THE COURTS, CONGRESS, AND THE POLITICS OF FEDERAL JURISDICTION

DISSertation

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By

Brett W. Curry, B.A., M.A.

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Dissertation Committee:
Professor Lawrence Baum, Adviser
Professor Elliot Slotnick
Professor Herbert Weisberg

Approved By:

Adviser
Political Science Graduate Program
ABSTRACT

Although the institutional relationship between the federal courts and Congress has been the subject of substantial empirical research, scholars know relatively little about the specific role that jurisdiction plays in structuring that relationship. Most prior scholarship on the courts and Congress has focused on ways in which Congress has attempted to use its influence over court structure and judicial personnel to impact the federal courts. However, Congress’s ability to expand or limit the types of cases eligible for federal court review has received much less attention. By analyzing congressional efforts to limit federal jurisdiction in two major areas of law, this dissertation sheds new light on jurisdiction’s role in the relationship between these governmental branches and, more generally, the degree of autonomy from congressional oversight that the federal judiciary possesses.

The dissertation’s assessment of this jurisdictional activity begins with a technical area of federal statutory jurisdiction known as diversity jurisdiction. There, in a combination of qualitative and quantitative analyses, I examine the
impact that judicial outcomes, court caseloads, and group involvement have played in motivating congressional attempts to limit diversity jurisdiction’s scope. I conclude that, while administrative caseload factors have accounted for much of Congress’s jurisdictional activity in this area of statutory law, dissatisfaction with federal court outcomes has also contributed to Congress’s jurisdictional activity in a more limited way.

The dissertation then moves to an analysis of congressional attempts to curtail federal jurisdiction over certain areas of constitutional law. Again, by combining quantitative approaches with systematic qualitative analyses, I assess the impact of judicial outcomes, public opinion, Congress’s ideological preferences, and several related factors on the intensity with which legislators have sought to excise certain constitutional claims from the purview of the federal courts since the 1950s. The results obtained from these analyses generally indicate that the tenor of federal judicial outcomes, the preferences of the general public, and the likelihood of judicial reversal all relate to the intensity with which members of Congress pursue this jurisdiction- or court-stripping legislation.

Taken together, the dissertation’s results suggest that jurisdictional politics may be more critical to the relationship between the federal courts and Congress than most scholars have realized. At a minimum, they intimate that
separation-of-powers models of the courts and Congress cannot be complete without an acknowledgement of jurisdiction’s potential importance to the relationship between these two institutions.
Dedicated to my family,
for their tireless love and support
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VITA

February 13, 1978………………………..Born, St. Joseph, Missouri

2000………………………………………B.A., Summa Cum Laude, Political Science and History, University of Missouri-Columbia

2003………………………………………M.A., Political Science, The Ohio State University

2000-2001………………………………...University Fellow, The Ohio State University

2001-2004………………………………...Graduate Teaching and Research Associate, The Ohio State University

2004-2005………………………………...University Fellow, The Ohio State University

PUBLICATIONS


FIELDS OF STUDY

Major Field: Political Science
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Three Varieties of Jurisdiction-Stripping Legislation
“When the Constitution has given Congress the power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise, and Congress under that power has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this Court is as much bound by an implied as an expressed exception”—Chief Justice John Marshall, U.S. v. More (1805), 170-171

2004 and 2005 were particularly conspicuous years for federal jurisdiction in the U.S. House of Representatives. In 2004, the Republican-controlled House passed legislation to eliminate federal jurisdiction over cases and controversies arising out of the 1996 Defense of Marriage Act and the Pledge of Allegiance. Scarcely six months later it passed S. 686, a much more specific bill which conferred the United States District Court for the Middle District of Florida with federal jurisdiction over the matter of In re Schiavo (2005). As if to demonstrate the capriciousness of member attitudes toward jurisdictional policy, of the 157 House members who had voted to curb federal jurisdiction in the One Hundred Eighth Congress and participated in the Schiavo roll call in the next, 153 advocated expanding the reach of federal judicial power in 2005. Though members of Congress have never been wholly consistent in their positions on matters of federal jurisdiction, the salience of these episodes brought that
inconsistency into especially sharp relief. While these episodes illustrate many things, they are probably most instructive as a joint reminder that jurisdictional rules are frequently important instruments which political actors view as a way to advance their preferred policy outcomes.

On the other hand, federal jurisdiction is much more than just a means to an end. While Congress may often undertake jurisdictional activity with the decisional predispositions of certain courts in mind, it has pursued jurisdictional change with regard to additional factors as well. That pursuit, referred to here as the politics of federal jurisdiction, is this dissertation’s unifying core. More specifically, by examining the conditions under which national lawmakers consider imposing limitations on particular aspects of federal jurisdiction, my goal is to demonstrate the relevance of those theoretical factors to real world jurisdictional debates. After reviewing existing scholarship on the relationship between Congress and the federal courts in Chapter Two, Chapter Three draws on legislative, judicial, and separation-of-powers scholarship to formulate a theoretical model that recognizes the role of judicial outcomes, administrative considerations, and various external forces in congressional debates over jurisdictional change. In Chapters Four and Five, that model is measured—quantitatively and qualitatively—against congressional activity in the area of federal diversity jurisdiction, a construct which is defined below. In Chapters Six and Seven, the dissertation turns to a multi-method examination of congressional
activity in a more visible series of jurisdictional debates—attempts to undermine federal judicial decisions in areas of constitutional law under the veneer of jurisdictional oversight. Before proceeding to those important issues, however, it is vital to sketch the constitutional underpinnings of Congress’s jurisdictional power and to present an historical overview of American jurisdictional development.

FEDERAL JURISDICTION IN THE AMERICAN SYSTEM

Measured against the many legislative and executive responsibilities laid out in Articles I and II of the United States Constitution, Article III’s detailing of the judicial branch appears as an example of parsimony and restraint. At just under three hundred words, Article III is a purposefully vague text designed to give Congress wide latitude in administering numerous aspects of the federal court system. Indeed, despite its moniker as the “judicial article,” Article III explicitly invokes Congress’s power over the judiciary no fewer than four times. Congress has, in turn, utilized this discretion to, among other things, erect a system of lower federal district (Act of September 24, 1789) and appeals (Act of March 3, 1891) courts, prescribe the size of the United States Supreme Court (Act of September 24, 1789), and even create specialized courts for the adjudication of specific types of claims (Baum 1991).
Yet, of at least equal importance to the flexibility Article III bestows upon Congress by its silence is that which it expressly charges the legislature with regulating—namely, the jurisdiction of the federal courts. Literally derived from the Latin for “to say the law,” Justice Oliver Wendell Holmes once defined jurisdiction as “[the] authority to decide the case either way” (Holmes, J. in *The Fair v. Kohler Die & Specialty Company* 1913, at 228 U.S. 22, 25). This ability of the federal courts to decide a case either way is, to a substantial degree, dependent upon the will of Congress. “The Supreme Court,” says Article III, “shall have appellate Jurisdiction, both to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.” With regard to the jurisdiction of any lower federal courts Congress chooses to create, the Constitution similarly notes that such jurisdiction is to be defined by treaties and laws of the United States—both of which fall squarely within the regulatory responsibility of Congress.

**An Introduction to Federal Jurisdiction**

Though it may not carry with it the fanfare of Supreme Court nominations or have the visibility of proposals designed to reconfigure geographic boundaries of particular courts, Congress’s ability to administer federal jurisdiction represents an integral and routinely exercised part of its oversight over the federal judiciary. While the precise contours of federal jurisdiction at any given time are shaped by
many factors, including judicial decisions themselves and bureaucratic agency interpretations of federal law, examining Congress’s role in structuring the exercise of federal jurisdiction is advantageous for at least two reasons. For one, it provides the opportunity to illuminate an aspect of the institutional relationship between Congress and the courts that has long been underappreciated. Second, and more broadly, approaching the politics of federal jurisdiction from a Congress-centered perspective helps to gain leverage on the question of just how insulated from outside actors the activities of federal courts and judges truly are. However, before addressing this oversight in greater detail, the nature of federal jurisdiction as well as its relationship to the jurisdiction of state courts and the concept of federalism in general requires elaboration.

Premised on the notion of reserved powers that undergirds the separation of state and federal governmental entities, the American federal system mandates the coexistence of federal and state courts. In contrast to most state courts, federal courts are tribunals of limited jurisdiction. Unlike state courts of general jurisdiction, where jurisdiction is assumed to exist in the absence of explicit legislative authority, the ability of federal courts to hear cases is more restricted and must derive from particularized grants of jurisdictional power. In practice, this means that “[The federal courts] are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress” (Wright
Ever since passage of the First Judiciary Act in 1789, Congress has utilized its authority to place federal jurisdiction over certain areas exclusively within the province of the federal courts (e.g., Warren 1923). Contemporary examples of this exclusive federal jurisdiction are found in the areas of bankruptcy as well as patent and copyright cases (14 Wright, Miller, and Cooper 1991, 3570, 3582).

Of greater relevance to this dissertation, however, is the concept of concurrent jurisdiction between the states and the federal government as well as Congress’s ability to control that jurisdiction. Another feature of the American federal system, concurrent jurisdiction refers to those situations in which both state and federal courts have the shared authority to decide particular cases. Thus, concurrent jurisdiction’s defining feature lies in the fact that responsibility for a particular area of law is shared between the state and federal courts. Unlike bankruptcy matters or patent proceedings, concurrent jurisdiction has not been placed within the exclusive province of a single judicial system. Article VI of the U.S. Constitution makes it clear that state courts, no less than federal ones, are responsible for the enforcement of the U.S. Constitution and federal law (e.g., Gordon and Gross 1984; Redish and Muench 1977; Claflin v. Houseman 1876) and, unless Congress has made jurisdiction in a particular area exclusive to the federal courts, “state court[s] may entertain an action even though it is entirely based on a federal claim” (Wright 1994, 287). Many important categories of
cases fall under the heading of concurrent jurisdiction, including cases based on
diversity of citizenship¹, federal question cases², and conflicts involving prisoner
detention and writs of habeas corpus³. Diversity jurisdiction, discussed
extensively in Chapters Four and Five, is a particularly useful illustration of
concurrent jurisdiction in practice. Congressional attempts to remove, or strip,
federal court jurisdiction over controversial constitutional questions also implicate
issues surrounding concurrent jurisdiction, albeit in a different way. Chapters Six
and Seven present a comprehensive discussion of that phenomenon.

To summarize the above points, then, “Congress possesses significant
powers [sic] to apportion jurisdiction among state and federal courts and, in doing
so, to define and limit the jurisdiction of federal courts” (Fallon, Meltzer, and
Shapiro 1996, 348). Exclusive or concurrent designations aside, jurisdictional
questions have long been at the forefront of the state-federal relationship that
looms so large in the American judicial system. As will shortly become clear,
Congress’s activities with respect to these jurisdictional questions have been
motivated by a number of objectives. However, in order to appreciate those

¹ Diversity of citizenship jurisdiction is authorized by federal statute and gives the federal courts
jurisdiction over cases that do not involve federal law, so long as the controversy is between
citizens of different states and meets the monetary requirements established by federal law.

² In contrast to diversity of citizenship cases, federal question jurisdiction is unrelated to the
citizenship of the parties. In federal question jurisdiction, suits qualify for federal court review
because they implicate provisions of the U.S. Constitution, treaties, or other federal laws.

³ A writ of habeas corpus is a petition filed with a court by a person who objects to one’s detention
or imprisonment.
multiple objectives, we must begin in 1789, just after states-rights interests
unsuccessfully opposed the creation of inferior federal courts, arguing that state
courts in combination with the U.S. Supreme Court’s oversight would provide
sufficient protection for rights established by federal law and the U.S.
Constitution.

An Historical Overview of Federal Jurisdiction

Since passage of the first Judiciary Act in 1789, which established thirteen
federal district and three federal circuit courts, history registers innumerable
attempts—both successful and unsuccessful—to redefine the jurisdictional
balance between the federal and state courts. One of the first came in an obscure
portion of the Judiciary Act of 1801 (Act of Feb 13, 1801) which also established
the infamous “Midnight Judgeships” that ultimately culminated in the Supreme
Court’s decision in *Marbury v. Madison* (1803). There, the Federalist-dominated
Sixth Congress significantly expanded federal jurisdiction by conferring general
federal question jurisdiction on the federal courts. Legally, this expansion
allowed the federal courts to take general cognizance of all civil cases “arising
under” the Constitution, laws, or treaties of the United States. In practical terms,
this act lowered or removed the monetary amounts required to invoke federal
jurisdiction in particular cases, made it easier to remove state cases to federal
court, and otherwise expanded the national judicial power at the expense of the
The 1801 Act also enhanced the power of the Federalist-controlled judiciary even as the party’s elected representatives were swept from executive and legislative power in an electoral rout, illustrating what Hirschl refers to as the “hegemonic preservation thesis” (Hirschl 2000). Though this short-lived enactment nudged the jurisdictional balance between the federal and state courts in the direction of national judicial power, its prompt repeal by the Jeffersonian Republicans in 1802 (Act of March 8, 1802) quickly restored the status quo (see Turner 1961; Turner 1965; Surrency 1958).

After several decades of relative calm, jurisdictional changes were quick in coming in the immediate wake of the American Civil War. The so-called “Civil War Amendments” to the Constitution aside, Reconstruction Congresses enacted several important pieces of legislation which, collectively, had the effect of extending the jurisdiction of the federal courts at the expense of the states. Not inclined to trust the new constitutional rights embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments to state enforcement for obvious reasons, Congress enacted no fewer than twelve legislative proposals providing for the

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4 Although its specifics can be confusing, Wright (1994, 223) describes removal jurisdiction this way: “The right to remove a case from state to federal court is purely statutory, being dependent on the will of Congress. It is quite an anomalous jurisdiction, giving a defendant, sued in a court of competent jurisdiction, the right to elect a forum of its own choosing. Such a procedure was unknown to the common law, nor is removal mentioned in the Constitution. Nevertheless there has been provision for removal of cases from state courts to federal courts from the First Judiciary Act, in 1789, to the present day, and the constitutionality of removal is entirely settled.”
removal of various cases and controversies from state to federal court during postwar Reconstruction (e.g., Kutler, 1968; Wieck 1969; Hyman 1972).

During the war itself, Congress authorized the removal from state to federal court of certain cases brought against United States officers during the Rebellion (Act of March 3, 1863). Following this enactment, a wave of proposals swept through Congress invoking the federal courts to secure the newly realized civil rights of African-Americans. Passed in 1866, the first Civil Rights Act conferred federal jurisdiction over “all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts…of the state or locality where they may be any of the rights secured to them by the first section of this act” (Act of April 9, 1866). In the early 1870s, Congress passed the Federal Enforcement Act and additional Civil Rights Acts which, taken together, had the undeniable effect of underscoring that the federal courts were to be the primary guarantors of civil rights in the Reconstruction Era (Act of May 31, 1870; Act of Feb. 28, 1871; Act of April 20, 1871; Act of March 1, 1875).

Yet, perhaps the best known episode in which Congress exercised its power of jurisdictional control occurred in 1867. In that year, Congress enacted legislation authorizing the federal courts to entertain habeas corpus petitions from prisoners held by state authorities in alleged violation of the Constitution, laws, and treaties of the United States (Act of Feb 5, 1867; “Developments” 1970, 1048). After imprisoned journalist William McCardle’s case, which was brought
under the 1867 Act’s authority, had been argued before the U.S. Supreme Court, Congress repealed the 1867 Habeas Corpus Act over President Johnson’s veto (Act of March 27, 1868), anticipating that the Court was poised to rule in favor of McCardle (Ex parte McCardle 1869; Epstein and Walker 1995; Fairman 1971, 456). The Court, in turn, affirmed the primacy of congressional action with respect to jurisdictional matters—particularly those concerning the Supreme Court’s appellate jurisdiction—saying, “We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words” (Ex parte McCardle 1869, 74 U.S. 506, 514). The Supreme Court did not hear another habeas case involving a state petitioner until Ex parte Royall (1886), which came before it one year after Congress had finally restored federal court jurisdiction over state habeas cases (“Developments” 1970, 1048).

As if to underscore the federal government’s triumph over the forces of provincialism and states rights in the Civil War, in 1875 the Reconstruction Congress provided the federal courts with an expansive grant of general federal question jurisdiction which, with the brief exception of the Judiciary Act of 1801, was unprecedented in the nation’s 86 year history (Act of March 3, 1875; see Forrester 1942, 374-377; Forrester 1943, 265-266). Indeed, despite its revolutionary implications for the American judicial system, Frankfurter and
Landis would later observe that the 1875 Judiciary Act’s grant of general federal question jurisdiction—the Act’s most important provision—hardly solicited a comment from either the members of Congress who had approved it or observers in the American public at large (Frankfurter and Landis 1928, 64-65).

After the steady accretion of federal jurisdiction that resulted from congressional passage of the various Civil Rights Acts and, finally, the Judiciary Act of 1875, the ballooning business of the federal courts and pressures of judicial administration soon sparked renewed debate over the proper jurisdictional balance between the state and federal courts. Although this increased judicial business resulted from policies Congress itself had enacted, the Supreme Court also contributed to this caseload saturation by its decision in the *Pacific Railroad Removal Cases* (1885), which held that actions involving federally chartered corporations could be adjudicated in federal court. The administrative solution proposed by many southerners, led by Senator Benjamin Jonas of Louisiana as well as Senators Jones of Florida, George of Mississippi, and Williams and Call of Kentucky, was for Congress to pass legislation ceding control of key aspects of federal jurisdiction back to the individual states (Frankfurter and Landis 1928, 84). Instead, the opposition—which favored the alternative of increasing the size of the federal bench, and ultimately prevailed on the point—chafed at giving state courts greater authority over matters of civil rights and, probably of more importance, the ability to interfere with the business practices of the many
railroads and corporations that were driving American industrialization.

Frankfurter and Landis (1928, 88) effectively summarized this debate, saying

Congress was not indifferent to the situation; indeed no one disputed the need for relief. But there was a fierce clash over remedies, because of differences over the purposes which federal courts should subserve. Throughout the postwar period the legislative history affecting judicial organization is in no small measure a story of strife between those who sought to curtail the jurisdiction of the federal courts and those who aimed merely to increase the judicial force to cope with the increase of judicial business.

Although these efforts to roll back federal jurisdiction were largely unsuccessful, this did not reflect a lack of trying. Between the 1880s and the 1930s, members of Congress introduced scores of bills whose ultimate effect would have been to remove certain types of controversies from the federal courts. Still, this is not to say that Congress took no remedial action with respect to the reigning in of federal jurisdiction during this period. Monetary requirements for invoking federal question jurisdiction in the district courts were increased, although Congress quickly watered down the impact of many of the reforms by continuing to carve out exceptions to these jurisdictional amounts. Moreover, any potential relief provided by the Act of 1887 was immediately offset by the Tucker Act of 1887, which gave the federal courts jurisdiction over virtually all cases involving governmental contracts (Fallon, Meltzer, and Shapiro 1996, 881;
Surrency 2002, 154). Still, Congress did move to prohibit the removal of certain cases from state to federal court during this time, the most notable being damage suits brought under the Federal Employers’ Liability Act (Act of April 22, 1908, amended by Act of April 5, 1910), maritime actions based on the Jones Act (14 Wright, Miller, and Cooper 1991, §3674, at 467-78), and suits brought under authority of the 1933 Securities Act (Act of May 27, 1933).

Even so, the effects of the 1875 Judiciary Act continued to be felt throughout the period. Indeed, that statute has been referred to as “the turning point in the history of the jurisdiction of the federal courts, for they became free to accept jurisdiction of any claim or any right arising under a federal statute, whereas, before this date, the courts had to review the statute to determine if they had the jurisdiction” (Surrency 2002, 153). The overall business of the federal courts grew steadily as the Waite and Fuller courts broadly interpreted jurisdictional statutes so as to sustain national power and legitimize laissez-faire capitalism (Keynes and Miller 1989, 128; Gillman 2002). Years later, Congress would continue to expand the jurisdiction of the Supreme Court and the lower federal courts as it crafted legislative responses to problems such as post-World War I industrialization and the Great Depression (Keynes and Miller 1989, 131).
During this period, increased court caseloads reflected the simultaneous growth of the federal government, and the preferred legislative solution to problems of judicial administration continued to be periodic expansions of the federal judiciary.

In the years during and especially since World War II, both federal jurisdiction as well as the raw size of the federal judiciary continued to grow. By the 1960s, the size of the federal district courts had grown from thirteen judges in 1789 to three hundred (Posner 1996, 398). And as the U.S. Supreme Court applied provisions of the Bill of Rights to the states via the Fourteenth Amendment and the reach of the federal government increased after World War II, the jurisdictional activity of the federal courts exhibited a corresponding surge.

Recently, Congress’s most publicized jurisdictional expansions have been undertaken as part of a general effort to use the Commerce Clause as a vehicle to federalize certain crimes that were once exclusively within the domain of state judicial systems. Successful examples of this federalization have included the Violent Crime Control and Law Enforcement Act of 1994 and the Unborn Victims of Violence Act of 2004. Congress was less successful with the 1990 Gun-Free School Zones Act and the Violence Against Women Act of 1994, which the Supreme Court held unconstitutional in *United States v. Lopez* (1995) and *United States v. Morrison* (2000). Critics of this federalization include Chief Justice William H. Rehnquist who, in 1999, said, “Congress has contributed
significantly to the rising caseload by continuing to federalize crimes already covered by state laws…The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas” (Suro 1999; Rehnquist 1999). Led by former Attorney General Edwin Meese III, an American Bar Association Task Force has echoed many of the Chief Justice’s concerns regarding this trend toward the federalization of American criminal law (American Bar Association Criminal Justice Section 1998).

**The Other Side of Federal Jurisdiction**

To be sure, this brief overview of federal jurisdiction’s historical development has not been exhaustive. Fortunately, that was not its intent. Rather, it was undertaken with the specific goal of pointing to two important subplots that have permeated Congress’s lengthy involvement with the jurisdiction of the federal courts. First and foremost among these is the regularity with which Congress has redefined or attempted to redefine the jurisdiction of the federal courts. Though many jurisdictional matters fail to warrant public attention, Congress is literally always altering or at least considering making changes to some aspect of federal jurisdiction. As a consequence, one of federal jurisdiction’s chief characteristics is its fluidity, its perpetual evolution. The second main feature to emerge from this narrative is that several competing
motivations have spurred Congress to both contemplate and enact changes in federal jurisdiction over the course of American history. For example, most of the Reconstruction Era enactments were purposeful and political, while certain other jurisdictional changes either represented the residual effect of general governmental growth or were motivated in part by legislative concern for the efficient operation of the federal judiciary. Finally, as noted by Chief Justice Rehnquist, much of the recent movement to federalize criminal law has been motivated by Congress’s basic desire to appear responsive to particular societal problems that happen to be attracting substantial public attention.

In spite of its necessarily broad character, two important facets of federal jurisdiction have been intentionally neglected in this overview. The history and development of each area will be carefully detailed in subsequent pages of this dissertation, but for now it is enough to appreciate that efforts by Congress to reform diversity jurisdiction and attempts to strip the federal courts of jurisdiction to decide certain constitutional issues have played important roles in the history and development of federal jurisdiction. In contrast to much of what was presented in the earlier synopsis regarding jurisdictional expansion, these have been important and relatively sustained attempts to limit or remove categories of cases from the federal courts. To appreciate that distinction, it is helpful to conceive of changes in federal jurisdiction as being divided into two broad categories. The first of these groupings concerns jurisdictional changes that have
reflected the federal government’s steady growth over time. The extensions of federal jurisdiction that accompanied the Civil War, post-World War I industrialization and Roosevelt’s New Deal typify this category, as have more recent efforts to federalize crimes already punishable in the state courts. A second class of jurisdictional changes is of greater relevance to this dissertation, however. That second category concerns Congress’s reallocation of existing jurisdiction between the state and federal courts. Because this second category of change presupposes a zero-sum relationship between the federal and state courts, it is a particularly useful way to assess the competing motivations that prod Congress to adjust the jurisdictional balance between these two court systems.

As we will see, with its origins in the Judiciary Act of 1789, diversity jurisdiction’s history since 1875 has been oriented around a series of measures designed to constrict or eliminate the ability of federal courts to take cognizance of civil cases involving citizens of different states. As a category of jurisdiction that has been a perennial target for limitation, it stands in contrast to most other types of federal jurisdiction. The second of these jurisdictional areas has its contemporary roots in the constitutional struggles of the mid-twentieth century, and pushes the Constitution’s mandate of congressional control over federal jurisdiction one controversial step further. Even prior to the 1950s, Congress periodically entertained the idea of removing or curtailing the ability of federal courts to render certain types of decisions—the issuance of labor injunctions
being a prime example (Frankfurter and Green 1930). But, especially since the 1950s, legislators have advanced “jurisdiction-stripping” proposals with an eye toward curtailing the ability of some or all federal courts to decide constitutional cases involving contentious civil liberties issues such as abortion, obscenity, and school prayer. These jurisdictional proposals are particularly controversial because, unlike other types of jurisdictional measures, they target the federal judiciary’s ability to adjudicate constitutional cases. In effect, critics of such measures argue that they are advocated with the intent of undermining the judicial mandate of constitutional interpretation—an area in which, absent constitutional amendment, the judiciary’s activity has long been viewed as authoritative. Though much doubt and controversy have surrounded the ultimate constitutionality of these proposals, they have nevertheless come to represent perhaps the most visible and one of the most volatile aspects of the modern jurisdictional relationship between Congress and the federal judiciary.

Plan of the Dissertation

Both proposals to limit diversity jurisdiction and those providing for the elimination of federal jurisdiction in certain areas of civil liberties and rights are unique in that they represent attempts to decrease federal jurisdiction. They stand in stark contrast to federal jurisdiction as a whole, the trajectory of which has grown markedly since 1789 (e.g., Gillman 2002; Frankfurter and Landis 1928).
This is an especially attractive feature because, in contrast to increases in federal jurisdiction, these limiting proposals are amenable to meaningful analysis. This is because they are, by definition, disentangled from increases in federal jurisdiction that are oftentimes residual effects of growth in governmental programs.

Recognizing these and other attributes of diversity jurisdiction and jurisdiction-stripping proposals, this dissertation treats these constructs as two broad case studies that, taken together, substantially illuminate the factors that lead Congress to consider changes in the jurisdiction of the federal courts. As theorized in Chapter Three, this dissertation argues that Congress’s actions with respect to federal jurisdiction can be viewed as the product of several distinct factors, including its attention to judicial administration and the views of external interests. In addition, Congress’s power to regulate federal jurisdiction has been underappreciated as a political tool that Congress and its members can utilize to influence the political and ideological tenor of federal judicial outcomes (see Lovell 2003).

Before moving to such theoretical matters, however, Chapter Two reviews the substantial body of existing literature describing the traditional mechanisms by which Congress can exercise administrative and political control over the federal courts. There, I argue for a more explicit inclusion of Congress’s jurisdictional powers in that oversight. Chapters Four and Five discuss the
relatively complex issue of federal diversity jurisdiction, present its narrative history, and use that history to assess competing theoretical explanations for congressional activity in that area of federal jurisdiction. In Chapters Six and Seven, the elements of this theoretical framework are extended and applied to the classic contemporary illustration of jurisdictional maneuvering: court-stripping proposals in the constitutional area of civil liberties since the beginning of the Warren Court. Finally, in Chapter Eight, the dissertation’s analytical findings are synthesized and presented, along with implications for future studies of the institutional relationship between Congress and the U.S. federal courts.
CHAPTER 2

CONGRESSIONAL OVERSIGHT AND THE FEDERAL COURTS

“We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words…Without jurisdiction, this court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining…is that of announcing the fact and dismissing the cause.”

—Chief Justice Salmon P. Chase, Ex parte McCardle (1869)

Congress clearly has the capacity to supervise the federal courts. However, the extent of that power—as well as the conditions under which Congress chooses to exercise it—remain far less settled. Much of this potential congressional involvement stems from the demonstrable importance of judicial outcomes to its individual members. Indeed, research on judicial behavior leaves little doubt that federal judges have policy-oriented goals that motivate their decisions in particular cases (Baum 1997; Murphy 1962; Tate and Handberg 1991; Tate 1981; Segal and Spaeth 1993, 2002; Rowland and Carp 1983; Nagel 1961; Stidham and Carp 1987; Goldman 1966, 1975; Walker and Barrow 1985; Gryski and Main 1986; Songer, Davis, and Haire 1994). As such, Congress’s supervisory role over the federal courts has important implications for theories of judicial behavior, since the extent of its legislative oversight can impact the degree to which judicial attitudes translate into judicial outcomes.
As Smith has noted, “Scholarship on congressional control of the bureaucracy presents a useful framework for studying interactions between Congress and the judiciary” (2005, 140). Specifically, the institutional relationship between Congress and the courts echoes the competing themes of agency independence and congressional control that are found in literature on the bureaucracy (e.g., Weingast and Moran 1983). For example, the attitudinal model of judicial decision making posits that the cumbersome institutional structure of Congress allows federal judges to vote their sincere ideological preferences with only the slight possibility that Congress will move to check those decisions (Segal 1997; Segal and Spaeth 1993; 2002). In contrast to this model of pure judicial independence, proponents of rational choice separation-of-powers models are more open to the idea that, while judges are indeed policy-oriented, their ability to simply register their sincere ideological preferences can be considerably more constrained than the attitudinal model allows (e.g., Epstein and Knight 1998). This approach contends that judicial actors will behave strategically and vote their ideological preferences, but recognizes that judges will only push those preferences as close to their ideal policy positions as they believe is possible without incurring the wrath of Congress.

Whatever the ultimate truth of these competing claims, the reality is that Congress does enjoy a certain ability to supervise the federal courts. And, although the role of judicial outcomes has been irrevocably linked with
Congress’s oversight of the federal courts for many of the reasons suggested here, its supervision of the judiciary derives from additional factors as well. As I argue below, Congress’s power to regulate federal court jurisdiction has been an underappreciated mechanism by which it can administer the federal courts. Before proceeding to that discussion, however, it is necessary to review several other oversight tools at Congress’s disposal in its constitutionally-defined relationship with the federal judiciary.

Both scholarly research and the U.S. Constitution implicitly identify two dimensions to Congress’s oversight of the federal judiciary. The first is temporal, and the second is described here as an operational dimension. While, in reality, each of these dimensions represents a continuum, they are discussed here as producing a two-way typology that captures the central aspects of Congress’s supervisory relationship with respect to the federal courts. These dimensions, in turn, intersect to produce four broad—if occasionally overlapping—categories into which virtually all major actions concerning Congress’s judicial oversight fall. After introducing these categories, I utilize them to frame the literature review that follows and, later, to discuss the role of federal jurisdiction in Congress’s matrix of controls over the courts.

The temporal dimension of Congress’s federal court oversight can be either forward-looking or retrospective. Simply put, this dimension’s essential concern is whether Congress is exercising its powers proactively or reactively, in
an *ex ante* or *ex post* fashion. Formally, I refer to these temporal categorizations as *prospective* and *retrospective*. The proposed distinction between these two types of action recognizes that some types of congressional oversight are undertaken with the intent of punishing courts or judges for previously rendered decisions (impeachment, budgetary restrictions) and/or attempting to undo the effects of those past decisions (statutory overrides, constitutional amendments, jurisdiction-stripping in constitutional matters). On the other hand, Congress may also employ mechanisms such as court creation, judgeship expansion, or changes in statutory jurisdiction in its dealings with the federal courts. While the wisdom of these latter changes may be realized via retrospective evaluations of variables including judicial efficiency or even the overall tenor of certain judicial outcomes, they differ from retrospective checks on the courts in that their objective is *not* to revisit a specific doctrinal status quo. As an example, whenever Congress makes it more difficult to bring diversity of citizenship cases to federal court, it has not done so with the intent of undermining a discrete federal court decision; rather, for whatever reason, it has decided that cases *from that point forward* should be subject to some new set of requirements.

The second dimension to Congress’s federal judicial oversight is operational in nature, and can be divided into composition-centered and case-centered considerations. Here, composition-centered matters are defined to encompass the physical makeup of the federal courts, both geographically and
with regard to the composition of their judicial personnel. By contrast, case-centered levers of congressional control include tools that can be used to alter the distribution of cases that are heard in federal court as well as the ultimate legal outputs that result from the adjudication of those cases. As Table 2.1 indicates, taken together these dimensions yield four general approaches that Congress can utilize in overseeing the federal judiciary: the composition-centered prospective, the composition-centered retrospective, the case-centered prospective, and the case-centered retrospective versions of judicial oversight.

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Table 2.1: General Typology of Congressional Checks on the Federal Courts

CONGRESS AND THE COURTS

Even if Congress can impact the courts both operationally and temporally, that does not mean that all such controls are given equal weight, either by the Constitution or among observers of the federal courts. With some exceptions, Congress’s sway over the federal courts has typically been cast in terms of its ability to alter, prospectively or retrospectively, judge- and court-centered aspects of the judiciary. In contrast, less attention has been given to the case-centered
side of this equation. To the limited extent that case-specific checks on judicial power such as statutory overrides of particular decisions or the process of constitutional amendment are acknowledged, they are often marginalized as being more theoretical than real checks on the power of the federal courts.

Perplexingly, questions of jurisdictional control have been noticeably absent from most discussions of Congress’s ability to administer the federal courts. This would be more explicable were there an abundance of other case-based controls at Congress’s disposal with which to oversee the federal courts. However, as the following review makes clear, comparatively few such restraints exist. Put differently, while Congress’s ability to manage various aspects of the federal courts in terms of both structure and composition has been well documented by legal and political scholars, those discussions have obscured the vital impact that jurisdictional rules prescribed by Congress play in its symbiotic institutional relationship with the judiciary.

**Composition-Based Prospective Control**

By most accounts, Congress exercises the greatest control over the federal courts when it acts preemptively with respect to the physical makeup and staffing of the judiciary. Typically manifested in perennial fights over judicial nominations, the timing and character of expansions to the federal bench, and the politics of court creation or circuit adjustment, the importance of this ex ante
compositional control is only underscored by the vitriolic political battles that traditionally accompany legislative consideration of such actions. In effect, much of what is referred to here as composition-based prospective control is predicated on the idea that, once an individual is appointed to a particular court or a particular court is created, Congress retains relatively few tools with which to impact the prospective decisions arrived at by those actors (e.g., Segal 1997).

In terms of both its profile as well as its immediate and tangible relation to judicial outcomes, the U.S. Senate’s role in advising and consenting to federal court nominations stands well above all other institutional powers of Congress vis-à-vis the courts. Quite clearly, such confirmation battles are symptomatic of Congress’s legitimate and substantial attention to how the approval of particular nominations may translate into future judicial outcomes. Supreme Court nominations in particular have long been recognized as prime opportunities for organized interests and politicians alike to shape future judicial policy via changes in personnel. Indeed, the literature pointing to ideological and interest group influence over such nominations has become one of the most thoroughly explored in political science (e.g., Abraham 1999; Moraski and Shipan 1999; Cameron, Cover, and Segal 1990; Caldeira and Smith 1996; Caldeira 1988-89; Felice and Weisberg 1988-89; Massaro 1990; Maltese 1989; Maltese 1995; Giuluzza et al 1994; Halper 1972; Overby et al 1992; Overby et al 1994; Songer 1979; Segal, Cameron, and Cover 1992; Segal 1987; Ruckman 1993; Caldeira and Wright
1998; Danelski 1990; Friedman 1983). This is understandable in light of the role ideological considerations have been shown to play in the decision making of Supreme Court justices (see Schubert 1964; Segal and Spaeth 1993, 2002). Still, even these high-profile opportunities to impact judicial outputs remain substantially constrained by at least two factors. First, these nominations invite participation from only one chamber of the United States Congress. Second, the legislative role in Supreme Court nominations is typically a reactive one. Though its ability to veto a given nominee bestows the Senate with substantial power, that power is necessarily dependent upon the nominations initially submitted by the president.

As both scholarly research and informal observation have made it increasingly evident that lower federal court judges are important policymakers whose preferences have a substantial impact on the development of national law (Giles, Hettinger, and Peppers 2001; Songer, Sheehan, and Haire 2000; Baum 1997; Rowland and Carp 1996; Stidham, Carp, and Songer 1996; Songer, Segal, and Cameron 1994; Gottschall 1986; Stidham, Carp, and Rowland 1984; Carp and Rowland 1983; Goldman 1975), scholars have looked beyond the Supreme Court and begun to examine the Senate’s confirmation of judges to the United States District Courts and United States Courts of Appeals with greater interest (e.g., Scherer 2005). In contrast to Supreme Court nominations, home state senators of the president’s party can be considerably more active in proposing
candidates for lower court vacancies through the norm of senatorial courtesy (Rowland and Carp 1996). Moreover, non-home-state senators have become increasingly vocal participants in lower court nominations—particularly when it comes to presidential nominations to the federal courts of appeals. Still, despite the fact that the most effective way to impact future judicial decisions is to control the judicial personnel who will hear those cases in the first place, Congress’s control over that process is far from plenary.

Congress’s power to create additional federal judgeships represents a second critical component of its ability to exercise forward-looking control over the federal judiciary’s composition and structure. However, in contrast to its role in judicial confirmations, Congress’s forward-looking power of judgeship addition can be undertaken out of several different motives. At one extreme, Congress might choose to authorize additional federal judgeships in order to alleviate administrative concerns and caseload pressures in the federal courts. The annual recommendations of the Judicial Conference, which highlight backlogs in particular judicial districts or circuits and frequently advocate specific judgeship additions by Congress to address them, illustrate congressional attention to such administrative problems. At the other extreme lies the prospect of Congress undertaking judgeship expansion with the goal of impacting future judicial decisions. Substantial research has been undertaken to test this premise, and there is evidence suggesting that Congress has used its power of judgeship
addition to impact judicial outcomes and to arrest growing federal caseloads. Richardson and Vines were among the first to speculate that Congress might create judgeships out of partisan motivations, noting in 1970 that passage of omnibus judgeship acts in 1949, 1954, 1961, and 1966 all coincided with a single political party’s control of the House, Senate, and the presidency (Richardson and Vines 1970, 48). The first quantitative examination of the question came a decade later, with Bond’s (1980) correlational study of judgeship addition from 1949 through 1978. Bond found that judgeship expansion was especially likely to occur during the first two years of unified government, suggesting that members of Congress may be particularly eager to authorize new judicial positions when they know those positions will be filled by a partisan ally in the White House.

This early work was validated by a series of studies in the 1990s which demonstrated the importance of congressional action in regard to the lower federal judiciary’s ideological composition and, presumably, its eventual decisions. In their examination of lower federal court composition, Zuk, Gryski, and Barrow point to Congress’s active role in this “partisan transformation of the federal judiciary,” noting that, “although unified control [of Congress and the presidency] galvanizes the president’s ability to shape the judiciary, Congress is far from obeisant, particularly in strategic areas such as omnibus judgeship legislation…[that have led to] major expansions in the size of the federal bench” (1993, 452). In other words, while ultimate staffing ability remains the
president’s, Congress must take the lead if there are to be any newly created positions to fill. According to Zuk, Gryski, and Barrow, there is at least modest evidence that this has been the product of strategic congressional action (Zuk, Gryski, and Barrow 1993; Barrow, Zuk, Gryski 1996).

Building on the theoretical contributions of McNollgast (1995), who contends that unified government should lead to expansions of the federal bench—primarily to cement a judicial legacy that can endure well beyond a single political party’s electoral hegemony (see also Hirschl 2000)—the work of deFigueiredo and his colleagues begins from the premise that, in combination with a sympathetic president, a politically unified Congress should be expected to balance, or stack, the personnel of the federal courts through the creation of additional lower court judgeships. Thus, deFigueiredo et al offer what they describe as a “political efficiency rationale” for judicial expansion. That rationale assumes that “[each institutional actor] prefers judges from its own party over no new judges and no new judges over judges of an opposing party” (deFigueiredo and Tiller 1996, 444). In contrast to previous studies, the deFigueiredo-Tiller analysis of judgeship creation on the Courts of Appeals from 1869-1991 takes alternative explanations for judgeship expansion into account. After controlling for caseload volume and expansion requests from the judiciary itself via the Judicial Conference, the deFigueiredo-Tiller analysis concludes that both caseload volume and congressional concern for judicial outcomes have impacted the
history of judgeship expansion at the circuit court level. More specifically, they find that political alignment is a highly significant predictor of judicial expansions and that the existing ideological makeup of the appellate courts is also key in determining the magnitude of those expansions, given that they occur.

In a subsequent examination of judgeship expansion at the district court level from 1875-1993, deFigueiredo et al find that the presence of unified government remains a significant predictor of whether or not judgeship expansions will be undertaken during a particular Congress (deFigueiredo et al 2000). In support of their earlier findings at the appellate level (deFigueiredo and Tiller 1996), the 2000 study finds that, at least prior to 1970, the magnitude of increases in the number of authorized federal district judgeships can be traced to political and ideological factors. Since the 1970s, however, they find evidence that concerns relating to judicial administration have increasingly dominated debates over judgeship addition. Taken together, the work of deFigueiredo and colleagues (1996; 2000) as well as a more recent formal theoretic contribution by Basinger (2001) on the partisan politics of judicial deck-stacking reiterate the importance of judgeship creation as a tool by which Congress can exercise forward-looking control over the composition of the federal bench. deFigueiredo and Tiller (1996, 459) summarize the advantages of using this prospective, composition-based control in a strategic manner that can impact case outcomes, saying
Installing like-minded judges relieves Congress of the need to monitor and discipline the judiciary as such judges would be expected to share a common sense of justice with legislators. Congress could rely on the judiciary to arrive at the “right” decisions rather than having to override judicial decisions with time-consuming legislation. Expanding the judiciary facilitates this effect by allowing Congress to selectively allocate judgeships to fit its own liking.

Aside from its powers over judicial personnel, Congress retains the constitutional authority to create additional courts altogether—and this too is a mechanism by which it can address administrative concerns and exert influence over federal court outputs. The creation of additional circuit courts provides one illustration of Congress’s ability to impact judicial outcomes through the tool of court creation. Though certainly not all congressional forays into the topic are motivated by policy-related factors—the largely consensual events surrounding Congress’s decision to create a new Tenth Circuit Court of Appeals out of the existing Eighth Circuit in 1929, for example (Logan 1992; Stanley and Russell 1983)—Barrow and Walker’s (1988) copious examination of the struggles that surrounded the eventual division of the Fifth Circuit provides a useful lens through which to view the policy motivations behind congressional action in this area. Finally realized in 1980, the division of the Fifth Circuit languished for two decades because pro-civil rights forces in Congress recognized that any such division would produce a new circuit with substantially less fidelity to civil rights
than the existing Fifth Circuit. Nor were these implications lost on opponents of civil rights such as Mississippi’s segregationist Senator James Eastland who, as chair of the Senate Judiciary Committee, was perhaps the most forceful advocate of dividing the circuit. Similar concern over judicial outputs is evidenced today in the ongoing campaign by many Republicans in Congress to split the Ninth Circuit Court of Appeals in an effort to temper its liberal ideological tendencies (e.g., Scott 2004). Advocates of a split have generally claimed their motivation is to address the circuit’s high caseload volume. However, the Ninth Circuit’s Chief Judge has recently noted that, “The reason that the issue of splitting the circuit comes up repeatedly is because of dissatisfaction in some areas with some of our decisions…[particularly with respect to] the Pledge of Allegiance case and [presently] some of the immigration decisions” (Schroeder, J., quoted in Glater 2005). Although these proposals, if successful, “would not directly affect the jurisprudence of the Ninth Circuit,” they could “speed the day that Republican appointees become the majority in the new, smaller circuits” (Hellman, quoted in Glater 2005).

A second aspect of Congress’s court creation power allows it to establish specialized courts for the adjudication of particular types of claims. Examples of these specialized courts include the Court of Veterans Appeals, created by Congress in 1988, and the Rail Reorganization Court, which was instituted in the 1970s (Fallon, Meltzer, and Shapiro 1996, 41-47). To be sure, a number of these
courts have been authorized in order to maximize judicial efficiency and take advantage of legal specialization in difficult areas of litigation. However, such specialization has also been recognized as a potentially important mechanism by which Congress can put its imprimatur on judicial outcomes in certain categories of cases. For example, Baum argues that the establishment of specialized federal courts has, in large part, been rooted in the federal government’s desire to strengthen its own position in litigation—not merely to enhance federal judicial efficiency (1991, 224). The Emergency Price Control Act of 1942 illustrates this point nicely. Passage of this act withdrew jurisdiction from the district courts to suspend the enforcement of price controls during the Second World War. Instead, the Democratic Congress created a specialized Emergency Court of Appeals to hear those challenges, and did so at a time when nearly half of all federal district judges were Republican-appointees—many of whom were known to be hostile to price controls (see Lockerty v. Phillips 1943). The Emergency Court of Appeals, staffed by federal judges appointed by Chief Justice Harlan Stone and led by Judge Fred M. Vinson, was friendlier toward the imposition of these price controls (St. Clair and Gugin 2002, 122-123; Ely 1996, 20). By exercising this power, along with the power to create new judicial subdivisions, additional judgeships, and, to a more limited degree, approve nominees to the federal bench,
Congress is equipped with multiple institutional tools with which it can exert a priori control over the structure, composition, and, ultimately, the decisions of the federal courts.

**Composition-Based Retrospective Control**

Congress’s capacity to influence the federal judiciary’s composition is, in practice, almost exclusively prospective. Though Congress does have the constitutional ability to impeach and remove federal judges, the historical rarity with which it has utilized that power\(^5\) virtually eliminates it as a threat to either judicial independence or even the incompetent federal judge (Van Tassell and Finkelman 1999). Judgeship expansion could conceivably be used to reverse a particular decision or line of decisions, but typically that power has been exercised prospectively with more general political or administrative goals in mind. Arguably, the ill-fated Roosevelt “Court-packing plan” of 1937 is the isolated exception that proves this rule. While it has been suggested that Congress can at least signal its overall agreement or disagreement with the Supreme Court’s decisions through budgetary allocations (Toma 1991), this hardly represents a decisive retrospective check on judicial decision making—most of which begins and ends in the lower federal courts. All this leads to the

\(^5\) Thirteen times.
conclusion that retrospective changes to judicial structure and composition are generally of little value to the Congress grasping for levers with which to shape the federal courts via institutional oversight.

**Case-Based Prospective Control**

Congress’s ability to exercise *ex ante*, case-based control over the federal judiciary is largely derived from its ability to make changes in statutory jurisdiction. This power, as well as its similarities to Congress’s ability to limit judicial discretion via forward-looking mechanisms such as sentencing guidelines, will be detailed subsequently. In general, however, the most critical aspect of these oversight mechanisms is their potential to impact a general class of judicial controversies. Unlike the retrospective case-based controls discussed below, these oversight tools are comparatively wide in scope and, as such, will be designed to impact more than a particular outcome in a specific case. In other words, both the motives behind and the objects of this control will be considerably more diffuse than those specific circumstances which prompt Congress to pursue retrospective case-based checks on judicial power. Because of its close connection with federal jurisdiction, the mechanisms of this case-based prospective control will be introduced with greater precision shortly.
Case-Based Retrospective Control

In light of the backward-looking nature of this control, it should not be surprising that concern over the outcomes of decisions in particular cases represents the singular consideration in this aspect of congressional control over the federal judiciary. If Congress is determined to undo the substance of judicial decisions in specific cases, it can do so in one of three major ways. The first of these concerns Congress’s ability to override statutory decisions through the passage of follow-up legislation. Though there is considerable debate with respect to both the frequency and effectiveness of statutory overrides as a mechanism of judicial control, Congress has nonetheless utilized this tool with some regularity. One early assessment acknowledged as much, but then went on to caution that “[an] unusual unanimity of interest and opinion…is generally required to bring about a congressional reversal [of federal statutory decisions]” (Note, “Congressional Reversal” 1958, 1337; see also Nagel 1965). Subsequent work has found statutory reversals of Supreme Court decisions to be more common than previously thought (Eskridge 1991b), and has attempted to identify special factors that motivate Congress to exercise this power (Henschen 1983; Solimine and Walker 1992; Ignagni and Meernik 1994; Hausegger and Baum 1999).
Still, substantial doubt surrounds the significance of Congress’s ability to monitor statutory interpretations of the federal courts. Eskridge (1991b) argues that Congress occasionally overrules statutory rulings without even realizing it has done so. He also notes that even purposeful action by Congress is almost always undertaken in response to Supreme Court decisions. He notes that, “[Congress] shows an unimpressive knowledge of and response to the far more numerous lower federal court statutory interpretation decisions [that never receive Supreme Court review]” (Eskridge 1991b, 416). All this points to the inherent difficulty in recognizing and responding to even the statutory subset of federal court decisions after those decisions have already been made—Congress must be aware of what outcomes the courts are generating in particular cases before it can take steps to counter that judicial action.

Though its successes have been rare, the process of constitutional amendment represents Congress’s second retrospective check on the substance of judicial decisions. Just four of the U.S. Constitution’s twenty-seven amendments—the Eleventh (Chisholm v. Georgia 1793), the Fourteenth (Scott v. Sandford 1857), the Sixteenth (Pollock v. Farmer’s Loan and Trust 1895), and the Twenty-Sixth (Oregon v. Mitchell 1970)—have overturned constitutional decisions of the Supreme Court. Yet, Congress is keenly aware that it possesses this power, as senators and representatives have introduced new amendments for consideration in nearly every Congress in recent memory. Whether the topic is
abortion, flag burning, the Pledge of Allegiance, or school desegregation, the judicial decisions addressed by these proposals are distinguished by their political volatility (e.g., Clark and McGuire 1996). Moreover, the amendment process can also be used as a position-taking tool, allowing legislators to publicly register their disapproval of a decision with both the federal courts and their constituents, even if the ultimate likelihood of enacting those proposals is quite poor (Segal 1991).

The third retrospective substantive check on the judiciary available to Congress is the constitutionally questionable notion of jurisdiction- or court-stripping. Because of its constitutional ambiguity, discussed in Chapter Six, court-stripping or “jurisdictional gerrymandering” (Tribe 1981) is a reactive remedy of a different character than either overriding statutory decisions with follow-up legislation or overturning constitutional decisions via the process of constitutional amendment. Introduced below, a more detailed discussion of the concept and the difficult problems of constitutionality it presents appear later in the dissertation.

**Federal Jurisdiction and Case-Based Oversight of the Federal Courts**

In the chapter’s earlier discussion of Congress’s control over federal judicial personnel, it was asserted that “the most effective way to impact future judicial decisions is to control the judicial personnel who will hear those cases in
“the first place.” However, it would be inaccurate to conclude that Congress’s control over court personnel represents the only way for it to accomplish this objective. To the contrary, when Congress takes a case-centered approach and tinkers with jurisdictional matters, it necessarily places certain judges in charge of some new category of cases and/or removes that responsibility from others. This is especially the case with jurisdiction that is concurrent, or shared, between the federal and state court systems. Should Congress choose to restrict or expand the ability of individuals to access the federal courts, those changes can be expected to produce broad differences in the substance of judicial decisions—provided that there are partisan or ideological differences in judicial personnel that can ultimately lead to different outputs between the state and federal court systems. As an example, if federal court judges are, generally speaking, more liberal than the majority of their state counterparts at a particular point in time—for instance, on civil liberties issues during the 1960s—and Congress were to make it more difficult for citizens to bring certain civil liberties actions to federal court during that time, the product of Congress’s jurisdictional adjustment would be a greater number of conservative judicial decisions than would have existed absent such action.

Congress can attempt to adjust federal jurisdiction either retrospectively or prospectively. Though most successful changes in federal jurisdiction have been enacted out of forward-looking motives that point to concerns over administrative
maintenance and the substance of judicial outcomes, members of Congress have also attempted to utilize the institution’s jurisdictional power as a reactive weapon. This has particularly been the case since the 1950s and 1960s, when a series of progressive civil rights and liberties Supreme Court decisions so angered certain segments in Congress that members introduced numerous bills to limit or remove the ability of federal courts to decide cases concerning particular constitutional questions. The Court’s school prayer and Bible reading decisions provide a case-in-point: After the Court handed down unpopular decisions in *Engel v. Vitale* (1962), *Abington School District v. Schempp* (1963), and *Murray v. Curlett* (1963), members of Congress introduced scores of proposals to limit or withdraw the ability of federal courts to pass judgment on those issues. Even the two most recent topics of court-stripping legislation—the Pledge of Allegiance and same-sex marriage—are retrospective in the sense that they represent negative congressional reaction to decisions reached by lower federal and state courts in specific cases that seem destined to stir spirited debate for some time (see *Elk Grove Unified School District v. Newdow* 2002; *Goodridge v. Department of Public Health* 2003).

Regardless of their specific provisions, attempting to strip the federal courts of jurisdiction in response to specific rulings in constitutional cases is the very definition of case-centered retrospective congressional oversight. Coupled with the small fraction of federal cases dealing with these issues, it should come
as no surprise that administrative considerations are absent from this particular form of jurisdictional activity. The constitutional ambiguity of jurisdiction-stripping proposals has, in large part, been responsible for the lack of attention ascribed to the tactic as a mechanism for exerting congressional influence over federal court outcomes. Still, these measures continue to be introduced with regularity, even if their rate of legislative success has been unimpressive.

Though court-stripping legislation generates considerable attention, relatively few proposed changes to federal jurisdiction are undertaken solely with an eye toward undoing the effect of specific past decisions. More frequently, changes in federal jurisdiction occur because Congress decides that, from some point forward, all future cases of a particular type or classification should be heard in one set of courts or another. For present purposes, Congress’s precise motivation for undertaking jurisdictional activity is unimportant; the relevant point is that, whether enacted out of political, administrative, or some mixed set of motives, much of Congress’s potential to influence the judiciary from this case-based perspective is both broad and future-oriented.

From an outcome-based perspective, this a priori jurisdictional control is somewhat analogous to the role played by mandatory minimum sentences. When Congress passed the Sentencing Reform Act of 1984, which ultimately led to the creation of federal sentencing guidelines, it did so in a general effort to make its preference for less judicial discretion in criminal sentencing felt throughout the
federal system. It did not enact the Sentencing Reform Act with the intent of revisiting particular federal criminal cases that had already been adjudicated; instead, the Act was designed to impact sentencing in *future* cases. Similarly, while many of Congress’s jurisdictional actions will inevitably be structured by lessons learned from past experience, changes such as setting a higher threshold for allowing diversity of citizenship cases into federal court, making it more difficult for state prisoners to seek *habeas corpus* relief in federal court, or eliminating the monetary requirements needed to enlist federal question jurisdiction will only impact the outcomes of hypothetical cases that are brought subsequent to that jurisdictional adjustment. Because Congress’s power to recalibrate federal jurisdiction in these ways would leave specific past decisions undisturbed, that power is defined here as a future-oriented check on the federal judiciary.

Noting “…the importance of the congressional power to limit judicial policymaking by controlling the jurisdiction of the federal courts,” one analysis of federal jurisdiction over labor issues in the 1930s criticizes the conventional view that Congress’s power over federal jurisdiction is irrelevant to policy outcomes (Lovell 2003, 162). The comparative lack of systematic research on this question is surprising because Congress’s power to alter jurisdictional responsibilities is, in many ways, a natural complement to its structural control of the courts through judgeship expansion. Describing an historical period over a century ago,
Frankfurter and Landis highlighted this point by noting, “The legislative history affecting judicial organization is in no small measure a story of strife between those who sought to curtail the jurisdiction of the federal courts and those who aimed merely to increase the judicial force to cope with the increased judicial business” (1928, 88). In many ways, judgeship addition and jurisdictional reform represent two sides of the same coin, with judgeship addition implicating compositional aspects of congressional control and jurisdictional reforms touching on its case-centered oversight of the courts.

Consider the several shared characteristics of judgeship creation and jurisdictional contraction. From an administrative perspective, each represents an alternative remedy for decreasing caseload problems in the federal courts. In order to decrease yearly caseload per judgeship ratios, one of two general types of actions must occur. Congress must either increase the number of federal judges, or it must lessen the number of cases that are allowed to reach the federal courts. In economic terms, the supply of judges must be increased to meet caseload demand, or current caseload demand must decline to the point that the existing supply of federal judges is sufficient to dispose of those cases. From the perspective of influencing substantive legal outcomes, each represents a forward-looking prescription that, in theory, allows Congress to relax its monitoring of individual court decisions by either “stacking” the judicial deck to make the overall ideological bent of the courts more amenable to congressional preferences.
or, whenever possible, ensuring that certain categories of cases will be heard in
the most favorable forums available. Finally, it should be reiterated that, as a
general rule, neither of these actions is likely to be undertaken with the chief goal
of manipulating outcomes in specific cases. Instead, the ostensible policy goals
behind these two forms of congressional action are considerably more diffuse,
reflecting a desire to shape the broad trajectory of judicial outcomes without
regard to the particular results of any single case.

SUMMARIZING CONGRESSIONAL CONTROL OF THE COURTS

Reviewing the existing scholarship on Congress’s relationship with the
federal courts has revealed several things. First, excepting recent investigations
into the frequency and determinants of statutory overrides of judicial decisions
(Eskridge 1991b; Hausegger and Baum 1999; Ignagni and Meernik 1994;
Henschen 1983; Solimine and Walker 1992), little has been made of Congress’s
ability to use “case-based” checks to influence the behavior of the federal courts
on particular matters. Instead, most scholarship investigating congressional
control of the courts has been focused on Congress’s prospective power to add
and confirm judges or to create or reconfigure particular courts. The second point
is closely related to the first, in that the relatively few investigations into
Congress’s case-based checks on the power of the federal courts have concentrated on retrospective aspects of that functional control, while its future-oriented actions have gone unexplained.

