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Recommended Citation
Lauren Hanson-Figueroa, Alexandra Piccirillo & Amy Steigerwalt, Congress is from Mars & Courts are from Venus: Reconceptualizing our Understanding of Interbranch Relations, 73 Emory L. J. 471 (2023). Available at: https://scholarlycommons.law.emory.edu/elj/vol73/iss2/5
CONGRESS IS FROM MARS & COURTS ARE FROM VENUS: RECONCEPTUALIZING OUR UNDERSTANDING OF INTERBRANCH RELATIONS

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ABSTRACT

In this Article, we argue for a reconceptualization of how to understand legislative-judicial relations in the United States. We propose that the Legislative and Judicial Branches of the U.S. government broadly reflect gender-stereotypical relations and divisions of labor in terms of both function and design. Congress was intended to be agentic and public, securely positioned as the public, lawmaking body; it fits the prototypical definition of Arendt’s “space of appearance.” The Legislative Branch can be conceptualized as men in a patriarchal culture, given agency and invited to action. In contrast, the courts reside in a more private sphere, toiling away in relative obscurity, removed from the public eye. Much like women in a prototypical patriarchal culture, courts’ work is both reactionary and mandatory—and often undervalued. The broader implication is that Congress takes advantage of its public nature to shout loudly and do little while transferring the work—and many times the blame—to the courts. Part I provides an overview of our theoretical reconceptualization of the court-Congress relationship, while Part II provides empirical support for our theoretical claims. Part III then discusses the implications of these empirical realities for the work of each branch and the views of the public.

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INTRODUCTION

In 2006, legislative scholars Norm Ornstein and Thomas Mann declared that Congress was the “broken branch,” characterized by increased partisan squabbles and a loss of institutional prerogative vis-à-vis the Executive. Left out of their examination was an examination of how this assessment of Congress influences Congress’ relationship with the judiciary. If Congress is “broken,” what does that mean for the courts and judges who are tasked with interpreting what this “broken branch” has produced? In the context of legislative-judicial relations, how are the courts both influenced and affected by the travails facing Congress?

To answer these questions, we propose a new conceptualization of the legislative-judicial relationship: Congress behaves as a prototypically masculine, “show-horse” institution—public, loud, attention-seeking, and happy to claim credit for actions big and small. Comparatively, the courts are the
stereotypical feminine, “workhorse” institution—private, quiet, hard-working, and happy to toil away behind the scenes (or at least happy to let others tout what they do rather than touting it themselves). We argue this theoretical framework, in turn, helps us to understand the processes adopted by each institution, their outputs, their mechanism for advertising their outputs, and also the means by which they interact and, when possible, shift work between the branches.

The purpose of this Article is primarily theoretical, with the aim of pushing scholars who study the courts and Congress to rethink how we understand the legislative-judicial relationship. We argue for moving beyond traditional separation-of-power analyses to using a framework which better captures the actual realities of the interactions between the two branches. Through this new theoretical framework, we can better understand how the branches interact, what each branch does and why, and how those actions and outputs influence the public’s evaluation of each branch. Our hope is that this theoretical conceptualization aids scholars in rethinking conclusions about legislative-judicial relations as well as revealing new paths for future research.

Part I explicates our theoretical framework, grounding it in the extant literatures on Congress and the courts as well as the broader literatures on gender and politics. Part II empirically assesses the work of Congress and the courts between 2004 and 2014 by comparing the scope of their actions and outputs in the areas of (1) environment; (2) gender discrimination; (3) antitrust; and (4) labor issues. Finally, Part III explores the implications of this theory and our empirical evidence, particularly with respect to how Congress chooses to shift work to the courts through legislation and how these decisions may, in turn, influence evaluations of the two institutions.

I. MARS VS. VENUS, OR HOW TO UNDERSTAND CONGRESS VS. THE COURTS

We propose that the relationship between Congress and the federal courts needs to be reconceptualized. This reconceptualization will create a better understanding of both branches’ actions and outputs, as well as the way they interact. Specifically, we argue that the Legislative and Judicial Branches of government broadly reflect gender-stereotypical relations and divisions of labor in terms of both function and design. Congress was intended to be agentic and public, securely positioned as the public, lawmaking body; the Legislative


3 Mann & Ornstein, supra note 1, at 14.
Branch can be conceptualized as men in a patriarchal culture, given agency and invited to action. Section A provides an overview of the history of gender stereotypes and gender role expectations, while section B explains how these stereotypes and role expectations were used to create a social division between the masculine public sphere and the feminine private sphere. Sections C and D reveal how these gendered stereotypes and role expectations manifest themselves in the design and structural incentives of Congress and the courts, respectively.

A. History of Gender Stereotypes and Gender Role Expectations

Gender stereotypes and gender role expectations from ancient times until now influence our conception of masculine versus feminine behavior and the relative merits of each. Sociologists term gender a “status characteristic” to which people attach “status beliefs” that benefit those who possess the status characteristic in question while undervaluing those who do not. Studies routinely find that the status of “male” receives benefits while the status of “female” is devalued. This finding is true for evaluations given by both men and women. Scholarship from a panoply of disciplines further reveals the prevalence of long-standing gender stereotypes which distinguish between the “masculine” and the “feminine” in terms of character traits, social roles, and the relative abilities and skills of men and women. Studies find that people group traits into masculine—such as “assertive,” “tough,” “rational,” and “self-confident”—and feminine—such as “gentle,” “sensitive,” “emotional,” and “talkative”—categories. As we discuss further below, masculine traits are often

6 See, e.g., supra note 5.
7 See, e.g., DAVID BAKAN, THE DUALITY OF HUMAN EXISTENCE: AN ESSAY ON PSYCHOLOGY AND RELIGION 107 (1966) (differentiating among four levels of “sex differentiation” including biological, social, and psychological differences).
8 See, e.g., id. at 112–13 (discussing sex-based characteristics and their association with achievement); Kay Deaux & Laurie L. Lewis, Structure of Gender-Stereotypes: Interrelationships Among Components and Gender Label, 46 J. PERSONALITY & SOC. PSYCH. 991 (1984) (studying the social correlation between gendered stereotypes and occupations); JOHN E. WILLIAMS & DEBORAH L. BEST, MEASURING SEX STEREOTYPES: A MULTINATION STUDY 15–45 (1990) (tracing the association between masculine and feminine terms across geographic regions and cultures).
preferred over feminine traits; this is particularly true in the public sphere. Individuals also link gender stereotypes to social roles and even occupations. Professors Elizabeth L. Haines, Kay Deaux, and Nicole Lofaro compared the association of gender, traits, and role perceptions by Americans in 1983 and 2014. They uncovered “a surprising durability of basic stereotypes about women and men” even in 2014, women were evaluated more likely than men to cook, do chores, and be a “source of emotional support,” while men were more likely to be deemed the “financial provider” and “head of household.” Occupational sorting also reflected strong gender lines, with women judged as more likely to be hairdressers, elementary school teachers, and nurses, and men as more likely to hold jobs such as construction workers, engineers, and—important for our purposes—politicians.

