in order to devote themselves entirely to the political process."); Ross, *supra* note 167, at 614 ("The judicial system . . . has no overwhelming need for judges to make extrajudicial comments.").

¹⁹⁵ See, e.g., Mark Scott Bagula & Judge Robert C. Coates, Trustees of the Justice System: Quasi-Judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct, 31 San Diego L. Rev. 617, 634 (1994) (arguing that "[t]he 'occasional' duty to engage in legal reform will only become more frequent as this decade passes" and that "the judges' code of ethical conduct must not discourage the efforts of even a single judge who might otherwise act to improve the legal system"); McKay, *supra* note 167, at 21 ("No one is better qualified to speak on law reform . . . than judges. Even though the efforts necessary to accomplish significant change are often substantial, no barrier should be raised against judicial participation in such activities beyond assurance that the obligations of judicial office are met.").

¹⁹⁶ See 2 Guide to Judicial Policies & Procedure, *supra* note 162, ch. 1, Canon 4; see also Thode, *supra* note 167, at 74 (arguing that judge could testify to his "'belie[f] that limited statutory grounds for divorce are not in the public interest,'" and that "'[t]he law should be

suggest that a judge's law reform activities are appropriate merely because they do not violate the Code of Conduct. Conduct falling short of a Canon 4 violation may nevertheless cause long-term damage to the judiciary's credibility and reputation.¹⁹⁷ That is an issue better characterized as a prudential constraint, however, and is discussed in Part III.

B. The Rulemaking Process

The judiciary's role in rulemaking, as in statutory reform, is subject to constitutional, statutory, and ethical constraints. In the case of ethical constraints, the change of context from statutory to rule reform adds no issues to those previously discussed and even takes some away, in that the ethical propriety of the judiciary's involvement in the development of its own operating procedures is not seriously disputed.¹⁹⁸ With respect to constitutional and statutory constraints, the analysis differs, but the conclusion does not: They impose few meaningful restrictions relative to the prudential constraints to be discussed in Part III.

I credit the intrepid spelunker-scholars who have braved the dark, the damp, and the guano to probe the depths of the federal judiciary's constitutional and statutory rulemaking power. I have opted against following them into the cave, not because their work is done (it's not) but because it is unnecessary for me to do so.

For my purposes, the following observations suffice. Congress, by virtue of its powers to constitute the lower federal courts¹⁹⁹ and to make laws necessary and proper for executing all "[p]owers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,"²⁰⁰ has legislative authority over federal court procedure. The federal judiciary has concurrent jurisdiction over court procedure because Congress delegated procedural rulemaking authority to the judiciary via the Rules Enabling Act,²⁰¹

changed to allow persons who no longer live in harmony to obtain a divorce," because it would not "compromise [the] judge's capacity to apply impartially the law as written," but should not testify that he "will grant all divorce actions . . . whatever the strength of the evidence to support the statutory ground for divorce—because [he] believe[d] that persons who no longer live in harmony should be divorced").

¹⁹⁷ One could argue that such conduct constitutes a Canon 2 violation. See *supra* note 164 and accompanying text. The difficulty is that in most cases, the isolated judge's conduct is insufficiently extreme to threaten "public confidence in the integrity and impartiality of the judiciary." 2 Guide to Judicial Policies & Procedure, *supra* note 162, ch. 1, Canon 2(A). Rather, it is the cumulative effect of multiple episodes that poses the threat.

¹⁹⁸ See *supra* note 167 and accompanying text.

¹⁹⁹ See U.S. Const. art. I, § 8, cl. 9.

²⁰⁰ *Id.* cl. 18.

²⁰¹ Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1994)).

and because the judiciary has some measure of inherent authority to regulate its procedure, in the absence of, if not in the teeth of, a contrary congressional directive.²⁰² At the same time, the federal judiciary is forbidden by the Rules of Decision and Rules Enabling Acts, if not by the Constitution, from promulgating rules that modify substantive law.²⁰³

The point at which procedure (and the judiciary's rulemaking authority) ends and substance begins changes with the context. When courts exercise their inherent authority to regulate procedure in diversity cases in the absence of a formal federal rule or statute, the boundary between permissible "procedural" rules and impermissible "substantive" rules is crossed when the rule in question violates the so-called "twin aims" of the *Erie* doctrine, by encouraging forum shopping or by precipitating inequitable administration of state law, in derogation of the Rules of Decision Act and federalism principles.²⁰⁴

In contrast, formal rules promulgated by the Judicial Conference, approved by the Supreme Court, and acquiesced in by Congress under the aegis of the Rules Enabling Act, are presumptively procedural.²⁰⁵

²⁰² In the absence of a statute or a rule promulgated pursuant to the Rules Enabling Act, judges may develop informal procedural rules necessary to facilitate the orderly administration of justice in their courtrooms. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988) (explaining that in diversity cases federal judge-made law will trump inconsistent state law, provided that federal law is procedural within meaning of *Erie*). In addition to the federal judge's inherent authority to fill minor procedural gaps overlooked by statutes and formal rules, some have argued that the judiciary's inherent authority gives the judiciary the exclusive right to regulate its own procedures in certain instances—statutory directives to the contrary notwithstanding. See, e.g., Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 Mercer L. Rev. 733, 733-34, 754 (1995) (arguing that Supreme Court has effectively acknowledged inherent authority of judiciary to make procedural rules).

²⁰³ See Rules of Decision Act, 28 U.S.C. § 1652 (1994) ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States."); Rules Enabling Act, 28 U.S.C. § 2072(a)-(b) (1994) ("Supreme Court . . . rules . . . for cases in the United States district courts . . . shall not abridge, enlarge or modify any substantive right."); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (holding that, because there is no "federal general common law," in determining substantive rights, federal courts in diversity actions must rely upon state law).

²⁰⁴ See 28 U.S.C. § 1652; *Stewart*, 487 U.S. at 27 n.6 (noting that where "application of federal judge-made law would disserve [twin aims of *Erie* doctrine], the district court should apply state law"); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (elucidating "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws"); *Erie*, 304 U.S. at 78-80 (holding that federal courts in diversity cases should apply substantive state law, whether it is statutory or common law).

²⁰⁵ See *Burlington N.R.R. v. Woods*, 480 U.S. 1, 6 (1987) ("Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, see 28 U.S.C. § 2072, give the Rules presumptive validity under both the constitutional and statutory constraints." (citation to *Hanna*, 380 U.S. at 471, omitted)).

That presumption is not overcome if the rules "incidentally affect litigants' substantive rights," as long as they are "reasonably necessary to maintain the integrity of that system of rules."²⁰⁶ Whether the Court's broad definition of procedure is appropriate, and if so, under what circumstances a so-called "procedural" rule should be deemed to cross the line from procedure to substance, remain the subject of active debate.²⁰⁷

The constitutional and statutory constraints on the judiciary's formal rulemaking power are ultimately of marginal consequence here, because they delineate only the theoretical limits of the judiciary's lawmaking authority. The judiciary promulgates the rules and then passes on their constitutional and statutory validity in subsequent litigation. While there is the theoretical possibility that the Supreme Court would approve a rule only to declare it unlawful later, the Court has yet to do so,²⁰⁸ and the likelihood that the Court will drag itself by the ear out to the woodshed anytime soon seems remote.

III

THE PRIMACY OF PRUDENTIAL CONSTRAINTS ON JUDGE-LEGISLATOR INTERACTION IN THE DEVELOPMENT OF STATUTES AND RULES

Taken together, the constitutional, statutory, and ethical constraints on judge-legislator interaction impose insignificant limits on the information judges can impart to legislators. This is not to say that there are no meaningful limits upon such communication. Even if one accepts that aggressive judicial lobbying and expansive judicial rulemaking are lawful and ethical, it would not compel the conclusion that they are prudent—interactive paradigm notwithstanding. To the contrary, the paradigm depends for its success upon the continued ability of the judiciary to influence Congress, an ability that could be and already is being compromised by arguably imprudent lobbying and rulemaking strategies. In this Part of the Article, I will discuss these strategies, their potentially deleterious effect on the interbranch relationship, and the prudential limits on judge-legislator interaction that ought to be respected if the goals of the interactive paradigm are to be realized.

²⁰⁶ *Id.* at 5.

²⁰⁷ See, e.g., Charles Alan Wright, *Law of Federal Courts* § 59 (5th ed. 1994) (discussing substance-procedure distinction in context of *Erie* doctrine).

²⁰⁸ See Ralph U. Whitten, *Erie and the Federal Rules: A Review and Reappraisal After Burlington Northern Railroad v. Woods*, 21 Creighton L. Rev. 1 (1987).

*A. Interaction and Acrimony in the New
Judge-Legislator Relationship*

1. Accusations of Judicial Self-Interest in Statutory Reform

As the judiciary's profile in the legislative process has risen, so too have attacks on the judiciary's credibility. Some commentators have suggested that the judiciary has compromised its impartiality by lobbying openly.²⁰⁹ Within Congress, legislators and committees have begun to challenge the judiciary's tactics, motives, and expertise.

In 1990, Senate Judiciary Committee Chairman Joseph Biden lambasted the Judicial Conference for its "over-wrought response"²¹⁰ to the proposed Civil Justice Reform Act, its failure to "reexamine [its] rhetoric,"²¹¹ and its lobbying behavior. As recounted in the Senate Judiciary Committee Report, the Judicial Conference had designated a special task force to be its exclusive representative in negotiations with the Senate Judiciary Committee over the bill²¹² but ultimately opposed the legislation on the basis of an eleventh-hour recommendation from the Judicial Conference Committee on Judicial Improvements, a committee with which the Senate Judiciary Committee had had no prior contact.²¹³ The Senate Judiciary Committee Report concluded: "Such actions only serve to undermine the cooperative relationship between Congress and the judicial branch that our citizens rightly expect and deserve. It is the committee's hope—and indeed, its expectation—that this troubling process will not recur."²¹⁴

Acrimony over the Civil Justice Reform Act spilled over into a companion title of the 1990 Judicial Improvements package that called for an increase in the number of federal judgeships. Chairman Biden openly questioned the Judicial Conference's process of determining where new judgeships were needed, noting that "[e]very single recom-

²⁰⁹ See, e.g., Carolyn Elefant, 'Shameless' Judges Should Be Removed, *Legal Times*, Feb. 20, 1989, at 19 (letter from editor by staff attorney of Federal Energy Regulatory Commission) (arguing that judges should not be allowed to lobby for higher salaries); Kenneth Jost, Ending 'Judicial Lockjaw': Guidelines for Speaking Out, *Legal Times*, Sept. 28, 1987, at 26 (arguing that Supreme Court justices should refrain from many forms of extrajudicial activity); Larry Lempert, Judges Run Into Ethical Problems in Lobbying Fight, *Legal Times*, Apr. 4, 1983, at 11 (noting substantial judicial lobbying with regard to Congress's proposed bankruptcy jurisdiction legislation and questioning whether such activity "steers clear of Canon 4 shoals"); see also *supra* note 193 and accompanying text.

²¹⁰ Civil Justice Reform Act Hearings, *supra* note 126, at 310 (statement of Joseph R. Biden, Jr., Chairman, Committee on the Judiciary).

²¹¹ *Id.*

²¹² See S. Rep. No. 416, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6806-07.

²¹³ See *id.* at 5, reprinted in 1990 U.S.C.C.A.N. at 6807.

²¹⁴ *Id.*

mendation regarding the court of appeals made by the Judicial Conference corresponds exactly to what the circuit council of each circuit asked for.”²¹⁵ He added that this “whatever you want, you get” approach was received with “astonishment in the Justice Department as well as here among Democrats as well as Republicans” and declared that “[w]hen it comes to playing politics and doling out patronage, the Judicial Conference has no equal that I have seen before this Committee.”²¹⁶

In April 1991, the Administrative Office of the United States Courts submitted a “judicial impact assessment” to the Senate Judiciary Committee on the proposed Violence Against Women Act.²¹⁷ The bill, which created a private cause of action in federal court for victims of certain types of domestic and street violence, troubled many federal judges because it continued a trend begun in the criminal law arena to crowd federal dockets with cases traditionally litigated in state courts. Their fears were quantified by the impact assessment, which estimated that the bill would add 13,450 cases to federal court dockets at a cost of \$43.6 million and 450 staff years²¹⁸—an obvious threat to the viability of the legislation, if true. The Senate Judiciary Committee Report, however, dismissed the judiciary’s figures out of hand as “wild estimates” that were “based on [an] improper interpretation of the statute” and were “obviously inaccurate,”²¹⁹ thereby implying that the Committee regarded the impact assessment as little more than the judiciary’s self-interested effort to cook the books.

That same year the Senate Appropriations Committee accused the Judicial Conference of basing its budget request upon “overestimated” caseload statistics, which the Committee found “particularly problematic during periods of constrained budgets.”²²⁰ In the future, “[t]he Committee expect[ed] that the courts will improve the process by which they estimate resource requirements.”²²¹ The judiciary has been submitting an annual budget estimate to Congress since 1939,²²² so it is unlikely that its confrontation with the Appropriations Committee is directly attributable to a new, more aggressively interactive

²¹⁵ Civil Justice Reform Act Hearings, *supra* note 126, at 308 (statement of Joseph R. Biden, Jr., Chairman, Committee on the Judiciary).

²¹⁶ *Id.*

²¹⁷ See Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 8-20 (1992) (considering bill designed to combat violence and crimes against women).

²¹⁸ See *id.* at 16.

²¹⁹ *Id.* at 70.

²²⁰ S. Rep. No. 331, 102d Cong., 2d Sess. 79 (1992).

²²¹ *Id.*

²²² See *supra* notes 33-34 and accompanying text.

judiciary. The imbroglio did, however, manifest a degree of congressional skepticism traditionally absent from the interbranch relationship.

More recently, the judiciary came under a sustained attack in Congress for the way in which it lobbied the General Services Administration (GSA) in connection with the courthouse construction program. In late 1994, the Senate Environment and Public Works Committee staff issued a report blaming recent increases in the judiciary's courthouse construction budget on the judiciary's involvement.²²³ The report noted that "[p]rior to 1987, the U.S. Judiciary had little involvement in the design and construction of courthouses," but that since then "the courts have been more aggressive about influencing the construction process."²²⁴ The report found that "the increasing role of Federal judges in the design and construction of courthouses has resulted in unnecessary expenditures";²²⁵ that "[i]n some cases, judges have improperly pressured GSA to waive procurement rules and steer contracts to certain firms";²²⁶ and that the Administrative Office's courthouse design guide, "more than anything else, has been used by judges to justify lavish furnishings and costly changes in the design of new buildings."²²⁷ The literal bottom line of the Report: "Committee staff recommends that GSA develop new procurement guidelines for courthouse construction. At minimum, the new guidelines should limit the role of U.S. judges in the contracting process."²²⁸ Despite the arguments of federal judges that they were merely seeking to create dignified venues comparable to those afforded representatives of the other branches of government, some legislators were unpersuaded,²²⁹ and one, Senator Max Baucus, declared his intention to introduce legislation to limit the judiciary's influence over future courthouse construction.²³⁰

²²³ See Majority Staff of Senate Comm. on Environment and Public Works, 103d Cong., 2d Sess., *Investigation of the Federal Courthouse Construction Program 1* (Comm. Print 1994) (finding lack of cost controls in courthouse construction program).

