BOOK REVIEWS

LESBIANS, LEGAL THEORY AND OTHER SUPERHEROES

SAPPHO GOES TO LAW SCHOOL. By Ruthann Robson. Columbia University Press 1998 (paper). Pp. xv, 320. $17.50.

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Why is Ruthann Robson always talking about lesbians?

A professor at the City University of New York School of Law, Robson is a prolific writer in multiple genres, all of which place lesbian lives at their heart.[1] It's not that she talks only about lesbians, or that lesbians occupy some exalted position in her legal cosmology. Rather, she situates lesbians, and lesbian issues at the center of every one of her works, including her most recent book of theoretical essays, *Sappho Goes to Law School*.[2]

At the same time, Robson leaves open the question of what "lesbian" itself means, and who can occupy that position. This is a difficult and challenging balancing act—to talk about and advocate for a sexual identity while insisting that what such an identity means remains fluid. Using the contributions of poststructuralist and postmodern theories of identity while

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1. Robson has written legal theory, novels, short stories, and political essays. Her fictional work (EYE OF A HURRICANE (1989), CECILE (1991), ANOTHER MOTHER (1995), *A/K/A* (1997)) mines similar issues—what it means to have moved from a working class childhood into a professional-class life, the experience of teenage prostitution, the challenges of lesbian motherhood, the power parents (particularly mothers) have over their lesbian children, how internal conflict can lead to destruction of oneself and others—through the perspective of lesbian life. Her theoretical work, in LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992), and in numerous law review articles, reorients issues familiar to lesbian and gay legal studies towards a lesbian worldview, for example in her analysis of how sodomy laws do or do not speak to lesbian sexuality.

2. RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY (1998) [hereinafter ROBSON, SAPPHO GOES TO LAW SCHOOL]. In this essay, we focus on Robson's theorizing around constructing a lesbian legal theory. *Sappho Goes to Law School* covers more material than that, however: the book contains chapters devoted to discussions of pedagogy and class difference in a lesbian context. Since this book is a collection of essays (or, as Robson terms them, "fragments"), not all the elements cohere into a single argument. Our emphasis on what we see as Robson's predominant goal—the fashioning of a lesbian legal theory—is not meant to imply that these more peripherally connected chapters are unimportant.

honoring the lived experience of lesbians in the United States, Robson forges a new kind of legal thinking: one that takes advantage of what Gayatri Spivak has called "strategic essentialism" for use in a "scrupulously delineated political interest,"[3] one that remains wary of the dangers of an essentialism that is either simply about strategy or too naive, and one that imbricates clear-eyed realism and a deep and enduring passion about the value of lesbian lives.

By putting lesbians at the center of legal theory and cultural critique more generally, Ruthann Robson opens up a world that might not otherwise be available to readers, lesbian or otherwise. For this reason, "legal theory" might be an oversimplification of what Robson does in *Sappho Goes to Law School.* Like any new paradigm, Robson's analysis is not "just theory."[4] Rather, Robson is performing a new way of imagining and acting in the world.[5] In all of Robson's work, and particularly in *Sappho Goes to Law School,* the theory itself is action: it does the work Robson proposes in imagining a lesbian-centered world by creating that world for us in her text.[6] That is not to say that Robson slights "theory." In fact, she emphasizes how crucial being able to theorize lesbians' place in contemporary culture and law is, and much of her work is deeply theoretical (that is, speculative rather than solution-oriented).[7] Instead, she *uses* "theory"—at

3. GAYATRI CHAKRAVORTY SPIVAK, *Subaltern Studies: Deconstructing Historiography, in* IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 197, 207 (1988) (citations ommited).

4. For a more complete (and originary) discussion of how paradigm shifts occur and what they mean, see THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d. ed. 1996).

5. *See generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.M. Urmson & Marina Sbisà eds., 2d. ed. 1975) (exploring the meanings of performative language as phrases that do, such as "I sentence you to 10 years in prison," in which the words perform an action, in contrast to words that simply describe).

6. This argument raises a number of issues. First, the debate over the relationship between theory and praxis is an old one, and has been resolved (or not resolved) differently in different fields. In *Sappho Goes to Law School,* Robson is, in a way, following Heidegger, who declared that "thinking acts insofar as it thinks." What is most interesting, though, is that Robson is writing out of, and creating an entente between, two quite different theoretical discourses, which have divergent relationships to "praxis": legal theory and poststructuralist philosophy. Traditional legal theory presupposes a transparent relationship with practice: law review articles customarily theorize about an issue in order to recommend policy decisions or judicial or legislative action. Poststructuralist theories have a much more attenuated relationship with praxis, particularly given Jacques Derrida's pronouncement that "there is nothing outside the text." JACQUES DERRIDA, OF GRAMMATOLOGY 158 (1976). Indeed, Judith Butler has argued that it is limiting to expect theory to have a necessarily dialectical relationship to a specific praxis; rather, theorizing has value in its very abstractness. Judith Butler, Address to the Lesbian and Gay Studies Group at Columbia University (Apr. 12, 1993).

7. This is, in fact, one of the things we find most valuable in Robson's work. Too often, legal theory assumes that it can only speculate on questions it believes it can answer, or lay out a problem that it believes can be solved. But Robson shows that theorizing without (and *beyond)* "the answer" is both intellectually and political important. Moreover, by posing questions that ordinarily aren't being asked, and formulating them in the context of lesbian lives, Robson is doing valuable *political* work.

this point such a contentious term that it may well be inadequate for her needs,[8] perhaps the reason she employs the term "theorizing" rather than "theory"—to mean imagining, naming, expanding our assumptions about the possible.

Throughout the text Robson defines and redefines "lesbian legal theory." Like lesbians, lesbian legal theory occupies a vexed site between the general and the particular: it is a theory in process rather than a finished product. Therefore, Robson muses, "[s]omewhere between the fragmentation of the unrelentingly particular and the imperialism of the totalizing universal is a place where I can speak a language that might be lesbian legal theory."[9] Central to lesbian legal theory is the power of imagination. Robson heroizes the lesbian as locus of the possible, the space in which we can re-imagine and reshape the legal and cultural terrain to make it more livable. Robson offers a bold challenge to legal theory: to grapple with the sometimes gorgeous, sometimes agonizing realities of lesbian life while envisaging a radically alternative reality. "Imaginings that do not take for granted a Supreme Court, or even a constitutional system, or even the 'rule of law'—these are the imaginings that are the real challenge of lesbian legal theory."[10]

Thus, Robson's desire to rethink legal theory from the bottom shapes the kind of reading her book requires: analyzing *Sappho Goes to Law School* topic by topic or chapter by chapter is at best counterproductive, and at worst, in direct opposition to Robson's stated project. For Robson, lesbian legal theory is a process, a methodology. *Sappho Goes to Law School* proposes systematic re-evaluation of legal assumptions, and its readers benefit most from this work by recognizing its focus on the abstract as much as the concrete in law. In the interplay (and gaps) between the terms "lesbian," "legal," and "theory," Robson expands the realm of the possible and explores the limits of the imaginable. We respect the ambition of this project, and out of this respect we frame our discussion of the text methodologically, and draw analogies to a similar project in the political arena, the New York Lesbian Avengers, in order to further examine the possibilities of Robson's lesbian-focused gestalt.

I.

In order to construct a lesbian legal theory, we need to understand what lesbian world views might look like, since those are the views from

8. For a variety of approaches to the debate over "theory," see Barbara Christian, *The Race for Theory* 14 FEMINIST STUDIES 67 (1988); JUDITH BUTLER, *Bodies That Matter, in* BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 27 (1993) [hereinafter BUTLER, *Bodies That Matter*]; Eve Kosofsky Sedgwick, *Paranoid Reading and Reparative Reading; Or, You're So Paranoid, You Probably Think This Introduction Is About You, in* NOVEL GAZING: READINGS IN QUEER FICTION 1 (Eve Kosofsky Sedgwick ed., 1998).

9. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 64.

10. *Id.* at 14.

which such theory will be generated. By entering into *Sappho Goes to Law School*, the reader takes on a new, lesbian-focused way of looking at the world. For lesbians, this can generate a vertiginous sense of power. After all, how often are lesbians the center of anyone's attention, even our own?[11] The nonlesbian reader must make substantial adjustments to her world view in order to even gain entrance into this text. If she is unable to place herself on the margins, and lesbians at the center, the book is unapproachable. Only as a partner in Robson's project of constructing a lesbian-focused theory can the reader fully comprehend the text in front of her.

Robson never announces that she is going to talk about lesbians, she just *does* it. Hence she can let "lesbian" mean any number of things, and do all kinds of work as a signifier of identity. In the opening essays of the volume, particularly *The Specter of a Lesbian Supreme Court Justice: Problems of Identity*, Robson works through what "lesbian" *can* mean. In one of the strongest analyses we have seen of the rewards and pitfalls of identity politics, Robson anatomizes the stakes behind subscribing to a purely constructivist view of identity. On the one hand, she is well aware of the appeal of postmodern theories of identity that reveal and represent the multiple and fragmentary nature of lesbian lives, rather than striving for a unitary, "correct" Procrustean bed of lesbian identity.[12] But she also recognizes that a lesbian legal theory is about *lesbians*, and that we know who we are even if we don't have a singular narrative for all of *what* we are. The problem with poststructuralist and postmodern accounts of identity is that they can erase what it means to be a lesbian in the world, or foreclose lesbians' being able to talk with some authority about our own lives. For

11. Rarely are lesbians even the sole subject of conversation or intellectual inquiry. Instead, the identity "lesbian" often gets subsumed into the phrase "lesbian and gay" (or "les-bi-gay," or "les-bi-gay-trans"). More importantly, even though lesbians are technically half (or a third or a quarter) of this formulation, lesbian-specific focus drops out of the equation; lesbians become simply exceptions to the rule, suffering more but not experiencing differently.

This is a striking change from the place of lesbians in progressive politics up to the early-to-mid 1980s, when lesbians were instead embraced by the term "women." The cottage industries of "women's music," "women's culture," "woman-centered religion," and the like were overwhelmingly produced by, aimed at, and consumed by lesbians. The radical feminist notion of the early 1970s that "lesbianism is the rage of all women condensed to the point of explosion" transmogrified into a consensus that "woman" spoke for and subsumed "lesbian." *See generally* RADICALESBIANS, THE WOMAN-IDENTIFIED WOMAN (1970), *republished in* RADICAL FEMINISM at 240-45 (Anne Koedt, Ellen Levine & Anita Rapone eds., 1973) [hereinafter RADICALESBIANS, THE WOMAN-IDENTIFIED WOMAN]. For a rich discussion of the development of "women's culture" and the place of lesbians within it, see ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967-75 (1989) [hereinafter ECHOLS, DARING TO BE BAD].

12. This is certainly not a new concern. Over the past twenty years, debate over what lesbian identity means and who it includes has been exciting and heated. With respect to the "lesbian sex wars," see, for example, PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole Vance ed., 2d ed. 1993); AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS (Robin Linden ed., 1982) [hereinafter AGAINST SADOMASOCHISM].

Robson, these theories can mean "a rejection not only of any (pre)determined connections between lesbians and politics, but also of any determinable connections between lesbian identity and anything else, except instability."[13]

Thus, rather than looking to epistemology for lesbian identity, Robson invokes a complex[14] kind of phenomenology that both incorporates epistemology and does not simply presume the authenticity of "experience,"[15] but that recognizes the interleavings of knowledge, feeling, ideology, affect, and mutuality—a perspective that owes a heavy debt to the work of feminists of color.[16] As Robson observes, "[l]esbian identity is something I have known, have felt, have recognized across a room and across years. It is the river lesbian theorist and poet Gloria Anzaldúa utilizes to describe identities: 'changing, yet perceptible, flowing . . . the weight of lesbian bodies, bodies in relation, in desire and sex.'"[17]

Robson shows us that if we can grasp the complexities of lesbian identity, we will have the key to understanding how identity works in U.S. culture more generally. As many of the feminist and sexuality theories of the past two decades (particularly those generated by white lesbians and women of color) have demonstrated, we cannot understand subordinated social status as singular or "pure."[18] For too long "woman" was assumed to mean white, straight, middle-class woman, and political and policy goals were set accordingly. However, even a cursory glance at the population of the United States reveals such a paradigm of womanhood to be at best pointless and at worst destructive. Necessarily, Robson acknowledges that lesbians exist at the interstices of a variety of other identities of race, class, ability, education, age, sexual practice, and national origin, to name but a few. But she subverts the ways in which progressive politics has constructed identity as (often) little more than a laundry list of substitutable

13. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 7.

14. This complexity may, in part, account for the diversity of topics the essays in *Sappho Goes to Law School* address, and the occasional disjointedness of the book itself. It is hard to come up with a methodology that can embrace a variety of issues without seeming to skip from one to another—a feeling that the reader gets from the final few essays in the book. However, Robson's focus and paradigm is a lesbian identity that is largely understood *through difference* and disjuncture.

15. For an important discussion of the ways culture constructs the ways in which we understand our experiences, see Joan Wallach Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773 (1991).

16. *See, e.g.*, GLORIA ANZALDÚA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA (1987) [hereinafter ANZALDÚA, BORDERLANDS]; THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 2d. ed. 1983) [hereinafter THIS BRIDGE CALLED MY BACK]; HOME GIRLS: A BLACK FEMINIST ANTHOLOGY (Barbara Smith ed.,1983); BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION (1992); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

17. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 13.

18. *See, e.g.*, ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS (1983); MAKING FACE, MAKING SOUL = HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY WOMEN OF COLOR (Gloria Anzaldúa ed., 1990).

attributes. For Robson, "lesbian" inevitably embraces the gamut of subjectivities; indeed "lesbian" encompasses the possibility of all other kinds of identities except for those that seem directly contradictory (and even then maybe not).[19]

This isn't a new idea. For example, in *Where Is Your Body?*, Mari Matsuda tells us to "ask the other question" in examining the ways in which the interrelations between oppressions function as a form of social control.[20] "When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where is the class interest in this?'"[21] Robson's work is clearly informed by the same political ethic as Matsuda's, but with a significant difference—Robson *doesn't* talk about any or all forms of identity, she chooses to concentrate on lesbians alone. Robson implicitly asks: if we can assume that all identities can potentially intersect (but *not* interchange), then why is it that political theorizing rarely, if ever, assumes a lesbian as its subject matter, or that lesbian identity is barely discussed at all? More importantly, why is it that lesbian concerns are considered so parochial and specific that they are usually represented as supplementary and illustrative, rather than constitutive of the paradigms by which we understand ourselves?

Robson's emphasis on lesbians and lesbian issues still raises two important questions: what is a lesbian and how do we define a lesbian issue? In partial answer to the first question, Robson melds essentialism and postmodernism to acknowledge both the power of the body in determining our sense of self, and the ways in which those selves are not experienced positivistically. On the one hand, lesbianism can be seen to have its ground in the body—the lesbian body that desires, that wants to find itself next to another female body.[22] But the body is not itself a knowable essence. Instead, the lesbian body is always *relational.* As Robson argues, "[i]n its

19. For example, heterosexual sex or sexual desire for men does not necessarily preclude women from being lesbians, particularly if that sex is part of a commercial rather than affectional relationship. *See, e.g.,* Judy Edelstein, *In the Massage Parlor, in* SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 62 (Frédérique Delacoste & Priscilla Alexander eds., 1987) [hereinafter SEX WORK]; Joan Nestle, *Lesbians and Prostitutes: A Historical Sisterhood, in* SEX WORK 231; JOHN D'EMILIO, *By Way of Introduction: Notes from One Gay Life, in* MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY xxiii (1992) (discussing the introduction of sex to his friendship with a lesbian and "what it meant for my gay identity or for Estelle's lesbian identity"). *See also* Maria Maggenti, *Falling for a Guy: A Lesbian Adventure,* THE VILLAGE VOICE, June 27, 1995, at 25.

20. MARI J. MATSUDA, WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 64-66 (1996).

21. *Id.* at 64-65. At the same time, we should also heed Catherine MacKinnon's articulation of feminism as embracing all women, however *privileged.* Catherine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?,* 4 YALE J.L. & FEMINISM 1, 13 (1991).

22. At the same time, although Robson does not refer to this argument, Judith Butler has constructed an important and compelling anti-essentialist account of the body itself,

grossest form, the decision whether or not one is a lesbian can be based on the gender of the person(s) one desires as sexual partner(s). That one's identity may not rest within one's self but rest outside one's self may mark lesbian identity (as well as all sexual identities) as ultimately postmodernist."[23] Robson notes that we cannot "know" lesbian sexuality like we "know" the Federal Rules of Civil Procedure: it is "a possible site of unity and specificity that does not privilege either: a site in which the recognition of lesbianism is possible without its idealized enforcement."[24]

Much of this definitional work depends on fuzziness, since so often clarity sacrifices recognizing the texture of lesbian lives. Few lesbians are what Robson, in a typical swatch of wit, names "but for" lesbians "who, 'but for' their lesbianism, are perfect."[25] As Robson observes, the "but for" lesbian has become a strategic necessity for the mainstream lesbian and gay legal rights movement in order to construct a plaintiff who does not threaten the heterosexual mainstream in her demand (or request?) for civil rights. The "but for" lesbian is squeaky-clean: the plaintiff must be able to prove that "but for" her lesbianism, there could be no imaginable reason that anyone would deny her anything, let alone the most crucial elements of her life and survival—housing, employment, custody of her children.[26]

This lesbian could possibly be a woman of color, but not a poor woman, and certainly not a woman on public assistance. This lesbian could not have a criminal record,[27] or a history of work in the sex industry; she could not be "too" masculine[28] or have any emotional or mental illness. This lesbian could not be rowdy or argumentative, a big drinker, or a "bad"

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positing that we cannot recognize our bodies outside of discourse, however "real" they seem. *See generally* BUTLER, *Bodies That Matter, supra* note 8.

23. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 52.

24. *Id.* at 69.

25. *Id.* at 30.