B. Social Division Based on Gender Stereotypes and Gender Expectations

The long-standing gender stereotypes discussed in section A also help explain the eventual social division that was created, particularly in the (white) Western world, between the public and private spheres. The public sphere is that of government and society, finance, and business; it is generally associated with men and masculine traits such as being tough, rational, and brash. Summarizing historian Hannah Arendt’s conception of the public sphere, Professor Margaret Canovan argued that “[t]he public realm is a ‘space of appearance,’ a focus of universal attention that confers dignity and importance on the things and people that appear in it.” It is attention-grabbing and attention-seeking, where debates are had and decisions made. The private sphere, alternatively, is where one toils away from the limelight, completing

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9 See, e.g., Inge K. Broverman et al., Sex-Role Stereotypes: A Current Appraisal, 28 J. SOC. ISSUES 59 (1972) (explaining that sex-role differences tend to treat masculine stereotypes more favorably in society).  
11 Id.  
12 Id. at 360.  
13 Id. at 358.  
14 Id. at 355.  
18 Id.
tasks that are both inherently important but also indisputably undervalued. This sphere is that of the home, where children are raised and nurtured; it is generally associated with women and feminine traits and activities such as caregiving and nurturing. The private sphere is also literally more private: tucked away from public view, where demanding work is completed with little to no public recognition.

For centuries, men dominated the public sphere while women were denied entry. Women were prevented from, among other things, owning property, attending schools, and even holding certain jobs. The enforcement of these separate spheres of influence was justified by linking gender stereotypes to the jobs and tasks each sphere required. Men—who were seen as stronger, tougher, more rational, and more intellectual—were argued to be inherently suited to the public sphere. Women—who were viewed as more emotional but also better equipped to raise and nurture children—were thought to be best placed in the home where they could be both protected and encouraged. And, studies continue to show that individuals more strongly link traits connected to the domestic sphere such as an “interest in children” and “warm and kind” to women as opposed to men.

Many scholars argue this public/private distinction can be seen throughout human social development as early as the sexual division of labor in hunter-

19 Id. at 183 (emphasizing the importance and “publicity” of the public sphere as compared to the private sphere).
21 Canovan, supra note 17, at 183.
23 See, e.g., SALMON, supra note 22.
24 See, e.g., MALKIEL, supra note 22, at 3–4 (explaining that even when schools became coeducational in 1837, women and men were separated into “different spheres of campus life” until the 1960s).
25 See, e.g., GOLDIN, supra note 22, at 17 (reviewing data documented women’s employment rate as low as 18.9% in the 1890s).
26 See, e.g., ALICE H. EAGLY, SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL-ROLE INTERPRETATION 20 (1987) (discussing the value of Parson and Bales’ 1955 study into the relegation of women and men to different “spheres” based on perceived ability to carry out domestic tasks).
27 See id. at 19–20.
28 See id.
29 See, e.g., Deborah A. Prentice & Erica Carnazzo, What Women and Men Should Be, Shouldn’t Be, Are Allowed to Be, and Don’t Have to Be: The Contents of Prescriptive Gender Stereotypes, 26 PSYCH. WOMEN Q. 269, 273 (2002); Sharon Lee Armstrong et al., What Some Concepts Might Not Be, 13 COGNITION 263 (1983) (collecting data exhibiting a strong correlation between “female” and “mother”).
gatherer societies. In Arendt’s conception, the establishment of prototypical institutions solidified the position of women in the private sphere as laborers, serving the biological needs of life like food, shelter, and child-rearing. Arendt further posits that men transcended to developing the public sphere, creating a society with governments, goods, and services. Men were viewed as freed from the need to care about basic household needs and thus able to participate in important, public work. The exclusion of women in the foundation of society placed them in the private sphere, attending to familial duties and communal concerns for much of Western history. Even today, women in the United States spend almost twice the amount of time on unpaid domestic labor (cooking, cleaning, childcare, etc.) than their male counterparts.

Not only was the public sphere historically reserved for men, but also the traits needed to achieve success within the public sphere were and continue to be those agentic traits typically perceived of as “masculine”: analytical, self-reliant, ambitious, and assertive. The traits needed in the private sphere, alternatively, are those most closely connected to the “feminine”: understanding, sensitive, affectionate, and loyal. Positive evaluations of leadership, and particularly political leadership, are strongly connected to the display of agentic leadership traits.

Dr. Andrea C. Vial and Professor Jamie L. Napier’s recent study continued to find that men and women more strongly value agentic traits.

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30 See, e.g., SIMONE DE BEAUVIOR, THE SECOND SEX 88–89 (H.M. Parshley ed. & trans., 1953) (arguing that biology played a key role in limiting women to the domestic realm, even during “primitive” periods of human social development).
33 See id.
34 See generally DE BEAUVIOR, supra note 30, passim (tracing the history of women’s social roles).
37 Id.
38 See, e.g., Broverman et al., supra note 9, at 63 (studying the association between feminine and masculine stereotypes and leadership skill); Alice H. Eagly & Blair T. Johnson, Gender and Leadership Style: A Meta-Analysis, 108 PSYCH. BULL. 233, 233 (1990) (noting the association between men and leadership persists despite the social science belief that no reliable leadership difference exists between men and women); Alice H. Eagly et al., Gender and the Evaluation of Leaders: A Meta-Analysis, 111 PSYCH. BULL. 3 (1992) (evaluating whether women are devalued in leadership roles); Leonie Huddy & Nayda Terkildsen, The Consequences of Gender Stereotypes for Women Candidates at Different Levels and Types of Office, 46 POL. RES. Q. 503, 504 (1993) (finding leadership to have disparate treatment across studies but similarly found to be within the “masculine dimension”); Kristyn A. Scott & Douglas J. Brown, Female First, Leader Second? Gender Bias in the Encoding of Leadership Behavior, 101 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 230 (2006) (cataloguing women’s leadership data across executive positions and Fortune 500 companies).
over communal traits when defining an “ideal” leader, while Professor Anne M. Koenig and her colleagues’ meta-analysis revealed a consistent link between effective leadership traits and “masculine” traits. We suggest that these gender stereotype conceptions and the public/private duality that undergirds historical gender norms can also aid us in understanding the legislative-judicial relationship.

We argue that the Legislative and Judicial Branches broadly reflect gender-stereotypical relations and divisions of labor in terms of both function and design. Congress was intended to be agentic and public, securely positioned as the public, lawmaking body; it fits the prototypical definition of Arendt’s “space of appearance.” The Legislative Branch can be conceptualized as men in a patriarchal culture: given agency and invited to action. And, voters—perhaps subconsciously—react to this framing: numerous studies find voters prefer political candidates with “masculine” traits who emphasize “masculine” policy expertise such as foreign policy and defense over candidates who are perceived to hold more “feminine” traits and policy expertise.

C. Congress as a Masculine, Public-Facing Institution

In this section, we showcase how Congress’s design encourages its members to be loud and public, seeking the spotlight. Congress acts within the public sphere, or, as defined by Professor David Mayhew, “a realm of shared American consciousness in which government officials and others make moves before an attentive stratum of the public.” We argue that members of Congress are masculine, active, and narcissistic—their institutional configuration allows self-organization and encourages agentic introduction of bills and attention-seeking. Further, members of Congress are elected, and they act primarily in pursuit of reelection. While legislators may have additional goals outside of re-election, maintaining office is a prerequisite to any other action.