²²⁴ *Id.* at 11.

²²⁵ *Id.* at 1.

²²⁶ *Id.*

²²⁷ *Id.* at 31.

²²⁸ *Id.*

²²⁹ Representative John Duncan declared that he was "critical of the courthouse projects all over the country." Ralph Ranalli, *Critics Keep Heat on Fan Pier Courthouse Plan*, Boston Herald, June 7, 1994, at 24. Senator Byron Dorgan described the courthouses as "extravagant, radically overpriced and substantially overbuilt." Kathleen Kerr, *Foley Square: Opulence in the Courts Project Part of Fed Building Spree*, N.Y. Newsday, May 1, 1994, at A51.

²³⁰ See Constance Johnson, *Federal Judiciary's Budget Comes Under Scrutiny to Judges' Dismay*, Wall St. J., June 20, 1995, at B10.

In December 1995, Senator Charles Grassley, Chairman of the Senate Judiciary Committee's Subcommittee on Courts, announced that he would circulate an extensive questionnaire to all federal judges, asking them how they spend their time on judicial activities, how they use support staff, and how much time they commit to extra-judicial activities.²³¹ Although one could spin the questionnaire as a new avenue for judge-legislator communication, Senator Grassley offered it in a spirit of skepticism rather than cooperation, and it was so received.²³² Federal judges, including Chief Justice William Rehnquist, criticized the proposed questionnaire; in his 1995 Year-End Report on the Federal Judiciary the Chief Justice warned that "the subject matter of the questions and the detail required for answering them could amount to an unwarranted and ill-considered effort to micro-manage the work of the federal judiciary."²³³ Senator Grassley was unmoved by the judiciary's criticisms, observing that "the very same judges who maybe think I shouldn't be questioning them applaud when I find waste in the Pentagon," a double standard he attributed to judicial "arrogance."²³⁴ He distributed the questionnaires as scheduled.²³⁵

These recent altercations do not undercut the desirability of an interactive paradigm. Congress needs the judiciary's expertise to make informed legislative choices, and the judiciary needs informed legislative choices to maintain control of its dockets and preserve the integrity of the judicial process. What these altercations *do* portend is the birth of a new skepticism coloring the judiciary's interactions with Congress in the legislative process.

Professor Christopher Smith advocates this new breed of skepticism in his recent book, *Judicial Self Interest: Federal Judges and Court Administration*.²³⁶ His study of the federal judiciary's role in legislative lobbying, case decisionmaking, and self-administration led him to conclude that "analysts must look carefully at judges' claims about the needs and 'best interests' of the judicial branch because

²³¹ See Neil A. Lewis, Survey to Press U.S. Judges on Caseload and Expenses, N.Y. Times, Dec. 17, 1995, at 35.

²³² See *id.* (reporting that Grassley questionnaire was motivated by "his suspicion that judges probably are not working hard enough").

²³³ Chief Justice William H. Rehnquist, 1995 Year-End Report on the Federal Judiciary 3-4 (Jan. 1, 1996).

²³⁴ Lewis, *supra* note 231, at 35. It should be noted that Senator Grassley's remarks predated Chief Justice Rehnquist's year-end report and were offered in response to other federal judges who raised similar concerns.

²³⁵ See Subcomm. on Administrative Oversight and the Courts, U.S. Senate Comm. on the Judiciary, Judicial Survey (Jan. 1996) (on file with author).

²³⁶ Smith, *supra* note 8, at 127-34.

such claims will frequently obscure the judges' self-interested personal motivations for preserving and enhancing their own positions in the system."²³⁷ In the context of legislative reform, he observed, judges "watch closely to ensure that proposed reforms do not threaten their status, autonomy, and power."²³⁸ He therefore recommended that Congress oversee judicial administration in a "less deferential fashion"²³⁹ and concluded that "[l]egislators should view critically the claims of federal judges about court administration and actively solicit alternative viewpoints from interested students of judicial affairs in academia and interest groups."²⁴⁰

2. *Accusations of Judicial Self-Interest in Rule Reform*

As with the judiciary's role in statutory development, its role in rulemaking has been accompanied by a new skepticism of the judiciary's motives and credibility. Representatives of litigation user groups have accused the Judicial Conference of being an elitist corps of unelected officials who are unrepresentative of the public they ostensibly serve in the rulemaking process,²⁴¹ and whose rulemaking activities are influenced if not dictated by self-interest.²⁴² They have characterized the Conference as "a few . . . voices in the wilderness," willing to disregard the "many, many thousands more" who represent the spectrum of litigation consumers,²⁴³ and they have successfully

²³⁷ Id. at 133.

²³⁸ Id. at 131.

²³⁹ Id. at 134.

²⁴⁰ Id. at 133.

²⁴¹ This perception has manifested itself in the form of calls to make rules committee advisory groups more representative. See, e.g., Rules Enabling Act Hearings, *supra* note 57, at 58.

²⁴² See Court Reform and Access Hearings, *supra* note 27, at 364-65 (statement of Professor Laura Macklin) (observing that judges "have a strong set of institutional interests, such as docket control and case management, which have become increasing [sic] emergent and visible in recent years, so the thinking that they bring to bear in evaluating rules proposals may well be limited by their institutional roles" (footnote omitted)); see also Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. Legal Stud. 627, 627-29 (1994) (pointing out that procedural rules are promulgated and construed almost entirely by judges and that rules often produce results inconsistent with efficiency).

²⁴³ Amendments to the Federal Rules of Civil Procedure: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 110 (1993) [hereinafter *Federal Rules Amendments Hearings*] (statement of Alfred Cortese, Jr., Esq., Lawyers for Civil Justice) (opposing proposed discovery rule changes); see also Rules Enabling Act Hearings, *supra* note 57, at 183 (letter from Alan B. Morrison, Director of the Public Citizen Litigation Group, to Judge Edward T. Gignoux (Aug. 20, 1982)) ("[P]ublic comments (not only mine) seem to have little effect on the decision-makers While it is possible that suggestions from the public are in fact considered, the outward appearance is to the contrary.").

lobbied Congress to open the rulemaking process to the public on the grounds that no government official can be trusted to make decisions behind closed doors after Watergate.²⁴⁴

As discussed in Part I, members of Congress and their interested constituents recently have begun to interpret the substance-procedure distinction independently of the courts and are increasingly likely to call judiciary-proposed rules "substantive" because they influence litigation outcomes long before the courts will call them "substantive" because they violate the Rules Enabling Act.²⁴⁵ Congress therefore must police judicial rulemaking more actively, litigation user groups have argued, because the elitist, self-interested, countermajoritarian courts should not be trusted to develop rules that affect substantive rights.²⁴⁶

The deepest, darkest fears of many litigation user groups were intensified by the Judicial Conference Rules Advisory Committee's approach to discovery rules promulgated in 1993. The Rules Committee's decision to move forward with mandatory disclosure reform in the absence of empirical support and in the teeth of intense and almost universal opposition from the organized bar seemed to confirm the growing suspicion that the judiciary was pursuing an agenda independent of the public good.²⁴⁷

Professor Jonathan Macey has organized these sentiments into a coherent theory of judicial rulemaking behavior, rooted in public choice, that "[s]tart[s] with the assumption that judges seek to maximize self-interest."²⁴⁸ Professor Macey regards such an assumption as "particularly valid in the context of a discussion about procedural rules" because they are not only interpreted but also promulgated by judges.²⁴⁹ He hypothesizes that judges further their own self-interest by maximizing their leisure time, power, and reputation, and to that

²⁴⁴ As one witness observed:

So many of the proceedings that surrounded [the Watergate] incident occurred in an air of secrecy that the public became naturally suspicious of any proceeding conducted outside the view of the public. In the public's eyes, the judiciary was the symbol of fairness in the "Watergate" incidents. For the judiciary to have compelled disclosure in so many instances in those cases, and yet to foreclose the public's access to its own rule-making proceedings has the potential of doing some violence to the public's image of our judicial system.

Rules Enabling Act Hearings, *supra* note 57, at 43 (prepared statement of James F. Holderman, Esq., Chairman, Subcommittee on the Rules Enabling Act, Criminal Justice Section, on Behalf of the ABA).

²⁴⁵ See *supra* notes 118-19, 130-31 and accompanying text.

²⁴⁶ See *supra* note 131 and accompanying text.

²⁴⁷ See generally Federal Rules Amendments Hearings, *supra* note 243 (letters and testimony of representatives of bar organizations opposed to mandatory disclosure).

²⁴⁸ Macey, *supra* note 242, at 629.

²⁴⁹ *Id.* at 627.

end will promulgate rules that are inefficient and not in the public interest whenever the public interest and judicial self-interest diverge.²⁵⁰ There is room in his theory for public-spirited judges, but as with public choice theory generally, ideological, other-oriented behavior maintains a decidedly low profile.²⁵¹ In the end Macey, like Smith,²⁵² cautions us that when judges "are heard to complain about their ever-increasing caseloads . . . [one should note that] while such complaints may be useful in allowing judges to extract more resources from Congress, these complaints may be exaggerated."²⁵³

Taking up where Professor Macey left off,²⁵⁴ the public choice theorist would say that litigation user groups are now beginning to recognize that judicial administration and procedural lawmaking are the equivalent of "agenda-setting" mechanisms that influence, if not dictate, case outcomes.²⁵⁵ Borrowing a simile from Professor Linda

²⁵⁰ See *id.* at 627, 631.

²⁵¹ Professor Macey argues that judges like the flexibility to "make discretionary decisions . . . quickly and with a minimum of outside interference," because it maximizes their leisure time as well as their ability to further "their own view of the good." *Id.* at 631.

Public choice theory has been criticized for its failure to take sufficient account of ideological motivations. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *Tex. L. Rev.* 873, 892-93 (1987) (describing public choice models of legislation as "reject[ing] . . . ideology as a significant factor in the political process"). But see Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 *Tex. L. Rev.* 993, 997-98 (1988) (arguing that public choice theory does account for ideology in voting behavior); Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 *Tex. L. Rev.* 1013, 1018 (1988) (arguing that if ideology is simply added to list of "taste[s]" that animate voting behavior, public choice theory "can explain anything" and is thus tautological).

²⁵² See *supra* notes 236-40 and accompanying text.

²⁵³ Macey, *supra* note 242, at 645.

²⁵⁴ For reasons that are unclear, Professor Macey concludes that Congress has been either insufficiently able to interfere significantly with the judiciary's rulemaking monopoly or has been insufficiently interested in doing so, a characterization at odds with Congress's numerous forays into the rulemaking arena during the past two decades. See *id.* at 628, 646.

²⁵⁵ For the public choice theorist, substantive legislative outcomes are unprincipled in part because outcomes can be dictated by the agenda setter. Professors Farber and Frickey offer an elegant illustration of this paradox first described by Kenneth Arrow. Three children are going to choose a pet by majority vote: Alice wants a dog most, a parrot second, and a cat third; Bobby wants a parrot most, a cat second, and a dog third; and Cindy wants a cat first, a dog second, and a parrot third. If Cindy is the agenda setter, she can get her cat by scheduling the first vote between dog and parrot—Alice and Cindy vote dog, and parrot drops out. She can then schedule the second vote between dog and cat—Bobby and Cindy vote cat, and cat wins. If, on the other hand, Alice is the agenda setter, she can get her dog by pitting cat against parrot in the first round of voting—Bobby and Alice vote parrot, and cat drops out. In the second round, Alice can schedule parrot against dog—Alice and Cindy vote dog, and dog wins. Bobby, in turn could get his parrot by pair-voting dog versus cat in round one (cat wins) and cat versus parrot in round two (parrot wins). See Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 *Va. L.*

Mullenix, user groups, like any five-year-old, know that the one "who gets to make the rules of the game has the greatest chance of winning."²⁵⁶ If unelected federal judges control these agenda-setting mechanisms, they will favor rules and statutes that maximize their self-interest in power, prestige, and leisure time, at the expense of litigation user group interests.²⁵⁷ If, on the other hand, legislators retain a significant measure of control, they will maximize their self-interest in reelection by favoring rules and statutes supported by their constituents and contributors—i.e., litigation user groups.²⁵⁸ Litigation user groups thus can be expected to challenge judge-made rules and seek legislative intervention with increasing frequency.

3. *The Strengths and Limitations of Judicial Self-Interest as an Explanatory Device*

Professor Macey's public choice model of rulemaking explains too much, in the sense that one can manipulate judicial "appetites" for power, leisure, and prestige to explain or predict just about any rulemaking outcome one desires. For example, if the Judicial Conference amends Federal Rule of Civil Procedure 11 (as it did in 1983) to require that judges impose sanctions against litigants who file frivolous claims, it is because judges want to maximize both their leisure time, by ridding themselves of frivolous litigation, and their prestige, by confining their dockets to challenging and important cases. On the other hand, if the Conference amends the rule (as it did in 1993) to permit but not require judges to impose such sanctions, it is because judges want to maximize their power by expanding the scope of their discretionary authority. If it amends the rule (consistent with the Republican Contract with America) to make the judgment loser pay the winner's costs without regard to whether the loser's claim is frivolous, it is because judges want to maximize their leisure time by discouraging litigants from filing any claims at all. Finally, if the Conference eliminates the rule altogether, it is because the rulemakers want to

Rev. 423, 426 n.9 (1988); see also William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 283-84 (1988) (illustrating so-called "Arrow's paradox," in which agenda setter can control legislative outcome by manipulating sequence in which proposals are voted upon). In other words, procedure can dictate substance.

²⁵⁶ Mullenix, *supra* note 7, at 801.

²⁵⁷ Public choice theorists posit that legislators are self-interested, that self-interested legislators want to be reelected, and that they therefore can be expected to cast votes that maximize their prospects for reelection. See Eskridge, *supra* note 255, at 288 (illustrating strategies legislators use to enhance their chances of reelection). Self-interested federal judges, by corollary, want power, prestige, and leisure time and can be expected to craft rules and judicial decisions accordingly.