26. A good example of this phenomenon can be found by examining the "exemplary" status of the plaintiffs in the leading military discharge status. The immaculate behavior and outstanding character of the lesbian (or gay) servicemember is almost always emphasized in the cases in the "winning" cases. *See, e.g.*, Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994), *overruled sub nom.* Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996). *See generally* Steffen v. Aspin, 8 F.3d 57 (D.C. Cir. 1993); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 Yale L.J. 485 (1998).

27. Criminality is a sensitive issue for queer organizing, given the criminalization of homosexual sodomy upheld by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and the focus by the gay rights establishment on gaining "equality" through a discourse of normality. Criminality is by definition, non-normative. As Robson argues, "the theorizing of lesbians as criminal defendants may be incompatible with a political agenda of achieving equality. . . . Distance from criminality [for example, through the abolition of sodomy laws] is a necessary condition of equality." ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 30.

28. *Id.* at 36.

mother.[29] These elements would irreparably alter the constructed image of the "but for" lesbian—elements that litigators, fearing complicating the "real" issues in their civil rights cases, are likely to try to edit out from the start.[30]

And yet lesbians cannot be titrated into one pure elemental identity. We come in complex and indivisible compounds of any number of identities, and as a result, discussions, theories, litigation (even when we win) that require a "but for" lesbian for their success in fact do not necessarily have a meaningful impact on the lives of actual lesbians.[31] If the standard is the "but for" lesbian, then the majority of lesbians cannot qualify for whatever benefit its litigants gained for "the lesbian and gay community."[32] The obstacle to real success is that the law, as it has been developed in civil rights cases over the past sixty years, depends upon definitional strategies that require, in the language of *United States v. Carolene Products Co.*,[33] "discrete and insular minorities" that are instantly recognizable and immutable, knowable and containable. Lesbianism can be any or none of these things. Legal battles waged to "protect" lesbians have, in fact, misrepresented us: we have been forged into objects of the law rather than shapers of it. Thus, Robson does not define for us what a lesbian is, only what a lesbian can be, can do, to maintain her integrity within a legal system that cannot recognize her on her own terms.

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29. As Robson argues, "lesbians can only be mothers if we are very very good girls." *Id.* at 25.

30. In fact, given the reformist orientation of many agencies bringing such cases, the choice of the "but for" lesbian may not be just about expedience but also be a reflection of the attorneys' own fantasies of what constitutes the "perfect" lesbian.

31. Ironically, the converse can also occur. For example, in a groundbreaking decision recognizing gay male partnership for the purposes of housing succession in New York City, *Braschi v. Stahl Associates,* 543 N.E.2d 49, (N.Y. 1989), the court established as a matter of fact the existence of a family relationship cognizable in law. In support of this finding of fact, the court illustrated some ways in which the two men's lives has become intertwined. However, the court's efforts creatively to search for indicia of family connections has become calcified in subsequent implementation into dyadic relationships whose existence can only be proven by possession of certain (middle class) criteria from the list of illustrative factors cited by the *Braschi* court. *See, e.g.,* New York City Rent and Eviction Regulations, N.Y. COMP. R. & REGS. tit. 9, § 2204.6(d) (1999). For this reason, Robson critiques *Braschi,* seeing in it the normative power of law in "heterosexualizing" queer relationships. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 159-61. We would argue, though, that Robson is reacting against the ways in which the decision has been deployed, and in effect, re-written, rather than the ecumenical spirit in which the decision was originally drafted.

32. This friction between the utilitarian value of "good for the community" and the needs of actual lesbians, gay men, bisexuals, and transpeople, is longstanding and ongoing. A recent conflict between the Human Rights Campaign, a mainstream (one might even say right-of-center) lobby and policy agency and the rank-and-file of the queer political community neatly illustrates this point. *See, e.g.,* Alisa Solomon, *Good for the Gays?,* THE VILLAGE VOICE, Oct. 27, 1998, at 58; Edward Walsh, *Gay Rights Group Stirs Flap With D'Amato Nod, One Director Resigns over Board's Choice,* WASH. POST, Oct. 23, 1998, at A13.

33. 304 U.S. 144, 153 (1938).

This question of how lesbian identity can be recognized by the lesbian and others opens into the more material political question of what qualifies as a lesbian issue. In fact, this question is hardly original; lesbians have been grappling with these issues in comparable theoretical contexts over the course of the past thirty-five years. Defining a "lesbian issue" grew out of the radical feminist movements of the late 1960s that "articulated the earliest and most provocative critiques of the family, marriage, love, normative heterosexuality, and rape."[34] Lesbians had long been involved in radical political movements, from the demonstrations in support of Julius and Ethel Rosenberg to the Civil Rights activism of the 1960s, but not *as* lesbians (and not even identifying themselves as lesbians to their comrades in those movements).[35]

With the development of radical feminism, however, lesbians became increasingly visible, and lesbianism was discussed as a viable mode of women's liberation.[36] Radical lesbian groups motivated by charismatic leaders like Rita Mae Brown pushed lesbian liberation to the forefront of the radical agenda.[37] One early articulation of the goals that radical lesbian-feminism set out for itself, and the contradictions those aims generated, appears in the groundbreaking Radicalesbians pamphlet *The Woman-Identified Woman*, which was distributed at the 1970 Congress to Unite Women.[38] The pamphlet argued that the lesbian experienced the intensification of the oppression of women since "she has not been able to accept the limitations and oppression laid on her by the most basic role of society—the female role. . . . To the extent that she cannot expel the heavy socialization that goes with being female she can never truly find peace with herself."[39] Accordingly, lesbian issues were first and foremost *women's* issues: the policing work of femininity, the oppression of heterocentricity, and so on.[40] The pamphlet imagined lesbians at the vanguard of the

34. ECHOLS, DARING TO BE BAD, *supra* note 11, at 3-4.

35. For narratives that describe first-person involvements in some of these movements in the 1950s and early 1960s, see JOAN NESTLE, *This Huge Light of Yours, in* A RESTRICTED COUNTRY 49, 49-67 (1987); LORDE ZAMI, A NEW SPELLING OF MY NAME (1982). This is not to imply that lesbian work in radical movements started with the 1960s.

36. As Echols points out, "opponents of women's liberation were more apt to raise the issue of lesbianism than radical feminists" as a way to delegitimate the movement. ECHOLS, DARING TO BE BAD, *supra* note 11, at 210.

37. The most dramatic example of this was the "Lavender Menace" action, led by Brown, at the second Congress, to Unite Women in 1970. About forty lesbians, enraged at the exclusion of lesbianism from the Congress's agenda, stormed the stage and spent two hours discussing "what it was like to be a lesbian in a heterosexist culture," culminating in the Congress adopting four affirmatively pro-lesbian resolutions. *Id.* at 214-15.

38. *See generally* RADICALESBIANS, WOMAN-IDENTIFIED WOMAN, *supra* note 11.

39. *Id.*

40. As Echols shows, this was in part a defensive strategy on the part of lesbian activists:

Radicalesbians had to persuade feminists that lesbianism was not simply a bedroom issue and that lesbians were not male-identified 'bogeywomen' out to sexually exploit other women. They accomplished this by redefining lesbianism as a primarily political choice and by

movement, but The *Woman-Identified Woman* was written in the context of radical feminism, and was not offered as a specific lesbian agenda for lesbians. Of course, lesbians still faced a number of as-yet unpoliticized issues: mothering and child custody, police harassment in and raids on lesbian bars, and subjection to arrest for cross-dressing, to name a few.[41]

The growth of lesbian-feminism in the 1970s had two effects. First was the theory that all women, absent heteropatriarchy, were potentially lesbians.[42] Second was the development and articulation of specific "lesbian issues" beyond just legitimation by and inclusion in the radical feminist agenda. One element of this definition was lesbian separatism: whatever the lesbian agenda, it could only be achieved by lesbians working in solely lesbian groups. Too often, though, separatism demanded that lesbians exclude any issue as "lesbian" that applied as much, or more, to straight women, even if it affected some lesbians.[43]

An ongoing legacy of the separatism some radical lesbian-feminists designed was the development of what Echols terms "cultural feminism": the belief that women are fundamentally different from men and that feminism should focus on creating a "women's culture" outside the mainstream.[44] In her 1973 collection of essays *The Lesbian Nation,* Jill Johnston imagined lesbians as constituting an imaginary radical state, and invoked "the return

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locating the discourse within the already established feminist framework of separatism. . . . Moreover, they suggested that far from being male-identified, lesbians, by virtue of their distance from contaminating maleness, were actually more likely to be woman-identified than heterosexual women.

ECHOLS, DARING TO BE BAD, *supra* note 11, at 216. Moreover, Radicalesbians offered an incisive analysis of the power of lesbian-baiting over women who claimed any kind of independence from male power. As they stated, "as long as the label 'dyke' can be used to frighten women into a less militant stand, keep her separate from her sisters, keep her from giving primacy to anything other than men and family—then to that extent she is controlled by the male culture." RADICALESBIANS, WOMAN-IDENTIFIED WOMAN, *supra* note 11.

41. *See, e.g.,* LESLIE FEINBERG, STONE BUTCH BLUES 135-47 (1993) (describing the contrast between Jess's oppression as a butch in working-class culture and her lover Theresa's growing involvement with lesbian-feminism and eventual rejection of her femme role). Many of these issues were later taken up a wide variety of political groups, from liberal feminists in NOW to gay men opposing police harassment, to direct action organizations including the Lesbian Avengers.

42. An eloquent and powerfully influential expression of this argument is Adrienne Rich's *Compulsory Heterosexuality and Lesbian Existence,* which coined the phrase "lesbian continuum" to link Chinese marriage resisters, African female sodalities, European women burned as witches, and nineteenth century "romantic friends" to self-conscious lesbian identity. All of these women resisted "compulsory heterosexuality" through creating primary emotional relationship with other women. ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence, in* BLOOD, BREAD AND POETRY: SELECTED PROSE 1978-1985 23 (1986).

43. *See, e.g.,* JULIA PENELOPE STANLEY, *Notes on the Edge, in* WIN, June 26, 1975, at 9 ("Only a lesbian can have no stake in the social system. . . . Straight women, even those who call themselves 'feminists,' are still tied to men and dependent on their tolerance and goodwill, which is why they cling to issues like equal pay and birth control. A woman who has no vested interest in men wouldn't bother.")

44. *Id.*

to the harmony of statehood and biology through the remembered majesty of women."[45] "Lesbian issues" were therefore defined as building institutions for women in general and lesbians in particular—bookstores, record labels, music festivals, health clinics, and the like.[46] Lesbians retreated into a theory of female superiority as a way to understand how they might construct a non-patriarchal, non-hierarchic world. Too often, however, the ideals of cultural feminism, already hobbled by its insistence on biologically essential gender difference, calcified into policy. Not only were issues defined as lesbian, but lesbian feminists were expected to conform to a set of beliefs about those issues, particularly in terms of sexuality. By the mid-1980s, cultural feminism was dislodged as the dominant voice in lesbian-feminist politics, replaced by a more fluid and contradictory set of understandings of lesbian lives motivated in part by the "sex wars,"[47] debates about race and racism within feminism,[48] and in part by the ascendance of poststructuralist and postmodern theories of identity.[49]

In adopting the language and perspective of postmodernist theory, Robson rejects the tenets of cultural feminism even though, ironically, she shares many of its goals. Robson's formulations of lesbian identity and lesbian issues are heirs to these series of lesbian and feminist movements that struggled to define what it meant to be a lesbian within the context of a progressive feminist critique. While the book rarely if ever explicitly refers to this legacy,[50] *Sappho Goes to Law School* is implicitly in conversation with and in reaction to the radical and cultural lesbian-feminisms that preceded the text. Thus the text is embedded in the political heritage of this movement.

Although Robson engages in a project drenched in lesbian consciousness, she is averse to limiting lesbian identity or lesbian issues to prescribed

45. JILL JOHNSTON, *Tarzana From the Tree at Cocktails, in* LESBIAN NATION: THE FEMINIST SOLUTION 15 (1973).

46. *See* ECHOLS, DARING TO BE BAD, *supra* note 11, at 269-81.

47. *See generally* LISA DUGGAN & NAN D. HUNTER, SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE (1995). For samples of the debates that constituted the sex wars, and a discussion thereof, see generally PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 2d ed. 1993); AGAINST SADOMASOCHISM, *supra* note 12.

48. *See, e.g.*, ANZALDÚA, THIS BRIDGE CALLED MY BACK, *supra* note 16.

49. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); DENISE RILEY, "AM I THAT NAME?": FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY (1988).

50. An important exception to this is the conclusion of Robson's essay *Reflections and Taxonomies: The Feminist Jurisprudence Question.* Robson engages in a rare display of reminiscence in which she remembers "participating in extended and complicated discussions among my fellow students about differences between what we called 'reform'and 'revolution.' . . . [T]he larger division—and the one that caused the most heated of our arguments—was the degree and rate of change we believed was necessary to achieve what we called 'liberation.'" ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 86. This kind of discussion is, of course, characteristic of the political debates that have surrounded radical politics and that were typical of the "New Left" in the late 1960s and of radical feminism in the 1970s.

formulae of cultural feminist dogma. Rather, the "lesbian issue" is almost unknowable in its multivalent complexities. In fact, in this postmodern world, the glib answer to the question "what is a lesbian issue?" might well be "every issue," since we can agree that lesbians can be anyone (except perhaps men, and even then, the long history of transgender and passing women suggests the permeability of even that apparently insurmountable barrier of biological sex[51]). But Robson wants to complicate the easy answer. If thinking through lesbian identity can expand, deepen, and enrich our understanding of identity more generally, how can exploring legal questions as *lesbian issues* enhance our sense of how we might construct legal arguments and legal theories more intelligently and sensitively? Indeed, perhaps asking "what is a lesbian issue" is the wrong way to go about things. Perhaps we should be asking, "how can focusing on lesbian realities help us fully understand this issue?"

II.

Robson's theories of lesbian identity undergird her notion of what is possible in constructing a lesbian legal theory. In many ways, lesbians are an ideal group to theorize through, since our sense of self is constructed so starkly in protest to a cultural mandate that "it is not in the best interest of anyone to be a lesbian."[52] We have had to fashion identities for ourselves between the Scylla of invisibility and the Charybdis of prohibition (and, perhaps, the Sirens of "lesbian chic"). Unlike our heterosexual counterparts, lesbians do not have, from childhood on, access to the wealth and detail of cultural narrative to construct our understanding of our lives:[53] at the very least we have to shape, massage and even deform those well-worn

51. *See, e.g.,* San Francisco Lesbian & Gay History Project, *"She Even Chewed Tobacco": A Pictorial Narrative of Passing Women in America, in* HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 183 (Martin Bauml Duberman, Martha Vicinus, & George Chauncey, Jr. eds., 1989); LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL (1996); MINNIE BRUCE PRATT, S/HE (1995).

52. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 25. At least, given the difficulties imposed by homophobic culture, that would not be true if lesbians (or anyone) functioned purely as in what Richard Posner terms "rational actors." Robson herself, in her chapter *Neither Sexy nor Reasonable*, takes on Posner's rationalization for lesbianism. In *Sex and Reason,* Posner applies an economic methodology of valuation to sexual choices and variations. *See generally* RICHARD A. POSNER, SEX AND REASON (1992).

53. That is not to say that such narratives do not exist. As the work of anthropologists, historians, and archivists have shown, lesbians have always constructed our own (sub)cultures. For an ethnography examining lesbian and gay community constructions of family in San Francisco, see KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1991). For a groundbreaking longitudinal study of lesbian communities in Buffalo, New York, see ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY (1994). However, a lesbian must usually search for connection to and membership in these cultures, while she must resist the narratives of bourgeois heterosexuality that pretend to understand and explain her. For this reason, the Lesbian Herstory Archives, founded in New York City in 1973, was created to "gather and preserve records of Lesbian lives and activities so that future generations will have ready access to materials relevant to their lives. The process of

stories of development, maturation, family, romance, and community before we can recognize them as our own. *Sappho Goes to Law School* opens up the possibility of lesbians telling our own stories,[54] and building a polity that accords our narratives the dignity and wholeness that the current social world renders unthinkable.[55]

Lesbian legal theory is not just for lesbians, however. What is remarkable about Robson's work is the unspoken assumption that lesbian legal theory is a crucial set of strategies for anyone who is interested in rethinking how law works.[56] Robson poses a deceptively simple thesis: the defamiliarization of the mainstream by making lesbian lives the point of reference, the mode for the deconstruction of the master narrative of heteropatriarchy, without seeking recourse in essentialized gender. Certainly, the assumed verities of male and female, masculine and feminine, and the behaviors (social and sexual), family position, location in the workplace, economic worth, and a sense of belonging in public and private space that are articulated to and by gender are dislodged from their accustomed places and set into motion by the presence of the lesbian. In Robson's work, this presence is not contingent or accidental. Instead, here, the lesbian—usually invisible or at least subordinated—becomes an affirmative force for re-envisioning cultural dictates.

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gathering this material will also serve to uncover and collect our herstory denied to us previously by patriarchal historians in the interests of the culture which they serve." Lesbian Herstory Archives, *Statement of Purpose* (visited Jan. 28, 1999) <http://www.datalounge.net/network/pages/lha>.

54. However, Robson is careful to warn us about the false expectations we bring to telling and reading personal narratives, and the paradoxes inherent in narrative as a mode of explication. *See* "Beginning from (My) Experience: Lesbian Narratives," in ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 87-112.

55. Lesbians are considered irrelevant or boring when our lives are not superseded by the needs of heterosexuality, to the extent that lesbian writers are implicitly (or even explicitly) discouraged from writing lesbian protagonists. As Sarah Schulman observes of lesbian literature, "Lesbians are really the only remaining writers of American literature who do not appear in their own work." SARAH SCHULMAN, *A Modest Proposal, in* MY AMERICAN HISTORY: LESBIAN AND GAY LIFE DURING THE REAGAN BUSH YEARS 272, 275 (1994) [hereinafter SCHULMAN, MY AMERICAN HISTORY].