References:

41 See Xavier Marquez, Spaces of Appearance and Spaces of Surveillance, 44 POLITY 6, 7 (2012).
42 See, e.g., Shirley M. Rosenwasser & Jana Seale, Attitudes Toward a Hypothetical Male or Female Candidate: A Research Note, 9 POL. PSYCH. 591, 592–93 (1988); see also KIRA SANBONMATSU, DEMOCRATS, REPUBLICANS, AND THE POLITICS OF WOMEN’S PLACE 3 (2002); Huddy & Terkildsen, supra note 38, at 504.
43 DAVID MAYHEW, AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH at x (2000).
45 Id.
46 Id. at 24.
Representatives tailor their behavior to maximize their prospects of re-election, avoiding policy issues that are too controversial or of little interest to their constituencies. Members may go so far as to ignore issues until “fire alarms” are raised, and they can race, very publicly, to the rescue.

The need for reelection also encourages members to emphasize Mayhew’s three central tools: position-taking, credit-claiming, and advertising. Each of these reelection tools values publicity over substance. As Mayhew explained, “[t]he electoral requirement is not that [a member of Congress] make pleasing things happen, but that [they] make pleasing judgmental statements. The position itself is the electoral commodity.” Professors Justin Grimmer, Solomon Messing, and Sean J. Westwood found that constituents respond positively to legislators’ attempts to credit claim for money sent back to their districts. Perhaps most notably, they found that what constituents respond to most is the number of messages sent as opposed to the number of dollars actually obtained. Similarly, members use bill sponsorship activity to send important messages about their positions to constituents, interest groups, and potential campaign donors. And studies found voters rewarded those who actively engage in the legislative process with both favorable evaluations and, most important, support at the voting booth. These studies were not about whether members see their bills successfully passed rather, as Mayhew argued, members receive credit simply for introducing the bills, even if the bills never move through the legislative process. The result is that members benefit from high

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47 Id.
50 See id. at 5.
51 Id. at 23.
52 See Justin Grimmer et al., How Words and Money Cultivate a Personal Vote: The Effect of Legislator Credit Claiming on Constituent Credit Allocation, 106 AM. POL. SCI REV. 703, 703 (2012).
53 Id.
levels of public credit-claiming and position taking, but do not necessarily need to report large, substantive wins.\textsuperscript{57}

Members of Congress are also heavily influenced by their own partisan ideology and act strategically to benefit the institutional position of their party to gain maximum legislative leverage.\textsuperscript{58} In an increasingly polarized political environment, members of Congress are encouraged to align more directly with their party’s issue positions.\textsuperscript{59} Party polarization increases the likelihood of legislative gridlock, further adding to members’ incentive to value symbolic position-taking actions over substantive policymaking.\textsuperscript{60}

Congress’s institutional rules further emphasize its “space of appearance” nature. Almost all activities Congress engages in are open to the public: individuals can sit in the House and Senate galleries, watch committee hearings and markups, and visit members’ offices.\textsuperscript{61} One of the House rules stipulates that all committee meetings, with the exception of the Committee on Ethics, must be open to the public unless a majority of the House publicly votes to move to an executive (closed) session “because disclosure of matters to be considered would endanger national security, would compromise sensitive law enforcement information, would tend to defame, degrade or incriminate any person, or otherwise would violate a law or rule of the House.”\textsuperscript{62} And, if one is unable to visit in person, all committee and floor actions are viewable via CSPAN; the official House rules again mandate that all of these proceedings be open to both audio and visual media coverage.\textsuperscript{63}

D. The Courts as Feminine, Private Institutions

In contrast, the courts reside in a more private sphere—the judiciary’s deliberative function is clear, but the Framers ultimately built a constrained, private, and dependent institution.\textsuperscript{64} Most of the work of courts is done far away

\begin{footnotesize}
\textsuperscript{57} See id.
\textsuperscript{60} David R. Jones, Party Polarization and Legislative Gridlock, 54 POL. RSC. Q. 125, 130 (2001).
\textsuperscript{64} See Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 1–2 (1979).
\end{footnotesize}
from public view, especially when we consider the appellate courts.\textsuperscript{65} As opposed to a “space of appearance,” appellate courts operate in privacy and mystery.\textsuperscript{66} While all appellate courts in the United States allow the public to view oral arguments (subject to a few, rare exceptions), the rest of the work of the courts is done behind closed doors.\textsuperscript{67} Oral arguments are also not required: in most circuits, cases are screened, and the vast majority are decided without arguments based solely on the parties’ briefs.\textsuperscript{68} The period between oral arguments and the announcement of the final decision is then hidden from public view; what scholars do know about this period comes either from insider accounts\textsuperscript{69}—many of which resulted in backlash to the authors\textsuperscript{70}—or the release of judges’ private papers well after their deaths.\textsuperscript{71}

The rules of the U.S. Courts of Appeals even allow final decisions to be hidden from public view: judges may choose to issue an “unpublised” opinion which will not be included in a reporter and which, until 2006, could not be cited as precedent.\textsuperscript{72} The federal courts adopted Rule 32.1 in 2006, determining that a federal court “may not prohibit or restrict the citation of federal judicial opinions” that were issued on or after January 1, 2007.\textsuperscript{73} Even after the adoption of Rule 32.1, appellate courts still routinely issue unpublished opinions.\textsuperscript{74} For example, the Fifth Circuit generally publishes less than 15% of total opinions issued; in 2018, only 13.1% of Fifth Circuit opinions (372 of 2,836) were

\textsuperscript{65} See id. at 1.
\textsuperscript{66} See id.
\textsuperscript{68} See, e.g., U.S. CTS., JUDICIAL WORKLOAD STATISTICS: UNITED STATES COURT OF APPEALS FIFTH CIRCUIT: CLERK’S ANNUAL REPORT JULY 2017-JUNE 2018 21–22, http://www.ca5.uscourts.gov/docs/default-source/default-document-library/2018-annual-report-public.pdf?sfvrsn=2. Table 35 lists the screening classification for each case. Id. From 2013 through 2018, about 72% of cases were decided without argument, another 27% received limited argument, and less than 1% received a full argument. Id.
\textsuperscript{69} See, e.g., Woodward & Armstrong, supra note 64, at 1.
\textsuperscript{73} Fed. R. App. P. 32.1(a). Courts, however, may still prohibit the citation of unpublished opinions issued prior to January 1, 2007. See id.
\textsuperscript{74} See, e.g., Judicial Workload Statistics, supra note 68, at 14–15.
The work and output of the courts are thus primarily kept out of public view.

Courts also reflect prototypically “feminine” procedures; they are both institutionally reactive and communal. First, the judiciary notably acts as a policy catch-all. Federal courts are required to hear and decide all cases properly presented to them, coping at times with the electorate’s most pressing needs due to congressional action, or even inaction. In contrast to Congress, courts do not solicit or initiate their cases; rather, cases are brought to them for resolution. The majority of courts are also expected to resolve or return a decision on every case presented to them; in general, the Federal Rules of Appellate Procedure cover “appeal as of Right.” Courts may dismiss cases based on a lack of jurisdiction or if the party filing suit lacks standing.