²⁵⁸ See *id.* (arguing that legislators attempt to please constituents).

maximize their prestige and leisure time by jettisoning time-consuming and tedious satellite litigation of Rule 11 motions that they regard as beneath them, in favor of more summary methods of disposition.

In other words, Professor Macey's formulation of judicial self-interest can explain almost every conceivable rule change. To the extent that desires for power, prestige, and leisure work in opposition to each other, a rule favoring one such interest will disfavor another—every hour a rule requires the judge to wield her power is an hour she will not be tanning herself by the pool. Thus, every rule change can be explained in terms of whichever interest is favored—never mind the interest that is disfavored. Likewise, insofar as one facet of a given interest comes at the expense of another facet of that same interest, every rule can be explained in terms of whichever facet is maximized. Therefore, a rule requiring the judge to exercise power she did not have before is explicable because it increases her absolute power (as it decreases her discretionary power), while a repeal of that rule is explicable because it increases her discretionary power (as it decreases her absolute power).

At the same time as it explains too much, the premise that judges are motivated solely by appetites for leisure time, prestige, and power explains too little, because it fails to account adequately for the complexity of human motivation. As Professor Janet Cooper Alexander points out, Professor Macey overlooks gender, racial, ethnic, socioeconomic, and other biases that may influence judicial behavior to at least as great an extent as leisure, prestige, or power concerns.²⁵⁹ Even Judge Richard Posner, who like Macey seeks to explain judicial behavior in terms of self-interest, adds a layer of complexity, arguing that "judicial voting"—the satisfaction that comes with deciding cases (and presumably, making procedural rules)—is a more significant part of the "judicial utility function" than leisure, prestige, or power.²⁶⁰ Judge Posner stops there, however, and refuses to accept that judges "desire to promote or maximize the public interest," because that would be "inconsistent with an approach that treats judges as 'ordinary' human beings."²⁶¹

²⁵⁹ See Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. Legal Stud. 647, 648, 661-65 (1994) (examining possible biases of predominantly "white, male, middle-aged or older, and wealthy" judiciary).

²⁶⁰ See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1, 13-20 (1993) (arguing that judges value their voting powers highly).

²⁶¹ *Id.* at 14.

Judge Posner's theory is likewise too simplistic. "Ordinary," self-interested human beings routinely seek to promote the interests of others, because it maximizes other "appetites," such as those for fame, respect, love, personal satisfaction, eternal salvation, and so on. Moreover, the notion that federal judges are presumptively no different from "ordinary" human beings strikes me as wrong. An "ordinary" murderer, martyr, or judge is not an "ordinary" person because each has self-selected into a group that is, almost by definition, *extraordinary*. In the case of federal judges, one reasonably might anticipate that individuals with appetites sated by public-spirited behavior will be selected in disproportionate numbers to occupy a post that calls for a lifetime of public service. In short, self-interest explains judicial conduct only if self-interest is defined broadly to account for other-oriented behavior. With such a definition, however, the public choice model becomes tautological and explains nothing.²⁶²

If one accepts my argument that judges can and do seek to further the public good in satisfaction of their broadly defined self-interest, difficulties nevertheless can arise in at least two situations: first, when the judiciary weighs its narrow interests in power, prestige, and leisure against its broader interest in promoting the public good and takes a position that furthers the former at the expense of the latter; and second, when the judiciary takes a position intended to promote the public good that is perceived by Congress or its constituents as promoting the judiciary's narrow self-interest at the expense of the public good. There is room for disagreement as to whether and which of the recent judge-legislator altercations exemplify the former situation or the latter, but as discussed below, in both cases the long-term impact on the judiciary's influence over statutory reform and rulemaking is deleterious.

B. Sources of the Judiciary's Extrajudicial Influence in Congress and the Impact of Interbranch Acrimony

As documented in the foregoing section, the judiciary has weathered a recent series of attacks on its credibility, attacks arising out of what members of Congress and their interested constituents have characterized as self-serving lobbying and rulemaking strategies. Other lobbyists routinely confront accusations that their positions are animated by self, not public interest, but judges and the Judicial Conference are not ordinary legislative lobbyists. For example, private sector lobbyists routinely campaign for, make contributions to, and

²⁶² See *supra* note 251.

attend functions for congressional candidates.²⁶³ One need not be a hardened cynic to appreciate the value of such undertakings to the lobbying enterprise.²⁶⁴ The Judicial Conference, in contrast, may not exploit these means of influence. The Code of Conduct for United States Judges provides that a judge should not "publicly endorse or oppose a candidate for public office[,] . . . make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions."²⁶⁵

Private organizations also may lobby at the grass roots level by urging members and nonmembers of the organization to contact their representatives on particular legislative proposals.²⁶⁶ The Judicial Conference, on the other hand, speaks for a meager 900 judges scattered across 435 legislative districts and is forbidden by statute from reaching beyond its membership to solicit grass roots support for legislation of interest to the judiciary.²⁶⁷

The Judicial Conference likewise lacks the lobbying firepower of its counterpart in the executive branch. The President can threaten to veto objectionable legislation as a means to alter its course, a power

²⁶³ See Bruce C. Wolpe, *Lobbying Congress: How the System Works* 44-47 (1990) (describing financial and political support lobbyists routinely give to legislators).

²⁶⁴ Commentator, lobbyist, and former congressional staffer Bruce C. Wolpe explained:

It is essential for those with business before Congress to support those legislators who are their allies. There is nothing wrong with it; there is everything right with it. . . .

. . . .

. . . Political contributions can promote your political profile with a legislator. . . . Political contributions can promote access to legislators. . . .

. . . Regular contributors attend dozens of fundraisers a year and become part of the "circuit" of lobbyists around a cadre of lawmakers and their committees. . . . Contacts are made, relationships formed, and networks established.

Id. at 44-45.

²⁶⁵ 2 *Guide to Judicial Policies & Procedure*, *supra* note 162, ch. 1, Canon 7(A)(2)-(3).

²⁶⁶ One longtime lobbyist elaborated upon the value of grass roots lobbying in a "how-to" book for corporation and trade association executives:

With all the skills the most talented lobbyist can bring to bear, there is one thing they cannot do for most of the legislators they cultivate, and that is vote for them. . . .

. . . .

. . . By mobilizing informed local members of the organization . . . the lobbyists extend, multiply, and reinforce their efforts in every legislative district into which they can reach. Provided some understanding of the issues is reflected, 100 calls, visits, or letters from back home provide substantial and impressive support for the position the direct lobbyist is urging a legislator to adopt. Communications from 500 constituents are overwhelming, even for a member of Congress representing half a million people.

Charles S. Mack, *Lobbying and Government Relations: A Guide for Executives* 123-24 (1989).

²⁶⁷ See *supra* notes 159-60 and accompanying text.

without corollary in the judiciary.²⁶⁸ Unlike the Judicial Conference, the President has direct access to the electorate through the electronic media and can urge voters to contact their representatives and support or oppose a given measure. These formidable powers, in turn, give executive branch lobbyists additional leverage to barter for the President's support or acquiescence on a given matter in exchange for congressional assistance on some other proposal of particular interest to the executive branch.²⁶⁹

After the lobbying powers denied judges and the Judicial Conference are excluded, what remains—over and above the merits of their position on a given issue—is their competence and credibility.²⁷⁰ Competence and credibility are assets on the balance sheets of most

²⁶⁸ One commentator described a comparable phenomenon on the state level. See Glenn Abney, *Lobbying by the Insiders: Parallels of State Agencies and Interest Groups*, 48 Pub. Admin. Rev. 911, 911 (1988) ("Even if the [executive] has not endorsed legislation, the [executive] may be a significant factor in an agency's lobbying. The threat or use of a[n executive] veto may help an agency out of a difficult situation.").

²⁶⁹ See, e.g., Michael Wines, *Reporter's Notebook; The Joy of Being Undecided: Senators Bask in the Lights*, N.Y. Times, Aug. 7, 1993, at 1 (reporting concessions undecided legislators extracted from President Clinton in exchange for support on budget bill).

²⁷⁰ Although it is outside the scope of this Article, an additional power unique to the judiciary is that it can bypass credibility-threatening, extrajudicial activity altogether through judicial decisionmaking. The Supreme Court's habeas corpus decisions are a recent example of the Court accomplishing through case law what it could not accomplish through formal rulemaking or legislative lobbying. See Smith, *supra* note 8, at 69-89 (discussing judicial reform of habeas corpus procedures); see also Larry W. Yackle, *The Habeas Hagioscope*, 66 S. Cal. L. Rev. 2331, 2331-33 (1993) (same). Because this form of judicial activism is generally regarded as inconsistent with the judicial role, it can invite criticism even more withering than that directed at confrontational, extrajudicial lobbying on the same issue, which may help to explain why it is not used more frequently.

For example, in *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892, 900 (D. Mass. 1991), District Judge Keeton "extend[ed] specificity of pleading requirements to CERCLA cases," despite the fact that Federal Rule of Civil Procedure 9(b) imposed such requirements only in cases of fraud and mistake. Shortly thereafter, Chief Justice Rehnquist authored an opinion in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), in which the Supreme Court invalidated expansion of Rule 9(b) particularity requirements to include § 1983 cases, concluding that "[p]erhaps if Rule [] . . . 9 were rewritten today," the specificity requirement might be expanded, "[b]ut that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 168.

Professors Richard L. Marcus, Martin H. Redish, and Edward F. Sherman juxtapose these cases in their civil procedure textbook and note that "Judge Keeton was, at the time of the decision in the *Cash Energy* case, the Chair of the Judicial Conference Standing Committee on Rules of Practice and Procedure, which oversees the amendment of the rules. He was appointed to that position by Chief Justice Rehnquist." Richard L. Marcus et al., *Civil Procedure: A Modern Approach* 164 (2d ed. 1995). The Supreme Court had to know that formally amending Rule 9 to make life more difficult for plaintiffs in environmental and civil rights cases was politically impracticable, but it was unwilling to amend the rule informally, through creative judicial construction.

good lobbyists.²⁷¹ But judges, by virtue of their present stations and past activities, possess such assets in abundance.

Competence: As extraordinary lawyers who, with rare exception, have abandoned other pursuits to dedicate the remainder of their professional lives to the federal bench,²⁷² judges are uniquely qualified experts who can offer valuable insights into the effects of legislative reform on the third branch. Indeed, an essential tenet of the new, interactive paradigm is that judges have indispensable expertise that they should share with legislators.²⁷³

It bears emphasizing that such expertise includes, but is not limited to, matters of court practice and procedure, judicial pay and perquisites, and judicial administration. As lawyers who adjudicate, judges acquire special knowledge on general issues of law that lawyers who advise, litigate, or legislate may lack. Judge William W Schwarzer, then-Director of the Federal Judicial Center, offered a good example to the House Judiciary Committee Subcommittee on Intellectual Property and Judicial Administration: "[T]here is considerable information that would be helpful to Congress within the judiciary. Probably nobody knows better how mandatory minimum sentences work in practice than the judges who have to impose them."²⁷⁴ It therefore "would be useful to have a constant flow of information from the judiciary to the Congress."²⁷⁵ Legislators and commentators have noted the contributions that judges can make to legislative reform efforts on subjects as diverse as environmental regulation and copyright protection.²⁷⁶

²⁷¹ See Wolpe, *supra* note 263, at 9-15 (outlining five "commandments" of good lobbying, all of which focus on preserving lobbyist's credibility with legislators and their staffs); *id.* at 45 (identifying expertise and contributions as "two routes of access to legislators for a lobbyist").

²⁷² See Van Tassel, *supra* note 50, at 345 (reporting that between 1789 and 1993 only 190 of 2627 federal judges—a mere 7%—left bench for reasons other than health or age).

²⁷³ See *supra* notes 52, 82-84.

²⁷⁴ Federal Judiciary Administration Hearing, *supra* note 28, at 105 (statement of Judge William W Schwarzer).

²⁷⁵ *Id.* at 106. More is at issue here than the simple transmission of facts and figures—judges are human beings with human reactions to events taking place in their courtrooms that they are uniquely positioned to share. For example, two years before Judge Schwarzer testified at the above-cited hearing, he choked back tears in open court at the point of imposing a mandatory minimum sentence for a drug offense that he believed to be excessive under the circumstances. See Stuart Taylor, Jr., *Ten Years for Two Ounces*, *Am. Law.*, Mar. 1990, at 65, 66.

²⁷⁶ Former Representative Robert Kastenmeier credited three federal judges with making a significant contribution to the development of copyright legislation under consideration by his subcommittee. See Building Bridges, *supra* note 49, at 169. Professor Robert Katzmann, in turn, observed that judges "have had lots of experience with the technical problems" associated with implementation of laws such as the Clean Air Act and therefore should be consulted when the law is revised. *Id.* at 168.

The net effect is that legislators rely on judges as sources of expert advice. Former Congressman Robert Kastenmeier estimated that "hundreds of judges at all levels" had testified before him in his roughly twenty years as Chairman of the House Judicial Subcommittee on Courts, Intellectual Property, and the Administration of Justice.²⁷⁷ "Without that resource," he concluded, "we would indeed be limited."²⁷⁸

Credibility: Judges enter the legislative process with an aura of integrity that is difficult to equal. It comes with the robe. Judge Richard Neely puts it nicely:

The public's willing acquiescence in government-by-judiciary is directly related to the judiciary's incomparable reputation for fairness and honesty. . . .

Courts have neither the power of the purse nor the power of the sword. Therefore, judges must capitalize on their prestige to elicit willing compliance with their orders.

Nothing is more important for the success of courts than a perception by litigants that judges are somehow larger than life—priestlike figures applying an arcane but curative science.²⁷⁹

Although it may be hyperbolic to characterize any lobbyist as "priestlike," judge or not, there is ample support for the proposition that judges are, by virtue of their stations, given added deference in the legislative process.²⁸⁰

Apart from the halo of integrity that accompanies the position, the judge-lobbyist's credibility is further augmented by the relationships she has formed with individual legislators—relationships often

²⁷⁷ Id. at 169.

²⁷⁸ Id.; see also Federal Judiciary Administration Hearing, *supra* note 28, at 113 (statement of Subcommittee Chairman William J. Hughes) ("[Judges and the Judicial Conference] are in a unique position. [They] are in the only position really to provide the insights from the perspective of the judiciary. That information is very important to us.").

²⁷⁹ Richard Neely, *Judicial Jeopardy: When Business Collides with the Courts* 55-56 (1986).

