JURISDICTION STRIPPING
Ideology, Institutional Concerns, and Congressional Control of the Court

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October 19, 2005

Abstract: Positive political theory models predict that Congress removes jurisdiction strategically from the federal courts to control the judiciary's influence over policy when congressional and court preferences differ. Conventional wisdom holds that Congress rarely strips courts of jurisdiction. Findings from this study reveal that Congress does remove court jurisdiction, and that the incidence of this jurisdiction stripping increases over time. Based on a database of all public laws containing jurisdiction stripping provisions from the 78th through the 108th Congress, I test for correlations between ideological distance and incidence of jurisdiction stripping by generating measures of ideological space between the Supreme Court, federal appellate courts, Congress, and agencies. The results indicate that, contrary to positive political theory models, administrative concerns, particularly regarding federal court caseloads, influence jurisdiction stripping, but ideology does not.

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Positive political theory models predict that Congress removes jurisdiction strategically from the federal courts to control the judiciary's influence over policy when congressional and court preferences differ. Conventional wisdom holds that Congress rarely strips courts of jurisdiction. Findings from this study reveal that Congress does remove court jurisdiction, and that the incidence of this jurisdiction stripping increases over time. Based on a database of all public laws containing jurisdiction stripping provisions from the 78th through the 108th Congress, I test for correlations between ideological distance and incidence of jurisdiction stripping by generating measures of ideological space between the Supreme Court, federal appellate courts, Congress, and agencies. The results indicate that, contrary to positive political theory models, administrative concerns, particularly regarding federal court caseloads, influence jurisdiction stripping, but ideology does not.

INTRODUCTION

The interactions between Congress and the federal courts are often couched in terms of competing institutions driven by ideological preference and jockeying for control over public policy. Decisional rules and procedural structure, such as the nature and extent of judicial review, become strategic tools which Congress can use to control agency and court policy making. This focus on ideology ignores alternate explanations for institutional behavior; explanations in which ideological positioning takes a back seat to the overlapping problems inherent in administrating large and complex institutions. In some areas, Congress may be less concerned with ideology and strategy than it is with the delay and interference ongoing litigation brings to governmental business and strained court dockets. One way to explore whether or not Congress uses structure to control court impact on policy is to examine instances in which Congress explicitly removes the courts' ability to adjudicate disputes. Little empirical attention has been paid to these congressional actions, commonly known as "jurisdiction stripping," because accepted academic wisdom holds that while Congress may periodically threaten and posture, it rarely, if ever, eliminates federal court jurisdiction. This study suggests that the conventional wisdom is false. Congress regularly, and with increasing frequency, strips jurisdiction from the federal courts. Furthermore, when Congress acts to remove courts' policy review, it appears to do so in response to operational concerns, particularly those associated with federal court caseloads, and not in response to ideological differences between institutions.

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The Court, Congress, Agencies, and Positive Political Theory

Positive Political Theory ("PPT") offers a description of interbranch relations premised on the assumption that institutions, acting through their median members, seek to imprint their preferences upon public policy (Weingast 2002; Meernik and Ignagni 1997; Epstein, Knight, and Martin 2001). Because the federal courts, Congress, and the president are endowed with different powers, both in an absolute sense and in relation to one another, this desire to affect policy manifests itself through strategic behavior (Ferejohn and Shipan 1990; Epstein, Segal, and Victor 2002; Tiller and Spiller 1999). Thus, Congress, when enacting laws, takes into account the executive's desires and its ability to veto legislation, and the federal courts' preferences along with their ability to review and overturn federal law (Cameron 2000; Eskridge 1991a, 1992). In anticipation of these preferences, and potential reactions to legislation that deviates too far from a preferred point, Congress adopts laws which are shaped by a series of strategic compromises, so as to fall within a range that is acceptable to all three branches (Martin 2001, Weingast 2002).

Congress, however, has an additional problem in that policy enactment and policy implementation are rarely the same thing. Few laws are self-executing, and increasingly the nuts and bolts of legislation, from its practical application to its adaptation and refinement over time, are left to the discretion of executive agencies and their attendant bureaucracies (Eskridge and Ferejohn 1992; Spence 1997). This presents a classic control issue, in which Congress, as principal, must seek ways to reign in its agents' deviating preferences to assure that the actual implementation of policy reflects Congress's wishes. Numerous scholars have addressed this issue with respect to agencies, identifying a number of ways in which Congress keeps the bureaucracy in check including oversight and follow up legislation (Weingast and Moran 1983), third party monitoring known as "fire alarms" (McCubbins and Schwartz 1984), and decisional rules which constrain discretion (McNollgast[1] 1987, 1989; Huber, Shipan and Pfahler 2001).

Structural Control of the Court.

Broad legislative delegation to agencies provides the courts with additional avenues to impact policy through their review of agency action. But congressional control over the courts is limited in a large degree by the courts' relative structural and political isolation (Rohde and Spaeth 1976; Segal 1997). Building on the work of McNollgast (1987, 1989), among others, recent scholarship focuses on the ways in which structure, in the form of ex ante decisional rules and their attendant costs, can be used strategically by Congress to affect court influence on agency policy (Shipan 1997; Spiller and Tiller 1997). The ideological proximity of the Congress, courts, and agencies is the determining factor in this dynamic, with Congress choosing rules which result in greater discretion to either court or agency depending on which entity is most closely aligned

[1] "McNollgast" is the moniker commonly used for works co-authored by Mathew McCubbins, Roger Noll, and Barry Weingast.

with congressional preferences. And by the same token, the need for such strategy dissipates when courts and agencies share similar preferences.

Shipan (1997), for example, argues that Congress shapes judicial review provisions by anticipating the agencies' and courts' preferences. The level of discretionary review allowed to courts turns on whether Congress believes its congressionally preferred policy position is closer to that of the courts or that of the implementing agency. Congress legislates broader latitude in judicial review, giving the court a greater hand in shaping policy outcomes, when Congress believes the courts will protect congressional interests.

Spiller and Tiller (1997) model this same dynamic in connection with the cost-benefit trade-offs inherent in agency or court decision making. They conclude that Congress strategically manipulates the costs associated with agency policy formation or judicial review in order to assure that greater policy control sits with whichever actor is most closely aligned with Congress. Depending on this alignment, Congress can legislate a structure which makes it costly for the court to review agency policy, for example requirements that courts defer to agency expertise, thereby stacking the deck in favor of agency discretion and against judicial influence.