These procedural rules, however, are stipulated by Congress. While many rightly focus on congressional attempts to limit courts’ jurisdiction, Congress can also expand the courts’ jurisdiction as well as increase the ability of individuals to file suit and thus transfer even more responsibility on to the courts to resolve the pressing issues of the day. For example, Professor Joseph L. Smith assessed how Congress has increasingly implemented citizen suit provisions in environmental bills as a mechanism to aid Congress’s oversight authority. Federal courts are also mandated to “always [be] open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” As Chief Justice Roberts noted in his 2017 Year End Report, this requires enormous work by court employees in times of emergency and does not apply equally to Congress itself.

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75 Id.
77 See id.
78 FED. R. APP. P. 3.
Second, as the weakest branch by design, the courts possess neither the power of the sword nor the power of the purse. Courts are thus, much like those relegated to the private sphere, dependent upon those in the public sphere to enforce their judgments. As a result, even relatively unconstrained Supreme Court Justices are constrained by the preferences of the legislative and executive branches; for example, the Supreme Court has many times deferred to Congress in statutory cases. Judges are, however, still tasked with managing the consequences of actions taken by the other branches and achieving some form of resolution at all levels of government—they must render a decision in all cases, and increasing delegation to the courts via citizen suits and other means has taxed the courts’ workload.

On occasion this overload has resulted in Congress creating additional courts or appointing a larger volume of judges to accommodate increasing caseloads. However, the courts are dependent upon Congress to take steps to address caseload concerns, such as budget increases, or the expansion of the number of authorized judgeships. As noted in the Chief Justice’s 2013 Year End Report, budget cuts disproportionality penalize the courts “because virtually all of their core functions are constitutionally and statutorily required,” and “[u]nlike most Executive Branch agencies, the courts do not have discretionary programs they can eliminate or postpone in response to budget cuts.”

Third, courts are necessarily communal. Courts strive to seek resolutions that are mutually agreed upon by the parties; in part, settlements that preclude the use of precious court time are necessary to ensure the efficient functioning of the courts given their large caseloads. The Federal Rules of Appellate Procedure encourage the circuit courts to hold conferences “to address any matter than may aid in disposing of the proceedings, including simplifying the issues and discussing settlement.” Similarly, the 1983 amendments to the Federal Rules of Civil Procedure instituted a number of changes that allowed for...
and also encouraged trial judges to take an active role in aiding parties in facilitating settlements. This mediation role requires patience, cooperation, and tolerance, traits stereotypically viewed as feminine. For example, one study that examined lawyers’ views of effective judicial behavior during settlements found that lawyers want a judge who “after listening and learning with an open mind, offers explicit assessments of parties’ positions and specific suggestions for ways to reach solutions.”

Courts are therefore the private-sphere-residing workhorse institution, managing the monotonous and messy work of government, while Congress is the public-sphere-residing show-horse institution, introducing legislation to garner attention and favor among other political actors and constituents. Conceptualizing the institutions in these terms helps us identify and illuminate differences in both their activities and outputs. The agentic, public institution seeks to look busy and important, even if it substantively produces very little. The communal, private institution is left to toil in private, required to continually produce with very little attention or accolades. Therefore, at the most basic level, our reconceptualization of how to understand these two branches helps to explain why an examination of the extant Congressional and judicial literatures reveals important institutional differences in activities and outputs between the two chambers. Members of Congress introduce a large number of bills—many of them so-called “messaging” or “symbolic” bills that send clear public messages to constituents that members can tout in reelection campaigns—but see very little of them become enacted or even move through the legislative process. Alternatively, the courts process a large number of cases per year, final dispositions are reached (relatively) quickly, and the majority of cases receive a disposition on the merits. And, in sharp contrast to the work of Congress, many if not most of these judicial decisions will be read by few others than the parties to the case at hand.

92 See Fed. R. Civ. P. 16(a), (c).
93 See infra Part I.A.
95 See supra Part I.C.
96 See supra Part I.C.
97 See supra notes 69–71.
98 See Ganesh Sitaraman, The Origins of Legislation, 91 Notre Dame L. Rev. 79, 93 (2015) (explaining that members of Congress introduce “message bills” that have a low chance of passage but serve the member’s political goals).
99 See infra Part II.B.
100 See supra notes 70–71 and accompanying text.
We argue that these empirical observations provide important information not simply about each institution, but also about the broader court-Congress relationship. The fact that Congress is a show-horse, public-facing institution whose members are focused on position-taking, credit-claiming, and reelection influences how Congress legislates about the courts, engages in oversight of the bureaucracy, and approaches important interbranch disputes.\textsuperscript{101} Similarly, the private, workhorse nature of the courts guides its reaction to congressional (as well as executive) actions and decisions. Thus, we propose that by recognizing how the courts and Congress reflect gender stereotypical creations of the private versus public spheres, we can better understand their dynamic, ongoing relationship.

II. AN OVERVIEW OF THE SHOW-HORSE VS. WORKHORSE INSTITUTIONS

In this section, we present some empirical data that highlights the theoretical and empirical realities discussed above about each institution. Our goal here is to highlight how the public-facing, space-of-appearance nature of Congress causes it to emphasize certain actions and outcomes over others, while the private-facing nature of the courts results in clearly distinct measures of activity and outputs. Section A explains the data we collected and how we assessed it, while section B presents the results of our analysis.

A. Methodology

In this section, we explain what data we collected about each branch to compare their work and outputs. To assess Congress’s activity, we utilized Congress.gov, which provides a publicly-searchable database of all bills introduced in both the House and Senate in each year, as well as information on how far in the legislative process each bill advanced.\textsuperscript{102} We collected all bills introduced in the House and Senate between the 109th and the 113th Congresses (2005–2014) in the areas of (1) environment; (2) gender discrimination; (3) antitrust; and (4) labor issues.

To assess the degree of action undertaken by the federal courts, we focused on cases heard and decided by the U.S. Circuit Courts of Appeals. The circuit courts are the federal system’s intermediate appellate courts: they hear all properly filed appeals of decisions made by the U.S. District Courts (the federal

\textsuperscript{101} See supra note 49.
Because we assessed appellate decisions, we intentionally undercut the degree of activity performed by the federal courts—approximately 85–90% of district court decisions will not be appealed. We focused on the circuit courts, as opposed to the Supreme Court, as the Court has a fully discretionary docket. The Court’s docket control sets the Court apart from other courts in the federal judicial hierarchy, and it means that almost 99% of cases filed in the federal courts are terminated in the circuit courts.