Table 2.2: Detailed Typology of Congressional Checks on the Federal Courts

<table>
<thead>
<tr>
<th>Composition-Based</th>
<th>Prospective</th>
<th>Retrospective</th>
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<tr>
<td>-Court nominations</td>
<td>-Budget</td>
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<td>-Judgeship expansion</td>
<td>-Judicial impeachment</td>
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<td>-Court creation</td>
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| Case-Based                         | -Changes in statutory jurisdiction   | -Statutory overrides                  |
|------------------------------------| -Standardizations of federal        | -Constitutional amendments            |
| procedure (such as sentencing      | -Jurisdiction-Stripping over         |                                       |
| guidelines)/Statutory limits to    | matters of constitutional interpretation|
| judicial discretion                |                                       |                                       |

As noted earlier, the constitutional questions raised by the idea of jurisdiction-stripping as well as the historical rarity with which decisions have been successfully reversed via constitutional amendment probably help explain the paucity of analysis vis-à-vis these retrospective controls. What, then, helps account for the lack of attention to Congress’s forward-looking substantive controls, the most notable of which are checks on federal jurisdiction? All too often jurisdictional matters have been viewed as mundane, esoteric decisions. This has especially been the case with regard to the so-called jurisdictional
amounts-in-controversy litigants must meet in order to raise diversity of
citizenship claims in the federal courts. As one authority (Purcell 1992, 103) has
noted,

Doctrinally, the jurisdictional amount seems insignificant and uninteresting, a simple,
mechanical, and intellectually trivial detail. In fact, for half a century it may have been one of the most
effective, if indirect, distributive rules in the American legal system. It kept many small cases
out of the federal courts but it also transformed into “small” cases untold numbers of claims that were
crucial to aggrieved individuals and whose proper value was by no means small. In the system of
corporate diversity litigation, the jurisdictional amount did not just reroute claims, it created them.

Whatever the reasons behind this lack of appreciation, there remains much to
learn about the role of jurisdictional adjustment as a tool of judicial oversight. To
that end, in the pages that follow I propose a theoretical framework for
understanding the jurisdictional relationship between Congress and the federal
courts, assess that theory’s applicability to congressional action in two quite
different areas of jurisdictional activity, and discuss the implications of these
findings for students of the federal courts, Congress, and the reciprocal
institutional relationship that exists between the two.
CHAPTER 3

A THEORETICAL MODEL OF COURT-Congress Jurisdictional Interaction

“A person is more willing to favor restricting federal court jurisdiction in situations where his or her preferences are more likely to be achieved in state courts...Jurisdictional rules often determine the outcome in specific cases; hence, it hardly is surprising that debates over the scope of federal court jurisdiction often turn on views about the appropriate nature of American government and, practically speaking, the best courses of action to achieve the desired outcomes.”

—Erwin Chemerinsky in Jurisdiction (1999, 40)

“I am concerned that we appear to be a Congress that is flexible on the jurisdiction of courts. When we agree with the decisions that courts make, we leave them jurisdiction. When we think they may make a decision that we want, we try to give them additional jurisdiction. But when we disagree with the federal courts, we have had legislation on this floor in recent months to take from them jurisdiction. If we pursue this course as a country, I suggest to you that we will become a Nation of men and politicians, not a Nation of laws.”

—Representative Steny Hoyer (D-MD), 151 Cong. Rec. H 1724 (2005)

In some respects, congressional involvement with federal court jurisdiction is difficult to summarize. The specific factors that prompt legislators to consider jurisdictional changes in one area of law are unlikely to transfer cleanly to another specific context. As a consequence, no single template can be expected to predict or explain jurisdictional change with much specificity. Nevertheless, several basic constituents of jurisdictional change derived from more general theories of legislative motivations and behavior, as well as research on the institutional relationship between Congress and the federal courts, can help make considerable sense of the politics of federal jurisdiction. First and foremost,
any theory of jurisdictional change must account for the reality that, as with other issues, “legislative behavior and legislative outputs are the result of various combinations of external and internal variables” (Brady, Cooper, and Hurley 1979, 386). Although no two jurisdictional episodes will be identical in their origins, each of those events does draw its own unique impetus from a finite collection of theoretical considerations. Those theoretical considerations, in turn, flow directly from the motivations of individual members of Congress, as those motivations are refined by the institutional framework within which the legislative and judicial branches of government sit. Ultimately, these individual motives and institutional relationships produce a theoretical model for understanding the jurisdictional interaction between Congress and the federal courts that is both useful and adaptable.

LEGISLATOR GOALS AND JURISDICTIONAL CHANGE

Fundamentally, all members of Congress are drawn to Washington in order to pursue certain goals. Though scholars have long debated the precise hierarchy of these goals, there is widespread agreement that the activities of individual legislators can be explained in general terms of goal-seeking behavior (e.g., Mayhew 1974; Arnold 1990; Fenno 1973, 1978; Hall 1987; Kingdon 1973; Smith 1988). In the most famous theoretical conceptualization of legislative behavior, legislators advertise themselves, claim credit for their accomplishments,
and stake out positions they believe will be well-received by their constituents, all in an effort to enhance the prospects of their own reelection (Mayhew 1974). A more popular, if less parsimonious, position views legislative behavior as the product of multiple goals, including reelection, the acquisition of institutional power, and the production of good public policy (Fenno 1973). In many ways these goals are intertwined, and seeking to parse them here serves no useful purpose. This is especially the case in that the relative weight given to particular goals by individual members is likely to differ, often substantially, as a function of multiple factors. As an example, Fenno has concluded that junior members of Congress typically concentrate on the goal of reelection while the greater electoral security of most senior members allows them to focus their attention on power- and policy-related goals (Fenno 1978).

Fortunately, whether legislative activities can be traced back to a single, discrete goal-based framework is beyond the scope of this dissertation. What is relevant for present purposes is that, irrespective of whether members advocate changes in federal jurisdiction out of concern for their reelection, to impact public policy for the better, or some combination of the two, this dissertation’s fundamental theoretical premise is that members approach the subject of jurisdictional adjustment by taking no more than three broad sets of considerations into account. As we will see, these three sets of considerations mirror the more general theoretical skeleton that is thought to characterize the
institutional relationship between the courts and Congress. Before formally introducing these factors and their implications, however, it is first necessary to consider the basic ways in which congressional debates over jurisdictional change can dovetail with two primary goals of individual legislators—securing reelection and enacting sound public policy.

**Jurisdictional Change and Electoral Politics**

If politicians wish to be reelected, they must attend to the most basic concerns of their constituents. Simply stated, they must take positions their constituents support, claim credit for their role in championing causes or securing policies that benefit their state or district, and publicize those roles and positions in order to be rewarded for their efforts at the ballot box (Mayhew 1974). To the extent that jurisdictional debates have an electoral dimension, then, politicians should approach those debates in ways that will maximize their ability to obtain votes. One of the easiest ways for members of Congress to secure electoral support through debates over jurisdictional reform is to use them as vehicles through which to express positions with which their constituents are sympathetic and, where appropriate, do their best to enact them into law. Consider Murphy’s description of southern senators’ behavior on the Jenner-Butler bill—legislation
that would have curbed the Supreme Court’s jurisdiction over certain national
security cases—which played out against the backdrop of the Court’s
desegregation decisions:

When the Jenner-Butler bill came up, every
southern senator had to vote for the measure and
against the Court; but few southern senators felt it
necessary to try to bargain with undecided
colleagues in order to gain new recruits for the bill.
A favorable vote and a stump speech against the
Court were thought to be sufficient for fence-
mending purposes (Murphy 1962, 267).

Many of the more recent debates concerning federal subject-matter jurisdiction
over controversial topics such as abortion, prayer in school, or same-sex marriage
are illustrative of this approach. Though many senators and representatives would
undoubtedly like to eliminate the ability of federal courts to decide such matters,
experience has taught that, their constitutionally ambiguous status
notwithstanding, such court-stripping efforts are unlikely to be enacted. Still,
even assuming this failure *arguendo*, those legislators representing anti-abortion,
pro-prayer, pro-traditional marriage constituencies still stand to gain, if not by
championing such proposals out of the false hope of eliminating federal judicial
tyranny, then by taking visible and popular stands on issues that are salient to
their electoral base. In other words, politicians may use jurisdictional politics in
an effort to stake out anti-court positions—assuming those litigators believe such
posturing will be electorally beneficial.
However, the influence of public opinion on an individual legislator’s view of particular aspects of federal jurisdiction need not be confined to mere position-taking. Position-taking represents a simple, relatively cost-free way for members of Congress to enhance their popularity, but particular constituencies will sometimes demand substantive results that require a greater legislative investment. If and when voters come to perceive that the federal courts are producing outcomes at odds with their own preferences, they will become anxious for jurisdictional change—and the electorally-conscious politician would do well to heed their criticisms. In the late 1800s and 1900s, politicians such as David Culberson of Texas and Nebraska’s George Norris illustrated this behavior by fighting for various limitations in federal diversity jurisdiction. Those limitations were strongly supported by many of their constituents, who viewed the lower federal courts as producing decisions that were, en masse, highly unfavorable to them (e.g., Purcell 1992). Since the 1950s, voter concern with liberal decisions of the Supreme Court has led many conservative legislators, particularly in the South, to advocate limitations in the appellate jurisdiction of the U.S. Supreme Court and/or inferior court jurisdiction via either court-stripping legislation or the passage of constitutional amendments. Of course, the line between position-taking for position-taking’s sake and position-taking in the hope of securing substantive legal change is one that cannot be clearly demarcated. Still, on the sliding scale of congressional action, the motivation is the same: lawmakers are
expected to represent the views of their constituents on jurisdictional matters, and to do so just as fully as they are to represent their views on non-judicial issues such as war and peace, farm subsidies, or funding for public education. To do otherwise would be to risk the unwelcome possibility of electoral reprisal.

As a corollary, legislators must not only consider general constituent opinion in arriving at their positions on jurisdictional matters. They must also be responsive to the views of organized groups and interests. Contemporary interest groups wield considerable influence over elected politicians, principally though not exclusively in the form of campaign contributions and organizational endorsements. Furthermore, as Truman (1951) and many subsequent scholars have noted, another important function of organized interests is to educate politicians on the potential political advantages or handicaps that are likely to result from their embrace of particular positions. In fact, much of the research on the interaction between interest groups and members of Congress is predicated on the assumption that interest group access results from congressional strategies for dealing with electoral uncertainty (Hansen 1991, 11-12). As such, interest groups represent an important component of the individual legislator’s voting calculus. In situations where proposed jurisdictional changes threaten the causes or positions of some groups or could enhance the standing of others, those organizations will mobilize and the electoral carrots or sticks wielded by them can be expected to impact an individual legislator’s thinking on jurisdictional matters.
Finally, legislators have an electoral incentive to ensure the judiciary’s smooth operation. While no legislator is likely to win votes out of appreciation for the efficient operation of the federal courts, none wants to be accused of being complicit in extreme judicial delay and federal court congestion. If, as some have maintained, access to the federal courts is conceptualized as a governmental service (Frank 1984, 79), constituents can be expected to react to inordinate federal judicial delays just as they would to other government-induced inconveniences in their daily lives such as the delayed receipt of a Social Security check or reimbursement from Medicare. All members have a shared political interest in maintaining the smooth operation of the federal courts, even if the individual possibility of being held electorally-accountable for problems of court administration is remote. Additionally, when court congestion does occur, multiple avenues for legislative correction exist. Along with judgeship creation, one of the surest is to decrease the volume of cases the courts are required to hear. Should an enterprising elected official seize on the issue and take a lead role in attempting to resolve it, she can plausibly claim credit for that activity with her constituents.

**Jurisdictional Change and Good Public Policy**

As described above, the reelection goal provides an important perspective from which to view the decisions of individual members of Congress with respect
to jurisdictional adjustment. Unfortunately however, by itself that motivation is inadequate to the task of providing an individual-level theoretical understanding of why elected politicians become involved with jurisdicational matters. This is illustrated by the classic observation that most bills considered in Congress lack a constituency dimension (e.g., Krehbiel 1991). In other words, if an appreciable number of legislative proposals have neither a particular salience to nor real-world implications for one’s electoral constituency—and, undoubtedly, many jurisdictional questions of a seemingly technical nature lack strong constituency dimensions—what else could explain Congress’s involvement with the politics of federal jurisdiction? Though interest group participation may ameliorate this lack of voter concern by bringing attention to otherwise invisible issues, even that is not enough to vindicate electoral considerations as the sole catalyst for jurisdictional reform.

Of course, legislators are also motivated by the desire to enact their preferred public policy (e.g., Fenno 1978; Fiorina 1989; Cox and McCubbins 1993; Rohde 1991; Krehbiel 1991). Two recent studies have concluded that members of Congress use jurisdictional controls to advance their preferred positions on regulatory policy (Smith 2005, Smith forthcoming), and there is no reason to suspect that such motivations are confined to that narrow category of federal legislation. Ideally, members of Congress will always do their best to enact good public policy, and what constitutes “good public policy” is typically
defined through each individual legislator’s own ideological prism. This is especially the case when one’s constituency proves to be apathetic on a particular issue, such as certain technical questions of federal jurisdiction, and legislators feel little or no pressure to subjugate their own views on the wisdom of a particular policy to those of their constituents. Simply put, the absence of a constituency dimension from a particular piece of legislation does not mean that ideological considerations suddenly become absent from the legislator’s decision calculus. It merely means that legislators will be free to act on their sincere preferences without fear of electoral reprisal.

On the other hand, in the absence of a constituency dimension legislators can also find themselves making relatively apolitical judgments on the merits of certain programs, approaches, and proposals for reform in the service of producing good public policy. Jurisdictionally, one recent manifestation of this behavior has been the increasing visibility of the nonpartisan Judicial Conference in debates about the operation of the federal judiciary (Fish 1973). The judgment of such nonpartisan administrative experts can exert an important influence on legislative behavior, especially when proposed jurisdictional solutions evince few, if any, visible partisan, ideological, or electoral fault lines. To extend the above example, if the Judicial Conference were to recommend a shift of federal judicial resources from one judicial district to another, a further division of a particular judicial district, or the elimination or extension of certain jurisdictional
requirements, politicians of all ideological stripes would likely acquiesce to the change—provided that the recommendations were confined to streamlining the judicial machinery of the federal courts without threatening to substantially alter judicial decisions or marginalize the position of powerful groups and interests. In short, this would occur because of a shared belief that the measure would result in sound, ideologically-neutral public policy. Although these hypothetical changes would probably not be completely devoid of political controversy, it is reasonable to suspect that debates over them would be much less controversial than those having more overt political or ideological overtones.

Finally, politicians who are unconstrained by either constituent views or their own ideological beliefs may even rely on other less-than-neutral groups and interests in attempting to forecast the impact of particular legislation. In addition to supplying legislators with information about the political ramifications of adopting certain positions, scholars have recognized that interest groups can also provide legislators with assessments of just what impact a piece of legislation’s implementation will likely have in the real world (e.g., Truman 1951; Bauer, Pool, and Dexter 1963). As with nonpartisan actors such as the Judicial Conference, non-neutral groups and interests engaged in competition with one another can provide members with information that can be used to measure the administrative desirability of particular measures. Thus, quite apart from electoral
concerns, legislators can be expected to tap the knowledge of both partisan and nonpartisan interests in attempting to discern for themselves the course of action that, in their view, embodies the most promising public policy.

INSTITUTIONAL DYNAMICS AND JURISDICTIONAL CHANGE

Having briefly examined the major ways in which debates over jurisdictional change can facilitate two major goals of individual legislators, the discussion now turns at once to the more general and the more specific. To that end, this section draws together the earlier discussion of individual members’ two overarching goals to produce three basic determinants of Congress’s aggregate activity vis-à-vis the courts. In other words, after theorizing about various reasons why individual members of Congress might find it necessary or at least beneficial to engage in debates over federal jurisdiction, we must step back and examine how those individual-level traits are manifested in Congress’s more corporate relationship with the federal courts. At the same time, we must appreciate how the general principles derived from that institutional relationship relate specifically to the alteration of federal jurisdiction.

A careful reading of the separation-of-powers scholarship reveals three distinct sets of factors that are of near perpetual importance in structuring Congress’s relationship with the federal judiciary. These factors were introduced individually in Chapter Two. Here they are assembled together in three broad
categories. These determinants of congressional action are, in no particular order, attention to the views and opinions of individuals, groups, and interests external to the government, concern for the judiciary’s institutional functioning and maintenance, and, finally, Congress’s own attitude toward federal judicial outcomes. After introducing each of these factors in the following section, I explore their specific application to the politics of federal jurisdiction in the chapter’s final major section.

External Groups and Interests

Because groups, interests, and individuals external to the legislative process permeate so much of what Congress does, it is no surprise that these outside actors represent an important element of Congress’s dealings with the federal courts. To be clear, these actors are external in the sense that they represent non-governmental entities with no first-hand institutional policymaking responsibilities. There is typically considerable overlap between these interest-based factors and the notion of attention to judicial outcomes, because concern for the latter will often mobilize the former. However, because there are situations in which groups can be expected to mobilize out of pure self-interest, and not out of concern for judicial outcomes per se, these categories are treated as theoretically distinct. For example, the opposition of trial lawyers to the elimination of federal diversity jurisdiction has not stemmed from the belief that more favorable
outcomes will always be obtained in federal court; rather, it is in their self-interest to preserve the forum-shopping ability provided to them by the maintenance of federal diversity jurisdiction. At the most basic level, these interests will take the form of the general public’s direct opinions on particular issues of contention between the federal courts and Congress. They may also simply represent the views of individual voters who communicate their preferences to members of Congress. In other cases including judicial nominations (Caldeira and Wright 1998) and matters such as judgeship expansion and court creation (Barrow and Walker 1988), the interests involved will undoubtedly be more professional and better organized than the public at-large. Still, whether these pressures are expressed by a diffuse public or championed by more cohesive groups, both represent interests outside the government itself. In short, these interests are united by both their externality and by the belief that they have some personal or collective stake in the decisions arrived at in Congress which are relevant to the federal courts.

To reiterate, the importance of these external interests to an individual legislator’s political future is difficult to overestimate. The judicial issues with which Congress deals are frequently ones of deep controversy, and the failure to heed groups’ advice can be devastating in an electoral sense. To a lesser extent, members of Congress can utilize competing group arguments and arrive at genuine policy-related decisions after weighing the arguments of each side.
Whatever individual members’ precise motivations for heeding these external voices, their doing so results in a substantial impact on most matters of judicial policy that come before the Congress.

Finally, scholarship on the relationship between Congress and the federal courts has long recognized the centrality of these external interests. Works by Pritchett (1961), Murphy (1962), and Stumpf (1965) were among the earliest to allude to the importance of external pressures in the context of particular historical episodes. More recently, the relevance of external individuals, groups, and interests has been confirmed in a variety of specific contexts by scholars including Henschen (1983), Eskridge (1991a, 1991b), Solimine and Walker (1992), and Zorn (1995). Without detailing their specific arguments here, there is clear scholarly agreement that outside groups and individuals represent important, often vital, considerations in nearly all facets of the cross-institutional relationship between the federal courts and Congress.

**Institutional Maintenance**

As Chapter Two made clear, Congress is empowered to undertake a number of activities in order to streamline the federal judiciary’s operations. It can expand the number of statutorily authorized federal judgeships with the goal of relieving court congestion. It also has the ability to recalibrate geographic boundaries of various federal courts or even create additional lower courts, and it
has utilized these powers on numerous occasions to improve the administration of the U.S. federal courts and the public’s access to justice (e.g., Fish 1973). Finally, Congress’s control of the appropriations process puts it in a position to determine and allocate precisely what level of resources the federal courts will require annually in order for them to operate as smoothly as possible (e.g., Toma 1991).

As previously noted, Congress’s collective motivation for ensuring the federal judiciary’s optimal institutional functioning derives from a combination of the electoral and policy-related goals of individual legislators. In light of the judiciary’s growth over the last several decades as well as the growing realization that questions of federal court administration are ones that must be continually addressed, Congress has increasingly relied on expert reports and analyses such as the recommendations of the United States Judicial Conference in its efforts to fine-tune the federal judicial machinery. Taken as a group, the organizational abilities spelled out above point to the existence of an important determinant of congressional control over the federal courts. That discrete role can best be described as one of administrative oversight and institutional maintenance, and its specific implications for the politics of federal jurisdiction will be explored shortly.
Congress’s Attention to Judicial Outcomes

Often referred to as “attitudinal” factors, Congress’s attention to the tenor of judicial outcomes represents the final piece in the triad of theoretical bases for its institutional interaction with the federal courts. Such attitudinal concerns have been defined elsewhere as “relating to the policy preferences of the various governmental actors involved” in particular debates concerning Congress and the federal courts, and numerous examples illustrate that assertion’s legitimacy (Zorn 1995, 6). Formal works by Eskridge (1991a, 1991b) and Gely and Spiller (1990) have underscored the theoretical importance of these attitudinal considerations, and others (Bond 1980; Henschen 1983; Solimine and Walker 1992; deFigueiredo and Tiller 1996, deFigueiredo et al 2000, Basinger 2001) have validated the importance of attitudinal factors more empirically in both the congressional and judicial contexts.

Congress’s collective preoccupation with federal judicial outcomes flows naturally from the key goals of its individual members. To varying degrees, members must at least tacitly support those judicial outcomes that are popular with their electoral constituency. Moreover, even when decisions escape constituents’ notice, legislators are likely to support or oppose certain judicial outcomes on the basis of their own political outlook, which they believe will produce the best public policy. As a result, both electoral and policy goals should
lead politicians to a strikingly similar endpoint—assessing the state of the federal courts, in substantial part, by the judicial outcomes those courts happen to be producing at any given time.

As summarized in Chapter Two, Congress’s concern for judicial outcomes has impacted many legislative debates involving the federal courts. The most identifiable example of this concern is, of course, the judicial nominations that come before the U.S. Senate. Nominations to the U.S. Supreme Court—and, increasingly, to the lower federal courts—are viewed as opportunities to shape future case outcomes, and challenges to particular nominees are especially likely to result when a nomination threatens to reorient the basic ideological direction of a court’s decisions (e.g., Moraski and Shiman 1999, 1070; Ruckman 1993). Once again, member positions on such nominations can represent a composite of electoral and policy-based factors. Still, Congress’s attention to case outcomes is by no means confined to this one area of inter-branch relations. For example, the policy preferences of Congress and the relevant federal court(s) have been shown to be important variables in debates over wide-ranging issues including judgeship expansion (deFigueiredo and Tiller 1996; deFigueiredo et al 2000), the creation of new federal courts (Barrow and Walker 1988), and the incidence of statutory overrides of judicial decisions (Henschen 1983; Eskridge 1991b; Solimine and Walker 1992). In light of the seemingly ubiquitous nature of Congress’s attention to judicial policy outcomes, it is no surprise that its jurisdictional dealings with
the federal courts have been characterized by more than a little attention to case outcomes and judicial policy. Finally, the similarities between congressional attention to judicial outcomes and the pressures of external interests should be noted, but not overemphasized. While both concerns are likely to derive much of their impact from judicial outcomes, the involvement of interests can stem from additional factors as well. Moreover, even when outcomes do come into play, the two considerations are separated by the entities reacting to those outcomes.

Having outlined the importance of institutional maintenance, external groups and interests, and judicial outcomes to the institutional relationship between Congress and the federal courts, it is necessary to apply those general considerations to the more specific area of federal jurisdiction. To that end, the following section builds on the previous two by addressing the role of these three factors in structuring the politics of federal jurisdiction.

**APPLICATIONS TO THE POLITICS OF FEDERAL JURISDICTION**

Having discussed the major forces that structure the institutional relationship between the federal courts and Congress and how those macro-level forces relate to the goals and motivations of individual legislators, it remains necessary to apply each of those determinants of general congressional activity to the specific realm of jurisdictional politics. While it bears repeating that specific jurisdictional episodes differ in terms of both the number and proportion of the
theoretical ingredients involved, it should also be reiterated that, as conceptualized here, external groups and interests, administrative matters, and cognizance of judicial outcomes are assumed to represent a comprehensive, if general list of the motivations that lead Congress to contemplate changes in federal jurisdiction.

**External Groups and Interests**

As might be imagined, the involvement of certain external interests in jurisdictional politics is quite difficult to capture systematically. In contrast to discrete historical episodes such as Supreme Court confirmation hearings, in jurisdictional politics the historical timeline is long and cross-time comparisons are imperfect. Because of this, much of what there is to say about the role of external actors in various jurisdictional debates must be presented qualitatively. However, because observers of American politics have become so accustomed to the importance of extra-legislative factors in the passage of federal legislation, the story is nevertheless a familiar one. What is more, the unique nature of these external pressures across jurisdictional debates does not preclude the drawing of several generalizations about their shared characteristics.

Organized interest groups will typically have the greatest impact in shaping changes in federal jurisdiction when the subjects of the proposed changes involve matters that are technical, unfamiliar, and difficult to understand. In such
circumstances, the issue’s salience to the general public is relatively low and organized interests can typically secure legislative allies with relatively little cost. Contemporary debates over diversity jurisdiction are illustrative of this approach, in that members of Congress experience little or no voter pressure to take a particular position on the issue. The same could also be said for many other areas, including admiralty and maritime jurisdiction and certain aspects of habeas corpus law. By contrast, mass opinion will be of much greater consequence when the public’s interest is great and the jurisdictional questions at issue are viewed as being simple and straightforward. Because attempts to strip the federal courts of the authority to review cases concerning the Ten Commandments or same-sex marriage are highly salient topics among the public, and—at least on the surface—seem easy for constituents to understand, legislators will typically face much greater public pressure in staking out positions on issues such as these. Put more formally, depending in part on the preferences of one’s constituents, some legislators will be willing to embrace an interest group’s position in exchange for less compensation than others (Denzau and Munger 1986). Organized interest groups will choose to lobby those individual legislators whose support they can obtain at the cheapest cost—namely, those whose voting constituents either agree with the policy position advocated by the interest group or, more likely, are rationally ignorant of the policy altogether. In such circumstances, organized
groups will typically serve as a mouthpiece for public opinion. When issues become more technical, however, organized interests are likely to be of greater consequence.

By contrast, securing legislative allies grows considerably more costly as constituents become better informed and are opposed to the policies favored by the interest group. In such circumstances, legislators will only shirk constituent-backed policies if the organized interest promises sufficient resources to make such shirking worthwhile. In the event that constituency interest is high and coincides with the policy position advocated by the interest group, unorganized interests—the voters—will have played the decisive role in structuring the political outcome, and all other interests need do is reinforce those predispositions with the contribution of token resources (Denzau and Munger 1986). Or, as Murphy has described it, “In sizing up his constituency’s views on a [jurisdictional] bill, a legislator has to consider such factors as the amount of publicity and the extent of public awareness of the issues as well as the complexity of those issues and the depth of public understanding” (Murphy 1962, 254)

The first of this dissertation’s two case studies concerns the congressional politics of federal diversity jurisdiction, a relatively technical type of jurisdiction that, particularly in recent times, has not been characterized by a high degree of public salience. Only a minority of the general public can be expected to
understand the substantive implications of making changes to federal diversity jurisdiction and, since 1875, much of diversity jurisdiction’s history has been defined by the interaction of change-oriented reformers and powerful organized interests intent on preserving the existing state of affairs. As will be seen in Chapters Four and Five, absent a high degree of public salience, the external interests involved in debates over diversity jurisdiction have been quite successful in turning back challenges to it. Early on, these interests typically became involved out of concern for judicial outcomes. More recently, that concern has arguably yielded to a more acute urge for self-preservation among segments of the legal bar. In either case, these external interests have generally consisted of organized groups and interests opposed to the enactment of significant changes in diversity jurisdiction.

The second case study examined in the dissertation—the jurisdiction-stripping movement with its modern origins in the early 1950s—represents a jurisdictional area of higher public salience where, in contrast to debates over diversity jurisdiction, much of the external pressure that has motivated the “court-stripping” movement has been thought to come from general public opinion. To the extent that organized interests have been involved in these debates, they have largely served as mouthpieces for influential corners of public opinion. Although general public opinion and organized interests are unquestionably distinct concepts, they are united by two important characteristics. Both have the
substantial ability to shape public policy and, unlike other determinants of jurisdictional debates, they each represent external pressures that can be brought to bear on Congress’s jurisdictional decision making. Precisely because these differing types of external forces are at work in each case study, the subsequent analyses of federal diversity jurisdiction and the contemporary jurisdiction-stripping movement represent attractive ways in which to gain leverage on the question of how individual and group interests impact debates over jurisdictional politics.

**Institutional Maintenance**

Of the three sets of influences on jurisdictional change presented here, Congress’s tenuous fidelity to the principle of institutional functioning best justifies reiterating that not all jurisdictional debates will implicate considerations from each of the three categories set forth here. While virtually all jurisdictional debates will, as operationalized here, implicate the role of groups, interests, or direct public opinion and most will take ideological factors into some account by examining relevant judicial outcomes, such is not necessarily the case with institutional maintenance. To the contrary, it has long been axiomatic that Congress waits to take on questions of judicial housekeeping until it finds itself in the midst of an administrative crisis and no option remains but to confront the problem. Frankfurter and Landis recognized as much, observing that
“Congressional preoccupation with judicial organization is extremely tenuous all through our history except after needs have gone unremedied for so long a time as to gather compelling momentum for action or when some unusually dramatic litigation arouses widespread interest” (1928, 36-37). This, in part, reflects the comparatively low payoff rank-and-file legislators are likely to receive from the apolitical administration of the federal courts in terms of their individual goal fulfillment.

Legislative time is valuable and, all else being equal, members should prefer to be active in those areas in which the linkage between legislative activity and electoral goals and policy aims is most tangible. Indeed, only in relatively recent times has attending to these administrative matters become a less costly legislative investment. Since 1922, the Conference of Senior Circuit Judges and, later, the Judicial Conference of the United States have been charged with “serv[ing] as the principal policy making body concerned with the administration of the U.S. Courts” (“Judicial Conference of the United States”). The recommendations of the Conference, in addition to studies carried out by the American Law Institute and other nonpartisan groups have eased the informational burden on legislators considerably. As a consequence, many major questions of federal judicial administration can be assessed without incurring
significant legislative investment, and this has led to greater congressional responsiveness in making changes in key areas such as judgeship addition, court creation, and certain jurisdictional rules (see Fish 1973).

Because it consistently accounts for over one quarter of all civil cases heard annually by the federal courts, federal diversity jurisdiction is noteworthy for its pervasive impact on the business of the federal courts (Mechem 2003). As the next two chapters make clear, numerous studies have suggested that its curtailment or even elimination would free up considerable judicial resources by removing such cases from the federal courts, thereby depressing the ratio between federal caseloads and statutorily authorized federal judgeships. Similar actuarial arguments have also been made with respect to reforming the role of federal courts in *habeas corpus* proceedings and limiting the “federalization of criminal law.”

Taking administrative variables into account in these instances is sensible, since the cases at issue represent such a sizeable proportion of federal judicial business. On the other hand, administrative concerns should not be expected to figure prominently into all jurisdictional debates, and the jurisdiction-stripping movement provides just such an example. Though they may secure substantial attention in the press, it is ironic that the types of cases that are the subject of jurisdiction-stripping legislation represent such a minuscule portion of the federal caseload. Given the infinitesimal impact of such cases on the federal judiciary’s
operation, there is simply no reason to theorize that campaigns to eliminate cases from the federal courts concerning subjects such as school prayer or the right to obtain an abortion are conceived out of any concern for administrative reform. Adopting this theoretical framework, the dissertation’s succeeding chapters consider the impact of all three sets of factors in assessing the politics of diversity jurisdiction. This approach is self-explanatory, because that category of cases represents such a key aspect of federal judicial caseloads. In the second case study, however, the examination of the so-called jurisdiction-stripping movement is confined to testing the relative impact of judicial outcomes and external interests such as public opinion on the incidence of jurisdiction-limiting activity, since the rate at which the federal courts hear those types of cases is far too low to impact federal court caseloads in any meaningful way.

**Congress’s Attention to Judicial Outcomes**

Though judicial outcomes may not always be the decisive catalyst that causes Congress to undertake jurisdictional activity, they are an undeniably critical factor in such decisions. Whether appraising district or appellate court outputs, Congress’s collective consideration of judicial outcomes stems directly from its individual members’ pursuit of good policy and reelection. When those
goals overlap—as they typically do, assuming a politician’s personal beliefs mirror those of his or her constituents—the potential payoff is enhanced, and members become more likely to undertake legislative action.

The following theoretical discussion proceeds with the assumption that, *ceteris paribus*, the outcome-based dimension of jurisdictional activity behaves as a function of both the judicial outcomes produced by particular federal courts and the ideal preferences of members of Congress. More concretely, this means that jurisdictional expansion becomes more likely as federal court outputs converge with the global preferences of Congress. By the same token, the probability of jurisdictional contraction should grow as the outputs and preferences of the two institutions drift apart (e.g., Shipan 2000). Because both diversity jurisdiction and jurisdiction-stripping in civil liberties cases are areas that concern jurisdictional contraction, the second theoretical proposition is especially relevant to this dissertation. However, before discussing the role of judicial outcomes in greater detail, several items must be addressed.

It should be noted that these judicial outputs cannot be assessed on their own terms; they must be interpreted by others. In other words, Congress’s perceptions of judicial decisions can be altered in three fundamental ways. First, the actual orientation of the judicial decisions at issue can change. Alternatively, the preferences of Congress itself can change, causing a more or less consistent line of judicial decisions to be subjectively reinterpreted as being more or less
palatable. Finally, both judicial decisions and congressional preferences can change. Consequently, in order to capture the impact of judicial outcomes on the politics of federal jurisdiction, both judicial and legislative preferences must be taken into some account. Although the case studies examined in this dissertation register this concern with judicial outputs and legislative preferences in different ways, it is critical to account for these variables if sound conclusions about the role of judicial outcomes and ideology in the inter-institutional politics of federal jurisdiction are to emerge.

Due to the concurrent nature of the two types of federal jurisdiction examined in this dissertation, perceptions of judicial outcomes at the state level may also be of potential importance for Congresses considering limitations in jurisdiction. With respect to both diversity jurisdiction and the jurisdiction-stripping movement, limiting or eliminating federal jurisdiction should not be confused with the elimination of certain types of cases altogether. Even if Congress is collectively frustrated with certain federal judicial outcomes at a given time and cedes those cases to the judiciaries of the individual states, court outputs per se will only change to the extent that individual state judiciaries arrive at judicial outcomes distinct from those that would otherwise have been produced at the federal level. In the simplest example, if these court outcomes are not
anticipated to differ much, Congress has little reason to enact jurisdictional change—or at least to enact jurisdictional change with the intent of altering judicial outcomes.

However, from the perspective of legislators who are dissatisfied with federal judicial policy outcomes—for example, those who disagreed with the Supreme Court’s pronouncement in and the federal judiciary’s adherence to the school prayer doctrines set forth in *Engel v. Vitale* (1962) and *Abington School District v. Schempp* (1963), macro-level changes in policy may only be of minimal importance. For example, even assuming that fifty sets of “state judicial outcomes” on school prayer cases could be aggregated together as a single variable and even if legislators determined that such a value was indistinguishable from federal judicial outcomes on those types of cases, Congress and its members might still consider jurisdictional limitations worth pursuing. In contrast to the federal judiciary, where substantial mechanisms exist to guarantee legal uniformity, the devolution of cases to fifty separate and ideologically heterogeneous state judiciaries would all but ensure that the judicial outcomes preferred by a majority of members of Congress—which are those not being produced by the federal courts—would be realized to a greater extent than if those cases were eligible for adjudication in the federal courts. Even if only ten state court systems were to produce legal interpretations of the First Amendment that were at odds with *Engel* or *Abington*, the sweep of those original Supreme Court
decisions would still have been diluted by approximately twenty percent. As a consequence, it is unnecessary to compare aggregate federal court outcomes in particular cases to the collective outcomes being produced by the fifty states. In cases where Congress finds itself in sharp disagreement with federal court outcomes, such jurisdictional limitation can only dilute legal uniformity and thereby advance the congressional majority’s preferred case outcomes.

As with many other important legislative issues, one difficulty with interpreting Congress’s motivations for advocating jurisdictional change is that public justifications cannot necessarily be taken at face value. Members of Congress are often reluctant to express their true motivations, no matter how transparent those motives may be. Moreover, as judicial critics of legislative intent have noted, the comments of particular individuals do not necessarily capture the underlying motivations of their fellow legislators (e.g., Scalia 1997). As such, Congress and its members must be judged by how they actually behave, not by how individual members claim to be behaving. This is particularly valuable in the present context, since the episodes considered in this dissertation have a discrete history that can be subjected to careful empirical analysis. While this is not to say that nothing can be gained from examining the public statements of individual legislators, relying on those statements alone is clearly inadequate for highlighting the possible motivations underlying jurisdictional change. By capturing the actual behavior of Congress as it relates to the areas of diversity
jurisdiction and jurisdiction-stripping over constitutional issues and examining the
determinants of that behavior over time both qualitatively and quantitatively, this
dissertation’s empirical chapters seek to demonstrate how concern for judicial
outcomes structures debates on questions of federal jurisdiction.

CONCLUSION

This chapter has attempted to show how the goal-oriented framework that
guides the behavior of individual legislators has concrete implications for both the
institutional relationship between Congress and the federal courts and, more
specifically, for the political interaction of those branches vis-à-vis the politics of
federal jurisdiction. Though they may not constitute a comprehensive set of the
factors that drive individual legislators, electoral and policy goals represent
perhaps the two most important determinants of legislative behavior. Moreover,
that two-pronged motivational framework leads to important, testable predictions
about the impact of judicial administration, judicial policymaking, and external
interests on congressional debates over jurisdictional policy.

Specifically, electoral concerns should motivate members to be attentive
to external interests, including direct expressions of public opinion, lead them to
advocate apolitical changes that maintain access to the public resource of the
federal courts, and convince them to use jurisdictional debates in ways that
advance the judicial outcomes favored by their constituents. Policy-based
concerns can be important as well, for they may convince legislators to use
jurisdictional debates in ways that advantage the types of judicial outcomes they
believe will best embody the notion of “good public policy.” Similarly, since the
efficient functioning of the federal courts is itself a laudable policy goal,
administrative consolidation of the judiciary may also be undertaken out of the
desire to produce good public policy.

In the remainder of the dissertation, this theoretical framework will be
applied to two different types of Congress’s jurisdictional debates. While the
structure of each analysis is presented in subsequent chapters, it is important now
to communicate the appropriateness of selecting these two case studies of
diversity jurisdiction and statutory efforts to limit jurisdiction over federal
constitutional cases. As previously noted, the two are united by their concurrent
status between federal and state courts, and they also share a history marked by
legislative efforts to limit their scope. At the same time, however, efforts to
restrict federal diversity jurisdiction and the resolution of certain civil liberties
issues by the federal courts differ in several key respects. Historically speaking,
debates over diversity jurisdiction are nothing new. In fact, they have existed as
long as the nation itself and, because diversity jurisdiction is a form of statutory
jurisdiction, no objective observers question the constitutional power of Congress
to limit or eliminate it. By contrast, statutory efforts to strip the federal courts of
jurisdiction over particular constitutional questions are relatively new and have
produced difficult questions of constitutionality. Not until the Warren Court’s inception in 1953 did the prospect of using congressional control over federal jurisdiction to circumvent unpopular judicial outcomes in constitutional cases begin to gain substantial support. Proposals to limit diversity jurisdiction typically concern the lower federal courts and, while sometimes motivated by outcome-motivated concerns, those concerns are usually unfocused and diffuse. To the contrary, the jurisdiction-stripping movement’s targets are generally specific decisions of the U.S. Supreme Court or, occasionally, the lower courts. Finally, while debates over diversity jurisdiction’s scope have resulted in multiple legislative enactments, none of the efforts to strip controversial cases from the federal courts has made its way to the president’s desk.

The two case studies also differ in other respects, including their salience with the public, their importance to federal judges themselves, and their relevance to the various theoretical components presented in this chapter. Contemporary diversity jurisdiction is not salient with the public, and most judges view such cases as administrative nightmares that, as matters of state law, should be resolved by state judges in state court. The topics-de-jour of the jurisdiction-stripping movement, on the other hand, are highly familiar to the public at-large, largely insignificant in terms of impact on federal court workloads, and are among the most coveted types of cases among federal judges. Whatever significance this
second class of cases may lack in terms of administrative considerations is more than offset by the deep and abiding importance of such questions to the interpretation and exposition of fundamental constitutional principles.
CHAPTER 4
THE CASE OF DIVERSITY JURISDICTION

“I simply say the state judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest ... when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, ipso facto, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.”—Congressman Henry J. Hyde (R-IL), 142 Cong. Rec. H3604

“I do not assert, I do not believe, that federal judges are men of higher character than state judges or that jurors in federal courts are more intelligent or more impartial as a general proposition. But there is this difference: the state trial judge is generally a local man with a local outlook. The federal trial judge has jurisdiction over a wide territory; he is part of a national judicial system and his action is subject to review as of right by a court having jurisdiction over a number of states...The question involved is not one upon which statistics of any value may be obtained. It is one which must be decided by men of experience in the light of the known facts of human nature. And no statistics are necessary to convince any lawyer of experience representing a non-resident client, that he will obtain a more impartial tribunal for his client under the conditions afforded by the federal courts than under those afforded by the courts of the state.”—Hon Judge John J. Parker (R-NC), (1932, 437)

Ever since the First Judiciary Act (Act of September 24, 1789) authorized federal jurisdiction in cases where the “‘matter in dispute’ exceeded the sum or value of five hundred dollars and . . . the suit was between a citizen of the state where the action was brought and a citizen of another state,” the concept of federal diversity jurisdiction has been surrounded by substantial legal and political controversy (Fallon, Meltzer, and Shapiro 1996, 1521). Concurrent between both federal and state courts, the precise motivations behind the establishment of
diversity jurisdiction are speculative because, though mentioned in Section 1 of the Constitution’s Article III, neither the debates of the Constitutional Convention nor historical accounts of the Judiciary Act of 1789 provide definitive rationales for its adoption. Nevertheless, historians do agree that “there was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists…as that which gave them power over controversies between citizens of different states” (Warren 1923, 81).

Even 216 years after its establishment, the status of federal diversity jurisdiction remains controversial, and the present chapter attempts to illuminate that controversial history in several ways. In detailing diversity jurisdiction’s legal, historical, and political background, Chapter Four begins by discussing several complementary rationales for diversity jurisdiction’s existence. It then provides a brief overview of diversity jurisdiction’s historical development, which is followed by consideration of several factors that may be relevant to congressional efforts designed to limit the reach of diversity jurisdiction. The remainder of Chapter Four builds on these general foundations by presenting a careful narrative history of federal diversity jurisdiction which, in turn, illustrates many of these points with greater specificity. The dissertation’s assessment of the courts, Congress, and the politics of federal diversity jurisdiction continues in
Chapter Five. There, in a combination of qualitative case studies and quantitative analyses, I attempt to pinpoint the determinants of congressional activity on diversity jurisdiction with additional precision.

BACKGROUND TO DIVERSITY JURISDICTION

Before it can be meaningfully analyzed, of course, federal diversity jurisdiction must be understood. In order to grasp the importance of federal diversity jurisdiction and gain insight into its development, it is necessary to understand the rationales that contributed to the jurisdiction’s establishment, situate diversity jurisdiction in proper historical perspective, and become familiar with the catalysts for jurisdictional change that are especially relevant to the politics of federal diversity jurisdiction.

Rationales for Federal Diversity Jurisdiction

Though its criticisms are many, the arguments in support of diversity jurisdiction’s existence generally fall into three basic categories. Some see diversity jurisdiction as a necessary safeguard against potential regional prejudice that, at least to the Framers, threatened the objectivity of state judicial proceedings. A closely related justification concerns the protection of commercial interests by nationally accountable courts, which many Framers appeared to view as a critical prerequisite to the diffusion and investment of
capital throughout the new nation. Third, some have held that, *ceteris paribus*,
federal judges tend to be more professional and more competent than do their
state counterparts. Though not equally prominent throughout the development of
federal diversity jurisdiction, these three basic considerations remain critical to
gaining a full understanding of federal diversity jurisdiction.

The most commonly cited raison d'être for diversity jurisdiction is that
espoused by such luminaries as Madison and Hamilton, who articulated the fear
that the sectional rivalries and regional biases inherent to state courts would inject
prejudice into cases involving out-of-state litigants (The Federalist No. 80). Chief
Justice John Marshall’s 1809 opinion in *Bank of the U.S. v. Deveaux* (9 U.S.
Cranch 61, 87) paraphrased many of these concerns, saying

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Other accounts of the debates surrounding diversity jurisdiction’s establishment
have disputed this state court prejudice rationale. Friendly’s (1928) analysis of
diversity jurisdiction’s historical bases hints at a more complex set of factors.
After noting the surprising “apathy of the [diversity jurisdiction’s] defense [during
the ratification debates],” Friendly reviews the record and concludes that Madison, Hamilton, and other proponents of the jurisdiction failed to lay out a convincing case that out-of-state prejudice by state courts was a problem (487, 493). Instead, Friendly argues that the Framers likely feared popular anti-creditor influences in the state legislatures, rather than adverse rulings from the state courts per se. He points to the high degree of legislative control over the appointment and removal of judicial personnel in most of the original states, suggesting that many of the Framers viewed the latter as agents of the former. At the very least, he argues, the questionable institutional independence of the state judiciaries did little to assuage the fear of anti-business bias in the state courts (Friendly 1928, 497). Ultimately, Friendly concludes that

Not unnaturally the commercial interests of the country were reluctant to expose themselves to the hazards of litigation before such courts as these. They might be good enough for the inhabitants of their respective states, but merchants from abroad felt themselves entitled to something better. There was a vague feeling that the new courts would be strong courts, creditors’ courts, business men’s courts (498).

Though some have disputed Friendly’s conclusions with respect to the local prejudice argument (e.g., Yntema and Jaffin 1931), Frank’s (1948) analysis provides yet another take on the historical bases of diversity jurisdiction. Frank argues that three main factors involving commercial interests contributed to the establishment of diversity jurisdiction, and that it is impossible for today’s
observers to scale those factors in any meaningful order of importance. First, he contends, was the desire to avoid general regional prejudice. This was particularly the case with respect to commercial litigants from out of state, and was not so much based on hard empirical evidence as it was common-sense anticipation of what could transpire at the state level. Second was the belief that commercial and manufacturing litigants should be given the opportunity to appear before judges who would be sympathetic to their financial interests. Finally, and most generally, Frank concludes that diversity jurisdiction probably provided a more efficient disposition of justice for these creditor classes than did courts in the states (1948, 27-28).

Taken together, the views of Frank, Friendly, Yntema and Jaffin, and others suggest that, particulars aside, much of the impetus behind the establishment of federal diversity jurisdiction—if not the lower federal courts themselves—can be tied to the priority of protecting commercial interests from potentially hostile state activities (Arnold 1995). Clearly this was the goal of the Federalists, who drew their primary political support from the mercantile and banking sectors of the Northeast and viewed the protection of business as vital to the new nation’s success. Others have emphasized diversity jurisdiction’s role in nationalizing the United States both economically and culturally (see Marbury 1960; Moore and Weckstein 1964). As future (failed) Supreme Court nominee Judge John J. Parker once put it, “No power exercised under the Constitution has,
in my judgment, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment…and nothing has been so potent in sustaining the public credit and the sanctity of private contracts” (Parker 1932, 437). In many ways, Chief Justice Taft’s comments on the subject a decade earlier were even more revealing: “The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress” (Taft 1922, 604, emphasis added).

Though a few observers have continued to note the potential danger for out-of-state bias to impact the objectivity of diversity proceedings, most modern advocates of retaining diversity jurisdiction have discounted that as the central justification for its continuation in the belief that it is largely untenable (Bratton 1976; American Law Institute 1969). Instead, proponents have shifted ground, comparing the prospect of diversity’s abolition to a “jurisdictional version of the old three-shell game” in which tens of thousands of diversity cases would disappear from under the shell of the federal walnut only to reappear under the state court shell (Frank 1984, 85). Despite an independent finding that abolition would increase state court caseloads by a mere 1.03% had a 1978 proposal to eliminate diversity become law (Flango and Blair 1978), supporters of diversity
jurisdiction argue that its abolition—and the concomitant shift of cases to state courts—would bestow a harsh and unnecessary burden on state court systems, most of which would lack the resources to absorb them.

It has also been argued that foreclosing access to the federal courts in diversity suits could highlight issues of judicial competence, with the presumption being that state judges, particularly those in rural areas, are of a substantially lower caliber than those at the federal level. The comments of Representative Hyde reprinted at the beginning of this chapter make it clear that he and others of like mind reject the premise altogether. Other opponents respond that, if anything, state judges should be presumed more competent to adjudicate diversity cases because those cases are governed by state, not federal, law (Butler 1984, 55). In this view, it does little good for a hypothetically more competent and experienced federal judge to adjudicate a claim, since her familiarity with relevant state law will almost always be more limited than that of a state judge. Consequently, the issue for opponents of diversity jurisdiction is simple—cases based solely on state law ought to be resolved in state courts.

There have also been those proponents of diversity jurisdiction who point to a nebulous but useful “cross-fertilization between the federal and state systems” that, in their view, would be eliminated if diversity were abolished and state judiciaries were “forced to operate in isolation without recourse to the federal safety valve” (Bar of the City of New York, qtd in Butler 1984, 65).
Others contend that this supposed interplay is actually threatened by diversity jurisdiction, which has itself been described as a frequent source of friction between the federal and state courts (e.g., Miner 1987). Most important to the maintenance of diversity jurisdiction, at least in recent times, has been the staunch support of the concept by American legal professionals and their representative organizations. Diversity’s defenders have asserted their unwavering support with surprising candor, going so far as to say that the jurisdiction should be retained even if it substantially complicates federal judicial administration. In one advocate’s view, “Diversity jurisdiction must be seen for what it is; a social service of the federal government provided for the people of the United States” (Frank 1984, 79). In his remarks during a 1978 Senate Judiciary Committee Hearing, this same advocate quipped that, “the [current] proposal to abolish the diversity jurisdiction is, from the standpoint of the bar, approximately as popular as tuberculosis in a hospital” (28). Still, diversity’s opponents have their own diagnosis for this view of diversity jurisdiction, which implicitly points to the role of powerful legal interests in shaping the jurisdiction’s recent history: “Basically, the bar likes forum shopping” (Kastenmeier and Remington 1979, 313).

By contrast, contemporary opponents of diversity jurisdiction tend to echo Roscoe Pound’s century-old pronouncement of the jurisdiction as “archaic” (Pound 1906, 744) and view it as an encumbrance to the efficiency of the federal courts (e.g., Frankfurter 1927; Frankfurter 1928; Frankfurter and Landis 1928).
And like former Supreme Court Justice Robert H. Jackson, many modern antagonists would agree that “the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states” (Jackson 1955, 38). Justice Felix Frankfurter, himself a colleague of Justice Jackson, once suggested from the bench that “An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts” (National Mutual Insurance Co v. Tidewater Transfer Co. 1949, Frankfurter, J. dissenting, 377 U.S. 582, 651).

Advocates of diversity jurisdiction’s elimination point to its strain on judicial resources. Historically, diversity of citizenship cases have amounted to roughly 20%-30% of all civil cases heard in the federal courts. In Fiscal Year 2003, 61,156 diversity of citizenship cases were commenced in the federal courts, accounting for just over 24% of the total federal caseload (Mechem 2003). One study commissioned in 1988 estimated that the administrative costs attributable to federal diversity cases exceeded $131 million annually (Partridge 1988; Boersema and Flango 1990). Another review concluded that diversity cases consume over 27% of all federal judicial resources and account for a disproportionate 39% share of all trials in the federal courts (Butler 1984, 57).

Opponents of diversity jurisdiction have also bristled at the suggestion that inefficiencies can simply be reduced by the creation of additional federal
judgeships. They note that new federal judgeships are costly and that the caseload pressures of the federal courts show no natural signs of attenuation. Further still, they have pointed to judgeship expansion as a suboptimal solution to the caseload problem, arguing that “a powerful judiciary implies a relatively small number of judges,” (Frankfurter 1928, 515) and that “signs are not wanting that…enlargement of the federal judiciary does not make for maintenance of its great traditions” (Kastenmeier and Remington 1979, 307). Since these diversity cases involve rights created under state law, it is argued, they are ideal candidates for elimination from federal court jurisdiction because that elimination would allow federal judges to take on the ever-increasing number of other matters implicating issues of federal law (Butler 1984, 53-55).

For all the competing claims over the wisdom of diversity jurisdiction, at least one thing seems certain. Assuming that regional prejudice was once a defensible justification for establishing and maintaining diversity jurisdiction and even stipulating that some residual geographic prejudice continues to the present day, few objective observers would claim that the justification is as defensible today as it once was. As Judiciary Committee Chair Peter Rodino (D-NJ) stated on the House floor in 1978, “Mr. Speaker, the original reasons for diversity of citizenship jurisdiction have long since disappeared” (124 Cong. Rec. 4993). In testimony before the Senate Judiciary Committee, Rep. Robert Kastenmeier (D-WI) argued that, “even assuming arguendo that vestiges of bias against out-of-
staters exist, the solution is not to leave 32,000 diversity cases in the federal courts, but to improve the state court systems” (18). A decade earlier, even as it recommended the retention of diversity jurisdiction, an American Law Institute study also conceded that, by itself, regional prejudice was an insufficient justification for maintaining diversity jurisdiction (American Law Institute 1969).

Although most scholarly research has focused on this issue of local bias—and has generally produced ambiguous results—(e.g, Summers 1962; Note 1965; Shapiro 1977; Goldman and Marks 1980), Bumiller’s (1981) survey of attorneys’ motivations also highlights the role of court efficiency and judicial competence in the debate. While she finds perceived local bias and judge quality to be concerns in rural areas, her larger conclusion is that local factors such as court efficiency and an attorney’s procedural familiarity with federal or state court typically trump concern over potential state court bias. Finally, although Miller’s more recent study of diversity jurisdiction finds fear of bias against out-of-state litigants to be an important factor in decisions to remove diversity suits to federal court, it too acknowledges that the relationship between attorney reports of disparities between state and federal court does not necessarily speak to the objective reality of those differences (Miller 1992, 426; Chemerinsky 1988, 269).
A Brief Historical Overview of Diversity Jurisdiction, 1789-1875

Diversity jurisdiction has been described as an “island of jurisdiction existing between the state and federal systems” (Kastenmeier and Remington 1979, 311). For nearly 80 years, that island’s boundaries were fixed, and the status of federal diversity jurisdiction laid relatively dormant as an issue for debate within the halls of Congress. During those initial years, the diversity cases federal courts adjudicated were numerous, but generally involved relatively minor private law disputes that took little effort to resolve (Purcell 2000, 44). Though never without controversy, the jurisdiction was left undisturbed until the 1870s, by which time the advent of industrial America began to impact the types of cases brought to the federal courts under the heading of diversity jurisdiction. This, in turn, exposed substantial discontent with the status quo. To one observer, the era helped bring about a litigation system that rested on a socio-economic divide between litigants whose forum preferences and preferred legal outcomes tended to diverge (Purcell 2000; Purcell 1992). These adverse parties were drastically unequal in their resources, with individual plaintiffs of limited means preferring to litigate in state court and powerful national corporations insisting upon the typically friendlier forums of the federal courthouse.

In addition to purely legal arguments, there were also significant geographic implications to the politics of federal diversity jurisdiction. The reality was that it was considerably easier, particularly in the larger, more rural
areas of the South and West, for individual plaintiffs to travel to state court—if only because many more of those courts existed there than did at the federal level (see 10 Cong. Rec. 700-702). According to one nineteenth century Alabama Democrat, “Thousands of citizens of my district live from three hundred to three hundred and fifty miles from the place of holding the [federal] court” (10 Cong. Rec. 1014-1015). Nonresident railroads and corporations took full advantage of their right to remove diversity of citizenship suits to an often-distant federal court—in fact, they employed this as a powerful litigation tactic—many plaintiffs had no alternative but to terminate their cases. As a partial result, the image of a de facto alliance between corporations and the federal judiciary became increasingly difficult for the public to ignore (Purcell 2000, 64). As one Michigan representative put it, “The United States courts have grown to be largely corporation mills, in which the tolls are largely taken from the individual citizen, and generally amount to his whole interest in the grist” (10 Cong. Rec. 724). Thus, by the late 1800s, against the backdrop of these changing circumstances, “diversity jurisdiction [became] the matrix within which a disparate collection of legal rules, practices and institutions interacted with specific and changing sets of social conditions to create systematic practices for resolving legal claims that tended in the long run and over the mass of cases to favor national corporations” (Purcell 1992, 13).
By the 1870s, some in Congress were registering serious efforts to reapportion diversity jurisdiction’s boundaries between the federal and state courts. As this chapter’s narrative history of diversity jurisdiction will show, those efforts reached a measure of fruition in the 1880s. Since that time, as Kramer notes, the history of diversity jurisdiction has been one of contraction, placing it in stark contrast with other types of federal jurisdiction—nearly all of which have expanded considerably over that same period (1990, 102). Since the 1880s, Congress has periodically addressed diversity jurisdiction by placing additional limitations on diversity cases. Some of these limitations have involved increasing the minimum amounts in controversy required to invoke federal diversity jurisdiction, making the least lucrative diversity cases ineligible for federal court. Others have involved the closing of certain legal loopholes concerning the ability of interstate corporations to invoke diversity jurisdiction in all but the state of their incorporation. Still, despite these periodic changes, federal diversity jurisdiction has endured—and so has the movement to abolish it. All too often, observers have treated debates over diversity jurisdiction as unimportant quibbles that, if anything, result in isolated, aseptic changes that have little bearing on judicial outcomes. In this view, changes to diversity jurisdiction have been designed to streamline federal judicial process and to reflect the incremental effects of legal, economic, and societal change.
Along the way, however, the policy debates surrounding federal diversity jurisdiction appear to have been marked by more than the simple desire for institutional efficiency. They have also been driven by political calculations with regard to judicial outcomes as well as the involvement of outside groups and interests intent on retaining certain legal and procedural advantages in the American judicial system. In order for an accurate picture of the politics of federal diversity jurisdiction to fully crystallize, the impact of these additional factors must be addressed.

