COURT CURBING, COURT REVERSALS, AND JUDICIAL REVIEW: THE SUPREME COURT VERSUS CONGRESS

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Congress and the Supreme Court have had many intense conflicts over the years. This paper examines that relationship in an effort to determine whether the Court's role is essentially that of legitimator or disturber of the political universe. Drawing upon the analysis of Dahl as critiqued by Funston, Adamany, and Casper, the relationship is tested using a much broader data base than was used by the previous studies. Based upon this analysis, the Court is characterized as a legitimator but also as a significant wielder of power (contrary to Dahl's earlier assertions).

The relationship between the United States Supreme Court and the United States Congress has been stormy. The Court has asserted and exercised the power to declare acts of Congress unconstitutional. Congress has long resisted such judicial exertions, although gaining effective leverage over the Court has often been difficult (Scigliano, 1971: Ch 2). John Marshall's maneuverings in *Marbury* v. *Madison* are an early but excellent example of the Court's ability to stymie a counter-response by Congress or the President. But these dramatic confrontations are not the whole story (*Congressional Reversal*, 1958). Through the less dramatic process of statutory interpretations, the Court has been able to thwart congressional will while often maintaining the facade of the legislation (Casper, 1976; Kurland, 1970).

These judicial intrusions have prompted members of Congress several times to attempt to curb the jurisdiction of the Supreme Court (Adamany, 1973). One successful example was the passage of the Sixteenth Amendment. Such congressional activities have generally followed a cyclical pattern. Recent examples of such activities include congressional attempts to overturn or limit Court decisions regarding school prayers, state legislative reapportionment, and

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abortion (Wasby, 1970). Generally, these episodes of congressional displeasure have been followed by relatively long periods of quiescence and apparent congressional indifference to the direction of the Court's decisions.

I. CONGRESS AND THE COURT

This paper examines the relationship between Congress and the Supreme Court in a broader context than have earlier studies. Our explicit concern is with determining what relationship actually exists between Court activities and congressional behavior. Earlier historical case studies indicate that such a relationship exists and provide some supporting evidence (Schmidhauser and Berg, 1972). These studies depict the Court as usually retreating into a less assertive position relative to Congress in times of conflict. Traditionally, such analyses of the Court's reaction to conflict hinge upon case studies for which several alternative explanations can be developed. The analytical focus is often upon individual personalities, textual analysis of opinions, and inferential judgments as to institutional and individual motivations, both congressional and judicial (Pritchett, 1948). This material, while interesting in itself, can be excessively time-bound. Two streams of literature have taken a broader focus. One focuses explicitly upon defined "periods" of congressional court-curbing activity, while the other is more broadly focused on the Supreme Court's relationship with national political majorities.

For example, Stuart Nagel's analysis focused upon the aggregate historical pattern in congressional efforts to curb the Court (1969). He measured the number of court curbing bills introduced in Congress during particular time periods and found a rather sporadic and episodic pattern to congressional efforts between 1789 and 1959 (1969: 260). Peaks of congressional activity were often followed by long periods of apparent quiescence at least as measured by bill introductions. Based upon historical and some general case analysis, Nagel reported that congressional displeasure was often appeased by the Court's retreat from what had become politically untenable doctrinal positions. The 1935-1937 constitutional crisis represents one extreme in a continuous struggle between the Court and the political branches (Pritchett, 1948; Kelly and Harbison, 1976: Ch. 11-14). In the context of that crisis, the Court was driven—or withdrew—from the field of economic regulatory policy. But its strategic retreat in 1937 preserved the Court's political capital for use in other policy areas, a result

confirmed by the 1954 *Brown* decision and the activism of the Warren Court (Adamany, 1973; Funston, 1975).

Schmidhauser and Berg have extended Nagel's line of analysis through the 1945-1968 time period. They concluded that the Court is confronted by a coalition whose opposition is continous and, by and large, partisan based (1972: 177-184). The Court can reduce the intensity of conflict by tactical withdrawals but is unable to remove the root cause: opposition to the Court's assertion of the power of judicial review. The actors vary depending upon the issue, but the conflict goes on.