Jurisdiction Stripping as Structural Control

This paper takes up Spiller and Tiller's invitation to scholars to examine "how Congress may use structural change as a means to control the discretion of regulators and courts" (1997, 364). When Congress removes court jurisdiction it eliminates the court entirely from the strategic dynamic of policy implementation. Like adjusting the level of review (Shipan 1997) or the cost of decision making (Spiller and Tiller 1997), eliminating jurisdiction is a structural control which can be used by Congress to affect court impact on policy. Little empirical research has been done on jurisdictional removals, in part because many scholars believe that jurisdiction stripping does not occur outside a few highly unusual and limited cases (Burbank 2004; Resnik 1998).[2] However, the understanding, both theoretically and historically, comports with the view that jurisdictional removal, when it does occur, is driven by a desire to limit the courts' ability to influence policy. The two most widely discussed examples both date back to post-Civil War attempts by Congress to remove the courts from decisions involving Reconstruction.[3]

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[2]This view is held despite a fairly extensive literature in the administrative law field which addresses the explicit removal of judicial review as anticipated by the Administrative Procedure Act which abrogates the presumption of judicial review where the "statute precludes judicial review." 5 U.S.C. §701(a)(1)-(2)(2000).

[3] Ex Parte McCardle, 74 U.S. 506 (1868) involved congressional repeal of a statute granting jurisdiction to federal courts to hear certain appeals, an action taken because Congress was concerned that the Supreme Court would overturn certain provisions of the Reconstruction Acts. McCardle, a newspaper publisher, wrote editorials critical of Reconstruction. He was imprisoned by the military, and sought a writ of *habeas corpus* claiming that the Reconstruction Acts that allowed his arrest and confinement were unconstitutional. In United State v. Klein, 13 Wall 128 (1872), Congress passed legislation removing the Supreme Court's jurisdiction to hear a case involving presidential pardons to confederate sympathizers.

If the strategic dynamic articulated in PPT holds, one would expect jurisdiction stripping to be related to the preferences of Congress, the courts, and agencies in the following ways. First, as the courts' preferences move away from those of Congress, court review no longer acts as a mechanism to keep agency policy in line with congressional goals. In fact, if the court is actively using its powers of review to influence policy outcomes, under this scenario court review operates against congressional interests. This leads to the first hypothesis:

> Hypothesis 1: As Congress and court preferences diverge jurisdiction stripping increases.

Second, if Congress and agency preferences are not aligned, Congress is more likely to use the courts, and their powers of judicial review over agency policy, to constrain agency action. This leads to the second hypothesis:

> Hypothesis 2: As Congress and agency preferences diverge jurisdiction stripping decreases.

Finally, it is only when court and agency preferences differ that Congress has a meaningful choice between the two. Thus, structural deck stacking by Congress is most likely to occur as agency and court preferences grow farther apart. This leads to the third hypothesis:

> Hypothesis 3: As court and agency preferences diverge jurisdiction stripping increases.

An Alternate View: Jurisdiction Stripping, Litigants, and Caseload

There is, however, an alternate way of looking at structural deck stacking that is largely ignored by most PPT models. Congressional concerns with court involvement in policy implementation may be institutional as well as ideological, particularly with respect to rules that manipulate the extent and reach of judicial review. Denying courts jurisdiction also denies litigants access to the judicial system, an action that has ramifications for the strategic use of litigation by groups dissatisfied with policy outcomes. In other words, the operative issue may not be the ideology of courts, Congress, and agencies alone. Rather, the congressional concern may also include the potential for litigants to use courts to delay the implementation of policy or divert agency resources during the course of litigation regardless of the expected litigation outcome and regardless of court policy preferences. Congress also may be responding to calls from the judiciary to alleviate burgeoning workloads which translate in to increased disposition time and overcrowded dockets. From this perspective jurisdiction stripping represents congressional protection of governmental institutions, designed to minimize interference

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The legislation further dictated that any recitation in the pardon that an individual had been involved in an insurrection against the United States disqualified that person from reclaiming property seized during the war.

with the ongoing operations of government without any particular regard for court or agency ideology.

Various strains of scholarship support this perspective. The federal courts have long been concerned about their increasing caseload in relation to expanded jurisdiction (*e.g.* Resnik 1998; Posner 1996; Judicial Conference 1995). Federal agencies are likewise concerned with both the delay and cost associated with litigation (Pritzker and Dalton 1990; Meltzer 1998). Courts themselves have adopted a deferential posture towards agency action and recent studies indicate an increased level of deference towards agencies generally beginning in the late 1970s (Stephenson 2004).[4] The success rates of agencies and other governmental entities before the courts is both significant and largely independent from ideology, indicating a broad institutional deference on the part of courts to agency action and undercutting PPT accounts which assume Congress acts primarily to insulate ideologically favored agencies from the courts (Songer, Sheehan and Haire 1999).[5]

If institutional concerns play a role in jurisdiction stripping then one would expect the following:

Hypothesis 4: As federal court caseloads increase jurisdiction stripping increases.

RESEARCH DESIGN

To test these hypotheses, I consider all instances of jurisdiction stripping from the 78th Congress through the 108th Congress. I then test for correlations between the incidence of jurisdiction stripping and the ideological distance between Congress, the Supreme Court and federal Circuit Courts of Appeals, and agencies. I first analyze PPT model predictions in connection with the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") and then expand the analysis to include the First through Tenth Circuit Courts of Appeals.[6]

Case Selection

Public laws with provisions that removed jurisdiction from the courts were identified from all public laws passed during a sixty year time span, running from the first

[4] Culminating with Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984) in which the Supreme Court held that courts should defer to an agency's statutory interpretations unless contradicted by the plain language of the statute in question.

[5] Numerous studies do show agencies responding to court ideology which suggests that agencies anticipate court preferences and craft their policies accordingly (Howard and Nixon 2002; Cross and Tiller 1998). This too would be consistent with high agency success rates in litigation, but these studies focus on agency response to ideology, not congressional changes in structure.