²⁸⁰ The respect and credibility that Congress affords judges in the legislative process is manifested in a number of subtle ways: its routine enactment of "housekeeping" reforms proposed by the Judicial Conference, see *supra* note 27; its repeated pronouncements, through key legislators, that Congress depends on information it receives from the judiciary, see *supra* note 278; and the symbolic gestures of placing judges ahead of other witnesses on hearing schedules, or affording them their own day of hearings, see, e.g., Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 86-182 (1990) (federal judges as first four witnesses); Civil Justice Reform Act Hearings, *supra* note 126, at 314-416 (second day of hearings dedicated exclusively to four-person panel, including three federal judges).

predating the judge's ascension to the bench. Nominees for federal judgeships typically are selected by the President upon the recommendation of a senator from the nominee's home state, meaning that most judges will have at least one acquaintance in Congress.²⁸¹ To have attracted the attention of a United States Senator, the nominee often will have led a public life sufficiently high in its political profile to have brought her into contact with other members of Congress as well.

Judges can and do exploit these contacts. In his study of the Judicial Improvements Act of 1990, Professor Christopher Smith argued that magistrate judges were successful in their efforts to lobby for certain amendments to the Act because they joined forces with Article III judges, who took advantage of the "political connections and personal relationships [that they] utilized in order to gain appointment."²⁸²

Professor Smith noted, however, that judges exploit their contacts in part because other means of influence available to conventional lobbyists are unavailable to judges.²⁸³ Moreover, contacts alone may be of increasingly questionable value. The career paths of judges and legislators diverge more now than they have in centuries past,²⁸⁴ suggesting the possibility that mutual understanding and prior relationships may not be as strong now as before. When judges test these increasingly attenuated relationships by taking positions on legislative reform that appear self-interested, preexisting contacts may not be enough to stop legislators from questioning the judges' credibility. Senior Circuit Judge Frank Coffin, reflecting back on an ultimately successful campaign to lobby Congress to increase judicial salaries, observed that "[w]e as judges could claim almost no influence with our lawmakers, who had sponsored us."²⁸⁵ Rather, it was only after the judges formed a coalition with the organized bar, thereby generat-

²⁸¹ See Harold W. Chase, *Federal Judges: The Appointing Process*, 51 Minn. L. Rev. 185, 190 (1966) (discussing custom, originating in Washington administration, by which "[s]enators of the President's party suggested candidates to the President for federal offices in their home states").

²⁸² Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. Ark. Little Rock L.J. 163, 196 (1992).

²⁸³ See *id.* at 167-70 (discussing ethical rules and federal law that prohibit judges from using public funds to influence Congress and that place limitations on interbranch communications); see also *supra* notes 263-69 and accompanying text.

²⁸⁴ See Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress*, in *Judges and Legislators*, *supra* note 5, at 90, 93-94 (describing absence of experiential overlap between judges and legislators and concluding that "[t]oday, the two career paths diverge more than ever before").

²⁸⁵ Coffin, *supra* note 49, at 127.

ing "influential, broadly representative support," that the effort prevailed.²⁸⁶ Therein lies a paradox that merits elaboration.

C. The Competence-Credibility Paradox and the Role of Prudence as a Constraint on Judge-Legislator Interaction

As I have just argued, judges are uniquely credible lobbyists and uniquely competent sources of information on legislation and rules. Accepting the core tenets of the interactive paradigm, they *need* to remain actively involved in law reform. The health and well-being of the judiciary depend on intelligent and sensitive lawmaking, which in turn depends on lawmakers having access to information and expertise that judges alone can provide. Yet when judges impart information to legislators on matters within their sphere of competence, they put their credibility at risk to the extent that their efforts coincide with personal or institutional self-interest. For the conventional interest group, overly aggressive self-interested lobbying does not necessarily threaten the group's ability to influence Congress, for it has other weapons at its disposal over and above its perceived competence and credibility.²⁸⁷ For the judiciary, on the other hand, which lacks these additional weapons,²⁸⁸ lost credibility translates into a lost capacity to influence congressional decisionmaking.

In statutory reform, then, the judiciary confronts a recurrent catch-22: to maximize the flow of competent information to Congress in the legislative process and risk credibility loss, or to preserve credibility at the expense of competent information flow. The challenge for the judiciary is to escape the competence-credibility paradox by channeling its interactions with Congress in ways that enable it to share its expertise on matters of institutional or personal self-interest without appearing so self-interested as to compromise its credibility. Escaping the paradox therefore imposes limits on the judiciary's extrajudicial activities, limits that are not created by the Constitution, statutes, or codes of judicial conduct, but rather by the dictates of prudence.

In rulemaking, we have another variation of the same problem. The judiciary is a uniquely competent procedural rulemaker, which is why Congress has delegated primary rulemaking authority to the judiciary. At the same time, its credibility is put at risk when it exercises that authority. As the scope of purely "procedural" rules—politically defined—continues to shrink, so too does the judiciary's latitude to

²⁸⁶ *Id.*

²⁸⁷ See *supra* notes 263-69 and accompanying text.

²⁸⁸ See *supra* notes 263-69 and accompanying text.

make rules without interest group and ultimately congressional second-guessing. As congressional second-guessing increases, so too does the interested public's skepticism, thereby generating a downward spiral. The operative prudential constraint is the same here as in the legislative process: The judiciary must avoid rulemaking activities that appear so self-interested as to invite credibility-damaging altercations with Congress. The \$64,000 question is likewise the same: How can the judiciary respect this prudential constraint in the context of an interactive paradigm that encourages the judiciary to lend its expertise to the lawmaking process on matters with respect to which the judiciary has an obvious institutional interest?

The stakes are high, for the consequences of lost credibility do not necessarily stop with frustration of the interactive paradigm. If the prevailing view in Congress becomes that judges cannot be trusted to take principled, public-spirited positions in the legislative process, it is a short, logical step to say that they cannot be trusted to administer their own affairs or to decide cases in a principled, public-spirited manner, thereby necessitating heavy-handed oversight by the political branches.

The concern may be more than theoretical. In January 1996, U.S. District Judge Harold Baer granted a criminal defendant's motion to exclude certain evidence in a drug case, on the grounds that the evidence had been seized pursuant to an unreasonable search in contravention of the Fourth Amendment.²⁸⁹ The ruling attracted the attention of then-Senate Majority leader and presidential candidate Robert Dole, who together with Speaker of the House Newt Gingrich called for impeachment proceedings if Judge Baer did not change his ruling.²⁹⁰ A Clinton administration official, in turn, suggested that the President would request Judge Baer's resignation if he did not reverse himself.²⁹¹ Judge Baer changed his ruling.

Even more recently, Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, citing nepotism concerns, threatened to block the appointment of William Fletcher to the United States Court of Appeals for the Ninth Circuit unless his mother, Judge Betty B. Fletcher, who was also on the court, stepped aside.²⁹² Five times previously in its history, the Senate had confirmed the appointment of

²⁸⁹ See John M. Goshko & Nancy Reckler, *Controversial Drug Ruling is Reversed*; N.Y. Judge Now Finds Evidence Admissible, *Wash. Post*, Apr. 2, 1996, at A1.

²⁹⁰ See *id.* at A5.

²⁹¹ See *id.* The official later backed away from his suggestion. See *id.*

²⁹² See *Playing Games with an Old Law; Phony Issue of Nepotism Is Being Used to Block Judgeship Nominee*, *L.A. Times*, May 10, 1996, at B8 (editorial) [hereinafter *Playing Games*].

federal judges at times when a relative of the appointee already was on the federal bench,²⁹³ but that was then, and this is now. Judge Fletcher agreed to take senior status.²⁹⁴

IV

DEVISING A STRATEGY FOR FACILITATING JUDGE-LEGISLATOR INTERACTION WITHIN PRUDENTIAL CONSTRAINTS

I do not want to overstate my case. I do not mean to argue or imply that Congress and the judiciary are in a state of war, or that interbranch confrontation is becoming the norm. To the contrary, the judiciary continues to pursue peaceful and productive interaction with Congress most of the time, consistent with the new, interactive paradigm.²⁹⁵ My concern is that credibility-damaging confrontations between the first and third branches of government—while not the norm—are nevertheless on the rise, and that if this trend is left unchecked, it could do serious long-term damage to the judiciary's institutional integrity.

In the final Part of this Article, I will first explore the mechanisms that the judiciary has used in the past to avoid damaging interbranch confrontation and seek to explain why confrontations persist despite the existence of conflict-avoidance mechanisms. Aided by a review of proposals offered by others, I will then offer a multipart reform proposal.

A. Conflict-Avoidance Mechanisms and Their Limits

1. Consensus, Compromise, and Acquiescence

A deceptively simple solution to the competence-credibility paradox is for the judiciary to pursue a strict policy of consensus and compromise building in its lobbying and rulemaking strategies, a policy that studiously avoids high-profile, credibility-damaging confrontations with Congress. In the past, when nobody outside of the judiciary could muster the energy to care very much about court administration and procedure, it was comparatively easy for the judiciary to promulgate procedural rules without interference and to secure statutory re-

²⁹³ See *id.*; see also Claudia MacLachlan, *Hatch Pressures Judge to Take Senior Status*, Nat'l L.J., May 20, 1996, at A14.

²⁹⁴ See *Playing Games*, *supra* note 292, at B8; MacLachlan, *supra* note 293, at A14. One could dismiss the Baer and Fletcher episodes as more a matter of election-year politics than a reflection of Congress's lack of confidence in the judiciary. Even so, the very fact that the political branches have deemed the judiciary a suitable football in their quadrennial games is a telling indicator of the judiciary's increasing vulnerability.

²⁹⁵ See *infra* notes 296-99 and accompanying text.

forms from a largely indifferent Congress by means of low-profile consensus building.

The judiciary has not abandoned its policy of consensus building. It continues to pursue such a policy successfully with respect to most statutory reforms it seeks.²⁹⁶ It has done so through a variety of means. Judges have exploited opportunities for informal interaction with legislators—such as Brookings Institution or Federal Judicial Center conferences—where disagreements can be resolved amicably in less political settings.²⁹⁷ The Judicial Conference has initiated reforms at the suggestion of congressional leaders without waiting for statutory directives, thereby promoting a spirit of cooperation and possibly obviating more draconian, legislated alternatives that the judiciary might have to oppose.²⁹⁸ It has picked its battles with care, acquiescing on matters of lesser concern and taking positions in opposition to congressional leaders only when its views are strongly held.²⁹⁹

²⁹⁶ A dramatic illustration of the judiciary's continuing ability to achieve results through cooperative interaction is the recent enactment of a separate budget for the federal judiciary, which enabled the judiciary to avoid the shutdown that affected the rest of the federal government during the 1995-1996 budget impasse. See Act of Jan. 6, 1996, Pub. L. No. 104-91, 1996 U.S.C.C.A.N. (110 Stat.) 7, 10-14. Administrative Office Director L. Ralph Mecham credited "[m]embers of Congress, leaders in the Judiciary and AO staff," who "joined forces to achieve what at one time appeared to be an unattainable goal." *Judiciary Secures FY 96 Funding, The Third Branch* (Admin. Office of the U.S. Courts), Jan. 1996, at 1, 10.

²⁹⁷ See Cannon & Cikins, *supra* note 49, at 9-10 (discussing role of Brookings Conference in development of Omnibus Judgeship Act).

²⁹⁸ See, e.g., *supra* note 126 and accompanying text; *infra* note 311 and accompanying text; see also Geyh, *supra* note 140, at 1053 n.97 (discussing Judicial Conference's proposal to create 14-point case-management plan in unsuccessful effort to dissuade Congress from enacting Civil Justice Reform Act).

²⁹⁹ For example, Administrative Office Director L. Ralph Mecham recently sent Senate Judiciary Committee Chairman Orrin Hatch a letter communicating the Judicial Conference's position on the "Stop Turning Out Prisoners" Act. The Conference opposed only one subsection that limited magistrate-judge authority in prison condition cases. It "expresse[d] no view on the merits of other provisions," despite obvious reservations about other sections that implicated "federalism concerns," raised "basic questions about the Constitution's separation of powers," and "affect[ed] procedures covered by [the Federal Rules of Civil Procedure] without resort to the processes contemplated by the Rules Enabling Act." Letter from L. Ralph Mecham, Secretary, Judicial Conference of the United States, to Senator Orrin Hatch, Chairman, Senate Committee on the Judiciary 2-3 (May 25, 1995) (on file with author). Even though legislative efforts to bypass the Rules Enabling Act had been actively opposed by the Judicial Conference in the past (as was the case with the Civil Justice Reform Act), here the judiciary limited its formal opposition, thereby preserving a spirit of cooperation and increasing the likelihood that the judiciary's most pressing problem would not be ignored. Compare this conciliatory approach with a more direct and combative approach taken by the Judicial Conference during an earlier controversy. See Civil Justice Reform Act Hearings, *supra* note 126, at 334 (testimony of Judge Robert F. Peckham, Chairman, Judicial Conference of the United States Subcommittee on the Civil Justice Reform Act of 1990) ("[O]ne of the primary bases for our opposition to

It also has sought to improve the quality and reliability of the information and recommendations it has communicated to Congress (thereby reducing the need for congressional second-guessing) through such innovations as the Office of Judicial Impact Assessment.³⁰⁰

In the rulemaking arena, the judiciary has likewise pursued a policy of conflict avoidance. Rule 1 of the Federal Rules of Civil Procedure makes the rules applicable to "all suits of a civil nature," and articulates the aspiration that the rules be construed "to secure the just, speedy, and inexpensive determination of every action."³⁰¹ As Professor Carrington has argued, for a transsubstantive set of rules to achieve the universal goals set out in Rule 1, such rules must remain neutral, which requires that rulemaking "avoid the interest group politics that is the meat and drink of the parliaments of the world."³⁰² The Judicial Conference traditionally has averted confrontations with Congress, Professor Carrington continues, by promulgating rules general enough and flexible enough to win widespread approval and avoid piquing legislative interest.³⁰³ When, as in the case of Civil Rule 68 reform, specific interest groups have complained that a proposed rule will affect them disproportionately, the rulemakers have abandoned the project.³⁰⁴

One could rightly argue that the more recent brouhaha over the discovery rules, in which the judiciary rammed mandatory disclosure down the throat of an unwilling bar without waiting to obtain empirical support for the reform, reflects a different, almost conflict-seeking approach to rulemaking.³⁰⁵ But the Civil Rules Committee has shown signs of learning from that episode in the case of Rule 23 reform, where the Committee has committed the rule to further study pending more extensive consultation with the practicing bar.³⁰⁶

Notwithstanding the judiciary's continuing efforts to promote interbranch communication and minimize credibility-damaging confron-

the statute is our belief that nationally applicable procedural norms should be imposed only through that rule-making process.").