**Potential Catalysts for Limiting Diversity Jurisdiction**

Since its inclusion in the Judiciary Act of 1789, debate over the scope of diversity jurisdiction has ostensibly involved the straightforward question of whether, and to what extent, state or federal court is the more appropriate forum for deciding controversies between citizens of different states that are governed by state law. This, of course, reflects the shared nature of the jurisdiction. There will always be cases involving litigants from different states, and there is nothing Congress can do to change that. It can, however, periodically reapportion the boundaries of federal diversity jurisdiction—or, indeed, remove the jurisdiction altogether—in order to shift some or all of these cases from one set of courts to another.
From an administrative standpoint, it makes sense for any Congress considering modifications to diversity jurisdiction to reflect on the judicial resources available for resolving those cases in the federal court system at any given time. If federal court caseloads are particularly high, Congress might well conclude that some portion of diversity cases should be shifted from the federal to the state systems. It might choose to accomplish that by raising the monetary threshold required for such cases to access the federal courts, by limiting the ability of corporations to enlist the jurisdiction, or by advocating the elimination of diversity jurisdiction altogether. Yet, framing the question as a chiefly administrative one ignores the significance of another vitally important factor—the outcomes the federal courts themselves happen to be producing. If, on the whole, there appears to be little or no difference in the overall case outcomes being produced by the federal and state courts, there should be no particular ideological or partisan incentive for Congress to advocate the redefinition of jurisdiction between the two systems. However, if the federal courts are perceived to be issuing rulings that systematically favor one category or type of litigant over another, such judicial trends will not long escape congressional notice.

If notable differences do emerge between federal and state court outcomes, two general scenarios are possible. If the perceived bias of the federal courts is in closer accord with the preferences of Congress, then that Congress
should be expected to *increase* the jurisdiction of the federal courts where it
can—as was the case with civil rights legislation in the 1960s—or maintain the
status quo. However, if the federal and state courts are, in the aggregate,
perceived as producing different decisions and the federal court outcomes are
those with which Congress is *dissatisfied*, it would be particularly astute from a
policy-oriented standpoint for Congress to exercise its power over jurisdiction and
cede all or part of it back to the states. Given its steady historical trajectory of
contraction since the 1870s, it is this second logic that drives this discussion of
diversity jurisdiction.

In other words, it seems dubious to conclude that members of Congress
will vote to enact jurisdictional changes without taking into some account the
likely influence those changes will have in terms of their impact on judicial
outcomes in future cases. For example, assuming that the volume of federal
judicial business is identical in both Congress A and Congress B, but that
Congress B is especially troubled by what it sees as a general trend of the federal
courts favoring corporate defendants over individual plaintiffs in diversity cases,
is it surprising that Congress B will be the more likely of the two to pursue
limitations in federal diversity jurisdiction? Though the particulars may be
confusing, for now it is enough to appreciate that Congress’s activities in the
arena of federal jurisdiction cannot be fully understood without taking into
account both objective administrative and substantially more subjective case
outcome-oriented variables. Parenthetically, it is also critical to note that, in the above illustration, Congress B’s dissatisfaction with federal court outputs can either stem from actual changes in federal court outputs, a change in Congress’s perspective on those outputs, or some combination of the two.

As will be seen in Chapter Five, the foregoing example is neither trivial nor purely hypothetical. In the early 1930s, the Senate Judiciary Committee approved two bills introduced by progressive Senator George Norris of Nebraska designed to abolish diversity jurisdiction altogether. Though neither bill received consideration on the Senate floor, in the words of one legal historian, “Angered by the conservative bias of the judiciary and the [Hoover] administration’s pro-business appointments, Norris sought to limit the power of the federal courts and make them more responsive to popular sentiment and less to the opinion of business” (Purcell 2000, 77). Norris’s efforts were also supported by other progressives, particularly Democrats, such as Montana’s Thomas Walsh, who repeatedly attacked the federal courts as a safe haven for large corporations (Purcell 2000, 78; Walsh 1922).

In 1931, with well over 80% of all sitting federal district court judges having been appointed by Republican presidents Taft, Hoover, Coolidge, and Harding, Senator Walsh’s view of the courts as protectors of big business was as widely held as it was accurate. However, the twenty-year interregnum from Republican presidential control signaled by the Roosevelt and Truman years soon
led to a significant partisan realignment of the federal bench. Owing to scores of pro-New Deal judicial appointments, Republicans came to comprise less than one quarter of the sitting federal judiciary by the time of President Eisenhower’s inauguration in 1953 (e.g., Barrow, Zuk, and Gryski 1996). As the pace of this erosion of Republican judicial power accelerated, the popular belief that the federal courts were beholden to corporate interests steadily lost traction. By the late 1940s, liberals in Congress, labor unions, personal injury plaintiffs, and other anti-business constituencies of the Democratic Party were convinced that the diversity jurisdiction they had so strenuously opposed in 1930 was no longer a threat now that the corporate biases of the federal courts had been eradicated.

Indeed, those biases had been so thoroughly eradicated that many of these former critics of the “pro-business federal courts” came to realize that the heavily Democratic federal courts had become especially favorable forums in which to resolve diversity of citizenship claims (Purcell 1992, 230-231).

This shift in judicial fortunes was also evident to many of the national corporations that had invoked federal diversity jurisdiction with such regularity since the 1870s. Naturally, as federal court outputs became increasingly favorable to individual plaintiffs, those same outputs became less and less amenable to the corporate world. Coupled with the Supreme Court’s declaration in *Erie Railroad v. Tompkins* (1938), which overturned the Court’s earlier decision in *Swift v. Tyson* (1842), eliminated the use of federal common law in
diversity cases, and required federal courts to apply state law when adjudicating
diversity cases, the corporate preference for federal litigation dropped
precipitously (see Purcell 2000, 51-57). By the late 1940s, corporate defendants
were opting to remove less than one third of eligible diversity cases to federal
court. Put succinctly, these defendants assessed their chances of success in state
court as being equal to or greater than their prospects in the increasingly
inhospitable federal courts, and many made the strategic decision to hope for the
best in state court (Purcell 1992, 231).

Thus, over the course of roughly twenty years, the politics of federal
diversity jurisdiction had undergone a seismic shift. Nothing signified this shift
better than Congress’s debates over curtailing diversity jurisdiction in the late
1950s, about which much more will be said shortly. For now, the most
noteworthy point is that the political heirs to the conservatism of the 1920s and
1930s had now become the principal opponents of federal judicial power—and
federal diversity jurisdiction in particular—while the more liberal progeny of the
progressive movement counted itself among the staunchest supporters of both
diversity jurisdiction and federal judicial power. And, through it all, the only real
change had been in the partisan composition of, and thus the nature of decisions
being handed down by, the federal courts.
NARRATIVE HISTORY OF FEDERAL DIVERSITY JURISDICTION

As this chapter’s earlier historical overview noted, from 1789 well into the 1870s Congress essentially left federal diversity jurisdiction undisturbed. For much of that period diversity cases comprised the bulk of federal court business, and the removal of those cases from the federal judiciary would have left those courts with almost nothing to do. By the late 1870s, however, a groundswell of support for cutting back the jurisdiction began to spread through the House of Representatives after that chamber had reverted back to Democratic control in 1875. After passage of the Judiciary Act of 1875, which increased access to the federal courts in federal question cases and allowed both plaintiffs and defendants to remove actions from state to federal court, concern soon began to spread about the scope of federal judicial power and numerous bills were introduced to cut down federal diversity jurisdiction (Frankfurter and Landis 1928, 89-90).

Postwar Politics of Diversity Jurisdiction: The Primacy of Judicial Outcomes

It was the U.S. Supreme Court’s ruling in *Ex parte Schollenberger* (1877), which declared that corporations were entitled to invoke federal diversity of citizenship jurisdiction in all but their primary state of incorporation, that ultimately prompted Congress to focus on curtailing diversity of citizenship jurisdiction (see McGovney 1943 for a discussion of corporate citizenship).
Angered by the Supreme Court’s declaration that, for all intents and purposes, interstate corporations could bypass litigation in state courts, Rep. David Culberson (D-TX) and the House Judiciary Committee reported HR 5069 to the full House of Representatives on June 1, 1878. Along with a proposal to increase the jurisdictional amount to $2,000 from the $500 threshold that had existed since 1789, the expressed purpose of the bill was to eliminate the diversity of citizenship made available to corporations in the wake of Schollenberger (10 Cong. Rec. 681). Though it did not come to a vote in the Forty-Fifth Congress, the proposals that were embodied in the legislation would structure the debate over diversity jurisdiction for some time to come. Years later, Missouri Congressman Richard Bland gave voice to many of the underlying concerns members of Congress had with this notion of corporate citizenship, saying:

In the first place, a corporation doing business within a State ought to be compelled to abide by the laws of that State like any other citizen—should be allowed the rights of an ordinary citizen but no more. It ought not to have the privilege of dragging the citizen of the state away from his home judicature into a foreign one. The corporation ought to be compelled to submit its controversies to the judicature of the State in which it does business. I repeat that if such an amendment of our statutes were made, it would largely reduce jurisdiction of the Federal courts and would promote justice to litigants who are citizens of various states (26 Cong. Rec. 7603).
In the very next Congress, the Culberson proposal reappeared as HR 4219, a substitute bill for HR 2701. This bill, like the one before it, proposed raising the minimum amount required to enlist federal diversity jurisdiction from $500 to $2,000, eliminated the ability of corporations to utilize diversity of citizenship as an avenue to the federal courts, and restricted the right of removal from state to federal court to defendants. The bill passed the House of Representatives on March 4, 1880 by a vote of 162 to 74, with all Democrats voting in favor of passage and only Republicans in opposition (10 Cong. Rec. 1305). The vote also reflected pervasive regional effects, with the chief opposition coming from the banking and commercial sectors of the Northeast that traditionally benefited most from the forum shopping provided by federal diversity jurisdiction. Though the measure was received by the Senate Judiciary Committee the next day, the Senate never acted on the legislation.

The Culberson Bill was next introduced on January 16, 1882, as HR 3123 (13 Cong. Rec. 427), and was forwarded to the House floor with a favorable Judiciary Committee Recommendation on March 9 (13 Cong. Rec. 1755). Preoccupied with other matters of judicial administration (Frankfurter and Landis 1928, 91), it was not until January of 1883 that the House considered and, ultimately, passed the bill by a vote of 134 to 67. Though diversity-curbing legislation never emerged from the U.S. Senate during that session, anti-corporate forces were able to secure enactment of a proposal limiting the ability of national
banks to remove cases from state to federal court solely on the ground of their incorporation under federal law. Thus, while no curbs on diversity jurisdiction itself were enacted during the Forty-Seventh Congress, anti-corporate forces were able to enact limitations on federal question jurisdiction that also served to limit corporate access to the federal courts (Frankfurter 1928, 509). Despite its failure in the Forty-Seventh Congress, an overwhelming majority of the House continued to support the Culberson Bill, and passed it again in the first three months of the Forty-Eighth Congress without so much as a roll call vote (15 Cong. Rec. 4879-4880). Once again, the measure languished in the Senate Judiciary Committee, only to die there at the end of the session (15 Cong. Rec. 4909).

Congress finally acted to restrict federal diversity jurisdiction in the Forty-Ninth Congress, though there was considerable disagreement between the House and Senate as to just how extensive that restriction should be. Buttressed by the recommendations of Attorney General and former Arkansas Senator Augustus Garland, on March 17, 1886, the House Judiciary Committee favorably reported a bill (HR 2441) that, again, provided for a $2,000 jurisdictional minimum amount of controversy, eliminated the ability of plaintiffs to remove litigation from state courts without the showing of severe local prejudice, and curbed the legal “fiction” of corporate citizenship (17 Cong. Rec. 2454). Though it passed the
Democratic House without debate, the bill emerged from the Republican-controlled Senate in February of 1887 in substantially amended form (18 Cong. Rec. 2168, 2542-2546).

Specifically, the Senate accepted the proposed increase in the jurisdictional amount, but balked at ending both the doctrine of corporate citizenship as well as the ability of corporations to invoke federal question jurisdiction based solely upon their federal incorporation (Frankfurter and Landis 1928, 94). The only ground given by the Senate was to agree that national banks—but not corporations in general—should be “deemed citizens of the States in which they are respectively located” for jurisdictional purposes (18 Cong. Rec. 2544). After a conference between the two chambers, the House conferees recommended that the House abandon its position and agree to the more moderate language of the Senate, and Democratic President Grover Cleveland signed the bill March 3, 1887 (18 Cong. Rec. 2727, 2756).6

Unsurprisingly, passage of this legislation in 1887 failed to mollify diversity jurisdiction’s many critics in the House of Representatives. In the very next Congress, Rep. Culberson again introduced his bill, HR 1873, removing the ability of corporations to rely on diversity of citizenship for resort to the federal courts (19 Cong Rec 232). In the words of the Judiciary Committee Report, “The

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6 Because this act of March 3, 1887, as enrolled, contained approximately 20 errors in spelling and punctuation, it was corrected by the Act of August 13, 1888. However, no other changes were made in the legislation (see 46 Cong. Rec. 310).
committee believe [sic] that a corporation that pursues its business in a state or States other than that in which it was organized ought to be regarded as a citizen of such State or States for judicial purposes” (19 Cong. Rec. 8266). Even the most cursory reading of the minority’s views, espoused in the Record by Representative George Adams (R-IL), himself a Chicago lawyer, reflects a wildly different interpretation of the controversial jurisdictional practice:

If it is needed by any non-resident litigant it is surely needed as much by a non-resident corporation as by a non-resident partnership...Aggregations of corporate power which have in many instances occurred in this country ought not to make us forget that in a large majority of cases the formation of manufacturing and other business corporations has been a benefit to the country...The only valid and reasonable objection which any litigant can have to being impleaded in a Federal rather than in a state court is the greater expense attending litigation in the former and the greater distance which parties and witnesses have to travel in order to attend court. Those evils exist to the same extent in cases in which the plaintiff is a non-resident individual or a non-resident corporation. The evil should be remedied by more stringent regulations of fees and by providing for terms of court to be held in different parts of the district rather than by the sweeping provisions of the pending bill, which deny the protection of the Federal courts to that particular class of litigants which more than all others stands in need of it (19 Cong. Rec. 8266).
It has also been noted that, by the end of the 1880s, state judges in all but eight states were popularly elected. In the eyes of many, this bestowed those courts with a more populist outlook, whereas the federal judiciary’s lifetime appointees were perceived as less responsive to democratic concerns (Beth 1971, 83). Consequently, despite the minority’s protestations, the jurisdiction-curbing bill passed the House without a roll call vote on September 5, 1888. Again, the Republican-controlled Senate took no action on the legislation.

Though Culberson again introduced his bill in the Fifty-First Congress (21 Cong. Rec. 255), the bill was never reported from the House Judiciary Committee. This was a direct result of the 1888 elections, which had turned an existing ten seat Democratic House majority into a twenty-seven seat Republican advantage. After this two-year historical blip, the Democrats regained overwhelming 152-seat and 94-seat majorities in both the Fifty-Second and Fifty-Third Congresses, and the House of Representatives again took up the complicated issues of corporate citizenship that had been so coolly received by the U.S. Senate. In December of 1892, Rep. Culberson again managed a bill (HR 456) designed to “make a corporation doing business in a State a citizen of such State for all judicial purposes, notwithstanding it was organized under the laws of another state” (24 Cong. Rec. 217). After noting with exasperation that the House had already given its assent to the bill on several prior occasions, Culberson was
asked whether the proposal was designed to reverse the Supreme Court’s ruling in *Schollenberger*. He replied that it was not, and then defended the bill’s purpose—not by pointing to the pro-corporate biases that many associated with federal court outcomes, but by acknowledging corporate citizenship’s strain on judicial workload—saying, “[Congress] has overloa ded the courts with business which may be better disposed of by the State courts” (24 Cong. Rec. 217-218). Perhaps reflecting the body’s impatience with reform, the House passed the bill by voice vote after limited floor debate. Once again, the Senate failed to take action on the proposal.

In July of 1894, the House of Representatives turned its attention to HR 1939, a more specific bill making railroad corporations citizens of all states into which “their line[s] of railway may extend,” for jurisdictional purposes (26 Cong. Rec. 7603). Arguments on the merits of the bill remained relatively unchanged, with Representative William Terry (D-AR) suggesting that the bill’s passage would put an end to “our citizens [being] dragged around to out-of-the-way places at the will of these corporations, some of which extend many hundreds of miles in length and pass through different states” (26 Cong. Rec. 7606). Others such as Representative George W. Ray (R-NY) spoke on behalf of the railroad corporations, but Representative Horace Powers of Vermont rebutted him, declaring that
Mr. Speaker, suppose a railroad runs from Washington to New York through the States of Maryland, Delaware, New Jersey, and Pennsylvania. If a train of that railroad happens to run over a man’s horse up in Maryland, it is within the power of that company to take that man into the Federal court, increasing the expense of that litigation fourfold; and the object of this bill is to say to that railroad company you shall answer in the court of Maryland for that accident. (26 Cong. Rec. 7607).

The bill subsequently passed the House of Representatives by a vote of 158 to 12 (26 Cong. Rec. 7608), but went nowhere in the United States Senate.

For the next eight congresses, the Republicans controlled the House of Representatives and, while Culberson and others continued to press for action on the question of corporate citizenship’s role in diversity jurisdiction, these reforms failed to garner majority support from either House of Congress. Indeed, the next set of restrictions on diversity jurisdiction to secure enactment came as part of the Judiciary Act of 1911, the primary purpose of which was to do away with the increasingly irrelevant federal circuit courts (e.g., Bunker 1911). Once again, the impetus for reform came from the House of Representatives. While the Senate merely sought to recodify the existing diversity jurisdiction in its bill, S. 7031, the House proceeded with its own legislation. Upon receiving the Senate’s bill, the House excised all but the bill’s enacting clause and substituted the text of HR 23377 in its place (46 Cong. Rec. 3216-3220). Though similar in many respects,
one of the House bill’s most notable points of departure from the Senate legislation came in the bill’s twenty-fourth section, where the House adopted two amendments designed to retract some measure of diversity jurisdiction from the federal courts. Rep. Finis J. Garrett (D-TN) successfully advocated the first amendment, which echoed the old Culberson proposal. That amendment, in its author’s words, “prevents the removal of causes brought in a state court against corporations to a federal court upon the ground of diversity of citizenship of the corporation.” Missouri Democrat J.B. “Champ” Clark remarked that Garrett’s proposal “ought to have been the law long ago” (46 Cong. Rec. 3217).

The second major difference in the House legislation was that it substantially increased the minimum amount in controversy required to enlist the federal diversity jurisdiction. Since the legislation of 1887 fixed that figure at $2,000 Congress had made no modification in that monetary amount, and Rep. Robert Thomas (D-KY) of Kentucky’s proposed amendment raised this figure to $5,000. Though one member charged that the increase would make the Federal courts a “rich man’s court,” others retorted that individual plaintiffs were more than willing to entrust their interests to state courts—even to the point that it was common for litigants to undervalue their requested damages in order to keep the suit beneath the threshold qualifying it for removal to federal court (46 Cong. Rec. 1074). Once the bill—including these amendments—passed the House by a vote of 130 to 11, the Senate immediately disagreed to the House amendments.
and a conference committee was convened (46 Cong. 3220-3258). Ultimately, the conference agreed to strike the Garrett amendment altogether, and revised the minimum amount in controversy proposed by the Thomas amendment from $5,000 to a minimum of $3,000 (46 Cong. Rec. 3853, 3998). Yet again, the pressures for reform that had percolated in the House had been substantially watered down by Senate negotiators in conference, and the only change in diversity jurisdiction that resulted was a nominal $1,000 increase in the minimum amount required to qualify a suit for federal court.

Between passage of the Judiciary Act of 1911 and the mid-1920s, Congress enacted two further restrictions affecting the legal standing of corporations to remove suits to federal court. Neither dealt squarely with diversity of citizenship jurisdiction, but they did eliminate the ability of federally-chartered corporate entities to enlist federal question jurisdiction and qualify for litigation in federal court on the mere ground of that federal incorporation. In a sense, these measures built on Congress’s 1882 enactment preventing removal of suits against federally-incorporated banks. In 1915, Congress extended this prohibition to railroads, holding that such federal ties did not enlarge their removal power. In 1925, the legislation was further extended to encompass all federally-chartered corporations in which the federal government owned less than half the stock (Purcell 1992, 164). From 1917 through most of the 1920s, Republican majorities on Capitol Hill and on the federal courts produced an
inhospitable political climate for Progressives and many Democrats seeking to enact additional limitations in the scope of federal diversity jurisdiction. However, the confluence of several developments in the last years of the 1920s produced an important change in those political dynamics.

In 1928, the U.S. Supreme Court handed down a controversial ruling in the *Taxicab* case (*Black & White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*) that immediately came to symbolize the abuses inherent in diversity jurisdiction. Specifically, the Court’s decision illustrated diversity jurisdiction’s often decisive impact on judicial outcomes. In that case, a Kentucky railroad corporation sought to give a Kentucky taxi company (Brown and Yellow Taxicab) a monopoly on business at its Kentucky train station. Since the desired arrangement was unquestionably illegal under the commonwealth’s law, the taxi company reincorporated itself in Tennessee so that, should a competing taxi service challenge the arrangement, it could rely on its diversity of citizenship to remove the suit to federal court—where the federal common law, applied at that time on the authority of *Swift v. Tyson*, was thought to be more favorable to the arrangement (Comments 1928-1929; see Holmes, J., dissenting in *Taxicab* at 276 U.S. 518, 532). Soon thereafter, the Black and White Taxicab Company challenged the Brown and Yellow Company’s monopoly. As the reincorporated taxi company had anticipated, the U.S. Supreme Court upheld the validity of its exclusive contract with the railroad by invoking the federal common
law. Writing in dissent for himself, Justice Brandeis, and Justice Stone, Justice Oliver Wendell Holmes noted that, “[The Supreme Court’s affirmation of the Circuit Court’s decision] expressly recognized that the decisions of the Kentucky Courts held that in Kentucky a railroad company could not grant such rights, but this being a ‘question of general law’ [due to the diverse citizenship of the parties] it went its own way regardless of the Courts of th[e] State” (Holmes, J., dissenting at 276 U.S, 518, 532). Combined with a barrage of scholarly critiques of the federal common law, the weakening of Republican control in the U.S. Senate, and increased economic turmoil, the Taxicab case helped give rise to a series of congressional debates that, though ultimately unsuccessful, served to highlight the important place of judicial outcomes, caseload pressures, and interest group involvement in proposals for jurisdictional change (Purcell 2000, 80). The resulting debates are subsequently presented and analyzed as a case study in Chapter Five.

**The Triumph of Judicial Administration**

As the Roosevelt and Truman administrations populated the federal courts with individuals sympathetic to the New Deal and considerably less enamored with corporate America than were the jurists they replaced, the need to reform or eliminate diversity jurisdiction lost its urgency for many of the progressive reformers who had been disaffected by the pro-business orientation of the federal
judiciary in the 1920s and 30s. In 1952, the House of Representatives did respond to a recommendation from the Judicial Conference and enacted legislation increasing the minimum amount in controversy for diversity cases from $3,000 to $10,000. However, the Senate failed to act on the proposal, and it was not until 1958 that the Congress enacted further restrictions on federal diversity jurisdiction. Like the debates in the 1930s, these congressional deliberations in the late 1950s serve as a useful case study for understanding the forces behind changes in diversity jurisdiction and will be discussed as such shortly. At present, however, it is important to appreciate that the 1958 enactments ultimately produced two unique results. First, the jurisdictional amount was raised from $3,000 to a minimum of $10,000 which, in turn, effectively gerrymandered a certain number of prospective diversity cases out of the federal system and into the state courts. Second, the 1958 revision tightened the definition of corporate citizenship by mandating that, for jurisdictional purposes, corporations were to be made citizens of both the state of their incorporation as well as the state which was considered to be its principal place of business (Recent Statute 1958). Though formulated thirty years after the Taxicab case, this “principal place of business test” was instituted to remedy the corporate abuse of diversity jurisdiction that 1928 case had highlighted.

In 1964, Congress followed up passage of this 1958 legislation with passage of HR 1997, the minor effect of which was to make out-of-state insurance
companies residents of all states in which they conducted business. The legislation’s technical purpose was to eliminate “suits on certain tort claims in cases where both parties are local residents, but under a State ‘direct action’ statute, may be brought directly against a foreign insurance carrier without joining the local tortfeasor as a defendant” (110 Cong. Rec. 18166). In effect, Congress desired to circumvent these so-called “direct action” statutes against out-of-state insurance companies, which existed in only two U.S. states—Wisconsin and Louisiana. The legislation passed each House without a recorded vote and, due in large measure to the focused nature of the problem, is typically mentioned in passing—if at all—in the legislative history of federal diversity jurisdiction.

Regardless of its scope, however, remarks from both the House and Senate point to caseload concerns as the sole motivation for closing this point of access to the federal courts (110 Cong. Rec. 9313, 18166). This was particularly the case for Louisiana’s Eastern District, where Judiciary Committee Chair Emmanuel Celler (D-NY) noted that there were more civil cases per judgeship than anywhere else in the country (110 Cong. Rec. 9313).

For more than a decade, the movement to reform diversity jurisdiction lost its urgency in Congress as both representatives and senators increasingly turned their collective attention to proposals designed to undercut the U.S. Supreme Court’s most controversial progressive decisions implicating civil liberties and individual rights. Though potential changes were examined in the early 1970s in
response to the American Law Institute’s diversity proposals, it was not until 1975 that Rep. Charles Bennett (D-FL) introduced legislation which called for something not seriously contemplated since the 1930s—the complete abolition of federal diversity jurisdiction (121 Cong. Rec. 10843). Though no action was taken on Bennett’s proposal in the Ninety-Fourth Congress, it opened a dialogue that would progress a good deal further in the Ninety-Fifth. Serious discussions concerning the fate of federal diversity jurisdiction were undertaken in the halls of Congress in 1977 and 1978, and the hearings, votes, and speeches that supplemented those debates provide a third important case study that serves to demonstrate how the relative importance of judicial outcomes, judicial administration, and interest group activity had evolved since 1958. Though that dialogue ultimately resulted in the House of Representatives endorsing the total elimination of federal diversity jurisdiction, a much deeper examination of this episode is required to fully appreciate both its groundbreaking nature and the lessons it embodies. This information is presented in the next chapter as a third case study.

Diversity Turns a Corner

Since this 1978 episode, the adjustments made with respect to federal diversity jurisdiction have involved increases in the minimum amount of controversy required to access the federal courts. Thus, while the scope of
diversity jurisdiction has continued to narrow, the organized bar has nevertheless emerged as the victor, and subsequent congressional battles have been fought on its turf. Since 1978, serious discussions of diversity seem to concede that it is destined to retain some role in the scheme of federal jurisdiction. No longer does the essential question seem to be, “should diversity jurisdiction continue to exist?” Rather, that question has become, “in light of diversity’s existence, what steps can be taken to ameliorate its least desirable effects?” In other words, even if Congress periodically adjusts diversity’s scope in response to inflationary pressures or other forces, the legal community seems to have succeeded in convincing lawmakers that the jurisdiction should not be discarded anytime in the foreseeable future.

In September of 1988, Rep. Kastenmeier took the House floor in support of HR 4807, “The Court Reform and Access to Justice Act of 1988.” Though far-reaching in its implications, part of the Act proposed increasing the amount-in-controversy requirement in Federal diversity of citizenship cases from the $10,000 in existence since 1958 to $50,000. Kastenmeier also noted that the proposed increase more than compensated for inflationary pressures, saying that the equivalent of $10,000 in 1958 would be approximately $35,000 in 1988 dollars (134 Cong. Rec. 23582). Thus, inflation aside, the net effect of the measure’s passage would be increasing the threshold required to invoke federal diversity jurisdiction. After passing the House in September, the bill secured final
passage on October 19, 1988 after the House agreed to a minor Senate
amendment unrelated to diversity jurisdiction (134 Cong. Rec. 23584, 31874).
Thus, for the first time in thirty years, Congress had increased the minimum
monetary threshold for bringing cases on diversity of citizenship jurisdiction to
the federal courts.

Congress’s most recent modification of diversity jurisdiction came in
1996, with passage of the “Federal Courts Improvement Act of 1996.” Here, the
U.S. Senate took the lead in undertaking several structural modifications in the
federal judiciary, including an increase in the jurisdictional amount in
controversy. The relevant section of the Act, Section 206, raised the existing
$50,000 requirement for diversity jurisdiction to $75,000 (142 Cong. Rec. 27304).
As was the case in 1988, Congress’s consideration of diversity jurisdiction’s
status highlighted an important fact—that, despite periodic acts to curb at its
excesses, diversity jurisdiction was in no danger of disappearing anytime soon.
Moreover, it underscored the reality that future battles over diversity jurisdiction
were not likely to be waged absent consideration of numerous other
administrative factors. Instead, they had become just one more of the peripheral
details entertained by general legislative acts to improve the overall operation of
federal judicial machinery.
CHAPTER 5
ANALYZING THE POLITICS OF DIVERSITY JURISDICTION

“However, with the powerful opposition coming from all the railroads in the United States, from practically all the big insurance companies of the United States, from many of the big mortgage companies of the United States, their influence is too great, there is too much opposition to the measure; so, as I have said, I can not expect to have it passed at the present session of Congress, but I am not going to give it up; I expect to have the bill before Congress at the next session.”—Senator George Norris (74 Cong. Rec. 3126)

“…Passage of the final [1958] diversity bill symbolized the difference between the 1930s and the 1950s. It rang down the curtain on diversity jurisdiction as a significant partisan political issue and confirmed that the age of Progressivism had long since passed.”—Edward A. Purcell Jr. (2000, 267)

In the previous chapter, the concept of federal diversity jurisdiction was defined, its history chronicled, and a number of its key justifications discussed. Over the course of that chapter, several possible catalysts emerged with respect to the congressional pursuit of limitations in federal diversity jurisdiction. As various comments of members of Congress made plain, perceived judicial favoritism to corporate interests was an important objection to diversity jurisdiction for some time. In addition, both the raw caseload statistics and legislative commentary presented in Chapter Four pointed to the centrality of administrative concerns in debates over diversity jurisdiction’s scope. On the
other hand, the involvement of several powerful business and legal interests opposed to limiting diversity’s reach complicated these jurisdictional debates even further.

Having presented this basic historical and conceptual understanding in Chapter Four, the present chapter’s focus shifts to a more systematic examination of diversity jurisdiction. This examination begins with an in-depth analysis of three historical episodes presented in Chapter Four, treating each as a self-contained case study embodying special lessons for the understanding of the congressional politics of federal jurisdiction. Following the presentation of those three case studies, the dissertation’s treatment of diversity jurisdiction concludes with a quantitative analysis that underscores a number of similar points in a more methodical and systematic fashion. In short, that quantitative study translates Chapter Four’s qualitative evidence into more objective evidence by testing the quantitative impact that both changes in judicial outcomes and administrative caseload considerations had played on congressional efforts to restrict access to the federal courts in diversity of citizenship cases.

THREE CASE STUDIES OF DIVERSITY JURISDICTION

Throughout the past century, three particular episodes have been especially instructive for spotlighting the shifting roles that judicial outcomes, administrative issues, and outside pressures have occupied in congressional
debates with respect to changes in federal diversity jurisdiction. The first came just prior to Franklin Roosevelt’s presidency and was spearheaded by the progressive reformer from Nebraska, Senator George Norris. The second occurred during the later Eisenhower years and was, in some measure, a conservative reaction to the increasing liberalism of both the courts and the federal government in general. The final important case study described here is from 1978, the year in which two-thirds of the House of Representatives voted to eliminate diversity jurisdiction from the federal code in its entirety. Though these proposals enjoyed varying degrees of success, each illuminates Congress’s control over federal diversity jurisdiction in a unique and theoretically useful way.

Echoes of the 1800s: Norris and the Progressives

In 1912, Nebraskans elected to the United States Senate the colorful George W. Norris, a progressive Republican who made little effort to hide his antipathy for big business. Though Norris’s arrival was felt immediately in Washington, it was not until his elevation to the Senate Judiciary Committee’s chairmanship in 1926 that his progressivism seriously began to impact debates over the federal judiciary (Lowitt 1971, 273). Norris, like so many other progressives, was exceedingly distrustful of the federal courts. He shared the progressive belief that many of the Republican appointees who ascended to the federal bench had formed an alliance with big business while neglecting the rights
of individual litigants. Norris had, in 1922, called for the abolition of the entire lower federal judiciary, desiring to leave “nothing of our United States judicial system except the Supreme Court” (Lief 1939, 296). He also believed that the Supreme Court should be prohibited from striking down acts of Congress by narrow majorities and that lifetime judicial tenure was undesirable (Lowitt 1971, 162). Once he acquired the Senate Judiciary Committee’s gavel, however, his attention shifted toward reforming federal diversity jurisdiction—which he viewed as little more than a litigation tool designed to benefit corporate America.

On February 13, 1928, Senator Norris introduced S. 3151, a bill to eliminate federal jurisdiction over diversity of citizenship cases. Just over a month later, his Judiciary Committee had produced a three page report on the legislation entitled Limiting the Jurisdiction of District Courts of the United States (Report No. 626). The report itself dismissed concern over out-of-state prejudice, instead citing arduous litigant travel, greater expense, and docket overcrowding in the federal courts as the most compelling reasons to abandon the jurisdiction (Report No. 626, 2-3). Speaking on the Senate floor in April of 1928, Norris admitted that he had held no hearings on the legislation because, in his words, “it is a bill on which I think no particular hearings are necessary” (69 Cong. Rec. 6378). He then warned his colleagues that “the class of attorneys who will object
to this proposed legislation will be attorneys for railroad companies, insurance
companies, and other big corporations whose business takes them into several
different States” (69 Cong. Rec. 6378).

Though Norris repeatedly admonished his colleagues not to base their
opposition on the views of this “one class of people,” (69 Cong. Rec. 8077, 8080)
his legislation never received a floor vote—and the historical record makes clear
why this was the case. The opposition was surreptitiously led by Chief Justice
Taft, long known for his legislative strategy of grassroots lobbying on judicial
matters. Once Norris’s bill emerged from the Senate Judiciary Committee
without dissent, the Chief Justice contacted editor Casper Yost of the St. Louis
Globe-Democrat who, in turn, quickly produced two editorials criticizing the bill.
Taft then commissioned his brother, New York attorney Henry Taft, to “go to the
New York Times and to the Tribune and explain the effect of the bill and have
editorials printed on the subject” (Fish 1973, 84-85). As a partial result of the
Chief Justice’s stealth campaign, awareness of the legislation and its implications
increased, and numerous telegrams from attorneys, pressure from the American
Bar Association (69 Cong. Rec. 7421) and others poured into lawmakers,
prompting one senator to suggest that “I have received more letters making
objection to this bill than with reference to any other bill on the calendar” (69
Cong. Rec. 8077).
Undaunted, Norris reintroduced a virtually identical bill, S. 4357, in the spring of 1930. The brief report produced by his Judiciary Committee was virtually indistinguishable from the one created two years earlier (Report No. 691). Once again, the bill’s opposition came from many of the same quarters that had frustrated the House’s attempts to enact the Culberson Bill during the late 1800s—railroads, corporations and, now, the organized bar. Though tangible objective evidence of opposition is difficult to produce, by January of 1931 Senator Norris himself was conceding that there was no hope of enacting his bill before the end of Congress’s session that following March. In the quotation reproduced at the beginning of this chapter, Norris signaled both his frustration with and defiance toward the interests that opposed him. He promised to reintroduce the bill in the Seventy-Second Congress, but went on to predict that, “when the measure does come up [again] there will be enough big corporations asking to be heard, through the mouths of their expensive and able attorneys, to take the time of the committee for six months in order to again defeat the bill” (74 Cong. Rec. 3126).

Buoyed by the substantial influx of Democrats and progressives into both the Senate and the House that resulted from the 1930 midterm elections, Senator Norris viewed the Seventy-Second Congress as an ideal opportunity to enact his jurisdictional reforms. Although counseled by Professor Felix Frankfurter—himself a strong proponent of diversity’s abolition—that the powerful political
support for diversity’s retention would make it more prudent to pursue a narrower, more limited strategy, Norris rejected both Frankfurter’s advice as well as the draft bills the law professor sent to him in favor of his perennial proposal to abolish diversity jurisdiction outright (Purcell 2000, 81). In December of 1931, Norris introduced two bills. The first, S. 937, was a measure introduced at the request of Attorney General William Mitchell that was markedly different from Norris’s own prior proposals (Senate Hearings 1932, 1). The Attorney General’s legislation was not designed to eliminate all facets of federal diversity jurisdiction. To the contrary, its ostensible goal was to rectify the failings of corporate diversity that had become apparent to all in the wake of the Supreme Court’s decision in the Black and White Taxicab Case (1928). The bill clearly reflected the Hoover administration’s position on diversity jurisdiction, which was that the concept ought to be maintained as a necessary protection for national business in spite of its documented shortcomings (Senate Hearings 1932, 6). More importantly, President Hoover and Attorney General Mitchell wisely proposed this more limited reform, hoping to complicate the debate and split diversity jurisdiction’s critics into two camps. In truth, the Hoover administration’s “support” for its own bill was confined to little more than an acknowledgement of the legislation’s sponsorship. Underscoring the true strategic objective of the Mitchell bill, some private correspondence indicates that
President Hoover had assured the American Bar Association’s Executive Committee that he would have vetoed Norris’s more radical bill if it had somehow managed to pass Congress (Purcell 2000, 82-83).

Norris’s second bill, S. 939, was nearly identical to the bills he had introduced in prior sessions. Norris’s proposal embodied his belief that neither Professor Frankfurter’s proposals nor the Attorney General’s bill went far enough in decreasing expenses for average litigants and that neither would be of sufficient magnitude to arrest caseload pressures. Addressing the first point, the Committee Report noted that “It is much more expensive to litigate in Federal courts than in State courts…The wealthy individual or corporation is thus often enabled to wear out his opponent” (Report No. 530, 3). With respect to the second, the Senate Judiciary Committee’s informal survey of federal judges indicated that the outright elimination of all diversity jurisdiction from the federal courts would reduce the aggregate number of civil cases in Federal court by roughly 27.7%. (Report No. 530, 10).

The Committee Report that accompanied the Norris bill also sought to highlight the nature of the coalition that had formed to oppose it. In a section titled “The Real Objections and the Real Objectors,” it outlined the interests opposed to the measure as well as the alleged reasons for that opposition. Some witnesses before the subcommittee of the Judiciary Committee, the report said, “very honestly and frankly admitted that [diversity jurisdiction] was a ‘privilege’
they had always possessed and they wanted to retain it…They desire to have the right in their litigation to choose between two tribunals. *What was originally intended to protect them in a right has become a ‘privilege’ which they use to give them an advantage over their adversaries*” (Report No. 530, 3-4, emphasis added). Elsewhere, Norris, Frankfurter, and their supporters noted the “great value” of diversity jurisdiction to corporations and described the federal courts as “the resort of powerful litigants” (Frankfurter 1929, 276).

In addition to whatever “advantage” might be gained by those seeking to invoke diversity jurisdiction in an attempt to force quicker settlements from complainants of limited means, the Norris Committee Report’s indictment of diversity jurisdiction also cut to the quick of the relationship many were convinced existed between the overwhelmingly Republican federal judiciary and corporate America, stating that

The usual objection made to this proposed legislation is based, as before stated, upon the alleged prejudice of the people against non-resident litigants. Another reason, however, seldom given publicly but often referred to privately, is that these large corporations do not want to try their cases before judges who have been elected by the people; and, in confidence, their attorneys often state frankly that they want to try their cases before a judge who has not been elected by the people but who has been appointed and who holds his office for life. They say that a judge who must be elected
by the voters and whose reelection depends upon the favor of the people, often is thinking about his reelection and does not give the corporation or the man of great wealth proper consideration (Report No. 530, 14 emphasis added).

In a separate submission to the Committee, Dean Charles Clark of the Yale Law School addressed the issue of pro-corporate bias in the federal courts even more straightforwardly. Addressing the perception of just what constituted this “proper consideration” by the federal courts, he said,

…I venture to believe that the charge of prejudice, turning exclusively upon nonresidence and affecting an appreciable number of cases, is not proven, while the present terms of the diversity of citizenship jurisdiction result in a selection of Federal cases in many ways unfortunate as giving the appearance of another sort of prejudice in the Federal tribunals…The present jurisdiction has been most unfortunate in creating the appearance, widely held by an all too large group of citizens, that the Federal bench is biased and partial. (Statement of Charles E. Clark, Senate Hearings 1932, 36-37).

As had long been the case with diversity jurisdiction, advocates of its elimination had no ready-made constituency of interests from which to draw support. By contrast, the reform efforts of Senator Norris, Representative Fiorella LaGuardia of New York, and other progressive politicians were vigorously attacked from all sides. Indeed, both Norris’s personality and his tactics
“succeeded only in dividing his sympathizers while uniting national business and the elite bar in a fervent campaign to preserve the jurisdiction” (Purcell 2000, 84). From its editorial page, the Chicago Tribune declared that Norris’s “socialistic preferences are hostile to all private enterprise” (“Withdrawing An Ancient Right” 1932). The American Bar Association Journal quoted Paul Howland, Chair of the Association’s Committee on Jurisprudence and Law Reform, as saying, “I shall consider the enactment of this legislation as the most hostile blow that has been struck at the Federal judiciary for many a year…It is intended to and is expressly advocated by its proponents on the ground that it will at least temporarily satisfy the radicals who hope, ultimately, to destroy the federal courts” (Diversity of Citizenship” 1932, 215).

Print journalism aside, Attorney General Mitchell himself was largely responsible for mobilizing opposition to the diversity proposals. Prior to his bill’s introduction in the Senate, Mitchell transmitted a copy to the American Bar Association with the cool admonition that the group “give the proposal attention.” “[T]his action, of course, was a clarion to the elite bar, warning that vigorous opposition was essential to protect diversity…National business organizations and bar associations responded forcefully, recognizing that the administration’s counterproposal was a tactical diversion [from the Norris bill]” (Purcell 2000, 82).

In response, many large corporations, railroads, and insurance companies registered their strident opposition to abolishing diversity, with organizations
including the Association of Casualty and Surety Executives, the Association of Life Insurance Presidents, the Investment Bankers Association of America, the Fidelity and Deposit Company, and the National Board of Fire Underwriters being among those who took visible roles in the Senate and House Committee Hearings (Senate Hearings 1932). For their part, the United States Chamber of Commerce and the American Bankers Association mobilized their membership, encouraging them to contact senators and congressmen and express their opposition to abolishing diversity jurisdiction (Purcell 2000, 83). The American Bar Association, joined by the legal communities of countless cities and states, also registered its strong hostility to the Norris Bill by, in part, disputing its constitutionality (e.g., Senate Hearing 1932; “Diversity of Citizenship” 1932, 216). In the words of an earlier editorial from the American Bar Association Journal, the organization viewed Norris’s proposal “as an attempt to take away an inherent judicial power with which the legislature has no right to interfere” (“Whittling Away at the Federal Tribunals” 1928, 200-201).

Although the U.S. Senate represented the flashpoint of the debates over diversity jurisdiction, Norris’s progressive allies in the House of Representatives also pressed for curbs on diversity jurisdiction. After once voting to report the House equivalent of the Norris bill out of committee (HR 10594), the House Judiciary Committee reconsidered its action at the urging of the same outside interests that had been prominent in the Senate debates and granted full hearings
on the bill. As one researcher later concluded, “The[se] House hearings on the bill were important, not for the empirical evidence or legal analysis they produced, but for the social realities they documented. Business groups put on a massive display of their commitment to diversity. There was no doubt as to the powerful interests that opposed change. The ABA and the elite corporate bar, moreover, showed the extent to which a partisan ideology controlled their thinking” (Purcell 2000, 83-84). Upon reconsideration, the House Judiciary Committee voted against the proposals of both Norris and Attorney General Mitchell.

The Senate Judiciary Committee came out in opposition to Attorney General Mitchell’s bill, but it did forward Norris’s bill out of committee in April of 1932 with a recommendation for passage (75 Cong. Rec. 14989). However, the Senate leadership bottled up the bill, refusing to give it a floor vote. In addition to the agitation of corporate America and the elite bar, the failure of Norris’s efforts was also the product of division among progressive politicians. Though nearly all of them agreed that diversity jurisdiction had its shortcomings, not all were comfortable with its total abolition. With these moderate progressives combined with traditional Republicans opposed to any changes in diversity jurisdiction, Norris’s proposed abolition of diversity jurisdiction had no chance of survival.

While ultimately unsuccessful, Norris’s crusade to abolish diversity jurisdiction served as something of a bridge between the nineteenth and twentieth
century struggles over diversity jurisdiction. As had been the case in the past century, the alleged pro-corporate bias of the Republican-dominated federal courts remained a key rallying point for proponents of diversity’s curtailment. Partisan lines were still recognizable in the debate, though the presence of progressives made those alignments somewhat less sharp than they had been in late nineteenth century America. Judicial workload was repeatedly cited by opponents of diversity as the overriding justification for reform. And, finally, opposition to reform came from many of the same quarters in which it had germinated decades earlier. One major difference between the 1880s and the 1930s, however, was the visibility of the American Bar Association in discussions of the Norris bill. Not only did the ABA and other elite bar organizations write editorials and participate in committee hearings, though their involvement with these tactics had advanced considerably since the 1880s as well. By the 1930s, their interest in the debates over diversity jurisdiction was also evidenced by an active and sustained effort to pressure members of Congress by enlisting their many members to lobby as individual citizens. For example, the president of the American Bar Association encouraged the organization’s members “to express [their] individual viewpoints [on the Norris bill]…to their members of Congress” (quoted in Purcell 2000, 83). This concerted effort of the legal community,
perhaps more than any other aspect, set the debates over Norris’s bill apart from the previous century’s political maneuvering over the scope of federal diversity jurisdiction.

**Traditional Politics vs. Professional Judicial Administration: A New View Emerges**

In 1951, the Judicial Conference of the United States’s Committee on Jurisdiction and Venue released a report on federal judicial administration that reinforced the same basic conclusion that had emerged from the political debates over the Norris bill two decades earlier: “Your Committee sees no valid reason for the destruction of the ancient diversity jurisdiction of the Federal courts” (House Hearings 1957, 13). Yet the Committee was open to other alternatives, including increasing the jurisdictional amount, which had not been altered since 1911, and closing certain loopholes surrounding the doctrine of corporate citizenship. Even so, despite the jurisdictional amount’s stability, a good deal else had changed since the century’s early years. Thanks to the Roosevelt and Truman administrations, the same progressives and New Dealers who had excoriated the federal courts as havens of corporate America were, by the 1950s, intoning their virtuous status as guardians of individual rights.

Though the House of Representatives passed a measure in 1952 that would have raised the minimum jurisdictional amount to $10,000, the crowded
legislative calendar and lateness of the session conspired to doom it in the Senate. By mid-decade the status quo of 1911 remained, and in July of 1957 House Judiciary Committee Chair Emanuel Celler (D-NY) convened new hearings on diversity jurisdiction to discuss two very different bills. It was universally agreed that each of the two bills would ease the workload of the Federal courts, but that superficial agreement on the legislation’s purpose masked other competing procedural principles.

Formally introduced by Rep. Thomas Ashley of Ohio, HR 4497 was drafted and endorsed by the Judicial Conference of the United States, with the principal backing of Chairman Celler. This moderate measure was essentially composed by external experts, and proposed relieving federal court congestion by codifying two separate proposals into law. First, the bill provided that the minimum jurisdictional amount required to invoke federal diversity jurisdiction should be increased from $3,000 to $10,000. Explaining the rationale of the $10,000 amount to a colleague on the House floor, Rep. Kenneth Keating (R-NY) reported that “The figure of $10,000 was arrived at roughly on the basis that it was equivalent to the $3,000 which was the jurisdictional limit fixed in 1911. The value of the dollar is about one-third today what it was in 1911. It was felt that the same congressional intent today would apply if the jurisdictional limit were
placed at $10,000” (103 Cong. Rec. 12688). As another member put it, “The
[$3000] amount is so small that now it permits a great many petty cases to be
removed to the Federal court” (103 Cong. Rec. 12683).

The bill also mandated that, for purposes of diversity jurisdiction,
corporations were to be treated as citizens of their state of incorporation and the
state that served as the corporation’s “principal place of business” (House Hearing
1957, 17-18). This second aspect of the legislation represented a direct
repudiation of the Supreme Court’s decision in the Taxicab Case (1928) because,
under the proposed 1957 legislation, the taxicab company would have been
prohibited from invoking federal diversity jurisdiction in both its state of
incorporation (Tennessee) and its state of principal business (Kentucky). In
effect, then, the rationale behind the “principal place of business” test embraced a
different view of the federal courts than the one which had animated progressives
like Norris. Unlike 1932, the prevailing wisdom among supporters of the
“principal place of business test” was that corporations conducting business
nationwide were deserving of access to the federal courts and that individual
litigants were not likely to be inconvenienced by that. However, that did not
mean corporations of an essentially local character—again, Taxicab being a prime
example—should be able to abuse that access and manipulate their way into the
federal system (Purcell 2000, 268-9).
If the first of these 1957 proposals was designed to ease court pressures by appealing to political neutrality, the second sought to limit federal court pressures in service toward another goal. It also foreshadowed the subsequent movement to limit federal constitutional jurisdiction in matters of civil rights and liberties. Introduced by former Virginia Governor William Tuck, HR 2516 also had the aim of reducing jurisdiction, but it was formulated from a much different political perspective. Tuck’s defense of his bill more closely mirrored the rhetoric of the progressives than that of Celler and the Judicial Conference. The bill itself was a relatively radical proposal which sought to confine diversity jurisdiction to individuals and eliminate its availability to corporations (House Hearings 1957, 2). Though its ultimate effect would have been substantially less drastic than passage of the Norris bill two decades earlier, it was nevertheless estimated that passage of Tuck’s bill would have resulted in an approximately 25 percent decrease in the civil caseload of the federal courts (House Hearing 1957, 34-42).

In terms of the stated objective—easing federal court workload—Tuck’s bill was vastly superior to the alternative of raising the jurisdictional amount. History had made it clear that raising the jurisdictional amount would provide little more than temporary relief of federal caseload pressures. On the other hand, cutting corporations off from federal diversity jurisdiction would permanently remove one quarter of all civil cases from the federal courts and lend itself to far less technical abuse. As Tuck himself stated,
If you want to get at the core of this situation, as far as the amount is concerned, I think such a bill isn’t worth the paper it is written on because litigants who wish to go to Federal court will allege the amount is $10,000 or over in order to get into the Federal courts. The real cure of this crowded condition of the dockets and delay of public justice is in the field of corporations (House Hearings 1957, 5).

If, as even an opponent of Rep. Tuck’s bill conceded, that bill “would unquestionably effect a much greater reduction in the caseload in the Federal courts,” (Statement of Albert B. Maris, House Hearings 1957, 34), why then was it ultimately shelved in favor of the legislation advocated by the Judicial Conference?

In many ways, the motives behind Tuck’s proposal were not altogether different from those of Norris, Culberson, and others who had come before. Fundamentally, his proposal sought to undermine the institutional power of the federal courts because he and other southerners increasingly disagreed with their outputs on issues including states rights, desegregation, and civil liberties. In the Judiciary Committee hearings on diversity jurisdiction, Tuck made no apologies for being “a firm believer in the principles of States rights, and particularly where these principles apply to litigation” (House Hearings 1957, 4). Indeed, though Tuck’s testimony was generally successful in hewing to the issues of caseload and administration, at one point he strayed and revealed his underlying motivation:
A greedy and Gargantuan Central Government in the last few years has usurped the powers of the States by expanding its activities into almost every phase of our existence, and we can feel its tentacles in all walks of life. This unwarranted invasion…has been carried on under the guise of beneficence, but if unchecked will finally leave the government of the States and localities nothing more than the hollow shells of a lost liberty. Some of the States have succumbed to these spurious doctrines …either through a failure to understand the fundamental principles upon which our Government was established and is based, or have surrendered in the hope of receiving a liberal abundance and share of the governmental largess made available to them under many of these socialistic schemes (House Hearings 1957, 3).

Political liberals and other supporters of the federal courts recognized that Tuck’s diversity bill was essentially a well-packaged manifestation of the more general southern, states-rights effort to curb the power of the federal judiciary—particularly as it related to constitutional issues such as desegregation. Despite the fact that Tuck’s bill did not implicate any particular constitutional subject-matter, his opponents were committed to “maintain[ing] the integrity of the national courts against an assault that attempted to use congressional power over federal jurisdiction as a political weapon” because, “however serious the problem of congestion was, and however abstruse or technical the specific legal issues were, Congress knew full well that questions of the scope and nature of federal jurisdiction remained ultimately issues of social values and political purposes”
Ultimately, the House Judiciary Committee adopted the provisions of HR 4497, the Judicial Conference’s moderate bill, and added an amendment that further restricted the removal of actions based on state workmen’s compensation laws. The new legislation was forwarded to the House floor as a substitute bill, HR 11102. That bill passed without recorded vote in June of 1958, and was soon agreed to by both the Senate and President Eisenhower.

This 1958 enactment was a transformative event for at least three related reasons. First, Congress gave substantial weight to recommendations proposed by outside experts, suggesting that the proposals and analyses formulated by independent, blue-ribbon commissions were likely to assume greater importance in subsequent instances of jurisdictional oversight. When combined with the absence of a sharp partisan divide with respect to the politics of diversity jurisdiction, this reliance on expert recommendations further suggested that subsequent recalibrations of diversity jurisdiction were likely to be more politically neutral affairs in which technical and relatively non-ideological considerations would predominate.

Second, the House Judiciary Committee’s 1957 hearings were transformative in their own right. In sharp contrast to the hearings on the Norris bill, comparatively little controversy swirled around the 1957 hearings. Neither business groups nor the organized bar were to be seen, and the only witnesses to testify were Rep. Tuck himself and Judge Albert Maris, who appeared on behalf
of the Judicial Conference. Though these outside interests would no doubt have preferred to maintain the status quo, the fact that diversity’s survival was not in jeopardy led them to remain on the sidelines. Compared to the Norris bill’s hearings a quarter century earlier, Congress’s 1957 hearings were exceedingly mundane.

Third, the 1957 hearings seemed to punctuate the end of longstanding concern over judicial outcomes that had so permeated previous debates over the fate of diversity jurisdiction. Ironically enough, this was largely due to the New Deal-inspired shift in federal judicial personnel. It also resulted from the Warren Court’s activism on issues of social concern, which helped to redirect attacks on the federal judiciary by giving rise to the phenomenon of jurisdiction-stripping that is discussed in Chapters Six and Seven. While this is not to suggest that Rep. Tuck and his followers were pleased with the general direction of the federal courts, their primary quarrel lay with what they viewed as being excessive judicial policing of civil and states rights—not, as had Democrats and Progressives in the past, with how the federal courts were treating diversity cases per se. No longer were the federal courts seen as excessively antagonistic to the individual litigant. Even if acrimonious debate loomed over difficult judicial questions of civil liberties and rights, there was now increasing agreement that diversity jurisdiction and broader questions of federal caseload were technical, apolitical administrative questions to be hashed out by experts—not career politicians. Put differently,
Tuck’s position faltered because diversity debates had shifted from questions of federal judicial power to questions of federal judicial administration. Thus, the episodes of the late 1950s “rang down the curtain diversity jurisdiction as a significant partisan political issue and confirmed that the age of Progressivism had long since passed” (Purcell 2000, 267). In subsequent years, jurisdiction-stripping proposals directed at the constitutional jurisdiction of the federal courts became the weapon of choice for those dissatisfied with federal judicial outcomes. Not coincidentally, when the House passed a measure designed to eliminate federal jurisdiction over reapportionment issues in 1964, it was Representative William Tuck who led the fight against the courts.

**The Triumph of Outside Interests and Administration over Judicial Outcomes**

This shift toward greater reliance upon expert recommendations was quick in coming, if slow to yield substantive results. In response to Chief Justice Warren’s urging a decade earlier, in 1969 the American Law Institute (ALI) finally published its *Study of the Division of Jurisdiction Between State and Federal Courts*. That report, prepared under the guidance of institute director Herbert Wechsler, contained numerous recommendations for narrowing federal diversity jurisdiction as part of a larger effort to ensure that the federal courts “concentrated upon the adjudication of rights created by federal substantive law”
Though hearings were held and potential changes in diversity jurisdiction were examined in the early 1970s in response to the ALI proposal, no real reform movement took hold in Congress. That changed in 1976, when Representative Charles Bennett, a Florida Democrat, introduced a bill that went beyond the ALI’s relatively tepid recommendations. The Bennett bill, HR 13219, called for complete abolition of federal diversity jurisdiction and, while it failed to gain traction in that Congress, it foreshadowed the profound debates over diversity jurisdiction that would ensue during the next congressional session.