[6] The Eleventh Circuit and U.S. Court of Appeals for the Federal Circuit are not included due to insufficient data. The Eleventh Circuit was established by 94 Stat. 1994 effective in October 1981. The U.S. Court of Appeals for the Federal Circuit was formed in 1982 by the merger of the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims (96 Stat. 25).

session of the 78th Congress (1943) through the second session of the 108th Congress (2004). Relevant legislation was identified from Westlaw and Congressional Universe using keyword searches for all public laws including any of the following terms: "court," "judicial," "review," "jurisdiction," or "conclusive." From this data set, public laws which contained any provision explicitly removing court jurisdiction were included.[7]

Data and Measurement

The study uses each session of Congress as the relevant point of analysis. The dependant variable is reported as the percentage of public laws containing jurisdiction stripping provisions in each congressional session.[8] A percentage measurement was chosen to control for variations in the raw number of enactments across different congressional sessions.[9]

In keeping with positive political theory modeling, the independent variables measure ideological distance between the Congress, courts, and agencies in each session of Congress using the median member for each institution as the relevant actor. For all actors, preferences were measured using derivations of Poole and Rosenthal's first dimension Nominate Common Space scores (Poole and Rosenthal 1997; Poole 1998, 2005).[10] This measurement places ideal points for representatives, senators, and presidents in to a single Downsian (1957) issue space ranging from -1.0 (most liberal) to 1.0 (most conservative). The existence of a common judicial measurement is due, in a large part, to the work of Epstein et al (2005) and Giles et al (2001, 2002) discussed below. Using one measurement system for all institutions, including the courts, overcomes significant reliability problems common to PPT analyses which arise when varying measurement strategies and metrics are used to identify different institutional preferences.

Congressional measures were derived for the floor median in each congressional session.[11] Although the model predicts that the House and Senate should react similarly to divergence from the courts, Each chamber was analyzed separately to allow for differences that may be masked by a unified approach. Congressional ideology was

[7] Limitations on causes of action, relief, statutes of limitation, and procedural requirements for filing a claim were not included in the data set.

[8] The analyses were run with different composite measures of the dependent variable to account for the increased tendency of Congress in recent years to include multiple legislative enactments in single omnibus bills. The analyses were run on dependent variables measured as the total number of public laws per congressional session containing jurisdiction stripping provisions, as well as a dependent variable measured by the total number of jurisdiction stripping provisions present in each congressional session. The results did not differ in any significant respect from those obtained with a jurisdiction stripping percentage per congressional session as the dependent variable.

[9] The dependent variable was converted to a square root in order to alleviate skew and normality issues with the residuals.

[10] The first dimension was chosen since it is the primary dimension along which ideological divides are structured in Congress (Poole and Rosenthal 1997).

[11] Because the literature disagrees whether the relevant measure for Congress should be the floor median or the majority party median, both were obtained and analyzed. As there was no significant difference in the results, only the results from the floor median analyses are reported.

derived from Poole and Rosenthal's first dimension Nominate Common Space scores (Poole and Rosenthal 1997; Poole 1998, 2005).

Presidential first dimension Nominate Common Space scores were used as a proxy for overall agency ideology (Moe 1987; Tiller and Spiller 1999; Wood and Anderson 1993). Common Space scores for Truman were taken from his Common Space score as a U.S. Senator (Binder and Maltzman 2002).

Appellate court Common Space scores were assigned according to the method developed by Giles et al (2001, 2002). Using norms of senatorial courtesy, appellate judges are assigned a Nominate Common Space score derived from the Common Space scores of their home state senators. If both senators are of the same party as the appointing president, the Judicial Common Space score is the average of both senators' scores. If only one senator is from the president's party, that senator's Common Space score is used. If both home state senators are in the opposition party, then the president's Common Space score is used.[12]

Judicial Common Space scores for Supreme Court Justices are derived from the method developed by Martin and Quinn (2002, 2005) and Epstein et al (2005) in which preference points for each Justice premised on changing voting patterns are transformed in to Nominate Common Space scores.[13]

For each congressional session, ideological divergence was measured as the absolute value of the difference between the median members of each institution. This results in the following independent variables representing ideological difference: Court-House, Court-Senate, Court-Agency, Agency-House, and Agency-Senate.

Litigation pressure on both the agencies and courts was measured by the total number of district court filings across the federal system in each year.[14] District court filings were chosen because they capture a number of important dynamics relevant to this study, even though such filings are an imperfect proxy for litigation delay and cost with respect to agencies because they aggregate all litigation without differentiating actions directly involving the government. Delay and cost begin to accrue to both the agency and

[12] Because Nominate Common Space scores currently begin with the 75th Congress, and some circuit judges sitting during the 78th Congress (the start of this study) and later were appointed prior to the 75th Congress, median member Common Space scores could not be obtained for some Circuits until later years. Most Circuits are comprised of fewer than 12 judges, therefore estimating median members without a full compliment of judges can skew the analysis. No panel median member was derived without a full set of Common Space scores, resulting in a variation from Circuit to Circuit in the number of congressional sessions analyzed. This is indicated in each table by the variation in N.

[13] Judicial Common Space scores for the full panel of justices can be derived from the second session of the 81st Congress through the second session of the 108th Congress. As with the Circuit Courts, median justices were identified only when a full court could be measured. Databases and documentation for Judicial Common Space scores are available at http://epstein.wustl.edu/research/JCS.html.

[14] These were taken from compilations made by Posner (1985, 1996) and updated through 2004 from data made available by the Director of the Administrative Office of the United States Courts at http://www.uscourts.gov/judbususc. Bankruptcy proceedings, but not bankruptcy appeals, are omitted, as are cases filed in the Federal Circuit.

the court once litigation is instituted, regardless of final disposition. Filings are a better measure of the strategic value of litigation than either decisions or appeals because filings represent the actual influx of litigation regardless of final case disposition and with out the winnowing process that occurs both as a case progresses and in connection decisions regarding whether to file an appeal. Finally, no current databases cover total agency based litigation throughout the 60 years covered by this study.[15]

Two models were run with respect to each court ideology examined.[16] Model 1 uses only the House floor median to calculate congressional preferences. Model 2 uses only the Senate floor median to calculate preferences. To test whether the incidence of jurisdiction stripping is related to interbranch ideological differences, the ideological variables are regressed on the percent of jurisdiction stripping legislation passed in each congressional session. Increased distance between either chamber floor's median member and the court median member should correspond to an increase in jurisdiction stripping if this action is designed to protect congressionally enacted policy from judicial interference. One would expect the coefficients for these variables to be both positive and significant. Likewise, as ideological space between the agencies and the court increases one would expect to see increased jurisdiction stripping, since the divergent preferences provide Congress with an opportunity to favor the actor most aligned with congressional preferences. Finally, as the distance between the agencies and Congress increases one would expect to see less jurisdiction stripping, since the removal of policy from court review acts to protect executive branch authority over policy implementation.[17] Accordingly, the coefficient for these variables should be both negative and significant.