We collected appellate case data on all cases filed in a federal appellate court between 2004 and 2014. These cases were identified using the Integrated Data Base (IDB) created by the Federal Judicial Center. The IDB is based on raw data provided by the Administrative Office of the United States Courts and provides information on every case terminated by the federal courts in each year. Cases are classified by the Federal Justice Center as being terminated on the merits (i.e., the court renders a decision on the substance of the question before it); terminated due to procedural defects (e.g., the court determines it lacks jurisdiction to hear the appeal or the appellee lacks standing); or terminated due to a non-judicial resolution (e.g., the two parties reach an out-of-court settlement). This data, therefore, reflects the floor of potential court activity for each year, as some number of cases may be pending for longer than a year. But since the circuit courts must render a decision on every case heard, this data provides a good starting point to understand the scope of the federal appellate bench’s yearly output. This data also provides information on the date when a notice of appeal is filed, as well as when the court entered a final opinion, order, or judgment, allowing us to track the amount of time it took for each appeal to be terminated.
We focused on four similar issue areas as in our assessments of Congress’s workload, using the coding determinations of the “nature of suit” by the IDB: (1) civil rights, employment/jobs; (2) antitrust; (3) labor related-cases (coded as cases involving the Fair Labor Standards Act, the Labor/Management Relations Act, and Labor Relations); and (4) environmental matters. We collected data on appeals for the first three issues from 2004 to 2014, but data on appeals for environmental matters was only available beginning in 2008. Unfortunately, the IDB issue coding scheme did not allow us to separate out only gender- or sex-related discrimination cases. We did, however, focus solely on employment-related cases, leaving out those that addressed voting, accommodations, welfare, or “other civil rights.” One important note is that we collected data on appeals initially filed between 2004 and 2014 even if the final disposition of the cases may have occurred in later years.

B. Results: Assessing the Work of the Courts and Congress

As discussed in Part I, we posit that the courts simply do more on each of the issue areas (employment discrimination, environment, labor issues, and antitrust) under assessment than Congress—the courts hear more cases, issue more decisions, and generally are more productive. This expectation is the core of our reconceptualization of the legislative-judicial relationship: while Congress is the public face of policy work, the courts are the actual workhorses who toil behind the scenes. While Congress engages in symbolic actions, the courts provide real results.

To begin, we examined the scope of work undertaken by each branch during 2017. In 2017, 38,832 cases were appealed to the U.S. Circuit Courts of Appeals; of those cases, 29,183 concerned non-criminal appeals. Over 63% of the non-criminal appeals received a ruling on the merits; another 11% were terminated through an out-of-court settlement, while 8% were dismissed due to jurisdictional defects, and approximately 15% reflected default determined by the court clerk. Finally, over 95% of the appellate cases filed in 2017 were resolved in two years or less.

Comparatively, a total of 8,539 bills on any topic were introduced in Congress in 2017; 1,322 bills received some consideration in committee (15.5%), and 918 (10.8%) eventually received floor consideration in at least one chamber. Ultimately, 284 of the 8,539 bills (3.3%) introduced in 2017 became law. Thus, even if we only compared final legislative outputs to cases where the appellate courts handed down a ruling on the merits, the result was that almost two-thirds of cases received such attention, while a mere 15.5% of legislative
bills even received a committee hearing. These initial, aggregate results suggest both that courts handle more issues, and see more of these issues to a final (and substantive) resolution, than Congress. We turn now to a more in depth examination of how the issues of labor, gender discrimination, antitrust, and the environment were addressed by the courts versus by Congress.

Figure 1 shows how many bills members of Congress introduced between 2005 and 2014 on the four issues selected for analysis. Overall, a total of 875 bills addressing issues related to gender discrimination, environmental issues, labor, and antitrust were introduced between 2005 and 2014. Figure 1 also reveals how many of these bills advanced through the various stages of the legislative process and eventually became law. While 875 bills were introduced, only 39 (4.5%) passed one chamber, and a mere 16 bills (1.8%) became law. Over 80% of bills never made it out of their respective committees or subcommittees. Of the 20% that did, less than 2% became law. And, as shown in Figure 2, this pattern existed across all four issue areas. In all four policy areas, the overwhelming majority of bills were referred to a committee, and no further action was taken. It was only the incredibly lucky few that passed even one chamber of Congress or were successfully enacted as law. Members of Congress thus take many, many positions through their bill introductions, but the work of crafting law and policy is difficult to find.
Figure 1: Final Legislative Stage Reached, 2005–2014
Table 1 provides a full listing of appellate cases processed in the four issue areas under analysis. In comparison to the relatively low amount of work Congress conducted, 1,529 appellate cases concerning the Fair Labor Standards Act alone were filed between 2004 and 2014. From 2008 to 2014, the U.S. Circuit Courts of Appeals handled 1,394 cases addressing environmental issues. Table 1 also reports how many of these cases were terminated (e.g., either received a decision on the merits, were settled, or were procedurally dismissed) within two years of the appeal being filed. In all four issue areas, the two-year termination rate was ninety percent or greater.
Table 1: Number of Appeals and Two-Year Termination Rate by Issue Area

<table>
<thead>
<tr>
<th>Issue Area</th>
<th>Total Appeals Filed</th>
<th>Percent of Appeals Terminated Within Two Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environment (2008–2014)</td>
<td>1,394</td>
<td>91.3%</td>
</tr>
<tr>
<td>Antitrust (2004–2014)</td>
<td>1,128</td>
<td>89.8%</td>
</tr>
<tr>
<td>Civil Rights: Jobs (2004–2014)</td>
<td>17,898</td>
<td>97.4%</td>
</tr>
<tr>
<td>Labor (2004–2014)</td>
<td>2,630</td>
<td>96.6%</td>
</tr>
<tr>
<td>Total</td>
<td>23,050 total</td>
<td></td>
</tr>
</tbody>
</table>

All of the appellate cases we examined were eventually terminated in some manner, whether via a decision on the merits, a procedural dismissal (e.g., lack of standing or jurisdiction), or through an out-of-court settlement between the parties. Figure 3 shows the primary methods (merits decision, settlement, or jurisdictional defects) by which cases were terminated by the U.S. Circuit Courts of Appeals for each of the four issue areas. Across all four issue areas, the overwhelming majority of cases were terminated through a decision based on the merits of the case. The second most common method of termination was a voluntary settlement between the parties, emphasizing the communal and cooperative nature of the work of the federal appeals courts.
III. IMPLICATIONS OF A PUBLIC CONGRESS AND PRIVATE COURTS

The underlying empirical premise of our reconceptualization of the Congress-courts relationship as one of a public/male and private/female duality was that Congress introduced many bills worthy of public credit-claiming but produced few pieces of legislation.\textsuperscript{110} Courts, alternatively, would have high levels of cases they must hear and high levels of cases that are terminated both substantively and quickly.\textsuperscript{111} And we showed exactly that above: we examined four distinct issue areas, and in each area, members of Congress introduced numerous bills, but saw few of them advance past the introduction stage. Meanwhile, the courts handled tens of thousands of cases and processed the vast majority in two years or less. And most of these cases resulted in either a decision on the merits or a settlement aided by the court itself. The basic reality of these two modern-day institutions is a Legislative Branch that is brash and

\textsuperscript{110} See Sitaraman, supra note 98, at 93.
\textsuperscript{111} See supra Part II.B.
loud, but produces relatively little substantive output, coupled with a private, workhorse judiciary that quietly toils away. What are the broader implications of reconceptualizing the legislative-judicial relationship through this gender-stereotyped lens?