The Dahl Thesis

Robert Dahl's analysis of the role of the Supreme Court in the American political system is the benchmark for all studies of this kind. Dahl's thesis (1957) is that the Court is not, and in fact cannot function as, protector of the rights of minorities against the will of a law-making majority. His position contrasted dramatically with a traditional view of the Court as defender of basic constitutional liberties (Abraham, 1975; Bickel, 1962). This role as constitutional defender, at least in the abstract, assumed that the Court would, if necessary, stand up against political repression. But the Court could play this role only if it stood outside the political system, an independent actor beholden to no temporary political majorities.

Dahl argued that the Court could not sustain such a nonmajoritarian role because it is necessarily and inevitably part of the dominant national political coalition (1957: 293-294). The recruitment process assures that justices will be drawn from the political arena (Danelski, 1964), and can be expected to be supportive of the political system which recruited them. According to Dahl, an exception might occur when the old national political coalition collapses and a new political coalition emerges. The "old" justices are out of touch with the new order, causing some temporary constitutional turbulence. As new, more politically attuned, justices join the Court, it moves back into "natural" harmony with the dominant political coalition.

The Court then resumes its role as legitimator of political and constitutional change. It can no longer effectively serve as defender of aggrieved minorities (see also Black, 1960). The Court rejects minority challenges to new legislative policies by constitutional reinterpretation if necessary. Some slippage will obviously occur during the transition of power, but the Court's primary role is that of facilitator rather than obstructor of

political events. Dahl contends that the Court is not merely an agent of the dominant alliance but an integral part of it. The Court becomes an important buttress of the existing system. In fact, a great deal of the Court's ascribed legitimacy apparently flows from its integration into the dominant coalition. The Court protects its power base by not flagrantly opposing the major policies of the dominant political alliance, although some circumstances, such as a fragmented alliance, may permit the Court to take its own policy initiatives.

Alternative Views

Major critiques have been made of the Dahl thesis by David Adamany (1973), Jonathan Casper (1976), and Richard Funston (1975). Two have focused on the legitimator role ascribed to the Court by Dahl. Adamany's argument is straightfoward: the court, rather than being a legitimator of the new national majority, is in fact a destabilizing force (1973: 842-846). The ultimate impact of the Court is not to facilitate governance but to prevent the policies of the new majority from being implemented. The struggle to overcome the Court's resistance to new policy initiatives diverts the political leadership's attention. "The leadership's hold over the loosely joined alliance is weakened; and the momentum for substantive policy change is slowed or stopped" (1973: 845). Adamany's analysis of the Court's role during the partisan realignment periods of American history is essentially the opposite of Dahl's. By the time that the new majority has seized control, the legitimacy function of the Court has been devastated.

> Indeed, since the legitimacy conferring function necessarily assumes a reasonably alert electorate and because the popular branches may often be compelled in realigning periods to assail a recalcitrant judiciary, the eventual coming around of the Court—its eventual validation and other approvals of popular branch policies—may have more the appearance of surrender to superior force than of legitimization (1973: 822).

Funston's analysis is an explicit attempt to test what was characterized as the "Dahl-Dooley hypothesis" or "The Supreme Court follows the election returns" (1975: 796). Stated more formally, the hypothesis asserts that "over long periods of time, the Supreme Court reflects the will of the dominant political forces; however, during transitional periods, in which the Court is a holdover from the old coalition, the Court will be more likely to perform the counter-majoritarian functions ascribed to it by traditional theory" (1975: 796). Funston essentially accepts and attempts to test the legitimation

argument for the Court during periods of political change. He concludes that the Court does fulfill a legitimizing function within the American political universe.

The opposing conclusions reached by Adamany in relation to Dahl and Funston are partly a function of the data bases used. Dahl and Funston rely upon instances of unconstitutionality within four years of the statute's enactment. Adamany's data is more wide ranging though imprecise, since he considers general policy trends during periods of electoral realignment in addition to specific instances of judicial review.