In that following session, proposals introduced in both the Senate and the House had as their objective the curtailment or outright elimination of federal diversity jurisdiction. Though a bill to amend the jurisdiction (123 Cong. Rec. 29266, S. 2094) and another eliminating it altogether (123 Cong. Rec. 28, S. 2389) were introduced in the Senate, it was in the House of Representatives that these diversity proposals were most seriously considered. In the House, Bennett again reintroduced his proposal to eliminate the jurisdiction completely (123 Cong. Rec. 361, HR 761). Several other bills, by contrast, merely advocated reductions in diversity jurisdiction’s scope that were similar to those of the proposal submitted by the American Law Institute (HR 5546, HR 9123, HR 9308).
In response to this flurry of legislative activity—as well as the belief that, in years past, Congress had been relatively negligent and haphazard in policing matters of judicial administration\(^7\)—the House Judiciary Committee’s Subcommittee on Courts, Civil Liberties, and the Administration of Justice held oversight hearings on the general State of the Judiciary and Access to Justice in June and July of 1977. According to the Committee Report, none of the witnesses who testified in this first round of hearings espoused the view that federal diversity jurisdiction should be left undisturbed. Surprised by the “virtual unanimity with which the witnesses suggested that diversity jurisdiction be abolished or curtailed,” new hearings focusing on that specific topic were scheduled for September of 1977 (Report No. 95-893, 5-6).

In this second round of hearings, the Subcommittee concluded that “the vast majority of participants supported abolition of diversity jurisdiction.” Indeed, individual expert witnesses including Professor Charles Alan Wright, Judge Henry J. Friendly, Chief Justice Warren Burger, Professor Robert Bork, and others did express support for diversity’s elimination (Report No. 95-893, 6). However, representatives from several important groups remained unconvinced. Representatives of the American College of Trial Lawyers, Public Citizen, and even consumer advocate Ralph Nader were of the view that, while total

\(^7\) Arguably, one of the major reasons for this negligence was the increasing involvement of members of Congress in attempting to strip the federal courts of jurisdiction over particular types of constitutional claims.
elimination of diversity jurisdiction would be unwise, some form of curtailment was appropriate. Finally, according to the Committee Report, the only two witnesses to publicly oppose any alteration in diversity jurisdiction were John P. Frank and Robert G. Begam. Both individuals appeared before the Committee on behalf of the Association of Trial Lawyers of America (Report No. 95-893, 7).

Frank and Begam’s views notwithstanding, this second set of hearings convinced the Subcommittee to draft a new bill to use as a markup vehicle and, ultimately, the House Judiciary Committee’s Subcommittee on Courts, Civil Liberties, and the Administration of Justice did so. This new bill embodied the ALI Study’s basic view that state courts should be responsible for cases arising from state law and federal courts should be responsible for those cases arising under federal law (124 Cong. Rec. 4992-4993). To that end, the substitute bill (HR 9622) proposed abolition of federal diversity jurisdiction while, at the same time, eliminating the amount in controversy required for individuals to bring cases under federal question jurisdiction. As the Judiciary Committee explained in its report, the end result of the proposal would be a substantial net decrease in the number of cases allowed into federal court—the negligible number of cases that would be added to the federal docket by eliminating an already low monetary threshold for federal question jurisdiction would easily be offset by the estimated 32,000 cases that abolition of diversity jurisdiction would excise from the federal courts (124 Cong. Rec. 4993). In doing so, the legislation would funnel federal
cases to federal court and cases based on state law to state court. Led by
Representative Robert Kastenmeier (D-WI), the House Subcommittee sent the bill
to the full committee with a unanimous recommendation for passage in October
of 1977.

Though the bill emerged from the full Judiciary Committee on a 28 to 2
vote early in 1978, it encountered greater opposition on the House floor. The
bill’s principal backers, a bipartisan group of representatives including Robert
Kastenmeier (D-WI), Charles Wiggins (R-CA), and Robert Drinan (D-MA),
noted that the bill had a broad base of support and that “the only possible
objection to this bill would come from a tiny handful of personal injury lawyers or
insurance company lawyers” (124 Cong. Rec. 4997). Object they did, and
probably with substantially more force than most representatives had anticipated.
Still, many important groups supported the measure. Although the American Bar
Association opposed the measure, other interests including the American Civil
Liberties Union and the NAACP Legal Defense and Educational Fund were
enthusiastically supportive of the proposal. Assent from the Conference of State
Chief Justices was also critical, as it provided direct assurance that the elimination
of diversity jurisdiction would not have an overwhelming impact on the state
court systems (124 Cong. Rec. 4993, 4997). Yet, even as Kastenmeier
characterized the legislation as “an important step in reducing endemic court
congestion and its insidious side effects,” opponents of the measure began to point to other alleged flaws in the legislation (124 Cong. Rec. 4993).

Tellingly, in contrast with earlier legislative squabbles over diversity jurisdiction, the sides in the 1978 episode are difficult to characterize in partisan and even regional terms. Representatives Dan Glickman (D-KS) and Richard Gephardt (D-MO) raised concerns about the swiftness of justice in those state courts situated in large, urban areas. As Gephardt put it, “In St. Louis, Federal diversity jurisdiction in many cases spells justice achieved in a reasonable time rather than an unreasonably long time” (124 Cong. Rec. 4999). Other members, including Elizabeth Holtzman (D-NY) and Keith Sebelius (R-KS), pointed to the inability of state courts to enforce decisions beyond their jurisdictional boundaries and suggested that the possibility of regional prejudice could not be categorically dismissed by supporters of diversity’s abolition (124 Cong. Rec. 4998-9).

Though opponents of abolition unsuccessfully attempted to water down the bill by merely increasing the jurisdictional amount (124 Cong. Rec. 4996), Rep. Harold Sawyer (R-MI) bluntly rebuked the effort, saying, “With respect to the possibility of raising the jurisdictional amount, this is a farce, and would accomplish absolutely nothing…” (124 Cong. Rec. 4999).

After surprisingly little floor debate, the House ultimately voted by a two-to-one margin to suspend the rules and pass HR 9622, abolishing diversity jurisdiction, and sent the measure to the Senate for concurrence (124 Cong. Rec. 4999).
The alignment of votes on the House floor made it clear that the question of diversity jurisdiction could no longer be explained in purely partisan terms. In fact, virtually every group of representatives supported the legislation. Sixty-three percent of Republicans supported abolition, compared to seventy-two percent of Democrats. Even fifty-six percent of southern representatives supported abolition. The only major voting bloc to oppose abolishing diversity jurisdiction were the southern Democrats, with just over forty-three percent of them voting with the majority. Although some southern representatives might have viewed diversity jurisdiction as Representative Tuck had two decades earlier—as a way to strike more generally at the “gargantuan” power of the federal courts—judging from the 1978 House vote, southern members had become the strongest defenders of diversity’s retention.

The organized bar’s role in the House hearings bore little resemblance to the role those organizations would come to play in the Senate Judiciary Committee hearings, and this mobilization probably helps to explain the Senate’s failure to act on the legislation. At the House hearings, the presence of state, local, and national bar associations was minimal. Though a number of participants opposed eliminating diversity jurisdiction or even making minor changes in its scope, their positions were generally advocated with neither urgency nor vigor. Perhaps these antagonists failed to fully mobilize, finding it difficult to believe that the House would turn its back on 189 years of historical
precedent and take the drastic step of eliminating the concept of federal diversity jurisdiction from the Judicial Code. Reflecting the immediate lack of attention received by the House’s action, the national media barely reported what had happened. The *Washington Post’s* reporting consisted of a four paragraph story on page fourteen (“House Backs Shift of Suits” 1978). Though the *New York Times’s* story contained more substance, noting that “many trial lawyers like the [current] system because it gives them a choice of forums and an opportunity to select the one that appears more favorable to their clients,” and that a number of representatives had shifted their votes on the floor in order to produce the minimum winning coalition, it too was buried deep inside the paper. Notably, the *Times’s* story also quoted a prescient House staffer, who commented that “…It’s unlikely the Senate would vote to abolish diversity jurisdiction this year” (Weaver 1978, B14).

However, after HR 9622 had passed the House and diversity jurisdiction’s abolition moved one step closer to enactment, a torrent of bar association resolutions, memos, and representatives communicated their opposition to diversity’s elimination to Senator James Eastland’s Senate Judiciary Committee. In addition to the American Bar Association, thirty state and local bar associations transmitted their opposition to diversity’s abolition to the Committee. A handful of trial lawyer groups and corporate associations also beseeched the Committee to reject the House’s approach to streamlining the
federal courts (Senate Hearings 1978). Though the Senate Judiciary Committee did hold hearings on the measure, the House’s proposal never progressed to the floor. As had been the case with the Culberson Bill nearly a century before, the associations and interests opposed to radical changes in diversity jurisdiction had successfully pressured the Senate to bury the House’s groundbreaking proposal for reform.

Post-Mortem

The events surrounding Congress’s actions with respect to federal diversity jurisdiction in 1978 culminated an important shift in the politics of that jurisdiction that had begun in the 1950s. First, in contrast with the period spanning from the late 1800s to the mid-1900s, the discussions in the Ninety-Fifth Congress made virtually no mention of the role of judicial outcomes. Quite the contrary, the primary impetus for eliminating diversity jurisdiction seems to have been caseload. Unlike the Tuck bill of 1957-1958, no major partisan or ideological effects are evident in the House vote on the radical 1978 proposal to abolish diversity jurisdiction. The 1978 struggles marked a profound shift on another front as well. As the discussion of diversity in the 1930s and late 1950s made clear—and as subsequent actions in the late 1980s and 1990s would later reinforce—the organized interests so opposed to diversity’s outright abolition were generally willing to countenance reasonable changes, such as tightening the
definition of corporate citizenship or raising the minimum amount in controversy. Whether motivated by a willingness to fix rather than end the jurisdiction or by the belief that clever legal maneuvering could effectively circumvent the intended effect of these changes, these interests did not reflexively oppose all changes to diversity with equal vigor. Indeed, a look at recent political history indicates that the most consistent feature of this interest group involvement has been its prominence where the very survival of federal diversity jurisdiction has been at stake.

**QUANTITATIVE ANALYSIS OF DIVERSITY JURISDICTION**

Based on the prior discussion of diversity jurisdiction and its development, it should be clear that questions of judicial administration, interest group politics, partisan, and ideological influences have all played unique roles in that history. In the absence of outside interests, there is certainly reason to suspect that diversity jurisdiction would not exist today. At the very least, it would not exist in its present form. However, against the preserving influence of state bar associations, various trial lawyer groups, and others stand the two powerful rationales of judicial workload and disagreement with federal judicial outcomes that have led many in Congress to advocate limitations in the scope of diversity jurisdiction.
Neither detailed historical narratives nor in-depth case studies of particular episodes are equipped to pinpoint the impact that these two considerations have had on congressional attempts to restrict diversity jurisdiction since 1875. Isolated episodes, however detailed, cannot systematically resolve whether one of these considerations has tended to dominate the other as an impetus for diversity reform or, in fact, whether either even relates to congressional activity at all. As we have seen, though congressional preoccupation with reforming diversity jurisdiction has been pervasive, limitations in diversity jurisdiction have only been enacted in six of the sixty-five congressional sessions since 1875. Diversity-curbing measures have passed a single house of Congress (always the House of Representatives) on eight additional occasions, yielding a total of fourteen congressional sessions during which a majority of the House has voted to restrict such access to the federal courts. Using each of the sixty-five two-year congressional sessions between 1875 and 2004 as a unit of observation, these analyses test whether administrative concern for judicial workload, ideologically-based attention to federal court outcomes, or a combination of both can explain congressional decisions about whether or not to pursue passage of restrictions in diversity jurisdiction during a particular congressional session.
Operationalization of Key Variables

The dependent variable being analyzed is technically the timing of diversity-curbing legislation’s passage and that timing’s relationship to administrative and outcome-related factors. The dependent variable in each of the following logistic regression equations is dichotomous. The variable is given a value of 1 for those two-year sessions of Congress during which curbs on diversity jurisdiction were passed that had nationwide implications; otherwise, its value is zero. In the House-specific equation, twenty percent of the data consists of positive occurrences, while that figure falls to just under eight percent when the threshold is raised to reflect legislation’s passage through both the House and Senate. For purposes of reference, the specific proposals constituting those observations are reported in Table 5.1. The formal equations representing the two models tested here are included below:

Equation 1: House passage = β₀ + β₁Workload + β₂Distance + β₃Control + ε
Equation 2: Congressional passage = β₀ + β₁Workload + β₂Distance + β₃Control + ε

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8 Imposing this restriction excludes a minor, but highly technical, 1964 adjustment to diversity jurisdiction from the analysis. That adjustment eliminated from diversity jurisdiction those claims in which both the injured party and the tortfeasor are local residents but which, under state “direct action” statutes, are brought against the tortfeasor’s foreign insurance carrier without joining the tortfeasor as the defendant. Because only two states—Wisconsin and Louisiana—had such direct action statutes, the jurisdictional legislation was in no sense targeting the design of diversity jurisdiction as a whole.
<table>
<thead>
<tr>
<th>Description of Legislation</th>
<th>Congress</th>
<th>Year</th>
<th>Passed House</th>
<th>Passed Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eliminate corporate citizenship, increase minimum jurisdictional amount to $2,000, and limit removal to defendants</td>
<td>46th</td>
<td>1880</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Eliminate corporate citizenship, increase minimum jurisdictional amount to $2,000, and limit removal to defendants?</td>
<td>47th</td>
<td>1883</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Eliminate corporate citizenship, increase minimum jurisdictional amount to $2,000, and limit removal to defendants</td>
<td>48th</td>
<td>1883</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Raise minimum jurisdictional amount to $2,000; Restrict removal to nonresident defendants</td>
<td>49th</td>
<td>1887</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Limit Supreme Court review of diversity cases</td>
<td>51st</td>
<td>1890</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Eliminate corporate citizenship</td>
<td>52nd</td>
<td>1892</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Eliminate railroad citizenship</td>
<td>53rd</td>
<td>1894</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Raise minimum jurisdictional amount to $3,000</td>
<td>61st</td>
<td>1911</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Raise minimum jurisdictional amount to $10,000</td>
<td>82nd</td>
<td>1952</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Limit the definition of corporate citizenship; raise minimum jurisdictional amount to $10,000</td>
<td>85th</td>
<td>1958</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Alter citizenship to make out-of-state insurance companies residents of all states in which they conduct business</td>
<td>88th</td>
<td>1964</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Abolish diversity jurisdiction</td>
<td>95th</td>
<td>1978</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Raise minimum jurisdictional amount to $50,000</td>
<td>100th</td>
<td>1988</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Raise minimum jurisdictional amount to $75,000</td>
<td>105th</td>
<td>1996</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

Table 5.1: Summary of Diversity-Curbing Legislation, 1875-2004
Judicial workload has typically been cited as the primary reason for curtailing the diversity jurisdiction of the federal courts. Though it is probably true that certain reforms have been motivated by such administrative concern, it is also conceivable that the concept has been superficially invoked by those whose desires for reform stem from other, more outcome-driven factors. Invoking court capacities and judicial workload as justifications for congressional action on the jurisdictional front is not uncommon. Indeed, several of the transparently outcome-oriented “court-stripping” proposals considered in Congress since the mid-twentieth century have been packaged as “bills for the relief of the federal courts.” Because of the potential disconnect between the public justifications members of Congress give for certain actions and the underlying motivation for those actions, the present analysis subjects the proposition that congressional action on the jurisdictional front is motivated by these administrative factors to empirical test.

Operationalizing the existing state of federal judicial resources as the analysis’s first explanatory variable was straightforward. Though caseload-per-judgeship statistics exhibit some degree of fluctuation from judicial district to judicial district, that statistic has been recognized as a rough, if reliable, indicator of judicial business at the system level (e.g., deFigueiredo and Tiller 1996;
Because statistics on the number of diversity cases filed in federal district court do not exist prior to 1940 it was necessary to utilize another, less specific caseload measure. Fortunately, statistics on the annual number of private civil cases commenced in the federal courts—a subcategory that encompasses diversity cases—are available for this entire period. With a correlation between the two measures of .946 for those years in which both data are available (1940-2004), this measure is an adequate proxy for the annual business of the federal courts attributable to diversity of citizenship cases over the analysis’s entire historical time frame.

In order to calculate the study’s caseload-per-judgeship measure, the number of private civil cases commenced in the federal district courts during each Fiscal Year was divided by the number of authorized judgeships in existence at that time. To the extent that administrative caseload concerns have driven Congress’s historical actions with respect to diversity jurisdiction, this caseload-per-judgeship variable should be positively associated with those sessions during which either or both houses of Congress have enacted legislation making it more difficult for diversity suits to qualify for federal court review. In this view, when

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9 These caseload statistics are reported in a number of historical sources. Prior to 1940, multiple federal district court caseload measures are reported in the Annual Reports of the Attorney General. Subsequent to 1940, these caseload statistics are reported in a scattering of sources, including the Report of the Judicial Conference of Senior Circuit Judges (1940-1947), Report of the Judicial Conference of the United States (1948-1953), Annual Report of the Proceedings of the Judicial Conference of the United States (1954-1960), and Reports of the Proceedings of the Judicial Conference of the United States (1961-present).

10 Obtained from federal district court histories at http://www.fjc.gov/history/home.nsf.
the resources of the federal courts are heavily strained and the caseload-per-judgeship ratio is especially high, Congress should have greater incentive to limit the flow of diversity cases to the federal courts than during periods of administrative calm.

Of course, a second explanation for congressional action with respect to diversity jurisdiction concerns the symmetry between the political views of Congress and the federal courts. In this view, Congress should become more inclined to limit jurisdiction as federal court outputs increasingly diverge from their preferences. In contrast to the straightforward caseload-per-judgeship variable, operationalizing the relationship between congressional preferences and the tenor of federal judicial outcomes is substantially more complex. This difficulty is a product of two factors. First, the lengthy time span encompassed by the data precludes the use of presidential ideology as a proxy for each judge’s positions in a way that can be compared directly to congressional ideology (see Poole and McCarty 1995). The second concerns the related problem of directly comparing preferences between actors in different governmental institutions (e.g., Bailey and Chang 2001). In other words, while comparable measures for judicial and congressional actors do exist (e.g., Giles, Hettinger, and Peppers 2001), their application is inappropriate here because of the analysis’s lengthy historical time frame. These are critical concerns in light of the expectation that, as the aggregate
preferences of Congress and the federal courts diverge, Congress becomes increasingly likely to seek limitations in the jurisdiction of the federal courts.

In the absence of an ideal solution to this difficulty, an adequate one must suffice. Substituting a variable that captures the political distance between the courts and Congress in terms of institutional partisanship allows both Congress and the federal district courts to be set on the same scale of measurement, though it is undoubtedly a measure that cannot capture everything. The chief utility of obtaining some sort of ideological preference measure over a partisan one lies in the ability of ideology to account for intra-party differences on non-cohesive issues such as civil rights and, to the extent that those ideological preferences regularly transcend partisan lines, this could become a problem. To be sure, partisanship and ideology are not fungible concepts. Yet, the very nature of diversity jurisdiction’s close association with corporate America offers some assistance in this regard, since Republicans and Democrats have historically been relatively cohesive in terms of economic issues. Although there has been some slippage between ideology and partisanship with respect to positions on diversity jurisdiction—particularly in recent times, as trial lawyers and other Democratic constituencies have begun to value the forum shopping ability provided by diversity jurisdiction—the general historical record suggests that the two have typically coincided over the historical period with which the study is concerned (e.g., Purcell 1992). To put it differently, by all qualitative indications, when
concern for judicial outcomes has motivated disenchantment with diversity jurisdiction, that disenchantment has generally reflected partisan lines. In short, while an ideological measure might be preferable to a strictly partisan one, that disadvantage is ameliorated to the extent that ideology and partisanship have overlapped considerably on questions surrounding the politics of diversity jurisdiction.

In order to capture the difference between the outcomes being produced by the lower federal courts and the U.S. Congress’s ideal outcomes in each of the sixty-five congressional sessions between 1875 and 2004, two related data transformations were performed. First, I calculated the percentage of Republican-appointed active-duty federal district judges during each congressional session. All active-duty judges serving the entire first year of a session were counted, even if they ceased their duties during the second year. In those cases where a judge left office during the first year of a congressional session, only those judges serving for a majority of the first year were counted.

For each Congress, the percentages of Republican House and the Senate membership were separately recorded. All independent members or those belonging to third-parties were excluded from the analysis, and the resulting figure was the Republican percentage of the two-party composition of each chamber. To arrive at a “difference score” between the two institutions for each

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11 Judges on senior status were not included in this measure of judicial partisanship.
session of Congress, the percentage of congressional Republicans was subtracted from the percentage of Republicans on the federal bench. Finally, because it is the overall magnitude of this difference that is of interest rather than its direction, the absolute value of each score was computed to produce a proxy measure for the difference between the preferred outcomes of the legislative and judicial branches. To reiterate, the hypothesis is that as the differences in preferred case outcomes—as proxied by partisan differences—widen, Congress should become increasingly likely to exercise its jurisdictional power in ways that will limit the ability of the federal courts to produce those outcomes.

Because all diversity proposals clearing at least one House of Congress since 1875 have been passed by the House of Representatives, constructing a proxy measure of the difference between federal court outputs and congressional preferences for the sixty-five congressional sessions contained in that analysis was not difficult. That variable was captured by subtracting the percentage of Republicans in the House of Representatives from the percentage of Republican appointees on the federal district courts, and computing the absolute value of the result. That difference score is utilized in the first analysis, which tests for the
role that partisan distance and judicial workload variables play in whether or not diversity-curbing legislation secures House enactment during a session of Congress.

\[
| \% \text{ bench GOP} - \% \text{ House GOP} | = \text{ Difference Score}
\]

The second analysis tests the extent to which judicial workload and judicial outcomes have impacted diversity-curbing legislation’s enactment by the full Congress during each of the 65 sessions being analyzed. Here, capturing legislative preferences was more difficult. Although the percentage of Republicans in the House and Senate could be averaged to create a single score for each Congress, that measurement strategy would be suboptimal in situations where one body is close to the composition of the federal courts, the other is somewhat distant, and the resulting average reflects the truth of neither extreme. To overcome that difficulty, in the analysis of passage through both houses of Congress, the difference between the courts and Congress was captured by utilizing the percentage of Republicans in the chamber closer in partisan composition to that of the federal district courts. By operationalizing institutional distance in this manner, the analysis effectively treats the judiciary’s closest congressional ally in terms of partisan composition as a veto point that must be overcome in any discussion of curbing the jurisdiction of the courts. In 28 of the analysis’s 65 sessions, the House of Representatives was more closely aligned
with the makeup of the federal courts; in the remaining 37, the U.S. Senate was the judiciary’s closest institutional ally. To summarize, the institutional difference scores utilized in this section of the analysis were calculated in the following way:

\[ |\% \text{ bench GOP} - \% \text{ GOP of chamber closest to the federal courts}| \] = Difference Score

Table 5.2 summarizes the distribution of both the explanatory variables included in the analyses, and their component parts.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Courts GOP</td>
<td>60.455</td>
<td>18.627</td>
<td>20.750</td>
<td>89.800</td>
</tr>
<tr>
<td>% of House GOP</td>
<td>45.942</td>
<td>10.504</td>
<td>20.850</td>
<td>73.200</td>
</tr>
<tr>
<td>% of Congress (closest to courts) GOP</td>
<td>49.544</td>
<td>10.268</td>
<td>20.850</td>
<td>73.200</td>
</tr>
<tr>
<td>% Courts GOP-% House GOP</td>
<td>19.909</td>
<td>15.077</td>
<td>.160</td>
<td>58.390</td>
</tr>
<tr>
<td>% Courts GOP-% Congress GOP</td>
<td>15.658</td>
<td>12.581</td>
<td>.160</td>
<td>50.670</td>
</tr>
<tr>
<td>Private Civil Caseload Per Judgeship</td>
<td>183.789</td>
<td>58.776</td>
<td>93.741</td>
<td>329.228</td>
</tr>
</tbody>
</table>

Table 5.2: Means and Standard Deviations for Relevant Variables

Finally, the analyses include a dummy variable to control for situations in which the same political party dominates both the judiciary and the House of Representatives (Equation 1) or the legislative chamber closest in composition to the courts (Equation 2). All else being equal it is reasonable to suspect that, if any relationship exists at all, unified partisan control of both institutions should make
pursuit of jurisdictional curbs less likely. However, when it has existed, that partisan hegemony has rarely been overwhelming and, as such, this expectation cannot be made with much confidence. In any case, the primary purpose of that control variable, which takes a value of one when a single political party’s representatives comprise at least a simple majority on both the courts and the relevant chamber of Congress, is simply to separate the overall direction of institutional control from the main variable of concern—the magnitude of the partisan difference between the courts and Congress.

Remaining Issues

Although the theoretical expectation remains the same across both analyses—that restrictions in diversity jurisdiction are likely to be associated with a disconnect between the preferences of Congress and the outputs of the federal courts above and beyond judicial caseload pressures—there is some reason to expect that relationship to be stronger in the first equation, where the dependent variable is the lower threshold of passage through just one House of Congress. This expectation primarily results from the reality that it is easier to pass legislation through one House of Congress than two. In the former case, political and administrative factors might produce a relatively immediate and direct impact; in the latter, however, the political passions that may have produced passage in one House must necessarily be filtered through another, often less
supportive, body. Of course, legislative passage can hardly ever be guaranteed even under favorable conditions. Thus, just as the threshold for passage becomes twice as complex, so too will additional potential roadblocks to passage appear with the introduction of a second chamber, its committees, and distinctive procedural rules.

By necessity, the logit models described here are imperfect. Specifically, though the importance of various outside interests in the historical evolution of diversity jurisdiction has already been noted, those pressures do not lend themselves to quantification. Arriving at a defensible quantitative measure of group activity would be onerous enough; finding such a measure that could be tapped over the course of one hundred thirty years of American history would be impossible. Moreover, these interests have desired to preserve the status quo, and virtually none have advocated limitations on diversity jurisdiction. Because of this, the subsequent quantitative analyses are purposefully streamlined, their sole objective being to determine the relative weight of administrative and outcome-oriented factors on congressional decisions to retract the reach of diversity jurisdiction. Nonetheless, it is important to keep in mind that the earlier qualitative assessments of these interest-based factors suggest they have played a consistent role in either delaying or diluting changes in diversity jurisdiction’s scope.
Before presenting the results of these analyses, it is necessary to underscore several imperfections in this design’s construction that could operate to underestimate the hypothesized effects in the obtained results. First, the study’s dependent variables are but two high-profile indicators of congressional action that do not account for more nuanced activities such as a proposal’s passage through committee but denial of a floor vote. For instance, although there was considerable support in the U.S. Senate for extreme proposals of several Progressive politicians to abolish diversity jurisdiction during the Seventy-Second Congress—indeed, enough support to win the Senate Judiciary Committee’s approval—no full floor vote ever occurred on the question. This came at a time when the U.S. Senate was over 35% less Republican than were the federal district courts (Ross 1994, 290). In other words, there is no guarantee that a measure will receive a floor vote even if it has substantial support in Congress. On balance, however, analyzing these instances of congressional action makes a good deal of sense.

Second, while the two-year congressional session is a meaningful and appropriate unit of analysis, it does require somewhat imprecise indicators of both compositional changes to the federal judiciary and modifications in judicial workload statistics. In other words, though the study’s explanatory variables are only allowed to vary every two years, the reality is that neither caseload-per-judgeship nor the partisan difference between Congress and the federal district
courts is ever static. As one example, when the minimum amount in controversy required for diversity suits to qualify for federal court was raised to $2,000 in March of 1887 during the waning days of the Forty-Ninth Congress, the caseload statistics serving as the independent variable were obtained from the Fiscal Year in which that Congress began—1885. Had the bill been acted upon three weeks later at the beginning of the new congressional session, data from 1887 would have been utilized. Practically speaking, this approach is justified by the view that the status quo present at the beginning of a congressional session does considerably more to structure debates over jurisdictional change than do the everyday fluctuations in workload or partisan composition of the federal bench. Finally, the analyses deal with a relatively small number of cases. This, of course, makes it all the more difficult to discern meaningful relationships from the data. Thus, while the analysis is designed as precisely as possible given the units of analysis, it remains possible that factors such as those described above could operate to weaken the quantitative results that are hypothesized to emerge from the analyses.
MODELS AND RESULTS

As previously noted, Models 1 and 2 examine activity relating to diversity jurisdiction throughout the entire 1875-2004 period. The formal equation representing the House-specific model is provided below:

**Equation 1**: $\text{House passage} = \beta_0 + \beta_1 \text{Workload} + \beta_2 \text{Distance} + \beta_3 \text{Control} + \varepsilon$

In light of the data’s distribution and potential for skewed outcomes, the results obtained from each of the binary logit analyses were measured against results obtained from rare-event corrected logit analyses to check for bias in the estimates (King and Zeng 2001). However, because the dependent variable’s distribution is not seriously skewed in any of the cases, the statistical and substantive results of the rare-event analyses were virtually identical to the results obtained from traditional logit. In every case, the levels of statistical significance were identical between the two analyses. Thus, for sake of parsimony and ease of interpretation, only the traditional logit results have been reported here. The results obtained from the logit analysis of diversity-curbing legislation’s passage through the House of Representatives from 1875 to 2004 appear in Table 5.3.
Table 5.3: Logit Analysis of House Activity on Diversity-Curbing Legislation, 1875-2004

Looking to Table 5.3, the results obtained from Equation 1 make it clear that both judicial workload considerations as well as differences in the partisan composition of the House of Representatives and the federal judiciary are significant and positive predictors of those congresses during which the House attempted to restrict the scope of federal diversity jurisdiction. This is consistent with each of the directional hypotheses advanced earlier. Before interpreting
these results in additional, more meaningful ways, consider Equation 2, which represents passage of diversity-curbing legislation through both Houses of Congress.

**Equation 2:** \( \text{Congressional passage} = \beta_0 + \beta_1 \text{Workload} + \beta_2 \text{Distance} + \beta_3 \text{Control} + \varepsilon \)

<table>
<thead>
<tr>
<th>Variables</th>
<th>Logit Model Coefficient (SE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Civil Cases-per-judgeship</td>
<td>.021** (.011)</td>
</tr>
<tr>
<td></td>
<td>% Courts GOP - % Congress GOP</td>
</tr>
<tr>
<td>One Party Control of Congress and Courts</td>
<td>1.881 (1.491)</td>
</tr>
<tr>
<td>Constant</td>
<td>-9.524*** (3.907)</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-14.756</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>65</td>
</tr>
<tr>
<td>% Correctly Predicted</td>
<td>92.3%</td>
</tr>
<tr>
<td>Pseudo R2</td>
<td>.163</td>
</tr>
<tr>
<td>LR Chi2 (2)</td>
<td>5.740</td>
</tr>
<tr>
<td>Prob &gt; Chi2</td>
<td>.125</td>
</tr>
</tbody>
</table>

***Significant at .01 level (one-tailed tests)  
**  Significant at .05 level (one-tailed tests)

Table 5.4: Logit Analysis of Congressional Activity on Diversity-Curbing Legislation, 1875-2004
Table 5.4 displays the results of the second logit analysis, in which congressional enactment is the dependent variable. In the enactment equation, the caseload-per-judgeship variable exhibits clear statistical significance. On the other hand, the partisan differences in institutional composition that emerged from the House-specific analysis disappear.

Of course, these results must be interpreted with considerable caution in light of the fact that Congress has only enacted diversity-curbing legislation with nationwide implications on five occasions since 1875. Additionally, the coefficient for the partisan difference between the courts and Congress remains in the predicted direction, even if it falls short of statistical significance. Still, it appears that while both institutional and outcome-oriented variables have structured the timing of diversity-curbing legislation’s passage by the House of Representatives, that legislation’s emergence from Congress as a whole has largely been a function of perceived problems with court congestion, as captured by our caseload-per-judgeship measure. That is broadly consistent with the qualitative story described in Chapter Four and the three case studies of this chapter.

In order to better understand the substantive implications of these results, Tables 5.5 and 5.6 contain several predicted probabilities that further illustrate the
findings reported in Tables 5.3 and 5.4.\textsuperscript{12} Examining Table 5.5, which contains predicted values for House passage only, two things become clear. First, the probability estimates increase as one goes both down and across the table, suggesting that as both judicial caseloads and the partisan distance between the House of Representatives and the courts increase, the House becomes increasingly likely to trim the jurisdictional sails of the federal courts in cases involving diversity of citizenship. Second, these trends are unmistakable. When both variables are set at their mean values, there is a roughly sixteen percent chance that the House will vote to curb federal diversity jurisdiction. When the proportion of Republicans in the House of Representatives is equal to the proportion of Republicans on the federal district courts and caseload-per-judgeship remains at its mean, that probability falls to slightly less than seven percent. By contrast, if the distance between the House and the courts is increased one standard deviation above the mean and caseload remains constant, the probability of House action increases to over fifty percent.

Table 5.5 also illustrates the effect of changing caseload-per-judgeship figures on the likelihood of House action. When caseload pressures are fixed at one standard deviation below the mean and the federal courts and the House of Representatives are in perfect partisan alignment, the likelihood of passage is a mere four percent. Yet, when partisan composition is held constant and the

\textsuperscript{12} The predicted probabilities are calculated with party control set at its modal value (1).
caseload value is increased by one standard deviation above the mean, the probability of action more than triples. Finally, when both caseload pressures and the partisan disconnect between the House and the courts are high, the probability of action on diversity jurisdiction rises to nearly seventy percent.

Moving to the predicted probabilities representing passage of diversity-curbing legislation through both houses of Congress that are contained in Table 5.6, a slightly different substantive picture emerges. The results are similar to the House-specific ones in that both caseload pressures and the partisan difference between the courts and the house of Congress nearest in composition to the courts are associated with an increased probability of congressional action. However, it is clear from the estimates that increases in caseload are substantially more predictive of congressional passage than are increases in the partisan gap between the institutions. For example, the probability of congressional action increases by less than five percent when caseloads are low and the partisan divergence between the two institutions moves from zero to one standard deviation above the mean. By contrast, increases in the likelihood of congressional action are much more substantial when caseload pressures are increased. As with the logit results presented earlier in Table 5.4, the implication of these predicted probabilities is that caseload pressure—much more than differences in institutional partisanship—has a consistent and discernible impact on diversity-curbing legislation’s enactment by Congress.
The different weight attached to these determinants of passage in one House of Congress and actual enactment of change revealed by these quantitative analyses makes a good deal of intuitive sense. As the more electorally accountable chamber of Congress, the House of Representatives has historically been more concerned with the judicial outcome-based considerations captured by the partisan gap between its collective membership and the composition of the
lower federal courts. Although it has not been completely immune to the influence of caseload pressures, the case-based concern for judicial outcomes has been especially notable here. By contrast, the importance of these partisan differences has not been echoed as a predictor of congressional enactment of these changes, but concern over judicial administration has been especially important in that regard. This result fits nicely with both the dynamics of the legislative process and many historical interpretations of congressional activity relating to diversity jurisdiction. Because actual passage of legislation is so much more arduous than winning the assent of just one House of Congress, it is unsurprising that the impact of judicial outcomes is so tenuous in the full model of congressional activity. Although the results of this second equation must be qualified by reiterating the lack of congressional action taking place, it appears that many of the outcome-oriented motivations attached to House passage have been stripped away by the time proposals progress to actual legislative passage. Quite simply, it has been relatively difficult to extend the outcome-based motivations that have often led to passage of reform in the House to the actual enactment of diversity reforms by Congress itself.

These results are also consistent with a more general observation of Frankfurter and Landis, who noted long ago that, “Congressional preoccupation with judicial organization is extremely tenuous all through our history except after needs have gone unremedied for so long a time as to gather compelling
momentum for action, or when some unusually dramatic litigation arouses widespread general interest” (Frankfurter and Landis 1928, 36). In other words, as far as passage of legislation is concerned, Congress as a whole has generally ignored the administrative implications of federal diversity jurisdiction until it can no longer turn a blind eye to its impact on the functioning of the federal judiciary. Far from acting swiftly and decisively with respect to the jurisdiction and its effect on caseloads, the quantitative analysis reveals that Congress as a whole has been prodded to enact limitations on the jurisdiction because it has had strong administrative reasons for doing so.

**Diversity Jurisdiction Pre- and Post- 1950s**

There is considerable historical evidence that the congressional politics of federal diversity jurisdiction underwent a shift around the beginning of the Warren Court. As the qualitative analyses indicated, after that time administrative motivations apparently became even more important to the pursuit of curbs in diversity jurisdiction and the importance of judicial outcomes in those debates attenuated. Specifically, as the Warren Court began issuing controversial decisions in the areas of civil liberties and civil rights, the irritation over judicial outcomes that had done so much to influence the course of diversity jurisdiction in past congresses was redirected and soon manifested itself in more direct attacks on the judicial system (e.g., Purcell 1992). Those attacks sought to limit federal
constitutional jurisdiction over areas such as racial desegregation, communist subversion, and the like. At the same time, anecdotal accounts suggest that subsequent efforts to reform federal diversity jurisdiction were increasingly being driven by forces other than congressional disagreement with federal court outputs in diversity cases (see Kastenmeier and Remington 1979).

In reality, the limited nature of the historical data makes it impossible to analyze this assertion with any degree of statistical certitude. Still, with this historical evidence in mind, I undertook a series of supplementary analyses of congressional activity vis-à-vis diversity jurisdiction pre- and post-1953—the year in which Earl Warren became Chief Justice of the United States. Due to the exceptionally small samples being utilized, the models performed quite poorly and, as such, are not reproduced here. However, the models of congressional activity from 1875 to 1952 generally indicated that both the caseload and judicial outcome variables were important constituents of diversity-curbing activity’s success in both the House of Representatives and Congress as a whole prior to 1953. The models of congressional activity subsequent to Warren’s appointment as Chief Justice were less clear. In the House-specific equation, differences in the composition of the chamber and the lower federal courts were statistically significant predictors of House activity, but caseload had no statistically significant impact on that activity. Still, the magnitude of that composition-based variable is less compelling than it was in the pre-1953 House equation. Moving
to actual enactment of jurisdictional changes subsequent to 1953, caseload emerged as a statistically significant predictor of action while the party-based difference measure showed no signs of statistical significance. Of course, in light of the small number of occasions on which diversity-curbing jurisdiction has passed either the House (N=4) or Congress as a whole (N=3) since 1953, these findings carry little—if any—substantive weight.

In any case, since the beginning of the Warren Court most observers have pointed to the increased role of actors such as the Judicial Conference and other groups in congressional decisions to retract diversity jurisdiction. Typically, their involvement has been associated with the adjustment of diversity jurisdiction to keep caseload pressures under control. The idea of Congress’s increasing use of judicial workload considerations in its administration of the federal courts has been noted elsewhere, principally in the activity of judgeship creation, and it would be unsurprising if a similar set of considerations were found to drive its jurisdictional activities as well (deFigueiredo et al 2000). Another possibility is that Congress has simply chosen to treat the supply side of the judicial equation by adding judges to dispose of the ever-growing number of diversity cases in the federal courts, and has done relatively little to curb those caseload demands by pursuing jurisdictional limitations to lighten those caseloads.
CONCLUSION

The examinations of congressional behavior and the politics of federal jurisdiction presented here are revealing in several ways. For one, they indicate that both judicial workload concerns as well as judicial outcomes have represented important aspects of Congress’s decisions to limit the scope of federal jurisdiction. At the very least, it is clear that the history of diversity jurisdiction has been influenced by more than a single-minded concern to alleviate the workload of the federal courts. Outcome-oriented concerns with diversity jurisdiction were most evident in the House of Representatives, especially prior to the beginning of the Warren Court in the 1950s, even if attention to judicial workload had a smaller impact on those deliberations. However, it is equally clear that this one House’s largely outcome-motivated concern for limiting diversity jurisdiction has generally not been sufficient to ensure enactment of substantive jurisdictional changes by Congress as a whole. In order for those changes to be realized, it has typically taken an additional factor. Only when faced with substantial and immediate challenges to judicial efficiency have both houses of Congress acquiesced and enacted limitations in diversity jurisdiction. Though not definitively settled by the supplementary quantitative analyses, many believe the post-Warren Court years have ushered in an era of diversity jurisdiction that has been driven by attention to matters of judicial administration. More than anything else, it is argued, this alleged shift from outcome-based
concerns reflects an evolution in the weight given to various social and political concerns that came before the federal courts. Prior to the Warren Court’s ascendance, economic cases pitting individual litigants against large corporations were both high-profile and common—as was the strong perception that Republican-dominated federal courts had a special affinity toward big business and its concerns. By the mid-1950s, however, increases in the rate of liberal judicial decision making in other areas of social and political concern redirected the attention of Congress and many of its members to jurisdictional oversight’s potential role in disrupting a number of judicially-led advances in civil liberties and civil rights. The following chapter begins to tell that story.
CHAPTER 6

THE CASE OF “COURT-STRIPPING” PROPOSALS

“The legislation proposed…is not in harmony with the spirit and intention of the Constitution. It can not fail to affect most injuriously the just equipoise of our system of Government, for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation. Thus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution, and any act which may be construed into or mistaken for an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country can not fail to be attended with unpropitious consequences.”—President Andrew Johnson, (Message Accompanying Veto of Repeal of 1867 Habeas Corpus Act, in Fisher and Devins 1996, 51)

“The Constitution leaves room for countless political responses to an overly assertive court….Congress can strip it of jurisdiction….The means are available, and they have been used to great effect when necessary—used, we should note, not by disreputable or failed leaders, but by some of the most admired Presidents and Congresses in American history.”–Larry D. Kramer (2004, 249)

“Whether Congress may wholly divest the Supreme Court of appellate jurisdiction over a constitutional claim is a complex question that has been the subject of much heated and inconclusive scholarly debate…However intrigued we may be by such questions, we should not purchase answers to them at the price of an unnecessary and possibly unfortunate confrontation between the Congress and the Court.”

—Attorney General Griffin B. Bell
Letter to Senator Ribicoff,
(127 Cong. Rec. 7636-7637)

When the United States House of Representatives passed it on July 22, 2004 by a vote of 233 to 194, the Marriage Protection Act became the first court-stripping legislation in twenty-two years to clear one House of Congress. The bill itself, designed to preclude all federal courts from reviewing the constitutionality
of the 1996 Defense of Marriage Act, was touted by its proponents as being necessary to safeguard the sanctity of traditional marriage from “activist judges” seeking to impose same-sex unions on the nation by judicial fiat. Barely two months later, the House of Representatives passed a second measure designed to tame the federal courts. That legislation, commonly known as the Pledge Protection Act, came about in response to the Ninth Circuit Court of Appeals’s 2002 decision in *Elk Grove Unified Schools v. Newdow*, which held that voluntary, teacher-led recitations of the Pledge of Allegiance violated the First Amendment’s Establishment Clause because of the Pledge’s reference to “one nation under God.” That act’s purpose was to prohibit the federal courts from adjudicating controversies related to the constitutionality of the Pledge of Allegiance.

The House’s passage of these measures—alternatively described as jurisdictional gerrymandering, jurisdiction-stripping, or court-stripping—was noteworthy for several reasons. First, it resurrected an ongoing historical debate over the extent to which Congress may use its jurisdictional oversight to limit the federal judiciary’s involvement in controversial areas of law and politics. In other words, these actions revived discussions about the propriety of Congress using its jurisdictional controls to circumvent constitutional decisions of the federal courts. Since the earliest years of the Warren Court, debates over the constitutional legitimacy of such attempts, which have sought to limit federal court review of
such controversial issues as desegregation, legislative reapportionment, abortion, and voluntary school prayer, have come to occupy such a perennial place in legal academe that the literature has been described as “choking on redundancy” (Gunther 1984, 897). Yet, in spite of this piquant debate, it has long been said that “few constitutional problems are more fundamentally unsolved.” (Merry 1962, 53). This stems, at least in part, from the Constitution’s lack of clear guidance—some might even say its internal contradictions—on the subject. This has even led one partisan in the ongoing debate over jurisdiction-stripping to concede that “there are credible constitutional arguments on both sides” of the issue (Kay 1981, 185).

Second, in giving new life to discussions over the proper scope of federal judicial activity, the House’s 2004 actions also contributed to the ongoing debate over the federal judiciary’s appropriate role in American society. What is more, these actions could signal the beginning of yet another wave of jurisdiction-stripping, which had been hard-pressed to attract a sustained legislative following since the mid-1980s. Such a surge certainly seems possible, now that the Senate Republican Policy Committee has followed the House of Representatives in embracing the tactic as a way to “restore popular control of the Constitution” (“The Case for Jurisdiction-Stripping Legislation,” 1). In light of this activity and
its potential implications, it is critical for scholars to gain a better appreciation for jurisdiction-stripping and to pinpoint the factors that lead members of Congress to pursue it.

Unfortunately, investigations of jurisdiction-stripping have been impeded by a belief that such proposals represent little more than knee-jerk reactions by crackpot legislators who object to isolated judicial decisions. What has resulted from that view is a silent consensus that there is not much about these jurisdiction-stripping proposals worthy of investigation, and the paucity of scholarship in the area reflects that belief. With one recent exception (Bell and Scott 2005), the literature that does exist on the topic is dominated by descriptive scholarship rather than rigorous analytical work (see Nagel 1965; Segal 1991; Schmidhauser and Berg 1972). As Bell and Scott (2005) have accurately noted, “Although it has been forty years since Nagel noted the lack of systematic efforts within the discipline to understand congressional attempts to limit judicial jurisdictions, relatively little progress has been made in this area. Much of the recent scholarship in this area has been descriptive rather than analytical, or partisan rather than impartial” (2). As a result, it is necessary to reexamine the phenomenon more systematically.

The fact that no modern jurisdiction-stripping legislation has secured enactment has clearly depressed scholarly interest in analyzing the activity. Many have assumed that jurisdiction-stripping activity lacks importance because it has
not translated into substantive policy enactments, but if legislative success were the threshold for scholarly interest in judicial matters, topics such as the Roosevelt Court-packing plan or unsuccessful efforts to divide the Ninth Circuit Court of Appeals would be of little interest to political scientists. Moreover, as a reading of the historical record indicates and subsequent pages of this dissertation demonstrate, the failure of several of these measures was by no means preordained. One observer has even concluded that “[i]t is surprising, in view of the heat generated…that not one of those bills was enacted into law” (Taylor 1981, 2789). Nor is it entirely clear that such measures must secure enactment in order to accomplish their purpose—particularly if part of that purpose is to exert a chastening effect on the federal courts themselves. Segal (1991) has noted as much, saying, “[studying attempted Court-curbing] might give us clues as to when future attempts will be made, attempts that someday could be successful. Even if Court-curbing never formally succeeds, however, the question is important, for even failed attempts may lead to self-imposed limits on judicial policy-making” (Segal 1991, 388). Senator Jesse Helms put it much the same way in 1982, saying, “In the long run such [jurisdiction-stripping] action will be highly salutary in that it may not only correct actual errors but it also serves as a warning to the courts that they must stay within the bounds of judicial competence” (128 Cong. Rec. 4365). According to yet another authority, “The
potential reach of this power…cautions against the judiciary straying too far or too often from elected branch preferences” (Fisher and Devins 1996, 51).

Finally, jurisdictional episodes can represent an integral part of broader attacks on the federal courts. A week before he criticized Supreme Court justice Anthony Kennedy’s majority opinion in Roper v. Simmons (2005)13 for its reliance on international law (Hulse 2005) and after berating the federal judiciary for its handling of In re Schiavo (Hulse and Kirkpatrick 2005), House Majority Leader Tom DeLay (R-TX) lobbed a thinly veiled threat to the courts. He said, “We set the jurisdiction of the courts. We set up the courts. We can unset the courts” (Stolberg 2005). In short, by treating legislative enactment as the sine qua non of court-curbing, researchers have failed to pinpoint the precise determinants of when, why, and with what frequency Congress as a whole—as well as its individual members—have pursued jurisdiction-stripping activity, much less how that activity fits into a more basic theoretical understanding of Congress’s behavior on matters of federal jurisdiction. Congress and its members may advocate stripping the federal courts of jurisdiction over particular civil liberties topics for a number of specific reasons, and do so with varying degrees of intensity over time. Even if the original impetus for activity in a particular area is

13 A 5-4 Court held the death penalty unconstitutional, as applied to minors who were under age 18 at the time criminal activity was alleged.
traceable to a highly polarizing past or present judicial decision, that does not necessarily account for the seemingly erratic nature of congressional behavior in later years.

In the pages that follow, I operationalize the types of activity encompassed by the term “jurisdiction-stripping,” present an historical overview of jurisdiction-stripping, describe its unique status in the larger relationship between the federal courts and Congress, and provide an overview of the arguments advocated by each side in the debate over the practice’s constitutional legitimacy. I also situate the notion of jurisdiction-stripping within the general theoretical framework for understanding the politics of federal jurisdiction that Chapter Three presented. Subsequent to that, the chapter contains several quantitative analyses designed to demonstrate certain empirical regularities in the incidence of jurisdiction-stripping activity and the characteristics of the members who have championed it. These analyses pay particular attention to the role of judicial outputs, public opinion, and congressional preferences in structuring consideration of court-stripping legislation. More generally, they seek to provide a better appreciation for the particular dynamics that drive attempts by Congress and its members to restrain the constitutional jurisdiction of the federal courts.

Chapter Seven builds upon the current chapter’s theoretical background and quantitative findings by presenting detailed case studies of jurisdiction-stripping in the areas of school assignment, religious establishment, and the right
to privacy. Those case studies rely heavily on the broad quantitative results discussed in the second half of Chapter Six, in an attempt to assess the relative impact of judicial outcomes, congressional preferences, and public opinion on court-stripping activity in these more specific issue contexts. In addition, Chapter Seven addresses comparisons and contrasts in jurisdiction-stripping behavior across these three broad issues, uses comparative analysis in an effort to understand the absence of jurisdiction-stripping activity in certain areas of constitutional adjudication, and concludes with a brief discussion of court-stripping’s future viability.

**AN INTRODUCTION TO JURISDICTION-STRIPPING**

As prior chapters have made clear, it is neither unusual nor necessarily controversial for Congress to impose limitations on the exercise of federal jurisdiction. For instance, Congress’s authority to limit diversity jurisdiction as it sees fit is widely accepted, and it regularly passes legislation restricting the ability of federal courts in other, more esoteric ways. In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which placed substantial limits on the federal courts’ ability to provide habeas corpus relief (e.g., Yackle 1996). More recently, in passing the Terrorism Risk Insurance Act of 2002, Congress specifically prohibited the federal courts from reviewing the U.S. Treasury Secretary’s official designation of particular events as “terrorist acts”
During that same session, Congress also passed an appropriations bill which contained a provision stripping all federal courts of jurisdiction over certain timber projects. As the measure itself stipulated, “Any action authorized under this section shall not be subject to judicial review by any court of the United States” (PL 107-206; “The Case for Jurisdiction-Stripping Legislation,” 7). Nor does such legislation show any signs of attenuation. In February of 2005, the House of Representatives passed HR 418, the REAL ID Act of 2005. In addition to prohibiting states from issuing driver’s licenses to illegal aliens, the legislation contained a section eliminating federal jurisdiction over legal questions arising out of the construction of a border fence between Tijuana, Mexico, and San Diego, California. According to Section 102 of the Act, “Notwithstanding any other provision of law (statutory or nonstatutory), no court shall have jurisdiction ... to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security with regard to the construction of the fence” (Kenkel 2005; “Real ID, Real Problems”). This language is remarkably similar to that contained in many of the jurisdiction-stripping measures that members of Congress have proposed since the beginning of the Warren Court in attempts to undo federal constitutional decisions.

At first blush, this dissertation’s working definition of jurisdiction-stripping activity—advocating legislative passage of statutes designed to limit or remove the ability of federal courts to adjudicate specific classes of constitutional
issues—no doubt strikes most observers as being fundamentally distinct from the imposition of limitations on federal statutory jurisdiction over suits arising from diversity of citizenship. However, the two are actually wedded by an important feature. As Chapter One noted, each is an example of concurrent jurisdiction, where jurisdictional responsibilities are shared between the state and federal courts. When Congress enacts limitations on diversity jurisdiction at the federal level, it necessarily affects the number of diversity cases being heard in the state courts as well. In the same way, were Congress to limit or eliminate access to the federal courts in cases concerning a particular constitutional provision—the Establishment Clause, for instance—state courts would, by default, assume a much more prominent role in the adjudication of cases concerning that constitutional provision. As with suits between citizens of different states, legal struggles over those issues would not disappear as a result of Congress’s jurisdictional action; instead, those cases would be redirected to courts in the individual states, yielding a net increase in the importance of state judges and the finality of their decisions in such legal disputes. To some, this prospect embodies the holiest tenets of the American federal system. To many others, it represents a dangerous legislative encroachment on the power of federal judicial review.
Jurisdiction-Stripping Defined

Since Congress regularly limits federal jurisdiction over various topics, what then constitutes the constitutionally ambiguous notion of “jurisdiction-stripping” as the term has come to be defined in contemporary times? Since Congress engages in certain types of jurisdiction-limiting activity without much controversy, why does such strident debate surround the practice when it is pursued in regard to issues such as school prayer, involuntary school busing, or the Pledge of Allegiance? After all, as moderate Senator Lowell Weicker (R-CT) described it in 1982, “No one is confronting here the substance of prayer in schools…or the substance of abortion. Rather, we are confronted very baldly with the issue of whether or not the Congress of the United States by statute can overrule the courts of this Nation—the issue of court-stripping” (128 Cong. Rec. 21841). Of course, Weicker’s assertion is somewhat misleading. There are many issues—statutory issues—on which the Congress clearly can and does overrule the federal courts (e.g., Eskridge 1991b; Hausegger and Baum 1999). This dissertation’s earlier examination of federal diversity jurisdiction has demonstrated that its history has also been shaped by efforts to undermine the authority and decisions of the federal courts. Still, the policy motives behind those efforts have produced no serious questions of constitutionality. Others
would accurately note the highly polarizing nature of the subjects which have occupied proponents of jurisdiction-stripping, concluding that the character of those issues virtually insures heated debate over them.

However, the modern practice of jurisdiction-stripping is rooted in something even more fundamental. It is based on the implicit assumption that a simple majority of Congress is just as equipped as are five members of the U.S. Supreme Court or individual lower federal court judges to arbitrate constitutional questions. As utilized here, the idea of jurisdiction-stripping challenges the federal judiciary’s supremacy over constitutional interpretation, because it assumes that Congress can limit that judicial interpretation via traditional statutory action. Senator Jesse Helms betrayed that intent in 1979, when he argued that “…The Congress need not yield to any Justice of the Supreme Court in its respect for the words of the First Amendment or for the principles of history behind them (125 Cong. Rec. 7579). Naturally, many others believe this view is antithetical to the Constitution, which outlines the process of constitutional amendment as a means by which to check the power of the federal courts. Consider the comments of Senator Edward Kennedy: “The Helms [school prayer] amendment reaches one of the most basic and fundamental issues, and that is the appropriateness of the Supreme Court to be the interpreter of the Constitution of the United States, an issue which I thought was resolved many years ago” (125 Cong. Rec. 7632). Missouri’s Thomas Eagleton (D-MO) made a
similar point several years later, calling jurisdiction-stripping efforts “Nothing more than disguised efforts to amend the Constitution through passage of a mere statute” (128 Cong. Rec. 4447).

Before going further, it must be underscored that the hypothetical removal of federal jurisdiction over certain constitutional questions would not, by itself, formally reverse a single judicial interpretation of constitutional principles. This is important to appreciate, and it is a subtlety that seems to have been lost on a substantial number of jurisdiction-stripping’s proponents. Senator Paula Hawkins’s (R-FL) appraisal of the 1982 Helms Prayer Bill, which would have eliminated all federal court jurisdiction over the constitutional issue of voluntary school prayer, is typical: “The question we now face, Mr. President, is whether or not to reinstate voluntary school prayer” (128 Cong. Rec. 24890). It is difficult to conceive of a more explicit admission of jurisdictional adjustment’s instrumentality in securing certain policy outcomes.

Jurisdiction-stripping’s opponents have noted that passage of such jurisdictional bills would actually have the paradoxical effect of elevating the very liberal judicial decisions that motivated them to permanent status. If Congress were to pass legislation barring federal courts from reviewing abortion-related cases, that action would not reverse the Supreme Court’s ruling in *Roe v. Wade*. To the contrary, doing so would etch the decision in constitutional stone, since future Supreme Courts would be barred from reconsidering the decision at a later
date (Kay 1981, 187). Practically, however, removing federal jurisdiction over abortion-related cases would enable antagonistic state courts to disregard *Roe v. Wade*, since their actions would no longer be subject to federal judicial oversight. In a sense then, court-curbing measures are premised on the assumption that inferior courts will abandon principles of *stare decisis* once the ability of superior courts to check their decisions is removed.

Congress’s unquestioned ability to limit federal jurisdiction in certain contexts illustrates the fallacy of concluding that all attempts to limit jurisdiction represent unaccepted and unconstitutional uses of congressional power. It also makes it difficult to operationalize just what activities are encompassed by the notion of “jurisdiction-stripping.” Much like Justice Stewart’s classic definition of obscenity (see *Jacobellis v. Ohio* 1964, 378 U.S. 184, 197), most astute observers simply recognize jurisdiction-stripping when they see it. Still, it is quite challenging to lay out objective criteria that define the practice *a priori*. Perhaps the main handicap in doing so surrounds the difficulty of drawing a line—if one can even be drawn—between constitutional and unconstitutional jurisdictional adjustment. However, as previously noted, this dissertation’s operational definition of jurisdiction-stripping refers to any legislative effort which attempts to use Congress’s jurisdictional power in a way that would undermine those federal court decisions that have their basis in the U.S. Constitution.
In principle, this definition is applicable to federal court decisions on topics ranging from interstate commerce or school prayer to eminent domain or the exercise of presidential authority. As well be seen, however, virtually all court-stripping activity has been limited to the broad domain of civil liberties topics. Although Chapter Seven discusses more specific reasons for this selectiveness, many explanations for the centrality of civil liberties issues to the politics of jurisdiction-stripping can be traced to the progressive constitutional decisions issued by the Warren Court during the 1950s and 1960s. As a result, political conservatives have been the only notable advocates of jurisdiction-stripping legislation since that time; liberals, on the other hand, have generally refrained from championing such measures. Thus, the conservative monopoly on contemporary jurisdiction-stripping activity appears to stem more from recent political and legal history than it does from any underlying theoretical predisposition of right-wing politicians to attack the federal courts—or, for that matter, a liberal reluctance to attack the courts when it suits their political purposes.