We argue that in order to understand the relationship between Congress and the courts, we first need to understand important facets of their underlying design and structure. Most important, Congress was designed to be a public, agentic, “space of appearance” institution where elected officials convene to publicly debate the issues of the day. Congress thus takes on a decidedly gender-stereotypical masculine character, and its members are rewarded for displaying prototypical masculine traits. Conversely, the judiciary was intentionally designed to be the “least dangerous” branch, limited in its powers and dependent upon the other two branches to enforce its decisions as its judges toil away in relative obscurity and privacy. The courts therefore reflect stereotypical qualities of the feminine private sphere.

But how does reconceptualizing the legislative-judicial relationship in terms of gender stereotypes help us to understand the relationship between the two branches? We argue it does so by revealing the underlying impetus for decisions Congress reaches vis-à-vis the courts, helping us to predict future congressional decision-making, as well as how these decisions are viewed by the broader public. We focus in section A on the outputs of the two branches and turn in section B to how Congress deliberately shifts work onto the courts. Section C discusses the potential negative backlash these structural realities may create for the courts.

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112 See Mayhew, America’s Congress: Actions in the Public Sphere, James Madeson Through Newt Gingrich, supra note 43 (“By ‘public sphere’ I mean a realm of shared American consciousness in which government officials and others make moves before an attentive stratum of the public.”).
113 Cf. Koenig et al., supra note 40 (finding that leader stereotypes align with masculine stereotypes); Sanbonmatsu, supra note 42, at 53 (“Gender stereotypes may be more harmful to women candidates than to men candidates because stereotypically male traits are usually seen as more relevant to politics.”); Huddy & Terkildsen, supra note 38 (finding that “male” characteristics are preferred in candidates at higher levels of office); Nichole M. Bauer, The Effects of Counterstereotypic Gender Strategies on Candidate Evaluations, 38 Pol. Psych. 279 (2017) (finding that female candidates are perceived better when they employ stereotypically masculine characteristics).
114 The Federalist No. 78 (Alexander Hamilton).
115 See id. (describing the judiciary as the least dangerous branch of government that is dependent on the other branches—in a stereotypically feminine manner).
A. Understanding the Outputs of the Branches

First, we argue that using a gendered lens helps us to understand the specific types of outputs each branch produces and why they produce those outputs. Congress and its members, as the agentic show-horse branch, desire to take positions and claim credit for these positions, but not to do the hard work of crafting detailed policy. In fact, if they were to craft detailed policy it might result in colleague, public, and/or constituent backlash. Congress is therefore incentivized to introduce bills with vague and ambiguous language that allow legislators and their constituents to read a provision multiple ways so that everyone believes their policy goals have been met.

The problem, however, is that the courts tasked with interpreting these laws are asked to give specificity to this vague language and to try and ensure consistency in application. Professors Joseph A. Grundfest and A.C. Pritchard argued that, overall, “congressional ability to obscure prevails over the judiciary’s ability to interpret at the appellate level.” Furthermore, statutory ambiguity and the resulting possibility that courts will inconsistently or “incorrectly” interpret ambiguous or vague text puts judges between the proverbial rock and a hard place:

When a legislator cannot avoid conflictual demand patterns, she will try to satisfy all the relevant interest groups through a compromise statute acceptable to all concerned. If this cannot be accomplished, the legislator’s next-best strategy will be to support an ambiguous law, with details to be filled in later by courts . . . the legislator will be able to assure each group that it won, and they then will be able to blame a court . . . if subsequent developments belie that assurance.

Professor George I. Lovell’s analysis of four major federal labor statutes provides a clear case study in how legislators enact ambiguous legislation that they can claim credit for while simultaneously shifting the responsibility—and

117 See id.
120 Id. at 634.
thus the blame—for hard policy decisions onto the courts. 122 As the majority of courts must answer all legal questions properly brought before them, courts have no choice but to rule in these cases and then brace for the possibility of backlash by legislators and the public alike.

The electoral concerns of members, especially in an era of extreme partisan polarization, 123 may also encourage gridlock. Drafting a bill that a majority of the 535 members of Congress can agree to necessitates deliberation, negotiation, and compromise. As Professor Sarah Binder highlighted, an unanticipated byproduct of a directly elected Senate composed of senators with their own policy initiatives was the need for both intra-chamber negotiation as well as inter-chamber negotiation; the successful enactment of statutes also requires negotiation with the Executive. 124

Compromise and negotiation, however, can both undercut the ability of members to gain their preferred policy outcomes and increase the likelihood of potential constituent backlash. 125 As Professor John Gilmour explained “politicians often prefer disagreement to agreement, believing that the compromise necessary to reach an agreement may be more politically damaging than no agreement at all.” 126 Instead, members of Congress are judged based on their positions rather than their actual accomplishments, particularly with respect to legislative enactments. 127 Members of Congress, including chamber leaders, are therefore incentivized to encourage rigid position-taking and to refuse to

122 GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY, at xxvi, 16 (2003) (explaining the potential problems that occur when a legislature defers policymaking to the judiciary).
124 See SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 11, 15, 18 (2003) (explaining that the Senate must negotiate with itself, the House of Representatives, and the President to enact legislation).
126 Id.
127 See Box-Steffensmeier et al., supra note 55, at 267 (finding that constituents respond positively to representatives’ symbolic actions, especially bill sponsorship); Michael S. Rocca & Stacy B. Gordon, The Position-Taking Value of Bill Sponsorship in Congress, 63 POL. RESQ. Q. 387, 387 (2010) (“[W]e find a strong correlation between legislators’ non-roll call position taking and campaign contributions from PACs.”); MAYHEW, CONGRESS: THE ELECTORAL CONNECTION, supra note 44, at 62 (“The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements.”).
compromise. These forces are heightened when there is divided government, and especially when we see partisan control divisions between Congressional chambers.

The implications of Congressional inaction, however, have important reverberations in the judiciary. Legislative gridlock is far-reaching, preventing Congress from passing everything from necessary technical fixes to statutes to more wide-ranging overhauls of public and social policy. Legislative stalemates can also prevent Congress from responding efficiently to societal or technological advances that may render existing statutes inoperable or producing unintended and problematic outcomes. Legislative inaction does not mean, however, that courts are able to similarly evade action. Rather, Professor Tonja Jacobi found that gridlock “create[s] the demand for litigation as a substitute for legislation.” Legislative procrastination necessarily shifts a greater burden onto courts to determine how to respond to these particular situations, and inevitably results in courts making important policy decisions in the face of legislative inaction.