56. In some ways this project is analogous to Richard D. Mohr's in his essay "*Knights, Young Men, Boys": Masculine Worlds and Democratic Values, in* GAY IDEAS: OUTING AND OTHER CONTROVERSIES 129 (1992) [hereinafter MOHR, GAY IDEAS]. Mohr imagines an ideal liberal democracy as paradigmatically represented in the final act of Wagner's *Parsifal.* Mohr argues that the all-male world that ends the opera can be read as an environment of total equality that gay male culture also offers. *Id.* at 138. But Mohr is not interested in a radical re-evaluation of gay men's position in the legal system (or in what might happen to women in this scenario). Moreover, as his arguments against outing show, he is more concerned that the system give him his due as a middle class white man (Robson might say he is a "but for" gay man) than create a truly democratic world. *See generally The Outing Controversy: Privacy and Dignity in Gay Ethics, in* MOHR, GAY IDEAS, *supra*, at 11-48.

Such a project is particularly valuable in a legal context. Certainly, the courts have not been kind to lesbians as a class in any setting.[57] However, Robson is not arguing for an illusory "fairness" in treatment by the courts or legislature. She pushes our understanding of the law harder than that. Robson demonstrates that the legal system was constructed with lesbians absent, exiled, excised.[58] The standards by which the law judges us can do little more than take lesbians into account *ex post facto.* Since individual laws, and the legal system more generally, were not constructed by lesbians, or with lesbian interests in mind, the law inevitably does violence (either passive or active) to the ethical and metaphysical dimensions of lesbian life. After all, "even relatively benign legal categories without a history of violence, such as 'attorney in fact' or 'beneficiary' do violence to lesbians because they compress lesbian relationships into legal categories rather than lesbian ones."[59]

Although Robson challenges us to imagine a world without the rule of law, we (and she) cannot deny that that is not the world in which we live.[60] If we believe in the meaningfulness of law, we are caught in a paradox that lesbian legal theory might help us bear, even if we cannot resolve it. After all, the law (or juridical structures more generally) is the framework within which we understand ourselves. And yet, the law renders lesbians invisible, or, at best, manages to "make room" for us as addenda to a more "general" ruling.

This raises another, more pressing question. Why, then, create a lesbian legal theory in the first place? By looking to the law to understand the place and power of lesbian theorizing, are we not crashing a party to which we have not been invited and from which, if we attempt to enter, we are so often brutally ejected? Moreover, has not feminist jurisprudence covered much of the same material that lesbian legal theory claims as its purview?

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57. Commentators have suggested, for example, that lesbians may face harsher penalties than nonlesbians in the U.S. criminal justice system and may be disproportionately represented among women on death row. *See, e.g.,* Victoria A. Brownworth, *Dykes on Death Row,* THE ADVOCATE, June 16, 1992, at 62; Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice,* 75 TEX. L. REV. 1413 (1997). Similar observations regarding the unequal treatment of lesbians in civil courts have been made in a variety of settings, most notably in the area of family law. *See, e.g.,* Susan J. Becker, *Court-Created Boundaries Between Visible Lesbian Mother and Her Children,* 12 WIS. WOMEN'S L.J. 331 (1997); Gloria M. Custodio, *The Discourse of Discrimination: How Lesbian Mothers Are Judged in Child Custody Disputes,* 63 REV. JUR. U.P.R. 531 (1994).

58. For an analogous argument in terms of race, showing how the post-Enlightenment ideas of liberty and selfhood within a representative democracy required a population of enslaved Africans (and later segregated and subordinated African Americans) see generally TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1992); DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991).

59. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 21.

60. *Id.* at 13-14.

As Robson herself argues in her overview of the connections and disjunctures between feminist and lesbian legal theories, often the two can seem so similar as to be indistinguishable.[61] In fact, at conclusion of her chapter on the intersections between feminist jurisprudence and "les-bi-gay-trans legal scholarship," Robson herself asks, "what are the real differences between feminist jurisprudence and lesbian legal theory?"[62]

Her answer to this question is surprisingly opaque, but offers the reader an important insight into Robson's formulation of what lesbian legal theory can mean and do. First, she asserts that lesbian legal theory, if its practitioner does not pay attention to the real meanings of "lesbian," can be as homogenous or as expansive as any other kind of jurisprudence. Second, she questions the fears and reluctance legal scholars, even lesbians, have about aligning themselves with "solely" lesbian issues:

> it seems to me that much of the anxiety surrounding the positing of a lesbian legal theory (including my own anxiety) is the specter of the label *separatist.* To bear the badge of lesbian separatism is to be marked as reactionary, racist, and definitely retrograde. Yet I find it interesting that such anxieties are provoked whenever the term *lesbian* appears without partners or modifiers.[63]

Robson's commitment to lesbians seems in part generated by her resistance to those anxieties. She asserts that all theories "at their very best . . . 'open up the larger question,'" not just lesbian legal theory.[64] But *lesbian* legal theory, she implies, forces us to face our internalized self-doubt, our belief (created and maintained by the courts, the dominant family, schools, popular culture, and what have you) that lesbians are not worth talking about, are an embarrassment, or are a bunch of narrow, humorless separatists who could not have anything of any value to tell anyone. *Lesbian* legal theory is not only valuable to readers because of its unique perspective on cultural norms but is crucial because unless lesbians talk about our lives (whether as paradigms for theorizing, or at all) no one else will.

One construct that lesbian legal theory is particularly qualified to unpack is the "nonlegal mother" under the third party doctrine in child custody law. The law insists that every child can have only two legal parents, one mother and one father. Everyone else outside this dyad is a "third party," whose sanctioned relationship to the child is weaker than that of

61. At least, she says certain *kinds* of feminist jurisprudence and certain *kinds* of lesbian legal theory overlap. In fact, Robson's project is only concerned with the vector in which those two approaches to legal thought converge (and intersect with questions of race, class, and other possible systems of subordination within which lesbians live). *See id.* at 75-86.

62. *Id.* at 85.

63. *Id.* at 85.

64. *Id.* at 86.

the official parents.[65] Through an etiological interrogation of the cultural meanings of "third," Robson links the doctrine of the third party to the construction of lesbians as the "third sex," abjected from the biologically "natural" and socially sanctioned heterosexual dyad of one man partnered through law and custom with one woman. As Robson argues, "the notion of the third sex/sexual inversion rests upon a strict antipodal relation between gender identity and gender object choice as well as the assumption of heterosexual hegemony."[66] Although sexology and medical science have jettisoned the idea of the third sex, we still think of gender not just as binary but as *paired* and *opposite,* and "continue to deploy its underlying premise of paradigmatic heterosexuality."[67]

Robson builds a powerfully convincing argument that exposes how deeply the notion of the pathology of the third sex carries over to the delegitimation of the "third party" in child custody cases (with some crucial exceptions that still disadvantage lesbians).[68] By reading third party doctrine explicitly through a genealogy of representations of lesbians, Robson gets to the heart of what is wrong with child custody rulings. Her critique of the assumption that two is the magic number shows the limited terms under which lesbians can enter into the role of legal parent through second-parent adoption,[69] and how those terms are anti-progressive and, ironically, anti-lesbian. Lesbians must prove how closely they "satisfy the most traditional and stereotypical terms of the heterosexual marriage mandate: [their] relationship . . . must be long-term, committed, and monogamous."[70] Their relationship must be dyadic: if Heather cannot have a mommy and a daddy she may only have two mommies.[71] Moreover, "fitness" for second-

65. For a more thorough discussion of this doctrine, see NANCY POLIKOFF, *This Child Does Have Two Mothers: Redefining Parenthood to meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families,* 78 GEO. L.J. 459 (1990).

66. ROBSON, Sappho Goes to Law School, supra note 2, at 173.

67. *Id.* at 175.

68. The most poignant examples are those in which custody of children is taken away from their legal mothers and awarded to third parties such as grandparents as a condemnation of the mothers' lesbianism. *See, e.g.,* T.K.T. v. F.P.T., 716 So.2d 1235 (Ala. Civ. App. 1998); Knotts v. Knotts, 693 N.E.2d 962 (Ind. Ct. App. 1998); Bottoms v. Bottoms, 457 S.E.2d 102 (1995).

69. Under second-parent adoption, a parent can become the legal guardian of a child without the pre-existing guardian of the same sex having to give up parental rights. In second-parent adoption, the non-biological mother is no longer a third party. Such adoptions have been granted in several states, including Alaska, Illinois, Massachusetts, New York, and Vermont. *See generally* David E. Rovella, *Using Family Values to Expand Lesbian Rights,* NAT'L L.J., Aug. 25, 1997, at A7.

70. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 186.

71. Of course, the fact that Heather *does* have two mommies was itself a cause of controversy among educators in New York City, where Leslea Newman's book sparked debates over what, how, and whether schoolchildren should learn about homosexuality. *See* LESLEA NEWMAN, HEATHER HAS TWO MOMMIES (1989). For an account of the controversy, see Josh Barbanel, *Under the "Rainbow," a War: When Politics, Morals and Learning Mix,* N.Y. TIMES, Dec. 27, 1992, at B34.

parent adoption has, as Robson pointedly illustrates, been explicitly linked to economic wellbeing and class status.[72]

The connection between the discourse of the third sex and the doctrine of the third party means that only a tiny minority of lesbians have access to a relationship with children that mimics the privileges of heterosexuality. The majority of lesbians—single, in short-term or multiple relationships, socio-economically unstable or just working-class—are in fact disadvantaged further by the "advantages" a minute number of privileged lesbians have won for the "community."[73]

Robson's strength in this chapter is to interrogate and deconstruct the *raison d'etre* of lesbian and gay impact litigation: that is, winning high-profile cases with "perfect" plaintiffs is good for all of us. These cases, instead, maintain a homogenized vision of "community" that is *not* necessarily in the best interests of the majority of lesbians or, in fact, anyone.[74] Moreover, Robson is not afraid to poke at the sacred cow of contemporary mainstream lesbian politics and culture: the (long-term, monogamous, committed) lesbian couple. Just as she yokes together the discourse of the third sex and the doctrine of the third party through the reification (and deification) of the heterosexual matrix, Robson reveals the ideological duress on the diversity of lesbian lives imposed by the apotheosis of the lesbian couple.

In the chapter *The Codification of Lesbian Relationships: Examples from Law and Literature*, Robson works through the mythology of the supposedly utopian lesbian dyad. The "rules" of lesbian relationships that she

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72. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 186-87.

73. This again raises the specter of the "but for" lesbian. More importantly, these cases illustrate the ease with which factors descriptively approved of by one court's ruling (i.e., monogamy, financial security, middle class status) become interpreted as prescriptively necessary for future success by other litigants. This is similar to the process by which the *Braschi* findings became codified. *See* discussion *supra* note 31.

For an illustration of how glowing descriptions of lesbian litigants' professional achievements, normative relationship and financial security can ground a "successful" judicial opinion, see *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (permitting Massachusetts' first "second parent" adoption in a lesbian-headed family). This case provides a stark contrast with the language in *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. Ct. App. 1995) (denying a lesbian mother custody of her children, in favor of the children's heterosexual maternal grandmother) suggesting that the litigant's social and economic class factored into the court's determination that lesbian sexuality precluded satisfactory parenting.

74. This flattening of difference has been particularly noticeable in the debates over same-sex marriage. While disagreements have been open and heated, some proponents of gay marriage have suggested that opposing the fight for marriage is undemocratic and undermines the segment of the community that passionately supports it. This is usually phrased in the following terms: "If you don't want to get married, fine. But some people do, and no one should stand in their way, particularly since someone else's marriage doesn't harm you." From this position, opposition to gay marriage cannot be understood as a political stance that can strengthen the place of queer people in society. *See, e.g.*, Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* LESBIANS, GAY MEN, AND THE LAW (William B. Rubenstein ed., 1993). For further development of this debate, see SAME-SEX MARRIAGE, PRO AND CON: A READER (Andrew Sullivan ed., 1997).

skewers are so basic to the cultural assumptions (that lesbians must either accept and internalize, or consciously reject) of what it might mean to be a lesbian and to be happy, that reading the chapter is a profoundly defamiliarizing experience. All of these axioms—"lesbian relationships are mimetic of the myths of heterosexual marriage and romance"[75]; "lesbian relationships are apolitical"[76]; "lesbian relationships are sexually privatized"[77]; "lesbian relationships are definitional of lesbianism"[78]—reproduce some of the foundational concepts of post-industrial notions of the family as a "haven in a heartless world."[79]

The romance of lesbian relationships re-enacts a number of possibly contradictory but still co-existing ideas: that women's relationships are their whole lives; that sexuality belongs in the private not the public or commercial sphere; that the best relationships are sexually exclusive; that interpersonal relationships are free from ideological influence; that we all want to live "happily ever after." Robson enumerates the ways in which these axioms in fact police lesbians and limit the possibilities of lesbian relationships even as they make us feel safe and authentic if we ascribe to them. Representations of lesbian lives that do not fit this script seem "unrealistic" and relationships that do not fulfill these rules are "not serious."[80]

Robson's use of lesbian literature for some of her examples is instructive in this regard. It is a rare contemporary Anglo-American lesbian novel that does not focus in some important way on its protagonist's romantic

75. In order for lesbian relationships to seem and feel authentic and worthy of respect, Robson argues, they must embody (and broadcast) the assumed goals of heterosexual marriage: sexual exclusivity, the myth of the "soul mate," and longevity. ROBSON, SAPPHO GOES TO LAW SCHOOL, supra note 2, at 115.

76. Insofar as lesbian relationships are legitimated, they are understood as being about only love, desire, and companionship, not constructed around any politically conscious rejection of heterosexual norms or involvement in radical activism. In fact, Robson shows that any such involvement is explicitly punished when lesbians come into contact with the U.S. legal system. *Id.* at 119.

77. In response to the condemnatory representation of lesbianism as only or definingly sexual, so called "positive" images of lesbianism have been evacuated of lesbian content, since any suggestion of intimacy is by definition sexual. Thus TV's "Ellen" kissing her girlfriend was deemed so sexually explicit that the program required a parental advisory notice. Since all lesbian intimacy is representationally equivalent to explicit sex, it must be cordoned off to a private space. *Id.* at 123.

78. As Robson herself notes, this may not be a "rule" as such, but underlies the other axioms she identifies. That is, the subcategory "lesbian relationships" envelops and is seen to define the category "lesbian." *Id.* at 126.

79. *See generally* CHRISTOPHER Lasch, Haven in a Heartless World: The Family Besieged (1977).

80. Robson narrates a discussion she had with "a lesbian who ha[d] some power to insure the publication of her novel *Another Mother*, *supra* note 1. Her interlocutor insisted that Robson put the main character's girlfriend along with her at the center of the novel, rather than relegating her to the sidelines as a necessary but minor character. "'What you don't understand is that this is a serious lesbian novel, and serious lesbian novels are about relationships.'" Robson's insistence that "They don't have to be," is met with incomprehension by both this woman and the book's reviewers. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 128-29.

relationship(s).[81] This is not universally the case, nor has it always been so, particularly with the explosion of experimental lesbian novels in the 1970s.[82] But lesbian fiction generally takes for granted the salutary effects of commitment and coupledom. Robson finds a significant irony in this perception of consensus because, as she says, it seems to come "at a point in history at which we have an opportunity to expand our experimentation and multiplicitous attempts to construct lesbianism and our relationships."[83] It is not simply that we lose something when we fail to avail ourselves of potential creativity in representing our relationships in law and literature, Robson suggests, but that we (lesbians or not) cannot afford to ignore these possibilities.[84]

Some of the most intense pleasures of this text come from these kinds of moments, when Robson leans into speculation and invokes imagination rather than policy or litigation. Robson wants her readers to participate in a kind of limitlessness of possibility, and cut themselves loose from the strictures of pre-existing legal constructs. This, for her, is the promise of lesbian legal theory, and of theorizing more generally. The trajectory of theory is more than just a set of intellectual points—it can provide a map to alternative ways not just of thinking but of acting in the world.

This is the utopian promise of Robson's text. The very power of this vision, though, reveals the limits of trying to push theory beyond the realm of what is conceivable (let alone doable) within pre-existing systems. Despite being so imaginative, Robson's analysis has trouble being at all prescriptive. Several of the chapters work through crucial questions in lesbian legal theory, but there is a paucity of answers. This does not *have* to represent a deficiency in Robson's project; theory does not need to be programmatic to be valuable, since the laying out of a new paradigm can itself do important cultural work. Nonetheless, if Robson does not define her project in terms of outlining such a program, it's clear that someone has to. In order for the future to be different from the present theory must

81. This is true even in genres that do not take as their central concern the lesbian romance. For example, mystery and detective novels emerged at the end of the 1980s as the predominant popular genre of lesbian fiction. In these texts, the development of the protagonist's love life is as important as (and occasionally more important than) and parallel to the solving of the mystery. This is particularly noticeable in novels that form a series featuring a specific detective. *See, e.g.*, the series produced by Sarah Dreher, J.M. Redman, Sandra Scoppetone, and Kate Calloway. These can be usefully contrasted with the novels of Sara Paretsky and Sue Grafton. Both Paretsky and Grafton create believable, competent, and sympathetic female heroes, for whom romantic relationships are incidental rather than central to understanding the characters.

82. *See, e.g.*, JUNE ARNOLD, SISTER GIN (Feminist Press 1989); JOANNA RUSS, THE FEMALE MAN (1986); GILLIAN HANSCOMBE, BETWEEN FRIENDS (1982); JEANETTE WINTERSON, ORANGES ARE NOT THE ONLY FRUIT (1985); SARAH SCHULMAN, SHIMMER (1998).

83. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 130.

84. *Id.*

provide for the possibility of praxis. Critique of the *status quo* is worthwhile, but beyond critique Robson too often speaks longingly about what could be instead of formulating a programmatic legal system organized around the principles of lesbian legal theory.