The History of Jurisdiction-Stripping, 1789-1953

It has been argued that the contemporary jurisdiction-stripping movement’s roots reach back as far as the 1820s and 1830s, when members of Congress began to react to certain Supreme Court rulings by introducing
legislation proposing the elimination of the Court’s appellate jurisdiction over all state court decisions (Ratner 1960, 157). Although none of those measures passed, “those who perceived a tendency toward centralization in the Court’s decisions proposed repealing section 25 of the 1789 Judiciary Act, which authorized Supreme Court review of certain state court judgments” (Gunther 1984, 896-897; Warren 1923). Not unlike more contemporary struggles, disagreement with the Court’s substantive constitutional decisions motivated a number of early lawmakers to view Congress’s jurisdictional power as a way to circumvent those decisions.

Congress’s 1868 decision to limit the Supreme Court’s jurisdiction over Southern habeas corpus appeals during postwar Reconstruction is, of course, a much more commonly cited historical precedent for jurisdictional limitation. Faced with the prospect that the Supreme Court would grant imprisoned journalist William McCardle a writ of habeas corpus, as it had been given jurisdiction to do under federal legislation enacted in 1867, the Reconstruction Congress quickly passed an act over President Johnson’s veto removing the Supreme Court’s jurisdiction over those appeals. The Court itself ultimately validated Congress’s action by concluding that, since the legislature’s power to adjust the Supreme Court’s appellate jurisdiction was plenary, it no longer had the authority to adjudicate McCardle’s case (Perry 1989; see Wright 1994, 40-42 for an extended discussion).
Although congressional use of jurisdictional measures to undermine certain federal court decisions has been associated with political conservatism in contemporary times, that was not always the case. Nor, as was just noted, are there especially powerful theoretical reasons to associate political conservatism in general with the court-stripping movement. Indeed, when the federal courts were especially friendly to big business during the 1920s and early 1930s, it was chiefly Democrats and other future New Dealers who advocated jurisdictional legislation to curb the perceived excesses of the conservative, pro-business federal courts. This was especially true with regard to the judiciary’s injunctive interference in labor disputes (Frankfurter and Green 1930). In 1932, for example, the Democratic-controlled Congress enacted the Norris-LaGuardia Act, which withdrew from the generally pro-employer federal courts jurisdiction to issue injunctions in labor disputes (see Lovell 2003 for a comprehensive discussion). It also deprived federal courts of jurisdiction to enforce so-called “yellow dog contracts,” in which employees had agreed not to join labor unions as a condition of employment. The U.S. Supreme Court ultimately sustained the Act’s constitutionality by a 5-2 vote in the 1938 case of Lauf v. E.G. Shinner & Company, and many contemporary advocates of jurisdiction-stripping continue to view the Norris-LaGuardia Act as a validating precedent for their position (Rice 1981, 190).
An Overview of the Jurisdiction-Stripping Movement Since the Warren Court

Though discussed at length in Chapter Seven, it is important here to introduce the various legal and political topics that have driven this contemporary era of court-stripping. Since the Warren Court’s 1954 progressive decision in Brown v. Board of Education, conservative members of Congress have introduced measures designed to limit or remove federal jurisdiction over certain constitutional questions on a reasonably consistent basis. The first of these were southern-sponsored proposals constructed to eliminate federal jurisdiction over public school desegregation in the wake of the Supreme Court’s decisions in Brown v. Board of Education and Bolling v. Sharpe (1954). Similar jurisdiction-stripping measures soon began to appear in response to Supreme Court decisions in certain subversion and national security cases, as segregationists and security-conscious senators “found common ground for opposition in the concepts of states’ rights and virulent anti-communism” (Murphy 1962, 88). The Jenner-Butler Bill, which failed to pass the Senate by just eight votes in 1958, would have precluded the Supreme Court from deciding cases concerning the authority of congressional committees, programs designed to assure the loyalty of government employees, state-level subversive activity controls, school district regulations concerning subversive teaching activities, and policies regulating admission to the legal bar (Pritchett 1961). Each of the bill’s sections was a direct
response to a specific Supreme Court decision—*Watkins v. U.S.* (1957), *Service v. Dulles* (1957) and *Cole v. Young* (1956), *Pennsylvania v. Nelson* (1956), *Slochower v. Board of Higher Education* (1956), and *Schware v. Board of Bar Examiners* (1957) and *Konigsberg v. State Bar of California* (1957), respectively. “All of these decisions were handed down [by the Warren Court] during 1956 and 1957 and limited the Cold War loyalty and security programs. The bill was thus a major political response tuned to the perceived crisis of its time” (Beck 1982, 4439-40; see Pritchett 1961; Murphy 1962). The legislation itself may have failed, but the vote was, nevertheless, “an impressive demonstration of anti-Court strength” (Murphy 1962, 208). While members of Congress continued to introduce similar legislation in the early 1960s, the Warren Court’s controversial decisions concerning legislative reapportionment (*Baker v. Carr* 1962; *Wesberry v. Sanders* 1964; *Reynolds v. Sims* 1964)—and, later, school prayer and Bible reading (*Engel v. Vitale* 1962; *Abington School District v. Schempp* 1963; *Murray v. Curlett* 1963)—led to an unprecedented embrace of jurisdictional gerrymandering by members of Congress.

Later in the 1960s, the Supreme Court’s decisions in several criminal rights and obscenity cases also stirred the ire of a few court-strippers in Congress. A handful of members also introduced jurisdictional legislation in response to the Supreme Court’s 1969 decision in *Powell v. McCormack*, providing the lone instance of jurisdiction-stripping’s pursuit on a topic unrelated to civil liberties.
There, the Court held that the House of Representatives had no power to exclude a duly elected member from the Chamber. However, those decisions quickly took a back seat to the Court’s unanimous but provocative decision in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), which declared mandatory busing to be a constitutionally permissible method for enforcing racial desegregation. *Swann* immediately provided a new motivation for the jurisdiction-stripping movement, and it remained a popular one for the greater part of the 1970s and even into the 1980s. By the 1970s and early 1980s, school prayer and abortion had become prominent targets of the jurisdiction-stripping movement as well. Aside from a few isolated proposals in the 1990s, Congress’s jurisdiction-stripping activity remained relatively dormant until the House of Representatives passed the Marriage Protection Act and the Pledge Protection Act in the summer and fall of 2004.

**The Constitutionality of Jurisdiction-Stripping**

Because the scope of Congress’s control over both the Supreme Court’s appellate jurisdiction and the jurisdiction of the lower federal courts has been the topic of so few judicial decisions, the Supreme Court’s decision in *ex parte*

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14 See Wright 1994, 40-47; Fallon, Meltzer, and Shapiro 1996, 348-387; and Fisher and Devins 1996, 44-54 for more detailed discussions of the difficult constitutional questions surrounding the practice of jurisdiction-stripping. For a comprehensive symposium on both the wisdom and constitutionality of jurisdiction-stripping, see Sloviter 1982; Redish 1982; Ratner 1982; Rice 1982; McClellan 1982; Baucus and Kay 1982.
McCardle (1869) represents a centerpiece in arguments on both sides of the jurisdiction-stripping issue (Wright 1994, 41-42). Advocates of the tactic argue that McCardle embodies the proposition that Congress’s jurisdictional power is plenary, regardless of whether the variety of federal jurisdiction at issue is the ability of federal courts to decide cases based on diversity of citizenship, to entertain injunctions in labor disputes, or to rule on proposals concerning voluntary prayer in public schools. Adherents to this position argue that inquiries into congressional motivations are irrelevant because, whether Congress seeks to limit jurisdiction in order to facilitate judicial administration or to undermine a line of judicial decisions, its jurisdictional power comes with virtually no constitutional strings attached (e.g., Abraham 1981; Rice 1981).

While opponents of jurisdiction-stripping may differ on specifics, they generally agree that the only acceptable method for effectively rejecting a constitutional decision of a federal court is by amending the Constitution. Congress may, of course, overturn a constitutional decision of the U.S. Supreme Court or any other federal court by utilizing the process of constitutional amendment that is explicitly outlined in the founding document. However, that process is a delicate one requiring both legislative supermajorities and ratification by three-fourths of the states. In light of this difficulty, only four constitutional amendments have ever overturned decisions of the U.S. Supreme Court. To opponents of jurisdictional gerrymandering, this is precisely the point. If a
substantial popular majority disagrees with a particular decision—and if the Court refuses to reconsider that decision—the procedural mechanism of constitutional amendment is in place to deal with just such an occurrence. But since today’s narrow majority could easily become tomorrow’s minority, efforts that would all but overrule federal constitutional decisions by simple majority strike opponents as beyond the pale. Because these requirements of amendment are specifically articulated by the Constitution, no serious contemporary legal observers contend that a simple majority of Congress could pass legislation directly overruling a constitutionally-based decision of a federal court. To do so would render members of the federal judiciary advisory interpreters of the Constitution, whose opinions Congress could freely disregard.

Apart from naked policy concerns, intellectual positions on the constitutional legitimacy of jurisdiction-stripping typically hinge on whether one believes Congress may accomplish surreptitiously what it cannot, by all accounts, do directly. Foes of jurisdiction-stripping argue that Congress should not rely on jurisdictional technicalities to undermine the constitutionally-prescribed supermajorities required to undo constitutional decisions of the federal courts. At minimum, they argue that pursuing such a course violates the spirit of the Constitution by jeopardizing judicial independence and the separation of powers (Kay 1981, 187). Opponents also argue that the enactment of jurisdiction-stripping proposals would represent an open invitation for lower courts to ignore
stare decisis, which could have grave consequences for the judicial system. No less a conservative than Senator Barry Goldwater counseled against court-stripping’s use in 1982, saying, “As sure as the sun will rise over the Arizona desert, the precedent will return to oppress those who would weaken the federal courts. If there is no independent tribunal to check legislative or executive action, all the written guarantees of rights in the world will amount to nothing” (128 Cong. Rec. 1041).

As Brilmayer and Underhill have described it, “the usual arguments against jurisdictional gerrymandering are based…on reasoned speculation about what ‘our perfect constitution’ ought to say” (1983, 821, emphasis added). On the other hand, advocates of the practice have gravitated toward the letter of the Constitution. They argue that, whatever contemporary observers might wish the document said or even what it might have been advisable for it to say, nothing beyond the expressed words of the Constitution is relevant to the constitutionality of using jurisdictional curbs to check decisions of the federal courts. While even most proponents admit that Congress could not curb jurisdiction in ways that would violate other constitutional provisions such as the Equal Protection Clause—by, for instance, selectively stripping the federal courts of jurisdiction over those lawsuits to which Catholics, homosexuals, racial minorities, or disabled citizens are a party—they interpret Congress’s power to regulate federal jurisdiction far more literally and view it as being a more flexible tool of
legislative oversight than do their opponents (e.g., “The Case for Jurisdiction-Stripping,” 11). As Rep. John Hostettler (R-IN), principal author of the 2004 Marriage Protection Act put it, “The U.S. Constitution is very clear that Congress has the authority to regulate all [the Supreme Court’s] appellate cases. Anyone who reads the Constitution and has a basic understanding of grammar understands [that]” (Vascellaro 2004).

Before moving to the chapter’s theoretical and analytical sections, it should be noted that Congress’s power to limit the jurisdiction of lower federal courts and its ability to make exceptions to the U.S. Supreme Court’s appellate jurisdiction invoke distinct constitutional arguments. The Supreme Court’s existence is mandated by Article III of the Constitution—indeed, it is the only judicial tribunal the document specifically requires. By contrast, the federal judiciary’s lower tiers owe their existence to statutory authorizations by Congress. Because those inferior courts are created subject to the will of Congress, their jurisdiction is often perceived as being more malleable than is the U.S. Supreme Court’s appellate jurisdiction. According to this view, which has been expressed by Professor Paul Bator and others, “The essence of [the original Madisonian Judicial] Compromise was an agreement that the question of access to the lower federal courts as a way of assuring the effectiveness of federal law should not be
constituted as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment to be made from time to time in light of particular circumstances (Anderson 1981, 688).

According to this view, Congress’s statutory ability to establish inferior federal courts presupposes the ability to define and limit the jurisdiction of those courts as it sees fit. If Congress can repeal the very existence of those lower courts via statutory means, then surely it retains the less drastic power to limit their jurisdiction as well (Bator 1982, 1031). While a few scholars have suggested there are substantial internal constraints on Congress’s authority to supervise lower federal court jurisdiction (e.g., Eisenberg 1974), most others argue that relatively few constraints govern Congress’s authority over the jurisdiction of those lower federal courts (Gunther 1984, 913; see Fallon, Meltzer, and Shapiro 1996, 358-365 for a general review).

Whether Congress can prohibit Supreme Court review of certain types of constitutional cases is an even more difficult question to answer. While Article III of the U.S. Constitution explicitly gives Congress the power to create exceptions to the Supreme Court’s appellate jurisdiction, whether or not that power is subject to restriction has largely escaped judicial determination. Supporters of jurisdiction-stripping argue that the text of Article III, the Court’s decision in *McCordlle*, and even *Marbury v. Madison* (1803) all stand for the proposition that the Supreme Court’s appellate jurisdiction is entirely within
congressional control, and that Congress’s power to make exceptions to the Court’s jurisdiction cannot be diluted by its motivations for doing so. On the other hand, some have cast doubt on McCardle’s relevance as precedent, suggesting that “there is a serious question whether the McCardle case could command a majority view today” (Douglas, J., dissenting in Glidden Co. v. Zdanok 1962, 370 U.S. 530, 606). Others have concluded that Congress’s power to make exceptions to the Court’s appellate jurisdiction cannot be exercised so as to interfere with the essential or core functions of the Supreme Court (Hart 1953, 1365). At least one other observer has argued that one of those essential functions is to maintain the uniformity and supremacy of federal law. As such, he concludes that “[Legislation precluding] Supreme Court review in every case involving a particular subject is an unconstitutional encroachment on the Court’s essential functions” (Ratner 1960, 201). In that view, the Marriage Protection Act would represent just such an unconstitutional encroachment because of its threat to the uniformity and enforcement of federal law. Finally, those who dispute Congress’s assertion of broad control over exceptions to the Court’s jurisdiction point to the Court’s 1871 decision in U.S. v. Klein, which “effectively precluded any congressional attempt to control the decision in a particular case through the guise of a jurisdictional limitation” (Ratner 1960, 181; see Fallon, Meltzer, and Shapiro 1996, 365-370).
TOWARD A SYSTEM-LEVEL UNDERSTANDING OF JURISDICTION-STRIPPING

Though the topics addressed by jurisdiction-stripping legislation have represented some of the most central social and political questions of the day, that salience is not reflected in the actual frequency with which the federal courts hear those types of cases. While no longer a subject of intense political disagreement, diversity of citizenship cases still comprise a substantial portion of federal court business. By contrast, the civil liberties questions touched by jurisdiction-stripping proposals only represent a small fraction of the federal judicial workload. Accordingly, it is not realistic to expect administrative concerns to motivate these efforts of jurisdictional limitation. Instead, as noted in Chapter Three, the examinations of jurisdiction-stripping undertaken here afford an ideal opportunity to explore the impact of judicial outcomes themselves, the role of congressional ideology, and the preferences of the public on the intensity with which court-stripping activity has been pursued since the beginning of the Warren Court.

This chapter and the next argue that the practice of jurisdiction-stripping represents something more than an arbitrary series of responses by members of Congress that happen to be directed toward the federal courts. While this may be true in particular instances, it is more accurate to describe court-stripping as a
tactic whose existence (and intensity) can be traced to congressional responses to trends in the substance of judicial outcomes, current shifts in public opinion and, perhaps, even changes in Congress’s ideological composition.

Chapter Three presented a theory of jurisdictional change which held that a finite list of general factors will motivate members of Congress to advocate changes in federal jurisdiction. One of that theory’s chief features was the fluid character of Congress’s jurisdictional oversight that it described, and this dynamic ability—whether evidenced by reactions to trends in judicial workloads, changes in the substance of judicial outcomes, or even in response to public preferences or the periodic involvement of outside interests—is highly applicable to the phenomenon of jurisdiction-stripping. In many ways, the examinations of diversity jurisdiction in Chapters Four and Five provided the classic case in which workload trends, perceived changes in judicial outcomes, and extra-governmental interests coalesced to produce pressures for and against jurisdictional change. By contrast, efforts to strip the federal courts of jurisdiction over certain constitutional cases are, by necessity, focused on a narrower set of theoretical factors. Indeed, there is no other aspect of federal jurisdictional debate in which the instrumentality of procedure is more closely tied to judicial outcomes than in the jurisdiction-stripping movement. These outcome-based concerns may motivate members to advocate court-curbing legislation as an end in itself, as a
way in which to secure other important benefits such as electoral advantage or
greater ideological responsiveness from the federal judiciary, or perhaps a
combination of the two.

Traditionally, many have tacitly assumed that conservative disapproval of
long-standing liberal court decisions has been constant, and that members have
been continually motivated to do whatever might be necessary to reverse their
impact. Implicitly, such a view treats political changes in the elected branches
as the driving force behind the ebbs and flows of jurisdiction-stripping activity,
because it presupposes that members who oppose constitutional precedents on
abortion or school prayer will object to them just as vigorously in one Congress as
they do another. However, even the most cursory examination of jurisdiction-
stripping’s history demonstrates that members of Congress have not pursued the
tactic with equal intensity across time. Similarly, there has been substantial
variation in the frequency with which individual members have opted to associate
themselves with jurisdiction-stripping legislation. Even Senator Jesse Helms,
dean of the contemporary jurisdiction-stripping movement and perpetual critic of
progressive judicial decisions, sponsored Supreme Court-stripping legislation in
just over half the sessions encompassed by his thirty year Senate career. Because
Senator Helms and other advocates of court-curbing have only pursued the
practice with tenuous fidelity, it hardly seems defensible to assert that fluctuations in congressional membership have had a determinative or even a substantial impact on these jurisdictional debates.

If the introduction of jurisdiction-stripping legislation has waxed and waned since the 1950s, what factors have contributed to this vacillation? Assuming those factors can be identified, do they buttress the theoretical claims advanced earlier about congressional efforts to control federal jurisdiction and, if so, how? Before taking on these questions in detail, there are important theoretical and analytical reasons to distinguish court-curbing efforts directed at the Supreme Court’s appellate jurisdiction from more limited congressional attempts to circumscribe the jurisdiction of inferior federal courts. Though prior examinations of court-stripping have not categorized proposals in this way, it is critical to do so if we are to expose the role of judicial outputs in determining the circumstances under which members of Congress seek to flex the institution’s jurisdictional muscles.

**Potential Catalysts for Limiting the Supreme Court’s Appellate Jurisdiction**

The most efficient way to identify the potential determinants of jurisdiction-stripping activity is to consider situations in which members of Congress would be unlikely to pursue limits on the constitutional jurisdiction of the federal courts. Curiously, past research is of limited assistance in this regard.
Bell and Scott’s (2005) recent examination of court-stripping analyzes a number of important member-level determinants of that behavior—including a unique district-level measure of Supreme Court support. However, their member-centered analysis contains no variable capturing fluctuations in judicial outcomes *per se* or the role of those outcomes in generating pressure for jurisdictional curbs. In light of Chapter Three’s theoretical framework, there is strong reason to suspect that outputs of the U.S. Supreme Court should impact the rate at which Congress targets the Court’s appellate jurisdiction for elimination. This output-oriented concern could be manifested in one of two ways. Even if conservatives in Congress oppose a particular constitutional precedent, those members will be unlikely to attack the Supreme Court’s jurisdiction during periods in which the Court’s general performance on civil liberties issues is conservative.\(^{15}\) Although isolated conservative members may attempt to curb the Court without regard to its actual outputs, it is unlikely that broad-based court-stripping campaigns will gain much traction during periods in which the Court’s civil liberties decisions generally echo conservative policy preferences. As the Court’s decisions grow more liberal, however, it is reasonable to expect the volume of jurisdictional activity directed toward it in Congress to increase. On the other hand, it would be counterproductive for congressional conservatives to pursue jurisdictional

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\(^{15}\) To reiterate, although there is no particular theoretical reason to suggest that conservative judicial decisions on constitutional issues would not have provoked jurisdiction-stripping among liberals in Congress had American political history been different, the directional nature of the expectations noted here simply reflects the existing historical record.
limitations during periods in which the Supreme Court is issuing conservative
decisions in civil liberties cases. For instance, the Court’s search-and-seizure
jurisprudence reminds us that, even if a conservative Court is unlikely to overturn
a particular liberal precedent (e.g., the exclusionary rule), it might still be inclined
to limit the scope of the previous decision in other ways.

In any case, conservatives in Congress should hesitate to disturb the
jurisdictional status quo when the Supreme Court’s decisions are conservative. At
the very least, it should be difficult for them to take issue with the overall
ideological trajectory of the Court’s outputs—or at least to do so credibly. At the
same time, increased levels of liberalism on the Supreme Court should mobilize
conservatives in Congress and stimulate greater legislative interest in curtailing
the Court’s appellate jurisdiction. In this view, increasing levels of liberalism on
the Supreme Court will simultaneously create disdain for contemporary case
outcomes and point the way to other potentially hazardous decisions on the
horizon.

Of course, it is also possible that no relationship will emerge between the
Court’s objective outcomes and the intensity with which members of Congress
advocate court-curbing activity against it. The Supreme Court may still issue
occasional liberal decisions that so disturb members of Congress that they push
for jurisdictional curbs even when, on the whole, the Court is sympathetic to their
conservative positions. For example, according to objective statistics taken from
the Supreme Court Judicial Database, the Court’s 1988 and 2002 terms were the two most conservative Supreme Court terms in the sample of cases examined here (see Epstein et al 2003, 236-237). However, each of those terms produced highly controversial civil liberties decisions. The 1988 term produced the contentious flag burning decision in *Texas v. Johnson*, and the 2002 term saw the Court issue decidedly non-conservative rulings on affirmative action and homosexual rights in *Grutter v. Bollinger* and *Lawrence v. Texas*. Though neither of these decisions directly produced jurisdiction-stripping reactions in Congress, it is important not to overemphasize the role that objectively measured judicial outcomes may exert on Congress’s jurisdictional behavior. To do so would neglect the obvious—the Supreme Court can, and has, issued isolated but highly polarizing progressive civil liberties decisions in the context of an otherwise conservative term.

Chapter Three also identified outside interests as a potential motivator of jurisdictional change. Though the involvement of more traditional groups and interests will be discussed in Chapter Seven, the present chapter focuses on the role of public opinion and its influence on jurisdiction-stripping debates since the 1950s. All else being equal, rational politicians should challenge the Supreme Court’s liberal decisions—via jurisdictional gerrymandering or other methods—when the public is most disturbed by those liberal outcomes. Put another way, politicians should press for jurisdictional measures designed to circumvent liberal judicial outcomes during periods when the general public views those liberal
results as being especially objectionable. Since the jurisdiction-stripping movement has been exclusively conservative since the 1950s it follows that, ceteris paribus, the volume of court-stripping activity in Congress should increase as the public’s general political outlook becomes more conservative.

Finally, macro-level examinations of Congress’s jurisdiction-stripping activity must also take into account the ideological composition of the body itself. Whether or not changes in Congress’s ideological balance should be expected to impact jurisdiction-stripping activity is another question, however. The most sensible hypothesis is that conservative-led jurisdiction-stripping activity should become increasingly common as Congress’s ideological composition grows more conservative. However, such an expectation assumes that securing legislative enactment is always the central goal of jurisdiction-stripping’s legislative advocates. In reality, however, it could be that actual passage of court-curbing legislation is sometimes less important to legislators than sending signals of displeasure to the judiciary or cementing one’s ideological credentials with constituents (e.g., Segal 1991, but see Bell and Scott 2005). If rational, policy-related concerns are of paramount importance to advocates of jurisdiction-stripping, the volume of court-stripping activity should increase as the ideological character of Congress becomes conservative, and the likelihood of passage grows. If members pursue these jurisdictional changes to enhance their public standing or to communicate disapproval to the Court without regard to conditions for their
legislative success, no such relationship is likely to emerge. It may also be that Congress’s ideological character is secondary to the contextual impact of public opinion and judicial outputs in stimulating court-curbing activity. For example, if the Supreme Court’s outputs are conservative and if public mood is relatively liberal—as was the case for much of the 1990s—conservative legislators will have no real incentive to pursue jurisdiction-stripping, regardless of their numerical strength in Congress. As such, the Congress’s ideological composition may be neither necessary nor sufficient for appreciable jurisdiction-stripping activity to occur. This may be an especially relevant point in light of the limited number of congressional sessions included in the subsequent analyses of contemporary jurisdiction-stripping.

**Potential Catalysts for Limiting the Jurisdiction of Inferior Federal Courts**

Prior examinations of jurisdiction-stripping have neglected to assess individual proposals on the basis of the segments of the federal judiciary they target. While most jurisdiction-stripping measures have somehow involved the Supreme Court’s appellate jurisdiction, a nontrivial number have dealt exclusively with inferior federal court jurisdiction. When members of Congress advocate jurisdictional measures vis-à-vis the U.S. Supreme Court—either exclusively, or in combination with the lower courts—to the extent that judicial outputs are relevant to that advocacy, it is clearly because members object to the decisions
being produced by the *Supreme Court*. If Congress did not object to the Court’s decisions, it would not be a target of jurisdictional attention. On some level, of course, because of its authoritative role in federal constitutional adjudication, those Supreme Court outcomes are indispensable to appreciating the role that federal judicial policy plays in motivating Congress’s jurisdiction-stripping behavior. At the same time, however, the outcome-related factors that lead members of Congress to press for curbs in the High Court’s jurisdiction are unlikely to be identical to the outcome-related factors that are relevant to more limited proposals that exclude the Supreme Court and target the jurisdiction of inferior federal courts for elimination.16

In a sense, the theoretical role of judicial outcomes in lower-court specific measures to curtail federal jurisdiction is difficult to conceptualize. Because the number of those courts is so large, their decisions are much more heterogeneous than the outcomes produced by the single United States Supreme Court. Some lower courts and lower court judges are quite conservative, a number are moderate, and more than a few are politically liberal. As a consequence, it is hardly an exaggeration to assert that, if conservative politicians search thoroughly enough, they will inevitably discover liberal lower court decisions with which they strongly disagree—regardless of how isolated or anomalous those decisions

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16 The bivariate correlations between these types of proposals attest to their status as distinct concepts. The correlational relationships between the two varieties of jurisdictional gerrymandering are as follows: Senate Cosponsorship: $r = .25$; Senate Bills: $r = .19$; House Cosponsorship: $r = .17$; House Bills: $r = .08$. 
may be. The demonstrable ability of conservative legislators to catalyze inferior court-curbing movements with a solitary outlier decision by an individual judge or court makes it questionable whether aggregate lower court outputs will impact this narrower form of jurisdiction-stripping. For example, though it had not been called into serious question outside the left-leaning Ninth Circuit Court of Appeals, that court’s declaration of the Pledge of Allegiance’s unconstitutionality sparked a jurisdiction-stripping movement that eventually led to the House’s passage of the *Pledge Protection Act*.

As noted earlier, many legal scholars believe congressional efforts to limit inferior federal court jurisdiction are less constitutionally odious than are challenges to the Supreme Court’s jurisdiction over constitutional cases. However, there is actually little practical reason for advocates of jurisdiction-stripping to limit their efforts to the lower federal courts. Though doing so could conceivably avoid thorny constitutional questions, the history of court-stripping provides no indication that its congressional advocates appreciate any legal distinction between these two types of action at all. Nor does the record indicate that confining such attempts to the inferior federal courts makes congressional debate any less heated or legislative success any easier to obtain. Thus, the question becomes, “If an objection arises in response to a supposed overreaching
of federal judicial power, why should members ever limit the scope of these jurisdictional proposals to the lower courts and exempt the Supreme Court’s appellate jurisdiction from their efforts?”

Though they may be reactions to specific lower court outcomes, decisions by members of Congress to advocate these more limited jurisdiction-stripping efforts also presuppose a conscious decision to exempt the United States Supreme Court’s appellate jurisdiction from adjustment. Although members of Congress may be otherwise predisposed to attack federal jurisdiction, they have opted not to challenge the Supreme Court’s appellate review on a number of occasions. If judicial outcomes are indeed relevant to jurisdictional debates, these conscious exemptions should generally occur during periods in which the Supreme Court’s decisional outputs are relatively conservative. Put differently, even if conservative trends in public opinion or other political circumstances make it opportune for conservative legislators to attack liberal judicial decisions, there is no reason to make the Supreme Court a party to such activities if the decisions it is issuing are already acceptable to conservatives.

From an outcome-based perspective, there is no reason for conservatives to press for limitations in the Supreme Court’s jurisdiction in issue areas where its decisions are almost certain to be conservative anyway. Quite the contrary, if the Court is issuing decisions that are broadly acceptable to conservatives, right-wing members of Congress should want it to have jurisdiction over these contentious
areas of constitutional law. As the Court’s outcomes move to the right, conservative legislators will be increasingly likely to view it as an ideological ally. It also becomes less credible for conservative legislators to threaten jurisdictional retaliation against the Supreme Court when the Court’s outputs are already sympathetic to their ideological preferences. However, the pursuit of limitations in lower court jurisdiction could still allow conservative legislators to score political points by highlighting isolated pockets of judicial liberalism in the lower courts, even during periods when that cannot legitimately be done with respect to the Supreme Court itself.

Though it was ultimately amended in committee to limit the Supreme Court’s jurisdiction as well, from the time it was first considered in 2001 until just before it emerged from the Judiciary Committee in 2004, the Pledge Protection Act’s main purpose had always been to limit the ability of inferior federal courts to rule on the Pledge’s constitutionality. It is not unreasonable to suspect that House conservatives behind the initial effort adopted the following decisional strategy: “There is a problem with isolated lower court judges in places such as the Ninth Circuit striking down the Pledge of Allegiance’s constitutionality. We ought to communicate our dissatisfaction with those types of decisions, but there is no need for us to take on the High Court directly. Given what we know about the contemporary Court’s position on the Establishment Clause, there is simply no way it will conclude that the Pledge constitutes an establishment of religion.
Since we are all but certain that the Supreme Court shares our view on this issue, there is no reason to preempt its jurisdiction—particularly because we want the Ninth Circuit’s decision overturned.” On the other hand, the decisions which culminated in the House’s passage of the Marriage Protection Act—which had always intended to curtail federal court jurisdiction at all levels—may have been motivated by the belief that the Court’s views on gay rights, as revealed in cases such as Romer v. Evans (1996) and Lawrence v. Texas (2003), were less likely to parallel the conservative position on same-sex marriage. To summarize, then, congressional attentiveness to the Supreme Court’s outcomes should lead it to exempt the High Court from jurisdiction-stripping efforts when the Court’s decisions are conservative enough to insulate it from such retribution.

**Variable Operationalizations and Hypotheses**

To assess the role of variations in the Supreme Court’s decisions in influencing the volume of court-stripping activity taking place in Congress, the analyses contain a **Supreme Court Liberalism** variable obtained from the U.S. Supreme Court Judicial Database. That variable captures the Supreme Court’s median percent liberal score on cases involving criminal procedure, civil rights, the First Amendment, due process, privacy issues, and attorneys for the justices who served during a particular Court term. These cases, taken together, represent the Court’s liberalism on civil liberties cases per term, as defined in *The Supreme
Court Compendium (Epstein et al 2003, 236-237). Because there is no reason to expect a lag between the Court’s contemporaneous decisions and congressional responses to those decisions, the scores utilized in the analysis are taken from the Supreme Court term for the year immediately prior to the beginning of each congressional session. For example, since the One Hundred Seventh Congress commenced in 2001, the median civil liberties score from the Court’s 2000 term was paired with that Congress in the analysis. In descriptive terms, the Court’s most conservative term in the sample came in 2002 when, prior to the beginning of the One Hundred Eighth Congress, its median justice on civil liberties issues was Anthony Kennedy, with a percent liberal score of just .310. By contrast, the Court’s civil liberties decisions were at their most liberal in 1962, when Justice Brennan was the Court’s median justice, and voted in a liberal direction over 84% of the time.

An Inferior Court Liberalism variable is also included in the four models of congressional support for measures designed to impact inferior court jurisdiction. If, collectively, lower court outputs impact the incidence of this type of jurisdiction-stripping, congressional activity should increase as the outputs of those lower courts become increasingly liberal. On the other hand, if lower court-curbing activity is the result of isolated but highly salient decisions, no such relationship should emerge. In the absence of a specific measure of lower court outputs, this variable simply represents the percentage of Democratic-appointed
judges sitting on the federal district courts at the beginning of each congressional session. Assuming that a higher percentage of Democratic appointees translates into a greater proportion of progressive civil liberties decisions, a higher percentage of Democratic judges should lead to greater levels of inferior court-stripping activity in Congress. Since isolated lower court outputs may affect the volume of court-stripping proposals aimed at the inferior federal judiciary, the analytical utility of including a single variable measure of those lower court outputs is uncertain. This, of course, flows from both the size and heterogeneity of the inferior federal courts as well as the wide ideological variations among the judges who staff them. As a result, this hypothesis is highly tenuous.

Even if systematic factors have motivated the court-stripping movement, actual changes in judicial outputs at either the Supreme Court or in the lower courts will only account for part of the variation in Congress’s support for jurisdiction-stripping. Though it is reasonable to expect fluctuations in Congress’s collective ideology to impact the rate at which it pursues jurisdiction-stripping legislation, we must be cautious in relying on changes in collective preferences to explain the behavior of conservative members who typically represent the ideological extremes of their respective chambers. On the one hand, conservative court-stripping activity might be expected to increase as a chamber of Congress becomes increasingly politically conservative. However, that assumes both that a) Chamber-level ideological shifts will reflect similar changes in the subset of
individual members who typically drive jurisdiction-stripping activity and b) that members always champion court-curbing bills with the intent of legislative passage. It may also be that the contextual variables of judicial outcomes and public opinion drive court-stripping behavior, and that the ideological composition of the House or Senate is largely inconsequential to decisions to pursue various forms of jurisdiction-stripping. Despite all this, a measure of congressional ideology is included in the subsequent analyses. To capture the ideological composition of the House and Senate, the chamber medians of Poole and Rosenthal’s first dimension DW-NOMINATE scores are included in the analyses as a Congressional Liberalism variable. Here the hypothesis is that, all else being equal, legislators will pursue court-curbing with greater intensity as a chamber of Congress becomes more ideologically conservative. These first dimension NOMINATE scores range from -1 to +1, and capture general levels of liberalism-conservatism in each Congress by measuring the ideological predisposition of each chamber’s median member. While the variable’s traditional scaling is for increasingly positive values to represent ideological

17 I ran a second series of models in which overall chamber ideology was replaced with the ideological median of the Republican party in each chamber, since members of that political party have accounted for a disproportionate amount of jurisdiction-stripping activity since 1953. Because the quantitative results were virtually identical to those produced when congressional liberalism is captured by the overall chamber’s ideological median, those results are not reported here.

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conservatism, that has been reversed here in order to maintain directional consistency among the independent variables. As utilized here, then, -1 is the scale’s conservative anchor and +1 is its liberal limit.

It is axiomatic that skilled politicians must be responsive to the public and its preferences, and this leads to the final independent variable included in the present analyses. Since annual measures of the public’s approval of the U.S. Supreme Court rarely exist throughout the 1950s and only appear for select years during the 1960s (Caldeira 1986, 1212-1213), the analyses required a more general approximation of the public’s overall political conservatism. However, Stimson’s well-known public policy mood data is available throughout the entire period being analyzed, and is widely cited as both a valid and reliable measure of the general public’s ideological preferences (Stimson 1999; 2004; e.g., Mishler and Sheehan 1993). That variable, designated Public Mood Liberalism, is included in the models to test whether the public’s contemporary ideological zeitgeist impacts the rate at which Congress pursues jurisdiction-stripping activity. By including this variable, we can determine the degree to which the public’s ideological outlook influences the volume of court-stripping activity independent of either the content of the Supreme Court’s actual decisions or shifts in Congress’s aggregate ideological composition. Simply put, the variable captures the relationship between the rate at which jurisdiction-stripping is pursued and the general state of public opinion. Formally, this hypothesis holds that, after
controlling for legislative composition and taking into account the substance of relevant judicial outputs, the volume of jurisdiction-stripping activity occurring in Congress will be greater when public opinion is more conservative.

Table 6.1 summarizes the explanatory variables included in the subsequent models, and outlines the expected relationship of those factors to the intensity of jurisdiction-stripping activity in Congress. Due to the nature and distribution of the dependent variable (discussed below), multiple event count models are used to analyze the relationship between these variables and the dependent variable—the intensity of support for jurisdiction-stripping in a given Congress.

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Substantive Expectation</th>
<th>Expected Sign</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court Liberalism</td>
<td>Court-stripping activity involving the Supreme Court will increase as the Supreme Court’s civil liberties decisions become more liberal, but court stripping activity exclusively involving the lower federal courts will increase as the Supreme Court’s civil liberties decisions become more conservative.</td>
<td>+, -</td>
</tr>
<tr>
<td>Inferior Court Liberalism</td>
<td>Court-stripping activity restricted to inferior levels of the federal judiciary will increase as the decisional outputs of the inferior federal courts grow more liberal.</td>
<td>+</td>
</tr>
<tr>
<td>Congressional Liberalism</td>
<td>The ideological character of the House or Senate will exert an independent impact on the incidence of jurisdiction-stripping activity. Tentatively, greater conservativism in Congress should yield higher levels of court-curbing activity during a given session.</td>
<td>-</td>
</tr>
<tr>
<td>Public Mood Liberalism</td>
<td>Court stripping activity will increase as the public’s overall policy mood becomes more ideologically conservative.</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 6.1: Variables, Hypotheses, and Expected Signs
Capturing the Dependent Variable

Having operationalized “jurisdiction-stripping” to include any stand-alone congressional bill that attempts to circumvent a federal constitutional decision by majority vote, the next task is to construct measures capturing that quantity of interest empirically. At present, the goal is to approximate the intensity with which Congress has pursued jurisdiction-stripping legislation between the Eighty-Third through the One Hundred Eighth Congresses, and then to test the impact of several explanatory variables on the magnitude of that activity. The measurement issues involved in that endeavor are complicated by the fact that, in contrast to many other jurisdictional debates, no Congress in the past fifty years has enacted a court-stripping measure into law. Many jurisdictional proposals have been advocated, and a number of committee hearings on the tactic have been held. A few measures have even cleared one chamber of Congress, and each of those activities will be examined in Chapter Seven. Still, this comparative lack of traditional legislative success poses problems for quantifying this central concept of the study.

Due to the number of congressional sessions being analyzed and the fact that no authoritative measures exist to capture the volume of court-stripping activity, several closely related measures are utilized here. Because each of these
measures conceptualizes court-stripping activity as a series of occurrences, the
analysis relies on an event count framework to assess the potential determinants
of court-stripping activity. Of the four event count models dealing with the
Supreme Court’s appellate jurisdiction, two concern court-stripping activity in the
House of Representatives, and the remaining two address the practice in the U.S.
Senate. More importantly, two of the measures treat member cosponsorship of
jurisdiction-stripping bills as an indicator of aggregate court-curbing activity,
while the remaining two utilize a raw count of the number of bills introduced in
each Congress to capture the same concept. This same distribution holds for the
analyses of lower court-stripping measures as well. While these bill and
cosponsorship measures clearly do not capture identical concepts, they have
overlapped considerably, as the correlations in Table 6.2 show. As such, they
represent reasonable proxy measures for the level of jurisdiction-stripping activity
being pursued in a chamber of Congress at any given time.
Table 6.2: Correlations Between Select Dependent Variables

<table>
<thead>
<tr>
<th></th>
<th>Senate Bills Supreme Court</th>
<th>Senate Bills Inferior Courts</th>
<th>House Bills Supreme Court</th>
<th>House Bills Inferior Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senate Cosponsors Supreme Court</td>
<td>.769</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Senate Cosponsors Inferior Courts</td>
<td>---</td>
<td>.487</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>House Cosponsors Supreme Court</td>
<td>---</td>
<td>---</td>
<td>.520</td>
<td>---</td>
</tr>
<tr>
<td>House Cosponsors Inferior Courts</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>.451</td>
</tr>
</tbody>
</table>

While the count of court-stripping bills introduced during each session is straightforward, the operationalization of legislative cosponsorship requires some elaboration. Suppose that Senator Jesse Helms sponsored or cosponsored five separate pieces of jurisdiction-stripping legislation in a particular Congress, that Utah senators Hatch and Garn each cosponsored a single jurisdiction-stripping bill while, to no one’s surprise, California’s liberal Democratic Senator Alan Cranston cosponsored no court-stripping legislation. There are two ways in which this aggregate-level cosponsorship variable might be operationalized. It could have a maximum value of 100 (or 435) if the dependent variable were simply operationalized as the number of individuals cosponsoring at least one piece of
court-curbing legislation in each session of Congress. In the above example, that total would be three senators—Helms, Hatch, and Garn. However, there are at least two problems with defining the variable in this way. Constraining the count variable in this manner violates the negative binomial count model’s theoretical assumption that the dependent variable will have no finite limit. Moreover, counting the cosponsorship activities of these senators equally fails to capture the intensity with which Senator Helms pursued jurisdiction-stripping activity in that Congress. As a result, each separate occurrence of legislative cosponsorship is considered a unique event in the subsequent analyses, meaning that individual members can be counted an infinite number of times. In the above example, that count variable’s value would be seven. Since members may cosponsor as much legislation as they choose, this measurement strategy meets the theoretical requirements of the negative binomial count model and is utilized below.\(^{18}\)

The quantitative analyses are premised on the view that higher levels of legislative cosponsorship and bill introduction are broadly indicative of member support for jurisdiction-stripping in a particular Congress. To whatever extent the analyses arrive at similar conclusions, we can be increasingly confident about the robustness of the observed effects. While each of these individual analyses is potentially interesting and important, the ultimate goal here is not to highlight the

\(^{18}\) Although this choice of operationalization was initially a cause for concern, in the end this measurement choice was of minimal consequence—both operationalizations of cosponsorship are correlated at .95 or higher in each of the categories examined below.
results of any single analysis. Rather, in light of this prohibitively small number of cases, the results are assessed as a whole and are used to facilitate broad inferences about the factors that motivate some congresses to pursue jurisdiction-stripping activity with considerably more vigor than others. Those results, in turn, are used to structure the qualitative assessments undertaken in Chapter Seven.

To reiterate, jurisdiction-stripping bills can take three basic forms. At the most general level, they can propose eliminating jurisdiction over an issue such as school prayer throughout the entire federal judiciary. This most common type of proposal would affect both the lower federal courts as well as the U.S. Supreme Court and raise two distinct sets of complicated constitutional questions. On occasion, particularly early in the Warren Court era, members of Congress have advanced proposals to eliminate the Supreme Court’s jurisdiction over a particular issue area while making no effort to curb lower federal court jurisdiction. For present analytical purposes, these measures are treated as interchangeable.\(^1\)

Presumably, since they share a common focus on the Supreme Court’s appellate jurisdiction, these types of jurisdictional proposals should be motivated by the Supreme Court’s progressive civil liberties decisions. Though most court-curbing proposals have sought to impact the Supreme Court’s jurisdiction in one way or another, members of Congress have also advocated limitations in the jurisdiction

\(^1\) The number of bills exclusively targeting the Supreme Court’s appellate jurisdiction is too limited in both number and temporal distribution over the 1953-2004 period to justify a separate analysis.
of inferior federal courts while seeking to preserve the Supreme Court’s appellate review of state court judgments. While not drawn to scale, Figure 6.1 provides a pictorial representation of the three basic forms that jurisdiction-stripping legislation has taken since 1953.

Figure 6.1: Three Varieties of Jurisdiction-Stripping Legislation

In light of these differing forms, the dependent variables are subdivided into two analytical groups. In the first, the dependent variables represent the number of bills and cosponsors per congressional session seeking to abolish the
Supreme Court’s jurisdiction over a constitutional issue. Measures designed to limit only the Supreme Court’s appellate jurisdiction as well as those attempting to eliminate all federal court jurisdiction over a particular issue are grouped together here (segments A and B in Figure 6.1). Since these measures share the goal of limiting the Supreme Court’s appellate jurisdiction over particular questions of law, they are treated as interchangeable for analytical purposes. In the second set of proposals, the dependent variables capture that narrower class of measures that have sought to abolish lower court jurisdiction over particular issues while leaving the Supreme Court’s review of state court appeals undisturbed (segment C in figure 6.1). In contrast to the first set of proposals, they do not target the Supreme Court. Though these measures have been less prominent in the jurisdiction-stripping movement than measures touching the Supreme Court’s jurisdiction, they must be analyzed separately in order to discern the impact of judicial outputs on the incidence of court-curbing activity. In terms of classification, distinguishing these two varieties of jurisdiction-stripping legislation was not difficult. Unless an exception was noted in the bill’s summary or specific reference was made to the inferior federal courts in the Digest of Public General Bills and Resolutions, a measure was classified as attempting to curb the Supreme Court’s jurisdiction. Although there is a small risk in relying on these bill summaries to infer the content of the legislation actually proposed, the
explicitness with which those summaries described the judicial systems that were the object of these individual bills lends a good deal of confidence to this approach.

Data and Methods

The analyses are structured as event count models in which both the number of bills introduced in each House of Congress as well as the number of legislators cosponsoring those bills are tallied as dependent variables, and each cosponsor or bill introduction is treated as a unique event. Event count models are appropriate to utilize when a random dependent variable $y$ represents the number of times a certain event occurs during a specified period of time. In such models, the dependent variable must be an integer, cannot take a value less than zero and, in theory, must have no upper limit. As King (1988) has noted, because event count data are nonnegative and discrete, analyzing such data with ordinary least squares regression can yield improper estimates that are inaccurate and inefficient.

The Poisson Regression Model is an appropriate distribution for analyzing event count data when the dependent variable’s mean and variance are equal, or equidispersed. By contrast, the Negative Binomial Regression Model is required in the more common case where the dependent variable is overdispersed and its

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20 The appendix provides specific examples of the classificatory scheme used to categorize these jurisdictional measures.
variance exceeds its mean (Long 1997, 230; Greene 1993). Although the Poisson Regression Model has been central to the development of count models, in practice it is rarely applicable due to this requirement of equidispersion (Long 1997, 249). Because equidispersion is present in much of the current data, the following analyses are modeled with negative binomial regression.

Because the dependent variables were obtained from the bills proposed during each congressional session between 1953 and 2004, it was necessary to identify all bills introduced by members of Congress that concerned the elimination of federal jurisdiction over particular classes of constitutional claims. Again, all such proposals addressed topics broadly associated with civil liberties. This master list of legislation was completed by following a careful three-stage process. First, using the Indexes of the Congressional Record for each congressional session from the Eighty Third Congress through the One Hundred Eighth Congress, I identified all bills listed under the subject headings of U.S. Courts, federal jurisdiction, the U.S. Supreme Court and its jurisdiction, and even the headings of all individual issue areas that made mention of federal jurisdiction or matters of judicial administration. Next, these bill numbers were cross-referenced with more detailed summary information from each Congress on the content of each piece of legislation, located in the Congressional Research
A considerable number of proposals were deleted in this more detailed second examination, after additional information made it clear that several of the items were extraneous to jurisdiction-stripping activities. No real difficulty surrounded the separation of jurisdiction-stripping bills from non-jurisdictional bills intended to impact the federal courts in other, more general ways. Bills proposing generic limitations in the scope of federal habeas corpus jurisdiction were excluded from consideration, since their general character made it clear that they were not motivated by any specific constitutional decisions. Still, all proposals targeting specific criminal rights issues such as criminal confessions were included in the sample. This had no real impact on the operationalization of jurisdiction-stripping, however. An examination of the data makes it clear that, in decisions such as *Miranda v. Arizona* (1966) where prisoner custody and detention were technically at issue, members of Congress responded by advocating the elimination of jurisdiction over criminal confessions—not by addressing general limitations in habeas corpus *per se*. Finally, measures designed to extinguish the Supreme Court’s jurisdiction over all state supreme court judgments were included in the dataset, since these more general proposals would burden the ability of losers at the state level to vindicate their federal constitutional rights in federal court.

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21 After 1990, bill information was retrieved from [http://thomas.loc.gov](http://thomas.loc.gov).
In the final stage of data collection, the list of legislative proposals was again combed to eliminate any remaining proposals such as constitutional amendments, Sense of the Congress Resolutions, measures to delay the enforcement of judicial orders relating to reapportionment and busing, and non-jurisdictional “human life bills” seeking to extend the Fifth and Fourteenth Amendment’s protections of personhood to fetuses in the womb. These proposals, designed to limit or undermine certain civil liberties decisions without attempting to curb federal jurisdiction, were excluded from analysis. Only measures expressing a clear desire to limit federal jurisdiction over particular constitutional issues by majority vote were included in the final sample. In terms of raw statistics, U.S. Senators introduced 50 total jurisdiction stripping bills between 1953 and 2004, while House members proposed 231 such bills. Of the Senate bills, 18 were specific to the lower courts and 32 were designed to impact the Supreme Court’s appellate jurisdiction. 206 of the House bills addressed the Supreme Court’s appellate jurisdiction, while the remaining 25 sought to limit inferior federal court jurisdiction over particular constitutional claims.\textsuperscript{22} Table 6.3 provides an overview of these bills by summarizing the amount of legislative activity per Congress and noting the topics of constitutional law most frequently targeted by court-strippers in Congress.

\textsuperscript{22} An appreciable number of these bills were introduced in identical form in both the House and Senate. While the introduction of identical legislation may represent another level of legislative attention, such measures were not separately analyzed here.
<table>
<thead>
<tr>
<th>Congress (Years)</th>
<th>Supreme Court Senate Bills/Cosponsors</th>
<th>Supreme Court House Bills/Cosponsors</th>
<th>Lower Courts Senate Bills/Cosponsors</th>
<th>Lower Courts House Bills/Cosponsors</th>
<th>Most Frequent Topics</th>
</tr>
</thead>
<tbody>
<tr>
<td>83rd (1953-54)</td>
<td>0/0</td>
<td>0/0</td>
<td>0/0</td>
<td>0/0</td>
<td>None</td>
</tr>
<tr>
<td>84th (1955-56)</td>
<td>2/2</td>
<td>2/2</td>
<td>0/0</td>
<td>0/0</td>
<td>Public Schools</td>
</tr>
<tr>
<td>85th (1957-58)</td>
<td>4/4</td>
<td>3/3</td>
<td>0/0</td>
<td>0/0</td>
<td>Public Schools Subversion</td>
</tr>
<tr>
<td>86th (1959-60)</td>
<td>1/1</td>
<td>4/4</td>
<td>0/0</td>
<td>1/1</td>
<td>Public Schools Subversion</td>
</tr>
<tr>
<td>87th (1961-62)</td>
<td>1/2</td>
<td>6/6</td>
<td>0/0</td>
<td>0/0</td>
<td>Public Schools Subversion Reapportionment</td>
</tr>
<tr>
<td>88th (1963-64)</td>
<td>2/2</td>
<td>32/34</td>
<td>0/0</td>
<td>0/0</td>
<td>Reapportionment Public Schools Subversion</td>
</tr>
<tr>
<td>89th (1965-66)</td>
<td>1/1</td>
<td>11/11</td>
<td>1/1</td>
<td>1/1</td>
<td>Reapportionment</td>
</tr>
<tr>
<td>90th (1967-68)</td>
<td>4/22</td>
<td>6/6</td>
<td>1/1</td>
<td>1/1</td>
<td>Criminal Confession Reapportionment Public Schools</td>
</tr>
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<td>91st (1969-70)</td>
<td>0/0</td>
<td>19/37</td>
<td>0/0</td>
<td>0/0</td>
<td>Obscenity Reapportionment</td>
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Table 6.3 Continued

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<th></th>
</tr>
</thead>
<tbody>
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<td>3/12</td>
<td>4/23</td>
<td>2/24</td>
<td>1/1</td>
<td>3/20</td>
<td>1/1</td>
<td>1/4</td>
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<td>16/17</td>
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<td>8/103</td>
<td>18/42</td>
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<tr>
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<tr>
<td></td>
<td>Obscenity</td>
<td>Reapportionment</td>
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</table>

Continued
Table 6.3 Continued

<table>
<thead>
<tr>
<th>Congress</th>
<th>Favor</th>
<th>Oppose</th>
<th>Abstain</th>
<th>Affirm</th>
<th>Issue</th>
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<tbody>
<tr>
<td>100th</td>
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<td>4/4</td>
<td>1/2</td>
<td>0/0</td>
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<td>101st</td>
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<td>0/0</td>
<td>1/25</td>
<td>1/143</td>
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<td>102nd</td>
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<td>0/0</td>
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</tr>
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<td>0/0</td>
<td>0/0</td>
<td>1/73</td>
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</tr>
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<td>104th</td>
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<td>2/3</td>
<td>0/0</td>
<td>1/4</td>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Judicial Taxation</td>
</tr>
<tr>
<td>105th</td>
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<td>0/0</td>
<td>1/1</td>
<td>1/1</td>
<td>Judicial Taxation</td>
</tr>
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<td>106th</td>
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<td>1/1</td>
<td>1/1</td>
<td>2/7</td>
<td>Abortion</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td>Judicial Taxation</td>
</tr>
<tr>
<td>107th</td>
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<td>0/0</td>
<td>1/1</td>
<td>2/68</td>
<td>Judicial Taxation</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>Pledge of Allegiance</td>
</tr>
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<td></td>
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<td></td>
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<td></td>
<td>Abortion</td>
</tr>
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<td>108th</td>
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<td>1/49</td>
<td>2/19</td>
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<td>Pledge of Allegiance</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>Ten Commandments</td>
</tr>
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</table>
While these measures are good approximations of jurisdiction-stripping activity’s strength in each Congress since 1953, they do have certain limitations. Obtaining measures of jurisdiction-stripping from individual, stand-alone bills necessarily excludes isolated jurisdiction-stripping measures offered as floor amendments to other pieces of legislation. As the next chapter demonstrates, these floor amendments played a limited but significant role in conservatives’ campaign against federal court jurisdiction in cases involving abortion, prayer, and busing during the 1970s and 1980s. Nor does it give special weight to measures actually receiving majority support from one House of Congress. Still, it makes sense to treat these bill and cosponsorship measures as approximations of jurisdiction-stripping’s support, and anecdotal evidence suggests that even these isolated occurrences broadly mirror the trends in most of our measures of jurisdiction-stripping activity. By way of summary, Table 6.4 provides the mean number of bills and cosponsors for all congresses, as well as figures for those congresses in which jurisdiction-stripping measures passed either the House or Senate.
<table>
<thead>
<tr>
<th></th>
<th>Senate Cosponsors (Supreme Ct) (Lower Ct)</th>
<th>Senate Bills (Supreme Court) (Lower Courts)</th>
<th>House Cosponsors (Supreme Court) (Lower Courts)</th>
<th>House Bills (Supreme Court) (Lower Courts)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean Values</td>
<td>4.690</td>
<td>1.230</td>
<td>17.120</td>
<td>7.923</td>
</tr>
<tr>
<td></td>
<td>3.580</td>
<td>.692</td>
<td>22.230</td>
<td>1.000</td>
</tr>
<tr>
<td><strong>88th Congress</strong></td>
<td>No Action</td>
<td>No Action</td>
<td>34</td>
<td>32</td>
</tr>
<tr>
<td><strong>96th Congress</strong></td>
<td>1</td>
<td>1</td>
<td>No Action</td>
<td>No Action</td>
</tr>
<tr>
<td><strong>97th Congress</strong></td>
<td>20</td>
<td>3</td>
<td>No Action</td>
<td>No Action</td>
</tr>
<tr>
<td><strong>108th Congress</strong></td>
<td>No Action</td>
<td>No Action</td>
<td>49</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>No Action</td>
<td>No Action</td>
<td>224</td>
<td>3</td>
</tr>
</tbody>
</table>

Table 6.4: Bill and Cosponsor Statistics by Chamber, 1953-2004

**RESULTS**

**Limiting the Supreme Court’s Appellate Jurisdiction**

The results of the negative binomial regression equations in which the dependent variable is a count of legislation targeting the Supreme Court’s appellate jurisdiction are displayed in Table 6.5. As hypothesized, an overall increase in the Supreme Court’s progressivism on civil liberties issues is positively associated with higher levels of Court-stripping activity in a session of Congress. This is the case for each of the four analyses, and the strength of that relationship does not differ substantially between the House and Senate. In three
of the four cases, the Supreme Court Liberalism variable’s hypothesized directional relationship to court-curbing activity rises to conventional levels of statistical significance. In the Senate cosponsorship equation, where it is not significant, the variable’s coefficient remains in the expected direction. This is noteworthy in light of both the small number of cases being analyzed and the aggregation of the Court’s many civil liberties decisions into a single measure. Given the similarity of these results and keeping in mind the analysis’s small sample size, this is solid quantitative evidence that the rate of jurisdiction-stripping activity in Congress targeting the U.S. Supreme Court is influenced, in part, by the tenor of the Court’s contemporary outputs in civil liberties cases. Put in plainer terms, there is concrete statistical evidence demonstrating that the Supreme Court’s behavior has had a substantial and direct impact on the rate at which Congress pursues court-stripping activity.
<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>Model 1 Senate Cosponsorship β (S.E.)</th>
<th>Model 2 Senate Bills β (S.E.)</th>
<th>Model 3 House Cosponsorship β (S.E.)</th>
<th>Model 4 House Bills β (S.E.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court Liberalism</td>
<td>3.559 (3.634)</td>
<td>2.829* (1.723)</td>
<td>5.303** (2.811)</td>
<td>5.293*** (1.976)</td>
</tr>
<tr>
<td>Congressional Liberalism</td>
<td>9.330*** (3.643)</td>
<td>3.021 (2.591)</td>
<td>-.256 (2.637)</td>
<td>5.603*** (2.220)</td>
</tr>
<tr>
<td>Public Mood Liberalism</td>
<td>-.221*** (.088)</td>
<td>-.086* (.054)</td>
<td>-.216** (.100)</td>
<td>-.075 (.065)</td>
</tr>
<tr>
<td>Constant</td>
<td>12.150*** (4.662)</td>
<td>3.786* (2.882)</td>
<td>13.114*** (5.088)</td>
<td>3.709 (3.357)</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-57.997 (-37.213)</td>
<td>-91.526 (-74.295)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Observations</td>
<td>26</td>
<td>26</td>
<td>26</td>
<td>26</td>
</tr>
<tr>
<td>Pseudo R²</td>
<td>.067</td>
<td>.055</td>
<td>.027</td>
<td>.073</td>
</tr>
<tr>
<td>LR Chi² (3)</td>
<td>8.300</td>
<td>4.320</td>
<td>5.160</td>
<td>11.660</td>
</tr>
<tr>
<td>Prob &gt; Chi²</td>
<td>.0403</td>
<td>.228</td>
<td>.162</td>
<td>.009</td>
</tr>
</tbody>
</table>

***Significant at .01 level (one-tailed test)  
**  Significant at .05 level (one-tailed test)  
*    Significant at .1 level (one-tailed test)

Table 6.5: Negative Binomial Regression Models of Supreme Court-Curbing Activity, 1953-2004

Somewhat surprisingly, the models hint that increases in the ideological liberalism of the House and Senate—as captured by median NOMINATE scores—have actually been associated with increases in the volume of court-stripping activity taking place in Congress, after the influence attributable to
judicial decisions and public mood is held constant. This is clearly the most
tenuous of all the relationships displayed in Table 6.5, with just two of the four
models providing statistically significant evidence of such a relationship. Taken
at face value, the results would seem to indicate that members of Congress do not
have the goal of legislative enactment in mind when it comes to jurisdiction-
stripping legislation. However, that interpretation of the results ignores two
related concerns. First, for jurisdiction-stripping legislation to go into effect, it
must have presidential support. Second, the influence of Congress’s institutional
ideology in any given session will almost certainly be secondary consideration to
advocates of court-stripping. As the chapter’s prior discussion of the possible
artifactual nature of this variable noted, conservatives in Congress have no real
incentive to pursue court-curbing when the Supreme Court is issuing civil
liberties decisions with which it agrees. The 1990s provides the clearest
illustration of these points. From 1995-2001, both houses of Congress were quite
ideologically conservative—at least relative to the broader time period being
examined. At the same time, however, conservatives in those congresses may
have felt no pressing need to target the Supreme Court’s jurisdiction, since the
Court’s working five-member majority of Rehnquist, O’Connor, Scalia, Kennedy,
and Thomas was typically able to deliver conservative civil liberties decisions.
Even if the Court itself had proved less conservative in its decisions, however,
these members of Congress were well-aware that Democratic president Bill Clinton would have vetoed such measures if they managed to pass the Congress.