³⁰⁰ For a discussion of the OJIA's establishment, see *infra* notes 315-41 and accompanying text.

³⁰¹ Fed. R. Civ. P. 1.

³⁰² Carrington, *supra* note 85, at 2078.

³⁰³ See *id.* at 2078-85 (arguing that goal of political neutrality requires rules to be driven by need for generalism and flexibility).

³⁰⁴ See *id.* at 2078-79 (noting that complaints by civil rights bar led rulemakers to abandon attempt to amend Federal Rule of Civil Procedure 68).

³⁰⁵ See *supra* note 247 and accompanying text.

³⁰⁶ See Stephen B. Burbank, *Procedure and Power*, Address at the AALS Concurrent Session on Civil Procedure 4-5 (Jan. 4, 1996) (transcript on file with author) (exploring history of power struggles between judiciary, legislature, and practitioners in arena of civil procedure).

tations with Congress, the problem is that the opportunities for consensus and compromise have contracted as the pressure for Congress to make impositions on the third branch has expanded. This has proved to be true in both the statutory and rule reform arenas.

With respect to statutory reform, the political branches have responded to pressure to address such issues as crime, civil rights, civil case management, and the budget by increasing the federal judiciary's workload, decreasing its discretionary power, and scrutinizing the judiciary's pay, perquisites, and operating expenses more closely.³⁰⁷ Unable to forge a consensus or compromise, the judiciary has responded by criticizing and sometimes opposing congressional action, buoyed by a core tenet of the interactive paradigm that interbranch communication of this sort is appropriate and desirable. The net effect, as documented in Part III, has been an occasional movement away from the politics of consensus and toward the politics of confrontation that has engendered congressional skepticism and precipitated a number of attacks on the judiciary's credibility.³⁰⁸

With respect to rulemaking, there has been a variation on the same theme, as increasingly skeptical interest groups have solicited Congress to challenge the judiciary's rulemaking monopoly on a more and more regular basis, once again pitting Congress against the judiciary in a series of comparatively high-profile confrontations.³⁰⁹ To avoid confrontations, the judiciary has pursued equally problematic alternatives, acquiescing in precipitous congressional rule reform³¹⁰ or engaging in precipitous rule reform of its own in an effort to stave off congressional interference and confrontation.³¹¹

2. *Buffering Devices*

On a number of occasions in which the judiciary has been unable to achieve consensus or compromise, and acquiescence would disserve the goals of the interactive paradigm, the judiciary has managed to avoid direct confrontations with Congress on controversial subjects by routing its communications through others. To the extent that organizations such as the American Bar Association share the judiciary's perspective on a particular piece of legislation, e.g., a judicial pay

³⁰⁷ See *supra* notes 50, 220-22, 231-34 and accompanying text.

³⁰⁸ See *supra* notes 209-40 and accompanying text.

³⁰⁹ See *supra* notes 241-47 and accompanying text.

³¹⁰ See *supra* note 299.

³¹¹ See, e.g., 23 Wright & Graham, *supra* note 128, § 5381.1 (Supp. 1996) (describing Judicial Conference's promulgation of Federal Rule of Evidence 412 as "preemptive strike against more radical reform" by Congress, in which "[h]aste was necessary . . . to beat Congress to the punch").

raise, it has been possible for the judiciary to insulate itself by joining forces and reducing the need to assume a high-profile, leadership role on the issue.³¹²

Federal judges have also buffered their recommendations to Congress through independent commissions.³¹³ The recommendations that have emerged from these commissions are those of the commissions and not their member judges, despite the fact that the judges have, in many instances, authored the recommendations. In such instances, the recommendations represent the collected wisdom of an independent, public-spirited commission, rather than the work product of arguably self-interested judges.³¹⁴ The net effect is that the proposals of the commission are presented to Congress with an aura of credibility that assists in their adoption, while any public and congressional criticism of the proposals is deflected away from the judges who authored them and toward the commission that issued them.

In some cases, there will be no readily available intermediary through which the judiciary may buffer its communications to Congress. In the rulemaking context, the judiciary has a statutorily assigned leadership role—there are no intermediaries. In the case of statutory reform, other lobbyists may be unsuitable intermediaries insofar as their positions differ from the judiciary's. Independent commissions may not exist when intermediaries are needed. Occasionally, there may be insufficient time to communicate indirectly.

The judiciary also may bypass an available intermediary and communicate with Congress directly on controversial issues despite the risk of a credibility-damaging confrontation because the judiciary does not want to lose control over how information is gathered, what information is communicated to Congress, and how that information is

³¹² See *supra* note 285 and accompanying text (discussing role of ABA in securing congressional approval of judicial pay raise); see also Katzmman, *supra* note 51, at 165 ("Judges, asserted [former ABA president Chesterfield] Smith, should filter their views through the ABA and let that organization, 'as a voice of officers of the court,' present proposals that are in the interest of the administration of justice. In other words, the ABA would serve as a surrogate for the judiciary.").

At the same time, to the extent that the judiciary affiliates itself with an outside organization, there is the risk that the positions of the organization will be attributed to the judiciary. For this reason the ABA, for example, has sought to define the appropriate limits of judges' participation in its affairs. See generally O'Scannlain, *supra* note 167 (reviewing ABA's attempts to define limits of judicial participation).

³¹³ See *supra* notes 59-64 and accompanying text.

³¹⁴ This is true at least when the judge's participation on the commission is not unusually visible. Former judge Abner Mikva, for example, distinguished between judicial participation on commissions charged with making recommendations for the administration of justice, which he regarded as helpful, and "high-profile, highly visible commissions," such as the Warren Commission, about which he had misgivings. Katzmman, *supra* note 51, at 166.

transmitted. The debate between judges and legislators within the Federal Courts Study Committee over who should control the judicial impact assessment function—the courts or Congress—illustrates nicely the reluctance of the judiciary to relinquish control to an intermediary of the information Congress receives concerning the courts, even if that means risking the possibility that the information Congress receives directly from the judiciary will be discredited as the work product of a self-interested source.

At the first meeting of the Federal Courts Study Committee on February 3, 1989, Study Committee Chairman, Circuit Judge Joseph Weis, Jr., created a Subcommittee on the Role of the Federal Courts in Relation to State Courts, chaired by Judge Richard Posner, to examine, among other subjects, "the partnership with Congress."³¹⁵ By July, the Posner Subcommittee had developed a proposal, which was explained in a memorandum prepared by Subcommittee reporter Professor Larry Kramer: "We recommend that Congress create an agency to engage in ongoing review of the use of federal judicial resources," called the "Office of Judicial Impact Assessment" (OJIA).³¹⁶ Recognizing that "success depends on how the agency is organized," the Subcommittee recommended that the OJIA be "an independent support agency within the legislature, like the Congressional Research Service," with a staff removable only for cause.³¹⁷ Among the OJIA's possible tasks would be "to predict what kinds of cases are likely to arise under particular legislation."³¹⁸

At the July 31, 1989, meeting of the Study Committee, the federal judges who were members of the Study Committee (other than Judge Posner) reacted cautiously to the proposed creation of the OJIA. "[W]hy is it in the legislative branch rather than the judicial branch[?]" inquired District Judge Jose Cabranes.³¹⁹ "I suspect that some members of the judicial branch might wonder whether it wouldn't be, in a sense, too independent of judicial perspective or judicial interest or concern."³²⁰ Senior Circuit Judge Levin Campbell echoed the same concern:

I [am] worried a little bit about whether an agency that was put in the legislative branch exclusively with tenured officials would, at

³¹⁵ Transcript of Proceedings of the Federal Courts Study Committee 32 (Feb. 3, 1989) (on file with author).

³¹⁶ Memorandum from Larry Kramer to Members of the Federal Courts Study Committee 5 (July 21, 1989) (on file with author).

³¹⁷ *Id.* at 7.

³¹⁸ *Id.* at 6.

³¹⁹ Transcript of Proceedings of the Federal Courts Study Committee 74 (July 31, 1989) (on file with author).

³²⁰ *Id.*

some point, assert itself in a way to not intimidate the judiciary but to start getting a particular point of view expressed to the judiciary. Of course, the legislative branch is very powerful. It can be because they have what we need—money and resources—and there is always the possibility that people in an agency of that sort would develop a sense that they sort of ought to be running the show a little bit.³²¹

The concerns of Judges Campbell and Cabranes underscore the judiciary's reluctance to buffer its communications through an intermediary because of the lost control it would entail. In their minds, an entity divorced from the judiciary would be insufficiently attuned to the needs of the third branch to assess judicial impact effectively and could develop other agendas that might interfere with accurate, good-faith impact forecasting.

On the other hand, the advantage of locating the OJIA in the legislative branch would be to create, in the minds of legislators, a more credible information source. Senator Charles Grassley, a member of the Study Committee, underscored the point at the July 31, 1989, Study Committee meeting:

[T]he power of the Congressional Budget Office just on appropriation is a leading indicator of an impact that an agency of Congress can have

And if you were thinking in terms of something that would force that sort of consideration on the part of Congress it could make a real difference.³²²

Asked, "What would be a meaningful kind of [judicial impact] statement to you?" Senator Grassley sounded the credibility theme explicitly: "I don't know whether it is the statement, itself, but it is respect for the statement," he replied, respect like that accorded the reports of such congressional agencies as the General Accounting Office or the Congressional Budget Office.³²³

At the October 29 and 30, 1989, meeting of the Study Committee, when a vote on the proposal was scheduled, Robert Feidler, the Legislative and Public Affairs Officer for the Administrative Office of the United States Courts and judicial liaison to the Study Committee, circulated to Study Committee members a memorandum he had prepared for Administrative Office Director L. Ralph Mecham.³²⁴ The

³²¹ *Id.* at 76-77.

³²² *Id.* at 81.

³²³ *Id.* at 86-87.

³²⁴ See Memorandum from Robert E. Feidler, Legislative and Public Affairs Officer, Administrative Office of the U.S. Courts, to L. Ralph Mecham, Director, Administrative Office of the U.S. Courts 1 (Oct. 30, 1989) [hereinafter Feidler Memorandum] (on file with author) (arguing that placement of support agency such as OJIA within legislative branch

memo stressed the relative competence of the judiciary to assess judicial impact: "All of the objectives [of the proposed OJIA] are now being done by the [Judicial] Conference," Feidler wrote.³²⁵ "When Congress asks for an impact statement . . . the [Administrative Office] has responded in a timely and thoughtful manner."³²⁶ Feidler noted: "There is simply no reason to believe that an agency created within the Legislative Branch would be better capable of advising the Members than is the Judicial Branch directly."³²⁷ Of primary concern to Feidler, however, was that if the judiciary's data were filtered through a congressional OJIA, the judiciary would lose control over the process:

To place these functions in the Legislative Branch in a support agency as envisioned by the subcommittee would eviscerate the role of the Judicial Conference in the legislative process.

. . . To create a specific body within the Legislative Branch to perform these functions would make the Judiciary non-players in many major decisions affecting the Judiciary.³²⁸

In the vote that followed, the Committee "[r]ecommended in substance that Congress create an agency to enhance inter-branch communications."³²⁹ The recommendation to locate the agency in Congress ultimately was defeated; in its place, the Committee approved a recommendation that the agency be within the "Judicial Branch."³³⁰

While the Study Committee evidently was satisfied that the task of assessing judicial impact was one that should remain in the competent hands of the third branch, the possibility that the judiciary would appear self-interested and that its impact assessments therefore could lack credibility with Congress remained a concern. On the basis of a report of the Study Committee Subcommittee on Administration, Management and Structure,³³¹ a November 27, 1989, tentative draft of the Study Committee refined its recommendation by proposing that

would eviscerate role of Judicial Conference). This memorandum was, in effect, submitted in response to a request from Chairman Weis that Mr. Feidler "give us your ideas." Transcript of Proceedings of the Federal Courts Study Committee 88 (July 31, 1989) (on file with author).

³²⁵ Feidler Memorandum, *supra* note 324, at 1.

³²⁶ *Id.* at 2.

³²⁷ *Id.* at 1.

³²⁸ *Id.*

³²⁹ Draft Minutes of the Sixth Meeting of the Federal Courts Study Committee, October 29 & 30, 1989, at 6 (Nov. 2, 1989) (on file with author).

³³⁰ *Id.*

³³¹ Report of the Subcommittee on Structure to the Federal Courts Study Committee 28-29 (Nov. 15, 1989) (on file with author) (recommending creation of OJIA in Federal Judicial Center).

the OJIA be located in the Federal Judicial Center specifically, rather than in the judicial branch generally.³³² Although impact forecasting previously had been undertaken by the Administrative Office, the tentative draft explained that "[t]he advantage of placing this office in the Center is that it would be separate from operational entities and thus would be more likely to be perceived as being an objective agency rather than an advocacy agency."³³³ To that end, "[t]he office would not endorse or condemn legislation. It would confine itself to an analysis of the impact of the legislation."³³⁴

The refinement of the tentative draft was approved by the Study Committee on December 10, 1989. A subsequent draft, dated December 22, 1989, was disseminated for public comment, with a reference to the Federal Judicial Center as "an objective agency rather than an advocacy agency" deleted.³³⁵ Not surprisingly, the committee of the Judicial Conference that oversees the Administrative Office objected to locating the OJIA in the Federal Judicial Center: "The Committee on the Administrative Office [of the Judicial Conference] . . . does not support the recommendation to create an Office of Judicial Impact Assessment in the Federal Judicial Center," wrote Conference Committee Chairman and Circuit Judge Harlington Wood, Jr., to the Federal Courts Study Committee.³³⁶ "We believe this responsibility should remain under the direction of the Judicial Conference. Impact assessments are currently being made for the Conference by the Administrative Office which has firsthand familiarity with these matters."³³⁷

In the end, the Judicial Conference prevailed. On February 15, 1990, the Committee voted to substitute "the judicial branch" for the Federal Judicial Center, which is how the recommendation was

³³² See Federal Courts Study Comm., Report of the Federal Courts Study Committee, Tentative Draft No. 1, at 86-87 (Nov. 27, 1989) [hereinafter Draft No. 1] (on file with author) (submitted to Federal Courts Study Committee for discussion at meetings held on December 10 and 11, 1989). Because of the closeness of the October 30 vote, and the absence of four members, the Posner Subcommittee proposal was included in the tentative draft as a second option. See *id.* at 87-89. The second option was rejected at the December 10, 1989, meeting. See Federal Courts Study Committee, Draft Agenda, at 2 (Dec. 10-11, 1989) (on file with author) (noting approval of proposal "with elimination of option 2").