RESULTS

Table 1 shows that, contrary to conventional wisdom, Congress does explicitly and regularly remove court jurisdiction. Since 1943, Congress passed 248 public laws containing 378 provisions expressly stripping jurisdiction from the federal courts.

[15] The Untied States Courts of Appeals Database Phase I (1997), allows for selection of cases in which the government is either an appellant or respondent, but its analysis is at the appellate level only, and consists of a per annum random sample of cases (ranging from 15 to 30) in each circuit selected from those cases for which there is a published opinion (ICPSR Study No. 2086, at http://www.icpsr.umich.edu).

[16] This was due to high multicollinearity between measures using House and Senate ideology.

[17] Similarly, studies on the delegation of authority to the executive branch by Congress conclude that less delegation occurs when the President and Congress are ideologically divergent (Epstein and O'Halloran 1999).

Table 1. Jurisdiction Stripping Laws Per Congressional Session

Congressional Session	Jurisdiction Stripping Laws	Congressional Session	Jurisdiction Stripping Laws
78-1 (1943)	0	93-2 (1974)	3
78-2 (1944)	0	94-1 (1975)	2
79-1 (1945)	1	94-2 (1976)	5
79-2 (1946)	3	95-1 (1977)	4
80-1 (1947)	2	95-2 (1978)	7
80-2 (1948)	3	96-1 (1979)	1
81-1 (1949)	0	96-2 (1980)	13
81-2 (1950)	3	97-1 (1981)	1
82-1 (1951)	1	97-2 (1982)	8
82-2 (1952)	1	98-1 (1983)	1
83-1 (1953)	0	98-2 (1984)	27
83-2 (1954)	0	99-1 (1985)	5
84-1 (1955)	1	99-2 (1986)	10
84-2 (1956)	2	100-1 (1987)	6
85-1 (1957)	0	100-2 (1988)	16
85-2 (1958)	2	101-1 (1989)	6
86-1 (1959)	0	101-2 (1990)	8
86-2 (1960)	0	102-1 (1991)	3
87-1 (1961)	1	102-2 (1992)	5
87-2 (1962)	4	103-1(1993)	1
88-1 (1963)	0	103-2 (1994)	6
88-2 (1964)	2	104-1 (1995)	2
89-1 (1965)	3	104-2 (1996)	16
89-2 (1966)	6	105-1 (1997)	3
90-1 (1967)	0	105-2 (1998)	7
90-2 (1968)	1	106-1 (1999)	2
91-1 (1969)	1	106-2 (2000)	9
91-2 (1970)	2	107-1 (2001)	7
92-1 (1971)	2	107-2 (2002)	9
92-2 (1972)	2	108-1 (2003)	4
93-1 (1973)	1	108-2 (2004)	7

Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

Jurisdiction stripping provisions fall into one of nine general categories with three categories making up roughly 60% of all jurisdictional removals (see Table 2). Of these, provisions dealing with social benefits, such as medicare/medicaid reimbursement levels, social security payments, housing and food programs, or individual loss compensation make up the largest proportion, totaling 22% of all jurisdiction stripping provisions. Matters dealing with environmental regulation comprised the next largest category, with 20% of all jurisdiction stripping provisions, the bulk of which occur after the early 1970s passage of comprehensive environmental laws such as the National Environmental Policy Act of 1969, the Clean Air Amendments of 1970, the Clean Water Act of 1972, and the Occupational Safety and Health Act of 1970. General law enforcement measures account for roughly 15%, and include matters such as informational awards, protection of undercover agents, implementation of airport explosive detection systems, and determinations by the Attorney General of certain civil penalties.

Jurisdictional removals primarily are designed to prevent court review of administrative decision making. For example, the 2002 Supplemental Appropriations Act[18] contains a provision that authorizes the Secretary of Agriculture to treat certain forests in Colorado for insect infestation and to begin forest thinning programs in the area. The Secretary's actions under this legislative section are not subject to judicial review. The Railroad Revitalization and Regulatory Reform Act of 1976[19] authorizes the Secretary of Transportation to supply loan guarantees for railroad improvement projects. The asset valuation of these guarantees cannot be challenged in any court. Similarly, no court has jurisdiction to review the Attorney General's decisions with respect to paying awards for information regarding international terrorism.[20]

[18] P.L. 107-206; 116 Stat 820 (August 2, 2002).
[19] P.L. 94-210; 90 Stat 31 (February 5, 1976).
[20] 1984 Act to Combat International Terrorism. P.L.98-533; 98 Stat 2706 (October 19, 1984).

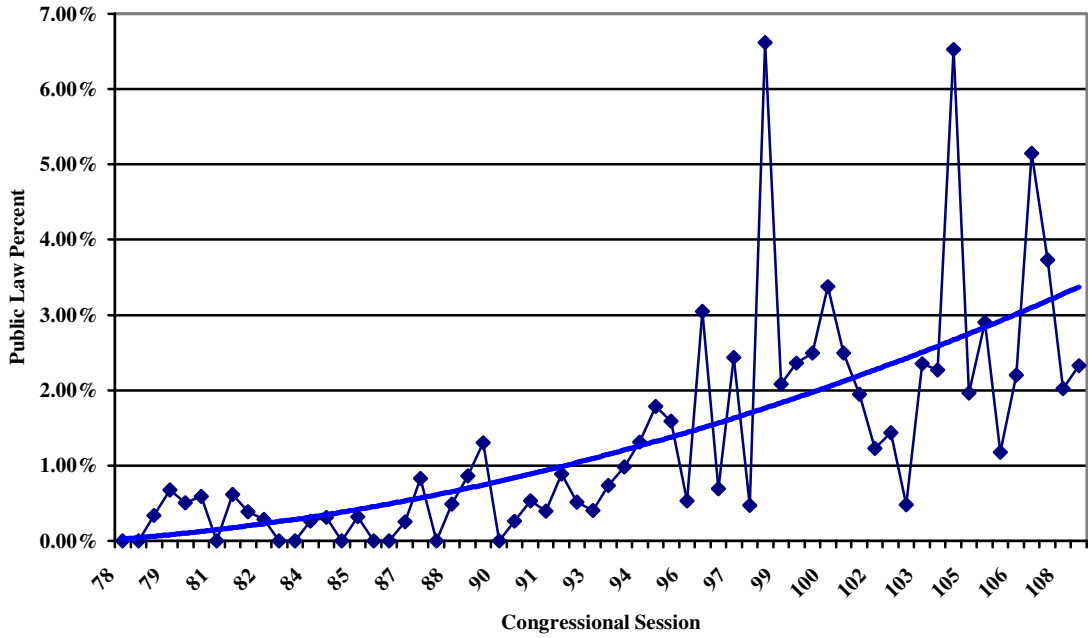
Table 2. Jurisdiction Stripping Law Categories 78th to 108th Congress