Finally we turn to the external preferences of society at-large, captured in the equations by Stimson’s aggregate public mood index. That variable is in the hypothesized direction in each of the four cases, is highly significant in the two cosponsorship equations, is moderately significant in Model 2, and falls just short of statistical significance in Model 4. Here too, there is clear evidence of an across-the-board pattern in which decreases in the public’s overall policy liberalism have yielded higher levels of court-stripping activity in Congress. Apart from all other considerations, then, members of Congress are more likely to advocate the imposition of jurisdictional limitations on the Supreme Court when the public’s policy mood is conservative. Presumably, this is because it is during those periods when a legislator’s constituents are most receptive to attacks on the “liberal” federal judiciary.

A broader examination of the Supreme Court-specific models shows that, in general, they perform fairly well in light of the small number of congresses eligible for analysis. Although the $\chi^2$ for Models 2 and 3 is relatively poor, there are no other diagnostic trends to suggest the models are particularly problematic. The most striking substantive story to emerges from the analysis is that Congress does seem to take the Court’s aggregate outputs into account when engaging in jurisdiction-stripping activity designed to impact the Supreme Court. When the
Court exhibits a general propensity toward rendering liberal decisions in civil liberties cases, jurisdiction-based responses to those decisions have enjoyed considerably greater legislative support. In addition, in order for jurisdiction-stripping to be a worthwhile legislative pursuit, the results indicate that the public must be receptive to such attacks on the Court’s decisions. Taken together, this provides evidence that jurisdiction-stripping legislation targeting the U.S. Supreme Court has exhibited fluctuation, and has varied in meaningful ways that acknowledge trends in both the Supreme Court’s decision making and the public’s policy mood. Though some randomness undoubtedly exists in response to idiosyncratic pressures on members of Congress, it appears there are multiple identifiable components to the phenomenon of jurisdiction-stripping activity. To the extent that these components change, oscillations in the volume of Supreme Court-specific jurisdiction-stripping activity being pursued in Congress should result.

**Limiting the Jurisdiction of Inferior Federal Courts**

A cloudier picture emerges from the analysis of jurisdiction-stripping in the inferior federal courts. As before, one of the most decisive findings revealed by the analyses concerns the impact of the Supreme Court’s case outputs on jurisdiction-stripping activity geared toward the lower courts. In contrast to the earlier analysis, here it was hypothesized that *conservatism* on the Supreme Court
would be associated with higher levels of this variety of jurisdiction-stripping, meaning that Congress should be more likely to pursue jurisdiction-stripping proposals specifically excluding the Supreme Court when the Court’s decisions are conservative. This follows because Congress will only be inclined to exclude the Supreme Court from jurisdictional action during periods in which the Court is reliably conservative on civil liberties issues. This appears to be the case in each of the four models reproduced in Table 6.6, and strongly so. In all four equations, the Supreme Court ideology variable has a negative and statistically significant relationship with lower court-curbing activity, suggesting that Congress is likely to limit its jurisdiction-stripping activity to the inferior federal courts when the Supreme Court’s conservative outputs make it a poor target. In other words, when the Supreme Court issues conservative civil liberties decisions, members of Congress appear to ignore it and focus on the lower federal courts. On the other hand, the liberalism of the inferior federal courts appears to have essentially no impact on the intensity with which Congress pursued inferior court-curbing activity. That suggests lower court-curbing activity is more about responses to specific decisions\(^{23}\) than it is a reaction to the overall ideological complexion of the judiciary. Given the character of lower court-curbing activity, this is not particularly surprising.

\(^{23}\) The Ninth Circuit Court of Appeals’s decision on the Pledge of Allegiance, for example.
According to Table 6.6, members appear to focus their energies on the inferior federal courts when the Supreme Court’s behavior makes it a difficult target to attack. The distribution of bills and cosponsors reproduced earlier in Table 6.3
demonstrates that members of the House have been particularly active in proposing this more limited variety of legislation, which may suggest that these responses are often localized reactions to particular judicial decisions. This underscores the earlier point that there will always be isolated lower court decisions that exist for individual members to criticize. However, as the measures of congressional ideology and public mood make clear, the volume of jurisdiction-stripping activity confined to the lower courts is otherwise difficult to predict. In this second class of cases, our global measure of congressional ideology only exhibits a statistically significant relationship to court-curbing activity as operationalized by Senate cosponsorship—and, as was the case in the Supreme Court-centered analysis, that variable’s direction is contrary to expectation. In the remaining analyses, it has no relationship to the frequency with which members have pursued jurisdictional limitations specific to the lower federal courts. While the lower-court specific equations in Table 6.6 provide limited evidence that the public’s overall policy orientation impacts the incidence of this more specific form of jurisdiction-stripping, that impact is limited to jurisdiction-stripping activity in the United States Senate. Although this difference was not hypothesized, it makes some sense in retrospect. Consider both the disproportionate role that proposals dealing with judicially-ordered tax increases and mandatory busing have played in the phenomenon of lower court jurisdiction-stripping as well as the greater prevalence of such legislation in the
House of Representatives than in the Senate. With the notable exception of abortion, when jurisdiction-stripping proposals have targeted the lower federal courts instead of the Supreme Court, the relevant concerns have been local issues whose salience may not translate easily to the wider populace. It also helps explain isolated occasions where anti-busing or judicial taxation measures were disproportionately sponsored by members from a particular geographic area. Perhaps individual House members have been concerned about the implementation of the Court’s busing decisions by the district courts in places such as Detroit, Michigan or Wilmington, Delaware—not the more general propositions announced by the Supreme Court in Swann v. Charlotte Mecklenburg Schools (1971)—particularly as the U.S. Supreme Court’s busing decisions grew more favorable to busing’s opponents.

Since members of the United States Senate are less parochial in terms of both the people and interests they represent, they should be more responsive to broader measures of the public’s preferences such as those captured in Stimson’s measure of public policy mood. As a result, it is conceivable that senators will be less easily influenced by isolated lower court decisions on busing or judicial taxation than their House counterparts. In other words, senators may well be more reluctant to anticipate the larger public’s preferences because they have a more diverse set of constituents to satisfy than do most members of the House. On the other hand, because members of the House come from the more
homogeneous districts and constituencies that are being directly affected by specific lower court decisions on busing and judicially-imposed tax increases, they may be considerably insulated from broader trends in the public’s mood when it comes to reacting to judicial rulings that are essentially local in character. For them, all that matters is whether schoolchildren in their district are being subjected to busing or if their constituents are being ordered by the courts to pay additional taxes.

Members of Congress have been increasingly likely to confine their jurisdiction-stripping efforts to the inferior judiciary during periods of conservatism on the U.S. Supreme Court. Although these proposals have been championed much less frequently than measures targeting the Supreme Court’s appellate jurisdiction and are somewhat difficult to predict, they do illustrate the attention members of Congress give to the Supreme Court’s constitutional decisions. When the Court is liberal, members have typically included it in their jurisdictional gerrymandering proposals. When the Court is conservative and members find it beneficial to attack lower court jurisdiction over particular constitutional topics, however, that conservatism has regularly served to insulate the High Court from jurisdictional attack. Taken together the preceding analyses indicate that, along with attention to changes in public opinion, the Supreme Court’s behavior has been key to determining the scope and intensity of Congress’s court-curbing activity since 1953.
INDIVIDUAL MEMBERS AND THE PURSUIT OF JURISDICTION-STRIPPING

This chapter’s primary objective was to test for certain regularities in the incidence of jurisdiction-stripping. Thus far, we have examined the influence of macro-level forces including the Supreme Court’s decisional outputs, inferior court outputs, Congress’s ideological complexion, and the state of contemporary public opinion on the frequency of jurisdiction-stripping activity over a fairly small number of congressional sessions. While not wholly definitive, the event count analyses used to test these propositions have served as valuable indicators of basic trends in the history of the court-stripping movement, and those findings will help structure the more qualitative examinations of particular jurisdiction-stripping attempts presented in Chapter Seven. However, these macro-level analyses must also be supplemented with individual-level characteristics if a truly comprehensive understanding of court-stripping is to be realized. Only by doing so can scholars begin to understand when and why certain members have championed various forms of jurisdiction-stripping, while many others have not. The remainder of this chapter presents an abbreviated treatment of those questions, focusing on the cosponsorship of that class of jurisdictional measures which are designed to impact the U.S. Supreme Court’s appellate jurisdiction.

In their examination of congressional court-stripping attempts, Bell and Scott (2005) assessed the factors that lead individual House members to support
court-stripping proposals. Ultimately, they concluded that those efforts represent attempts by legislators to express policy preferences and to represent constituent views. Their useful study tests the impact of numerous individual-level characteristics on court-stripping activity from a Congress-centered perspective, but it does not directly examine the impact of judicial decisions themselves on the incidence of that activity. Nor does it incorporate a general measure of public opinion which, presumably, would capture the public’s receptiveness to conservative judicial policy. In the remaining pages of this chapter, I present a cross-sectional cross-time analysis of court-stripping legislation’s cosponsorship in both the House and Senate from 1953 to 2004. That exploratory analysis draws on both macro- and individual-level characteristics in an attempt to illuminate the forces that drive individual legislators to support jurisdiction-stripping proposals.

Data and Methods

In the analyses that follow, I follow Bell and Scott (2005) and treat individual member decisions to cosponsor jurisdiction-stripping legislation as a simple dichotomous choice. In short, an individual will either opt to support curbs in federal jurisdiction during a particular session of Congress or s/he will not. As before, the analyses are differentiated by the chambers of Congress in which those jurisdictional curbs are pursued. This yielded two analyses: an examination of Court-stripping cosponsorship in the House, and an analysis of
Court-stripping cosponsorship in the Senate. As the following discussion indicates, the variables in the House and Senate equations are identical, although the Senate model also tests the direct and interactive impact of one’s proximity to reelection on the decision to engage in jurisdiction-stripping activity.

Because nearly all members were present in the dataset multiple times, it was necessary to take steps to account for the relationship between serial observations on the same unit. In other words, disregarding the correlation of activity across cosponsorship by the same individuals would result in inefficient estimation and incorrect standard errors (Maddala 1987). By utilizing a random-effects approach, the analysis adjusts for autocorrelation across individuals and heteroskedasticity across congressional sessions. Coupled with the highly unbalanced nature of the data, random-effects logit was an especially appropriate methodological technique for performing the analysis (e.g., Wooldridge 2003, 482-495; Hsiao 2003).

Variables and Hypotheses

Because advocates of modern jurisdiction-stripping have been distinguished by their opposition to progressive federal court decisions on civil rights and liberties issues, Hypothesis 1 is straightforward: *All else being equal, conservative members of Congress will be more likely to advocate jurisdiction-stripping legislation than will more ideologically liberal members of Congress.*
Since Poole and Rosenthal’s NOMINATE scores are comparable across congressional sessions, they are utilized to capture the ideological predispositions of individual House and Senate members. Those scores were rescaled from 0 to 1 in order to facilitate interpretation of several interaction terms, with 0 representing the scale’s conservative anchor and 1 being the maximum liberal value.

Similarly, it has been recognized that contemporary jurisdiction-stripping was born of southern intransigence over progressivism in civil rights. History makes it clear that it was the reactions of southern lawmakers to the Supreme Court’s decision in *Brown v. Board of Education* (1954) that ignited the contemporary jurisdiction-stripping movement (e.g., Murphy 1962; Pritchett 1961). Moreover, since the South has long been the region of the country most hostile to federal governmental involvement—particularly on matters dealing with federal jurisdiction and the courts (Frankfurter and Landis 1928, 84)—each of the analyses includes a control for the South to test a second hypothesis:  

\[\text{Holding all else constant, southern members of Congress should be more likely than their northern counterparts to press for curbs in federal jurisdiction.}\]

I also include an interaction term to test whether less conservative members from the south are particularly likely to pursue jurisdictional curbs. Given the above discussion, there is reason to suspect that regional pressures may cause members with otherwise comparable ideological predispositions to differ in

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24 Once again, these expectations regarding the South simply reflect the realities of American political history—not any theoretical uniqueness about the South *per se.*
their support for jurisdiction-stripping. Specifically, Hypothesis 3 contends that
while being from the South should have a positive and independent impact on
one’s propensity to cosponsor jurisdiction-stripping legislation, less conservative
members will be especially likely to participate in jurisdiction-stripping activity if
they represent a southern state.

The primary macro-level variables of interest in the prior event-count
models—Supreme Court liberalism and public policy mood—are included in the
present analyses as well. The direct effects of these variables should mirror the
results obtained in the prior analyses, making their inclusion here somewhat
redundant. Still, including them here allows us to test the impact of several
interactive effects on one’s participation in jurisdiction-stripping activity. Even if
most individual-level jurisdiction-stripping behavior can be explained by the
direct effects of ideology, judicial outputs, and the like, it is a conceivable that a
few members may be differentially affected by changes in public mood, judicial
outputs, representation of a southern state and, in the case of U.S. senators,
proximity to reelection. Four interaction terms are included here, and all concern
the conditional impact of those four variables on ideology. First, member
liberalism and public mood liberalism are interacted, with higher levels of that
variable indicating that more moderate members are especially inclined to pursue
jurisdiction-stripping when the public’s mood favors liberal policy outcomes.
Here a negative relationship between the interaction term and

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jurisdiction-stripping activity is expected, since it should be strong conservative trends in public opinion that pressure less conservative members to participate in court-stripping.

Second, the Court’s liberalism in civil liberties cases is interacted with member liberalism, with positive values signaling that less extreme members become increasingly prone to advocate court-stripping when the Supreme Court’s decisional outcomes grow especially liberal. The hypothesis here is that, to the extent that less ideologically extreme members engage in court-stripping, they will only do so when the Court’s outputs become liberal enough to make that action necessary.

Finally, in the Senate equation I test whether an individual’s proximity to reelection exerts a differential impact on members in light of their political ideologies. I include a dummy variable to represent senators whose terms expire at the end of the relevant congressional session. I first test the direct effect of this electoral proximity, and hypothesize that members will be less likely to advocate jurisdiction-stripping when they are electorally vulnerable. Bell and Scott (2005) have suggested that electorally vulnerable members are unlikely to advocate jurisdiction-stripping, if only because they can ill-afford to alienate even a small number of constituents by pursuing these highly controversial measures (Bell and Scott 2005, 11-12; but see Segal 1991). They find evidence that more senior legislators tend to sponsor court-curbing legislation, and argue that it is their
typically hefty reservoir of electoral support that gives those members the freedom to engage in court-stripping over issues that are highly polarizing (Bell and Scott 2005, 15; Parker 1992). Aside from seniority or one’s vote share in the previous election, the Senate’s staggered electoral calendar also represents a distinct dimension of political vulnerability. While electoral concerns are always in a legislator’s mind, those concerns become especially prominent immediately prior to an electoral campaign. Thus, all else being equal, conservative members who typically advocate jurisdiction-stripping should moderate their positions when they are most vulnerable to electoral retribution. As part of that moderation, they might well distance themselves from the polarizing topic of jurisdiction-stripping as reelection approaches.

Apart from this hypothesized direct effect, my analysis includes an interactive term to capture the joint effect of electoral proximity and member ideology as well. In contrast to the hypothesized direct effect of electoral proximity, here I advance the hypothesis that more moderate senators will actually become more active court-strippers immediately prior to reelection. In other words, while staunch liberals are unlikely to pursue court-curbing under any circumstances, moderate Republicans or conservative Democrats who generally disapprove of court-stripping may find it advantageous to associate themselves with proposed curbs on certain conservative issues as their electoral campaigns approach. Because these more moderate members will generally be reluctant to
participate in court-curbing activity, it stands to reason that on those select occasions when they do decide to pursue it, that involvement will be calculated to redound to their electoral benefit. In short, those members should use court-stripping to demonstrate their acceptability to more conservative members of the electorate. Table 6.7 provides a list of these independent variables, the hypotheses for each, and the signs the model coefficients are expected to produce.
<table>
<thead>
<tr>
<th>Variables</th>
<th>Substantive Expectation</th>
<th>Expected Sign</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member Liberalism</td>
<td>Ideologically liberal members will be less likely to advocate jurisdiction-stripping legislation than will conservative legislators.</td>
<td>–</td>
</tr>
<tr>
<td>Region</td>
<td>Southern members of Congress will be more likely to advocate jurisdiction-stripping legislation than will other legislators.</td>
<td>+</td>
</tr>
<tr>
<td>Court Liberalism</td>
<td>As the Supreme Court’s civil liberties decisions become increasingly liberal, all members of Congress will be increasingly likely to advocate stripping it of jurisdiction.</td>
<td>+</td>
</tr>
<tr>
<td>Public Liberalism</td>
<td>More members will advocate jurisdiction-stripping when the public’s mood is conservative</td>
<td>–</td>
</tr>
<tr>
<td>Reelection</td>
<td>Senators will be less likely to support jurisdiction-stripping in the Congress prior to their next election</td>
<td>–</td>
</tr>
<tr>
<td>Member Liberalism*Region</td>
<td>More moderate members from the South will be more likely to support jurisdiction-stripping than will more moderate members from other regions.</td>
<td>+</td>
</tr>
<tr>
<td>Member Liberalism*Court Liberalism</td>
<td>More moderate members become more supportive of jurisdiction-stripping as the Court’s outputs become more liberal.</td>
<td>+</td>
</tr>
<tr>
<td>Member Liberalism*Re-election</td>
<td>More moderate members will become more supportive of jurisdictional curbs in the Congress prior to their next election.</td>
<td>+</td>
</tr>
<tr>
<td>Member Liberalism*Public Liberalism</td>
<td>More moderate members should be particularly supportive of jurisdiction-stripping activity when the public’s policy mood is conservative</td>
<td>–</td>
</tr>
</tbody>
</table>

Table 6.7: Summary of Hypotheses, Individual-Level Analysis of Congressional Court-Curbing Behavior, 1953-2004
Results

Table 6.8 displays the results of the House and Senate random-effects logit models. For the most part, the results indicate that the determinants of court-stripping behavior are direct effects—not interactive ones. Member ideology, Supreme Court liberalism, and the liberalism of the public’s mood remain statistically significant in each of the equations, as they did in the earlier count models. It is also clear that Southern senators and representatives have been significantly more likely to advocate jurisdictional curbs than have officeholders from other regions of the nation, even after controlling for ideology. The Senate-specific equation hints that individuals facing reelection are, as a group, less likely to pursue jurisdiction-stripping. However, the variable’s coefficient fails to attain conventional statistical significance.

Only two of the interaction terms show signs of statistical significance. Non-conservative Southerners are no more likely than their non-southern counterparts to pursue jurisdiction-stripping; nor are less conservative members especially likely to pursue court-stripping when the Supreme Court’s decisions become more liberal. However, there is limited evidence that less conservative senators tend toward greater participation in jurisdiction-stripping activity when an electoral contest is imminent. Whereas the average advocate of jurisdictional limitation is somewhat less inclined to pursue court-curbing when facing reelection—probably because, as Bell and Scott (2005) note—Court-stripping
topics are defined by their volatility (11)—more moderate senators seem to use
court-curbing as a way to solidify their conservative base prior to such campaigns.
Finally, and contrary to expectation, the House-specific equation indicates that
moderate members are significantly more likely to pursue court-curbing activity
when the public’s policy mood is liberal. Though the sign remains the same in
the Senate equation, the result does not rise to statistical significance. This is
quite puzzling, and it directly contradicts the a priori directional expectation.
Because no theoretical reason can legitimately explain that implausible result,
however, it is important not to give undue weight to that particular finding.
<table>
<thead>
<tr>
<th></th>
<th><strong>House Court-Stripping</strong></th>
<th></th>
<th><strong>Senate Court-Stripping</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(\beta) (Standard Error)</td>
<td>(\beta) (Standard Error)</td>
<td></td>
</tr>
<tr>
<td><strong>Member Liberalism</strong></td>
<td>-22.548*** (5.799)</td>
<td>-17.103* (10.138)</td>
<td></td>
</tr>
<tr>
<td><strong>Region (South = 1)</strong></td>
<td>.893* (.457)</td>
<td>1.596* (.830)</td>
<td></td>
</tr>
<tr>
<td><strong>Court Liberalism</strong></td>
<td>3.503** (1.504)</td>
<td>4.191’ (2.918)</td>
<td></td>
</tr>
<tr>
<td><strong>Public Liberalism</strong></td>
<td>-.222*** (.044)</td>
<td>-.186** (.080)</td>
<td></td>
</tr>
<tr>
<td><strong>Reelection</strong></td>
<td>-- -.731 (.677)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>*<em>Member Liberalism</em></td>
<td>.656 (1.113)</td>
<td>-.152 (1.956)</td>
<td></td>
</tr>
<tr>
<td><strong>Region</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>*<em>Member Liberalism</em></td>
<td>2.111 (3.701)</td>
<td>-3.383 (6.780)</td>
<td></td>
</tr>
<tr>
<td><strong>Court Liberalism</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>*<em>Member Liberalism</em></td>
<td>-- 2.323’ (1.596)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Reelection</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>*<em>Member Liberalism</em></td>
<td>.233* (.108)</td>
<td>.209 (.185)</td>
<td></td>
</tr>
<tr>
<td><strong>Public Liberalism</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Constant</strong></td>
<td>9.835*** (2.334)</td>
<td>6.800 (4.314)</td>
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</tr>
<tr>
<td><strong>Log-Likelihood</strong></td>
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<td></td>
</tr>
<tr>
<td><strong>Number of Obs</strong></td>
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<td>2523</td>
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</tr>
<tr>
<td><strong>Number of Groups</strong></td>
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<td>386</td>
<td></td>
</tr>
<tr>
<td><strong>Prob&gt;chi2</strong></td>
<td>.000 .000</td>
<td>.000 .000</td>
<td></td>
</tr>
</tbody>
</table>

***Significant at .001 level (one-tailed test)
**  Significant at .01 level (one-tailed test)
*   Significant at .05 level (one-tailed test)
+   Significant at .1 level (one-tailed test)

Table 6.8: Random-Effects Logit Analysis of Member Decisions to Cosponsor Supreme Court-Stripping Legislation, 1953-2004
CONCLUSION

This chapter has endeavored to demonstrate several things. First, it sought to provide an overview of jurisdiction-stripping’s history and to present competing arguments over the practice’s constitutional legitimacy. It then discussed the need to appreciate the macro-level forces that have enabled court-curbing activities to take hold in Congress over the past half-century, and undertook a series of theoretical discussions and quantitative analyses to elucidate those forces. After linking the general relevance of changes in both judicial outcomes and the public’s preferences to the intensity of congressional efforts to limit the constitutional jurisdiction of the federal courts, the narrative progressed to a somewhat narrower conclusion. That conclusion, of course, reiterated the significance of judicial outputs and public mood in court-stripping debates. However, it also verified the importance of conservative ideology and regional considerations in the individual decision to sponsor legislation depriving the Supreme Court of appellate jurisdiction over certain controversial constitutional issues. It even suggested that one’s proximity to reelection may play at least a peripheral role in shaping the decisional calculus of the Senate’s would-be jurisdiction-strippers.

Chapter Seven concludes the dissertation’s discussion of court-stripping. There, I present a series of careful qualitative studies designed to illustrate the relevance of many of the factors discussed generally in Chapter Six to particular
episodes in the contemporary history of jurisdiction-stripping. Chapter Seven also addresses several possible explanations for the lack of jurisdiction-stripping activity in certain areas of federal constitutional adjudication. By building on the quantitative foundations presented here, that chapter provides a richer and considerably more vivid picture of court-stripping’s history since the dawn of the Warren Court in 1953.
CHAPTER 7

A COMPARATIVE PERSPECTIVE ON COURT-STRIPPING BEHAVIOR IN THE UNITED STATES

“[T]here is more than one way to skin a cat, and there is more than one way for Congress to provide a check on arrogant Supreme Court Justices who routinely distort the Constitution to suit their own notions of public policy…[If] Congress relegates itself solely to the amendment process to correct judicial errors and usurpations, then the very difficulty of the amendment process will be used to protect, not the constitutional text, but distortions of it. Thus, in the face of usurping Federal judges, the amendment process would serve to subvert the Constitution rather than to preserve it.”—Sen. Jesse Helms (130 Cong. Rec. 5919; 131 Cong. Rec. 23174-76)

“The President of the [American Bar Association] has declared the matter before us today…the gravest constitutional crisis since the Civil War…If you can strip from the Supreme Court the right to hear one question, you can strip from it the right to hear any question. There is no right in the Constitution that would not be placed in jeopardy…What we are considering is whether Congress can deny Supreme Court jurisdiction in cases involving the Court’s fundamental activity—interpreting the Constitution…This would be the most profound change in the separation-of-powers arrangement in the history of our system.”—Sen. Daniel Patrick Moynihan (128 Cong. Rec. 24170, 24444)

Aside from differentiating individual jurisdiction-stripping proposals by the federal courts they target, Chapter Six’s findings were quite general. Although they yielded several basic conclusions about the role of factors such as public opinion, congressional preferences, and judicial decisions themselves on the volume of jurisdiction-stripping legislation pursued by Congress, those findings did not speak to the impact of those forces in policy-specific situations. There have been a number of policy areas in which court-stripping legislation has been pursued, and it is highly doubtful that the conclusions reached in Chapter Six
have applied to each with equal force. At a minimum, it is necessary to consider the ways in which those conclusions hold—and, in some cases, may not hold—across individual issue areas.

This dissertation’s analysis of jurisdiction-stripping concludes with an examination of the ways in which the general patterns observed in Chapter Six have been reflected in particular policy debates, how those manifestations have differed between policy areas, and what systematic comparisons between those issues can do to further illuminate the motivations behind jurisdiction-stripping. Specifically, the chapter begins by discussing the place of jurisdictional politics in debates over race and school assignment, religion and the establishment clause, and sexuality, privacy, and abortion. After detailing the role of jurisdiction-stripping in these three major areas individually, the chapter undertakes a series of systematic comparisons and contrasts across them. That comparative examination assesses the relative impact of factors including ideology, regionalism, public opinion, and the availability of alternatives to court-stripping on the intensity of court-curbing in these areas of substantial congressional activity. Next, the chapter assesses several constitutional areas in which court-curbing efforts were either more limited in duration or altogether nonexistent. The chapter’s final pages combine these areas of substantial and less extensive jurisdiction-stripping
into a second comparative analysis that, in turn, yields several broader conclusions about the factors that relate to the intensity with which Congress and its members pursue jurisdiction-stripping activity.

**CONGRESSIONAL PARTICIPATION IN COURT-STRIPPING ACTIVITY**

Since the beginning of the Warren Court in 1953, members of Congress have attempted to use jurisdictional curbs to limit the power of the federal courts in a number of policy areas. As Chapter Six demonstrated, several early court-stripping efforts were geared toward undoing Warren Court decisions concerning governmental regulation of subversive activities (Pritchett 1961; Murphy 1962). Similarly, after the Court’s reapportionment decisions in the early 1960s, members began to pursue jurisdiction-stripping in that area as well. The House of Representatives even passed the Tuck Bill in 1964, which would have eliminated federal court jurisdiction over matters of legislative reapportionment (see 110 Cong. Rec. 20223). A number of other issues have occasionally surfaced as topics of jurisdiction-stripping legislation, including cases dealing with obscenity, the admissibility of criminal confessions, and even the constitutionality of the all-male draft.
With the exception of legislative reapportionment, none of these issues produced much in the way of court-curbing legislation. Even when such legislation did appear, those attempts did not continue beyond a handful of congressional sessions. Taking legislative reapportionment as an example, many court-curbing bills appeared after the Supreme Court’s rulings in *Baker v. Carr* (1962), *Wesberry v. Sanders* (1964), and *Reynolds v. Sims* (1964). But, aside from a brief resurgence in the Ninety-First Congress (1969-1970), the topic produced little more in the way of jurisdiction-stripping legislation. On the other hand, the politics of race and school assignment, issues of privacy and abortion, and school prayer and the establishment of religion more generally have all played critical roles in the court-stripping movement’s development. Given their histories, which are detailed below, those issues represent particularly appropriate areas in which to assess the applicability of Chapter Six’s conclusions to specific policy areas in a more qualitative fashion. After presenting detailed descriptions of these three areas, a series of systematic comparisons are undertaken to gain additional leverage on the factors that have prodded Congress and its members to contemplate—and, in some cases, to pass—jurisdictional limitations in these areas. Subsequent to that, the discussion broadens to encompass a wider range of constitutional issues on which Congress theoretically could have pursued—and, in a few cases, did pursue—the tactic of jurisdiction-stripping.
RACE AND SCHOOL ASSIGNMENT

A number of scholars have identified the Warren Court’s desegregation decision in *Brown* as being the catalyst behind the modern court-stripping movement (e.g., Pritchett 1961, vii). The first jurisdiction-stripping measures introduced during the Warren Court era were, in fact, sponsored by Southern lawmakers sharply opposed to the Court’s repudiation of the “separate-but-equal doctrine” in *Brown v. Board of Education* (1954) and *Bolling v. Sharp* (1954). These proposals were clearly motivated by segregationist views, as is evidenced by the high second dimension DW-NOMINATE cosponsorship scores displayed in Table 7.1. These second dimension scores capture member attitudes on the specific topic of African-American civil rights from the 1930s to the 1970s. Though they represent a very specific subset of member attitudes and are not applicable to the broader operationalization of civil liberties and rights utilized here, they are presented in Table 7.1 to underscore the unique role of race-based attitudes—as opposed to more general ideological ones—in jurisdiction-stripping activity vis-à-vis desegregation in the decade after *Brown*. As that table indicates, the typical cosponsors of those post-*Brown* proposals were not ideologically extreme in general terms, even if they did share a strong disdain for African-American civil rights in particular. In fact, the mean first dimension scores—which represent general member liberalism—for House and Senate sponsors are quite close to .000, or pure ideological moderation on the Poole-Rosenthal scale.
The first of these proposals came in 1955 at the beginning of the Eighty-Fourth Congress in 1955, when Senators Olin Johnston and Strom Thurmond, both of South Carolina, introduced legislation designed to

[Exclude] from appellate jurisdiction of the United States Supreme Court and the United States Courts of Appeals all actions relating to a State constitutional provision, law, etc., on the establishment, maintenance, or operation of the public schools, on the grounds that it is repugnant to the United States Constitution, etc., for any reason other than the substantial inequality of physical facilities and other tangible factors (Digest 1955, S. 1011, S. 1016).

These first jurisdiction-stripping efforts were also echoed in the House of Representatives by South Carolina’s Mendel Rivers and Elijah Forrester of Georgia. With just one exception, each piece of jurisdiction-stripping legislation relating to school desegregation that was proposed in either the House or Senate from 1955 until the 1970s provided for limiting the jurisdiction of the U.S. Supreme Court.
Reactions to Brown  |  First Dimension Ideological Mean | Second Dimension Civil Rights Issues
---|---|---
Senate cosponsors | .034 | .984
House cosponsors | .023 | 1.020 †

Note: First and Second dimensions range from -1 to +1, with more positive values representing ideological conservatism in the First Dimension and opposition civil rights in the Second Dimension.

†Average exceeds +1 because several of these House members' second dimension scores have large linear terms (see http://www.voteview.com/page2a.htm). The substantive point is that opponents of African-American civil rights were particularly active in proposing jurisdictional reforms in the wake of Brown.

Table 7.1: School Assignment, 1955-1965: Cosponsor Ideology

As an aside, since these first-dimension NOMINATE scores—which capture the general ideological extremity of individual members in a manner that can be compared across congresses—are used to characterize the ideological intensity of court-stripping throughout the remainder of the chapter, I include Table 7.2 below as a point of reference. Table 7.2 presents the first-dimension ideology scores for several well-known senators, and is intended to facilitate the substantive understanding of the ideological component of the jurisdiction-stripping episodes discussed herein. All scores fall between -1 and +1, with positive values indicating more conservative ideology.
<table>
<thead>
<tr>
<th>Senator</th>
<th>First Dimension Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jesse Helms</td>
<td>.732</td>
</tr>
<tr>
<td>Barry Goldwater</td>
<td>.675</td>
</tr>
<tr>
<td>Orrin Hatch</td>
<td>.464</td>
</tr>
<tr>
<td>William Roth</td>
<td>.246</td>
</tr>
<tr>
<td>John Danforth</td>
<td>.131</td>
</tr>
<tr>
<td>Arlen Specter</td>
<td>-.05</td>
</tr>
<tr>
<td>Sam Nunn</td>
<td>-.103</td>
</tr>
<tr>
<td>Lowell Weicker</td>
<td>-.182</td>
</tr>
<tr>
<td>Robert Byrd</td>
<td>-.287</td>
</tr>
<tr>
<td>Joseph Biden</td>
<td>-.401</td>
</tr>
<tr>
<td>Edward Kennedy</td>
<td>-.553</td>
</tr>
</tbody>
</table>

Table 7.2: First-Dimension Senator Estimates, Ninety-Ninth Congress (1985-86)

Congress’s preoccupation with court-curbing in the wake of *Brown* was consistent, but not substantial. During no session of Congress in the decade after *Brown* did more than four members associate themselves with efforts to remove the Supreme Court’s jurisdiction over school desegregation claims by cosponsoring jurisdiction-stripping legislation. What is more, each of the members who did participate in that cosponsorship represented a southern U.S. State—three were from South Carolina, one was from Louisiana, and two each came from Florida, Georgia, and Mississippi. To be sure, the American public’s basic acceptance of integration explains a great deal about why all but these few legislators opted not to pursue statutory changes in jurisdictional rules that would turn back the clock on racial integration. To underscore this isolation, even as
these legislators challenged the Court’s desegregation rulings, neither chamber’s Judiciary Committee held so much as a hearing to address possible ways that *Brown* and the principles it embodied might be circumvented.

That is not to say that members expressed no opposition to the Court’s rulings on the desegregation cases, however. To the contrary, in the decade following *Brown*, members proposed over twenty-five constitutional amendments with the specific goal of circumscribing federal court jurisdiction over the issue of school integration. Although the relationship between jurisdiction-stripping and the strategy of constitutional amendment will be revisited, it is important to contextualize the use of those tactics here. Both jurisdiction-stripping and constitutional amendments were proposed as responses to the desegregation cases of the 1950s, though most members who pursued one of these avenues did not engage in the other. It is generally assumed that jurisdiction-stripping emerges as a tactic only after proponents have realized the futility of pursuing a constitutional amendment (e.g., Fitzgerald and Cooperman 2004). However, no such sequencing is evident from the record on desegregation. Between the Eighty-Fourth and Eighty-Eighth Congresses, the introduction of jurisdiction-stripping legislation remained constant, with a minimum of three and a maximum of four individuals cosponsoring legislation to curtail federal review over school assignment issues.
That is paralleled in the introduction of constitutional amendments, where activity began in 1955 and had, for all practical purposes, ceased by the end of the Eighty-Eighth Congress.

By the beginning of the Eighty-Ninth Congress in 1965, these legislative assaults on the Warren Court’s desegregation decisions had subsided. This abrupt end to jurisdiction-stripping activity motivated by *Brown* can be explained by a number of factors. First, for all the angst it produced in the South, a majority of the American public favored the Supreme Court’s ruling in *Brown*. As early as May of 1954, 54% of the American public expressed agreement with the decision (Epstein et al 2003, 722). Though many of these Americans were not personally affected by the decision, a majority viewed the notion of racial progress that *Brown* embodied as desirable. As such, there was no real pressure to continue this assault on the judiciary over that decision outside the South, especially as acceptance of *Brown* continued to grow elsewhere (Epstein et al 2003, 722). In addition, though the Court decided *Brown* in 1954, it postponed full-scale implementation of the decision for some time. As Wilkinson (1979, 25) has noted,

The Court…knew only too well the mood of its day. And that mood was not ignored. With the segregation cases, the Court moved in its own sweet time. It called for reargument. It sought unanimity. It spoke in a tone both bland and conciliatory. It postponed in the original *Brown* decision any plan for implementation. When a plan was announced, it
refrained from fixing deadlines or uniform conditions. All it asked was the elimination of racial discrimination in public schools with ‘all deliberate speed.’

Third, as the Warren Court continued its progressivism, it overshadowed Brown by issuing profoundly countermajoritarian decisions on matters such as school prayer, and those decisions were more strongly resisted by the public than Brown had ever been. Finally, the actions of Congress itself probably contributed to the attenuation of this jurisdictional activity as well. In many ways, Congress endorsed the Court’s decisions in the desegregation cases by passing the Civil Rights Act of 1964, which explicitly “confer[red] jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations…[and authorized] the Attorney General to institute suits to protect the constitutional rights in public facilities and public education” (PL-88-352). In effect, the Eighty-Eighth Congress not only ratified the Warren Court’s desegregation decisions—it expanded the Court’s holdings about state-based discrimination to encompass activities touching on interstate commerce, and did so in the face of an unsuccessful Southern filibuster. In passing the Civil Rights Act of 1964, Congress sent a strong signal to opponents of racial desegregation that the issues settled in Brown were no longer open to debate. That signal was further reinforced in 1965 and 1968 with passage of the Voting Rights Act and the Housing Act (Rosenberg 1991, 41).
Between 1964 and the seminal 1971 decision in Swann v. Charlotte-Mecklenburg Board of Education (1971), the Warren and Burger Courts continued to build on the desegregation cases and expanded the applicability of civil rights protections available to American minorities. In Griffin v. Prince Edward County School Board (1964), the Supreme Court struck down a Virginia plan which sought to close public schools rather than integrate them. It invalidated yet another school assignment plan as constitutionally inadequate in Green v. School Board of New Kent County, saying that “[school districts are] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch” (391 U.S. 430, 1968, 437-438). In Alexander v. Holmes County Board of Education, the Burger Court made it clear that the “standard allowing ‘all deliberate speed’ for desegregation [would no longer be] constitutionally permissible” (396 U.S. 19, 1969, 20). While many southerners continued to object to the Court’s actions, most probably realized that these subsequent decisions were inevitable outgrowths of both the Court’s momentous decision in Brown and the Congress’s increasing activity on the issue of civil rights.

In 1971, those decisions culminated in the case of Swann v. Charlotte-Mecklenburg. In Swann, the Court assessed the constitutionality of the so-called “Finger Plan,” which had been commissioned by the federal district court and,
ultimately, was approved by district Judge James B. McMillan (O’Brien 2002, 1396-1397). The net effect of the plan’s adoption was to require the Charlotte-Mecklenburg schools to implement a comprehensive system of district-wide busing for its students to remedy the *de jure* segregation that had taken root there. Among its controversial aspects, the Finger Plan set out a series of noncontiguous school attendance zones, which required many students to be bused to and from schools that were often quite distant from their homes. Though it applied only to legal (*de jure*) discrimination, Chief Justice Burger’s majority opinion in *Swann* underscored the broad powers the district courts possessed to exact local compliance with the Court’s holding in *Brown* (Schwartz 1986). In it, the Court unanimously upheld Judge McMillan’s action and endorsed a degree of flexibility in future implementation of school desegregation. As the opinion put it, “the nature of the violation determines the scope of the remedy” (402 U.S. 1, 16).

It did not take long for the Burger Court’s validation of this sweeping federal district court power to reverberate in Congress. Between the fall of 1971 and the end of 1972, several members had introduced jurisdiction-stripping legislation designed to prohibit the federal courts from mandating busing as a remedy in school desegregation cases. And, although the *Swann* case had dealt with Southern school desegregation, it quickly became clear that, when it came to the issue of judicially-mandated busing, southern members would have no
monopoly on the tactic. In fact, the first court-curbing response to Chief Justice Burger’s opinion in *Swann* came from a Californian, Representative John Schmitz. His bill, HR 10614, provided that

> U.S. District Courts or the U.S. Supreme Court shall not have jurisdiction to review any case arising out of any State statute, ordinance, rule, or regulation or any Act interpreting, applying, or enforcing the same which relates to assigning or requiring any public school student to attend a particular school because of his race, creed, or color (*Digest 1972, HR 10614*).

Others, including Illinois Republican Philip Crane, introduced even more pointed legislation. His bill, HR 13024, simply provided that, “…No federal court shall have jurisdiction to require attendance at a particular school of any student because of race, color, creed, or sex” (*Digest 1972*). Although some southern members championed similar legislation, prominent non-southern members introduced court-curbing legislation in the Ninety-Second Congress as well. Senator Robert P. Griffin of Michigan’s Student Antibusing Act provided that no federal court should have jurisdiction to require the transportation of pupils on the basis of their race, color, religion, or national origin. Colorado Senator Peter Dominick advocated legislation in 1972 that sought to do much the same thing (*Digest 1972, S. 3783, S. 3395*).

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25 Schmitz, the father of Mary Kay LeTourneau, was so conservative that he was a candidate for president on George Wallace’s American Independent Party and was later shunned as a political extremist by the John Birch Society ([www.arlingtoncemetery.net/jgschmitz.htm](http://www.arlingtoncemetery.net/jgschmitz.htm), last accessed July 15, 2005).
The House of Representatives held extensive hearings on busing in the winter and spring of 1972, and in those hearings it explored a number of possible ways to circumvent the Court’s busing decisions. Both constitutional amendments and jurisdiction-stripping legislation were considered at those hearings, and members of Congress and numerous independent groups made their views on busing known there. Interest group organizations such as the National Council Against Forced Busing, Concerned Citizens for Improved Schools, the Council of Citizens for Neighborhood Schools, Parents Against Forced Busing, the Concerned Parents Association, and many other anti-busing groups appeared at the House hearings (1972 House Subcommittee Hearings—School Busing).

After Swann, the district courts were limited to imposing busing as a remedy for legal segregation; they had no power to provide such relief in situations where de facto segregation had resulted, not under the color of law, but as an indirect result of more informal social or environmental arrangements. Practically speaking, this meant that Swann’s main impact would be felt in southern public schools where segregation had been legally sanctioned (Keynes and Miller 1989, 212). The involvement of these northern members might have been difficult to understand, were it not for the open secret that school segregation was a problem whose implications were inevitably national in scope. After all, the Court’s decision in Swann had no direct effect outside the almost exclusively southern areas where discrimination was sanctioned by law. That involvement by
northern lawmakers—particularly Senators Dominick and Griffin—is especially revealing in light of the Court’s subsequent two terms, in which it addressed important desegregation cases from their home states of Colorado and Michigan. In the 1973 case of Keyes v. School District No. 1 of Denver, Colorado, an 8-1 Supreme Court majority held that, even in situations where dual school systems had not been sanctioned by law, “where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of…the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system” (413 U.S. 189, 201). Justice Powell, writing separately in Keyes, put the issue in somewhat starker terms, noting that

As the remedial obligations of Swann extend far beyond the elimination of the outgrowths of the state-imposed segregation outlawed in Brown, the rationale of Swann points inevitably toward a uniform, constitutional approach to our national problem of school segregation (Powell, J., concurring at 223).

Quite simply, the Court’s decision in Keyes recognized the national scope of the school segregation problem and put the nation on notice that a number of the northerners—politicians and parents alike—who had supported Brown in principle would now be expected to do so in practice. After Keyes, the Court’s next major desegregation case came in Milliken v. Bradley (1974). There the Court struck down a wide-ranging plan which had been designed to subject
students in outlying districts to busing in order to achieve racial balance in Detroit’s inner-city schools. Even though the Court invalidated Detroit’s particular arrangement, *Milliken* underscored that northern districts would be held accountable for perpetuating purposeful discrimination in their schools.

During the Ninety-Third Congress (1973-1974), over forty members of the House and Senate cosponsored legislation to deprive the Supreme Court of jurisdiction over school assignment issues. This level of support for jurisdiction-stripping is hardly startling in light of both the Supreme Court’s contemporaneous statements on matters of student transportation and district desegregation and the general public’s antipathy for busing as a remedy for segregation. In 1971, the Court’s progressive decisions in *Swann, Davis v. Board of Commissioners*, and *North Carolina Board of Education v. Swann* had collectively pronounced busing to be a legitimate tool for the implementation of desegregation. Two years later in *Keyes*, it expanded the concept of *de jure* desegregation even further to encompass what promised to be a great deal of activity in northern school districts as well. These developments no doubt prodded southern senators Helms (R-NC), Allen (D-AL), Eastland (D-MS), Scott (R-VA), and Thurmond (R-SC) to introduce their “Public School Jurisdiction Act” in the summer of 1973. It also led various representatives from states such as Michigan, California, Indiana, Illinois, Florida, Tennessee, and Ohio to associate themselves with similar measures in the House of Representatives.
Table 7.3: School Assignment, 1971-present: Cosponsor Ideology

<table>
<thead>
<tr>
<th></th>
<th>First Dimension Ideological Mean</th>
<th>Standard Deviation</th>
<th>Min/Max</th>
</tr>
</thead>
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<tr>
<td>All courts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senate cosponsors</td>
<td>.281</td>
<td>.296</td>
<td>-.227, .686</td>
</tr>
<tr>
<td>House cosponsors</td>
<td>.327</td>
<td>.339</td>
<td>-.451, 1.357</td>
</tr>
<tr>
<td>Inferior courts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senate cosponsors</td>
<td>.339</td>
<td>.322</td>
<td>-.443, .750</td>
</tr>
<tr>
<td>House cosponsors</td>
<td>.340</td>
<td>.200</td>
<td>-.220, .793</td>
</tr>
</tbody>
</table>

In the 1970s, public support for busing black and white school children to achieve racial balance was quite low. According to the General Social Survey, no more than 20% of the American public ever approved of busing as a tool for integration during the 1970s (Epstein et al 2003, 724). Although advocates of curbing federal jurisdiction over the implementation of desegregation were ideologically conservative as a whole, congressional support for many of those proposals was comparatively broad. An appreciable number of more liberal legislators, including John Dingell (D-MI) and Alan Mollohan (D-WV) in the House and Joseph Biden (D-DE) and Walter Huddleston (D-KY) in the Senate, joined with their more conservative colleagues in advocating these jurisdictional curbs. That cooperation is reflected in the averages reported in Table 7.3.

In that context, the Senate Judiciary Committee’s Subcommittee on Constitutional Rights held hearings on the busing issue in 1974. In those proceedings, it considered two pieces of jurisdiction-stripping legislation, as well
as several non-jurisdictional measures designed to circumvent the busing
decisions. Senator Griffin reintroduced his “Student Antibusing Act of 1973,”
which provided that “…no court of the United States shall have the jurisdiction to
make any decision, enter any judgment, or issue any order requiring pupils to be
transported to or from school on the basis of their race, color, religion, or national
origin” (Digest 1973, S. 179). The hearings also assessed the aforementioned
“Public School Jurisdiction Act of 1973” of Helms and his colleagues. That
legislation stated that, “…no district court or court of appeals of the United States
shall have original, continuing, or pendent jurisdiction to issue in any case or
controversy any command directing, forbidding, or changing (1) the assignment
or transportation of any student; (2) the employment, transfer, or retention of
teaching or administrative staffs; (3) any appropriation or expenditure of any
funds for any such school; or (4) the accreditation of any such school (Digest

By the Ninety-Fourth and Ninety-Fifth Congresses, the number of senators
and representatives sponsoring legislation to limit the Supreme Court’s ability to
adjudicate student assignment cases had fallen from over forty in the Ninety-
Second Congress to eighteen and seven, respectively. By contrast, however, the
number of members advocating legislation to limit inferior federal court
jurisdiction over the issue rose from four in the Ninety-Second Congress to
sixteen in the Ninety-Third, twenty-three in the Ninety-Fourth, and to eighteen in
the Ninety-Fifth. Interestingly, this comparative decrease in the emphasis given to the Supreme Court’s jurisdiction by members of Congress coincided with the Court’s issuance of several conservative rulings on school desegregation and forced busing. As previously noted, the Court refused to uphold a multidistrict busing order that had been imposed on the Detroit schools by district judge Stephen J. Roth in *Milliken v. Bradley* (1974). After that decision, the number of members who associated themselves with court-stripping legislation in the subsequent Congress declined. On the heels of that ruling, the Court announced decisions in *Austin Independent School District v. United States* (1976) and *Dayton Board of Education v. Brinkman [Dayton I]* (1977), where it remanded two desegregation plans to the lower courts because the remedies ordered by the district courts were unsupported by the violations alleged (Keynes and Miller 1989, 213). Finally, in *Pasadena City Board of Education v. Spangler* (1976), a 6-2 Court majority held that school attendance zones need not be reapportioned annually to fulfill the requirements of a court-ordered desegregation plan. Writing for the majority, Justice Rehnquist used the occasion to reiterate that *Swann* had expressly disapproved of the “substantive constitutional right [to a] particular degree of racial balance or mixing” at issue in the *Pasadena* case (427 U.S. 424, 434).

Though pleased that the Supreme Court had appeared to moderate its position on busing between 1974 and 1977, members of Congress continued to
agitete for jurisdictional limitations on the inferior federal courts. Specifically, twenty-three members proposed curtailing inferior federal court jurisdiction over school assignment in the Ninety-Fourth Congress, and eighteen did so in the following session. This was probably due to the fact that, while the Supreme Court was producing more favorable rulings on the issue of busing, the real enforcement continued to take place at inferior levels of the federal judiciary. In addition, the public’s strident opposition to busing provided an additional motivation for attacking the lower courts, even as the Supreme Court’s outputs grew more moderate. Even assuming that the Supreme Court’s busing decisions had become palatable to congressional conservatives, few believed that the Court had the capacity to oversee every individual desegregation program being implemented by the federal district courts. In any case, attacks on the Supreme Court’s jurisdiction over matters of school assignment did abate noticeably after its issuance of those more moderate rulings.

Unfortunately for busing’s critics, the Supreme Court’s decisions in 1974, 1976, and 1977 proved to be temporary victories. By 1979, Dayton Board of Education v. Brinkman (Dayton II) had returned to the Court along with Columbus Board of Education v. Penick. There, in opinions by Justice Byron White, the Court narrowly upheld lower court orders which had found intentional discrimination by the Dayton and Columbus, Ohio, school boards. In those districts, where, in 1976, 70 percent of all students attended school that were at
least 80 percent black or white, the Court also gave its assent to massive busing plans that had been imposed on the school systems by the district court (see Jacobs 1998).

This apparent change of course quickly provoked additional jurisdiction-stripping legislation in Congress that targeted the Supreme Court. In the Ninety-Sixth Congress, forty-seven members of the House joined together to cosponsor three bills aimed at curbing all federal court jurisdiction over school assignment issues. Not surprisingly, five of Ohio’s representatives cosponsored that legislation. In the Ninety-Seventh Congress, it was the Republican Senate that took the lead in attempting to curtail the Court’s jurisdiction over school assignment cases. Although a House subcommittee held general hearings regarding statutory limitations on federal jurisdiction in the summer of 1981, two Senate subcommittees held hearings on the specific issue of busing. In February of 1981, thirteen senators cosponsored the Neighborhood School Act of 1981, which “prohibit[ed] a Federal court from ordering any student to be assigned or transported to a public school other than that which is nearest to the student’s residence unless: (1) such assignment or transportation is incident to attendance at a school of specialized instruction; (2) such assignment is incident to a purpose directly and primarily related to an educational purpose; (3) such assignment is incident to the voluntary attendance of a student; or (4) the requirement of such transportation is reasonable” (Digest 1981 S. 528) Hearings on that legislation
were held in May and June of 1981, and a second round of hearings took place in the fall of that same year (1981 Senate Hearings—*Court-Ordered School Busing*).

After nearly a year of legislative inaction, Senator J. Bennett Johnston (D-LA) attached the measure as an amendment to the Justice Department Authorization Bill of 1982.

Johnston’s parliamentary maneuver caused a stir. Senator Dodd of Connecticut led the fight against the jurisdiction-stripping measure, saying at one point that “The amendment to this bill is only superficially a jurisdictional issue. At its heart, it is a political attack on the judiciary” (128 Cong. Rec. 2793).

Senator Charles Percy (R-IL) read a communication from the Illinois Bar Association in which the group “Unanimously and strongly reassert[ed] its frequently stated position that it opposes the many congressional proposals that seek to limit the appellate jurisdiction of the United States Supreme Court and the jurisdiction of inferior federal courts to hear and decide federal constitutional questions” (128 Cong. Rec. 2786). However, after a filibuster of several months, the Senate finally included the Neighborhood School Act in the Authorization Bill by voice vote, and the overall bill cleared the chamber by a vote of 57 to 37 (128 Cong. Rec. 2779). Though a House subcommittee held hearings on the measure’s constitutionality in the summer of 1982 (1982 House Subcommittee Hearings—
Limitations on Court-Ordered Busing: Neighborhood Schools Act), Johnston’s Neighborhood School Act was subsequently killed in the House of Representatives and never reached President Reagan’s desk.

In some ways, the Neighborhood School Act’s failure to pass the House of Representatives registered the death knell for the use of jurisdiction-stripping on matters of desegregation and school assignment. But the Act’s failure did less to bring about that end than it did to symbolize it. This was because, after 1982, changing societal pressures and the actions of the Supreme Court itself acted in concert to take the issue off the table. In Washington v. Seattle School District (1982), the Court struck down an initiative requiring children to attend the schools nearest to their homes. In effect, the Court rejected the idea that busing in any form or of any distance was unconstitutional per se. However, that same year in Crawford v. Los Angeles Board of Education, the Court upheld an amendment to the California state constitution that limited court-imposed busing designed to ensure integrated public schools. These decisions seem to have reflected the Court’s arrival at a tenuous equilibrium on the busing issue. While the position of that equilibrium might not have been ideal to conservatives, it was sufficiently moderate to be satisfactory. Moreover, as justices with more conservative views on civil rights were elevated to the Supreme Court throughout the 1980s, that equilibrium shifted further to the political right. That, in turn, made the case for jurisdiction-stripping on the busing issue even less pressing.
When the Neighborhood Schools Act died in the House late in 1982, the Supreme Court’s original holding in *Swann* had been in force for over ten years. During that interval, the court-ordered remedies for desegregation that decision permitted had been at least marginally successful in breaking down vestiges of *de jure* segregation in many school districts across the nation (see Stanley and Niemi 2001, 376-377). As such problems became more tractable, the federal judiciary’s role in fights over school desegregation presumably became somewhat more peripheral. One constitutional law textbook’s summary of notable Supreme Court school assignment rulings seems to confirm this, as no school assignment case between 1982 and 1990 is included on that list (O’Brien 2002, 1413-1415).

In 1990, the Supreme Court issued an important opinion in *Missouri v. Jenkins (Jenkins I)*, a Kansas City case which raised the question of whether federal district judge Russell G. Clark had exceeded his authority by imposing a local tax increase to pay for a magnet school plan designed to achieve racial integration. While the Court unanimously held that the district judge had exceeded his authority by ordering the tax himself, five justices acknowledged that the district judge had the power to authorize or require the school district to “levy property taxes at a rate adequate to fund the desegregation remedy” (495 U.S. 33, 51). Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy strongly objected to that aspect of the decision, saying, “The power of taxation is one that the Federal Judiciary does not possess.” (Kennedy J.,
Rehnquist C.J., O'Connor, and Scalia, JJ., concurring in judgment at 495 U.S. 33, 69). A substantial number of legislators shared that view, and members of the One Hundredth Congress soon began introducing measures to strip the judiciary of this authority to require tax increases.