Take for example the application of criminal child pornography statutes in the advent of cell phones and “sexting.” Federal statutes criminalize the creation and distribution of child pornography, with a particular focus on visual depictions. Federal law, as well as most state laws, consider visual depictions to fall under this law when the genitalia or pubic area of a minor is shown, or the minor is shown engaging in sexual activity. Congress enacted child pornography laws with the purpose of protecting children from sexual exploitation; an underlying assumption of these laws, as originally drafted, is protection of child victims from third-party perpetrators. But what happens when the creator of the material is the “victim” the statute is designed to protect? Can an individual be charged with essentially victimizing themselves? That is the precise question that arises in cases of “sexting,” where even minors may

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128 See Box-Steffensmeier et al., supra note 55, at 267.
129 See, e.g., BINDER, supra note 124, at 11 (arguing that partisan divide in government leads to deadlock); DAVID MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS 1946-2002, at 2 (2d ed. 2005) (same).
130 See BINDER, supra note 124, at 3 (explaining that deadlock halts changes to the law both substantively and procedurally).
131 Id.
133 Id.
135 See id. § 2256.
136 See id. § 2251 (making it a crime to sexually exploit children).
take a sexually explicit picture of themselves (usually with a built-in phone camera) and send it to another party over text message. Under a strict reading of these child pornography laws, the child who took a picture of themselves and distributed it could be charged with both the creation and dissemination of child pornography. In effect, the “victim” would be charged with harming themselves. A student note written by Joanna Barry provided an overview, as of 2011, of how various state legislatures and state courts have dealt with the question of “sexting” and the applicability of child pornography statutes.

One of the most striking facets is that, in the absence of legislative action, courts were left to discern how to best handle these situations. Some state courts interpreted these laws literally, thereby convicting individuals who are both the victim and perpetrator of child pornography. Other state courts dismissed such charges, arguing that “pursuing child pornography charges against teenagers ‘encourages arbitrary and erratic arrests and convictions’, which is one of the concerns addressed by the void for vagueness doctrine.” These conflicting interpretations of similar laws by various courts throughout the country highlight how courts many times must shoulder the burden of legislation inaction in the face of a rapidly changing society.

Most important, in contrast to traditional accounts of the legislative-judicial relationship that suggest increases in litigation during gridlock are a function of decreased constraints on judicial power, our reconceptualization reveals that courts are not looking to expand their powers but rather are forced to act in the fact of legislative inaction. Courts are not seeking out ways to increase their reach, but instead are acting exactly how they were designed: an institution structured to consistently respond regardless of external circumstances. Courts

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138 Id.

139 Id. at 135.

140 See id., passim.

141 See, e.g., A.H. v. State, 949 So. 2d 234, 238–39 (Fla. Dist. Ct. App. 2007) (upholding trial court’s determination of delinquency for child pornography where the defendant herself had created explicit images of herself and another individual).


must act, and, as we will discuss below, this design feature is often used to unduly criticize courts for simply doing their job.144

B. Shifting Work to the Courts

Second, the design of Congress and the courts not only creates a result where the courts must act while Congress dithers, but also where Congress often shifts work onto the courts. Congress increasingly pushes highly salient issues off to the courts through a variety of legislative mechanisms that go beyond simply enacting bills with ambiguous statutory language.145 Congress engages in such workload shifting as another means to engage in high-level position taking and credit-claiming without having to then take responsibility for the end results.146 This workload shifting is achieved through a variety of mechanisms. One is to increase standing for third parties to bring suits to help enforce existing statutes, what are also known as “citizen suit provisions.”147 The use of citizen suits provides a means for Congress to shift the responsibility for responding to “fire alarms”148 brought by interested parties from congressional committees to the courts. As Professor Joseph Smith noted in his assessment of Clean Air Act amendments that expanded judicial review, “Congress has both the constitutional authority and legislative creativity to finetune the role of the judiciary to serve particular policy goals.”149

Another workload-shifting mechanism arises when Congress includes in bills a provision for “expedited judicial review” or “expedited Supreme Court review.”150 Congress itself often questions the constitutionality of the legislation being debated, such as the Bipartisan Campaign Reform Act of 2002.151 Here, the agentic, publicity-seeking nature of Congress overrides its members’ oath to independently interpret and uphold the Constitution. By enacting laws that Congress deems will immediately be sent for judicial review, Congress both

144 See infra Section III.B.
145 See LOVELL, supra note 122, at xviii, 8.
146 LOVELL, supra note 122, at 8, 17, 49, 51, 98, 223–24, 246–47, 257.
147 Smith, supra note 82, at 285, 289.
148 McCubbins & Schwartz, supra note 48, at 166, 168.
149 Joseph Smith, Congress Opens the Courthouse Doors: Statutory Changes to Judicial Review Under the Clean Air Act, 58 POL. RsCH. Q. 139, 148 (2005).
150 See 47 U.S.C. § 332(c)(7)(B)(v) (2012) (“Any person adversely affected by any final action or failure to act by a State or local government . . . that is inconsistent with this subparagraph may . . . commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.” (emphasis added)).
increases the courts’ workload and also pushes the burden onto the courts to say “no, that is not allowed.” As Senator Robert Byrd argued when debating an expedited review provision in the Line Item Veto Act, “It is irresponsible to simply punt to the courts, hoping that the judiciary will somehow catch our mistakes.” These provisions, however, are created by Congress to do just that, and are particularly likely to arise when legislation is of high salience and hotly contested. The courts are then forced to render a judgment on the wisdom of Congress’s actions and are pulled unwillingly into hot-button political fights.

Congress can also create additional work for the courts (not merely shift the burden of work to them) by creating new federal crimes. The reach of Federal criminal laws were relatively limited until the 1960s and 1970s. However, as calls for “law and order” increasingly became a political campaign tag line, so too were efforts to federalize criminal law. When crime rates increased, or when public perceptions of crime as a prominent national issue rose, Congress many times enacted measures that created new federal crimes, thereby increasing the federal courts’ workload substantially. And courts had no choice but to handle these cases unless future legislative changes were implemented, even as they fear the potential repercussions. For example, Chief Justice Rehnquist’s 1993 Year-End Report on the Federal Judiciary called out legislation expanding federal criminal law as “unwise,” raising concerns about “sweeping many newly created crimes, such as those involving juveniles and handgun murders, into a federal court system which is ill-equipped to deal with those problems and will increasingly lack the resources [to address them].”

153 See Lovell, supra note 122, at 17.
In each of these instances of workload shifting, public-facing Congress took advantage of its ability to move difficult and messy decisions onto the private, workhorse judiciary. Congress approaches legislating vis-à-vis the courts with an eye towards shifting as much of the work on to the courts as they can, while securing public credit. And this is particularly true when issues are highly salient to outside actors. When outside interest groups or concerned citizens raise “fire alarms,” Congress seeks to show that it is devoting attention to an issue. But, legislating on contentious issues is difficult both institutionally as well as politically. Congress resolves this dilemma by passing legislation that shifts the handling of contentious issues to the courts, thereby insulating members of Congress from blowback. Congress is most likely to shift responsibility to the courts for issues that are highly salient, more complex, and that garner more attention from outside interest groups.

C. A Court in (Public) Peril

The ultimate implication of these differences in output—each of which is a direct result of each institution’s design—is to influence how each branch is viewed by the public. We argue that the direct consequences of a public Congress versus a private judiciary increase the likelihood of negative evaluations of the courts. By shifting work to the courts, Congress increases the likelihood of the courts being blamed for the outputs they must produce. Ambiguous statutes shift the burden onto the courts to make messy decisions and allow members of Congress to place the blame on the courts, rather than themselves. Gridlock forces courts to make decisions in the face of legislative inaction, with probable backlash from many. Citizen suit provisions increase litigation, creating more backlogs for the courts, and making the courts a target for companies’ ire at the enforcement of federal statutes, rather than Congress or administrative agencies. Expedited legal review provisions force the courts to strike down clearly unconstitutional, but many times highly popular, congressional laws. And the increasing federalization of criminal law dramatically adds to the courts’ workload, while causing the courts to become a focal point for complaints about over-policing and over-criminalization.