The most striking example of this is in her treatment of lesbian family relationships. The very strictures that Robson wants to move beyond in fact frame the central chapters of the book. After laying out in the opening chapters the predicates for constructing a lesbian legal theory, she devotes four substantive chapters to exploring how lesbian legal theory understands different dimensions of lesbian relations, explicitly in the family context.[85] Thus, a fundamental critique that lesbian legal theory offers—that a lesbian is worth consideration in law in terms of more than her family relationships to others—is somehow undercut by the very attention that Robson pays to family issues. It is as though she were obeying the maxim of her lesbian publisher in paraphrase: "serious lesbian theory is always about relationships."[86] This is not necessarily a criticism; in order to critique the hegemony she has to name it. But it does suggest how very difficult it is to break out of the narrowness of the heterosexual matrix. Even as she affirms that lesbian space exists beyond our places in "the family," Robson provides few opportunities to see what that space might look like and how we might occupy it. Ironically, Robson's thorough analysis does more to pose rather than answer the difficult question, "what can reading issues as lesbian do?"

III.

This question is difficult to answer, but the lack of a definitive answer has not kept people from trying to engage in lesbian-centered political activism. Hence, we might move from examining theory to considering sites of explicit activism in order to gain a richer and more multilayered solution to this conundrum. Lesbian activists have expended a great deal of time and energy trying to define and address "lesbian issues." One of the most recent lesbian activist groups to grapple with this question was the Lesbian Avengers.[87] The Avengers were a direct action organization founded in

85. Robson deals with a variety of issues in the following chapters of *Sappho Goes to Law School*: Chapter 7, *The Codification of Lesbian Relationships: Examples from Law and Literature;* Chapter 8, *States of Marriage;* Chapter 9, *Resisting the Family: Repositioning Lesbians;* and Chapter 10, *The Third Sex, Third Parties, and Child Custody. Id.* at 113-95.

86. *See* discussion *supra* note 80.

87. The Avengers was founded in June 1992 by a group of lesbian activists who had previously been involved in variety of political movements from tenants' rights to AIDS. These women handed out thousands of cards at the 1992 Lesbian and Gay Pride March in New York that read "Lesbians! Dykes! Gay Women! We want revenge and we want it now." The Avengers chose as their logo a cartoon bomb with a lit fuse. *The Lesbian Avengers—Part One, in* SCHULMAN, MY AMERICAN HISTORY, *supra* note 55, at 279-80. The group was designed around direct action—that is, political activism that tries to accomplish long-term political goals through immediate, specifically targeted activities ranging from street demonstrations, disruptions, sit-ins, barrages of telephone calls and faxes to chosen targets,

New York in the mid-1990s; the original group generated numerous sister Avengers organizations throughout the country and in Europe (thirty-five by the end of 1994).[88] The Avengers operated out of a politics very similar in focus to Robson's: any woman was welcome in the group, but the actions the Avengers executed were lesbian-focused and devoted to "lesbian survival and visibility."[89] Like Robson, the Avengers take for granted a shared heritage of radical lesbian organizing and theorizing.[90] The Avengers designed actions that were lesbian-focused and lesbian-specific, even as the group acknowledged the multiplicity of lesbian identities and issues available to them. Just as Robson identifies part of the task of a lesbian legal theory as "mak[ing] the world of law an inviting one to Sappho" and "ensur[ing] that the law protects and nourishes Sappho rather than silencing, distorting, and appropriating her talents,"[91] the Avengers were dedicated to improving the lives of lesbians, as participants in direct action and as beneficiaries of whatever positive results that action might entail.

In their "handy guide to homemade revolution," *The Lesbian Avenger Handbook,* the New York Avengers[92] lay out an action-oriented agenda for

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vigils, and other ventures that can be assembled using the tools that participant have ready access to.

88. SALLY R. MUNT, HEROIC DESIRE: LESBIAN IDENTITY AND CULTURAL SPACE 109 (1998).

89. THE LESBIAN AVENGER HANDBOOK: A HANDY GUIDE TO HOMEMADE REVOLUTION 5 (Amy Parker & Ana Simo eds., 2d. ed., 1993); *excerpted in* SCHULMAN, MY AMERICAN HISTORY, *supra* note 55, at 290 [hereinafter AVENGER HANDBOOK].

90. While the Avengers were certainly inspired by the outrageousness of radical feminism (best exemplified in the 1968 New York Radical Women protest against the Miss America contest) see Carol Hanisch, *Two Letters From the Women's Liberation Movement, in* THE FEMINIST MEMOIR PROJECT: VOICES FROM WOMEN'S LIBERATION 197-202 (Rachel Blau DuPlessis & Ann Snitow eds., 1998) [hereinafter FEMINIST MEMOIR PROJECT] and cultural feminism's commitment to lesbian-focused politics, several of the lessons the Avengers learned from earlier movements were along the lines of what *not* to do. The idea (originally voiced by radicals such as Maxine Wolfe in the late 1970s but hardly heeded) that "we not repeat any strategy that had not worked before" was "heresy in the old/new left which fears change more than it fears stagnancy," but became gospel to the Avengers. SCHULMAN, MY AMERICAN HISTORY, *supra* note 55, at xvi; AVENGER HANDBOOK, *supra* note 89, at 5 (SCHULMAN, MY AMERICAN HISTORY, *supra* note 55, at 298). Similarly, the radical feminist focus on consciousness raising and ideological struggle for its own sake was specifically rejected by the *Avengers Handbook.* Avenger Handbook, *supra* note 89, at 21 (SCHULMAN, MY AMERICAN HISTORY, *supra* note 55, at 290).

Of course, the Avengers did not only learn from lesbian history. We cannot forget the importance of ACT-UP, WHAM!, and WAC for many Lesbian Avengers: all were organizations that relied on snappy visuals, appealing and direct slogans, and media savvy to communicate complex messages. *See generally* Louise Bernikow, *The New Activists: Fearless, Funny, Fighting Mad,* COSMOPOLITAN, April 1993, at 162. Moreover, involvement in ACT-UP taught previously politically active lesbians "to challenge the government directly" rather than assuming no one would bother to listen. SCHULMAN, MY AMERICAN HISTORY, *supra* note 55, at 217.

91. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at xv.

92. The *Avengers Handbook* was written and compiled by members of the New York organization primarily to assist new groups in forming. The *Avengers Handbook* did more than lay out the Avengers' philosophy. It also included templates for press releases, poster ideas for fundraisers, sticker graphics, and tips on compiling media resources, among other

lesbian advancement. One of the goals of the Avengers is "to identify and promote lesbian issues and perspectives while empowering lesbians to become experienced organizers who can participate in political rebellion."[93] Deftly negotiating the potential for disagreement over strategy and tactics, the *Handbook* acknowledges that the diversity of lesbian communities means that

> [a]s a direct action, activist group, the Lesbian Avengers is not for everybody, nor should it be. It is for women who want to be involved in activism, work in community, be creative, do shit-work, take responsibility on a regular basis, have their minds blown, change their opinions and share organizing skills. Other strategies are also valid but the Avengers' reason for existing is direct action.[94]

This philosophy was evident in the way the group operated. The New York Avengers organized dozens of actions, some with as few as five or six participants, some that attracted tens of thousands.[95] While we cannot describe all of these, a few events encapsulate the Avengers' ethos. Anatomizing these actions can help us understand the Lesbian Avengers' concept of what qualified as a lesbian issue, and the images, rhetorics, and responses that the group imagined clustered around specifically lesbian direct action.

The Avengers' first action, in September 1992, prefigured much of the future demonstrations the group would organize. The Avengers responded to the furious debate then going on in New York about the "Rainbow Curriculum"[96] by visiting a public elementary school in Middle Village, Queens, located in the school district that had put up the most opposition to implementing the new curriculum. The date chosen for the action was the first day of school. Flanked by a kilted marching band playing "We Are Family," about fifty Avengers, some wearing t-shirts emblazoned with the slogan "I Was A Lesbian Child," handed school children balloons that entreated kids to "Ask About Lesbian Lives."[97]

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useful information. The *Handbook* was designed to help new groups become fully independent and functioning. Many Lesbian Avengers groups began with the help of the handbook (and, we assume, subscribed to the Avengers philosophy outlined therein), and the New York group was often regarded as foundational. Although other Avengers. groups took on their own specific issues according to their needs, we are focusing on the New York Avengers because this group clearly articulated its goals in the *Handbook,* documented its activities most extensively, and is the group with which we have the most personal experience.

93. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at xv.

94. *Id.*

95. *See generally Lesbian Avengers Eat Fire Too: A Documentary of the First Year* (videotape by Janet Baus and Su Friedrich, 1993); SCHULMAN, MY AMERICAN HISTORY, *supra* note 55.

96. *See generally* William Tucker, *Revolt in Queens,* AM. SPECTATOR, Feb. 1993, at 26.

97. *See* Liz Willen, *"We Are Family," Lesbians Chant,* NEWSDAY, Sept. 10, 1992, at 6; Liz Willen, *Parents Fear Loss of Kids' Innocence,* NEWSDAY, Sept. 20, 1992, at 11. *See also*

As Sarah Schulman observes, "this action was emblematic of the stance that the Avengers were to take."[98] First of all, the action was both humorous and confrontational. The atmosphere was almost carnival-like, with the balloons and brass band. However, the Avengers were venturing into hostile territory as open and assertive lesbians. More importantly, they took on one of the enduring negative stereotypes about lesbians: that we "recruit" into our ranks by taking advantage of the young. In the planning stages of the action, this stereotype was never far from the surface, and caused long and heated debate.[99] However, in another characteristic move, rather than running from negative images of lesbians, the Avengers embraced this myth: Lesbian Avenger t-shirts featured the cartoon bomb on the front, and on the back the slogan "We Recruit."[100]

The Avengers were not satisfied simply by staring down homophobia and its representatives. Instead, they sought them out, latched onto them, and followed them around. Outraged by the passage by referendum of Colorado's notorious "Amendment 2" prohibiting civil rights protection based on sexual orientation,[101] different combinations of about six to sixteen Avengers tailed Wellington Webb, then Mayor of Denver, through the entirety of his two-day public relations visit to New York. Shouting slogans such as, "Boycott the Hate State!" and, "We're here! We're queer! We're not going skiing."[102] Avengers followed him into his hotel, into office buildings, and throughout the city, hijacking the media coverage Webb's staff had arranged.[103] In a particularly effective intervention, the Avengers crashed an interview Webb had granted the *Village Voice* in his hotel suite, "making his life difficult for the second consecutive day."[104]

Lesbian Avengers Communique #1: December 1992, in AVENGER HANDBOOK, *supra* note 89, at 45 [hereinafter *Communique #1*].

98. SCHULMAN, MY AMERICAN HISTORY, *supra* note 35, at 281.

99. *Id.* at 280-81.

100. The t-shirt was specifically inspired by the comments of Mary Cummins, chair of Queens School Board 24. At a hearing on the Rainbow Curriculum, Cummins screamed at a Lesbian Avenger who attempted to speak, "All you want to do is recruit!" Liz Willen, *More Rainbow Squalls; Meeting Explodes; Cummins Attacks,* NEWSDAY, Dec. 18, 1992, at 42; Liz Willen, *Gays Defeat Roadblock; Secure Permit for Queens March,* NEWSDAY, Apr. 14, 1993, at 6. This was later immortalized by the t-shirt slogan.

101. COLO. CONST. art. H, § 30b (1992), and later overturned in *Romer v. Evans,* 517 U.S. 620, 635 (1996).

102. A large coalition of lesbian and gay activists nationwide were organizing a "Boycott Colorado" movement in the wake of Amendment 2. *See* Anthony Scaduto, *Inside New York; Agita at Breakfast,* NEWSDAY, Dec. 8, 1992, at 13. For a more complete description of the Colorado boycott, see also James B. Meadow, *Colorado Endures Boycotts, Charges of Bigotry; Meetings, Conventions Canceled Their Plans to Voice Displeasure,* Denv. Rocky Mtn. News, May 21, 1996, at 21A; Chance Conner, *Colorado Takes Heat for Antigay Law,* NEWSDAY, Dec. 27, 1992, at 21.

103. Lesbian Avengers Eat Fire Too, *supra* note 95; *Communique #1, supra* note 97.

104. SCHULMAN, MY AMERICAN HISTORY, *supra* note 55, at 283.

Several elements link these and similar actions. First, the Avengers acutely understood the larger issues represented in seemingly small incidents. As Schulman points out, Avenger presence meant that "Webb was unable to discuss anything beyond Proposition 2." He was also forced to acknowledge that Amendment 2 was part of a nationwide strategy by the right.[105] In the same vein, the Queens schoolyard action connected adults' embarrassment over the presence of open lesbians in their midst with the devastating effects silence over sexual difference could have on all New Yorkers.

Second, both actions translated issues that had many facets into lesbian-specific moments. For example, Amendment 2 affected lesbians, gay men, bisexuals, and transgendered people in Colorado. But the Avengers' goal was to dramatize the importance of Amendment 2 to *lesbians,* to construct an action for lesbians, by lesbians, embodying a kind of lesbian aesthetic (whatever that might mean), and to give nonlesbians the opportunity to apply a lesbian issue to their own lives. The Avengers expected their audiences to practice a radical empathy with them by seeing lesbians as the standard and nonlesbians as important variations.[106]

Finally, both the visit to the Queens schoolyard and the hounding of Mayor Webb were open to anyone. The Avengers deployed several methods of publicizing upcoming events, ranging from elaborate phone trees to poster pasted on lamp-posts to word of mouth. Any lesbian who wanted to learn organizing skills was encouraged, but the actions themselves required no more of the majority of participants than showing up. As Sally Munt observes in her analysis of Avenger strategies, "[b]asing education in the praxis of an action ensures members feel enabled rather than judged inadequate by intellectual debate; it should forge solidarity between differences."[107] However, as the Avengers *Handbook* itself made clear,[108] these actions were not designed to appeal to the political or aesthetic tastes of all lesbians. They were unapologetically radical, vocal, outrageous, and lesbian.

In many ways, then, the rationales behind these actions are remarkably analogous to Ruthann Robson's purpose in attempting to limn a lesbian legal theory. The principles of connecting the micro and the macro issues, recognizing the effect that focusing on and empathizing with lesbians can

105. *Id.*

106. This ethos of empathy was particularly important in the work of the Lesbian Avengers Civil Rights Organizing Project ("LACROP"). First in Lewiston, Maine, and then more extensively in Idaho, Lesbian Avengers organized door-to-door advocacy against anti-gay initiatives that were on the ballot. Rather than avoiding direct mention of lesbians and gay men, as local organizers were inclined to do, Avengers spoke to people in person about the meaning of these initiatives for queer people in the area, and the need to empathize with them as queers. Sara Pursley, *With the Lesbian Avengers in Idaho: Gay Politics in the Heartland,* THE NATION, Jan. 23, 1995, at 3.

107. MUNT, *supra* note 88, at 116.

108. *See* text accompanying *supra* notes 87-94.

have for a larger political or theoretical movement, and understanding that theorizing must take all lesbians into account even as they may not be willing or able to participate in those conceptual processes or actions, powerfully link the abstract legal theory of *Sappho Goes to Law School* and the gritty, goal-oriented street politics of the Lesbian Avengers.

Even more striking are the ways in which Robson's critiques of the dominant discourse of lesbian relationships[109] dovetail with Avengers actions around lesbian romance and love. The Avengers' multilayered approach to heroizing lesbian love without reifying the monogamous couple is most fully exemplified by the "Valentine's Day Action," which took place in Bryant Park on February 14, 1993. Lesbian sculptor Dolores Departo created a statue of Alice B. Toklas to accompany the sculpture of Gertrude Stein that was a fixture in the park. The new sculpture was lovingly unveiled for an audience of about a hundred lesbians and others, followed by readings of erotic poetry by lesbian writers and a dramatic recitation of excerpts from Stein's sexually suggestive *Lifting Belly*. While this event could easily have devolved into a sentimental mimesis of the message of St. Valentine's Day—the superiority of coupledom—it was instead an anarchic celebration of lesbian sexualities that culminated in mass waltzing and simulated sex in the falling snow.[110] Gertrude Stein and Alice B. Toklas were invoked as foremothers but not "role models." The Lesbian Avengers both reclaimed the lesbian past and insisted on forging their own lesbian sexual present."[111]

The radical democracy of the Lesbian Avengers was one of its greatest strengths; however it could also be a liability. Since the success of actions depended most heavily on lesbian participation, every action required that at least a few Avengers commit to organizing it and others decided to attend. This dynamic served to highlight some of the differences in attention and interest within the group. Often lesbians' interests divided down lines of race, class, and education.[112] As a result, the Avengers had little trouble recognizing a wide variety of issues as "lesbian," but had a more difficult time getting other lesbians to invest politically or emotionally in those issues. Since the majority of Avengers were white, actions proposed by lesbians of color that spoke to specific ethnic communities frequently evinced minimal involvement by white Avengers.[113]

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109. *See* text accompanying *supra* notes 75-86.

110. This multiplicity of lesbian relationships was announced in the flyer for the event, which invited lesbians to "Celebrate and venerate: the glorious herstory of conventional romantic love! Politically incorrect domestic bliss! Butch genius! Forgotten femmes! Queer biddies at large! Lesbian odd couples/singles! And especially the union of Gertrude and Alice." AVENGER HANDBOOK, *supra* note 89, at 44.

111. Lesbians Avengers Eat Fire Too, *supra* note 95.

112. *See* MUNT, *supra* note 88, at 111.

113. A specific example of this was a series of actions that was organized around homophobic D.J.s at the Spanish-language radio station Mega-KQ.97.9 FM. The action was organized by experienced, long-time Avengers who were Latina and who had a great deal of

While this was by no means the sole cause of the New York Avengers' eventual decline, it does speak to the challenges, difficulties and rigors of enacting a lesbian praxis in the context of direct action politics. Just as Ruthann Robson finds herself enclosed by the same paradigm she wants to theorize beyond, the Lesbian Avengers were overly optimistic in imagining that its members could enter into lesbian-centered direct action with an ideological clean slate. Lesbians inevitably bring with them social and political expectations of their place in the world, whether explicit or unspoken.

