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Of politics, self-preservation, and symbolism: An investigation of jurisdiction-stripping and legislative redistricting

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ABSTRACT

Jurisdiction-stripping has long been a questionable component of Congress's power to supervise the judiciary's policymaking role. It has gained notoriety in recent debates surrounding judicial involvement in areas including religious establishment and privacy issues such as abortion and same-sex marriage. Most scholarship equates the advocacy of jurisdiction-stripping measures with symbolic position-taking that is unmotivated by the goal of traditional policy success. This work, a quantitative case study of the first such measure to pass the House of Representative since Reconstruction, seeks to isolate legislative motivations for exerting jurisdictional controls against the Supreme Court. Legislators' votes on this measure were multifaceted. While those decisions were guided in part by the symbolic and representational considerations that traditionally underlie the advocacy of such legislation, there is also evidence more substantive motivations played a part. The study highlights the evolving objectives of jurisdiction-stripping's advocates and, more broadly, Congress's objectives vis-à-vis the courts.

1. Introduction

By the mid-1960s, the Warren Court's rights revolution was in full flower. For a decade, legislators witnessed the Court's policy activism in desegregation cases and had seen it strike down popular prayer and Bible reading programs in public schools. Though decisions in these areas—as well as several contentious decisions in communist subversion cases—gave rise to a variety of Court-curbing[1] measures, no majority of either chamber of Congress was prepared to strike at the Court's jurisdictional power. But in 1962, the Supreme Court began to wade into an even more treacherous political thicket (Colegrove v. Green, 1946, p. 253) when it issued its landmark decision in *Baker v. Carr*, which declared issues of legislative reapportionment to be fit for adjudication by the federal courts. The justices wasted little time addressing those questions in cases including *Wesberry v. Sanders* and, later, a series of state cases in *Reynolds v. Sims*, leading one observer to conclude that, "The Supreme Court's decision[s] in the apportionment cases involved the most remarkable and far-reaching exercise of judicial power in our history" (Cortner, 1970, p. 253). Chief Justice Earl Warren underscored that assessment years later, calling *Baker v. Carr* the most important case he heard on the Supreme Court, because it removed the jurisdictional barrier to redistricting challenges (Warren, 1977, p.

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[1] "Court-curbing" has traditionally been used to describe a variety of measures, including jurisdiction-stripping initiatives. For example, Clark's (2011) study distinguished several categories of court-curbing legislation, including measures related to composition, jurisdiction, judicial review, remedy, procedural and other.

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306). The U.S. House of Representatives certainly noticed. Scarcely two years after *Baker v. Carr*, the House voted to pass HR 11,926, a measure known as the Tuck Bill, in order to "exclude cases involving apportionment or reapportionment from the appellate jurisdiction of the Supreme Court and the jurisdiction of Federal district courts" (*Digest*, 1964, 11,926). The present study examines the factors related to this bill's passage by the House.

Why did the House pass a jurisdictional response to the Court's reapportionment cases when it had failed to do so in reaction to a number of other contentious decisions? Neither public opinion nor political ideology provides a fully satisfactory explanation. The public's response to the reapportionment cases was broadly favorable (Cortner, 1970, p. 144). Conservatives in Congress may have been predisposed to support the legislation because of simmering disapproval of the Warren Court, but it remains curious why it was the issue of legislative districting around which many other, less conservative members coalesced.[2] The present study evaluates the influence of electoral context, representation interests, and perceived threats from the decisions in structuring the House vote on this measure.