³³³ Draft No. 1, *supra* note 332, at 86-87.

³³⁴ *Id.* at 87.

³³⁵ See Federal Courts Study Comm., Tentative Recommendations for Public Comment 126-27 (Dec. 22, 1989) (on file with author).

³³⁶ Letter from Harlington Wood, Jr., Chairman, Committee of the Judicial Conference, to Joseph F. Weis, Jr., Chairman, Federal Courts Study Committee 1 (Jan. 9, 1990) (on file with author).

³³⁷ *Id.*

phrased when the Committee report was issued in April.³³⁸ Five of the Committee's fifteen members dissented, arguing that the Committee should have recommended locating an OJIA in Congress.³³⁹

The final draft of the Posner Subcommittee report, issued after the full Committee had concluded its OJIA deliberations, persisted in its support for a congressional OJIA, arguing that "precisely because [the Administrative Office is] not part of Congress, [it has] only a limited ability to demand attention and [is] often treated more like [a] lobb[y] than [a] helpmate[]."³⁴⁰ The prescience of the Subcommittee's conclusion is borne out by the subsequent altercations between Congress and the judiciary, discussed earlier, in which skeptical legislators have rejected the judiciary's caseload and impact assessments as exaggerated and self-interested.³⁴¹

B. *Proposals for Reform*

So, here we are. We have a new way of thinking about the relationship between courts and Congress in statutory reform and rulemaking that eschews separation in favor of interaction between judges and legislators. Moreover, I have argued there are no *meaningful* constitutional, statutory, or ethical constraints upon judge-legislator interaction in this new paradigm. Although such constraints exist, they are significantly less confining than prudential constraints, key among which is that the judiciary communicate with Congress in ways that minimize the risk of credibility-damaging confrontations that have proliferated in recent years. By pursuing reform through consensus and compromise, and communicating policy positions to Congress through intermediaries when consensus and compromise are impossible, the judiciary has (for the most part) interacted within prudential constraints. More recently, however, external pressures on the two branches have occasionally caused the judiciary to bypass conflict-avoidance devices, exceed prudential constraints, and assume a more confrontational posture with Congress. The question that remains is

³³⁸ Study Committee Report, *supra* note 62, at 89.

³³⁹ The five were Representative Robert Kastenmeier, former Solicitor General Rex Lee, Judge Judith Keep, Representative Carlos Moorhead, and Judge Richard Posner. Because a number of Committee members chose not to draft or sign on to dissents from recommendations they opposed in the Committee, it is probably *not* safe to assume that the final vote on the proposal was 10 to 5. See *id.* at 92-93.

³⁴⁰ Report to the Federal Courts Study Committee on the Role of the Federal Courts and Their Relation to the States, in 1 Federal Courts Study Committee Working Papers and Subcommittee Reports 1, 138 (1990). For a powerful argument in support of the Subcommittee's proposal, see Kramer, *supra* note 48, at 94-97 (arguing that locating agency in Congress would enhance its credibility and influence).

³⁴¹ See *supra* Part III.A.

what more, if anything, can be done to avert such confrontations in the future so as to preserve the judiciary's influential extrajudicial role and its institutional integrity.

Others have proposed some innovative solutions to the problems afflicting the judiciary in its extrajudicial role. The difficulty with such proposals has been their tendency to define "the problem" too narrowly. Individual commentators have focussed on varied concerns: the amount of communication between judges and legislators;³⁴² the level of congressional and judicial interference in procedural rulemaking;³⁴³ the movement away from transsubstantive procedural lawmaking;³⁴⁴ and the balkanization of the national system of procedural rules on a district-by-district basis.³⁴⁵ These commentators have, in effect, addressed the problems of the elephant in terms of its trunk, its tail, or its leg, without putting together a picture of the animal as a whole. What I have tried to do in this Article is to provide a wide-angle view of the entire pachyderm. Aided by that view, it becomes possible to reassess the merits of the proposals offered to date, to accept parts or all of some, and to amplify others, to the end of developing a more complete package of reforms.

1. Statutory Reform Proposals

I propose the creation of a permanent, independent, fifteen-member Interbranch Commission on Law Reform and the Judiciary, to be comprised of representatives from all three branches of government, litigation user groups, and academia. The Interbranch Commission would develop court reform recommendations for Congress on an ongoing basis and evaluate legislative proposals affecting the courts introduced by members of Congress.³⁴⁶ To preserve the Commission's independence, each of the three branches would appoint an equal number of commissioners. The implementing legislation could

³⁴² See Marcus & Van Tassel, *supra* note 20, at 31 (discussing historical lack of communication between federal judiciary and Congress); see also *supra* note 6.

³⁴³ See Burbank, *supra* note 9, at 842 (seeking rulemaking moratorium); Walker, *supra* note 9, at 574-82 (arguing that rules ordinarily should not be promulgated without empirical foundation); see also *supra* note 7.

³⁴⁴ See Marcus, *supra* note 4, at 778-79 (explaining movement toward more subject-matter specific procedural rules).

³⁴⁵ See Tobias, *supra* note 10, at 1402-03 (arguing that Civil Justice Reform Act, by requiring district courts to develop their own case-management procedures, has balkanized procedural reform).

³⁴⁶ The assumption here is that members of Congress would remain free to develop and introduce proposals on their own, independent of the Commission; moreover, even when a proposal is developed by the Commission it may be redrafted by legislative counsel or members of Congress before or after a bill is introduced, therefore necessitating better Commission evaluation.

be modeled after that establishing the National Commission on Judicial Discipline & Removal (NCJDR).³⁴⁷ The President and the Chief Justice would each appoint four commissioners for staggered, multi-year terms, and the Speaker of the House and President Pro Tempore of the Senate would each appoint two (one from each political party). I would, however, propose two deviations from the NCJDR model: First, I would include in the enabling legislation a directive that the appointing authorities make their selections with an eye toward ensuring that the Commission represent a spectrum of perspectives on the administration of justice. With each appointing authority limited to four selections, it is quite likely that the Commission would inadvertently exclude essential points of view in the absence of such a directive. The NCJDR, for example, initially included no women on the twelve-member Commission.³⁴⁸ Perhaps as a consequence, the Commission did not address in earnest the issue of gender bias as the subject of judicial discipline until after the issue was called to its attention by hearing witnesses—female witnesses.³⁴⁹ Second, I suggest that the twelve commissioners, after being selected by the branch leaders, choose three additional commissioners from the ranks of litigation user groups and academia. Although it would be simpler for the latter three commissioners to be selected, one each, by the branch leaders themselves, assigning the task to the remainder of the Commission would facilitate the selection of a more representative group by reducing the risk that the branch leaders might randomly appoint representatives from the same or substantially similar user groups.

Over the course of the past century, various judges, legislators, and commissions have proposed the creation of an entity to monitor and recommend legislative proposals affecting the courts.³⁵⁰ They

³⁴⁷ See National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, §§ 408-418, 104 Stat. 5089, 5124-27 (1990), reprinted in 28 U.S.C. § 372 Historical and Statutory Notes (1994).

³⁴⁸ See Commission Masthead, Report of the National Commission on Judicial Discipline (Aug. 1993) (naming commissioners and dates of service).

³⁴⁹ See Hearings of the National Commission on Judicial Discipline and Removal 411-80 (Jan. 29, 1993) (testimony of Justice Elizabeth Lacy, Barbara Saffret, and Judith Resnik). The Commission subsequently assigned Assistant Director Michael Straight to prepare a consultant's report on gender. See Michael Straight, *Accountability for Racial, Religious, Ethnic and Gender Bias Misconduct and Sexual Harassment by Federal Judges*, in 2 Research Papers of the National Commission on Judicial Discipline and Removal, *supra* note 42, at 1679.

³⁵⁰ Proposals for creation of an office charged with reviewing laws and/or court decisions and recommending revisions include: Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts 118 (1995) (proposing creation of National Commission on the Federal Courts); Benjamin N. Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113, 123-26 (1921) (proposing creation of ministry of justice to review and recommend revisions to laws passed); William E. Cooper,

have argued that an independent office or agency of this sort is needed to ensure that court reform is systematic, to minimize statutory errors and oversights, to better inform Congress as to the impact of its proposals on the courts, and to improve interbranch cooperation.³⁵¹ The time has come to revisit such a proposal in pursuit of a fundamentally different and far more ambitious goal: to redefine and restructure the process by which legislation affecting the judiciary is developed for the purpose of accommodating the needs and avoiding the pitfalls of the new, interactive paradigm.

In the short term, the Interbranch Commission would help to preserve the judiciary's influential role as a competent, credible advisor in statutory development. The judiciary's influence upon the recommendations of the Interbranch Commission would be considerable. Because the Commission's task would be to develop and monitor legislation affecting the judiciary, it is a fair assumption that the commissioners most familiar with the inner workings of the judiciary, namely the judges, would be paid considerable heed by the Commission as a whole. Such was the case with the tri-branch Federal Courts Study Committee, as evidenced by the successful efforts of the judges on the Committee to redirect the OJIA proposal.³⁵²

The influence of Interbranch Commission recommendations on Congress is also likely to be considerable. In the past, Congress has created and deferred to the judgment of administrative agencies and other independent entities when it has lacked the time, competence, or political will to make appropriate judgments independently.³⁵³ In

A Proposal for a Congressional Council of Revision, 12 Seton Hall Legis. J. 233, 238-40 (1989) (proposing council of revision comprised of former judges and legislators); Friendly, *supra* note 48, at 802-07 (proposing creation of committee for legislative development of laws, equivalent to ministry of justice); Ginsburg, *supra* note 48, 1011-17 (1987) (proposing that "second look at laws" committee be established within each house of Congress); Kramer, *supra* note 48, at 95 (advocating establishment of planning agency within legislative branch).

³⁵¹ See sources cited *supra* note 350.

³⁵² See *supra* notes 315-41 and accompanying text.

³⁵³ See Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 40 (1993) (noting that *raison d'être* for administrative agency rulemaking is to fill statutory gaps that Congress lacks time or competence to fill on its own). More recently, Congress created an independent entity for a different purpose—to make hard choices that Congress could not. The Defense Authorization Amendments and Base Closure and Realignment Act created a commission to recommend which military bases should be closed and limited Congress to accepting all or none of the commission's recommendations, so as to prevent Congress from letting the politics of local constituent pressure control the decisionmaking process. See Pub. L. No. 100-526, §§ 201-203, 102 Stat. 2623, 2627 (1988) (codified as amended at 10 U.S.C. § 2687 (1994)); see also Don't Close Down Base Closings, *Wash. Post*, Mar. 7, 1994, at A18 (editorial) (describing Base Closure and Realignment Act as "ingenious" means by which Congress could "save itself from itself").

the case of an entity that includes members of Congress, the level of congressional deference may be even greater. The fifteen-member Federal Courts Study Committee, for example, included four members of Congress. The extent of congressional deference to the Study Committee's recommendations is reflected in the Judicial Improvements Act of 1990, which implemented seventeen Study Committee recommendations less than a year after the Study Committee issued its final report.³⁵⁴ By buffering its communications to Congress through the Interbranch Commission, then, the judiciary's contribution to and influence over statutory reform would be preserved.

At the same time, the Interbranch Commission would maximize opportunities for consensus lawmaking and minimize interbranch confrontation. Small group dynamics suggest that the proposed Commission would seek to avoid conflict and develop recommendations by consensus, compromise, and acquiescence whenever possible.³⁵⁵ If consensus on a given proposal is achieved within the Commission, odds are good that it will translate into consensus legislation, because even though the Commission would be comprised of small subsets of the three branches, that number, if carefully selected, would be sufficient to influence, if not speak for, the three branches in most instances.³⁵⁶

³⁵⁴ See Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 302-318, 104 Stat. 5104 (codified in scattered sections of 5, 11, 18, 28 U.S.C.). Of these 17 sections, all but the four relating to bankruptcy reform were discussed in the House Judiciary Committee Report with explicit reference to the corresponding Study Committee recommendations. See H.R. Rep. No. 734, 101st Cong., 2d Sess. 17-30 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6862-78. The four bankruptcy reform sections, which were not a part of the bill at the time the House Report was written, were nevertheless Study Committee recommendations. See Draft No. 1, *supra* note 332, at 75-78 (describing bankruptcy reform recommendations).

³⁵⁵ See generally A. Paul Hare, *Small Group Research: A Handbook* (1994) (reviewing studies involving interactions in small groups or having special relevance for small group processes).

³⁵⁶ In Congress, only eight legislators have an ongoing, institutional interest in court reform legislation: the four chairs of the House and Senate judiciary committees and their respective subcommittees on courts, and the four ranking minority members of those committees and subcommittees. Granted, these eight cannot represent the views of Congress as an institution, but for most purposes they are the only ones sufficiently interested in court reform to do so. See Charles Gardner Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 Rev. Litig. 401, 403-04 (1991) (discussing lack of congressional interest in complex litigation reform outside and, to lesser extent, within inner circle of legislators with committee jurisdiction over such matters). The judiciary, in contrast, can speak in a single voice through the Judicial Conference, and therefore could be adequately represented on the Commission by a sole designee. See *supra* notes 24-31 and accompanying text. To insure parity, however, the number of third branch representatives should equal those of the first. The executive branch likewise speaks through a single voice and therefore could be represented by only one designee, although again, as a coequal branch of government it should have an equal role on the Commission.

Contentious recommendations within the Commission, on the other hand, would foreshadow a contentious legislative process to follow. Even then, however, it would be the recommendation of an independent commission, rather than an apparently self-interested judiciary at the center of the controversy—meaning that the judiciary could communicate its concerns on a divisive issue without risking its credibility. Moreover, by endorsing (or opposing) judiciary-supported reforms, the Commission could help to placate skeptics seeking independent validation of the judiciary's proposals.

In the long term, the benefits could be even more significant. As critical as the separation of powers may be to avoiding overconcentrations of might in a single branch, too much separation begets unfamiliarity. Unfamiliarity, in turn, begets mistrust, mistrust that could give way to debilitating hostility in an era in which the public is predisposed to suspect the worst of its government. The Interbranch Commission represents a first step down a different path. Without disturbing the essential separation provided for in the Constitution, the Commission would institutionalize a new avenue for intragovernmental cooperation. If successful in the limited context of court reform, the Interbranch Commission conceivably could serve as a model for other commissions assigned tasks in other substantive areas of law reform.