Too often we judge progressive politics by its failures, building a culture of what Jo Freeman in the late 1960s presciently called "trashing."[114] A movement's or a theory's shortcomings become the focus of a critique rather than a way of more accurately understanding its goals and theorizing about how those goals can be achieved in a progressive agenda.[115] To this extent, it seems mean-spirited to fault Robson and the Avengers for imagining a world they could not possibly inhabit. So, rather than dwelling on the limits of their theories (which is *not* to say that we should not work to understand, learn from, and if possible not re-enact them) we might ask: what is the power of the lesbian political imagination?

IV.

The projects described in this essay have in common an insistence on the instrumentality of imagination. They demonstrate how crucial it is for lesbians to imagine a world that exceeds the bounds of the cultural space we now inhabit. Imagination is more than just daydreaming: it involves fashioning a set of identities that can move us through time and space more effectively than the selves to which we have access. To put it bluntly, we *need* lesbian heroes and the Lesbian Avengers and Ruthann Robson's lesbian legal theory go some of the way towards fulfilling that need.

As Sally Munt has argued, "[h]eroes offer a metaphor of the self in movement, change and process."[116] In her recent study *Heroic Desire: Lesbian Identity and Cultural Space,* Munt devotes a chapter to the lesbian

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respect in the group. See *Lesbians Strike Back at Hate Radio,* THE PROGRESSIVE, Jan. 1995, at 17, for an account of these actions. However, follow-up actions had less support among the group; many action organizers felt that white Avengers lost interest in the issue.

114. *See* ECHOLS, DARING TO BE BAD, *supra* note 11, at 67.

115. An early example of this is Marx and Engels' critique of Feuerbach in *The German Ideology. See* KARL MARX & FREDERICK ENGELS, THE GERMAN IDEOLOGY 60-68 (C.J. Arthur ed., 1970). More recently, this problematic was seen in the conflict between anti-pornography and sex-radical feminists. *See, e.g.,* AGAINST SADOMASOCHISM, *supra* note 12, at 4 (arguing that "lesbian sadomasochism is firmly rooted in patriarchal sexual ideology"). For a description of the feminist conflicts over sexuality erupting into pickets and demonstrations picketing at the 1982 Bamard Sexuality Conference, see Joan Nestle, *A Fem's Feminist History, in* FEMINIST MEMOIR PROJECT, *supra* note 90, at 338.

116. MUNT, *supra* note 88, at 2.

hero and how she can help us both recognize the heroism of living as lesbians in a homophobic world and make a meaningful liberationist theory out of the multiplicity of lesbian identities and lesbian issues. The figure of the lesbian hero provides space for

> the expression of an authentic personal history which is understood as experience and is loyal to the lesbian's own life trajectory and specific felt needs. However, it also provides a model of the self as a series of intersecting plates, so the ground of the self shifts and recombines with the intervention and chafing of other selves, which sculpt a new self based on intersubjectivity.[117]

The hero is not flawless nor perfect. The heroes of many cultures, including contemporary Anglo-American popular culture, are freaks of nature, mutants, neither human nor animal, neither male nor female.[118] Heroes occupy mythic narratives, but those narratives are necessarily connected to the world as we experience it. As Spencie Love has argued, myths are stories that are not historically accurate, but reflect our experience so well that they might as well be true.[119] Munt translates this into a lesbian context, asking "[d]oes it really matter whether it was a diesel dyke who threw the first punch at a police officer outside the Stonewall Bar, way back in the dawn of Lesbian and Gay Liberation, in 1969? The image is symbolic, and has important function as a *legend*."[120] It is crucial for lesbians that we see ourselves as playing an essential originary role in the Stonewall Riots, a historical moment most often identified with drag queens and gay men. Moreover, Munt argues, the lesbian in this legend is a diesel dyke: the most visible, most abjected lesbian identity.[121]

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117. *Id.*

118. Contemporary comic book superheroes are the clearest example of this in English-speaking culture. Older heroes like Spiderman, Batman, or Superman represent the merging of the human (or appearance of the human) with the extra-human: animal, extra-terrestrial, genetically mutated. Newer comics like the X-men series explore our cultural fascination with genetic mutation. For a discussion of the cultural meaning of comic books in the U.S., see M. THOMAS INGE, COMICS AS CULTURE (1990). For an analysis of the changeability of culture heroes in Native American creation narratives, see WILLIAM E. COFFER (KOI HOSH), SPIRITS OF THE SACRED MOUNTAINS: CREATION STORIES OF THE AMERICAN INDIANS (1978). For accounts of the hero as a mixture of human and animal or male and female in ancient Greek and Roman mythologies, see SIR JAMES GEORGE FRAZER, THE GOLDEN BOUGH: A STUDY OF MAGIC AND RELIGION (Penguin Books 1996); and OVID, METAMORPHOSES (A.D. Melville trans., Oxford Univ. Press 1987).

119. SPENCIE LOVE, ONE BLOOD: THE DEATH AND RESURRECTION OF CHARLES R. DREW 6-9 (1996).

120. MUNT, *supra* note 88, at 4.

121. The image of the butch as definitional of visible lesbian identity has undergone serious revision in recent years. The work of femme activists such as Amber Hollibaugh, Susie Bright, and Joan Nestle have expanded our understanding of lesbian heroics and femme commitment to lesbian identity and community. For an extended set of discussions of femme visibilities and politics, see THE PERSISTENT DESIRE: A FEMME-BUTCH READER (Joan Nestle ed., 1992).

Similarly, the Lesbian Avengers transform the "recruitment" of lesbians into a positive good. It is hardly coincidental that for the 1993 International Dyke March,[122] New York Avengers designed superhero costumes, complete with capes and shields. This was a conscious identification: the Avenger philosophy assumes that "we're the superheroes here."[123]

Ordinary lesbians dressed up in capes and shiny leotards are not actually superheroes. Nor, exactly, is the lesbian trying to negotiate her way through a hostile legal system.[124] The lesbian hero is magical, excessive, powerful, possible in a way that actual lesbians cannot presently be: rather than a Lesbian Avenger she is the archetypal Avenging Lesbian. By analogy, then, the everyday lesbian in *Sappho Goes to Law School* is not the hero, although she may perform elements of the heroic. Lesbian legal theory is *itself* the hero here—it "can provide an intricate statement of identity and struggle, and a fantasy of a whole, complex self."[125]

But Robson's heroic lesbian legal theory is not a comforting, gentle, nurturing "superwoman." Like all legendary heroes, lesbian legal theory is a warrior, and warriors must use violence to win justice.[126] Violence is a crucial element in the fantasy life of the oppressed[127]: how can we expect the powerful to give up power if we do not take it? Valerie Solanas's *SCUM Manifesto* (originally published in 1968), a radical (although slightly unhinged) tract for women's liberation, creates a new kind of culture hero, the Society for Cutting Up Men ("SCUM"), a band of "dominant, secure, self-confident, nasty, violent, selfish, independent, proud, thrill-seeking, freewheeling, arrogant females, who consider themselves fit to rule the universe . . . by systematically fucking up the system, selectively destroying property, and murder."[128] We can see Solanas' legacy in a recent imaginary lesbian hero, Diane DiMassa's Hothead Paisan, a neo-punk, Uzi-wielding dyke who castrates rapists, pulps homophobes, and engages in wild, raucous sex with sexually indeterminate lovers.[129]

Like Solanas and DiMassa, Robson does not shy away from the lesbian hero's relationship with violence. However, Robson's understanding

122. Contrast the Avengers' use of the more aggressive term "dyke" with the more mainstream language of "lesbian" in the larger march.

123. *Lesbian Avengers Eat Fire Too*, *supra* note 95.

124. Although, as Munt argues, to "live as a lesbian today, even after twenty-five years of attempted liberation, is still an heroic act." MUNT, *supra* note 88, at 2.

125. *Id.* at 25.

126. Let us not forget, after all, that the Lesbian Avengers' logo is a bomb with the fuse lit, just about to explode. *See* AVENGER HANDBOOK, *supra* note 89 (displaying this emblem on its cover).

127. *See* FRANTZ FANON, BLACK SKIN, WHITE MASKS 60 (Charles Lam Markman trans., 1967) (theorizing that a racist colonial environment creates a series of neuroses and psychoses in the colonized, including self-hatred and violent rage.

128. VALERIE SOLANAS, THE SCUM MANIFESTO 25 (1971).

129. *See generally* DIANE DIMASSA, HOTHEAD PAISAN: HOMICIDAL LESBIAN TERRORIST (1993).

of violence is necessarily more nuanced than the (metaphorically and literally) cartoonish violence that Solanas and DiMassi represent. For Robson, violence is a force that can be used in a variety of ways, just as cartoon superheroes choose to use their powers for good, not evil. Robson wants "to claim violence as an attribute of lesbianism . . . the existence of lesbianism as a violent denial of the law's system of heterosexual and male hegemony."[130] Robson analogizes violence to fire, which can "be both good and bad, helpful or harmful."[131] As she observes, "fire has long been a trope lesbians have deployed to represent our spiky relationship to the dominant discourse, and the links between women, fire and violence exist in a variety of cultures."[132]

Fire, and the transformation of fire from destructive to empowering, was also a fundamental imaginary for the Lesbian Avengers. An early Avengers action responded to the murder of Brian Mock and Hattie Mae Cohens, a gay man and a lesbian in Oregon whose joint home was firebombed. After a march through New York's Greenwich Village (a neighborhood with a heavy queer population that is also the site of much homophobic violence), the Avengers constructed a shrine to Mock and Cohens, and consecrated their memories by eating fire.[133] This action dramatized the membrane between destruction and survival that lesbianism embodies: as Avengers ate fire, other lesbians chanted "we take the fire within us; we take it and make it our own."[134] Robson encapsulates the immense psychic and spiritual resonance of this action in her use of fire and violence as allegories for the lesbian hero: "Fire and violence. Extraordinary power and exceptional danger; the archetype of human behavior; the possibility of lesbianism."[135]

Sappho is the ideal figure to embody this possibility. While numerous myths have grow up around her, we know very little about her besides the fact that she lived for a while on the island of Lesbos, most likely around 600 B.C.E., and that she was lauded as a poet during and beyond her lifetime.[136] Sappho is inextricably linked to the Western vision of lesbian identity, as the early label "sapphist" and contemporary term "lesbian" show.

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130. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 16.

131. *Id.*

132. *Id.* at 16-17.

133. *Lesbian Avengers Eat Fire Too*, supra note 95. Fire-eating became a signature New York Avengers statement. While it was not deployed at every action, it was incorporated in major actions and adopted by Avengers nationwide. The cover photograph of the *Avengers Handbook is* a picture of two women in Avengers t-shirts eating fire.

134. ROBSON, SAPPHO GOES TO LAW SCHOOL, *supra* note 2, at 16-17.

135. *Id.* at 18.

136. For the historical information on Sappho, and an analysis of the legends the figure of Sappho has generated, see generally MARGARET WILLIAMSON, SAPPHO'S IMMORTAL DAUGHTERS (1995); JOAN DEJEAN, FICTIONS OF SAPPHO 1546-1937 (1989). For translations of Sappho's poetry, most of which exists in fragments quoted in contemporary critical discussions of her work, see SAPPHO, SAPPHO: POEMS AND FRAGMENTS (Josephine Ballmer trans., Bloodeye Books 1992).

Moreover, Sappho—living on an island, running a school for girls—can offer an alternative vision of what it is women need to know. In *The Poetics of Sex*, Jeannette Winterson speaks through the voice of Sappho, articulating what it is she can give her students on Lesbos that they cannot get anywhere else: "I like to be a hero, like to come back to my island full of girls carrying a net of words forbidden them. Poor girls, they are locked outside their words just as the words are locked into meaning."[137] Just as violence shatters a whole into many pieces, or fire transforms the raw into the cooked, lesbian legal theory unlocks the meanings of words and gives not just lesbians but everyone the key.

Fire burns but we cannot catch hold of it. Sappho existed but we cannot know her. The hero shows us what our lives can be but we can never catch up with her. Lesbian legal theory unlocks meaning and leaves us standing at the threshold. What we see when we cross to the other side is as yet unknowable; all we know is that we have to walk through.

137. Jeanette Winterson, *The Poetics of Sex, in* THE PENGUIN BOOK OF LESBIAN SHORT STORIES 417, 418 (Margaret Reynolds ed., 1993).

DIALOGUES BETWEEN COORDINATE BRANCHES AND STORIES OF THEIR FAILINGS

COURTS AND CONGRESS. By Robert A. Katzmann. Washington D.C.: Brookings Institution Press, 1997. Pp. xvi, 163. $16.95.

THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE. By Louis Fisher. College Station: Texas A&M University Press, 1998. Pp. xii, 309. $15.95.

TONI M. FINE*

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[1]

I.
INTRODUCTION

The constitutional principle of separation of powers, in its most formulaic sense, implies a legislature that makes the law, an executive that implements it, and a judiciary that, when confronted with an actual case or controversy, interprets it. Our reality, however, is far more complicated and fluid. The federal branches interact and influence one another, often engaging in activities that might be perceived as usurpation of the others' power. But branches that might be considered "victims" of such appropriations are often the most willing participants. Indeed, the branches communicate and coordinate their efforts in order to promote efficient government and to shift the responsibility for unpopular decisions to those branches of government best positioned to absorb the impact of public disapproval. This reality has long defined the "separate but shared" concept behind the separation of powers principle.

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1. 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 80 - 83 (Robert H. Jackson et al. eds., 1937).

Two books—*Courts and Congress*,[2] by Robert A. Katzmann, and the recently updated *The Politics of Shared Power*,[3] by Louis Fisher, explore the indeterminate relationship among coordinate branches. Part II of this Essay provides a brief background and overview of both works. Part III discusses *Courts and Congress*, examining the more reasonable suggestions set forth by Katzmann, who focuses on the interaction between Congress and the federal courts and argues that the relationship should become more fluid. While some of Katzmann's suggestions are practical and are already being implemented, others derive from a fundamental misunderstanding of the institutional competence of the legislative and judicial branches. Part IV considers the strengths and weaknesses of *The Politics of Shared Power*. Fisher provides a useful review of the ways in which Congress and the executive occasionally trade hats, but his arguments are ultimately disappointing in that he fails to share his views on the sharing of powers not principally allocated to each branch under the Constitution. Finally, the conclusion of this Essay draws together some of the common principles that join these works and the issues they address.

II.
OVERVIEW OF THE WORKS

The product of many years of research (including significant field work) for the Brookings Institution[4] and the Governance Institute,[5] *Courts and Congress* presents Katzmann's first-hand experiences, observations, and criticisms of the relationship between the federal courts and Congress. Katzmann supplements his scholarly investigation of constitutional principles with a discussion of the actual problems he has observed in relations between the federal judiciary and Congress. He then proposes methods for enhancing communication between the legislative and judicial branches as solutions to what he perceives as inherently problematic relationships between these branches.

Courts and Congress focuses on two main areas of interaction between the legislative and judiciary branches: the Senate's constitutional duty to give "advice and consent" on judicial nominations, and the judiciary's power of statutory interpretation as first announced in *Marbury v.*

2. ROBERT A. KATZMANN, COURTS AND CONGRESS (1997) [hereinafter KATZMANN, COURTS AND CONGRESS].

3. LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1997) [hereinafter FISHER, POLITICS OF SHARED POWER].

4. The Brookings Institution defines itself as an independent, nonprofit organization devoted to research, education, and publication in various areas of the social sciences. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at v.

5. *Id.* The Governance Institute is described by Katzmann as a nonprofit organization concerned with exploring, discussing, and alleviating problems associated with the separation and division of powers. Its self-proclaimed focus is in how the branches of government can best work together.

Madison.[6] Katzmann identifies these areas as the two major sources of controversy between the federal judiciary and Congress. He asserts that the proper functioning of judicial-legislative relations "depends upon at least four ingredients":

> a sensible way to choose judges, the bedrock of the courts; a proper attention to the manner in which courts interpret statutes; the development of mechanisms to transmit to Congress judicial opinions identifying perceived problems in statutes; and a process of communications between the courts and Congress to ensure both branches' institutional well-being and the fair and efficient administration of justice.[7]

As discussed below, Katzmann's proposals for improved communication are far too overreaching. While his more modest ideas make sense and work well within established institutional mechanisms, the mainstay of his work focuses on ideas that make no sense within the context of a system of shared governance. Put simply, many of his suggestions would fundamentally alter the institutional roles of the respective branches and the delicate balance among them quite consciously established by the Framers.

Now in its fourth edition and substantially updated (according to the book jacket),[8] Louis Fisher's *The Politics of Shared Power* is a testament to the quandaries and obstacles presented by the "separate but shared" concept and its effect on the relations between the executive and legislative branches. Fisher's stated goal, to discuss how the "separation of powers doctrine work[s] in practice"[9] and "to help the reader understand how the federal government operates within the context of the separation of powers theory,"[10] is achieved through relating actual, historical instances of shared responsibility and resultant conflict. This description is amply balanced by Fisher's discussion of the points at which congressional and executive interests intersect.

Fisher presents complicated material in clear, lucid prose, with ample references to primary sources. His book is unique because contextualizes the inherent discord that characterizes the relationship between the executive and legislative branches, bringing a new empirical dimension to the ages-old debate about the respective spheres of authority between Congress and the President. *The Politics of Shared Power* is a refreshing and more realistic counterpoint to Katzmann's expansive suggestions. Yet Fisher ultimately falls short in his own policy reforms, leaving the reader to

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6. 5 U.S. (1 Cranch) 137 (1803).

7. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 4.

8. A comparison of the fourth edition with the previous edition, however, reveals no structural changes and few substantive additions. Even the Preface to both editions are virtually the same *verbatim*.