Category	Number of Provisions	Percent of Total
Social Benefits (including housing, food, loss compensation, social security, medical)	84	22.22%
Environmental Issues	76	20.11%
Law Enforcement	58	15.34%
Federal and Court Administration (including federal land and employees)	45	11.90%
Industry Regulation	39	10.32%
Foreign Policy, Defense, and Veteran's Affairs	28	7.41%
Immigrations and Non-nationals	20	5.29%
Industry Benefits	14	3.70%
State Benefits (including transportation, schools, and urban renewal)	14	3.70%
(N)	378	

Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

While the occurrence of jurisdiction stripping was very low in the early years of this study, the incidence increased over time. Until the mid-1970s, an average congressional session produced 1.5 laws, or 0.4% of its legislation, with provisions removing court jurisdiction. From 1975 to 2004 that average rose to 2.3% of all legislation passed in each session. The most recent ten year average, for the 104th Congress through the 108th Congress, is 3% of all public laws per session, the equivalent of roughly 7 laws each session which contain provisions stripping the courts' jurisdiction (Table 3).

Table 3. Jurisdiction Stripping Legislation 78th to 108th Congress



Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

Regression Results for Congress, the D.C. Circuit, and the Supreme Court

First, jurisdictional removals are analyzed in the context of interbranch ideological differences arising in relation to the Supreme Court and the D.C. Circuit. Supreme Court ideology is often the focus of PPT modeling as well as much separation of powers modeling (Eskridge 1991a, 1991b; Sheehan 1992; Epstein, Segal, and Victor 2002). The D. C. Circuit, because of its physical location in Washington, D.C., the geographic nature of most district court jurisdiction, and express statutory provisions has a docket which contains a disproportionate number of appeals involving the federal government and governmental agencies (Revesz 2001; Cross and Tiller 1998). Table 4 shows the regression results with respect to these two courts.

Court-Congress Differences

Hypothesis 1 states that if jurisdiction stripping is a means of insulating policy from court preferences, then jurisdictional removals should increase as the ideological distance between the chambers of Congress and the court increases. For both courts, neither the Court-House nor Court-Senate ideological variables are significant.[21]

[21] Significance is denoted as $p < 0.05$. All hypotheses also were examined using House and Senate median majority party members to measure congressional ideology. The results did not vary from those obtained using the chamber floor medians, with the exception of the D.C. Circuit, where the Court-House Majority Party variable was significant at $p < 0.05$, with a coefficient of -0.47. This result is opposite of that

Congress-Agency Differences

Hypothesis 2 states that if jurisdiction stripping is a means of stacking the procedural deck in favor of agency-made policy, then jurisdictional removals should increase as the ideological distance between the chambers of Congress and the agencies decrease. In other words, Congress will want to remove court interference from policy when Congress and the agency, as represented by presidential ideology, are aligned. Contrary to PPT model predictions, the regression results in Table 4 show that the ideological variables for Agency-House and the Agency-Senate are not significant.

Court-Agency Differences

Hypothesis 3 states that as ideological differences between the courts and agencies increase, jurisdiction stripping should increase as well. This is because the differing preferences of the court and agency present Congress with affirmatively different policy-making outcomes, depending on which entity influences policy the most. Under these conditions, as opposed to those in which the court and agency preferences are interchangeable, it becomes more likely that Congress will chose to tip the balance in favor of the agency and remove the court from the process. Again, the ideological variable (Court-Agency) does not rise to the level of significance.[22]

Caseload Impact

Hypothesis 4 states that the institutional pressure which litigation creates on both courts and agencies (as represented by district court case filings) is related to jurisdiction stripping. The results for this variable are highly significant, at the $p < 0.001$ level, for both the Supreme Court and the D.C. Circuit analyses. In both cases, R^2 exceeds 0.60, indicating that over 60% of jurisdiction stripping variation can be explained by the independent variables. Regardless of the ideological differences between Congress, agency, and either the Supreme Court or the D.C. Circuit, jurisdiction stripping increases as caseloads increase.

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expected by the model, indicating that as the D.C. Circuit and the House majority party diverge ideologically, jurisdiction stripping *decreases*.

[22] With respect to the D.C. Circuit, when the analysis was run using House and Senate majority party medians instead of floor medians, the ideological difference between the median member of the D.C. Circuit and the agencies, was significant, but only under a model using the median member of the House majority party to represent congressional preferences. The coefficient for the Court-Agency variable was negative (-0.42), significant at the $p < 0.05$ level. This result, however, lacks stability. When the analysis is run using the Senate majority party to represent congressional preferences the Court-Agency variable is not significant.