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159 See Lovell, supra note 122, at 17, 98.
160 McCubbins & Schwartz, supra note 48, at 166, 168.
161 See Lovell, supra note 122, at xv.
162 See id. at xviii, 8; Tom S. Clark, The Limits of Judicial Independence 255–58 (2010).
163 See supra note 162.
164 Supra note 132 and accompanying text.
165 Supra notes 146–48 and accompanying text.
166 Supra notes 150–53 and accompanying text.
policies. The end result is a judiciary forced to act, and then penalized by legislators, the Executive, and the public for merely doing its job.

CONCLUSION

We propose reconceptualizing the relationship between Congress and the courts through the lens of a stereotypical gendered, public-private dichotomy. As we have discussed, Congress is the masculine public “space of appearance,” agentic and brash. Members of Congress seek to influence policy but even more they seek to win reelection and convince their constituents they are busy working in their favor. This “working,” however, need not result in substantive policy outputs; rather, members are rewarded for introducing bills and responding to “fire alarms” raised by concerned citizens and interest groups.

Alternatively, the courts reflect the stereotypically feminine private sphere: hard-working, communal, and mandated to always be open and available. Courts toil in relative obscurity, required to hear all cases that come before them, and to do most of that work behind closed doors. It is not that the work of the courts cannot be revealed, but rather that, much like the labor undertaken in the private sphere, it is not always viewed as work that is worthy of attention. Unpublished opinions are the overwhelming majority of the U.S. Circuit Courts of Appeals’ outputs, but also viewed as so routine and commonplace that they need not be brought to public attention.

The normative implication of our theory is that to understand the legislative-judicial relationship, we need to recognize the roles consciously given to each branch. With these roles come certain benefits as well as important limitations. Congress is public and attention-seeking, but its members are also incentivized to stay away from the messy work of substantive policy determinations. The courts are hard-working and communal, but also routinely placed in the uncomfortable position of having to render a decision on those issues Congress can (and does) blithely ignore. Judges are therefore criticized for rendering

167 Supra notes 154–58.
169 Supra note 17 and accompanying text.
170 Supra Part III.
171 See Mondak, supra note 168, at 1121–22.
172 See id.
173 Supra note 68 and accompanying text.
174 See supra Part III.
175 See supra Parts I.C–D.
decisions on cases before them.\textsuperscript{176} We argue, however, they are also merely doing their job as proscribed by the Constitution.\textsuperscript{177} This tension raises important questions pertaining to public opinion and institutional legitimacy.

Chief Justice Roberts’s 2019 Year-End Report on the Judiciary included a plea to his fellow judges “to continue their efforts to promote public confidence in the judiciary” and to “resolve to do [their] best to maintain the public’s trust that [they] are faithfully discharging [their] solemn obligation to equal justice under the law.”\textsuperscript{178} The issue, however, is what can the courts do when other actors in the policymaking sphere shift work to them and then blame them for rendering required decisions? Similar to arguments that the work of motherhood is both overlooked and idealized, leading to a propensity to blame mothers whenever issues arise with children,\textsuperscript{179} we propose that the work of courts is both overlooked and idealized, encouraging criticism of the courts when they are viewed as stepping out of line or when issues arise.

Our theoretical framework for understanding the design and interrelation between Congress and the courts raises important empirical and normative questions about the legislative-judicial relation, as well as how the public conceives of each branch: What does the public expect from the courts? Does our conventional understanding of the role of the courts obscure their true role as well as create public misunderstandings? Might an explicit accounting of how Congress transfers responsibility to the courts—and the ways in which the courts are mandated to respond—help increase both public understanding of and support for the courts’ actions? As then-Chief Judge of the Second Circuit Court of Appeals stated plaintively, “Now, when the federal judiciary faces a workload crisis of unprecedented proportions, the federal courts are particularly vulnerable to the attacks of those who do not like their decisions. As we seek to make the federal judicial system work better, let us remember the job we want it to do.”\textsuperscript{180}

We propose that unless and until the public understands the role of the courts vis-à-vis the other branches of government—and also the implications of a judiciary designed to be private, passive, communal, consensual, and meek—

\textsuperscript{176} See infra note 180 and accompanying text.

\textsuperscript{177} See supra Part III.B.


the work of the courts will continue to be misunderstood and undervalued. Our argument suggests a need for much more research into how people understand courts and their role in the government system, the degree to which individuals’ conceptions of courts conflict with what courts actually do, and potential ways to solve that disconnect.

Our theoretical framework and supporting evidence also specifically suggest a need for a revised civic education curriculum that better presents to the American people what the courts actually do, as opposed to what we want them to do. We contend that the judiciary is often criticized for simply doing its job: interpreting and applying statutes to resolve disputes between parties. Courts are frequently asked to interpret and apply vague and ambiguous congressional statutes.\textsuperscript{181} They are also required to intercede into certain disputes, despite claims of “judicial activism,” because Congress writes statutes expanding their jurisdiction, or what we term “workload shifting” in our discussion above.\textsuperscript{182} And judges are criticized when they appear to depart from what Professors John M. Scheb II and William Lyons deemed the “myth of legality”: “the belief that judicial decisions are based on autonomous legal principles . . . [and] that cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning.”\textsuperscript{183} But, as Professor Ronald Dworkin once noted, judges will continue to themselves espouse this myth “until the idea that judges’ personal convictions can and should play no role in their decisions loosens its grip not just on politicians but on the public at large.”\textsuperscript{184}

More attention, therefore, needs to be given to how we introduce courts and judges to Americans, even from a young age. A heavy reliance on the symbols of the courts (e.g., black robes and gavels), particularly those related to judicial authority, reinforce for citizens that “courts are different from ordinary political institutions.”\textsuperscript{185} While presidents and members of Congress are pictured in textbooks dressed in suits or even more everyday clothes, judges are shown in their robes, and many times seated at the bench, which rises higher than the

\textsuperscript{181} See supra Part III.B.
\textsuperscript{182} See supra Part III.B.
\textsuperscript{185} James L. Gibson et al., Legitimacy, Positivity Theory, and the Symbols of Judicial Authority, 48 L. SOC’Y REV. 837, 840 (2014).
others within a courtroom. They are thus unlike other actors in the government, set apart both physically and in physical appearance. Similarly, more attention needs to be paid to what courts are truly asked to do. Resolving disputes is not a neutral activity, but one in which winners and losers are chosen, resources are potentially redistributed, and meaning is given to words and phrases in statutes. Even if judges utilize neutral legal principles, the impacts of their decisions are anything but neutral, and that reality needs to be articulated to the public. Until the public understands the true limits and reaches of courts—and also what they are asked, if not bound, to do by the other branches—the courts will remain the least understood and most misunderstood of all the branches.