The conceptual bridge between these earlier works and this particular project can be found in Casper's (1976) paper. By broadening the perspective proposed by Dahl, Casper significantly expands the amount of power and influence ascribed to the Court (1976: 50). Dahl's focus is criticized as too narrow, empirically and conceptually. Dahl's data base consists only of instances of judicial review of acts of Congress and the government's reaction to those cases. In addition, over half of the available cases are excluded by Dahl's coding schema (1976: 55-56). More fundamentally, Dahl's coding schema makes it impossible for the Court to show power or influence. The schema's essential defect, according to Casper, is that it excludes all cases where the statute was more than four years old, and much of the Court's work is *de facto* omitted.[1] More important, Dahl's limited focus severely distorts the nature of the Court's work and its actual power. The Court's influence may be more accurately assessed, according to Casper, by considering its role in the areas of "statutory construction" and "federal constitutional issues arising out of state and local legislation or practice" (1976: 56). By including the statutory interpretation function, the Court's observed influence increases appreciably (1976: 57).[2]

Tying the Two Approaches Together

The two approaches to the problem of Court-congressional interaction appear complementary, although they have not

[1] Dahl, in his earlier paper, established a four-year cutoff point for considering instances of judicial review. The reasoning was that by the end of four years, the national policymaking majority that passed the statute no longer existed. Therefore, the possibility of confrontation was nonexistent, since the new legislative majority did not have the same commitment to the affected statute (1957: 287).

[2] Casper presents an extensive discussion of several areas of statutory construction as support for his assertion.

usually been merged explicitly. Our concern is to determine whether the Court does respond to changes in congressional attitudes, especially those manifested in court curbing efforts. If such a relationship exists, what factors explain it best? It may be that the Court randomly asserts positions in opposition to congressional or presidential policy preferences. Or, the Court's adaptation of confrontational positions may signal that its policy preferences are no longer in harmony with the dominant political values of the country. The political universe has changed while the Court's membership has not.

Given this perspective on the Court's role in American politics, periods of conflict between Congress and the Court should coincide with periods of political discontinuity. That is, times of congressional opposition to Court policy should coincide with what are termed "critical" or "lag" periods (Funston, 1975: 804; Canon and Ulmer, 1976: 1217-1218). The "critical" period concept represents an attempt to relate Court behavior to the changes in the American political universe. These changes have been operationalized by Funston as periods of electoral realignment, which occur when significant segments of the electorate permanently change their party affiliation. Examples would be the rise of the Republican party in the 1850's and 1860's and the Democratic party in the late 1920's and early 1930's. Such enduring coalitional shifts place one party or another in the electorally dominant position. The "lag" period refers to the time between the new national coalition's seizure of the executive and legislative branches and their achievement of control over the Court through the appointment process. Funston (1975: 805) hypothesizes that the Court will be more likely to strike down acts of Congress during these periods of electoral realignment. The Supreme Court's activity level supposedly rises because the Court's membership reflects the policy preferences of the old coalition which has been politically superseded. This increased activity should therefore lead to some congressional counter-response such as Court curbing bills or resolutions.

II. VARIABLE DEFINITION AND DATA

Unlike the earlier studies, this paper draws upon a broader spectrum of Court activity than just the relatively few incidents of judicial review. An attempt is made to include some aspects of the Court's statutory interpretation function, to take into account Casper's idea that much of the Court's policy making is

done through statutory interpretation.[3] The analysis is based upon three sets of variables. The first is drawn from Stuart Nagel's work identifying various periods of congressional court curbing activity (1969). Nagel's primary measure consists of a simple frequency count of the number of Court curbing bills introduced in Congress over a particular time period and the percentage of those bills passed out of committee. These time periods (see Table 1 for years) are characterized as either high or low frequency in terms of congressional attempts to curb the Court.