Table 4. Jurisdiction Stripping and Median Member Ideological Differences in the Supreme Court and D.C. Circuit

	Supreme Court		DC Circuit	
	Model 1	Model 2	Model 1	Model 2
Court-House Difference	0.26	----	-0.69	----
	(0.72)		(0.38)	
Court-Senate Difference	----	0.06	----	-0.37
		(0.77)		(0.39)
Court-Agency Difference	0.39	0.37	-0.23	-0.19
	(0.43)	(0.44)	(0.14)	(0.14)
Agency-House Difference	0.22	----	0.64	----
	(0.48)		(0.38)	
Agency-Senate Difference	----	0.22	----	0.53
		(0.62)		(0.45)
District Court Filings	4.67**	4.71**	5.06**	5.19**
	(7.88)	(8.95)	(6.98)	(8.43)
Constant	-0.14	-0.11	0.14	0.04
	(0.17)	(0.16)	(0.17)	(0.16)
R-square	0.64	0.64	0.66	0.65
N	55	55	59	59

Notes. **Coefficient significant at $p < .001$. Jurisdiction stripping variable is percent of legislation in a given session of Congress converted to square root to enhance normal distribution of residuals.
Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

Regression Results for Congress and the Federal Courts of Appeals

Table 5 shows regression results with respect to Congress, agencies, and the First through Tenth Circuit Courts of Appeals using floor medians in each congressional chamber as the salient measure of congressional ideology. None of the ideological variables with respect to Congress, the agencies, and the remaining federal courts of appeals rise to the level of significance except for a single variable in the Sixth Circuit analysis where the coefficient is opposite of expected.[23] These results are consistent with those obtained for the Supreme Court and D.C. Circuit. The results are uniformly contrary to the hypothesized results based on PPT predictions that ideological differences drive congressional use of structure to control the courts and agencies.

[23] As in the prior analyses two models were run: Model 1 using House floor medians and Model 2 using Senate floor medians to account for multicollinearity between the House and Senate variables. The analyses were also run using median majority party members in the House and Senate to represent congressional ideology. As there was no significant difference from the floor median results, these analyses are not reported. However, with respect to 4th Circuit court measures of ideology, the variable, Court-Senate Majority Party was significant at the $p < 0.001$ level, with a coefficient of -0.678. This result is contrary to the direction predicted by PPT models, showing a decrease in jurisdiction stripping as the court median and the Senate majority party median grow farther apart.

Table 5. Jurisdiction Stripping and Median Member Distance Between Circuit Courts, Agencies, and Chamber Floors

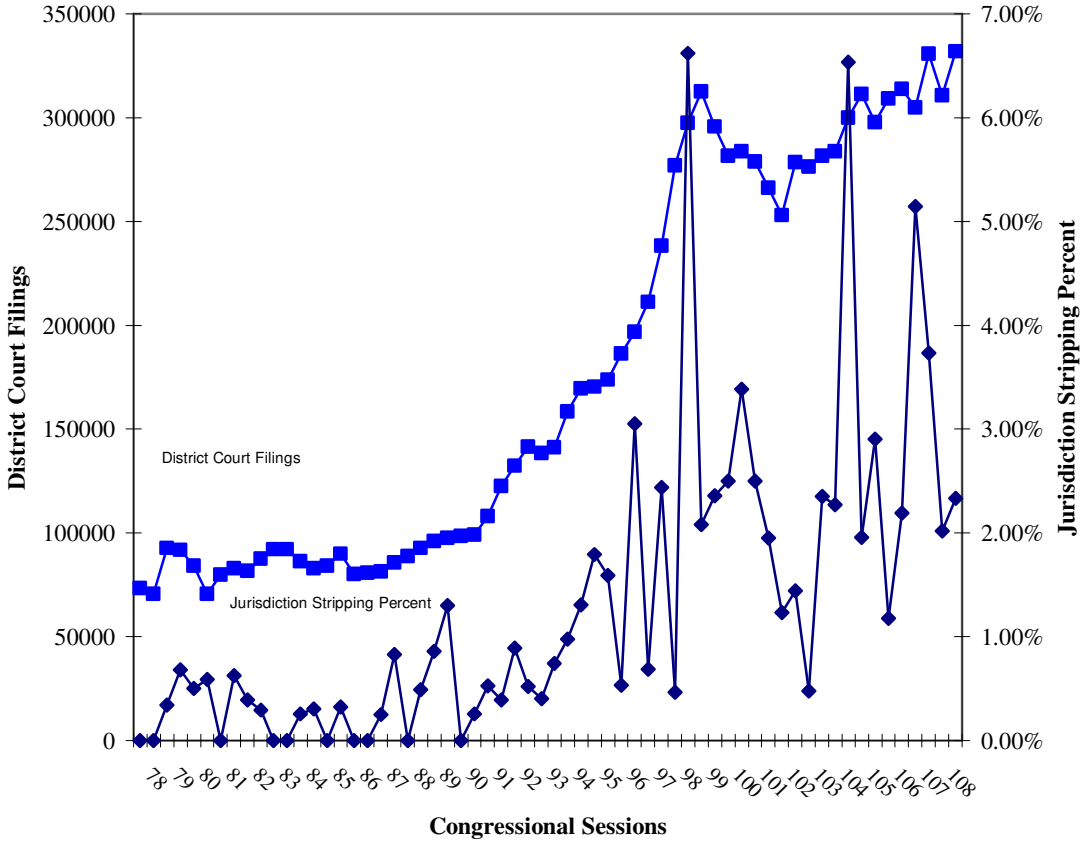
Circuit	Model	Court-House	Court-Senate	Court-Agency	Agency-House	Agency-Senate	District Filings	Constant	R^2	N
First	1	-0.90	----	0.15	-0.42	-----	4.38**	0.55	0.53	44
		(0.84)		(0.39)	(0.78)		(9.26)	(0.42)		
	2	----	-0.48	-0.02	-----	-0.02	4.93**	0.25	0.53	44
			(0.83)	(0.40)		(0.85)	(9.50)	(0.28)		
Second	1	-0.41	----	0.20	0.08	----	5.47**	-0.06	0.62	50
		(0.51)		(0.29)	(0.45)		(1.04)	(0.19)		
	2	----	-1.13	0.03	----	0.16	5.97**	-0.03	0.64	50
			(0.59)	(0.32)		(0.54)	(9.48)	(0.17)		
Third	1	-0.06	----	-0.22	0.37	-----	4.92**	0.06	0.64	60
		(0.34)		(0.25)	(0.44)		(8.64)	(0.30)		
	2	----	-0.11	-0.29	----	0.49	4.76**	0.09	0.64	60
			(0.36)	(0.24)		(0.47)	(8.96)	(0.26)		
Fourth	1	0.30	----	0.17	0.02	----	5.10**	-0.07	0.58	47
		(0.47)		(0.26)	(0.51)		(8.02)	(0.25)		
	2	----	0.24	0.19	----	0.23	4.93**	-0.14	0.58	47
			(0.51)	(0.28)		(0.61)	(9.34)	(0.33)		
Fifth	1	-0.43	----	-0.11	-0.13	----	5.05**	0.30	0.47	40
		(0.51)		(0.32)	(0.60)		(1.08)	(.029)		
	2	----	-0.38	-0.20	----	-0.31	5.20**	0.41	0.47	40
			(0.54)	(0.37)		(0.71)	(1.25)	(0.38)		
Sixth	1	-1.41*	----	0.12	0.11	----	6.63**	-0.05	0.70	53
		(0.48)		(0.27)	(0.39)		(9.58)	(0.18)		
	2	----	-0.69	0.26	----	0.31	5.54**	-0.15	0.66	53
			(0.46)	(0.27)		(0.47)	(9.50)	(0.18)		
Seventh	1	-0.46	----	-0.01	0.32	----	4.38**	0.17	0.64	55
		(0.59)		(0.27)	(0.47)		(9.49)	(0.33)		
	2	----	-0.09	-0.05	----	0.44	4.73**	-0.01	0.63	55
			(0.48)	(0.25)		(0.52)	(9.03)	(0.29)		
Eighth	1	-0.16	----	-0.28	0.08	----	4.70**	0.31	0.52	44
		(0.75)		(0.43)	(0.61)		(8.31)	(0.30)		
	2	----	-0.23	-0.25	----	0.003	4.75**	0.34	0.52	44
			(0.71)	(0.39)		(0.60)	(9.03)	(0.32)		
Ninth	1	0.19	----	0.21	0.13	----	4.74**	-0.05	0.58	47
		(0.48)		(0.28)	(0.51)		(8.84)	(0.25)		
	2	----	-0.15	0.20	----	0.14	4.72**	0.03	0.58	47
			(0.54)	(0.27)		(0.57)	(9.96)	(0.26)		
Tenth	1	-0.60	----	-0.24	0.08	----	4.92**	0.31	0.53	44
		(0.55)		(0.38)	(0.56)		(8.92)	(0.27)		
	2	----	-0.51	-0.17	----	0.30	4.87**	0.17	0.53	44
			(0.57)	(0.37)		(0.69)	(1.03)	(0.24)		