9. FISHER, POLITICS OF SHARED POWER, *supra* note 3, at xii.

10. *Id.* at 20.

wonder just what the proper balance among the branches of the national government could be.[11]

III.
THE *COURTS AND CONGRESS*

"Congress presumably should be greatly interested in the statutory opinions of the courts." (69) With these words, Katzmann begins his discussion of the need for increased communication between the federal legislative and judicial branches. It is this "presumption" that guides and provides the foundation for his proposed experiments in statutory communication in Chapter Four of *Courts and Congress*. But Katzmann does not closely examine this presumption and, as discussed below,[12] Congress may not, in fact, care deeply about court decisions involving federal statutory analysis.

Courts and Congress discusses the ongoing experiment,[13] designed by Katzmann and Judge Frank M. Coffin[14] at the behest of the District of Columbia Circuit Judicial Conference ("Judicial Conference"),[15] to examine the way Congress reacts to court decisions. As the basis for this inquiry, judges on the D.C. Circuit identified a number of court opinions which had discussed difficulties with the underlying legislation in three discrete respects: (1) statutory gaps; (2) ambiguities; and (3) grammatical problems.[16] In each of the identified cases, the court recognized and indicated one of these deficiencies in its opinion. Katzmann and Coffin then investigated the congressional response to the judiciary. To the lament of the experimenters, there was virtually no congressional response to the court's commentary regarding the need for legislative action (which at times was explicit)—be it the correction of a grammatical error or a substantive amendment to elucidate an incomplete legislative scheme.[17]

A. Suggested Approaches to Improved Legislative—Judicial Communications: The Good, The Bad, and the Ugly.

Perhaps fortified by these results, Katzmann presents a number of innovative and promising ideas in *Courts and Congress*. Katzmann's proposals range from the somewhat sensible idea that courts send opinions to

11. *See generally* text accompanying notes 68 - 71, *infra*.
12. *See generally* text accompanying notes 40 - 64, *infra*.
13. Katzmann originally set forth these arguments in a 1992 article. *See* Robert A. Katzmann, *Bridging the Statutory Gap Between Courts and Congress: A Challenge of Political Theory*, 80 GEO. L.J. 653, 654 (1992) (discussing parameters of the Judicial Conference experiment).
14. *Id.*.
15. *Id.* at 656. This project was essentially the continuation of similar work undertaken by Katzmann and Judge Coffin under the auspices of the U.S. Judicial Conference Committee on the Judicial Branch.
16. *Id.* at 658. *See also* KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 71-3.
17. *Id. See also* KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 73-6.

Congress,[18] to more implausible ideas, such as his suggestion that federal court judges speak out as "private citizens," and testify before Congress on pending legislation, or explain what their decisions mean and propose legislation necessary to cure difficulties with existing statutes (Chapter 5). While it sounds intuitively valid and harmless enough to suggest that there be a greater understanding by each branch of the respective roles of the courts and Congress, it is less than certain that this understanding should emerge from the forms of interaction envisioned by Katzmann. Many of Katzamann's suggestions are reasonable and relatively benign. Others are simply not practical; several, if implemented, would violate long-standing and fundamental precepts of law and comity. None promise any perceptible impact on the legislative discord Katzmann identifies.

1. The Good: Using established mechanisms

Katzmann's best ideas are perhaps his most modest. These examples utilize the expertise of existing organizations, presenting the best prospect for improving interbranch communications, and make the best use of limited resources. Katzmann recommends that the House Office of Law Revision Counsel[19] take a more substantial role reviewing statutes that may be more problematic than their drafters thought.[20] If this suggestion were to become a reality, Katzmann further suggests the Administrative Office of the U.S. Courts, the Federal Judicial Center, and the Judicial Conference lend their assistance to this enterprise.[21] Although Katzmann does not mention them, the House and Senate Offices of Legislative Counsel could also be employed towards this end.[22] Numerous interviews held with key legislators prompt Katzmann to also endorse a program whereby the House and Senate legislative counsel would receive complete decisions of the D.C. Circuit, with a mandate that counsel distribute those opinions to

18. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 97. While this suggestion may be characterized as "sensible" because it does not create any conflicts or require a great expenditure of resources, it may not be necessary or even fruitful. *See also* text accompanying notes 40 - 64, *infra*.

19. The United States House of Representatives Office of Law Revision Counsel develops and keeps current the codification of laws of the United States. CONGRESSIONAL YELLOW BOOK 846 (Winter 2000). *See also Office of the Law Revision Counsel* (visited Apr. 24, 2000) <http://uscode. house.gov> (providing a "consolidation and codification by subject matter of the general and permanent laws of the United States").

20. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 67-68.

21. *Id.* at 79, 101-05, 113-14.

22. "Because the Office [of Legislative Counsel] works on an ongoing basis with all of the House Committees, and is often called upon to evaluate the technical aspects of legal problems presented in a draft bill, it is well-positioned to serve as a conduit for technical feedback from the courts." M. Douglass Bellis, *A View From the House of Representatives*, 85 GEO. L.J. 2209, 2209 (1997).

the appropriate committees and sub-committees.[23] The Judicial Conference adopted this recommendation and has encouraged all federal circuit courts to follow the same practice.[24]

Indeed, other, less radical proposals are already in effect, some of which Katzmann recognizes. For instance, the Office of Judicial Impact Assessment has been in place since the early 1990s to provide Congress with the judiciary's assessment of the expected benefits and burdens of proposed legislation affecting the federal courts.[25] And in 1995, the Judicial Conference adopted a Long Range plan for the Federal Courts setting forth recommendations affecting federal court dockets.[26] (Although Katzmann supports the idea of an annual address from the Court, he seems not to know that the Chief Justice of the Supreme Court has for some years given an annual speech on the "state of the judiciary."[27]) Nevertheless, Katzmann neither explains what benefits have derived from these institutional mechanisms of communication. Katzmann neither explores reasons for their limitations nor why his particular proposals would warrant a greater impact. It is unfortunate that his best ideas—those that call for strengthening the role of procedures and offices already in place to help improve inter-branch communications—are often buried in subtext.

2. *The Bad: Illogical Proposals To Enhance Interbranch Communications*

Two of Katzmann's remaining proposals to improve judicial-legislative communications are simply impractical in light of political realities. First, he suggests that new members of Congress and new federal jurists participate in seminars and other information sessions.[28] If such conferences were to take place, however, what themes or topics would they cover? Who would teach them? How would they be presented to be meaningful to their audience? Would they even make a difference? How and in what ways? Katzmann never answers these questions; nor does he address the significant logistical difficulties or the time and other resources that such a program would require. Curiously, Katzmann is careful to note the already

23. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 77.

24. *Id.* at 78. While there is no objection in principle to employing the services of these organizations, any such proposal must be alert to the possibility of overburdening their workload.

25. *See generally* CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS (A. Fletcher Mangum ed., 1995); KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 102.

26. *See Judicial Conference of the United States, Long Range Plan for the Federal Courts*, reprinted in 166 F.R.D. 49 (1995); KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 103.

27. *See* William H. Rehnquist, *Chief Justice Recaps 1995 in Year-End Report*, THIRD BRANCH, Jan. 1996; KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 102.

28. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 105-6.

heavy workload of federal judges,[29] but imposes additionally significant duties on already overburdened schedules without further discussion.

Second, Katzmann suggests that Congress prepare an "authoritative" legislative history before completing final passage of a law.[30] This suggestion ignores the crazy-quilt nature of the legislative processes: most important congressional action is undertaken by fragmented committees and subcommittees, often over a protracted period of time.[31] Since Katzmann acknowledges this elsewhere,[32] it is puzzling that he also proposes that an "authoritative" legislative history somehow be compiled. Even if this were possible, it would be unnecessary, as the law would be drafted in a way that would obviate the need to look beyond the statute at all.[33] Katzmann's suggestion that "[g]reater attention to drafting would make it more likely that congressional intent will be understood and respected"[34] is also somewhat naïve. Even after years of criticism and with the availability of numerous conventional resources on how to draft legislation,[35] Congress has failed to make significant improvements. And the fact that Congress often passes legislation which is vague and incomplete most often merely reflects the urgency of compromise and political expediency, not a lack of information or know-how.[36]

3. *The Ugly: Seeking More Activist Extrajudicial Roles for Federal Judges*

Katzmann's next proposal, more radical than the previous, focuses on techniques encouraging a more activist judiciary. For example, he would have judges speak out both before Congress[37] and in other public fora

29. *Id.* at 6.
30. *Id.* at 66-7.
31. *Id.* at 48.
32. *Id.*
33. All this notwithstanding the debate over how to use legislative history, if at all, in discerning legislative intent. See Part II.A.3., *infra.*
34. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 65.
35. *See, e.g.*, C.G. THORNTON, LEGISLATIVE DRAFTING (4th ed. 1996); WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING (2d ed. 1984); David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437 (1996); Grayfred B. Gray, *Reducing Unintended Ambiguities in Statutes: An Introduction to Normalization of Statutory Drafting*, 54 TENN. L. REV. 433 (1987); Reed Dickerson, *How to Write a Law*, 31 NOTRE DAME L. REV. 14 (1955); and Herbert F. Goodrich, *Restatement*, in *Proceedings of the Nebraska State Bar Association*, 25 NEB. L. REV. 159 (1946). *Cf.* Reed Dickerson, The Fundamentals of Legal Drafting (2d ed. 1986) and BARBARA CHILD, DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES (2d ed. 1982).
36. *See* Part II.B., *infra.*
37. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 68, 96-8.

about issues that concern them as jurists and as citizens[38]. Another proposal would enlist judges' expertise in evaluating statutory flaws at the drafting stage[39]. These suggestions call for judges to take actions that are both unnecessary and inappropriate.[40]

It is unnecessary for judges to speak to the meaning of statutes in extra-judicial fora. As stated by Justice Ginsburg (among others), "the court speaks primarily through its opinions."[41] Indeed, the opportunity to write concurring and dissenting opinions provides each judge sitting on any particular case the chance to state her views clearly and expressly through normalized judicial means. The prohibition against advisory opinions[42] also

38. *Id.* at 98.

39. *Id.* at 96-8.

40. Another unsettling aspect of *Courts and Congress* is that Katzmann seems to ascribe blame to the judiciary (albeit subtly) for the problems in communications between the federal courts and Congress (*e.g.*, 46-47). To the extent that this criticism is directed at the courts for not understanding Congress better or reading statutes more effectively, this criticism is misplaced. It is Congress, after all, that initiates legislative action which ultimately results in court review. To have an expectation that courts should somehow do better with what they are given is unfair. As one commentator has observed, the responsibility for drafting statutes plainly and unambiguously resides in the main with Congress:

> Legislatures cannot have it both ways. They cannot write vague, complex, and difficult statutes and complain that the courts fail to interpret them properly or fail to exercise sufficient "restraint." Courts are faced daily with actual cases and controversies involving real-life people whose disputes must be resolved. They cannot refer those disputes to committees to commissions for study and for report at some day far in the future. Courts must do the best they can with what they have, including legislative history and attempts to "divine" the legislative intent. . . .More guidance for the courts is required in order that both branches may perform the roles assigned to them.

Roger J. Miner, *Confronting the Communication Crisis in the Legal Profession*, 34 N.Y.L. SCH. L. REV. 1, 14-15 (1989).

41. Ruth Bader Ginsburg, *Communicating and Commenting in the Court's Work*, 83 GEO. L.J. 2119, 2119 (1995). *See also* Ruth Bader Ginsburg, *Informing the Public About the US Supreme Court's Work*, 29 LOY. CHI. L.J. 275, 275 (1998); Abner J. Mikva, *Why Judges Should Not be Advicegivers: A Response to Professor Neal Kaytal*, 50 STAN. L. REV. 1825, 1829 (1998) (noting that "[j]udges are precluded from expressing any prior views about the matter to be decided.... [T]he decision itself is what the judges say it means: no legislative history, no amendments, no committee reports explaining how it was done. Zilch.") [hereinafter Mikva, *Why Judges Should Not be Advicegivers*]; Geoffrey C. Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 UNIV. CHI. L. REV. 242, 250 (1970) (agreeing that judges "can speak ex cathedra only through written opinions.... [n]o press conferences, no committee hearings, no stump speeches, no Face the Nation").

42. This reluctance on the part of the federal courts to present a view as to issues not properly before them in a live case or controversy is, of course, constitutionally based and long-standing. Correspondence between Thomas Jefferson, writing as Secretary of State, to the Justices is an early indication of the refusal of the Supreme Court to grant advisory opinions, even when the need was great. Jefferson's letter beseeched the Justices to offer their views concerning treaties and relations with foreign States. Still, the Justices refused; in a pointed reply to Jefferson dated July 20, 1793, Chief Justice Jay, writing for the Court, said as follows:

> The lines of separation drawn by the Constitution between the three departments of the government – their being in certain respects checks upon each other – and our being judges of a court in the last resort – are considerations which afford

stands for the fundamental notion that federal judges should not speak on the merits of substantive legal issues that are not before them. The technical prohibition against the use of *dictum* reflects the same rationale. Ambiguity in judicial decisions often reflects the authors' unwillingness or inability to provide better guidance. Having no real political constituency, judges are not equipped, either personally or institutionally, to undertake the role of quasi-legislators.

Katzmann's proposal to have judges indicate their views on statutes or cases involving statutory interpretation or construction and speak out as "private citizens" is also misguided in a number of respects. Katzmann's suggestions are wildly incompatible with the universally accepted notion that judges avoid the appearance of bias or impropriety. Even more so than members of the other branches of government, a judge is required to avoid the appearance of partiality.[43] Under ABA judicial canons, public statements made by a judge must be carefully circumscribed to preserve judicial demeanor and to avoid any lack of neutrality. While the parameters of these judicial canons may not be entirely clear,[44] they instruct that great caution be taken by a judge acting even as a private person. As the Honorable Shirley Abrahamson put it, "[t]he overriding rule is that a judge must conduct all extrajudicial activities in a manner that will not cast doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties."[45] As one commentator has said in agreement:

> A component of good judging, an appearance of propriety, is the external perception of judicial performance that judges should consciously seek to create. . . . [A]s it relates specifically to judicial independence, a judge should be particularly conscious not to

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strong arguments against the propriety of our extrajudicially deciding the questions alluded to; especially as the power given by the Constitution to the President of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly limited to the *executive* departments.

15 THE PAPERS OF ALEXANDER HAMILTON 111 n. 1 (H. Syrett ed. 1969). *See also* 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (Johnston ed. 1891), *reprinted in* RICHARD H. FALLON et al., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996), 92, 93.

43. *See* 28 U.S.C. § 455(a) (1996).

44. *See, e.g.*, Leslie W. Abrahamson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949 (1996). Canon 2 proscribes judges' behavior that is either improper or bears the "appearance of impropriety." Abrahamson discusses the lack of clear guidance as to what actions may constitute the "appearance of impropriety." Id. at 955-57. *See* 28 U.S.C. § 455(a) (providing that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned").

45. Shirley A. Abrahamson, *Remarks of the Honorable Shirley A. Abrahamson before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT 69, 82 (1996).

> communicate anything that could contribute to an impression that his independence could or has been affected.[46]

Katzmann's proposals ignore the importance of preserving the appearance of judicial objectivity and neutrality, and the need for judges to follow the rule of law rather than their own personal or philosophical leanings. If a judge speaks out, committing himself to a certain position on the merits of an issue, it becomes questionable whether he is fit to hear a case involving the same or a related issue. Encouraging judges to make extra-judicial statements on issues of their personal interest will inevitably lead to the appearance of bias.

The prospect of success for the proposals proffered by Katzmann are also undermined by his own assertions. Earlier in *Courts and Congress*, Katzmann notes the reluctance of judicial nominees during the confirmation process to speak about their views on issues that may come before them during their tenure. Indeed, he discusses rather extensively the process of judicial appointments in the second chapter, noting that judicial nominees often refuse to answer pointed questions about the issues that may come before them on the bench[47]. Katzmann does a commendable job of describing the history of congressional-judicial battles during the confirmation process, from the 1920s to the mid-1950s when Senate questioning of judicial nominees was infrequent,[48] to the Warren Court era during which nominees appeared regularly before the Senate Judiciary Committee,[49] to the highly belligerent confirmation battles of the 1960s through the mid-1980s (*e.g.*, Douglas Ginsburg, Robert Bork),[50] to the more recent processes of confirming Justices Souter, Ginsburg, and Breyer.[51] Breyer's and Ginsburg's responses to questions posed by the Senators in particular reflect the reluctance of the judiciary to answer questions which may be the subject of litigation before the Court.[52]

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46. John Q. Barrett, *Introduction: The Voices and Groups That Will Preserve (What We Can Preserve Of) Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT 1, 6 (1996).

47. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 19.

48. *Id.* at 19-21.

49. *Id.* at 21-24.

50. *Id.* at 28-30.

51. *Id.* at 30-34.

52. This is one reason why Ruth Bader Ginsburg's responses to questions during her Supreme Court confirmation process were so artful. For example, in response to a question about her views on the death penalty, she said the following:

> I can tell you that I do not have a closed mind on this subject. I don't think it would be consistent with the line I have tried to hold to tell you that I definitely accept of definitely reject any position. I am well aware of the precedent, and *I have already expressed my views on the value of precedent.*

Nomination of Ruth Bader Ginsburg to be Associate Justice of the United States Supreme Court of the United States: *Hearings Before the Senate Comm. on the Judiciary*, 103rd Cong. 263 (1994) (testimony of Ruth Bader Ginsburg), *quoted in* KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 33 (emphasis added).

Katzmann does not seem to argue that judicial nominees should be more forthcoming in responses to questions during confirmation hearings. Yet his later proposals expect judges to speak publicly about "live" legal issues once they are on the bench. Once a judge or judicial nominee has expressed a personal view under oath before the Senate, his ability to hear and resolve disputes on an impartial and independent basis becomes open to serious question. If judicious behavior calls for not answering questions of this nature during the confirmation process (which seems to be the case), then it would be even more imprudent to ask a *sitting judge* to comment on such issues.