The second set of variables concern changes within the national electorate. Various years can be identified as being associated with electoral realignment, others (possibly overlapping with the realignment periods) as lag periods. The electoral realignment and lag periods used in this paper are derived from Funston's study (1975) as corrected by Beck (1976) and by Canon and Ulmer (1976). The realignment periods are: 1821-1828, 1853-1860, 1889-1896, and 1929-1936. The lag periods are: 1829-1836, 1861-1865, 1897-1909, and 1930-1940. Through Nagel's congressional activity measure, the electoral change variables described above, we are able to provide a historical/political context within which to examine the Court's behavior pattern.

The last variable is a more generalized measure of Court activity than are the rather singular instances of judicial review used in earlier studies (Dahl, 1957; Funston, 1975; Casper, 1976). This variable includes all formally decided cases in which the Federal government participated as a principal litigant before the Supreme Court during the terms 1801 to 1957. The cases

[3] Casper summarizes this aspect of the Court's work as follows:

> The Court is frequently called upon to interpret the meaning of federal statutes, and in the course of doing so, important policy choices must be made. If we adopt for the moment the notion that influence in policy making is most accurately judged in situations in which various participants conflict with one another, it is clear that the interpretations that are made by the Court—even when they are based on "legislative intent"—are often quite different from those that members of Congress and the President had in mind when the legislation was passed. The Court's doctrine that it will, if at all possible, interpret a statute in such a way as to "save" it from being declared unconstitutional means that the Court will often significantly twist and change the ostensible provisions of a statute. Thus, in interpreting statutes the Court often makes important policy choices, and these choices are at least arguably quite contrary to the preferences of the law-making majority that passed the legislation. The more influence the Court exercises by virtue of statutory construction, the less influence it will appear to have in terms of Dahl's coding rules. When the Court "saves" a law by interpreting it rather than declaring it unconstitutional, its contribution to the course of public policy is excluded from consideration under Dahl's rules (1972: 56).

were collected as part of a long-term project looking into the relationship between the Supreme Court and changing national partisan majorities (Handberg and Hill, 1977).

All cases have been coded according to whether the Court accepted the government's position or not. Operationally, a nonfavorable decision is defined as one in which the Court (a) directly rules against the Federal government; (b) rejects government arguments or rationales (at least as identified in the opinion); or (c) denies motions or petitions requested by the United States. A favorable decision is operationalized in diametrically opposed terms. The votes of each justice are coded in terms of whether the justice accepted or rejected the government's position. A small number of cases falls outside the confines of this definition (Handberg and Hill, 1977: Appendix B).

This definition of cases may exclude instances which represented important (to the federal government) policy issues but did not involve the government as a litigant. This analysis also submerges certain qualitative differences between cases. We in effect treat a contract action against a government supplier on the same level as a major constitutional case such as *Schechter*. The analysis though is more extensive than several earlier studies which focused only upon cases involving Federal administrative agencies (Handberg, forthcoming; Canon and Giles, 1972; Tanenhaus, 1960).

III. ANALYSIS

Over the entire 1801 to 1958 time period, the government averaged a 62 percent success rate before the Court; in the pre-Civil War period the acceptance rate was 57 percent. However, the bulk of the cases occurred after the Civil War (N=5471). Table 1 presents several aspects of the general relationship between Congress and the Court. The figures on the left are the historical periods (according to Nagel) when Court curbing activities by Congress were fairly high. The right set constitutes the periods of low congressional activity. What appears in each set is the time period covered, the number of congressional acts introduced, the percentage of such acts that successfully got past the committee stage, and the Court's success rate during the time period. In the latter category, we are able to assess whether a significant difference exists between court acceptance levels in the periods of court curbing behavior and the nonactive periods. In the low frequency periods (the right set of figures), the percent of bills

successfully brought beyond the committee stage was zero; therefore, that column has been eliminated from the Table.