Notes. **Coefficient significant at $p < .001$. *Coefficient significant at $p < .01$. Jurisdiction stripping variable is percent of legislation in a given session of Congress converted to square root to enhance normal distribution of residuals. The Eleventh Circuit and U.S. Court of Appeals for the Federal Circuit are not included due to insufficient data.

Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

Caseloads, however, are highly significant for every analysis at the $p < 0.001$ level, consistent with the results from the Supreme Court and D.C. Circuit analyses. For all regressions, the R^2 ranged from 0.47 to 0.70, indicating that the variables are highly predictive of jurisdiction stripping activity, explaining 47% to 70% of the variance in jurisdictional removals. As case filings in the district courts increase, Congress increasingly removes court jurisdiction (Table 6).

Table 6. Comparison Between Court Filings and Congressional Session Jurisdiction Stripping



Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

DISCUSSION

Positive political theory modeling assumes that Congress responds strategically, before the fact, to the ideological preferences of courts and agencies by manipulating structural features of decision making. However, ideology fails to explain why Congress removes jurisdiction from the federal courts. In particular, the results do not to support models which predict Congress will alter jurisdictional review and its attendant costs in

order to control policy outcomes. In conjunction with the strong link between caseload pressures and jurisdiction stripping found in this study, the results argue for greater consideration of the role non-ideological factors play in the interactions between Congress and the courts.

Jurisdiction and Litigant Access

Prior studies addressing the manipulation of judicial review by Congress assume that the focus of this action is the courts themselves and their ideological predilections. This is only part of the story. Jurisdiction removal does not just impact the courts' influence on policy, it impacts litigants. Without a court authorized to adjudicate a particular dispute, litigants cannot access the judicial system. The highly significant correlation between case filings and jurisdiction stripping (and the ideological variables' lack of significance) suggests that Congress is concerned with the number of litigants in the system and not the ideological direction of court or agency decisions. Lawsuits impact both court operations and administrative implementation of policy in ways that are wholly independent of final judicial disposition in a case.

Courts, by their very nature, are limited in their ability to adjust output in response to increasing caseloads, because there is a limit, in time and energy, to the number of cases a single judge can handle. Because of the judicial system's structure, increasing the number of judges, particularly at the appellate level, creates significant organizational problems, making panel hearings cumbersome, and interfering with the system's ability produce legal uniformity across – or even within – the circuits (Posner 1985, 1996). The federal courts have long been calling for reductions in federal jurisdiction (Resnik 1998; Judicial Conference 1995). Some scholars note an attendant increase in self-imposed federal court barriers to litigation as well, including use of the requirements under standing, ripeness, and mootness (concepts which define when a case is appropriately mature and an injury appropriately concrete to sustain litigation), along with the increased application of summary judgment to reduce case load pressures (*see e.g.* Miller 2003; Levit 1989). Removal of jurisdiction from the courts may represent congressional concerns with the institutional burdens associated with burgeoning caseloads.

In addition, the mere initiation of a lawsuit can impact agency policy making by creating both delay in policy implementation and imposing litigation costs in terms of agency time and resources (Levin 1996, Wald 1996). These costs are borne despite the high litigation success rates of government parties (Songer, Sheehan, and Haire 1999, Crowley 1987), suggesting, as does the significance of case filings in the present study, that the litigation process and not the outcome is at issue. Some scholars estimate that close to 80% of agency rulemaking is subject to court challenge (Prizker and Dalton 1990). Agencies will often adopt highly inefficient and cumbersome means of rulemaking in response to judicial (and litigant) access to review (Tiller and Spiller 1999; Wilson 1989). Agencies also resist changing or even issuing rules to avoid litigation resulting in static and unresponsive policy, often contrary to the broad delegatory intent of Congress (Hamilton and Schroeder 1994; Breyer 1993). In response, Congress may

remove jurisdiction to insulate all agency action, regardless of court or agency ideology, from the practical interference that litigation brings.