Finally, Katzmann's proposal to have judges appear before Congress to testify as to the meaning of a court opinion is unlikely to lead to any genuinely helpful results. Katzmann acknowledges that extra-judicial testimony by judges would raise similar concerns to those raised by the use of legislative history by the judiciary. He briefly explores important rift on the question of legislative history between Justice Scalia, on the one hand, and Justice Frankfurter (more recently, Justices Souter, Ginsburg, Breyer, and Souter) on the other.[53] Scalia, both in his opinions[54] and academic writings,[55] opposes the use of legislative history to discern the meaning of a statute. Scalia's objection is twofold: First, it amounts to a violation of the separation of powers doctrine;[56] and second, legislative history is frequently limited to committee reports and floor statements reflecting the view of a single individual, sub-committee, or committee. Justices Frankfurter, Breyer,[57] Ginsburg, and Souter, on the other hand, have championed the use of legislative history to discern legislative intent when the

53. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 60-64.

54. *See* note 34, *infra*.

55. *See, e.g.*, Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1989/1990); Antonin Scalia, *The Rule of law as a law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

56. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518 (1993) (Scalia, J., concurring); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1992) (Scalia, J., concurring); United States v. Taylor, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring); Immigration and Naturalization Serv. v. Caroza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). *See also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 3-47, 129-49 (1997).

57. Justice Breyer, for example, has argued that legislative history is useful in helping court understand the context and purpose of a statute and allows a court to avoid an absurd result, to "cure" drafting errors, to provide any "special" meaning that a statutory word might have, to identify the purpose of a word or phrase used in the statute, and to allow a court to choose among more than one reasonable interpretations of a politically controversial statute. Stephen Breyer, *On The Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 - 861 (1992).

words of a statute do not reveal a plain, unambiguous meaning.[58] While Katzmann reminds his readers that true legislative intent is difficult to detect because there is no agreement as to the impact of one legislator's words, he fails to see how this difficulty would be exacerbated by a judge testifying about her impressions of a court ruling or proposed legislative scheme. Having a judge—or even a group of judges—appear before Congress to testify as to the meaning of case law or pending legislation would only compound already existing problems with discerning legislative meaning.

Equally important, it is extremely unlikely that any single judge's comments about a particular case, set of cases, or proposed or enacted legislation would have much effect. Several realities of the United States legal system suggest this outcome: the development of case law on a case-by-case basis founded on real parties with genuine controversies; that in all but trial-level cases a decision is rendered by more than one judge; procedures such as appeal, abstention, *certiorari*, and certification, which involve even more judges and courts at different levels; and the fact that court opinions do not often prescribe an outcome in subsequent, related cases. Thus, any one judge's view of the impact of precedent will therefore necessarily be of limited utility and impact. Justice Ginsburg seems to agree that reviewing a single case in isolation may do little to enhance one's understanding of a legal principle and how a case will be applied or its "practical effects."[59]

These problems are exacerbated by the system of precedent and *stare decisis*. Judges do not rethink each legal issue as though it were a question of first impression. This is even true of Supreme Court justices who possess the greatest authority to rethink earlier court opinions. They, too, must

58. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 46. Other jurists have weighed in on the debate as to the appropriate use of legislative history in divining congressional intent. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y. 61 (1994); Kenneth W. Starr, *Observations About the use of Legislative History*, 1987 DUKE L. J. 371 (1987); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L. J. 380 (1987); Patricia M. Wald, *Some Observations on the Use of Legislative* History *in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983). Well-regarded commentators have also entered the fray. *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998); Paul C. Sweeney, *Abuse, Misuse, and Abrogation of the Use of Legislative History: Title IX and Peer Harassment*, 66 UMKC L. REV. 41 (1997); Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573 (1996); Jack Schwartz & Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 MD. L. REV. 432 (1995); Gregory E. Maggs, *The Secret Decline of legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INT. L. REV. 57 (1994); Daniel R. Ortiz, *The Self-Limitation of Legislative History: An Intrainstitutional Perspective*, 12 INT'L L. & ECON. 232 (1992); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

59. Ginsburg, *Communicating and Commenting in the Court's Work*, *supra* note 41, at 2122.

choose their battles and often subordinate their views to the impact of settled law.[60]

B. *Unexamined Assumptions Lead To Flawed Analysis*

Notwithstanding the individual problems with Katzmann's suggestions identified above, it is not at all clear that the end result of enhanced congressional-judicial communications would lead to increased congressional responsiveness to judicial opinions and better legislation. So, for instance, while Katzamann declares that all of the congressional staffers interviewed indicated that they would like to receive copies of court opinions,[61] there is nothing to suggest credibly that doing so would have any appreciable impact.[62] The fact that staffers desire to be advised of judicial decisions does not prove that distributing copies of opinions will bring Congress any closer to satisfying Katzmann's stated goals.

There are numerous institutional reasons why legislative modifications in response to a court decision may be unlikely to occur. First, Congress as an institution, and members of Congress themselves, operate under severe time and resource constraints. Members of Congress have numerous legislative and non-legislative duties, from sub-committee work to floor debates, from constituent case work to fundraising. At any given time, there may be demands on particular members of Congress that seem to be of greater importance than a statute passed some time earlier. It may thus be difficult to get key members of Congress to reconsider statutes that were

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60. Professor Fallon speaks most eloquently to this point:

> [T]he practical need for the Court to speak effectively as an institution often requires the Justices to subordinate their personal views about how the Constitution would best be implemented and to accept doctrinal structures that they regard as less than optimal. As members of a collective body, the Justices must reach complex judgments, sometimes premised on predicted effects, about when to compromise in order to achieve the law-settling benefits of a majority opinion, when to settle for a plurality opinion or to concur separately, and when to dissent.

Richard H. Fallon, Jr., *Foreword to Supreme Court 1996 Term*, 111 HARV. L. REV. 56, 59 (1997) (footnotes omitted). Continuing, he argues:

> Implementing the Constitution successfully is a project that involves many elements and requires the coordinated efforts of many people.... When an argument seems destined for rejection by a majority of the Court, the obligation of constitutional fidelity does not absolutely require individual Justices to take that argument seriously—even if, were they to do so, some of the Justices might be disposed to conclude that it deserved to prevail. Given the practical character of their roles, the Justices are entitled to some flexibility in choosing their occasions for revisiting first principles.

Id. at 113.

61. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 74.

62. *Cf.* Mikva, *Why Judges Should Not be Advicegivers, supra* note 41, at 1828 (noting that "[e]ven if judges did formally start up an advisory function, the Congress might not pay it much attention").

already passed. Given these realities, the communication of judicial opinions to congressional staffers would be unlikely to have any major impact on related legislation.[63]

Insofar as legislative attention to bills alone is concerned, one writer has estimated that fewer than ten percent of bills introduced in each session of Congress survives the legislative process and becomes law.[64] As to statutes that have been considered by federal courts, "there may be scores if not hundreds of cases during each Congress about which substantial disagreement exists [in court opinions] and comes to the attention of congressional members of committees."[65] This estimate hints at the startling extent of the resources that would be necessary for Congress to attend to all statutes that arguably merit further legislative attention. It also shows that the problem would not be solved by simply communicating to Congress the need for curative legislative action. Rather, it may be that not enough members of Congress have (or that Congress as an institution does not have) the interest or wherewithal to give renewed attention to statutes that have already become law.

Second, Katzmann's assumptions do not bear out when considered historically. Congress does respond to court rulings when it seems provident to do so politically and in terms of resource allocation, demonstrating that when it does not it may well be for reasons unrelated to a lack of information or imperfect communications. For example, Congress reacted

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63. As one commentator has observed, the "realities of ignorance and inertia" may explain Congress' refusal to modify legislation:

> [T]hese two attributes of the legislative process compel the conclusion that Congress cannot be counted upon to overrule all decisions that are widely considered bad or wrong. Even if a substantial number of congresspersons are made aware of, and disagree with, such decisions, the strong gravitational force of the status quo will often stand in the way of legislative action.

Lawrence C. Marshall, *"Let Congress Do It": The Case for An Absolute Rule of Statutory Stare Decisis,* 88 MICH. L. REV. 177, 197 (1989). Others agree that:

> [P]rompt legislative reaction to judicial interpretation is probably the exception... not the rule. Legislative reexamination of a statute probably depends on whether the decision attracts adequate attention and creates sufficient demands on the legislative process to build another majority for a new enactment. Legislative action will probably occur when the decision has received media attention, when one or more legislators or legislative committees become interested in the subject, when there is near unanimity that the court decision is wrong, or when a powerful interest group or governmental agency is affected by the decision and seeks legislative relief, or when the decision arouses passionate response among various constituencies.

Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation,* 75 MINN. L. REV. 1045, 1054 (1991). *See also* Earl Maltz, *The Nature of Precedent,* 66 N.C. L. REV. 367, 389 (1988).

64. James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?,* 93 MICH. L. REV. 1, 21 n. 77 (1994).

65. *Id.* at 7 n. 16.

swiftly and by an overwhelming majority by enacting the Religious Freedom Restoration Act[66] (albeit unconstitutionally[67]) in response to the Supreme Court's decision in *Employment Division v. Smith*.[68] At other times, Congress does express its disapproval of a court's interpretation of a statute, but in ways that remain vague and inconclusive.[69]

Third, there is no indication that members of Congress really want to correct errors in legislation identified by the courts. Often when acts of Congress are vague, incomplete, contain gaps, or are internally inconsistent, the problems arise as a result of compromise and other political expediencies.[70] To attempt to remedy such failings in legislation would embroil Congress in a time-consuming controversy involving the same issues that Congress was unable or unwilling to resolve the first time around.

Fourth, because members of Congress have difficulty reaching a consensus on most issues that confront them, they often simply agree to disagree by using ambiguous language in statutes, leaving problems of interpretation to the courts.[71] It is not inconceivable that Congress is fully satisfied with the strategies it has developed for getting important legislation passed while avoiding hard decisions concerning issues about which consensus was unobtainable.[72] It is this premise that fuels the ubiquitous public choice theory: Legislators perceive a great need to avoid alienating constituents and powerful interest groups. In an effort to avoid doing so, they agree to ambiguities in legislation, thereby passing the buck to the

66. 42 U.S.C. § 2000b (1994).

67. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

68. 494 U.S. 872 (1990).

69. Brudney, *supra* note 41, at 5 n. 11.

70. KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 109.

71. *See, e.g.*, Abrahamson & Hughes, *supra* note 63 (noting "the difficulty in reaching political consensus on the legislature"). *See also* Marshall, *supra* note 63, at 202 (noting that "it is often impossible to discover any legislative intent about an issue which a court needs to decide. In many instances, the generality of the statutory language seems to be a *purposeful invitation to the courts to develop a body of law, reflecting Congress' inability or unwillingness to make certain hard political choices*") (footnotes omitted) (emphasis added).

72. As the Deputy Legislative Counsel in the House Office of Legislative Counsel to the United States put it:

> [m]any ambiguities in statutory language arise from political compromises, which are inevitably part of the democratic process. Two differing political factions may agree on a proposed statutory text, knowing that they disagree on the meaning of the text. From a drafting point of view, this is not the best way to draft legislation, but it sometimes is the only way to enact legislation.

Bellis, *supra* note 16 at 2211 n. 10. Bellis continues, noting that, unlike courts who have concrete cases before them, Congress "cannot as a practical matter anticipate every possible combination of future circumstances in which any particular term used in a statute will be relevant, even assuming the political nature of its deliberations was consistent with a desire to do so." *Id.* at 2211. As one writer observed, "legislative committees may accept obscure or ambiguous amendments in pursuit of compromise" (citation omitted), while strong party government need not obfuscate or evade by 'passing the buck' to the courts." Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 835 n. 64 (1994) (quoting PARTICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 305 (1987)).

courts to make determinative decisions as to the meaning and impact of the legislation. In that way, individual legislators can disclaim responsibility for judicial interpretations that dissatisfy their supporters and can gain favor with voters by denouncing unpopular court decisions.[73]

Fifth, Congress may well be satisfied with the courts' interpretation of politically difficult issues that could not have been resolved through normal legislative channels. As a top player in the House Office of Legislative Counsel confirmed, when Congress takes no action in response to opinions brought to its attention as ambiguous or as otherwise warranting a legislative response, "it probably means that [the court] is making good decisions in hard cases, and that Congress is sufficiently satisfied with those decisions to leave them undisturbed."[74] Another author put it this way:

Legislators, in the main, are practical politicians, dependent on popular acceptance and support for survival. Though they have the legislative power to make needed reforms they are fearful of the political consequences or bound by their own personal attachment to their environments and to the majoritarian sense of values. The Court has moved in where legislators feared to tread, and the nation, in general, has accepted the intrusion and has become accustomed to it.[75] This perspective suggests a general ease with the overlapping competencies of the respective branches, a notion that apparently leaves Katzmann unsettled.

Finally, Katzmann's theory that knowledge induces corrective action attributes to Congress a deliberative element that is widely believed not to exist. In the words of one commentator, it has been "frequently observed [that] Congress is not in any meaningful sense a deliberative body. . . . Congress is a bureaucratic organization with thousands of employees, and its members are managers on the executive model more than deliberators on the judicial model."[76] These points are summarized well by Professor Brudney:

> The initiation, negotiation, and enactment of a statute is a multidimensional process that requires committing considerable institutional resources, navigating politically sensitive internal procedures, and anticipating substantial societal consequences. The complexity of the process precludes the more straightforward interpretive inferences that may be appropriate when constructing

73. *See, e.g.*, Marshall, *supra* note 40 at 211 (opining that "[w]hen there are strong competing factions on an issue, the legislature will often pass the buck to an agency, or to the courts, by enacting a vaguely worded statute that offers each side of the controversy some hope of ultimately prevailing. *This same desire to avoid controversy or to 'shift responsibility' helps explain congressional inaction where judicial decisions have stimulated strong negative sentiment*") (footnotes omitted) (emphasis added).

74. Bellis, *supra* note 22, at 2213.

75. Ray Forrester, *Truth in Judging: Supreme Court Opinions as Legislative Drafting*, 38 VAND. L. REV. 463, 465 (1985).

76. Brudney, *supra* note 41 at 26-27.

> certain other legal texts. . . . [L]egislation is a product of negotiation and compromise among multiple participants over an extended period of time. . . . [T]o treat inconclusive statutory text as though it were the consciously streamlined product of one legislator's pen risks undervaluing what the legislative process has to offer in explaining that text. Further, to assert that Congress can simply "do it better next time" discounts how resource-intensive that next time is likely to be.[77]

By blithely assuming that Congress will respond rationally to the judiciary's input, Katzmann ignores the reality that Congress is a largely reactive body. The rationality that Katzmann ascribes to Congress is therefore inappropriate and undeserved.

A pair of articles appearing in the *Stanford Law Review* shortly after *Courts and Congress* was published bears on these issues.[78] Professor Neal Kaytal argues that judges should take a more active role in "advicegiving," or recommending ideas to the legislature through their written opinions. Kaytal's position is like Katzmann's in that it seeks to better inform the dialogue that judges have with legislatures to take corrective action; but his position does not (as does Katzmann's) advocate the use of mechanisms outside of judicial opinions by which to enhance the level of inter-branch communication. (Likewise, Kaytal's suggestion that courts give more advice through their written opinions is not one which Katzmann advocates in his book.) As defined by Kaytal, "[a]dvicegiving occurs when judges recommend, but do not mandate, a particular course of action based on a rule or principle in a judicial case or controversy."[79] His lengthy article seeks to demonstrate the historical justifications and precedent for such advicegiving,[80] and that jurists have in fact been involved in advicegiving for a long time.[81]

Former D.C. Circuit Court of Appeals judge Abner Mikva, once a member of Congress himself, persuasively argues that "advicegiving" as suggested by Katyal would in fact be inconsistent with basic precepts of the American judicial system. He argues that the "fatal flaw" in the pro-advicegiving argument is "the notion that there is something in judges' status or stature that qualifies them to give such advice to elected officials. Aside

77. *Id.* at 16-17.

78. Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709 (1998). *See also* Ronald J. Krotoszynski, Jr., *Constitutional Flares: on Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998) (discussing this general dilemma mainly in the context of Judge Calabresi's concurring opinion in *United States v. Then*, 56 F.3d 464 (2d Cir. 1995)). Professor Krotoszynski does not reach any definitive conclusions about the nature, scope, or extent to which judges should give advice to the legislature, but concludes that "[i]t is high time for a dialogue about a dialogue." *Id.* at 62.

79. Katyal, *supra* note 78, at 1710.

80. *See id.* at 1723-53.

81. *Id.* at 1710.

from the question of legitimacy, . . . there is simply no capacity."[82] As Mikva explains,

> [T]he notion that the courts are suitable instruments to "correct" legislative mistakes [is misplaced]. That it is undemocratic is obvious; that such corrections might bring on even worse solutions to the problem at hand is less obvious, but even more true. Judges don't have that kind of know-how. More importantly, the institution of the judiciary is ill-suited to such activity.[83]

Mikva also argues that the legitimacy and secrecy of the Supreme Court's process also speaks in favor of declining to engage in "advicegiving."[84] In so arguing, he implicitly acknowledges the different institutional competencies of each governmental branch— a lesson that often seems lost on Katzmann.

Perhaps it is true, as *Courts and Congress* suggests, that the dialogue between members of Congress and the federal judiciary is less than ideal, and that there is room for improved communications. But in proposing or planning for any changes, one must pay due respect to the preservation of a judiciary that acts with both independence and the appearance of propriety. Underlying constitutional precepts such as the diminishment clause,[85] lifetime tenure (absent an impeachable offense),[86] and the shared responsibility between the executive and legislative branches in selecting judges,[87] also demonstrate the Founders' intent to maintain an independent federal judiciary.[88] The value of judicial independence has never been subject to serious debate and is indeed a hallmark of a functioning democracy with a judiciary that is responsive to its citizens and especially protective of its minorities. So, too, must there be adequate regard for the limits imposed on and by Congress itself. To do otherwise would inflict on Congress a role for which it is neither equipped to perform nor desirous. Katzmann's underlying assumptions – that more knowledge and information will result in a better, more activist, and more responsive body is inconsistent with the means by which Congress operates and with Congress's institutional competence.