The Interbranch Commission on Law Reform and the Judiciary would coincide nicely with reform proposals offered by others in the field, sidestepping their weaknesses and accentuating their strengths. Professor Katzmman, Judge Deanell Tacha, and Judge Frank Coffin, among others, have emphasized the need to further improve interbranch communication as a means to reduce friction between the first and third branches and to enhance the quality of legislation affecting the courts.³⁵⁷ Consistent with Part II of this Article, they acknowledge that such communication must take place within constitutional, statutory, and ethical limits, but they question whether such limits stand in the way of more meaningful interaction. The views of this group have helped to catalyze a paradigmatic shift in our understanding of the judiciary's appropriate extrajudicial lawmaking role. Their continuing efforts to develop the infrastructure of the new paradigm by expanding and streamlining channels of interbranch communication will assist in acclimating the judiciary to its interactive role, provided that the judiciary respects prudential constraints.

³⁵⁷ See *supra* notes 49-52 and accompanying text.

If these authors are to be faulted, it is for failing to appreciate the impact of their own efforts.³⁵⁸ Continued uncertainty as to the appropriate limits of judge-legislator interaction undoubtedly hampers interbranch exchanges of information to some extent.³⁵⁹ Nevertheless, interbranch interaction has become so much the norm that key members of Congress and their staffs (at least those whose committee jurisdiction affects the judiciary) routinely expect it, welcome it, and do not regard the flow of information they receive from the judiciary as deficient.³⁶⁰

As argued in Part III, the problem for the future is not that judges will fail to communicate with Congress. The problem is that they may communicate too much or in such a way as to appear self-interested to a Congress and public predisposed to second-guess the motives of government officials in the aftermath of Watergate, thereby fueling the arguments of Professor Christopher Smith and others that the judiciary should no longer be trusted as a legislative advisor.³⁶¹

Professor Smith's proposal, that Congress rely more heavily on the views of other participants in the legislative process, parallels re-

³⁵⁸ In a recent article, Judge Tacha acknowledges that "much progress has been made" toward opening channels of communication between judges and legislators in the past decade but warns that "nurturing of this ever-changing relationship requires vigilance." Deanell Reece Tacha, *Judges and Legislators: Enhancing the Relationship*, 44 *Am. U. L. Rev.* 1537, 1551 (1995).

³⁵⁹ See *supra* note 17 and accompanying text.

³⁶⁰ See A. Fletcher Mangum, *Federal Judicial Ctr., Conference on Assessing the Effects of Legislation on the Workload of the Courts* 27 (1995) (quoting Circuit Judge Randall Rader, former chief minority counsel for the Senate Judiciary Committee's Subcommittee on Patents, Trademarks and Copyrights, as saying "[t]here is not a grievous communication gap between the branches"); Biden Speaks on Agenda for Federal Courts, *The Third Branch* (Admin. Office of the U.S. Courts), May 1993, at 1, 1-2 (quoting Senate Judiciary Committee Chairman Joseph Biden as saying: "[m]y job is to provide you with all the resources you need in order to do the job that we can conclude on a principled basis must be done Your job . . . is to help us decide and give us your input on what those principles are that should guide us"); Hollings Discusses Appropriations Work, *The Third Branch* (Admin. Office of the U.S. Courts), Feb. 1994, at 1, 10 (quoting Senator Ernest Hollings, Chairman of Senate Committee on Appropriations, Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, as answering question "Do you and your subcommittee have sufficient communications from the judicial branch?" by saying, "[a]bsolutely. Members of our subcommittee certainly receive many contacts and communications from judges. . . . We value these discussions. We do not operate in a vacuum."); Senator Grassley Discusses Agenda, *The Third Branch* (Admin. Office of the U.S. Courts), Sept. 1995, at 1, 11 (quoting Senator Charles Grassley, Chairman of the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts as saying that "mutual communication is a necessity," that he had "a responsibility to seek out information and answers from members of the Judiciary," and that "judges have a responsibility to come to Congress with their input on issues affecting the Judiciary"); see also *supra* notes 277-78 and accompanying text.

³⁶¹ See *supra* notes 236-40 and accompanying text.

cent efforts to enhance public confidence in the rulemaking process by increasing nonjudge membership on rules committees and opening committee meetings to the public.³⁶² While there is nothing objectionable about increasing opportunities for interested organizations to participate in the legislative process, Professor Smith's suggestion that Congress discontinue its longstanding deference to Judicial Conference positions on statutory reform is less a solution than a manifestation of the problem. The interactive paradigm is born of the view that it is proper for the judiciary to influence the course of statutory reform, now more than ever, as Congress responds to escalating demands for legislative fixes to social problems by creating new causes of action in the federal courts. The judiciary will remain an influential voice in statutory reform, however, only as long as it possesses a reputation for competence and credibility that engenders congressional trust and deference. If Professor Smith's recommendation is followed and the judiciary is stripped of that reputation, it would deprive the judiciary of its principal lobbying asset and thereby diminish dramatically the significance of the judiciary's role in statutory reform relative to other lobbyists who can exploit the constituent and financial resources the judiciary lacks.

If one accepts the essential tenets of the interactive paradigm, the business of reform logically begins not by attacking the credibility of the judiciary but by protecting it. The judiciary's credibility is put on the chopping block whenever it is forced into a high-profile confrontation with Congress over an issue with respect to which the judiciary's position is consistent with its institutional self-interest. Various conflict-avoidance mechanisms have averted such confrontations on an ad hoc basis, and that may have been sufficient when interbranch interaction was itself ad hoc. But as interbranch interaction has become an institutional norm, the opportunities for confrontation have proliferated to the point where ad hoc avoidance mechanisms are inherently inadequate. To address an institutional problem, we must seek an institutional solution.

The Interbranch Commission on Law Reform and the Judiciary offers such a solution. The Commission would create a new avenue for judge-legislator communication, thereby furthering the cause advanced by Coffin, Katzmman, and Tacha. At the same time, the Commission would address Smith's concerns that Congress is too quick to accept proposals offered by a markedly self-interested judiciary by creating a forum in which such proposals could be evaluated expertly and dispassionately.

³⁶² See *supra* note 122 and accompanying text.

2. *Rulemaking Reform Proposals*

Commentators have criticized the frequency with which Congress has involved itself in procedural rulemaking in recent years.³⁶³ Consistent with the changing role of the judiciary in rulemaking as I have described it in this Article, the 1973 Rules of Evidence episode underscored the impact of procedural rules on the enforcement of substantive rights to a Congress and public increasingly reluctant to accept governmental decisionmakers at their word.³⁶⁴ Politicization of the rulemaking process, as evidenced by a heightened level of congressional activity, was an inevitable consequence of the new skepticism. Precipitous judicial rulemaking—a central concern to other commentators³⁶⁵—is a byproduct of politicization, as the judiciary becomes more responsive to outside calls for reform as a means to ward off congressional intervention.³⁶⁶ The proliferation of congressionally generated, subject-matter-specific procedural rules, yet another concern raised by still other commentators, follows naturally from the conflation of substance and procedure that accompanied politicization of the rulemaking process.³⁶⁷

In sum, the varied criticisms of the judiciary's role in the rulemaking process have a common origin with each other and with companion criticisms of the judiciary's role in statutory reform. In both contexts, the judiciary's lawmaking activities have become a more visible part of the political process, and with increased visibility has come heightened public and congressional skepticism, intervention, and criticism. Despite the fact that rulemaking and legislative lobbying are related means by which the judiciary influences law reform, commentators have tended to treat the two as utterly separate and distinct. This is to some extent understandable, in that when the judiciary is acting as a rulemaker, it has more the look and feel of an administrative agency than a private lobbyist. That has led some scholars, including Professor Laurens Walker, to borrow from administrative law in search of solutions to the judiciary's rulemaking woes.³⁶⁸

³⁶³ See *supra* note 7.

³⁶⁴ See *supra* notes 116-22 and accompanying text.

³⁶⁵ See *supra* note 9.

³⁶⁶ See, e.g., 23 Wright & Graham, *supra* note 128, § 5381.1 (Supp. 1996) (describing haste with which Judicial Conference promulgated Federal Rule of Evidence 412 to avoid congressional intercession); Mullenix, *supra* note 7, at 855-56 (predicting that Judicial Conference Rules Committee will be under increased pressure to promulgate rules to avoid congressional involvement).

³⁶⁷ See Marcus, *supra* note 4, at 779 (linking retreat from transsubstantive rulemaking to new focus on "winners and losers" in more politicized rulemaking process).

³⁶⁸ See Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 Geo. Wash. L. Rev. 455, 464 (1993) (drawing analogy between procedural and administra-

Professor Walker shares my concern that the "furor" over recent rule changes "threatens judicial control of civil rulemaking," and worries that "the expertise of federal judges may be lost as a major asset in this process."³⁶⁹ From Professor Walker's perspective, the problem originated with the "vast discretion" exercised by the rulemakers.³⁷⁰ He argues that the Advisory Committee is at liberty to promulgate rules as it sees fit, and it has done so incrementally without first considering all affected interests or the full range of available alternatives.³⁷¹

Professor Walker argues that in the 1970s a similar problem confronted administrative agencies, which had come under attack as serving "not the public interest but self-interests deeply entangled with narrow private interests."³⁷² In an effort to overcome this challenge to their credibility, notes Walker, agencies gradually changed their approach to rulemaking from an unstructured, piecemeal "incrementalist" model to a structured, systematic "comprehensive rationality model" that culminated in an Executive Order.³⁷³

Professor Walker recommends that this Executive Order be adapted for use by the judiciary in procedural rulemaking, so as to require the Judicial Conference to consider the systemic impact of its rules by gathering sufficient information, weighing costs and benefits, and considering available alternatives to the ultimate end of maximizing social utility.³⁷⁴ A logical extension of this proposal, which Walker advances separately, is that the Judicial Conference should ordinarily develop empirical support for proposed rules before adopting them.³⁷⁵ The net benefits, concludes Professor Walker, would be to clarify the unique role of the Rules Advisory Committee in rulemaking and to enhance "general satisfaction" with the rulemaking process, to the ultimate ends of "discourag[ing] participation by both the legislative and

tive rulemaking); see also Burbank, *supra* note 85, at 1193 (observing that "would-be reformers have followed, often without acknowledging it, the path of administrative law," and that in light of "the aptness of the analogy . . . explicit attention to the similarities of, as well as the differences between, the two contexts may well be useful if there is to be further reform" (footnotes omitted)).

³⁶⁹ Walker, *supra* note 368, at 459.

³⁷⁰ *Id.* at 462-63.

³⁷¹ See *id.* at 477.

³⁷² *Id.* at 472 (quoting Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 *Yale L.J.* 1487, 1496-97 (1983)).

³⁷³ *Id.* at 473-76 (discussing Executive Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988)). In his discussion of recent developments in administrative law, Professor Walker relies heavily on the work of Professor Colin Diver. See generally Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 *Harv. L. Rev.* 393 (1981) (presenting an alternate way of evaluating agency decisionmaking).

³⁷⁴ See Walker, *supra* note 368, at 480-81.

³⁷⁵ See Walker, *supra* note 9, at 572.

executive branches in rulemaking and preserv[ing] judicial primacy."³⁷⁶

Professor Walker seeks to achieve "general satisfaction," i.e., consensus, on rule reform proposals by enhancing the quality of, and hence public confidence in, the rulemaking process and product. To the extent that Congress responds to interest group pressure for legislative intercession because of a perception that the Rules Committee has not formally considered available options or weighed relevant costs and benefits, Professor Walker's proposal could make a difference. By restructuring Judicial Conference Rules Advisory Committee deliberations to ensure that relevant options and interests are explicitly considered, his proposal creates new opportunities for consensus building within the rulemaking process itself that could reduce the need for recourse to (and confrontations with) Congress.

Professor Walker may overstate the extent to which the Rules Committee fails to consider a range of alternatives and interests in the current rulemaking process,³⁷⁷ but that does not necessarily detract from the value of his proposal to the extent that it would dispel the *perception* that the rulemakers are neither thorough enough nor sufficiently willing to consider alternatives.³⁷⁸ His proposal is also subject to the criticism that it will make the rulemaking process more cumbersome and time consuming.³⁷⁹ To a certain extent, that may be a good thing, given what some regard as the precipitous pace of rule reform in recent years.³⁸⁰ More to the point, however, one does not have to accept his proposal in every detail to accept the basic notion that the integrity of the rulemaking process would be improved if the Rules Committee was more explicitly attentive to the costs and benefits of proposed rules and their alternatives, and relied more heavily on empirical data.

³⁷⁶ See Walker, *supra* note 368, at 489.

³⁷⁷ See Carrington, *supra* note 85, at 2119-22 (describing Rules Committee's deliberations); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 *Am. U. L. Rev.* 1655, 1671-75 (1995) (describing seven stages of rule reform).

³⁷⁸ See *supra* note 243. Moreover, Walker makes a good argument that, at least with respect to the recent discovery and disclosure rules, the Rules Committee did not proceed as systematically as it should have. See Walker, *supra* note 368, at 458-59; see also Burbank, *supra* note 9, at 844-46 (arguing that rulemaking is done in "virtual empirical vacuum").

³⁷⁹ See Thomas D. Rowe, Jr., *Repealing the Law of Unintended Consequences?* Comment on Walker (2), 23 *J. Legal Stud.* 615, 616-17 (1994) ("Not only would generating and assimilating data about likely effects of rule changes cost money and take time in itself . . . [but] requiring such efforts before proceeding with most amendments could also delay needed changes and impose a status quo bias that might even lead to efforts at bypassing a balky process by appeals to Congress.").

³⁸⁰ See Burbank, *supra* note 9, at 841-42 (calling for moratorium on rule reform "until such time as we know what we are doing").

The more fundamental problem with the Walker proposal, it seems to me, is its assumption that user groups and their legislative representatives will reassume their traditionally deferential posture toward judicial rulemaking if the judiciary does a better job of rulemaking. That assumption may hold true for user groups whose interests will be better accounted for in a more comprehensive rulemaking proceeding and who are satisfied with the results they achieve. But those who are not satisfied will be no less inclined to seek congressional redress under a new and improved rulemaking process than they were before. That is so because litigation user groups are troubled not only by the rulemaking product and process but also by the rulemaker. They are no longer willing to defer to judicial rulemakers, I have argued, because they read substantive implications into an increasingly broad array of "procedural" rules and do not trust what they regard as an elitist, unaccountable, and self-interested judiciary to protect their substantive rights in a rulemaking proceeding.