Fully one-fourth of the U.S. Senate and over thirty-two percent of all House members cosponsored legislation to strip the inferior federal courts of the jurisdiction to order such tax increases. In the following Congress more than seventy members of the House cosponsored identical legislation, but neither session saw the enactment of jurisdictional reform. The Supreme Court itself escaped Congress’s wrath, perhaps because of the decision’s narrowness, its isolated nature, or the central role of the district courts in prescribing such taxation-based remedies. After the One Hundred Second Congress these court-curbing measures were effectively reduced to isolated occurrences that never attracted support from more than four cosponsors. As the addition of new justices buttressed the Supreme Court’s conservative wing and it, in turn, issued conservative decisions in cases such as Oklahoma City Board of Education v. Dowell (1991) and Freeman v. Pitts (1992), there remained little reason for conservatives in Congress to advocate stripping it—or, for that matter, the Republican-dominated lower courts—of the ability to decide matters relating to school desegregation.
In *Dowell*, a five-member majority of the Supreme Court reversed a Tenth Circuit Court of Appeals decision binding the Oklahoma City School District to a 1972 desegregation decree. In that case, the Supreme Court essentially held that court-mandated busing could be terminated, even if school resegregation occurred—provided that such resegregation had occurred because of private choices, and that “in light of every facet of school operations, the vestiges of past *de jure* segregation had been eliminated to the extent practicable” (498 U.S. 237, 239). In *Freeman v. Pitts*, the Court seemed to approve incremental relinquishment of judicial supervision over desegregation, and noted that, “…with the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision” (563 U.S. 467, 469). Moreover, it reiterated that, “Racial balance is not to be achieved for its own sake, but is to be pursued only when there is a causal link between an imbalance and the constitutional violation. Once racial imbalance traceable to the constitutional violation has been remedied, a school district is under no duty to remedy an imbalance that is caused by demographic factors” (563 U.S. 467, 469).

That commitment to *Freeman v. Pitts* was reitered in 1995, when *Missouri v. Jenkins (Jenkins II)* returned to the Supreme Court. By that time, the Court’s conservatives were positioned to strike down a district court order requiring the state of Missouri to fund salary increases for teachers and staff within the Kansas
City Missouri School District. Taken together, these decisions appeared to confirm one scholar’s prediction on school desegregation’s ultimate fate: “at some point—perhaps in words that could connote either triumph or despair—the Court will come to say: it is finished” (Gerwitz 1986, 798). After the Court’s conservative decisions in Dowell, Freeman v. Pitts, and Jenkins II, it seemed that moment was at hand.

<table>
<thead>
<tr>
<th>Years</th>
<th>Notable Desegregation Cases</th>
<th>Jurisdiction-Stripping Cosponsors</th>
<th>Congressional Action</th>
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<tr>
<td>1955-56</td>
<td>Brown II (1955)</td>
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<td></td>
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<tr>
<td>1957-58</td>
<td>Cooper v. Aaron (1958)</td>
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<tr>
<td>1959-60</td>
<td>---</td>
<td>4</td>
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<td>1961-62</td>
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<td>3</td>
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<tr>
<td>1963-64</td>
<td>Griffin v. Prince Edward County Schools (1964)</td>
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<tr>
<td>1965-66</td>
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Continued

Table 7.4: Notable Supreme Court Desegregation Decisions

296
Table 7.4 Continued

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<tr>
<td>1979-80</td>
<td>Dayton Bd. of Ed. v. Brinkman (1979); Columbus Bd. of Ed. v. Pinick (1979)</td>
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<tr>
<td>2003-04</td>
<td>---</td>
<td>None</td>
</tr>
</tbody>
</table>

†Number of House and Senate members in support of legislation. *Italicized* decisions are those in which the Court reached a liberal outcome; *underlined* decisions are those in which the Court moderated its insistence on desegregation via busing or judicially-mandated tax increases.

**RELIGION AND THE ESTABLISHMENT CLAUSE**

In the 1947 case of *Everson v. Board of Education*, a 5-4 majority of the U.S. Supreme Court held that the First Amendment’s Establishment Clause had effectively been extended to the individual states via the Fourteenth Amendment’s
Due Process Clause. With that decision, the justices set fire to a long constitutional fuse that continues even now to wind its way through American legal and political history. Paradoxically, however, the *Everson* decision itself struck a blow for religious accommodation, as the justices held that the New Jersey law in question did not constitute an establishment of religion. Aside from its decisions on school release-time programs in *McCollum v. Board of Education* (1948) and *Zorach v. Clausen* (1952), however, the Court’s next major appraisal of *Everson*’s revitalized Establishment Clause did not come until 1962. In that year, the Court’s assessment of twenty-two words ignited a firestorm in Congress and among powerful segments of American society: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country” (*Engel v. Vitale* 370 U.S. 421, 422).

In *Engel v. Vitale*, a 6-1 Court majority struck down the constitutionality of that nondenominational prayer as well as the larger daily classroom invocation program of which it was a part. With characteristic bluntness, Justice Hugo Black’s majority opinion stated, “We think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government” (370 U.S. 421, 425). Justice Potter Stewart’s prescient dissent warned against the decision’s future implications, citing the presence of “In God
“We Trust” on U.S. coinage, chaplain-led prayer in the House and Senate, the Court’s own recitation of “God Save the United States and this Honorable Court,” and, since 1954, the presence of the phrase “One Nation Under God” in the Pledge of Allegiance as potential violations of this recast Establishment Clause (Stewart J., dissenting at 445-451).

In its very next session, the Warren Court used Engel’s rationale to strike down the constitutionality of Bible reading and scripture recitation in the public schools, doing so in the companion cases of Abington School District v. Schempp (1963) and Murray v. Curlett (1963). The political response to these three decisions was both immediate and predictable. After the Engel decision, South Carolina Representative Mendel Rivers proposed a constitutional amendment requiring Supreme Court justices to stand for reelection every ten years. He also articulated the view that, “…It is time for the Congress to at least exercise its constitutional right under Article III to drastically restrict and limit the appellate jurisdiction of this court which flaunts its authority in our very faces and it flaunts its authority because we have permitted them to run rampant over us” (Keynes and Miller 1989, 188). Representative Howard Smith echoed Rivers’s view, saying, “So far as the Supreme Court is concerned, the simplest and most practical remedy [to overcoming the school prayer decisions] is that provision in the Constitution which authorizes the Congress to curtail the appellate powers of
the Supreme Court and limit the Court’s jurisdiction to those fundamental areas of review originally envisaged by the Framers of the Constitution” (Keynes and Miller 1989, 188).

Nor were such reactions limited to members of Congress. In July of 1963, Dean Clarence Manion responded to the school prayer decisions on his national radio program with a broadcast entitled “Congress Should Strip the Supreme Court of its Appellate Jurisdiction.” In that broadcast, Manion opined that

These unfortunate Court ventures into policymaking and legislation in disregard for what the State justices called proper judicial restraint cannot be corrected by the slow process of constitutional amendment….In the national interest, therefore, Congress should now exercise the authority given to it under Article III of the Constitution and strip the Supreme Court of its appellate jurisdiction which it now exercises so prodigally… (Keynes and Miller 1989, 188-9).

These criticisms reflected the public’s disapproval of the Court’s actions as well. According to a 1963 Gallup Poll, just 24% of the American public agreed with the Warren Court’s decisions in the school prayer and Bible reading cases. By 1974, the General Social Survey pegged support for the Court’s decisions at an anemic 32% (Epstein et al 2003, 732).

While various floor statements indicate that proponents of school prayer viewed jurisdictional limitations and constitutional amendments as “alternative, interchangeable methods of achieving their strategic goal,” the immediate strategy
for reversing the prayer decisions centered on the amendment process (Keynes and Miller 1989, 188). Judging by the overwhelming public support school prayer had behind it, the prospect of securing passage of a constitutional amendment struck many as an attainable goal. In 1962 alone, members of Congress introduced over fifty constitutional amendments designed to overcome the Court’s decisions. By the next session, that number of proposed amendments had increased more than fivefold.

In August of 1966 a Senate subcommittee held hearings on a proposed constitutional amendment to overturn the school prayer decisions, but those hearings did not address the prospect of Congress using its jurisdictional power to undermine the decisions. Despite substantial support, the school prayer amendment could not secure congressional passage. After prayer amendments failed to garner the necessary two-thirds majority required for passage in the Senate in 1966 and 1970 and the House in 1971, it had become clear that the amendment process would not be the avenue through which the Warren Court’s prayer decisions would be undone (Keynes and Miller 1989, 193-195).

Though jurisdiction-stripping would, in time, occupy a central role in the conservative struggle to overcome both the Supreme Court’s school prayer decisions and its enforcement of the Establishment Clause in general, no such legislation was introduced until the Ninety-Second Congress in 1971. That, of course, contrasts with the simultaneous relationship between jurisdiction-stripping
legislation and the tactic of constitutional amendment evidenced on the school assignment issue. Even so, only a small number of House members pursued court-stripping on the school prayer issue in the Ninety-First Congress. However, that changed in 1972 when a North Carolina radio and television executive named Jesse Helms won election to the United States Senate. By 1974, Helms had joined with senators Wallace Bennett (R-UT), Carl Curtis (R-NE), James Eastland (D-MS), and Strom Thurmond (R-SC) to sponsor S. 3981—a measure they had designed to extinguish federal court jurisdiction over matters relating to prayer in public schools. In introducing the bill, Senator Helms signaled a tactical shift and made a telling statement that confirmed the most traditional explanation for court-stripping’s existence:

[M]any of us have sought to reverse the Court’s decision through the adoption of a constitutional amendment. But our efforts have not been successful. At this very moment, Senate Joint Resolution 84 is before the Senate Judiciary Committee…but I am also aware of the fact that this proposal has been before the committee for more than a year. The amendment process is time consuming and exceedingly difficult. The time has come to consider an alternative means of dealing with this problem.
Fortunately, the Constitution provides this alternative under the system of checks and balances. In anticipation of judicial usurpation of power, the framers of our Constitution wisely gave Congress the authority, by a simple majority of both Houses, to check the Supreme Court through regulation of its appellate jurisdiction (120 Cong. Rec. 30720-30721).

As the legislation itself put it,

The Supreme Court shall not have jurisdiction to review any case arising out of any state statute or arising out of any Act interpreting a State statute, which relates to voluntary prayers in public schools and public buildings. Provides that the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review (S. 3981; 120 Cong. Rec. 30721).

Several members of the House of Representatives, including Pennsylvania Democrat Daniel Flood and Tennessee Republican James H. Quillen, introduced similar measures. Others in the House and Senate advocated legislation eliminating some or all federal court jurisdiction over all public school activities—not just school prayer.

Meanwhile, the Supreme Court had no immediate occasion to revisit the issue of school prayer since handing down its initial decisions in 1962 and 1963. However, the Court’s other Establishment Clause decisions gave conservatives in Congress little reason to believe the Court—now led by Chief Justice Warren
Burger—would dramatically rethink its position on the prayer issue. In *Lemon v. Kurtzman* (1971), the Supreme Court enunciated the so-called *Lemon* Test. According to that three-pronged test, a challenged program must have a secular purpose, may neither advance nor inhibit religion, and may not foster an excessive government entanglement with religion if it is to pass constitutional muster. A strict application of that test would make it difficult for most programs—least of all school prayer—to pass Establishment Clause muster.

The frequency of congressional efforts to strip the courts of the ability to adjudicate cases involving prayer in public schools has probably been more heavily influenced by extra-judicial considerations such as public opinion and individual member preferences than the other topics of this study. After all, the Court did not even issue additional decisions on the specific subject of school prayer for many years. Before describing that congressional behavior in more detail, however, it should be pointed out that prayer-related jurisdiction-stripping measures have almost exclusively focused on the U.S. Supreme Court’s appellate jurisdiction over such controversies. Indeed, since 1975, only one member of Congress has ever sponsored jurisdiction-stripping legislation on the issue of school prayer targeting inferior court jurisdiction while leaving the Supreme Court’s jurisdiction undisturbed. This, as we will see, is a marked contrast to the more assorted measures proposed by members on the issues of sexuality and abortion and school assignment. While it is at variance with Congress’s behavior
in these other areas, this single-minded attention to the Supreme Court’s appellate jurisdiction is understandable in the context of school prayer. Unlike its decisions on student transportation and even the right to obtain an abortion, the Court’s decisions on school prayer were clear-cut and left little room for interpretation or independent judgment on the part of the district courts—no matter the context, schools could not prefer religion by actively sanctioning participation in such activities. While slightly different fact patterns often made considerable difference in the outcomes of these other cases, those shades of gray were much less visible on the prayer issue. In addition, the Court’s prayer decisions represented a model of consistency, whereas its rulings on abortion and desegregation had vacillated considerably over the years.

Senator Helms’s prayer bill was reintroduced at the beginning of the Ninety-Fourth Congress in 1975, and Senators Curtis (R-NE), Eastland (D-MS), McClure (R-ID), Stennis (D-MS), Thurmond (R-SC), Talmadge (D-GA), and Buckley (C-NY) cosponsored the legislation (Digest 1975, S. 283). In addition, Senators Roth of Delaware and Fannin of Arizona jointly cosponsored a nearly identical piece of legislation that same session. As if to underscore the relationship between jurisdiction-stripping and the strategy of constitutional amendment, Senator Roth simultaneously introduced his court-curbing bill with a proposed constitutional amendment to permit the restoration of prayer in public
schools (Digest 1975, S. 1467, SJ Res 46). Six members of the House introduced similar jurisdiction-stripping measures, but none attracted much support.

At the beginning of the Ninety-Sixth Congress in 1979, Senator Helms again introduced his school prayer bill. Frustrated with the lack of attention being given to his legislation, Helms proposed the same measure as an amendment to the bill establishing the Department of Education in the spring of 1979. Specifically, the Helms amendment would have “exclude[d] from the Court’s appellate jurisdiction, and the inferior federal courts’ jurisdiction as a whole, any cases drawing into question the validity of state or local statutes or ordinances permitting voluntary prayer in public schools or other public buildings” (Beck 1982, 4439-40). Although it was inserted into the larger bill on a 47-37 vote, Helms’s measure would have jeopardized passage of that legislation. As a result, it was subsequently tabled and added to the Supreme Court Jurisdiction Act of 1979, a largely administrative bill designed to abolish most of the Supreme Court’s mandatory jurisdiction.

On April 9, 1979, Helms’s jurisdiction-stripping legislation was included in the new Senate bill on a 51-40 vote, and the Supreme Court Jurisdiction Act then cleared the Senate with 60 affirmative votes. However, the House took no action on the legislation, despite a House Judiciary Subcommittee’s hearings on the measure and a campaign to discharge the legislation from the House Judiciary Committee that came within 32 votes of success (Ackerman 1982; Wicker 1981).
During those House hearings, the subcommittee heard favorable testimony on the legislation from representatives of the Southern Baptist Convention, Campus Crusade for Christ, the executive director of the Moral Majority, the American Legion, the Christian Civil Liberties Union, and representatives from the National Association of Evangelicals and the National Committee to Revive School Prayers. It also heard opposition from various organizations, including Americans United for Separation of Church and State and the American Civil Liberties Union (1980 House Subcommittee Hearing—*Prayer in Public Schools and Buildings: Federal Court Jurisdiction*).

After the Republican Party won control of the U.S. Senate in the 1980 elections, Senators Helms (R-NC), East (R-NC), Roth (R-DE), Cannon (D-NV), and Zorinsky (D-NE) introduced the “Voluntary School Prayer Act of 1981,” which “eliminate[d] Supreme Court and Federal district court jurisdiction to review and hear any case arising out of State law relating to voluntary prayer in public buildings and schools” (*Digest* 1981, S. 481). Although the Senate was now in conservative Republican hands, the School Prayer Act went nowhere in the Ninety-Seventh Congress. That reality was brought home in September of 1982, when Senator Helms again utilized shrewd parliamentary tactics to attach his prayer measure as an amendment to an imperative piece of legislation—an increase in the public debt limit (S. 450). His measure received support from 53 senators, but he did not have the votes necessary to invoke cloture. Even if the
measure had passed the Senate, however, the House of Representatives remained firmly under Democratic control and would have been unlikely to endorse the elimination of federal court jurisdiction over the prayer issue (Keynes and Miller 1989, 201).

Helms would unsuccessfully pursue measures seeking to curb federal court jurisdiction over school prayer on three additional occasions—in 1983, 1985, and 1991. Though a few members of the House continued to pursue court-curbing legislation on the subject until the mid-1980s, the body’s ideological makeup was substantially less amenable to that aim than was the Republican Senate’s. As such, its members did little more than follow the Senate’s lead on school prayer measures. After 1985, jurisdictional measures targeting the Court’s specific decisions in the prayer cases virtually disappeared. The most decisive factor in this shift may have been the return of Senate control to Democratic hands in 1987. Or perhaps Reagan-appointee Sandra Day O’Connor’s presence in the Court’s 6-3 majority in the Wallace v. Jaffree (1985) “moment-of-silence” case signaled that even membership turnover would not be enough to erode the prayer decisions.

On another level, the politics of school prayer had changed. The public had slowly grown more supportive of the Court’s rulings on prayer, even if many continued to fear the judicial establishment of a strict wall of church-state separation that would extend beyond the school prayer decisions. With roughly
40% of the American voting public agreeing with the Court’s school prayer
decisions by the late 1980s, members felt considerably less pressure to challenge
those decisions via jurisdictional manipulation than they had two decades earlier
when that approval hovered in the 20% range (Epstein et al 2003, 732).
Fortunately for them, the Rehnquist Court’s approach to the Establishment Clause
took on a decidedly accommodationist perspective.  Though it remained
consistent in invalidating school prayer in cases such as Lee v. Weisman (1992)
and Santa Fe v. Doe (1996), it became much more accepting of
accommodationist arguments in cases such as Zobrest v. Catalina Foothills
School District (1993), Lamb’s Chapel v. Center Moriches Union Free School
(2002).

26 Lee v. Weisman concerned invocations at high school graduation ceremonies, while Santa Fe
weighed the constitutionality of student-led prayers prior to home football games.
27 Held that state funds could be used to provide a deaf student in Roman Catholic high school
with a sign-language interpreter.
28 Held that a church could not be denied the after-hours use of a public high school solely because
the film it intended to show was religiously oriented.
29 In Rosenberger, the Court ruled that public universities could not restrict access to student
activity funds on the basis of a particular group’s religious viewpoint.
30 Agostini held that state-supported remedial instruction for private school students did not violate
the Establishment Clause.
Due, in part, to these successes, only one piece of congressional legislation since 1987 has sought to limit the High Court’s jurisdiction over Establishment Clause cases. Indeed, conservatives have been so successful on establishment clause issues at the Court—albeit by consistently narrow margins—that recent jurisdiction-stripping efforts concerning the Pledge of Allegiance and the public display of the Ten Commandments have been exclusively geared toward the inferior federal judiciary. Although the Court’s 2005 decision striking down courtroom displays of the Ten Commandments\textsuperscript{33} might well lead some congressional conservatives to target the Court’s appellate jurisdiction, in striking contrast to the Warren Court’s prayer decisions, today’s conservatives appear largely satisfied with the U.S. Supreme Court’s Establishment Clause decisions. As a result, court-strippers in Congress have shifted tactics and begun to attack particular applications of the Court’s Establishment Clause jurisprudence at inferior levels of the judiciary, but not those decisions \textit{per se}. The ideological compositions of those cosponsors are presented in Table 7.5, and they will be discussed in greater detail shortly.

\textsuperscript{31} In \textit{Mitchell v. Helms}, the Supreme Court held that public funds could be used to buy instructional materials such as computers and library materials for private religious schools without violating the Establishment Clause.

\textsuperscript{32} The Court held that the use of public money to fund student vouchers to private, religiously-affiliated schools did not breach the Establishment Clause.

\textsuperscript{33} \textit{McCreary County, Kentucky v. American Civil Liberties Union of Kentucky} (2005).
Table 7.5: Establishment Clause Issues: Cosponsor Ideology

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<td>Senate cosponsors N/A</td>
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<td></td>
<td>House cosponsors .430</td>
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After a hiatus from jurisdiction-stripping activity for most of the 1990s, the Republican-controlled Congress has been quite active in this area since 2001. Buoyed by the return of a Republican to the White House, in the One Hundred Seventh Congress, Congressman W. Todd Akin (R-MO) introduced legislation cosponsored by sixty-six other House members designed to remove inferior federal court jurisdiction over cases concerning the Pledge of Allegiance. In the One Hundred Eighth Congress, twelve U.S. senators cosponsored the “Religious Liberties Restoration Act,” and fifty-two members cosponsored the identical “Safeguarding Our Religious Liberties Act” in the House. Those measures would have eliminated inferior federal court jurisdiction to decide controversies concerning the Ten Commandments, the Pledge of Allegiance, and the presence of “In God We Trust” on U.S. coinage—some of the very topics that had motivated Justice Stewart’s dissents in the prayer cases forty years earlier. Seven
members of the Senate also introduced the “Protect the Pledge Act of 2003,” which would have retracted inferior court jurisdiction over cases involving the Pledge of Allegiance. While none of these measures secured passage, HR 2028 was more successful. There, Representative Akin and 226 of his House colleagues introduced the “Pledge Protection Act,” designed to eliminate inferior federal court jurisdiction over the Pledge of Allegiance—specifically its reference to “one nation under God.” That legislation came about in direct reaction to the Ninth Circuit Court of Appeals’s decision in Elk Grove Schools v. Newdow, which had held that the Pledge’s reference to a higher power violated the First Amendment’s Establishment Clause. The Pledge Protection Act passed the House in September of 2004.

Recently, there has been a resurgence of jurisdiction-stripping activity in Congress with regard to Establishment Clause issues. It is noteworthy, however, that neither the Supreme Court nor its decisions in the school prayer cases have motivated any such activity in the past twenty years. Instead, as American society became resigned to the Court’s decisions in Engel, Abington, and Murray—and, as it became increasingly clear that no retreat from those decisions would be forthcoming—such jurisdiction-stripping attacks on the Court subsided. It

34 As originally introduced and cosponsored by 227 House members, the Pledge Protection Act was written to impact inferior federal court jurisdiction alone. In the committee mark-up of September 21, 2004, however, the legislation was amended to encompass the Supreme Court’s jurisdiction as well (see House Report 108-691, “The Pledge Protection Act of 2004.”).
remains unclear whether that respite would have resulted had William Rehnquist’s Supreme Court pushed Establishment Clause jurisprudence in a more liberal direction, but of course it did not. It continued to adhere to the school prayer decisions, even as it breathed greater accommodation into the Establishment Clause more generally. One imagines the focus of conservative jurisdictional activity might change if and when the Court grows less supportive of religious accommodation. At present, however, conservatives in Congress seem content to use jurisdiction-stripping to point out what they interpret to be gratuitous departures by inferior levels of the federal judiciary from the Supreme Court’s generally accommodationist perspective. In short, they appear to be sufficiently content with the Court’s Establishment Clause jurisprudence to overlook its refusal to reverse the prayer decisions.
### Table 7.6: Notable Supreme Court Prayer and Establishment Clause Decisions

<table>
<thead>
<tr>
<th>Years</th>
<th>Notable Prayer and Establishment Clause Cases</th>
<th>Jurisdiction-Stripping Cosponsors</th>
<th>Congressional Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965-66</td>
<td>---</td>
<td>None</td>
<td>'66, Hearings on School Prayer Amendment, Senate</td>
</tr>
<tr>
<td>1967-68</td>
<td>---</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>1969-70</td>
<td>---</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>1973-74</td>
<td>---</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>1975-76</td>
<td>---</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>1977-78</td>
<td>---</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>1979-80</td>
<td>---</td>
<td>50</td>
<td>'80, Prayer legislation passes Senate; '80 Hearings on Prayer and Federal Jurisdiction, House</td>
</tr>
<tr>
<td>1981-82</td>
<td>---</td>
<td>16</td>
<td>'81, Hearings on Statutory Limitations on Federal Jurisdiction, House</td>
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Continued
### Table 7.6 Continued

<table>
<thead>
<tr>
<th>Year</th>
<th>Decision</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983-84</td>
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<td>6</td>
</tr>
<tr>
<td>1987-88</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>1989-90</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>2003-04</td>
<td></td>
<td>243</td>
</tr>
</tbody>
</table>

*Italicized* decisions are separationist Establishment Clause decisions; *underlined* decisions are accommodationist Establishment Clause decisions.

### SEXUALITY, ABORTION, AND THE RIGHT TO PRIVACY

On January 22, 1973, six other members of the Supreme Court joined Justice Harry Blackmun’s opinion in *Roe v. Wade* and the companion case of *Doe*.
v. Bolton. Once the dust had settled, the abortion laws of forty-six states had been declared unconstitutional, abortion was proclaimed a fundamental right under the U.S. Constitution, and American politics would never be the same. Writing in dissent, Justice Byron White excoriated the ruling, saying

The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. *As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court* (White, J., dissenting in *Doe v. Bolton* 410 U.S. 179, 222).

Opposition to the decision came immediately, both within Congress and among the larger public. Many viewed the decision as being morally offensive, while others echoed Justice White in pointing to its alleged constitutional defects. Yet, according to a Harris Poll released in early 1974, a slim majority of Americans—52%—actually supported *Roe*. Though another 1974 poll pegged support for the decision at just 47%, *Roe* enjoyed substantially more public support than had the prayer cases (Epstein et al 2003, 730). At the very least, “public opinion would not provide…the sort of clear-cut guidepost as it did, for example, after the capital punishment case of 1972” (Epstein and Kobylka 1992, 203). Congressional reaction to the decision was swift, but primarily centered on the strategy of
constitutional amendment. *Roe* was handed down at the beginning of the Ninety-Third Congress and, between January of 1973 and 1975, members introduced some three dozen constitutional amendments to reverse the decision (Epstein and Kobylka 192, 208). The only committee hearings held on the topic in the 1970s concerned the process of constitutional amendment; no such hearings were held on stripping the federal courts of jurisdiction over abortion cases (e.g., 1974 Senate Subcommittee Hearings—*Abortion*; 1976 House Subcommittee Hearings—*Proposed Constitutional Amendments on Abortion*). Unlike the school prayer decisions, however, jurisdiction-stripping did play a limited role in the abortion controversy from the beginning. Initially these efforts at court-curbing were confined to the House of Representatives. In the Ninety-Third Congress, Representative Philip Crane (R-IL) introduced legislation “limit[ing] the jurisdiction of the Supreme Court and the district courts in cases arising out of state laws regarding abortion” (*Digest* 1974, HR 14337). Eventually nine members of the Ninety-Third House cosponsored legislation to that effect. However, none of those proposals were passed, and relatively little jurisdiction-stripping activity took place in the following two sessions.

By the Ninety-Sixth Congress, however, more members were openly supporting jurisdictional curbs to deal with the Court’s decision in *Roe v. Wade*. Members of the Senate also began introducing court-curbing legislation at that time, and over thirty members of that Congress cosponsored legislation to curb
federal court jurisdiction over abortion cases. By that time, however, this
jurisdiction-stripping activity was generally being limited to the inferior federal
courts. Many of these measures were designed to “prohibit any federal court
(excluding the Supreme Court) from issuing injunctive relief in any case arising
out of federal, state or local law that prohibits, limits, or regulates abortion or the
provision of public assistance for the performance of abortions” (e.g., *Digest
1980*, HR 7307). A few members of the House of Representatives continued to
pursue these jurisdictional curbs in the Ninety-Seventh Congress, but enhanced
Republican strength in the Senate made it the new battleground in the abortion
debate.

After the Republicans recaptured control of the Senate in the 1980
elections, Senators Helms (R-NC), D’Amato (R-NY), Jepsen (R-IA), Zorinsky
(D-NE), Denton (R-AL), and Mattingly (R-GA) collaborated to introduce a
“Human Life Bill.” In addition to “defining ‘person’ to include the unborn for the
purpose of the right to life guarantee under the Fourteenth Amendment,” the
legislation went on to “Prohibit any inferior federal court from issuing injunctive
relief in any case arising out of state law or local law that prohibits or regulates
abortion or the provisions of public assistance for the performance of abortions
(*Digest* 1981, S. 178). A month later, Senator Orrin Hatch (R-UT) introduced a
virtually identical bill (*Digest* 1981, S. 583). Earlier “Human Life Bills” had been
limited to defining life as beginning at conception, stipulating that the Fourteenth
Amendment’s protections of due process apply to the unborn, and/or detailing findings of fact that conflicted with the Supreme Court’s decision in *Roe v. Wade*. This was the first Human Life Bill to emerge from the Judiciary Committee that carried with it jurisdictional limitations (Keynes and Miller 1989, 297). In the spring of 1981, the Senate Judiciary Committee’s Separation of Powers Subcommittee held hearings on Helms’s Human Life Bill (1981 Senate Subcommittee Hearings—*Human Life Bill*). The National Right to Life Committee was perhaps the bill’s primary organizational supporter at the hearings, though its support was more than counterbalanced by opposition from pro-choice interests including Planned Parenthood, the National Abortion Federation, the Abortion Rights Action League, and the Religious Coalition for Abortion Rights. Again, far from eliminating the Supreme Court’s appellate jurisdiction over abortion-related cases, the bill actually provided for expedited Supreme Court review of the act’s constitutionality.

Weary of delaying tactics, in September of 1982 Senator Helms attempted to attach an anti-abortion rider to the same debt ceiling bill he would use in his attempt to strip the courts of jurisdiction over the prayer issue. The abortion-related rider was not successful, and was tabled after Helms and his allies failed in three attempts to invoke cloture. In many ways, the Senate’s refusal to support his abortion measure and its passage of Helms’s school prayer proposal in 1979 reflected public opinion’s contradictory impulses on those two issues (Epstein and
Walker 2004, 450). While powerful social voices objected to *Roe*, it was considerably more popular with the general public than the Court’s school prayer decisions—even though those decisions had been in force a full decade longer than *Roe*. Despite spotty polling data, by the early 1980s public support for *Roe v. Wade* consistently exceeded 50%, while approval of the school prayer decisions rarely broke the 40% mark (Epstein et al 2003, 730-732). Although they may have taken some solace in the fact that the abortion measure did receive support from fifty senators, the conservatives fell ten votes short of cutting off debate. As a result, the Helms rider—dubbed a “legislative parasite” by the New York Times editorial page—died on the Senate floor (“The Issue is Court-Stripping”). In 1983, Helms joined with Senators East (R-NC), Zorinsky (D-NE), Nickles (R-OK), Jepsen (R-IA), Laxalt (R-NV), and Denton (R-AL) to champion virtually the same bill. That legislation would have “Eliminated inferior Federal court jurisdiction to issue any order in any case involving a state or local law that: (1) protects the rights of persons between conception and birth; or (2) limits or regulates abortion or provides funding or other assistance for abortion” (*Digest* 1983, S. 26). No other court-stripping legislation was introduced in the Senate in that Congress, and only one member of the House of Representatives introduced similar legislation there.

With one exception, no member of the United States Senate has pushed for curbing federal court jurisdiction over the abortion issue since 1983. Nor have
there been many serious efforts in the House of Representatives to do the same. Though Representative Crane introduced legislation to strip all federal courts of jurisdiction over abortion-related issues in the Ninety-Ninth and One Hundredth Congresses, all court-curbing activity ebbed until 1995 when Reps. Robert Dornan (R-CA), Barbara Cubin (R-WY), and Steve Stockman (R-TX) introduced measures to retract all federal jurisdiction over abortion-related matters. In the One Hundred Sixth, One Hundred Seventh, and One Hundred Eighth Congresses, Congressman Ron Paul (R-TX) led the fight against abortion-related jurisdiction in the inferior judiciary. The most “successful” of those bills, which aimed to strip inferior court jurisdiction over the specific question of partial-birth abortion, attracted just five additional cosponsors (HR 3691).

Congressional efforts to strip the federal courts of jurisdiction over abortion-related controversies have ebbed significantly since the mid-1980s—in some cases, to the point of nonexistence. To a lesser extent, this has also been true of proposed constitutional amendments seeking the reversal of Roe, and this decline in activity has been the result of several important factors. For one, critics of the Court’s decision in Roe have been successful in weakening various aspects of its legal rationale and practical application. Though it struck the law in question, in Bellotti v. Baird (1979) Justice Powell’s opinion made it clear that, “We are not persuaded that, as a general rule, the requirement of obtaining both parents’ consent unconstitutionally burdens a minor’s right to seek an abortion”
(443 U.S. 662, 649). In 1983, the Court upheld a state law requiring parental consent—with the alternative option of judicial bypass—in abortion cases involving unmarried minors (Planned Parenthood v. Ashcroft 1983). Since that time, the Court’s abortion-related decisions have typically permitted states to require consent in the presence of a judicial bypass option, and many states have taken advantage of that ability (e.g., Hodgson v. Minnesota 1990; Ohio v. Akron Center for Reproductive Health 1990; see Epstein and Kobylka 1992, 213-220).

Similarly, the Court has also been receptive to governmental restrictions on the public funding of abortion (Epstein and Kobylka 1992, 220-226). Whereas Brown enunciated a right and compelled governmental entities to assist in its implementation, the Court has not required such active governmental cooperation with the fundamental right to choose it announced in Roe. In three 1977 cases, the Court upheld restrictions on the use of state Medicaid funding and various local resources in performing abortions (Maher v. Roe; Beal v. Doe; Poelker v. Doe). At one point, over half the states had legislation on the books restricting the use of Medicaid funds for abortions by low-income women. Three years later in Harris v. McRae (1980), five members of the Court held the federal government could do much the same thing. There it found the Hyde Amendment, which prohibited federal funding of abortion unless “the life of the mother would be endangered if the fetus were carried to full term,” free of constitutional defect (Epstein and Kobylka 1992, 210-212). According to Justice Stewart’s opinion for
the *Harris* majority, “…It simply does not follow that a woman's freedom of choose carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices” (448 U.S. 297, 316).

A related factor in the decline of jurisdiction-stripping legislation on abortion cases concerns the role of changes in the Court’s membership. In short, conservatives in Congress must have appreciated the growing strength of their position on the Court in terms of the abortion issue. After dissenting from the Court’s decisions in *Akron v. Akron Center for Reproductive Health* (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) which struck down certain local and state restrictions on abortion, it was evident that Justice O’Connor had greater problems with *Roe* than did Potter Stewart, the Justice she had replaced on the Court in 1981 (Epstein and Walker 2004, 456). By 1989, when the Court ruled in *Webster v. Reproductive Services*, membership change had placed *Roe* in even greater jeopardy. Chief Justice Burger, a nominal *Roe* supporter, had been replaced by William Rehnquist who was, in turn, replaced as Associate Justice by conservative jurist Antonin Scalia. Finally, Justice Powell’s replacement by Anthony Kennedy in 1987 had produced a majority to overturn *Roe*, assuming each of President Reagan’s appointees would vote to overrule the 1973 decision. The Court’s decision in *Webster* seemed to make jurisdiction-stripping legislation on abortion even less necessary. There, the Court upheld the constitutionality of a restrictive 1986 Missouri abortion law and,
aside from an outright reversal of *Roe*, conservative opponents of the Court’s abortion jurisprudence could hardly have asked for a more favorable outcome.

In 1992, the Court pulled back from its attack on *Roe v. Wade* and reaffirmed the 1973 decision’s central holding—that women had a general constitutional right to terminate their pregnancies—in *Planned Parenthood v. Casey*. This ruling, quite naturally, came as a disappointment to many conservatives, who believed the Reagan-Bush years had produced justices who would unite to bury *Roe*. It was a special irony that Justices O’Connor, Kennedy, and Souter—three Reagan-Bush appointees—did join together, only they did so to save *Roe*. At the same time, however, no bill advocating jurisdiction-stripping was introduced in direct response to *Casey*. Indeed, not a single piece of court-curbing legislation touching on abortion issues was introduced between 1988 and 1995. In order to understand the absence of jurisdiction-stripping activity in the wake of *Casey*, several realities must be appreciated. First, despite its explicit reaffirmation of *Roe’s* central holding, *Casey* abandoned several aspects of the original decision—most notably, its trimester framework (see Scalia, J. joined by Rehnquist, C.J., White and Thomas, JJ., concurring in part and dissenting in part at 505 U.S. 833, 993). In addition, the 1992 decision was not out-of-step with public attitudes on the abortion controversy. To the contrary, it reflected the belief of most Americans that abortion should be legal, but also be subject to certain restrictions (Epstein and Walker 2004, 471; Epstein et al 2003, 729).
Conservatives also continued to be successful in more peripheral attacks on the right to choose. In 1991, the Court upheld a regulation issued by the Department of Health and Human Services known as the “gag rule,” since it prohibited workers in federally funded clinics from providing clients with abortion-related information or referrals (Rust v. Sullivan 1991). More generally, before the mid-1980s, “pro-choicers had grown relatively accustomed to winning in federal courts; after that date, they faced an increasingly hostile environment (Epstein and Kobylka 1992, 292-293). After years of President Reagan’s conservative judicial appointments, the lower courts were “becoming increasingly hostile to abortion rights” as well (Walker 1990, 348). Finally, even though Casey had not overruled Roe v. Wade, by 1992 the Court’s support for the original decision had narrowed from 7-2 to 5-4, making ultimate reversal of Roe much more probable than it seemed in 1973. In that context, Casey was surely a disappointment, but it was not a fatal one. If congressional conservatives were less than pleased with Casey, they were even more reluctant to attack a Supreme Court that had, in so many other areas, validated some of their most central policy positions.

Privacy and Sexual Autonomy

In addition to its role in the abortion controversy, the constitutional right to privacy first enunciated in Griswold v. Connecticut (1965) has had a number of other troubling implications for social conservatives. In 1986 the Supreme Court
examined the concept’s applicability to homosexual conduct in *Bowers v. Hardwick* (1986). There the barest of majorities held that the Constitution permits state regulation of consensual homosexual conduct between adults, even if that activity occurs in the privacy of one’s own home. Justice John Paul Stevens blasted the decision’s dismissal of *Griswold*’s right to privacy, saying, “The essential ‘liberty that animated the development of the law in cases like *Griswold*…surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral” (Stevens, J., dissenting at 478 U.S. 186, 218). The majority’s decision was also roundly criticized in legal and academic circles (e.g., Eskridge 1999a; 1999b).

Seventeen years later in *Lawrence v. Texas* (2003), the Court revisited the issue and overruled *Bowers*. Writing for the majority, Justice Kennedy made it clear that, although intervening cases—particularly *Romer v. Evans* (1996)35—had diluted the force of the 1986 decision, “*Bowers* was not correct when it was decided, [and it] is not correct today” (539 U.S. 558, syllabus). Conservatives, taking their cue from Justice Antonin Scalia’s far-reaching dissent in *Lawrence*, feared the next step would be the judicial imposition of same-sex marriage. This, of course, resonated particularly well in light of the Massachusetts Supreme

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35 In *Romer*, a 6-3 Court majority struck down a Colorado provision known as Amendment 2, which explicitly forbade the state and its agencies from recognizing discrimination on the basis of sexual orientation. The Court found the measure unconstitutional, saying that, “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else” (517 US 620, 633).
Judicial Court’s ruling in *Goodridge v. Department of Health* (2003), which had ordered the state’s legislature to devise an acceptable way to sanction same-sex marriage. In the summer of 2004, just prior to a heated presidential election in which social issues were expected to figure prominently, the House of Representatives passed the *Marriage Protection Act*. A discussion of that legislation, intended to curb the ability of all federal courts to weigh the 1996 Defense of Marriage Act’s constitutionality, appears at the conclusion of this chapter.

<table>
<thead>
<tr>
<th>Years</th>
<th>Notable Abortion and Privacy Cases</th>
<th>Jurisdiction-Stripping Cosponsors</th>
<th>Notable Congressional Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975-76</td>
<td><em>Planned Parenthood v. Danforth</em> (1976)</td>
<td>4</td>
<td>’75 Abortion Hearings, Senate; ’76 House Amendment Hearings, Abortion</td>
</tr>
</tbody>
</table>

Table 7.7: Notable Supreme Court Abortion and Privacy Decisions

328
Table 7.7 Continued

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Details</th>
<th>Value</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Akron v. Akron Center for Reproductive Health (1983)</td>
<td></td>
</tr>
<tr>
<td>1987-88</td>
<td>---</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Ohio v. Akron Center for Reproductive Health (1990)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Planned Parenthood v. Casey (1992)</td>
<td></td>
</tr>
<tr>
<td>1993-94</td>
<td>---</td>
<td>None</td>
</tr>
<tr>
<td>1997-98</td>
<td>---</td>
<td>None</td>
</tr>
<tr>
<td>1999-00</td>
<td>Stenberg v. Carhart (2000)</td>
<td>6</td>
</tr>
<tr>
<td>2001-02</td>
<td>---</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>House passes Marriage Protection Act '04, MPA Hearings, House</td>
</tr>
</tbody>
</table>

Italicized decisions are abortion-related cases; underlined decisions are relevant to homosexual rights.
<table>
<thead>
<tr>
<th>First Dimension Ideological Mean</th>
<th>Standard Deviation</th>
<th>Min/Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abortion, inferior courts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senate cosponsors</td>
<td>.426</td>
<td>.221</td>
</tr>
<tr>
<td>House cosponsors</td>
<td>.422</td>
<td>.359</td>
</tr>
<tr>
<td>Abortion, all courts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senate cosponsors</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>House cosponsors</td>
<td>.450</td>
<td>.374</td>
</tr>
<tr>
<td>Marriage Protection Act</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senate cosponsors</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>House cosponsors</td>
<td>.555</td>
<td>.206</td>
</tr>
</tbody>
</table>

Table 7.8: Privacy and Sexual Autonomy: Cosponsor Ideology

DESEGREGATION, PRAYER, AND ABORTION: COMPARISONS AND CONTRASTS

It should be clear that, since the 1950s, much of Congress’s involvement in jurisdiction-stripping has been confined to three broad areas of law—fights over racial desegregation, religion’s role in the public sphere, and the right to privacy and personal autonomy. Within those areas, members of Congress have been particularly active in pursuing court-stripping legislation designed to subvert the school desegregation mandated by *Brown v. Board of Education*, to limit the specific remedy of forced busing recognized in *Swann*, and to undermine the Court’s decisions banning school prayer and legalizing abortion. Although independent assessments of jurisdiction-stripping within each of those areas have
already been presented, a more systematic comparative examination of
jurisdiction-stripping across them is necessary in order to fully formulate
“…explanations of [the] regularities and variations in [our] empirical
phenomenon [of interest]” (Smelser 1976, 174). By comparing and contrasting
the relevance of numerous factors and their impact on Congress’s jurisdictional
activity in each of these areas, the following pages attempt to do just that.
Specifically, this comparative assessment of court-stripping examines several
informal hypotheses concerning the impact of factors such as ideological
considerations and public opinion on the volume or intensity of congressional
court-stripping activity in a given area of law.

It should also be noted that, while the present comparative analysis
focuses on a relatively narrow segment of the dependent variable—principally, by
examining sources of variation within legal areas in which Congress’s
jurisdiction-stripping activity has been relatively common—the dissertation’s
comparative examination of court-stripping activity does not end there. After
introducing several constitutional areas in which Congress’s court-curbing efforts
were either more limited or altogether nonexistent, the Chapter’s final sections
combine these areas to produce a second, more comprehensive comparative
examination of jurisdiction-stripping activity across a fuller range of legal issues.
Table 7.9: Variables Relating to Intensity of Jurisdiction-Stripping Activity Across Four Major Issues

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Reactions to Brown</th>
<th>School Prayer</th>
<th>Busing and Desegregation</th>
<th>Abortion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Importance of Conservative Ideology</td>
<td>None</td>
<td>Moderate</td>
<td>Moderate</td>
<td>High</td>
</tr>
<tr>
<td>Scope of Regional Support</td>
<td>Narrow</td>
<td>Nationwide</td>
<td>Nationwide</td>
<td>Nationwide</td>
</tr>
<tr>
<td>Legislation to Affect the Supreme Court?</td>
<td>Always</td>
<td>Always</td>
<td>Sometimes</td>
<td>Occasionally</td>
</tr>
<tr>
<td>Public’s Attitude Toward Issue</td>
<td>Supports Court</td>
<td>Strongly Opposes Court</td>
<td>Strongly Opposes Court</td>
<td>Mixed</td>
</tr>
<tr>
<td>Availability of Alternatives to Jurisdiction-Stripping</td>
<td>Limited</td>
<td>Limited</td>
<td>Moderate</td>
<td>Extensive</td>
</tr>
</tbody>
</table>

Table 7.10: Intensity of Congress’s Jurisdiction-Stripping Activity Across Four Major Issues

<table>
<thead>
<tr>
<th>Dependent Variable</th>
<th>Reactions to Brown</th>
<th>School Prayer</th>
<th>Busing and Desegregation</th>
<th>Abortion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intensity of Congressional Activity</td>
<td>Low</td>
<td>High</td>
<td>High</td>
<td>Moderate</td>
</tr>
<tr>
<td>(Longevity)</td>
<td>Limited</td>
<td>Extensive</td>
<td>Extensive</td>
<td>Extensive</td>
</tr>
<tr>
<td>(Activity)</td>
<td>Low</td>
<td>High</td>
<td>High</td>
<td>Moderate</td>
</tr>
<tr>
<td>(Passage)</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 7.10: Intensity of Congress’s Jurisdiction-Stripping Activity Across Four Major Issues
Tables 7.9 and 7.10 summarize the variables that structure this comparative examination of court-stripping. As is evident from the table, up to five independent variables are anticipated to impact the intensity of congressional activity in a particular legal area. Those variables include the centrality of political ideology in motivating court-stripping activity in each area, the scope of those attempts’ regional support, the federal judicial systems they are designed to affect, the public’s attitudes on the issues they concern, and the availability of alternatives to jurisdiction-stripping in each of the four major areas described above. The dependent variable, labeled “intensity of congressional activity,” is a composite measure of three related factors—the amount of jurisdiction-stripping legislation actually proposed on the issue, the temporal longevity of those efforts, and whether or not those jurisdictional responses secured passage in one House of Congress. The dependent variable and its three components are reproduced in Table 7.10.

**Ideology and Regionalism**

Whether defined in terms of passage, the duration of jurisdiction-stripping efforts, or simply the amount of jurisdictional activity proposed in a particular area, it is reasonable to hypothesize that jurisdiction-stripping proposals will be more likely to generate substantial congressional activity when their support is broad-based in regional and ideological terms. This comports with both the
historical record and common sense. It also appears to be mirrored in the histories of jurisdictional politics across the four major issues described in Table 7.9. One of the chief reasons jurisdictional reactions to Brown were so unsuccessful was because discontent with the decision was generally confined to a single region of the country (e.g., Rosenberg 1991, 50-52). On the other hand, the broader character of geographic support for jurisdictional limitations on cases dealing with busing, school prayer, and abortion contributed to moderate-to-high degrees of congressional activity on those issues that lasted for more extended periods of time. Since southern post-Brown reactions were provincial in their character, they were difficult to sustain. However, once Brown’s long-term implications (e.g., busing, magnet schools) began to be felt in regions all across the country, substantially more congressional action resulted.

Congress’s treatment of the school prayer and busing issues also illustrates the importance of broad-based ideological support to the survival of court-stripping campaigns in particular areas. Conservatives have clearly been more inclined to call for jurisdictional changes in these areas than have liberals, but as Tables 7.3 and 7.5 indicated, these issue areas—particularly busing—have attracted a more diverse base of ideological support than has the abortion issue. In addition to the support of traditional conservatives, the busing issue occasionally benefited from the involvement of more liberal lawmakers such as Congressmen John Dingell (D-MI) and Alan Mollohan (D-WV) and Senators
Joseph Biden (D-DE) and Robert Byrd (D-WV). Similarly, while sponsors of school prayer legislation have been, on average, more ideologically conservative than busing’s opponents, they have still been slightly less ideologically extreme than supporters of abortion-related jurisdictional proposals. That fact alone provides insight into why the volume of activity on the prayer and busing issues has been so high and why those issues secured Senate passage in 1979 and 1982 while abortion-related proposals have been less successful.

**Public Opinion and Jurisdiction-Stripping**

Chapter Three asserted that agitation for various types of jurisdictional change should become more likely as extra-legislative interests such as public opinion become less supportive of a given class of federal judicial outcomes. Judging from Table 7.9, it does, in fact, appear that public opinion has been critical in maintaining congressional interest in court-stripping on particular issues. A majority of the general public supported the Court’s 9-0 decision in *Brown*, and the limited efforts to overcome that decision via jurisdictional gerrymandering quickly faded as a larger and larger proportion of the American public embraced the decision (Epstein et al 2003, 722). Public reaction to *Roe v. Wade* was more mixed, with polls showing a slim majority of the public to be behind the decision. Unlike the desegregation cases, however, *Roe’s* popularity has not grown exponentially. Rather, precise percentages of support have waxed
and waned through the years even as a majority of the public has clung to its basic support for the Court’s abortion jurisprudence (Epstein et al 2003, 730).

On the other hand, the Supreme Court’s decisions in Engel, Abington, and Murray as well as Swann v. Charlotte-Mecklenburg met with the American public’s overwhelming disapproval—both in the immediate aftermath of the decisions and for decades thereafter. Such strong levels of disagreement manifested themselves in unprecedented levels of interest in curbing federal jurisdiction. As we know, in 1979 a majority of the U.S. Senate passed legislation retracting all federal jurisdiction over voluntary school prayer issues; in 1982, it followed suit by sending the Neighborhood Schools Act to the House of Representatives as an amendment to the Justice Department Authorization Bill. It is worth reiterating that these proposals succeeded where similar activity on abortion failed. Whether jurisdiction-stripping’s failure in that area owed more to the public’s mixed attitude on the subject, the greater ideological homogeneity of its supporters, or a combination of the two is impossible to say. What is certain, however, is that the two major issues on which public opinion was both unambiguous and hostile toward the Court’s activities were also those issues that—by any measure—have attracted the broadest and most sustained support for jurisdictional curbs among members of the U.S. Congress over the past half-century.
Alternatives to Jurisdiction-Stripping: Constitutional Amendments, Remedial Legislation, and State-Level Regulation

Another potential determinant of the intensity with which Congress pursues jurisdiction-based remedies is the extent to which other options short of court-curbing represent alternative ways of undermining particular judicial decisions. For example, since jurisdiction-stripping is typically viewed as a “fall back” option to the process of constitutional amendment (e.g., Fitzgerald and Cooperman 2004; Mottl, 1983 House Subcommittee Hearings—Neighborhood School Act Hearings, 69), court-curbing measures may not be pursued, at least initially, if it appears there may be enough support in Congress to win passage of an amendment. If jurisdiction-stripping is truly a last resort, its importance should be minimal in areas where conservative goals can be realized in other, less drastic ways. The primary reason jurisdictional curbs did not appear on the issue of school prayer until the 1970s was because opponents of the prayer decisions believed that passage of a constitutional amendment was within reach. Once it became apparent that such an amendment did not have sufficient support, however, opponents of the Court’s prayer decisions had few options left but to advocate jurisdictional change. As we will soon see, the flag burning controversy shares certain commonalities with the prayer debate, even though the Flag Burning Amendment’s defeat has failed to produce any visible support for jurisdictional curbs among members of Congress.
By contrast, opponents of *Roe v. Wade* benefited from a substantially wider range of options. They too advocated passage of a constitutional amendment, although support for that strategy never approached the levels attracted by the prayer amendment. Unlike advocates of school prayer, however, opponents were able to chip away at abortion rights by advocating numerous restrictions on public funding of abortion at the state and local levels of government. Similarly, pro-life forces exploited Court-created loopholes subsequent to *Roe* and pressed states to enact parental consent requirements. By focusing on these consent and funding provisions, particularly at the state-level, pro-life advocates succeeded in limiting the constitutional right to abortion in ways that were not available to advocates of school prayer. This broader range of options limited the necessity of championing quasi-constitutional jurisdictional controls to check the Court’s abortion-related jurisprudence, and helps account for the more limited frequency with which those proposals were pursued.

Opponents of busing may have had a greater arsenal of weapons with which to resist the Court’s decisions than did defenders of school prayer, but they were less successful than the anti-abortion forces in deploying them. Members of Congress pursued constitutional amendments to eliminate forced busing, but they failed to generate much enthusiasm. In 1979, the House of Representatives defeated the Mottl Amendment by a vote of 209 to 206, falling well short of the two-thirds necessary for passage (125 Cong. Rec. 20412-13). No vote on a
constitutional amendment to eliminate forced busing was ever taken after that. However, Congress was able to take several small steps to limit the federal government’s complicity in desegregative busing. In 1968, it amended the Health, Education, and Welfare Act of 1968 to prohibit the use of public funds for the busing of students or forcing particular school attendance to implement racial balancing. Congress continued to pursue this tactic in the mid-1970s, with more liberal members of Congress such as Robert Byrd (D-WV), Thomas Eagleton (D-MO), and Joseph Biden (D-DE) successfully advocating additional funding limitations on busing. Many opponents of busing also attempted to restrict the Justice Department’s involvement in desegregation cases and even passed legislation to that effect in 1980, but President Carter subsequently vetoed it (Keynes and Miller 1989, 219-220).

Although non-jurisdictional remedial legislation has sometimes been effective in undermining judicial decisions in certain issue areas, jurisdiction-stripping is typically viewed as a less onerous tactic designed to approximate the effects of a constitutional amendment. As one opponent of the 2004 Marriage Protection Act described it, “They couldn’t amend the Constitution last week, so they’re trying to desecrate and circumvent the Constitution this week” (Fitzgerald and Cooperman 2004). Congress’s response to the school prayer decisions represents a textbook example of jurisdiction-stripping—only after opponents of the Court’s prayer decisions had unsuccessfully labored for passage of a
constitutional amendment did they turn to the “fall back option” of jurisdiction-stripping. The issues of desegregation and abortion present less traditional explanations of jurisdiction-stripping and its relationship to the amendment process. Both the immediate statutory reactions to *Brown* and the busing decisions of 1971 were greeted by a nearly simultaneous chorus of proposals designed to amend the constitution. In a sense, that behavior is counterintuitive—particularly in the wake of *Swann*, when it was apparent that so many objected to the ruling. However, because the busing issue was so unpopular and threatened to have immediate consequences for millions of school children throughout the nation, some members may have viewed court-stripping as a tactical way to delay the ruling until the time-consuming process of constitutional amendment could be accomplished. Senator Sam Ervin (D-NC) hinted at this rationale in testimony before a Senate subcommittee in 1974:

I might add that I favor [jurisdiction-stripping] statutes to put an end to this tyranny immediately, and a constitutional amendment to put an end to it forever. I am reminded somewhat of a story about the man who was away from home and received a telegram from his undertaker saying, ‘Your mother-in-law died today, shall we cremate or bury? He wired back and said, ‘Take no chances: Cremate and bury.’ I would cremate first by legislation and then bury by constitutional amendment. (quoted in Keynes and Miller 1989, 241).
Most conservative reactions to *Roe v. Wade* came in the form of proposed constitutional amendments. However, although it was clearly a second-tier option at that time, a few members of Congress occasionally advocated jurisdictional curbs during those early days as well. Their reasons for doing so are not clear. Perhaps it was the fresh memory of the unsuccessful effort to pass a constitutional amendment returning voluntary prayer to the classroom. In that case, members must have surmised that, if overwhelming opposition to prayer decisions had not been a sufficient catalyst for a constitutional amendment, then surely the public’s more ambiguous views on *Roe* would fail to yield constitutional change. By the late 1970s, however, pro-life conservatives had increasingly embraced court-stripping, presumably because they recognized that there were simply not enough votes in Congress to secure passage of a constitutional amendment restricting abortion rights.

The availability of many of these alternatives to court-stripping has, of course, dovetailed with the Supreme Court’s willingness to retreat from its original decisions in particular areas of constitutional law. For example, the availability of secondary options on the abortion issue came as the Court recognized certain limitations on choice in cases such as *Planned Parenthood of Missouri v. Danforth* (1976), *Beal v. Doe, Maher v. Roe*, and *Poelker v. Doe* (1977), *Bellotti v. Baird* (1979), *Harris v. McRae* (1980), and *Planned Parenthood v. Ashcroft* (1983). However, the Court’s consistent refusal to carve
out exceptions to its voluntary prayer and Bible-reading rulings made it impossible for advocates to pursue similar state-level restrictions on that issue. Because there was no similar judicial retreat from those decisions, the options of conservatives were much more limited. As a result, Congress contemplated considerably more jurisdictional activity with regard to those prayer decisions than it did with the Court’s abortion jurisprudence.

Scope of Proposed Jurisdictional Change

The final major explanatory factor to consider concerns the scope of the jurisdictional limitations contemplated by Congress in regard to each of these issues. At a minimum, the reach of these jurisdictional proposals is an important control variable to recognize as the intensity of court-curbing efforts is assessed. More specifically, if Congress and its members advocate jurisdictional changes largely on the basis of the decisions certain courts happen to be producing, we should expect the scope of those proposals to fluctuate with particular court outcomes in these areas. Conservative reactions to Brown v. Board of Education and the school prayer decisions almost always sought to extinguish both lower court jurisdiction and the Supreme Court’s appellate jurisdiction over those issues. Responses to the busing decisions of the early 1970s were more mixed, with some proposals advocating elimination of all federal jurisdiction and others pressing for more limited jurisdictional curbs directed solely at the lower federal
courts. On the other hand, a majority of the proposed curbs on abortion-related
issues were designed to limit inferior federal jurisdiction and leave the Supreme
Court’s appellate review undisturbed. This was particularly the case in the U.S.
Senate, where no abortion-related measures targeted the Supreme Court’s
jurisdiction. What is more, the behavior of individual members has often differed
across these issue areas, sometimes even during the same year. In 1981, for
example, Senators Helms and Zorinsky cosponsored S. 158, a bill whose purpose
was to eliminate the jurisdiction of inferior courts to issue injunctions in abortion-
related cases. Less than a month later, the same two senators cosponsored the
“Voluntary School Prayer Act,” which was designed to eliminate all federal court
jurisdiction over issues of prayer in schools or other public buildings (Digest
1981, S. 158, S. 481). Such behavior strongly suggests that most advocates of
jurisdictional change are keenly aware of—and responsive to—the outcomes that
different levels of the federal judiciary are producing, going so far as to parse that
judicial behavior at the level of individual legal issues.