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82. Mikva, *Why Judges Should Not be Advicegivers, supra* note 41, at 1826.

83. *Id.* at 1827.

84. *Id.* at 1828-29.

85. U.S. CONST. ART. III, § 1.

86. *Id.*

87. U.S. CONST. ART. II, § 2, cl.2.

88. *See* Lloyd N. Cutler, *The Limits of Advice and Consent*, 84 NW. U. L. REV. 876, 877 (1990) ("The Constitution tries to assure the appearance of judicial independence and impartiality in several ways. First, the President and the Senate share the power to select Justices. Second, the diminishment clause provides that an Article III judge's salary may not be reduced during his or her term in office. Third, and most importantly, the good behavior clause provides that federal judges shall serve 'during good behavior,' or for life").

IV.
THE POLITICS OF SHARED POWER

The Politics of Shared Power likewise discusses the balance of power between two branches of the national government – in this case the executive and legislative branches. In doing so, Fisher turns common notions of the President and Congress on their head. Recognizing (and discussing) the respective roles of each of these branches as explicit or enumerated powers under the Constitution, *The Politics of Shared Power* examines the role of the President as legislator and of Congress as administrator, thus showing the extent to which there are elements of "shared power" between these two branches. Fisher describes the ways in which the President acts as legislator, through instruments such as recommending legislation in the State of the Union address and otherwise[89] and the Presidential veto power, discussing the force of the veto,[90] the pocket veto,[91] and the impact of the *threat* of a veto on congressional action.[92] He also gives as examples of the President's implied and evolved legislative powers authority delegated to him by Congress,[93] and the power to issue regulations, proclamations, and executive orders.[94] Fisher also discusses how a President's personal abilities and the institutional strength of the presidency have been used to effectuate legislative results.[95] Fisher then goes on to describe the role of Congress as administrator. As with the Presidency, this role is a matter both of constitutional charge, such as the oversight of agencies,[96] and as instruments of legislative power, such as its ability to control government personnel policies,[97] the ability to appoint advisors,[98] the power to initiate and conduct investigations,[99] the authority to introduce private bills,[100] and the need to do constituent case work.[101]

Much of what Fisher reports is important if for no other reason than this information help to expose common misperceptions about the respective roles of Congress and the President. For instance, Fisher notes that, vis-à-vis the legislature, the President's role is relatively modest, and that his powers of persuasion and ability to call on favors have diminished over time.[102] Also, the fact that members of Congress rely more on specific

89. FISHER, POLITICS OF SHARED POWER, *supra* note 3, at 24-28.
90. *Id.* at 28.
91. *Id.* at 29.
92. *Id.* at 28, 29.
93. *Id.* at 32-33.
94. *Id.* at 33-36.
95. *Id.* at 39-42.
96. *Id.* at 69-71.
97. *Id.* at 71-72.
98. *Id.* at 72-73.
99. *Id.* at 73-75
100. *Id.* at 76-77.
101. *Id.* at 77-78.
102. *Id.* at 66.

voter mandates and less on presidential coattails has contributed to the decline in presidential ability to influence legislative behavior. Moreover, a President who is too ambitious in attempting to influence certain members' behavior may alienate other members of Congress.[103]

Fisher also argues, again contrary to popular belief, that Presidents do have access to powerful legislative channels. Congressional decentralization through concentrated committee and subcommittee action leaves the President with an identifiable channel of communication to the members of Congress who are in the best position to influence congressional action. Presidents, therefore, should see decentralization of Congressional work as a benefit rather than a hindrance to their ability to influence Congressional action.[104] Finally, giving several modern examples, Fisher also debunks the notions that "divided government"[105] will render a president impotent to influence Congress; asserting that same-party control of both branches will leave the President with extraordinary influence over a legislative agenda. From this premise, Fisher reaches the rather apparent but unhelpful conclusion that "[a] good leader makes the best of a situation that is never ideal".[106]

Fisher makes the same kind of analysis as to Congress' "executive" powers – for example, the power to create offices and define their powers and duration,[107] the power of the Senate to confirm certain presidential appointees,[108] the power of appropriations,[109] and the legislative veto.[110] Fisher's discussion of how Congress circumvented the Supreme Court's repudiation of the legislative veto in *Chadha*[111] is particularly compelling, because it demonstrates the ability of Congress to in effect avoid Supreme Court precedent through creative measures. It also shows that, despite the basic premise of our Constitutional system, the Supreme Court does not necessarily always have the last word.

As to Congress' influence over matters that are normally considered "administrative" and hence executive, Fisher concludes that Congress *does* have a legitimate stake in the functioning of executive officials. If anything, Fisher takes the position that Congress should be given more oversight and enhanced controls over administrative operations.[112] Further, he opines

103. *Id.*

104. *Id.*

105. *Id.* at 67. The term "divided government" is defined by Fisher as a government in which one party controls the White House and the other party controls Congress.

106. *Id.* at 67.

107. *Id.* at 71-72.

108. *Id.* at 72.

109. *Id.* at 75-76.

110. *Id.* at 91-104.

111. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). *See* FISHER, POLITICS OF POWER, *supra* note 3, at 101 (stating that "[w]hat is now prohibited directly by *Chadha* can be accomplished indirectly by House and Senate rules").

112. FISHER, POLITICS OF POWER, *supra* note 3, at 105.

that the frequent lack of executive cooperation with Congress over budgetary and other matters spurs Congress to adopt mechanisms for ever greater control over appropriations, often through specific legislation.[113]

Fisher also explores the fragmented nature of the federal bureaucracy, presenting abundant evidence that this bureaucracy is agent of neither the President nor Congress (Chapter 4). He presents a similar case as to the nominal "independent agencies" (Chapter 5). Fisher discusses the influences of both branches that render the so-called "alphabet agencies" so difficult to categorize as belonging to either the executive or legislative branch.[114] While he presents a strong case for this somewhat well-accepted proposition, the book regrettably does not offer much of anything new here; Fisher simply restates much of the rhetoric of confusion that has surrounded the independent agencies since their initial development and growth.

Concluding that "[b]oth branches have powerful arguments supporting their efforts to control the bureaucracy",[115] Fisher notes that with the explosion of the so-called "independent" agencies, Presidential control over the bureaucracy has become more and more difficult,[116] but that Congress has greater tools at its disposal—such as budgetary control, the power of investigation, and the power to devise structural checks—to more directly monitor the work of administrative agencies.[117] As Fisher argues, the Framers had no intention of developing a monolithic executive, and the modern legislature is far better prepared than is the President to discharge that oversight function.[118]

In terms of budgetary control, Fisher argues that Congress has done a disservice by enacting the Budget Act of 1974, which took away certain responsibilities from the President and left them to Congress; the President, Fisher says, no longer can be held to any real level of accountability with regard to the budget – a situation which Fisher finds to be inconsistent with the President's nationwide political leadership role.[119]

With respect to the war powers and foreign affairs, the framers were careful to divide functions between the President and Congress, giving the President the role of Commander-in-Chief of the armed forces and Congress the power to declare war and to raise and maintain the armed forces.[120] Fisher shows through historical examples that, notwithstanding

113. *Id.* at 104.
114. *Id.* at 170.
115. *Id.* at 145.
116. *Id.*
117. *Id.* at 174-76.
118. *Id.* at 175-76.
119. *Id.* at 251.
120. *See id.* at 211 (referring to FEDERALIST No. 69 (Alexander Hamilton)). *See also* U.S. CONST. ART. I, § 8, cl.11 (giving Congress the power to declare war); U.S. CONST. ART. I, § 8, cl. 12-16 (giving Congress the power to raise and support the armed forces). The

these constitutionally prescribed functions, Presidents have been able to "finance" war efforts through backdoor methods.[121]

Fisher argues vigorously for the need for comity between Congress and the President in all matters relating to foreign affairs. Here, Fisher seems to suggest that members of Congress are as well-suited as the President to engage in such matters.[122] But the importance of a strong and singular national identity vis-à-vis foreign states cannot be overstated. While it may be true, as Fisher says, that the President cannot develop a coherent foreign policy without the assistance of Congress,[123] when it comes to dealing with foreign governments, the President and his closest deputies must act in unity. Forcing the President to share his standing as representative of the nation with members of Congress who do not share his agenda and who lack the national constituency of the President would weaken him in the eyes of foreign nations – a result that the Founders vigorously sought to prevent.

The Politics of Shared Power disappoints in three additional respects: First, Fisher does not develop the depths of insight that the reader might expect; second, the book lacks any discussion of how the courts play a role in the relationship between the executive and the legislature; and third, the seeming bottom-line articulated by Fisher in the book's Epilogue borders on the banal.

Given Fisher's abilities and renown as a scholar of politics and government,[124] it is disappointing that he does not express many of his own views on the issues that he notes are of current importance and the object of lively academic discussion. In the main, he declines to express strong views about the appropriate role of the President and Congress with respect to the powers the book discusses. Fisher's own insights into these conflicts would have been enormously beneficial; as to each issue, what was the balance struck by the Framers? What could be done to alleviate some

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President, on the other hand, is given the power to make treaties and to appoint ambassadors (subject to the advice and consent of the Senate). U.S. CONST. ART. II, § 2. *See also* LOUIS FISHER, PRESIDENTIAL WAR POWER (1995).

121. *See* FISHER, POLITICS OF POWER, *supra* note 3, at 206-13.

122. *Id.* at 216.

123. *Id.*

124. Fisher has published a spate of law review articles on myriad issues of government. *See, e.g., Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (with Neal Devins); *Presidential Independence and the Power of the Purse*, 3 U.C. DAVIS J. INT'L L. REV. 1237 (1997); *The Ubiquity and Ambiguity of Unfunded Mandates*, 4 CORNELL J. L. & PUB. POL'Y 472 (1995); *The Korean War: On What Basis Did Truman Act?*, 89 AM. J. INT'L L. 21 (1995); *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993); *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57 (1990). He has also written numerous books in addition to this one and its earlier editions, such as AMERICAN CONSTITUTIONAL LAW (1999), CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1997), CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988), POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (1996) (with Neal Devins), and PRESIDENTIAL SPENDING POWER (1975).

of the conflict that obstructs the smooth operation of the Federal State? How important is each of these issues in the quest for a more harmonious balance of power? Does the confusion over the nature and scope of the President's war powers present a greater risk to the public good than does the uncertainty over who really controls the independent agencies? Are these issues that the courts are empowered to resolve or are they "political issues" and hence inappropriate for judicial intervention?[125] Fisher is well-qualified to present his views on these and other issues, and it is disappointing that he stops short of doing so.

Perhaps Fisher's reticence is based on some judgement that there is no ideal "balance" between the powers shared by the President and Congress. The ample discussions throughout *The Politics of Shared Power* speak to the truth of that proposition. But surely there is more that can be said about the sharing of powers between the legislative and executive branches as divined by the Framers and as supplemented by political realities. Readers may feel cheated when Fisher refuses to advocate particular roles for these branches with regard to specific functions.

Second, although he begins his work by noting that "[t]o study one branch of government in isolation from the others is an exercise in make-believe,"[126] Fisher, like Katzmann, partakes in this fiction by effectively eliminating one of the three branches from his analysis. When necessary, *The Politics of Shared Power* does discuss important court precedent, but it does little or nothing to integrate the influence of the judicial branch into the discussion of the intersection of the work of the other branches.

To be sure, Fisher's work, like Katzmann's, is ambitious in examining the often conflicting spheres of authority between two of the three branches of the national government. But there are places in Fisher's work where he seems intent on adhering to his primary focus even when the perfect occasion arises to examine the role of the federal judiciary vis-à-vis its coordinate branches. The most glaring example of this is Fisher's extraordinary account of the events leading up to *Chadha* and the Supreme Court's striking down of the legislative veto, followed by Fisher's discussion of how the legislative veto continues to exist in form if not in name.[127] This discussion makes the reader curious as to the future of this particular conflict, which so intimately involves the judiciary. Surely the courts recognize that the spirit of *Chadha* has been violated. Will they look for an opportunity to reaffirm and expand *Chadha*? Or is there judicial sentiment that *Chadha* was perhaps wrongly decided and a willingness therefore to allow Congress to continue to exercise what amounts to legislative vetoes in

125. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 519 (1969); Baker v. Carr, 369 U.S. 186, 217(1962); Luther v. Borden, 7 How. 1 (1849).

126. *See* FISHER, POLITICS OF POWER, *supra* note 3, at xi.

127. *Id.* at 99-104.

other contexts? Any potential future role for the judiciary is not even explored,[128] although such a discussion would have been enlightening.[129]

Finally, Fisher's bottom-line conclusions seem to be expressed most vividly in the book's short Epilogue. There, Fisher retreats to tautology by suggesting that the press and the public ought to be more compassionate in their evaluation of Congress. While the President, Fisher says, is looked upon with dignity and "is associated with such lofty qualities as rationality, accountability, and a commitment to the public interest"[130] (a characterization with which surely not everyone would agree), Congress is often seen as slow rather than deliberative,[131] obstructionist rather than thoughtful as to legitimate proposals,[132] or controlled by special interest groups.[133] Fisher seems to call here for a kinder, gentler evaluation of Congress.

If this is the lesson Fisher wants us to take from his work, his conclusions are based on questionable premises. Moreover, he underestimates both his own work and his audience. After presenting a scholarly and credible account of the combined influences of the President and Congress, he seems to retreat to the importance of rhetoric – feel good about Congress and the problems associated with the shared powers between the branches will somehow become less daunting.

Why does Fisher think it so important what the public thinks and says about Congress? Fisher presents no evidence to suggest that there is any reason to believe that the difficulties he identifies would somehow dissipate if the public and press reaction to Congress were more positive and less critical. Nor is there any reason to think that the work of Congress is in any real way affected by the public's general perceptions. No large, decentralized, politically accountable group can expect verbal approbation, and to suggest that it would somehow make a difference is fatuous. Members may care in some general way about what is said about Congress, and more about what is said about themselves individually; but elections are the main focus of legislative representatives, and what may be said about the institutions in other, private contexts, hardly amounts to much. If Fisher's ultimate suggestion is that the nature of the public rhetoric will somehow alleviate Congress' work pressure and feelings of aspersion, his message is misplaced and largely irrelevant.

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128. This is but one example of how the branches communicate in oblique fashion, sending messages through the channels ascribed to each particular branch and their traditional roles under the Constitution, a subtlety which seems to largely have been lost on Katzmann.

129. *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT 133 - 71 (1991) (discussing issues involved in *Chadha* and progeny and their ultimate resolution).

130. *See* FISHER, POLITICS OF POWER, *supra* note 3, at 253.

131. *Id.*

132. *Id.*

133. *Id.* at 254.

V.
CONCLUSION

Courts and Congress and *The Politics of Shared Power* add significantly to the modern literature on the sharing of authority between and among the three branches of the government. Each book yields its own particular value: Katzmann sets forth concrete proposals for an improved dialogue between the federal judiciary and the US Congress; and Fisher presents concrete scenarios of the sometimes unforeseen roles of Congress vis-à-vis the President (and vice-versa). While each book also has its individual shortcomings, both suffer from a lack of wholeness. While giving a respectful nod towards the need to look at all of the three coordinate branches to truly understand the functioning of each and their mutual interactions,[134] both authors entirely exclude one of the three branches from his work. Yet there can not be any meaningful dialogue about the operations of only two branches without factoring in the complimentary and complicating actions of the third. *All* of the three branches interact with each other, and there is little that affects two of the branches without somehow implicating the third. With respect to the legislative and executive branches, conflicts arise over the nature of their overlapping powers on an ongoing operational basis. These two branches must work together daily on a wide range of activities. It could even be said that no major government initiative could take place without the influence and action of both Congress and the Executive. Whether the interactions between the Executive and the Legislature are hostile or cooperative in any particular instance or as to a particular issue can have a major influence on how laws get made and enforced.

The judiciary stands somewhat apart from the other branches of the government. While the federal courts are clearly an integral part of the governmental triumvirate, the courts are not engaged in day-to-day policy making in the same way as are the Executive and Congress. While courts *are* subject to political forces and personal inclinations, judges are driven in the main by the legal issues and facts of cases that are brought before them and by the trappings of judicial precedent. But the federal courts' agenda is also driven, albeit more indirectly, by the actions of the executive and legislative branches, in that cases brought before them often concern an action taken by one of those branches. As the Supreme Court confirmed in *Marbury v. Madison*[135], it is the domain of the Court to state what the law is. This role, of course, often creates conflict and engenders the dissension of legislators and members of the Executive branch.

134. *See* Fisher, THE POLITICS OF SHARED POWER, *supra* note 3, at xi (arguing that "[t]o study one branch of government in isolation from others is usually an exercise in make-believe"). *See also* KATZMANN, COURTS AND CONGRESS, *supra* note 2, at 1.

135. 5 U.S. (1 Cranch) 137 (1803).

The federal system was designed to foster conflict. Preventing the accumulation of too much power in the hands of a single branch is widely believed to be the major purpose behind the separation of powers. *By its very nature*, the structure of the federal government creates conflict and disagreement over the respective powers of the three branches. If such conflict were not inherent in a government of shared powers, there would be no need for a design to avert overreaching by one branch or another. Yet there remains room for improvement. The question is, then, how much and what kind of improvement is needed? Are the problems charged by many driven more by political and other interests than by anything else? Can existing problems be remedied within the institutional framework or should basic Constitutional reforms be seriously considered? What makes sense from an institutional perspective? From economic, social, and historical perspectives?

These questions are not easily resolved, but they must be critically examined before risking the uncertainty of change. Change inevitably brings about new sources of conflict, as well as difficulties that could not have been anticipated. The United States system of government has been remarkably resilient and enduring. Before seeking to impose modifications that could disturb its functioning, the risks of the unknown must be weighed against the abiding nature of the delicate balances struck by the Framers.