Table 1. High- and Low-Frequency Periods of Court Curbing[a]

High Frequency				Low Frequency		
Years	# of Bills		Court Support levels	Years	# of Bills	Court Support levels
1802-1804	2	50%	83.3%	1789-1801	0	NA[b]
1823-1831	12	25%	61.1%	1805-1822	0	47.1%
1858-1869	22	50%	60.7%	1832-1857	1	59.1%
1893-1897	9	11%	59.4%	1870-1892	8	54.8%
1922-1924	11	18%	54.8%	1898-1921	6	67.1%
1935-1937	37	16%	56.7%	1925-1934	2	65.1%
1955-1959	53	4%	50.6%	1939-1954	2	69.2%
Total	146			Total	19	

[a] The time periods, number of bills, and percent of bills out of committee figures are drawn from Nagel (1969).
[b] This study did not begin collecting data until 1801; therefore, no information exists on the earlier period.

In comparing the time periods reported in Table 1 with the previously identified realignment and lag periods, the overlap is fairly substantial. Four of the court curbing periods clearly intersect with periods of electoral realignment and lag. This lends at least a surface plausibility to the merging together of the two streams of research. Clearly, the congressional response to Court activities is not random, but rather appears to be the strategic response of one political institution to the actions of another.

If one assumes that Congress reacts to changes in Court acceptance levels, the expected pattern in Table 2a would be that low levels of Court acceptance of the government's position would trigger a congressional counter-response. Table 2a shows that the expected pattern holds when one considers only the two types of time periods. When Congress is in an assertive court curbing posture, the Court's levels of support tend to be below average. Which triggers the pattern—Court activities or congressional activities, is an issue we will attempt to address shortly. Among the government positions likely to be rejected by the Court are those which are likely to be of great importance to Congress (Nagel, 1969; Schmidhauser and Berg, 1972). During periods of high Court acceptance, one would at least theoretically find fewer such abrasive instances. The actual pattern, though, is more diffuse because of the historical differences between the nineteenth-century Court and the more recent (post-1900) Court. In the initial historical periods of strife, the Court's acceptance levels of the

Table 2a. Aggregate Court Behavior During Differing Historical Periods

		COURT SUPPORT LEVELS	
		Below Mean *	On/Above Mean
Congressional Position	Curbing	6	1
	Low Activity	3	3

$X^2 = 1.935$ $p < .20$, Yule's $Q = .714$
*Mean – 62 %

Table 2b. Court Behavior By Term During Differing Historical Periods

		COURT SUPPORT LEVELS		
		Below Mean *	On/Above Mean	
Congressional Position	Curbing	62%	38%	(39)
	Low Activity	46%	54%	(117)

$Z = 1.78$, $p = .0375$, Yule's $Q = .302$
*Mean – 62%

government's position are significantly higher than in the low-frequency court curbing periods. This gap eventually closes by the late 1890's and reverses to the pattern one might expect. That is: periods of court curbing behavior by Congress are also characterized by low levels of Court acceptance of the Government's positions. The contrasting low-frequency Court curbing periods are significantly above the Court's aggregate mean of 62 percent.

The initial results are partially explicable in light of two factors. First, early Court terms were often characterized by low case volume. Therefore, the shift in a few cases could make a significant percentage difference (Handberg and Hill, 1977). Second, and more important, many of the major battles fought over the Court's decisions and its role in the American political system were initially over issues of states' police powers and the protection of private property (Kelly and Harbison, 1976). These issues affected the federal government but were ones in which that government was, legally speaking, not directly involved (Casper, 1976: 58). Not until the post-Civil War era did the case volume become consistently large. Also, the issues then began to involve direct confrontations over the use of federal power.