To reiterate, the courts targeted by jurisdiction-strippers have varied as a
function of the decisions being handed down by the Supreme Court in these
particular areas. That observation is broadly consistent with the theoretical
scheme presented in Chapter Three, part of which held that the judicial outcomes
being produced by particular courts should impact the rate of jurisdictional
activity directed toward them. When the Supreme Court issued several
conservative busing decisions in the mid 1970s, subsequent jurisdiction-stripping legislation began to focus on the lower federal courts. Once the Court began releasing more progressive busing decisions in the late 1970s, however, it again became a target of congressional wrath.

This legislative attention to judicial outcomes has been manifested in another way as well. Because some of the Court’s decisions require greater lower court interpretation than others, *ipso facto*, some Supreme Court decisions necessarily constrain the lower courts more than others. The Court’s busing and abortion rulings required considerable independent judgment and discretion on the part of lower court judges; by contrast, its more sweeping decisions on school prayer and Bible reading drew a much brighter constitutional line for those inferior court judges to follow. Those Establishment Clause rulings limited that discretion considerably. In a sense, the Supreme Court had already done the bulk of the “dirty work” in the prayer cases by taking overtly religious exercises off the table, regardless of their voluntary character or specific form. On the other hand, because they recognized the potential decisiveness of program- or statute-specific characteristics, *Roe, Swann*, and their progeny left substantially more of that interpretive work to the district courts. In combination with the Court’s own unwillingness to moderate its rulings in the prayer cases, the comparative rigidity of those decisions no doubt contributed to the exclusive focus on depriving the Supreme Court of jurisdiction to decide such prayer cases. In areas
of greater lower court discretion, however, it appears that advocates of court-stripping sought to influence the exercise of that discretion by pursuing changes in inferior jurisdiction.

EXPLAINING THE (RELATIVE) ABSENCE OF COURT-STRIPPING ACTIVITY

Chapter Six defined jurisdiction-stripping legislation as “any legislative effort which attempts to use Congress’s jurisdictional power in a way that would undermine those federal court decisions that have their basis in the U.S. Constitution.” Since 1953, however, the courts have had occasion to weigh in on many additional constitutional questions besides those surrounding school desegregation, the Establishment Clause, and the right to privacy. A few of these areas have been targeted by jurisdiction-stripping, but most have failed to generate much support. Others have failed to provoke any jurisdictional responses at all. In what follows, I discuss a sampling of those issues and assess a number of possible explanations for Congress’s failure to pursue jurisdiction-stripping activity in them. Subsequent to that, I undertake a second, broader comparative examination of court-stripping that combines these areas of limited activity with the areas of more substantial court-curbing activity examined earlier, all in an effort to highlight the circumstances under which the federal judiciary and its decisions become the target of congressional action.
The Redistricting Controversy

Though Congress’s response to them was relatively short-lived, the Supreme Court’s reapportionment decisions of the 1960s succeeded in uniting political and even ideological forces in a way that neither the desegregation cases nor the Cold War cases could. The controversy began with *Baker v. Carr* (1962), in which the Court held for the first time that legislative districting issues presented justiciable equal protection questions. Over the spirited dissents of Justices Frankfurter and Harlan, the Court said that the political question doctrine did not bar such issues from judicial determination. Justice Douglas’s majority opinion in *Gray v. Sanders* (1963) built on *Baker*, held that all votes in statewide elections must be given equal weight, and articulated the principle of “one person, one vote” (372 U.S. 368, 381). In the 1964 case of *Wesberry v. Sanders*, the Court ruled that a state’s congressional districts must be approximately equal in population. That same year in *Reynolds v. Sims*, it extended that ruling to encompass state legislative districts.

The Court’s reapportionment decisions were a far more ominous and immediate threat to most members of Congress than the Court’s desegregation, prayer, and abortion rulings had been and would be. As might be expected in light of *Wesberry v. Sanders*, opposition was especially intense in the popularly-elected House of Representatives. The Court’s insistence on equality of
population at the state level in *Reynolds v. Sims* added insult to injury, since those redrawn state legislatures would, ultimately, be responsible for redrawing those new congressional districts. By contrast, members of the Senate were unaffected by the decisions, and only one senator\(^{36}\) bothered to sponsor legislation seeking to eliminate federal jurisdiction over reapportionment cases.

Immediately after the Court’s decision in *Baker v. Carr*, two members of the House, Watkins Abbitt and William Tuck—both Virginia Democrats—introduced legislation to deprive all federal courts of jurisdiction to decide reapportionment issues. By the end of the Eighty-Eighth Congress in 1964, twenty-seven House members from fourteen states had sponsored similar legislation. A number of others introduced non-jurisdictional measures designed to postpone implementation of the Court’s decisions. Of greater importance, however, was the fact that, on August 19, 1964, a solid majority of the House of Representatives—218 members—actually voted to enact the “Tuck Bill,” HR 11926. Crafted with the goal of enacting jurisdiction-stripping legislation into law, the legislation was to “exclude[] cases involving apportionment or reapportionment from the appellate jurisdiction of the Supreme Court and the jurisdiction of Federal district courts” (*Digest* 1964, HR 11926).

\(^{36}\) Senator Thurmond introduced S. 2919 in 1964 and S. 534 in 1965, both of which provided that “no court of the United States shall have jurisdiction over any matter concerning the composition of any legislative body of any state” (*Digest* 1964, 1965).
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<tr>
<th>First Dimension Ideological Mean</th>
<th>Standard Deviation</th>
<th>Min/Max</th>
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<td>Cosponsors, 1962-1970</td>
<td>.235</td>
<td>.151</td>
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<td>Tuck Bill Supporters</td>
<td>.160</td>
<td>.252</td>
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Table 7.11: Legislative Reapportionment: House Member Ideology

As Table 7.11 indicates, congressional support for curbing federal jurisdiction over legislative redistricting was considerably less ideological than were later attempts to retract jurisdiction over the issues of prayer, busing, and abortion. Indeed, this jurisprudential episode was unique in that much of its impetus likely stemmed from legislative self-interest. Unlike later attempts to curb federal jurisdiction, however, the redistricting decisions failed to create a noticeable backlash in public opinion. Of course, the Warren Court itself had already facilitated such a backlash in 1962 and 1963 with its decisions in the school prayer cases. If the prayer decisions had not been sufficient to make the typical voter oppose the Court, it was doubtful that the redistricting cases would somehow be able to do so.

After the Tuck Bill passed the House it was summarily dismissed by the Senate, and attempts to curb the Court’s jurisdiction over reapportionment matters disappeared until 1969. In that year, over thirty House members resurrected similar court-curbing legislation. In contrast to earlier proposals, these measures
concentrated on the Supreme Court’s appellate jurisdiction over “the 
apportionment of population among districts from which members of Congress 
are elected.” More specifically, they were designed to remove the Supreme 
Court’s appellate jurisdiction over reapportionment cases, “unless the trial court 
found that the population of any district in the State [was] less than 90 percent of 
the population of the district” (e.g., 1969 Digest, HR 10903). These court-curbing 
bills reflected increasing congressional impatience with the Court’s inability to 
formulate precise, objective standards—and the ability of states to satisfy the 
Court’s amorphous ones—for assessing the constitutionality of legislative 
reapportionment schemes. It was particularly irksome to members when the 
Court invalidated district court-approved reapportionment plans, generally 
conceived in good faith, on apparent technicalities.

For example, in its 1969 decision in *Kirkpatrick v. Preisler*, the Supreme 
Court struck down a Missouri redistricting plan in which the “most populous 
legislative district was 3.13% above the mathematical ideal, and the least 
 populous was 2.84% below [it]” (394 U.S. 526, 528-529). In a companion case 
from New York, *Wells v. Rockefeller*, the Court invalidated a district court-
approved New York redistricting scheme, and seemed to reiterate its belief that 
virtual mathematical precision would be required to satisfy the rule of “one 
person, one vote.” Four justices pointedly declined to “subscribe to the standard 
of near-perfection which the Court announces as obligatory upon state legislatures
facing the difficult problem of reapportionment for congressional elections” (Fortas, J., concurring at 537). Justices Harlan, Stewart, and White dissented altogether. Writing for himself and Justice Stewart, Justice John Marshall Harlan noted that

We do not deal here with the hopelessly malapportioned legislature unwilling to set its own house in order. Rather, the question before us is whether the Constitution requires that mathematics be a substitute for common sense in the art of statecraft. As I do not think that the apportionment plans submitted by the States of New York and Missouri can properly be regarded to the requirement of equality imposed in Wesberry—a case whose constitutional reasoning I still find impossible to swallow, but by whose dictate I consider myself bound—I dissent (Harlan, J., joined by Stewart, J., dissenting in Wells at 552).

These sentiments aptly described the frustrated reactions of House members, many of whom had endured several reapportionments in well under a decade’s time. Illinois Republican William Springer denounced the Court from the House floor in May of 1969, saying, “Nowhere has the Court indicated what it believes would be a valid and legal reapportionment…The decisions have been so mixed and without guidance that it has been impossible for me as a Congressman to properly advise my own state legislature as well as lesser bodies as to what is the proper course to follow” (Supreme Court Decisions On Reapportionment Result in Chaos,” 115 Cong. Rec. 11220). Clearly frustrated with this lack of guidance,
and because he feared the decisions would require his state to reapportion for the third time in eight years, Rep. Springer introduced a court-curbing bill that was cosponsored by all but one of the Republican members of Illinois’s House delegation (115 Cong. Rec. 11220; see HR 10903, *Digest* 1969).

Although a few of these measures were reintroduced early in the Ninety-Second Congress, attempts to eliminate the Supreme Court’s appellate jurisdiction over redistricting quickly faded. Even as members of Congress were beginning to attack the Burger Court for its busing decisions, the addition of Nixon-appointees Burger, Blackmun, Powell, and Rehnquist created a bloc on the Court that, with the assistance of Justices Stewart and White, began upholding good-faith reapportionment schemes—to the consternation of Justices Brennan, Marshall, and Douglas (e.g., *Gaffney v. Cummings* [1973], *White v. Regester* [1973], *White v. Weiser* [1973]). Of equal importance to the limited nature of this jurisdictional episode, however, were two additional facts. First, the redistricting issue was largely invisible to a general public that was, at best, ambivalent about such matters. Second, several of the legislators who had opposed the Court’s decisions had become casualties of reapportionment. In the wake of that electoral natural selection, those who remained in Congress despite those rulings probably concluded their electoral positions were secure. As such, there was no real reason for them to continue opposing the Court’s reapportionment rulings—particularly since the public was largely ambivalent toward those decisions.
Police Interrogation and Criminal Penalties

The Court’s decision in *Miranda v. Arizona* (1966) motivated approximately twenty-eight members of Congress to advocate jurisdictional curbs over criminal confessions between 1966 and 1972, including twenty members of the United States Senate in 1967 alone (*Digest* 1967, S. 1194). However, Congress’s statutory challenges to *Miranda* did not last, as they would on the issues of school prayer and abortion. Although the decision itself was roundly condemned, beginning in 1971 the Burger and Rehnquist Courts steadily narrowed *Miranda* in cases such as *Harris v. New York* (1971), *New York v. Quarles* (1984), *Illinois v. Perkins* (1990), and *Arizona v. Fulminante* (1991) (*Dickerson v. United States* 2000, 530 U.S. 428, syllabus). As a result, *Miranda* did not become the hard-and-fast prohibition on police conduct that *Engel* and *Abington* did to the school prayer issue. Perhaps more importantly, *Miranda* did not noticeably affect the ability of the police to obtain criminal confessions (see White 1986). Because it caused limited disruption to the political order—and because the Court began retreating from the decision’s absolutes soon thereafter—court-stripping activity focused on the *Miranda* decision quickly evaporated.

Six years later in *Furman v. Georgia* (1972), the Supreme Court held that the death penalty, as then imposed, violated the Eighth Amendment’s prohibition on cruel and unusual punishment. A tremendous public backlash greeted the
decision, and “virtually every political indicator pointed to massive disdain for
Furman v. Georgia” (Epstein and Kobylka 1992, 83). At the same time, however, the outcome hinged on a slim majority, and the decision’s implications remained ambiguous. Chief Justice Burger’s dissent suggested states should rewrite their death penalty statutes, bringing them into conformity with the Court’s per curiam opinion in Furman. President Nixon sought to highlight the silver lining Burger’s opinion had noted, saying that “The holding of the Court must not be taken . . . to rule out capital punishment” (Epstein and Kobylka 1992, 84). Still, even the Chief Justice speculated that “There will never be another execution in this country” (Woodward and Armstrong 1979, 219). During the Ninety-Third Congress, several constitutional amendments were proposed to reverse the Court’s decision in Furman. Given that public support for capital punishment—already above 50%—increased markedly after the Court’s 1972 decision, it is reasonable to conjecture that jurisdiction-stripping activity might have followed had the amendment process been unsuccessful (Epstein et al 2003, 720).

However, the Court made that unnecessary in 1976 with its decision in Gregg v. Georgia. There, it reversed course and held that “the concerns expressed in Furman can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance” (opinion of Stewart, Powell, Stevens, JJ., at 155). Indeed, the Court’s retreat in Gregg was much more immediate than the rate at which it was making exceptions to Miranda. Since
Gregg, the Court has consistently hewed to the view that capital punishment does not violate the Eighth Amendment. Even in imposing certain controversial limitations on the death penalty’s scope (e.g., Atkins v. Virginia 2002; Roper v. Simmons 2005), it has not yet shown sufficient hostility to activate jurisdiction-stripping activity in this area.

**Freedom of Expression and the Controversy of Flag Desecration**

Of all the issues that have failed to produce court-stripping legislation in Congress, the flag burning controversy is at once the most puzzling and the most illuminating. In Texas v. Johnson (1989), a five-member Supreme Court majority consisting of moderates, liberals, and even Justice Antonin Scalia found the burning of the American flag to be protected expression under the First Amendment. The Court’s ruling was condemned by President Bush and many members of Congress. A majority of the public also favored passage of a constitutional amendment to overturn the decision, and scores were proposed by members of Congress in the immediate aftermath of the case. (see Goldstein 1996). Congress’s immediate response was to enact a federal Flag Protection Act in 1989 which, though it had no jurisdictional implications, imposed federal penalties for flag desecration. However, the Supreme Court promptly found that

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37 Prohibiting capital punishment’s application to mentally retarded persons.

38 Prohibiting capital punishment’s application to juveniles under the age of eighteen.
legislation unconstitutional in *United States v. Eichman* (1990) by the same 5-4 alignment that had decided *Johnson* the year before. Though Congress continued to pursue the amendment process for more than a decade, at no time did a single member of Congress introduce legislation to strip the Court of jurisdiction to decide flag desecration cases.

There are several reasonable explanations for this lack of jurisdictional activity. For one, the constitutional amendment option enjoyed considerable support. While it was ultimately not successful, many initially thought the amendment would sail toward ratification—especially since powerful interests such as the American Legion were so outspoken in their desire to see passage of a constitutional amendment overturning the decision (Goldstein 1996, 299-303). Second, the *Johnson* and *Eichman* majorities included Reagan appointees Scalia and Kennedy, both of whose conservative credentials were fairly well-established. It was one thing for conservatives in Congress to attack the school prayer rulings or even *Roe v. Wade* as a manifestation of judicial liberalism; it would have been quite another to lay the blame for the flag burning decision at the feet of liberal judicial activism. While the *Abington* and *Roe* majorities did include a number of moderate-to-conservative members, those cases differed from the flag burning decisions in that both the majority and the dissents in *Johnson* and *Eichman* were the product of truly mixed ideological coalitions. Specifically, the presence of Scalia and Kennedy with Brennan, Marshall, and Blackmun in the majority, plus
Rehnquist and O’Connor’s alignment with Stevens and White in dissent, made it
difficult to characterize the flag burning decisions in ideological terms at all. The
conservative division evidenced on the Court was underscored by noted
conservative commentators James Kilpatrick, George Will, and William Safire,
each of whom registered his opposition to a constitutional amendment in
nationally syndicated columns (Goldstein 1996, 192). In addition, by 1989 the
U.S. Supreme Court was consistently issuing more conservative civil liberties
rulings than it had at any time in recent memory (Epstein et al 2003, 236-237). In
that context, congressional conservatives were reluctant to attack the federal
judiciary’s jurisdictional authority. Finally, unlike the Court’s decisions on
school prayer and abortion, Johnson was much less important in a practical sense.
While the prayer and abortion decisions generally resonated in everyday life—at
least in the lives of most social conservatives—desecration of the flag was hardly
an activity of epidemic proportions.

In some ways, the flag burning controversy’s history is similar to that of
the school prayer decisions. In each case, Congress pursued the strategy of
constitutional amendment in the immediate aftermath of an adverse Supreme
Court ruling—and, in both cases, conservatives were quite optimistic about the
amendment’s chances of passage. After the amendment process had run its
course in the prayer debate, an overwhelming majority of the American public
continued to oppose the Court’s ruling. By the mid-1990s, however, public
opinion had grown closer to the Court’s position in the flag burning cases—a solid majority continued to oppose flag burning in practice, but a substantial number of Americans had come to embrace the constitutional principle of free expression that had motivated the Court’s decision (Goldstein 1996, 332-333). After that, neither public opposition nor the issue’s salience would remain intense enough to motivate Congressional conservatives to pursue jurisdiction-stripping.

The Court Since 1990: Legislative Term Limits and the “Federalism Revolution”

Since the 1990s, much of the Supreme Court’s “activism” has consisted of striking down lower-profile matters concerning legislative term limits and using a stricter reading of the Commerce Clause and state-federal relations to bring about what has been called a “Federalism Revolution.” None of the Court’s rulings in these areas generated court-stripping activity, and basic political realities make it easy to understand why. The Supreme Court’s disapproval of legislative term limits in U.S. Term Limits, Inc. v. Thornton (1995) led to the introduction of several constitutional amendments designed to limit the tenure of legislative careers. However, just as members advocated court-stripping on reapportionment matters to benefit themselves in the 1960s, they probably eschewed the tactic in the aftermath of Thornton out of a similar desire for self-preservation. Moreover, as in other areas of constitutional jurisprudence, one would expect conservative
members of Congress to show reluctance in chastening a Court whose rulings reflected their own preferences on so many other legal questions.

Understanding Congress’s failure to respond to the Court’s “Federalism Revolution” is even more straightforward. Whether one considers the Court’s Commerce Clause rulings in *United States v. Lopez* (1997) and *United States v. Morrison* (2000) or its path-breaking decisions on Sovereign Immunity and the Eleventh Amendment (e.g., *Seminole Tribe of Florida v. Florida* 1996; *Alden v. Maine* 1999), the Rehnquist Court’s (5-4) decisions in favor of states’ rights speak for themselves. Of course, the Rehnquist Court’s “activism” on these issues has also “made the term activism almost useless as an analytical tool” (Tushnet 2005, 339).

Ultimately, Congress’s failure to challenge the Court on these issues—by jurisdiction-stripping legislation or much else—can be traced to several factors. For one, “interest groups don’t care much about federalism…In fact, no one besides the justices really cares about federalism” (Tushnet 2005, 276-277). For another, the Court’s decisions epitomized conservative policy preferences—preferences for less federal governmental involvement in daily life. Since liberals have typically abstained from jurisdiction-stripping in contemporary times, these conservative outcomes ensured that Congress would not attempt to curb the Court. More generically, one constitutional scholar has observed that, “…the Court was striking down statutes that the [Republican-controlled] Congress of the
late 1990s wouldn’t have enacted anyway. In some ways, the Court was moving with the Congress that existed in the 1990s rather than against it. It ‘dissed’ the Congress controlled by Democrats, and it’s not surprising that the Republican Congress did not take up arms against the Court’s disparagement of Congress” (Tushnet 2005, 277). Because its greatest areas of activism were of little concern to either the general public or organized interests and because that activism echoed the preferences of congressional conservatives, the Rehnquist Court’s federalism decisions failed to awaken the court-strippers in Congress.

(The Lack of) Jurisdiction-Stripping Activity In Comparative Perspective

Table 7.12 extends the earlier comparative examination of court-stripping to a larger analysis in order to explain wider variations in the incidence of that activity. In other words, the goal is to identify what—if any—characteristics separate areas in which jurisdictional curbs have been frequently pursued from areas in which that pursuit has either been less frequent or nonexistent altogether. As in the original analysis, the dependent variable of interest remains the intensity of court-curbing activity across individual issues. A number of potential explanations for these differences in intensity structure that discussion, and they are introduced in Table 7.12.
<table>
<thead>
<tr>
<th></th>
<th>Areas of Substantial Activity</th>
<th>Legislative Redistricting</th>
<th>Police Interrogation</th>
<th>Capital Punishment</th>
<th>Flag Burning</th>
<th>Federalism Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological Opposition To Decision?</td>
<td>Yes, to varying degrees</td>
<td>Minimal</td>
<td>Moderate</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Public’s Attitude Toward Issue</td>
<td>See Table 7.5</td>
<td>Ambivalence</td>
<td>Opposed Court</td>
<td>Opposed Court</td>
<td>Opposed Court</td>
<td>Ignorance</td>
</tr>
<tr>
<td>Evolving Public Opinion</td>
<td>See Table 7.5</td>
<td>N/A</td>
<td>Yes</td>
<td>No</td>
<td>Moderate</td>
<td>N/A</td>
</tr>
<tr>
<td>Viable Alternatives to Jurisdiction-Stripping</td>
<td>See Table 7.5</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Few</td>
<td>Generally, yes</td>
</tr>
<tr>
<td>Perceived importance to everyday life</td>
<td>Yes</td>
<td>No</td>
<td>Moderate</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>(Time Lapsed Before) Judicial Retreat?</td>
<td>On busing and abortion</td>
<td>Yes, a decade Later</td>
<td>Yes, Gradually</td>
<td>Yes, Quickly</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Core Social Conservative Issue?</td>
<td>Yes</td>
<td>No</td>
<td>Moderate</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Court Vote in Relevant Decision(s)</td>
<td>9-0, Brown 8-1, Engel 7-2, Roe 6-2, Baker 6-3, Wesberry 8-1, Reynolds 5-4, Escobedo 5-4, Miranda 5-4, Furman 5-4, Johnson 5-4, Eichman</td>
<td>5-4, all</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dependent Variable</td>
<td>Varies, see Table 7.5</td>
<td>Moderate</td>
<td>Occasional</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

Table 7.12: Variables Relating to Intensity of Jurisdiction-Stripping Activity Across Multiple Issues
First, all else being equal, members of Congress should be unlikely to pursue jurisdiction-stripping with much vigor when other viable alternatives exist for undercutting unsatisfactory judicial outcomes. That certainly holds true with capital punishment, where passage of additional statutes at the state level met the Court’s objections in *Furman v. Georgia*. Similarly, several of the Rehnquist Court’s federalism decisions would probably be fairly easy for Congress to circumvent, if it desired to do so (Tushnet 2005). The absence of viable alternatives motivated successful jurisdictional activity on legislative redistricting issues, even if that activity was relatively limited in its duration. With several qualifications, this availability of alternatives has impacted the incidence of jurisdiction-stripping activity in the areas of prayer, busing, and abortion as well. Aside from passage of a constitutional amendment, no non-jurisdictional alternatives existed for opponents of the Court’s prayer decisions. As a result, Congress undertook significant court-curbing activity on that issue. While the same limited options were available in the wake of *Brown*, the decision’s narrow base of opposition kept these jurisdictional attacks to a minimum. The busing and abortion cases afforded the Court’s opponents greater flexibility, even if they did not allow legislators the freedom *Furman* did to satisfy the Court’s qualms about the death penalty.
An examination of the role played by public attitudes and their evolution vis-à-vis the issues listed in Table 7.12 helps illuminate variations in jurisdictional activity as well. Not unexpectedly, when the general public has been ambivalent toward or ignorant of judicial outputs in an area, as it was with legislative redistricting and federalism, the court-curbing movement has been either limited or nonexistent. And, of course, the prior discussion claimed that the jurisdictional activity that did result from the reapportionment decisions was largely a product of legislative self-interest. But even there, the jurisdictional debate proved unsustainable in the absence of public concern over the judicial decisions in that area. The absence of jurisdictional debate over the Court’s recent federalism decisions may also stem from the public’s lack of attention to those issues, aside from the fact that conservatives in Congress are highly unlikely to object to them.

The role of public opinion and issue salience in the areas of police interrogation, the death penalty, and flag burning has been much more conditional. In each of those areas the Supreme Court initially found itself on the opposite side of public opinion; however, only the Warren Court’s decisions in police interrogation cases such as Escobedo v. Illinois and Miranda v. Arizona provoked jurisdictional responses from Congress. Both the Court’s vague ruling in Furman v. Georgia and its quick reaffirmation of capital punishment’s constitutional legitimacy in Gregg v. Georgia make it easy to understand the absence of jurisdictional activity there. Because the Supreme Court retreated
from its unpopular decision in *Furman* just four years later, public opposition to the initial decision was not sufficient to motivate jurisdictional activity. While the public opposed the Court’s 1989 flag burning decision as well, serious discussions of a constitutional amendment to overrule it triggered a moderate evolution in public opinion on the issue. Once it became clear that the amendment process had failed, there was insufficient support for pursuing jurisdictional curbs—despite the Court’s failure to retreat from that decision.

Taken together, none of the explanatory variables discussed above offers a parsimonious explanation for Congress’s pursuit of jurisdiction-stripping in the areas of busing, abortion, and religious establishment, and its dearth of jurisdictional activity on most of these other issues. Nor does the ideological character of the coalitions in these areas appear to predict the intensity with which jurisdictional activity has been pursued in them, as it did within the issues of desegregation, abortion, and prayer. On the other hand, an issue’s public salience, or perceived importance in everyday life, appears to correlate broadly with the intensity with which Congress has pursued jurisdictional activity in each of these areas. The issue of capital punishment was particularly salient to the public, but the availability of additional options and the Court’s resulting retreat from *Furman* made jurisdiction-based remedies unnecessary there. The Court’s decisions in *Escobedo* and *Miranda* sparked substantial public concern, but the Court began weakening the force of those decisions in subsequent terms. Those
cases did relatively little to disrupt the social order; nor did they directly impact
the everyday lives of ordinary people. The issues of desegregation, abortion, and
prayer were, of course, highly salient to the public as well. However in contrast
to these other issues, busing, prayer, and, to some extent, the abortion controversy
directly affected many individuals. The first two affected hundreds of thousands
of people on a daily basis, and many other interpreted the judiciary’s
legitimization of abortion as a personal affront to their moral and/or religious
beliefs.

Along with this issue salience, what seems to separate the issues of busing, prayer, and abortion from most other issues displayed in Table 7.12 is the
former’s importance to social conservatives. Although additional factors explain
the absence of activity in several of the areas discussed, the issues of abortion,
school prayer, and school assignment—and, later, same-sex marriage and other
judicial attacks on religion in public life—have been among the signature issues
around which modern social conservatism was built and has been maintained.

**Court-Stripping and the Prospects of Judicial Reversal**

One final explanatory factor to consider regarding the intensity of
jurisdiction-stripping activity is derived from research on congressional responses
to the Supreme Court’s statutory decisions. Numerous scholars have examined
the decisiveness of the Court’s rulings, measured by the size of the decisional
majority, and tested the impact of that decisiveness on congressional reactions to
the Court (e.g., Zorn 1995; Solimine and Walker 1992; Henschen 1983). Though
the evidence is mixed at best, it is traditionally argued that a larger decisional
majority lowers the probability that Congress will respond to correct the Court’s
reading of a given statutory provision. In contrast to statutory interpretation
cases, however, the doctrine of *stare decisis* is less relevant to the Court’s
constitutional decisions. As the Court has repeatedly noted, “Although adherence
to the doctrine of *stare decisis* is usually the best policy, the doctrine is not an
inexorable command…particularly in constitutional cases, where correction
through legislative action is practically impossible” (see *Payne v. Tennessee* 1991,
501 U.S. 808, 809; *Burnet v. Coronado Oil & Gas* 1932, 285 U.S. 393, 407,
Brandeis, J., dissenting).

*Ceteris paribus*, because of the Court’s greater willingness to overturn
constitutional precedents, members of Congress should be less prone to advocate
jurisdictional curbs in those areas of law where the Court’s potential to self-
correct is comparatively high. Since it is a truism that the Court overrules its
narrowly decided precedents with greater frequency than it does its more
consensual ones, conservative members of Congress should be more hesitant to
advocate elimination of federal jurisdiction over an issue if the Court is sharply
conflicted about how to properly adjudicate that issue. In addition to being
potentially unnecessary, as discussed in Chapter Six, such premature removal of
jurisdiction would preclude the Court from overruling its earlier precedent. Thus, it is only sensible for members of Congress to advocate jurisdictional limitations on those issues from which subsequent courts are unlikely to deviate. Put formally, Congress’s propensity to pursue jurisdiction-stripping on a given issue should increase in direct proportion to the decisiveness of the Supreme Court’s majority on cases dealing with that issue.

From a conservative perspective, it is disappointing enough for the Court to issue liberal decisions. However, it is doubly worse when—for example, in the school prayer or busing decisions—those positions are espoused with near unanimity, making it all but impossible for one or two changes in the Court’s membership to disturb the ruling. On the other hand, narrowly-decided cases offer conservatives considerably more hope that, in the future, such decisions may trend their way. The data in Table 7.13 bear out these expectations surprisingly well. Indeed, of the major topics of jurisdiction-stripping—early desegregation, school prayer, busing and desegregation, and abortion—the narrowest majority was the Court’s 7-2 decision in Roe v. Wade. What is more, as that five vote margin narrowed further over the 1980s with the replacement of retiring justices with more favorable judicial personnel and the prospect of Roe’s reversal grew more conceivable, court-stripping efforts vis-à-vis abortion declined substantially. Similarly, the implausibility of the Warren Court’s retreat from its redistricting decisions may have been a key consideration for those members who favored the
Tuck Bill in 1964. On the other hand, with the exception of the Court’s suspect interrogation cases—which, it should be remembered, generated considerably less congressional activity than all other decisions listed above it in Table 7.13—not one of the Court’s 5-4 decisions on capital punishment, flag desecration, or federal-state relations led to the introduction of a single jurisdictional proposal in Congress. Perhaps more than any other, this consideration—the likelihood of an unfriendly decision’s judicial reversal, as operationalized by the size of the Court’s decisional majority—separates subjects of jurisdiction-stripping activity from areas of non-activity, and areas of intense jurisdictional activity from those about which Congress’s jurisdictional concerns have been more sporadic.

All this, of course, suggests that most members of Congress are attentive to more than just the direction of judicial outcomes per se. It also implies legislators are conscious of the strength of the Court’s belief in a decision’s “rightness” and, by extension, the likelihood of that decision’s subsequent reversal by the Court. This too is unsurprising, and is illustrated by the fact that Roe v. Wade’s security has become the sine qua non of recent Supreme Court confirmation battles. These related observations are consistent with the dissertation’s fundamental premise, which is that judicial outputs should affect Congress’s exercise of its jurisdictional power. In that sense, congressional opponents of judicial outcomes in these constitutional cases do not appear to be the irrational zealots many believe them to be. To the contrary, much of their
behavior—while extremist, to be sure—appears eminently rational when one considers that their issues of greatest activity are unlikely to be undercut or reversed in ways short of jurisdiction-stripping.

<table>
<thead>
<tr>
<th>Issue Area</th>
<th>Relevant Decision(s) and Supreme Court Vote</th>
<th>Jurisdiction-Stripping</th>
</tr>
</thead>
<tbody>
<tr>
<td>Early Desegregation</td>
<td>Brown v. Board of Education, 9-0</td>
<td>Yes</td>
</tr>
<tr>
<td>School Prayer</td>
<td>Engel v. Vitale, 8-1</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Abington School Dist. v. Schempp, 8-1</td>
<td></td>
</tr>
<tr>
<td>Busing and Desegregation</td>
<td>Swann v. Charlotte-Mecklenburg, 9-0</td>
<td>Yes</td>
</tr>
<tr>
<td>Abortion</td>
<td>Roe v. Wade, 7-2</td>
<td>Yes</td>
</tr>
<tr>
<td>Legislative Redistricting</td>
<td>Baker v. Carr, 6-2; Wesherry v. Sanders, 6-3; Reynolds v. Sims, 8-1</td>
<td>Some</td>
</tr>
<tr>
<td>Police Interrogation</td>
<td>Escobedo v. Illinois, 5-4; Miranda v. Arizona, 5-4</td>
<td>Limited</td>
</tr>
<tr>
<td>Capital Punishment</td>
<td>Furman v. Georgia, 5-4</td>
<td>No</td>
</tr>
<tr>
<td>Flag Desecration</td>
<td>Texas v. Johnson, 5-4</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>U.S. v. Eichman, 5-4</td>
<td></td>
</tr>
<tr>
<td>Federalism Cases</td>
<td>Printz v. U.S., 5-4; Alden v. Maine 5-4; U.S. v. Lopez, 5-4; U.S. v. Morrison, 5-4</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 7.13: Potential Areas of Court-Stripping, with Decision Breakdowns

SUMMARY AND CONCLUSIONS: THE FUTURE OF COURT-STRIPPING

From the time the Supreme Court issued its decision in Brown v. Board of Education in the spring of 1954, jurisdiction-stripping has represented a key aspect of Congress’s responses to a number of high-profile federal judicial decisions. Whether that prominence carries over into the first half of the new
century remains to be seen, but two recent developments suggest that it could. In 2004, the House of Representatives passed legislation depriving all federal courts of jurisdiction to rule on the constitutionality of the 1996 Defense of Marriage Act. An even larger House majority coalesced behind the Pledge Protection Act several weeks later, which was intended to limit federal court jurisdiction over Pledge-related cases. Although these measures were widely criticized and seen by detractors as conservative attempts to influence the 2004 elections, the fact that each received majority support from a chamber of Congress is no small feat. They also bring to mind Walter Murphy’s prediction that “the issues generating conflict may change, but the Court in the future is likely to remain as it has been in the past—a focal point in the struggle for political power” (1962, 268).

Though conservatives in Congress have not been shy in advocating court-stripping of late, increased conservative strength in Washington may actually serve to limit the incidence of jurisdiction-stripping activity over the long-term. Just as Republican judicial appointments moved federal court outputs rightward during the 1980s and decreased the perceived necessity of jurisdiction-stripping for conservatives, Republican control of judicial nominations in both the White House and the Senate may obviate the perceived need for court-stripping activity in the years ahead. If the decline of jurisdiction-stripping during the second Reagan term and the presidency of George H.W. Bush is any guide, the remainder of George W. Bush’s presidency may be relatively free of these jurisdictional
debates. If Republican control of the judicial confirmation process translates into further consolidation of the federal judiciary’s conservative ideological orientation, it is not unreasonable to predict that contemporary jurisdictional struggles over religious establishment or same-sex marriage will fade as conservatives in Congress increasingly trust the federal courts to make the “right” decisions on those issues.

In some ways, however, the House of Representatives’s 2004 actions are different in kind from jurisdiction-stripping sagas of earlier generations. As such, one should be careful not to pin too much on them, since the activities of a single Congress do not necessarily imply the makings of a trend. Though both the House measures ultimately targeted the U.S. Supreme Court’s jurisdiction, the Court itself had not directly provoked that action through its decisions, as had been the case with its prayer, desegregation, and busing rulings. While the Court’s 6-3 decision in *Lawrence v. Texas* (2003) represented a substantial advance for the gay rights movement, it had by no means imposed same-sex marriage by judicial decree. Nor had the Court’s recent decisions provided any indication that it would follow the Ninth Circuit Court of Appeals in declaring the Pledge of Allegiance unconstitutional. What is more, as the One Hundred Eighth Congress began, the Supreme Court was in the midst of its most conservative civil liberties jurisprudence since the beginning of the Warren Court in 1953 (Epstein et al 2003, 326-327). Coupled with the presence of a neck-and-neck presidential
contest in which the Republicans sought to highlight issues of morality and liberal judicial activism, these efforts smacked more of political opportunism than of a retrospective concern for judicial outcomes (Hulse 2004).

Whether this recent activity represents an aberration or a trend, jurisdiction-stripping is likely to reemerge periodically so long as its constitutional status remains judicially undetermined. Of course, even if that illegitimacy were exposed, that would not necessarily guarantee the tactic’s abandonment by politicians. As one activist said of legislative behavior in a non-jurisdictional context, “Many…legislators really don’t give a damn whether or not what they pass is constitutional. All they care about is whether it will be popular with their constituents” (Rubin 1987, 131). Whether or not that is the case for advocates of court-stripping, it is clear that the intensity of Congress’s jurisdiction-stripping activity has ebbed and flowed over time—and, more often than not, it has been equally evident that those variations have fluctuated in direct proportion to the judicial outcomes being rendered by the federal courts.
CHAPTER 8

THE POLITICS OF FEDERAL JURISDICTION

“The mechanisms of law—what courts are to deal with which causes and subject to what conditions—cannot be dissociated from the ends the law subserves. So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is a means of effectuating public policy. Particularly true is this of the federal courts.”—Frankfurter and Landis (1928, 2)

“…Under the guise of seemingly dry jurisdictional and procedural problems, majestic and subtle issues of great moment to the political life of the country are concealed.”—Felix Frankfurter, in a letter to Herbert Wechsler (cited in Purcell 1999, 685-686)

Congress’s ability to set the jurisdiction of the federal courts is an important but underappreciated check on judicial power in the American governmental system. In this, the final chapter of the dissertation, the examination of Congress’s involvement with jurisdictional politics concludes with three related sets of discussions. The chapter begins by summarizing the dissertation’s most critical empirical results. I then present several implications of those results, including what they suggest about the relationship of jurisdictional politics to Congress’s broader oversight of the federal courts as well as the role congressional control over jurisdiction might play in affecting certain aspects of judicial behavior. Finally, the chapter concludes by discussing several ways in which future research on the judicial and legislative branches might expand upon the findings of this dissertation.
SUMMARY OF EMPIRICAL RESULTS

In the research presented here, I have attempted to elaborate on Congress’s case-based ability to supervise the federal courts by describing and analyzing congressional behavior with regard to two particular aspects of federal jurisdiction. While the specific results of the two case studies differed in some respects, a number of general points did emerge from the analyses. For one, no two jurisdictional episodes are the same. As such, any comprehensive theory of Congress’s jurisdictional activity must take into account a certain amount of situational fluidity. For another, the examinations of both diversity jurisdiction and court-stripping showed that Congress’s jurisdictional activity is determined by many of the same forces that motivate other aspects of the judicial-legislative relationship—concern for judicial outcomes, attention to matters of court administration, and the reaction of nongovernmental entities such as interest groups and public opinion itself.

More specifically, Chapters Four and Five emphasized the shared role of court caseloads, judicial outcomes, and interest group politics in inspiring various levels of congressional activity to restrict the reach of federal diversity jurisdiction. In both Chapter Four’s narrative history and the qualitative case studies of Chapter Five, we saw the politics of federal diversity jurisdiction progress from thinly-veiled attempts to undermine pro-corporate decisions of the Republican federal courts to less contentious discussions over ways to check the
ballooning caseload of those courts. That development, of course, paralleled the historical evolution away from legislative concern over judicial outputs on economic issues and an increasing attention toward issues of social concern.

Chapter Five’s quantitative analyses of congressional activity on diversity jurisdiction highlighted the differential role of these administrative and outcome-based factors as they related to both House passage and the actual enactment of jurisdictional limitations. Since 1875, the House of Representatives has been especially likely to enact limitations in diversity jurisdiction’s scope during periods in which the partisan composition of the federal courts and Congress has diverged. Although its involvement with reform has been conditioned by objective factors of judicial administration as well, judicial outcomes appear to have played a particularly prominent role in the House’s decisions to support limitations in diversity jurisdiction. On the other hand, analyzing the actual enactment of reform underscored the limitations of using substantive judicial outputs to predict congressional action on matters of diversity jurisdiction. There we saw that the enactment of diversity reform has tended to be structured by more politically-neutral concerns over the administrative status of the federal courts.

Against these potential motivations for change, the diversity chapters also noted the role of external groups and interests in debates over the jurisdiction. In most cases, these external groups and interests represented a counterforce opposing the changes advocated by proponents of federal court administration and
opponents of the judiciary’s substantive case outputs. In the 1800s the bulk of this pressure came from corporate America and its political allies, who wanted to maintain the favorable position in litigation that diversity of citizenship afforded them. These opponents of change remained much the same during the Progressive crusades to abolish federal diversity jurisdiction. In later years, however, the organized bar began to play a larger role in these jurisdictional debates—particularly when diversity’s very survival was at stake. Since 1978, however, diversity jurisdiction’s existence has not been in serious doubt, and this has been reflected in the willingness of external groups and interests to defer to relatively minor adjustments in the jurisdiction’s scope.

Although administrative rationales proved irrelevant to the politics of jurisdiction-stripping, the dissertation’s analyses of that phenomenon were particularly useful in highlighting the role of judicial outcomes in congressional debates over federal jurisdiction. In Chapters Six and Seven, we saw the close connection between the Supreme Court’s outputs in civil liberties cases and the American public’s general policy mood on the one hand and, on the other, the rate at which members of Congress have pursued these constitutionally-suspect measures to limit federal review of certain constitutional questions. Unlike prior analyses of court-curbing, the chapters also distinguished between jurisdiction-stripping measures designed to impact the U.S. Supreme Court’s appellate jurisdiction and the narrower class of proposals targeting the inferior federal
courts. Ultimately, those analyses demonstrated an impressive degree of attention to judicial outcomes on the part of Congress—when the Supreme Court’s civil liberties decisions have been relatively liberal, Congress has been especially active in targeting its appellate jurisdiction for limitation. When the Supreme Court’s decisional outcomes have been more conservative, however, Congress has been less inclined to have segments of the Court’s jurisdiction in its cross-hairs. Congress’s inferior court-curbing activity has been responsive to judicial outcomes as well, but in a somewhat different way. While Congress’s attempts to curtail inferior court jurisdiction have not borne much relationship to the overall outcomes being produced by those courts, those attempts have been pursued with much greater fervor during periods of conservatism on the Supreme Court. Put somewhat differently, then, even when members of Congress may be predisposed to champion jurisdiction-stripping legislation, Congress has chosen to exclude the Supreme Court from such discussions when its decisions are ideologically acceptable to conservative lawmakers. Taken together, this evidence suggests that characterizing the modern court-curbing movement as the product of irrational legislative tendencies is somewhat misguided. To the contrary, both the intensity and the targets of these efforts suggest that most members of Congress have a basic appreciation for the Supreme Court’s judicial outcomes, and that sense has been reflected in the institution’s aggregate court-stripping behavior on issues of constitutional concern.
The dissertation’s assessments of the modern court-stripping controversy also highlighted the impact of public attitudes in structuring congressional behavior on these jurisdictional matters. According to Chapter Three’s theoretical model of jurisdictional control, public opinion should be a particularly relevant concern in jurisdictional matters of high public salience. That basic expectation was heartily confirmed with regard to efforts to retract constitutional jurisdiction over civil liberties issues such as school prayer, abortion, and school desegregation. As Chapter Six confirmed, jurisdiction-stripping activity has been particularly intense during periods in which the general public’s overall policy preferences have been relatively conservative. However, when the public’s mood has liberalized, court-stripping has enjoyed considerably less support among members of Congress. The individual-level supplemental analysis of court-curbing legislation’s cosponsorship validated these connections between judicial outcomes, public opinion, and court-curbing activity, and also hinted at several other potential motivations for pursuing court-curbing activity. That analysis found that both conservative and southern legislators were particularly likely to advocate court-curbing measures, and there was even limited evidence that one’s proximity to reelection influenced senatorial cosponsorship of such measures.

Chapter Seven undertook a more qualitative, issue-specific examination of constitutional jurisdictional gerrymandering from 1953 to 2004, and addressed a number of possible reasons why members of Congress have only pursued
jurisdiction-stripping activity within a relatively small subset of all constitutional issues. Again, what emerged was a reasonable picture. The aggregate patterns in public opinion and judicial outcomes presented in Chapter Six were generally validated in Chapter Seven’s qualitative examinations of congressional activity in particular issue areas. Moreover, members of Congress have only tended to pursue jurisdiction-based approaches to undoing the Supreme Court’s constitutional decisions when the Court itself appears unlikely to retreat from and ultimately overrule a particular decision, or when less drastic options for circumventing the decisions are not feasible. Just as congressional attention to shifts in public opinion and judicial decisions demonstrated the responsiveness of court-curbing activity to political conditions, its decisions about whether or not to pursue jurisdiction-stripping as a remedy in various areas of law have appeared to exhibit a similar degree of attention to real world political circumstances.

In light of the very small number of data points available for the quantitative analyses of both diversity jurisdiction and court-stripping, it is remarkable that they produced such robust results. If anything, the quantitative results reported in the dissertation probably underestimate the impact of these variables on congressional efforts to restrict federal jurisdiction. Just sixty-five sessions were available in which to analyze congressional activity on diversity jurisdiction, and even the results obtained from those sessions had their limitations. For example, contraction of diversity jurisdiction has not taken place
in a vacuum. Even as it considers limitations in particular types of jurisdiction, Congress can also alter the tenor of federal court outcomes and affect judicial workloads by authorizing additional federal judgeships. That the analyses of diversity jurisdiction produced the results they did in spite of such peripheral activity is all the more reason to subscribe to their basic conclusions. The smaller number of cases available for Chapters Six’s event count analyses raised the bar even further. With just twenty-six congressional sessions in which to analyze contemporary jurisdiction-stripping activity, the clarity of those results was striking. It is all the more remarkable when one considers the aggregation across issue areas that was necessary to produce the broad measures of judicial outcomes, public opinion, and even the dependent variables utilized in the analyses. Because the results were robust enough to survive these severe constraints—and because many of those general results were validated by Chapter Seven’s explication of court-curbing activity within specific issue areas—the quantitative findings of Chapter Six likely undervalue the already considerable impact of judicial outcomes and public opinion on the intensity of a particular Congress’s jurisdiction-stripping activity.

**IMPLICATIONS AND DIRECTIONS FOR FUTURE RESEARCH**

The research presented in this dissertation has a number of important substantive implications for the institutional relationship between Congress and
the federal courts. When considered with existing scholarship on federal jurisdiction by Gillman (2002), Lovell (2003), Smith (2005; forthcoming), and a number of others, the findings presented here make a compelling case for the more explicit inclusion of jurisdictional controls in future models of congressional oversight of the federal courts. As noted in Chapter Two, Congress has a number of prospective and retrospective tools at its disposal with which to administer the federal courts. Generally, most of these checks have stemmed from Congress’s institutional ability to impact the structure and composition of the federal courts via court creation, judgeship expansion, and judicial nominations. By contrast, this dissertation has focused on Congress’s ability to exercise case-based checks on the federal judiciary. These case-centered mechanisms of jurisdictional control may only serve as decisive constraints on judicial power in a small number of specific cases, but that does not necessarily represent the sum of their importance to the court-Congress relationship. Even some well-recognized composition-based checks on the courts—for example, judgeship expansion—are unlikely to be decisive in a substantial number of cases, at least in the traditional sense; however, that does not make them unimportant checks on judicial power. To put it differently, jurisdictional oversight, by itself, probably only marginally strengthens Congress’s grip on the federal courts. However, when combined with
other oversight mechanisms such as court creation, budgetary authority, and even the ability to override federal statutory decisions, this jurisdictional power takes on greater importance.

Even more substantively, the analyses illustrated that the politics of federal jurisdiction can be motivated by a number of different factors. However, it is quite clear that much of the jurisdictional change contemplated in the pages of this dissertation has been motivated by acute attention to and concern for the substantive judicial outcomes being produced by the federal courts. Whether these motivations transfer to additional aspects of the jurisdictional relationship between Congress and the courts can only be the subject of speculation until further research is undertaken. Still, especially when combined with its other institutional checks on the federal judiciary, Congress’s ability to appreciate, react to, or even anticipate changes in judicial outcomes represents a potentially important arrow in the legislative quiver of judicial oversight—one that can be fired when the courts stray too far from the policy preferences of the elected branches in particular legal areas.

In addition to raising important questions about the supposedly independent and unaccountable federal judiciary, the results reported here indirectly challenge the view held by scholars and laypersons alike that the actions of federal judges are virtually unconstrained (e.g., Segal 1997; Levin 2005). This postulate, long a staple of the attitudinal model of judicial decision
making, emphasizes the federal judiciary’s general independence from institutional oversight and its concomitant ability to do what it pleases with the cases it adjudicates. In point of fact, however, if Congress can occasionally use jurisdictional rules to influence substantive legal outcomes by redirecting certain classes of cases to particular courts or court systems, its inability (or unwillingness) to check the actual outcomes of certain judicial decisions in more traditional ways—vis-à-vis statutory overrides, constitutional amendments, and the like—is rendered somewhat less important. While this is not to say scholars have wrongly assessed the overall balance of power between the courts and Congress, the relevance of these case-based jurisdictional checks does suggest that Congress need not always be limited to structural or compositional avenues when attempting to exert its influence over the federal courts.

What is more, by threatening to alter federal jurisdiction in a particular area of law, it is conceivable—but by no means certain (see Hansford and Damore 2000)—that Congress and its actions may cause “judges and justices [to] alter their own behavior in order to stave off future [jurisdictional changes]” (Bell and Scott 2005, 6-7; Segal 1991). Admittedly, in many cases, jurisdictional threats may not be sufficient to influence judicial decisions. This is particularly likely in technical areas such as diversity jurisdiction, where most federal judges would welcome the removal of such issues from their cluttered dockets. However, it is at least conceivable that judicial decisions might be influenced by jurisdictional
pressures in some areas, even if that influence is largely peripheral. For example, some subset of federal judges might feel special political and/or social pressure to uphold the Pledge of Allegiance’s constitutionality, now that nearly sixty percent of the House of Representatives voted to limit federal court review of such cases in 2004. Even assuming the constitutionally problematic nature of such measures and the small likelihood of their ultimate enactment, some jurists might be impacted by the belief that issuing a decision striking down the words “under God” from the Pledge would simply not be politically or institutionally defensible against the voices of the public, as expressed through their congressional representatives. If Congress can alter or even threaten to alter federal jurisdiction in ways that maximize its policy preferences, then judicial actors may not have the near plenary power over judicial outcomes that many have suggested. While far from being a decisive check on judicial power, much less a direct challenge to the attitudinal model, scholars cannot expect to obtain a comprehensive assessment of that picture by disregarding the case-based jurisdictional remedies that Congress has at its disposal for dealing with and affecting certain substantive federal court outputs.

Although this dissertation has sought to highlight the role of several factors in motivating changes in federal jurisdiction, it has necessarily been subject to certain limitations. Principally, the jurisdictional changes assessed herein have been unidirectional and have been limited to developments in
particular legal areas. As a consequence, future research on the factors related to changes in federal jurisdiction must supplement the analyses presented here by addressing these limitations. Because it has been marked by a general history of contraction, congressional treatment of the issues surrounding the reach of federal habeas corpus protection represents a natural extension of the research undertaken here. Assessing proposed changes in the scope of habeas corpus review will likely implicate many of the same issues seen in this dissertation’s examination of diversity jurisdiction. Habeas corpus cases account for an appreciable portion of federal judicial business and, as such, they obviously implicate issues of judicial administration. At the same time, it would be naïve to expect congressional consideration of such changes to be wholly divorced from the judicial outcomes being produced by the U.S. federal courts in these cases. Of course, there are countless other aspects of congressional involvement with federal jurisdiction that have involved the steady accretion of federal court involvement over particular issue areas. Just as the limitations in federal jurisdiction discussed here appear to have been particularly popular when the views of Congress clash with those of the courts, it is similarly reasonable to expect expansions of jurisdiction to be prominent when the views of these actors are in harmony (e.g., Gillman 2002; Frankfurter and Landis 1928). These instances, both specifically and in general, may also represent potentially fruitful areas of future research.
As noted earlier, there also remains a good deal to learn about the phenomenon of court- or jurisdiction-stripping. As of this writing, published research has yet to incorporate interviews of either past or present actors in these jurisdiction-stripping controversies. Gaining that perspective from both the practice’s proponents and antagonists is important if a richer and truly comprehensive picture of court-curbing is to emerge. In addition, although some general research has been performed in attempts to discern those factors which may correlate with individual member decisions to support court-stripping measures (e.g., Bell and Scott 2005; see also Clark and McGuire 1996), it is also critical to assess the relevance of these factors—and perhaps others—in specific episodes of jurisdiction-stripping. To that end, I am currently examining the role that policy considerations and individual electoral circumstances may have played in the voting decisions of House members on the 1964 Tuck Bill, which was designed to eliminate federal court jurisdiction over reapportionment matters (see Chapter Seven). By focusing on such scenarios, scholars will be better able to appreciate the extent to which particular factors have been more or less robust predictors of court-curbing activity across both time and individual issues. Finally, although the topic was of secondary importance to this dissertation, it may also be useful to probe the specific role that proposed constitutional amendments have played in the relationship between the courts and Congress.
Aside from these direct supplements to the inter-institutional research undertaken here, the general topic of federal diversity jurisdiction also suggests several additional research questions that are worthy of exploration. The institutional analyses of jurisdictional change examined in this dissertation have alluded to one particular aspect of federal diversity jurisdiction, but its implications—in practical terms and for the American judicial system—extend well beyond that. While related to this dissertation more indirectly, these potential research topics are particularly relevant to judicial scholars, who know relatively little about federal diversity jurisdiction’s central features. Existing research on the topic has generally been restricted to addressing the considerations that lead attorneys to exercise their right to remove certain cases to federal court (e.g., Summers 1962; Shapiro 1977; Miller 1992; Bumiller 1981; Goldman and Marks 1980) but diversity jurisdiction poses a number of additional questions as well. For instance, it is well-established that the decisions of Republican and Democratic federal judges typically exhibit certain differences—particularly on issues such as crime and punishment, the environment, and civil liberties. However, scholars have not focused on the role that partisan or ideological differences may play in the contemporary adjudication of diversity cases per se. Thus, the extent to which diversity cases reflect these same ideological cleavages remains an open question. As demonstrated in Chapters Four and Five, Congress’s attention to judicial outcomes in diversity cases has
arguably waned in recent decades, and one of the main reasons scholars believe this has occurred is that the courts have become increasingly active in salient areas of social concern (e.g., Purcell 1992). Still, that inattention would be even more explicable if researchers were to demonstrate that judicial partisanship has become a less potent predictor of judicial decisions in diversity cases in recent times.

On another note, there are also compelling reasons to question whether differences in judicial selection at the state level may impact the rate at which litigants opt to remove diversity cases to federal court. For instance, it may be that litigants from states with more professionalized judiciaries will view their state courts as largely evenhanded and be less likely to remove diversity cases to federal court than will similarly situated individuals from states with more overtly partisan judicial systems. Other investigations of diversity jurisdiction’s political and legal importance might include analyses of inter-circuit appellate court deference to federal district court decisions in diversity of citizenship cases or inquiries into what factors help determine when federal courts do and do not publish full written opinions in diversity of citizenship cases (e.g., Songer, Sheehan, and Haire 2000, 140). In other words, while diversity jurisdiction’s relevance to this dissertation was framed in terms of Congress’s efforts to control it, much research remains to be done on the concept from a purely judicial perspective.
CONCLUSION

Federal jurisdiction is a complicated, multilayered concept. As such, it is not easily amenable to a one-size-fits-all explanation. Indeed, a longtime champion of federal jurisdictional reform once described the uniqueness of federal jurisdiction this way: “[The] enactment of court reform legislation is similar to creating a quilt. The entire fabric of our system of justice is woven piece by piece through the use of State and Federal courts, traditional litigation, and alternative dispute resolution mechanisms” (Rep. Robert Kastenmeier, D-WI, 134 Cong. Rec. 31871). By focusing on two specific jurisdictional patches of that exceedingly complex and ever-growing quilt, this dissertation has attempted to demonstrate both the complexity and pervasiveness of federal jurisdictional politics in the American system. More importantly, it has sought to use federal diversity jurisdiction and jurisdiction-stripping in areas of constitutional concern as case studies that illustrate important aspects of the institutional give-and-take that epitomizes the politics of federal jurisdiction.
APPENDIX

Appendix: Examples of Various Jurisdiction-Stripping Proposals

Select examples of legislation classified as impacting the Supreme Court’s jurisdiction:

1) “Eliminates federal court jurisdiction to require a student to attend a particular school because of race, creed, color, or sex.”—HR 4756, 97th Congress

2) “Eliminates the appellate jurisdiction of the United States Supreme Court over any claim that a Federal or State law which prohibits an abortion is invalid under the Constitution.”—HR 15169, 94th Congress

Select examples of legislation classified as impacting the inferior federal courts only:

1) “Provides any federal court (excluding the Supreme Court) from issuing injunctive relief in any case arising out of Federal, State, or local law that prohibits or regulates abortion or the provision of public assistance for the performance of abortions.”—HR 73, 97th Congress

2) “Provides that no court created by Act of Congress and having general jurisdiction, original or appellate, with respect to cases or controversies arising under the laws or the Constitution of the United States, shall have any jurisdiction to hear or decide cases or controversies involving the public schools…Vests in the Supreme Court of the United States appellate jurisdiction by writ of certiorari…”—HR 12476, 93rd Congress


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