Perhaps the ultimate difficulty is that despite certain obvious similarities between the Judicial Conference and administrative agencies acting in their respective rulemaking capacities, there are also some fundamental differences. Agencies—even so-called "independent" agencies—are politically accountable in ways that the judiciary is not.³⁸¹ Unlike administrative agencies, the judiciary is an independent branch of government.³⁸² To preserve the independent status of the judiciary, judges serve for life,³⁸³ not for a term of years or at the pleasure of the President, as agency officials do.³⁸⁴ Whereas agency

³⁸¹ See Geoffrey P. Miller, *Independent Agencies*, in *Administrative Law Anthology* 282, 293 (Thomas O. Sargentich ed., 1994) ("[I]t is most definitely not the case that independent agencies are insulated from political pressures. The unanimous testimony of those who have served at the highest levels of such agencies is emphatically to the contrary.").

³⁸² See *id.* at 288 (arguing that characterizing agencies as "fourth branch" of government "cannot be reconciled with the written Constitution"); cf. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, in *Administrative Law Anthology*, *supra* note 381, at 300, 311 (arguing that agencies should be recognized as fourth branch of government, while conceding that to do so requires that we "give up the notion that [the Constitution] embodies a neat division of all government into three separate branches").

³⁸³ See U.S. Const. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

³⁸⁴ See Aman & Mayton, *supra* note 353, at 582-83 (explaining that whereas "cabinet level officers . . . serve at the pleasure of the President" and are "subject to unconditional Presidential removal powers," Congress has "often sought to insulate certain [independent agency] officials from the executive by granting them a term of years and conditioning their removal during that term on 'inefficiency, neglect of duty, or malfeasance in office'" (citation omitted)).

officials are nominated and confirmed in light of their aptitude for agency administration and can be discharged for mismanagement or less,³⁸⁵ judges are nominated and confirmed in light of their aptitude for judicial office with little or no regard to their administrative skills, and as a practical matter are removed only for criminal misconduct.³⁸⁶

In short, the judiciary is insulated from majoritarian/political influence to an extent that agencies are not. As long as the modification of substantive rights outside of the Constitution is viewed as a majoritarian/political concern, and procedural rules are thought to modify substantive rights, a politically insulated judiciary will remain an inherently suspect decisionmaker, and no amount of tinkering with the judiciary's decisionmaking process is going to convince a disaffected group or its elected representatives not to seek congressional intercession.³⁸⁷ Professor Mullenix therefore concludes that all is lost and urges us to run for our lives. "[T]he Visigoths are not at the gate, but the lobbyists are," she warns, which "may signal the last hurrah for Old Guard rulemaking."³⁸⁸ In the wake of "the current trend toward politicization of the rulemaking process," she predicts that "good questions worth debating"—such as who should make rules of procedure and how—"will be decided by default or politics."³⁸⁹

I hope that Professor Mullenix is too pessimistic. The judiciary's loss of influence in rule reform is not a direct or inevitable consequence of politicization per se. Rather, politicization creates an environment in which all participants, including the judiciary, are

³⁸⁵ See *id.* at 585.

³⁸⁶ See Emily Field Van Tassel, *Federal Judicial Ctr., Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992*, at 130 (1993) (listing seven judges removed from office following impeachment and conviction).

³⁸⁷ Professor Robert Bone makes a related argument. He argues that in no-stone-left-unturned rulemaking proceedings of the type Professor Walker recommends, well-heeled user groups will be able to influence the process by funding their own empirical research, while poorer groups will not. Bone concludes: "A group that does not have the financial resources to wield power before a committee dependent on access to empirical tests may decide to take its case directly to Congress. If enough groups choose this alternative, legislation could supplant court rulemaking as the preferred method of rule reform." Robert G. Bone, *The Empirical Turn in Procedural Rulemaking: Comment on Walker* (1), 23 *J. Legal Stud.* 595, 613 (1994).

Burbank also writes on this point:

Procedural safeguards are, to be sure, a useful antidote to overreaching Unless there is consensus about the limits of the rulemaking function, however, it is doubtful that all the procedural safeguards in the world will prevent controversy where it counts—in Congress—because the rulemakers' reaction to controversy in the lawmaking process will necessarily continue to be ad hoc.

Burbank, *supra* note 85, at 1195.

³⁸⁸ Mullenix, *supra* note 7, at 856.

³⁸⁹ *Id.*

perceived as self-interested political actors. That perception, in turn, gives legislators reason to devalue as unreliable the judiciary's primary asset in the lawmaking process—its expertise—which may precipitate a loss of influence *unless* legislators have some other reason to credit the judiciary's position.

To restore and preserve public confidence in the judiciary as rulemaker, then, what is needed is an external validation of the judiciary's rulemaking product, a buffering mechanism that could simultaneously allay concerns that judiciary-promulgated rules are self-serving and insulate the judiciary from political fallout when disappointed interest groups seek congressional review. Professor Carrington has made such a proposal, urging the creation of an organization, the "primary function" of which would be "to organize and orchestrate efforts to protect the rules in Congress."³⁹⁰ The organization Professor Carrington envisions would be comprised of a "couple dozen persons" who have a "substantial presence in the American Bar Association and other bar organizations."³⁹¹ Although the organization would "use its antennae to advise the rules committees if it appears that a particular proposal is likely to arouse overwhelming concern in Congress . . . [it] would not otherwise advise the rules committees on proposed changes," because the organization "would be less able to lend institutional support" if the Conference did not accept the organization's advice.³⁹²

As previously discussed, the judiciary has occasionally capitalized on the lobbying efforts of other organizations, such as the American Bar Association, to represent the judiciary's interests in Congress.³⁹³ The Carrington proposal is, in effect, an attempt to institutionalize this heretofore ad hoc relationship with a freestanding organization closely tied to the bar being substituted for the bar itself.

The American Bar Association has been an effective intermediary between courts and Congress for at least two reasons. First, it has been an independent voice validating Judicial Conference proposals for members of Congress who might otherwise be inclined to disregard the judiciary's positions as self-interested.³⁹⁴ Second, it has been a politically influential lobbying force with constituent and financial

³⁹⁰ Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 *Judicature* 161, 166 (1991).

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ See *supra* note 312 and accompanying text.

³⁹⁴ See *supra* note 286 and accompanying text.

resources that the judiciary lacks.³⁹⁵ The organization that Professor Carrington proposes, however, would have no independent voice, being duty bound to support proposed rules. Moreover, it could exert no useful political influence over and above that already exerted by the bar organizations to which the entity would be tied. If the bar enthusiastically supported or vigorously opposed a proposed rule, the bar's political clout would dwarf that of the new organization and render it superfluous. If, on the other hand, the bar was insufficiently concerned to take a position, the likelihood that the rule would be so controversial as to need the organization's political clout to secure congressional acquiescence would seem remote. Granted, the entity would still serve a monitoring function that the bar does not, but that is a function already being served by the Office of Legislative and Public Affairs within the Administrative Office of the United States Courts.³⁹⁶

A promising alternative is to expand the jurisdiction of the Inter-branch Commission on Law Reform and the Judiciary, discussed earlier, to include not only matters of statutory reform but rule reform as well. The net effect would be to restructure the entity Professor Carrington proposes as a tri-branch commission, rather than a lobby group, and to empower the commission to review rules proposals and make recommendations independent of the Judicial Conference. Consistent with the goal of preserving the primacy of the Judicial Conference in rule reform, I would limit the Commission's role to evaluating rules proposed by the Judicial Conference and suggesting the need for reform, without authorizing the Commission to develop significant rules proposals independent of the Judicial Conference. To the extent that the Commission favored a proposed rule, legislators skeptical of the judiciary's rulemaking motives would have independent validation of the proposals. To the extent that the Commission opposed a proposed rule, the judiciary would be put on notice that going forward with the rule as written could provoke a confrontation in Congress that the judiciary might or might not be willing to risk.

My proposal has at least two potential problems that Professor Carrington's does not. First, the Commission's power to disagree with the Judicial Conference could be interpreted as a *de facto* veto power that would undercut rather than reinforce the judiciary's rulemaking authority. To obviate this concern, the Commission's enabling statute could include a statement of purpose, undergirded by legislative his-

³⁹⁵ See Albert P. Melone, *Lawyers, Public Policy, and Interest Group Politics* *passim* (1977) (discussing nature and extent of American Bar Association influence in legislative process).

³⁹⁶ See *supra* text accompanying note 67.

tory, acknowledging that the judiciary should remain rulemaker of primary resort and that the Commission is being established in part to preserve public confidence in judicial rulemaking. Consistent with that purpose, the statute should direct the Commission to employ a deferential standard when assessing rules (as opposed to statutory) proposals.

A second potential problem with the proposed Commission is that it would be too cumbersome to be effective. In the case of rulemaking, Commission scrutiny would add a layer of review to an already time-consuming process.³⁹⁷ Such concerns, while understandable, are easy to overstate. Minor statutory and rule adjustments would not warrant Commission attention. Major rule revisions are years in the making,³⁹⁸ with opportunities built into the process for interested parties—such as the proposed Interbranch Commission—to familiarize themselves with pending proposals and communicate their positions to the Judicial Conference Rules Committee without causing additional delay.

The goal in reforming the rulemaking process should be to reorient existing rulemaking structures to accommodate the new judge-legislator relationship. Although I have focussed here on restructuring the role of the judge, any such effort necessarily will restructure the role of the legislator as well. The ultimate embodiment of the judge-legislator rulemaking relationship is the Rules Enabling Act, and that is where Professor Burbank sees the greatest opportunity for

³⁹⁷ In this respect it is arguably subject to the same concerns about delay as have been raised in response to Professor Walker's proposal that procedural rules ordinarily should receive an additional layer of empirical support before they are promulgated. See Rowe, *supra* note 379, at 616-17. A similar concern arises in the case of statutory reform, where the Commission might not be able to review proposals rapidly enough to be of service to Congress in the midst of a legislative session. Judge Tacha makes this point with respect to the judiciary's ability to respond to legislative reforms in a timely fashion, with the observation that "[o]ne of the most difficult impediments to effective interbranch communication is that the issues that are the most important to the judiciary are also those that Congress must respond to most rapidly." Tacha, *supra* note 358, at 1553-54. One must remember, however, that unlike the Judicial Conference, which votes on legislative proposals semiannually, the proposed Commission would have the flexibility to meet more regularly.

³⁹⁸ See McCabe, *supra* note 377, at 1671 (noting that enactment of rule takes two to three years at minimum). With respect to statutory reforms, the concern would not apply to the Commission in its proactive role as formulator of reform proposals (for it would always be ready to defend the measures it had developed). Rather, time constraints would become an issue only when the Commission sought to react to proposals offered by others. As a practical matter, most significant court reform proposals of the past decade have taken years to work their way from initial development to final passage, meaning that the Commission ordinarily would have ample time within which to act. That the occasional legislative proposal may still become law too quickly for the Commission to develop a position and communicate its views to Congress does not strike me as fatal to the proposal.

reform—with a “new treaty, the Rules Enabling Act of 1997.”³⁹⁹ Professor Burbank’s new treaty “contemplates that the branches will cooperate, with the judiciary taking the lead, in the formulation and promulgation of reforms that would necessarily and obviously affect substantive rights,” and makes a “national commitment” to research on civil justice.⁴⁰⁰

Professor Burbank’s proposal is a logical end point that would or could codify much of what I have proposed in this Article—including a fixed role for the Interbranch Commission. My primary concern is that 1997 may be too soon. For a “treaty” to be worth the paper it is written on, the parties must be tired of war, receptive to negotiation, and willing to abide by the terms of their agreement in letter and spirit. The 1988 Rules Enabling Act “treaty” failed in part because user groups and their congressional representatives had not yet tired of interbranch war and were unready to trust the judiciary to exercise the rulemaking authority contemplated by the 1988 amendments, even with added checks on the judiciary’s power. Congress and its interested constituents appear no more ready to trust the judiciary now. If the Act were amended today—consistent with Professor Burbank’s suggestions—but before other measures are implemented to restore public confidence in the judiciary’s rulemaking role, I fear that the new law would suffer the same fate as its 1988 predecessor: to be honored in letter, but not in spirit, meaning that Congress would not trust the judiciary to “take the lead” as the statute intended. The odyssey of rule reform might thus target 2001 as the better date for Rules Enabling Act reform, after the Interbranch Commission and other reforms have had an opportunity to allay prevailing skepticism and set the stage for meaningful and lasting reform.

CONCLUSION

Professor Lauren Robel recently observed that “[c]risis rhetoric is enduringly popular in the discussion of the court system,”⁴⁰¹ a trend that Professor Richard Marcus suspects may “reflect[] the difficulty of attracting attention to the dry problems of court procedure in the absence of a crisis.”⁴⁰² I have avoided crisis rhetoric in this Article, despite the implications for my readership. We do, however, have a problem on our hands, a potentially serious one. In the past generation there has been a transformation of the judiciary’s role in statutory

³⁹⁹ Burbank, *supra* note 306, at 5.

⁴⁰⁰ *Id.*

⁴⁰¹ Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 *Ohio St. J. on Disp. Resol.* 115, 115 (1991).

⁴⁰² Marcus, *supra* note 4, at 762.

reform and rulemaking in which interbranch interaction has replaced perceived isolation and delegated authority as a central feature. As this new, more interactive judiciary has moved into the limelight, it has become the target of post-Watergate skepticism that had previously been directed at the first and second branches alone. Whatever constitutional, statutory, and ethical constraints there are on extrajudicial interactions with Congress, they are dwarfed by the prudential constraint that the judiciary channel its interactions to minimize credibility-damaging skepticism that threatens the judiciary's continued effectiveness in the lawmaking process and ultimately its integrity in the courtroom. Consensus-building and buffering devices that the judiciary has used in the past to avoid high-profile, credibility-threatening showdowns with Congress and litigation user groups do not work as well now. Consensus is more difficult to achieve as court reform has become increasingly politicized, and buffering devices too often are unavailable or avoided.

Once it is understood that the challenges now confronting the judiciary in statutory reform and rulemaking are an outgrowth of a fundamental change in our understanding of the judiciary's role in lawmaking, it becomes clear that "one-trick pony" solutions inevitably will yield disappointing results. Each may address a corner of the larger problem, but none is going to be adequate by itself. As an exasperating consequence, every proposed "solution" to date—improve interbranch communication, make the process more open, insist upon an empirical foundation for proposed rules, impose a rulemaking moratorium, adopt a comprehensive rationality rulemaking model, create an independent lobby group or commission—has been advanced, rejected as inadequate, and another solution substituted, in seemingly perpetual recurrence.

Instead of evaluating each proposal in isolation, each should be analyzed in terms of its potential contribution to a larger package of reforms aimed at facilitating the transmission of judicial expertise to Congress with a minimum of interbranch friction. If new proposals are approached in this manner and modified to suit the needs of the package—rather than rejected outright because they do not constitute a panacea in and of themselves—we will have made real progress toward acclimating the judiciary to its new role in a new millennium.