Table 2b utilizes a somewhat less aggregated level of analysis. Table 2a reports the results computed over each

complete time period in Table 1. Several of those time periods span a decade or so, while others are only three or four years. In Table 2b, the measurement level is a year of Court activity rather than the earlier multiple years. Thus, Table 2b indicates that even on this less aggregated level the basic relationship holds. During periods of high congressional court curbing activity, Court acceptance levels are depressed, at least relative to what might be termed the historical average of 62 percent. This pattern is interesting because it provides a better fit to the data than the one found when one considers only critical or lag periods. In an earlier analysis by Handberg and Hill (1977: Table 1), no significant relationship could be found between the government's success rate in the Supreme Court and whether or not the Court was operating during a period of critical realignment, or even a lag situation. In that earlier paper, only when the analysis was restricted to the post-Civil War period did a relationship appear, and then only when restricted to declarations of unconstitutionality (1977: Table 2). By contrast here, no such relationship appears when only declarations of unconstitutionality and congressional court curbing periods are considered. At least statistically speaking, Court declarations of unconstitutionality appear relatively uniformly distributed across the differing court curbing time periods.

Table 3. Comparison of Court Behavior in Three Time Frames

Time Period	Prologue	Curbing Period	Epilogue
1802-1804	NA	83% (6)	20% (15)
1823-1831	67% (30)	61% (95)	47% (64)
1858-1869	55% (40)	61% (346)	63% (162)
1893-1897	60% (207)	59% (340)	65% (161)
1922-1924	68% (243)	55% (248)	66% (238)
1935-1937	64% (309)	57% (203)	72% (316)
1955-1958	62% (173)	51% (178)	NA

In Table 3, we consider changes in aggregate Court behavior patterns before and after the Court curbing periods. In the left column, the Court curbing periods are identified. The column labeled "Prologue" refers to the last four years immediately prior to the Court curbing period. The third column entitled "Curbing Period" refers to Court support levels during the time period referenced in the left column. Finally, we report the Court support rate over the first four years immediately after the Court curbing period (the "Epilogue"). The N for each period is reported in the brackets to the right of the column percentage. What appears is a

curvilinear relationship. In five of the six court periods prior to the Court curbing period, the support level is higher than during the Court curbing era itself. In contrast (excluding the first period because of its small N), four of the five epilogue periods were higher than the immediately prior time span. What appears to occur is that the Court antagonizes Congress, which results in a decrease in general Court support levels but is then followed by a period in which support is recovered.

IV. SUMMARY AND DISCUSSION

Given the overlap of court curbing periods with the realignment and lag periods previously identified, the data portray an institution attempting to grapple somewhat erratically with its changing political environment. The Court's support of Congress declines for reasons specific to a particular time period and then generally recovers to previous levels. Further analysis is underway to consider rises and declines in Court support in specific policy areas.

In 1900 the Court moved into a new historical pattern (Handberg and Hill, 1977). The government's role now has so expanded that many of the critical issues apt to trigger congressional counteraction in fact involve the exercise of federal governmental powers. This is not to deny the impact that other issues such as school prayer, abortion, or legislative reapportionment may have on congressional attitudes.

The Court may now be in a situation where a decline in support of the federal government as a litigant can provoke adverse reactions more quickly than in the past. For example, the crises in the 1930's over economic regulation and in the 1950's over subversives in government were extremely intense and prolonged, forcing both temporary and permanent doctrinal retreats on the part of the Court. Successful court curbing legislation continues to be the exception, but persistent attacks on the Court and threats to its powers may have a long-term deterrent effect.

Schmidhauser and Berg have extensively analyzed this new antagonistic relationship between Court and Congress. Their conclusion is, in effect, that the Court no longer exercises a legitimizing function. "A curious overdependence upon an alleged congressional attitude of 'reverence' for the Court has compounded the difficulty by masking the significance of the Court's persistent modern opposition" (1972: 184). Our findings indicate that Congress has consistently over the years reacted negatively to the Court's failure to accept the government's

position (and by extension Congress's position). For the national political elite, the Court has become a highly visible political actor subject to the same reprisals as other such actors. If congressional reaction is a measure of Court influence, then the Court is, and is perceived as, a powerful and independent political actor, contrary to Dahl's earlier assertions. The Court may be a legitimator (Dahl, 1957; Funston, 1975), but it is also a significant wielder of power (Adamany, 1973; Casper 1976).

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