Ideology and Informational Problems

It is also possible that ideology is not relevant to jurisdiction stripping because Congress cannot confidently identify a discrete set of court preferences which would trigger a congressional response.[24] Most PPT models, including those involving structural controls, assume perfect information between the actors. Congress is posited to know the courts' preferred position over any policy matter. This is problematic, in that administrative review can, and often does, involve a myriad of mundane details ranging from cost of living calculations for social benefits, to award provisions for law enforcement information. It strains credulity to imagine that Congress can confidently predict how courts will respond to such a wide range of issues.

Even if court preferences are easily ascertained, Congress may not know which court in the federal system is the relevant actor. Many PPT and separation of powers models use the Supreme Court (Sheehan 1992; Eskridge 1991a; Martin 2001). However, the Supreme Court's plenary docket, ranging in the last 50 years from between 75 to 150 cases per annum (Cordray and Cordray 2001), makes it a sporadic participant in administrative policy implementation at best. From this perspective, it is not surprising that ideological differences between Congress and the Supreme Court are not significantly related to jurisdictional removal. The courts of appeals might be considered the relevant actors, as their appellate jurisdiction is largely mandatory (28 U.S.C.A. §1291). However, each of the thirteen courts of appeals operates independently of the others. In order to curtail circuit court influence, Congress would need to anticipate which circuit court was most likely to be presented with cases involving the legislation in question. Again, this is an uncertain proposition which mitigates against congressional responses premised on ideology. This uncertainty is supported by the results which find none of the ideological variables significant with respect to any of the individual circuit courts. Some statutes do assign general jurisdiction, most often to the D.C. Circuit, and various scholars have found links between *agency* behavior and D.C. Circuit ideology (Revesz 1997; Sheehan 1992). Agency response and congressional response are different things. The frequency and nature of agency interaction with the courts provides preference information to the agency that may not be as easily available to Congress, whose interaction with the courts is less direct. These informational difficulties are supported by current research which suggests that courts' statutory overrides are part of an informational loop designed to provide Congress with feedback on policy effects and court preferences. (Rogers 2001).

[24] If ideological positioning is in play with respect to jurisdiction stripping, it may be in response to prior court behavior, a proposition not directly addressed by this study. However, removing current court oversight in reaction to prior court behavior is not consistent with the argument that structural controls are designed to empower *current* courts whose preferences favorably compare to congressional preferences.

Uniqueness of Jurisdiction Stripping

Perhaps ideology does not play a role in congressional decisions to remove jurisdiction entirely, but it does play a role in lesser manipulations of judicial review. Certain features of jurisdiction stripping could contribute to this difference. The courts decide for themselves whether they have the jurisdiction to hear a case by virtue of the fact that they alone determine whether or not the removal of jurisdiction is warranted by a particular statute or in comportment with the United States Constitution (*see e.g.* Biodiversity Associates v. Cables (2004); Marbury v. Madison (1803)). It may be the case that in order to fully remove jurisdiction, Congress needs courts that will accede to that removal. One would still expect to see ideological significance if this were the case, but in a direction opposite to that predicted by PPT. If the court has to be a willing participant in jurisdictional removal then jurisdiction stripping should increase as courts and Congress become more ideologically aligned. This is supported by the single significant ideological variable in the Sixth Circuit analysis, which indicates that jurisdiction stripping increases as Sixth Circuit and House preferences grow closer. As well, some intriguing, but inconclusive results from supplemental analyses not reported support this view. Although not stable across the circuits, when majority party differences were used as a proxy for congressional preferences both the D.C. Circuit and the Fourth Circuit analyses suggest that Court-House Majority Party (D.C. Circuit) and Court-Senate Majority Party differences (4^{th} Circuit) play a role in jurisdiction stripping. In both cases the coefficients were negative, indicating that jurisdiction stripping was more common as ideological disparity decreased.[25] Nonetheless, given the overall lack of significance in the ideological variables, the present study more strongly supports the observation that while a sympathetic judiciary may be necessary to effectively remove jurisdiction, the courts' complicity is not linked to any ideological disparity with Congress.

Measurement Issues

One of this study's methodological strengths is that is places all relevant actors, courts, Congress members, and agencies, on a single preference measurement scale: Nominate Common Space scores. This gives spatial and ordinal meaning to the ideological differences measured between the branches. However, Common Space scores have not yet been derived for all sitting judges and Justices as far back as 1943. Accordingly, a number of the analyses were run on sample sizes of less than 60, although no sample was less than 40. It may be that small sample sizes contributed to the lack of significance in the variables. This can be remedied as Common Space Score calculations for the judiciary are extended to earlier (and later) dates.

Measurement of agency preferences globally by using the president as a proxy may also miss some of the subtle variation between different agency ideologies. Although using the sitting executive to represent agency preferences is the current best practice (Eskridge and Ferejohn 1992; Epstein and O'Halloran 1994; Spence 1997), the

[25] For the D.C. Circuit the ideological variable, Court-House Majority Party was significant at $p < 0.05$, with a coefficient of -0.46. For the Fourth Circuit Court of Appeals, the Court-Senate Majority Party variable was significant at $p < 0.001$, with a coefficient of -0.68.

significance of ideological differences between Congress, courts, and any one agency may be lost by such a uniform approach.

Conclusion

While this study primarily was designed to test the proposition that structural deck stacking in the form of jurisdiction stripping should correspond to interbranch ideological differences, its results suggest the need to reconsider certain assumptions often used in examining congressional response to the courts. First, in some areas Congress may be responding to the administrative delay and cost associated with litigation and not the ideological make-up of the judiciary itself. Second, even if Congress wanted to respond to judicial ideology ex ante, the structure of the judicial system may prevent any meaningful identification of which court's ideology matters.

Finally, the removal of jurisdiction in relation to specific subject areas, suggests avenues for future study which focus on jurisdiction stripping as it relates to discrete agencies and their specific policy making regimes. It may be the case that jurisdictional removals play a greater role with respect to some agencies as opposed to others, both in terms of the nature of agency policy making as well as the incidence of litigation in that policy area. Environmental matters are one example (comprising 20% of all the jurisdiction stripping legislative provisions identified). This calls in to question whether or not the specific ideology of these agencies, their oversight committees, and their particular longitudinal litigation history may shed light on the motivation behind congressional removals of court jurisdiction

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