This article also considers the ways in which this singular episode—the first time in nearly 100 years that a congressional majority indicated its receptiveness to jurisdiction-stripping—may offer broader insight into the forces that may motivate members of Congress to participate in that practice. This component of the paper is particularly timely, given renewed interest in the idea of jurisdiction-stripping among conservative members of Congress, Republican presidential candidates,[3] and academic scholars in recent years. After a brief summary of the ways Congress and its members may respond to Supreme Court decisions, a description of the phenomenon of jurisdiction-stripping and review of the concept's history are provided. The study then turns to legislative redistricting and examines both the Supreme Court's decisions and congressional reactions to them. After sketching the legal and political context of the decisions, an analysis of individual members' voting activity on the 1964 Tuck Bill reveals numerous significant factors—including variables related to both ideological and representational forces, as well as the likely threat to individual members posed by the decisions. The study concludes with observations about the Tuck Bill's relevance in piecing together the phenomenon of jurisdiction-stripping and its historical evolution in American legal and political history.

2. Congressional responses to Supreme Court decisions

Congress and its members have the ability to blunt the effects of Supreme Court decisions in a number of ways. In non-constitutional cases, a simple majority of Congress may reverse the Court's decisions (Eskridge, 1991; Henschen, 1983).[4] In some situations, the Court itself may even invite Congress to overrule those holdings (Hausegger & Baum, 1999). Pickerill (2004) asserts that Congressional deliberations are frequently structured by the Court's decisions, and he buttresses that view with evidence from the Court's federalism cases. Decisions arrived at on constitutional grounds, by contrast, impose weightier constraints on congressional efforts to override the Court. Still, the nature of certain policy areas may enable Congress to circumvent decisions in ways that fall short of overturning them (Keynes & Miller, 1989). Others have argued that, by pursuing coordinate interpretation of the Constitution, Congress can sometimes vitiate the Court's constitutional interpretations. Members may also pursue the avenue of constitutional amendment, although the vast majority of those efforts have proven unsuccessful (Clark & McGuire, 1996; Meernik & Ignagni, 1997).

2.1. Jurisdictional controls and the phenomenon of "court-stripping"

According to the U.S. Constitution (Article III, Section 2), "the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Congress has relied on this "Exceptions Clause" to justify numerous limitations in the Supreme Court's appellate jurisdiction. However, those limitations have traditionally been undertaken in order to grant the Court greater administrative discretion over which cases it chooses to review—not to influence or circumvent judicial policy outcomes in specific classes of constitutional cases.[5]

Although the position is controversial, some believe cases such as Ex parte McCardle (1869) validate the idea that Congress may preclude some or all federal courts from adjudicating cases in specific areas of law (Abraham, 1981; Rice, 1981). *McCardle*, of course, was the case in which the Supreme Court unanimously upheld Congress's authority to withdraw the Court's jurisdiction over an imprisoned journalist's pending *habeas corpus* proceeding. On the other hand, subsequent cases, including *U.S. v. Klein* (1871) and Boumediene v. Bush (2008),[6] suggest that congressional

[2] The 88th House was hardly a bulwark of ideological conservatism (Poole & Rosenthal, 2000). Indeed, it passed the Civil Rights Act of 1964 just months before approving the jurisdictional measure we focus on here.

[3] During the campaign for the 2012 Republican Party nomination for President, a number of candidates—including Newt Gingrich, Michelle Bachmann, and Ron Paul—went on record in support of such measures.

[4] As one recent illustration of this phenomenon, Congress passed and President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 to overrule the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007).

[5] In the Judges Bill of 1925, Congress utilized its power under the Exceptions Clause to place substantial limits on direct Supreme Court review of numerous district court decisions. Since 1925, Congress has continued to use the Exceptions Clause in ways designed to give the Supreme Court greater control of its own docket. In the Omnibus Crime Control Act of 1970, Congress eliminated direct appeals from the district courts in certain types of criminal cases. By 1988, Congress had used its power under the Exceptions Clause to eliminate virtually all the Supreme Court's mandatory jurisdiction over appeals arising from the lower federal courts (Fallon, Meltzer and Shapiro (1996), pp. 1637–1640).

[6] In *Boumediene* the Court held that the Military Commissions Act of 2006, which "remove[d] federal court jurisdiction over habeas corpus petitions by enemy combatants held in the military detention facility in Guantanamo Bay" (Clark, 2011, p. 40), failed to provide an adequate