

FOREWORD CONGRESS AND THE CONSTITUTION

ROBERT A. KATZMANN†

When the Constitution turns to institutional arrangements, the Congress is first in line. It is thus particularly appropriate that a symposium should be devoted to an examination of the first branch and the charter of nationhood.

The Constitution, of course, establishes the framework and structure in which governmental institutions exist. In creating separate institutions with shared powers, the Constitution assumes that the branches of government will very much affect one another. Indeed, governance is designed as a process of interaction among institutions—legislative, executive, and judicial—whose different structures, incentives, and purposes yield a constructive tension that preserves liberty and fosters the public interest.¹ The Constitution, then, envisions a continuing dialogue among our institutions.² For their part, the institutions—Congress, the President, the courts, the states, and the people—share a “profound responsibility,” as Justice Ginsburg put

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† U.S. Circuit Judge, United States Court of Appeals for the Second Circuit.

1. *See generally* ROBERT A. KATZMANN, *COURTS & CONGRESS* (1997) (examining how the interaction between the judicial and legislative branches shapes the administration of justice); WILLIAM H. REHNQUIST, *THE SUPREME COURT 280* (2001) (describing the Framers’ limitations on the judiciary); James Q. Wilson, *Interests and Deliberation in the American Republic, or, Why James Madison Would Never Have Received the James Madison Award*, 23 *POL. SCI. & POL.* 558, 558-62 (1990) (describing *The Federalist*’s definition of governance).

2. *See generally* LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988) (exploring the role of all three branches in developing constitutional law).

it,³ to be faithful to the Founders' conception. Even as we confine our focus to Congress and the Constitution, we are ever mindful that what the legislative branch does can have vital consequences for the coordinate institutions and the federal system generally.

A responsible legislature is purposive and deliberative,⁴ and has even been compared to a school that teaches its members to govern well.⁵ That is, its structures and processes are meant to facilitate reasoned consideration of issues so that legislators can act in the public interest.

In thinking about Congress, the Constitution, and the role of deliberation, a cluster of questions come to mind—in fact, are raised in this symposium volume. What should be the role of Congress as constitutional interpreter? Congress frequently addresses questions with constitutional ramifications. Some, such as the line-item veto,⁶ are later tested in the courts, while many others are not subjected to sub-

3. *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 54 (1993) (statement of Judge Ruth Bader Ginsburg).

4. See, e.g., ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 161 (7th ed. 2000) (referring to Congress as a “deliberative assembly”); Charles O. Jones, *A Way of Life and Law*, 89 AM. POL. SCI. REV. 1, 4 (1995) (describing lawmaking as continuous, iterative, informative, deliberative, speculative, sequential, orderly, and declarative).

5. ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY* 15 (1986); WILLIAM K. MUIR, JR., *LEGISLATURE: CALIFORNIA'S SCHOOL FOR POLITICS* 1-8 (1982).

6. As one example, see the remarks and colloquies of Senator Daniel Patrick Moynihan (D-NY), 142 CONG. REC. 6544 (1996) (“Mr. President, I rise in the serene confidence that this measure is constitutionally doomed. . . . I find myself once again agitated that a measure of such enormity—I use this work in both of its meanings—came to use for so frivolous a reason.”); Senator Robert Byrd (D-WV), 142 CONG. REC. 6534 (1996) (“I believe that passage of [the Line Item Veto Act] . . . would be a truly monumental mistake that will do great harm to the constitutional balance of powers while contributing very little toward balancing the federal budget.”); Senator Carl Levin (D-MI), 142 CONG. REC. 6535 (1996) (“The Constitution establishes by which laws are enacted, by which laws are amended, and by which laws are repealed. It is fundamental constitutional law. . . . The Founding Fathers made a conscious decision to give the power of the purse to the Congress and not to the President.”); Senator Dan Coats (R-IN), 142 CONG. REC. 6567 (1996) (“[T]he real benefit of the line-item veto is that it exposes a process that thrives on public deception. . . . This measure is a milestone of reform. It is the first time that Congress will voluntarily part with a form of power it has abused.”); Senator John McCain (R-AZ), 142 CONG. REC. 6568 (1996) (“It is to help preserve the notion that Government derived from the consent of the governed is as sound as it is just that I have advocated this small shift in authority from one branch of the Government to another.”); and Senator Pete Domenici (R-NM), 142 CONG. REC. 6550 (1996) (“I am not worried about the balance of power because, obviously, Congress will withhold some of the President's power if this gets into an arbitrary match of power, and I believe it is going to be used to the betterment of our country, our people, and the taxpayers.”).

sequent judicial review.⁷ Institutionally, how is Congress organized to engage in such exercises of constitutional deliberation?⁸ What are the criteria by which we would judge Congress's performance?⁹ Under those criteria, how has Congress performed?¹⁰ How should the legislative branch undertake constitutional interpretation?¹¹ As a matter of process and organization, how can legislative arrangements be improved?¹² How should congressional factfinding be reviewed in the courts?¹³ Are there "super-statutes" that "successfully penetrate public normative and institutional culture in a deep way" to occupy legal terrain once held by fundamental law, thus becoming "quasi-constitutional"?¹⁴

In engaging these questions, the essays in this symposium promise to stimulate further thinking about Congress and the Constitution—and in that effort reinforce the vitality of the enduring American experiment.

7. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001).

8. *Id.*

9. Neil Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001); Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395 (2001).

10. Tushnet, *supra* note 9.

11. Katyal, *supra* note 9.

12. Garrett & Vermeule, *supra* note 7.

13. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001).

14. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).